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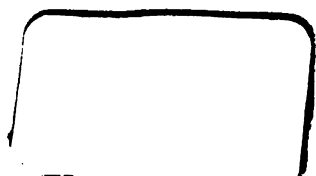
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UNITED STATES
SUPREME COURT REPORTS

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TO EDITORIAL NOTES IN THE LAWYERS EDITION OF THESE RE-
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International Claims—Prize and Capture.

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SUPREME COURT REPORTS

FROM THE ORGANIZATION OF THAT COURT TO THE BEGINNING OF THE
OCTOBER TERM 1907.

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1. The law of nations is the "usage of all civilized nations." *United States v. de la Maza Arredondo*, 6 Pet. 691, 8: 547

2. In the absence of a treaty or statute, questions of international law are to be determined by such aid as the courts can obtain from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95
Cited in The Paquete Habana, 175 U. S. 700, 44 L. ed. 329, 20 Sup. Ct. Rep. 290.

3. The works of jurists and commentators on the subject of international law are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. Rep. 290, 44: 320

4. The opinion of foreign writers on international law cannot be accepted as, in any particular, overruling prior decisions of the Supreme Court of the United States to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure. *The Adula*, 176 U. S. 361, 20 Sup. Ct. Rep. 432, 44: 505

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5. When the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement. *Ware v. Hylton*, 3 Dall. 199, 1: 558
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6. [Municipal laws of a country cannot change the law of nations, so as to bind the subjects of another nation. *Miller v. The Resolution* (Fed. Ct. App.) 2 Dall. 1, 1: 263]

7. [The law of nations forms a part of the municipal law of Pennsylvania. *Respublica v. De Longchamps* (Ct. O. & T. Phila.) 1 Dall. 111, 1: 59]

8-10. International law, including what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation, is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

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11. There is no universal rule or obligation on a national ship of war sailing under the authority of its government, in time of peace, which requires it to affirm its national flag by an appropriate gun. *The Marianna Flora*, 11 Wheat. 1, 6: 405

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12. The municipal laws of one nation do not extend, in their operation, beyond its own territory, except as regards its own citizens. *The Apollon*, 9 Wheat. 362, 6: 111
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See also *infra*, 33.

13. A seizure for a branch of the municipal laws of one nation cannot be made within the territory of another. *The Apollon*, 9 Wheat. 362, 6: 111

Cited in Osburn v. Bank of United States, 9 Wheat. 870, 6 L. ed. 235—*Crapo v. Kelly*, 16 Wall. 633, 21 L. ed. 439—*Brown v. Duchesne*, 2 Curt. C. C. 373, Fed. Cas. No. 2,004—*People v. McLeod*, 1 Hill, 424, 37 Am. Dec. 328—*People v. McLeod*, 25 Wend. 590.

14. The right of a nation to seize vessels attempting an illicit trade is not confined to its harbors or the range of its batteries, but the range varies with different seas and coasts. *Church v. Hubbard*, 2 Cranch, 187, 2: 249

Cited in The Ann, 1 Gall. 63, Fed. Cas. No. 397—*United States v. New Bedford Bridge*,

1 Woodb. & M. 488, Fed. Cas. No. 15,867—The Kodiak, 53 Fed. 128—The Coquilham, 57 Fed. 710—The Alexander, 60 Fed. 918—Cucullu v. Louisiana Ins. Co. 5 Mart. N. S. 482, 16 Am. Dec. 199—Higginson v. Pomeroy, 11 Mass. 108—Francis v. Ocean Ins. Co. 6 Cow. 425—Mahler v. Norwich & N. Y. Transp. Co. 35 N. Y. 355—Smith v. Delaware Ins. Co. 3 Serg. & R. 84.

15. A seizure on the high seas for breach of a municipal regulation is warranted by the law of nations. *Hudson v. Guestier*, 6 Cranch, 281, 3: 224
Cited in *The Arabella*, 2 Gall. 369, Fed. Cas. No. 501—*The Invincible*, Fed. Cas. No. 7,054—*The Parkhill*, Fed. Cas. No. 10,755a—*Abraham v. Plestoro*, 3 Wend. 554—*Francis v. Ocean Ins. Co.* 6 Cow. 425—*Page v. Lennox*, 15 Johns. 174.

Vessels as national territory.

16. A vessel registered as a vessel of the United States is, in many respects, considered as a portion of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs. *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. Rep. 1002, 38: 936
Cited in *Lindstrom v. International Nav. Co.* 117 Fed. 171.

17. A vessel at sea is considered a part of the territory to which it belongs when at home, and the jurisdiction of the local sovereign over her and over those belonging to her is, according to the law of nations, the same as when she is in the home port. *Willson v. McNamee*, 102 U. S. 572, 26: 234
Cited in *The E. B. Ward Jr.* 17 Fed. 459—*Nonce v. Richmond & D. R. Co.* 33 Fed. 435—*The Lamington*, 87 Fed. 754—*Re Clyde S. S. Co.* 134 Fed. 99—*Schellenger v. Port Wardens*, 45 Phila. Leg. Int. 282, 19 Phila. 475.

18. Although the deck of a private American vessel is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions of the Constitution as to indictment and trial by jury, until brought within the actual territorial boundaries of the United States. *Roas v. McIntyre (Re Ross)* 140 U. S. 453, 11 Sup. Ct. Rep. 897, 35: 581

19. A vessel is deemed part of the territory of the country to which she belongs. *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. Rep. 109, 37: 1071
Cited in *Flint & P. M. R. Co. v. Marine Ins. Co.* 71 Fed. 215—*State v. McDonald*, 109 Wis. 517, 85 N. W. 502.

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20. Merchant vessels of one country, visiting the ports of another for the purpose of trading, subject themselves to the laws which govern the ports so visited, so long as they remain; and this as well in war as in peace, unless otherwise provided by treaty. *United States v. Diekelman*, 92 U. S. 520, 23: 742
Cited in *Wildenhus Case (Mall v. Keeper of Common Jail)* 120 U. S. 11, 30 L. ed. 567,

7 Sup. Ct. Rep. 385—*The Keator*, 110 Fed. 447.

21. A merchant vessel of one country entering the ports of another for trade is subject to the law of the place, unless otherwise agreed by the two countries. *Mali v. Keeper of Common Jail (Wildenhus's Case)* 120 U. S. 1, 7 Sup. Ct. Rep. 383, 30: 565

Foreign subjects in domestic territory.

22. By the general law of nations, no nation is bound to recognize the state of slavery as to foreign slaves within its territorial dominions, when it is opposed to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does it, it is as matter of comity, and not as matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. *Prigg v. Pennsylvania*, 16 Pet. 539, 10: 1060

Cited in *Scott v. Sandford*, 19 How. 534, 15 L. ed. 754—*Osborn v. Nicholson*, 1 Dill. 224, Fed. Cas. No. 10,595—*Re Archy*, 9 Cal. 163—*Berry v. Alsop*, 45 Miss. 8—*Anderson v. Poindexter*, 6 Ohio St. 642.

23. When private individuals of one nation enter the territory of another as business or caprice may direct, or when their merchant vessels enter for purposes of trade, they are amenable to the jurisdiction of the sovereign whose country they have entered. *The Exchange v. M'Faddon*, 7 Cranch, 116, 3: 287

Cited in *United States v. Diekelman*, 92 U. S. 525, 23 L. ed. 745—*Wildenhus's Case (Mali v. Keeper of Common Jail)* 120 U. S. 11, 30 L. ed. 567, 7 Sup. Ct. Rep. 383—*Chae Chan Ping v. United States*, 130 U. S. 604, 32 L. ed. 1075, 9 Sup. Ct. Rep. 623—*Re Debs*, 158 U. S. 579, 39 L. ed. 1101, 15 Sup. Ct. Rep. 309—*United States v. Wong Kim Ark*, 169 U. S. 683, 42 L. ed. 903, 18 Sup. Ct. Rep. 456—*Patterson v. The Eudora*, 190 U. S. 176, 47 L. ed. 1007, 23 Sup. Ct. Rep. 821—*Diekelman v. United States*, 8 Ct. Cl. 382—*The Keator*, 110 Fed. 447—*Middlebrooks v. Springfield F. Ins. Co.* 14 Conn. 308—*People v. Tyler*, 7 Mich. 209, 74 Am. Dec. 703—*People v. McLeod*, 25 Wend. 584.

Foreign naval or military powers in domestic territory.

24. The exemption of foreign public ships coming into our waters, under an express or implied license, from the local jurisdiction, does not extend to their prize ships or goods captured in violation of our neutrality. *The Santissima Trinidad*, 7 Wheat. 283, 5: 454
Cited in *Stewart v. United States*, 1 Ct. Cl. 117—*Ingersoll v. Campbell*, 46 Ala. 286.

25. The troops of a foreign prince, permitted by another sovereign to pass through his dominion, are exempt from the latter's territorial jurisdiction. *The Exchange v. M'Faddon*, 7 Cranch, 116, 3: 287
Cited in *Coleman v. Tennessee*, 97 U. S. 515, 24 L. ed. 1122—*Dow v. Johnson*, 100 U. S. 165, 25 L. ed. 635.

Exemptions from sovereign dominion.

26. All exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory, either ex-

press or implied; and, when implied, its extent must be regulated by the nature of the case. *The Exchange v. M'Faddon*, 7 Cranch, 116, 3: 287
Cited in People v. McLeod, 1 Hill, 417, 37 Am. Dec. 328.

27. All persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts, and the exceptions to this rule have been allowed in order to preserve the peace and harmony of nations. *The Santissima Trinidad*, 7 Wheat. 283, 5: 454
Cited in Rc Fassett, 142 U. S. 485, 35 L. ed. 1089, 12 Sup. Ct. Rep. 295—*The Oyster Police Steamer*, 31 Fed. 766—*Hatch v. Baez*, 7 Hun, 600.

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28. A foreign sovereign may prosecute in our courts. *The Sapphire v. Napoleon III.* (*The Sapphire*) 11 Wall. 164, 20: 127
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29. One nation treats with the citizens of another only through their governments. A sovereign cannot be sued in his own courts without his consent. *United States v. Dieckman*, 92 U. S. 520, 23: 742
Cited in Young v. United States, 97 U. S. 68, 24 L. ed. 1000—*Heard v. Sturgis*, 146 Mass. 553, 16 N. E. 437.

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30. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction. *The Exchange v. M'Faddon*, 7 Cranch, 116, 3: 287
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31. A ship ought not to be condemned for doing that which, by the laws of the country of its origin or ownership, it was required to do. *Sears v. The Scotia (The Scotia)* 14 Wall. 170, 20: 822
Cited in The Belgenland (The Belgenland v. Jensen) 114 U. S. 369, 29 L. ed. 157, 5 Sup. Ct. Rep. 860—*The Golden Grove*, 13 Fed. 702.

32. A ship cannot be condemned for doing that which, by the laws of the country of its origin or ownership, it was required to do. *The Belgenland v. Jensen (The Belgenland)* 114 U. S. 355, 5 Sup. Ct. Rep. 860, 29: 152

33. The seizure of an American vessel within the territorial jurisdiction of a foreign power, for violating the nonintercourse laws of the United States, is an offense against that power. *The Richmond v. United States*, 9 Cranch, 102, 3: 670

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34. By the law of nations, dominion of new territory may be acquired by discovery and occupation as well as by cession or conquest. *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. Rep. 80, 34: 691
Cited in Shively v. Bowby, 152 U. S. 50, 38 L. ed. 350, 14 Sup. Ct. Rep. 548.

35. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted. *Johnson v. M'Intosh*, 8 Wheat. 543, 5: 681
Cited in State v. Foreman, 8 Yerg. 344.

36. The principle that a treaty ceding territory does not divest the antecedent sovereignty without a surrender of possession was recognized. *Keene v. M'Donough*, 8 Pet. 308, 8: 955
Cited in De Lima v. Bidwell, 182 U. S. 194, 45 L. ed. 1055, 21 Sup. Ct. Rep. 743.

37. The legal title and possession of the United States to the Philippine Islands, derived from the cession in the treaty of peace with Spain, whose sovereignty and possession under claim of title had existed for many years prior to the war with the United States, is unaffected by the continuance in insurrection against the United States of those who had been previously in insurrection against Spain. *The Diamond Rings (Fourteen Diamond Rings v. United States)* 183 U. S. 176, 22 Sup. Ct. Rep. 59, 48: 138

38. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed; and the ceded territory becomes a part of the nation to which it is annexed,

either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. *American Ins. Co. v. Canter* (*American Ins. Co. v. 356 Bales of Cotton*) 1 Pet. 511, 7: 242

Cited in Pollard v. Kibbe, 14 Pet. 378, 10 L. ed. 501—*United States v. Huckabee*, 16 Wall. 434, 21 L. ed. 464—*Goetze v. United States*, 103 Fed. 77.

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39. The conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them. *United States v. LeGardiur De Repentigny* (*United States v. De Repentigny*) 5 Wall. 211, 18: 627

40. Where people change their allegiance, their relation to their former sovereign is dissolved: their relations to each other and their rights of property remain undisturbed. *Leitensdorfer v. Webb*, 20 How. 176, 15: 891

United States v. LeGardiur De Repentigny, (*United States v. DeRepentigny*) 5 Wall. 211, 18: 627

United States v. Percheman, 7 Pet. 51, 8: 604

Cited in Miller v. United States (Page v. *United States*) 11 Wall. 316, 20 L. ed. 148—*Coffee v. Groover*, 123 U. S. 10, 31 L.

ed. 56, 8 Sup. Ct. Rep. 1—*Norris v. Donlphan*, 4 Met. (Ky.) 391—*Scott v. Billgerry*, 40 Miss. 134—*Hill v. Boyland*, 40 Miss. 633—*Galbraith v. McFarland*, 3 Coldw. 272, 91 Am. Dec. 281—*Trimble v. Smithers*, 1 Tex. 797.

41. Where a French subject in Canada, who was the grantee of a large tract of land at Sault St. Marie, "in perpetuity by title of feof and seignior," upon the conquest and cession transferred his allegiance to England, and his lands fell within the boundary of the United States, upon the treaty acknowledging their independence, a conveyance of his estate subsequently to a citizen of the United States was a title no longer French or English, but American, held under the laws of the United States, and subject to them. Transmission by deed, devise, or descent must be by the laws of the United States, and not of France. *United States v. Le Gardiur De Repentigny* (*United States v. De Repentigny*) 5 Wall. 211, 18: 627

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42. One who refused to continue an inhabitant of Canada, and to become a subject of Great Britain, upon the surrender of Canada to that power, but elected to adhere in his allegiance to his native sovereign, deprived himself of any protection or security of his property, except so far as it was secured by the treaty of cession, and protection was limited to the privilege of sale or sales to British subjects, and to carry with him his effects, at any time within eighteen months from its ratification. Whatever property was thereafter left unsold was abandoned to the conqueror. *United States v. Le Gardiur De Repentigny* (*United States v. De Repentigny*) 5 Wall. 211, 18: 627 *Cited in Crane v. Reeder*, 21 Mich. 63, 4 Am. Rep. 430.

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43. Every nation acquiring territory by treaty or otherwise must hold subject to the Constitution and laws of its own government, and not according to the government ceding it. *Pollard v. Hagan*, 3 How. 212, 11: 565

Cited in Ferris v. Coover, 10 Cal. 620—*Ex parte Ortiz*, 100 Fed. 959—*Josephs v. United States*, 1 Ct. Cl. 200.

44. Conquered territory, while in hostile possession of the conqueror is part of his territory as regards all other nations and belongs to him as exclusively as the territory within his borders, the relation which such territory bears to him while so held by force of his arms not being dependent upon the law of nations, but upon his own laws. *Fleming v. Page*, 9 How. 603, 13: 276 *Cited in Thorington v. Smith*, 8 Wall. 10, 19 L. ed. 364—*Hansauer v. Woodruff*, 15 Wall. 447, 21 L. ed. 227—*New Orleans v. New York Mail S. S. Co.* 20 Wall. 398, 22 L. ed. 359—*Ford v. Surget*, 97 U. S. 617, 24 L. ed.

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Cited in State v. Bustamente, 47 Tex. 322.

Continuation of private municipal law.

Judicial Notice of Laws of Antecedent Government, see *Evidence*, 23-26.

Effect of State Cession to Nation, see *States*, 201, 202.

See also *infra*, 79; *Duties*, 7.

47. Upon the transfer of political jurisdiction and legislative power over any territory, municipal laws continue in force until abrogated by the new government or sovereign. *Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 5 Sup. Ct. Rep. 1005,

29: 270

Distinguished in United States v. American Waterworks Co. 37 Fed. 748.

Cited in Benson v. United States, 146 U. S. 330, 36 L. ed. 994, 13 Sup. Ct. Rep. 60—*Downes v. Bidwell*, 182 U. S. 298, 45 L. ed. 1110, 21 Sup. Ct. Rep. 770—*Crook v. Old Point Comfort Hotel Co.* 54 Fed. 608—*Bigley v. New York & P. R. S. Co.* 105 Fed. 77—*Chicago, R. I. & P. R. Co. v. McGlinn*, 33 Kan. 776—*Barnett v. Barnett*, 9 N. M. 212, 50 Pac. 337—*Barrett v. Palmer*, 135 N. Y. 340, 17 L.R.A. 723, 31 Am. St. Rep. 835, 31 N. E. 1017.

47a. After the cession of territory by a treaty, the municipal laws continue in force until altered by the power to which it was ceded. *Strother v. Lucas*, 12 Pet. 410,

9: 1137

Cited in Coburn v. San Mateo County, 75 Fed. 528—*Bigley v. New York & P. R. S. Co.* 105 Fed. 77—*Reynolds v. West*, 1 Cal. 314—*Hill v. Boyland*, 40 Miss. 634—*Charlotte v. Chouteau*, 25 Mo. 478—*Ward v. Broadwell*, 1 N. M. 85—*Hardy v. De Leon*, 5 Tex. 234—*First Nat. Bank v. Kinner*, 1 Utah, 106.

48. Laws, usages, and municipal regulations in force at the time of the conquest remain in force until changed by the conqueror. *United States v. Power*, 11 How. 570,

13: 817

Cited in State v. Bank of Tennessee, 5 Baxt. 30—*First Nat. Bank v. Kinner*, 1 Utah, 106.

49. In case of conquest among civilized nations, the laws of the conquered territory, except of a political nature, continue until superseded by those of the conqueror. *American Ins. Co. v. Canter* (*American Ins. Co. v. 356 Bales of Cotton*) 1 Pet. 511, 7: 242

Cited in Pollard v. Kibbe, 14 Pet. 374, 10 L. ed. 501—*Holden v. Joy*, 17 Wall. 247, 21 L. ed. 535—*Palmer v. Low*, 98 U. S. 15, 25 L. ed. 64—*Murphy v. Ramsey*, 114 U. S. 43, 29 L. ed. 57, 5 Sup. Ct. Rep. 747—*Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 547, 29 L. ed. 272, 5 Sup. Ct. Rep. 1005—*Dooley v. United States*, 182 U. S. 231, 45 L. ed. 1081, 21 Sup. Ct. Rep. 762—*Downes v. Bidwell*, 182 U. S. 298, 45 L. ed. 1111, 21 Sup. Ct. Rep. 770—*Philippine Sugar Estates Development Co. v. United States*, 39 Ct. Cl. 245—*Tobin v. Walkinshaw*, McAll. 192, Fed. Cas. No. 14,070—*Crook v. Old Point Comfort Hotel Co.* 54 Fed. 609—*Fowler v. Smith*, 2 Cal. 48—*Hart v. Burnett*, 15 Cal. 560—*Hill v. Boyland*, 40 Miss. 634—*Leitensdorfer v. Webb*, 1 N. M. 44—*United States v. Lucero*, 1 N. M. 447—*Barnett v. Barnett*, 9 N. M. 211, 50 Pac. 337—*First Nat. Bank v. Kinner*, 1 Utah, 106.

50. The validity of the legislation of the Republic of Texas cannot be tested by the Constitution of the United States. *Bevins v. Ramsey*, 11 How. 185,

13: 657

51. If a territory should be annexed whose jurisprudence is that of the civil law it would be a narrow construction of the Constitution which would require the abandonment of that system for another with which its inhabitants had had no previous acquaintance or sympathy. *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42: 780

Cited in De Lima v. Bidwell, 182 U. S. 216, 45 L. ed. 1063, 21 Sup. Ct. Rep. 743.

Preservation of existing private rights.

Effect of Annexation to Bring Real Property in Texas within Previous Bankruptcy, see *Conflict of Laws*, 141.

Claims for Lands Granted by Former Sovereignty, see *Private Land Claims*.

Effect of Land Grants Made by *De Facto* Government, see *Private Land Claims*, 9-11.

Titles Acquired under Judicial Sale under Former Government, see *Private Land Claims*, 417.

See also *supra*, 40; *Treaties*, 74.

52. Private relations and rights of property are not disturbed by a change of allegiance. *United States v. Percheman*, 7 Pet. 51,

8: 604

Cited in Mitchel v. United States, 9 Pet. 734, 9 L. ed. 291—*Strother v. Lucas*, 12 Pet. 436, 9 L. ed. 1147—*Pollard v. Kibbe*, 14 Pet. 375, 10 L. ed. 501—*Doe ex dem. Barbarie v. Es-lava*, 9 How. 445, 13 L. ed. 210—*Jones v. Mc-Masters*, 20 How. 20, 15 L. ed. 810—*Leitensdorfer v. Webb*, 20 How. 177, 15 L. ed. 891—*United States v. De Repentigny*, 5 Wall. 260, 18 L. ed. 643—*Langdeau v. Hanes*, 21 Wall. 527, 22 L. ed. 608—*Airhart v. Massieu*, 98 U. S. 496, 25 L. ed. 215—*Dauter-leve v. United States*, 101 U. S. 706, 25 L. ed. 871—*More v. Steinbach*, 127 U. S. 80, 32 L. ed. 54, 8 Sup. Ct. Rep. 1067—*Knight v. United Land Asso.* 142 U. S. 184, 35 L. ed.

982, 12 Sup. Ct. Rep. 258—Kinhead v. United States, 150 U. S. 499, 37 L. ed. 1158, 14 Sup. Ct. Rep. 172—United States v. Chaves, 159 U. S. 457, 40 L. ed. 218, 16 Sup. Ct. Rep. 57—Crespin v. United States, 168 U. S. 213, 42 L. ed. 440, 18 Sup. Ct. Rep. 53—Downes v. Bidwell, 182 U. S. 367, 45 L. ed. 1137, 21 Sup. Ct. Rep. 770—Coburn v. San Mateo County, 75 Fed. 528—Smyth v. New Orleans Canal & Bkg. Co. 35 C. C. A. 669, 93 Fed. 921—Eslava v. Doe, 7 Ala. 553—Woodworth v. Fulton, 1 Cal. 314—Reynolds v. West, 1 Cal. 326—Fowler v. Smith, 2 Cal. 46—Vanderslice v. Hanks, 3 Cal. 38—Farris v. Coover, 10 Cal. 619—Teschemacher v. Thompson, 18 Cal. 22, 79 Am. Dec. 151—Leese v. Clark, 20 Cal. 421—Minturn v. Brower, 24 Cal. 660—MaGee v. Doe, 9 Fla. 392—Clement v. Sigur, 29 La. Ann. 799—May v. Specht, 1 Mich. 189—Roussin v. Parks, 8 Mo. 539—Charlotte v. Chouteau, 25 Mo. 479—Sanborn v. Vance, 69 Mich. 226, 37 N. W. 273—Pino v. Hatch, 1 N. M. 142—United States v. Lucero, 1 N. M. 529—Browning v. Browning, 3 N. M. 671, 9 Pac. 677—Chaves v. Whitney, 4 N. M. 622, 16 Pac. 608—Barnett v. Barnett, 9 N. M. 212, 50 Pac. 337—McMullen v. Hodge, 5 Tex. 72—Hardy v. De Leon, 5 Tex. 234—Killpatrick v. Sisaneros, 23 Tex. 131—Puget Sound Agri. Co. v. Pierce County, 1 Wash. Terr. 163.

53. Private rights of property in a ceded territory are nowise affected by a treaty cession. *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 11 Sup. Ct. Rep. 656, 35: 278

54. When territory is acquired by treaty or grant the property rights of the inhabitants are respected. *Henderson v. Poindexter*, 12 Wheat. 530, 6: 718
Cited in *United States v. Arredondo*, 6 Pet. 712, 8 L. ed. 555—*Livingston v. Story*, 11 Pet. 394, 9 L. ed. 763—*Strother v. Lucas*, 12 Pet. 436, 9 L. ed. 1147—*Pollard v. Kibbe*, 14 Pet. 407, 10 L. ed. 516—*Castillero v. United States*, 2 B'ack, 366, 17 L. ed. 447—*United States v. Chaves*, 159 U. S. 457, 40 L. ed. 218, 16 Sup. Ct. Rep. 57—*Groover v. Coffee*, 19 Fla. 80.

55-6. In the case of an absolute conquest of the enemy's country, the right of property in all those who become subjects or citizens of the new government is unaffected by the change. *United States v. Le Gardiur De Repentigny* (*United States v. De Repentigny*) 5 Wall. 211, 18: 627
United States v. Percheman, 7 Pet. 51, 8: 604

Cited in *Coffee v. Groover*, 123 U. S. 10, 31 L. ed. 56, 8 Sup. Ct. Rep. 1—*Coburn v. San Mateo County*, 75 Fed. 528—*Hawkins v. Filkins*, 24 Ark. 303.

57. A cession of territory is never understood to be a cession of the property of the inhabitants. The King cedes only that which belongs to him; lands he had previously granted were not his to cede. *Strother v. Lucas*, 12 Pet. 410, 9: 1137
Cited in *Pollard v. Kibbe*, 14 Pet. 409, 10 L. ed. 517—*Hornsby v. United States*, 10 Wall. 242, 19 L. ed. 905—*Bryan v. Kennett*, 113 U. S. 182, 28 L. ed. 912, 5 Sup. Ct. Rep. 407—*Coffee v. Groover*, 123 U. S. 10, 31 L. ed. 56, 8 Sup. Ct. Rep. 1—*Knight v. United Land Assn.* 142 U. S. 184, 35 L. ed. 982, 12 Sup. Ct. Rep. 258—*Ainsa v. United States*, 161 U. S. 220, 40 L. ed. 677, 16 Sup. Ct. Rep. 544—U. S. Dig.—224

Ainsa v. New Mexico & A. R. Co. 175 U. S. 79, 44 L. ed. 80, 20 Sup. Ct. Rep. 28—*Chisolm v. Caines*, 67 Fed. 289—*De Camara v. Brooke*, 135 Fed. 391—*Vanderslice v. Hanks*, 3 Cal. 38—*Teschemacher v. Thompson*, 18 Cal. 23, 79 Am. Dec. 151—*Leese v. Clark*, 20 Cal. 421—*Minturn v. Brower*, 24 Cal. 660—*Roussin v. Parks*, 8 Mo. 538—*United States v. Lucero*, 1 N. M. 447—*Stillman v. Canales*, 39 Tex. 414.

58. Upon the cession of territory to the United States, this government succeeds to the position of the former government in respect to all property rights of the inhabitants, whether executed or executory. *Soulard v. United States*, 4 Pet. 511, 7: 938

Cited in *Smith v. United States*, 10 Pet. 330, 9 L. ed. 444—*Strother v. Lucas*, 12 Pet. 436, 9 L. ed. 1147—*Pollard v. Kibbe*, 14 Pet. 390, 10 L. ed. 508—*Teschemacher v. Thompson*, 18 Cal. 23, 79 Am. Dec. 151—*Tameling v. United States Freehold Land & Emigration Co.* 2 Colo. 422.

59. By the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they are changed. *Mitchel v. United States*, 9 Pet. 711, 9: 283

Cited in *Livingston v. Story*, 11 Pet. 395, 9 L. ed. 763—*Strother v. Lucas*, 12 Pet. 436, 9 L. ed. 1147—*Rhode Island v. Massachusetts*, 12 Pet. 749, 9 L. ed. 1270—*Doe ex dem. Barbara v. Eslava*, 9 How. 445, 13 L. ed. 210—*Leitenad v. Webb*, 20 How. 178, 15 L. ed. 891—*Town v. De Haven*, 5 Sawy. 149, Fed. Cas. No. 14,113—*Crystal Springs Land & Water Co. v. Los Angeles*, 76 Fed. 153—*Hawkins v. Filkins*, 24 Ark. 307—*Fowler v. Smith*, 2 Cal. 48—*Vanderslice v. Hanks*, 3 Cal. 37—*Teschemacher v. Thompson*, 18 Cal. 23, 79 Am. Dec. 151—*Le Roy v. Dunkerly*, 54 Cal. 456—*Scott v. Billgerly*, 40 Miss. 134—*Hill v. Boyland*, 40 Miss. 634—*Charlotte v. Chouteau*, 25 Mo. 478—*Ward v. Broadwell*, 1 N. M. 85—*Barnett v. Barnett*, 9 N. M. 212, 50 Pac. 337—*McKeegan v. McSwiney*, 2 S. C. N. 195—*State ex rel. Kain v. Hall*, 6 Baxt. 9—*McMullen v. Hodge*, 5 Tex. 71.

60. Where incorporation of the conquered with the victorious nation is practicable, or it can be safely governed as a distinct people, the rights of the conquered to property should remain unimpaired. *Johnson v. M'Intosh*, 8 Wheat. 543, 5: 681
Cited in *Strother v. Lucas*, 12 Pet. 436, 9 L. ed. 1147—*Rhode Island v. Massachusetts*, 12 Pet. 749, 9 L. ed. 1270—*Pollard v. Kibbe*, 14 Pet. 412, 10 L. ed. 518—*United States v. Huckabee*, 16 Wall. 434, 21 L. ed. 404—*Downes v. Bidwell*, 182 U. S. 281, 45 L. ed. 1104, 21 Sup. Ct. Rep. 770—*Groover v. Coffee*, 19 Fla. 80.

61. Aside from treaty stipulations, inhabitants of ceded territory should be protected in the free enjoyment of their property. *Soulard v. United States*, 4 Pet. 511, 7: 938
Cited in *Pollard v. Kibbe*, 14 Pet. 390, 10 L. ed. 508—*Knight v. United Land Assn.* 142 U. S. 201, 35 L. ed. 988, 12 Sup. Ct. Rep.

258—*Town v. DeHaven*, 5 Sawy. 149, Fed. Cas. No. 14,113—*Coburn v. San Mateo County*, 75 Fed. 528—*Reynolds v. West*, 1 Cal. 326—*Leese v. Clark*, 20 Cal. 421—*May v. Specht*, 1 Mich. 189—*Merrick v. Van Santvoord*, 84 N. Y. 217—*Jones v. Menard*, 1 Tex. 783.

62. A title derived by grant from a government is not to be affected or regulated by the political authorities to whom the country is afterwards ceded any more or otherwise than any private rights and property of the inhabitants of such a country. *Doe ex dem. Barbarie v. Eslava*, 9 How. 421, 13: 200

Cited in Coffee v. Groover, 123 U. S. 10, 31 L. ed. 56, 8 Sup. Ct. Rep. 1—*Hall v. Doe*, 19 Ala. 386—*Chavez v. Chavez de Sanchez*, 7 N. M. 69, 32 Pac. 137.

63. It is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object—so deservedly held sacred in view of policy as well as of justice and humanity—is always required, and is never refused. *United States v. de la Maza Arredondo*, 6 Pet. 691, 8: 547

Cited in New Orleans v. De Armas, 9 Pet. 236, 9 L. ed. 113—*Mitchel v. United States*, 9 Pet. 734, 9 L. ed. 291—*Livingston v. Story*, 11 Pet. 394, 9 L. ed. 763—*Strother v. Lucas*, 12 Pet. 436, 9 L. ed. 1147—*Rhode Island v. Massachusetts*, 12 Pet. 749, 9 L. ed. 1270—*Pollard v. Kibbe*, 14 Pet. 375, 10 L. ed. 501—*Doe ex dem. Barbarie v. Eslava*, 9 How. 445, 13 L. ed. 210—*Castillero v. United States*, 2 Black. 368, 17 L. ed. 447—*Coffee v. Groover*, 123 U. S. 10, 31 L. ed. 56, 8 Sup. Ct. Rep. 1—*United States v. Chavez*, 159 U. S. 457, 40 L. ed. 218, 16 Sup. Ct. Rep. 57—*Hancock v. Walsh*, 3 Woods, 365, Fed. Cas. No. 6,012—*Groover v. Coffee*, 19 Fla. 80—*Spinning v. Ohio L. Ins. & T. Co.* 2 Disney (Ohio) 380.

64. Division of an empire works no forfeiture of rights of property previously acquired. The title remains, after a revolution and the formation of a new government, the same as before. *Jones v. McMahesters*, 20 How. 8, 15: 805

Cited in Airhart v. Massieu, 98 U. S. 494, 25 L. ed. 214—*Coffee v. Groover*, 123 U. S. 10, 31 L. ed. 56, 8 Sup. Ct. Rep. 1—*Chisolm v. Caines*, 87 Fed. 289—*Kilpatrick v. Sisneros*, 23 Tex. 131—*Maxey v. O'Connor*, 23 Tex. 243—*Sabriego v. White*, 30 Tex. 589.

65. The division of a country, and the maintenance of independent governments over its different parts, do not of themselves divest the rights which the citizens of either have to lands situated within the territory of the other. Before the title can be divested, proceedings for enforcing its forfeiture must be provided by law and carried into effect. *Airhart v. Massieu*, 98 U. S. 491, 25: 213

66. The sovereign who acquires an inhabited country acquires full dominion over it, but this dominion is never supposed to divest the vested rights of individuals to property. *Delassus v. United States*, 9 Pet. 117, 9: 71
Cited in Strother v. Lucas, 12 Pet. 436, 9 L.

ed. 1147—*Rhode Island v. Massachusetts*, 12 Pet. 749, 9 L. ed. 1270—*Pollard v. Kibbe*, 14 Pet. 391, 10 L. ed. 508—*Castillero v. United States*, 2 Black. 233, 17 L. ed. 402—*Coffee v. Groover*, 123 U. S. 10, 31 L. ed. 56, 8 Sup. Ct. Rep. 1—*Whitney v. United States*, 181 U. S. 113, 45 L. ed. 775, 21 Sup. Ct. Rep. 565—*Town v. De Haven*, 5 Sawy. 149, Fed. Cas. No. 14,113—*Woodworth v. Fulton*, 1 Cal. 314—*Reynolds v. West*, 1 Cal. 326—*Hart v. Burnett*, 15 Cal. 553—*Groover v. Coffee*, 19 Fla. 80.

67. Neither the law of nations, nor the faith of the United States, would justify Congress in authorizing boards constituted to determine the validity of existing land claims to annul pre-existing titles, which might consequently be asserted in the ordinary courts of the country against any grantee of the American government. *United States v. Clarke*, 8 Pet. 436, 8: 1001

Cited in Mitchel v. United States, 9 Pet. 735, 9 L. ed. 292—*Strother v. Lucas*, 12 Pet. 436, 9 L. ed. 1147—*Rhode Island v. Massachusetts*, 12 Pet. 749, 9 L. ed. 1270—*Pollard v. Kibbe*, 14 Pet. 397, 10 L. ed. 511—*Coffee v. Groover*, 123 U. S. 9, 31 L. ed. 55, 8 Sup. Ct. Rep. 1—*Minturn v. Brower*, 24 Cal. 667—*Groover v. Coffee*, 19 Fla. 80—*Coffee v. Groover*, 20 Fla. 81.

— Editorial note.

Dominion acquired over conquered or ceded territory does not divest the vested rights of individuals to property. 9: 71

Preservation under particular treaties.

As to Treaties Generally, see *Treaties*.

See also *supra*, 41, 42.

68. The treaty with Spain by which Porto Rico and other territory was ceded to the United States, and by article 9 of which it is declared that the civil rights and political status of the native inhabitants therein "shall be determined by the Congress," shows an express purpose, not only to leave the status of the territory to be determined by Congress, but to prevent the treaty from operating to the contrary. [Per Justices White, Shiras, and McKenna.] *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. Rep. 770, 45: 1088

69. In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. *Soulard v. United States*, 4 Pet. 511, 7: 938

70. The capacity of British subjects, or of corporations created by the Crown in this country or in Great Britain, to hold lands or other property in this country, was not affected by the Revolution. The effect of the Revolution was not to divest civil rights. *Terrett v. Taylor*, 9 Cranch, 43, 3: 650
Society for Propagation of Gospel v. New Haven, 8 Wheat. 464, 5: 662
Society for Propagation of Gospel v. Pawlet, 4 Pet. 480, 7: 927

Cited in Dartmouth College v. Woodward, 4 Wheat. 707, 4 L. ed. 676—*Society for Propagation of the Gospel v. New Haven*, 8 Wheat. 481, 5 L. ed. 660—*Society for Propagation*

of Gospel v. Pawlet, 4 Pet. 502, 7 L. ed. 935—Kilpatrick v. Sisneros, 23 Tex. 126.

71. Titles which were perfect before the cession of the territory of Louisiana to the United States were not affected by the change of sovereignty. Dent v. Emmeger, 14 Wall. 308, 20: 838
Trenier v. Stewart, 101 U. S. 797, 25: 1021
Cited in Ainsa v. New Mexico & A. R. Co. 175 U. S. 81, 44 L. ed. 81, 20 Sup. Ct. Rep. 28—Muse v. Arlington Hotel Co. 68 Fed. 641—Grant v. Jaramillo, 6 N. M. 317, 28 Pac. 508.

72. Louisiana was ceded by France to Spain without any abridgement of the vested rights to property enjoyed by private individuals or communities. New Orleans v. United States, 10 Pet. 662, 9: 573
Cited in Strother v. Lucas, 12 Pet. 440, 9 L. ed. 1149.

73-4. The retrocession of Louisiana to France by the Western Company did not abrogate the rights which had been acquired under it. New Orleans v. United States, 10 Pet. 662, 9: 573

75. A Mexican was not, by the revolution which resulted in the independence of Texas, or by its Constitution of March 17, 1836, or its laws subsequently enacted, divested of his title to lands in that state, but he retained the right to alienate and transmit them to his heirs; and the latter are entitled to sue for and recover them. Airhart v. Massieu, 98 U. S. 491, 25: 213
Cited in Hanrick v. Patrick, 119 U. S. 169, 30 L. ed. 404, 7 Sup. Ct. Rep. 147—Gonzales v. Ross, 120 U. S. 625, 30 L. ed. 808, 7 Sup. Ct. Rep. 705—Williams v. Conger, 125 U. S. 426, 31 L. ed. 790, 8 Sup. Ct. Rep. 933—Kircher v. Murray, 54 Fed. 621—Wunderle v. Wunderle, 144 Ill. 64, 19 L.R.A. 89, 33 N. E. 195—Hanrick v. Hanrick, 54 Tex. 118—Hanrick v. Hanrick, 61 Tex. 603.

76. The grant of a perpetual ferry franchise, made by the Spanish governor-general of Louisiana after the date of the treaty by which Spain retroceded to France the province of Louisiana, is not property protected by the treaty by which France ceded Louisiana to the United States. Davis v. Police Jury, 9 How. 280, 13: 138

77. The United States did not acquire by treaty with Spain power to alien or to interdict the sale of a quay or any part of it in the city of New Orleans, part of the common property of the city. New Orleans v. United States, 10 Pet. 662, 9: 573

Cited in Strother v. Lucas, 12 Pet. 436, 9 L. ed. 1147—Pollard v. Kibbe, 14 Pet. 370, 10 L. ed. 498—New Orleans v. Louisiana Constr. Co. 140 U. S. 662, 35 L. ed. 559, 11 Sup. Ct. Rep. 968—Hart v. New Orleans, 12 Fed. 295—Geiger v. Fillor, 8 Fla. 338—State ex rel. Illinois C. R. Co. v. Orleans Levee District, 109 La. 419, 33 So. 385—New Orleans, M. & C. R. Co. v. New Orleans, 26 La. Ann. 518—Fleitas v. New Orleans, 51 La. Ann. 18, 24 So. 623—Coleman v. Doe, 4 Smedes & M. 49—Hill v. Boyland, 40 Miss. 634—Land v. Keirn, 52 Miss. 351.

Public proprietary rights.

Effect of European Discovery and Occupation on Indian Titles, see Indians, 90-96.

Transition of Power to Grant Lands in Public Domain, see Private Land Claims, I. a, 2.

Vacant Land within Colonies at Time of Revolution, see States, 369.

Construction of Particular Treaties Generally, see Treaties, II.

78. By the treaty which concluded the War of the Revolution, Great Britain relinquished all claim, not only to the government, but to the proprietary and territorial rights of the United States. Johnson v. M'Intosh, 8 Wheat. 543, 5: 681
Cited in Rhode Island v. Massachusetts, 12 Pet. 720, 9 L. ed. 1259—Bonaparte v. Camden & A. R. Co. Baldw. 220, Fed. Cas. No. 1,617—Sharpless v. Philadelphia, 21 Pa. 160, 59 Am. Dec. 759—McCready v. Com. 27 Gratt. 988.

79. The doctrine that the laws of a conquered country, except so far as affected by the political institutions of the new government, remain in force until changed by it, does not apply to laws authorizing the alienation of the public domain, or to officers charged under the former government with that power. More v. Steinbach, 127 U. S. 70, 8 Sup. Ct. Rep. 1067, 32: 51
Cited in Ely v. United States, 171 U. S. 230, 43 L. ed. 146, 18 Sup. Ct. Rep. 840—Harvey v. Barker, 126 Cal. 274, 58 Pac. 692.

Assumption of sovereign obligations.

Effect of Recognition by new Government to Purge Contract Violative of Neutrality Laws, see Insolvency, 26.

80. It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession; but it is no part of its duty to right the wrongs which the grantor nation may have theretofore committed upon an individual,—at least when these are not so recent as to have given no time to seek their redress. Cessna v. United States, 169 U. S. 165, 18 Sup. Ct. Rep. 304, 42: 702

VI. Arbitration.

81. There is no inconsistency with the principles underlying international arbitration in providing for a judicial investigation of fraud in obtaining an award from an international commission, the amount of which has been paid to the United States in accordance with the award, for distribution, as the purpose of the suit is to enforce good faith on the part of citizens who seek the intervention of the government to obtain redress of alleged wrongs from another country. La Abra Silver Min. Co. v. United States, 175 U. S. 423, 20 Sup. Ct. Rep. 168, 44: 223

INTERPLEADER.

Costs on Bill of, see Costs and Fees, 44.
 In Court of Claims, see Court of Claims, 8.
 Right to Maintain, as Affecting Claimant's
 Right to Maintain Independent Bill in
 Equity, see Equity, 167.
 Interest Against Plaintiff in Bill of, see In-
 terest, 29.
 Conclusiveness of Judgment on, see Judg-
 ment, 748.
 In Attachment Suit, see Parties, 291.
 Nature of Relief to be Sought, see Plead-
 ing, 91.
 Averments in Bill of, see Pleading, 461.

1. Upon a bill of interpleader filed by
 underwriters against the different creditors
 of an insolvent debtor, claiming the fund
 proceeding from an insurance made for ac-
 count of the debtor,—some on the ground
 of special liens, and others under the as-
 signment,—the rights of the respective par-
 ties will be determined. *Spring v. South*
Carolina Ins. Co. 8 Wheat 268, 5: 614
Cited in *Widaman v. Hubbard*, 88 Fed. 813—
Chase v. Manhardt, 1 Bland. Ch. 345—
School Dist. No. 1 v. Weston, 31 Mich. 97—
Wilbraham v. Horrocks, 8 W. N. C. 287.

2. Those of the codefendants in a bill of
 interpleader who fail in establishing any right
 to the fund in suit are not entitled to an ac-
 count, from the defendant whose claims are
 allowed, of the amount and origin of those
 claims. *Spring v. South Carolina Ins. Co.*
 8 Wheat. 268, 5: 614

3. A member of a firm in liquidation,
 holding in his hands a fund retained from
 proceeds of a mortgage owned by the firm,
 to pay a prior mortgage, when sued by the
 prior mortgagee, may, notwithstanding his
 substantial although indirect interest in de-
 feating the plaintiff, which would enure to
 the benefit of the firm, bring in by inter-
 pleader the mortgagor, who has prohibited
 him from paying over the fund. *Groves v.*
Sentell, 153 U. S. 465, 14 Sup. Ct. Rep. 898,

38: 785
Cited in *McNamara v. Provident Sav. Life*
Assur. Soc. 52 C. C. A. 532, 114 Fed. 912
 —*Provident Sav. Life Assur. Soc. v. Loeb*,
 115 Fed. 359.

Editorial note.

[By one who has contract with one of
 parties defining his rights or obligations
 with respect to the subject matter. 10
 L.R.A.(N.S.) 748.]

INTERPRETATION.

Of Contract, see Contracts, II.
 Of Private Land Grant Generally, see Pri-
 vate Land Claims, I. d.
 Of Statute, see Statutes, II.

INTERPRETER.

Swearing Juror as, see Appeal and Error,
 4347.

Review of Discretion in Refusing to Ap-
 point, see Appeal and Error, 4463.
 Compensation in Indian Department, see
 United States, 90.

INTERROGATORIES.

Service of, on Person Charged with Con-
 tempt, see Contempt, 47.
 Necessity of Answer to, see Pleading, 786.
 Special Interrogatories, see Trial, X.

INTERSTATE BOUNDARIES.

As Presenting Federal Question between
 Land Claimants, see Courts, 617.
 See also Boundaries, III.

INTERSTATE BRIDGE.

State Regulation of Tolls as Affecting Com-
 merce, see Commerce 202, 203.
 Taxation of, see Taxes, I. c, 7.

INTERSTATE COMMERCE ACT.

Appellate Jurisdiction of Supreme Court
 over Cases Relating to, see Appeal and
 Error, 958, 959.
 Publication of Tariffs, see Carriers, III. g.
 Carriers Subject to, see Carriers, 218, 219.
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 Courts, 540.

INTERSTATE COMMERCE COMMISSION.

Stay of Proceedings on Order of, Pending
 Appeal, see Appeal and Error, 2830.
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 upon by, see Appeal and Error, 5394.
 Regular Published Rates as Controlling
 Quoted Rates, see Carriers, 140.
 General Effect of Interstate Commerce Act
 as to Carriers, see Carriers, 214.
 Power to Refuse Copies of Telegrams as
 Vouchers in Rendering Accounts, see
 Claims, 195.
 Admissibility of Evidence in Proceedings
 Before, see Evidence, 1399.
 Compulsory Production of Documentary Evi-
 dence before, see Search and Seizure, 13.
 Adopting Construction of Statute by, see
 Statutes, 271.
 Privilege of Witness before, see Witnesses,
 V. c.

1. The Interstate Commerce Commission
 is an administrative and not a judicial body.
Interstate Commerce Commission v. Brim-
son, 154 U. S. 447, 14 Sup. Ct. Rep. 1125,
 38: 1047
Cited in *Interstate Commerce Commission v.*

Cincinnati, N. O. & T. P. R. Co. 5 Inters. Com. Rep. 132, 64 Fed. 982—Western New York & P. R. Co. v. Penn. Ref. Co. 70 C. C. A. 29, 137 Fed. 349.

2. The Interstate Commerce Commission is made a body corporate, with legal capacity to be a party plaintiff or defendant in the Federal courts, by the acts of Congress creating the Commission, providing that it shall have an official seal, and making it lawful for it to apply by petition for the enforcement of its orders. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. Rep. 666, 40: 940

3. A carrier which has elected to enter into the carriage of interstate freights, and thus subjected itself to the control of the Interstate Commerce Commission, cannot limit that control in respect to foreign traffic to certain points on its road, and exclude other points. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. Rep. 700, 40: 935

4. The 12th section of the act of Feb. 4, 1887, as amended Feb. 10, 1891, is constitutional and valid, so far as it authorizes or requires the circuit courts of the United States to use their process in aid of inquiries before the Interstate Commerce Commission. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. Rep. 1125, 38: 1047

Cited in Re Gross, 78 Fed. 109—*United States v. Bell*, 81 Fed. 848—*United States ex rel. Kellogg v. Lehigh Valley R. Co.* 115 Fed. 375—*Interstate Commerce Commission v. Philadelphia & R. R. Co.* 123 Fed. 970—*People ex rel. Akin v. Kipley*, 171 Ill. 67, 41 L.R.A. 783, 49 N. E. 229—*Re Davies*, 168 N. Y. 105, 56 L.R.A. 861, 61 N. E. 118.

Parties.

5. A railroad company which participated in through rates is not a necessary, even if it is a proper, party to a proceeding by the Interstate Commerce Commission against another company for disobedience of an order of the Commission in the matter of such rates. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666, 40: 490

Cited in Interstate Commerce Commission v. Southern P. Co. 123 Fed. 599.

5a. A suit to enjoin a common carrier from discriminating between localities in violation of the act to regulate commerce could not be brought on behalf of the United States by its law officers at the request of the Interstate Commerce Commission prior to the passage of the act of Congress of February 19, 1903, the 3d section of which expressly authorizes the prosecution of such suits. *Missouri P. R. Co. v. United States*, 189 U. S. 274, 23 Sup. Ct. Rep. 507, 47: 811

Cited in United States v. Atchison, T. & S. F. R. Co. 142 Fed. 185—*United States v. Milwaukee Refrigerator Transit Co.* 145 Fed. 1010.

Refusal to produce contracts.

6. The refusal to produce contracts under

which railroad companies engaged in carrying coal from the anthracite regions in Pennsylvania to tidewater, or coal companies owned by the railroads, purchase coal from independent operators engaged in mining in that district, for which payment is made on the basis of a fixed percentage of the average price at certain tide points of coal of the same quality and size, cannot be justified on the ground of irrelevancy, in a proceeding before the Interstate Commerce Commission on a complaint charging the railroad companies with violating the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), to regulate commerce, by unfair discrimination and by charging unreasonable and unjust rates in carrying anthracite coal. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. Rep. 563, 48: 860
Cited in United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 252.

7. The production of contracts under which railroad companies engaged in interstate carriage of anthracite coal, who had acquired certain collieries whose proprietors were about to build a competing line, guaranteed the stock and bonds issued in payment thereof by a corporation whose charter they had purchased for that purpose, may be compelled in a proceeding before the Interstate Commerce Commission on a complaint charging such railroad companies with violations of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), to regulate commerce, by the pooling of freights and the charging of unreasonable rates in carrying anthracite coal. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. Rep. 563, 48: 860

Review and enforcement of decisions.

Conclusiveness of Finding by, see Appeal and Error, VIII. 1. 3, i.

Reversal of Decree Enforcing Order, see Appeal and Error, 4993.

Proceeding to Require Witness to Answer as a Case for Federal Jurisdiction, see Courts, 459.

Power of Courts to Enforce Regulations by Mandamus, see Courts, 1110, 1111.

Effect of Stipulation on Enforcement, see Judgment, 75.

Stipulation in Judicial Proceedings to Enforce Order, see Trial, 1.

See also *supra*, 2, 4; *infra*, 18.

8. The decision of the Interstate Commerce Commission on a charge that rates are unjust and unreasonable or make unjust discriminations and preferences in violation of § 3 of the act to regulate commerce is subject to review in the courts on the consideration of the allegations and evidence of the parties, giving effect, however, to the findings of fact by the Commission as *prima facie* evidence of the matters therein stated. *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 18 Sup. Ct. Rep. 45, 42: 414

9. The courts in reviewing a decision of the Interstate Commerce Commission is not restricted to the evidence adduced before the Commission nor to the power of the Commission to make the order in question, but they may admit other evidence and it is the duty of the courts to decide as courts of equity, upon the entire body of evidence. *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 18 Sup. Ct. Rep. 45, 42: 414

Cited in Interstate Commerce Commission v. Clyde S. S. Co. 181 U. S. 32, 45 L. ed. 731, 21 Sup. Ct. Rep. 512—*Interstate Commerce Commission v. East Tennessee, V. & G. R. Co.* 85 Fed. 118—*Interstate Commerce Commission v. Southern P. Co.* 123 Fed. 601—*Interstate Commerce Commission v. Southern P. Co.* 132 Fed. 837—*Western N. Y. & P. R. Co. v. Penn. Ref. Co.* 70 C. C. A. 32, 137 Fed. 352.

10. On application to the courts to enforce an order of the Interstate Commerce Commission which is based on an erroneous construction of the statute, by reason of which error it has declined adequately to find the facts, the courts will not proceed to an original investigation of the facts which should have been passed upon by the Commission, but will correct the error of law committed by that body, and, after doing so, dismiss the application without prejudice to the right of the Commission to make a further investigation of the facts. *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 21 Sup. Ct. Rep. 516, 45: 719
Interstate Commerce Commission v. Clyde S. S. Co. 181 U. S. 29, 21 Sup. Ct. Rep. 512, 45: 729

Cited in Missouri P. R. Co. v. United States, 189 U. S. 288, 47 L. ed. 816, 23 Sup. Ct. Rep. 507—*Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 454, 51 L. ed. 1134, 27 Sup. Ct. Rep. 700—*Louisville & N. R. Co. v. Interstate Commerce Commission*, 46 C. C. A. 685, 108 Fed. 988—*Interstate Commerce Commission v. Southern P. Co.* 123 Fed. 603—*United States v. Atchison, T. & S. F. R. Co.* 142 Fed. 188.

11. Any supposed admissions in a complaint filed by soap manufacturers with the Interstate Commerce Commission as to the freight rate for common soap promulgated in a classification adopted to govern in official classification territory are ineffectual to deprive a Federal circuit court, in a proceeding to enforce an order of the Commission directing the carriers to desist from enforcing this classification as to soap in less than car-load lots, of the power to test the validity of such order by the scope of the act to regulate commerce. *Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 27 Sup. Ct. Rep. 648, 51: 995

12. The enforcement of an order of the Interstate Commerce Commission directing common carriers to desist from maintaining or enforcing a rule adopted by them may be decreed by a Federal circuit court if it finds such rule is, for any reason, in violation of the act of February 4, 1887 (24

Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3165), although such reason may not have been the one relied upon by the Commission itself to invalidate the rule. *Southern P. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 26 Sup. Ct. Rep. 330, 50: 585

13. It is not proper for railroad companies to withhold the larger part of their evidence from the Interstate Commerce Commission, and first adduce it in the circuit court in proceedings by the Commission to enforce its order, but the purposes of the act of Congress to regulate commerce call for a full inquiry by the Commission in the first instance. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. Rep. 700, 40: 935

Cited in Farmers' Loan & T. Co. v. Northern P. R. Co. 83 Fed. 251—*Interstate Commerce Commission v. Louisville & N. R. Co.* 118 Fed. 626—*Western N. Y. & P. R. Co. v. Penn. Ref. Co.* 70 C. C. A. 34, 137 Fed. 354.

14. A concerted advance by interstate carriers in the freight rate upon a particular commodity may be held unreasonable and unjust by the Interstate Commerce Commission and by a Federal circuit court in the subsequent proceedings to enforce the order of the Commission, although such rate may be but a mere division of a through rate. *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 27 Sup. Ct. Rep. 700, 51: 1128

Power to prescribe or pass upon rates.

15. The power of Interstate Commerce Commission to pass upon the reasonableness of rates does not necessarily imply a right on the part of the Commission to prescribe rates in advance of a case made on the subject. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. Rep. 666, 40: 940

Cited in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 500, 42 L. ed. 253, 17 Sup. Ct. Rep. 896—*Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 76 Fed. 185—*Behlmer v. Louisville & N. R. Co.* 28 C. C. A. 241, 42 U. S. App. 581, 83 Fed. 909—*Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 154, 52 U. S. App. 732, 86 Fed. 419—*Southern P. Co. v. Colorado Fuel & Iron Co.* 42 C. C. A. 16, 101 Fed. 783.

16. The function of the Commission is to consider and give proper weight to the facts on which the reasonableness of a rate in a given case depends, when such a case is presented. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. Rep. 700, 40: 935

Cited in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 500, 42 L. ed. 253, 17 Sup. Ct. Rep. 896—*Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 162, 42 L. ed.

421, 18 Sup. Ct. Rep. 45—Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 429—Interstate Commerce Commission v. Northeastern R. Co. 74 Fed. 72—Interstate Commerce Commission v. Alabama Midland R. Co. 21 C. C. A. 56, 5 Inters. Com. Rep. 691, 41 U. S. App. 453, 74 Fed. 720—Interstate Commerce Commission v. Lehigh Valley R. Co. 74 Fed. 787—Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 140, 43 U. S. App. 308, 74 Fed. 840—Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 76 Fed. 184—Old Colony Trust Co. v. Atlanta, 83 Fed. 42—Farmer's Loan & T. Co. v. Northern P. R. Co. 83 Fed. 254—Interstate Commerce Commission v. Northeastern R. Co. 27 C. C. A. 633, 42 U. S. App. 603, 83 Fed. 613—Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 154, 52 U. S. App. 732, 86 Fed. 419—Interstate Commerce Commission v. Western & A. R. Co. 35 C. C. A. 225, 93 Fed. 91—Southern P. Co. v. Colorado Fuel & Iron Co. 101 Fed. 782—Louisville & N. R. Co. v. Com. 104 Ky. 245, 43 L.R.A. 546, 46 S. W. 707 (cited in dissenting opinion)—State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co. 80 Minn. 196, 89 Am. St. Rep. 514, 83 N. W. 60.

17. Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum or minimum or absolute, nor has it authorized the Commission to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates which it has determined to have been in the past reasonable and just. Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 18 Sup. Ct. Rep. 45, 42: 414

Cited in Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 154, 52 U. S. App. 732, 86 Fed. 419—Southern P. Co. v. Colorado Fuel & Iron Co. 42 C. C. A. 16, 101 Fed. 782—State ex rel. Godard v. Johnson, 61 Kan. 818, 49 L.R.A. 667, 60 Pac. 1068.

18. The Interstate Commerce Commission has no power to prescribe a tariff of rates which shall control in the future, and therefore cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 17 Sup. Ct. Rep. 896, 42: 243

Cited in Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 162, 42 L. ed. 421, 18 Sup. Ct. Rep. 45—Farmers' Loan & T. Co. v. Northern P. R. Co. 83 Fed. 267—Interstate Commerce Commission v. Northeastern R. Co. 27 C. C. A. 631, 42 U. S. App. 603, 83 Fed. 612—Interstate Commerce Commission v. East Tennessee V. & G. R. Co. 85 Fed. 117—Interstate Commerce Commission v. Chicago, B. & Q. R. Co. 94 Fed. 273—Southern P. Co. v. Colorado Fuel & Iron Co. 42 C. C. A. 16, 101 Fed. 782—Blair v. Sioux City & P. R. Co. 109 Iowa, 381, 80 N. W. 673.

19. Incorporating into the interstate commerce act the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implica-

tion carry to the Commission or invest it with power to exercise the legislative function of prescribing rates which shall control in the future,—especially in view of the fact that the statute expressly recognizes the right of the carrier to establish, increase, or reduce rates on the condition of publishing them and filing them with the Commission. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 17 Sup. Ct. Rep. 896, 42: 243

Inquiry as to reasonableness of and discrimination.

Necessity of Resorting to Commission before Suing in Court, see Carriers, 241, 242.

Power to Determine Whether Conditions are Similar, see Carriers, 282.

Application for Leave to Make Competing Rates, see Carriers, 294.

See also *supra*, 8, 14–17.

20. The important duties of the Interstate Commerce Commission in respect to railroad rates include the duty of inquiry as to the management of the business, with the right to compel complete and full information concerning it, and the duty of seeing that there is no violation of the long and short haul clause of the act, or any prohibited discrimination, rebate, or other device to give undue preferences, and also that the publicity required by § 6 is observed. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 17 Sup. Ct. Rep. 896, 42: 243

21. It is within the jurisdiction of the Interstate Commerce Commission to consider whether a railroad company transporting interstate freight, and charging a higher rate for a shorter than for a longer distance over the same line in the same direction, is doing it under substantially similar circumstances and conditions. Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. Rep. 700, 40: 935

Cited in Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 170, 42 L. ed. 424, 18 Sup. Ct. Rep. 45—Behlmer v. Louisville & N. R. Co. 28 C. C. A. 286, 42 U. S. App. 581, 83 Fed. 904.

22. The Interstate Commerce Commission is acting within its powers under the act to regulate commerce in ordering carriers to desist from further enforcing a classification by percentage of common soap in less than car-load lots, operating throughout official classification territory, which it finds has brought about a general disturbance in relations previously existing in that territory, and has created discriminations and preferences among manufacturers and shippers of the commodity, and between localities in such territory. Cincinnati, H. & D. Co. v. Interstate Commerce Commission, 206 U. S. 142, 27 Sup. Ct. Rep. 648, 51: 995

23. The Interstate Commerce Commission, in making an investigation of a complaint filed by soap manufacturers as to the freight rate for common soap promulgated in a classification adopted to govern in official

classification territory, had the power, in the public interest, unembarrassed by any supposed admissions contained in the complaint, to consider the whole subject and the operation of the classification in the entire territory, and also how far its going into effect would be just and reasonable, would create preferences, or would engender discrimination. *Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 27 Sup. Ct. Rep. 648, 51: 995

INTERVENTION.

In an Action Generally, see Parties, III.
 In Admiralty, see Admiralty, III. b. 3.
 In Foreclosure Suit, see Mortgage, VII. c. 3.
 In Proceedings Confirming Private Land Claims, see Private Land Claims, 575, 576.
 In Suit to Cancel Land Patent, see Public Lands, 1160.
 Finality of Decision of Circuit Court of Appeals on, see Appeal and Error, III. d, 2, c.
 Intervener's Right to Appeal or Bring Error, see Appeal and Error, 2411-2418, 2449, 2474, 2483.
 Motion in Appellate Court by Intervener, see Appeal and Error, 3735.
 Consideration of Proper Disposition of, on Motion to Dismiss, see Appeal and Error, 3772.
 Right of Intervening Prior Mortgagee to Payment from Proceeds of Foreclosure, see Mortgage, 275.
 Removal of Intervention Proceeding, see Removal of Causes, 41, 141-159, 160.
 Effect of, on Right to Remove Cause, see Removal of Causes, 202.

1. The court will consider the evidence offered by the United States on intervention by it on a bill to establish the boundary between two states, but, as it is not a party, no judgment will pass for or against it. *Florida v. Georgia*, 17 How. 478, 15: 181

2. If other parties entitled to distribution appear and claim an interest in a suit by a distributee, and there are controverted matters between them and the administrator, outside of the mere accounting to be made by him, these can be decided only on proper pleadings and regular hearing by the court. *Hook v. Payne*, 14 Wall. 252, 20: 887

INTOXICATING LIQUORS.

- I. *Validity of Statutes and Ordinances*, 1-4.
- II. *License; Tax*, 5-10.
- III. *Legality of Traffic in; Offenses*, 11-5.
- IV. *Civil Remedies*, 16-7.

Regulating Manufacture and Sale of Intoxicating Liquors Generally as Affecting Commerce, see Commerce, IV. b. 2.

Effect of Wilson Act on State Regulation, see Commerce, 408-417, 432, 433, 468, 539-541.

Sale of, in Original Packages, see Commerce, 428-433.

Inspection Laws, see Commerce, 537-541.
 Discrimination Against Foreign Corporations in Sale of, see Constitutional Law, 230.

Equal Protection and Privileges as to, see Constitutional Law, 347-355.

Regulation of Sale As Denying Privileges and Immunities, see Constitutional Law, 306.

Contract Rights Granted by Charter for Manufacture and Sale of Beer, see Constitutional Law, 1071.

Impairment of Obligations of Contract with Brewing Company, see Constitutional Law, 1190.

Customs Duties on, see Duties, V. d, 16.

Allowance for Breakage, Leakage, etc., see Duties 382-384.

Opinion as to Effect of Use, see Evidence, 1776.

Effect of Use as Question for Jury, see Trial, 143, 144.

Use of, by Insured, see Insurance, 265-268, 314, 315, 362.

Warranties or Representations by Insured as to Use of, see Insurance, 265-268.

Habits of Insured as to Temperance as Question for Jury, see Trial, 205.

Condition in Deed Against Manufacture or Sale, see Real Property, 14, 30.

Constable's Right to Seize Liquors in Receiver's Possession, see Receivers, 48.

I. *Validity of Statutes and Ordinances.*

Validity of Statute for Abating Liquor Nuisance, see *infra*, IV.

Federal Question as to, see Appeal and Error, 1668.

Delegating Legislative Power to Judiciary, see Constitutional Law, 152.

Ordinance Excluding Women from Saloons as Exercise of Police Power, see Constitutional Law, 904.

Equal Protection and Privileges, see Constitutional Law, 347-355, 382.

Due Process in Prohibiting Manufacture, see Constitutional Law, 479, 480.

Police Power to Regulate Liquor Business, see Constitutional Law, 896-900.

Relative Power of State and Nation, see States, 101-103.

1. The legislature of a state in the absence of any restrictions in the state constitution has the power to regulate the mode and manner and the circumstances under which the liquor traffic may be conducted, and to surround the right to pursue it with such conditions, restrictions, and limitations as the legislature may deem proper. *Giozza v.*

Tiernan, 148 U. S. 657, 13 Sup. Ct. Rep. 721, 37: 599
 Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6, 32: 346

Cited in Rhodes v. Iowa, 170 U. S. 427, 42 L. ed. 1097, 18 Sup. Ct. Rep. 664—Austin v. Tennessee, 179 U. S. 347, 45 L. ed. 227, 21 Sup. Ct. Rep. 182—Kellkopf v. Denver, 19 Colo. 828, 35 Pac. 535—United States v. Cohn, 2 Ind. Terr. 492, 52 S. W. 38—Garrett v. Aby, 47 La. Ann. 630, 17 So. 238—Trageser v. Gray, 73 Md. 255, 9 L.R.A. 784, 25 Am. St. Rep. 587, 20 Atl. 905—Territory v. Guyott, 9 Mont. 52, 22 Pac. 134—Ex parte Boyce, 27 Nev. 340, 65 L.R.A. 58, 75 Pac. 1—Re Peter Schoenhofer Brewing Co. 8 Pa. Super. Ct. 144, 42 W. N. C. 403—McCullough v. Brown, 41 S. C. 279, 23 L.R.A. 433, 19 S. E. 458—State ex rel. George v. Alken, 42 S. C. 253, 26 L.R.A. 359, 20 S. E. 221—Danville v. Hatcher, 101 Va. 527, 44 S. E. 723.

2. That part of the statute of Iowa concerning the sale of liquors which declares that no person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating liquors with intent to sell the same within that state, and all the prohibitory clauses of the statute, are within the constitutional powers of the state legislature. Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. Rep. 424, 33: 801

Cited in Glozza v. Tiernan, 148 U. S. 662, 37 L. ed. 602, 13 Sup. Ct. Rep. 721—Rhodes v. Iowa, 170 U. S. 427, 42 L. ed. 1096, 18 Sup. Ct. Rep. 664—United States v. Debs, 5 Inters. Com. Rep. 210, 64 Fed. 753—State v. Brennan, 2 S. D. 390, 50 N. W. 625—State ex rel. Duensing v. Roby, 142 Ind. 192, 33 L.R.A. 221, 51 Am. St. Rep. 174, 41 N. E. 145—United States v. Cohn, 2 Ind. Terr. 492, 52 S. W. 38—State v. Hanaphy, 117 Iowa, 19, 90 N. W. 601—Davis v. Auld, 96 Me. 565, 53 Atl. 118—Wright v. State, 88 Md. 440, 41 Atl. 795—Webster v. State, 110 Tenn. 505, 75 S. W. 1020—Harrell v. Speed, 118 Tenn. 280, 1 L.R.A. (N.S.) 641, 106 Am. St. Rep. 814, 81 S. W. 840.

3. The laws of Massachusetts regulating liquor traffic are not in conflict with the Constitution of the United States. Pervear v. Massachusetts, 5 Wall. 475, 18: 608

4. The ordinance of the city of Chicago that no person shall sell in such city spirituous liquors in quantities of one gallon or more at a time without having first obtained a license therefor from such city, is valid. Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. Rep. 884, 36: 759

Editorial notes.

Validity of state regulation of sales.

28: 696; 42: 1089

Validity of police regulations excluding women from saloons. 48: 365

[Municipal power to prohibit screens in bar-rooms. 24 L.R.A. 768.

Municipal regulation of nuisance of. 39 L.R.A. 525.

Validity of ordinance excluding persons from saloon during hours of closing. 4 L.R.A. (N.S.) 109.

Constitutional right of state to declare certain liquor intoxicating irrespective of its intoxicating character as a matter of fact. 6 L.R.A. (N.S.) 186.

Validity of police regulation discriminating in favor of saloons already established. 6 L.R.A. (N.S.) 722.

Discrimination as between different localities, in respect to the right to sell. 8 L.R.A. (N.S.) 362.]

II. License; Tax.

Federal Question as to, see Appeal and Error, 1669, 1670.

Review of Discretion as to, see Appeal and Error, 4402.

As Affecting Commerce, see Commerce, 414, 417a, 424.

Due Process as to, see Constitutional Law, 508, 586.

Police Power as to, see Constitutional Law, 890, 897, 898.

Federal Taxation, see Internal Revenue, III. j. 75, 76.

Federal Stamp Tax on Bonds Given to State and City as Condition Precedent to Issue of License, see Internal Revenue, 231.

State Taxation of Liquors in Bonded Warehouses, see Taxes, 313.

State Taxation of, When Imported or Exported, see Commerce, 503, 504.

5. A foreign corporation is a trafficker in intoxicating liquors subject to tax under 92 Ohio Laws, p. 34, when it maintains a store house in the state where it sells and delivers beer and collects payment. Reymann Brewing Co. v. Brister, 179 U. S. 445, 21 Sup. Ct. Rep. 201, 45: 269
Cited in Atty. Gen. ex rel. Commissioner of Corporations v. Electric Storage Battery Co. 188 Mass. 242, 74 N. E. 467—People v. Voorhis, 181 Mich. 403, 91 N. W. 624.

Editorial notes.

[Discretion in granting license. 21 L.R.A. 580.

Discrimination against women in granting licenses to sell. 49 L.R.A. 111.]

Rights of holder of internal revenue license.

6. A license under the internal revenue act of June 30, 1864, and the amendatory acts, conveyed to the licensee no authority to carry on the licensed business within a state. McGuire v. Massachusetts, 3 Wall. 387, 18: 226

License Tax Cases, 5 Wall. 462, 18: 497

License Tax Cases, 5 Wall. 480, note, 18: 675

Pervear v. Massachusetts, 5 Wall. 475, 18: 608

Cited in Lelsy v. Hardin, 135 U. S. 130, 34 L. ed. 140, 3 Inters. Com. Rep. 49, 10 Sup. Ct. Rep. 681—Plumley v. Massachusetts, 155 U. S. 466, 39 L. ed. 225, 5 Inters. Com. Rep. 595, 15 Sup. Ct. Rep. 154—Snyder v. Bettman, 190 U. S. 253, 47 L. ed. 1037, 23 Sup. Ct. Rep. 803—Daniels v. McGabe,

3 Cliff. 117, Fed. Cas. No. 3,567—*Re Hirsch*, 74 Fed. 931—*Dabbs v. State*, 39 Ark. 356, 43 Am. Rep. 275—*Mazzia v. State*, 51 Ark. 180, 10 S. W. 257—*Haggart v. Stehlin* (Ind.) 22 L.R.A. 582—*New Orleans v. Eclipse Tow Boat Co.* 33 La. Ann. 651, 39 Am. Rep. 279—*People ex rel. Trombley v. Humphrey*, 23 Mich. 482, 9 Am. Rep. 94—*Youngblood v. Sexton*, 32 Mich. 425, 20 Am. Rep. 654—*Coldwater v. Russell*, 49 Mich. 619, 43 Am. Rep. 478, 14 N. W. 568—*State ex rel. Sage v. Bennett*, 19 Neb. 205, 26 N. W. 714—*Boyd v. State*, 12 Lea, 689.

7. A license under an act of Congress gives no right to keep or sell intoxicating liquors in violation of a state law, and is no defense to an indictment under the law of the state. *McGuire v. Massachusetts*, 3 Wall. 387, 18: 226
Cited in Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 643, 44 L. ed. 307, 20 Sup. Ct. Rep. 245—*Snyder v. Bettman*, 190 U. S. 253, 47 L. ed. 1037, 28 Sup. Ct. Rep. 803—*Endleman v. United States*, 30 C. C. A. 191, 57 U. S. App. 1, 86 Fed. 462—*Mazzia v. State*, 51 Ark. 180, 10 S. W. 257—*Territory ex rel. McMahon v. O'Connor*, 5 Dak. 408, 3 L.R.A. 360, 41 N. W. 746—*Standard Oil Co. v. Combs*, 96 Ind. 184, 49 Am. Rep. 156—*Youngblood v. Sexton*, 32 Mich. 425, 20 Am. Rep. 654—*State v. Lillard*, 78 Mo. 138—*State ex rel. v. Bennett*, 19 Neb. 205, 26 N. W. 714—*State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 543, 2 Inters. Com. Rep. 65, 14 Atl. 604—*United States v. Lees*, 46 Phila. Leg. Int. 88.

8. The requirement of payment for an internal revenue license is only a mode of imposing taxes on the licensed business; and the prohibition under penalties, against carrying on the business without license, is only a mode of enforcing the payment of such taxes. *License Tax Cases*, 5 Wall. 480 note, 18: 675

9. Payment of the special internal revenue tax for selling liquors in a collection district does not exempt from the penalties of the act of 1864 for the unauthorized introduction of liquors into Indian territory within the district. *United States v. Lariviere* (*United States v. 43 Gallons Whiskey*) 108 U. S. 491, 2 Sup. Ct. Rep. 906, 27: 803

10. A license under the internal revenue laws, and the establishment of a collection district embracing the territory, did not authorize the introduction of liquors into Indian country contrary to the laws of the United States. *United States v. Lariviere* (*United States v. 43 Gallons of Whiskey*) 108 U. S. 491, 2 Sup. Ct. Rep. 906, 27: 803

III. Legality of Traffic in; Offenses.

Federal Question as to, see *Appeal and Error*, 1783.

Prohibiting or Restricting Transportation of, see *Commerce*, 179-184.

Denial of Due Process in Prosecution for Illegal Sale, see *Constitutional Law*, 202a.

Sufficiency of Information for Illegal Sale, see *Constitutional Law*, 796.

Right to Recover Price of Liquor Illegally Sold, see *Contracts*, 486.

State Decision as to Municipal Police Power, as Binding Federal Courts, see *Courts*, 1739.

Cruel and Unusual Punishment of One Convicted of Illegal Sale, see *Criminal Law*, 193.

Presumption of Innocence in Sale of, see *Evidence*, 310.

Indictment for Offenses Relating to, see *Indictment, etc.*, 123-129, 176.

Raising Objection to Selection of Jurors in Advance of Trial for Violation of Local Option Law, see *Trial*, 29.

11. Traffic in intoxicating liquors is not, in itself, unlawful. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34: 128
Cited in Ex parte Loeb, 72 Fed. 659—*McGregor v. Cone*, 104 Iowa, 469, 39 L.R.A. 486, 65 Am. St. Rep. 522, 73 N. W. 1041—*State v. Hickox*, 64 Kan. 657, 68 Pac. 35—*People v. Buffalo Fish Co.* 164 N. Y. 104, 52 L.R.A. 806, 79 Am. St. Rep. 622, 58 N. E. 34—*Crossman v. Lurman*, 171 N. Y. 332, 98 Am. St. Rep. 599, 63 N. E. 1097—*McCullough v. Brown*, 41 S. C. 239, 23 L.R.A. 418, 19 S. E. 458.

Editorial notes.

[Liability of purchaser on illegal sales. 24 L.R.A. 212.

Instigation to unlawful sale. 25 L.R.A. 341.

Prosecution and punishment of distinct offenses, committed by single sale of. 45 L.R.A. 858.

Liability of carrier for transporting. 46 L.R.A. 417.

Mistake in beverage as defense to charge of illegal liquor sale. 10 L.R.A. (N.S.) 477.]

What liquors are intoxicating.

12. Lager beer is not a "spirituous liquor or wine" within the meaning of U. S. Rev. Stat. § 2139, as to introducing such liquors into the Indian country. *Sarilis v. United States*, 152 U. S. 570, 14 Sup. Ct. Rep. 720, 38: 556

— Editorial note.

[What liquors are within statutory restriction as to sale. 20 L.R.A. 645.]

To prohibited persons.

Sale or Disposal of, to Indians, see *Indians*, 54-61.

13. Congress was not given the power, by the commerce clause of the Federal Constitution, to penalize by the act of January 30, 1897 (29 Stat. at L. 506, chap. 109), the sale of liquor within a state to an Indian to whom an allotment had been made under the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), which grants the allottees the privilege of citizenship, and gives them the benefit of, and requires them to be subject to, the civil and criminal laws of the state where they reside; since this emancipation from Federal control is not affected by the fact that the statute provides that the Indian title shall not be alienated or

encumbered for twenty-five years, when a final patent shall issue, and stipulates that the grant of citizenship shall not impair their right to tribal or other property. *Re Heff*, 197 U. S. 488, 25 Sup. Ct. Rep. 506, 49: 848

Cited in Insurance Co. of N. A. v. Frederick Leyland & Co. 139 Fed. 68.

— Editorial note.

[Right to rely on physician's certificate in selling. 21 L.R.A. 449.]

Place of sale.

Military Officer's Liability for Supposed Sale in Indian Country, see *Army and Navy*, 169.

14. The question of the place of sale of liquor sent upon order by express *C. O. D.* referred to, but not passed upon. *O'Neil v. Vermont*, 144 U. S. 323, 12 Sup. Ct. Rep. 693, 36: 450

Cited in State v. American Exp. Co. 118 Iowa, 450, 92 N. W. 66—*State v. McAdams*, 106 La. 730, 31 So. 187—*Sims v. Norfolk & W. R. Co.* 130 N. C. 557, 41 S. E. 673.

15. Where a contract is made in one state for the purchase of liquors, by a resident of another state in which such a contract would be invalid, and the buyer received at the place of the contract certain labels, which the jury found were a part of the goods sold and added to the value of the liquors, the sale is to be held valid according to the law of the state where the agreement was made and such labels delivered, and can be enforced in the United States circuit court within the state where the purchaser resided. *Garfield v. Paris*, 96 U. S. 557, 24: 821

IV. Civil Remedies.

Exclusiveness of Remedies Given by Civil Damage Act as Preventing Injunctive Relief Against Future Sales, see *Injunction*, 26.

Right to Remove to Federal Court Suit to Abate Liquor Nuisance, see *Removal of Causes*, 40.

Strict Construction of Statute Giving, see *Statutes*, 489.

16. A state may declare that any place maintained for the illegal manufacture and sale of liquors shall be deemed a common nuisance, and abated, and at the same time provide for the indictment and trial of the offender. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31: 205

17. It is no objection to a statute that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors, which are by law prohibited, and to abate the nuisance which the statute declares such acts to be. *Eilenbecker v. District Court*, 134 U. S. 31, 10 Sup. Ct. Rep. 424, 33: 801
Cited in Lelsy v. Hardin, 135 U. S. 122, 34 L. ed. 137, 3 Inters. Com. Rep. 46, 10

Sup. Ct. Rep. 681—*Hartley v. Henretta*, 35 W. Va. 239, 13 S. E. 375.

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See *Drunkenness*.

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What Constitutes, Within Exception in Insurance Policy, see *Insurance*, 429.

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Protective Relief by Injunction, see Injunction, 47-49.

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IRRIGATION DISTRICTS.

Right to Review Question as to Benefits, see Appeal and Error, 2083.
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Conclusiveness of Judgment as to Issue of Bonds, see Judgment, 725.

Delegation of Power as to Organization of, see Constitutional Law, 158.

Ad Valorem Assessment on Lands in, see Constitutional Law, 564.

Due Process in Taking Property into, see Constitutional Law, 748.

De Facto Existence of, see Municipal Corporations, 15.

1. The California act of March 7, 1887, as amended by the acts of 1889 and 1891, providing for the organization and government of irrigation districts, does not violate the provision of the Federal Constitution relating to the taking of property without due process of law. *Fallbrook Irrig. District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41: 369
Cited in *Alessandro Irrig. District v. Savings & T. Co.* 88 Fed. 929—*Herring v. Modesto Irrig. District*, 95 Fed. 716—*California ex rel. Brady v. Brown's Valley Irrig. District*, 119 Fed. 538—*Re Central Irrig. District*, 117 Cal. 390, 49 Pac. 354.

2. The formation of an irrigation district amounts to the creation of a public corporation, and its officers are public officers. *Fallbrook Irrig. District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41: 369
Cited in *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 79 Fed. 506—*Perry v. Otay Irrig. District*, 127 Cal. 568, 60 Pac. 40—*Belknap Sav. Bank v. Lamar Land & Canal Co.* 28 Colo. 339, 64 Pac. 212.

3. An apportionment of water between the landowners of an irrigation district on the basis of their assessments, with the right of each to assign the whole or any portion of his share, does not show that the use is other than public, or that it amounts to a distribution to individuals rather than to lands, and on that account may not result in a use for irrigation. *Fallbrook Irrig. District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41: 369

4. The fact that the use of water in an irrigation district is limited to the landowners therein, without expressly giving every resident in the district a right to share in the use, although any landowner has the right to sell or assign any or all of his portion, does not prevent the use from being public. *Fallbrook Irrig. District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41: 369
Assessments.

5. Land which can be beneficially used to a certain extent without irrigation may yet be so much improved by it that it can properly be included in an irrigation district and assessed for the benefits of the artificial irrigation as a public improvement. *Fallbrook Irrig. District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41: 369
Contest.

6. The right to appear and contest the facts upon which a petition for an irrigation district is based, and also the fact of

benefit to any particular land, is implied in the provisions of Cal. act March 7, 1887, as amended by the acts of 1889 and 1891, which require a petition to be presented after notice published, and that the board shall hear the same and on final hearing shall define the boundaries of the district. Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41: 369. *Cited in* Tulare Irrig. District v. Shepard, 185 U. S. 16, 46 L. ed. 781, 22 Sup. Ct. Rep. 531—*Re* Harrisburg & C. Turnp. Co. 2 Dauphin. Co. Rep. 54.

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[Prisoner's right of action for unfitness of prison. 36 L.R.A. 293.]

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I. In General.

1. If two are bound jointly and severally, and one of them makes the obligee his executor, the obligee may, notwithstanding, maintain an action against the other obligor. *Bradford v. Williams*, 4 How. 576, 11: 1109
Cited in *Ransom v. Geer*, 20 Blatchf. 536, 12 Fed. 608—*Lanier v. Chappell*, 2 Fla. 630
—*Rossman v. McFarland*, 9 Ohio St. 382—*Shields v. Odell*, 27 Ohio St. 404—*Booth v. Kinsey*, 8 Gratt. 563, 568, 573—*Van Winkle v. Blackford*, 28 W. Va. 687.

2. In a suit against all of the joint obligors on a joint and several bond, after judgment against one by confession, the suit may be continued against the others. *United States v. Leffler*, 11 Pet. 86, 9: 642

3. Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff without examining the question of the different degrees of culpability. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. Rep. 296, 43: 543
Cited in *Cunningham v. Underwood*, 53 C. C. A. 102, 116 Fed. 806—*Texas & P. R. Co. v. Sheftall*, 66 C. C. A. 554, 133 Fed. 724.

4. A joint contract can never be defeated by the mere private contract of an individual of the concern, to whom the other parties have confided no authority for that purpose. *Young v. Black*, 7 Cranch, 565, 3: 440

5. If two joint owners of merchandise consign it to a merchant for sale, and inform him that each owns one moiety, and if they give separate instructions, each for his own moiety, one of the consignors alone may maintain an action against the consignee for a violation of his separate instructions. *Hall v. Leigh*, 8 Cranch, 50, 3: 484
Distinguished in *Suydam v. Combs*, 15 N. J. L. 135.

Cited in *Shipman v. Straitsville Cent. Min. Co.* 158 U. S. 362, 39 L. ed. 1017, 15 Sup. Ct. Rep. 886—*Fain v. United States*, 4 Ct. Cl. 239—*Meldrim v. United States*, 7 Ct. Cl. 598—*Jewett v. Cunard*, 3 Woodb. & M. 321, Fed. Cas. No. 7,310—*Gray v. Buck*, 78 Me. 478, 7 Atl. 16—*Parker v. Elder*, 11 Humph. 548—*Angus v. Robinson*, 59 Vt. 589, 59 Am. Rep. 758, 8 Atl. 497—*Welch v. Franklin Ins. Co.* 23 W. Va. 311.

6. When the consideration of a note given in the name of joint owners of a vessel, by one of them, was the balance due by the vessel and its owners to plaintiff, the defendant, one of such owners, is liable for the consideration thereof, although he did not sign the note, and there was no partnership. *Newell v. Nixon*, 4 Wall. 572, 18: 305

7. An agreement among several insurance

companies, to employ counsel, and unite in defending certain actions, and contribute to pay the expenses *pro rata*, does not import a joint promise of compensation from the companies to the counsel employed, or make them jointly liable to him for his charges for defending such actions. *Adriatic F. Ins. Co. v. Treadwell*, 108 U. S. 361, 2 Sup. Ct. Rep. 772, 27: 754
Cited in *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.* 24 Fed. 517—*Prindle v. Washington L. Ins. Co.* 73 Hun, 456, 26 N. Y. Supp. 474.

8. A release obtained by fraud from one of two joint contractors has no effect upon the interest of the other, but operates merely to sever the interests and give the other a right to sue without joining the one who has given the release. *South Fork Canal Co. v. Gordon*, 6 Wall. 561, 18: 894

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Joint liability of master and servant for latter's negligence. 50: 441

[Condition as to execution of contract by others. 45 L.R.A. 321.]

Joint liability of master and servant for latter's tort. 12 L.R.A.(N.S.) 669.]

Death of joint obligor or obligee.

9. At law, if one of two joint obligors die, the debt is extinguished against his representative, and the surviving obligor is alone chargeable. *Pickersgill v. Lahens*, 15 Wall. 140, 21: 119
Distinguished in *Wilson v. Fridenberg*, 22 Fla. 148.

Cited in *American Bonding & T. Co. v. United States*, 23 App. D. C. 544—*McCoy v. Payne*, 68 Ind. 335—*Hudelson v. Armstrong*, 70 Ind. 101—*American Copper Co. v. Lowther*, 25 Misc. 444, 54 N. Y. Supp. 960—*Mays v. Cockrum*, 57 Tex. 353.

10. [The survivor of two joint obligees is at law entitled to possession of the joint securities; and a court of equity will not interfere with the disposition of them, unless some ground is laid for its interposition. *Penn v. Butler* (C. Ct.) 4 Dall. 354, 1: 864]

11-12. Equity has afforded relief against the representatives of a deceased obligor in a joint bond given for money lent to both the obligors, though such representatives are discharged at law, on the ground of mistake, not in the agreement of the parties, but in the execution of it by the draftsman who should have made the bond joint and several. *Hunt v. Rhodes*, 1 Pet. 1, 7: 27
Cited in *United States v. Price*, 9 How. 97, 13 L. ed. 62—*United States v. Archer*, 1 Wall. Jr. 185, Fed. Cas. No. 14,464—*United States v. Cushman*, 2 Sumn. 435, Fed. Cas. No. 14,908—*Olmsted v. Olmsted*, 38 Conn. 337—*Yorks v. Peck*, 14 Barb. 647.

II. Release of One Joint Debtor.

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See also Judgment, 1098.

13. [The release of one of two joint debt-

ors is the release of both. *McFadden v. Parker* (Pa. Sup. Ct.) 4 Dall. 275, 1: 831]

14-5. If the obligee of a joint bond agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences, although the release was given under a manifest misapprehension of the legal effect of it in relation to the other obligors. *Hunt v. Rhodes*, 1 Pet. 1, 7: 27
Cited in Washington v. Barber, 5 Cranch, C. C. 161, Fed. Cas. No. 17,224—*Mellon v. Webster*, 5 Mo. App. 464.

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Effect of judgment against one joint tortfeasor upon liability of the other. 58 L.R.A. 410.

Effect of judgment in favor of one defendant charged with negligence, on liability of codefendant. 2 L.R.A. (N.S.) 764.

Effect on pre-existing judgments of statutes permitting release of one joint judgment debtor without affecting the others. 9 L.R.A. (N.S.) 1066.]

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Several Liability as Conferring Jurisdiction on Federal Court by Omitting Parties, to Produce Diverse Citizenship, see Courts, 737.

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Province of Court or Jury as to Questions of Law or Fact, see *Trial*, VI.

General Matters as to Courts, see *Courts*.

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I. In General.

1. [The recorder of the city of Philadelphia is not a judge, within the meaning of Pa. Const. art. 2, § 8. *Commonwealth v. Dallas* (Pa. Sup. Ct.) 4 Dall. 229, 1: 812]

2. The acts of a judge *de facto* are not U. S. Dig.—225

open to collateral attack. *Ball v. United States*, 140 U. S. 118, 11 Sup. Ct. Rep. 761, 35: 377

Cited in Wright v. United States, 158 U. S. 239, 39 L. ed. 965, 15 Sup. Ct. Rep. 819—*McDowell v. United States*, 159 U. S. 601, 40 L. ed. 273, 16 Sup. Ct. Rep. 111—*Ex parte Ward*, 173 U. S. 456, 43 L. ed. 766, 19 Sup. Ct. Rep. 459—*McDowell v. United States*, 20 C. C. A. 479, 42 U. S. App. 1, 74 Fed. 406—*State v. Barnard*, 67 N. H. 224, 68 Am. St. Rep. 648, 29 Atl. 410.

II. Appointment; Tenure, Suspension, and Removal.

Substitution of Successor on Termination of Office, see *Appeal and Error*, 2513.

Length of Term or Manner of Appointment as Fixing Territorial or Federal Character of Court, see *Courts*, 362, 363.

Power of President to Remove Territorial Judges, see *Courts*, 364.

Appointment by Military Authority, see *War*, 69-71.

See also *infra*, 17.

3. Act of Congress May 17, 1884, which fixed the term of the judge of the district court of Alaska at four years, did not repeal, but is qualified by, U. S. Rev. Stat. § 1768, which confers upon the President the power of suspension. *McAllister v. United States*, 141 U. S. 174, 11 Sup. Ct. Rep. 949, 35: 693

4. The President of the United States can suspend from office a district judge for the district of Alaska, until the end of the next session of the Senate; and if the Senate confirms another person as such judge the suspension becomes permanent; and the suspended judge is not entitled, after suspension, to receive his salary. *McAllister v. United States*, 141 U. S. 174, 11 Sup. Ct. Rep. 949, 35: 693

Cited in Wingard v. United States, 141 U. S. 202, 35 L. ed. 720, 11 Sup. Ct. Rep. 959—*Parsons v. United States*, 30 Ct. Cl. 246—*Cole v. Territory*, 5 Ariz. 141, 48 Pac. 217.

III. Disqualification; Eligibility.

Eligibility of District Judges Dependent upon Absence or Disqualification of Circuit or Supreme Judges, see *Courts*, 435.

Designation of District Judge by Circuit Judge to hold District or Circuit Court, see *Courts*, 437.

Disability of District Judges as Authorizing Circuit Judge to Sit, see *Courts*, 438.

Propriety of Habeas Corpus to Review Conviction before Disqualified Judge, see *Habeas Corpus*, 155.

5. A Federal district judge cannot sit in the circuit court on a writ of error to re-

view his own decision. *United States v. Lancaster*, 5 Wheat. 434, 5: 127
Cited in American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 387, 37 L. ed. 492, 13 Sup. Ct. Rep. 758—*Harmon v. United States*, 43 Fed. 820.

6. A district judge cannot sit as a member of the circuit court upon questions adjourned to that court under the bankruptcy act. *Nelson v. Carland*, 1 How. 265, 11: 126

7. Judges of the Supreme Court may sit as circuit judges without distinct commissions for that purpose. *Stuart v. Laird*, 1 Cranch, 299, 2: 115

8. A district judge of the United States is a *de facto* if not a *de jure* judge when holding court under an order of designation by the circuit judge under U. S. Rev. Stat. § 596, U. S. Comp. Stat. 1901, p. 482, which is regular in form, with nothing on its face to show its invalidity. *McDowell v. United States*, 159 U. S. 596, 16 Sup. Ct. Rep. 111, 40: 271
Cited in Starr v. United States, 164 U. S. 631, 41 L. ed. 579, 17 Sup. Ct. Rep. 223—*McDowell v. United States*, 20 C. C. A. 477, 42 U. S. App. 1, 74 Fed. 403—*United States v. Murphy*, 82 Fed. 896.

9-10. Although the statute of Iowa provides that in case of the absence of the county judge the county clerk shall fill his place, the absence spoken of is doubtless absence from the county seat. In that event, unlimited authority is given to the clerk to act as his substitute. But it is not declared that the judge shall be regarded as out of office while absent, or that he shall do no official act during that period. Judicial power is necessarily local in its nature, and its exercise, to be valid, must be local also; but it is otherwise as to many ministerial acts. These may be valid although performed out of the state. *Lynde v. Winnebago County*, 16 Wall. 6, 21: 272

Distinguished in Hammond v. Wilcher, 79 Ga. 423, 5 S. E. 113.

Cited in McKee v. Vernon County, 3 Dill. 213, Fed. Cas. No. 8,851—*People's Sav. Bank & T. Co. v. Batchelder Egg Case Co.* 2 C. C. A. 139, 4 U. S. App. 603, 51 Fed. 135—*Watkins v. Mooney*, 114 Ky. 656, 71 S. W. 622.

Previous connection with case.

District Judge Sitting in Circuit, on Case Previously Before him, see Cases Certified, 81, 82.

Decision below, see *supra*, 5, 6, 10.

11. A judge is not disqualified by the fact that he had formerly been the attorney of one of the parties in matters not connected with the case. *Carr v. Fife*, 156 U. S. 494, 15 Sup. Ct. Rep. 427, 39: 508

12. A judge who appointed a receiver in a foreclosure suit and made an order allowing him a monthly sum for services, and also rendered the final decree of foreclosure and decrees for delivery of possession, is prohibited by the act of Congress of March

3, 1891, chap. 517, § 3, 26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 548, to sit in the circuit court of appeals on an appeal from the decree of another judge concerning the monthly compensation of the receiver after a certain compromise between him and purchasers on the foreclosure. *Moran v. Dillingham*, 174 U. S. 153, 19 Sup. Ct. Rep. 620, 43: 930
Cited in Dillingham v. Moran, 42 C. C. A. 92, 101 Fed. 934.

Interest.

Invalidity of Judgment by Interested Judge, see Poor and Poor Laws, 1.

13. A district judge, although interested in the suit, may, by the express provisions of the act of March 3, 1821, make the order for its removal to the most convenient circuit court of an adjacent state. *Spencer v. Lapsley*, 20 How. 264, 15: 902
Cited in The Richmond, 9 Fed. 863.

14. A magistrate who is a surety on the bond of an insolvent debtor is incompetent to sit as a magistrate in the discharge of the debtor, under the Virginia insolvent law. *Slacum v. Simms*, 5 Cranch, 363, 3: 126

15. The disqualification of the trial judge for interest is not established, nor is it offered to be established in any legitimate way, by an unverified petition stating that the wife of the judge has acquired an interest in the property which is the subject-matter of the litigation, accompanied by a statement of a desire to offer testimony in support thereof, without furnishing the names of the witnesses, or filing any affidavits, or definitely stating what the witnesses would say if permitted to testify. *McGuire v. Blount*, 199 U. S. 142, 26 Sup. Ct. Rep. 1, 50: 125

IV. Compensation.

Compelling Payment of, after Removal, see *Mandamus*, 107.

After Suspension, see *supra*, 4.

16. 19 Stat. at L. 294, chap. 102, appropriating a sum "in full compensation" for the salary of certain territorial judges, prevents a recovery, during the time covered by the appropriation act, of any more than the sum appropriated, and 16 Stat. at L. 152, chap. 130, U. S. Rev. Stat. § 1879, fixing the salary, is suspended thereby for the time being. *United States v. Fisher*, 109 U. S. 143, 3 Sup. Ct. Rep. 154, 27: 885
Cited in Mullett v. United States, 21 Ct. Cl. 487.

17. An associate justice of the supreme court of the territory of Washington, who is suspended by the President under U. S. Rev. Stat. § 1768, is not entitled to the salary of his office during the time of such suspension and while another person, designated by the President, performs the duties of the

office. *Wingard v. United States*, 141 U. S. 201, 11 Sup. Ct. Rep. 959, 35: 719
Cited in *McAllister v. United States*, 26 Ct. Cl. 626.

18. The salary payable to a judge of the United States district court, after his resignation, under U. S. Rev. Stat. § 714, U. S. Comp. Stat. 1901, p. 578, when he has held his commission at least ten years, and has reached the age of seventy years, does not include the allowance of \$300 per term provided by U. S. Rev. Stat. § 613, U. S. Comp. Stat. 1901, p. 494, in case of a judge holding terms of the circuit court of the southern district of New York for criminal business, although the judge may, for many years before his resignation, have held every such term. *Benedict v. United States*, 176 U. S. 357, 20 Sup. Ct. Rep. 458, 44: 503

19. The supreme court of the District of Columbia is "a court of the United States" within the meaning of U. S. Rev. Stat. § 714, U. S. Comp. Stat. 1901, p. 578, providing that, when any judge of any court of the United States resigns his office after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation. *James v. United States*, 202 U. S. 401, 26 Sup. Ct. Rep. 685, 50: 1079

20. The salary of justices of the supreme court of the District of Columbia payable by law during the fiscal year ending June 30, 1893, was \$5,000, which was the amount to which such salaries were increased by the express provision of the appropriation act for the fiscal year ending June 30, 1892, although the appropriation for the next fiscal year was a lump sum, inadequate to pay more than the former salary, since these provisions must be read in connection with the appropriation made by the act of March 2, 1895 (28 Stat. at L. 851, chap. 187), to pay, as a deficiency for the fiscal year ending June 30, 1893, to the justices of that court, a sum representing the difference between the rate of compensation theretofore received by them and \$5,000 per year. *James v. United States*, 202 U. S. 401, 26 Sup. Ct. Rep. 685, 50: 1079

V. Liability.

Jurisdiction of Action against Judge in Admiralty, see Admiralty, 61.

Federal Judge, Federal Question as to, see Appeal and Error, 1773, 1774.

For Wrongful Removal of Attorney from Bar, see Attorneys, 7.

Liability for Contempt, see Contempt, 19.

Immunity as to Order Enlarged in its Operation by Reason of Subsequent Legislation, see Courts, 411.

For Preventing Associate from Charging Jury, see Criminal Law, 30.

21. Judges of limited and inferior authority are not liable to a civil action for any judicial act within their jurisdiction. *Randall v. Brigham*, 7 Wall. 523, 19: 285.

22. Judges of superior or general authority are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless, perhaps, when done maliciously or corruptly. *Randall v. Brigham*, 7 Wall. 523, 19: 285
Distinguished in *Harlow v. Carroll*, 6 App. D. C. 138.

Explained in *Bradley v. Fisher*, 13 Wall. 350, 20 L. ed. 650.

Cited in *Spalding v. Villas*, 161 U. S. 493, 40 L. ed. 784, 16 Sup. Ct. Rep. 631—*Re Eaves*, 30 Fed. 24—*Cooke v. Bangs*, 31 Fed. 642—*Re Circuit Court Comrs.* 65 Fed. 313—*Re Boone*, 83 Fed. 947—*English v. Ralston*, 112 Fed. 273—*Mitchell v. Galen*, 1 Alaska, 340—*Bradley v. Fisher*, 7 D. C. 50—*Calhoun v. Little*, 106 Ga. 339, 43 L.R.A. 632, 71 Am. St. Rep. 254, 32 S. E. 86—*Harrison v. Redden*, 53 Kan. 270, 36 Pac. 325—*Smith v. Casner*, 2 Kan. App. 596, 44 Pac. 752—*Dixon v. Cooper*, 109 Ky. 30, 58 S. W. 437—*Ross v. Griffin*, 53 Mich. 9, 18 N. W. 534—*Stewart v. Cooley*, 23 Minn. 350, 23 Am. Rep. 690—*Pike v. Megoun*, 44 Mo. 496—*Kicker's Petition*, 66 N. H. 250, 24 L.R.A. 760, 29 Atl. 559—*Lange v. Benedict*, 73 N. Y. 34, 28 Am. Rep. 80—*Randall v. Packard*, 142 N. Y. 59, 30 N. E. 823—*Comstock v. Eagleton*, 11 Okla. 492, 69 Pac. 955—*Webb v. Fisher*, 109 Tenn. 705, 60 L.R.A. 792, 97 Am. St. Rep. 863, 72 S. W. 110—*Banister v. Wakeman*, 64 Vt. 207, 15 L.R.A. 204, 23 Atl. 585—*Johnston v. Moorman*, 80 Va. 140.

23. But a distinction must be observed between acts in excess of jurisdiction, and the clear absence of all jurisdiction over the subject-matter. *Bradley v. Fisher*, 13 Wall. 335, 20: 645

Cited in *Spalding v. Villas*, 161 U. S. 493, 40 L. ed. 784, 16 Sup. Ct. Rep. 631—*Lange's Case*, 13 Blatchf. 560, Fed. Cas. No. 18,307—*Re Eaves*, 30 Fed. 24—*Cooke v. Bangs*, 31 Fed. 643—*Allec v. Reece*, 30 Fed. 342—*Re Circuit Court Comrs.* 65 Fed. 318—*Hofschulte v. Doe*, 78 Fed. 439—*Philbrook v. Newman*, 85 Fed. 144—*English v. Ralston*, 112 Fed. 273—*O'Connell v. Mason*, 127 Fed. 437—*United States use of Kinney v. Bell*, 68 C. C. A. 146, 135 Fed. 338—*Mitchell v. Galen*, 1 Alaska, 341—*Turpen v. Booth*, 56 Cal. 68, 38 Am. Rep. 48—*Pickett v. Wallace*, 57 Cal. 557—*Hughes v. McCoy*, 11 Colo. 596, 19 Pac. 674—*Blakeslee v. Carroll*, 64 Conn. 233, 25 L.R.A. 108, 29 Atl. 473—*Root v. Rose*, 6 N. D. 582, 72 N. W. 1022—*Calhoun v. Little*, 106 Ga. 341, 43 L.R.A. 632, 71 Am. St. Rep. 254, 32 S. E. 86—*State ex rel. Egan v. Wolever*, 127 Ind. 312, 26 N. E. 762—*Jones v. Brown*, 54 Iowa, 78, 37 Am. Rep. 185, 16 N. W. 140—*Henke v. McCord*, 55 Iowa, 385, 7 N. W. 623—*Thompson v. Jackson* 93 Iowa, 382, 27 L. R.A. 95, 61 N. W. 1004—*Smith v. Casner*, 2 Kan. App. 596, 44 Pac. 752—*State ex rel. Atty. Gen. v. Lazarus*, 39 La. Ann. 181, 1 So. 361—*Barthe v. Larque*, 42 La. Ann. 137, 7 So. 80—*Maulsby v. Reifsnider*, 69 Md. 166, 14 Atl. 503—*Hoosac Tunnel Dock*

& Elevator Co. v. O'Brien, 137 Mass. 426, 50 Am. Rep. 323—Morton v. Crane, 39 Mich. 530—Curnow v. Kessler, 110 Mich. 14, 67 N. W. 982—Stewart v. Cooley, 23 Minn. 350, 23 Am. Rep. 690—Re Mousseau, 30 Minn. 205, 14 N. W. 887—State ex rel. Walker v. Dobson, 135 Mo. 19, 36 S. W. 238—Patzack v. Von Gerichten, 10 Mo. App. 428—Grove v. Van Duyn, 44 N. J. L. 659, 42 Am. Rep. 648 note—Lange v. Benedict, 48 How. Pr. 468—Lange v. Benedict, 8 Hun, 366—Crisfield v. Perine, 15 Hun, 201—Ayers v. Russell, 50 Hun, 295, 3 N. Y. Supp. 383—Lange v. Benedict, 73 N. Y. 25, 29 Am. Rep. 80—Scott v. Fishblate, 117 N. C. 275, 30 L.R.A. 696, 23 S. E. 436—Comstock v. Eagleton, 11 Okla. 492, 69 Pac. 955—McCall v. Cohen, 16 S. C. 449, 42 Am. Rep. 641—Abrams v. Carlisle, 18 S. C. 246—Webb v. Fisher, 109 Tenn. 705, 60 L.R.A. 792, 97 Am. St. Rep. 863, 72 S. W. 110—Taylor v. Goodrich, 25 Tex. Civ. App. 117, 40 S. W. 515—Vaughn v. Congdon, 56 Vt. 124, 48 Am. Rep. 758—Banister v. Wakeman, 64 Vt. 208, 15 L.R.A. 204, 23 Atl. 585—Burch v. Hardwicke, 30 Gratt. 41, 32 Am. Rep. 640—Johnston v. Moorman, 80 Va. 141.

24-5. A judge of a state court, who is also a county commissioner, is, as commissioner, amenable to the authorized process of the courts of the United States, in the same manner and to the same extent that his associates are. *Re Rowland*, 104 U. S. 604,

26: 861

Cited in Branch v. Davis, 29 Fed. 890.

26. The act of a county judge, charged by law with the selection of jurors, in excluding persons otherwise qualified, on account of their race or color, contrary to the statute under which he is acting, is not within the limits of his discretion, and is not a judicial act for which he is exempt from punishment, under the act of March 1, 1875, imposing a penalty upon officers who shall exclude persons from such service on account of race, color, or previous condition of servitude. *Re Virginia*, 100 U. S. 339,

25: 676

Cited in Philbrook v. Newman, 85 Fed. 145.

27. An order striking the name of an attorney off the rolls is a judicial act for which the judge is not liable to the attorney in a civil action. *Bradley v. Fisher*, 13 Wall. 335,

20: 646

Cited in Philbrooke v. Newman, 85 Fed. 145.

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VI. Power and Duties.

Authority to Take Acknowledgment, see Acknowledgment, 2.

Authority to Issue Writ of Error, see Appeal and Error, 2648, 2649, 2661-2668.

Authority to Allow Appeal, see Appeal and Error, 2710-2716.

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Grant of New Trial in Case Tried by Predecessor, see New Trial, 20.

28. The power of another justice to perform the duties of any justice of the supreme court who is absent from his district or incapacitated from acting, which is conferred by N. M. Comp. Laws 1884, § 1852, is within the power of the legislative assembly, and is not inconsistent with the provision of the act of Congress of July 10, 1890, for the assignment of the judges to particular districts and their residence therein. *Gonzales y Borrego v. Cunningham*, 164 U. S. 612, 17 Sup. Ct. Rep. 182, 41: 572
Cited in Stockslager v. United States, 54 C. A. 51, 116 Fed. 595.

29. The district judge has a right to act on every case that remains on the docket when he takes his office, as fully as his predecessor could have done, and may grant a new trial in a cause although the judgment therein was rendered by his predecessor. *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8: 949
Cited in Doggett v. Emerson, 1 Woodb. & M. 4, Fed. Cas. No. 3,961—*Charles v. State*, 4 Port (Ala.) 109—*Hays v. McNealy*, 16 Fla. 408—*Bowden v. Wilson*, 21 Fla. 168—*Galbraith v. Sidener*, 28 Ind. 150—*Ketcham v. Hill*, 42 Ind. 70—*Conway v. Smith Mercantile Co.* 6 Wyo. 339, 49 L.R.A. 214, 44 Pac. 940.

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Recalling Execution in Vacation, see Execution, 76.

Power to Order Peremptory Writ of Mandamus in Vacation, see Mandamus, 209.

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30. A judge has no power in vacation, out of court, without notice to the judgment creditor, to recall executions, although application was made at the previous term to set aside the judgment, and continued until the next term without prejudice to either party. *Freeman v. Dawson*, 110 U. S. 264, 4 Sup. Ct. Rep. 94, 28: 141
Cited in Stockmeyer v. Tobin, 139 U. S. 195, 35 L. ed. 180, 11 Sup. Ct. Rep. 504.

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31. The power of the Hawaiian judges at chambers in proceedings not incident or ancillary to some cause pending before a court, conferred by the Hawaiian laws in force at the passage of the organic act of April 30,

1900 (31 Stat. at L. 141, chap. 339), was preserved by the provision of § 81 of that act, continuing in force the previous laws of Hawaii concerning "the civil courts and their jurisdiction and procedure." *Carter v. Gear*, 197 U. S. 348, 25 Sup. Ct. Rep. 491, 49: 787

VII. Protection of.

Homicide by Deputy Marshal While Protecting, see Homicide, 9.

Authority of Marshal to Afford Protection, see Marshal, 4.

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32. The justice of the Supreme Court of the United States are members of the circuit courts of the United States, and while traveling to attend such courts are in the discharge of a duty imposed by law. *Cunningham v. Neagle* (Re Neagle) 135 U. S. 1, 10 Sup. Ct. Rep. 658, 34: 55
Cited in *Ex parte McLeod*, 120 Fed. 133.

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In Criminal Case, see Criminal Law, V.

On Motion in Suit on Importers Bond, see Duties, 462.

In Ejectment, see Ejectment, VIII.

In Condemnation Proceedings, see Eminent Domain, 91, 92.

In Injunction Suit, see Injunction, II. b.

Of Separation of Property, see Husband and Wife, 33, 34.

In Suit by or Against Infant, see Infants, III. c.

On Foreclosure Generally, see Mortgage, VII. e.

For Deficiency on Foreclosure, see Mortgage, VII. i.

In Proceedings to Confirm Private Land Claim, see Private Land Claims, III. a, 6.

In Replevin, see Replevin, 17, 18.

In Action for Specific Performance, see Specific Performance, VIII.

Finality of, for Purposes of Appeal, see Appeal and Error, I. d.

When Final for Purpose of Determining Time to Appeal, see Appeal and Error, IV. d, 3, a.

Determination of Jurisdictional Amount on Appeal from, see Appeal and Error, I. f, 4, e, (8).

Presumption as to, see Appeal and Error, VIII. d, 6.

First Objecting as to, on Appeal, see Appeal and Error, VIII. j, 9; 4653-4655.

Prejudicial Error in, see Appeal and Error, VIII. m, 7.

As Part of Record on Appeal, see Appeal and Error, 3154.

Failure to Record, see Appeal and Error, 5187.

Incorporating into Bill of Exceptions, see Appeal and Error, 3555-3556.

Necessity of Signature by Judge, see Appeal and Error, 330.

Rate of Interest on, see Appeal and Error, 5358-5360.

As Contract or Chose in Action not Assignable for Suit in Federal Court, see Courts, 798-800.

As Contract Protected from Impairment, see Constitutional Law, 1254-1259.

Impairment of Contract Obligations as to, see Constitutional Law, 1506.

Against Corporation as Prerequisite to Suit Against Stockholders, see Corporations, 594-601.

Effect of Offer of, on Costs, see Costs and Fees, 52.

As Prerequisite to Creditors' Bill, see Creditors' Bill, 14-26.

Bill for Discovery after Recovery of, see Discovery and Inspection, 15-17.

Presumption as to Judicial Acts, see Evidence, II. i. 3.

As Evidence, see Evidence, IV. k.

Judicial Notice of Judicial Records and Decisions, see Evidence, 50-52.

Secondary Evidence of Lost Judgment, see Evidence, 978, 979.

Parol or Extrinsic Evidence Concerning Judicial Record Generally, see Evidence, 1724-1739.

Probative Effect of Judicial Opinion and Records, see Evidence, 2488-2497.

Variance Between Allegations of Decree in Action of Debt and Proof, see Evidence, 2764.

Interest on, see Interest, I. d.

Rate of Interest on, see Interest, II. c.

Interest for Nonpayment of, see Interest, 66.

Peremptory Judgment against Defendant on Plea of Matter in Abatement, see *infra*, 63.

Limitation of Action as to, see Limitation of Actions, II. i.

Mandamus for Entry or Control of, see *Mandamus*, II. c, 2.
Mandamus for Review or Control of Decisions Generally, see *Mandamus*, II. c, 3.
Mandamus to Compel Signing of, see *Mandamus*, 78, 79.
Necessity of, as Foundation for Writ of *Mandamus to Enforce Collection of Municipal Obligations*, see *Mandamus*, 181, 182.
Relation Back of Judicial Invalidation of Marriage, see *Marriage*, 11.
When Judgment against Corporation Collusive, see *Mortgage*, 264.
Deficiency Judgment in Foreclosure Suit, see *Mortgage*, 305.
Assignee of Note Secured by, as Party to Foreclosure Suit, see *Mortgage*, 332.
Suspending Operation of, Pending Application for New Trial, see *New Trial*, 24.
Necessity of Having Proper Parties before the Court, see *Parties*, II.
Nature of Judgment on Demurrer, see *Pleading*, 949-955.
Right to Examine Indices of, see *Records*, 6.
Set-off against, see *Set-off and Counterclaim*, III.
Sufficiency of Verdict to Support Judgment, see *Trial*, IX.
Judgments on Special Verdict or Findings, see *Trial*, X.
Military Order Cannot Annul Decree Regularly Made, see *War*, 80.
Matters Relating to Courts Generally, see *Courts*.
Decisions of Interstate Commerce Commission, see *Interstate Commerce Commission*.

I. Rendition; Entry.

a. In General.

Against National Bank after Appointment of Receiver, see *Banks*, 367.
State Laws and Decisions as Rules Binding Federal Courts, see *Courts*, 2123-2125.

Rendition.

See also *Evidence*, 540b.

1-2. It is conformable neither to the principles of equity nor of the common law to render judgment in favor of a competent party who asserts no claim, denies the right to relief, and refuses to proceed in the case. *United States v. Union P. R. Co.* 98 U. S. 569, 25: 143

3-4. A decree for the distribution of assets of an insolvent corporation should not be rendered in an action brought by some of the creditors, in which other creditors have subsequently been permitted to intervene, until the assets are collected and the amount thereof ascertained. *Ogilvie v. Knox Ins. Co.* 2 Black, 539, 17: 349
Bronson v. La Crosse & M. R. Co. 2 Black, 528, 17: 359

5-6. In an equity suit, if the plaintiff takes issue on the plea in bar, and the facts stated in the plea are determined for the defendant, and the plea meets and satisfies all the claims of the bill, the defendant should have a final decree in his favor. *Horn v. Detroit Dry Dock Co.* 150 U. S. 610, 14 Sup. Ct. Rep. 214, 37: 1199
Cited in Appleton v. Marx, 10 C. C. A. 561, 23 U. S. App. 420, 62 Fed. 644—*American Graphophone Co. v. Edison Phonograph Works*, 68 Fed. 452—*Rejall v. Greenhood*, 35 C. C. A. 100, 92 Fed. 947.

Power of court before entry.

7. Until decree is actually entered, the court retains power to withhold it. *Re Sawyer*, 21 Wall. 235, 22: 617
Cited in State v. Dougherty, 70 Iowa, 440, 30 N. W. 685.

b. Against Whom.

Against Surety on Attachment Bond, Pre-requisites to, see *Attachment*, 68a.
 See also *infra*, 709.

8. A court of equity cannot decree between defendants, when neither pleadings nor proofs show any controversy or adverse interest between them. *Graham v. La Crosse & M. R. Co. (Milwaukee & M. R. Co. v. Chamberlain)* 3 Wall. 704, 18: 247

9. In Louisiana, distinct judgments may be rendered against the same person in different capacities. It is really a question of joinder of parties. The objection is too late when taken in this court for the first time. *Kittredge v. Race*, 92 U. S. 116, 23: 488

10. Where the suit was instituted against the defendant as tutrix of the minor heirs, the judgment may declare that those heirs are liable each for his or her proportional share of the estate. *Kittredge v. Race*, 92 U. S. 116, 23: 488

11. In Louisiana, if a person dies pending suit against him, and the proceedings are continued by his heirs becoming parties, the judgment should be against his succession or them; if it be entered only against the deceased *eo nomine*, and be so recorded, it is, as a judicial mortgage, void against third persons. *Montgomery v. Sawyer*, 100 U. S. 571, 25: 692

12. Where a suit affecting real estate is revived against defendant's administrator, but not against his heirs, no decree can be made against the latter. *Bigler v. Waller*, 14 Wall. 297, 20: 891

c. Joint or Several.

Power of Federal Courts to Take Jurisdiction by Judgment without Prejudice to Omitted Parties, see *Courts*, 761-764.

State Practice in Federal Courts, see Courts, 1320, 1321.

In Ejectment, see Ejectment, 106.

See also Appeal and Error, 77.

Joint judgment.

Conclusiveness of, in Other State, see infra, 1018.

Enforcement of, in Other State, see infra, 1030-1032.

Against Principal and Sureties on Appeal Bond, see Appeal and Error, 5687-5689.

Effect of Electing to Take, see Election of Remedies, 29.

13. In an action against joint debtors in New York, where only one is served with process, judgment may be rendered against both; but execution cannot issue against the person or the sole property of the one not served. *D'Arcy v. Ketchum*, 11 How. 165, 13: 648

Cited in *Re Grossmayer*, 177 U. S. 50, 44 L. ed. 666, 20 Sup. Ct. Rep. 535—*Re Hinds*, 3 Nat. Bankr. Reg. 355, Fed. Cas. No. 6,516 —*Raiya Market Co. v. Armour & Co.* 102 Fed. 532—*Bonesteel v. Todd*, 9 Mich. 376, 80 Am. Dec. 90—*Enterprise Lumber Co. v. Mundy*, 62 N. J. L. 23, 55 L.E.A. 203, 42 Atl. 1063.

14. A joint judgment against defendants and their sureties on an appeal bond is proper in the territory of New Mexico. *Moore v. Huntington*, 17 Wall. 417, 21: 642
Cited in *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 401, 30 L. ed. 451, 7 Sup. Ct. Rep. 254—*Hopkins v. Orr*, 124 U. S. 515, 31 L. ed. 525, 8 Sup. Ct. Rep. 590—*McClaskey v. Barr*, 79 Fed. 412.

15. A joint judgment which is erroneous as to one of the judgment debtors cannot be sustained as against the other. *Bartle v. Coleman*, 6 Wheat. 475, 5: 309

16. A joint decree against stockholders of a bank for debts of the bank, whose liability is several, only depending upon the number of shares held by each, cannot be sustained. *Godfrey v. Terry*, 97 U. S. 171, 24: 944
Cited in *Leucke v. Tredway*, 45 Mo. App. 519 —*Martin v. South Salem Land Co.* 97 Va. 354, 33 S. E. 600.

17. On a joint action, brought by consent, against four insurance companies whose liability was several, a judgment must be several, not joint. *Germania F. Ins. Co. v. Boykin* (*Insurance Cos. v. Boykin*) 12 Wall. 433, 20: 442
Cited in *Chlis v. Gronlund*, 41 Fed. 505.

18. In an action against a widow as administratrix of her husband's succession and as tutrix of his minor children, to recover the balance due on promissory notes given by the husband, judgment for all the costs may be rendered against her and the minor heirs *in solido*. *Kittredge v. Race*, 92 U. S. 116, 23: 488

19. A decree in a case of collision against two offending vessels should not be *in solido* for the whole amount of the loss, but against each for one half, with the right re-

served to the libellant to collect from either the entire amount to the extent of her stipulated value, in case of the inability of the other to respond for her portion. *The Sterling v. Petersen* (*The Sterling*) 106 U. S. 647, 1 Sup. Ct. Rep. 89, 27: 98
Cited in *The Max Morris* (*The Max Morris v. Curry*) 137 U. S. 9, 34 L. ed. 587, 11 Sup. Ct. Rep. 29—*The Wm. H. Beaman*, 18 Fed. 336—*Vessel Owners' Towing Co. v. Wilson*, 11 C. C. A. 369, 24 U. S. App. 49, 63 Fed. 630—*The Job T. Wilson*, 84 Fed. 206—*The Maling*, 110 Fed. 239.

Judgment against one.

Federal Courts Retaining Jurisdiction by Rendering Judgment without Prejudice to Omitted Parties, see Courts, 761-764.

Suit against one or all of Joint Debtors, see Parties, 260-268.

20. A plaintiff cannot proceed to obtain a judgment against one defendant, in a joint action against two, until he has proceeded against the other as far as the law will authorize, unless the law dispenses with the necessity of proceeding against the other defendant beyond a certain point, to force an appearance. *Barton v. Petit*, 7 Cranch, 194, 3: 313

Distinguished in *Early v. Clarkson*, 7 Leigh, 85.

Cited in *Crumbaugh v. Otterback*, 9 Mackey. 453—*Doggett v. Jordan*, 3 Fla. 217—*Helm v. Van Vleet*, 1 Blackf. 344, 12 Am. Dec. 248 —*Gibbons v. Surber*, 4 Blackf. 155—*Kincaid v. Purcell*, 1 Ind. 325—*Goodhue v. Palmer*, 13 Ind. 458—*Loney v. Bailey*, 43 Md. 19—*Brooks v. McIntyre*, 4 Mich. 319—*Beazley v. Sims*, 81 Va. 646.

21. A final decree on the merits by default cannot be made separately against one of several defendants, upon a joint charge against all, where the case is still pending as to the others. If the bill in such a case be dismissed on the merits, it will be dismissed as to the defendant in default, as well as the others. *Frow v. De La Vega*, 15 Wall. 552, 21: 60

22. Where one joint debtor is beyond the reach of the court, and equity has jurisdiction, a decree may be taken against the other for the whole amount due. *Lewis v. United States*, 92 U. S. 618, 23: 513
Cited in *Logan v. Greenlaw*, 25 Fed. 307—*Doggett v. Dill*, 108 Ill. 566, 48 Am. Rep. 565.

23. That the other owners of a ship are sued with a part owner who exclusively managed the vessel and was the charterer, is no bar to a recovery against him as it is in accordance with admiralty practice to decree against one of several respondents to a libel for a tort and to discharge the others. *Thorp v. Hammond*, 12 Wall. 408, 20: 419

23a. A plaintiff with the right to a joint judgment against joint and several debtors may waive the right, and such waiver is conclusively shown by taking a separate judg-

ment voluntarily against one of the defendants. *United States v. Leffler*, 11 Pet. 86, 9: 642
Cited in Durant v. Abendroth, 97 N. Y. 145.

24. Recovery against either of the defendants may be had under the California practice, even when the action is founded upon a contract. *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. Rep. 120, 41: 485
Cited in Doremus v. Root, 94 Fed. 761.

Judgment against part.

Joinder of Part of Joint Debtors, see Parties, 260-267.

Partial Confirmation of Private Land Claim on Petition of one Co-Tenant, see Private Land Claims, 496.
 See also Parties, 261.

25. Allowing judgment to be taken against a part of those sued on a joint contract does not make the joint contract several, nor divide a joint suit into several parts. *Putnam v. Ingraham*, 114 U. S. 57, 5 Sup. Ct. Rep. 746, 29: 65
Distinguished in Chils v. Gronlund, 41 Fed. 503—*Albright v. McTighe*, 49 Fed. 820.

26. A judgment may be entered in favor of some of the defendants and against others whose liability is shown, in an action of debt to recover a statutory penalty for violation of the internal revenue law, as the action, though in form *ex contractu*, is in fact founded on a tort, and as joint liability need not in such case be proved, even though alleged. *Chaffee v. United States*, 18 Wall. 516, 21: 908

Principal and surety.

Amending Judgment as to Medium, see *infra*, 1213.

See also *supra*, 14.

27. In an action on a joint and several bond, judgment may be entered against the sureties, and a *nolle prosequi* against the principal. *Minor v. Mechanics Bank*, 1 Pet. 46, 7: 47

Cited in United States v. Leffler, 11 Pet. 96, 9 L. ed. 646—*Amls v. Smith*, 16 Pet. 311, 10 L. ed. 976—*Hawes v. Marchant*, 1 Curt. C. C. 147, Fed. Cas. No. 6,240—*United States v. O'Fallon*, 15 Blatchf. 300, Fed. Cas. No. 15,911—*Ferguson v. State Bank*, 11 Ark. 516—*United States v. Mattoon*, 5 Mackey, 567—*Washington Gaslight Co. v. Lansden*, 9 App. D. C. 541—*Goodhue v. Luce*, 82 Me. 226, 19 Atl. 440—*Tuttle v. Cooper*, 10 Pick. 290—*Reading v. Beardsley*, 41 Mich. 127, 1 N. W. 965—*Peyton v. Scott*, 2 How. (Miss.) 872—*Montgomery v. Comrs. of Sinking Fund*, 7 How. (Miss.) 13—*Rohrer v. Morningstar*, 18 Ohio, 585—*Lacroix v. Macquart*, 1 Miles (Pa.) 45—*Burke v. Noble*, 48 Pa. 175—*Austin v. Jordan*, 5 Tex. 185—*Forbes v. Davis*, 18 Tex. 275—*Allen v. Butler*, 9 Vt. 127—*Stephoe v. Read*, 19 Gratt. 9.

28. Upon a stipulation executed in a suit for collision under the provisions of Rev. Stat. § 941, U. S. Comp. Stat. 1901, p. 692, judgment against both principal and sureties may be recovered at the time of rendering the decree in the original cause. *Re*

Warden (The Belgenland) 108 U. S. 153, 2 Sup. Ct. Rep. 864, 27: 685
Waiver.

29. A plaintiff with the right to a joint judgment against joint and several debtors may waive the right, and such waiver is conclusively shown by taking a separate judgment voluntarily against one of the defendants. *United States v. Leffler*, 11 Pet. 86, 9: 642

30-31. Where there was a confession of judgment of foreclosure and release of errors before a prothonotary in Pennsylvania, in 1820, the court, under the circumstances of the case, may presume the judgment to have been entered. *Slicer v. Bank of Pittsburgh*, 16 How. 571, 14: 1063

d. Entry.

1. In General.

Collateral Attack on Unrecorded Verdict, see *infra*, 408.

When Judgment Entered, for Purpose of Computing Time to Appeal, see Appeal and Error, IV. d, 3, a.

Necessity of, to Reviewability, see Appeal and Error, 62.

Amending Record so as to Show, see Appeal and Error, 3262.

Review of Discretion as to, see Appeal and Error, 4400.

Necessity of Stay to Prevent Judgment Pending Bankruptcy Proceedings, see Bankruptcy, 393-396.

Entry of Void Judgment as Deprivation of Liberty or Property, see Constitutional Law, 440.

Presumption of Entry, see Evidence, 550.

Mandamus to Compel, see Mandamus, II. c, 2; Supreme Court of the United States, 66.

Entry on Sunday, see Sunday, 1.

Expiration of Power of Supreme Court to Enter Judgment in Boundary Case, see Supreme Court of the United States, 139.

See also *supra*, 7; *infra*, 132.

32. In Texas an index and abstract of a judgment in the judgment record book, which state the defendant's name in full, and also the firm name of plaintiffs containing the surname of the plaintiff first in order, sufficiently state the names of the parties. *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. Rep. 340, 37: 209
Cited in Bush v. Farris, 18 C. C. A. 320, 30 U. S. App. 626, 71 Fed. 774—*First Nat. Bank v. Cloud*, 2 Tex. Civ. App. 628, 21 S. W. 770—*Stephens v. Turner*, 9 Tex. Civ. App. 627, 29 S. W. 987.

33. On a motion in Virginia against a sheriff, for not paying over moneys collected by execution, judgment need not be entered at the first term after return of the execution. *Turner v. Fendall*, 1 Cranch, 117, 2: 53

34. Where reference was made of all the

issues, and with the order, by consent of parties, that on filing the report judgment should be entered as if the cause had been tried before the court, judgment may be entered by the clerk. *Hecker v. Fowler*, 2 Wall. 123, 17: 759

35. An omission to enter a formal judgment on one of two pleas which was demurred to, and which showed no defense, is a mere imperfection in form, not affecting the rights of the parties on writ of error, under act of Congress of 1789, chap. 20, § 32. *Morsell v. Hall*, 13 How. 212, 14: 117

36. Where, after the announcement of a decision by a court, ousting the directors of a corporation, because illegally elected, but before any decree in accordance therewith had been filed with the clerk of the court, and by him recorded, such directors, by resolution, authorized its president and secretary to execute the note of the corporation to a bank for the amount of an overdraft, the rate of interest agreed to be paid in such note is binding upon the corporation, since the decree of ouster did not take effect until it was filed with the clerk and entered of record. *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26: 707
Cited in *Kennedy v. Citizens' Nat. Bank*, 119 Iowa, 126, 93 N. W. 71.

37. While it may be difficult to keep entirely separate, proceedings in the same cause, part of which take place on the law side and part on the chancery side of the same court before the same judge, no confusion can result in a case where whatever is done on the law side is approved by the chancellor. *Kerr v. South Park*, 117 U. S. 379, 6 Sup. Ct. Rep. 801, 29: 924
Cited in *Kelly v. Herb*, 14 Pa. Co. Ct. 25, 3 Pa. Dist. 286.

Editorial notes.

[Entry and index of. 14 L.R.A. 393.
What entry or record necessary to complete. 28 L.R.A. 621.]

2. *Nunc Pro Tunc*.

On Rehearing, see *infra*, 1199.

Amendment *Nunc Pro Tunc*, see *infra*, 1211, 1214.

Judgment on Appeal, see Appeal and Error, IX. b.

Order for Mandamus, see Mandamus, 208.

Supplying Omissions in Record *Nunc Pro Tunc*, see Records, 11, 12.

See also *infra*, 1157; Limitation of Actions, 397.

38. A *nunc pro tunc* order is admissible, when delay has arisen from the act of the court. *Brignardello v. Gray* (*Gray v. Brignardello*) 1 Wall. 627, 17: 692
Distinguished in *Re Jarrett*, 42 Ohio St. 201—*Kessel v. Zelser*, 102 N. Y. 119, 55 Am. Rep. 760, 6 N. E. 574—*Harle v. Langdon*, 60 Tex. 562—*Turk v. Skiles*, 38 W. Va. 408, 18 S. E. 561.

Cited in *Re Drisco*, 14 Nat. Bankr. Reg. 553, Fed. Cas. No. 4,086—*Ex parte Buskirk*, 18 C. C. A. 416, 25 U. S. App. 613, 72 Fed.

21—*Re Wolff*, 100 Fed. 431—*Todd v. Todd*, 7 S. D. 178, 63 N. W. 777—*Ferris v. Commercial Nat. Bank*, 158 Ill. 239, 41 N. E. 1118—*Doughty v. Meek*, 105 Iowa, 18, 67 Am. St. Rep. 282, 74 N. W. 744—*Newbury v. Getchell & M. Lumber & Mfg. Co.* 106 Iowa, 153, 76 N. W. 514—*Blaisdell v. Harris*, 52 N. H. 195—*Boody v. Watson*, 64 N. H. 193, 9 Atl. 794—*Ruckman v. Decker*, 27 N. J. Eq. 246.

39. Where a party dies after his cause is finally submitted for decision, the court may enter the decree as of the term when the cause was finally submitted. *Mitchell v. Overman*, 103 U. S. 62, 26: 369

Cited in *Coughlin v. District of Columbia*, 108 U. S. 11, 27 L. ed. 76, 1 Sup. Ct. Rep. 37—*Borer v. Chapman*, 119 U. S. 596, 30 L. ed. 536, 7 Sup. Ct. Rep. 342—*Bell v. Bell*, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 555—*Sharon v. Terry*, 1 L.R.A. 586, 13 Sawy. 412, 36 Fed. 354—*Re Wolff*, 100 Fed. 431—*Fox v. Hale & N. Silver Min. Co.* 109 Cal. 481, 41 Pac. 328—*Todd v. Todd*, 7 S. D. 178, 63 N. W. 777—*Hutchinson v. Brown*, 8 App. D. C. 163—*Dawson v. Waldheim*, 89 Mo. App. 250—*Oliver v. Love*, 104 Mo. App. 84, 78 S. W. 335—*Calhoun v. Port Royal & W. C. R. Co.* 42 S. C. 136, 20 S. E. 30—*Land Mortg. Invest & Agency Co. v. Faulkner*, 45 S. C. 507, 24 S. E. 288—*State v. Fullmore*, 47 S. C. 38, 24 S. E. 1020—*Griffith v. Cromley*, 58 S. C. 455, 36 S. E. 738—*Rushton v. Woodham*, 68 S. C. 114, 46 S. E. 943—*Roberts v. Weisinger*, 69 S. C. 284, 48 S. E. 248—*Perkins v. Dunlavy*, 61 Tex. 245—*Weatherman v. Com.* 91 Va. 799, 22 S. E. 349—*McClain v. Davis*, 37 W. Va. 340, 18 L.R.A. 638, 16 S. E. 629—*Shakman v. United States Credit-System Co.* 92 Wis. 378, 32 L.R.A. 887, 53 Am. St. Rep. 920, 66 N. W. 528—*Hocks v. Sprangers*, 113 Wis. 143, 89 N. W. 113.

40. A judgment rendered without plaintiff's fault, after defendant's death, is not void. The irregularity or error may be cured by entering it *nunc pro tunc* of a date prior to the defendant's death; and even this is not necessary in a collateral proceeding. *New Orleans v. Whitney* (*New Orleans v. Gaines*) 138 U. S. 595, 11 Sup. Ct. Rep. 428, 34: 1102

41. A judgment of the United States Supreme Court affirming a judgment of the court below for a divorce and for alimony and costs rendered after appearance and answer of the husband may be entered *nunc pro tunc*, as of the date of argument, where the husband has died since the argument of the cause. *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. Rep. 551, 45: 804

42. A judgment of naturalization which has never been recorded, or, if recorded, the record of which has been lost, cannot be entered by a common-law court *nunc pro tunc*, thirty-three years after its rendition, when no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered,—especially where the declaration of intention was made before another court, in another state, and the territorial court which is alleged to have entered the judgment has itself been abolished and a state

court substituted in its place. *Gagnon v. United States*, 193 U. S. 451, 24 Sup. Ct. Rep. 510, 48: 745

Editorial note.

[Entry of judgment *nunc pro tunc*. 20 L. R.A. 143.]

e. By Default or Confession.

1. By Default.

Conclusiveness and Validity of, see *infra*, III. d, 1.

Against one Joint Defendant, see *supra*, 21. Judgment *Pro Confesso* against Defaulting Defendant, see *infra*, 57.

Lien of, see *infra*, 887.

Setting Aside, see *infra*, 1202.

Opening of, see *infra*, 1224.

After Withdrawal of Appearance, see *Appearance*, 69.

As Constituting Unlawful Preferences, see *Bankruptcy*, 205-213.

Mandamus to Compel, see *Mandamus*, 77.

Mandamus to Compel Vacation of, see *Mandamus*, 85.

Filing Pleading after, *Pleading*, I. p.

See also *Parties*, 261.

43. [To entitle a plaintiff to judgment by default, in Pennsylvania, the service of a summons on the person of the defendant, as well as if left at his house, must be ten days before the return. *Case v. Hufty* (Ct. Com. Pl. Phila.) 1 Dall. 154, 1: 79]

44. To support a judgment by default on a collector's bond at the return term, the record must show that the writ was executed fourteen days before the return day. *Dobynes v. United States*, 3 Cranch, 241, 2: 427

45. It is error to render a final decree for want of appearance at the first term after service of subpoena (equity rules, 18, 19) unless another rule-day has intervened. *O'Hara v. McConnell*, 93 U. S. 150, 23: 840
Cited in *Thomson v. Wooster*, 114 U. S. 120, 29 L. ed. 110, 5 Sup. Ct. Rep. 788—*Schofield v. Horse Springs Cattle Co.* 65 Fed. 436—*Price v. Boden*, 39 Fla. 222, 22 So. 657.

46. Where a defendant appears for the purpose of pleading in abatement only, and the decision of the court upon the plea put him out of court, for failing to appear again and plead in the action, judgment by default was properly rendered against him. *Randolph v. Barrett*, 16 Pet. 138, 10: 914

47. Where a declaration contained two counts, and all the pleas were applicable to the first count only, which was stricken out upon the trial, judgment was properly given upon the second count for want of a plea. *Hogan v. Ross* use of *Patterson*, 13 How. 173, 14: 100
Cited in *Aurora v. West*, 7 Wall. 91, 19 L. ed. 46—*Chapman v. Barney*, 129 U. S. 681, 32 L. ed. 801, 9 Sup. Ct. Rep. 428.

48. Where a demurrer to a plea was overruled, and the plaintiff did not reply, but

allowed judgment to be entered upon the plea, another plea of *nil debet* became immaterial, and judgment was properly entered for the defendant on the whole case. *United States v. Ballard*, 14 Wall. 457, 20: 845

49. [The jury being at the bar, defendant cannot retract his plea and enter judgment by *non sum informatus*, because of the delay that would be thereby occasioned. *Vasse v. Spicer* (Pa. Sup. Ct.) 2 Dall. 111, 1: 310]

50. A withdrawal of appearance by defendant, without prejudice to plaintiff, in an attachment proceeding, after a rule to plead had been served, leaves the plaintiff at liberty to enter a personal judgment against defendant, as upon default after appearance. *Creighton v. Kerr*, 20 Wall. 8, 22: 309
Cited in *Rio Grand Irrig. & Colonization Co. v. Gildersleeve*, 174 U. S. 606, 43 L. ed. 1104, 19 Sup. Ct. Rep. 761—*Graham v. Spencer*, 14 Fed. 607—*First Nat. Bank v. Cunningham*, 48 Fed. 517—*White v. Ewing*, 16 C. C. A. 299, 37 U. S. App. 365, 69 Fed. 454—*Bloxham v. Florida C. & P. R. Co.* 39 Fla. 294, 22 So. 697—*Rogers v. New York & T. Land Co.* 134 N. Y. 219, 32 N. E. 27.

Against state.

In Suit between States in Supreme Court, see *Supreme Court of the United States*, 155, 156.

51-2. Judgment may be entered against a state for default of appearance. *Oswald v. New York*, 2 Dall. 415, 1: 438
Chisholm v. Georgia, 2 Dall. 419, 1: 440
Cited in *Oswald v. New York*, 2 Dall. 415, 1 L. ed. 438—*New Jersey v. New York*, 5 Pet. 288, 8 L. ed. 120—*Massachusetts v. Rhode Island*, 12 Pet. 761, 9 L. ed. 1275—*Illinois C. R. Co. v. Adams*, 180 U. S. 38, 45 L. ed. 414, 21 Sup. Ct. Rep. 251—*Bloxham v. Florida C. & P. R. Co.* 35 Fla. 713, 17 So. 902—*Coster v. Albany*, 43 N. Y. 408.

2. By Confession.

Validity and Conclusiveness of, see *infra*, III. d, 3.

Setting Aside Judgment, see *infra*, 1191, 1195, 1200.

Setting Aside Agreement to Confess, see *infra*, 1232.

Relief in Admiralty because of Mistake, see *Admiralty*, 290.

Estoppel to Object to, on Appeal, see *Appeal and Error*, VIII. g, 3.

As Constituting Unlawful Preference, see *Bankruptcy*, 205-213.

Continuing Suit Against Other Joint Obligors after Judgment by Confession against one, see *Joint Creditors and Debtors*, 2.

Effect of, on Validity of Foreclosure Sale, see *Mortgage*, 375.

Power of Partner to Confess, see *Partnership*, 48.

See also *supra*, 30; *infra*, 156.

53. A decree *pro confesso* is not of course according to the prayer of the bill, nor merely such as the complainant chooses to

take, but is made by the court according to what is proper to be decreed upon the statements of the bill assumed to be true. Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. Rep. 788, 29: 105

Ohio C. R. Co. v. Central Trust Co. 133 U. S. 83, 10 Sup. Ct. Rep. 235, 33: 561
Cited in Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 756, 31 L. ed. 313, 8 Sup. Ct. Rep. 337—Ohio C. R. Co. v. Central Trust Co. 133 U. S. 90, 33 L. ed. 563, 10 Sup. Ct. Rep. 235—Sheffield Furnace Co. v. Witherow, 149 U. S. 576, 37 L. ed. 855, 13 Sup. Ct. Rep. 936—Southern P. R. Co. v. Temple, 59 Fed. 18—Sturtevant v. National Foundry & Pipe Works, 32 C. C. A. 58, 60 U. S. App. 235, 88 Fed. 614—Cape Fear Towing & Transp. Co. v. Pearsall, 33 C. C. A. 164, 61 U. S. App. 521, 90 Fed. 438—Aull v. Day, 133 Mo. 349, 34 S. W. 578—Jesser v. Armentrout, 100 Va. 671, 42 S. E. 681.

54. Where the allegations of a bill on which a decree *pro confesso* is taken are indefinite, or the demand of the plaintiff is, in its nature, uncertain, the certainty requisite to a proper decree must be afforded by proofs. Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. Rep. 788, 29: 105
Cited in Wong Him v. Callahan, 119 Fed. 383—Starr Cash & Package Car Co. v. Starr, 69 Conn. 446, 37 Atl. 1057—Dotterer v. Freeman, 88 Ga. 498, 14 S. E. 863—Welsh v. Solenberger, 85 Va. 443, 8 S. E. 91.

55. If the allegations of the bill are distinct and positive, they may be taken as true on a decree *pro confesso*, without proof; but if they are indefinite, or the demand of the plaintiff is in its nature uncertain, the requisite certainty must be afforded by proof. Ohio C. R. Co. v. Central Trust Co. 133 U. S. 83, 10 Sup. Ct. Rep. 235, 33: 561

56. In suits for the foreclosure of mortgages, a decree *pro confesso* can be rendered for a balance due over and above the proceeds of the sale, only when the case made by the bill shows that the amount is due. Ohio C. R. Co. v. Central Trust Co. 133 U. S. 83, 10 Sup. Ct. Rep. 235, 33: 561

57. A defaulting defendant, jointly charged with conspiracy and fraud, should have a formal decree *pro confesso* entered against him, not a final decree on the merits, while the case is pending against the others, as he is then out of court, and can take no further part in the case. If the suit is decided against complainant on the merits, he is entitled to have the bill dismissed against him as well as the other defendants. Frow v. De La Vega, 15 Wall. 552, 21: 60

Cited in Hohorst v. Hamburg-American Packet Co. 148 U. S. 265, 37 L. ed. 445, 13 Sup. Ct. Rep. 590—Lockhart v. Horn, 3 Woods, 548, Fed. Cas. No. 8,446—Baker v. Old Nat. Bank, 33 C. C. A. 571, 63 U. S. App. 34, 91 Fed. 450—American Coat Pad Co. v. Phoenix Pad Co. 51 C. C. A. 342, 113 Fed. 633—Price v. Boden, 39 Fla. 222, 22 So. 657—Russell v. Lathrop, 122 Mass. 303—Goff v. Hathaway, 180 Mass. 498, 62 N. E. 722—Hazard v. Durant, 12 R. I. 101—Kop-

per v. Dyer, 59 Vt. 490, 59 Am. Rep. 742, 9 Atl. 4.

58. Where a conversion of capital stock represented by certificates is charged in the complaint, and the facts charged are confessed by demurrer, a judgment for the plaintiff is correct. McAllister v. Kuhn, 96 U. S. 87, 24: 615
Cited in United Waterworks Co. v. Stone, 127 Fed. 595.

59. By the terms of the 20th of the rules made by this court at the February term, 1822, no service of any copy of an interlocutory decree, taking the bill *pro confesso*, is necessary before the final decree. Bank of United States v. White, 8 Pet. 262, 8: 938
Cited in Deford v. Mehaffy, 13 Fed. 486—Chappell v. Funk, 57 Md. 481—Forbes v. Tuckerman, 115 Mass. 120.

II. Form and Contents.

a. In General.

Uncertainty in Description of Property, see *infra*, 732.

Directions by Appellate Court as to, see Appeal and Error, IX. i, 1, d.

Necessity of Judge's Signature to Finality, see Appeal and Error, 50.

Necessary Parties on Appeal or Error from Severable Judgment, see Appeal and Error, 2463-2466.

Form of Judgment on Appeal, see Appeal and Error, 5211, 5212.

On Hearing of Certified Questions, see Cases Certified, VI. b.

Of Court of Claims, see Claims, 196-200.

Provision in Judgment for Repayment on Rescission of Contract, see Contracts, 646.

Record Showing of Jurisdiction of Federal Court as Essential, see Courts, V. c, 11.

Nature of Judgment Permissible against United States, see Courts, 841.

State Laws and Decisions as Rules Binding Federal Courts, see Courts, 2123-2125.

Time and Place of Execution as Part of Judgment, see Criminal Law, 215.

Sufficiency of Record in Criminal Case to Show Nature of Judgment, see Criminal Law, 230-233.

What Amounts to a Judgment Admissible Under Plea of *Res Judicata*, see Evidence, 2722.

Form of Order in Habeas Corpus, see Habeas Corpus, 239, 240.

Sufficiency of Decree to Authorize Judicial Sale, see Judicial Sale, 5.

Money Decree in Action for Specific Performance, see Specific Performance, 145-152.

In Ejectment, see Ejectment, VIII.

In Proceedings to Confirm Private Land Claim, Generally, see Private Land Claims, III. a, 6.

In Replevin Suit, see Replevin, 17, 18.

See also *supra*, 10, 35; *infra*, 132; Parties, 282.

60. The division of decrees into two classes, interlocutory and final, is generally recognized by judges and lawyers. Perkins v. Fourniquet, 14 How. 328, 14: 441
Cited in Richmond v. Atwood, 17 L.R.A. 618, 2 C. C. A. 607, 5 U. S. App. 151, 52 Fed. 21.

61. A Minnesota decree is not defective because it wants the judge's signature. Secombe v. Steele, 20 How. 94, 15: 833
Cited in Spencer v. Lapsley, 20 How. 270, 15 L. ed. 905.

62. A decree must be rendered in accordance with the rights of the parties as they stand at that time, and not as they stood at any preceding time. Randel v. Brown, 2 How. 406, 11: 318

62a. Under the practice in Pennsylvania, when a balance is found to be due the defendant on a set-off, such finding is a foundation for a scire facias, but cannot be treated as itself a judgment. Reeside v. Walker, 11 How. 272, 13: 693
Cited in Taylor v. Bunyan, 8 Iowa, 483.

63. If matter in abatement is pleaded *pais darrein continuance*, the judgment, if against the defendant, is peremptory as well on demurrer as on trial. Renner v. Marshall, 1 Wheat. 215, 4: 74

64. Decision of the court on a rule to show cause, rendered in the words, "The rule is, therefore, refused." Postmaster General v. Trigg, 11 Pet. 173, 9: 676
Cited in Holmes v. Jennison, 14 Pet. 629, 10 L. ed. 628.

65. A cross bill which was answered should be disposed of on the final decree. Moore v. Huntington, 17 Wall. 417, 21: 642

66. In an action to recover land, a mandamus from this court to the court below, to enter a judgment in favor of defendant, does not authorize a judgment that defendant hath right to the lands claimed. The judgment entered pursuant to the mandamus should have been simply in favor of the defendant upon the issue joined, and for the costs. Litchfield v. Dubuque & P. R. Co. 7 Wall. 270, 19: 150

67. The final determination of all the rights in question contemplated by the act of Congress of 1836, providing for the determination of interests in the Potomac river flats, should include the determination of the value of wharves or warehouses owned by licensees and standing on land belonging to the government. Morris v. United States, 174 U. S. 196, 19 Sup. Ct. Rep. 649, 43: 496

Editorial note.

[Form of, on penal bonds. 62 L.R.A. 427.]

Equitable relief.

Reforming Contract and Rendering Judgment as Reformed, see Claims, 109, 110.

Disability of Law Courts to Impose Conditions against Relief in Equity, see Equity, 236.

See also *infra*, 74.

68. In the supreme court of the District of Columbia, as in the circuit courts of the United States, equitable relief cannot be granted in an action at law. Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. Rep. 831, 34: 210

69. A court of equity, in setting aside a deed of a purchaser upon grounds other than positive fraud on his part, sets it aside upon terms, and requires a return of the purchase money, or that the conveyance stand as a security for its payment. Coiron v. Mil-laudon, 19 How. 113, 15: 575
Cited in Tompkins v. Sprout, 55 Cal. 37.

Without prejudice.

Modifying Judgment so as to Provide for, see *infra*, 1210.

Direction for, by Appellate Court, see Appeal and Error, IX. i, 1, d.

Federal Courts Retaining Jurisdiction by Rendering Judgment without Prejudice to Omitted Parties, see Courts, 761-764.

See also *infra*, 307; Dismissal and Discontinuation, 18, 27-29, 58; Parties, 313.

70. When a suit in equity is dismissed without a consideration of the merits, the dismissal should be without prejudice. Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. Rep. 691, 37: 577
Cited in Greenwood A. & W. B. Co. v. Strang.

77 Fed. 499—Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 30 C. C. A. 635, 58 U. S. App. 83, 87 Fed. 255—Hale v. Hardon, 89 Fed. 285—Bradford Belting Co. v. Kinsinger-Ison Co. 51 C. C. A. 485, 113 Fed. 813—Hale v. Coffin, 114 Fed. 573—Allen v. Myers, 1 Alaska, 121—Ambler v. Archer, 1 App. D. C. 107—National Foundry & Pipe Works v. Oconto City Water Supply Co. 105 Wis. 68, 81 N. W. 125.

71. Where a court lacks jurisdiction of a bill because of failure to aver citizenship of the parties, a dismissal should be without prejudice. Gaylord v. Kelshaw, 1 Wall. 81, 17: 612

Cited in Durant v. Essex Co. 7 Wall. 110, 19 L. ed. 156.

72. Where a bill is dismissed for the want of parties, the dismissal should not be on the merits, but should be without prejudice. A decree dismissing the bill on merits under such circumstances will be reversed. Kendig v. Dean, 97 U. S. 423, 24: 1061

Cited in Keith v. Clark, 97 U. S. 456, 24 L. ed. 1072—Van Norden v. Morton, 99 U. S. 382, 25 L. ed. 455—Goodman v. Niblack, 102 U. S. 563, 26 L. ed. 232—Rogers v. Durant, 106 U. S. 646, 27 L. ed. 303, 1 Sup. Ct. Rep. 623—Lacassagne v. Chapluis, 144 U. S. 126, 36 L. ed. 371, 12 Sup. Ct. Rep. 659—Swan Land & Cattle Co. v. Frank, 148 U. S. 612, 37 L. ed. 581, 13 Sup. Ct. Rep. 691—Raton Waterworks Co. v. Raton, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 719—Stevens v. Railroads, 4 Fed. 100—Watson v. United States Sugar Refinery, 15 C. C. A. 667, 34 U. S. App. 81, 68 Fed. 773.

73. Where words of qualification, such as "without prejudice," or other terms indi-

cating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits. *Durant v. Essex Co.* 7 Wall. 107, 19: 154
Lyon v. Perin & G. Mfg. Co. 125 U. S. 698, 8 Sup. Ct. Rep. 1024, 31: 839
Distinguished in Dunham v. Carson, 87 S. C. 283, 15 S. E. 960.

Cited in Lyon v. Perin & G. Mfg. Co. 125 U. S. 702, 31 L. ed. 841, 8 Sup. Ct. Rep. 1024
 —*Baker v. Cummings*, 181 U. S. 125, 45 L. ed. 780, 21 Sup. Ct. Rep. 578—*Spicer v. United States*, 5 Ct. Cl. 50—*Graver v. Faurot*, 64 Fed. 242—*Re Lemmon & G. Co.* 50 C. C. A. 251, 112 Fed. 299—*Tankersly v. Pettis*, 71 Ala. 185—*Strong v. Grant*, 2 Mackey, 226—*DaCosta v. Dibble*, 40 Fla. 424, 24 So. 911—*Barbee v. Shannon*, 1 Ind. Terr. 208, 40 S. W. 584—*Smith v. Auld*, 31 Kan. 267, 1 Pac. 626—*Meitas v. Meraux*, 47 La. Ann. 241, 16 So. 848—*Martin v. Evans*, 85 Md. 13, 36 L.R.A. 220, 60 Am. St. Rep. 292, 36 Atl. 258—*O'Keefe v. Irvington Real Estate Co.* 87 Md. 199, 39 Atl. 428—*Dunham v. Carson*, 37 S. C. 283, 15 S. E. 960—*Seamster v. Blackstock*, 83 Va. 236, 5 Am. St. Rep. 262, 2 S. E. 36—*Washington, O. & W. R. Co. v. Cazenove*, 83 Va. 753, 3 S. E. 433—*Carberry v. West Virginia & P. R. Co.* 44 W. Va. 265, 28 S. E. 694.

74. Dismissal of a suit in which a claim properly cognizable only at law was united with a claim for equitable relief made without prejudice to an action at law for the demand claimed. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. Rep. 712, 35: 358
Cited in Lacassagne v. Chapuis, 144 U. S. 126, 36 L. ed. 371, 12 Sup. Ct. Rep. 659.

Restitution.

75. The final decree of a Federal circuit court in the proceedings prosecuted under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 16, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may direct an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum of the increase in rates paid since the rate went into effect, where defendants stipulated in open court that, in case complainants prevailed, a decree of restitution might be made. *Southern R. Co. v. Tift*, 206 U. S. 428, 27 Sup. Ct. Rep. 709, 51: 1124

76. Decree in admiralty, directing that libeled goods be restored to the claimants, and that they pay the duties thereon. *Yeaton v. United States*, 5 Cranch, 281, 3: 101

Cited in United States v. 500 Boxes of Pipes, 2 Abb. (U. S.) 501, Fed. Cas. No. 15,116.

b. Personal Judgment.

Without Service of Process, see *infra*, III. c, 1.

How Jurisdiction to Render against Non-resident Acquired, see *infra*, 201, 204.
 After Withdrawal of Plea, see *infra*, 206.
 Amendment of Judgment as to, see *infra*, 1214.

For Public Improvement Assessment, see Constitutional Law, 580, 581.

Power of Court to Act on Person Respecting Things to be Done Beyond the Jurisdiction, see Courts, 66-74.

Judgment against Personal Representatives, see Executors and Administrators, 178-182.

Against Principal in Bond for Release of Property from Mechanics' Lien, see Mechanics' Liens, 42.

Deficiency Judgment in Foreclosure Suit, see Mortgage, VII. i.

For Street Improvement Assessment, see Public Improvements, 18.

Against Receiver, see Receivers, 192.

See also *supra*, 32.

77. A decree upon a bill in equity to set aside a release given by the trustee of a deed of trust, in violation of his duty, cannot include relief against the trustee personally. *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. Rep. 814, 27: 529
Cited in Merriman v. Chicago & E. I. E. Co. 12 C. C. A. 291, 24 U. S. App. 428, 64 Fed. 551—*Security Sav. & L. Asso. v. Buchanan*, 14 C. C. A. 99, 31 U. S. App. 244, 66 Fed. 801—*Pierce v. Jacobs*, 7 Mackey, 499.

78. Under the statutes of Texas, in a suit against partners, where one of them was a nonresident, and notice was addressed to him under Tex. Rev. Stat. art. 1230, and the other partner was served personally, the judgment is not a personal judgment against the nonresident partner, but a judgment against the partner individually who was personally served, and against the firm as a distinct legal entity. *Sugg v. Thornton*, 132 U. S. 524, 10 Sup. Ct. Rep. 163, 33: 447
Cited in Tillinghast v. Boston & P. R. Lumber Co. 39 S. C. 495, 22 L.R.A. 53, 18 S. E. 120.

79-82. A personal judgment against the United States for the indemnity provided by the private land claim act, § 14, in case the lands decreed to a claimant have been sold or granted by the United States to any other person, is authorized only when such lands have been sold or granted as public lands for a consideration which equitably belongs to the owner of the land, and not where the government has merely released its interest to one apparently holding a good title under a Spanish or Mexican grant, which subsequently turns out to be invalid by reason of an older or better title. *Real de Dolores del Oro v. United States*, 175 U. S. 71, 20 Sup. Ct. Rep. 17, 44: 76

Married women.

See also *infra*, 146.

83. A personal judgment against a married woman, in an action against her on her promissory note, is a nullity under the laws of Mississippi. *Canal Bank v. Partee*, 99 U. S. 325, 25: 390
Cited in McAnally v. Alabama Insane Hospital, 109 Ala. 113, 34 L.R.A. 225, 55 Am. St. Rep. 923, 19 So. 492—*Foertsch v. Germuller*, 9 App. D. C. 359—*Magruder v. Armes*, 15 App. D. C. 384—*Prentiss v. Pais*

key, 25 Fla. 929, 7 L.R.A. 644, 7 So. 56—
Little v. Hazlett, 197 Pa. 600, 47 Atl. 855
—Young v. Forest Oil Co. 30 Pittsb. L. J.
N. S. 226.

84. Where a settlement on the wife is
condemned as fraudulent, a personal de-
cree against her for the rents, issues, and
profits, and for the use and occupation of
the premises, is erroneous. *Clark v.*
Beecher, 154 U. S. 631 Appx. and 14 Sup.
Ct. Rep. 1184, 24: 705
Cited in *Bigby v. Warnock*, 115 Ga. 391, 57
L.R.A. 757, 41 S. E. 622.

c. Names of Parties.

Validity of Judgment against Person De-
scribed in Wrong Capacity, see Ex-
ecutors and Administrators, 182.

Restriction of Terms of Injunctive Order to
Exclude Persons not made Parties, see
Injunction, 231.

85. If a mistake be made in the name of
a defendant, and he fails to plead it in
abatement, the judgment binds him, though
he is called by the wrong name. *Lafayette*
Ins. Co. v. French, 18 How. 404, 15: 451
Cited in *Burlington & M. River R. Co. v.*
Burch, 17 Colo. App. 497, 69 Pac. 6—
L'Engle v. Florida C. & W. R. Co. 21 Fla.
357—*Pond v. Ennis*, 69 Ill. 345—*Bloom-*
field R. Co. v. Burress, 82 Ind. 84—*Vogel*
v. Brown Twp. 112 Ind. 300, 2 Am. St.
Rep. 187, 14 N. E. 77—*Lindsey v. Delano*,
78 Iowa. 354, 43 N. W. 218—*Hoffield v.*
Board of Education, 33 Kan. 648, 7 Pac.
216—*Heckman v. Louisville & N. R. Co.* 85
Ky. 637, 4 S. W. 342—*Casper v. Klippen*,
61 Minn. 355, 52 Am. St. Rep. 604, 63 N.
W. 737—*Alabama & V. R. Co. v. Bolding*,
69 Miss. 263, 30 Am. St. Rep. 541, 13 So.
844—*Waldrop v. Leonard*, 22 S. C. 125—
McGhee v. Romatka, 92 Tex. 43, 45 S. W.
552—*McGhee v. Romatka*, 19 Tex. Civ. App.
401, 47 S. W. 291—*First Nat. Bank v. Hun-*
tington Distilling Co. 41 W. Va. 535, 56
Am. St. Rep. 878, 23 S. E. 792.

86. Where writ, pleadings, and contract
speak only of Frederick D. Conrad, but the
judgment is for the plaintiff against
"Daniel Frederick Conrad, the defendant,"
the defect is cured by the statute of
jeofails. *Conrad v. Griffey*, 11 How. 480,
13: 779

Cited in *Odell v. Reynolds*, 17 C. C. A. 323, 37
U. S. App. 447, 70 Fed. 661—*McDonald v.*
Nebraska, 41 C. C. A. 284, 101 Fed. 177.

d. Amount.

Judgment for Less than Asked for, see
infra, 105, 106, 126.

Judgment for More than Asked for, see
infra, 123-125.

Remittitur of Part of, see *infra*, 1219-1222.
On Appeal, see Appeal and Error, 4204.

Prejudicial Error as to, see Appeal and
Error, 5181-5186.

In Ejectment, see Ejectment, 105.

For Double Rent, see Landlord and Tenant,
48.

As to Fees of Marshals for Service Ren-
dered to United States as a Party, see
Marshal, 39.

See also *supra*, 56; *infra*, 275.

87. [In an action for money had and re-
ceived, recovery can be had for no greater
sum than the defendant actually received.
Eastwick v. Hugg (Ct. Com. Pl. Phila.) 1
Dall. 222, 1: 109]

88. A judgment for alimony based on a
decree of a court in another state is prop-
erly restricted to the fixed sum already
due, excluding provision for future alimony
which is subject to the discretion of the
court in the other state, which may at any
time alter it. *Lynde v. Lynde*, 181 U. S.
183, 21 Sup. Ct. Rep. 555, 45: 810
Cited in *Audubon v. Shufeldt*, 181 U. S. 578, 45
L. ed. 1010, 21 Sup. Ct. Rep. 735—*Wetmore*
v. Markoe, 196 U. S. 73, 49 L. ed. 392, 25
Sup. Ct. Rep. 172—*Hilliker v. Hale*, 54 C.
C. A. 257, 117 Fed. 225—*Israel v. Israel*,
130 Fed. 239—*Israel v. Israel*, 148 Fed.
578—*Leyland v. Leyland*, 186 Mass. 422, 71
N. E. 794—*Page v. Page*, 189 Mass. 88, 75
N. E. 92—*Lynde v. Lynde*, 64 N. J. Eq. 741,
58 L.R.A. 473, 97 Am. St. Rep. 692, 52
Atl. 694—*Anglo-American Provision Co. v.*
Davis Provision Co. 169 N. Y. 513, 88 Am.
St. Rep. 608, 62 N. E. 587—*Arrington v.*
Arrington, 131 N. C. 145, 92 Am. St. Rep.
769, 42 S. E. 554—*Wagner v. Wagner*
(*Wagener v. Latham*) 26 R. I. 27, 65 L.R.A.
816, 57 Atl. 1058.

89. Although, by the common law, a
judgment rendered upon a verdict found
generally for the plaintiff, without specifi-
ing the amount, may not be strictly proper,
yet, under a power of amending the verdict,
the judgment can stand, where the plea
was that no consideration was given for the
note sued on, since the verdict being for
the plaintiff, it necessarily finds that the
whole amount is due. *Parks v. Turner*, 12
How. 39, 13: 883
Cited in *Hopkins v. Orr*, 124 U. S. 513, 31
L. ed. 525, 8 Sup. Ct. Rep. 590—*McDonald*
v. Nebraska, 41 C. C. A. 284, 101 Fed. 177
—*Tyler v. Mutual Dist. Messenger Co.* 13
App. D. C. 268.

90. In Illinois, a judgment for taxes is
defective which fails to show the amount
of tax for which it was rendered; and the
use of numerals, without some mark indi-
cating for what they stand, is insufficient.
Woods v. Freeman, 1 Wall. 398, 17: 543
Distinguished in *Midland R. Co. v. State*, 11
Ind. App. 440, 38 N. E. 57—*Ward v. Gal-*
latin County, 12 Mont. 84, 29 Pac. 658—
State v. Eureka Consol. Min. Co. 8 Nev. 26
—*Cahoon v. Coe*, 52 N. H. 525.

Cited in *Re Boyd*, 4 Sawy. 266, 16 Nat. Bankr.
Reg. 141, Fed. Cas. No. 1,746—*Gray v. Lar-*
rimore, 4 Sawy. 652, 2 Abb. (U. S.) 558,
Fed. Cas. No. 5,721—*Brady v. Seaman*, 30
Cal. 619—*Turner v. Hand County*, 11 S.
D. 351, 77 N. W. 589—*Coombs v. O'Neal*, 1
MacArth. 409—*Hopper v. Lucas*, 86 Ind.
51—*Brown v. Reeves*, 31 Ind. App. 519, 68
N. E. 604—*Re State*, 54 Mich. 447, 23 N.
W. 189.

91. It is error, in a report assessing dam-
ages for an illegal seizure, to award a gross
sum, without any specification of items or
any explanation of the principles on which
the sum was given. *Murray v. The Charm-*
ing Betsy, 2 Cranch, 64, 2: 208

92. A judgment for costs generally in-

cludes all the costs belonging to the suit, whether prior or subsequent to the rendition of judgment; if new costs accrue, the judgment opens to receive them. *Peyton v. Brooke*, 3 Cranch, 92, 2: 376
Cited in Kitchen v. Woodfin, 1 Hughes, 342, Fed. Cas. No. 7,855—*Blake v. Hawkins*, 19 Fed. 205.

e. Money Judgment; Kind of Money.

Money Judgment as Beyond Jurisdiction of Equity, see Equity, 45.

93. The objection that the district court of the United States for the district of Porto Rico should not have given a money decree in a suit by the wife to obtain the liquidation of the community is not a valid one, where the rights of the wife arise simply from an increased value of property or assets brought by the husband to the marriage, or as a result of the falling into the community of the revenues of the property of the husband. *Garrozi v. Dastas*, 204 U. S. 64, 27 Sup. Ct. Rep. 224, 51: 559

94. In an equitable proceeding, a decree for damages cannot be rendered against a fraudulent assignee of property. The decree against him must be a decree for an account. *Dunphy v. Kleinschmidt*, 11 Wall. 610, 20: 223

Cited in Marsh v. Burroughs, 1 Woods, 467, Fed. Cas. No. 9,112—*Lippincott v. Shaw Carriage Co.* 34 Fed. 574—*Harrigan v. Gilchrist*, 121 Wis. 252, 99 N. W. 909.

95. A court of equity does not give a decree for damages upon rescinding a sale at auction for fraudulent by-bidding, when it allows the sale to stand so far as not fraudulent, and makes the vendor restore the amount obtained by his fraud. *Veazie v. Williams*, 8 How. 134, 12: 1018

Kind of money.

96. A decree in pounds, shillings, and pence is valid. *Telfair v. Stead*, 2 Cranch, 407, 2: 320

97. The statement in a judgment for duties, that it is "payable in gold and silver coin, for duties," is strictly correct, and, though unnecessary, cannot affect the validity of the judgment. *Sun Cheong-Kee v. United States*, 3 Wall. 320, 18: 72
Distinguished in Baker v. Ward, 3 Ben. 505, Fed. Cas. No. 785.

Cited in Bronson v. Rodes, 7 Wall. 255, 19 L. ed. 148—*Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 462—*The Vaughan (The Telegraph v. Gordon)* 14 Wall. 270, 20 L. ed. 809—*Stockwell v. United States*, 3 Cliff. 291, Fed. Cas. No. 13,466—*Chrysler v. Renols*, 43 N. Y. 215—*Greentree v. Rosenstock*, 61 N. Y. 591.

98. Where advances to a vessel in a foreign port are made in gold, and drafts for the amount on the owners show that the payment to the parties making the advances is to be also in gold, the court may direct that its decree be entered for the amount in like currency. *The Emily B. Souder v.*

Pritchard (The Emily Souder) 17 Wall. 666, 21: 683

99. Where contracts made payable in coin are sued upon, judgment may be entered for coined dollars and parts of dollars; and when contracts have been made payable in dollars generally, without specifying in what description of money payment is to be made, judgment may be entered generally without such specification. *Bronson v. Rodes*, 7 Wall. 229, 19: 141
Butler v. Horwitz, 7 Wall. 258, 19: 149
Trebilcock v. Wilson, 12 Wall. 687, 20: 460

Cited in Butler v. Horwitz, 7 Wall. 259, 19 L. ed. 150—*Dewing v. Sears*, 11 Wall. 380, 20 L. ed. 190—*Legal Tender Cases*, 12 Wall. 624, 20 L. ed. 335—*Trebilcock v. Wilson*, 12 Wall. 699, 20 L. ed. 463—*The Vaughan (The Telegraph v. Gordon)* 14 Wall. 270, 20 L. ed. 809—*The Emily Souder (The Emily B. Souder v. Pritchard)* 17 Wall. 672, 21 L. ed. 685—*Tyers v. United States*, 5 Ct. Cl. 521—*The Edith*, 5 Ben. 146, Fed. Cas. No. 4,281—*Re Elder*, 1 Sawy. 81, 3 Nat. Bankr. Reg. 678, Fed. Cas. No. 4,326—*Forbes v. Murray*, 3 Ben. 498, Fed. Cas. No. 4,928—*Jordan v. Cass County*, 3 Dill. 194, Fed. Cas. No. 7,517—*Young v. Montgomery & E. R. Co.* 2 Woods. 614, Fed. Cas. No. 18,166—*Fuller v. Aylesworth*, 21 C. C. A. 510, 43 U. S. App. 657, 75 Fed. 700—*Russell v. McCormick*, 45 Ala. 594, 6 Am. Rep. 707—*Bowen v. Darby*, 14 Fla. 218—*Morrow v. Rainey*, 58 Ill. 359—*Belford v. Woodward*, 158 Ill. 128, 29 L.R.A. 597, 41 N. E. 1097—*Dorr v. Hunter*, 183 Ill. 435, 56 N. E. 159—*Churchman v. Martin*, 54 Ind. 384—*Stringer v. Coombs*, 62 Me. 165, 18 Am. Rep. 414—*Knox v. Gerhauser*, 3 Mont. 279—*Kelly v. Ferguson*, 46 How. Fr. 415—*Church v. Howard*, 17 Hun, 6—*Chrysler v. Renols*, 43 N. Y. 215—*Greentree v. Rosenstock*, 61 N. Y. 591—*Halliburton v. Carson*, 100 N. C. 110, 6 Am. St. Rep. 565, 5 S. E. 912—*Re Church of the Holy Communion*, 14 Phila. 122—*Martin v. Evans*, 37 Phila. Leg. Int. 146—*McCalla v. Ely*, 64 Pa. 256—*Bobo v. Goss*, 1 S. C. N. S. 265—*Cunningham v. Cauthen*, 37 S. C. 136, 15 S. E. 917—*Wills v. Allison*, 4 Helsk. 396—*Bond v. Greenwald*, 4 Helsk. 469—*Townsend v. Jenkinson*, 44 Vt. 318.

100. A judgment on a contract for the payment or delivery of a specified weight of pure gold, solvable in coined money, should be entered for coined dollars and parts of dollars. *Dewing v. Sears*, 11 Wall. 379, 20: 189

Cited in Legal Tender Cases, 12 Wall. 624, 20 L. ed. 336—*Hittson v. Davenport*, 4 Colo. 174—*Bowen v. Darby*, 14 Fla. 218—*Belford v. Woodward*, 158 Ill. 136, 29 L.R.A. 600, 41 N. E. 1097—*Knox v. Gerhauser*, 3 Mont. 280—*Phillips v. Dugan*, 21 Ohio St. 471, 8 Am. Rep. 661.

101. A judgment on a contract for an amount of gold coin, upon a verdict for its value in dollars and cents in currency, is not erroneous, where the plaintiff was willing to have his damages estimated according to the currency value of bullion, instead of a judgment for the gold itself. *Gregory v. Morris*, 96 U. S. 619, 24: 740
Cited in United States v. Erie R. Co. 107 U. S. 3, 27 L. ed. 386, 2 Sup. Ct. Rep. 83—

Belford v. Woodward, 158 Ill. 131, 29 L.R.A. 598, 41 N. E. 1097—Dorr v. Hunter, 183 Ill. 435, 56 N. E. 159.

102. It is not a sufficient variance between a decree and the bill in a foreclosure suit, to render the decree erroneous, that the bill alleges that the bonds were to be paid in gold coin, and the decree is for payment in lawful money. *Wallace v. Loomis*, 97 U. S. 146, 24: 895
Cited in Burt v. C. Gotzian & Co. 43 C. C. A. 67, 102 Fed. 945—*Atlantic Trust Co. v. Dana*, 62 C. C. A. 668, 128 Fed. 220.

103. A judgment rendered at a time when coin and currency are equal in value, for the recovery of a 5 per cent tax on interest paid in coin by a railroad company to foreign bondholders, may be simply a general judgment for the amount due, although the law imposing the tax provided for its collection in legal tender currency, according to the value of the coined money in currency. *United States v. Erie R. Co.* 107 U. S. 1, 2 Sup. Ct. Rep. 83. 27: 385

104. A judgment on a contract payable in Confederate notes should be for their value in United States legal tender at the date and place of payment. *Thorington v. Smith*, 8 Wall. 1, 19: 361
Stewart v. Salamon, 94 U. S. 434, 24: 275
Bissell v. Hayward, 96 U. S. 580, 24: 678
Rives v. Duke, 105 U. S. 132, 26: 1031
Cited in Effinger v. Kenney, 115 U. S. 572, 29 L. ed. 497, 6 Sup. Ct. Rep. 179—*Daughdrill v. Edwards*, 59 Ala. 428—*Henry v. Northern Bank*, 63 Ala. 546—*Bartow County v. Conyers*, 108 Ga. 561, 34 S. E. 351—*White v. White*, 50 La. Ann. 108, 23 So. 95.

Editorial note.

[Form of, on liability to pay in coin. 29 L.R.A. 593.]

f. Conformity to the Writ, Pleadings, and Proof.

Writ.

105. The judgment must be responsive to the writ, and must either be given for the whole sum demanded, or exhibit cause why it is given for a less sum. *Hughes v. Union Ins. Co.* 8 Wheat. 294, 5: 620

106. In debt a less sum may be recovered than that demanded in the writ, where the entire sum demanded is shown by the counts to consist of several distinct accounts, or where the precise sum demanded is diminished by extrinsic evidence. *Hughes v. Union Ins. Co.* 8 Wheat. 294, 5: 620
Cited in Buckwalter v. United States, 11 Serg. & R. 197.

107. Conformity between the writ and judgment, in the action of debt, may be complied with either by the pleadings, the finding of the jury, or a remitter entered by plaintiff either before or after verdict, or even after demurrer. *Hughes v. Union Ins. Co.* 8 Wheat. 294, 5: 620
 U. S. Dig.—226

Pleadings and proof generally.

Conclusiveness of Foreign Judgment
 Not Responsive to Issues, see *infra*, 963.

Variance between Pleading and Proof in Admiralty, see Admiralty, III. i, 3.

Variance between Pleading and Proof Generally, see Evidence, XIII. f.

In Ejectment, see Ejectment, VIII.

Suit against Administrator and Decree against Him as Trustee, see Executors and Administrators, 182.

Judgment on Pleadings, see Pleading, I. k.

Relief under Pleadings, see Pleading, I. l.

See also *supra*, 56; *infra*, 154.

108. It is a settled rule that the decree must conform to the allegations in the pleadings as well as to the proofs in the cause. *Crocket v. Lee*, 7 Wheat. 522, 5: 513

Carneal v. Banks, 10 Wheat. 181, 6: 297
Vattier v. Hinde, 7 Pet. 252, 8: 675
Harrison v. Nixon, 9 Pet. 483, 9: 201
Cited as overruled in David Bradley Mfg. Co. v. Eagle Mfg. Co. 7 C. C. A. 443, 18 U. S. App. 455, 58 Fed. 721.

Cited in Harrison v. Nixon, 9 Pet. 512, 9 L. ed. 212—*Boone v. Chiles*, 10 Pet. 209, 9 L. ed. 399—*Baker v. Nachtrieb*, 19 How. 130, 15 L. ed. 531—*Jones v. Morehead*, 1 Wall. 165, 17 L. ed. 664—*Durant v. Essex Co.* 7 Wall. 110, 19 L. ed. 156—*Nashville, C. & St. L. R. Co. v. United States*, 19 Ct. Cl. 479—*Bradley v. Converse*, 4 Cliff. 373, Fed. Cas. No. 1,775—*Tilghman v. Tilghman*. *Baldw.* 491, Fed. Cas. No. 14,045—*Phelps v. Elliott*, 35 Fed. 461—*Insurance Co. of N. A. v. Svendsen*, 74 Fed. 348—*Edison Electric Light Co. v. Peninsular Light, Power & Heat Co.* 95 Fed. 676—*Thomas v. Winne*, 58 C. C. A. 616, 122 Fed. 398—*Morgan v. Crabb*, 3 Port. (Ala.) 473—*Clements v. Kellogg*, 1 Ala. 333—*McKinley v. Irvine*, 13 Ala. 694—*Graham v. Tankersley*, 15 Ala. 647—*Anslley v. Robinson*, 16 Ala. 798—*Land v. Cowan*, 19 Ala. 300—*Byers v. Fowler*, 12 Ark. 286, 54 Am. Dec. 271—*Conway v. Ellison*, 14 Ark. 363—*Merrick v. Hutt*, 15 Ark. 342—*Trapnall v. Byrd*, 22 Ark. 17—*Stafford v. Watson*, 41 Ark. 34—*Hanf v. Whittington*, 42 Ark. 494—*Burdsall v. Waggoner*, 4 Colo. 259—*St. Andrews Bay Land Co. v. Campbell*, 5 Fla. 565—*Phelan v. Phelan*, 12 Fla. 453—*Hyer v. Caro*, 17 Fla. 354—*Robson v. Harwell*, 6 Ga. 599—*Helm v. Cantrell*, 59 Ill. 530—*Buck v. McCaughtry*, 5 T. B. Mon. 221—*New Orleans v. Hopkins*, 13 La. 330—*Bayne v. State*, 62 Md. 115—*Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 549, 5 Atl. 253—*Le Baron v. Shepherd*, 21 Mich. 275—*Livingston v. Hayes*, 43 Mich. 134, 5 N. W. 78—*Miller v. Finn*, 1 Neb. 296—*Hawthorne v. Smith*, 3 Nev. 192, 93 Am. Dec. 397—*Thomas v. Austin*, 4 Barb. 273—*Mickles v. Colvin*, 4 Barb. 313—*Walrod v. Bennett*, 6 Barb. 146—*Ferguson v. Ferguson*, 2 N. Y. 361—*Kelsey v. Western*, 2 N. Y. 506—*Heatherly v. Hadley*, 4 Or. 19—*Keene v. Wheatley*, 5 Clark (Pa.) 519—*Howard v. Cannon*, 11 Rich. Eq. 26, 75 Am. Dec. 736—*Bedford v. Williams*, 5 Coldw. 207—*Patton v. McClure, Mart. & Y.* 352—*Potomac Mfg. Co. v. Evans*, 84 Va. 722, 6 S. E. 2—*Wren v. Moncure*, 95 Va. 375, 28 S. E. 588.

109. The decree must be *secundum allegata* as well as *secundum probata*. The Hoppet v. United States, 7 Cranch, 389,

3: 380

Cited in Bender v. Bender, 14 Or. 855, 12 Pac. 713.

110. A judgment must be within the plaintiff's stated cause of action. Windsor v. McVeigh, 93 U. S. 274, 23: 914
Cited in Elsey v. Falconer, 56 Ark. 422, 20 S. W. 5—Priest v. Way, 87 Mo. 25—Turner v. Barraud, 102 Va. 338, 46 S. E. 378—St. Lawrence Boom & Mfg. Co. v. Holt, 51 W. Va. 364, 41 S. E. 351.

111. An indemnity under the private land claim act, § 14, cannot be adjudged when no such claim is made by the petition. Real de Dolores del Oro v. United States, 175 U. S. 71, 20 Sup. Ct. Rep. 17, 44: 76

112. A decree as to the nonliability of a bank for a license tax is erroneous when that question was not presented by the pleadings, and was entirely *dehors* the issues of the case. New Orleans v. Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42: 202

113-14. In a suit to wind up a bank because of its insolvency, the decree should not discharge the stockholders from all liability for the debts of the bank, where they are not parties, and their liability has not been put in issue. Terry v. Commercial Bank, 92 U. S. 454, 23: 620
Cited in Penniman v. Smith, 5 Lea, 137.

115. A decree setting aside a deed for the incompetency of the grantor sufficiently conforms to the allegations in a bill which, although averring that the deed was received on a parol trust for the benefit of the grantor and his family, details the grantor's condition and habits, which are stated to have excited fears in his family that he would waste all his property or convey it to his profligate companions, and alleges that it was agreed that the grantee should obtain deeds of the property and hold it for the use of the grantor during the latter's life, and of his heirs after his death. Harding v. Handy, 11 Wheat. 103, 6: 429

Cited in Harrison v. Nixon, 9 Pet. 512, 9 L. ed. 212—Boone v. Chiles, 10 Pet. 209, 9 L. ed. 399—St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 577, 33 L. ed. 687, 10 Sup. Ct. Rep. 390—Smith v. Burnham, 2 Sumn., 624, Fed. Cas. No. 13,018—Tilghman v. Tilghman, Baldw. 491, Fed. Cas. No. 14,045—Wilson v. Matthews, 32 Ala. 338—Byers v. Fowler, 12 Ark. 288, 54 Am. Dec. 271—Johnson v. Foreman, 16 Ill. App. 633—Owing's Case, 1 Bland, Ch. 405, 17 Am. Dec. 311—Chase v. Winans, 59 Md. 480—Lockhart v. Leeds, 10 N. M. 594, 63 Pac. 48—Heatherly v. Hadley, 4 Or. 19—Thompson v. Thompson, 126 Pa. 371, 17 Atl. 643—Dormitzer v. German Sav. & Loan Soc. 23 Wash. 101, 62 Pac. 862.

116. No judgment can be rendered upon a verdict when the finding is different from the issue, or is confined to a part only of the matters in issue. Downey v. Hicks, 14 How. 240, 14: 404

Cited in Hadden v. Dooley, 34 C. C. A. 345,

63 U. S. App. 173, 92 Fed. 281—Holt v. Van Eps, 1 Dak. 212, 46 N. W. 689.

117. A decree cannot be made against one individually where the bill is not framed so as to charge him or seek relief against him personally, but only as administrator. Boyce v. Grundy, 9 Pet. 275, 9: 127

118-19. One sued as personal representative cannot be charged as devisee by reason of a statement in a master's report that he is such. Boyce v. Grundy, 9 Pet. 275, 9: 127

120. Where one claims that, as cotenant, he has a right to call for an accounting of the proceeds of a mine, the finding that there was no such cotenancy between the plaintiff and the defendants in the mine in controversy as entitled the plaintiff to an account is not a sufficient finding of fact upon which to base a decree. Kahn v. Central Smelting Co. 102 U. S. 641, 26: 266

121. In a suit for relief from fraud, it is enough if the facts found are not substantially different from those alleged in the bill. Tufts v. Tufts, 123 U. S. 76, 8 Sup. Ct. Rep. 54, 31: 91

122. A judgment against the respondent upon the merits is not warranted in a cause stipulated to be submitted upon proofs and arguments, although the respondent appeared generally, where he pleaded only to the jurisdiction of the court, and the question of jurisdiction was the only point argued and submitted for decision. Cox v. United States ex rel McGarrahan (The Secretary v. McGarrahan) 9 Wall. 298, 19: 579

More than demanded.

Effect of Omission of Interest from Jurisdictional Allegation of Amount on Right to Recover Sum, see Courts, 906.

Invalidity of Sale of Property not Included in Prayer, see Judicial Sale, 66.

123. A judgment or decree is erroneous if it is rendered for a larger sum than is demanded in the pleadings. Cox v. United States, 6 Pet. 172, 8: 539
[Pinchin v. Fry (Pa. Sup. Ct.) 1 Dall. 405, 1: 197]

Cited in Hagood v. Blythe, 37 Fed. 251.

124. A court cannot grant any more relief than is claimed in the bill, no matter what may be proved. Simms v. Guthrie, 9 Cranch, 19, 3: 642
Cited in Foster v. Goddard, 1 Black, 518, 17 L. ed. 232—Blandy v. Griffith, 3 Fisher, Pat. Cas. 614, Fed. Cas. No. 1,529—Goodyear v. Providence Rubber Co. 2 Cliff. 370, 2 Fisher, Pat. Cas. 509, Fed. Cas. No. 5,583.

125. The equity law of procedure requires that the allegations and proofs must agree, that the court can only consider what is put in issue by the pleadings, and that the decree must conform to the scope and object of the prayer, and cannot go beyond

them. *Washington, A. & G. R. Co. v. Washington* (Washington, A. & G. R. Co. v. Bradley) 10 Wall. 299, 19: 894
Cited in Dumont v. Fry, 12 Fed. 21—*Hill v. Ryan Grocery Co.* 23 C. C. A. 630, 41 U. S. App. 714, 78 Fed. 27—*Alabama Iron & R. Co. v. Austin*, 36 C. C. A. 540, 94 Fed. 901
 —*The New York*, 47 C. C. A. 236, 108 Fed. 107—*Ringo v. Woodruff*, 43 Ark. 498.

Less than demanded.

See also *supra*, 105, 106.

126-8. In a writ of right, on the mise joined on the mere right, under a count for the entire right, a demandant may recover a less quantity than the entirety. *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99, 7: 617
Cited in Lyon v. Moltuse, 19 Ala. 465—*Somes v. Skinner*, 8 Pick. 63.

Construction.

129. The language of a decree in chancery must be construed in reference to the issue which is put forward by the prayer for relief and other pleadings and which these show it was meant to decide. *Graham v. LaCrosse & M. R. Co.* (Milwaukee & M. R. Co. v. Chamberlain) 3 Wall. 704, 18: 247
Cited in Barnes v. Chicago, M. & St. P. R. Co. 122 U. S. 14, 30 L. ed. 1132, 7 Sup. Ct. Rep. 1043—*Lockhart v. Horn*, 3 Woods, 547, Fed. Cas. No. 8,446—*Linton v. First Nat. Bank*, 10 Fed. 898—*Stearns v. Lawrence*, 28 C. C. A. 70, 54 U. S. App. 532, 83 Fed. 742
 —*Case v. Hicks*, 76 Iowa, 40, 40 N. W. 75—*Mercier v. West Kansas City Land Co.* 72 Mo. 492—*Bettys v. Milwaukee & St. P. R. Co.* 37 Wis. 327.

130. Every decree in a suit in equity must be considered in connection with the pleadings; and if its language is broader than is required, it will be limited to such effect only as is needed for the purposes of the case made and issues decided. *Barnes v. Chicago, M. & St. P. R. Co.* 122 U. S. 1, 7 Sup. Ct. Rep. 1043, 30: 1128
Cited in Gilmer v. Morris, 46 Fed. 335.

131. A decree in a suit by creditors to set aside a mortgage and foreclosure may be held to mean that the foreclosure was only voidable as to such creditors, although the decree is broader in its terms. *Barnes v. Chicago, M. & St. P. R. Co.* 122 U. S. 1, 7 Sup. Ct. Rep. 1043, 30: 1128

III. Validity, Effect, and Conclusiveness.

a. In General.

1. Validity.

Judgment of Foreign Country, see *infra*, 926-928.

Validity of Judgment of Naturalization, see *Aliens*, 170-172.

Presumption and Burden of Proof, see *Evidence*, II. i. 3.

In Suit by or against Infant, see *Infants*, III. c.

See also *supra*, 96, 97.

132. A judgment is complete evidence of

its own validity, where it is in legal form, and has been entered upon the record as the judgment of the court. *Spratt v. Spratt*, 4 Pet. 393, 7: 897
Cited in Holcomb v. Phelps, 16 Conn. 131—*Knapp v. Thomas*, 39 Ohio St. 387, 48 Am. Rep. 462—*Com. v. Snowden*, 1 Brewst. (Pa.) 221.

133. Upon the examination of the cause of action upon which judgment has been rendered, for the purpose of ascertaining whether such judgment is protected by the provision of the Federal Constitution against the impairment of its obligation, the propriety and validity of the judgment cannot be questioned. *Louisiana ex rel Nelson v. St. Martins Parish*, 111 U. S. 716, 4 Sup. Ct. Rep. 648, 28: 574
Cited in New Orleans v. United States, 1 C. C. A. 150, 2 U. S. App. 125, 49 Fed. 42—*Lake County v. Platt*, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 572—*Rio Grande County v. Burpee*, 24 Colo. 59, 48 Pac. 539—*Grand County v. People*, 16 Colo. App. 246, 64 Pac. 675—*State use of Faulkner County v. Bowen*, 9 Mackey, 297.

Editorial note.

[Insanity as affecting. 39 L.R.A. 775.]

When void.

Collateral Attack on Void Judgment, see *infra*, III. i.

Nullity of Judgment Procured Conclusively, see *Action or Suit*, 17.

134. A judgment by a court without jurisdiction is void. *Re Sawyer*, 124 U. S. 200, 8 Sup. Ct. Rep. 432, 31: 402
Cited in United States v. Debs, 5 Inters. Com. Rep. 188, 64 Fed. 739—*Dexter, H. & Co. v. Sayward*, 84 Fed. 300—*Re Groen*, 22 Wash. 55, 60 Pac. 123.

135. Everything done under the judicial process of courts not having jurisdiction is, *ipso facto*, void. *Martin v. Hunter*, 1 Wheat. 304, 4: 97
Cited in Strong v. Strong, 8 Conn. 412—*Munger v. Doolan*, 75 Conn. 661, 55 Atl. 169.

136. Where it appears from its own records that a court did not have jurisdiction, its judgment is absolutely void. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42: 215
Cited in Dexter, H. & Co. v. Sayward, 84 Fed. 300.

137. The circuit courts of the United States are of limited jurisdiction, but they are not, on that account, inferior courts, in the technical sense of these words, whose judgments, taken alone, are to be disregarded. They are inferior courts in the language of the Constitution, but not in the language of the common law. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous and may be reversed for that cause. But they are not absolute nullities. *Turner v. Bank of North America*, 4 Dall. 8, 1: 718

Distinguished in Evans v. Gee, 11 Pet. 83, 9 L. ed. 641.

Cited in McNutt v. Bland, 2 How. 20, 11 L. ed. 163—*Bank of United States v. Moss*, 6

Howe, 37, 12 L. ed. 334—Marshall v. Baltimore & O. R. Co. 16 How. 340, 14 L. ed. 964—Bushnell v. Kennedy, 9 Wall. 390, 19 L. ed. 738—Hornthall v. The Collector (Hornthall v. Keary) 9 Wall. 565, 19 L. ed. 562—Morgan v. Gay, 19 Wall. 83, 22 L. ed. 100—Corbin v. Black Hawk County, 105 U. S. 666, 26 L. ed. 1139—Continental L. Ins. Co. v. Rhoads, 119 U. S. 239, 30 L. ed. 380, 7 Sup. Ct. Rep. 193—Parker v. Ormsby, 141 U. S. 85, 35 L. ed. 656, 11 Sup. Ct. Rep. 812—Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 447, 38 L. ed. 770, 12 Sup. Ct. Rep. 935—Holmes v. Goldsmith, 147 U. S. 157, 37 L. ed. 121, 13 Sup. Ct. Rep. 288—Giles v. Harris, 189 U. S. 501, 47 L. ed. 918, 23 Sup. Ct. Rep. 639—Stevenson v. Fain, 195 U. S. 167, 49 L. ed. 143, 25 Sup. Ct. Rep. 6—Bank of Cumberland v. Willis, 3 Sumn. 373, Fed. Cas. No. 885—Brown v. Noyes, 2 Woodb. & M. 79, Fed. Cas. No. 2,023—The Fiddellter v. United States, 1 Sawy. 156, 1 Abb. (U. S.) 579, Fed. Cas. No. 4,755—Ex parte Law, 35 Ga. 289, Fed. Cas. No. 8,126—Ludington v. Nucleus, The, Fed. Cas. No. 8,598—Re McDonald, 9 Am. L. Reg. 664, Fed. Cas. No. 8,751—Varner v. West, 1 Woods, 495, Fed. Cas. No. 16,885—Adams v. Republic County, 23 Fed. 212—Jewett v. Bradford Sav. Bank & T. Co. 45 Fed. 802—United States Nat. Bank v. McNair, 58 Fed. 327—Re Cilley, 58 Fed. 978—Huntington v. Pinney, 126 Fed. 239—Yocum v. Parker, 66 C. C. A. 81, 130 Fed. 771—Utah-Nevada Co. v. De Lamar, 66 C. C. A. 187, 133 Fed. 121—United States ex rel. Maxwell v. Barrett, 135 Fed. 194—Commissioners Court v. Thompson, 18 Ala. 697—Ex parte Law, 35 Ga. 289—Kenney v. Greer, 13 Ill. 452, 54 Am. Dec. 439—Wright v. Marsh, 2 G. Greene, 103—Beebe v. Armstrong, 11 Mart. (La.) 441—Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 468—Reed v. Vaughn, 10 Mo. 448—Bierbower v. Miller, 30 Neb. 181, 47 N. W. 1—Frees v. Ford, 6 N. Y. 178—Gilbert v. York, 111 N. Y. 548, 19 N. E. 268—Lange v. Benedict, 48 How. Pr. 468—Dumfeld v. Smith, 3 Serg. & R. 599.

138. If a court act without authority, its judgments or sentences are nullities, and constitute no justification to persons concerned in executing them. *Elliott v. Peirsol*, 1 Pet. 328, 7: 164

Cited in Bell v. Ohio Life & T. Co. 1 Biss. 270, Fed. Cas. No. 1,260—*Sprague v. Litherberry*, 4 McLean, 445, Fed. Cas. No. 13,251—*United States v. Stowell*, 2 Curt. C. C. 156, Fed. Cas. No. 16,409—*Kyle v. Evans*, 3 Ala. 483, 37 Am. Dec. 705—*Bowler v. Eldredge*, 18 Conn. 13—*Cheever v. Wilson*, 6 D. C. 165—*Lowry v. Erwin*, 6 Rob. (La.) 205, 39 Am. Dec. 556—*Campbell v. Webb*, 11 Md. 482—*Clark v. Holmes*, 1 Dougl. (Mich.) 394—*Putnam v. Man*, 3 Wend. 205, 20 Am. Dec. 686—*Savacool v. Boughton*, 5 Wend. 179, 21 Am. Dec. 181—*Hoose v. Sherrill*, 16 Wend. 47—*People ex rel. Tweed v. Liscomb*, 60 N. Y. 568, 19 Am. Rep. 211.

139. Failure of the pleadings to show the jurisdiction of the circuit court does not render a judgment void. *Skilern v. May*, 6 Cranch, 267, 3: 220
Distinguished in Kingsbury v. Buckner, 134 U. S. 675, 33 L. ed. 1057, 10 Sup. Ct. Rep. 638.

Cited in McCormick v. Sullivan, 10 Wheat. 199, 6 L. ed. 302—*Ex parte Watkins*, 3 Pet. 206, 7 L. ed. 654—*McNutt v. Bland*, 2 How. 22, 11 L. ed. 164—*Washington Bridge Co.*

v. Stewart, 3 How. 425, 11 L. ed. 661—*Bank of United States v. Moss*, 6 How. 39, 12 L. ed. 335—*Kennedy v. Bank of State of Georgia*, 8 How. 611, 12 L. ed. 1219—*Noonan v. Bradley*, 12 Wall. 120, 20 L. ed. 281—*Etna F. Ins. Co. v. Boon*, 95 U. S. 143, 24 L. ed. 403—*Williams v. Bruffy*, 102 U. S. 255, 26 L. ed. 137—*Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 557, 31 L. ed. 204, 8 Sup. Ct. Rep. 217—*Gaines v. Rugg* (*Gaines v. Caldwell*) 148 U. S. 241, 37 L. ed. 436, 13 Sup. Ct. Rep. 611—*Dowell v. Applegate*, 152 U. S. 338, 38 L. ed. 467, 14 Sup. Ct. Rep. 611—*Evers v. Watson*, 156 U. S. 533, 39 L. ed. 522, 15 Sup. Ct. Rep. 430—*Brown v. Noyes*, 2 Woodb. & M. 80, Fed. Cas. No. 2,023—*Fisher v. Rutherford*, Baldwin, 193, Fed. Cas. No. 4,823—*Galpin v. Page*, 1 Sawy. 340, Fed. Cas. No. 5,205—*Nesmith v. Calvert*, 1 Woodb. & M. 38, Fed. Cas. No. 10,123—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 392, 9 Fed. 237—*Moore v. Edgefield*, 32 Fed. 501—*Re Eaton*, 51 Fed. 804—*Billings v. Aspen Min. & Smelting Co.* 53 Fed. 561—*Thatcher v. Gottlieb*, 8 C. C. A. 336, 19 U. S. App. 469, 59 Fed. 873—*Foltz v. St. Louis & S. F. R. Co.* 8 C. C. A. 637, 19 U. S. App. 576, 60 Fed. 318—*Ex parte Lennon*, 12 C. C. A. 137, 22 U. S. App. 561, 64 Fed. 322—*Lake County v. Platt*, 25 C. C. A. 90, 49 U. S. App. 216, 70 Fed. 571—*Dexter, H. & Co. v. Sayward*, 84 Fed. 302—*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 178—*Re Columbia Real Estate Co.* 3 N. B. N. Rep. 162, 101 Fed. 970—*Johnson v. Hunter*, 127 Fed. 227—*Pearce v. Winter Iron Works*, 32 Ala. 72—*Borden v. State*, 11 Ark. 539, 54 Am. Dec. 217—*Davidson v. Dallas*, 15 Cal. 83—*Bloxham v. Florida C. & P. R. Co.* 39 Fla. 288, 22 So. 697—*Semple v. Anderson*, 9 Ill. 562—*Kenney v. Greer*, 13 Ill. 444, 54 Am. Dec. 439—*Wright v. Marsh*, 2 G. Greene, 114—*Jameson v. Moseley*, 4 T. B. Mon. 415—*Ward v. Cozens*, 3 Mich. 258—*Wertz v. Wertz*, 11 Mo. App. 36—*Davenport v. Kleinschmidt*, 8 Mont. 480, 20 Pac. 823—*Morse v. Presby*, 25 N. H. 302—*Milam County v. Robertson*, 47 Tex. 238—*Renick v. Ludington*, 20 W. Va. 537—*State v. Wau-pacca County Bank*, 20 Wis. 643.

140. Failure to make patentees from the United States of land within the limits of a Spanish land grant parties to a suit for the confirmation of such grant, as required by § 6 of the court of private land claims act, does not affect the validity of the decree of confirmation where the patents and the boundaries of the land patented are undisputed, as the only consequence of such omission in such a case is an acknowledgement of the title of such patentees to the land, and of its boundaries. *United States v. Martinez*, 184 U. S. 441, 22 Sup. Ct. Rep. 422, 48: 632

141. A judgment of the supreme court of Louisiana, rendered some days after the passage of the ordinance of secession of that state, is not, therefore, void. *White v. Cannon*, 6 Wall. 443, 18: 923
Cited in Parks v. Coffey, 52 Ala. 36—*Penny-wit v. Foote*, 27 Ohio St. 630, 22 Am. Rep. 340.

142. Judgments, as well as grants, obtained by fraud or collusion, are void and confer no vested title. *League v. De Young*, 11 How. 185, 13: 657
Cited in United States v. Steenerson, 1 C. C.

A. 558, 4 U. S. App. 332, 50 Fed. 508—*American Mortg. Co. v. Hopper*, 56 Fed. 69—*California Redwood Co. v. Little*, 79 Fed. 858—*Fahrney v. Kelly*, 102 Fed. 414.

143. Provisions in a judgment vesting title to land in the state on proceedings for escheat are distinct and severable from provisions for a sale and conversion into money after the title vests in the state, and may stand good though the latter provisions prove invalid. *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. Rep. 585, 40: 691

144. A decree in favor of a fictitious person is a mere nullity. *Sampeyreac v. United States*, 7 Pet. 222, 8: 665
Cited in *Ex parte Henshaw*, 73 Cal. 499, 15 Pac. 110.

145. A decree in foreclosure, in a suit begun after the plaintiff named therein was dead, is void. *Harter v. Twohig*, 158 U. S. 448, 15 Sup. Ct. Rep. 883, 39: 1049

146. A judgment against a married woman is void where the record does not disclose the fact that she has a separate estate and that it is liable for her debts. *Canal Bank v. Partee*, 99 U. S. 325, 25: 390
Cited in *Wilder v. Rio Grande County*, 41 Fed. 514—*Howard v. Huron*, 6 S. D. 191, 26 L.R.A. 502, 60 N. W. 803.

— Editorial note.

[Judgment against constitutional right as a nullity. 39 L.R.A. 449.]

Voidable.

See also *infra*, 24.

147. A judgment obtained by fraud is voidable, but not void. *Simms v. Slacum*, 3 Cranch. 300, 2: 446
Distinguished in *Lowe v. Blake*, 3 Desauss. Eq. 270.

Cited in *Noble v. Union River Logging R. Co.* 147 U. S. 174, 37 L. ed. 127, 13 Sup. Ct. Rep. 271—*Bank of United States v. Vorhees*, 1 McLean, 224, Fed. Cas. No. 939—*Derby v. Jacques*, 1 Cliff. 437, Fed. Cas. No. 3,817—*Farmers' Loan & T. Co. v. McKinney*, 6 McLean, 10, Fed. Cas. No. 4,667—*Pratt v. Northam*, 5 Mason, 103 Fed. Cas. No. 11,376—*Hancock Inspirator Co. v. Jenks*, 21 Fed. 914—*Jamison v. Beaubien*, 4 Ill. 115, 36 Am. Dec. 534—*Granger v. Clark*, 22 Me. 130—*Wilton Mfg. Co. v. Butler*, 34 Me. 441—*Gregg v. Bigham*, 1 Hill, L. 303, 26 Am. Dec. 181—*Hibler v. Hammond*, 2 Strobb. L. 107—*Turner v. Malone*, 24 S. C. 406—*Murchison v. White*, 54 Tex. 85—*Raymond v. Southerland*, 3 Vt. 506.

148-51. [A judgment entered in the Pennsylvania supreme court, since the act of 1786, as of the county of Bucks, is erroneous. *Kirkbride v. Durden* (H. Ct. Er. & Ap. Pa.) 1 Dall. 288, 1: 141]

2. Effect.

Effect Accorded to Judgment of Sister State, see *infra*, VI. b, 3.

Effect Given in State Court to Judgment of Federal Court, see *infra*, 1072-1075.

Effect of Suing for and Recovering Judgment on Part of Claim, see *Action or Suit*, 51-59.

In Confiscation Proceedings, see *Confiscation and Sequestration*, III. j.

Federal Decisions as Binding Rules of Decision in Federal Courts as to Effect of Federal Judgment, see *Courts*, 1710.

Judgment of Court-Martial, see *Courts-Martial*, II. c.

Former Acquittal or Conviction as Bar to Prosecution, see *Criminal Law*, II.

When Suit Terminates; Execution as Part thereof, see *Execution*, 3.

Judgment in Favor of Executor as Vesting Personal rather than Representative Right, see *Executor and Administrators*, 164.

Expiration and Renewal of Injunctional Order, see *Injunction*, 233, 234.

Effect of Erasure and Cancellation of Mortgage, see *Mortgage*, 247.

Decree in Partition, see *Partition*, 13, 14.

Effect of Pleading Former Judgment, see *Pleading*, 603.

Effect of Decree of Condemnation, see *Prize and Capture*, I. o.

Right to Remove Cause from State Court after Judgment, see *Removal of Causes*, 384.

See also *supra*, 130, 131.

152. A judgment recovered upon a debt is based upon a contract, and the judgment is a contract. *Walker v. Powers*, 104 U. S. 245, 26: 729
Cited in *Barber v. International Co.* 74 Conn. 656, 92 Am. St. Rep. 246, 51 Atl. 857.

153. A liability for a tort, when reduced to judgment by a recovery for the damages suffered, does not thereby become a debt by contract within the scope of a statute making trustees of a corporation liable for its debts. *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. Rep. 554, 28: 1038
Cited in *Wisconsin v. Pelican Ins. Co.* 127 U. S. 293, 32 L. ed. 244, 8 Sup. Ct. Rep. 1370—*State use of Faulkner County v. Bowen*, 9 Mackey, 297—*Gutta Percha & Rubber Mfg. Co. v. Houston*, 108 N. Y. 279, 2 Am. St. Rep. 412, 15 N. E. 402—*Livingston v. Livingston*, 173 N. Y. 388, 61 L.R.A. 805, 93 Am. St. Rep. 600, 66 N. E. 123.

154. The effect of a former judgment does not depend upon the correctness of the verdict or finding upon which it was rendered. *Milne v. Deen* (*Wilson v. Deen*) 121 U. S. 525, 17 Sup. Ct. Rep. 1004, 30: 980

155. Where a judgment is obtained against an insolvent, and an agreement accompanies the judgment that it shall be "subject to the legal operation of the insolvent laws" of the state, the sole effect of the agreement is to save to the party whatever rights he may claim from the legal operation of those laws. It does not admit their validity. *Boyle v. Zacharie*, 6 Pet. 635, 8: 527

Cited in *Heard v. Jones*, 37 Ga. 179—*Savoie v. Marsh*, 10 Met. 595, 43 Am. Dec. 451—*Brighton Market Bank v. Merick*, 11 Mich. 418—*Mount v. Bradford*, 2 Miles (Pa.) 20—*McCarty v. Gibson*, 5 Gratt. 324.

156. Although the defense which the

plaintiff relinquished by confessing judgment was held by a subsequent decision not sustainable, this decision would not annul the agreement. *Union Bank v. Geary*, 5 Pet. 99, 8: 60

157. [A judgment before a justice in Pennsylvania is sufficient to defeat the privilege of a freeholder. *Quesnel v. Mussi* (Pa. Sup. Ct.) 1 Dall. 436, 1: 212]

Editorial notes.

Estoppel by. 11: 1059

[Judgment entered against dead person. 49 L.R.A. 153.]

Certainty.

158. A decree, to be operative, must contain sufficient certainty in itself. It cannot be aided by presumption. *Watts v. Waddle*, 6 Pet. 389, 8: 437
Cited in *Douglass v. Reed*, 20 Ind. 204.

159. A sufficient description of mining property for which action is brought is furnished by a decree which, when taken in connection with the complaint, fully describes and furnishes ample means of identifying the property in controversy and to which the plaintiff was adjudged entitled. *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 16 Sup. Ct. Rep. 282, 40: 436

Sale.

160-1. A contract of sale at auction is avoided *in toto*, and not in part only, by a decree in a suit for rescission on the ground of by-bidding, which sets aside the sale on condition that the plaintiff allow any countervailing equities of the respondent,—i. e., to let the sale stand at what was fairly bid and to require only the residue of the consideration to be restored. *Veazie v. Williams*, 8 How. 134, 12: 1018
Cited in *Schneider v. Foote*, 23 Blatchf. 516, 27 Fed. 585.

Title.

See also *supra*, 140, 142, 143.

162. A decree of the supreme court of Ohio ordering a party to make a deed, and if he did not, the other party should take the land as if the same had been conveyed to him, clothes the party to whom the deed was ordered to be made with the legal title as amply as a deed. *Steele v. Spencer*, 1 Pet. 552, 7: 259

163. Under Neb. Code, § 429, a judgment rendered for a conveyance, in a state court, not complied with by the parties within the time limited, has the same operation and effect as if the conveyance had been executed pursuant thereto. *Langdon v. Sherwood*, 124 U. S. 74, 8 Sup. Ct. Rep. 429, 31: 344

164. The recovery of judgment by the owner against the wrongful taker of his property does not vest the title of the property in the defendant, but the satisfaction of the judgment produces that result. *Lovejoy v. Murray*, 3 Wall. 1, 18: 129
Cited in *Union P. R. Co. v. Schiff*, 78 Fed. 220—*Foerderer v. Tradesmen's Nat. Bank*, 46 C. C. A. 247, 107 Fed. 222—*Meyer Bros. Drug Co. v. Davis*, 68 Ark. 115, 56 S. W.

788—*Gilman v. Gilby Twp.* 8 N. D. 631, 73 Am. St. Rep. 791, 80 N. W. 889—*Ledbetter v. Embree*, 12 Ind. App. 619, 40 N. E. 928—*Singer Mfg. Co. v. Skillman*, 52 N. J. L. 264, 19 Atl. 260—*Goff v. Craven*, 34 Hun, 152—*Turner v. Brock*, 6 Helsk. 53—*Moore v. King*, 4 Tex. Civ. App. 402, 23 S. W. 484—*Peerce v. Kitzmiller*, 19 W. Va. 577.

3. Conclusiveness.

What Matters Concluded, see *infra*, III. j.
What Parties Concluded, see *infra*, III. k.
Conclusiveness of Foreign Judgment, see see *infra*, VI. b, 2.

Conclusiveness of Judgment of Sister State, see *infra*, VI. b, 2.

Conclusiveness of State Judgment in Federal Court, see *infra*, VII.

Conclusiveness of Federal Judgment in State Court, see *infra*, VIII.

Satisfaction of Judgment as Bar to other Action, see *infra*, 1091.

Federal Question as to, see Appeal and Error, III. d, 9, h. 21.

Conclusiveness on Appeal of Decision on Former Appeal, see Appeal and Error, IX. o, 2.

Conclusiveness of Appropriation Act as, see Appropriations, 5.

Conclusiveness of Award, see Arbitration, II.

Conclusiveness of Compromise, see Compromise and Settlement, 10-22.

Effect of Judgments as Precedents, see Courts, VII. b-e.

Of Judgment of Court-Martial, see Courts-Martial, II. c.

Judgment on Verdict under Erroneous Instructions, see Evidence, 1253.

Conclusiveness of Patent to Mining Claim on Persons Failing to Interpose Adverse Claims, see Mines, 159-161.

Effect of Proceedings to Determine Adverse Claims to Mines, see Mines, 162-166a.

Necessity of Pleading *Res Judicata*, see Pleading, 694, 695.

Conclusiveness of Decree of Condemnation, see Prize and Capture, 206.

Conclusiveness of Finding of Referee, see Reference, V. c.

Right of Court to Review Findings of Referee, see Reference, V. d.

Of Judgment Remanding Cause to State Court, see Removal of Causes, 470.

165. In order that a judgment or decree may be set up as a bar by plea, or relied on as evidence by way of estoppel, it must have been made by a court of competent jurisdiction upon the same subject-matter, between the same parties, for the same purpose. *Washington, A. & G. Steam Packet Co. v. Sickles*, 24 How. 333, 16: 650
Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18: 550
Aspden v. Nixon, 4 How. 467, 11: 1059
Cited in *Wilkes v. Dinaman*, 7 How. 123, 12 L. ed. 634—*Washington, A. & G. Steam Packet Co. v. Sickles*, 24 How. 342, 16 L. ed. 653—*Washington A. & G. Steam Packet Co. v. Sickles*, 5 Wall. 592, 18 L. ed. 554—*Aurora v. West*, 7 Wall. 102, 19 L. ed. 49

—Reynolds v. Stockton, 140 U. S. 270, 35 L. ed. 469, 11 Sup. Ct. Rep. 773—Carpenter v. Strange, 141 U. S. 105, 35 L. ed. 647, 11 Sup. Ct. Rep. 960—Last Chance Min. Co. v. Tyler Min. Co. 137 U. S. 687, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—New Orleans v. Citizens' Bank, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—Southern P. R. Co. v. United States, 168 U. S. 49, 42 L. ed. 377, 18 Sup. Ct. Rep. 18—Mitchell v. First Nat. Bank, 180 U. S. 481, 45 L. ed. 632, 21 Sup. Ct. Rep. 418—Shrewsbury v. United States, 9 Ct. Cl. 266—Hay v. Alexandria & W. R. Co. 4 Hughes, 361—Allen v. Blunt, 2 Woodb. & M. 133, Fed. Cas. No. 217—Burnham v. Webster, 1 Woodb. & M. 176, Fed. Cas. No. 2,179—Polger v. The Robert G. Shaw, 2 Woodb. & M. 533, Fed. Cas. No. 4,899—Hanford v. Westcott, 16 Off. Gaz. 1182, Fed. Cas. No. 6,022—Parkhurst v. Kinsman, 3 Woodb. & M. 176, Fed. Cas. No. 10,761—Fife v. Bohlen, 22 Fed. 882—Ehmannson v. Best, 6 C. C. A. 473, 18 U. S. App. 288, 57 Fed. 534—Clay v. Deskins, 11 C. C. A. 231, 8 U. S. App. 661, 63 Fed. 832—Empire State Nail Co. v. American Solid Leather Button Co. 71 Fed. 590—Lawrence v. Stearns, 79 Fed. 882—Norton v. House of Mercy, 41 C. C. A. 400, 101 Fed. 386—Georgia R. & Bkg. Co. v. Wright, 132 Fed. 917—Union P. R. Co. v. Kelley, 4 Colo. App. 330, 35 Pac. 923—District of Columbia v. Hutchinson, 1 App. D. C. 408—Strong v. Grant, 2 Mackey, 222—Keefe v. Malone, 3 MacArth. 243—Cummings v. Baker, 16 App. D. C. 16—Evans v. Birge, 11 Ga. 272—Chicago Theological Seminary v. People, 189 Ill. 444, 59 N. E. 977—Davis v. Hamilton, 53 Ill. App. 105—McDowell v. Gibson, 58 Kan. 609, 50 Pac. 870—Gatewood v. Long, 106 Ky. 724, 51 S. W. 569—Bond v. Markstrum, 102 Mich. 17, 60 N. W. 282—Putnam v. Clark, 34 N. J. Eq. 535—Territory ex rel. Jones v. Hopkins, 9 Okla. 150, 59 Pac. 976—Philadelphia v. Ridge Ave. Pass. R. Co. 142 Pa. 494, 24 Am. St. Rep. 512, 21 Atl. 982—Hart v. Bates, 17 S. C. 43—Ex parte Roberts, 19 S. C. 158—Ruff v. Doty, 26 S. C. 177, 4 Am. St. Rep. 709, 1 S. E. 707—Bledsoe v. White, 42 Tex. 136—Wilkes v. Davies, 8 Wash. 120, 23 L.R.A. 106, 35 Pac. 611—Coville v. Gilman, 13 W. Va. 328—Beckwith v. Thompson, 18 W. Va. 120, 122.

166. In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. Hughes v. United States, 4 Wall. 232,

18: 303

167. The judgment of a court of law, or a decree of a court of equity, directly upon the same point and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit. Thompson v. Roberts, 24 How. 233, 16: 648 Cited in Tloga R. Co. v. Blossburg & C. R. Co. 20 Wall. 144, 22 L. ed. 335—Southern P. R. Co. v. United States, 168 U. S. 49, 42 L. ed. 377, 18 Sup. Ct. Rep. 18—Mitchell v. First Nat. Bank, 180 U. S. 481, 45 L. ed. 632, 21 Sup. Ct. Rep. 418—Spicer v. United States, 5 Ct. Cl. 52—Burwell v. United States, 22 Ct. Cl. 97—Woodland v. Newhall, 31 Fed. 437—Newton Mfg. Co. v. Wilgus, 90 Fed. 488—Norton v. House of Mercy, 41 C. C. A. 400, 101 Fed. 386—Kilham v. Wilson, 50 C. C. A. 463, 112 Fed. 573—Garton

v. Botts, 73 Mo. 276—Territory ex rel. Jones v. Hopkins, 9 Okla. 150, 59 Pac. 976—Western Min. & Mfg. Co. v. Virginia Cannel Coal Co. 10 W. Va. 285.

168. Where subject-matter, cause of action, and parties are the same as in a former suit, the judgment therein constitutes a bar to the suit. Lyon v. Perin & G. Mfg. Co. 125 U. S. 698, 8 Sup. Ct. Rep. 1024,

31: 839

Cited in Lawrence v. Nelson, 143 U. S. 223, 36 L. ed. 134, 12 Sup. Ct. Rep. 440—Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co. 65 Fed. 425.

169. An objection that the parties were not the same cannot be sustained, where both the parties were parties in the former suit, and the subject-matter was the same, and the defense here set up was the same which the pleadings and the evidence show to have been adjudicated in the former suit. Thompson v. Roberts, 24 How. 233, 16: 648

170. In an action on a note given for goods, etc., brought against the maker jointly with another, alleged to have been a secret partner, a prior unsatisfied judgment against the maker only is not a bar. Sheehy v. Mandeville, 6 Cranch, 253,

3: 215

Denied in Mason v. Eldred, 6 Wall. 236, 18 L. ed. 784.

Disapproved in Stearns v. Aguirre, 6 Cal. 130.

Distinguished in Woodworth v. Spaffords, 2 McLean, 173, Fed. Cas. No. 18,020—Whitbeck v. Van Ness, 11 Johns. 413.

Cited in Van Ness v. Forrest, 8 Cranch, 35, 3 L. ed. 479—United States v. Price, 3 How. 93, 13 L. ed. 60—Lawrence v. Vernon, 3 Sumn. 25, Fed. Cas. No. 8,146—Murray v. Lovejoy, 2 Cliff. 199, Fed. Cas. No. 3,963—Sedam v. Williams, 4 McLean, 52, Fed. Cas. No. 12,609—Swett v. Black, 1 Sprague, 583, Fed. Cas. No. 13,690—Trafton v. United States, 3 Story, 649, Fed. Cas. No. 14,135—United States v. Ames, Fed. Cas. No. 14,440—Hutchinson v. Brown, 8 Mackey, 151—United States v. Cushman, 2 Sumn. 313, Fed. Cas. No. 14,907—United States v. Cushman, 2 Sumn. 438, Fed. Cas. No. 14,908—Sheldon v. Kilbe, 3 Conn. 220, 8 Am. Dec. 176—Palmer v. Gallup, 16 Conn. 566—Ferrall v. Bradford, 2 Fla. 515, 50 Am. Dec. 293—Griffin v. Orman, 9 Fla. 52—Wann v. McNulty, 7 Ill. 358, 43 Am. Dec. 58—Taylor v. Claypool, 5 Blackf. 558—Crosby v. Jeroloman, 37 Ind. 274—Sherman v. Christy, 17 Iowa, 326—Sneed v. Wlester, 2 A. K. Marsh. 286—Scott v. Colmesnil, 7 J. J. Marsh. 419—Dennett v. Chick, 2 Me. 193—Dodge v. Minnesota Plastic Slate Roofing, 16 Minn. 370, Gil. 327—Tootle v. Otis, 1 Neb. (Unof.) 362, 95 N. W. 681—Farmer v. Stewart, 2 N. H. 99—Townsend v. Riddle, 2 N. H. 450—Pierce v. Kearney, 5 Hill, 94—Benson v. Paine, 17 How. Pr. 411—Waggoner v. Walrath, 24 Hun, 445—Robertson v. Smith, 18 Johns. 482—Sloo v. Lea, 18 Ohio, 306—Tyson v. Pollock, 1 Penr. & W. 381, 24 Am. Dec. 320—Smith v. Black, 9 Serg. & R. 143, 11 Am. Dec. 686—Collins v. Lemasters, 1 Ball. I. 352, 21 Am. Dec. 469—Collins v. Lemasters, 1 Ball. L. 353, 21 Am. Dec. 469—The Treasurers v. Bates, 2 Ball. L. 382—Union Bank v. Hodges, 11 Rich. L. 483—Union Bank v. Hodges, 11 Rich. L. 726—Isbell v. Johnson, 13 Gratt. 650—How v. Kane, 2 Chand. (Wis.) 246, 54 Am. Dec. 152—How v. Kane, 2 Pinney (Wis.) 551, 54 Am. Dec. 152—Oleson v. Merrihew, 45 Wis. 401.

171. A judgment of acquittal in a criminal prosecution for a violation of the internal revenue laws is conclusive in favor of the defendant as claimant of the property involved in a subsequent suit *in rem*, when, as against him, the existence of the same act or fact involved in the criminal prosecution is in issue as a cause for the forfeiture of the said property. *Coffey v. United States*, 116 U. S. 436, 29: 684
Cited in Boyd v. United States, 110 U. S. 634, 29 L. ed. 752, 6 Sup. Ct. Rep. 524—*United States v. Zucker*, 161 U. S. 478, 40 L. ed. 779, 16 Sup. Ct. Rep. 641—*Stone v. United States*, 167 U. S. 184, 42 L. ed. 130, 17 Sup. Ct. Rep. 778—Iowa v. Chicago, B. & Q. R. Co. 3 L.R.A. 557, 37 Fed. 497—*United States v. Butler*, 38 Fed. 499—*Texas v. Day Land & Cattle Co.* 41 Fed. 220—*United States v. One Distillery*, 43 Fed. 852—*United States v. Three Copper Still*s, 47 Fed. 497—*United States v. Shapleigh*, 4 C. C. A. 244, 12 U. S. App. 26, 54 Fed. 132—*United States v. Olsen*, 57 Fed. 582—*Stone v. United States*, 12 C. C. A. 454, 29 U. S. App. 34, 64 Fed. 671—*United States v. Jardicke*, 73 Fed. 103—*The Good Templar*, 97 Fed. 653—*Burt v. Union Cent. L. Ins. Co.* 59 L.R.A. 396, 44 C. C. A. 551, 105 Fed. 422—*People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 255, 66 N. E. 349—*State v. Caywood*, 96 Iowa, 373, 65 N. W. 385—*State ex rel. Remley v. Meek*, 112 Iowa, 347, 51 L.R.A. 418, 84 Am. St. Rep. 342, 84 N. W. 3—*Cooper v. Com.* 106 Ky. 911, 45 L.R.A. 217, 90 Am. St. Rep. 275, 51 S. W. 789—*Rollins v. Breed*, 54 Hun, 488, 8 N. Y. Supp. 48—*People v. Plat*, 19 Misc. 133, 43 N. Y. Supp. 231—*Com. ex rel. Kirkpatrick v. Western U. Teleg. Co.* 1 Dauphin Co. Rep. 149—*State v. Adams*, 72 Vt. 255, 82 Am. St. Rep. 937, 47 Atl. 779.

172. An acquittal of a defendant on an indictment for cutting or removing timber from lands of the United States is not a defense to an action against him by the United States for conversion of the timber. *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. Rep. 778, 42: 127
Cited in Teller v. United States, 51 C. C. A. 235, 113 Fed. 278—*United States v. A Lot of Precious Stones & Jewelry*, 68 C. C. A. 3, 134 Fed. 63—*United States v. Seattle Brewing & Malting Co.* 135 Fed. 598—*Perry v. Sweeny*, 11 App. D. C. 416—*People v. Snyder*, 90 App. Div. 426, 86 N. Y. Supp. 415.

173. A decree denying to creditors a right to reach a vested remainder of their debtor's, rendered during the life of the life tenant, is not the less *res judicata* after the life tenant's death. *Nichol v. Levy*, 5 Wall. 433, 18: 596

174. An *ex parte* order admitting a deed to record does not preclude the examination in another tribunal of the sufficiency of the testimony on which it was made, where the recording act requires the deed to be acknowledged by the vendor or proved by one or more witnesses upon oath. *Blackwell v. Patton*, 7 Cranch, 471, 3: 408

175. The decision of a motion or summary application is not to be regarded in the light of *res judicata*, or as so far conclusive upon the parties as to prevent their

drawing the same matters in question again in the more regular form of an action. *Denny v. Bennett*, 128 U. S. 489, 9 Sup. Ct. Rep. 134, 32: 491

176. A prior judgment cannot be used as *res judicata* without pleading or proof. *United States v. Bliss*, 172 U. S. 321, 19 Sup. Ct. Rep. 216, 43: 463
Cited in Union & Planters' Bank v. Memphis, 49 C. C. A. 464, 111 Fed. 570.

177. A judgment may be complete and perfect, and have full effect independent of the right to issue execution thereon. *Mills v. Duryee*, 7 Cranch, 481, 3: 411
Cited in Tillou v. United States, 1 Ct. Cl. 230—*Dillingham v. Hawk*, 23 L.R.A. 520, 9 C. C. A. 104, 23 U. S. App. 273, 60 Fed. 498—*New York Security & T. Co. v. Equitable Mortg. Co.* 71 Fed. 580.

Editorial notes.

Conclusiveness generally. 11:75;
 38: 429; 42: 355

Appeal or reversal.

Conclusiveness of Judgment until Reversed, see Appeal and Error, 816.

Effect of Withdrawal of Certain Issues and Appeal as to Others, see Injunction, 243.

See also *infra*, 376, 397, 422, 571, 590, 652, 672, 1042.

178. The courts of the United States are courts of limited, but not of inferior, jurisdiction, and their judgments are conclusive between the parties until reversed, although the jurisdiction does not appear upon the record. *Kennedy v. Bank of Georgia*, 8 How. 586, 12: 1209
Cited in Evers v. Watson, 156 U. S. 533, 39 L. ed. 523, 15 Sup. Ct. Rep. 430—*Ex parte Law*, 35 Ga. 289, Fed. Cas. No. 8,120—*Oologardt v. The Anna*, 9 Am. L. Reg. N. S. 481, Fed. Cas. No. 10,545—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 392, 9 Fed. 237—*United States v. Shaw*, 8 L.R.A. 232, 39 Fed. 433—*Pullman's Palace Car Co. v. Washburn*, 66 Fed. 794—*Re Columbia Real-Estate Co.* 3 N. B. N. Rep. 162, 101 Fed. 970—*Busteed v. Parsons*, 54 Ala. 401, 25 Am. Rep. 688—*Ex parte Law*, 35 Ga. 289—*Ward v. Cozzens*, 3 Mich. 258—*Johnson v. Beazley*, 65 Mo. 260, 27 Am. Rep. 276—*State ex rel. Wilson v. Rainey*, 74 Mo. 234—*Smith v. Montoya*, 3 N. M. 20, 1 Pac. 175.

179. Where a suit was removed to a Federal court and all the parties appeared without objection, the decree of the Supreme Court on appeal is not void for want of jurisdiction, because it appears on the face of the record that some of the defendants, not joining in the petition for removal, were citizens of the same state with plaintiff; but, until judicially annulled, vacated, or set aside, it is binding on the parties, and bars a subsequent action for the same cause. *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 8 Sup. Ct. Rep. 217, 31: 202

Cited in Re Sawyer, 124 U. S. 221, 31 L. ed. 409, 8 Sup. Ct. Rep. 482—*Kingsbury v. Buckner*, 134 U. S. 675, 3 L. ed. 1057, 10 Sup. Ct. Rep. 638—*Re Cooper*, 143 U. S. 506, 36 L. ed. 248, 12 Sup. Ct. Rep. 453—*Noble*

- v. Union River Logging R. Co. 147 U. S. 174, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—Dowell v. Appelgate, 152 U. S. 339, 38 L. ed. 468, 14 Sup. Ct. Rep. 611—Evers v. Watson, 156 U. S. 533, 39 L. ed. 523, 15 Sup. Ct. Rep. 430—F. G. Oxley Stave Co. v. Butler County, 166 U. S. 660, 41 L. ed. 1153, 17 Sup. Ct. Rep. 709—Re Eaton, 51 Fed. 804—Skirving v. National L. Ins. Co. 8 C. C. A. 244, 19 U. S. App. 442, 59 Fed. 745—Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 637, 19 U. S. App. 576, 60 Fed. 318—Pullman's Palace Car Co. v. Washburn, 66 Fed. 794—Lake County v. Platt, 25 C. C. A. 90, 49 U. S. App. 216, 79 Fed. 571—Dexter, H. & Co. v. Sayward, 84 Fed. 302—Woods v. Woodson, 40 C. C. A. 528, 100 Fed. 519—Re Ives, 111 Fed. 497—Wonderly v. Lafayette County, 150 Mo. 646, 45 L.R.A. 389, 73 Am. St. Rep. 474, 51 S. W. 745—Tzschuck v. Mead, 47 Neb. 267, 66 N. W. 428—Sherman v. Hanno, 66 N. H. 166, 28 Atl. 18.
180. If the jurisdiction be not alleged in the proceedings, the judgments and decrees of the courts of the United States may be reversed for that cause, on a writ of error or appeal; but, until reversed, they are conclusive evidence between parties and privies. *Re Watkins*, 3 Pet. 193, 7: 650. *McCormick v. Sullivan*, 10 Wheat. 192, 6: 300.
- Distinguished in Kingsbury v. Buckner*, 184 U. S. 675, 38 L. ed. 1057, 10 Sup. Ct. Rep. 638.
- Cited in McNutt v. Bland*, 2 How. 22, 11 L. ed. 164—Bank of United States v. Moss, 6 How. 40, 12 L. ed. 335—Kennedy v. Bank of Georgia, 8 How. 611, 12 L. ed. 1219—Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 557, 31 L. ed. 204, 8 Sup. Ct. Rep. 217—*Re Cuddy*, 131 U. S. 284, 33 L. ed. 156, 9 Sup. Ct. Rep. 703—*Re Cooper*, 143 U. S. 506, 36 L. ed. 243, 12 Sup. Ct. Rep. 453—Dowell v. Appelgate, 152 U. S. 339, 38 L. ed. 467, 14 Sup. Ct. Rep. 611—*Re Lennon*, 166 U. S. 553, 41 L. ed. 1112, 17 Sup. Ct. Rep. 658—Brown v. Noyes, 2 Woodb. & M. 80, Fed. Cas. No. 2,023—Farmers' Loan & T. Co. v. McKinney, 6 McLean, 10, Fed. Cas. No. 4,667—The Fidelity v. United States, 1 Sawy. 156, 1 Abb. (U. S.) 579, Fed. Cas. No. 4,755—*Re McDonald*, 9 Am. L. Reg. 685, Fed. Cas. No. 8,751—Speigle v. Meredith, 4 Biss. 127, Fed. Cas. No. 13,227—United States v. Ames, 1 Woodb. & M. 80, Fed. Cas. No. 14,441—United States v. Ta-wan-ga-ca, Hempst. 305, Fed. Cas. No. 16,435—Warner v. Brinton, Fed. Cas. No. 17,179—Holmes v. Oregon & C. R. Co. 7 Sawy. 392, 9 Fed. 237—United States v. Shaw, 3 L.R.A. 232, 39 Fed. 433—*Re Eaton*, 51 Fed. 805—Reinach v. Atlantic & G. W. R. Co. 58 Fed. 43—Skirving v. National L. Ins. Co. 8 C. C. A. 244, 19 U. S. App. 442, 59 Fed. 745—Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 637, 19 U. S. App. 576, 60 Fed. 318—*Ex parte Lennon*, 12 C. C. A. 137, 22 U. S. App. 561, 64 Fed. 322—Lake County v. Platt, 25 C. C. A. 90, 49 U. S. App. 216, 79 Fed. 571—Dexter, H. & Co. v. Sayward, 84 Fed. 303—*Re Columbia Real-Estate Co.* 3 N. B. N. Rep. 162, 101 Fed. 970—*Re Ives*, 111 Fed. 497—Ridge v. Manker, 67 C. C. A. 599, 132 Fed. 602—Wyman v. Campbell, 6 Port. (Ala.) 244, 31 Am. Dec. 677—Busted v. Parsons, 54 Ala. 401, 25 Am. Rep. 688—Goodman v. Winter, 64 Ala. 426, 38 Am. Rep. 13—*Ex parte Gibson*, 31 Cal. 627, 91 Am. Dec. 546—Richmond & D. R. Co. v. Gorman, 7 App. D. C. 107—Kenney v. Greer, 13 Ill. 452, 54 Am. Dec. 439—Haywood v. Collins, 60 Ill. 342—Wright v. Marsh, 2 G. Greene, 103—Vincent v. Davidson, 1 Kan. App. 612, 42 Pac. 390—Ward v. Coxzens, 3 Mich. 258—Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 468—Jim v. State, 3 Mo. 163—Johnson v. Beazley, 65 Mo. 260, 27 Am. Rep. 276—State ex rel. Wilson v. Rainey, 74 Mo. 234—Wertz v. Wertz, 11 Mo. App. 35—Sherman v. Hanno, 66 N. H. 166, 28 Atl. 18—Russell v. Work, 35 N. J. L. 320—Beandrias v. Hogan, 23 App. Div. 85, 48 N. Y. Supp. 468—Bumstead v. Read, 31 Barb. 670—Ruckman v. Cowell, 1 N. Y. 507—Chemung Canal Bank v. Judson, 8 N. Y. 261—Adams v. Jeffries, 12 Ohio, 271, 40 Am. Dec. 477—Sheldon v. Newton, 8 Ohio St. 500—Thompson v. Lyle, 3 Watts & S. 168—Williamson's Case, 26 Pa. 23, 67 Am. Dec. 374—Ferguson v. Tobey, 1 Wash. Terr. 277—Re Booth, 3 Wis. 180.
181. Where a court has jurisdiction, its judgment, until reversed, is binding on every other court. *Thompson v. Tolmie*, 2 Pet. 157, 7: 381.
- Cited in Voorhees v. Jackson*, 10 Pet. 477, 9 L. ed. 501—Beauregard v. New Orleans, 18 How. 503, 15 L. ed. 472—United States v. California & O. Land Co. 148 U. S. 44, 37 L. ed. 360, 13 Sup. Ct. Rep. 458—Manson v. Duncanson, 166 U. S. 547, 41 L. ed. 1110, 17 Sup. Ct. Rep. 647—Sprague v. Litherberry, 4 McLean, 452, Fed. Cas. No. 13,251—Starr v. Stark, 2 Sawy. 621, Fed. Cas. No. 13,317—Sumner v. Moore, 2 McLean, 64, Fed. Cas. No. 13,610—Tompkins v. Tompkins, 1 Story. 553, Fed. Cas. No. 14,091—Walker v. Sturbans, 38 Fed. 300—Bonbright v. Schoettler, 64 C. C. A. 216, 127 Fed. 324—Evans v. Percifull, 5 Ark. 429—Borden v. State, 11 Ark. 548, 54 Am. Dec. 217—George v. Norris, 23 Ark. 129—Corrigan v. Jones, 14 Colo. 314, 23 Pac. 913—Ponder v. Moseley, 2 Fla. 267, 48 Am. Dec. 194—Tucker v. Harris, 13 Ga. 14, 58 Am. Dec. 458—Buckmaster v. Carlin, 4 Ill. 108—Lalanne v. Moreau, 13 La. 437—Orr v. Thomas, 3 La. Ann. 584—Sallsbury Permanent Bldg. & L. Asso. v. Wilcomico County, 86 Md. 622, 39 Atl. 425—Kittredge v. Emerson, 15 N. H. 263—Schnader v. Bender, 19 Lanc. L. Rev. 198—Williams v. Saunders, 5 Coldw. 78—Sutherland v. De Leon, 1 Tex. 310, 46 Am. Dec. 100—Burdett v. Slisbee, 15 Tex. 619—Lancaster v. Wilson, 27 Gratt. 630.
182. Where a court has jurisdiction it has a right to decide every question in the cause, and its judgment, until reversed, is binding on every other court. *Elliott v. Peirsol*, 1 Pet. 328, 7: 164.
- Cited in Thompson v. Tolmie*, 2 Pet. 168, 7 L. ed. 385—Voorhees v. Jackson, 10 Pet. 478, 9 L. ed. 501—Holmes v. Jennison, 14 Pet. 627, 10 L. ed. 627—Grignon v. Astor, 2 How. 343, 11 L. ed. 293—Beauregard v. New Orleans, 18 How. 503, 15 L. ed. 472—*Re Sawyer*, 124 U. S. 220, 31 L. ed. 409, 8 Sup. Ct. Rep. 482—Nixon v. United States, 18 Ct. Cl. 455—Amory v. Amory, 3 Biss. 271, Fed. Cas. No. 334—Bank of United States v. Voorhees, 1 McLean, 224, Fed. Cas. No. 939—Bell v. Ohio Life & T. Co. 1 Biss. 270, Fed. Cas. No. 1,260—Derby v. Jacques, 1 Cliff. 437, Fed. Cas. No. 3,817—Otis v. The Rio Grande, 1 Woods, 281, Fed. Cas. No. 10,613—Tompkins v. Tompkins, 1 Story, 553, Fed. Cas. No. 14,091—United States v. Stowell, 2 Curt. C. C. 156, Fed. Cas. No. 16,409—Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 119, 10 Fed. 706—The Monte A., 12 Fed. 336—Beattie v. Wilkinson, 36 Fed. 650—

Swift v. Meyers, 37 Fed. 43—Elder v. Richmond Gold & Silver Mfn. Co. 7 C. C. A. 357, 19 U. S. App. 118, 58 Fed. 539—United States v. Debs. 5 Inters. Com. Rep. 188, 64 Fed. 739—Phelps v. Mutual Reserve Fund Life Assn. 61 L.R.A. 725, 50 C. C. A. 340, 112 Fed. 463—Wyman v. Campbell, 6 Port. (Ala.) 241, 31 Am. Dec. 677—Lucas v. Bank of Darlen, 2 Stew. (Ala.) 310—Evans v. Percifull, 5 Ark. 429—Re Warfield, 22 Cal. 63, 83 Am. Dec. 49—Holcomb v. Phelps, 16 Conn. 131—United States ex rel. Scott v. Burdick, 1 Dak. 147, 46 N. W. 571—Green v. Saulsbury, 6 Del. Ch. 398, Appx. 33 Atl. 623—Fraser v. Willey, 2 Fla. 120—Ponder v. Moseley, 2 Fla. 267, 48 Am. Dec. 194—Re Executive Communication, 14 Fla. 306—Price v. Winter, 15 Fla. 106—McGehee v. Wilkins, 31 Fla. 86, 12 So. 228—Stell v. Glass, 1 Ga. 486—Rodgers v. Evans, 8 Ga. 145, 52 Am. Dec. 390—McConnell v. Wilcox, 2 Ill. 381—Buckmaster v. Carlin, 4 Ill. 108—Swiggart v. Harber, 5 Ill. 371, 39 Am. Dec. 418—McGhee v. Wright, 16 Ill. 558—Bermudez Asphalt Paving Co. v. Gibson, 106 Ill. App. 7—Clay County v. Markle, 46 Ind. 110—Greenup v. Crooks, 50 Ind. 420—Cooper v. Sunderland, 3 Iowa, 134, 66 Am. Dec. 52—Hampson v. Weare, 4 Iowa, 16, 66 Am. Dec. 116—Pursley v. Hayes, 22 Iowa, 34, 92 Am. Dec. 350—Muncaster v. Bland, 11 La. Ann. 508—Turley v. Dreyfus, 33 La. Ann. 888—Cockey v. Cole, 28 Md. 284, 92 Am. Dec. 684—Greenvault v. Farmers' & M. Bank, 2 Dougl. (Mich.) 507—Re Wrisley, 126 Mich. 112, 85 N. W. 456—Stephenson v. Smith, 7 Mo. 638—Vantilburg v. Black, 3 Mont. 468—Kittredge v. Emerson, 15 N. H. 262—Hollister v. Abbott, 31 N. H. 448, 64 Am. Dec. 342—People ex rel. Tweed v. Liscomb, 3 Hun. 773—Risley v. Phenix Bank, 83 N. Y. 337, 38 Am. Rep. 421—Love v. Love, 10 Phila. 455, 30 Phila. Leg. Int. 86—Guthrie v. Lowry, 34 Phila. Leg. Int. 320—Schnader v. Bender, 19 Lanc. L. Rev. 197—Mottet v. Welty, 12 Pa. Co. Ct. 83, 2 Pa. Dist. R. 39—Miltimore v. Miltimore, 40 Pa. 155—Guthrie v. Lowry, 84 Pa. 537—Ex parte Bond, 9 S. C. N. S. 81, 30 Am. Rep. 20—Williams v. Saunders, 5 Coldw. 78—Yates v. Houston, 3 Tex. 447—Burdett v. Silsbee, 15 Tex. 618—Lancaster v. Wilson, 27 Gratt. 630.

183. When a court has jurisdiction, it has a right to decide every question that arises in the cause; and, whether the decision be correct or not, its judgment, until reversed, is regarded as binding. Voorhees v. Jackson ex dem. Bank of United States, 10 Pet. 449, 9: 490
Nations v. Johnson, 24 How. 195, 16: 628
Re Sawyer, 124 U. S. 200, 8 Sup. Ct. Rep. 482, 31: 402
Cited in Christmas v. Russell, 5 Wall. 302, 18 L. ed. 478—Michaels v. Post, 21 Wall. 428, 22 L. ed. 528, 12 Nat. Bankr. Reg. 168—New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 661, 23 L. ed. 339, 13 Nat. Bankr. Reg. 390—Noble v. Union River Logging R. Co. 147 U. S. 174, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—King v. United States, 27 Ct. Cl. 533—Delaware R. Co. v. Prettyman, Fed. Cas. No. 3,767—Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 120, 10 Fed. 706—Skirving v. National L. Ins. Co. 8 C. C. A. 244, 19 U. S. App. 442, 59 Fed. 745—Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 637, 19 U. S. App. 576, 60 Fed. 318—Ryan v. Staples, 23 C. C. A. 546, 40 U. S. App. 427, 76 Fed. 726—Lake County v. Platt, 25 C. C. A. 90, 49 U. S. App. 216, 79 Fed. 571—Butler v. White, 82 Fed. 587—Leathe v.

Thomas, 38 C. C. A. 78, 97 Fed. 139—Re American Brewing Co. 50 C. C. A. 524, 112 Fed. 759—Wyman v. Campbell, 6 Port. (Ala.) 241, 31 Am. Dec. 677—Bush v. Glover, 47 Ala. 174—Whiting v. Beebe, 12 Ark. 554—Tenney v. Taylor, 1 App. D. C. 227—Camp v. Moseley, 2 Fla. 189—Darden v. Lines, 2 Fla. 573—Swiggart v. Harber, 5 Ill. 371, 39 Am. Dec. 418—Clay County v. Markle, 46 Ind. 110—Palmer v. Oakley, 2 Dougl. (Mich.) 491, 47 Am. Dec. 41—People v. Dawell, 25 Mich. 270, 12 Am. Rep. 260—Hard v. Shipman, 6 Barb. 624—Cromwell v. Gallup, 17 Hun, 56—Morrill v. Morrill, 20 Or. 102, 11 L.R.A. 159, 23 Am. St. Rep. 95, 25 Pac. 362—Schnader v. Bender, 19 Lanc. L. Rev. 198—Thompson v. Whitman, 31 Phila. Leg. Int. 157.

184. Where a court has jurisdiction it has a right to decide every question in the cause, and its judgment, till reversed, is binding on every other court. Randall v. Howard, 2 Black, 585, 17: 269
Cited in Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. (Milwaukee & M. R. Co. v. Seutter) 2 Wall. 633, 17 L. ed. 895—Nougue v. Clapp, 191 U. S. 554, 25 L. ed. 1027—Central Trust Co. v. St. Louis, A. & T. R. Co. 41 Fed. 555—Ex parte Holman, 28 Iowa, 156, 4 Am. Rep. 159—Edwards Mfg. Co. v. Sprague, 76 Me. 62—National Docks & N. J. Junction Connecting R. Co. v. Pennsylvania R. Co. 52 N. J. Eq. 62, 28 Atl. 71.

185. If a court has jurisdiction, its decisions upon the questions that arise regularly in the cause are binding upon all other courts until reversed. Beauregard v. New Orleans, 18 How. 497, 15: 469
Cited in Buckner v. Wisdom, 31 La. Ann. 58—Turner v. Malone, 24 S. C. 402.

186. A judgment in an inferior court of admiralty, though final as to that court, is not definitive, unless acquiesced in, where subject to appeal. United States v. The Peggy, 1 Cranch, 103, 2: 49
Cited in Sharon v. Hill, 26 Fed. 389—Hills v. Sherwood, 33 Cal. 479—Bayard v. McLane, 3 Harr. (Del.) 233—Oakes v. Rogers, 47 Minn. 39, 28 Am. St. Rep. 326, 49 N. W. 330.

187. The judgment of a United States court, even if rendered without jurisdiction, for want of diverse citizenship, is not a nullity, and until reversed is a valid bar. Evers v. Watson, 156 U. S. 527, 15 Sup. Ct. Rep. 430, 39: 520
Cited in Cutler v. Huston, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 868—New Orleans v. Fisher, 180 U. S. 196, 45 L. ed. 492, 21 Sup. Ct. Rep. 347—Pullman's Palace Car Co. v. Washburn, 68 Fed. 794—Richmond & D. R. Co. v. Gorman 7 App. D. C. 108.

188-9. An erroneous judgment is not void where the court had jurisdiction, and, until reversed, cannot be disregarded. Kempe v. Kennedy, 5 Cranch, 173, 3: 70

190. A judgment of a court of record upon a case before it is final and conclusive in all courts, where no appeal is taken or available. Grignon v. Astor, 2 How. 319, 11: 283
Cited in Sargeant v. State Bank, 12 How. 396, 13 L. ed. 1034—Griffith v. Bogert, 18 How. 164, 15 L. ed. 310—Parker v. Kane, 22 How. 14, 16 L. ed. 290—Gray v. Brignardello, 1 Wall. 684, 17 L. ed. 697—Cooper v. Reynolds,

10 Wall. 316, 19 L. ed. 932—Tilton v. Coffield, 93 U. S. 165, 23 L. ed. 859—Matthews v. Denmore, 109 U. S. 220, 27 L. ed. 913, 3 Sup. Ct. Rep. 126—White v. Crow, 110 U. S. 189, 28 L. ed. 115, 4 Sup. Ct. Rep. 71—Pollock v. Farmers' Loan & T. Co. 158 U. S. 690, 39 L. ed. 1144, 15 Sup. Ct. Rep. 912—Root v. United States, 9 Ct. Cl. 222—Elliot v. Van Voorst, 3 Wall. Jr. 304, Fed. Cas. No. 4390—Galpin v. Page, 1 Sawy. 319, Fed. Cas. No. 5,205—Re McKibben, 12 Nat. Bankr. Reg. 101, Fed. Cas. No. 8,859—Mohr v. Manierre, 7 Biss. 420, Fed. Cas. No. 9,695—Dally v. Doe, 3 Fed. 914—Holmes v. Oregon & C. R. Co. 7 Sawy. 387, 9 Fed. 234—Walker v. Cronkite, 40 Fed. 135—Bateman v. Reitter, 19 Colo. 552, 36 Pac. 548—Wilson v. Hayward, 6 Fla. 197—May v. May, 7 Fla. 244, 68 Am. Dec. 431—Hanna v. Yocum, 17 Ill. 389—American Exch. Nat. Bank v. Moxley, 50 Ill. App. 322—Anderson v. Wilson, 100 Ind. 407—People v. Dawell, 25 Mich. 271, 12 Am. Rep. 260—Freeman v. Thompson, 53 Mo. 190—De Graw v. De Graw, 7 Mo. App. 127—Quesenberry v. Barbour, 81 Gratt. 500—Allan v. Hoffman, 83 Va. 134, 2 S. E. 602—Lawson v. Moorman, 85 Va. 887, 9 S. E. 150—Sheldon v. Newton, 3 Ohio St. 506—Schnader v. Bender, 19 Lanc. L. Rev. 198—Saint v. Taylor, 12 Helsk. 491—Giddings v. Steele, 28 Tex. 752, 91 Am. Dec. 336.

191. The fact that the judgment in a former suit, by reason of the small amount in dispute, cannot be reviewed by a court of appellate jurisdiction, does not restrict its effect as *res judicata*. Johnson Steel Street Rail Co. v. Wharton, 152 U. S. 252, 14 Sup. Ct. Rep. 608, 38: 429

Cited in Dowell v. Appelgate, 152 U. S. 344, 38 L. ed. 470, 14 Sup. Ct. Rep. 611—Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 688, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—Roberts v. Northern P. R. Co. 158 U. S. 29, 39 L. ed. 883, 15 Sup. Ct. Rep. 756—Forstyth v. Hammond, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665—New Orleans v. Citizens' Bank, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—Southern P. R. Co. v. United States, 168 U. S. 49, 42 L. ed. 377, 18 Sup. Ct. Rep. 18—Baldwin v. Maryland, 179 U. S. 222, 45 L. ed. 162, 21 Sup. Ct. Rep. 105—Mitchell v. First Nat. Bank, 180 U. S. 481, 45 L. ed. 632, 21 Sup. Ct. Rep. 418—Ex parte Lennon, 12 C. C. A. 136, 22 U. S. App. 561, 64 Fed. 322—Earl v. Southern P. Co. 75 Fed. 611—Norton v. San Jose Fruit Packing Co. 25 C. C. A. 196, 48 U. S. App. 295, 79 Fed. 794—Lawrence v. Stearns, 79 Fed. 882—Norton v. San Jose Fruit Packing Co. 27 C. C. A. 578, 48 U. S. App. 590, 83 Fed. 514—Norton v. House of Mercy, 41 C. C. A. 400, 101 Fed. 386—Chisolm v. Caines, 121 Fed. 402—Wilcox & G. Sewing Mach. Co. v. Sherborne, 59 C. C. A. 366, 123 Fed. 878—First Nat. Bank v. Covington, 129 Fed. 795—Georgia R. & Bkg. Co. v. Wright, 132 Fed. 917—Russell v. Russell, 67 C. C. A. 437, 134 Fed. 841—Australian Knitting Co. v. Gormly, 138 Fed. 106—Barber v. Rutherford, 12 Misc. 37, 33 N. Y. Supp. 89—Territory ex rel. Jones v. Hopkins, 9 Okla. 150, 59 Pac. 976.

192. An application for an appeal never allowed or perfected will not prevent the judgment from being *res judicata*. Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. Rep. 828, 43: 136
Cited in Hubbell v. United States, 179 U. S.

79, 45 L. ed. 97, 21 Sup. Ct. Rep. 24—Norton v. House of Mercy, 41 C. C. A. 400, 101 Fed. 886—Southern P. R. Co. v. United States, 66 C. C. A. 565, 133 Fed. 667

193. The reversal of a judgment, and the remanding of it to a lower court for further proceedings, do not constitute a decision that can be pleaded as an estoppel. Aurora v. West, 7 Wall. 82, 19: 42
Cited in Chicago Theological Seminary v. People, 189 Ill. 452, 59 N. E. 977—Ketchum v. Thatcher, 12 Mo. App. 188—Grubb's Appeal, 62 Pa. 271—Fries v. Pennsylvania R. Co. 98 Pa. 145, 11 W. N. C. 26.

Divided court.

194. That a judgment was rendered upon an equal division of opinion among the judges is the same, for all the purposes of that case, as if rendered unanimously. Durant v. Essex Co. 7 Wall. 107, 19: 154
Durant v. Storrow (Durant v. Essex Co.) 101 U. S. 555, 25: 961
Cited in Hartman v. Greenhow, 102 U. S. 670, 26 L. ed. 273—Bird v. Penn Mut. L. Ins. Co. 11 Phila. 496, Fed. Cas. No. 1,430—Kolb v. Swann, 68 Md. 521, 13 Atl. 379—Northern R. Co. v. Concord R. Co. 50 N. H. 176—State v. Sunapee Dam Co. 72 N. H. 115, 55 Atl. 899—Lathrop v. Krapp, 37 Wis. 313—State ex rel. Turner v. Circuit Court, 71 Wis. 608, 38 N. W. 192.

b. Jurisdiction of Person or Property.

Conclusiveness of Judgment Where Court has Jurisdiction, see *supra*, 181-185.
Collateral Attack for Lack of Jurisdiction, see *infra*, III. i, 3, c.
Judgment of Sister State, see *infra*, 959, 1011.
Presumption and Burden of Proof, see Evidence, 566-584.
Justice's Judgment, see Justice of the Peace, 5.
See also *supra*, 134-139, 178-188, 211, 212.

1. Of Person.

Foreign Judgment, see *infra*, 928.
Judgment of Sister State, see *infra*, 939, 985.
Jurisdictional Recitals in Foreign Judgment, see *infra*, 949-952.
Necessity of Suing in Particular Federal District Generally, see Courts, V. c, 7.
Who are Necessary or Proper Parties, see Parties, II. a, 2.
See also *infra*, 1036, 1120.

195. Before the rights of an individual can be bound by judicial sentence, he must have notice of the proceedings. The Mary, 9 Cranch, 126, 3: 678
Cited in The Globe, 13 Month. L. Rep. 493, Fed. Cas. No. 5,484—Mathewson v. Sprague, 1 Curt. C. C. 462, Fed. Cas. No. 9,278—Parsons v. Lyman, 5 Blatchf. 179, Fed. Cas. No. 10,780—Re Sheppard, 1 Nat. Bankr. Reg. 449, Fed. Cas. No. 12,753—Bowler v. Eldredge, 18 Conn. 10—Parsons v. Lyman, 32 Conn. 576—Dorrance v. Raynsford, 67 Conn. 8, 52 Am. St. Rep. 266, 34 Atl. 706—Fisher v. Fielding, 67 Conn. 128, 32 L.R.A. 247, 52 Am. St. Rep. 270, 34 Atl. 714—Penobscot R. Co. v. Weeks, 52 Me. 462—Conklin v. Cunningham,

7 N. M. 483, 38 Pac. 170—Dorr v. Rohr, 82 Va. 362, 3 Am. St. Rep. 106—Richardson v. Seewers, 84 Va. 267, 4 S. E. 712—Fowler v. Lewis, 86 W. Va. 138, 14 S. E. 447.

196—8. A decree where defendant was never brought before the court is *coram non judice* and void. D'Arcy v. Ketchum, 11 How. 165, 13: 648 Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19: 948

Cited in Wilson v. Seligman, 144 U. S. 45, 36 L. ed. 339, 12 Sup. Ct. Rep. 541—Noble v. Union River Logging R. Co. 147 U. S. 173, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—Swift v. Meyers, 37 Fed. 43—Brooks v. Dun, 61 Fed. 144—Re Anderson, 94 Fed. 497—Moredock v. Kirby, 118 Fed. 183—Cady v. Associated Colonies, 119 Fed. 424—Pickett v. Ferguson, 45 Ark. 192, 55 Am. Rep. 545—Hamilton v. Rogers, 67 Mich. 138, 34 N. W. 278—Cofrode v. Gartner, 79 Mich. 348, 7 L.R.A. 515, 44 N. W. 623—Elsasser v. Haines, 52 N. J. L. 25, 18 Atl. 1095—Campbell v. Rawdon, 19 Barb. 490—Pennywit v. Foote, 27 Ohio St. 626, 22 Am. Rep. 340.

199. Jurisdiction over both subject-matter and parties is necessary in cases in *personam*. Grignon v. Astor, 2 How. 319, 11: 283

Cited in Dearing v. Bank of Charleston, 5 Ga. 518, 48 Am. Dec. 800—Palmer v. Oakley, 2 Dougl. (Mich.) 489, 47 Am. Dec. 41—Wood v. Myrick, 16 Minn. 502, Gil. 447.

200. Jurisdiction is acquired in one of two modes,—either as against the person of the defendant by the service of process, or by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. Boswell v. Otis, 9 How. 336, 13: 164

Cited in Ray v. Norneworthy, 23 Wall. 136, 23 L. ed. 118, 12 Nat. Bankr. Reg. 150—Earle v. McVeigh, 91 U. S. 510, 23 L. ed. 401—Heldritter v. Elizabeth Oil Cloth Co. 112 U. S. 301—Mexican C. R. Co. v. Pinkney, 149 U. S. 209, 37 L. ed. 705, 13 Sup. Ct. Rep. 859—Re Johnson, 167 U. S. 124, 42 L. ed. 104, 17 Sup. Ct. Rep. 735—De Kraft v. Barney, 2 Hayw. & H. 409, Fed. Cas. No. 18,288—Lavin v. Emigrant Industrial Sav. Bank, 18 Blatchf. 26, 1 Fed. 665—Rogers v. Pitt, 96 Fed. 675—Ralya Market Co. v. Armour & Co. 102 Fed. 532—Turner v. Turner, 44 Ala. 450—Comer v. Jackson, 50 Ala. 385—Jones v. Knox, 51 Ala. 370—Borden v. State, 11 Ark. 558, 54 Am. Dec. 217—Loaiza v. Superior Court, 85 Cal. 32, 9 L.R.A. 381, 20 Am. St. Rep. 197, 24 Pac. 707—Atchison, T. & S. F. R. Co. v. Maggard, 6 Colo. App. 94, 39 Pac. 985—Mitchell v. Garrett, 5 Houst. (Del.) 40—Caldwell v. Armour & Co. 1 Penn. (Del.) 550, 43 Atl. 517—Barney v. DeKraft, 6 D. C. 364 Appx.—Harris v. Pullman, 84 Ill. 25, 25 Am. Rep. 416—Patterson v. Lynde, 112 Ill. 206—Blickerdike v. Allen, 157 Ill. 100, 29 L.R.A. 784, 41 N. E. 740—Fahrig v. Milwaukee & C. Breweries, 113 Ill. App. 531—Eastman v. Wadleigh, 65 Me. 255, 20 Am. Rep. 695—Salem v. Eastern R. Co. 98 Mass. 449, 96 Am. Dec. 650—Beyer v. Continental Trust Co. 63 Mo. App. 528—Buchanan v. Edmisten, 1 Neb. (Unof.) 434, 95 N. W. 620—Williams v. Lowe, 4 Neb. 398—Newmarket Bank v. Butler, 45 N. H. 238—Conklin v. Cunningham, 7 N. M. 483, 38 Pac. 170

—Schwinger v. Hickok, 53 N. Y. 285—Thompson v. The Julius D. Morton, 2 Ohio St. 30, 59 Am. Dec. 658—Kemper-Thomas Paper Co. v. Shyer, 108 Tenn. 450, 58 L. R.A. 175, 67 S. W. 856—Grewar v. Henderson, 1 Tenn. Ch. 78—Ferriss v. Lewis, 2 Tenn. Ch. 295—McCoy v. Crawford, 9 Tex. 356—Wilson v. Zeigler, 44 Tex. 680—Littlejohn v. Ferguson, 18 Gratt. 74—Burtner v. Keran, 24 Gratt. 61—Jennings v. Rocky Bar Gold Min. Co. 29 Wash. 729, 70 Pac. 136—Garrison v. Cheeney, 1 Wash. Terr. 499, 503—Atchison v. Rosalip, 4 Chand. (Wis.) 16.

200a. A judgment or decree rendered by a state or territorial court does not bind nonresidents in a proceeding purely in *personam* in which they did not appear and had no notice except by publication. Pennoyer v. Neff, 95 U. S. 714, 24: 565

Cited in Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 617, 43 L. ed. 574, 19 Sup. Ct. Rep. 308—Henrietta Min. & Mill. Co. v. Johnson, 173 U. S. 224, 43 L. ed. 677, 19 Sup. Ct. Rep. 402—Roller v. Holly, 176 U. S. 402, 44 L. ed. 522, 20 Sup. Ct. Rep. 410—Bennett v. Fenton, 10 L.R.A. 502, 41 Fed. 285—Wakelee v. Davis, 44 Fed. 532—Lockett v. Rumbaugh, 45 Fed. 30—Morris v. Graham, 51 Fed. 55—Austin v. Hamilton County, 22 C. C. A. 131, 46 U. S. App. 260, 76 Fed. 211—Sutherland-Innes Co. v. American Wired Hoop Co. 51 C. C. A. 149, 113 Fed. 187—Kirk v. United States, 181 Fed. 337—Spencer v. Houghton, 68 Cal. 87, 8 Pac. 679—Crall v. Poso Irrig. District, 87 Cal. 147, 26 Pac. 797—Blumberg v. Birch, 99 Cal. 417, 37 Am. St. Rep. 67, 34 Pac. 102—Sayre-Newton Lumber Co. v. Park, 4 Colo. App. 485, 36 Pac. 445—Everett v. Connecticut Mut. L. Ins. Co. 4 Colo. App. 513, 36 Pac. 616—Hartzell v. Vigen, 6 N. D. 125, 35 L.R.A. 455, 68 Am. St. Rep. 589, 69 N. W. 203—Blanchard v. Raines, 20 Fla. 475—King v. Sullivan, 93 Ga. 627, 20 S. E. 76—Reynolds & H. Estate Mortg. Co. v. Martin, 116 Ga. 498, 42 S. E. 796—Dewey v. Des Moines, 101 Iowa, 428, 70 N. W. 605—Robbins v. Martin, 43 La. Ann. 494, 9 So. 108—Piurede v. Levasseur, 89 Me. 175, 36 Atl. 110—Glenn v. Williams, 60 Md. 116—Fisher v. Parr, 92 Md. 272, 48 Atl. 621—Crim v. Crim, 162 Mo. 556, 54 L.R.A. 507, 85 Am. St. Rep. 521, 63 S. W. 489—Silver Camp Min. Co. v. Dickert, 31 Mont. 496, 67 L.R.A. 943, 78 Pac. 967—Beck v. Thompson, 22 Nev. 127, 36 Pac. 562—Smith v. Collopy, 69 N. J. L. 371, 55 Atl. 805—Hotel Registry Realty Corp. v. Stafford, 70 N. J. L. 534, 37 Atl. 145—McKinney v. Collins, 88 N. Y. 224—New York v. McLean, 57 App. Div. 606, 68 N. Y. Supp. 606—People v. Mercantile Credit Guarantee Co. 65 App. Div. 312, 72 N. Y. Supp. 858—Paget v. Stevens, 8 Misc. 242, 28 N. Y. Supp. 549—Fisher v. Traders Mut. L. Ins. Co. 136 N. C. 221, 48 S. E. 667—McCreery v. Davis, 44 S. C. 213, 28 L.R.A. 662, 51 Am. St. Rep. 794, 22 S. E. 178—Abbeville Electric Light & P. Co. v. Western Electrical Supply Co. 61 S. C. 389, 55 L.R.A. 149, 85 Am. St. Rep. 890, 39 S. E. 559—Abbeville Electric Light & P. Co. v. Western Electrical Supply Co. 61 S. C. 378, 55 L.R.A. 152, 85 Am. St. Rep. 890, 39 S. E. 559—Little v. Christie, 69 S. C. 59, 48 S. E. 89—Kemper-Thomas Paper Co. v. Shyer, 108 Tenn. 461, 58 L.R.A. 177, 67 S. W. 856—Stewart v. Anderson, 70 Tex. 600, 8 S. W. 295—Kimmarrle v. Houston & T. C. R. Co. 76 Tex. 695, 12 S. W. 698—Foote v. Sewall, 81 Tex. 662, 17 S. W. 373—Osborne v. Bar-

nett, 1 Tex. App. Civ. Cas. (White & W.)
 § 129—Baker v. Collins, 4 Tex. Civ. App.
 525, 23 S. W. 493—Milburn v. Smith, 11
 Tex. Civ. App. 682, 33 S. W. 910—Roller
 v. Holly, 13 Tex. Civ. App. 638, 35 S. W.
 1074—Netzorg v. Green, 26 Tex. Civ. App.
 121, 62 S. W. 789—People ex rel. Jones v.
 House, 4 Utah, 384, 10 Pac. 843—Greiner
 v. Ogden Street R. Co. 21 Utah, 168, 60
 Pac. 548—Nat. Bank v. Peabody, 55 Vt.
 495, 45 Am. Rep. 632—Grubb v. Starkey,
 90 Va. 835, 20 S. E. 784—Maxey v. McCord,
 120 Wis. 572, 98 N. W. 529.

201. State courts can acquire jurisdiction
 to render a personal judgment against non-
 residents only by personal service of cita-
 tion on the party, or his voluntary appear-
 ance, except where proceedings are taken in
 a state to determine the status of one of its
 citizens toward a nonresident, or where a
 party has agreed to accept a notification to
 others, or service on them, as citation to
 himself. *Pennoyer v. Neff*, 95 U. S. 714,

24: 565

Cited in *Atherton v. Atherton*, 181 U. S. 163,
 45 L. ed. 800, 21 Sup. Ct. Rep. 544—*Har-
 land v. United Lines Teleg. Co.* 6 L.R.A.
 254, 40 Fed. 311—*Re James*, 99 Cal. 376, 37
 Am. St. Rep. 60, 33 Pac. 1122—*Bickerdike
 v. Allen*, 157 Ill. 100, 29 L.R.A. 783, 41 N.
 E. 740—*Dunham v. Dunham*, 162 Ill. 610,
 35 L.R.A. 79, 44 N. E. 841—*Proctor v.
 Proctor*, 215 Ill. 277, 69 L.R.A. 676, 106
 Am. St. Rep. 168, 74 N. E. 145—*Dunham v.
 Dunham*, 57 Ill. App. 499—*Smith v. Smith*,
 43 La. Ann. 1146, 10 So. 248—*Reed v. Reed*,
 52 Mich. 123, 50 Am. Rep. 247, 17 N. W.
 720—*Hervey v. Hervey*, 56 N. J. Eq. 175,
 39 Atl. 767—*O'Dea v. O'Dea*, 101 N. Y. 39,
 4 N. E. 110—*Rigney v. Rigney*, 127 N. Y.
 413, 24 Am. St. Rep. 462, 28 N. E. 405—
Wile's Estate, 41 W. N. C. 578, 6 Pa. Super.
 Ct. 438—*Cook v. Cook*, 56 Wis. 219, 43 Am.
 Rep. 706, 14 N. W. 443—*Moyer v. Koontz*,
 103 Wis. 25, 74 Am. St. Rep. 837, 79 N.
 W. 50.

202. A defendant's being beyond the juris-
 diction of a court is not conclusive evidence
 that the judgment is void; he may have left
 counsel to defend suits brought against him
 in his absence. *Landes v. Brant*, 10 How.
 348, 13: 449

Cited in *DeKraft v. Barney & Hayw. & H.*
 409, Fed. Cas. No. 18,288—*Hunt v. Ellison*,
 82 Ala. 185—*Barney v. DeKraft*, 6 D. C.
 364, Appx.—*Price v. Schaeffer*, 161 Pa. 534,
 26 L.R.A. 700, 34 W. N. C. 443, 29 Atl. 279.

203. Jurisdiction cannot be justly exer-
 cised by a state over persons not owing al-
 legiance, or not subjected to its jurisdiction
 by being found within its limits. Per *John-
 son, J.* *Mills v. Duryee*, 7 Cranch, 481,

3: 411

Offed in *Middlebrooks v. Springfield F. Ins. Co.*
 14 Conn. 307—*Sanford v. Sanford*, 28 Conn.
 20—*Hall v. Williams*, 6 Pick. 241, 17 Am.
 Dec. 356—*Scott v. Noble*, 8 Pittsb. 141.

204. There can be no jurisdiction in a
 court of a territory to render a personal
 judgment against anyone, upon service made
 outside its limits. *Harkness v. Hyde*, 98 U.
 S. 476, 25: 237

Offed in *Smith v. Woolfolk*, 115 U. S. 149, 29
 L. ed. 300, 5 Sup. Ct. Rep. 1177—*Swan
 Land & Cattle Co. v. Frank*, 148 U. S. 614,
 37 L. ed. 581, 13 Sup. Ct. Rep. 691—*Max-*

ican C. R. Co. v. Pinkney, 149 U. S. 209,
 37 L. ed. 705, 13 Sup. Ct. Rep. 859—*Brooks
 v. Dun*, 51 Fed. 145—*United States v. Amer-
 ican Lumber Co.* 80 Fed. 313—*Epps v.
 Buckmaster*, 104 Ga. 702, 30 S. E. 959—
Northwestern Mut. L. Ins. Co. v. Kidder.
 162 Ind. 392, 66 L.R.A. 94, 70 N. E. 489
 —*Laughlin v. Louisiana & N. O. Ice Co.* 35
 La. Ann. 1186—*McGehee v. McGehee*, 41
 La. Ann. 661, 6 So. 253—*Hobson v. Peake*,
 44 La. Ann. 386, 10 So. 762—*Elsasser v.
 Haines*, 52 N. J. L. 29, 18 Atl. 1095—*York
 v. State*, 73 Tex. 654, 11 S. W. 869—*Franz
 Falk Brewing Co. v. Hirsch*, 78 Tex. 196,
 14 S. W. 450—*Texas & P. R. Co. v. Jay*.
 86 Tex. 586, 25 L.R.A. 56, 26 S. W. 599—
Paxton v. Daniell, 1 Wash. 22, 23 Pac. 441.

205. The appearance of foreigners who
 have a storehouse and an agent in the coun-
 try, and are carrying on the litigation
 merely to prevent their property within the
 jurisdiction, but not in the custody of the
 court, from being taken to satisfy any judg-
 ment that might be recovered against them,
 may be sufficient to give jurisdiction which
 will sustain a judgment against them.
Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct.
 Rep. 139, 40: 95

Cited in *Fisher v. Fielding*, 67 Conn. 137, 32
 L.R.A. 240, 52 Am. St. Rep. 270, 34 Atl.
 714.

206. When a defendant not served with
 process has filed a plea to the merits and
 afterwards withdraws his plea, that does
 not withdraw his appearance, and he is still
 in court, so as to be bound personally by a
 judgment rendered against him in the ac-
 tion. *Eldred v. Michigan Ins. Bank*, 17
 Wall. 545, 21: 685

Cited in *Habich v. Folger*, 20 Wall. 7, 22 L.
 ed. 308—*Creighton v. Kerr*, 20 Wall. 13, 22
 L. ed. 311—*Graham v. Spencer*, 14 Fed. 606
 —*Romaine v. Union Ins. Co.* 28 Fed. 638—
Platt v. Manning, 34 Fed. 813—*L'Engle v.
 Gates*, 74 Fed. 515—*Kinkade v. Myers*, 17
 Or. 471, 21 Pac. 557.

Opportunity to be heard.

Necessity of Making Interested Persons
 Parties, see Parties, II. a, 2.

207. A decree against a party who has
 not been heard and has had no chance to be
 heard is not a judicial determination of his
 rights, and is not entitled to respect in any
 other court. *Smith v. Woolfolk*, 115 U. S.
 143, 5 Sup. Ct. Rep. 1177, 29: 357

208. A judgment of a court, pronounced
 against a party without hearing him or
 giving him an opportunity to be heard, is
 not a judicial determination of his rights,
 and is not entitled to respect in any other
 tribunal. *Windsor v. McVeigh*, 93 U. S. 274,
 23: 914

Cited in *Ex parte Reed*, 100 U. S. 23, 25 L.
 ed. 539—*Smith v. Woolfolk*, 115 U. S. 149,
 29 L. ed. 360, 5 Sup. Ct. Rep. 1177—*Sa-
 bariego v. Maverick*, 124 U. S. 292, 31 L.
 ed. 442, 8 Sup. Ct. Rep. 461—*Ex parte Ter-
 ry*, 128 U. S. 307, 32 L. ed. 410, 9 Sup. Ct.
 Rep. 77—*Harsall v. Wilcox*, 130 U. S. 504,
 32 L. ed. 1005, 9 Sup. Ct. Rep. 590—*New
 Orleans Waterworks Co. v. New Orleans*,
 164 U. S. 480, 41 L. ed. 523, 17 Sup. Ct.
 Rep. 161—*Hovey v. Elliott*, 167 U. S. 414,
 42 L. ed. 220, 17 Sup. Ct. Rep. 841—*Avil
 v. Alexandria Water Co.* 1 Hughes, 408,

Fed. Cas. No. 679—*Andrews v. Smith*, 19 Blatchf. 111, 5 Fed. 844—*The Ann*, 5 Hughes, 297, 8 Fed. 927—*Polk v. The J. W. French*, 5 Hughes, 432, 13 Fed. 919—*North Carolina v. Vanderford*, 85 Fed. 285—*The H. F. Dimock*, 52 Fed. 600—*Lewis v. Shaw*, 57 Fed. 518—*The Fred M. Lawrence*, 36 C. C. A. 632, 94 Fed. 1018—*Re Rosser*, 41 C. C. A. 503, 101 Fed. 567—*New River Mineral Co. v. Seeley*, 56 C. C. A. 508, 120 Fed. 196—*Rosenau v. Legg*, 82 Ala. 569, 2 So. 441—*Loalza v. Superior Court*, 85 Cal. 34, 9 L.R.A. 381, 20 Am. St. Rep. 197, 24 Pac. 707—*Moynihan v. Drobaz*, 124 Cal. 214, 71 Am. St. Rep. 46, 56 Pac. 1026—*Yentzer v. Thayer*, 10 Colo. 65, 8 Am. St. Rep. 563, 14 Pac. 53—*Sturges v. Hancock*, 4 App. D. C. 202—*Mercier's Succession*, 42 La. Ann. 1138, 11 L.R.A. 820, 8 So. 732—*Rouge v. Larfargue Bros. Co.* 47 La. Ann. 1649, 18 So. 632—*State ex rel. Tanner v. Police Board*, 51 La. Ann. 945, 25 So. 935—*Loeber v. Schroeder*, 76 Md. 351, 25 Atl. 340—*Re Bomino*, 83 Mo. 447—*Dennison v. Kansas City*, 95 Mo. 429, 8 S. W. 429—*Troyer v. Wood*, 96 Mo. 480, 9 Am. St. Rep. 367, 10 S. W. 42—*State ex rel. Klotz v. Ross*, 118 Mo. 66, 23 S. W. 196—*Russell v. Grant*, 122 Mo. 180, 43 Am. St. Rep. 563, 26 S. W. 958—*Williams v. Monroe*, 125 Mo. 588, 28 S. W. 853—*Harness v. Cravens*, 126 Mo. 247, 28 S. W. 971—*State ex rel. Gemmell v. Clancy*, 24 Mont. 364, 61 Pac. 987—*Chapman v. Phoenix Nat. Bank*, 85 N. Y. 451—*Feuchter v. Key*, 48 Ohio St. 366, 27 N. E. 860—*Schelnber v. Baer*, 174 Pa. 483, 34 Atl. 193—*State v. Port Royal & A. R. Co.* 45 S. C. 466, 23 S. E. 380—*Dillard v. Harris*, 2 Tenn. Ch. 196—*Bowler v. Huston*, 80 Gratt. 276, 32 Am. Rep. 673—*Boggs v. Com.* 76 Va. 999—*Dorr v. Rohr*, 82 Va. 362, 3 Am. St. Rep. 106—*Grigg v. Dalsheimer*, 88 Va. 511, 13 S. E. 993—*Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 835—*Grinnan v. Edwards*, 21 W. Va. 362—*Haymond v. Camden*, 22 W. Va. 204—*Fowler v. Lewis*, 36 W. Va. 126, 14 S. E. 447—*Schiltz v. Roenitz*, 86 Wis. 40, 21 L.R.A. 486, 39 Am. St. Rep. 878, 56 N. W. 194.

209. No one can be condemned as to person or property without an opportunity to be heard; hence, a judgment taken within lines of the Federal Army is not binding against a Confederate, who was powerless to protect his rights, because he could not do business within the Federal lines, and will be reversed. *Lasere v. Rochereau*, 17 Wall. 437, 21: 694

Cited in *Burbank v. Conrad*, 96 U. S. 305, 25 L. ed. 728—*Newcomb v. Newcomb*, 13 Bush, 570, 26 Am. Rep. 222—*Grinnan v. Edwards*, 21 W. Va. 362—*Sturm v. Fleming*, 22 W. Va. 420—*Cunningham v. Brown*, 39 W. Va. 596, 20 S. E. 615.

210. A judgment of the Supreme Court establishing the validity of a patent is not conclusive against third parties who had no opportunity to be heard, and they may show that the judgment was collusive, or that material facts were not presented and considered. *Cochrane v. Deener*, 95 U. S. 355, 24: 514

Distinguished in *Page v. Holmes Burglar Alarm Teleg. Co.* 18 Blatchf. 126, 5 Bann. & Ard. 447, 2 Fed. 337.

Cited in *American Middlings Purifier Co. v. Atlantic Mill. Co.* 4 Dill. 100, Fed. Cas. No. 805.

2. Of Property.

Foreign Judgment, see *infra*, 314.

See also *supra*, 199, 200, 205; *infra*, 236, 402, 643, 1120; *Writ and Process*, 88a.

211. A state judgment without personal service against a nonresident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a nonresident further than respects the property within the state. *Dewey v. Des Moines*, 173 U. S. 193, 19 Sup. Ct. Rep. 379, 43: 665

Cited in *Bristol v. Washington County*, 177 U. S. 146, 44 L. ed. 707, 20 Sup. Ct. Rep. 585—*Kerna v. McAulay*, 8 Idaho, 565, 69 Pac. 539—*Comptoir National D'Escompte de Paris v. Board of Assessors*, 52 La. Ann. 1329, 27 So. 801—*New York v. McLean*, 57 App. Div. 607, 68 N. Y. Supp. 606—*Boston Mfr's Mut. F. Ins. Co. v. Hendricks*, 41 Misc. 482, 85 N. Y. Supp. 44.

212. An attachment of the property of a nonresident is a necessary preliminary jurisdictional step to the rendition of a judgment against him upon the service of the summons by publication. *Pennoyer v. Neff*, 95 U. S. 714, 24: 565

Cited in *Dewey v. Des Moines*, 173 U. S. 203, 43 L. ed. 668, 19 Sup. Ct. Rep. 379—*Graham v. Spencer*, 14 Fed. 606—*The City of New Bedford*, 20 Fed. 60—*Boston Electric Co. v. Electric Gas Lighting Co.* 23 Fed. 839—*McDonald v. Cooper*, 32 Fed. 751—*Gates v. Buck*, 4 C. C. A. 127, 12 U. S. App. 69, 53 Fed. 967—*Baumgardner v. Bono Fertilizer Co.* 58 Fed. 3—*Mudge v. Steinhart*, 78 Cal. 38, 12 Am. St. Rep. 17, 20 Pac. 147—*Staffan v. Zeust*, 10 App. D. C. 272—*Quarl v. Abbott*, 102 Ind. 239, 52 Am. Rep. 662, 1 N. E. 476—*Rothschild v. Knight*, 176 Mass. 53, 57 N. E. 337—*Cousins v. Alworth*, 44 Minn. 509, 10 L.R.A. 507, 47 N. W. 169—*Lydiard v. Chute*, 45 Minn. 280, 47 N. W. 967—*State ex rel. Mathews v. Eddy*, 10 Mont. 318, 25 Pac. 1032—*Winfree v. Bagley*, 102 N. C. 517, 9 S. E. 198—*Balk v. Harris*, 122 N. C. 66, 45 L.R.A. 259, 30 S. E. 318—*Cooper v. Adel Security Co.* 122 N. C. 465, 30 S. E. 348—*Ditmore v. Goins*, 128 N. C. 331, 39 S. E. 61—*Goodwin v. Claytor*, 137 N. C. 230, 67 L.R.A. 224, 49 S. E. 173—*Dowell v. Portland*, 13 Or. 268, 10 Pac. 309—*White v. Johnson*, 27 Or. 289, 50 Am. St. Rep. 726, 40 Pac. 511—*Willamette Real Estate Co. v. Hendrix*, 28 Or. 494, 52 Am. St. Rep. 800, 42 Pac. 514—*Bank of Colfax v. Richardson*, 34 Or. 524, 75 Am. St. Rep. 664, 54 Pac. 359—*Tillinghast v. Boston & P. R. Lumber Co.* 39 S. C. 493, 22 L.R.A. 53, 18 S. E. 120—*Toms v. Richmond & D. R. Co.* 40 S. C. 523, 19 S. E. 142—*Gibson v. Everett*, 41 S. C. 27, 19 S. E. 286—*Townes v. Augusta*, 46 S. C. 31, 23 S. E. 994—*Scott v. Streep*, 73 Tex. 548, 11 S. W. 532—*Schmidt v. Stern*, 2 Tex. App. Civ. Cas. (Willson) § 92—*Rowan v. Shapard*, 2 Tex. App. Civ. Cas. (Willson) § 302—*Murphy v. Wallace*, 3 Tex. App. Civ. Cas. (Willson) § 430—*Neufelder v. German American Ins. Co.* 6 Wash. 339, 22 L.R.A. 290, 36 Am. St. Rep. 166, 33 Pac. 870—*Peck v. Tuttlch*, 10 Wash. 450, 38 Pac. 1134.

213. The jurisdiction of a state court over a controversy with respect to taxes and tax sales is founded on the presence of the property, and, like a proceeding *in rem*, is conclusive against the absent claimant as well as the present contestant. *Thomas v. Lawson*, 21 How. 331, 16: 82

214. A judgment *in rem* binds only the property within the control of the court which rendered it. *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. Rep. 525, 35: 112

215. A judgment for the sale of property by a receiver appointed in an earlier action is not invalid for want of jurisdiction over the property because there was no formal order extending the receivership to the suit in which such judgment was rendered, where all the parties to the first suit were likewise parties to the second one, and both the court and the parties treated the causes as in fact consolidated, and the receivership as extended. *Gila Bend Reservoir & Irrig. Co. v. Gila Water Co.* 202 U. S. 270, 26 Sup. Ct. Rep. 615, 50: 1023
Cited in *Gila Bend Reservoir & Irrig. Co. v. Gila Water Co.* 205 U. S. 279, 51 L. ed. 801, 27 Sup. Ct. Rep. 495.

c. Necessity of Service or Appearance; Unauthorized Appearance.

1. Necessity of Service or Appearance.

Necessity of Acquiring Jurisdiction Over Person, see *supra*, III. b, 1.

Conclusiveness of Judgment on Persons not Served, see *infra*, III. k, 2.

Collateral Attack for Lack of Service, see *infra*, 431.

Judgment of Sister State, see *infra*, 961, 1023.

Due Process in Judgment without Service, see *Constitutional Law*, 701-703.

Judgment Entered of Course, on Breach of Forthcoming Bond, see *Execution*, 81.

Necessity of Making Interested Persons Parties, see *Parties*, II. a, 2.

Who are Necessary Parties, see *Parties*, II. a, 2.

Sufficiency of Service, see *Writ and Process*, III.

See also *infra*, 708, 729, 947, 1038, 1049, 1230; *Removal of Causes*, 277.

216. By the general law of the land, no court is authorized to render a judgment or decree against anyone, or his estate, until after due notice, by service of process, to appear and defend. *Hollingsworth v. Barbour*, 4 Pet. 466, 7: 922

Noted in Nations v. Johnson, 24 How. 205, 16 L. ed. 632—*Earle v. McVeigh*, 91 U. S. 508, 23 L. ed. 400—*Galpin v. Page*, 1 Sawy. 380, Fed. Cas. No. 5205—*Dugger v. Tayloe*, 60 Ala. 519—*Flint River S. B. Co. v. Roberts*, 2 Fla. 110, 48 Am. Dec. 178—*Bobb v. Graham*, 4 Mo. 224—*Jacobus v. Mutual Ben. L. Ins. Co.* 27 N. J. Eq. 624.

217. Judgment *in personam* has no force as to one upon whom there was no service of process, actual or constructive, who had no day in court, or notice of proceedings. *Harris v. Hardeman*, 14 How. 334, 14: 444
Noted in Nations v. Johnson, 24 How. 205, 16 L. ed. 632—*Thompson v. Whitman*, 18 Wall.

466, 21 L. ed. 900—*Habich v. Folger*, 20 Wall. 7, 22 L. ed. 308—*Ray v. Norseworthy*, 23 Wall. 186, 23 L. ed. 118, 12 Nat. Bankr. Reg. 150—*Pennoyer v. Neff*, 95 U. S. 782, 24 L. ed. 572—*Noble v. Union River Logging R. Co.* 147 U. S. 173, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*Mexican C. R. Co. v. Pinkney*, 149 U. S. 209, 37 L. ed. 705, 13 Sup. Ct. Rep. 859—*Albree v. Johnson*, 1 Filipp. 346, Fed. Cas. No. 146—*Gray v. Larimore*, 2 Abb. (U. S.) 549, Fed. Cas. No. 5,721—*Preston v. Walsh*, 10 Fed. 325—*Babbitt v. Doe*, 4 Ind. 358—*Doe ex dem. Platter v. Anderson*, 5 Ind. 36—*Beard v. Beard*, 21 Ind. 328—*North v. Moore*, 8 Kan. 150—*Clark v. Bryan*, 16 Md. 178—*Dorsey v. Garey*, 30 Md. 497—*Salem v. Eastern R. Co.* 98 Mass. 449, 96 Am. Dec. 650—*Tarleton v. Cox*, 45 Miss. 436—*Brown v. Levee Comrs.* 50 Miss. 483—*Hauswirth v. Sullivan*, 6 Mont. 209, 9 Pac. 798—*Atkins v. Atkins*, 9 Neb. 202, 2 N. W. 466—*Judkins v. Union Mut. F. Ins. Co.* 37 N. H. 477—*Stone v. Peasley*, 28 Vt. 721—*Washington, A. & G. R. Co. v. Alexandria & W. R. Co.* 19 Gratt. 610, 100 Am. Dec. 710—*Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 835.

218-19. No one shall be personally bound by a judgment until he has had his day in court; which means until citation is issued to him, and opportunity to be heard is afforded. *Mason v. Eldred*, 6 Wall. 231.

Galpin v. Page, 18 Wall. 350, 18: 783
Noted in Hovey v. Elliott, 167 U. S. 418, 42 L. ed. 221, 17 Sup. Ct. Rep. 841—*Re Rosser*, 41 C. C. A. 503, 101 Fed. 568—*McClatchy v. Superior Court*, 119 Cal. 421, 39 L.R.A. 694, 51 Pac. 696—*Israel v. Arthur*, 7 Colo. 11, 1 Pac. 438—*Frankel v. Satterfield*, 9 Houst. (Del.) 204, 19 Atl. 898—*Jewett v. Iowa Land Co.* 64 Minn. 537, 58 Am. St. Rep. 555, 67 N. W. 639—*Troyer v. Wood*, 96 Mo. 480, 9 Am. St. Rep. 367, 10 S. W. 42—*State ex rel. Gemmell v. Clancy*, 24 Mont. 364, 61 Pac. 987—*Riglander v. Star Co.* 98 App. Div. 107, 90 N. Y. Supp. 772—*Blyth & F. Co. v. Swenson*, 15 Utah, 354, 49 Pac. 1027—*Bell v. St. Johnsbury & L. C. R. Co.* 76 Vt. 52, 56 Atl. 105—*Dorr v. Rohr*, 82 Va. 383, 3 Am. St. Rep. 106.

220. No court in the ordinary administration of justice can make a judgment or decree against a party unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process. *Cooper v. Reynolds*, 10 Wall. 308, 19: 931

Hollingsworth v. Barbour, 4 Pet. 466, 7: 922

Kendall v. United States ex rel. Stokes, 12 Pet. 524, 9: 1181
Pennoyer v. Neff, 95 U. S. 714, 24: 565
Noted in Goldey v. Morning News, 156 U. S. 521, 39 L. ed. 518, 15 Sup. Ct. Rep. 559—*Davis v. Wakelee*, 156 U. S. 685, 39 L. ed. 583, 15 Sup. Ct. Rep. 555—*Owens v. Henry* (Owens v. McCloskey) 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 693—*Re Johnson*, 167 U. S. 124, 42 L. ed. 104, 17 Sup. Ct. Rep. 735—*Henrietta Min. & Mill. Co. v. Gardner*, 173 U. S. 124, 43 L. ed. 638, 19 Sup. Ct. Rep. 327—*Caledonian Coal Co. v. Baker* (New Mexico ex rel. Caledonian Coal Co. v. Baker) 196 U. S. 444, 49 L. ed. 545, 25 Sup. Ct. Rep. 375—*Burt v. Delano*, 4 Cliff. 617, Fed. Cas. No. 2,211—*Hauf v. Williams*, 31 Fed. 389—*Laredo Improv. Co. v.*

Stevenson, 13 C. C. A. 665, 32 U. S. App. 97, 66 Fed. 637—L'Engle v. Gates, 74 Fed. 515—Ormsby v. Ottman, 29 C. C. A. 298, 56 U. S. App. 510, 85 Fed. 496—Re Anderson, 94 Fed. 497—Hale v. Hardon, 37 C. C. A. 255, 95 Fed. 762—Balya Market Co. v. Armour & Co. 102 Fed. 532—Millan v. Mutual Reserve Fund Life Assn. 103 Fed. 769—Moredock v. Kirby, 118 Fed. 182—Kirk v. United States, 124 Fed. 339—Mason v. Connors, 129 Fed. 833—Opelka v. Daniel, 59 Ala. 219—Silver v. Luck, 42 Ark. 269—Fisher v. Fielding, 67 Conn. 103, 32 L.R.A. 238, 52 Am. St. Rep. 270, 34 Atl. 714—Munger v. Doolan, 75 Conn. 659, 55 Atl. 169—Caldwell v. Armour & Co. 1 Penn. (Del.) 550, 43 Atl. 517—State ex rel. Andreu v. Canfield, 40 Fla. 64, 42 L.R.A. 82, 23 So. 591—Epps v. Buckmaster, 164 Ga. 702, 30 S. E. 959—Minter v. Green, 3 Ind. Terr. 763, 49 S. W. 48—Smith v. Kreager, 6 Kan. App. 273, 51 Pac. 813—State ex rel. Hart v. Burke, 33 La. Ann. 512—Crow v. Manning, 45 La. Ann. 1223, 14 So. 122—Rand v. Hanson, 154 Mass. 89, 12 L.R.A. 574, 26 Am. St. Rep. 210, 28 N. E. 62—Rothschild v. Knight, 176 Mass. 55, 57 N. E. 337—Hildreth v. Thibodeau, 180 Mass. 84, 104 Am. St. Rep. 560, 71 N. E. 111—Schweigel v. L. A. Shakman Co. 78 Minn. 149, 80 N. W. 871—Hunt v. Searcy, 167 Mo. 182, 67 S. W. 206—Beyer v. Continental Trust Co. 63 Mo. App. 527—Chumasero v. Potts, 2 Mont. 252—Silver Camp Min. Co. v. Dickert, 31 Mont. 490, 67 L.R.A. 943, 78 Pac. 967—Elsasser v. Haines, 52 N. J. L. 28, 18 Atl. 1005—Hoffman v. Wight, 1 App. Div. 516, 37 N. Y. Supp. 262—Park v. Park, 24 Misc. 373, 53 N. Y. Supp. 677—Korman v. Grand Lodge, I. O. F. S. of I. 44 Misc. 566, 90 N. Y. Supp. 120—People v. Baker, 76 N. Y. 84, 32 Am. Rep. 274—Ward v. Boyce, 152 N. Y. 196, 36 L.R.A. 551, 46 N. E. 180—Bumpus v. Hardenburg, 3 Pa. Dist. R. 27—Richardson's Estate, 132 Pa. 295, 19 Atl. 82—Ford v. Calhoun, 53 S. C. 113, 30 S. E. 830—Peedmont & A. L. Ins. Co. v. Fitzgerald, 1 Tex. App. Civ. Cas. (White & W.) § 1345—Amy v. Young, 12 Utah, 321, 42 Pac. 1121—Betts v. Johnson, 68 Vt. 555, 35 Atl. 489—Smith v. Smith, 74 Vt. 23, 93 Am. St. Rep. 882, 51 Atl. 1060—People's Nat. Bank v. Hall, 76 Vt. 283, 56 Atl. 1012—Smith v. Chilton, 77 Va. 538—McAllister v. Guggenheimer, 91 Va. 321, 21 S. E. 475.

221. No court, in the ordinary administration of justice, can make a judgment or decree against a party, unless he shall voluntarily appear, where it does not appear that any process was issued against him or that he was notified of the pendency of the suit by publication or otherwise. Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367,

19: 948

221a. No court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears. Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. Rep. 859,

37: 699

Cited in Goldrey v. Morning News, 156 U. S. 520, 39 L. ed. 518, 15 Sup. Ct. Rep. 559—Re Johnson, 167 U. S. 124, 42 L. ed. 104, 17 Sup. Ct. Rep. 785—Dewey v. Des Moines, 173 U. S. 203, 43 L. ed. 668, 19 Sup. Ct. Rep. 379—United States Graphite Co. v. Pacific Graphite Co. 68 Fed. 444—Rust v. United Waterworks Co. 17 C. C. A. 24, 36

U. S. App. 167, 70 Fed. 137—Excelsior Pebble Phosphate Co. v. Brown, 20 C. C. A. 432, 42 U. S. App. 55, 74 Fed. 324—Pierson v. Gaskill, 23 Pa. Co. Ct. 116, 30 Pittsb. L. J. N. S. 251, 9 Pa. Dist. R. 554—Tillinghast v. Boston & P. R. Lumber Co. 39 S. C. 495, 22 L.R.A. 53, 18 S. E. 120—Emanuel v. Ferris, 63 S. C. 121, 41 S. E. 20.

221b. In all cases in which a personal liability is sought to be enforced by judicial proceedings and after written notice, the notice must be personally served upon the defendant within the territorial jurisdiction of the court by whose order or judgment his personal liability is to be ascertained and fixed, unless he has agreed in advance to accept or does in fact accept, some other form of service as sufficient. Wilson v. Seligman, 144 U. S. 41, 12 Sup. Ct. Rep. 541,

36: 338

Cited in Goldrey v. Morning News, 156 U. S. 521, 39 L. ed. 517, 15 Sup. Ct. Rep. 559—Moredock v. Kirby, 118 Fed. 184—Smith v. Collyot, 69 N. J. L. 371, 55 Atl. 805—Harris v. Harris, 115 N. C. 588, 44 Am. St. Rep. 471, 20 S. E. 187—Tillinghast v. Boston & P. R. Lumber Co. 39 S. C. 495, 22 L.R.A. 53, 18 S. E. 120—Emanuel v. Ferris, 63 S. C. 121, 41 S. E. 20—Netzorg v. Green, 26 Tex. Civ. App. 121, 62 S. W. 789.

221c. A suit to enforce a lien upon a mining claim is ineffectual to transfer the title to the claim, where there is no service upon the defendant, or appearance entered for him, and he is never in court. Turner v. Sawyer, 150 U. S. 578, 14 Sup. Ct. Rep. 192,

37: 1189

222. Where a judgment was obtained, without actual service of process, on a forged note, in a time of civil war, when the defendant was within the lines of the enemy, it will be set aside, together with a sale made thereunder. Monger v. Shirley, 131 U. S. xxxxi. Appx. and

22: 449

223. No judgment can be rendered by a court of the United States against a defendant who is not an inhabitant of the district where the court is sitting, unless process has been served upon his person within that district, or unless he waives the necessity of such process by entering his appearance in the suit. Levy v. Fitzpatrick, 15 Pet. 167,

10: 699

Cited in Chaffee v. Haywood, 20 How. 215, 15 L. ed. 852—Martin v. Lalley, 17 Wall. 18, 21 L. ed. 596—Fleitas v. Richardson, 147 U. S. 544, 37 L. ed. 272, 13 Sup. Ct. Rep. 495—Knott v. Southern Life Ins. Co. Fed. Cas. No. 7,894, 2 Woods, 479—Saddler v. Hudson, Fed. Cas. No. 12,206—Sadler v. Fallon, Fed. Cas. No. 12,210, 2 Curt. 579—Schollenberger v. 45 Foreign Ins. Cos. Fed. Cas. No. 12,475a, 5 W. N. C. 405—United States v. Ottman, Fed. Cas. No. 15,977, 1 Hughes, 313—Anderson v. Shaffer, 10 Fed. 267—United States v. American Lumber Co. 80 Fed. 311—Fosha v. Western U. Teleg. Co. 114 Fed. 702.

224. Service of process or notice upon defendants in an original proceeding is necessary to enable a court to exercise jurisdiction thereof. In the absence of such notice

or service, the proceeding is not only voidable, but absolutely void. *Walden v. Craig*, 14 Pet. 147, 10: 353

Cited in *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 25, 1 Fed. 604—*Boykin v. Rahn*, 28 Ala. 342, 65 Am. Dec. 349—*Jones v. Knox*, 51 Ala. 370—*Clapp v. Houg*, 12 N. D. 606, 65 L.R.A. 760, 102 Am. St. Rep. 559, 98 N. W. 710—*Troyer v. Wood*, 96 Mo. 480, 9 Am. St. Rep. 367, 10 S. W. 42.

225. The rule that service of process or notice is necessary to enable a court to exercise jurisdiction in a case, and that, if jurisdiction is taken where there has been no service of process or notice, the proceeding is absolutely void, applies only where original jurisdiction is exercised, and not to the decision of a collateral question in a case where the parties are before the court. *Walden v. Craig*, 14 Pet. 147, 10: 393
Cited in *Maitland v. Gibson*, 79 Fed. 138.

226. No valid judgment in *personam* can be rendered against a defendant without personal service upon him in a court of competent jurisdiction, or waiver of summons, and voluntary appearance therein. *Clark v. Wells*, 203 U. S. 164, 27 Sup. Ct. Rep. 43, 51: 138

227. The doctrine requiring personal service or a voluntary appearance, to give jurisdiction, applies in all its force to personal judgments of state courts against foreign corporations. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354, 27: 222

228. After a final decree the parties are not bound to take notice of subsequent proceedings, unless they are served with process or enter their voluntary appearance. *Smith v. Woolfolk*, 115 U. S. 143, 5 Sup. Ct. Rep. 1177, 29: 357

Editorial note.

Service of notice to appear and defend, when necessary to its validity. 7: 923

Several defendants.

Judgment of Other State, see *infra*, 1030-1032.

229. A judgment against several defendants is a nullity as to one not served with process and who did not appear. *Shelton v. Tiffin*, 6 How. 163, 12: 387
Godfrey v. Terry, 97 U. S. 171, 24: 944
Distinguished in *Ferguson v. Crawford*, 70 N. Y. 260, 26 Am. Rep. 589.

Cited in *Arnott v. Webb*, 1 Dill. 303, Fed. Cas. No. 562—*Logansport Gaslight & Coke Co. v. Knowles*, 2 Dill. 423, Fed. Cas. No. 8467—*Nettleton v. Mosier*, 3 Fed. 389—*First Nat. Bank v. Cunningham*, 48 Fed. 514—*Lapham v. Campbell*, 61 Cal. 300—*Barney v. DeKraft*, 6 D. C. 364 Appx.—*Martin v. Gray*, 19 Kan. 469, 27 Am. Rep. 149—*Keeler v. Elston*, 22 Neb. 312, 34 N. W. 891—*Kerr v. Kerr*, 41 N. Y. 275—*Gardner v. Austin*, 14 Pa. Co. Ct. 555—*Weber v. Yancy*, 7 Wash. 89, 34 Pac. 473.

230. Where there were only twenty out of sixty-four individuals against whom a decree was rendered, who were served with process or who appeared in the proceedings, U. S. Dig.—227

and where the liability of each depended upon facts peculiar to his own case, the decree cannot be sustained. *Godfrey v. Terry*, 97 U. S. 171, 24: 944

Nonresident.

Judgment Against Foreign Corporation, see *supra*, 227.

Judgment of Sister State, see *infra*, 960.
Conclusiveness of State Judgment in Federal Court, see *infra*, 1052a.

Service by Publication Against, see *Writ and Process*, 87a-92.

See also *supra*, 201, 204, 211, 212; *infra*, 243, 1121; *Partnership*, 167.

231-2. State courts can acquire jurisdiction to render a personal judgment against nonresidents only by personal service of citation on the party, or his voluntary appearance. *Pennoyer v. Neff*, 95 U. S. 714, 24: 565

Cited in *Harkness v. Hyde*, 98 U. S. 478, 25 L. ed. 238—*Brooklyn v. Aetna L. Ins. Co.* 99 U. S. 370, 25 L. ed. 418—*Livingston County v. Darlington*, 101 U. S. 413, 25 L. ed. 1018—*Mohr v. Manierre*, 101 U. S. 422, 25 L. ed. 1054—*New York L. Ins. Co. v. Bangs*, 103 U. S. 441, 26 L. ed. 582—*St. Clair v. Cox*, 106 U. S. 353, 27 L. ed. 224, 1 Sup. Ct. Rep. 354—*Pana v. Bowler*, 107 U. S. 545, 27 L. ed. 430, 2 Sup. Ct. Rep. 704—*Hart v. Sansom*, 110 U. S. 156, 28 L. ed. 103, 3 Sup. Ct. Rep. 588—*Smith v. Woolfolk*, 115 U. S. 149, 29 L. ed. 360, 5 Sup. Ct. Rep. 1177—*Renaud v. Abbott*, 116 U. S. 288, 29 L. ed. 632, 6 Sup. Ct. Rep. 1194—*Freeman v. Alderson*, 119 U. S. 188, 30 L. ed. 374, 7 Sup. Ct. Rep. 165—*Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 295, 34 L. ed. 672, 11 Sup. Ct. Rep. 92—*Wilson v. Sellman*, 144 U. S. 45, 36 L. ed. 339, 12 Sup. Ct. Rep. 541—*Noble v. Union River Logging R. Co.* 147 U. S. 173, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*Swan Land & Cattle Co. v. Frank*, 148 U. S. 614, 37 L. ed. 581, 13 Sup. Ct. Rep. 691—*Mexican C. R. Co. v. Pinkney*, 149 U. S. 209, 37 L. ed. 705, 13 Sup. Ct. Rep. 859—*Scott v. McNeal*, 154 U. S. 46, 38 L. ed. 902, 14 Sup. Ct. Rep. 1108—*Dorr v. Gihoney*, 3 Hughes, 387, Fed. Cas. No. 4,006—*Mickey v. Stratton*, 5 Sawy. 480, Fed. Cas. No. 9,530—*Parrott v. Alabama Gold L. Ins. Co.* 4 Woods, 355, 5 Fed. 393—*McHenry v. New York, P. & O. R. Co.* 25 Fed. 67—*United States v. American Teleph. Co.* 29 Fed. 32—*Cornwall v. Davis*, 4 L.R.A. 565, 38 Fed. 881—*McCormick v. Elliot*, 43 Fed. 473—*Bentlif v. London & C. Finance Corp.* 44 Fed. 668—*Brooks v. Dun*, 51 Fed. 143—*Remer v. McKay*, 54 Fed. 435—*Pickett v. Ferguson*, 45 Ark. 192, 55 Am. Rep. 345—*Loaiza v. Superior Court*, 85 Cal. 28, 9 L.R.A. 380, 20 Am. St. Rep. 197, 24 Pac. 707—*Williams v. Follett*, 17 Colo. 54, 28 Pac. 330—*Davis v. John Monat Lumber Co.* 2 Colo. App. 388, 31 Pac. 187—*Tenney v. Taylor*, 1 App. D. C. 227—*Germania Sav. Bank v. Peuser*, 40 La. Ann. 798, 5 So. 75—*Grover & B. Sewing Mach. Co. v. Radcliffe*, 66 Md. 517, 8 Atl. 265—*Elliot v. McCormick*, 144 Mass. 11, 10 N. E. 705—*Peaslee v. Peaslee*, 147 Mass. 180, 17 N. E. 506—*Needham v. Thayer*, 147 Mass. 538, 18 N. E. 429—*Rand v. Hanson*, 154 Mass. 89, 12 L.R.A. 574, 26 Am. St. Rep. 210, 28 N. E. 62—*Troyer v. Wood*, 96 Mo. 480, 9 Am. St. Rep. 367, 10

S. W. 42—*Eastman v. Dearborn*, 63 N. H. 366—*Boody v. Watson*, 64 N. H. 194, 9 Atl. 794—*Elsasser v. Haines*, 52 N. J. L. 13, 18 Atl. 1095—*Smith v. Montoya*, 3 N. M. 22, 1 Pac. 175—*Bartlett v. Spicer*, 75 N. Y. 534—*Puckett v. Benjamin*, 21 Or. 380, 28 Pac. 65—*Com. v. Stevens*, 25 Pa. Co. Ct. 73—*Taylor v. Rountree*, 15 Lea, 727—*O'Neill v. Brown*, 61 Tex. 37—*Dorr v. Rohr*, 82 Va. 365, 3 Am. St. Rep. 106—*Paxton v. Daniell*, 1 Wash. 22, 23 Pac. 441—*Renier v. Hurlbut*, 81 Wis. 28, 14 L.R.A. 564, 29 Am. St. Rep. 850, 50 N. W. 783.

233. A personal judgment is without validity if rendered by a state court in an action upon a money demand against a non-resident of the state, upon whom no personal service of process within the state was made, and who did not appear. *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. Rep. 92, 34: 670

Cited in Brooks v. Dun, 51 Fed. 147—*Du Pont v. Abel*, 81 Fed. 534—*Crim v. Crim*, 162 Mo. 556, 54 L.R.A. 506, 85 Am. St. Rep. 521, 63 S. W. 489—*Hinton v. Penn Mut. L. Ins. Co.* 126 N. C. 24, 78 Am. St. Rep. 636, 35 S. E. 182—*Tillinghast v. Boston & P. R. Lumber Co.* 39 S. C. 495, 22 L.R.A. 53, 18 S. E. 120—*Ferry v. Miltmore Elastic Steel Car Wheel Co.* 71 Vt. 458, 76 Am. St. Rep. 987, 45 Atl. 1035.

234. A judgment rendered in an action of debt against a nonresident who has not been served with process or voluntarily appeared has no binding force. *Owens v. McCloskey (Owens v. Henry)* 161 U. S. 642, 16 Sup. Ct. Rep. 693, 40: 837

235-6. A judgment in a proceeding against an absent nonresident defendant, without personal service by attachment of property, cannot bind the defendant personally. *Cooper v. Reynolds*, 10 Wall. 308, 19: 931

Cited in Pana v. Bowler, 107 U. S. 545, 27 L. ed. 430, 2 Sup. Ct. Rep. 704—*Freeman v. Alderson*, 119 U. S. 188, 30 L. ed. 374, 7 Sup. Ct. Rep. 165—*Dorr v. Gibboney*, Fed. Cas. No. 4,006—*Galpin v. Page*, 3 Sawy. 113, Fed. Cas. No. 5,206—*Moredock v. Kirby*, 118 Fed. 184—*Brown v. Campbell*, 100 Cal. 641, 38 Am. St. Rep. 314, 35 Pac. 433—*De la Montanya v. De la Montanya*, 112 Cal. 112, 32 L.R.A. 86, 53 Am. St. Rep. 165, 44 Pac. 345—*First Nat. Bank v. Eastman*, 144 Cal. 492, 103 Am. St. Rep. 95, 77 Pac. 1043—*Munger v. Doolan*, 75 Conn. 659, 55 Atl. 169—*Frankel v. Satterfield*, 9 Houst. (Del.) 209, 19 Atl. 808—*Robinson v. Morrison*, 2 App. D. C. 123—*Kerns v. McAulay*, 8 Idaho, 565, 69 Pac. 539—*State Bank v. Thweatt*, 111 Ill. App. 604—*National Bank v. Peters*, 51 Kan. 69, 32 Pac. 637—*Brand v. Brand*, 116 Ky. 791, 63 L.R.A. 209, 76 S. W. 808—*Eastman v. Wadleigh*, 65 Me. 255, 20 Am. Rep. 695—*Moore v. Speed*, 55 Mich. 87, 20 N. W. 801—*Eastman v. Dearborn*, 63 N. H. 366—*Goldmark v. Magnolia Metal Co.* 65 N. J. L. 346, 47 Atl. 720—*Sargent v. Sargent Granite Co.* 6 Misc. 386, 26 N. Y. Supp. 737—*Rigney v. Rigney*, 127 N. Y. 414, 24 Am. St. Rep. 462, 28 N. E. 405—*Oil Well Supply Co. v. Koen*, 64 Ohio St. 430, 60 N. E. 603—*Stanley v. Stanley*, 35 S. C. 99, 14 S. E. 675—*York v. State*, 73 Tex. 654, 11 S. W. 860—*M. v. Jones Lumber Co. v. Rhoades*, 17 Tex. Civ. App. 674, 41 S. W. 102—*Neufelder v. German American Ins. Co.* 6 Wash. 339, 22 L.R.A. 290, 36 Am. St. Rep. 166, 33 Pac. 870—*Jennings v. Rocky Bar Gold Min. Co.* 20

Wash. 730, 70 Pac. 136—*Colborn v. Booth*, 41 W. Va. 292, 23 S. E. 556.

237. Where two of the defendants in partition were nonresidents and did not appear, and were not served with process, the proceedings were purely *in rem* as to them, and the decree cannot conclude the title of a party shown to have had no interest in the question of partition. *Doe ex dem. McCall v. Carpenter*, 18 How. 297, 15: 389
Cited in Bailey v. Sundberg, 1 C. C. A. 390, 1 U. S. App. 101, 49 Fed. 585.

238. The decree rendered in a suit commenced in a state court against the holders and owners of bonds and coupons which have been issued in the name of a town and delivered to a railroad company in payment of the town subscription to its stock cannot bind anyone not personally served with process or who did not appear, nor affect the rights of nonresident holders of bonds and coupons proceeded against by constructive service. *Brooklyn v. Aetna L. Ins. Co.* 99 U. S. 362, 25: 416

Cited in Empire v. Darlington, 101 U. S. 92, 25 L. ed. 880—*Livingston County v. Darlington*, 101 U. S. 413, 25 L. ed. 1018—*Pana v. Bowler*, 107 U. S. 545, 27 L. ed. 430, 2 Sup. Ct. Rep. 704—*Smith v. Woolfolk*, 115 U. S. 149, 29 L. ed. 380, 5 Sup. Ct. Rep. 1177—*Enfield v. Jordan*, 119 U. S. 693, 30 L. ed. 529, 7 Sup. Ct. Rep. 358—*Lackett v. Rumbaugh*, 45 Fed. 32—*Brooks v. Dun*, 51 Fed. 146—*Laughlin v. Louisiana & N. O. Ice Co.* 35 La. Ann. 1186—*Hobson v. Peake*, 44 La. Ann. 387, 10 So. 762—*Wilson v. St. Louis & S. F. R. Co.* 108 Mo. 597, 32 Am. St. Rep. 624, 18 S. W. 286—*Eastman v. Dearborn*, 63 N. H. 366—*National Bank v. Peabody*, 55 Vt. 497, 45 Am. Rep. 632.

239-40. A decree in an Illinois court perpetually enjoining taxation to pay township bonds issued in payment of railroad stock, and declaring them void, does not conclude any bondholders proceeded against as "unknown owners and holders," who were not served with process and did not appear, nor bondholders residing in other states who were proceeded against only by constructive service. *Empire Twp. v. Darlington*, 101 U. S. 87, 25: 878

Cited in Livingston County v. Darlington, 101 U. S. 413, 25 L. ed. 1018—*Pana v. Bowler*, 107 U. S. 545, 27 L. ed. 430, 2 Sup. Ct. Rep. 704—*Smith v. Woolfolk*, 115 U. S. 149, 29 L. ed. 380, 5 Sup. Ct. Rep. 1177—*Enfield v. Jordan*, 119 U. S. 693, 30 L. ed. 529, 7 Sup. Ct. Rep. 358—*Brooks v. Dun*, 51 Fed. 146—*Elsasser v. Haines*, 52 N. J. L. 29, 18 Atl. 1095—*National Bank v. Peabody*, 55 Vt. 497, 45 Am. Rep. 632.

— Editorial note.

[Service of process upon foreign corporation not doing business within the state, as basis of a judgment *in personam*. 8 L.R.A. (N. S.) 538.]

Proceeding in rem.

Collateral Attack, see *infra*, 437.

Due Process in, see *Constitutional Law*, 716, 717.

Service by Publication, see *Writ and Process*, 87b, 88b, 90.

See also *supra*, 211, 237.

241. It is essential to a proceeding *in rem* that there should be at least constructive notice to adverse claimants to appear and maintain their rights, before a judgment in such a proceeding can operate as *prima facie* evidence. *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. Rep. 590, 32: 1001

Cited in *Central Trust Co. v. Charlotte, C. & A. R. Co.* 65 Fed. 263—*Central Trust Co. v. Condon*, 14 C. C. A. 333, 31 U. S. App. 387, 62 Fed. 103—*National Foundry & Pipe Works v. Oconto Water Co.* 68 Fed. 1008—*Southern R. Co. v. Bouknight*, 30 L.R.A. 827, 17 C. C. A. 187, 25 U. S. App. 415, 70 Fed. 448—*Southern Bank & T. Co. v. Folsom*, 21 C. C. A. 572, 43 U. S. App. 713, 75 Fed. 932—*Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 337, 47 U. S. App. 36, 76 Fed. 290—*Central Trust Co. v. Louisville, St. L. & T. R. Co.* 81 Fed. 774—*Central Trust Co. v. Hennen*, 33 C. C. A. 192, 61 U. S. App. 714, 90 Fed. 596—*Guardian Trust & Deposit Co. v. Greensboro Water Supply Co.* 115 Fed. 189—*Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson*, 130 Fed. 165—*Krotz v. A. R. Beck Lumber Co.* 34 Ind. App. 586, 73 N. E. 273—*Russell v. Grant*, 122 Mo. 174, 43 Am. St. Rep. 563, 26 S. W. 958—*Winningham v. Trueblood*, 149 Mo. 586, 51 S. W. 399—*Railroad Equipment Co. v. Blair*, 143 N. Y. 611, 39 N. E. 962—*Milburn v. Smith*, 11 Tex. Civ. App. 682, 33 S. W. 910—*M. T. Jones Lumber Co. v. Rhoades*, 17 Tex. Civ. App. 674, 41 S. W. 102.

242. Where proceedings are *in rem*, as in admiralty, notice is served upon the thing itself, and is necessarily notice to all who have an interest therein such as will sustain a judgment or decree against them. *The Mary*, 9 Cranch, 126, 3: 678
Limited in *Verner v. Bosworth*, 28 Kan. 673—*Thompson v. The Julia D. Morton*, 8 Ohio St. 227.

Cited in *Nations v. Johnson*, 24 How. 205, 16 L. ed. 632—*The Commander-in-Chief (La Tourette v. Burton)* 1 Wall. 52, 17 L. ed. 612—*Miller v. United States (Page v. United States)* 11 Wall. 323, 20 L. ed. 151—*Ray v. Norseworthy*, 23 Wall. 136, 23 L. ed. 113, 12 Nat. Bankr. Reg. 150—*Earle v. McVeigh*, 91 U. S. 510, 23 L. ed. 401—*Scott v. McNeal*, 154 U. S. 46, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108—*Hamilton v. Brown*, 161 U. S. 274, 40 L. ed. 699, 16 Sup. Ct. Rep. 585—*Allen v. United States*, Taney, 117, Fed. Cas. No. 240—*Ashbrook v. The Golden Gate, Newberry*, Adm. 306, Fed. Cas. No. 574—*Bradstreet v. Neptune Ins. Co.* 3 Sumn. 605, Fed. Cas. No. 1,793—*Cushing v. Laird*, 6 Ben. 461, Fed. Cas. No. 3,509—*Harris v. The Henrietta, Newberry*, Adm. 291, Fed. Cas. No. 6,121—*The Hendrik Hudson*, 17 Month. L. Rep. 107, Fed. Cas. No. 6,358—*The Parkhill*, Fed. Cas. No. 10,753a—*Poole v. Nixon*, 9 Pet. 781 Appx. Fed. Cas. No. 11,270—*Sumner v. Marcy*, 3 Woodb. & M. 118, Fed. Cas. No. 13,609—*Tompkins v. Tompkins*, 1 Story, 553, Fed. Cas. No. 14,091—*United States v. Mackoy*, 2 Dill. 308, Fed. Cas. No. 15,696—*Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 24, 1 Fed. 663—*Daily v. Doe*, 3 Fed. 912—*The Trenton*, 4 Fed. 659—*The Ann*, 5 Hughes, 297, 8 Fed. 927—*Branch Bank v. Hodges*, 12 Ala. 122—*Merrick v. Hutt*, 15 Ark. 343—*Thoms v. Southard*, 2 Dana, 482, 26 Am. Dec. 467—*Reynolds v. Whittemore*, 99 Me. 110, 58 Atl. 415—*Salem v. Eastern R. Co.* 98 Mass. 449, 96 Am. Dec. 650—*Brigham v. Fayerweather*, 140 Mass. 413, 5 N. E. 265—*Tyler v. Registration Ct. Judges*, 175 Mass. 75, 51 L.R.A. 435, 55 N.

E. 812—*Williams v. Barnaman*, 28 How. Pr. 64—*Tracy v. Corse*, 49 How. Pr. 340—*Tracey v. Corse*, 58 N. Y. 151—*Cunnius v. Reading School District*, 21 Pa. Super. Ct. 350—*Williams v. Saunders*, 5 Coldw. 78—*Brown v. Brown*, 86 Tenn. 319, 7 S. W. 640—*Underwood v. McVeigh*, 23 Gratt. 420.

242a. A decree in chancery for the conveyance of land does not come within the principle of proceedings *in rem*, so as to dispense with the service of process on the party. *Hollingsworth v. Barbour*, 4 Pet. 466, 7: 922

Cited in *Salem v. Eastern R. Co.* 98 Mass. 449, 96 Am. Dec. 650—*Hunt v. Searcy*, 167 Mo. 182, 87 S. W. 206—*Cunnius v. Reading School District*, 21 Pa. Super. Ct. 350.

243–263. A decree *in rem* is binding upon nonresident parties by reason of the constructive notice given them through the seizure of the property. *Hollingsworth v. Barbour*, 4 Pet. 466, 7: 922

2. Unauthorized Appearance.

Collateral Attack for Lack of Authority, see *infra*, 429, 430.

As Ground for Setting Aside Judgment, see *infra*, 1231.

See also *supra*, 205; Partnership, 167.

264. In Louisiana, where a warrantor is bound to defend in ejectment, he is not bound by the judgment unless he is subjected to the jurisdiction of the court by a citation for that purpose. The appointment of a curator who appears and defends for him, without his knowledge, is not sufficient. *Flowers v. Foreman*, 23 How. 132, 16: 405

265. Where a citizen of Missouri was sued in a circuit court for the district of Louisiana, and on this account the court had no jurisdiction of defendant save by his personal appearance, he may show that the attorney who appeared for him was unauthorized to do so; and if he shows this he is not bound by the proceedings of the court, whose judgment as to him is a nullity. *Shelton v. Tiffin*, 6 How. 163, 12: 387

266. A domestic judgment, regular upon its face, entered upon the appearance of an attorney for defendant, is presumed valid, but proceedings on the judgment may be suspended and the defendant permitted to prove that the appearance was unauthorized. *Hall v. Lanning*, 91 U. S. 160, 23: 271

Cited in *Harper v. Cunningham*, 5 App. D. C. 205.

Editorial note.

[Effect of judgment, when obtained upon unauthorized appearance of attorney. 21 L.R.A. 848.]

d. Judgment by Default, Consent, or Confession.

1. By Default.

Collateral Attack on, see *infra*, 378.

Setting Aside, see *infra*, 1156, 1202.

Opening of, see *infra*, 1224.

In Confiscation Proceedings, see Confiscation and Sequestration, 95, 96.

Entry of Default as Discontinuance, see Dismissal and Discontinuance, 1.

Mandamus to Compel Vacation of, see Mandamus, 85.

Effect on Right of Remaining Defendants to Have Cause Removed to Federal Court, see Removal of Causes, 140, 161, 162.

See also Jury, 26.

267. A judgment is not less conclusive because rendered by default. *United States ex rel. Harshman v. County Court* (Harshman v. County Court) 122 U. S. 306, 7 Sup. Ct. Rep. 1171, 30: 1152

268. A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest. *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 15 Sup. Ct. Rep. 733, 39: 859

Southern P. R. Co. v. United States. 168 U. S. 1, 18 Sup. Ct. Rep. 18, 42: 355
Cited in *Southern P. R. Co. v. United States*, 168 U. S. 51, 42 L. ed. 378, 18 Sup. Ct. Rep. 18—*Tyler Min. Co. v. Sweeney*, 24 C. C. A. 581, 48 U. S. App. 203, 79 Fed. 279—*Lake County v. Platt*, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 572—*Garner v. Second Nat. Bank*, 89 Fed. 636—*Tyler Min. Co. v. Last Chance Min. Co.* 32 C. C. A. 500, 61 U. S. App. 193, 90 Fed. 17—*Geer v. Ouray County*, 38 C. C. A. 256, 97 Fed. 440—*Bunker Hill & S. Min. & Concentrating Co. v. Empire State Idaho Min. & Developing Co.* 108 Fed. 193—*Re American Brewing Co.* 50 C. C. A. 524, 112 Fed. 759—*Mackay v. Fox*, 57 C. C. A. 442, 121 Fed. 490—*Third Nat. Bank v. Atlantic City*, 65 C. C. A. 180, 130 Fed. 754—*Ayres v. Cone*, 71 C. C. A. 156, 138 Fed. 790—*Rupplin v. McLachlan*, 122 Iowa, 350, 98 N. W. 153.

269. In a suit on municipal bonds, plaintiff's averment that they were issued in pursuance of a certain statute, being one of which must be proved if denied, in order to make the plaintiff's case, is confessed by default; and as to it the judgment constitutes an estoppel. *United States ex rel. Harshman v. County Court* (Harshman v. County Court) 122 U. S. 306, 7 Sup. Ct. Rep. 1171, 30: 1152

Cited in *Knox County v. Harshman*, 132 U. S. 14, 33 L. ed. 249, 10 Sup. Ct. Rep. 8.

270. The withdrawal of an answer in an action to determine adverse claims to a mining location, and an amendment by the defendant of his application in the land office, so as to exclude the land in contest, do not destroy jurisdiction or prevent a judgment by default from being conclusive of every fact necessarily determined, including that of priority of location, on which the complaint was based. *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 15 Sup. Ct. Rep. 733, 39: 859
Cited in *Green v. Bogue*, 158 U. S. 504, 39 L. ed. 1070, 15 Sup. Ct. Rep. 975.

In admiralty.

271. A judgment against one defendant

for the want of a plea, or a decree for want of an answer, does not prevent any other defendant from contesting, so far as respects himself, the facts admitted by the absent party. There is no reason why the same rule should not obtain in admiralty. *The Mary*, 9 Cranch, 126, 3: 678

As an admission.

272. A judgment by default against an executor or an administrator is an admission of assets to the extent charged in the proceeding against him, whether it be by action on the original judgment or by scire facias. *Dickson v. Wilkinson*, 3 How. 57, 11: 491

Cited in *Sensecal v. Bolton*, 7 N. M. 358, 34 Pac. 446.

273. A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit, but does not make the allegations of the declaration or complaint evidence in an action upon a different claim. *Cromwell v. Sac County*, 94 U. S. 351, 24: 195

Cited in *Abendroth v. Durant*, 1 Fed. 831—*Emma Silver Min. Co. v. Emma Silver Min. Co.* 7 Fed. 413—*Howard v. Huron*, 6 S. D. 183, 26 L.R.A. 499, 60 N. W. 803—*Farrell v. St. Paul*, 62 Minn. 276, 29 L.R.A. 781, 54 Am. St. Rep. 641, 64 N. W. 809.

2. By Consent.

Judgment of Sister State, see *infra*, 970, 1034.

As Bar to Suit in Federal Court, see *infra*, 1064.

Enforcement of, see *infra*, 1134.

Right to Relief in Equity from Judgment, see *Equity*, 256-258.

Validity of Judgment as Against Other Creditors, see *Fraudulent Conveyances*, 45-47.

When Bill of Review will Lie against, see *Review*, 29.

See also *infra*, 305, 322, 478.

274. A judgment that the cause is hereby discontinued by consent of both parties does not of itself import an agreement to terminate the controversy, and cannot avail as a bar to a subsequent suit. *Jacobs v. Marks*, 182 U. S. 583, 21 Sup. Ct. Rep. 865, 45: 1241

Cited in *Brand v. Brand*, 116 Ky. 799, 63 L.R.A. 212, 26 S. W. 568—*Illinois C. R. Co. v. Bentz*, 108 Tenn. 675, 58 L.R.A. 693, 69 S. W. 317, 91 Am. St. Rep. 763.

275. A judgment entered into by consent for a certain sum, subject to any credits for which vouchers might be produced, is binding on parties and privies, and establishes a claim for the whole sum, if the debtor establishes no credits. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10, 27: 359

276. A decree for the separate maintenance of the wife in a suit brought under Ill. Laws 1877, p. 115, is not less *res judicata* in Illinois on the question of her desertion because it was rendered by consent, where

the appellate court and the supreme court of that state have affirmed the decree and the finding therein made that the wife was living separate and apart from her husband without fault on her part. *Harding v. Harding*, 198 U. S. 317, 25 Sup. Ct. Rep. 679, 49: 1066

277. A decree entered by consent, "that the complainants are entitled to the perpetual injunction and the amount prayed for by the bill," does not ratify in advance subsequent proceedings of the court, and prevent objections to the account rendered by the master. *Livingston v. Woodworth*, 15 How. 546, 14: 809

278. A consent decree that a town shall issue bonds which shall be valid is no adjudication by the court of their validity, on the submission to it, as a judicial tribunal, of the question of such validity. *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. Rep. 1101, 32: 77

Cited in Lake County v. Platt, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 573—*Union Bank v. Oxford*, 90 Fed. 12.

279. Where a decree is entered by consent, and in pursuance of an agreement, the court merely recording the agreement and ordering it to be binding, the court may subsequently determine that the validity of an article of the agreement was not in controversy or passed upon in making the decree. *Texas & P. R. Co. v. Southern P. R. Co.* 137 U. S. 48, 11 Sup. Ct. Rep. 10, 34: 614

Cited in Alabama Nat. Bank v. Mary Lee Coal & R. Co. 108 Ala. 298, 19 So. 404—*Oakland v. Oakland Water Front Co.* 118 Cal. 227, 50 Pac. 268—*Union Bank v. Oxford*, 119 N. C. 227, 34 L.R.A. 490, 25 S. E. 966.

280. A decree in a suit in equity by the United States against a railroad corporation in Tennessee, by consent of parties, confirming a compromise of all claims between them, including any claim of the corporation for mail service, is a bar to a suit by the corporation in the court of claims for mail service performed before the War of the Rebellion, although at the time of the decree payment to it of any claim was prohibited by law, because of its having aided the Rebellion. *Nashville, C. & St. L. R. Co. v. United States*, 113 U. S. 261, 5 Sup. Ct. Rep. 460, 28: 971

Erroneous decree.

281. One is not estopped from contesting the force of an erroneous decree in partition in chancery, although entered by his consent, which he has never obeyed, but has actually caused to be reversed, and has held in opposition to for years under a deed made with others *inter partes*, ignoring the decree immediately after it was rendered. *Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. Rep. 456, 27: 256

Cited in Compton v. Jesup, 15 C. C. A. 448, 31 U. S. App. 486, 68 Fed. 315—*National Foundry & Pipe Works v. Oconto City Water Supply Co.* 51 C. C. A. 476, 113 Fed. 804—*Jenkins v. International Bank*, 111 Ill. 471.

282. Where a consent decree is entered

restraining a manufacturing company from using a label or trademark of the plaintiff, and the suit is afterwards brought to restrain the successor of the company from using said trademark and to enforce the decree against it, on the ground that the agreement on which the decree was entered in terms bound the successor, the court may refuse to be constrained by or to enforce the previous consent decree or treat as *res judicata* where that decree was erroneous and contrary to the right of the case. *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 11 Sup. Ct. Rep. 402, 34: 1005

Cited in New Orleans v. Fisher, 180 U. S. 197, 45 L. ed. 492, 21 Sup. Ct. Rep. 347—*O'Brien v. Wheelock*, 184 U. S. 483, 46 L. ed. 652, 22 Sup. Ct. Rep. 354—*Compton v. Jesup*, 15 C. C. A. 428, 31 U. S. App. 486, 68 Fed. 294—*Buchanan v. Knoxville & O. R. Co.* 18 C. C. A. 133, 37 U. S. App. 499, 71 Fed. 335—*National Foundry & Pipe Works v. Oconto City Water Supply Co.* 51 C. C. A. 476, 113 Fed. 804—*Alabama Nat. Bank v. Mary Lee Coal & R. Co.* 108 Ala. 298, 19 So. 404—*Oakland v. Oakland Water Front Co.* 118 Cal. 228, 50 Pac. 277—*Wheeler v. Eldred*, 121 Cal. 30, 66 Am. St. Rep. 20, 53 Pac. 431—*Mawhinney v. Shallcross*, 48 Phila. Leg. Int. 264, 10 Pa. Co. Ct. 103—*Union Bank v. Oxford*, 119 N. C. 228, 34 L.R.A. 490, 25 S. E. 966.

3. By Confession.

Confession by Demurring, see *infra*, III. e. Foreign Judgment, see *infra*, 988.

Judgment of Sister State, see *infra*, 967.

Setting Aside Judgment, see *infra*, 1191, 1195, 1200, 1202.

Power of Court to Set Aside, see *infra*, 1151.

Motion to Set Aside, see *infra*, 1186, 1187.

Setting Aside Agreement to Confess, see *infra*, 1232.

Effect as Act of Bankruptcy, see Bankruptcy, 78-81.

Due Process in, see Constitutional Law, 701.

Right of Creditor Preferred By, to Share Equally with Other Creditors, see Creditors' Bill, 41.

Right to Relief in Equity from Judgment, see Equity, 256-258.

Burden of Proving Error in Amount, see Evidence, 793.

Validity of Judgment as against Other Creditors, see Fraudulent Conveyances, 45-47.

Against Infants, see Infants, 62.

Injunction against Enforcement, see Injunction, 86, 87.

Effect of, on Validity of Foreclosure Sale, see Mortgage, 375.

See also *supra*, 156, 269; *infra*, 584; Constitutional Law, 690.

283-4. [Judgment entered by a warrant of attorney, on a bond given before the passage of the Pennsylvania act of 1786, is invalid under a provision prohibiting actions "on a cause which arose before the passing" of the act. *Kirkbride v. Durden* (H. Ct. Er. & Ap. Pa.) 1 Dall. 288,

285. Where a decree is taken *pro confesso*, the allegations of the bill cannot be questioned in subsequent proceedings in the court below or upon appeal. Anything in the allegations themselves tending to show that the decree is erroneous is assignable for error; but facts not found in the allegations of the bill are inadmissible to affect the decree. *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. Rep. 788, 29: 105
Cited in Dobson v. Hartford Carpet Co. 114 U. S. 440, 29 L. ed. 170, 5 Sup. Ct. Rep. 945—*Price v. Boden*, 39 Fla. 222, 22 So. 657—*Junge v. MacKnight*, 135 N. C. 113, 47 S. E. 452—*St. Lawrence Boom & Mfg. Co. v. Holt*, 51 W. Va. 375, 41 S. E. 35.

286. Under the law of Virginia, a confession of judgment by the defendant is a release of errors. *Mandeville v. Holey*, 1 Pet. 136, 7: 85

287. A decree nisi, taken *pro confesso* in a foreclosure suit, is preliminary in its nature, requiring a further order to complete it. *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10, 27: 47
Cited in Re Wiseman, 123 Fed. 185—*Llde v. Park*, 132 Ala. 223, 31 So. 360—*Plaisted v. Coke*, 181 Mass. 119, 63 N. E. 132.

288. Where a demurrer was fatally defective in lacking the affidavit of defendant and certificate of counsel required by rule 31, there was no error in disregarding it and entering a decree *pro confesso*. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. Rep. 936, 37: 853
Cited in Preston v. Finley, 72 Fed. 853—*Brasoria County v. Youngstown Bridge Co.* 25 C. C. A. 309, 52 U. S. App. 6, 80 Fed. 13—*American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 599—*Dupree v. Leggett*, 124 Fed. 701—*Taylor v. Brown*, 32 Fla. 340, 13 So. 957.

Editorial note.

[Confessed on warrants of attorney. 13 L.R.A. 796.]

e. On Demurrer.

What Matters Concluded, see *infra*, 504.
 Nature of Judgment on Demurrer, see Pleading. 949-955.
 See also *supra*, 288; *infra*, 639; Pleading. 632.

289-292. Judgment on demurrer is final, if the merits are involved, and is conclusive between the same parties upon the same matter directly in question in a subsequent action. *Aurora v. West*, 7 Wall. 82, 19: 42
Cited in Gould v. Evansville & C. R. Co. 91 U. S. 533, 23 L. ed. 419—*Kelly v. Milan*, 21 Fed. 867—*Oregonian R. Co. v. Oregon R. & Nav. Co.* 27 Fed. 283—*North Muskegon v. Clark*, 10 C. C. A. 594, 22 U. S. App. 522, 62 Fed. 697—*Lindsley v. Union Silver Star Min. Co.* 52 C. C. A. 644, 115 Fed. 50—*Luttrell v. Reynolds*, 63 Ark. 258, 37 S. W. 1051—*McLaughlin v. Doane*, 40 Kan. 304, 10 Am. St. Rep. 210, 19 Pac. 853—*Dixon v. Zadek*, 59 Tex. 531—*Frye v. Miley*, 54 W. Va. 333, 46 S. E. 135.

293. Judgment upon a demurrer to a

complaint because it does not state facts sufficient to constitute a cause of action finally disposes of the case upon its merits as stated in the complaint, unless leave to amend or plead over is granted, and can be pleaded in bar to any other suit for the same cause of action. *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. Rep. 495, 28: 491
Distinguished in North Muskegon v. Clark, 10 C. C. A. 594, 22 U. S. App. 522, 62 Fed. 698.

Cited in Lovell v. Cragin, 136 U. S. 151, 34 L. ed. 379, 10 Sup. Ct. Rep. 1024—*Price v. Coleman*, 22 Fed. 684—*Frisbie v. Chesapeake & O. R. Co.* 57 Fed. 2—*Messinger v. New England Mut. L. Ins. Co.* 59 Fed. 417—*Hobart v. Illinois C. R. Co.* 81 Fed. 6—*Atlanta, K. & N. R. Co. v. Southern R. Co.* 66 C. C. A. 605, 131 Fed. 661—*Goldtree v. Spreckels*, 135 Cal. 689, 67 Pac. 1091—*Brennan v. Berlin Iron Bridge Co.* 71 Conn. 490, 42 Atl. 625—*Hirshbach v. Ketchum*, 70 App. Div. 563, 80 N. Y. Supp. 143—*Hirshbach v. Ketchum*, 84 App. Div. 259, 82 N. Y. Supp. 739—*Hume v. Woodruff*, 28 Or. 376, 38 Pac. 191—*O'Hara v. Parker*, 27 Or. 163, 39 Pac. 1004.

294. A judgment rendered upon demurrer to the declaration is equally as conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be. *Gould v. Evansville & C. R. Co.* 91 U. S. 526, 23: 416
United States v. Pacific Mail S. S. Co. 104 U. S. 480, 26: 850

Cited in Brown v. District of Columbia, 19 Ct. Cl. 460—*Cromwell v. Sac County*, 94 U. S. 370, 24 L. ed. 204—*Lovell v. Cragin*, 136 U. S. 151, 34 L. ed. 379, 10 Sup. Ct. Rep. 1024—*Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 410, 35 L. ed. 1061, 12 Sup. Ct. Rep. 188—*Kelly v. Milan*, 21 Fed. 867—*Oregonian R. Co. v. Oregon R. & Nav. Co.* 27 Fed. 283—*Edwards v. Bates County*, 55 Fed. 438—*Haug v. Great Northern R. Co.* 42 C. C. A. 169, 102 Fed. 76—*Lindsley v. Union Silver Star Min. Co.* 106 Fed. 469—*Lindsley v. Union Silver Star Min. Co.* 52 C. C. A. 641, 115 Fed. 47—*Ohio River R. Co. v. Fisher*, 53 C. C. A. 418, 115 Fed. 936—*Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.* 57 C. C. A. 14, 121 Fed. 318—*Luttrell v. Reynolds*, 63 Ark. 258, 37 S. W. 1051—*Schroers v. Fisk*, 10 Colo. 610, 16 Pac. 285—*Brennan v. Berlin Iron Bridge Co.* 71 Conn. 490, 42 Atl. 625—*National Bank v. Southern Porcelain Mfg. Co.* 59 Ga. 163—*Greene v. Central R. Co.* 112 Ga. 862, 38 S. E. 360—*Griffin v. Wallace*, 66 Ind. 415—*Nickleas v. Pearson*, 126 Ind. 486, 26 N. E. 478—*McLaughlin v. Doane*, 40 Kan. 304, 10 Am. St. Rep. 210, 19 Pac. 853—*Conery v. New Orleans Waterworks Co.* 41 La. Ann. 944, 7 So. 8—*Police Jury v. Police Jury*, 49 La. Ann. 1335, 22 So. 376—*Carlin v. Brackett*, 38 Minn. 308, 37 N. W. 342—*State ex rel. Woodruff-Dunlap Printing Co. v. Cornell*, 52 Neb. 39, 71 N. W. 961—*Hirshbach v. Ketchum*, 79 App. Div. 563, 80 N. Y. Supp. 143—*Hirshbach v. Ketchum*, 84 App. Div. 259, 82 N. Y. Supp. 739—*Henck v. Barnes*, 84 Hun. 549, 32 N. Y. Supp. 840—*Hirshbach v. Ketchum*, 40 Misc. 307, 81 N. Y. Supp. 937—*Dixon v. Zadek*, 59 Tex. 531—*Bomar v. Parker*, 68 Tex. 439, 4 S. W. 599—*Plant v. Carpenter*, 19 Wash. 624, 53 Pac. 1107.

295. Judgment on demurrer is no less conclusive of facts confessed by it than judgment on verdict. *Bissell v. Spring Val-*

ley Twp. 124 U. S. 225, 8 Sup. Ct. Rep. 495. 31: 411

Cited in Edwards v. Bates County, 55 Fed. 438—Gilmer v. Billings, 55 Fed. 781—Messinger v. New England Mut. L. Ins. Co. 59 Fed. 417—Brennan v. Berlin Iron Bridge Co. 71 Conn. 490, 42 Atl. 625—Carlin v. Brackett, 38 Minn. 308, 37 N. W. 342—O'Hara v. Parker, 27 Or. 163, 30 Pac. 1004—Donaldson v. Nealis, 108 Tenn. 644, 69 S. W. 732.

296. In Wisconsin the decision of the state supreme court upon a demurrer is conclusive upon the questions legitimately involved, and is *res judicata* in that case. Northern P. R. Co. v. Ellis, 144 U. S. 458, 12 Sup. Ct. Rep. 724, 36: 504

297. The estoppel of a judgment rendered on the merits, whether on demurrer, agreed statement, or verdict, extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue and determined. Aurora v. West, 7 Wall. 82, 19: 42

Cited in Shrewsbury v. United States, 9 Ct. Cl. 265—Davenport v. Lord (Davenport v. United States, 9 Wall. 414, 19 L. ed. 707—Tioga R. Co. v. Blossburg & C. R. Co. 20 Wall. 143, 22 L. ed. 334—420 Mtu. Co. v. Bullion Min. Co. 3 Sawy. 653, Fed. Cas. No. 4,989—Nesbit v. Independent School District, 25 Fed. 637—Gilmer v. Morris, 46 Fed. 335—Fessenden v. Barrett, 50 Fed. 691—Fuller v. Hamilton County, 53 Fed. 415—Lynde v. Columbus, C. & I. C. R. Co. 57 Fed. 995—Wilcox & G. Sewing Mach. Co. v. Sherborne, 59 C. C. A. 366, 123 Fed. 878—Georgia R. & Bkg. Co. v. Wright, 132 Fed. 917—Los Angeles v. Melius, 58 Cal. 20—Wiese v. San Francisco Musical Soc. 82 Cal. 646, 7 L.R.A. 583, 23 Pac. 212—Hanna v. Read, 102 Ill. 603, 40 Am. Rep. 608—Weiss v. Guerinneau, 109 Ind. 444, 9 N. E. 399—Emerick v. Miller, 159 Ind. 328, 64 N. E. 28—Scott v. Wagner, 2 Kan. App. 391, 42 Pac. 741—Heroman v. Louisiana Institute of Deaf & Dumb, 34 La. Ann. 815—Police Jury v. Police Jury, 49 La. Ann. 1335, 22 So. 376—Dixon v. Merritt, 21 Minn. 201—Pratt v. Rathlef, 10 Okla. 174, 61 Pac. 523—Almy v. Daniels, 15 R. I. 314, 4 Atl. 753—Hart v. Bates, 17 S. C. 43—Ex parte Roberts, 19 S. C. 158—Louisville & N. R. Co. v. State, 8 Heisk. 789—Darragh v. Kaufman, 2 Posey Unrep. Cas. (Tex.) 107—Webster v. Mann, 56 Tex. 123, 42 Am. Rep. 688.

298. A judgment on demurrer to a pleading involving the merits in favor of the plaintiffs in a former suit between the same parties to recover the amount of an interest coupon attached to a bond, is a conclusive answer, in a suit upon another interest coupon attached to the same bond, to the defense that the bond is invalid. Aurora v. West, 7 Wall. 82, 19: 42

299. Where, by a judgment rendered on demurrer, coupons of municipal bonds were adjudged invalid, plaintiff cannot bring an action upon different coupons afterwards becoming due, attached to the same bond. Bissell v. Spring Valley Twp. 124 U. S. 225, 8 Sup. Ct. Rep. 495, 31: 411
Distinguished in State ex rel. National Subway Co. v. St. Louis, 145 Mo. 590, 42 L.R.A. 127, 46 S. W. 981.

Cited in Dowell v. Applegate, 152 U. S. 343, 38 L. ed. 469, 14 Sup. Ct. Rep. 611—Southern P. R. Co. v. United States, 168 U. S. 49,

42 L. ed. 377, 18 Sup. Ct. Rep. 18—Mitchell v. First Nat. Bank, 180 U. S. 481, 45 L. ed. 632, 21 Sup. Ct. Rep. 418—Gilmer v. Morris, 35 Fed. 687—Grannis v. Cherokee Twp. 47 Fed. 430—David Bradley Mfg. Co. v. Eagle Mfg. Co. 6 C. C. A. 671, 18 U. S. App. 349, 57 Fed. 990—Thomson v. Crane, 73 Fed. 332—Empire State Nail Co. v. American Solid Leather Button Co. 21 C. C. A. 154, 83 U. S. App. 522, 74 Fed. 867—Equitable Trust Co. v. Smith, 23 C. C. A. 399, 46 U. S. App. 561, 77 Fed. 681—St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co. 32 C. C. A. 289, 60 U. S. App. 675, 89 Fed. 653—Norton v. Jensen, 33 C. C. A. 147, 61 U. S. App. 291, 90 Fed. 421—Norton v. House of Mercy, 41 C. C. A. 400, 101 Fed. 386—Haug v. Great Northern R. Co. 42 C. C. A. 169, 102 Fed. 76—Mercantile Nat. Bank v. Hubbard, 45 C. C. A. 78, 105 Fed. 821—Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 644, 107 Fed. 787—Gorham v. Broad River Twp. 56 C. C. A. 144, 109 Fed. 776—Ætna L. Ins. Co. v. Hamilton County, 54 C. C. A. 475, 117 Fed. 89—McGrantt v. Baggett, 128 Ala. 485, 29 So. 199—Wiese v. San Francisco Musical Soc. 82 Cal. 646, 7 L.R.A. 583, 23 Pac. 212—Southern P. R. Co. v. Painter, 113 Cal. 253, 45 Pac. 320—Chicago Theological Seminary v. People, 189 Ill. 444, 59 N. E. 977—Madison v. Garfield Coal Co. 114 Iowa, 64, 86 N. W. 41—Garden City v. Merchants' & F. Nat. Bank, 65 Kan. 348, 93 Am. St. Rep. 284, 69 Pac. 325—Kleinschmidt v. Binsel, 14 Mont. 53, 43 Am. St. Rep. 604, 35 Pac. 400—Paterson v. Baker, 51 N. J. Eq. 53, 26 Atl. 324—Territory ex rel. Jones v. Hopkins, 9 Okla. 150, 59 Pac. 976—Moorehouse v. Moorehouse, 7 Pa. Super. Ct. 290—McMakin v. Fowler, 34 S. C. 288, 13 S. E. 534.

300. Where a judgment in a former action is upon demurrer to the declaration, the estoppel extends only to the exact point raised by the pleadings or decided, and does not operate as a bar to a second suit for other breaches of the same covenants; although, if the judgment be upon pleadings and proofs, the estoppel extends not only to what was decided, but to all that was necessarily involved in the issue. Wiggins Ferry Co. v. Ohio & M. R. Co. 142 U. S. 396, 12 Sup. Ct. Rep. 188, 35: 1055
Cited in Ryan v. Seaboard & R. R. Co. 89 Fed. 403—Kilham v. Wilson, 50 C. C. A. 463, 112 Fed. 573—Ohio River R. Co. v. Fisher, 53 C. C. A. 418, 115 Fed. 936—Trimbel v. Wollman, 71 Mo. App. 486—Taylor v. Matteson, 86 Wis. 122, 56 N. W. 829.

301. If the plaintiff fails on demurrer, from the omission of an essential allegation, which is fully supplied in the second suit, the judgment in the first suit is no bar to a second to enforce the same right. Gould v. Evansville & C. R. Co. 91 U. S. 526, 23: 416

Cited in Gilmer v. Morris, 30 Fed. 481—Gilmer v. Morris, 35 Fed. 688—Gilmer v. Morris, 46 Fed. 335—Gilmer v. Billings, 55 Fed. 782—North Muskegon v. Clark, 10 C. C. A. 593, 22 U. S. App. 522, 62 Fed. 697—Ryan v. Seaboard & R. R. Co. 89 Fed. 403—State v. Roth, 47 Ark. 226, 1 S. W. 98—Gallup v. Lichter, 4 Colo. App. 299, 35 Pac. 985—Florida Southern R. Co. v. Brown, 23 Fla. 120, 1 So. 512—Terre Haute & I. R. Co. v. State, 159 Ind. 470, 65 N. E. 481—McClung v. Hohl, 10 Kan. App. 97, 61 Pac. 507—Swanson v. Great Northern R. Co. 73

Minn. 106, 75 N. W. 1033—Kleinschmidt v. Binzel, 14 Mont. 53, 43 Am. St. Rep. 604, 35 Pac. 480—Moore v. Dunn, 41 Ohio St. 63—Brakefield v. Lucas, 10 Okla. 587, 64 Pac. 10—O'Hara v. Parker, 27 Or. 164, 39 Pac. 1004—Frye v. Miley, 54 W. Va. 332, 40 S. E. 435—State v. McKelowney, 54 W. Va. 701, 47 S. E. 650—Taylor v. Matteson, 86 Wis. 122, 56 N. W. 829.

302. A judgment on general demurrer that a declaration is bad in substance can never be pleaded as a bar to a good declaration for the same cause of action. It is in no sense a judgment on the merits. *Gilman v. Rives*, 10 Pet. 298, 9: 432 *Distinguished in United States v. Price*, 9 How. 99, 13 L. ed. 62.

Cited in United States v. Price, 9 How. 98, 13 L. ed. 62—*Gould v. Evansville & C. R. Co.* 91 U. S. 534, 23 L. ed. 419—*Cromwell v. Sac County*, 94 U. S. 364, 24 L. ed. 202—*Spicer v. United States*, 5 Ct. Cl. 49—*Kelly v. Milan*, 21 Fed. 867—*North Muskegon v. Clark*, 10 C. C. A. 594, 22 U. S. App. 522, 62 Fed. 697—*Cannon v. State*, 17 Ark. 370—*Los Angeles v. Mellus*, 59 Cal. 452—*Lockett v. Lindsay*, 1 Idaho, 327—*Vanlandingham v. Ryan*, 17 Ill. 30—*Sherry v. Foresman*, 6 Blackf. 59—*Estep v. Larsh*, 21 Ind. 197—*Reed v. Higgins*, 86 Ind. 148—*Wells v. Moore*, 49 Mo. 231—*Tobener v. Hassinbusch*, 56 Mo. App. 598—*Moore v. Dunn*, 41 Ohio St. 63—*O'Hara v. Parker*, 27 Or. 164, 39 Pac. 1004—*Hassell v. Nutt*, 14 Tex. 265—*Taylor v. Matteson*, 86 Wis. 122, 56 N. W. 829.

f. Of Dismissal or Nonsuit.

1. Dismissal.

Form of Judgment of Dismissal, see *supra*, 70-74.

Discontinuance by Consent, see *supra*, 274.

Judgment of Sister State, see *infra*, 971.

Setting Aside for Fraud, see *infra*, 1191.

Modification of, see *infra*, 1210.

Power of Court to Modify, see *infra*, 1155.

Presumptions, see Evidence, 551, 551 a, 551 b.

As to Dismissal Generally, see Dismissal and Discontinuance.

See also Pleading, 569.

When conclusive.

See also *infra*, 544, 639.

303. A dismissal of the plaintiff's suit upon the merits is as conclusive upon the rights of the parties as any other judgment that might have been rendered in the case. *Doe ex dem. Parrish v. Ferris* (Parrish v. Ferris) 2 Black, 606, 17: 317

Durant v. Essex Co. 7 Wall. 107, 19: 154

Cited in Durant v. Essex Co. (Durant v. Storow) 101 U. S. 556, 25 L. ed. 963—*Spicer v. United States*, 5 Ct. Cl. 52—429 Min. Co. v. Bullion Min. Co. 3 Sawy. 653, Fed. Cas. No. 4,980—*Kelly v. Milan*, 21 Fed. 863—*Gilmer v. Morris*, 30 Fed. 479—*Billing v. Gilmer*, 8 C. C. A. 650, 23 U. S. App. 168, 60 Fed. 336—*Garner v. Second Nat. Bank*, 89 Fed. 636—*Wilson v. Smith*, 61 C. C. A. 449, 126 Fed. 919—*Gordon v. Johnson*, 3 Colo. App. 142, 32 Pac. 347—*Cummings v. Baker*, 16 App. D. C. 17—*Sauls v. Freeman*, 24 Fla. 223, 12 Am. St. Rep. 100, 4 So. 525—*Epsstein v. Ferst*, 35 Fla. 510, 17 So. 414

—*Adams County v. Graves*, 75 Iowa. 646, 36 N. W. 889—*Lamb v. McConkey*, 76 Iowa. 49, 40 N. W. 77—*Magill v. Mercantile Trust Co.* 81 Ky. 132—*Martin v. Evans*, 85 Md. 13, 36 L.R.A. 220, 60 Am. St. Rep. 292, 36 Atl. 258—*O'Keefe v. Irvington Real Estate Co.* 87 Md. 199, 39 Atl. 428—*Carroll v. Patrick*, 23 Neb. 844, 37 N. W. 671—*Farish v. New Mexico Min. Co.* 5 N. M. 287, 21 Pac. 634—*Webb v. Buckelew*, 82 N. Y. 561—*Philadelphia v. Ridge Ave. R. Co.* 142 Pa. 493, 24 Am. St. Rep. 512, 21 Atl. 982—*Reynolds v. Hennessy*, 17 R. I. 175, 23 Atl. 639—*Burton v. Burton*, 58 Vt. 420, 5 Atl. 281—*Hazen v. Lyndonville Nat. Bank*, 70 Vt. 551, 67 Am. St. Rep. 680, 41 Atl. 1046—*Beale v. Gordon*, 2 Va. Dec. 41, 21 S. E. 667—*Payne v. Grant*, 81 Va. 173—*Seamster v. Blackstock*, 83 Va. 236, 5 Am. St. Rep. 262, 2 S. E. 36—*Washington, O. & W. R. Co. v. Cazenove*, 83 Va. 752, 3 S. E. 433—*Karn v. Rorer Iron Co.* 86 Va. 762, 11 S. E. 431—*Diehl v. Marchant*, 87 Va. 450, 12 S. E. 803—*Watson v. Watson*, 45 W. Va. 295, 31 S. E. 939—*National Foundry & Pipe Works v. Oconto City Water Supply Co.* 105 Wis. 68, 81 N. W. 125.

304. The rule holds true, although the second bill contains additional allegations that, since the dismissal of the former suit, the complainant has obtained judgments and issued executions on his demand. *Case v. New Orleans & C. R. Co.* (Case v. Beauregard) 101 U. S. 688, 25: 1004

Cited in Patterson v. Wold, 33 Fed. 702—*Chavent v. Schefer*, 50 Fed. 232—*Samuels v. Revlere*, 47 C. C. A. 638, 106 Fed. 720—*Wilson v. Smith*, 61 C. C. A. 449, 126 Fed. 919—*Glade v. Schmidt*, 15 Ill. App. 56—*Windett v. Connecticut Mut. L. Ins. Co.* 27 Ill. App. 72—*Fleitas v. Meraux*, 47 La. Ann. 241, 16 So. 848—*Ashuelot R. Co. v. Cheshire R. Co.* 59 N. H. 411—*Shumate v. Fauquier County*, 84 Va. 577, 5 S. E. 570—*Rogers v. Rogers*, 37 W. Va. 419, 16 S. E. 633.

304a. A *retraxit* operates as a full release and discharge of the action, and bars any future suit. *Minor v. Mechanics Bank*, 1 Pet. 46, 7: 47

Cited in Harris v. Preston, 10 Ark. 209.

305. A judgment of dismissal in pursuance of agreement, reciting a settlement and that nothing is due the plaintiff, is a bar to a subsequent action. *United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. Rep. 454, 30: 601

Cited in Jacobs v. Marks, 182 U. S. 593, 45 L. ed. 1247, 21 Sup. Ct. Rep. 865—*Rincon Water & P. Co. v. Anaheim Union Water Co.* 115 Fed. 549—*Wilson v. Smith*, 117 Fed. 710—*Hallack v. Loft*, 19 Colo. 84, 34 Pac. 568—*Richmond & D. R. Co. v. Gorman*, 7 App. D. C. 103—*Pethel v. McCullough*, 49 W. Va. 522, 39 S. E. 199.

306. A dismissal of a bill, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination, and constitutes a bar to any further litigation of the same subject between the same parties. *Durant v. Essex Co.* 7 Wall. 107, 19: 154

Cited in Howth v. Owens, 30 Fed. 911—*United States v. Gwyn*, 4 N. M. 641, 42 Pac. 167—*Cook v. Burniey*, 45 Tex. 116.

307. A decree dismissing the complaint and entitling defendant to recover costs, if set up as a plea in bar to a new bill for the same cause, is conclusive, if dismissal was upon hearing and is not in direct terms "without prejudice." *Lyon v. Perin & G. Mfg. Co.* 125 U. S. 698, 8 Sup. Ct. Rep. 1024. 31: 839

Cited in *Billing v. Gilmer*, 8 C. C. A. 650, 23 U. S. App. 168, 60 Fed. 336.

308. The dismissal of a bill filed by the vendor of land, seeking to enforce a specific performance, on account of defect of title, is a bar to a new bill for the same object. *Hepburn v. Dunlop*, 1 Wheat. 179, 4: 65 *Distinguished in* *Wisconsin v. Torinus*, 28 Minn. 184, 9 N. W. 725.

Cited in *Seaver v. Hall*, 50 Neb. 884, 70 N. W. 373—*Rutter's Estate*, 40 Phila. Leg. Int. 121—*Simmon's Estate*, 16 Phila. 226—*Burton v. Burton*, 58 Vt. 421, 5 Atl. 281.

309. The dismissal of a suit for infringement of a patent is a complete estoppel in favor of the successful party, in a subsequent action upon the same state of facts except as to the time covered by the alleged infringement, even if the new action is based on a different theory. *Hubbell v. United States*, 171 U. S. 203, 18 Sup. Ct. Rep. 828, 43: 136

310. A general dismissal on the merits of a bill in equity, not made conditionally or without prejudice or with any saving of the right of action, will constitute a bar to the use of the cause of action there involved as a set-off in a subsequent action at law between the same parties. *Baker v. Cummings*, 181 U. S. 117, 21 Sup. Ct. Rep. 578, 45: 776

Cited in *United States ex rel. Coffman v. Norfolk & W. R. Co.* 114 Fed. 686—*Greene v. United Shoe Machinery Co.* 60 C. C. A. 96, 124 Fed. 964—*Stratton v. Essex County Park Commission*, 145 Fed. 437.

311. A decree dismissing, because of the bona fides of defendant's purchase, a bill filed by the United States under the act of Congress of March 2, 1889 (25 Stat. at L. 850, chap. 377), to avoid, by way of forfeiture, certain patents of land issued by the United States in pursuance of the wagon-road grant made by the act of Congress of July 2, 1864 (13 Stat. at L. 355, chap. 213), is a bar to a subsequent suit by the United States against the same defendant to avoid the patents on the ground that the lands were within an Indian reservation, and therefore excepted from the operation of the grant. *United States v. California & O. Land Co.* 192 U. S. 355, 24 Sup. Ct. Rep. 266, 48: 476

Cited in *Fayerweather v. Ritch*, 195 U. S. 301, 49 L. ed. 211, 25 Sup. Ct. Rep. 58—*Gunter v. Atlantic Coast Line R. Co.* 200 U. S. 290, 50 L. ed. 486, 26 Sup. Ct. Rep. 252—*United States v. Dalcour*, 203 U. S. 423, 51 L. ed. 252, 27 Sup. Ct. Rep. 58—*Northern P. R. Co. v. Slaght*, 205 U. S. 131, 51 L. ed. 741, 27 Sup. Ct. Rep. 442—*The New Brunswick*, 64 C. C. A. 328, 129 Fed. 896—*Rew v. Independent School District*, 125 Iowa, 35, 106 Am. St. Rep. 282, 98 N. W. 802—*Ruckman v. Union R. Co.* 45 Or. 583, 60 L.R.A. 482, 78 Pac. 748.

When not conclusive.

Judgment of Discontinuance in State Court as Bar to Suit in Federal Court, see *infra*, 1065.

312. If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. *Hughes v. United States*, 4 Wall. 232, 18: 303

313. A dismissal of a suit for want of parties does make the subject of controversy *res judicata*. *de St. Romes v. Levee Steam Cotton-Press Co.* (St. Romes v. Levee Steam Cotton-Press Co.) 127 U. S. 614, 8 Sup. Ct. Rep. 1335, 32: 289

314. A bill dismissed for want of, or a misjoinder of, parties, does not conclude either party upon the merits; and any of them may bring another suit, with proper parties, in regard to the subject-matter of the first one. *House v. Mullen*, 22 Wall. 42, 22: 838

Distinguished in *Gilmer v. Morris*, 30 Fed. 480.

Cited in 420 Min. Co. v. Bullion Min. Co. 3 Sawy. 652, Fed. Cas. No. 4,989—*Hershberger v. Blewett*, 55 Fed. 172—*Billing v. Gilmer*, 8 C. C. A. 650, 23 U. S. App. 168, 60 Fed. 336—*Speer v. Kearney County*, 32 C. C. A. 105, 60 U. S. App. 38, 88 Fed. 753—*Hoooven, O. & R. Co. v. John Featherstone's Sons*, 49 C. C. A. 233, 111 Fed. 86—*Merrill v. Ness County*, 7 Kan. App. 721, 52 Pac. 109—*Bledsoe v. Erwin*, 33 La. Ann. 619—*Hazen v. Lyndonville Nat. Bank*, 70 Vt. 551, 67 Am. St. Rep. 080, 41 Atl. 1046—*Van Winkle v. Blackford*, 33 W. Va. 588, 11 S. E. 26.

315. A decree dismissing a bill in chancery generally may be set up in bar of a second bill; but where the bill has been dismissed on the ground that the court has no jurisdiction, which shows that the merits were not heard, the dismissal is not a bar to a second bill. *Walden v. Bodley*, 14 Pet. 156, 10: 398

Cited in *Hughes v. United States*, 4 Wall. 237, 18 L. ed. 305—*Durant v. Essex Co.* 7 Wall. 109, 19 L. ed. 156—*Smith v. McNeal*, 109 U. S. 429, 27 L. ed. 987, 3 Sup. Ct. Rep. 319—*Baker v. Cummings*, 181 U. S. 125, 45 L. ed. 780, 21 Sup. Ct. Rep. 578—*Badger v. Badger*, 1 Cliff. 244, Fed. Cas. No. 717—*Bunker Hill & S. Min. & Concentrating Co. v. Shoshone Min. Co.* 47 C. C. A. 203, 109 Fed. 507—*Smith v. Auld*, 31 Kan. 267, 1 Pac. 626—*Martin v. Evans*, 85 Md. 13, 36 L.R.A. 220, 60 Am. St. Rep. 292, 36 Atl. 258—*Pittsburgh, C. C. & St. L. R. Co. v. Bemis*, 64 Ohio St. 32, 59 N. E. 745—*Welgley v. Coffman*, 144 Pa. 499, 27 Am. St. Rep. 687, 22 Atl. 919—*Burton v. Burton*, 58 Vt. 420, 5 Atl. 281—*Taylor v. Matteson*, 86 Wis. 122, 56 N. W. 829.

316. The judgment of a court, dismissing a suit for want of jurisdiction, does not conclude the plaintiff's right of action,—especially where the dismissal was not for inherent want of jurisdiction. *Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. Rep. 319, 27: 986

Cited in *Pepper v. Donnelly*, 87 Ky. 262, 8 S. W. 441—*Tompkins v. Pacific Mut. L. Ins. Co.*

53 W. Va. 482, 62 L.R.A. 491, 97 Am. St. Rep. 1006, 44 S. E. 439.

317. A decree in an action to remove a cloud upon a title, which was dismissed on the ground that the case was not one in which a court of equity could give relief, is not *res judicata*, so as to constitute a bar to a subsequent action of ejectment for the same land, between the same parties. *Phelps v. Harris*, 101 U. S. 370, 25: 855
Cited in *Cummings v. Baker*, 16 App. D. C. 17—*Anderson v. Reid*, 16 App. D. C. 65—*Follett v. Brown*, 114 Ill. App. 17—*Embsen v. Lisherness*, 89 Me. 579, 56 Am. St. Rep. 442, 36 Atl. 1101.

318. The dismissal of a suit brought by a nominal plaintiff suing for the benefit of his assignee, if procured by collusion with defendant, is no bar to a subsequent suit for the same cause of action by the assignee in the assignor's name. *Welch v. Mandeville*, 1 Wheat. 233, 4: 79

Cited in *Mandeville v. Welch*, 5 Wheat. 283, 5 L. ed. 90—*Burke v. United States*, 13 Ct. Cl. 243—*Brown v. Hartford Ins. Co.* 21 Month. L. Rep. 731, Fed. Cas. No. 2,009—*Whetmore v. Murdock*, 3 Woodb. & M. 386, Fed. Cas. No. 17,509—*Hazleton Tripod-Boller Co. v. Citizens Street R. Co.* 72 Fed. 328—*Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 474, 47 U. S. App. 1, 76 Fed. 435—*Cronin v. Patrick County*, 89 Fed. 83—*Wagner v. National L. Ins. Co.* 33 C. C. A. 128, 61 U. S. App. 691, 90 Fed. 402—*Chisholm v. Newton*, 1 Ala. 372—*Cunningham v. Carpenter*, 10 Ala. 112—*Hudson v. Weir* 29 Ala. 209—*Buckner v. Greenwood*, 6 Ark. 206—*Karrick v. Wetmore*, 22 App. D. C. 493—*Price v. Bradford*, 5 Ga. 366—*Robinson v. Schly*, 6 Ga. 523—*Chauman v. Shattuck*, 8 Ill. 52—*Blackberry v. Blackberry*, 5 Dana, 522—*Hackett v. Martin*, 8 Me. 80—*Matthews v. Houghton*, 10 Me. 421—*Pitts v. Holmes*, 10 Cush. 96—*Koch v. Lyon*, 82 Mich. 516, 46 N. W. 779—*Cameron v. Little*, 13 N. H. 26—*Greene v. Republic F. Ins. Co.* 84 N. Y. 575—*McFadin v. MacGreal*, 25 Tex. 80—*Strong v. Strong*, 2 Ark. (Vt.) 378—*Tate v. Bank of New York*, 96 Va. 770, 32 S. E. 478.

319. A party to a bill in equity, against whom it has been dismissed without prejudice as to his rights against the others, stands, in all respects, as though he had never been a party to the suit. *McLaughlin v. Swann*, 18 How. 217, 15: 357

320. A decree dismissing a bill in foreclosure does not, as to the claim and prior lien of a creditor who was made a defendant, operate to sustain against him the defense of *res judicata* on a subsequent bill of foreclosure filed by him. *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 105, 7 Sup. Ct. Rep. 841, 30: 905

321. A judgment dismissing a suit against a city upon drainage warrants issued for work done under compulsion of a statute is not a decisive authority against the right to recover upon other warrants issued under a voluntary agreement by the city for purchase of property, although the owner of certain of the latter warrants intervened in the former suit, where the court did not notice the distinction between the two kinds

of warrants, but treated them all as belonging to the former class. *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44: 96

322. The general entry of the dismissal of a suit by agreement is no evidence of intent to abandon the claim, but rather of intent to preserve the right. There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively. *Haldeman v. United States*, 91 U. S. 584, 23: 433

Cited in *United States v. Parker*, 120 U. S. 95, 30 L. ed. 604, 7 Sup. Ct. Rep. 454—*Jacobs v. Marks*, 182 U. S. 591, 45 L. ed. 1246, 21 Sup. Ct. Rep. 865—*First Nat. Bank v. Cunningham*, 48 Fed. 517—*Rincon Water & Power Co. v. Anaheim Union Water Co.* 115 Fed. 549—*State ex rel. Smith v. Anderson*, 26 Fla. 262, 8 So. 1—*Murphy v. Creath*, 28 Mo. App. 585—*Wilcher v. Robertson*, 78 Va. 618—*Pethel v. McCullough*, 49 W. Va. 522, 39 S. E. 199—*Bishop v. McGillis*, 82 Wis. 127, 51 N. W. 1075.

323. Dismissal of a former bill filed by the same complainant, set up by an answer as a defense, is insufficient, unless the record is exhibited. *Bank of United States v. Beverly*, 1 How. 134, 11: 75

Effect of dismissal.

324. A party asserting possession of real property under a tax title may obtain relief by intervention against proceedings in a partition suit which would cast a cloud upon his title after the bill has been dismissed as to him on the grounds of lack of jurisdiction, multifariousness, and laches, barring complainants from equitable relief against him. *Clark v. Roller*, 199 U. S. 541, 26 Sup. Ct. Rep. 141, 50: 300

— Editorial note.

Effect of, on second action. 14: 970

2. Nonsuit.

Delay in Motion to Set Aside, see *infra*, 1204.

Judgment of Nonsuit in State Court as Bar to Suit in Federal Court, see *infra*, 1069, 1070.

325. A judgment of nonsuit does not determine the rights of the parties, and neither bars a new action nor is of any weight as evidence therein. *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. Rep. 99, 27: 878

Cited in *United States v. Parker*, 120 U. S. 95, 30 L. ed. 604, 7 Sup. Ct. Rep. 454—*Kelley v. Milan*, 127 U. S. 160, 32 L. ed. 85, 8 Sup. Ct. Rep. 1101—*Morris v. Gilmer*, 129 U. S. 328, 32 L. ed. 695, 9 Sup. Ct. Rep. 289—*Gardner v. Michigan C. R. Co.* 150 U. S. 356, 37 L. ed. 1109, 14 Sup. Ct. Rep. 140—*National Park Bank v. Remsen*, 158 U. S. 343, 39 L. ed. 1010, 15 Sup. Ct. Rep. 891—*Kelly v. Milan*, 21 Fed. 863—*Lippincott v. Shaw Carriage Co.* 25 Fed. 587—*Ramsay v. Ryerson*, 40 Fed. 745—*Gilbert v. American Surety Co.* 61 L.R.A. 257, 57 C. C. A. 622, 121 Fed. 502—*Howard v. Huron*, 6 S. D. 188, 26 L.R.A. 501, 60 N. W. 803—*Smith v. Floyd County*, 85 Ga. 423, 11 S. E.

350—Pepper v. Donnelly, 87 Ky. 282, 8 S. W. 441—Pendergrass v. York Mfg. Co. 76 Me. 514—West v. McMullen, 112 Mo. 410, 20 S. W. 628—Ready v. Smith, 141 Mo. 309, 42 S. W. 727—Ordway v. Boston & M. R. Co. 69 N. H. 431, 45 Atl. 243—Chapin Hall Lumber Co. v. Dalrymple, 53 N. J. L. 268, 21 Atl. 949.

326. A judgment of nonsuit does not determine the rights of the parties nor bar a new action. *Homer v. Brown*, 16 How. 354, 14: 970

Haldeman v. United States, 91 U. S. 584, 23: 433

Cited in United States v. Parker, 120 U. S. 95, 30 L. ed. 604, 7 Sup. Ct. Rep. 454—*Badger v. Badger*, 1 Cliff. 245, Fed. Cas. No. 717—*Derby v. Jacques*, 1 Cliff. 432, Fed. Cas. No. 3,817—*Kelly v. Milan*, 21 Fed. 863—*Lippincott v. Shaw Carriage Co.* 25 Fed. 587—*Anderson v. Gregory*, 43 Conn. 64—*State ex rel. Smith v. Anderson*, 26 Fla. 262, 8 So. 1—*Smith v. Floyd County*, 85 Ga. 423, 11 S. E. 850—*Bledsoe v. Erwin*, 33 La. Ann. 619—*McIver v. Florida, C. & P. R. Co.* 110 Ga. 225, 65 L.R.A. 439, 86 S. E. 775—*Pendergrass v. York Mfg. Co.* 76 Me. 514—*West v. McMullen*, 112 Mo. 410, 20 S. W. 628—*National Waterworks Co. v. School District*, 23 Mo. App. 235—*Cheney v. Cooper*, 14 Neb. 418, 16 N. W. 471—*Ordway v. Boston & M. R. Co.* 69 N. H. 431, 45 Atl. 243—*Mandeville v. Reynolds*, 68 N. Y. 543—*Weeks v. McPhail*, 129 N. C. 75, 39 S. E. 732—*Robinson v. Merchants' & M. Transp. Co.* 16 R. I. 639, 19 Atl. 113.

327. After a nonsuit a new action may be brought, but after a judgment upon a verdict given by direction of the court, the action is ended, unless a new trial be granted, either upon motion or appeal. *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26: 539

Cited in Peoples' Bank v. Aetna Ins. Co. 20 C. C. A. 634, 42 U. S. App. 81, 74 Fed. 512—*Patting v. Spring Valley Coal Co.* 93 Fed. 99—*Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 447, 32 L.R.A. 365, 34 S. W. 1029.

328. A claim to submit a cause upon an agreed statement, and that the plaintiff shall be *non pros'd* if the facts stated are insufficient to maintain the right which he claims, does not make a judgment of nonsuit conclusive. It is not a sufficient plea in bar to prevent a recovery of the property in dispute under a writ of right. *Homer v. Brown*, 16 How. 354, 14: 970

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Effect of, on second action. 14: 970

g. Proceedings Not Terminating in Judgment.

Collateral Attack on Unrecorded Verdict, see *infra*, 408.

Conclusiveness of Verdict on Trial Court, see Trial, X. d.

See also *infra*, 610, 621, 623, 624, 733.

329. Until a final judgment or decree is rendered in a suit, the proceedings therein are not a bar to a subsequent action. *Aurora v. West*, 7 Wall. 82, 19: 42
Cited in Spring Valley Coal Co. v. Patting, 210 Ill. 347, 71 N. E. 371.

330. A verdict upon which no judgment passes cannot have the force or effect of *res judicata*. *Reed v. Proprietors of Locks & Canals*, 8 How. 274, 12: 1077

331. A special verdict without judgment is not an estoppel as to, or evidence of, facts found in it. *Smith v. McCool*, 16 Wall. 560, 21: 324

Cited in McFadden v. Ross, 108 Ind. 517, 8 N. E. 161—*Whitney v. Marshall*, 138 Ind. 478, 37 N. E. 964—*Edwards v. Baker*, 145 Ind. 286, 44 N. E. 467—*Citizens' State Bank v. Morse*, 60 Kan. 531, 57 Pac. 115—*Whitney v. Bayer*, 101 Mich. 154, 59 N. W. 414—*Buttling v. Halton*, 30 App. Div. 193, 51 N. Y. Supp. 305.

332. An ineffectual attempt at confiscation does not deprive chancery proceedings to sell property of legal validity. *Ludlow v. Ramsey*, 11 Wall. 581, 20: 216

333. [What passes before a judge on the question of bail cannot be evidence on the trial, unless clearly admitted as a fact by the opposite party. *Jackson v. Winchester* (Pa. Sup. Ct.) 4 Dall. 205, 1: 802]

h. Of What Tribunals.

Collateral Attack on Judgment, see *infra*, 380-389.

Secretary of Treasury's Approval of Expenses in Sale of Abandoned Property, see Abandoned and Captured Property, 9.

Conclusiveness of Decision of Inspector of Immigration, see Aliens, 116.

Conclusiveness of Award by Arbitrators, see Arbitration, II.

Decision of Arbitrator Appointed by Contract, see Contracts, V. e.

Conclusiveness of Official Certificate as to Issuance of Bonds, see Bonds, V. h.

Conclusiveness of Officer's Decision as to Issuance of Municipal Bond, see Bonds, 186-189.

Honorable Discharge of Deserter as Final Judgment of Government, see Bounties, 3.

Of Court-Martial, see Courts-Martial, II. c.
Board of Audit, see District of Columbia, 38, 38a.

Allowance by Administrator Confirmed by Court as Equivalent of Judgment, see Executors and Administrators, 132.

Of Order to Sell Decedent's Lands for Payment of Debts, see Executors and Administrators, 239, 242.

Conclusiveness of Decision of Patent Office or Commissioner of Patents, see Patents, 425, 544, 552-559, 645, 646, 682, 707.

Of Decree of Court of Private Land Claims or of Commissioners, see Private Land Claims, III. f, 2, 3.

Finding of City Council as to Consent to Assessment, see Public Improvements, 23.

See also *infra*, 575, 608.

334. A judgment in its nature concludes the subject on which it is rendered, and pronounces the law of the case. The judgment

of a Federal court of record whose jurisdiction is final is as conclusive on all the world as the judgment of the Supreme Court would be. It is as conclusive upon this court as upon other courts. It puts an end to inquiry concerning the fact, by deciding it. *Re Watkins*, 3 Pet. 193, 7: 650
Limited in Horan v. Wahrenberger, 9 Tex. 320, 58 Am. Dec. 145.

Distinguished in McClaughry v. Deming, 186 U. S. 63, 46 L. ed. 1055, 22 Sup. Ct. Rep. 786—*Terry v. Dickinson*, 75 Va. 478.

Cited in Decatur v. Paulding, 14 Pet. 600, 10 L. ed. 810—*Grignon v. Astor*, 2 How. 338, 11 L. ed. 291—*Harvey v. Tyler*, 2 Wall. 342, 17 L. ed. 873—*Runkle v. United States*, 122 U. S. 556, 30 L. ed. 1170, 7 Sup. Ct. Rep. 1141—*Noble v. Union River Logging R. Co.*, 147 U. S. 174, 37 L. ed. 127, 13 Sup. Ct. Rep. 271—*Dowell v. Applegate*, 152 U. S. 339, 38 L. ed. 468, 14 Sup. Ct. Rep. 611—*Evers v. Watson*, 156 U. S. 538, 39 L. ed. 523, 15 Sup. Ct. Rep. 430—*Re Debs*, 158 U. S. 600, 39 L. ed. 1108, 15 Sup. Ct. Rep. 900—*Root v. United States*, 9 Ct. Cl. 222—*American Wood-Paper Co. v. Glens Falls Paper Co.* 8 Blatchf. 523, 4 Fisher Pat. Cas. 567, Fed. Cas. No. 321—*Galpin v. Page*, 1 Sawy. 319, Fed. Cas. No. 5,205—*Re Mc Kibben*, 12 Nat. Bankr. Reg. 101, Fed. Cas. No. 8,859—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 386, 9 Fed. 233—*Deming v. McClaughry*, 51 C. C. A. 360, 113 Fed. 650—*Godchaux v. Morris*, 57 C. C. A. 437, 121 Fed. 485—*Busted v. Parsons*, 54 Ala. 401, 25 Am. Rep. 688—*Berry v. State*, 65 Ala. 122—*Cooper v. People*, 13 Colo. 371, 6 L.R.A. 442, 22 Pac. 790—*Fox v. Hoyt*, 12 Conn. 497, 31 Am. Dec. 760—*United States ex rel. Scott v. Burdick*, 1 Dak. 147, 46 N. W. 571—*Sessions v. Stevens*, 1 Fla. 240, 46 Am. Dec. 339—*Darden v. Lines*, 2 Fla. 571—*Fraser v. Willey*, 2 Fla. 119—*Wilson v. Hayward*, 6 Fla. 197—*May v. May*, 7 Fla. 244, 68 Am. Dec. 431—*Kelly v. People*, 115 Ill. 589, 56 Am. Rep. 184, 4 N. E. 644—*Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 421—*Weston v. Lumley*, 33 Ind. 495—*English v. Smock*, 34 Ind. 134, 7 Am. Rep. 215—*Anderson v. Wilson*, 100 Ind. 407—*Koehler v. Hill*, 60 Iowa, 568, 14 N. W. 738—*Manley v. Park*, 62 Kan. 563, 64 Pac. 28—*Bell v. State*, 4 Gill, 365, 45 Am. Dec. 130—*Tyler v. Pomeroy*, 8 Allen, 485—*Wales v. Lyon*, 2 Mich. 281—*State ex rel. Walker v. Dobson*, 135 Mo. 14, 36 S. W. 238—*Wertz v. Wertz*, 11 Mo. App. 35—*Rolf v. Timmermeister*, 15 Mo. App. 252—*Babb v. Bruere*, 23 Mo. App. 608—*Vantilburg v. Black*, 3 Mont. 468—*Young v. Rathbone*, 16 N. J. Eq. 227, 84 Am. Dec. 151—*Colton v. Beardsley*, 38 Barb. 51—*People ex rel. Davis v. Sturtevant*, 9 N. Y. 275, 59 Am. Dec. 536—*Lange v. Benedict*, 73 N. Y. 35, 29 Am. Rep. 80—*Ex parte Bushnell*, 9 Ohio St. 183—*Adams v. Jeffries*, 12 Ohio, 271, 40 Am. Dec. 477—*James v. Smith*, 2 S. C. N. S. 187—*Yates v. Houston*, 3 Tex. 447—*Ex parte Ball*, 2 Gratt. 590—*Quesenberry v. Barbour*, 31 Gratt. 500.

335. A decree of the district court in a bankruptcy case is as conclusive as the decree of any other court of general jurisdiction, and, where the record shows jurisdiction, cannot be impeached except in the court where it was entered, or by some direct proceeding in some other court of competent

jurisdiction. *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. Rep. 799, 29: 83
Cited in Evers v. Watson, 156 U. S. 532, 39 L. ed. 522, 15 Sup. Ct. Rep. 430—*Belt v. United States*, 4 App. D. C. 30—*Mount v. Manhattan Co.* 41 N. J. Eq. 214, 3 Atl. 726—*Potter v. Martin*, 122 Mich. 544, 81 N. W. 424—*Curdy v. Stafford*, 88 Tex. 125, 30 S. W. 551.

336. The judgment of a court which is competent by its constitution to decide on its own jurisdiction and to exercise it to final judgment, without setting forth in its proceedings the facts and evidence upon which it is rendered; whose record is verity not to be impugned by averment or proof to the contrary,—is conclusive if not removed to an appellate court, as distinguished from that of a court whose proceedings are nullities if its jurisdiction does not appear upon its face. *Grignon v. Astor*, 2 How. 319, 11: 283

Cited in The Atlantic, Abb. Adm. 467, Fed. Cas. No. 620—*Ludington v. The Nucleus*, Fed. Cas. No. 8,598—*Salisbury v. Sands*, 2 Dill. 277, Fed. Cas. No. 12,251—*Bruce v. Strickland*, 47 Ala. 197—*Meyer v. Rousseau*, 47 Ark. 462, 2 S. W. 112—*Sessions v. Stevens*, 1 Fla. 241, 46 Am. Dec. 339—*Horner v. Doe*, Smith (Ind.) 11—*Russell v. Work*, 35 N. J. L. 320—*Patterson v. Fagan*, 38 Mo. 81—*Magwire v. Tyler*, 40 Mo. 441—*State ex rel. Wingate v. Woodson*, 41 Mo. 237—*Russell v. Lewis*, 3 Or. 382—*Tustin v. Gaunt*, 4 Or. 309—*Wilbur v. Loveland*, 5 Luzerne Legal Reg. 123—*Cox v. Thomas*, 9 Gratt. 327—*Kreglo v. Fulk*, 3 W. Va. 80.

337. When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. *Johnson v. Towseley*, 13 Wall. 72, 20: 485
Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 1 Sup. Ct. Rep. 389, 27: 226
Distinguished in Rector v. Gibbon, 111 U. S. 292, 28 L. ed. 433, 4 Sup. Ct. Rep. 603.

Cited in Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 83, 37 L. ed. 377, 13 Sup. Ct. Rep. 457—*Aiken v. Ferry*, 6 Sawy. 84, Fed. Cas. No. 112—*United States v. Dalles Military Road Co.* 41 Fed. 497—*Northern P. R. Co. v. Barden*, 46 Fed. 618—*United States v. Lee Hoy*, 48 Fed. 828—*The Burlington*, 73 Fed. 262—*Brown v. Charles*, 85 Fed. 174—*Kansas City Min. & Mill. Co. v. Clay*, 3 Ariz. 328, 29 Pac. 9—*Wright v. Roseberry*, 63 Cal. 254—*Union River Logging R. Co. v. Noble*, 9 Mackey, 564—*Silver Bow Min. & Mill. Co. v. Clark*, 5 Mont. 424, 5 Pac. 570—*Talbot v. King*, 6 Mont. 105, 106, 9 Pac. 434—*Colburn v. Northern P. R. Co.* 13 Mont. 484, 34 Pac. 1017—*Small v. Rakestraw*, 28 Mont. 419, 104 Am. St. Rep. 691, 72 Pac. 746—*South End Min. Co. v. Tinney*, 22 Nev. 43, 35 Pac. 89—*Knapp v. Thomas*, 39 Ohio St. 387, 48 Am. Rep. 462—*Sanford v. Sanford*, 19 Or. 4, 13 Pac. 602—*Sparks v. Brown*, 2 Wash. Terr. 432, 7 Pac. 864.

Editorial note.

Authority of judgments of courts of Confederacy. 8: 955

Decree in chancery.

338-9. A final decree in chancery is as

conclusive as a judgment at law; and both are conclusive on the rights of the parties thereby adjudicated. *Sibbald v. United States*, 12 Pet. 488, 9: 1167

Shriver v. Lynn, 2 How. 43, 11: 172
Washington Bridge Co. v. Stewart, 3 How. 413, 11: 658

Pennington v. Gibson, 16 How. 65, 14: 847
Nations v. Johnson, 24 How. 195, 16: 628

Hornbuckle v. Stafford, 111 U. S. 389, 4 Sup. Ct. Rep. 515, 28: 468

Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28: 908

Cited in Noonan v. Bradley, 12 Wall. 120, 20 L. ed. 281—*Legal Tender Cases*, 12 Wall. 603, 20 L. ed. 329—*Tyler v. Magwire*, 17 Wall. 283, 21 L. ed. 583—*Johnson Steel Street Rail Co. v. Wharton*, 152 U. S. 258, 38 L. ed. 433, 14 Sup. Ct. Rep. 608—*Dowell v. Applegate*, 152 U. S. 344, 38 L. ed. 469, 14 Sup. Ct. Rep. 611—*Last Chance Min. Co. v. Tyler Mtn. Co.* 157 U. S. 687, 39 L. ed. 802, 15 Sup. Ct. Rep. 733—*New Orleans v. Citizens Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Illinois v. Illinois C. R. Co.* 184 U. S. 91, 46 L. ed. 446, 22 Sup. Ct. Rep. 300—*Akerly v. Villas*, 1 Abb. (U. S.) 295, Fed. Cas. No. 119—*Brown v. Noyes*, 2 Woodb. & M. 81, Fed. Cas. No. 2,023—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 392, 9 Fed. 238—*Miller v. Clark*, 52 Fed. 903—*Lynde v. Columbus C. & I. C. R. Co.* 57 Fed. 995—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 917—*Keenan v. Strange*, 12 Ala. 294—*Palmer v. Utah & N. R. Co.* 2 Idaho, 382, 16 Pac. 553—*McGregor v. Gardner*, 16 Iowa, 550—*Glenn v. Williams*, 60 Md. 113—*Hickox v. Chicago & C. S. R. Co.* 94 Mich. 238, 58 N. W. 1105—*Huxley v. Harrold*, 62 Mo. 523—*Lincoln Trust Co. v. Nathan*, 122 Mo. App. 327, 99 S. W. 484—*Smith v. Montoya*, 3 N. M. 20, 1 Pac. 175—*Younkin v. Younkin*, 44 Neb. 731, 63 N. W. 31—*New Mexico Nat. Bank v. Brooks*, 9 N. M. 122, 49 Pac. 947—*State v. Marsh*, 134 N. C. 192, 67 L.R.A. 189, 47 S. E. 6—*Longworth v. Sturges*, 4 Ohio St. 713—*Rutenic v. Hamakar*, 40 Or. 450, 67 Pac. 196—*Philadelphia v. Fricke*, 6 Phila. 579—*Kelsey v. Murphy*, 26 Pa. 80—*Silva v. Pickard*, 14 Utah, 251, 47 Pac. 144—*Tracey v. Shumate*, 22 W. Va. 509—*Oakley v. Hibbard*, 2 Pinney (Wis.) 22, 52 Am. Dec. 139—*Akerly v. Villas*, 24 Wis. 174, 1 Am. Rep. 166.

340. A decree in chancery may be *res judicata*, as between the original parties, although other persons collaterally interested were made parties that it might be final, and not because they were legal parties to the original contract on which the litigation is founded. *Thompson v. Roberts*, 24 How. 233, 16: 648

Cited in Gaines v. Hennen, 24 How. 621, 16 L. ed. 793—*Green v. Bogue*, 158 U. S. 503, 39 L. ed. 1070, 15 Sup. Ct. Rep. 975—*Hanna v. Read*, 102 Ill. 605, 40 Am. Rep. 608—*Wright v. Griffey*, 147 Ill. 500, 37 Am. St. Rep. 228, 35 N. E. 732—*Peterson v. Warner*, 6 Kan. App. 304, 50 Pac. 1091—*Re Butrick*, 185 Mass. 114, 69 N. E. 1044—*Meagley v. Binghamton*, 36 Hun, 173—*Gallaher v. Moundville*, 34 W. Va. 735, 26 Am. St. Rep. 942, 12 S. E. 859.

341. When a former bill of chancery was for the same cause as a subsequent ejectment suit, and the decrees of the court in the chancery suit embraced the decision of the same question involved in the ejectment

suit, they are conclusive of the controversy. *Parker v. Kane*, 22 How. 1, 16: 286
Cited in Smith v. Butler, 15 App. D. C. 355—*Drake v. Drake*, 61 App. Div. 7, 70 N. Y. Supp. 163.

342. A decree of chancery, like a judgment, is proper evidence if it decided, or professed to decide, the same question which was made on the trial at law where it was offered. *Hopkins v. Lee*, 6 Wheat. 109, 5: 218

Cited in Harrison v. Nixon, 9 Pet. 534, 9 L. ed. 220—*Sibbald v. United States*, 12 Pet. 492, 9 L. ed. 1169—*Bank of United States v. Beverly*, 1 How. 148, 11 L. ed. 81—*Washington Bridge Co. v. Stewart*, 3 How. 426, 11 L. ed. 664—*Smith v. Kernochen*, 7 How. 217, 12 L. ed. 674—*Pennington v. Gibson*, 16 How. 77, 14 L. ed. 852—*Aurora v. West*, 7 Wall. 101, 19 L. ed. 49—*Illinois v. Illinois C. R. Co.* 184 U. S. 91, 46 L. ed. 446, 22 Sup. Ct. Rep. 300—*Akerly v. Villas*, 1 Abb. (U. S.) 295, Fed. Cas. No. 119—*Badger v. Badger*, 1 Cliff. 245, Fed. Cas. No. 717—*Baring v. Fanning*, 1 Paine, 556, Fed. Cas. No. 982—*Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 32, 43 U. S. App. 47, 72 Fed. 532—*Colt v. Tracy*, 8 Conn. 276, 20 Am. Dec. 110—*Fairman v. Bacon*, 8 Conn. 425—*McKim v. Odum*, 12 Me. 101—*Divoll v. Atwood*, 41 N. H. 445—*New York Mut. L. Ins. Co. v. Newton*, 50 N. J. L. 577, 14 Atl. 756—*Tilson v. Davis*, 32 Gratt. 104—*Shenandoah Valley R. Co. v. Griffith*, 76 Va. 925—*Oakley v. Hibbard*, 2 Pinney (Wis.) 22, 52 Am. Dec. 139—*Pierce v. Kneeland*, 9 Wis. 38.

343. A private act empowering one who has a life interest in property to sell or mortgage a part of it with the assent of the chancellor, for the benefit of his children, who are entitled upon his death to the property in fee, and which permits the chancellor to act summarily upon the petition of the life tenant, confers extraordinary jurisdiction. In such cases the court will not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction and partly upon the statute. But whatever the chancellor does, he does as a court of chancery. It will stand as his judgment when it has been done within the jurisdiction conferred, until it has been set aside upon motion. *Williamson v. Berry*, 8 How. 495, 12: 1170

Court of admiralty.

Judgment of Foreign Court, see *infra*, 912-916.

See also *infra*, 545.

344. In prize causes the sentence of a court of final jurisdiction is conclusive as to all persons. *Penhallow v. Doane*, 3 Dall. 54, 1: 507

Cited in Haydock v. Cobb, 5 Day, 529—*Whitney v. Walsh*, 1 Cush. 32, 48 Am. Dec. 590—*Webbers v. Underhill*, 19 Wend. 451.

345. A court of the United States having prize jurisdiction will, without inquiry into the merits, enforce a decree of the court of appeals, in a prize cause, under the Confederation of 1781. *Penhallow v. Doane*, 3 Dall. 54, 1: 507

346. The sentence and condemnation of a

foreign prize court of admiralty, condemning a vessel as prize for attempting to enter a blockaded port, is not conclusive evidence of that fact in an action upon a policy on property warranted neutral, "proof of which to be required in the United States only." *Maryland Ins. Co. v. Woods*, 6 Cranch, 29. 3: 143

347. [The decision, by a court of admiralty, of the question whether a captain had authority to hypothecate a vessel, is conclusive. *Cupisino v. Perez* (Pa. Sup. Ct.) 2 Dall. 194, 1: 345]

348. The judgment of a foreign court of admiralty is conclusive upon questions of jurisdiction, as well as upon other matters involved. *Hudson v. Guestier*, 6 Cranch, 281, 3: 224

Cited in Re Cooper, 143 U. S. 509, 36 L. ed. 244, 12 Sup. Ct. Rep. 453—*Noble v. Union River Logging R. Co.* 147 U. S. 174, 37 L. ed. 127, 13 Sup. Ct. Rep. 271—*Re Lennon*, 166 U. S. 553, 41 L. ed. 1112, 17 Sup. Ct. Rep. 658—*Bradstreet v. Neptune Ins. Co.* 3 Sumn. 605, Fed. Cas. No. 1,793—*Re Kibben*, 12 Nat. Bankr. Reg. 101, Fed. Cas. No. 8,859—*The Trenton*, 4 Fed. 662—*Reinach v. Atlantic & G. W. R. Co.* 58 Fed. 43—*Rio Grande v. Otis*, 32 Phila. Leg. Int. 258.

— Editorial note.

In admiralty, when conclusive. 3: 392

Court of claims.

349. The judgments of the court of claims, where no appeal is taken to this court, are absolutely conclusive of the rights of the parties, and are not subject to revision by any one of the executive departments. *United States v. O'Grady*, 22 Wall. 641, 22: 772

Cited in United States v. Jones, 119 U. S. 479, 30 L. ed. 441, 7 Sup. Ct. Rep. 283—*United States v. Waters*, 133 U. S. 213, 33 L. ed. 595, 10 Sup. Ct. Rep. 249—*Re Sanborn*, 148 U. S. 225, 37 L. ed. 430, 13 Sup. Ct. Rep. 577—*Pendall v. United States*, 14 Ct. Cl. 252—*Meigs v. United States*, 20 Ct. Cl. 185—*Waters v. United States*, 21 Ct. Cl. 36—*Hartson v. United States*, 21 Ct. Cl. 456—*Balmer v. United States*, 26 Ct. Cl. 90—*Sanborn v. United States*, 27 Ct. Cl. 488—*United States v. Moore*, 3 MacArth. 233—*United States ex rel. Bernardin v. Seymour*, 10 App. D. C. 312.

350. The Secretary of the Treasury, in paying a judgment of the court of claims for the proceeds of cotton under the abandoned and captured property act, cannot deduct from it the amount due for an internal revenue tax on such cotton. The claim for such deduction should have been made in the action, and the judgment must be paid according to its terms. *United States v. O'Grady*, 22 Wall. 641, 22: 772

Divisions of court.

351-3. The fact that the civil district court of the parish of Orleans, Louisiana, is composed of several judges, each of whom presides over a separate division, does not prevent the judgment of one of the divisions from being *res judicata*. *New Orleans v.*

Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42: 202

Spanish tribunal.

354. Where power is delegated to a tribunal over a subject matter, its acts are binding and valid as the subject-matter. *Garcia de Sabariego v. Maverick* (*Sabariego v. Maverick*) 124 U. S. 261, 8 Sup. Ct. Rep. 461, 31: 430

355. A decision by a Spanish intendant, that land about to be granted formed part of the royal domain by the abandonment of the Indian right of occupancy, is an adjudication which, after cession of the territory to the United States, the Supreme Court will regard as *res judicata*. *United States v. de la Maza Arredondo*, 6 Pet. 691, 8: 547 *Cited in United States v. Fernandez*, 10 Pet. 304, 9 L. ed. 434—*Strother v. Lucas*, 12 Pet. 440, 9 L. ed. 1149—*Rhode Island v. Massachusetts*, 12 Pet. 723, 9 L. ed. 1260—*Doe ex dem. Barbarie v. Mobile*, 9 How. 469, 13 L. ed. 220—*Hooper v. United States*, 22 Ct. Cl. 419—*Crystal Springs Land & Water Co. v. Los Angeles*, 32 Fed. 119—*Antones v. Eslava*, 9 Port. (Ala.) 544—*Ryder v. Innerarity*, 4 Stew. & P. (Ala.) 29—*Stewart v. Trenler*, 49 Ala. 503—*Thomas v. Cox*, 6 Mo. 510.

356. An adjudication made by a Spanish tribunal in Louisiana after the cession of that country to the United States, but while it was *de facto* in Spanish possession, is, in the absence of any showing of irregularity or illegality, prima facie evidence of a judicial proceeding, and sufficient to warrant the judgment of the district court awarding the possession of land. *Keene v. M' Donough*, 8 Pet. 308, 8: 955 *Cited in Strother v. Lucas*, 12 Pet. 438, 9 L. ed. 1148—*Pollard v. Kibbe*, 14 Pet. 406, 10 L. ed. 516—*Devall v. Choppin*, 15 La. 575—*Daniel v. Hutcheson*, 86 Tex. 66, 22 S. W. 933.

357. A decree of the alcalde of New Orleans in 1792, declaring a will valid, is the judicial act of a court of competent jurisdiction. It was the only judicial authority in the province except that exercised by the governor. *Fouvergne v. Municipality No. 2. of New Orleans*, 18 How. 470, 15: 399 *Cited in Adams v. De Cook*, McAll. 256, Fed. Cas. No. 51.

358-63. A judicial ruling made in 1785 by an alcalde, ousting a person from certain lands claimed by heirs of a grantee, in a case to which the Crown was not a party, is not conclusive of the title to such lands under a Spanish grant. *Whitney v. United States*, 167 U. S. 529, 17 Sup. Ct. Rep. 857, 42: 263

4. Collateral Attack.

1. In General.

In Federal Court on Judgment of State Court, see *infra*, 1057-1062.
On Judgment of Court-Martial, see *Courts-Martial*, 52-61.

Presumption and Burden of Proof, see Evidence, II. i. 3.
 On Acts of Judge *De Facto*, see Judges, 2.
 On Judicial Sales, see Judicial Sale, VI.

364. A fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again collaterally between the same parties in the same or any other court. *Hopkins v. Lee*, 6 Wheat. 109.

Penhallow v. Doane, 3 Dall. 54, 5: 218
 United States v. Nourse, 9 Pet. 8, 9: 31
 Bank of United States v. Beverly, 1 How. 134, 11: 75
 Cromwell v. Sac County, 94 U. S. 351, 24: 195

Russell v. Place, 94 U. S. 606, 24: 214
 Hornbuckle v. Stafford, 111 U. S. 389, 4 Sup. Ct. Rep. 515, 28: 468

Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28: 908

Cited in United States v. King, 7 How. 865, 12 L. ed. 948—Barreda v. Silabee, 21 How. 167, 16 L. ed. 93—Parker v. Kane, 22 How. 17, 16 L. ed. 291—Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. 249, 21 L. ed. 833—New York L. Ins. Co. v. Bangs, 103 U. S. 782, 26 L. ed. 609—Elgin v. Marshall, 106 U. S. 579, 27 L. ed. 249, 1 Sup. Ct. Rep. 484—Kelley v. Milan, 127 U. S. 160, 32 L. ed. 85, 8 Sup. Ct. Rep. 1101—Wiggins Ferry Co. v. Ohio & M. R. Co. 142 U. S. 410, 35 L. ed. 1061, 12 Sup. Ct. Rep. 188—Johnson Steel Street Rail Co. v. Wharton, 152 U. S. 257, 38 L. ed. 433, 14 Sup. Ct. Rep. 608—Dowell v. Applegate, 152 U. S. 343, 38 L. ed. 469, 14 Sup. Ct. Rep. 611—Hilton v. Guyot, 159 U. S. 183, 40 L. ed. 115, 16 Sup. Ct. Rep. 139—Washington Gaslight Co. v. District of Columbia, 161 U. S. 329, 40 L. ed. 719, 16 Sup. Ct. Rep. 564—Forsyth v. Hammond, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665—New Orleans v. Citizens' Bank, 167 U. S. 396, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—Southern P. R. Co. v. United States, 168 U. S. 49, 42 L. ed. 377, 18 Sup. Ct. Rep. 18—Werlein v. New Orleans, 177 U. S. 396, 44 L. ed. 820, 20 Sup. Ct. Rep. 682—Mitchell v. First Nat. Bank, 180 U. S. 480, 45 L. ed. 632, 21 Sup. Ct. Rep. 418—West v. United States, 3 Ct. Cl. 341—Shrewsbury v. United States, 9 Ct. Cl. 266—Le More v. United States, 35 Ct. Cl. 13—Van Duzee v. United States, 35 Ct. Cl. 217—Allen v. Blunt, 2 Woodb. & M. 133, Fed. Cas. No. 217—Badger v. Badger, 1 Cliff. 244, Fed. Cas. No. 717—Sarchet v. The General Isaac Davis, Crabbe, 191, Fed. Cas. No. 12,357—Sloman v. Wyssman, Fed. Cas. No. 12,955a—Stewart v. Lansing, 15 Blatchf. 285, Fed. Cas. No. 13,432—Vogler v. Spauld. 4 Biss. 293, Fed. Cas. No. 16,988—Radford v. Folsom, 3 Fed. 202—Flanagin v. Thompson, 9 Fed. 181—The Tubal Cain, 9 Fed. 836—Barker v. Stowe, 20 Blatchf. 191, 11 Fed. 308—Lippincott v. Shaw Carriage Co. 25 Fed. 587—Hughes v. Dundee Mortg. Trust Invest Co. 26 Fed. 833—Oregonian R. Co. v. Oregon R. & Nav. Co. 27 Fed. 283—The Holladay Case, 27 Fed. 836—Gilmer v. Morris, 30 Fed. 479—Laird v. DeSoto, 32 Fed. 652—Patterson v. Wold, 33 Fed. 792—Neal v. Foster, 36 Fed. 33—Burton v. Huma, 37 Fed. 740—Re Vetterlein, 44 Fed. 60—Gilmer v. Morris, 46 Fed. 335—Russell & Co. v. Lamb, 49 Fed. 771—Fuller v. Hamilton County, 53 Fed. 415—Baltimore & O. R. Co. v. Pittsburgh, C. & St. L.

R. Co. 55 Fed. 703—Chavent v. Schefer, 59 Fed. 232—St. Joseph & G. I. R. Co. v. Steele, 11 C. C. A. 475, 27 U. S. App. 436, 63 Fed. 872—Frank v. Wedderin, 16 C. C. A. 5, 30 U. S. App. 329, 68 Fed. 822—Buchanan v. Knoxville & O. R. Co. 18 C. C. A. 134, 37 U. S. App. 499, 71 Fed. 336—Empire State Nall Co. v. American Solid Leather Button Co. 71 Fed. 590—Empire State Nall Co. v. American Solid Leather Button Co. 21 C. C. A. 153, 33 U. S. App. 522, 74 Fed. 865—O'Hara v. Mobile & O. R. Co. 75 Fed. 135—Humphreys v. Third Nat. Bank, 21 C. C. A. 546, 43 U. S. App. 698, 75 Fed. 860—Ricaud v. Tysen, 78 Fed. 562—Norton v. San Jose Fruit-Packing Co. 27 C. C. A. 578, 48 U. S. App. 590, 88 Fed. 514—Belleville & St. L. R. Co. v. Leather, 28 C. C. A. 280, 53 U. S. App. 718, 84 Fed. 104—Truman v. Carvill Mfg. Co. 87 Fed. 474—Fayerweather v. Ritch, 88 Fed. 717—St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co. 32 C. C. A. 287, 60 U. S. App. 675, 89 Fed. 651—St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co. 32 C. C. A. 285, 60 U. S. App. 675, 89 Fed. 659—Norton v. Jensen, 33 C. C. A. 147, 61 U. S. App. 291, 90 Fed. 421—Newton Mfg. Co. v. Wilgus, 90 Fed. 488—Fayerweather v. Ritch, 34 C. C. A. 65, 63 U. S. App. 112, 91 Fed. 725—Norton v. House of Mercy, 41 C. C. A. 399, 101 Fed. 385—Hill v. Phelps, 41 C. C. A. 572, 101 Fed. 653—Pittsburgh, C. C. A. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 644, 107 Fed. 787—Moss v. Whitzel, 108 Fed. 582—Olsen v. Whitney, 109 Fed. 81—Union & Planters' Bank v. Memphis, 49 C. C. A. 463, 111 Fed. 569—United States v. Eisenbels, 50 C. C. A. 185, 112 Fed. 196—Soderberg v. Armstrong, 116 Fed. 711—Dennison Mfg. Co. Scharf Tag, Label & Box Co. 57 C. C. A. 14, 121 Fed. 318—Williamson v. McCaldin Bros. Co. 58 C. C. A. 400, 122 Fed. 64—Wilcox & G. Sewing Mach. Co. v. Sherborne, 59 C. C. A. 366, 123 Fed. 878—Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 95—Georgia R. & Bkg. Co. v. Wright, 132 Fed. 916—Wyman v. Campbell, 6 Port. (Ala.) 237, 31 Am. Dec. 677—McCreery v. Fuller, 63 Cal. 32—Ferre v. Chabot, 63 Cal. 570—Beronio v. Ventura County Lumber Co. 129 Cal. 236, 79 Am. St. Rep. 118, 61 Pac. 958—Maddux v. County Bank, 129 Cal. 669, 79 Am. St. Rep. 143, 62 Pac. 264—Phelan v. Quinn, 130 Cal. 378, 62 Pac. 623—Solly v. Clayton, 12 Colo. 38, 20 Pac. 351—Clark v. Knox, 32 Colo. 348, 76 Pac. 372—Pueblo Chicago Lumber Co. v. Danziger, 7 Colo. App. 151, 42 Pac. 683—Montezuma Cattle Co. v. Dake, 16 Colo. App. 144, 63 Pac. 1058—Holcomb v. Phelps, 16 Conn. 131—Fisher v. Fielding, 67 Conn. 133, 32 L.R.A. 249, 52 Am. St. Rep. 270, 34 Atl. 714—Wildman v. Wildman, 70 Conn. 711, 41 Atl. 1—Wells v. Edmlson, 4 Dak. 51, 22 N. W. 497—Birdsall v. Welch, 6 D. C. 325—Bleber v. Fechheimer, 9 App. D. C. 557—Wagenhurst v. Wineland, 22 App. D. C. 363—Elizabethport Cordage Co. v. Whitlock, 37 Fla. 224, 20 So. 255—National Bank v. Southern Porcelain Mfg. Co. 59 Ga. 165—Sloan v. Price, 84 Ga. 173, 20 Am. St. Rep. 354, 10 S. E. 601—Worth v. Carmichael, 114 Ga. 701, 40 S. E. 797—Hanna v. Read, 102 Ill. 603, 40 Am. Rep. 608—Wright v. Griffey, 147 Ill. 498, 37 Am. St. Rep. 228, 35 N. E. 732—Campbell v. Goodall, 8 Ill. App. 272—Glade v. Schmidt, 15 Ill. App. 56—Meters v. Pinover, 21 Ill. App. 555—Windett v. Connecticut Mut. L. Ins. Co. 27

III. App. 72—Indiana, B. & W. R. Co. v. Koons, 105 Ind. 512, 5 N. E. 549—Kilander v. Hoover, 111 Ind. 14, 11 N. E. 796—Roby v. Eggers, 130 Ind. 425, 29 N. E. 365—Terre Haute & I. R. Co. v. State, 159 Ind. 470, 65 N. E. 401—Everhart v. Holloway, 55 Iowa, 181, 7 N. W. 506—Defries v. McMeans, 121 Iowa, 541, 97 N. W. 65—Shepard v. Stockham, 45 Kan. 249, 25 Pac. 559—Bledsoe v. Erwin, 33 La. Ann. 619—Flagg v. St. Charles, 48 La. Ann. 767, 19 So. 944—Police Jury v. Police Jury, 49 La. Ann. 1335, 22 So. 376—Russ v. Wilson, 22 Me. 211—Dodge v. Gaylord, 53 Md. 369—Reid v. Holmes, 127 Mass. 328—Foye v. Patch, 132 Mass. 111—Daggett v. Daggett, 143 Mass. 521, 10 N. E. 311—Watts v. Watts, 160 Mass. 465, 23 L.R.A. 188, 39 Am. St. Rep. 509, 36 N. E. 479—Nashua & L. R. Corp. v. Boston & L. R. Corp. 164 Mass. 226, 49 Am. St. Rep. 454, 41 N. E. 268—People v. Dawell, 25 Mich. 271, 12 Am. Rep. 260—Jacobs v. Miller, 41 Mich. 96, 1 N. W. 1013—Bond v. Markstrum, 102 Mich. 17, 60 N. W. 282—West v. Hennessey, 58 Minn. 137, 58 N. W. 984—Greene v. Merchants' & P. Bank, 73 Miss. 549, 19 So. 350—State ex rel. Hospes v. Branch, 134 Mo. 604, 56 Am. St. Rep. 533, 36 S. W. 226—State ex rel. National Subway Co. v. St. Louis, 145 Mo. 590, 42 L.R.A. 127, 46 S. W. 981—Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 442, 74 S. W. 979—Murphy v. Creath, 26 Mo. App. 586—Piper v. Boonville, 32 Mo. App. 145—Rector v. Rotton, 3 Neb. 178—Hanson v. Hanson, 64 Neb. 507, 90 N. W. 208—Kittredge v. Emerson, 15 N. H. 263—Paterson v. Baker, 51 N. J. Eq. 53, 26 Atl. 324—First Nat. Bank v. Wallis, 59 N. J. L. 48, 34 Atl. 983—New Brunswick Water Comrs. v. Cramer, 61 N. J. L. 273, 68 Am. St. Rep. 705, 39 Atl. 671—Robbins v. Collier, 3 N. M. 347, 5 Pac. 538—New Mexico Nat. Bank v. Brooks, 9 N. M. 122, 49 Pac. 947—Lowenthal v. Baca, 10 N. M. 361, 62 Pac. 982—Territory v. Santa Fe P. R. Co. 10 N. M. 412, 62 Pac. 985—Hawks v. Swett, 4 Hun, 150—Mechanics & T. Bank v. Dakin, 8 Hun, 436—Edson v. Bartow, 10 App. Div. 108, 41 N. Y. Supp. 723—Felix v. Devlin, 50 App. Div. 334, 64 N. Y. Supp. 214—Conant v. Jones, 50 App. Div. 339, 64 N. Y. Supp. 189—Church v. Kidd, 88 N. Y. 654—Ward v. Boyce, 152 N. Y. 196, 36 L.R.A. 551, 46 N. E. 180—Temple v. Williams, 91 N. C. 92—Jordan v. Farthing, 117 N. C. 188, 23 S. E. 244—Piedmont Wagon Co. v. Byrd, 119 N. C. 468, 26 S. E. 144—Territory ex rel. Jones v. Hopkins, 9 Okla. 150, 59 Pac. 976—Hall v. Zeller Bros. 17 Or. 389, 21 Pac. 102—Wengert v. Manfare, 1 Pearson (Pa.) 497—M'Fadden v. Geddis, 17 Serg. & R. 339—Oldham v. McIver, 49 Tex. 572—Nichols v. Dilbrell, 61 Tex. 541—New York L. Ins. Co. v. English, 96 Tex. 274, 72 S. W. 58—Carson v. McCormick Harvesting Mach. Co. 18 Tex. Civ. App. 227, 44 S. W. 406—State v. Mortensen, 27 Utah, 44, 74 Pac. 350—Hearst v. Putnam Min. Co. 28 Utah, 200, 66 L.R.A. 791, 107 Am. St. Rep. 607, 77 Pac. 753—Gray v. Pingry, 17 Vt. 424, 44 Am. Dec. 345—Blackwell v. Bragg, 78 Va. 539—Washington, O. & W. R. Co. v. Cazenove, 83 Va. 753, 3 S. E. 433—Randolph v. Longdale Iron Co. 84 Va. 465, 5 S. E. 330—Miller v. Willis, 95 Va. 354, 28 S. E. 337—McCullough v. Dashiell, 85 Va. 41, 6 S. E. 610—Fishburne v. Ferguson, 85 Va. 325, 7 S. E. 361—Marble Sav. Bank v. Williams, 23 Wash. 772, 63 Pac. 511—Coville v. Gilman, 13 W. Va. 328—Wand-

ling v. Straw, 25 W. Va. 708—Jackson ex dem. Grignon v. Astor, 1 Pinney (Wis.) 158, 39 Am. Dec. 281—Akerly v. Villas, 24 Wis. 174, 1 Am. Rep. 166—Rupiper v. Calloway, 105 Wis. 7, 80 N. W. 916.

365. A decree which remains in full force is not open to contest in a subsequent suit between the same parties. *Hornbuckle v. Stafford*, 111 U. S. 389, 4 Sup. Ct. Rep. 515, 28: 468

366. A judgment or decree by a competent tribunal against a party having actual or constructive notice of the pendency of the action is conclusive on collateral attack. *Hollingsworth v. Barbour*, 4 Pet. 466, 7: 922

Distinguished in *Amory v. Amory*, 3 Biss. 270, Fed. Cas. No. 334—*Ferguson v. Crawford*, 70 N. Y. 259, 28 Am. Rep. 589.

Cited in *Buckmaster v. Carlin*, 4 Ill. 108—*Massey v. Scott*, 49 Mo. 282—*Ferriss v. Lewis*, 2 Tenn. Ch. 295.

367. Where it appears that a United States district court sitting in admiralty had jurisdiction of the subject-matter, and that the defendant was duly served with process, or voluntarily appeared and made defense, the decree is not open to attack collaterally. *Re Cooper*, 143 U. S. 472, 12 Sup. Ct. Rep. 453, 36: 232
Cited in *Sherman v. Hanno*, 66 N. H. 166, 28 Atl. 18.

368. A judgment is conclusive in respect to the parties to it. It cannot be impeached collaterally, and it cannot be questioned upon a creditors' bill. *Mattingly v. Nye*, 8 Wall. 370, 19: 380

Cited in *New Orleans v. Fisher*, 180 U. S. 190, 45 L. ed. 492, 21 Sup. Ct. Rep. 347—*Sioux City Terminal R. & Warehouse Co. v. Trust Co.* 27 C. C. A. 85, 49 U. S. App. 523, 82 Fed. 136—*Alkire Grocery Co. v. Richesin*, 91 Fed. 84—*New Orleans v. Fisher*, 34 C. C. A. 25, 63 U. S. App. 455, 91 Fed. 584—*Lynch v. Burt*, 67 C. C. A. 316, 132 Fed. 423—*Gentry v. Allen*, 32 Gratt. 258.

369. Questions involved in the determination of a suit in equity are not open to re-examination in any collateral proceeding between the same parties or their privies, if the court rendering the decree had jurisdiction of the subject-matter and of the parties. *Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28: 908

Who may attack.

See also *infra*, 404; *Infants*, 58.

370-2. A judgment against an administrator cannot be collaterally attacked by the sureties in a suit on the administration bond. *McLaughlin v. Bank of Potomac*, 7 How. 220, 12: 675
Stovall use of *Eubanks v. Banks*, 10 Wall. 583, 13: 1036

2. What Judgments Subject to.

Foreign Judgment, see *infra*, 923, 925, 934, 936.

Foreign Admiralty Court, see *infra*, 948.

Decree of Federal Court, see *infra*, 1077a.

Adjudications in Bankruptcy, see Bankruptcy, 86a-89.

Decisions by Commissioners Confirming Private Land Claims, see Private Land Claims, 675-677.

Nullity of, of Confederate State Courts, see States, 341.

Collateral Attack on Assessment of Taxes, see Taxes, 575, 576.

Collateral Attack on Tax Deed or Title, see Taxes, 701, 702.

See also Eminent Domain, 92.

373-5. Where a record is perfect on its face, evidence cannot be let in to contradict and overthrow it in a collateral proceeding. *Erwin v. Lowry*, 7 How. 172, 12: 655

376. A decree divesting a defendant of all right and interest in certain premises divests his homestead right. Such decree cannot be collaterally questioned until reversed, and its reversal would not affect a title acquired under it while it was in force. *Miller v. Sherry*, 2 Wall. 237, 17: 827
Cited in *Re Falconer*, 49 C. C. A. 57, 110 Fed. 118—*First Nat. Bank v. Kennedy*, 113 Ala. 290, 36 L.R.A. 329, 21 So. 387—*Norris v. Kidd*, 28 Ark. 498—*Turner v. Vaughan*, 33 Ark. 463—*Richardson v. Adler*, 48 Ark. 48—*Clubb v. Wise*, 64 Ill. 159—*Lane v. Union Nat. Bank*, 75 Ill. App. 306—*McNally v. White*, 154 Ind. 171, 54 N. E. 794—*Henderson v. Still*, 61 Miss. 392—*New Mexico Nat. Bank v. Brooks*, 9 N. M. 120, 49 Pac. 947—*Nichol v. Davidson County*, 3 Tenn. Ch. 555—*Plant v. Carpenter*, 10 Wash. 626, 53 Pac. 1107—*Graham v. Culver*, 3 Wyo. 655, 31 Am. St. Rep. 105, 29 Pac. 270.

377. An order appointing commissioners in partition is not open to collateral attack; it can only be questioned on appeal or writ of error. It is not void because no petition or complaint appears in the record. *Hall v. Law*, 102 U. S. 461, 26: 217
Cited in *Applegate v. Lexington & C. County Min. Co.* 117 U. S. 289, 29 L. ed. 896, 6 Sup. Ct. Rep. 742—*Robinson v. Fair*, 128 U. S. 87, 32 L. ed. 423, 9 Sup. Ct. Rep. 30—*Puncanson v. Manson*, 3 App. D. C. 275—*Long v. Long*, 62 Md. 63—*Pe Amy*, 12 Utah, 313, 42 Pac. 1121.

378. Under the decisions of the supreme court of Illinois, a judgment by default in a tax-sale proceeding is not conclusive upon the taxpayer, but may be impeached collaterally. *Gage v. Pumpelly*, 115 U. S. 454, 6 Sup. Ct. Rep. 136, 29: 449

379. The construction of a local statute by a foreign court of competent jurisdiction cannot be collaterally questioned in the Federal Supreme Court. *Griffith v. Frazier*, 8 Cranch, 9, 3: 471
Cited in *Hatch v. White*, 2 Gall. 162, Fed. Cas. No. 6,209.

County bonds.

380. A judgment of a county judge, authorized to decide, for the issuing of county bonds, can no more be collaterally attacked than can any other judgment of a court of competent jurisdiction, rendered with the parties properly before it. *Lyons v. Munson*, 99 U. S. 684, 25: 451
Cited in *Andes v. Ely*, 158 U. S. 317, 39 L. ed. U. S. Dig.—228

1000, 15 Sup. Ct. Rep. 954—*Barbee v. Shannon*, 1 Ind. Terr. 208, 40 S. W. 584—*Scarborough v. Eubank*, 93 Tex. 109, 53 S. W. 573.

381. A judgment awarding recovery for the amount of county bonds cannot be collaterally questioned on appeal from a writ of mandamus compelling the supervisors to levy a tax to pay the judgment. *Rock Island County v. United States ex rel. State Bank*, 4 Wall. 435, 18: 419
Cited in *Vogler v. Spaugh*, 4 Biss. 293, Fed. Cas. No. 16,988—*United States ex rel. Hill v. Scotland County Judges*, 32 Fed. 715—*People ex rel. Rollins v. Rio Grande County*, 7 Colo. App. 237, 42 Pac. 1032—*Cairo v. Campbell*, 116 Ill. 308, 5 N. E. 114—*Iowa Railroad Land Co. v. Sac County*, 39 Iowa, 142—*State ex rel. Wilson v. Rainey*, 74 Mo. 234—*People ex rel. Mott v. Greene County*, 5 Hun, 651.

Orphan's or probate courts.

Collateral Attack on Letters of Administration, see Executors and Administrators, 15-17.

Of Order for Sale of Infant's Real Estate, see Infants, 27.

See also *infra*, 696.

382. The orders, judgments, and decrees of the orphans' court of Philadelphia county, in a case where it had jurisdiction of the subject-matter, cannot be impeached collaterally. *Herron v. Dater*, 120 U. S. 464, 7 Sup. Ct. Rep. 620, 30: 748
Cited in *Wood v. Mobile*, 99 Fed. 616—*Wood v. Mobile*, 47 C. C. A. 12, 107 Fed. 848—*McCarter v. Nell*, 50 Ark. 190, 6 S. W. 731—*Hodgdon v. Southern P. R. Co.* 75 Cal. 648, 17 Pac. 928.

383. The courts of ordinary in Georgia are courts of original, exclusive, and general jurisdiction over decedents' estates; and their judgments are no more open to collateral attack than the judgments, decrees, or orders of any other court. *Veach v. Rice*, 131 U. S. 293, 9 Sup. Ct. Rep. 730, 33: 163
Cited in *Overby v. Gordon*, 177 U. S. 220, 44 L. ed. 744, 20 Sup. Ct. Rep. 603—*Comstock v. Herron*, 5 C. C. A. 275, 6 U. S. App. 626, 55 Fed. 812—*Overby v. Gordon*, 13 App. D. C. 427—*King v. Ross*, 21 R. I. 417, 45 Atl. 146.

384. The action of a probate court on a report of insolvency cannot be collaterally questioned. *Williams v. Benedict*, 8 How. 107, 12: 1007

385. Letters of administration upon the estate of a person who is in fact alive have no validity and may be impeached collaterally. *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38: 896
Cited in *Hamilton v. Brown*, 161 U. S. 267, 40 L. ed. 697, 16 Sup. Ct. Rep. 585—*Forsythe v. Hammond*, 142 Ind. 519, 30 L.R.A. 583, 41 N. E. 950—*Springer v. Shavender*, 118 N. C. 42, 33 L.R.A. 776, 54 Am. St. Rep. 708, 23 S. E. 976.

386. Courts of the United States have no probate jurisdiction, and must receive the judgments of state probate courts as conclusive of the validity and contents of a

will. *Fouvergne v. Municipality No. 2*, of New Orleans, 18 How. 470, 15: 399
Cited in Re Frazer, 18 Alb. L. J. 354, Fed. Cas. No. 5,068—*Comstock v. Herron*, 5 C. C. A. 275 6 U. S. App. 626, 55 Fed. 811—*Copeland v. Bruning*, 72 Fed. 8—*Re Foley*, 80 Fed. 951—*Wahl v. Franz*, 49 L.R.A. 67, 40 C. C. A. 645, 100 Fed. 687.

387. The first district court of New Orleans possesses jurisdiction competent to the legal transfer of the succession of a debtor who is enjoying a respite from the claims of his creditors for an unexpired term at the time of his death, and before any default has arisen in the fulfilment of the conditions of the respite as to payment; hence its decree is binding on collateral attack in the Federal courts. *Beauregard v. New Orleans*, 18 How. 497, 15: 469

388. The accounts of an administrator settled by the probate court cannot be collaterally attacked. *Tate v. Norton*, 94 U. S. 746, 24: 222
Cited in Pulliam v. Pulliam, 10 Fed. 30—*Sowles v. First Nat. Bank*, 54 Fed. 565.

389-91. Where an account as administrator is settled in the orphans' court, the allowance made there cannot be reviewed collaterally in another court, in a suit in which a different trust is involved. *Barney v. Saunders*, 16 How. 535, 14: 1047

Insolvency cases.

Effect of Mistake in Consenting to Discharge, see *Insolvency*, 66.

392. A cession, under the insolvent law of Louisiana, by surviving partners, carries their own undivided interests; and if it purports to carry the interest of a deceased partner, and the court determines that it is effectual and accepts the surrender, the validity of the cession cannot be attacked collaterally in attachment proceedings. *Tua v. Carriere*, 117 U. S. 201, 6 Sup. Ct. Rep. 565, 29: 855

3. Grounds.

a. In General.

Foreign Judgment, see *infra*, 934a.

Judgment of Sister State, see *infra*, 967, 1020.

Definition of Inferior Court, see *Courts*, 5.
 Orders for Sale of Decedent's Land to Pay Debts, see *Executors and Administrators*, 240-243.

Restriction of Habeas Corpus to Question of Jurisdiction, see *Habeas Corpus*, 94-119.

Collateral Attack on Patent, see *Patents*, 1133, 1169.

See also *supra*, 210.

393. Multifariousness as to subjects or parties, within the jurisdiction of equity, must be taken advantage of by demurrer, plea, or answer, it does not render a decree void so as to be collaterally impeached. *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 8 Sup. Ct. Rep. 337, 31: 309
Cited in Chisholm v. Johnson, 106 Fed. 210—

St. Lawrence Co. v. Holt, 51 W. Va. 374, 43 S. E. 351.

394. The sufficiency of the proof upon which the court took its action is not a matter open to consideration in a collateral matter. *Comstock v. Crawford*, 3 Wall. 396, 18: 34

Cited in Sawyer v. Rector, 5 Dak. 129, 37 N. W. 741—*Price v. Winter*, 15 Fla. 106—*Deans v. Wilcoxon*, 25 Fla. 1031, 7 So. 163.

395. The decree of a court of competent jurisdiction cannot be collaterally attacked by averring and proving that there was a good defense to the suit if the defendant had chosen to make it. *Avegno v. Schmidt*, 113 U. S. 293, 5 Sup. Ct. Rep. 487, 28: 976
Cited in Beattie v. Wilkinson, 38 Fed. 651.

Editorial note.

[Attack by alleged fraudulent grantee on judgment on which action to set aside his conveyance is based. 67 L.R.A. 590.]

b. Errors and Irregularities.

In Federal Court on Judgment of State Court, see *infra*, 1059, 1060.

Judgment of Court-Martial, see *Courts-Martial*, 52, 55-61.

Judgment Against Infant, see *Infants*, 42, 59, 60, 64.

Effect of Errors in or Anterior to Decree upon Sale had Thereunder, see *Judicial Sale*, 41, 42.

Validity of Judicial Sale to Bona Fide Purchaser notwithstanding Errors in Judgment, see *Judicial Sale*, 85-87.

Trial by Court without Waiver of Jury, see *Jury*, 4.

See also *infra*, 465.

396. If a court had jurisdiction to render a judgment, no error or irregularity in the proceedings will render it void; nor can such errors or irregularities be considered when the judgment is collaterally questioned. *Kempe v. Kennedy*, 5 Cranch, 173, 3: 70
McGoon v. Scales, 9 Wall. 23, 19: 545
Voorhees v. Jackson ex dem. Bank of United States, 10 Pet. 449, 9: 490
Sargeant v. State Bank of Indiana, 12 How. 371, 13: 1028

Brignardello v. Gray (Gray v. Brignardello) 1 Wall. 627, 17: 692

Florentine v. Barton, 2 Wall. 210, 17: 783

Harvey v. Tyler, 2 Wall. 328, 17: 871

Secrist v. Green, 3 Wall. 744, 18: 153

Rock Island County v. United States ex rel. State Bank, 4 Wall. 435, 18: 419

Marchand v. Frellsen, 105 U. S. 423, 26: 1057

Distinguished in Hart v. Selzas, 21 Wend. 55.

Cited in Strother v. Lucas, 12 Pet. 448, 9 L. ed. 1152—*Grignon v. Astor*, 2 How. 343, 11 L. ed. 292—*Gray v. Brignardello*, 1 Wall. 634, 17 L. ed. 697—*Cooper v. Reynolds*, 10 Wall. 316, 19 L. ed. 932—*McNitt v. Turner*, 16 Wall. 386, 21 L. ed. 348—*Habich v. Folger*, 20 Wall. 7, 22 L. ed. 308—*Tilton v. Coffield*, 93 U. S. 165, 23 L. ed. 858—*White v. Crow*, 110 U. S. 189, 28 L. ed. 115, 4 Sup. Ct. Rep. 71—*Applegate v. Lexington & C. County Min. Co.* 117 U. S. 270, 29 L. ed. 896, 6 Sup. Ct.

Rep. 742—Robinson v. Fair, 128 U. S. 87, 32 L. ed. 423, 9 Sup. Ct. Rep. 30—Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 565, 32 L. ed. 1048, 9 Sup. Ct. Rep. 603—Re Lennon, 166 U. S. 553, 41 L. ed. 1112, 17 Sup. Ct. Rep. 658—Goodrich v. Detroit, 184 U. S. 441, 46 L. ed. 632, 22 Sup. Ct. Rep. 397—Swan v. United States, 19 Ct. Cl. 65—Galpin v. Page, 1 Sawy. 326, Fed. Cas. No. 5205—Lincoln v. Tower, 2 McLean, 473, Fed. Cas. No. 8,355—Re McKibben, 12 Nat. Bankr. Reg. 102, Fed. Cas. No. 8,859—Semple v. Bank of British Columbia, 5 Sawy. 98, Fed. Cas. No. 12,659—Sumner v. Moore, 2 McLean, 63, Fed. Cas. No. 13,610—Thompson v. Phillips, Baldw. 271, Fed. Cas. No. 13, 974—Tolmie v. Thompson, 3 Cranch, C. C. 123, Fed. Cas. No. 14,080—McArthur v. Allen, 3 Fed. 321—Daily v. Doe, 3 Fed. 914—Holmes v. Oregon & C. R. Co. 6 Sawy. 283, 5 Fed. 534—Re Mott, 6 Fed. 692—Walker v. Sturbans, 38 Fed. 300—Ex parte Lennon, 12 C. C. A. 137, 22 U. S. App. 561, 64 Fed. 322—Pullman's Palace Car Co. v. Washburn, 66 Fed. 795—Compton v. Jesup, 15 C. C. A. 434, 31 U. S. App. 486, 68 Fed. 300—Wyman v. Campbell, 6 Port. (Ala.) 238, 31 Am. Dec. 677—Hunt v. Ellison, 32 Ala. 196—Logan v. Central Iron & Coal Co. 139 Ala. 555, 36 So. 729—Borden v. State, 11 Ark. 552, 54 Am. Dec. 217—Conway v. Ellison, 14 Ark. 363—Coulter v. Routt County, 9 Colo. 267, 11 Pac. 100—Fraser v. Prather, 1 MacArth. 215—Duncanson v. Manson, 3 App. D. C. 275—McGehee v. Wilkins, 31 Fla. 86, 12 So. 228—Rodgers v. Evans, 8 Ga. 145, 52 Am. Dec. 390—Kenney v. Greer, 13 Ill. 452, 54 Am. Dec. 439—Haywood v. Collins, 60 Ill. 342—Lyons v. Cooledge, 89 Ill. 534—Sutterlin v. Connecticut Mut. L. Ins. Co. 90 Ill. 488—Barbee v. Shannou, 1 Ind. Terr. 208, 40 S. W. 584—Horner v. Doe, 1 Ind. 133, 48 Am. Dec. 855—Wright v. Marsh, 2 G. Greene, 114—Lathrop v. American Emigrant Co. 41 Iowa, 549—Moore v. Jeffers, 53 Iowa, 208, 4 N. W. 1084—National Bank v. Peters, 51 Kan. 69, 32 Pac. 637—Long v. Long, 62 Md. 63—Osman v. Traphagen, 28 Mich. 88—Wilkin v. Keith, 121 Mich. 71, 79 N. W. 887—Newman v. Home Ins. Co. 20 Minn. 427, Gil. 378—McNamara v. Casserly, 61 Minn. 344, 63 N. W. 880—First Nat. Bank v. Hughes, 10 Mo. App. 12—Connell v. Gallagher, 36 Neb. 755, 53 N. W. 229—Kittredge v. Emerson, 15 N. H. 203—Morse v. Presby, 25 N. H. 302—Diehl v. Page, 3 N. J. Eq. 147—Maxwell v. Pittenger, 3 N. J. Eq. 167—Young v. Bathbone, 16 N. J. Eq. 227, 84 Am. Dec. 151—State v. Middlesex, 15 N. J. L. 71—State v. Lewis, 22 N. J. L. 566—Russell v. Work, 35 N. J. L. 320—Monroe v. Douglass, 4 Sandf. Ch. 196—Birdsall v. Phillips, 17 Wend. 468—Foot v. Stevens, 17 Wend. 484—Kundolf v. Thalheimer, 17 Barb. 509—People ex rel. Porter v. Rochester, 21 Barb. 670—Embury v. Conner, 3 N. Y. 522, 53 Am. Dec. 325—Morewood v. Hollister, 6 N. Y. 315—Adams v. Jeffries, 12 Ohio, 271, 40 Am. Dec. 477—Morrill v. Morrill, 20 Or. 102, 11 L.R.A. 159, 23 Am. St. Rep. 95, 23 Pac. 362—Schnader v. Bender, 19 Lanc. L. Rev. 198—Wilcox v. Emerson, 10 R. I. 277, 14 Am. Rep. 683—Angell v. Angell, 14 R. I. 544—Camberford v. Hall, 3 M'Cor'd, L. 346—Clyburn v. Reynolds, 31 S. C. 112, 9 S. E. 973—Guilford v. Love, 49 Tex. 742—Kenyon v. Kenyon, 3 Utah, 435, 24 Pac. 829—Quesenberry v. Barbour, 31 Gratt. 500—Hill v. Woodward, 78 Va. 769—Gresham v. Ewell, 85 Va. 6, 6 S. E. 700—Taylor v. Huntington, 34 Wash. 458, 75 Pac. 1104—Hall v. Hall, 12 W. Va. 13—Patton v. Merchants' Bank, 12 W. Va. 607—Keystone Bridge Co. v. Sum-

mers, 13 W. Va. 503—Wandling v. Straw, 25 W. Va. 700.

397. An erroneous judgment by a court upon matters within its jurisdiction is binding until reversed, and cannot be collaterally attacked. Griffith v. Frazier, 8 Cranch, 9, 3: 471

Cited in Cuyler v. Ferrill, 1 Abb. (U. S.) 178, Fed. Cas. No. 3,523—Hatch v. White, 2 Gall. 162, Fed. Cas. No. 6,209—State v. Middlesex, 15 N. J. L. 71—M'Pherson v. Cunliff, 11 Serg. & R. 431, 14 Am. Dec. 642.

398. A decree, although erroneous, but not void, cannot be questioned in a collateral proceeding. Union Trust Co. v. Southern Inland Nav. & Improv. Co. 130 U. S. 565, 9 Sup. Ct. Rep. 606, 32: 1043

Cited in Belt v. United States, 4 App. D. C. 30.

399-400. A judgment upon the merits, between the same parties, for the same cause of action, whether erroneous or not, is *res judicata* and a bar to a subsequent action, and nothing that can be done in another suit can take away the legal effect of the decree. Case v. New Orleans & C. R. Co. (Case v. Beauregard) 101 U. S. 688, 25: 1004

Cited in Le More v. United States, 35 Ct. Cl. 13—People ex rel. Bryant v. Holladay, 98 Cal. 251, 27 Am. St. Rep. 180, 29 Pac. 54—Jenkins v. International Bank, 111 Ill. 471—Shumate v. Fauquier County, 84 Va. 577, 5 S. E. 570—Tracey v. Shumate, 22 W. Va. 510—Rogers v. Rogers, 87 W. Va. 419, 16 S. E. 633.

401. The action of a court with jurisdiction of the subject-matter and of the person of the defendant is binding in a collateral proceeding as to all errors not going to the jurisdiction of the court. Insley v. United States, 150 U. S. 512, 14 Sup. Ct. Rep. 158, 37: 1163

Cited in Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 637, 19 U. S. App. 570, 60 Fed. 318—Pullman's Palace Car Co. v. Washburn, 66 Fed. 797—Lake County v. Platt, 25 C. C. A. 90, 49 U. S. App. 216, 79 Fed. 571.

402-3. When the jurisdiction over the subject, of the court under whose authority lands have been sold appears on the face of the proceedings, its errors, if any were committed, cannot be corrected or examined when brought up collaterally. Thompson v. Tolmie, 2 Pet. 157, 7: 381

Cited in Parker v. Kane, 22 How. 14, 16 L. ed. 290—Bank of United States v. Voorhees, 1 McLean, 225, Fed. Cas. No. 939—Derby v. Jacques, 1 Cliff. 437, Fed. Cas. No. 3,817—Garrett v. Boeing, 15 C. C. A. 219, 37 U. S. App. 42, 68 Fed. 61—National Nickel Co. v. Nevada Nickel Syndicate, 106 Fed. 115—National Nickel Co. v. Nevada Nickel Syndicate, 50 C. C. A. 117, 112 Fed. 48—Duncanson v. Manson, 3 App. D. C. 271—Finlayson v. Lipscomb, 16 Fla. 763—Lane v. Bommelmann, 17 Ill. 98—Denegre v. Haun, 14 Iowa, 248, 81 Am. Dec. 480—Dupuy v. Bemiss, 2 La. Ann. 515—Hebrard's Succession, 18 La. Ann. 494—Schlev v. Baltimore, 29 Md. 47—Waters v. Stickney, 12 Allen, 10, 90 Am. Dec. 122—Seward v. Didier, 16 Neb. 62, 20 N. W. 12—Monroe v. Douglas, 4 Sandf. Ch. 197—Pennybacker v. Switzer, 75

Va. 686—Turnbull v. Mann, 99 Va. 46, 37 S. E. 288.

404. A married woman may collaterally attack a judgment rendered against her and under which her property was sold, by showing that judgment was recovered upon a count in the declaration based upon a contract void as to her, where such evidence would not contradict the record in the former action. Gibson v. Lyon, 115 U. S. 439, 6 Sup. Ct. Rep. 129, 29: 440

405. Error in holding that a trust did not protect real estate from the creditors of the beneficiary, or in holding that a will not so executed that it can be proved in the jurisdiction constitutes a sufficient exercise of a power of appointment, will not render the decision void on collateral attack. Manson v. Duncanson, 166 U. S. 533, 17 Sup. Ct. Rep. 647, 41: 1105

406. Where the question whether a suit to remove a lien on property of an insolvent corporation could be brought before plaintiff had exhausted his legal remedies by judgment and execution was one of the questions necessary to be determined in a suit, any error in deciding it will not authorize even the same court, in an original, independent suit, to treat the decree as void. Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. Rep. 781, 33: 778

Cited in State ex rel. Fowler v. Circuit Court, 98 Wis. 153, 73 N. W. 788.

407. A state judgment is not void because the cause was tried by the court without the waiver of a trial by jury. Such error cannot be taken advantage of collaterally. Maxwell v. Stewart, 21 Wall. 71, 22 Wall. 77, 22: 564

Cited in Humphries v. District of Columbia, 174 U. S. 195, 43 L. ed. 946, 19 Sup. Ct. Rep. 637—Walker v. Sturbans, 38 Fed. 300—Judson v. Gage, 39 C. C. A. 159, 98 Fed. 543—Belt v. United States, 4 App. D. C. 20—District of Columbia v. Humphries, 12 App. D. C. 132—Barbee v. Shannon, 1 Ind. Terr. 208, 40 S. W. 584—Snow v. Mitchell, 37 Kan. 641, 16 Pac. 737.

408. Judgment on an unrecorded verdict, otherwise duly entered, is not void. Omission is an irregularity only. Gunn v. Plant, 94 U. S. 664, 24: 304

Cited in Robinson v. Fair, 128 U. S. 87, 32 L. ed. 423, 9 Sup. Ct. Rep. 30—McMillan v. Lovejoy, 115 Ill. 501, 4 N. E. 772—Vantilburg v. Black, 3 Mont. 468.

409. No exceptions to the regularity of proceedings offered in evidence can be taken, which should have been properly made in the original action by the parties sued in the same. Bank of the Metropolis v. Gutschlick, 14 Pet. 19, 10: 335

Court of limited authority.

Attack for Lack of Jurisdiction, see infra, 442-444.

Nature and Grade of Federal Courts and their Jurisdiction, see Courts, 440, 441, 465, 466.

410. When the jurisdiction of a court of

limited authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. Beauregard v. New Orleans, 18 How. 497, 15: 469

Comstock v. Crawford, 3 Wall. 396, 18: 34
Cited in Parker v. Kane, 22 How. 14, 16 L. ed. 290—Simmons v. Saul, 138 U. S. 452, 34 L. ed. 1060, 11 Sup. Ct. Rep. 369—Noble v. Union River Logging R. Co. 147 U. S. 174, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—Re Lennon, 166 U. S. 553, 41 L. ed. 1112, 17 Sup. Ct. Rep. 658—Goodrich v. Detroit, 184 U. S. 441, 46 L. ed. 632, 22 Sup. Ct. Rep. 397—Re McKibben, 12 Nat. Bankr. Reg. 102, Fed. Cas. No. 8,859—Mohr v. Manierre, 7 Blas. 420, Fed. Cas. No. 9,685—Dally v. Doe, 3 Fed. 915—The Trenton, 4 Fed. 662—Holmes v. Oregon & C. R. Co. 6 Sawy. 285, 5 Fed. 534—Holmes v. Oregon & C. R. Co. 7 Sawy. 387, 9 Fed. 234—May v. Logan County, 30 Fed. 255—Beattie v. Wilkinson, 36 Fed. 650—Reinach v. Atlantic & G. W. R. Co. 58 Fed. 43—Garrett v. Boeing, 15 C. C. A. 219, 37 U. S. App. 42, 68 Fed. 61—Graft v. Louis, 71 Fed. 595—Hill v. Wall, 66 Cal. 135, 4 Pac. 1139—Sawyer v. Rector, 5 Dak. 129, 37 N. W. 741—Latney v. United States, 18 App. D. C. 272—Hays v. McNealy, 16 Fla. 414—Epping v. Robinson, 21 Fla. 47—Deans v. Wilcoxon, 25 Fla. 1031, 7 So. 163—Long v. Long, 62 Md. 63—Blanchard v. Webster, 62 N. H. 468—Turner v. Malone, 24 S. C. 402—Ex parte Marx, 86 Va. 46, 9 S. E. 475.

Necessity of direct proceeding.

411. The errors and irregularities of any suit are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court. Thompson v. Tolmie, 2 Pet. 157, 7: 381
Voorhees v. Jackson ex dem. Bank of United States, 10 Pet. 449, 9: 490

Cited in Cocke v. Halsey, 16 Pet. 87, 10 L. ed. 897—Hall v. Law, 102 U. S. 464, 26 L. ed. 218—Keyes v. United States, 109 U. S. 340, 27 L. ed. 956, 3 Sup. Ct. Rep. 202—White v. Crow, 110 U. S. 189, 28 L. ed. 115, 4 Sup. Ct. Rep. 71—Laing v. Rigney, 160 U. S. 543, 40 L. ed. 528, 16 Sup. Ct. Rep. 366—Re Lennon, 166 U. S. 553, 41 L. ed. 1112, 17 Sup. Ct. Rep. 658—Keyes v. United States, 15 Ct. Cl. 541—Brown v. Noyes, 2 Woodb. & M. 80, Fed. Cas. No. 2,023—Burnham v. Webster, 1 Woodb. & M. 180, Fed. Cas. No. 2,179—Casals v. Vernon, 5 Mason, 335, Fed. Cas. No. 2,503—Miller v. Sullivan, 4 Dill. 343, Fed. Cas. No. 9,592—Sumner v. Moore, 2 McLean, 62, Fed. Cas. No. 13,610—Dally v. Doe, 3 Fed. 913—McArthur v. Allen, 3 Fed. 322—Dunlevy v. Dunlevy, 38 Fed. 462—Re Barry, 42 Fed. 126—Reinach v. Atlantic & G. W. R. Co. 58 Fed. 43—Rector v. Fitzgerald, 8 C. C. A. 280, 19 U. S. App. 423, 59 Fed. 810—Ryan v. Staples, 23 C. C. A. 546, 40 U. S. App. 427, 76 Fed. 726—National Nickel Co. v. Nevada Nickel Syndicate, 106 Fed. 115—National Nickel Co. v. Nevada Nickel Syndicate, 50 C. C. A. 117, 112 Fed. 48—Wyman v. Campbell, 6 Port. (Ala.) 234, 31 Am. Dec. 677—Hunt v. Ellison, 32 Ala. 194—Wright v. Ware, 50 Ala. 558—Conway v. Ellison, 14 Ark. 363—Re Warfield, 22 Cal. 63, 83 Am. Dec. 49—Duncanson v. Manson, 3 App. D. C. 275—Belt v. United States, 4 App. D. C. 30—Camp v. Moseley, 2 Fla. 186—Glchrist v. Meacham, 3 Fla. 230—Willson v. Hayward, 6 Fla. 197—May v. May, 7 Fla. 244, 68 Am. Dec. 431—Michel v. Sammis, 15 Fla. 315—Grier v. McLendon, 7

Ga. 365—Tucker v. Harris, 13 Ga. 10, 58 Am. Dec. 488—Buckmaster v. Carlin, 4 Ill. 108—Rigg v. Cook, 9 Ill. 349, 46 Am. Dec. 462—Galena & S. W. R. Co. v. Ennor, 9 Ill. App. 165—Wright v. Marsh, 2 G. Greene, 114—Tiffany v. Glover, 3 G. Greene, 402—Cooper v. Sunderland, 3 Iowa, 130, 66 Am. Dec. 52—Ex parte Holman, 28 Iowa, 103, 4 Am. Rep. 159—Applegate v. Applegate, 107 Iowa, 323, 78 N. W. 34—Livingston v. Lamb, 1 Kan. 223—Paine v. Spratley, 5 Kan. 541—Buckner v. Wisdom, 31 La. Ann. 57—Sanders v. McDonald, 63 Md. 512—Sanders v. Raina, 10 Mo. 772—State ex rel. Wilson v. Rainey, 74 Mo. 234—Vantilburg v. Black, 3 Mont. 468—Watson v. Ulbrich, 18 Neb. 189, 24 N. W. 732—Kittredge v. Emerson, 15 N. H. 263—Den ex dem. Runyon v. Newark India Rubber Co. 24 N. J. L. 476—Stewart v. Maxwell, 1 N. M. 570—Morrill Morrill, 20 Or. 102, 11 L.R.A. 159, 23 Am. St. Rep. 95, 25 Pac. 362—Miltimore v. Miltimore, 40 Pa. 135—Yates v. Houston, 3 Tex. 447—Lee v. Kingsbury, 13 Tex. 71, 62 Am. Dec. 546—Giddings v. Steele, 28 Tex. 752, 91 Am. Dec. 336—Quesenberry v. Barbour, 31 Gratt. 500—Allan v. Hoffman, 83 Va. 137, 2 S. E. 602—Camden v. Haymond, 9 W. Va. 690—Keystone Bridge Co. v. Summers, 13 W. Va. 503—St. Lawrence Boom & Mfg. Co. v. Holt, 51 W. Va. 308, 41 S. E. 331.

412. When the jurisdiction of the court has once attached, the regularity or irregularity of its subsequent steps, can only be questioned in some direct mode prescribed by law. Comstock v. Crawford, 3 Wall. 396, 18: 34
Cited in Hall v. Law, 102 U. S. 464, 26 L. ed. 218—Apel v. Kelsey, 47 Ark. 419, 2 S. W. 102—Meyer v. Rousseau, 47 Ark. 462, 2 S. W. 112.

Defects; Informalities.

413. Defects in an affidavit for an order for service of summons by publication cannot be urged to impeach the judgment collaterally. Pennoyer v. Neff, 95 U. S. 714, 24: 565

Cited in Kilbourn v. Thompson, 103 U. S. 198, 26 L. ed. 389—Applegate v. Lexington & C. County Min. Co. 117 U. S. 271, 29 L. ed. 897, 6 Sup. Ct. Rep. 742—Cole v. Cunningham, 133 U. S. 112, 33 L. ed. 541, 10 Sup. Ct. Rep. 269—Porter v. United States, 20 Ct. Cl. 314—Holmes v. Oregon & C. R. Co. 7 Sawy. 401, 9 Fed. 245—Beattie v. Wilkinson, 36 Fed. 650—Capwell v. Sipe, 51 Fed. 668—Sipe v. Copwell, 8 C. C. A. 420, 16 U. S. App. 704, 59 Fed. 971—Arnold v. Kahn, 67 Cal. 473, 8 Pac. 36—Brown v. Tucker, 7 Colo. 34, 1 Pac. 221—Mentzer v. Ellison, 7 Colo. App. 328, 43 Pac. 464—Porter v. Orient Ins. Co. 72 Conn. 528, 45 Atl. 7—Frankel v. Satterfield, 9 Houst. (Del.) 204, 19 Atl. 898—Plumb v. Bateman, 2 App. D. C. 173—Earle v. Earle, 91 Ind. 43—Mastin v. Gray, 19 Kan. 469, 27 Am. Rep. 149—Glenn v. Williams, 60 Md. 112—Soule v. Hough, 45 Mich. 423, 8 N. W. 50—Leonard v. Sparks, 63 Mo. App. 603—Elmendorf v. Elmendorf, 58 N. J. Eq. 115, 44 Atl. 164—Re Law, 56 App. Div. 457, 67 N. Y. Supp. 857—Hoffheimer v. Stiefel, 17 Misc. 238, 39 N. Y. Supp. 714—George v. Nowlan, 38 Or. 543, 64 Pac. 1—McFarlane v. Cornelius, 43 Or. 519, 73 Pac. 325—Montgomery v. Rich, 3 Tenn. Ch. 663—Watson v. McCane, 18 Tex. Civ. App. 215, 45 S. W. 176—Dillard v. Central Virginia Iron Co. 82 Va. 741, 1 S. E. 124—

Fowler v. Lewis, 36 W. Va. 126, 14 S. E. 447.

414. The jurisdiction of a court over a subject-matter having attached, any informalities as to notices, advertisements, etc., in the subsequent proceedings, cannot be made the grounds of collateral attack. Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. Rep. 369, 34: 1054

c. Lack of Jurisdiction.

Judgment of State Court in Federal Court, see *infra*, 1057–1058a.

In Special or Statutory Proceedings, Necessity of Strict Compliance, see Courts, 305, 306.

Amendment of Record to Show Ground of Controversy, see Courts, 1149.

Of Court-Martial, see Courts-Martial, 52.

Averment of Jurisdictional Ground and not Truth of Averments as Giving Jurisdiction, see Equity, 244, 245.

Presumption and Burden of Proof, see Evidence, 566–584.

Recitals as Prima Facie Evidence of Jurisdictional Facts, see Evidence, 2489, 2490.

Restriction of Habeas Corpus to Question of Jurisdiction, see Habeas Corpus, 94–119.

Judgment Against Infant, see Infants, 64.

Attempted Confirmation of Private Land Claim by State Court, see Private Land Claims, 375.

414a. The judgment of a court of general jurisdiction cannot be collaterally attacked for want of jurisdiction. Grignon v. Astor, 2 How. 319, 11: 283
Cited in Delaware R. Co. v. Prettyman, Fed. Cas. No. 3,767.

Total want of jurisdiction.

415. If there is a total want of jurisdiction, the proceedings are not merely voidable but void, and may be rejected when collaterally drawn in question. Rose v. Himely, 4 Cranch, 241, 2: 608
Griffith v. Frazier, 8 Cranch, 9, 3: 471
Elliott v. Peirsol, 1 Pet. 328, 7: 164
Voorhees v. Jackson ex dem. Bank of United States, 10 Pet. 449, 9: 490
Shriver v. Lynn, 2 How. 43, 11: 172
Hickey v. Stewart, 3 How. 750, 11: 814
Williamson v. Berry, 8 How. 495, 12: 1170
Distinguished in Ferguson v. Crawford, 70 N. Y. 259, 26 Am. Rep. 589.

Cited in Rhode Island v. Massachusetts, 12 Pet. 720, 9 L. ed. 1258—Wilcox v. Jackson, 13 Pet. 511, 10 L. ed. 270—Decatur v. Paulding, 14 Pet. 600, 10 L. ed. 609—Hickey v. Stewart, 3 How. 762, 11 L. ed. 819—Williamson v. Berry, 8 How. 541, 12 L. ed. 1190—Thompson v. Whitman, 18 Wall. 461, 21 L. ed. 899—Kilbourn v. Thompson, 103 U. S. 198, 26 L. ed. 389—Noble v. Union River Logging R. Co. 147 U. S. 173, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—Andrews v. Andrews, 188 U. S. 35, 47 L. ed. 370, 23 Sup. Ct. Rep. 237—Cook v. United States, 9 Ct. Cl. 290—Winchester v. United States, 14 Ct. Cl. 46—Swan v. United States, 19 Ct. Cl. 63—King v. United States,

27 Cl. Cl. 533—Bell v. Ohio Life & T. Co. 1 Biss. 270, Fed. Cas. No. 1,260—Burnham v. Webster, 2 Ware, 243, Fed. Cas. No. 2,178—Farmers' Loan & T. Co. v. McKinney, 6 McLean, 8, Fed. Cas. No. 4,667—Gray v. Larrimore, 4 Sawy. 644, 2 Abb. (U. S.) 548, Fed. Cas. No. 5,721—Re McKibben, 12 Nat. Bankr. Reg. 101, Fed. Cas. No. 8,859—Shuford v. Cain, 1 Abb. (U. S.) 309, Fed. Cas. No. 12,823—Adams v. Terrell, 4 Woods. 341, 4 Fed. 800—Pulliam v. Pulliam, 10 Fed. 47—Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 119, 10 Fed. 706—Re Haynes, 30 Fed. 770—Moore v. Edgefield, 32 Fed. 501—Re Eaton, 51 Fed. 805—Murray v. American Surety Co. 17 C. C. A. 143, 44 U. S. App. 43, 70 Fed. 346—Dexter, H. & Co. v. Sayward, 84 Fed. 300—Re Elmira Steel Co. 109 Fed. 465—Rood v. Eslava, 17 Ala. 433—Wightman v. Karsner, 20 Ala. 454—Eslava v. Lepretre, 21 Ala. 522, 56 Am. Dec. 266—Lamar v. Gunter, 39 Ala. 333—Ex parte Norton, 44 Ala. 186—Bruce v. Strickland, 47 Ala. 196—Smith v. Flournoy, 47 Ala. 360—Moody v. Bibb, 50 Ala. 248—Dugger v. Tayloe, 60 Ala. 519—Hatchett v. Billingslea, 65 Ala. 31—Territory v. Delinquent Tax List, 3 Ariz. 91, 21 Pac. 888—Smith v. Morrill, 12 Colo. App. 236, 55 Pac. 824—Prince v. Thomas, 11 Conn. 477—Belt v. United States, 4 App. D. C. 30—Thaw v. Ritchie, 4 Mackey, 374—Marshall v. Wheeler, 7 Mackey, 425—Stansbury v. Inglehart, 9 Mackey, 160—McNealy v. Gregory, 13 Fla. 446—Epping v. Robinson, 21 Fla. 48—Inferior Ct. Justices v. Selman, 6 Ga. 442—Tucker v. Harris, 13 Ga. 8, 58 Am. Dec. 488—Swiggart v. Harber, 5 Ill. 371, 39 Am. Dec. 418—Kerfoot v. People, 51 Ill. App. 416—Davis v. Hamilton, 53 Ill. App. 101—Horner v. Doe, Smith (Ind.) 11—Doe ex dem. Haine v. Smith, Smith (Ind.) 387—Nooe v. Bradley, 3 Blackf. 160—Barkeloo v. Randall, 4 Blackf. 478, 32 Am. Dec. 46—Horner v. Doe, 1 Ind. 133, 48 Am. Dec. 355—Doe ex dem. Hain v. Smith, 1 Ind. 460—Doctor v. Hartman, 74 Ind. 231—Robertson v. State, 109 Ind. 83, 10 N. E. 582—Reed v. Wright, 2 G. Greene, 36—Seely v. Reid, 3 G. Greene, 379—Morrow v. Weed, 4 Iowa, 100, 76 Am. Dec. 122—Ex parte Holman, 28 Iowa, 178, 4 Am. Rep. 159—Farmers' & M. Bank v. Mather, 30 Iowa, 284—Moore v. Jeffers, 53 Iowa, 207, 4 N. W. 1084—Mastin v. Gray, 19 Kan. 463, 27 Am. Rep. 149—Ludelling v. Vester, 20 La. Ann. 436—McCabe v. Ward, 18 Md. 509—Folger v. Columbian Ins. Co. 99 Mass. 273, 96 Am. Dec. 747—Palmer v. Oakley, 2 Dougl. (Mich.) 491, 47 Am. Dec. 41—Greenvault v. Farmers' & M. Bank, 2 Dougl. (Mich.) 507—Dawson v. Helmes, 30 Minn. 112, 14 N. W. 462—Re Mousseau, 30 Minn. 205, 14 N. W. 887—State v. Kinmore, 54 Minn. 140, 40 Am. St. Rep. 305, 55 N. W. 830—Fithian v. Monks, 43 Mo. 521—Tarleton v. Cox, 45 Miss. 438—Hauswirth v. Sullivan, 6 Mont. 210, 9 Pac. 798—Morrill v. Taylor, 6 Neb. 246—Russell v. Perry, 14 N. H. 155—Adams v. Saratoga & W. R. Co. 10 U. S. 333—Buffalo & S. L. R. Co. v. Erie County, 48 N. Y. 99—Adams v. Jeffries, 12 Ohio, 271, 40 Am. Dec. 477—Re Patswald, 5 Okla. 795, 50 Pac. 139—Trutch v. Bunnell, 11 Or. 60, 50 Am. Rep. 456, 4 Pac. 588—Thompson v. Whitman, 31 Phila. Leg. Int. 157—Camp v. Wood, 10 Watts, 120—Hamor v. Loeb, 9 Pa. Co. Ct. 611—Gambe v. Gambe, 22 Pa. Co. Ct. 25—English v. English, 19 Pa. Super. Ct. 593—Gambe v. Gambe, 18 Lanc. L. Rev. 80—Miltimore v. Miltimore, 40 Pa. 155—Torrance v. Torrance, 53 Pa. 510

—Com. ex rel. Elkin v. Barnett, 199 Pa. 180, 55 L.R.A. 889, 48 Atl. 976—Re College Street, 11 R. I. 474—Den ex dem. Hodges v. Wharton, 1 Yerg. 140—State v. De Castanova, 1 Tex. 404—Mason v. Russell, 1 Tex. 728—Horan v. Wahrenberger, 9 Tex. 319, 58 Am. Dec. 145—Hansen v. Anderson, 21 Utah, 291, 61 Pac. 219—Hunter v. Martin, 4 Munf. 53—Pierce v. Frace, 2 Wash. 94, 26 Pac. 192—Hall v. Wadsworth, 30 W. Va. 57, 3 S. E. 29—Re Tarble, 25 Wis. 397, 3 Am. Rep. 85.

416. A judgment rendered without jurisdiction of the defendant is void, and subject to collateral attack. Hollingsworth v. Barbour, 4 Pet. 466, 7: 922

Cited in Harris v. Hardeman, 14 How. 343, 14 L. ed. 448—Hart v. Sansom, 110 U. S. 156, 28 L. ed. 103, 3 Sup. Ct. Rep. 586—Scott v. McNeal, 154 U. S. 46, 38 L. ed. 902, 14 Sup. Ct. Rep. 1108—Roller v. Holly, 176 U. S. 406, 44 L. ed. 523, 20 Sup. Ct. Rep. 410—Re Shepard, 1 Nat. Bankr. Reg. 449, Fed. Cas. No. 12,753—Lavin v. Emigrant Industrial Sav. Bank, 18 Blatchf. 25, 1 Fed. 663—Daily v. Doe, 3 Fed. 913—Preston v. Walsh, 10 Fed. 325—Boykin v. Rain, 28 Ala. 342, 65 Am. Dec. 349—Hunt v. Ellison, 32 Ala. 200—Bruce v. Strickland, 47 Ala. 198—Comer v. Jackson, 50 Ala. 385—Jones v. Knox, 51 Ala. 370—Hatchett v. Billingslea, 65 Ala. 31—Miller v. Barkeloo, 8 Ark. 823—Mitchell v. Ferris, 5 Houst. (Del.) 40—Flint River S. B. Co. v. Foster, 5 Ga. 202, 48 Am. Dec. 248—Horner v. Doe, 1 Ind. 133, 48 Am. Dec. 355—Babbitt v. Doe, 4 Ind. 357—Doe ex dem. Platter v. Anderson, 5 Ind. 36—Reed v. Wright, 2 G. Greene, 33—Seely v. Reid, 3 G. Greene, 379—Penobscot R. Co. v. Weeks, 52 Me. 463—Dorsey v. Garey, 30 Md. 497—Gwin v. McCarroll, 1 Smedes & M. 368—Campbell v. Brown, 6 How. (Miss.) 114—Tarleton v. Cox, 45 Miss. 437—Young v. Downey, 150 Mo. 329, 51 S. W. 751—Rice v. Schofield, 9 N. M. 315, 51 Pac. 673—Flournoy v. Champion (N. M.) 55 L.R.A. 749, 66 Pac. 547—Grewar v. Henderson, 1 Tenn. Ch. 78—Richardson v. Seever, 84 Va. 267, 4 S. E. 712—Blanton v. Carroll, 86 Va. 541, 10 S. E. 329.

417. A judgment void for want of jurisdiction may be collaterally impeached. Griffith v. Frazier, 8 Cranch, 9, 3: 471

Cited in Re Haynes, 30 Fed. 770—Epping v. Robinson, 21 Fla. 49—Nooe v. Bradley, 3 Blackf. 160—Re Mousseau, 30 Minn. 206, 14 N. W. 887—Vick v. Vicksburg, 1 How. (Miss.) 440, 31 Am. Dec. 167—Gregor v. Slingluff, 1 Miles (Pa.) 213—Blakely v. Frazier, 20 S. C. 155—Atchison v. Rosalip, 4 Chand. (Wis.) 15—Atchison v. Rosalip, 3 Pinney (Wis.) 291.

418. A judgment of a court not having jurisdiction is absolutely void and may be attacked collaterally. Galpin v. Page, 18 Wall. 350, 21: 959

Cited in Dick v. Foraker, 155 U. S. 413, 39 L. ed. 205, 15 Sup. Ct. Rep. 124—Porter v. United States, 20 Ct. Cl. 314—Re McKibben, 12 Nat. Bankr. Reg. 101, Fed. Cas. No. 8,859—Little Rock Junction R. Co. v. Burke, 13 C. C. A. 348, 27 U. S. App. 736, 66 Fed. 90—Northern P. R. Co. v. Kurtzman, 82 Fed. 243—Blythe v. Hinckley, 84 Fed. 254—Dexter, H. & Co. v. Sayward, 84 Fed. 300—Thompson v. Reasoner, 122 Ind. 458, 7 L.R.A. 498, 24 N. E. 223—Palmer v. McMaster, 8 Mont. 192, 19 Pac. 585—Holmes v. Buckner, 67

Tex. 100, 2 S. W. 452—Re Christiansen, 17 Utah, 423, 41 L.R.A. 508, 70 Am. St. Rep. 794, 53 Pac. 1003.

419. Proceedings for the escheat of the estate of a deceased person for want of heirs or devisees, like ordinary proceedings for the administration of his estate, presuppose he is dead; if he is still alive the court is without jurisdiction, and its proceedings are null and void even in a collateral proceeding. *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. Rep. 585, 40: 691
Cited in *Ziegler's Estate*, 25 Pa. Co. Ct. 615.

420. Where confiscation proceedings come before the court collaterally as the foundation of the defendant's title, no error can be regarded that does not show want of jurisdiction in the court which rendered the judgment condemning the property. *Tyler v. Defrees*, 11 Wall. 331, 20: 161
Cited in *Bragg v. Lorio*, 1 Woods, 211, Fed. Cas. No. 1,800—*Todd v. Neal*, 49 Ala. 269—*Micou v. Benjamin*, 26 La. Ann. 721.

Judgment in excess of jurisdiction.

What Jurisdictional Defects in Conviction may be Assailed by Habeas Corpus, see *Habeas Corpus*, 179a-179d.

For Joint Possession of Land against Officers Claiming in Right of United States, see *United States*, 185.

421. That an estate is not subject to execute on a judgment against an administrator holding office under an appointment void by reason of its having been made during the duration of office of a qualified executor was determined in an action of trespass to try title to the property sold under such execution. *Griffith v. Frazier*, 8 Cranch, 9, 3: 471
Cited in *Roach v. Martin*, 1 Harr. (Del.) 559, 27 Am. Dec. 746.

422. The distinction between error in judgment and usurpation of power is definite: the one denotes cases where a judgment is reversible by the appellate court, the other where it may be declared a nullity collaterally. *Voorhees v. Jackson ex dem. Bank of United States*, 10 Pet. 449, 9: 490

Cited in *Goodman v. Winter*, 64 Ala. 433, 38 Am. Rep. 13—*Evans v. Perciful*, 5 Ark. 428—*Pritchett v. Clark*, 5 Harr. (Del.) 72—*Frankel v. Satterfield*, 9 Houst. (Del.) 204, 19 Atl. 898—*Ponder v. Moseley*, 2 Fla. 267, 48 Am. Dec. 194—*Darden v. Lines*, 2 Fla. 591—*Muncaster v. Bland*, 11 La. Ann. 508—*Wall v. Wall*, 28 Miss. 413—*Reynolds v. Stansburg*, 20 Ohio, 352, 55 Am. Dec. 459.

423. The judgment of every tribunal acting judicially is final whilst acting within the sphere of its jurisdiction, where no appellate tribunal is created, and even where is such an appellate power, its judgment is conclusive where it only comes collaterally in question, so long as it is unreversed. But directly the reverse is true, in relation to the judgment of any court acting be-

yond the pale of its authority. *Wilcox v. Jackson ex dem. McConnel*, 13 Pet. 498, 10: 264

Cited in *Hickey v. Stewart*, 3 How. 763, 11 L. ed. 819—*Bank of United States v. Moss*, 6 How. 38, 12 L. ed. 334—*Williamson v. Berry*, 8 How. 541, 12 L. ed. 1190—*Thompson v. Whitman*, 18 Wall. 467, 21 L. ed. 901—*Nixon v. United States*, 18 Ct. Cl. 454—*Adams v. Terrell*, 4 Woods, 341, 4 Fed. 800—*Wightman v. Karsner*, 20 Ala. 455—*Ex parte Hardy*, 68 Ala. 331—*Tucker v. Harris*, 13 Ga. 8, 58 Am. Dec. 488—*McConnell v. Wilcox*, 2 Ill. 381—*Lane v. Bommelmann*, 17 Ill. 98—*Fremont County v. Burlington & M. River R. Co.* 22 Iowa, 129—*State v. Bachelier*, 5 Minn. 242, Gil. 188—*Russell v. Lowth*, 21 Minn. 170, 18 Am. Rep. 389—*Eaton v. Badger*, 33 N. H. 238—*Doty v. Brown*, 4 How. Pr. 430—*Kamp v. Kamp*, 46 How. Pr. 145—*Thompson v. Whitman*, 31 Phila. Leg. Int. 157—*James v. Smith*, 2 S. C. N. S. 188—*Horan v. Wahrnberger*, 9 Tex. 321, 58 Am. Dec. 145—*Sparks v. Brown*, 2 Wash. Terr. 432, 7 Pac. 864.

424. The doctrine that a judgment in a case of which the court has once acquired jurisdiction cannot be collaterally assailed is only correct where the court proceeds, after acquiring jurisdiction, according to established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it; where the court transcended the limits of its authority, its judgment is not merely erroneous, but is void. *Windsor v. McVeigh*, 93 U. S. 274, 23: 914

Distinguished in National Nickel Co. v. Nevada Nickel Syndicate, 106 Fed. 115.

Cited in *United States use of Wilson v. Walker*, 109 U. S. 267, 27 L. ed. 930, 3 Sup. Ct. Rep. 277—*Winchester v. United States*, 14 Ct. Cl. 40—*Polk v. The J. W. French*, 5 Hughes, 434, 13 Fed. 920—*Murray v. American Surety Co.* 59 Fed. 348—*Murray v. American Surety Co.* 61 Fed. 276—*United States v. Debs*, 5 Inters. Com. Rep. 188, 64 Fed. 739—*Hatch v. Ferguson*, 33 L.R.A. 763, 15 C. C. A. 204, 29 U. S. App. 651, 68 Fed. 45—*Murray v. American Surety Co.* 17 C. C. A. 143, 44 U. S. App. 43, 70 Fed. 346—*Dexter, H. & Co. v. Sayward*, 84 Fed. 300—*St. Louis, I. M. & S. R. Co. v. State*, 55 Ark. 205, 17 S. W. 806—*Hall v. Melvin*, 62 Ark. 444, 54 Am. St. Rep. 301, 35 S. W. 1109—*Bruner v. Superior Court*, 92 Cal. 262, 28 Pac. 341—*Long v. Superior Court*, 102 Cal. 452, 56 Pac. 807—*Ex parte Glambonini*, 117 Cal. 576, 49 Pac. 732—*Sutro v. Merritt*, 143 Cal. 492, 77 Pac. 402—*Russell v. Shurtleff*, 28 Colo. 419, 89 Am. St. Rep. 216, 65 Pac. 27—*Craft Refrigerating Mach. Co. v. Quinneapolis Brewing Co.* 63 Conn. 568, 25 L.R.A. 860, 29 Atl. 76—*United States use of Wilson v. Ames, MacArth. & M.* 281—*District of Columbia v. Humphries*, 12 App. D. C. 131—*Mitchell v. Evans*, 18 App. D. C. 257—*Thaw v. Ritchie*, 4 Mackey, 358—*Suttliff v. Connecticut Mut. L. Ins. Co.* 90 Ill. 488—*Kelly v. People*, 115 Ill. 588, 56 Am. Rep. 184, 4 N. E. 644—*Maloney v. Dewey*, 127 Ill. 403, 11 Am. St. Rep. 131, 19 N. E. 848—*Kerfoot v. People*, 51 Ill. App. 416—*Great Western Teleg. Co. v. Barker*, 56 Ill. App. 419—*Henry v. Carson*, 96 Ind. 423—*Strosser v. Ft. Wayne*, 100 Ind. 446—*Hastings v. Whitmer*, 2 Ind. Terr. 340, 51 S. W. 967—*Amsbaugh v. Exchange Bank*, 33 Kan.

105, 5 Pac. 384—Blitzer v. Mercke, 111 Ky. 307, 63 S. W. 771—State ex rel. Duffy v. Civil Dist. Court, 112 La. 196, 36 So. 315—State ex rel. Rocchi v. Civil Dist. Judge, 45 La. Ann. 547, 12 So. 941—Coleman v. Stearns Mfg. Co. 38 Mich. 34—Re Mousseau, 30 Minn. 205, 14 N. W. 887—Garrison v. Tyle, 38 Mo. App. 564—Flinders v. Bodle, 58 Neb. 60, 78 N. W. 480—Foley v. Foley, 24 Nev. 212, 51 Pa. 834—Wilson v. Morse, 25 Nev. 877, 60 Pac. 832—Clapp v. McCabe, 84 Hun. 389, 32 N. Y. Supp. 425—Re Norton, 32 Misc. 227, 66 N. Y. Supp. 317—Randolph v. Merchants' Nat. Bank, 9 Lea, 68—Vermont & C. R. Co. v. Vermont C. R. Co. 50 Vt. 592—Nulton v. Isaacs, 30 Gratt. 741—Wade v. Hancock, 76 Va. 625—Dillard v. Central Virginia Iron Co. 82 Va. 738, 1 S. E. 124—Anthony v. Kasey, 83 Va. 340, 5 Am. St. Rep. 277, 5 S. E. 176—State ex rel. Dodge v. Langhorne, 12 Wash. 594, 41 Pac. 917—Hall v. Hall, 30 W. Va. 780, 5 S. E. 280—Hoback v. Miller, 44 W. Va. 637, 29 S. E. 1014—State ex rel. Morley v. Godfrey, 54 W. Va. 72, 46 S. E. 185.

425. The doctrine that when a court has once acquired jurisdiction it has a right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. United States use of Wilson v. Walker, 109 U. S. 258, 3 Sup. Ct. Rep. 277,

27: 927

Cited in American Freehold Land & Mortg. Co. v. Thomas, 12 L.R.A. 687, 47 Fed. 556—Hubbard v. Urton, 67 Fed. 424—Hatch v. Ferguson, 33 L.R.A. 763, 15 C. C. A. 204, 29 U. S. App. 651, 68 Fed. 45—Murray v. American Surety Co. 17 C. C. A. 143, 44 U. S. App. 43, 70 Fed. 346—Mutual L. Ins. Co. v. Richardson, 77 Fed. 399—Ritchie v. Sayers, 100 Fed. 532—Russell v. Shurtleff, 28 Colo. 418, 89 Am. St. Rep. 216, 65 Pac. 27—Great Western Teleg. Co. v. Barker, 56 Ill. App. 419—J. B. Watkins Land Mortg. Co. v. Mullen, 8 Kan. App. 710, 54 Pac. 921.

426. The decree and process of a court in excess of its jurisdiction is void and can be impeached collaterally. Bigelow v. Forrest, 9 Wall. 339,

19: 696

Cited in Windsor v. McVeigh, 93 U. S. 283, 23 L. ed. 917—United States use of Wilson v. Walker, 109 U. S. 258, 27 L. ed. 920, 3 Sup. Ct. Rep. 277—Avegno v. Schmidt, 113 U. S. 302, 28 L. ed. 978, 5 Sup. Ct. Rep. 487—Electoral College Case, 1 Hughes, 587, Fed. Cas. No. 4,336—Thomas v. American Freehold Land & Mortg. Co. 12 L.R.A. 688, 47 Fed. 557—Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 629, 19 U. S. App. 576, 60 Fed. 321—Murray v. American Surety Co. 17 C. C. A. 143, 44 U. S. App. 43, 70 Fed. 346—Russell v. Shurtleff, 28 Colo. 418, 89 Am. St. Rep. 216, 65 Pac. 27—Re Taylor, 7 S. D. 388, 45 L.R.A. 147, 58 Am. St. Rep. 843, 64 N. W. 253—Mitchell v. Evans, 18 App. D. C. 257—Sutcliffe v. Connecticut Mut. L. Ins. Co. 90 Ill. 488—Clevenger v. Figley, 68 Kan. 707, 75 Pac. 1001—Sennott's Case, 146 Mass. 493, 4 Am. St. Rep. 344, 16 N. E. 448—Re Mousseau, 30 Minn. 205, 14 N. W. 887—Flinders v. Bodle, 58

Neb. 60, 78 N. W. 480—People ex rel. Tweed v. Liscomb, 60 N. Y. 573, 19 Am. Rep. 211—Hovey v. Elliott, 145 N. Y. 143, 39 L.R.A. 463, 39 N. E. 84—Wade v. Hancock, 76 Va. 625—Dillard v. Central Virginia Iron Co. 82 Va. 738, 1 S. E. 124—Turner v. Barraud, 102 Va. 338, 46 S. E. 378—Ammons v. Ammons, 50 W. Va. 404, 40 S. E. 490.

427. A judgment rendered in excess of jurisdiction is void, and not merely voidable, and is subject to collateral attack. Re Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77,

32: 405

Cited in Hovey v. Elliott, 145 N. Y. 143, 39 L.R.A. 463, 39 N. E. 841.

428. Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree directing the delivery of administered assets, which is not within the power granted to it by the law of its organization, such decree will be held void when collaterally attacked. United States use of Wilson v. Walker, 109 U. S. 258, 3 Sup. Ct. Rep. 277, 27: 927 Cited in Thomas v. American Land & Mortg. Co. 12 L.R.A. 687, 47 Fed. 556—Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 640, 19 U. S. App. 576, 60 Fed. 321—Tenney v. Taylor, 1 App. D. C. 227—District of Columbia v. Humphries, 12 App. D. C. 132—Mutual L. Ins. Co. v. Richardson, 27 Pittsb. L. J. N. S. 184.

Appearance.

Appearance in Sister State, see *infra*, 976.

429. Where the record shows that the defendant appeared by attorney, the authority of the attorney to appear cannot be disputed, when the judgment is brought into question collaterally. Landes v. Brant, 10 How. 348,

13: 449

But see *contra*, Knowles v. Logansport Gas Light & Coke Co. 19 Wall. 58, 22: 70

430. A record which shows an authorized appearance by an attorney will bind the party, until it is proven that the attorney acted without authority. Hill v. Mendenhall, 21 Wall. 453,

22: 616

Cited in German Sav. & L. Soc. v. Dormitzer, 192 U. S. 127, 48 L. ed. 376, 24 Sup. Ct. Rep. 221—Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 119, 10 Fed. 706—Hatch v. Ferguson, 57 Fed. 971—Bonnifield v. Thorp, 71 Fed. 927—Rutledge v. Waldo, 94 Fed. 265—Re Gasser, 44 C. C. A. 21, 104 Fed. 538—Coler v. Santa Fe County, 6 N. M. 116, 27 Pac. 619—Guthrie v. Lowry, 84 Pa. 537—Guthrie v. Lowry, 34 Phila. Leg. Int. 320—Latimer v. Latimer, 22 S. C. 262—Bowler v. Huston, 30 Gratt. 278, 32 Am. Rep. 673—Bowyer v. Knapp, 15 W. Va. 220.

Service; notice.

Judgment against Garnishee on Published Service against Nonresident Principal Debtor, see Courts, 354.

Failure to Serve Infant, see Infants, 59.

431-2. When a judgment is brought collaterally before the court as evidence, it may be shown to be void upon its face by a want of notice to the person against

whom the judgment was entered. *Webster v. Reid*, 11 How. 437, 13: 761
Distinguished in *Puckett v. Benjamin*, 21 Or. 380, 28 Pac. 65.

Cited in *Nations v. Johnson*, 24 How. 203, 16 L. ed. 631—*Christmas v. Russell*, 5 Wall. 305, 18 L. ed. 480—*Thompson v. Whitman*, 18 Wall. 464, 21 L. ed. 900—*Michaels v. Post*, 21 Wall. 428, 22 L. ed. 526, 12 Nat. Bankr. Reg. 168—*Ray v. Norseworthy*, 23 Wall. 136, 23 L. ed. 118, 12 Nat. Bankr. Reg. 150—*Pennoyer v. Neff*, 95 U. S. 728, 24 L. ed. 571—*Montgomery v. Samory*, 99 U. S. 488, 25 L. ed. 377—*Noble v. Union River Logging R. Co.* 147 U. S. 173, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*Pennoyer v. Neff*, 95 U. S. 745, 24 L. ed. 577—*Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 26, 1 Fed. 665—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 401, 9 Fed. 245—*Comer v. Jackson*, 50 Ala. 385—*Caldwell v. Armour & Co.* 1 Penn. (Del.) 550, 43 Atl. 517—*Tenney v. Taylor*, 1 App. D. C. 227—*Mastin v. Gray*, 19 Kan. 463, 27 Am. Rep. 149—*Sidensparker v. Sidensparker*, 52 Me. 486, 83 Am. Dec. 527—*Troyer v. Wood*, 96 Mo. 480, 9 Am. St. Rep. 367, 10 S. W. 42—*Great Falls Mfg. Co. v. Worster*, 45 N. H. 112—*Harker v. Brink*, 24 N. J. L. 349—*Cromwell v. Gallup*, 17 Hun, 56—*Pennywit v. Foote*, 27 Ohio St. 617, 22 Am. Rep. 340—*Thompson v. Whitman*, 31 Phila. Leg. Int. 157—*O'Neill v. Brown*, 61 Tex. 37—*Stephens v. Stephens*, 62 Tex. 340—*Washington, A. & G. R. Co. v. Alexandria & W. R. Co.* 19 Gratt. 610, 100 Am. Dec. 710—*Keystone Bridge Co. v. Summers*, 13 W. Va. 506.

Inquiry into jurisdiction.

Judgment of Sister State, see *infra*, 940-948.

Decision of Court-Martial, see *Courts-Martial*, 52a.

433. When a judgment or decree is offered in evidence, the jurisdiction of the court to render it and its nature and effect can be inquired into by the court. *Shriver v. Lynn*, 2 How. 43, 11: 172

Cited in *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 147, 35 L. ed. 120, 11 Sup. Ct. Rep. 512—*Swan v. United States*, 19 Ct. Cl. 65—*Moch v. Virginia F. & M. Ins. Co.* 4 Hughes, 119, 10 Fed. 706—*Walker v. Sturbans*, 38 Fed. 300—*Friedenwald v. Shipley*, 74 Md. 230, 24 Atl. 156.

434. When the record of a judgment is brought before the court collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment had jurisdiction. *Boswell v. Otis*, 9 How. 336, 13: 164

435-6. The jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings of the former are brought before the latter by a party claiming the benefit of such proceedings. *Elliott v. Peirsol*, 1 Pet. 328, 7: 164

Hickey v. Stewart, 3 How. 750, 11: 814
Williamson v. Berry, 8 How. 495, 12: 1170
Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 137, 11 Sup. Ct. Rep. 512, 35: 116

Distinguished in *Noble v. Union River Logging*

R. Co. 147 U. S. 173, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*Ferguson v. Crawford*, 70 N. Y. 259, 26 Am. Rep. 589.

Cited in *Williamson v. Berry*, 8 How. 541, 12 L. ed. 1190—*Thompson v. Whitman*, 18 Wall. 467, 21 L. ed. 901—*Re Sawyer*, 124 U. S. 220, 31 L. ed. 409, 8 Sup. Ct. Rep. 482—*Doolan v. Carr*, 125 U. S. 625, 31 L. ed. 847, 8 Sup. Ct. Rep. 1228—*Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 147, 35 L. ed. 120, 11 Sup. Ct. Rep. 512—*Cook v. United States*, 9 Ct. Cl. 290—*Swan v. United States*, 19 Ct. Cl. 65—*King v. United States*, 27 Ct. Cl. 533—*Randall v. Jaques*, Fed. Cas. No. 11,553—*Re Reynolds*, Fed. Cas. No. 11,721—*Adams v. Terrell*, 4 Woods, 341, 4 Fed. 800—*Polk v. The Jas. W. French*, 5 Hughes, 432, 13 Fed. 919—*Jones v. Lamar*, 34 Fed. 462—*Re Eaton*, 51 Fed. 805—*Reinach v. Atlantic & G. W. R. Co.* 58 Fed. 43—*Newman v. Crowls*, 8 C. C. A. 581, 23 U. S. App. 89, 60 Fed. 224—*Foltz v. St. Louis & S. F. R. Co.* 8 C. C. A. 639, 19 U. S. App. 576, 60 Fed. 320—*Dexter, H. & Co. v. Sayward*, 84 Fed. 300—*Re Elmira Steel Co.* 109 Fed. 465—*Phoenix Bridge Co. v. Castleberry*, 65 C. C. A. 484, 131 Fed. 178—*Lee v. Lee*, 55 Ala. 599—*Goodman v. Winter*, 64 Ala. 431—*Pritchett v. Clark*, 5 Harr. (Del.) 72—*Tenney v. Taylor*, 1 D. C. App. 227—*Thaw v. Ritchie*, 4 Mackey, 388—*Walker v. Hedrick*, 18 Ill. 571—*Reed v. Wright*, 2 G. Greene, 37—*Seely v. Reid*, 3 G. Greene, 379—*Mastin v. Gray*, 19 Kan. 463, 27 Am. Rep. 149—*Baltimore v. Hook*, 62 Md. 378—*Friedenwald v. Shipley*, 74 Md. 231, 24 Atl. 156—*Folger v. Columbian Ins. Co.* 99 Mass. 273, 96 Am. Dec. 747—*Marks v. McElroy*, 67 Miss. 547, 7 So. 408—*Ex parte O'Brien*, 127 Mo. 491, 30 S. W. 158—*Morse v. Presby*, 25 N. H. 303—*Demerit v. Lyford*, 27 N. H. 548—*Eaton v. Badger*, 33 N. H. 238—*Conklin v. Cunningham*, 7 N. M. 483, 38 Pac. 170—*Banks v. McIntosh*, 23 Barb. 598—*Moore v. Taylor*, 40 Hun, 58—*Chemung Canal Bank v. Judson*, 8 N. Y. 259—*Adams v. Saratoga & W. R. Co.* 10 N. Y. 333—*Ferguson v. Crawford*, 70 N. Y. 259, 26 Am. Rep. 589—*Craig v. Andes*, 93 N. Y. 410—*Pennywit v. Foote*, 27 Ohio St. 618, 22 Am. Rep. 340—*Guthrie v. Lowry*, 84 Pa. 537—*Thompson v. Whitman*, 31 Phila. Leg. Int. 157—*Com. ex rel. Bressler v. Gane*, 3 Grant, Cas. 452—*James v. Smith*, 2 S. C. N. S. 188—*State v. Nerland*, 7 S. C. N. S. 245—*Lyles v. Bolles*, 8 S. C. N. S. 262—*Montgomery v. Rich*, 3 Tenn. Ch. 663—*Mason v. Russell*, 1 Tex. 728—*Horan v. Wahrenberger*, 9 Tex. 320, 58 Am. Dec. 145—*Walker v. Myers*, 36 Tex. 252—*Re Tarble*, 25 Wis. 396, 3 Am. Rep. 85—*Frame v. Thormann*, 102 Wis. 670, 79 N. W. 39.

— Editorial note.

[Collateral impeachability of findings as to jurisdictional facts on which administration is based. 18 L.R.A. 242.]

Showing want of jurisdiction.

See also *infra*, 450; *Evidence*, 1738, 1739; *Removal of Causes*, 277.

437. Want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing. *Thompson v. Whitman*, 18 Wall. 457, 21: 897

Distinguished in *Holmes v. Oregon & C. R. Co.* 7 Sawy. 308, 9 Fed. 242.

Cited in *Knowles v. Logansport Gaslight &*

Coke Co. 19 Wall. 61, 22 L. ed. 72—Hall v. Lanning, 91 U. S. 165, 23 L. ed. 273—Penoyer v. Neff, 95 U. S. 730, 24 L. ed. 571—Colt v. Colt, 111 U. S. 578, 28 L. ed. 525, 4 Sup. Ct. Rep. 553—Hanley v. Donoghue, 116 U. S. 4, 29 L. ed. 537, 6 Sup. Ct. Rep. 242—Renaud v. Abbott, 116 U. S. 287, 29 L. ed. 632, 6 Sup. Ct. Rep. 1194—Noble v. Union River Logging R. Co. 147 U. S. 173, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—Owens v. Henry (Owens v. McCloskey) 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 693—Porter v. United States, 20 Ct. Cl. 314—Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 119, 10 Fed. 706—The City of New Bedford, 20 Fed. 60—Sharon v. Hill, 26 Fed. 346—Swift v. Meyers, 37 Fed. 43—Colt v. Colt, 48 Fed. 427—First Nat. Bank v. Cunningham, 48 Fed. 514—Furnald v. Glenn, 56 Fed. 373—Hatch v. Ferguson, 57 Fed. 971—King v. McLean Asylum, 26 L.R.A. 789, 12 C. C. A. 155, 21 U. S. App. 481, 64 Fed. 341—Rose v. Northwest F. & M. Ins. Co. 67 Fed. 439—L'Engle v. Gates, 74 Fed. 514—Kirk v. United States, 124 Fed. 330—Phoenix Bridge Co. v. Castleberry, 65 C. C. A. 483, 131 Fed. 177—Marr v. Wetzel, 3 Colo. 5—Frankel v. Satterfield, 9 Houst. (Del.) 205, 19 Atl. 898—Plumb v. Bateman, 2 App. D. C. 173—Overby v. Gordon, 13 App. D. C. 422—Thomas v. Morrisett, 76 Ga. 396—Thomas v. People, 107 Ill. 527, 47 Am. Rep. 458—Davis v. Hamilton, 53 Ill. App. 101—Olson v. Mackolite Fire Proofing Co. 116 Ill. App. 575—Chicago, R. I. & P. R. Co. v. Campbell, 5 Kan. App. 424, 49 Pac. 321—Pasteur v. Lewis, 39 La. Ann. 8, 1 So. 307—American Tube & Iron Co. v. Crafts, 156 Mass. 258, 30 N. E. 1024—Howard v. Coon, 93 Mich. 445, 53 N. W. 513—Crone v. Dawson, 19 Mo. App. 219—Starbuck v. Starbuck, 62 App. Div. 442, 71 N. Y. Supp. 104—Everett v. Everett, 75 App. Div. 374, 78 N. Y. Supp. 193—Villas v. Plattsburgh & M. R. Co. (Villas v. Butler) 123 N. Y. 455, 9 L.R.A. 849, 20 Am. St. Rep. 771, 25 N. E. 941—Guthrie v. Lowry, 84 Pa. 537—Guthrie v. Lowry, 34 Phila. Leg. Int. 320—Com. v. Simmen, 33 Pittsb. L. J. N. S. 261—Betts v. Johnson, 68 Vt. 555, 35 Atl. 489—Fisher v. March, 26 Gratt. 778—Gleichrist v. West Virginia Oil & Oil Land Co. 21 W. Va. 118, 45 Am. Rep. 555—Cook v. Cook, 56 Wis. 215, 43 Am. Rep. 706, 14 N. W. 33, 443—Renler v. Hurlbut, 81 Wis. 28, 14 L.R.A. 564, 29 Am. St. Rep. 850, 50 N. W. 783—St. Sure v. Lindsfelt, 82 Wis. 349, 19 L.R.A. 517, 33 Am. St. Rep. 50, 52 N. E. 308—Griggs v. Becker, 87 Wis. 217, 58 N. W. 396—Frame v. Thormann, 102 Wis. 670, 79 N. W. 39.

438. In an action upon a judgment, facts may be proved to establish that the court did not have jurisdiction of the action or of the defendant. Harris v. Hardeman, 14 How. 334, 14: 444
Distinguished in Ferguson v. Crawford, 70 N. Y. 260, 26 Am. Rep. 589.

Cited in Holmes v. Oregon & C. R. Co. 7 Sawy. 401, 9 Fed. 245—Martin v. Dollar, 32 Ala. 424—Beach v. Beach, 6 Dak. 377, 43 N. W. 701—Ex parte Holman, 28 Iowa, 178, 4 Am. Rep. 159—Clark v. Little, 41 Iowa, 501—Eaton v. Hasty, 6 Neb. 427, 29 Am. Rep. 365—Bruce v. Cloutman, 45 N. H. 38, 84 Am. Dec. 111—Pennywit v. Foote, 27 Ohio St. 618, 22 Am. Rep. 340—Thompson v. Whitman, 31 Phila. Leg. Int. 157—McCreery v. Davis, 44 S. C. 211, 28 L.R.A. 601, 51 Am. St. Rep. 794, 22 S. E. 178—Barrett v. Oppenheimer, 12 Helsk. 303—

House v. Collins, 42 Tex. 493—Blain v. Blain, 45 Vt. 544—Ambler v. Leach, 15 W. Va. 684.

439. Where jurisdiction to render a judgment is claimed to have existed under a statute, the preliminary requirements must have been complied with; and where such a judgment is set up as foundation of title by the plaintiff, the defendant has the right to show that such requirements were not complied with. Webster v. Reid, 11 How. 437, 13: 761

Cited in Cooper v. Sunderland, 3 Iowa, 129, 66 Am. Dec. 52—Eaton v. Badger, 33 N. H. 238—Grewar v. Henderson, 1 Tenn. Ch. 78.

440. An adjudication that a particular case is of equitable cognizance cannot be disturbed by an original suit. Such adjudication is not void, even if erroneous. Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. Rep. 781, 13: 178

Cited in American Freehold Land & Mortg. Co. v. Thomas, 12 L.R.A. 688, 47 Fed. 558—Pullman's Palace-Car Co. v. Washburn, 66 Fed. 797—Compton v. Jesup, 15 C. C. A. 416, 31 U. S. App. 486, 68 Fed. 282—Peck v. Elliott, 38 L.R.A. 620, 24 C. C. A. 427, 47 U. S. App. 605, 79 Fed. 11—Temple v. Glasgow, 25 C. C. A. 543, 42 U. S. App. 417, 80 Fed. 444—Clark v. Brown, 57 C. C. A. 78, 119 Fed. 132—Whitney v. Bank of Greenville, 71 Miss. 1020, 33 L.R.A. 534, 15 So. 33—Lemmon v. Herbert, 92 Va. 657, 24 S. E. 249—St. Lawrence Boom & Mfg. Co. v. Holt, 51 W. Va. 365, 41 S. E. 351.

441. Want of jurisdiction set up to avoid a judgment must be shown with the greatest certainty. Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 5 Sup. Ct. Rep. 1104, 29: 261

Limited jurisdiction; inferior court.

Attack for Error or Irregularity, see supra, 410.

442. Judgments of Federal courts, which are all of limited jurisdiction, are erroneous where jurisdictional facts are not shown by the record, but they are not absolute nullities, which may be totally disregarded when collaterally attacked. Kempe v. Kennedy, 5 Cranch, 173, 3: 70

Cited in Ex parte Watkins, 3 Pet. 203, 7 L. ed. 653—McNutt v. Bland, 2 How. 22, 11 L. ed. 164—Brown v. Noyes, 2 Woodb. & M. 79, Fed. Cas. No. 2,023—Slocum v. Wheeler, 1 Conn. 445.

443. A judgment of a United States circuit court, while it remains unreversed, is not a nullity, and cannot be collaterally attacked, although jurisdiction is not alleged in the proceedings. Cutler v. Huston, 158 U. S. 423, 15 Sup. Ct. Rep. 868, 39: 1040

Cited in Lake County v. Platt, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 572.

444. Judgments of technically inferior courts are void where the jurisdictional facts, even if they existed, do not appear upon the record, and they are subject to collateral attack. Kempe v. Kennedy, 5 Cranch, 173, 3: 70

Cited in Root v. United States, 9 Ct. Cl. 222—

The *Fideliter*, 1 Sawy. 156, 1 Abb. (U. S.) 579, Fed. Cas. No. 4,753—*Ludington v. The Nucleus*, Fed. Cas. No. 8,598—*Tolmie v. Thompson*, 3 Cranch, C. C. 137, Fed. Cas. No. 14,080—*United States v. New Bedford Bridge*, Fed. Cas. No. 15,867, 1 Woodb. & M. 401, 10 Law. Rep. 127—*Moseley v. Tuthill*, 45 Ala. 652, 6 Am. Rep. 710—*Ex parte Kearny*, 55 Cal. 216—*Macon & W. R. Co. v. Davis*, 13 Ga. 76—*Trader v. McKee*, 2 Ill. 561—*Gay v. Lloyd*, 1 G. Greene, 85, 46 Am. Dec. 78—*Waters v. Randall*, 8 Met. 184—*Van Doren v. Horton*, 25 N. J. L. 207—*Camp v. Wood*, 10 Watts. 120—*James v. Smith*, 2 S. C. N. S. 187—*Grewar v. Henderson*, 1 Tenn. Ch. 78.

Diverse citizenship.

Impeaching Federal Judgment in State Court, see *infra*, 1077 a.

Jurisdictional Showing as Prerequisite of Further Procedure in Federal Courts, see Courts, V. c, 11.

Ancillary Jurisdiction of Bill to Enjoin Collateral Attack by Denying Citizenship Previously Admitted, see Courts, 1051.

Defective Allegations as Cured by Summons, see Courts, 1151.

445-6. The objection that the United States circuit court had not jurisdiction of a suit on account of the citizenship of the parties cannot be raised and adjudicated in a subsequent suit, if by the record in the former suit there appeared to be jurisdiction. *Lacassagne v. Chapuis*, 144 U. S. 119, 12 Sup. Ct. Rep. 659, 36: 368

447. A judgment of the circuit court of the United States as to the competency of the plaintiff's assignors to sue in that court, and the diversity of citizenship between the parties, is not open to impeachment on either ground, either collaterally or on a creditors' bill, where an objection to jurisdiction on the first ground was raised and overruled in the proceedings resulting in the judgment and the petition alleged diversity of citizenship. *New Orleans v. Fisher*, 180 U. S. 185, 21 Sup. Ct. Rep. 347, 45: 485

Federal question.

Jurisdictional Showing as Prerequisite of Further Procedure in Federal Courts, see Courts, V. c, 11.

448. Even if the United States circuit court errs in entertaining jurisdiction on the ground that a Federal question is involved, its determination of that matter is conclusive upon the parties before it, and cannot be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal. *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. Rep. 611, 38: 463

Attachment; seizure.

See also *infra*, 451.

449. When a writ of attachment has been issued and the property seized, condemned, and sold, the court has jurisdiction; and the proceedings must be held valid when introduced in another action, although there

is a want of a sufficient publication of notice. *Cooper v. Reynolds*, 10 Wall. 308.

19: 931

Distinguished in *Harland v. United Lines Teleg. Co.* 6 L.R.A. 254, 40 Fed. 312—*Re Hall & S. Co.* 73 Fed. 530—*Darnell v. Mack*, 46 Neb. 745, 65 N. W. 805.

Cited in *Pennoyer v. Neff*, 95 U. S. 724, 24 L. ed. 569—*Cole v. Cunningham*, 133 U. S. 116, 33 L. ed. 543, 10 Sup. Ct. Rep. 269—*Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 146, 35 L. ed. 119, 11 Sup. Ct. Rep. 512—*Dorr v. Glibboney*, 3 Hughes, 388, Fed. Cas. No. 4,006—*Galpin v. Page*, Fed. Cas. No. 5,206—*Mickey v. Stratton*, 5 Sawy. 481, Fed. Cas. No. 9,530—*Bunnell v. Bunnell*, 25 Fed. 217—*Bigelow v. Chatterton*, 2 C. C. A. 408, 10 U. S. App. 287, 51 Fed. 620—*Gates v. Buckl*, 4 C. C. A. 127, 12 U. S. App. 69, 53 Fed. 987—*The Queen of the Pacific*, 61 Fed. 214—*Central Trust Co. v. Chattanooga, R. & C. R. Co.* 68 Fed. 687—*Southern Bank & T. Co. v. Folson*, 21 C. C. A. 571, 43 U. S. App. 713, 75 Fed. 931—*Connor v. Tennessee C. R. Co.* 54 L.R.A. 693, 48 C. C. A. 735, 109 Fed. 930—*Mudge v. Steinhart*, 78 Cal. 38, 12 Am. St. Rep. 17, 20 Pac. 147—*Blanc v. Paymaster Min. Co.* 95 Cal. 530, 29 Am. St. Rep. 149, 30 Pac. 765—*Brown v. Tucker*, 7 Colo. 36, 1 Pac. 221—*Rothschild v. Knight*, 176 Mass. 53, 57 N. E. 337—*Kenney v. Goergen*, 36 Minn. 191, 31 N. W. 210—*Plummer v. Hatton*, 51 Minn. 183, 53 N. W. 460—*Bray v. McClury*, 55 Mo. 138—*Abernathy v. Moore*, 83 Mo. 71—*First Nat. Bank v. Hughes*, 10 Mo. App. 11—*Hunt v. Hunt*, 72 N. Y. 239, 28 Am. Rep. 129—*Ditmore v. Goins*, 128 N. C. 330, 29 S. E. 61—*McClure v. Fellows*, 131 N. C. 517, 42 S. E. 951—*Bank of Colfax v. Richardson*, 34 Or. 529, 75 Am. St. Rep. 664, 54 Pac. 359—*The Rio Grande v. Otis*, 32 Phila. Leg. Int. 238—*Stanley v. Stanley*, 35 S. C. 99, 14 S. E. 675—*Walker v. Cottrell*, 6 Baxt. 263—*Barell v. Wagner* 5 Tex. Civ. App. 449, 27 S. W. 17—*Milburn v. Smith*, 11 Tex. Civ. App. 681, 33 S. W. 910—*Dorr v. Rohr*, 82 Va. 365, 3 Am. St. Rep. 106—*Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 840—*Bragg v. Gaynor*, 85 Wis. 484, 21 L.R.A. 167, 55 W. Va. 919.

450. Justices of the peace of a county into which a vessel seized in the state, but outside of the county, for raking clams, is brought, have no jurisdiction of a prosecution for the offense under a statute giving jurisdiction to justices of the county where the vessel is seized, and such want of jurisdiction may be shown in an action in another state for making such seizure, although the record of conviction by such justices is produced, which states that the seizure took place within the county. *Thompson v. Whitman*, 18 Wall. 457.

21: 897

Cited in *Kilbourn v. Thompson*, 103 U. S. 198, 26 L. ed. 389—*Re Sawyer*, 124 U. S. 220, 31 L. ed. 409, 8 Sup. Ct. Rep. 482—*Scott v. McNeal*, 154 U. S. 47, 38 L. ed. 902, 14 Sup. Ct. Rep. 1108—*National Exch. Bank v. Wiley*, 195 U. S. 269, 49 L. ed. 190, 25 Sup. Ct. Rep. 70—*Winchester v. United States*, 14 Ct. Cl. 46—*Porter v. United States*, 20 Ct. Cl. 314—*Re McKibben*, 12 Nat. Bankr. Reg. 101, Fed. Cas. No. 8,859—*Adams v. Terrell*, 4 Woods, 341, 4 Fed. 800—*Runkle v. Citizens' Ins. Co.* 6 Fed. 148—*Jones v. Lamar*, 34 Fed. 462—*Re Eaton*, 51 Fed. 805—*Reinach v. Atlantic & G. W. R. Co.* 58 Fed. 43—

Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 477, 47 U. S. App. 1, 76 Fed. 438
 —Dexter, H. & Co. v. Sayward, 84 Fed. 300
 —Keyser v. Lowell, 54 C. C. A. 578, 117 Fed. 404—National Bank v. Furtick, 2 Marv. (Del.) 61, 44 L.R.A. 121, 69 Am. St. Rep. 99, 42 Atl. 479—Tenney v. Taylor, 1 App. D. C. 227—Belt v. United States, 4 App. D. C. 30
 —Richmond & D. R. Co. v. Gorman, 7 App. D. C. 108—District of Columbia v. Humphries, 12 App. D. C. 135—Issett v. Stuart, 80 Ill. 410, 22 Am. Rep. 194, 16 Nat. Bankr. Reg. 197—Barbee v. Shannon, 1 Ind. Terr. 208, 40 S. W. 584—Neff v. Beauchamp, 74 Iowa, 94, 36 N. W. 905—Litowich v. Litowich, 19 Kan. 455, 27 Am. Rep. 145—Perry v. St. Joseph & W. R. Co. 29 Kan. 424—Newcomb v. Newcomb, 13 Bush, 571, 26 Am. Rep. 222—Grover & B. Sewing Mach. Co. v. Radcliffe, 66 Md. 517, 8 Atl. 265—Kelley v. Kelley, 161 Mass. 113, 25 L.R.A. 807, 42 Am. St. Rep. 389, 36 N. E. 837—Sadler v. Prairie Lodge, 59 Miss. 575—Risley v. Phenix Bank, 83 N. Y. 337, 38 Am. Rep. 421—Wehrle v. Wehrle, 39 Ohio St. 360—Rothschild v. Rochester & P. R. Co. 1 Pa. Co. Ct. 629—Ferry v. Miltimore Elastic Steel Car Wheel Co. 71 Vt. 459, 76 Am. St. Rep. 787, 45 Atl. 1035.

Decree of sale.

Sale in Bankruptcy upon Notice to Part only of Encumbrancers, see Bankruptcy, 318.

Invalidity of Sale as Affecting Power to Adjudicate Equities, see Courts, 36.

As against Person Absent at War and Enlisted in Hostile Army, see Judicial Sale, 118.

451. A court cannot disregard a judgment ordering the sale of land attached, given in evidence before it, or refuse to give it effect on any other ground than a want of jurisdiction in the court which rendered it. *Cooper v. Reynolds*, 10 Wall. 308, 19: 931 *Distinguished in Duxbury v. Dahle*, 78 Minn. 431, 79 Am. St. Rep. 408, 81 N. W. 198.

Cited in Tyler v. Defrees, 11 Wall. 344, 20 L. ed. 163—*Ludlow v. Ramsey*, 11 Wall. 587, 20 L. ed. 218—*Gunn v. Plant*, 94 U. S. 669, 24 L. ed. 306—*Marchand v. Frellsen*, 105 U. S. 428, 26 L. ed. 1059—*White v. Crow*, 110 U. S. 189, 28 L. ed. 115, 4 Sup. Ct. Rep. 71—*Huling v. Kaw Valley R. & Improv. Co.* 130 U. S. 565, 32 L. ed. 1048, 9 Sup. Ct. Rep. 603—*Manson v. Duncanson*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 647—*Bragg v. Lorio*, 1 Woods, 210, Fed. Cas. No. 1,800—*Mickey v. Stratton*, Fed. Cas. No. 9,530—*Otis v. The Rio Grande*, 1 Woods, 281, Fed. Cas. No. 10,613—*Salisbury v. Sands*, 2 Dill. 277, Fed. Cas. No. 12,251—*Smith v. Pomeroy*, 2 Dill. 420, Fed. Cas. No. 13,092—*McArthur v. Allen*, 3 Fed. 323—*Downs v. Allen*, 23 Blatchf. 64, 22 Fed. 811—*Walker v. Sturbans*, 38 Fed. 301—*Cornwall v. Davis*, 4 L. R.A. 565, 38 Fed. 881—*Needham v. Wilson*, 47 Fed. 97—*Slip v. Copwell*, 8 C. C. A. 420, 16 U. S. App. 704, 59 Fed. 971—*Pullman's Palace Car Co. v. Washburn*, 66 Fed. 797—*Purdy v. Wallace Muller & Co.* 81 Fed. 515—*Re Gut Lun*, 83 Fed. 142—*National Nickel Co. v. Nevada Nickel Syndicate*, 50 C. C. A. 117, 112 Fed. 48—*Bush v. Glover*, 47 Ala. 174—*Fleld v. Dortch*, 34 Ark. 405—*Silver v. Luck*, 42 Ark. 269—*Nachtrieb v. Stoner*, 1 Colo. 430—*Brown v. Tucker*, 7 Colo. 34, 1 Pac. 221—*Mentzer v. Ellison*, 7 Colo. App. 328, 43 Pac. 464—*Plumb v. Bateman*, 2 App. D. C. 173—*McMillan v. Lovejoy*, 115 Ill.

501, 4 N. E. 772—*Schott v. Youree*, 142 Ill. 243, 31 N. E. 591—*Barbee v. Shannon*, 1 Ind. Terr. 207, 40 S. W. 584—*Fred Miller Brewing Co. v. Capital Ins. Co.* 111 Iowa, 597, 82 Am. St. Rep. 529, 82 N. W. 1023—*Selders v. Boyle*, 5 Kan. App. 456, 49 Pac. 320—*Vicksburg, S. & P. R. Co. v. Tibbs*, 112 La. 58, 36 So. 223—*Mitchell v. Chambers*, 43 Mich. 158, 38 Am. Rep. 167, 5 N. W. 57—*Chauncey v. Wass*, 35 Minn. 37, 30 N. W. 826—*Erwin v. Heath*, 50 Miss. 802—*Hiller v. Lamkin*, 54 Miss. 23—*Massey v. Scott*, 49 Mo. 282—*Gromer v. Smith*, 49 Mo. 324—*Hardin v. Lee*, 51 Mo. 245—*Bray v. McClury*, 53 Mo. 140—*Hope v. Blair*, 105 Mo. 93, 24 Am. St. Rep. 366, 18 S. W. 595—*Knoll v. Woelken*, 13 Mo. App. 277—*Vantilburg v. Black*, 3 Mont. 468—*State ex rel. Mathews v. Eddy*, 10 Mont. 318, 25 Pac. 1032—*Hoagland v. Wilcox*, 42 Neb. 145, 60 N. W. 376—*Schenck v. Griffin*, 38 N. J. L. 465—*Southern California Fruit Exchange v. Stamm*, 9 N. M. 371, 54 Pac. 345—*Dreyfuss v. Charles Seale & Co.* 18 Misc. 554, 41 N. Y. Supp. 875—*Coyle Mercantile Co. v. Nix*, 7 Okla. 270, 54 Pac. 469—*Morrill v. Morrill*, 20 Or. 103, 11 L.R.A. 160, 23 Am. St. Rep. 95, 25 Pac. 362—*Schnader v. Bender*, 19 Lanc. L. Rev. 198—*Schnader v. Bender*, 8 Northampton Co. R. 262—*Burnett v. Keran*, 24 Gratt. 61—*Lancaster v. Wilson*, 27 Gratt. 630—*Dorr v. Rohr*, 82 Va. 363, 3 Am. St. Rep. 106—*Gresham v. Ewell*, 85 Va. 5, 6 S. E. 700—*Neufelder v. German American Ins. Co.* 6 Wash. 339, 22 L.R.A. 290, 36 Am. St. Rep. 166, 33 Pac. 870—*Belles v. Miller*, 10 Wash. 266, 38 Pac. 1050—*Hall v. Hall*, 12 W. Va. 15—*Keystone Bridge v. Summers*, 13 W. Va. 506—*First Nat. Bank v. Huntington Distilling Co.* 41 W. Va. 534, 56 Am. St. Rep. 878, 23 S. E. 792—*Miller v. White*, 46 W. Va. 71, 76 Am. St. Rep. 791, 33 S. E. 332.

452. A recital in a decree for the sale of lands for unpaid levee taxes that the non-resident defendants were "severally constructively summoned by publication . . . proof of which has been previously filed herein," is conclusive as against a collateral attack based on the objection that there was no sufficient proof of publication of the warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning order, even if required, is not jurisdictional. *Ballard v. Hunter*, 204 U. S. 241, 27 Sup. Ct. Rep. 261, 51: 461

453-7. The jurisdiction of a territorial court to order a sale of property by a receiver appointed in an earlier action without formally extending the receivership to the suit in which the decree of sale was made cannot be collaterally attacked by a party to such suit after unsuccessfully prosecuting appeals to both the territorial supreme court and the Supreme Court of the United States, in which the jurisdictional question was not presented. *Gila Bend Reservoir & Irrig. Co. v. Gila Water Co.* 205 U. S. 279, 27 Sup. Ct. Rep. 495, 51: 801

d. Fraud and Collusion.

Foreign Judgment, see *infra*, 930 a, 935, 938.
 Judgment of Sister State, see *infra*, 1014.
 Enforcing Judgment of Other State as to, see *infra*, 1026.

In Federal Court on Judgment of State Court, see *infra*, 1058.

Setting Aside Judgment for Fraud, see *infra*, 1233-1236.

Value of Decision as Precedent as Affected by Fraud in Obtaining Judgment, see Courts, 1632.

Refusal of Equity to Investigate Fraud already Tried and Passed upon in the Judgment, see Equity, 253.

Judgment Against Infant, see Infants, 61, 64, 65, 66.

Injunction against Setting up as a Defense Fraudulent Judgment of Divorce, see Injunction, 81.

See also Fraud and Deceit, 66.

458. Where jurisdiction has attached, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. *Nash v. Williams* (Cornett v. Williams) 20 Wall. 226, 22: 254
White v. Crow, 110 U. S. 183, 4 Sup. Ct. Rep. 71, 28: 113
Manson v. Duncanson, 166 U. S. 533, 17 Sup. Ct. Rep. 647, 41: 1105
Cited in Windsor v. McVeigh, 93 U. S. 283, 23 L. ed. 918—*Dewing v. Perdicaries*, 96 U. S. 195, 24 L. ed. 655—*Ex parte Reed*, 100 U. S. 23, 25 L. ed. 539—*United States v. Wilson v. Walker*, 109 U. S. 268, 27 L. ed. 929, 3 Sup. Ct. Rep. 277—*Keyes v. United States*, 109 U. S. 340, 27 L. ed. 956, 3 Sup. Ct. Rep. 202—*White v. Crow*, 110 U. S. 189, 28 L. ed. 115, 4 Sup. Ct. Rep. 71—*Laing v. Rigney*, 160 U. S. 542, 40 L. ed. 528, 16 Sup. Ct. Rep. 366—*Manson v. Duncanson*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 647—*Hull v. Dills*, 19 Fed. 659—*May v. Logan County*, 30 Fed. 255—*American Land & Mortg. Co. v. Thomas*, 12 L.R.A. 687, 47 Fed. 557—*Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting R. Co.* 58 Fed. 931—*Foltz v. St. Louis & S. F. R. Co.* 8 C. C. A. 637, 19 U. S. App. 576, 60 Fed. 318—*Odell v. Reynolds*, 17 C. C. A. 324, 37 U. S. App. 447, 70 Fed. 662—*Lake County v. Platt*, 25 C. C. A. 90, 49 U. S. App. 216, 79 Fed. 571—*United States v. Loeb*, 99 Fed. 732—*Re Columbia Real Estate Co.* 3 N. B. N. Rep. 163, 101 Fed. 972—*National Nickel Co. v. Nevada Nickel Syndicate*, 106 Fed. 114—*Phelps v. Mutual Reserve Fund Life Assn.* 61 L.R.A. 725, 50 C. C. A. 349, 112 Fed. 462—*Whitlow v. Echols*, 78 Ala. 211—*United States v. Green*, 8 Mackey, 238—*Suitterlin v. Connecticut Mut. L. Ins. Co.* 90 Ill. 488—*Kelly v. People*, 115 Ill. 589, 56 Am. Rep. 184, 4 N. E. 644—*Johnson v. Miller*, 50 Ill. App. 71—*Johnson v. Miller*, 65 Ill. App. 177—*Kanorowski v. People*, 113 Ill. App. 472—*Henry v. Carson*, 96 Ind. 423—*Com. v. Vincent*, 160 Mass. 281, 35 N. E. 852—*Culver v. Hardenbergh*, 37 Minn. 230, 33 N. W. 792—*Williams v. Monroe*, 125 Mo. 589, 28 S. W. 853—*Rothschild v. Mannesovitch*, 29 App. Div. 563, 51 N. Y. Supp. 253—*Pennybacker v. Switzer*, 75 Va. 687—*Belles v. Miller*, 10 Wash. 267, 38 Pac. 1050—*Baldwin v. Baer*, 10 Wash. 417, 39 Pac. 117—*Wells-Stone Mercantile Co. v. Truax*, 44 W. Va. 536, 29 S. E. 1006.

459. A judgment is not assailable collaterally except on the ground that the court had no jurisdiction of the cause of action or

of the defendant, or there was fraud and collusion. *Huff v. Hutchinson* use of Hurlbut, 14 How. 586, 14: 553
Cited in Christmas v. Russell, 5 Wall. 305, 18 L. ed. 480—*New Lamp Chimney Co. v. Ansonia Brass & Copper Co.* 91 U. S. 661, 23 L. ed. 338, 13 Nat. Bankr. Reg. 390—*Amory v. Amory*, 3 Biss. 271, Fed. Cas. No. 334—*Galpin v. Page*, 1 Sawy. 319, Fed. Cas. No. 5,205—*Drury v. Ewing*, 1 Bond, 544, Fed. Cas. No. 4,095—*Pullman's Palace-Car Co. v. Washburn*, 66 Fed. 797—*Cromwell v. Gallup*, 17 Hun, 56—*Chaffee v. Hooper*, 54 Vt. 515.

460. A judgment cannot be attacked collaterally when no fraud or collusion is shown, but only a failure on the part of an executor to plead the statute of limitations. *West v. Smith*, 8 How. 402, 12: 1130

461. A decree of foreclosure and sale cannot be questioned collaterally, in the absence of fraud or bad faith. *Kent v. Lake Superior Ship Canal R. & Iron Co.* 144 U. S. 75, 12 Sup. Ct. Rep. 650, 36: 352
Cited in Fernald v. Glenn, 56 Fed. 374.

462. The granting of a license by the court to an administrator to sell lands is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial if no appeal is taken. The record is absolute verity, to contradict which there can be no averment or evidence. The court having the power to make the decree of sale, it can be impeached only upon the ground of fraud in the party who obtains it. *Grignon v. Astor*, 2 How. 319, 11: 283
Cited in West v. Smith, 8 How. 412, 12 L. ed. 1135—*Florentine v. Barton*, 2 Wall. 216, 17 L. ed. 785—*McNitt v. Turner*, 16 Wall. 366, 21 L. ed. 348—*Mohr v. Manierre*, 101 U. S. 421, 25 L. ed. 1054—*Davis v. Gaines*, 104 U. S. 391, 26 L. ed. 759—*Culbertson v. H. Wittbeck Co.* 127 U. S. 333, 32 L. ed. 137, 8 Sup. Ct. Rep. 1136—*Thaw v. Ritchie* (Thaw v. Falls) 136 U. S. 548, 34 L. ed. 538, 10 Sup. Ct. Rep. 1037—*Simmons v. Saul*, 138 U. S. 454, 34 L. ed. 1061, 11 Sup. Ct. Rep. 369—*Amory v. Amory*, 3 Biss. 271, Fed. Cas. No. 334—*Badger v. Badger*, 2 Cliff. 151, Fed. Cas. No. 718—*Miller v. Sullivan*, 4 Dill. 343, Fed. Cas. No. 9,592—*Seaverns v. Gerke*, 3 Sawy. 366, Fed. Cas. No. 12,595—*Brewster v. Ludekins*, 19 Cal. 171—*McArthur v. Allen*, 3 Fed. 314—*Holmes v. Oregon & C. R. Co.* 6 Sawy. 285, 5 Fed. 534—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 301, 9 Fed. 236—*Reinach v. Atlantic & G. W. R. Co.* 58 Fed. 43—*Elliot v. Shuler*, 50 Fed. 456—*Ex parte Maxwell*, 37 Ala. 363, 79 Am. Dec. 62—*Smith v. Flournoy*, 47 Ala. 361—*Landford v. Dunklin*, 71 Ala. 604—*Thaw v. Ritchie*, 4 Mackey, 360—*Duncanson v. Manson*, 3 App. D. C. 273—*Richmond & D. R. Co. v. Gorman*, 7 App. D. C. 107—*Gilchrist v. Meacham*, 3 Fla. 230—*Deans v. Wilcoxon*, 25 Fla. 1031, 7 So. 163—*Lane v. Bommelmann*, 17 Ill. 98—*Doe ex dem. Haine v. Smith*, Smith (Ind.) 385—*Doe ex dem. Hain v. Smith*, 1 Ind. 460—*Coolman v. Fleming*, 82 Ind. 123—*Cooper v. Sunderland*, 3 Iowa, 135, 66 Am. Dec. 52—*Pursley v. Hayes*, 22 Iowa, 34, 92 Am. Dec. 350—*Miller v. Hall*, 1 Bush, 233—*Anheuser Busch Brewing Assn. v. McGowan*, 49 Ia Ann. 633, 21 So. 766—*Osman v. Traphagen*, 23 Mich. 88—*Telck v. Carver County*, 11 Minn. 294, Gil. 201—*McNamara v. Casserly*, 61 Minn. 344, 63 N. W. 880—*Brooks v. Duck*

worth, 59 Mo. 52—State ex rel. Walker v. Dobson, 135 Mo. 14, 38 S. W. 238—Carr v. Spannagel, 4 Mo. App. 289—Rolf v. Timmermeister, 15 Mo. App. 252—Trumble v. Williams, 18 Neb. 154, 24 N. W. 716—People ex rel. Tweed v. Liscomb, 3 Hun, 773—Jones v. New York, 37 Hun, 514—Monroe v. Douglas, 4 Sandf. Ch. 181—Herring v. New York, L. E. & W. R. Co. 105 N. Y. 372, 12 N. E. 763—Heatherly v. Hadley, 4 Or. 18—Reese v. Wildman, 27 Pittsb. L. J. N. S. 178—Sutherland v. DeLeon, 1 Tex. 309, 46 Am. Dec. 100—Murchison v. White, 54 Tex. 84—Wells v. Hughes, 89 Va. 547, 19 S. E. 689—Devaughn v. Devaughn, 19 Gratt. 565.

463. The fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, the truth of which was contested before and passed upon by it. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95 Cited in *Peplin v. Lautman*, 28 Ind. App. 77, 62 N. E. 60—*Grant v. Birrell*, 35 Misc. 772, 72 N. Y. Supp. 866.

464. Fraud cannot be pleaded as a ground of attack in a Federal court upon a judgment obtained in another. *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. Rep. 369, 34: 1054 Cited in *Barbee v. Shannon*, 1 Ind. Terr. 208, 40 S. W. 584—*Plant v. Harrison*, 36 Misc. 654, 74 N. Y. Supp. 411.

465. In the absence of fraud, a court of equity cannot collaterally question the conclusiveness of a judgment at law, nor can it correct the errors of a court of law. *Ober v. Gallagher*, 93 U. S. 199, 23: 829 *Tilton v. Coffield*, 93 U. S. 163, 23: 858 Cited in *Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting R. Co.* 51 Fed. 860—*Vantilburg v. Black*, 3 Mont. 470—*Glenn v. Maguire*, 3 Tenn. Ch. 697.

Defrauding third person.

Suffering or Confessing Judgment to Give Preference, see Bankruptcy, 205, 213.

Burden of Proof, see Evidence, 299.

466-8. Whenever a judgment or decree is procured through fraud or by collusion of the parties, for the purpose of defrauding some third person, such third person may show, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained. *Michaels v. Post*, 21 Wall. 398, 22: 520

Cited in *Evers v. Watson*, 156 U. S. 532, 39 L. ed. 522, 15 Sup. Ct. Rep. 430—*Re Lennon*, 166 U. S. 553, 41 L. ed. 1112, 17 Sup. Ct. Rep. 658—*Re McKibben*, 12 Nat. Bankr. Reg. 102, Fed. Cas. No. 8,859—*McDermott v. Copeland*, 9 Fed. 537—*Hawcock Inspirator Co. v. Jenks*, 21 Fed. 914—*Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 474, 47 U. S. App. 1, 76 Fed. 435—*Gay v. Brierfield Coal & I. Co.* 94 Ala. 327, 16 L.R.A. 574, 33 Am. St. Rep. 122, 11 So. 353—*Smith v. Hall*, 69 Conn. 665, 38 Atl. 386—*Connell v. Van derwerken*, 1 Mackey, 245.

j. What Matters Concluded.

1. In General.

Collateral Attack, see supra, III. i.

Conclusiveness of Judgment of Court of Ancillary Administration, see infra, 683.

As to Federal Courts Following State Laws or Decisions Determining Conclusiveness, see Courts, 2126.

Extrinsic Evidence to Show Matters Decided, see Evidence, 1724-1736.

Rebuttal of Extrinsic Evidence to, as Findings, see Evidence, 2188.

Second Writ of Habeas Corpus to Reach Matters not Decided by Former Writ, see Habeas Corpus, 120.

Amending Bill so as to Set up Judgment as Bar, see Pleading, 212.

Editorial notes.

Conclusiveness Generally.

11: 75; 38: 429; 42: 355.

Similarity of subject-matter.

Order in Other State for Assessment, see infra, 980.

See also supra, 166.

469. It must appear, either upon the face of the record or by extrinsic evidence, that the precise question was raised and determined in the former suit. *Russell v. Place*, 94 U. S. 606, 24: 214 *Cromwell v. Sac County*, 94 U. S. 351, 24: 195.

470. In an action of replevin to recover a mill under and by virtue of a chattel mortgage thereon, where defendant set up as a defense damages for a breach of a warranty of the mill and for delay in delivering it, and was allowed such damages as a set-off in that action, he is precluded from bringing a further action for the recovery of such damages, and the judgment in the former action is a bar to the subsequent one. *Clement v. Field*, 147 U. S. 467, 13 Sup. Ct. Rep. 358, 37: 244.

471-2. Where a controversy has passed into *rem judicatam*, and the identity of the causes of action has been established, it cannot be again drawn in question. *Young v. Black*, 7 Cranch, 565, 3: 440 Cited in *Aurora v. West*, 7 Wall. 101, 19 L. ed. 49—*Wyman v. Campbell*, 6 Port. (Ala.) 237, 31 Am. Dec. 677—*Goddard v. Colorado Springs Live Stock Co.* 4 Colo. App. 18, 34 Pac. 942—*Wagenhurst v. Wineland*, 22 App. D. C. 362—*Hanna v. Read*, 102 Ill. 603, 40 Am. Rep. 608—*Hargus v. Goodman*, 12 Ind. 632—*Marsh v. Pler*, 4 Rawle, 287, 28 Am. Dec. 131—*Coville v. Gilman*, 13 W. Va. 327—*Beckwith v. Thompson*, 18 W. Va. 119.

473. A judgment for compensation for extra services, obtained by one against whom the Treasury Department of the United States had issued a warrant of distress, under the act of May, 1820, to recover an alleged balance for a less amount than the claim for services, is a bar to a suit subsequently instituted by the United States on the same account on which the distress war-

rant was issued. *United States v. Nourse*, 9 Pet. 8, 9: 31

474. A judgment is conclusive not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject-matter, although the *res* itself may be different. *Beloit v. Morgan*, 7 Wall. 619, 19: 205

Cited in *Blandy v. Griffith*, 3 Fisher, Pat. Cas. 614, Fed. Cas. No. 1,529—*Dubois v. Philadelphia, W. & B. R. Co.* 5 Fisher, Pat. Cas. 210, Fed. Cas. No. 4,109—*The Tubal Cain*, 9 Fed. 836—*Geneva Nat. Bank v. Independent School District*, 25 Fed. 630—*Oregon R. Co. v. Oregon R. & Nav. Co.* 28 Fed. 510—*Columb v. Webster Mfg. Co.* 43 L.R.A. 197, 28 C. C. A. 226, 50 U. S. App. 264, 84 Fed. 594—*Samuels v. Reviers*, 47 C. C. A. 637, 108 Fed. 720—*Wilcox & G. Sewing Mach. Co. v. Sherborne*, 59 C. C. A. 366, 123 Fed. 878—*Boyd v. State*, 53 Ala. 614—*Re Northwestern University*, 206 Ill. 66, 69 N. E. 75—*Peru Plow & W. Co. v. Ward*, 6 Kan. App. 693, 51 Pac. 805—*Peterson v. Warner*, 6 Kan. App. 304, 50 Pac. 1091—*Adams v. Louisiana Bd. of Liquidation*, 39 La. Ann. 693, 2 So. 508—*Conery v. New Orleans Waterworks Co.* 41 La. Ann. 932, 7 So. 8—*Conery v. New Orleans Waterworks Co.* 41 La. Ann. 946, 7 So. 8—*Paterson v. Baker*, 51 N. J. Eq. 55, 26 Atl. 324—*Barnett v. Barnett*, 9 N. M. 217, 50 Pac. 337—*Philadelphia v. Ridge Ave. Pass. R. Co.* 48 Phila. Leg. Int. 362—*Philadelphia v. Ridge Ave. Pass. R. Co.* 142 Pa. 493, 28 W. N. C. 109, 21 Atl. 982—*Schwan v. Kelly*, 173 Pa. 72, 33 Atl. 1107—*Sanders v. Forgasson*, 3 Baxt. 261—*Boyd v. Robinson*, 93 Tenn. 28, 23 S. W. 72—*San Antonio v. Lane*, 32 Tex. 411—*Webster v. Mann*, 56 Tex. 123, 42 Am. Rep. 688—*Hanrick v. Gurley*, 93 Tex. 479, 55 S. W. 119—*Lochridge v. Corbett*, 31 Tex. Civ. App. 681, 73 S. W. 96—*Wolf River Lumber Co. v. Brown*, 88 Wis. 646, 60 N. W. 996.

475. A decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions, though the form and causes of action be different. *Forsyth v. Hammond*, 166 U. S. 506, 17 Sup. Ct. Rep. 665, 41: 1095
Cited in *Columb v. Webster Mfg. Co.* 43 L.R.A. 197, 28 C. C. A. 226, 50 U. S. App. 264, 84 Fed. 593.

476. A right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even if that suit is for a different cause of action. *Southern P. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. Rep. 18, 42: 355
Distinguished in *Overby v. Gordon*, 13 App. D. C. 414.

Cited in *Werlein v. New Orleans*, 177 U. S. 396, 44 L. ed. 820, 20 Sup. Ct. Rep. 682—*Mitchell v. First Nat. Bank*, 180 U. S. 480, 45 L. ed. 631, 21 Sup. Ct. Rep. 418—*Baker v. Cummings*, 181 U. S. 124, 45 L. ed. 780, 21 Sup. Ct. Rep. 578—*Southern P. R. Co. v. United States*, 183 U. S. 521, 46 L. ed. 309, 22 Sup. Ct. Rep. 154—*Stearns v. Lawrence*, 28 C. C. A. 70, 54 U. S. App. 532, 83 Fed. 742—*Columb v. Webster Mfg. Co.* 43 L.R.A. 197, 28 C. C. A. 226, 50 U. S. App. 264, 84 Fed. 594—*United States v. Southern P. R.*

Co. 86 Fed. 963—*Bank of Commerce v. Louisville*, 88 Fed. 405—*United States v. Southern P. R. Co.* 88 Fed. 835—*St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co.* 32 C. C. A. 287, 60 U. S. App. 675, 89 Fed. 651—*National Folding-Box & Paper Co. v. Dayton Paper Novelty Co.* 95 Fed. 995—*Re Skinner*, 97 Fed. 191—*United States v. Southern P. R. Co.* 38 C. C. A. 626, 98 Fed. 32—*United States v. Southern P. R. Co.* 38 C. C. A. 638, 98 Fed. 47—*Bresnahan v. Tripp Giant Leveler Co.* 39 C. C. A. 510, 99 Fed. 283—*Norton v. House of Mercy*, 41 C. C. A. 400, 101 Fed. 385—*Stewart v. Ashtabula*, 47 C. C. A. 27, 107 Fed. 864—*Gorham v. Broad River Twp.* 109 Fed. 776—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 462, 111 Fed. 568—*United States v. Eisenbeis*, 50 C. C. A. 185, 112 Fed. 196—*Re Lemmon & G. Co.* 50 C. C. A. 251, 112 Fed. 290—*Dady v. Georgia & A. R. Co.* 112 Fed. 842—*Estill County v. Embury*, 50 C. C. A. 575, 112 Fed. 884—*Ætna L. Ins. Co. v. Hamilton County*, 54 C. C. A. 474, 117 Fed. 88—*United States v. Southern P. R. Co.* 117 Fed. 551—*Gunnison v. Chicago, M. & St. P. R. Co.* 117 Fed. 643—*Penfield v. Potts*, 61 C. C. A. 376, 126 Fed. 480—*First Nat. Bank v. Covington*, 129 Fed. 794—*Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson*, 130 Fed. 165—*Allen v. Davenport*, 65 C. C. A. 653, 132 Fed. 221—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 916—*Stevens v. Wadleigh*, 6 Ariz. 359, 57 Pac. 622—*Cummings v. Baker*, 16 App. D. C. 13—*Wagenhurst v. Wineland*, 22 App. D. C. 363—*Green v. Thornton*, 130 Cal. 485, 62 Pac. 750—*Garden City v. Merchants' & F. Nat. Bank*, 65 Kan. 348, 93 Am. St. Rep. 284, 69 Pac. 325—*Adams v. Yazoo & M. Valley R. Co.* 77 Miss. 265, 60 L.R.A. 84, 24 So. 200—*Lowenthal v. Baca*, 10 N. M. 361, 62 Pac. 982—*Territory ex rel. Jones v. Hopkins*, 9 Okla. 149, 59 Pac. 976—*McMichael v. McFalls*, 23 Pa. Super. Ct. 260—*McMichael v. McFalls*, 20 Lanc. L. Rev. 894—*Hanrick v. Gurley*, 93 Tex. 479, 55 S. W. 119—*Ingram v. Ingram*, 75 Vt. 394, 56 Atl. 5—*Blern v. Ray*, 49 W. Va. 135, 38 S. E. 530—*Grunert v. Spalding*, 104 Wis. 214, 78 N. W. 606.

477. Although a former suit about the same subject-matter as a later one may not operate strictly as *res judicata*, yet it may well be referred to when it was heard on the scene of the transaction complained of, and when it relates to a transaction forty years old, as an element by which a conclusion as a later day in accordance with its result may be assisted. *Hume v. Beale* (*Crosby v. Beale*) 17 Wall. 336, 21: 602
Cited in *Farish v. New Mexico Min. Co.* 5 N. M. 287, 21 Pac. 654.

478. A decree in equity, by consent of parties and upon a compromise between them, is a bar to a subsequent suit upon a claim therein set forth as among the matters compromised and settled, although not in fact litigated in the suit in which the decree was rendered. *Nashville, C. & St. L. R. Co. v. United States*, 113 U. S. 261, 5 Sup. Ct. Rep. 460, 28: 971
Cited in *Kelley v. Milan*, 127 U. S. 160, 32 L. ed. 85, 8 Sup. Ct. Rep. 1101—*Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 692, 39 L. ed. 863, 15 Sup. Ct. Rep. 733—*Blount v. United States*, 21 Ct. Cl. 278—*Sowle v. United States*, 38 Ct. Cl. 532—*Salinas v. Stillman*, 14 C. C. A. 54, 30 U. S. App. 40, 66 Fed. 680—*Eustis v. Henrietta*, 20 C. C. A. 538, 41 U. S. App. 182, 74 Fed. 578—*Adler*

v. Van Kirk Land & Constr. Co. 114 Ala. 561.
62 Am. St. Rep. 133, 21 So. 490—Howard v.
Huron, 6 S. D. 188, 26 L.R.A. 501, 60 N. W.
803—Bigley v. Watson, 98 Tenn. 337, 38
L.R.A. 680, 39 S. W. 525—Sale v. Elchberg,
105 Tenn. 347, 52 L.R.A. 898, 59 S. W. 1020
—Wilson v. Schaefer, 107 Tenn. 334, 64 S.
W. 208—Johnston v. Osment, 108 Tenn. 36,
65 S. W. 23.

479. Where a party has a choice of remedies for a wrong done, selects one, proceeds to judgment, and reaps the fruit of his judgment, he cannot afterwards proceed in another suit for the same cause of action. Kendall v. Stokes, 3 How. 87, 11: 506
Cited in Kilham v. Wilson, 50 C. C. A. 463, 112 Fed. 573—Savage v. French, 13 Ill. App. 22—Fisher v. Brown, 111 Ill. App. 491—Porter v. Mack, 50 W. Va. 592, 40 S. E. 459.

480. A decision in favor of certain claims approved by the district court, on the ground that such approval threw the burden of proof against him on the government, without passing on the legality of the separate item, is not *res judicata* as to the validity of similar items in another case. Dennison v. United States, 168 U. S. 241, 18 Sup. Ct. Rep. 57, 42: 453
Cited in St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co. 32 C. C. A. 287, 60 U. S. App. 675, 89 Fed. 651.

Scope of former judgment.

Presumptions, see Evidence, 551a.

See also *infra*, 554, 584, 602.

481-2. For the purpose of ascertaining the subject-matter of a controversy, and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined. Washington Gas-light Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. Rep. 564, 40: 712
Cited in Belleville & St. L. R. Co. v. Leathe, 28 C. C. A. 281, 53 U. S. App. 718, 84 Fed. 105—Grunert v. Spalding, 104 Wis. 214, 78 N. W. 606.

483. The circuit court may properly determine the questions raised by a bill filed therein to be *res judicata*, where, in a preceding action instituted in the district court by the same petitioners, against the same defendant, judgment was rendered generally for the defendant. Fourniquet v. Perkins, 7 How. 160, 12: 650
Cited in Spicer v. United States, 5 Ct. Cl. 52—Bush v. Glover, 47 Ala. 174.

484. The rule of the common law, that a judgment against one upon a joint contract is a bar to an action against any others, is changed by the statute of Michigan, which makes such judgment evidence against those not served only as to the amount of the debt, but not as to the fact of liability, and which permits them to be subsequently sued upon the original demand. Mason v. El-dred, 6 Wall. 231, 18: 783

485. A decision that an agreement with a city respecting a lottery was valid when made is not *res judicata* as to the validity of a subsequent provision of the Constitution or statutes prohibiting all lotteries.

Douglas v. Kentucky, 168 U. S. 488, 15 Sup. Ct. Rep. 199, 42: 553
Cited in St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co. 32 C. C. A. 287, 60 U. S. App. 675, 89 Fed. 651.

2. Matters Pleaded or Involved.

Extrinsic Evidence as to Matters Decided, see Evidence, 1724-1736.

Pleadings as Evidence of Issues Litigated, see Evidence, 1728.

See also *supra*, 296, 297, 300, 342; *infra*, 527, 551, 574-576, 592, 593, 707; Estoppel, 278.

486. A judgment rendered, while it remains in force, is conclusive of all the facts properly pleaded by the plaintiffs. Washington, A. & G. Steam Packet Co. v. Sickles, 24 How. 333, 16: 650

487. A judgment is conclusive only so far as it determines matters which, by the pleadings, are put in issue. Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35: 464

Cited in Hovey v. Elliott, 167 U. S. 445, 42 L. ed. 230, 17 Sup. Ct. Rep. 841—Clarke v. Clarke, 178 U. S. 195, 44 L. ed. 1033, 20 Sup. Ct. Rep. 873—Glimer v. Billings, 55 Fed. 781—Compton v. Jesup, 15 C. C. A. 429, 31 U. S. App. 488, 68 Fed. 295—Jonathan Mills Mfg. Co. v. Whitehurst, 19 C. C. A. 137, 37 U. S. App. 664, 72 Fed. 503—Shinney v. North American Sav. Loan & Bldg. Co. 97 Fed. 11—Wells v. American Mortg. Co. 123 Ala. 426, 26 So. 301—McGhee v. Willis, 134 Ala. 291, 32 So. 301—Newman v. Bullock, 23 Colo. 223, 47 Pac. 379—Hume v. Robinson, 23 Colo. 361, 47 Pac. 271—Venner v. Denver Union Water Co. 15 Colo. App. 503, 63 Pac. 1061—Slack v. Perrine, 9 App. D. C. 176—Gille v. Emmons, 58 Kan. 120, 62 Am. St. Rep. 609, 48 Pac. 569—Blitzer v. Mercke, 111 Ky. 315, 63 S. W. 771—Consolidated Electric Storage Co. v. Atlantic Trust Co. 50 N. J. Eq. 97—Forman v. Manley, 52 N. J. Eq. 716, 29 Atl. 434—House v. Lockwood, 137 N. Y. 268, 33 N. E. 595—Stokes v. Foote, 172 N. Y. 342, 65 N. E. 170—National Foundry & Pipe Works v. Oconto City Water Supply Co. 105 Wis. 67, 81 N. W. 1113.

488. A prior judgment, in all respects regular, is conclusive in a later action between the same parties on a different claim as to the particular ground in controversy in the prior action, and binding by way of estoppel as to every fact necessarily determined by it. Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 15 Sup. Ct. Rep. 733, 39: 859
Cited in First Nat. Bank v. Covington, 129 Fed. 795.

489. A judgment, if admissible in evidence at all, is conclusive of the matters in issue and actually determined by it, although it is not pleaded. Southern P. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. Rep. 18, 42: 355
Cited in United States v. Bliss, 172 U. S. 326, 43 L. ed. 464, 19 Sup. Ct. Rep. 216—Brady v. Daly, 175 U. S. 159, 44 L. ed. 114, 20 Sup. Ct. Rep. 62—Overby v. Gordon, 13 App. D. C. 407.

490. A court possessing jurisdiction has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. *Peck v. Jenness*, 7 How. 612.

12: 841

Cited in *Carroll v. Carroll*, 16 How. 287, 14 L. ed. 941—*Lockhard v. Asher Lumber Co.* 123 Fed. 502—*Alexander v. Worthington*, 5 Md. 503n—*Thomas v. Flint*, 123 Mich. 20, 47 L.R.A. 503, 81 N. W. 936—*Griffin v. Woolford*, 100 Va. 478, 41 S. E. 949—*State ex rel. Drake v. Doyle*, 40 Wis. 190, 22 Am. Rep. 692.

491. Where a court having complete jurisdiction of a case has pronounced a decree upon a certain issue, such issue cannot be retried in a collateral action, although the evidence upon which the case was heard is in the record. *Franklin County v. German Sav. Bank*, 142 U. S. 93, 12 Sup. Ct. Rep. 147, 35: 948
Cited in *Le More v. United States*, 35 Ct. Cl. 13—*Southern Minnesota Railway Extension Co. v. St. Paul & S. R. Co.* 5 C. C. A. 255, 12 U. S. App. 320, 55 Fed. 695—*Skinner v. Franklin County*, 6 C. C. A. 121, 9 U. S. App. 676, 56 Fed. 785—*Clay v. Deskins*, 11 C. C. A. 231, 8 U. S. App. 661, 63 Fed. 332—*Austin v. Hamilton County*, 22 C. C. A. 131, 46 U. S. App. 260, 76 Fed. 211—*Lake County v. Platt*, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 572—*Union Bank v. Oxford*, 90 Fed. 13—*Manhattan Trust Co. v. Sioux City & N. R. Co.* 102 Fed. 713—*Rio Grande County v. Burpee*, 24 Colo. 59, 48 Pac. 539—*Grand County v. People*, 16 Colo. App. 246, 64 Pac. 675—*Chicago, K. & W. R. Co. v. Anderson County*, 47 Kan. 767, 29 Pac. 96—*Becker v. Cherry Creek*, 77 Hun. 18, 28 N. Y. Supp. 279.

492. A reduction of rents will not be decreed by a court of equity, after judgment at law for the rents. *Sheets v. Selden*, 7 Wall. 416, 19: 166

493-4. A judgment against a lessor in an action for rent, the only issue being that of fraud in procuring the lease, bars a subsequent action on the same lease. *Milne v. Deen* (*Wilson v. Deen*) 121 U. S. 525, 7 Sup. Ct. Rep. 1004, 30: 980

Cited in *Re Sawyer*, 124 U. S. 231, 31 L. ed. 414, 8 Sup. Ct. Rep. 482—*Neal v. Foster*, 36 Fed. 33—*Eagle Mfg. Co. v. David Bradley Mfg. Co.* 50 Fed. 195—*David Bradley Mfg. Co. v. Eagle Mfg. Co.* 6 C. C. A. 671, 18 U. S. App. 349, 57 Fed. 990—*Lawrence v. Stearns*, 79 Fed. 882—*Stearns v. Lawrence*, 28 C. C. A. 70, 54 U. S. App. 532, 83 Fed. 742—*St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co.* 32 C. C. A. 289, 60 U. S. App. 675, 89 Fed. 653—*Norton v. Jensen*, 33 C. C. A. 147, 61 U. S. App. 291, 90 Fed. 421—*Re Henry Ulfelder Clothing Co.* 98 Fed. 412—*Kilham v. Wilson*, 50 C. C. A. 463, 112 Fed. 573—*City Trust, S. D. & Surety Co. v. Glencove Granite Co.* 51 C. C. A. 141, 113 Fed. 179—*Shepard v. Stockham*, 45 Kan. 249, 25 Pac. 559—*Schmidt v. Louisville, C. & L. R. Co.* 99 Ky. 152, 35 S. W. 135—*Clark Thread Co. v. William Clark Co.* 55 N. J. Eq. 663, 37 Atl. 599—*Philadelphia v. Ridge Ave. R. Co.* 142 Pa. 493, 24 Am. St. Rep. 512, 21 Atl. 982—*Bell v. Allegheny County*, 184 Pa. 302, 63 Am. St. Rep. 795, 39 Atl. 227—*Everill v. Swan*, 20 Utah. 64, 57 Pac. 716—*Washington, O. & W. R. Co. v. Cazenove*, 83 U. S. Dig.—229

Va. 753, 3 S. E. 433—*Shumate v. Fauquier County*, 84 Va. 577, 5 S. E. 570.

495. In a suit upon a sheriff's bond in Alabama, charging omission to levy upon goods or to sell them after levy, a plea that, at the return of the execution, a suggestion was made that the money might have been collected with due diligence, and thereupon an issue was formed, and a verdict given for the sheriff, is good. Omission to levy upon goods or to sell them after levy fell directly within the issue, and the judgment thereon is conclusive. *Chapman use of Leavitt v. Smith*, 16 How. 114.

14: 868

Cited in *Walker v. Fuller*, 29 Ark. 465—Irion v. Bexar County, 26 Tex. Civ. App. 529, 63 S. W. 550.

496. Where the questions presented by new pleadings in the circuit court after removal from a state court are in all respects the same as those settled by the supreme court of the state, the parties are concluded by its decree. *Duncan v. Gegan*, 101 U. S. 810, 25: 875

Cited in *Kipp v. Burton*, 29 Mont. 102, 63 L. R. A. 328, 101 Am. St. Rep. 544, 74 Pac. 85.

Different demand.

Taxes for Different Years, see *infra*, 653-655, 657, 658.

See also *infra*, 559-561, 572, 587, 589, 596, 597.

497. A judgment upon the merits constitutes a bar to a subsequent action between the same parties upon the same claim or demand. *Davis v. Brown*, 94 U. S. 423, 24: 204

498. Where the second action between the same parties is upon a different claim or demand, judgment is the prior action is an estoppel only as to matters in issue or points controverted upon which the finding or verdict was rendered. *Cromwell v. Sac County*, 94 U. S. 351, 24: 195
Davis v. Brown, 94 U. S. 423, 24: 204
Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. Rep. 592, 38: 450
Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. Rep. 72, 36: 972
Nesbitt v. Independent District, 144 U. S. 610, 12 Sup. Ct. Rep. 746, 36: 562
Distinguished in *Wiese v. San Francisco Musical Soc.* 82 Cal. 646, 7 L.R.A. 583, 23 Pac. 212.

Cited in *Mason Lumber Co. v. Buchtel*, 101 U. S. 639, 25 L. ed. 1074—*Stewart v. Lansing*, 104 U. S. 510, 26 L. ed. 868—*Enfield v. Jordan*, 119 U. S. 691, 30 L. ed. 528, 7 Sup. Ct. Rep. 358—*Wilson v. Deen* (*Milne v. Deen*) 121 U. S. 532, 30 L. ed. 981, 7 Sup. Ct. Rep. 1004—*Blissell v. Spring Valley Twp.* 124 U. S. 231, 31 L. ed. 414, 8 Sup. Ct. Rep. 495—*Nesbitt v. Independent District*, 144 U. S. 618, 36 L. ed. 565, 12 Sup. Ct. Rep. 746—*Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 302, 36 L. ed. 981, 13 Sup. Ct. Rep. 72—*McComb v. Frink*, 149 U. S. 641, 37 L. ed.

881, 18 Sup. Ct. Rep. 993—Keokuk & W. R. Co. v. Missouri, 152 U. S. 315, 38 L. ed. 456, 14 Sup. Ct. Rep. 592—Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 688, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—New Orleans v. Citizens' Bank, 167 U. S. 400, 42 L. ed. 212, 17 Sup. Ct. Rep. 905—Fayerweather v. Ritch, 195 U. S. 300, 49 L. ed. 210, 25 Sup. Ct. Rep. 58—Burwell v. United States, 22 Ct. Cl. 97—Maine v. United States, 36 Ct. Cl. 554—Alexander v. Knox, 6 Sawy. 59, Fed. Cas. No. 170—American Diamond Rock Boring Co. v. Sheldon, 17 Blatchf. 211, 4 Bann. & Ard. 553, Fed. Cas. No. 296—Anderson v. Gerding, 3 Woods, 490, Fed. Cas. No. 356—First Nat. Bank v. Bennington, 16 Blatchf. 54, Fed. Cas. No. 4807—Re Van Buren, 2 Fed. 648—Radford v. Folsom, 3 Fed. 202—Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 408—The Tubal Cain, 9 Fed. 837—Clark v. Blair, 4 McCrary, 313, 14 Fed. 814—Hunt v. Mercantile Ins. Co. 22 Fed. 505—Snell v. Campbell, 24 Fed. 882—Geneva Nat. Bank v. Independent School District, 25 Fed. 631—Nesbitt v. Independent School District, 25 Fed. 637—Sharon v. Hill, 26 Fed. 345—Steam Gauge & Lantern Co. v. Meyrose, 27 Fed. 215—Oregon R. Co. v. Oregon R. & Nav. Co. 28 Fed. 509—Laird v. De Soto, 32 Fed. 652—Gilmer v. Morris, 35 Fed. 687—Snyder v. McComb, 39 Fed. 300—Keator v. St. John, 42 Fed. 586—Bailey v. Sundberg, 43 Fed. 82—Russell & Co. v. Lamb, 49 Fed. 771—Fessenden v. Barrett, 50 Fed. 691—Brusie v. Peck Bros. & Co. 4 C. C. A. 599, 14 U. S. App. 21, 54 Fed. 822—Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co. 5 C. C. A. 254, 12 U. S. App. 320, 55 Fed. 695—Baltimore & O. R. Co. v. Pittsburgh, C. & St. L. R. Co. 55 Fed. 703—Gilmer v. Billings, 55 Fed. 782—Bennett v. Glenn, 5 C. C. A. 355, 8 U. S. App. 419, 55 Fed. 957—Skinner v. Franklin County, 6 C. C. A. 121, 9 U. S. App. 676, 56 Fed. 786—Detroit v. Detroit City R. Co. 56 Fed. 893—David Bradley Mfg. Co. v. Eagle Mfg. Co. 6 C. C. A. 669, 18 U. S. App. 349, 57 Fed. 988—Mack v. Levy, 59 Fed. 470—De Chambrun v. Schermerhorn, 59 Fed. 508—Mack v. Levy, 60 Fed. 753—St. Joseph & G. I. R. Co. v. Steele, 11 C. C. A. 475, 27 U. S. App. 436, 63 Fed. 871—Compton v. Jesup, 15 C. C. A. 430, 31 U. S. App. 486, 68 Fed. 296—Equitable Trust Co. v. Smith, 23 C. C. A. 399, 46 U. S. App. 561, 77 Fed. 681—Lake County v. Platt, 25 C. C. A. 91, 49 U. S. App. 216, 79 Fed. 571—Chicago, R. I. & P. R. Co. v. St. Joseph Union Depot Co. 92 Fed. 25—New Dunderberg Min. Co. v. Old, 38 C. C. A. 92, 97 Fed. 153—Lake County v. Sutcliffe, 38 C. C. A. 171, 97 Fed. 274—Hill v. Phelps, 41 C. C. A. 572, 101 Fed. 653—Linton v. National L. Ins. Co. 44 C. C. A. 57, 104 Fed. 587—James v. Germania Iron Co. 46 C. C. A. 496, 107 Fed. 617—Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 644, 107 Fed. 787—Mercantile Nat. Bank v. Lander, 109 Fed. 25—Union & Planters' Bank v. Memphis, 49 C. C. A. 464, 111 Fed. 570—McIntosh v. Pittsburgh, 112 Fed. 707—United States ex rel. Coffman v. Norfolk & W. R. Co. 114 Fed. 687—Eastern Bldg. & L. Asso. v. Welling, 116 Fed. 105—Etna L. Ins. Co. v. Hamilton County, 54 C. C. A. 470, 117 Fed. 84—Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson, 130 Fed. 165—Georgia R. & Bkg. Co. v. Wright, 132 Fed. 917—Rankin v. Big Rapids, 66 C. C. A. 571, 133 Fed. 673—Oman v. Bedford-Bowling Green Stone Co. 67 C. C. A. 195, 134 Fed. 69—Bedford-Bowling Green Stone Co. v. Oman, 134 Fed.

453—United States Min. Co. v. Lawson, 67 C. C. A. 594, 134 Fed. 776—Crowder v. Red Mountain Min. Co. 127 Ala. 260, 29 So. 847—McGrantt v. Baggett, 128 Ala. 485, 29 So. 199—Dobson v. Hurley, 129 Ala. 382, 30 So. 598—Roth v. Merchants' & P. Bank, 70 Ark. 204, 91 Am. St. Rep. 80, 66 S. W. 918—Lillis v. Emigrant Ditch Co. 95 Cal. 560, 30 Pac. 1108—Freeman v. Barnum, 131 Cal. 389, 82 Am. St. Rep. 355, 63 Pac. 691—Clark v. Knox, 32 Colo. 355, 76 Pac. 372—Fuller v. Metropolitan L. Ins. Co. 68 Conn. 64, 57 Am. St. Rep. 84, 35 Atl. 766—Fahey v. Esterley Mach. Co. 3 N. D. 223, 44 Am. St. Rep. 554, 55 N. W. 530—Howard v. Huron, 6 S. D. 183, 26 L.R.A. 499, 60 N. W. 803—Noyes v. Belding, 6 S. D. 632, 62 N. W. 953—Pitts v. Oliver, 13 S. D. 566, 79 Am. St. Rep. 907, 83 N. W. 591—Strong v. Grant, 2 Mackey, 222—Slack v. Perrine, 9 App. D. C. 155—Brady v. Pryor, 69 Ga. 697—Price v. Carlton, 121 Ga. 20, 68 L.R.A. 749, 48 S. E. 721—Riverside Co. v. Townshend, 120 Ill. 18, 9 N. E. 65—Chicago v. Cameron, 120 Ill. 459, 11 N. E. 899—Louisville, N. A. & C. R. Co. v. Carson, 169 Ill. 251, 48 N. E. 402—Smith v. Rountree, 185 Ill. 224, 56 N. E. 1130—Chicago Theological Seminary v. People, 189 Ill. 443, 59 N. E. 977—Baldwin v. Haney, 204 Ill. 288, 68 N. E. 360—Stone v. Sallsbury, 209 Ill. 65, 70 N. E. 605—Ryan v. Potwin, 62 Ill. App. 140—Cleveland v. Creviston, 93 Ind. 33, 47 Am. Rep. 367—Gates v. Newman, 18 Ind. App. 408, 46 N. E. 654—Hahn v. Miller, 68 Iowa, 749, 28 N. W. 51—Madison v. Garfield Coal Co. 114 Iowa, 63, 86 N. W. 41—Shepard v. Stockham, 45 Kan. 249, 25 Pac. 559—Stroup v. Pepper, 69 Kan. 245, 76 Pac. 825—Jones v. Commercial Bank, 78 Ky. 424—Schuster v. White, 106 Ky. 320, 50 S. W. 242—Newport v. Com. 106 Ky. 445, 45 L.R.A. 521, 50 S. W. 845, 51 S. W. 433—Conery v. New Orleans Waterworks Co. 41 La. Ann. 944, 7 So. 8—Police Jury v. Police Jury, 49 La. Ann. 1335, 22 So. 376—Watts v. Watts, 160 Mass. 465, 23 L. R.A. 188, 39 Am. St. Rep. 509, 36 N. E. 479—Adams v. Adams, 25 Minn. 77—Adams v. Yazoo & M. Valley R. Co. 77 Miss. 265, 60 L.R.A. 84, 24 So. 200—State ex rel. National Subway Co. v. St. Louis, 145 Mo. 500, 42 L.R.A. 127, 46 S. W. 981—Garland v. Smith, 164 Mo. 22, 64 S. W. 188—Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 442, 74 S. W. 979—Dawson v. Quillen, 61 Mo. App. 678—Barkhoefer v. Barkhoefer, 93 Mo. App. 382, 67 S. W. 674—Gapen v. Bretternitz, 31 Neb. 304, 47 N. W. 918—Slater v. Skirving, 51 Neb. 115, 66 Am. St. Rep. 444, 70 N. W. 493—Metcalf v. Gilmore, 63 N. H. 190—Patrick v. Shaffer, 94 N. Y. 430—Hymes v. Estey, 116 N. Y. 509, 15 Am. St. Rep. 421, 22 N. E. 1087—Lewis v. Ocean Nav. & Pier Co. 125 N. Y. 348, 28 N. E. 301—Boyd v. Boyd, 53 App. Div. 160, 65 N. Y. Supp. 859—Cohoes v. Morrison, 42 Hun, 220—Robinson v. New York, L. E. & W. R. Co. 64 Hun, 45, 18 N. Y. Supp. 728—Cahnmann v. Metropolitan Street R. Co. 37 Misc. 477, 75 N. Y. Supp. 970—Brunhild v. Freeman, 80 N. C. 214—Debnam v. Chitty, 131 N. C. 681, 43 S. E. 3—Hixson v. Ogg, 53 Ohio St. 367, 42 N. E. 32—Applegate v. Dowell, 15 Or. 524, 16 Pac. 651—Nickum v. Burckhardt, 30 Or. 473, 60 Am. St. Rep. 822, 47 Pac. 788—White v. Ladd, 41 Or. 332, 93 Am. St. Rep. 732, 68 Pac. 739—La Follett v. Mitchell, 42 Or. 472, 95 Am. St. Rep. 780, 69 Pac. 916—Moorehouse v. Moorehouse, 7 Pa. Super. Ct. 289—Philadelphia v. Ridge Ave. R. Co. 142 Pa. 494, 24 Am. St. Rep. 512, 21 Atl. 982—Randall v. Carpenter, 25 E. I. 642, 57 Atl. 865—Willoughby v.

Northeastern R. Co. 52 S. C. 175, 29 S. E. 629—State v. Bank of Commerce, 95 Tenn. 222, 31 S. W. 993—Union & Planters' Bank v. Memphis, 101 Tenn. 168, 46 S. W. 557—Hanrick v. Gurley, 93 Tex. 479, 55 S. W. 119—Cook v. Carroll Land & Cattle Co. 8 Tex. Civ. App. 330, 25 S. W. 1034—Houston v. Walsh, 27 Tex. Civ. App. 125, 66 S. W. 106—Harrison v. Wallton (Harrison v. Turnbull) 95 Va. 724, 41 L.R.A. 706, 64 Am. St. Rep. 830, 30 S. E. 372—Blern v. Ray, 49 W. Va. 134, 38 S. E. 530—Wentworth v. Racine County, 99 Wis. 32, 74 N. W. 551—Grunert v. Spalding, 104 Wis. 214, 78 N. W. 606—Hart v. Moulton, 104 Wis. 353, 78 Am. St. Rep. 881, 80 N. W. 599—Fordyce v. State, 115 Wis. 616, 92 N. W. 430.

499. The estoppel of a judgment does not depend upon the question whether or not there is the same demand in both cases but it exists even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. Rep. 905,

42: 202

Cited in Southern P. R. Co. v. United States, 168 U. S. 51, 42 L. ed. 378, 18 Sup. Ct. Rep. 18—Werlein v. New Orleans, 177 U. S. 396, 44 L. ed. 820, 20 Sup. Ct. Rep. 682—Southern P. R. Co. v. United States, 183 U. S. 528, 46 L. ed. 312, 22 Sup. Ct. Rep. 154—Illinois v. Illinois C. R. Co. 184 U. S. 92, 46 L. ed. 447, 22 Sup. Ct. Rep. 300—Lander v. Mercantile Nat. Bank, 186 U. S. 470, 46 L. ed. 1254, 22 Sup. Ct. Rep. 908—Reynolds v. Ritch, 195 U. S. 301, 49 L. ed. 211, 25 Sup. Ct. Rep. 58—Norton v. House of Mercy, 41 C. C. A. 400, 101 Fed. 886—First Nat. Bank v. Covington, 103 Fed. 529—Los Angeles City Water Co. v. Los Angeles, 103 Fed. 716—Mercantile Nat. Bank v. Hubbard, 45 C. C. A. 77, 105 Fed. 820—Estill County v. Embury, 50 C. C. A. 576, 112 Fed. 885—Eastern Bldg. & L. Assn. v. Welling, 116 Fed. 105—Soderberg v. Armstrong, 116 Fed. 711—Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson, 130 Fed. 165—Re Drumgoole, 140 Fed. 210—Reynolds v. Lyon County, 121 Iowa, 743, 96 N. W. 1096—Adams v. Yazoo & M. Valley R. Co. 77 Miss. 265, 60 L.R.A. 84, 24 So. 200—State ex rel. Smyth v. Kennedy, 60 Neb. 305, 83 N. W. 87—State ex rel. Wright v. Savage, 64 Neb. 700, 90 N. W. 898—Hearst v. Putnam Min. Co. 28 Utah, 200, 66 L.R.A. 791, 107 Am. St. Rep. 698, 77 Pac. 753—Blern v. Ray, 49 W. Va. 135, 38 S. E. 530—St. Lawrence Boom & Mfg. Co. v. Holt, 51 W. Va. 372, 41 S. E. 351.

500. A prior judgment on a different claim or demand is not conclusive as to matters not in issue or not controverted in that action. *Roberts v. Northern P. R. Co.* 158 U. S. 1, 15 Sup. Ct. Rep. 756, 39: 873

Cited in Empire State Nail Co. v. American Solid Leather Button Co. 21 C. C. A. 155, 33 U. S. App. 522, 74 Fed. 868—Columb v. Webster Mfg. Co. 43 L.R.A. 197, 28 C. C. A. 226, 50 U. S. App. 264, 84 Fed. 594—Crockett v. Miller, 50 C. C. A. 449, 112 Fed. 732—Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson, 130 Fed. 165—Bedford-Bowling Green Stone Co. v. Oman, 134 Fed. 453—United States Min. Co. v. Lawson, 67 C. C. A. 594, 134 Fed. 776—Willoughby v. Northeastern R. Co. 52 S. C. 175, 29 S. E. 629—

Rio Grande Western R. Co. v. Telluride Power Transmission Co. 23 Utah, 36, 63 Pac. 995.

501. Where two suits, though seeking the same relief, rest upon a different state of facts, the adjudication in the one constitutes no bar to a recovery in the other. *Mobile County v. Kimball*, 102 U. S. 691,

26: 238

Cited in Alexander v. Bryan, 110 U. S. 420, 28 L. ed. 197, 4 Sup. Ct. Rep. 107—Cunningham v. Cleveland, 39 C. C. A. 215, 98 Fed. 661—Robinson v. American Car & Foundry Co. 68 C. C. A. 334, 135 Fed. 696—Epstein v. Ferst, 35 Fla. 510, 17 So. 414—State v. Sunapee Dam Co. 72 N. H. 123, 55 Atl. 899—Hazen v. Lyndonville Nat. Bank, 70 Vt. 550, 67 Am. St. Rep. 680, 41 Atl. 1046—Newberry v. Ruffin, 102 Va. 76, 45 S. E. 733.

502. When an action at law for breach of a contract to invest in stocks fails because it appears that the investment was made and a declaration of trust given in respect to the stock so purchased, the judgment in such action is not a bar to a suit in equity for a breach of the trust. *McComb v. Frink*, 149 U. S. 629, 13 Sup. Ct. Rep. 993,

37: 876

Cited in David Bradley Mfg. Co. v. Eagle Mfg. Co. 6 C. C. A. 671, 18 U. S. App. 349, 57 Fed. 990.

503. The judgment in a suit brought upon a certain written agreement for services performed in relation to business of a commercial character, wherein one claim was disallowed because the services were performed after the termination of the contract and the completion of the business covered by it, and the disallowance was affirmed by the Supreme Court, is conclusive that that claim was not within the agreement, and is not a bar to an action brought for the services performed under that claim on an implied promise to pay. *Goddard v. Foster*, 17 Wall. 123, 21: 589

504. A judgment sustaining a demurrer to the petition in an action by a creditor of a national bank against the directors, because the court was of the opinion that the petition only stated a right to recover for violations of the national bank act, causing damage to the bank as such, the right to recover for which was an asset of the bank, enforceable only by its receiver, is not a bar to a recovery in another action between the same parties under a petition which sets up a right to recover for the individual loss suffered, as distinct from the right of the bank. *Yates v. Utica Bank*, 206 U. S. 181, 27 Sup. Ct. Rep. 646,

51: 1015

505. Where a court has required complainants to proceed upon one only of two causes or grounds for relief alleged in the complaint, the court left the other cause open for a future suit. *Stark v. Starr*, 94 U. S. 477,

24: 276

Cited in Huntington v. Palmer, 7 Sawy. 356, 8 Fed. 450.

506. A decree does not bar a suit for a different cause of action arising afterward.

Chapman v. Crane (Chapman v. Goodnow) 123 U. S. 540, 8 Sup. Ct. Rep. 211, 31: 235

507. In covenant for instalments of rent not due when a former suit was instituted, and which were not included in it in any stage of the proceeding, the plea of former recovery is no bar. *Cross v. United States*, 14 Wall. 479, 20: 721

Questions collaterally considered.

508. The rule as to the conclusiveness of a judgment or decree of a court of competent jurisdiction does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree. *Hopkins v. Lee*, 6 Wheat. 109, 5: 218

Cited in *Gaines v. Hennen*, 24 How. 579, 18 L. ed. 779—*Dowell v. Applegate*, 152 U. S. 344, 38 L. ed. 470, 14 Sup. Ct. Rep. 611—*Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 887, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—*New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Burwell v. United States*, 22 Ct. Cl. 97—*Putnam v. New Albany*, 4 Blas. 383, Fed. Cas. No. 11,481—*Society for Propagation of Gospel v. Hartland*, 2 Paine, 542, Fed. Cas. No. 13,155—*Warner v. Brinton*, Fed. Cas. No. 17,179—*Woodland v. Newhall*, 31 Fed. 437—*Morris v. Bartlett*, 47 C. C. A. 581, 108 Fed. 678—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 917—*Phillips v. Thompson*, 3 Stew. & P. (Ala.) 379—*Davidson v. Dallas*, 15 Cal. 84—*Lillis v. Emigrant Ditch Co.* 95 Cal. 559, 30 Pac. 1108—*Betts v. Starr*, 5 Conn. 553, 13 Am. Dec. 94—*Evans v. Birge*, 11 Ga. 272—*Davis v. Millandon*, 17 La. Ann. 104, 87 Am. Dec. 517—*Ridgley v. Stillwell*, 27 Mo. 132—*McCarthy v. Hillier*, 26 App. Div. 592, 50 N. Y. Supp. 626—*Edwards v. Stewart*, 15 Barb. 69—*Western Min. & Mfg. Co. v. Virginia Cannel Coal Co.* 10 W. Va. 284.

509. The validity of an entry of land is open for investigation although it was held invalid in a former suit, where the evidence is different, and the question is only collateral to the merits in the latter action, and a decision upon it can in no respect affect the rights settled in the former case. *Holmes v. Trout*, 7 Pet. 171, 8: 647

Questions necessarily involved.

Collateral Attack on, see *supra*, 369.

See also *supra*, 300; *infra*, 583, 614, 632, 634a.

510. A judgment is conclusive only upon a matter within the issue and necessarily involved in the decision. *Doe ex dem. McCall v. Carpenter*, 18 How. 297, 15: 389 *Cited in* *Russell & Co. v. Lamb*, 49 Fed. 771—*Ohio River R. Co. v. Fisher*, 53 C. C. A. 418, 115 Fed. 936—*Eastern Bldg. & L. Asso. v. Weiling*, 116 Fed. 105—*District of Columbia v. Hutchinson*, 1 App. D. C. 408—*Bleber v. Fechheimer*, 9 App. D. C. 557.

511. If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions

between the parties. *Washington, A. & G. Steam Packet Co. v. Sickles*, 5 Wall. 580, 18: 550

Cited in *Wilson v. Deen* (*Milne v. Deen*) 121 U. S. 534, 30 L. ed. 982, 7 Sup. Ct. Rep. 1004—*Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 410, 35 L. ed. 1061, 12 Sup. Ct. Rep. 188—*Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 887, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—*New Orleans v. Citizens Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Southern P. R. Co. v. United States*, 168 U. S. 51, 42 L. ed. 378, 18 Sup. Ct. Rep. 18—*Williams v. United States*, 26 Ct. Cl. 142—*Adams v. United States*, 33 Ct. Cl. 414—*Maine v. United States*, 36 Ct. Cl. 553—*Woodland v. Newhall*, 31 Fed. 437—*Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co.* 5 C. C. A. 255, 12 U. S. App. 320, 55 Fed. 696—*Thompson v. N. T. Bushnell Co.* 80 Fed. 333—*Truman v. Carvill Mfg. Co.* 87 Fed. 473—*Ohio River R. Co. v. Fisher*, 53 C. C. A. 418, 115 Fed. 936—*Soderberg v. Armstrong*, 116 Fed. 711—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 917—*Chapman v. Hughes*, 134 Cal. 655, 60 Pac. 974—*Solly v. Clayton*, 12 Colo. 43, 20 Pac. 351—*Supples v. Cannon*, 44 Conn. 429—*Damon v. Denny*, 54 Conn. 256, 7 Atl. 409—*Sargent & Co. v. New Haven S. B. Co.* 65 Conn. 126, 31 Atl. 543—*Lake v. Hancock*, 38 Fla. 63, 56 Am. St. Rep. 159, 20 So. 811—*State ex rel. Combs v. Hudson*, 37 Ind. 202—*Felton v. Smith*, 88 Ind. 157, 45 Am. Rep. 454—*McBurnie v. Seaton*, 111 Ind. 59, 12 N. E. 101—*Dygert v. Dygert*, 4 Ind. App. 281, 29 N. E. 490—*Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 640—*Goodnow v. Litchfield*, 59 Iowa, 231, 9 N. W. 107—*Eckert v. Pickel*, 59 Iowa, 549, 13 N. W. 708—*Griffith v. Fields*, 105 Iowa, 366, 75 N. W. 325—*Hickerson v. Mexico*, 58 Mo. 65—*Campbell v. Rankin*, 2 Mont. 370—*Kleinschmidt v. Binzel*, 14 Mont. 56, 48 Am. St. Rep. 604, 35 Pac. 460—*Putnam v. Clark*, 34 N. J. Eq. 535—*Rowland v. Hobby*, 26 App. Div. 525, 50 N. Y. Supp. 629—*Stokes v. Foote*, 172 N. Y. 342, 65 N. E. 176—*Grubb's Appeal*, 62 Pa. 272—*Kille v. Ege*, 82 Pa. 111, 3 W. N. C. 447—*James v. Sterrett*, 137 Pa. 243, 20 Atl. 655—*Hart v. Bates*, 17 S. C. 43—*Ex parte Roberts*, 19 S. C. 158—*Ruff v. Doty*, 26 S. C. 177, 4 Am. St. Rep. 709, 1 S. E. 707—*Philipowski v. Spencer*, 63 Tex. 607—*Hanrick v. Gurley*, 93 Tex. 479, 55 S. W. 119—*Withers v. Sims*, 80 Va. 358—*Long v. Elsenbels*, 21 Wash. 28, 56 Pac. 933—*Brier v. Traders' Nat. Bank*, 24 Wash. 720, 64 Pac. 831—*State v. McEldowney*, 54 W. Va. 701, 47 S. E. 650.

512. Judgment upon the facts in issue, which appear upon the record either expressly or by necessary intendment, or which are shown *aliunde* to have been in issue, is conclusive upon parties and privies, as to such facts. *Chapman use of Leavitt v. Smith*, 16 How. 114, 14: 869 *Cited in* *Rosema v. Porter*, 112 Mich. 15, 70 N. W. 316—*Peay v. Salt Lake City*, 11 Utah, 341, 40 Pac. 206.

513. Although it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, that suit is not conclusive. *Washington, A. & G. Steam Packet Co. v. Sickles*, 5 Wall. 580, 18: 550

514. A judgment concludes the parties thereto and those in privity, not only as to every matter actually put in evidence to sustain or defeat the claim, but also as to any matter admissible to that end; and extends not only to the judgment itself, but to all facts involved in it and upon which it must have been founded. *United States ex rel. Harshman v. County Court* (Harshman v. County Court) 122 U. S. 306, 7 Sup. Ct. Rep. 1171, 30: 1152

Distinguished in *Taxing District v. Loague*, 129 U. S. 503, 32 L. ed. 783, 9 Sup. Ct. Rep. 327—*Loague v. Taxing District*, 36 Fed. 153.

Cited in *Knox County v. Ninth Nat. Bank*, 147 U. S. 94, 37 L. ed. 95, 13 Sup. Ct. Rep. 267—*New Orleans v. Citizens' Bank*, 167 U. S. 389, 42 L. ed. 208, 17 Sup. Ct. Rep. 905—*Wilder v. Rio Grande County*, 41 Fed. 514—*Fleming v. Trowsdale*, 29 C. C. A. 107, 54 U. S. App. 574, 85 Fed. 190—*Helena v. United States*, 43 C. C. A. 433, 104 Fed. 116—*Illicks v. Cleveland*, 45 C. C. A. 435, 106 Fed. 466—*Padgett v. Post*, 45 C. C. A. 490, 106 Fed. 602—*United States ex rel. Coffman v. Norfolk & W. R. Co.* 114 Fed. 687—*Glencove Granite Co. v. City Trust, S. D. & Surety Co.* 114 Fed. 980—*Howard v. Huron*, 6 S. D. 547, 26 L.R.A. 498, 59 N. W. 833—*Howard v. Huron*, 6 S. D. 184, 60 N. W. 803—*Manley v. Park*, 62 Kan. 564, 64 Pac. 28—*Shumate v. Fauquier County*, 84 Va. 578, 5 S. E. 570—*Stallcup v. Tacoma*, 13 Wash. 152, 52 Am. St. Rep. 25, 42 Pac. 541.

515. The questions which the case involves determine its character, whether those questions be made in the case or not. *Per Marshall, Ch. J. Osborn v. Bank of United States*, 9 Wheat. 738, 6: 204
Cited in *The Haytian Republic (United States v. The Haytian Republic)* 154 U. S. 128, 38 L. ed. 934, 14 Sup. Ct. Rep. 992—*Dowell v. Griswold*, 5 Sawy. 43, Fed. Cas. No. 4,041.

516. If, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence. *Russell v. Place*, 94 U. S. 606, 24: 214

Cited in *DeSollar v. Hanscome*, 158 U. S. 221, 39 L. ed. 959, 15 Sup. Ct. Rep. 816—*McCarthy v. Lehigh Valley R. Co.* 160 U. S. 120, 40 L. ed. 362, 16 Sup. Ct. Rep. 240—*New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Wood v. Ward*, Fed. Cas. No. 17,965—*Merchants' International S. B. Line v. Lyon*, 4 McCrary, 147, 12 Fed. 65—*Steam Gauge & Lantern Co. v. Meyrose*, 27 Fed. 213—*Woodland v. Newhall*, 31 Fed. 437—*Mack v. Levy*, 60 Fed. 753—*Empire State Nail Co. v. American Solid Leather Button Co.* 21 C. C. A. 154, 33 U. S. App. 522, 74 Fed. 867—*Lawrence v. Stearns*, 79 Fed. 882—*Union Mill & Min. Co. v. Dangberg*, 81 Fed. 116—*Southern P. Co. v. Earl*, 27 C. C. A. 188, 48 U. S. App. 716, 82 Fed. 693—*Belleville & St. L. R. Co. v. Leathe*, 28 C. C. A. 280, 53 U. S. App. 718, 84 Fed. 105—*Societe Anonyme du Filtre Chamberland Systeme Pasteur v. Allen*, 84 Fed. 816—*Norton v. Jensen*, 33 C. C. A. 147, 61 U. S. App. 291, 90 Fed. 421—*Whitaker v. Davis*, 91 Fed. 721—*Morris v. Bartlett*, 47 C. C. A. 581, 108 Fed. 678—*Soderberg v. Armstrong*, 116 Fed. 711—*Etna L. Ins. Co. v. Hamilton County*, 54 C. C. A. 470, 117 Fed. 84—*Sherbourne v. Wilcox & G. Sewing*

Mach. Co. 119 Fed. 372—*Wilcox & G. Sewing Mach. Co. v. Sherborne*, 59 C. C. A. 385, 123 Fed. 877—*First Nat. Bank v. Covington*, 129 Fed. 798—*Greenwood v. Warren*, 120 Ala. 78, 23 So. 686—*Wood v. Wood*, 134 Ala. 567, 33 So. 347—*Dawson v. Parham*, 55 Ark. 292, 18 S. W. 48—*Pillow v. King*, 55 Ark. 641, 18 S. W. 764—*McCoombs v. Wall*, 66 Ark. 344, 50 S. W. 876—*Roth v. Merchants' & P. Bank*, 70 Ark. 203, 91 Am. St. Rep. 80, 66 S. W. 918—*McCreery v. Fuller*, 63 Cal. 32—*Ferrea v. Chabot*, 63 Cal. 570—*Oakland v. Oakland Water Front Co.* 118 Cal. 223, 50 Pac. 277—*Graves v. Hebborn*, 125 Cal. 408, 58 Pac. 12—*Beronio v. Ventura County Lumber Co.* 129 Cal. 236, 79 Am. St. Rep. 118, 61 Pac. 958—*Fahey v. Esterley Mach. Co.* 3 N. D. 223, 44 Am. St. Rep. 554, 55 N. W. 580—*Howard v. Huron*, 6 S. D. 188, 26 L.R.A. 501, 60 N. W. 803—*Pitts v. Oliver*, 13 S. D. 567, 79 Am. St. Rep. 907, 83 N. W. 591—*Child v. McClosky*, 14 S. D. 188, 84 N. W. 769—*Brady v. Pryor*, 69 Ga. 697—*Sloan v. Price*, 84 Ga. 173, 20 Am. St. Rep. 354, 10 S. E. 601—*Stevens v. Stembbridge*, 104 Ga. 623, 31 S. E. 413—*Worth v. Carmichael*, 114 Ga. 701, 40 S. E. 797—*Palmer v. Sanger*, 143 Ill. 45, 32 N. E. 390—*Sawyer v. Nelson*, 160 Ill. 831, 43 N. E. 728—*Sawyer v. Nelson*, 59 Ill. App. 49—*Ryan v. Potwin*, 62 Ill. App. 140—*McFadden v. Ross*, 108 Ind. 517, 8 N. E. 161—*Dygart v. Dygart*, 4 Ind. App. 280, 29 N. E. 490—*John v. Farwell Co. v. Lykins*, 59 Kan. 103, 52 Pac. 99—*Nashua & L. R. Corp. v. Boston & L. R. Corp.* 164 Mass. 226, 49 Am. St. Rep. 454, 41 N. E. 268—*Augir v. Ryan*, 63 Minn. 376, 65 N. W. 640—*Greene v. Merchants' & P. Bank*, 73 Miss. 550, 19 So. 350—*Tutt v. Price*, 7 Mo. App. 197—*Dickey v. Helm*, 48 Mo. App. 120—*Arthur Fritsch Foundry & Mach. Co. v. Goodwin Mfg. Co.* 100 Mo. App. 423, 74 S. W. 136—*Kleinschmidt v. Binzel*, 14 Mont. 55, 43 Am. St. Rep. 604, 35 Pac. 460—*School Dist. No. 1 v. Whalen*, 17 Mont. 15, 41 Pac. 840—*Sanderson v. Peabody*, 58 N. H. 118—*Clark Thread Co. v. William Clark Co.* 55 N. J. Eq. 663, 37 Atl. 599—*Rowland v. Hobby*, 26 App. Div. 525, 50 N. Y. Supp. 629—*Coches v. Morrison*, 42 Hun, 220—*Lazarus v. Ludwig*, 18 Misc. 477, 41 N. Y. Supp. 999—*Everett v. New York Engraving & Print Co.* 19 Misc. 364, 43 N. Y. Supp. 502—*Zoeller v. Riley*, 100 N. Y. 107, 53 Am. Rep. 157, 2 N. E. 388—*Bell v. Merrifield*, 109 N. Y. 211, 4 Am. St. Rep. 436, 16 N. E. 55—*Lewis v. Ocean Nav. & Pier Co.* 125 N. Y. 348, 26 N. E. 301—*Rose v. Hawley*, 133 N. Y. 321, 31 N. E. 236—*Territory ex rel. Jones v. Hopkins*, 9 Okla. 150, 59 Pac. 976—*Winham v. Crutcher*, 3 Tenn. Ch. 672—*Freeman v. McAninch*, 6 Tex. Civ. App. 648, 24 S. W. 922—*Priest v. Foster*, 69 Vt. 421, 38 Atl. 78—*Chrisman v. Harman*, 29 Gratt. 500, 26 Am. Rep. 387—*Withers v. Sims*, 80 Va. 658—*Marble Sav. Bank v. Williams*, 23 Wash. 774, 63 Pac. 511—*Brier v. Traders' Nat. Bank*, 24 Wash. 721, 64 Pac. 881—*Pettel v. McCullough*, 49 W. Va. 525, 39 S. E. 199.

517. A former judgment is not conclusive as to the assent to a contract, where it is not certain whether the judgment was based on that fact or another. *De Sollar v. Hanscome*, 158 U. S. 216, 15 Sup. Ct. Rep. 816, 39: 956
Cited in *Empire State Nail Co. v. American Solid Leather Button Co.* 21 C. C. A. 155, 33 U. S. App. 522, 74 Fed. 868—*Lawrence v. Stearns*, 79 Fed. 882—*Emden v. Lisher*, 89 Me. 581, 58 Am. St. Rep. 442, 30

Atl. 1101—Nashua & L. R. Corp. v. Boston & L. R. Corp. 164 Mass. 226, 49 Am. St. Rep. 454 41 N. E. 288.

Questions which might have been decided.

See also *infra*, 558.

518. A judgment rendered upon the merits by a court of competent jurisdiction is a bar to the claim or demand in controversy, concluding the parties and those in privity with them not only as to every matter which was offered or received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. *Cromwell v. Sac County*, 94 U. S. 351,

24: 195

Cited in *Stout v. Lye*, 103 U. S. 71, 26 L. ed. 430—*Bernards Twp. v. Stebbins*, 109 U. S. 356, 27 L. ed. 962, 3 Sup. Ct. Rep. 252—*Dimock v. Revere Copper Co.* 117 U. S. 565, 29 L. ed. 996, 6 Sup. Ct. Rep. 855—*Harshman v. Knox County Court* (United States ex rel. *Harshman v. County Court*) 122 U. S. 317, 30 L. ed. 1165, 7 Sup. Ct. Rep. 1171—*Dowell v. Applegate*, 152 U. S. 343, 38 L. ed. 469, 14 Sup. Ct. Rep. 611—*Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 687, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—*Roberts v. Northern P. R. Co.* 158 U. S. 27, 39 L. ed. 882, 15 Sup. Ct. Rep. 756—*New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Dennison v. United States*, 168 U. S. 249, 42 L. ed. 456, 18 Sup. Ct. Rep. 57—*Southern P. R. Co. v. United States*, 183 U. S. 533, 46 L. ed. 314, 22 Sup. Ct. Rep. 154—*Melgs v. United States*, 20 Ct. Cl. 185—*Re People's Safe Deposit & Sav. Inst.* 10 Ben. 40, Fed. Cas. No. 10,971—*Semple v. Bank of British Columbia*, 5 Sawy. 97, Fed. Cas. No. 12,659—*Stillwell v. Walker*, 17 Nat. Bankr. Reg. 572, Fed. Cas. No. 13,451—*Smith v. Ontario*, 18 Blatchf. 455, 4 Fed. 388—*Hayner v. Stanley*, 8 Sawy. 219, 13 Fed. 221—*Bartels v. Schell*, 16 Fed. 344—*American Bell Teleph. Co. v. National Improved Teleph. Co.* 27 Fed. 665—*Howard v. Bates County*, 43 Fed. 279—*Etna L. Ins. Co. v. Lyon County*, 44 Fed. 344—*Granniss v. Cherokee Twp.* 47 Fed. 430—*Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co.* 5 C. C. A. 254, 12 U. S. App. 320, 55 Fed. 694—*Billing v. Gilmer*, 8 C. C. A. 648, 23 U. S. App. 168, 60 Fed. 334—*Thomson v. Crane*, 73 Fed. 332—*Austin v. Hamilton County*, 22 C. C. A. 132, 46 U. S. App. 260, 76 Fed. 212—*Black v. Black*, 77 Fed. 787—*Lawrence v. Stearns*, 79 Fed. 882—*Holt County v. National L. Ins. Co.* 25 C. C. A. 472, 49 U. S. App. 376, 80 Fed. 689—*Stearns v. Lawrence*, 28 C. C. A. 73, 54 U. S. App. 532, 83 Fed. 745—*Black v. Caldwell*, 83 Fed. 883—*Turner v. Hamilton*, 88 Fed. 468—*Allison v. Corson*, 32 C. C. A. 16, 60 U. S. App. 387, 88 Fed. 586—*Garner v. Second Nat. Bank*, 89 Fed. 637—*Chicago, R. I. & P. R. Co. v. St. Joseph Union Depot Co.* 92 Fed. 24—*Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co.* 37 C. C. A. 150, 95 Fed. 460—*St. Louis S. W. R. Co. v. Jackson*, 37 C. C. A. 178, 95 Fed. 571—*Lake County v. Sutcliffe*, 38 C. C. A. 170, 97 Fed. 274—*Manhattan Trust Co. v. Sioux City & N. R. Co.* 102 Fed. 712—*Helena v. United States*, 43 C. C. A. 433, 104 Fed. 116—*Linton v. National L. Ins. Co.* 44 C. C. A. 57, 104 Fed. 587—*Ross v. Portland*, 105 Fed. 683—*Manhattan Trust Co. v. Trust Co. of N. A.* 46 C. C. A. 327, 107 Fed. 332—*Kilham v. Wil-*

son, 50 C. C. A. 461, 112 Fed. 572—*Crockett v. Miller*, 50 C. C. A. 449, 112 Fed. 732—*Wilson v. Smith*, 117 Fed. 711—*Glencove Granite Co. v. City Trust, S. D. & Surety Co.* 55 C. C. A. 215, 118 Fed. 889—*London & S. F. Bank v. Dexter Horton & Co.* 61 C. C. A. 523, 126 Fed. 601—*Sacks v. Kupferle*, 127 Fed. 571—*Third Nat. Bank v. Atlantic City*, 65 C. C. A. 180, 130 Fed. 754—*Allen v. Davenport*, 65 C. C. A. 653, 132 Fed. 221—*Gordon v. Ware Nat. Bank*, 67 L.R.A. 554, 65 C. C. A. 585, 132 Fed. 449—*Bell v. Fergus*, 55 Ark. 538, 18 S. W. 931—*Allis v. Hall*, 76 Conn. 328, 56 Atl. 637—*Cummings v. Baker*, 16 App. D. C. 16—*Sauls v. Freeman*, 24 Fla. 223, 12 Am. St. Rep. 190, 4 So. 525—*Stevens v. Stembbridge*, 104 Ga. 623, 31 S. E. 413—*Felton v. Smith*, 88 Ind. 156, 45 Am. Rep. 454—*Cannon v. Castleman*, 162 Ind. 8, 69 N. E. 455—*Reed v. Douglas*, 74 Iowa, 247, 7 Am. St. Rep. 476, 37 N. W. 181—*Thomas v. McDonald*, 102 Iowa, 570, 71 N. W. 572—*McEntire v. Williamson*, 63 Kan. 281, 65 Pac. 244—*Hall v. Forman*, 82 Ky. 510—*Hardwicke v. Young*, 110 Ky. 506, 62 S. W. 10—*Bazille v. Murray*, 40 Minn. 50, 41 N. W. 238—*Dickey v. Helm*, 48 Mo. App. 118—*Dawson v. Quillen*, 61 Mo. App. 678—*Brown v. Missouri P. R. Co.* 96 Mo. App. 169, 70 S. W. 527—*Ashuelot R. Co. v. Cheshire R. Co.* 59 N. H. 411—*Wooster v. Cooper*, 59 N. J. Eq. 222, 45 Atl. 381—*Lorillard v. Clyde*, 122 N. Y. 47, 19 Am. St. Rep. 470, 25 N. E. 292—*Gall v. Gall*, 17 App. Div. 316, 45 N. Y. Supp. 248—*Skidmore v. Fahys Watch Case Co.* 28 App. Div. 97, 50 N. Y. Supp. 1016—*Zerega v. Will*, 34 App. Div. 489, 54 N. Y. Supp. 361—*Bracken v. Atlantic Trust Co.* 36 App. Div. 73, 55 N. Y. Supp. 506—*Brawner v. Fahy*, 64 App. Div. 124, 71 N. Y. Supp. 834—*McIntosh v. Pittsburgh*, 32 Pittsb. L. J. N. S. 214—*Peay v. Salt Lake City*, 11 Utah, 341, 40 Pac. 206—*Beale v. Gordon*, 2 Va. Dec. 41, 21 S. E. 667—*Sayward v. Thayer*, 9 Wash. 24, 36 Pac. 966—*Stallcup v. Tacoma*, 13 Wash. 147, 52 Am. St. Rep. 25, 42 Pac. 541—*Dolan v. Scott*, 25 Wash. 217, 65 Pac. 190—*Wandling v. Straw*, 25 W. Va. 708—*Windon v. Stewart*, 48 W. Va. 490, 37 S. E. 603—*Ward v. Ward*, 50 W. Va. 520, 40 S. E. 472—*Foster v. Fosson*, 105 Wis. 103, 81 N. W. 123.

519. An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense. *United States v. The Haytian Republic* (The Haytian Republic) 154 U. S. 118, 14 Sup. Ct. Rep. 992, 38: 930 *Cited in* *Glencove Granite Co. v. City Trust, S. D. & Surety Co.* 114 Fed. 980.

520. The plea of *res judicata* applies not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. *Beloit v. Morgan*, 7 Wall. 619, 19: 205 *Cited in* *The Haytian Republic* (United States v. The Haytian Republic) 154 U. S. 123, 83

L. ed. 933, 14 Sup. Ct. Rep. 992—Hay v. Alexandria & W. R. Co. 4 Hughes, 348—Smith v. Ontario, 18 Blatchf. 456, 4 Fed. 388—Flanagin v. Thompson, 9 Fed. 183—Allen v. Davenport, 65 C. C. A. 653, 132 Fed. 221—Harmon v. Auditor, 123 Ill. 133, 5 Am. St. Rep. 502, 13 N. E. 161—Litch v. Clinch, 136 Ill. 425, 26 N. E. 579—Swantz v. Muller, 27 Ill. App. 323—Armstead v. Bliskman, 51 Ill. App. 472—Boddie v. Brewer & H. Brewing Co. 107 Ill. App. 363—Indiana, B. & W. R. Co. v. Koons, 105 Ind. 512, 5 N. E. 549—State v. Brown, 64 Md. 204, 1 Atl. 54—Wagoner v. Wagoner, 76 Md. 316, 25 Atl. 338—Duttera v. Babylon, 83 Md. 637, 35 Atl. 64—Royston v. Horner, 86 Md. 253, 63 Am. St. Rep. 510, 37 Atl. 718—National Marine Bank v. Heller, 94 Md. 217, 50 Atl. 521—Nell v. Tolman, 12 Or. 294, 7 Pac. 103—Sale v. Eichberg, 105 Tenn. 337, 52 L.R.A. 896, 59 S. W. 1020—Everill v. Swan, 20 Utah, 64, 57 Pac. 716.

521. Where every objection urged in the second suit was open to the party within the legitimate scope of pleadings in the first suit and might have been presented in that trial, the matter must be considered as having passed in *rem judicatam* and the former judgment in such a case is conclusive between the parties. *Aurora v. West*, 7 Wall. 82, 19: 42

Cited in Beloit v. Morgan, 7 Wall. 622, 19 L. ed. 206—Braden v. United States, 10 Ct. Cl. 413—Blandy v. Griffith, 3 Fisher, Pat. Cas. 614, Fed. Cas. No. 1,529—Hay v. Alexandria & W. R. Co. 4 Hughes, 348, Fed. Cas. No. 6,254a—Smith v. Ontario, 18 Blatchf. 456, 4 Fed. 388—Ghmer v. Morris, 30 Fed. 480—Keator v. St. John, 42 Fed. 586—Third Nat. Bank v. Atlantic City, 65 C. C. A. 180, 130 Fed. 754—Quirk v. Rooney, 130 Cal. 511, 62 Pac. 825—Sauls v. Freeman, 24 Fla. 223, 12 Am. St. Rep. 190, 4 So. 525—Harmon v. Auditor, 123 Ill. 134, 5 Am. St. Rep. 502, 13 N. E. 161—Adams County v. Graves, 75 Iowa, 646, 36 N. W. 889—Lamb v. McConkey, 76 Iowa, 49, 40 N. W. 77—Howcott v. Pettit, 106 La. 533, 31 So. 61—Hewett v. Williams, 48 La. Ann. 709, 19 So. 604—State v. Brown, 64 Md. 204, 1 Atl. 54—National Marine Bank v. Heller, 94 Md. 218, 50 Atl. 521—Shelbina Hotel Asso. v. Parker, 58 Mo. 329—Mason v. Summers, 24 Mo. App. 182—Barnett v. Barnett, 9 N. M. 216, 50 Pac. 337—Lorillard v. Clyde, 122 N. Y. 47, 19 Am. St. Rep. 470, 25 N. E. 292—Petersine v. Thomas, 28 Ohio St. 601—Parkes v. Clift, 9 Lea. 529—Donaldson v. Nealis, 108 Tenn. 642, 69 S. W. 732—Knight v. Atkisson, 2 Tenn. Ch. 388—Nichols v. Dibreil, 61 Tex. 541—Moore v. Snowball, 98 Tex. 24, 66 L.R.A. 749, 81 S. W. 5—Blackwell v. Bragg, 78 Va. 539—McCullough v. Dashiell, 85 Va. 41, 6 S. E. 610—Fishburne v. Ferguson, 85 Va. 325, 7 S. E. 361—Wilkes v. Davies, 8 Wash. 120, 23 L.R.A. 105, 35 Pac. 611—State v. McEldowney, 54 W. Va. 702, 47 S. E. 650.

522. A judgment is conclusive in a second suit between the same parties as to every question which was or might have been presented and determined in the first suit, if the cause of action was the same. *Nesbitt*

v. Independent District, 144 U. S. 610, 12 Sup. Ct. Rep. 746, 36: 562
Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. Rep. 72, 36: 972
Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. Rep. 611, 38: 463

Cited in Forsyth v. Hammond, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665—*New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*United States Trust Co. v. New Mexico*, 183 U. S. 540, 46 L. ed. 819, 22 Sup. Ct. Rep. 172—*Edwards v. Bates County*, 55 Fed. 438—*Skinner v. Franklin County*, 6 C. C. A. 121, 9 U. S. App. 676, 56 Fed. 786—*David Bradley Mfg. Co. v. Eagle Mfg. Co.* 6 C. C. A. 671, 18 U. S. App. 349, 57 Fed. 990—*Austin v. Hamilton County*, 22 C. C. A. 132, 46 U. S. App. 260, 76 Fed. 212—*Lawrence v. Stearns*, 79 Fed. 882—*St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co.* 32 C. C. A. 287, 60 U. S. App. 675, 89 Fed. 651—*Thayer v. Kansas Loan & T. Co.* 41 C. C. A. 107, 100 Fed. 904—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 464, 111 Fed. 570—*Russell v. Russell*, 67 C. C. A. 437, 134 Fed. 841—*Newport v. Com.* 106 Ky. 445, 45 L.R.A. 521, 50 S. W. 845—*Willoughby v. North Eastern R. Co.* 52 S. C. 175, 29 S. E. 629—*State v. Bank of Commerce*, 95 Tenn. 222, 31 S. W. 993—*Union & Planters' Bank v. Memphis*, 101 Tenn. 168, 46 S. W. 557—*Foster v. Posson*, 105 Wis. 103, 81 N. W. 123—*Montpelier Sav. Bank & T. Co. v. School Dist. No. 5*, 115 Wis. 635, 92 N. W. 439.

523. A judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented. *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. Rep. 611, 38: 463

Cited in The Haytian Republic (United States v. The Haytian Republic) 54 U. S. 129, 38 L. ed. 934, 14 Sup. Ct. Rep. 992—*Southern P. R. Co. v. United States*, 168 U. S. 51, 42 L. ed. 378, 18 Sup. Ct. Rep. 18—*National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 237, 46 L. ed. 171, 22 Sup. Ct. Rep. 111—*Fayerweather v. Ritch*, 34 C. C. A. 65, 63 U. S. App. 112, 91 Fed. 725—*Thayer v. Kansas Loan & T. Co.* 41 C. C. A. 109, 100 Fed. 904—*Manhattan Trust Co. v. Trust Co. of N. A.* 46 C. C. A. 327, 107 Fed. 333—*Glencove Granite Co. v. City Trust, S. D. & Surety Co.* 114 Fed. 980—*Hanley v. Beatty*, 54 C. C. A. 453, 117 Fed. 67—*First Nat. Bank v. Kennedy*, 113 Ala. 301, 36 L.R.A. 333, 21 So. 387—*Richmond & D. R. Co. v. Gorman*, 7 App. D. C. 108—*Slack v. Perrine*, 9 App. D. C. 155—*Bieber v. Fechheimer*, 9 App. D. C. 557—*Cummings v. Baker*, 16 App. D. C. 16—*Police Jury v. Police Jury*, 49 La. Ann. 1335, 22 So. 376.

524. A former judgment between the same parties, in which plaintiff's claim was decided, or was properly involved and might have been decided,—as the equitable right or interest in a judicial mortgage, as attorney, for fees and costs, when the issue decided was the right to the mortgage,—is a bar to another action for the same cause. Neglect of plaintiff to avail himself of it is no ground for another suit. *Stockton v. Ford*, 18 How. 418, 15: 395
Cited in Johnson Steel Street Rail Co. v. Whar-

ton, 152 U. S. 258, 38 L. ed. 433, 14 Sup. Ct. Rep. 608—Dowell v. Applegate, 152 U. S. 344, 38 L. ed. 469, 14 Sup. Ct. Rep. 611—Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 687, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—New Orleans v. Citizens' Bank, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—Spicer v. United States, 5 Ct. Cl. 52—Russell & Co. v. Lamb, 49 Fed. 771—Farwell v. Brown, 35 Fed. 814—Clay v. Deskins, 11 C. C. A. 231, 8 U. S. App. 661, 63 Fed. 332—Third Nat. Bank v. Atlantic City, 65 C. C. A. 180, 130 Fed. 754—Georgia R. & Bkg. Co. v. Wright, 132 Fed. 917—McCreery v. Fuller, 63 Cal. 32—Woolverton v. Baker, 98 Cal. 632, 33 Pac. 731—District of Columbia v. Hutchinson, 1 App. D. C. 408—Rogers v. Higgins, 57 Ill. 247—McGillis v. Willis, 39 Ill. App. 317—Spraker v. Bartlett, 73 Ill. App. 524—Barber Asphalt Paving Co. v. Kiene, 99 Mo. App. 535, 74 S. W. 872—Bracken v. Atlantic Trust Co. 36 App. Div. 73, 55 N. Y. Supp. 506—Taylor v. Cornelius, 60 Pa. 199—Horton v. Bassett, 17 R. I. 130, 20 Atl. 234.

525. Previous adjudication of the state court upon the meaning of a statute, in a similar case between the same defendant and the state, where the constitutionality of the act was not drawn in question,—that it constituted a contract between the defendant and the state,—did not estop the state from denying its constitutionality in a subsequent case, or conclude the court upon that question, although the point might have been raised and determined in the first instance. *Boyd v. Alabama*, 94 U. S. 645, 24: 302 *Distinguished in* *Loague v. Taxing District*, 36 Fed. 153.

Cited in *Douglass v. Pike County*, 101 U. S. 687, 25 L. ed. 972—*Anderson v. Santa Anna Twp.* 116 U. S. 362, 29 L. ed. 635, 6 Sup. Ct. Rep. 413—*Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 410, 35 L. ed. 1061, 12 Sup. Ct. Rep. 188—*Mobile & O. R. Co. v. Tennessee*, 153 U. S. 492, 38 L. ed. 796, 14 Sup. Ct. Rep. 968—*Knight v. Shelton*, 134 Fed. 437—*Hoover v. State*, 59 Ala. 60—*Farrlor v. New England Mortg. Secur. Co.* 92 Ala. 181, 12 L.R.A. 858, 9 So. 532—*Adams v. Yazoo & M. Valley R. Co.* 77 Miss. 278, 60 L.R.A. 101, 24 So. 200—*Yazoo & M. Valley R. Co. v. Adams*, 81 Miss. 119, 32 So. 937—*Webb v. Lafayette County*, 67 Mo. 368—*New Brunswick Water Comrs. v. Cramer*, 61 N. J. L. 273, 68 Am. St. Rep. 705, 39 Atl. 671—*Whaley v. Galliard*, 21 S. C. 576—*Anderson v. Fowler*, 48 S. C. 16, 25 S. E. 900—*Hanrick v. Gurley*, 93 Tex. 470, 55 S. W. 119—*Justice v. Com.* 81 Va. 218—*Grunert v. Spalding*, 104 Wis. 217, 78 N. W. 606.

526. It is not necessary, to constitute an estoppel, as between parties and privies, that the record should show the question upon which the right of the plaintiff to recover, or the validity of the defense, depended, but only that the same matter in controversy might have been litigated. *Washington, A. & G. Steam Packet Co. v. Sickles*, 24 How. 333, 16: 650

527. A former judgment on a different matter of dispute between the same parties is conclusive only as to the matters decided, and not as to other matters which might have been decided. *Last Chance*

Min. Co. v. Tyler Min. Co. 157 U. S. 683, 15 Sup. Ct. Rep. 733, 39: 859 *Cited in* *Forsyth v. Hammond*, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665—*New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Baldwin v. Maryland*, 179 U. S. 222, 45 L. ed. 162, 21 Sup. Ct. Rep. 105—*Mitchell v. First Nat. Bank*, 180 U. S. 481, 45 L. ed. 632, 21 Sup. Ct. Rep. 418—*National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 234, 46 L. ed. 169, 22 Sup. Ct. Rep. 111—*Southern P. R. Co. v. United States*, 183 U. S. 533, 46 L. ed. 314, 22 Sup. Ct. Rep. 154—*Illinois v. Illinois C. R. Co.* 184 U. S. 92, 46 L. ed. 447, 22 Sup. Ct. Rep. 300—*Empire State Nail Co. v. American Solid Leather Button Co.* 21 C. C. A. 156, 33 U. S. App. 522, 74 Fed. 868—*Norton v. San Jose Fruit-Packing Co.* 25 C. C. A. 196, 48 U. S. App. 295, 79 Fed. 794—*Lawrence v. Stearns*, 79 Fed. 882—*Union Mill & Min. Co. v. Dangberg*, 81 Fed. 116—*Norton v. San Jose Fruit-Packing Co.* 27 C. C. A. 578, 48 U. S. App. 590, 83 Fed. 514—*St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co.* 32 C. C. A. 287, 60 U. S. App. 675, 89 Fed. 651—*St. Louis S. W. R. Co. v. Jackson*, 37 C. C. A. 176, 95 Fed. 571—*Norton v. House of Mercy*, 41 C. C. A. 490, 101 Fed. 386—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 463, 111 Fed. 569—*Ohio River R. Co. v. Fisher*, 53 C. C. A. 418, 115 Fed. 936—*Soderberg v. Armstrong*, 116 Fed. 711—*Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson*, 130 Fed. 165—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 917—*United States Min. Co. v. Lawson*, 67 C. C. A. 394, 134 Fed. 776—*Australian Knitting Co. v. Gormly*, 138 Fed. 105—*Casaday v. Lindstrom*, 44 Or. 318, 75 Pac. 222—*Grunert v. Spalding*, 104 Wis. 214, 78 N. W. 606.

3. Possible Defenses.

Inadequacy of Legal Remedy as Matter Conclusively Established by Former Decree Enjoining Collection of Taxes, see Injunction, 7.

Availability of Defense not made as Defeating Right to Enjoin Enforcement of Judgment, see Injunction, 88.

See also *supra*, 395, 526; *infra*, 849, 1197a.

528. If the party fail to plead matter in bar to the original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment, or in a scire facias. *Dickson v. Wilkinson*, 3 How. 57, 11: 491

Cited in *Union Trust Co. v. Rochester & P. R. Co.* 29 Fed. 610—*Lake County v. Platt*, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 572—*Holt County v. National L. Ins. Co.* 25 C. C. A. 472, 49 U. S. App. 376, 88 Fed. 689—*Allison v. Corson*, 32 C. C. A. 16, 60 U. S. App. 387, 88 Fed. 587—*St. Louis S. W. R. Co. v. Jackson* (cited in dissenting opinion) 37 C. C. A. 176, 95 Fed. 571—*Lyon v. Ford*, 7 App. D. C. 321—*Willet v. Otterback*, 9 Mackey, 328—*State v. Kinne*, 39 N. H. 138, *Carver v. Wells*, 17 R. I. 690, 24 Atl. 466.

529-30. Where a party brings suit upon a judgment obtained as administrator, the defendant cannot plead that he was appointed administrator of the same estate in another state. The defense, if any, should have been pleaded in the original action,

and is now immaterial. *Biddle v. Wilkins*, 1 Pet. 686, 7: 315
Cited in Lawrence v. Nelson, 143 U. S. 223, 36 L. ed. 134, 12 Sup. Ct. Rep. 440—*Lake County v. Platt*, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 572—*First Nat. Bank v. Wallis*, 59 N. J. L. 48, 34 Atl. 983—*Tucker v. Carr*, 20 R. I. 479, 78 Am. St. Rep. 893, 40 Atl. 1.

531. The omission of indorsers to set up an agreement in writing that they should not be held liable on their indorsement, as a defense to two of the notes included in such agreement, does not preclude setting up the agreement in a second action on others of the same series of notes. Judgment in the original action is not an estoppel against showing the agreement in the second action. *Davis v. Brown*, 94 U. S. 423, 24: 204

Cited in New Orleans v. Citizens' Bank, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 903—*Werlein v. New Orleans*, 177 U. S. 396, 44 L. ed. 820, 20 Sup. Ct. Rep. 682—*Hay v. Alexandria & W. R. Co.* 4 Hughes, 348—*American Diamond Rock Boring Co. v. Sheldon*, 4 Bann. & Ard. 553, 17 Blatchf. 211, Fed. Cas. No. 296—*Stewart v. Lansing*, 15 Blatchf. 285, Fed. Cas. No. 13,432—*Radford v. Folsom*, 3 Fed. 202—*Flanagan v. Thompson*, 4 Hughes, 425, 9 Fed. 181—*The Tubal Cain*, 9 Fed. 837—*Lippincott v. Shaw Carriage Co.* 25 Fed. 587—*Sharon v. Hill*, 26 Fed. 345—*Oregonian R. Co. v. Oregon R. & Nav. Co.* 27 Fed. 283—*The Holladay Case*, 27 Fed. 836—*Ricaud v. Tysen*, 78 Fed. 562—*Platt v. Vermillion*, 39 C. C. A. 559, 99 Fed. 360—*Eastern Bldg. & L. Asso. v. Welling*, 103 Fed. 356—*Eastern Bldg. & L. Asso. v. Welling*, 116 Fed. 105—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 917—*Bedford-Bowling Green Stone Co. v. Oman*, 134 Fed. 453—*Crowder v. Red Mountain Min. Co.* 127 Ala. 260, 29 So. 847—*Roth v. Merchants' & P. Bank*, 70 Ark. 203, 91 Am. St. Rep. 80, 66 S. W. 918—*Ferreira v. Chabot*, 63 Cal. 570—*Pueblo Chicago Lumber Co. v. Danziger*, 7 Colo. App. 151, 42 Pac. 683—*Brady v. Pryor*, 69 Ga. 697—*Sloan v. Price*, 84 Ga. 173, 20 Am. St. Rep. 354, 10 S. E. 601—*Stevens v. Stembbridge*, 104 Ga. 623, 31 S. E. 413—*Worth v. Carmichael*, 114 Ga. 701, 40 S. E. 797—*Hanna v. Read*, 102 Ill. 603, 40 Am. Rep. 608—*McFadden v. Ross*, 108 Ind. 517, 8 N. E. 181—*Stroup v. Pepper*, 69 Kan. 246, 76 Pac. 825—*Keedy v. Long*, 71 Md. 391, 5 L.R.A. 764, 18 Atl. 704—*Adams v. Adams*, 25 Minn. 77—*Mershon v. Williams*, 63 N. J. L. 401, 44 Atl. 211—*Meiss v. Gill*, 44 Ohio St. 260, 6 N. E. 656—*Philadelphia v. Ridge Ave. R. Co.* 142 Pa. 494, 24 Am. St. Rep. 512, 21 Atl. 982—*Phillipowski v. Spencer*, 63 Tex. 607—*Miller v. Willis*, 95 Va. 354, 28 S. E. 337—*Beale v. Gordon*, 2 Va. Dec. 41, 21 S. E. 667—*Biern v. Ray*, 49 W. Va. 134, 38 S. E. 530—*St. Lawrence Boom & Mfg. Co. v. Holt*, 51 W. Va. 372, 41 S. E. 351—*State v. McEldowney*, 54 W. Va. 700, 47 S. E. 650—*Hart v. Moulton*, 104 Wis. 353, 76 Am. St. Rep. 881, 80 N. W. 599.

532. Where defendant had, at the time judgment was rendered against him, a good defense,—as a discharge in bankruptcy,—and failed to present it to a court which had jurisdiction of his case and of all the defenses he might have made, the judgment is valid, and such defense cannot afterwards be set up in an action on the judgment.

Dimock v. Revere Copper Co. 117 U. S. 559, 6 Sup. Ct. Rep. 855, 29: 994
Cited in United States v. Wallace, 46 Fed. 571—*Holt County v. National L. Ins. Co.* 25 C. C. A. 472, 49 U. S. App. 378, 80 Fed. 680—*Turner v. Hamilton*, 88 Fed. 468—*St. Louis S. W. R. Co. v. Jackson*, 37 C. C. A. 176, 95 Fed. 571—*Glen Cove Granite Co. v. City Trust, S. D. & Surety Co.* 114 Fed. 980—*Sullivan v. Rabb*, 86 Ala. 440, 5 So. 746—*McEntire v. Williamson*, 63 Kan. 281, 65 Pac. 244.

533. Where the proper place to have made a defense was in a foreclosure suit, and ample opportunity was had there for such defense, the court, in a suit afterwards brought to declare the foreclosure sale void, is not bound to give effect to such defense. *Leavenworth County v. Chicago, R. I. & P. R. Co.* 134 U. S. 688, 10 Sup. Ct. Rep. 708, 33: 1064

533a. Where the mortgagor did not set up certain defenses in the foreclosure suit, he is concluded as to them by the decree, and so are his privies, including a judgment creditor whose judgment is obtained pending foreclosure. *Stout v. Lye*, 103 U. S. 66, 26: 428

Cited in Atlantic Trust Co. v. Dana, 62 C. C. A. 673, 128 Fed. 225—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 917—*Donaldson v. Nealls*, 108 Tenn. 643, 69 S. W. 732.

534. A decree in a Federal court which adjudges, as between all the parties to the suit in that court, that certain deeds are fraudulent and void, and that the plaintiff is entitled to a sale of the lands sought to be reached in the suit, in satisfaction of his claims, and directs such sale, concludes every matter that the defendant under the pleadings was entitled to bring forward; and after such decree has been fully executed, the defendant cannot have the same issue retried in an independent suit upon a title which he could have set up, but chose not to assert before the decree was rendered. *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. Rep. 611, 38: 463

535. All defenses then existing to the contract exemption from state taxation, asserted in a suit in a Federal circuit court to enjoin the collection of the tax, whether brought to the attention of the court, or waived, were foreclosed by the decree establishing such exemption. *Gunter v. Atlantic Coast Line R. Co.* 200 U. S. 273, 26 Sup. Ct. Rep. 252, 50: 477
Cited in Northern P. R. Co. v. Slight, 205 U. S. 131, 51 L. ed. 741, 27 Sup. Ct. Rep. 442.

4. Particular Kinds of Cases.

a. In General; Miscellaneous.

Judgment for Money Lost at Gambling. Due Process as to, see Constitutional Law, 777.

Effect of Denial of Writ of Habeas Corpus without Prejudice, see Habeas Corpus 212.

See also *infra*, 1123.

Editorial notes.

[Recovery by physician as bar to action for malpractice. 45 L.R.A. 541.]

Habeas corpus decree as to custody of infant as *res judicata*. 67 L.R.A. 783.

In favor of employee as bar to recovery against employer for employee's act. 54 L.R.A. 649.

Effect of verdict for servant in action against master and servant for latter's misfeasance. 9 L.R.A.(N.S.) 880.

Elimination of usury after judgment fixing amount of debt or lien. 3 L.R.A.(N.S.) 715.

Judgment in criminal action as *res judicata* in civil action. 11 L.R.A.(N.S.) 653.]

Admiralty causes.

What Parties Concluded, see *infra*, 779.

Extrinsic Evidence to Show Nationality of Prize, see Evidence, 1732.

Proprietary Interest in Prize Suit, see Admiralty, 546.

536. [The legality of a capture is always open to examination until decided by a court of competent jurisdiction. Such a decision is conclusive, and, if erroneous, redress can be sought only from the nation to which the court belongs. *Miller v. The Resolution* (Fed. Ct. Ap.) 2 Dall. 1, 1: 263]

537. [The record of a court of admiralty is always evidence of a condemnation and the cause of it. *Russel* use of *Crucet v. Union Ins. Co.* (C. Ct.) 4 Dall. 421, 1: 892]

538. Condemnation of a vessel as good prize is not conclusive evidence that the owner is not a neutral. *Maley v. Shattuck*, 3 Cranch, 458, 2: 498
Cited in *Cushing v. Laird*, 107 U. S. 80, 27 L. ed. 395, 2 Sup. Ct. Rep. 196—*Bradstreet v. Neptune Ins. Co.* 3 Sumn. 615, Fed. Cas. No. 1,793—*Bailey v. South Carolina Ins. Co.* 1 Treadway, Const. 391—*Pinson v. Ivey*, 1 Yerg. 350.

539. An order of restoration by a prize court proves the vessel to be neutral, but not that it was taken without probable cause. *Jennings v. Carson*, 4 Cranch, 2, 2: 531

Cited in *The Olinde Rodrigues*, 174 U. S. 535, 43 L. ed. 1076, 19 Sup. Ct. Rep. 851.

540. A decree of acquittal in a proceeding *in rem*, without a certificate of probable cause of seizure, and not appealed from with effect, is conclusive, in every inquiry before any other court, that there was no justifiable cause of seizure. *The Apollon*, 9 Wheat. 362, 6: 111

Cited in *Stacey v. Emery*, 97 U. S. 643, 24 L. ed. 1035—*Cushing v. Laird*, 107 U. S. 80, 27 L. ed. 395, 2 Sup. Ct. Rep. 196—*Fuller v. Colby*, 3 Woodb. & M. 11, Fed. Cas. No. 5,149—*Hall v. Warren*, 2 McLean, 334, Fed. Cas. No. 5,952—*Bailey v. Sundberg*, 43 Fed. 82—*Williams v. Delano*, 155 Mass. 14, 28 N. E. 1122.

541. The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an ab-

solute change of the property. *Williams v. Armroyd*, 7 Cranch, 423, 3: 392

Cited in *Cushing v. Laird*, 107 U. S. 80, 27 L. ed. 395, 2 Sup. Ct. Rep. 196—*Hilton v. Guyot*, 159 U. S. 167, 40 L. ed. 109, 16 Sup. Ct. Rep. 139—*Alabama & C. R. Co. v. Jones*, 7 Nat. Bankr. Reg. 171, Fed. Cas. No. 127—*The Parkhill*, Fed. Cas. No. 10,755a—*The Trenton*, 4 Fed. 659—*Holcomb v. Phelps*, 16 Conn. 132—*Pelton v. Platner*, 13 Ohio, 217, 42 Am. Dec. 197.

542. In a libel to recover damages for the sinking of a steamer, a final judgment previously rendered in an action at law for the same cause of action is a good defense.

Goodrich v. Chicago, 5 Wall. 566, 18: 511
Cited in *Washington A. & G. Steam Packet Co. v. Sickles*, 5 Wall. 597, 18 L. ed. 555—*Aurora v. West*, 7 Wall. 100, 19 L. ed. 48—*Gould v. Evansville & C. R. Co.* 91 U. S. 533, 23 L. ed. 419—*Green v. Bogue*, 158 U. S. 503, 39 L. ed. 1070, 15 Sup. Ct. Rep. 975—*Spicer v. United States*, 5 Ct. Cl. 47—*The Tubal Cain*, 9 Fed. 837—*The City of Lincoln*, 25 Fed. 843—*Oregonian R. Co. v. Oregon R. & Nav. Co.* 27 Fed. 283—*North Muskegon v. Clark*, 10 C. C. A. 594, 22 U. S. App. 522, 62 Fed. 697—*Lindsley v. Union Silver Star Min. Co.* 52 C. C. A. 644, 115 Fed. 50—*Brown v. Kirkbridge*, 19 Kan. 592—*Bledsoe v. White*, 42 Tex. 136—*Hanrick v. Gurley*, 93 Tex. 479, 55 S. W. 119—*Washington, O. & W. R. Co. v. Casenove*, 88 Va. 752, 3 S. E. 433.

543. A decree in a collision case, adjudging the ship to have been in fault and awarding damages, is *res judicata* on the question of the liability of the ship. *The Benefactor v. Mount* (The Benefactor) 103 U. S. 247, 26: 466
New York & W. S. S. Co. v. Mount (The Benefactor) 103 U. S. 239, 26: 351

544. The dismissal of a cross bill in a collision suit, if not appealed from, is conclusive that the libellant in the cross suit is not entitled to recover affirmative damages for any injuries received by his own vessel, but it does not preclude him from showing in the original suit that the collision was the result of unavoidable accident, or that it was occasioned by the negligence of those in charge of the other vessel, or that it is a case of mutual fault, where the damages should be divided. *The Mayflower v. The Dove* (The Dove) 91 U. S. 381, 23: 354

545. The finding of the board of local inspectors, in proceedings instituted under Rev. Stat. § 4450, U. S. Comp. Stat. 1901, p. 3039, for the investigation of the facts connected with a collision, so far as they have a bearing on the conduct of the licensed officers on board the boats, and the accompanying documents, are not admissible in evidence in an admiralty suit for collision to show whether or not the vessel was in her proper position, with proper watches and lights. *The Charles Morgan v. Kouns* (The Charles Morgan) 115 U. S. 69, 5 Sup. Ct. Rep. 1172, 29: 316

Cited in *Place v. Norwich & N. Y. Transp. Co.* 118 U. S. 468, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150—*Ex parte Phenix Ins. Co.* 118 U. S. 624, 30 L. ed. 280, 7 Sup. Ct. Rep. 25—

Re Morrison (*Morrison v. District Court*) 147 U. S. 34, 37 L. ed. 68, 13 Sup. Ct. Rep. 246.

546. A district court is not deprived of jurisdiction to entertain and act upon a petition for limitation of liability of the owner of a vessel injured in a collision from causes over which such owner had no control, by the fact that a prior petition for such limitation had been rejected by that court, and an appraisal of the vessel had been ordered by the court, in proceedings by libellants, and a stipulation entered into by the owner, which secured to him the delivery of the vessel, and that an interlocutory decree had been entered in favor of the libellants, with a report of the commission, showing the amount of the damages sustained. *Place v. Norwich & N. Y. Transp. Co. (The City of Norwich)* 118 U. S. 468, 6 Sup. Ct. Rep. 1150, 30: 134

547. Pending a decision as to what particular time was to be taken for fixing, in reference to the limited liability act (Rev. Stat. §§ 4282-4287, U. S. Comp. Stat. 1901, pp. 2943, 2944), the value of the vessel injured in a collision by causes over which the owner had no control, and shortly afterwards partially burned and sunk, but subsequently raised by the owner and repaired; and where—the petition of the owner for the benefit of the act having been rejected—such owner, desiring to obtain possession of the vessel, gave a stipulation for the full value of his interest in her, as appraised, at the time such value was sought to be appropriated,—such owner is not concluded, in a subsequent proceeding in which his right to the benefit of the act is recognized, by such stipulation, nor by the trial on the merits, which was had in the proceeding in which his claim for limited liability was rejected, and an interlocutory decree rendered in favor of the libellant, with the report of the commission showing the amount of the damages sustained by such libellant. *Place v. Norwich & N. Y. Transp. Co. (The City of Norwich)* 118 U. S. 468, 6 Sup. Ct. Rep. 1150, 30: 134
Cited in The Rose Culkin, 52 Fed. 331.

548. A decree dividing the damage sustained by two vessels held in fault for a collision, but refusing to divide the damages to cargo, because that question was not open under the pleadings, does not prevent the vessel which has been compelled to pay the entire cargo damage from bringing a libel in admiralty against the other vessel to enforce contribution. *Erie R. Co. v. Erie & W. Transp. Co.* 204 U. S. 220, 27 Sup. Ct. Rep. 246, 51: 450

549. A decree in an action for collision, adjudging that the libellant is not entitled to any amount for detention of the vessel while undergoing repairs, and allowing a specified sum for amount expended in repairing damages caused by the collision, which sum the court allows because he thinks it will be "about just between the parties on the whole case," will be considered as intend-

ing to give a just allowance for all damages sustained, without deciding that the claim for demurrage was not a proper one. *Sturgis v. Clough*, 1 Wall. 269, 17: 580
Cited in The Baltimore (The Baltimore v. Rowland) 8 Wall. 387, 19 L. ed. 465—*The Potomac (The Potomac v. Cannon)* 105 U. S. 632, 26 L. ed. 1194—*The Mayflower*, Brown, Adm. 385, Fed. Cas. No. 9,345—*The Excelsior*, 17 Fed. 925.

550. Where the record of the supreme court of the District of Columbia, decreeing to the claimant the restoration of his vessel libeled at the instance of the United States, is silent on the question of damages, either that court refused damages, or the claimant did not insist on a consideration of the question, and the United States government is not concluded on the point. *United States v. Lane*, 8 Wall. 185, 19: 445

Cited in Ross v. United States, 12 Ct. Cl. 571—*Fendall v. United States*, 14 Ct. Cl. 252—*Morgan v. United States*, 14 Ct. Cl. 445—*Re White*, 45 Fed. 239.

551. The decision of a circuit court as to whether a vessel is foreign or domestic, and whether it is subject to the lien of libellant's claim, is conclusive, where those questions were presented to the court and passed upon. *The Rio Grande v. Otis (The Rio Grande)* 23 Wall. 458, 23: 158

Assumpsit.

552. A judgment in assumpsit upon a policy is a bar to a subsequent action of covenant on the same policy. *Marine Ins. Co. v. Young*, 1 Cranch, 332, 2: 126

553. A judgment in an action of assumpsit, brought by a husband and wife on a contract by a carrier of passengers to carry the wife safely, for injuries to the wife while being carried, is not a bar to an action in tort on the same contract, by the husband alone, to recover for loss of services and society. *Pollard v. New Jersey R. & Transp. Co.* 101 U. S. 223, 25: 840
Cited in Central Trust Co. v. East Tennessee, V. & G. R. Co. 70 Fed. 766—*McConnell v. Day*, 61 Ark. 474, 33 S. W. 731—*Henneger v. Lomas*, 145 Ind. 291, 32 L.R.A. 849, 44 N. E. 462.

554. A verdict and judgment upon two special counts and the general counts in assumpsit cannot be given in evidence as an estoppel in a second suit founded upon the special counts, inasmuch as the verdict might have been founded upon the common counts. *Washington, A. & G. Steam Packet Co. v. Sickles*, 24 How. 333, 16: 650
Cited in Michigan Ins. Bank v. Eldred, 6 Biss. 374, Fed. Cas. No. 9,528—*Althrop v. Beckwith*, 14 Ill. App. 632—*Southside R. Co. v. Daniel*, 20 Gratt. 364—*Linke v. Fleming*, 25 Gratt. 709—*Beckwith v. Thompson*, 18 W. Va. 122.

Insolvency.

Adjudications in Bankruptcy, see Bankruptcy, 86c, 89.

555. In an action against syndics of an

insolvent in Louisiana, by the United States, to recover a debt due from the insolvent, a judgment against him in favor of the United States is admissible to prove the debt. *Field v. United States*, 9 Pet. 182, 9: 94

Bonds and coupons.

Judgment on Demurrer, see *supra*, 298, 299.

Merger of Bond into Judgment, see *infra*, 1117, 1118.

See also *supra*, 495; *infra*, 648.

556. A judgment on a prison bond against the defendant was no bar to proceeding by *fiery facias*. *Taylor v. Thomson*, 5 Pet. 358, 8: 154

557. The indebtedness of a city is conclusively established by a judgment recovered against it on its bonds. *United States ex rel Wolff v. New Orleans (Wolff v. New Orleans)* 103 U. S. 358, 26: 395

558. A judgment in an action on coupons of municipal bonds is conclusive in a subsequent action on the same bonds and other coupons and on other bonds of the same issue, between the same parties, only as to matters actually litigated and determined in the former suit, and not as to other matters which might have been litigated and determined. *Nesbitt v. Independent District*, 144 U. S. 610, 12 Sup. Ct. Rep. 746, 36: 562

559. A determination in one action, that a plaintiff was the owner for value of certain coupons sued on, does not estop the town from proving, in another action, that he is not such owner of other coupons detached from the same bonds. *Stewart v. Lansing*, 104 U. S. 505, 26: 866
Cited in *Hanrick v. Gurley*, 93 Tex. 479, 55 S. W. 119.

560. A judgment in an action upon interest coupons, where plaintiff had not proved that he had given value, and was adjudged not entitled to recover, does not estop plaintiff from showing, in a second action against the county, that he acquired other bonds and coupons for value before maturity. *Cromwell v. Sac County*, 94 U. S. 351, 24: 195

561. A finding that a plaintiff is holder and owner of certain coupons does not estop the defendant from showing, in another action, that plaintiff prosecuted the first action for the use and benefit of the plaintiff in the second action. *Cromwell v. Sac County*, 94 U. S. 351, 24: 195

562. A judgment in a mandamus case as to the invalidity of certain bonds is conclusive, in a subsequent action, as to the questions decided, on the parties and their privies. *Louis v. Brown Twp.* 109 U. S. 162, 3 Sup. Ct. Rep. 92, 27: 892
Cited in *Stearns v. Lawrence*, 28 C. C. A. 70, 54 U. S. App. 532, 83 Fed. 742—*Sanders v. Peck*, 30 C. C. A. 531, 50 U. S. App. 248, 87 Fed. 63—*Harmon v. Auditor*, 123 Ill. 130, 5 Am. St. Rep. 502, 13 N. E. 161—*Hudson v. Trammel*, 106 Mo. 520, 17 S. W. 502—*Case v. Gorton*, 33 Mo. App. 606—*Glasner v. Weisberg*, 43 Mo. App. 221—

Ward v. Boyce, 152 N. Y. 196, 36 L.R.A. 551, 46 N. E. 180.

563. A judgment holding bonds invalid is not *res judicata* as to their validity after a subsequent statute has cured their defect. *Utter v. Franklin*, 172 U. S. 416, 19 Sup. Ct. Rep. 183, 43: 498
Cited in *Central Baptist Church v. Manchester*, 21 R. I. 361, 43 Atl. 845.

564. Where a judgment at law has conclusively established the validity of town bonds, a suit in equity cannot be maintained by the town to compel their surrender. *Beloit v. Morgan*, 7 Wall. 619, 19: 205

565. A judgment commanding the sale of city bonds because of the existence of a legal duty arising from the provisions of La. Const. 1898, art. 317, should not be construed as excluding the right and duty to refer, in issuing the bonds, to the fact that they are issued by virtue of the Constitution and as a result of the command of the court. *Board of Liquidation v. Louisiana ex rel Wilder*, 179 U. S. 622, 21 Sup. Ct. Rep. 263, 45: 347

566. Upon a motion for mandamus to compel a city to pay a judgment, the city cannot set up that the bonds for which the judgment was rendered were illegally issued. *Davenport v. United States (Davenport v. Lord)* 9 Wall. 409, 19: 704
Cited in *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 645, 19 L. ed. 1018—*Clews v. Lee County*, 2 Woods, 475, Fed. Cas. No. 2,802—*United States v. Elizabeth*, Fed. Cas. No. 15,041a—*Fleming v. Trowsdale*, 29 C. C. A. 107, 54 U. S. App. 574, 85 Fed. 190—*Alabama Warehouse Co. v. Jones*, 62 Ala. 553—*Iowa Railroad Land Co. v. Sac County*, 39 Iowa, 142—*State ex rel Wilson v. Rainey*, 74 Mo. 234—*Sandmeyer v. Harris*, 7 Tex. Civ. App. 519, 27 S. W. 284.

567. In a suit to require the county court to pay the amount due on a judgment against the county on coupons, out of moneys in its treasury, or, if that could not be done, to raise the necessary means by a special tax, defenses cannot be set up which relate to the validity of the coupons as obligations of the county. *County Court v. United States ex rel Douglass*, 105 U. S. 733, 26: 1220

Citizenship.

568. If a party be admitted as a citizen by a court of record, the judgment, if it be in legal form, closes all inquiry as to the testimony on which it was pronounced. *Spratt v. Spratt*, 4 Pet. 393, 7: 897
Cited in *Re Loney (Thomas v. Loney)* 134 U. S. 376, 33 L. ed. 951, 10 Sup. Ct. Rep. 584—*Pargoud v. United States*, 4 Ct. Cl. 353—*The Acorn*, 2 Abb. (U. S.) 444, Fed. Cas. No. 29—*Ex parte Gregg*, 2 Curt. C. C. 100, Fed. Cas. No. 3,380—*United States v. Makins*, Fed. Cas. No. 15,710—*Charles Green's Son v. Salas*, 31 Fed. 107—*United States v. Gleason*, 78 Fed. 307—*Pintsch Compressing Co. v. Bergin*, 84 Fed. 141—*People ex rel Brackett v. McGowan*, 77 Ill. 647, 20 Am. Rep. 254—*Raymond v. Raymond*, 1 Ind. Terr. 339, 37 S. W. 202—*Andres v. Arnold (Am-*

dres v. Circuit Ct. Judge) 77 Mich. 88, 6 L.R.A. 239, 43 N. W. 857—State ex rel. Lacy v. Brandhorst, 156 Mo. 461, 79 Am. St. Rep. 538, 56 S. W. 1094—State ex rel. Thayer v. Boyd, 31 Neb. 710, 48 N. W. 739—State v. Whittemore, 50 N. H. 251, 9 Am. Rep. 196—People ex rel. Smith v. Pease, 30 Barb. 604—Priest v. Cummings, 16 Wend. 626—People ex rel. M'Kinch v. Bristol & R. Turnp. Road Co. 23 Wend. 227—McCarthy v. Marsh, 5 N. Y. 284—People v. Snyder, 41 N. Y. 409—Re O'Day, 5 Kulp, 495—Re Kane, 4 Luzerne Legal Reg. 265—Com. v. Towles, 5 Leigh, 746—State ex rel. Klickbush v. Hoeflinger, 35 Wis. 400—State ex rel. Atkinson v. McDonald, 108 Wis. 15, 81 Am. St. Rep. 878, 84 N. W. 171.

Status; domestic relations.

What Parties Concluded, see *infra*, 752, 753.

569. A verdict and judgment that a mother was born free is not conclusive evidence as to the freedom of her children, in a suit between different parties or privies. *Wood v. Davis*, 7 Cranch, 271. 3: 339

Cited in Dent v. Ashley, Hempst. 55, Fed. Cas. No. 3,809a—Greely v. Smith, 1 Woodb. & M. 182, Fed. Cas. No. 5,749—Reintzel v. Morgan, 2 Cranch, C. C. 20, Fed. Cas. No. 11,683—Warner v. Brinton, Fed. Cas. No. 17,179—Chamberlain v. Pierson, 31 C. C. A. 161, 59 U. S. App. 55, 87 Fed. 424—Bloodgood v. Grasey, 31 Ala. 591—Burlen v. Shannon, 3 Gray, 390—Nowak v. Knight, 44 Minn. 243, 46 N. W. 348—Chamberlain v. Carlisle, 26 N. H. 552.

570. A record from a state court finding the illegitimacy of a son is not evidence, in another suit, to disprove the marriage of the mother, or show the illegitimacy of her other children, who were not parties to the first suit. *Kearney v. Denn ex dem Sansbury*, 15 Wall. 51, 21: 41
Cited in Overby v. Gordon, 177 U. S. 226, 44 L. ed. 746, 20 Sup. Ct. Rep. 603—*Morin v. St. Paul, M. & M. R. Co.* 33 Minn. 180, 22 N. W. 251.

570a. A divorce determines and dissolves the marriage as to both spouses; a husband without a wife or a wife without a husband being unknown to the law. *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. Rep. 544. 45: 794

Cited in Re Hall, 61 App. Div. 273, 70 N. Y. Supp. 406—*English v. English*, 19 Pa. Super. Ct. 394.

Executors; administrators.

Administrator's Account, see *infra*, 674-677a.

Who Concluded by Judgment, see *infra*, 814-819.

Foreign Judgment, see *infra*, 918a, 988-997.

Conclusiveness and Effect of Letters of Administration, see *Executors and Administrators*, 13, 14.

571. A judgment in which it was expressly held that a person was an executor of a certain testator is conclusive of that question, although the judgment was reversed by the executor's representatives, upon the express ground that it was made payable out of his personal effects when it

ought to have been *de bonis testatoris*. *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. Rep. 342, 30: 532

572. Where the decision in a suit against executors was on a demand for one half, and four fifths of another half, of the property owned by complainant's father when he died, which she then claimed as the donee of her mother to the one half, and as forced heir of her father to four fifths of another half of his estate; and, in a subsequent suit against purchasers from such executors, she claims as universal legatee and legitimate child of her father under his will, which had been admitted to probate by the supreme court of Louisiana, the former decision cannot be pleaded against her as *res judicata*, under La. Code, art. 2265, requiring that the thing demanded must be the same, be made between the same parties, and formed against each in the same quality. *Gaines v. Hennen*, 24 How. 553, 16: 770

Cited in Fuentes v. Gaines, 1 Woods, 115, Fed. Cas. No. 5,145—*Carey v. Roosevelt*, 81 Fed. 611—*Morgan v. Morgan*, 1 Tex. Civ. App. 318, 21 S. W. 154—*Western Min. & Mfg. Co. v. Virginia Cannel Coal Co.* 10 W. Va. 292.

573. The record of recovery against an administrator in one state is no evidence of a demand against an administrator of the same person in another state. *McLean v. Meek*, 18 How. 16, 15: 277

Cited in Johnson v. Powers, 139 U. S. 159, 35 L. ed. 114, 11 Sup. Ct. Rep. 52a—*Johnston v. McKinnon*, 129 Ala. 226, 29 So. 696—*Turner v. Risor*, 54 Ark. 36, 15 S. W. 13—*McGarvey v. Darnall*, 134 Ill. 370, 10 L.R.A. 862, 25 N. E. 1005—*McGarvey v. Darnall*, 32 Ill. App. 228—*Creswell v. Slack*, 68 Iowa, 114, 26 N. W. 42—*Turley v. Dreyfus*, 33 La. Ann. 887—*Low v. Bartlett*, 8 Allen, 265—*Braithwaite v. Harvey*, 14 Mont. 220, 27 L.R.A. 115, 43 Am. St. Rep. 625, 36 Pac. 38—*Crelighton v. Murphy*, 8 Neb. 356, 1 N. W. 138—*Carrigan v. Semple*, 72 Tex. 308, 12 S. W. 178—*Leach v. Buckner*, 19 W. Va. 44.

Fraud.

Collateral Attack on Judgment for Fraud, see *supra* II. i, 3, d.

See also *supra*, 534; *infra*, 731.

574. A defense set up in an action for an instalment due on a contract, that the plaintiff, in obtaining the contract, was guilty of fraudulent representations, if decided against the defendant, is concluded in a subsequent action for another instalment. *Mason Lumber Co. v. Buchtel*, 101 U. S. 638, 25: 1073

Distinguished in Norton v. Jensen, 33 C. C. A. 147, 61 U. S. App. 291, 90 Fed. 421.

Cited in Wilson v. Deen (*Milne v. Deen*) 121 U. S. 534, 30 L. ed. 982, 7 Sup. Ct. Rep. 1004—*Bissell v. Spring Valley Twp.* 124 U. S. 231, 31 L. ed. 414, 8 Sup. Ct. Rep. 495—*Johnson Steel Street Rail Co. v. Wharton*, 152 U. S. 258, 38 L. ed. 433, 14 Sup. Ct. Rep. 608—*Dowell v. Applegate*, 152 U. S. 344, 38 L. ed. 469, 14 Sup. Ct. Rep. 611—*Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 688, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—*Forsyth v. Hammond*, 163 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665—

New Orleans v. Citizens' Bank, 167 U. S. 396, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—Southern P. R. Co. v. United States, 168 U. S. 49, 42 L. ed. 377, 18 Sup. Ct. Rep. 18—Mitchell v. First Nat. Bank, 180 U. S. 481, 45 L. ed. 632, 21 Sup. Ct. Rep. 418—David Bradley Mfg. Co. v. Eagle Mfg. Co. 6 C. C. A. 672, 18 U. S. App. 349, 57 Fed. 990—St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co. 32 C. C. A. 289, 60 U. S. App. 675, 89 Fed. 653—Newton Mfg. Co. v. Wilgus, 90 Fed. 488—Norton v. House of Mercy, 41 C. C. A. 400, 101 Fed. 386—Wilcox & G. Sewing Mach. Co. v. Sherborne, 59 C. C. A. 366, 123 Fed. 878—Georgia R. & Bkg. Co. v. Wright, 132 Fed. 916—Conery v. New Orleans Waterworks Co. 41 La. Ann. 944, 7 So. 8—Davis v. Hart, 66 Miss. 646, 6 So. 318—Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 442, 74 S. W. 979—Church v. Kidd, 88 N. Y. 654—Territory ex rel. Jones v. Hopkins, 9 Okla. 150, 59 Pac. 976—New York L. Ins. Co. v. English, 96 Tex. 274, 72 S. W. 58.

575. A party waives his right to have the question of fraud litigated in a court of chancery, when he has previously presented it as a defense to an action at law. When the question of fraud has been submitted to the jury, and determined against the complainant in ejectment, he cannot raise the same question anew in chancery. *Blanchard v. Brown*, 3 Wall. 245, 18: 69
Noted in McClaskey v. Barr, 62 Fed. 211—*Kilham v. Wilson*, 50 C. C. A. 462, 112 Fed. 572.

Municipal corporations.

Against Whom Judgment Conclusive,
 see *infra*, 754, 755.
 See also *infra*, 650, 744.

576. A decree enjoining a municipality, at the suit of a waterworks company, from building its own waterworks, or denying liability, or refusing to pay the water rentals contracted for, is not conclusive as to the right of the municipality to regulate water rates charged to private consumers under a law passed long after the bill was filed, even if it could be said that the pleadings put in issue the reasonableness of the rates then charged. *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 27 Sup. Ct. Rep. 762, 51: 1155

577. A city's claim that land which it holds by dedication for public use cannot be legally sold under a judgment against the city is conclusively defeated by a decision against the city in a suit for an injunction against the sale on the ground of its illegality, although in that suit the question of the effect of the dedication was not presented or considered. *Werlein v. New Orleans*, 177 U. S. 390, 20 Sup. Ct. Rep. 682, 44: 817

578. A judgment against a city in an action to restrain an alleged illegal sale of its property under a judgment against the city is a bar to another action after the sale to declare the sale null and void, although in the meantime the city has discovered that it held the property for public use only, by virtue of a long prior dedication, and therefore claims now to hold

it in a capacity different from that in which it formerly sued, since there is in truth no difference in the character of the title by which a municipality holds such property and that by which it holds other property. *Werlein v. New Orleans*, 177 U. S. 390, 20 Sup. Ct. Rep. 682, 44: 817

Noted in United States v. California & O. Land Co. 192 U. S. 358, 48 L. ed. 479, 24 Sup. Ct. Rep. 266—*Eastern Bldg. & L. Asso. v. Wellington*, 116 Fed. 105—*The New Brunswick*, 125 Fed. 568—*Hoseason v. Keegan*, 178 Mass. 251, 59 N. E. 627—*Moore v. Snowball*, 98 Tex. 24, 66 L.R.A. 749, 107 Am. St. Rep. 596, 81 S. W. 5—*Belcher Land-Mortg. Co. v. Norris*, 34 Tex. Civ. App. 113, 78 S. W. 390.

— Editorial note.

[Right to go behind judgment against county or municipality in mandamus proceedings to enforce same. 9 L.R.A. (N.S.) 1002.]

Nuisance.

579. The record of a former recovery by plaintiff against defendant for a nuisance is not conclusive, although admissible, in a subsequent action for damages arising from the continuation of the same nuisance. *Richardson v. Boston*, 19 How. 263, 15: 639

580. A judgment recovered for damages for a nuisance cannot bar a subsequent action for the continuance of the same nuisance, or diminish the measure of damages to be recovered for such continuance. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. Rep. 185, 34: 784
Noted in Berlin v. Thompson, 61 Mo. App. 243.

— Editorial note.

[In suit to abate nuisance as bar to action for damages. 58 L.R.A. 735.]

Patents.

Conclusiveness of State Judgment in Federal Court, see *infra*, 1051.

581. The Commissioner's decision upon the reissue of a patent is final and conclusive, except that, if the reissued patent is not for the same invention as the original patent, then the reissued patent is invalid. *Gardner v. Herz*, 118 U. S. 180, 30: 158

582. The decision of the Commissioner of Patents is not conclusive as to an invention; and upon all the questions involved in the allowance and issue of the patent its validity may be examined by the courts. *Gardner v. Herz*, 118 U. S. 180, 30: 158
Noted in United States v. American Bell Teleph. Co. 32 Fed. 603.

583. The judgment in an action at law for damages for infringement of a patent does not estop defendant, in a suit in equity by the same plaintiff for an injunction and an accounting for gains and profits, from contesting the validity of the patent, it not appearing by the record, and not being shown by extrinsic evidence, upon which of two claims in the patent the recovery was had. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of

recovery. A patent may be valid as to a single claim, and invalid as to the others. *Russell v. Place*, 94 U. S. 606, 24: 214

584. In a suit for the infringement of a reissued patent, after the entry of a decree *pro confesso*, the validity of the reissued patent cannot be successfully assailed on the ground that the bill avers that in numerous infringement suits the validity of the patent was established, thereby showing it to be valid and operative, and precluding a reissue, since the court cannot say, as matter of law, but that the suits on the original patent may have been for infringements committed against particular parts of the invention or modes of using it, or that the patentee may have claimed as his own invention more than he had a right to claim as new. *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. Rep. 788, 29: 105
Cited in *Wooster v. Thornton*, 26 Fed. 275—*Third Nat. Bank v. Atlantic City*, 65 C. C. A. 180, 130 Fed. 754.

585. A final decree of a Federal circuit court in favor of defendant in a patent infringement suit entitles him to continue the business of manufacturing and selling throughout the United States the alleged infringing article, free from all interference by the complainant by virtue of the patent alleged to have been infringed. *Kessler v. Eldred*, 206 U. S. 285, 27 Sup. Ct. Rep. 611, 51: 1065

586. Defendant's rights under a final decree in his favor rendered by a Federal circuit court in a patent infringement suit are violated by the action of the complainant therein in thereafter filing a bill against one of the former's customers for an alleged infringement of the patent on account of the use or sale of the same article passed upon in the prior suit. *Kessler v. Eldred*, 206 U. S. 285, 27 Sup. Ct. Rep. 611, 51: 1065

587. Judgment for and payment of nominal damages, upon a bill in equity by a patentee, without joining his licensee, against one who has made and sold a machine in violation of the patent, are no bar to a bill in equity by the patentee and licensee together, for the benefit of the licensee, against another person who afterwards uses the same machine. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244, 28: 768

Copyright.

588. A decree establishing the validity of a copyright, and determining that a railroad scene in a play, apart from the dialogue, is a dramatic composition and entitled to protection under the copyright laws, is conclusive on the parties in a subsequent action at law for damages for the infringement. *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. Rep. 62, 44: 109

Notes.

See also *supra*, 531; Bills and Notes, 288.

589. A suit against a defendant as in-

dorser of a note, and a suit against him for goods sold, in conditional payment for which he had indorsed the note, are upon distinct and different causes of action; and a judgment in the first is not a bar to the second, where the point decided by the former judgment was that a suit against the indorser would not lie until suit had been brought against the maker, and the point decided in the second suit was whether plaintiffs had lost their remedy on the original contract by failure to sue the maker. *Clark v. Young*, 1 Cranch, 181, 2: 74

590. The record of a suit by the holder against the maker and prior indorsers is proper evidence, against an indorser, of due diligence to collect the note from them. *Camden v. Doremus*, 3 How. 515, 11: 705

Releases.

591. The record of a suit is inadmissible to prove nonexecution of the release of a mortgage, to which suit the devisees of the purchaser of the equity of redemption had not been made parties. *Dick v. Balch*, 8 Pet. 30, 8: 856

592. The validity of certain releases is *res judicata* as between the parties to a suit in which the question of their invalidity for fraud and undue influence was put in issue by the pleadings, where the decree of the trial court, which could not properly have been rendered without holding the releases valid, was followed by an affirmance on appeal, with an opinion declaring that there was no evidence in the record justifying the contention that they were obtained by fraud and undue influence, with a further affirmance in the court of last resort, whose opinion declared that, upon the state of the record, it was to be presumed that the validity of the releases had been affirmatively found and that there was sufficient evidence to sustain such a finding, followed by a refusal to frame its remittitur so as to send this question back to the trial court for consideration, although the trial judge made no findings of fact, made no mention in his memorandum of decision of the contention respecting the releases, and in his opinion failed in terms to pass upon this point. *Fayerweather v. Ritch*, 195 U. S. 276, 25 Sup. Ct. Rep. 58, 49: 193
Cited in *Gunter v. Atlantic Coast Line R. Co.* 200 U. S. 290, 50 L. ed. 486, 26 Sup. Ct. Rep. 252—*Doyle v. Cincinnati, N. O. & T. R. Co.* 148 Fed. 324.

593. The effect as *res judicata* of a decree in a case in which the validity of certain releases was put in issue by the pleadings, and in which no judgment could properly have been rendered without a determination of that question, cannot be limited by the oral testimony of the trial judge, some six years after his decision, to the effect that, in deciding the case, he did not consider the validity of the releases. *Fayerweather v. Ritch*, 195 U. S. 276, 25 Sup. Ct. Rep. 58, 49: 193
Cited in *Coulter v. Louisville & N. R. Co.* 196 U. S. 610, 49 L. ed. 618, 25 Sup. Ct. Rep.

342—Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 593, 51 L. ed. 638, 27 Sup. Ct. Rep. 326—Michigan R. Tax Cases, 138 Fed. 248.

594. A judgment rendered generally for the defendant in the district court must be supposed to cover the whole case, and not to have rested upon only a branch of it, namely,—a release which was pleaded by the defendant. *Fourniquet v. Perkins*, 7 How. 160, 12: 650

b. Title; Matters as to Real Property Generally.

Dismissal of Bill for Specific Performance, see *supra*, 308.

Decree of Dismissal in Action to Remove Cloud, see *supra*, 317.

Collateral Attack on Proceedings for Escheat, see *supra*, 419.

Conclusiveness of State Judgment in Federal Court, see *infra*, 1068.

Sufficiency of Personal Service in Another State to Sustain Decree Setting Aside Conveyance, see *Writ and Process*, 26a.

Conclusiveness of Record of Proceedings Against "Unknown Heirs" to Show Existence of Heirs, see *Writ and Process*, 86a.

See also *supra*, 159, 341, 356, 509, 534; *infra*, 643.

594a. A writ of right is probably not barred by any prior recoveries between the parties. *Foxcroft v. Mallett*, 4 How. 353, 11: 1008

Title generally.

On Foreclosure Suit, see *infra*, 644, 645.

Conclusiveness of Probate of Will, see *infra*, 673.

What Parties Concluded, see *infra*, 704, 705, 728-733, 756-764.

Conclusiveness of Foreign Probate of Will, see *infra*, 998-1001.

Conclusiveness of State Judgment in Federal Court, see *infra*, 1067.

Conclusiveness of Judicial Confirmation of Private Land Grant, see *Private Land Claims*, III. b, 2.

See also *supra*, 140, 142, 143, 162-164, 541.

595. Where the title to lands is adjudicated in a suit, such adjudication, so long as it remains unreversed, is conclusive upon the parties to such suit and their privies. *Bedon v. Davie*, 144 U. S. 142, 12 Sup. Ct. Rep. 665, 36: 380

596. Where the parties are the same, the legal effect of a former judgment as a bar is not impaired because the subject-matter of the second suit is different, provided the second suit involves the same title and depends upon the same questions. *Aurora v. West*, 7 Wall. 82, 19: 42
Cited in Richardson v. Lockwood, 4 Cliff. 132, Fed. Cas. No. 11,786—*Clay v. Deskins*, 11 C. A. 231, 8 U. S. App. 661, 63 Fed. 332—*Eastern Bldg. & L. Asso. v. Welling*, 116 Fed. 105—*Hurd v. McClellan*, 1 Colo. App. 331, 29 Pac. 181—*Godding v. Colorado Springs Live Stock Co.* 4 Colo. App. 18, 34 Pac. 942—*Huntley v. Holt*, 59 Conn. 107, 21 Am.

St. Rep. 71, 22 Atl. 34—*Goodenow v. Litchfield*, 59 Iowa, 233, 13 N. W. 86—*Hodge v. Shaw*, 85 Iowa, 143, 39 Am. St. Rep. 290, 52 N. W. 8—*Watson v. Richardson*, 110 Iowa, 700, 80 Am. St. Rep. 331, 80 N. W. 416—*Conery v. New Orleans Waterworks Co.* 41 La. Ann. 933, 7 So. 8—*McLeod v. Lee*, 17 Nev. 117, 28 Pac. 124—*Philadelphia Ridge Ave. R. Co.* 142 Pa. 493, 24 Am. St. Rep. 512, 21 Atl. 982—*Lochridge v. Corbett*, 31 Tex. Civ. App. 681, 73 S. W. 96.

597. An adjudication of a fact on which depends the title to lands in controversy is conclusive as between the parties, in respect to the title of other lands depending upon the existence or nonexistence of that fact. *Southern P. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. Rep. 18, 42: 355

598. A decree in a former suit to enforce a lien for rents of the same land, in which the title was in issue and was decided, is conclusive, as to the title, upon the parties and their privies. *Whiteside v. Haselton*, 110 U. S. 296, 4 Sup. Ct. Rep. 1, 28: 152

599. Where a wife has obtained a decree quieting her title, as between her and her husband's heirs and his grantee, to an undivided half of lands conveyed to herself and husband; and has also joined with such grantee in seeking relief, as co-owners, against an execution sale of a parcel of the land, and the rectification of a mistake in the deeds, and the vesting of title in herself and such grantee; and such relief was accorded by the decree,—these adjudications, standing unreversed, are binding upon her. *Hunt v. Blackburn*, 128 U. S. 464, 9 Sup. Ct. Rep. 125, 32: 488

600. An adjudication that a party is entitled under a conveyance to one half the estate is a determination of a pre-existing right which dates from the time of the conveyance. *Grant v. Buckner*, 172 U. S. 232, 19 Sup. Ct. Rep. 163, 43: 430

601. A decision as to the construction of a will, acquiesced in for half a century, and which necessarily has become a rule of property, would seem to close all litigation under the will. *Doe ex dem. Cheesman v. Watson*, 8 How. 263, 12: 1072

602. A decision cannot be held *res judicata* on a question of title, by reason of certain language used by way of reasoning in the opinion, when the substantial effect of the decision is that the title will not be adjudicated in equity, and that the bill must be dismissed, but without prejudice to an action at law. *Abraham v. Casey*, 179 U. S. 210, 21 Sup. Ct. Rep. 88, 45: 156

603. Nothing decided in a suit for an unlawful inclosure of public lands, in which the Supreme Court of the United States on appeal reversed the judgment of the court below in favor of the government, and remanded the case, with instructions to dismiss the petition on the ground that there was color of title in the defendant sufficient to take the case outside of the operation of the statute, is *res judicata* in a suit to conform title under a Mexican grant, in

which defendant, in the prior suit claims a valid title to such land as being within the exterior boundaries of the grant. *United States v. Green*, 185 U. S. 256, 22 Sup. Ct. Rep. 640, 46: 898

Judicial sale.

Conclusiveness of Judgment on Foreclosure, see *infra*, III. j. 4, c.

Conclusiveness of State Judgment in Federal Court, see *infra*, 1047.

Distinction between Redemption and Decree Allowing Redemption, see *Judicial Sale*, 146.

604. Legal proceedings under which land was sold are evidence of title against all persons, in favor of the purchaser. *Barton v. Forsyth*, 20 How. 532, 15: 1012

605. In Louisiana a judgment confirming and homologating a judicial sale is *res judicata*, so as to operate "as a complete bar against all persons who may thereafter claim the property in consequence of all illegality or informality in the proceedings, whether before or after judgment." *Jeter v. Hewitt*, 22 How. 352, 16: 345
Montgomery v. Samory, 99 U. S. 482, 25: 375

Cited in Taxing District v. Loague, 129 U. S. 505, 32 L. ed. 784, 9 Sup. Ct. Rep. 327—*Nevada Nickel Syndicate v. National Nickel Co.* 103 Fed. 398—*Howard v. Huron*, 6 S. D. 189, 26 L.R.A. 501, 60 N. W. 803—*Wadhams v. Gay*, 73 Ill. 437—*Beard v. Beard*, 21 Ind. 827—*Shoemaker v. Cincinnati*, 68 Ohio St. 612, 68 N. E. 1.

606. A final decree in a controversy between a judgment creditor of a waterworks company and the latter's mortgagees and their assigns, in which the validity of the mortgage and the foreclosure sale under it was assailed and a mechanics' lien asserted by such creditor,—which decree determines that the mortgagees were lawfully in possession of the mortgaged property by virtue of such sale, and that there was no mechanic's lien in favor of such creditor, as against the mortgagees or their assigns, upon the waterworks plant and franchise, arising either from the laws of the state, the recording of the alleged lien, or a decree recognizing such lien as against the waterworks company,—is a bar to a claim in a suit between the same parties that by virtue of a sale made under the decree recognizing such lien the judgment creditor became the owner of the waterworks plant, entitled to the possession of the same, or, if not the owner, had been vested with a paramount lien, or that in any event there remained in the judgment creditor a right to redeem from the sale under foreclosure. *National Foundry and Pipe Works v. Oconto Water Supply Co.* 183 U. S. 216, 22 Sup. Ct. Rep. 111, 46: 157

Cited in National Foundry & Pipe Works v. Oconto City Water Supply Co. 51 C. C. A. 476, 113 Fed. 804—*Rew v. Independent School District*, 125 Iowa, 31, 106 Am. St. Rep. 282, 98 N. W. 802.

607. An adjudication in a suit in equity brought by a receiver of mortgaged property U. S. Dig.—230

against persons claiming the land under an execution sale, that such property was subject to the mortgage, did not so bring the property into the custody of the court as to invalidate a prior sale of the same property on execution to other persons, strangers to the suit. *Pardee v. Aldridge*, 189 U. S. 429, 23 Sup. Ct. Rep. 514, 47: 883

608. The district court, having only jurisdiction to sell the life estate of an offender, in confiscation proceedings, its judgment directing a sale of the fee is void as to the remainder. *Day v. Micou*, 18 Wall. 156, 21: 860

Cited in Ex parte Lange, 18 Wall. 177, 21 L. ed. 879—*Semmes v. United States*, 91 U. S. 27, 23 L. ed. 196—*Folts v. St. Louis & S. F. R. Co.* 8 C. C. A. 640, 19 U. S. App. 576, 60 Fed. 321.

Ejectment.

What Parties Concluded, see *infra*, 761, 766, 776, 777, 833, 834.

Conclusiveness in Federal Court of Judgment of State Court, see *infra*, 1066.

Federal Courts Following State Laws and Decisions as to Conclusiveness, see *Courts*, 2127–2132.

Successive Suits in Ejectment, see *Ejectment*, XI.

Parol Evidence to Show Issues Litigated, see *Evidence*, 1729.

Conclusiveness of Merits in Action to Enjoin Execution of Judgment, see *Injunction*, 90.

See also *infra*, 733, 1148.

609. A defendant in ejectment cannot set up as a bar the record in a prior chancery suit between the same parties. Such action is not barred even by possession of the premises after judgment under a writ of *habere facias*. *Hickey v. Stewart*, 3 How. 750, 11: 814

610. The general doctrine applicable to cases tried in the common-law form in an action of ejectment denies to a verdict and judgment in such an action the conclusive effect which they have in other actions, either in courts of law or equity. *Miles v. Caldwell*, 2 Wall. 35, 17: 755

611. A final judgment in ejectment in Arkansas, there being no exception or difference as to the conclusiveness of the verdict or judgment in real or personal action in that state, is a bar to a like action subsequently instituted between the same parties, for the same lands, involving the same title. *Sturdy v. Jackaway*, 4 Wall. 174, 18: 387

Cited in Hiller v. Shattuck, 1 Filipp. 275, Fed. Cas. No. 6,504—*Hayner v. Stanly*, 8 Sawy. 219, 18 Fed. 221—*Gaines v. Hale*, 26 Ark. 210—*Dawson v. Parham*, 55 Ark. 293, 18 S. W. 48—*Elizabethport Cordage Co. v. Whitlock*, 37 Fla. 224, 20 So. 255—*Oetgen v. Ross*, 54 Ill. 82—*Brooke v. Gregg*, 89 Md. 236, 43 Atl. 38—*Doyle v. Hallam*, 21 Minn. 516—*Kimmel v. Benna*, 70 Mo. 67—*Barrell v. Title Guarantee Co.* 27 Or. 83, 39 Pac. 992.

612. In California a judgment in eject-

ment has the same conclusiveness as a judgment in any common-law action. A defeated plaintiff may bring a new action upon an after-acquired title, and the former judgment will be no bar. *Merryman v. Bourne*, 9 Wall. 592, 19: 683

Cited in *Britton v. Thornton*, 112 U. S. 536, 28 L. ed. 820, 5 Sup. Ct. Rep. 291—*Amesti v. Castro*, 49 Cal. 330—*Swain v. McMillan*, 80 Mont. 441, 76 Pac. 943.

613. In Illinois every judgment in ejectment is conclusive as to the title established in such action. The judgment has the same effect upon the parties and those in privity with them as a judgment in a common-law action, but does not prevent a plaintiff who has been defeated by failure to establish title, from suing again upon one subsequently acquired. *Barrows v. Kindred*, 4 Wall. 399, 18: 383

Cited in *Merryman v. Bourne*, 9 Wall. 599, 19 L. ed. 685—*Watson v. Jones*, 13 Wall. 715, 20 L. ed. 671—*Hogan v. Kurtz*, 94 U. S. 775, 24 L. ed. 819—*Britton v. Thornton*, 112 U. S. 536, 28 L. ed. 819, 5 Sup. Ct. Rep. 291—*Hiller v. Shattuck*, 1 Flipp. 275, Fed. Cas. No. 6,504—*Northern P. R. Co. v. Smith*, 10 C. C. A. 338, 32 U. S. App. 573, 69 Fed. 581—*Mercantile Trust & D. Co. v. Roanoke & S. R. Co.* 109 Fed. 9—*Hawley v. Simons*, 102 Ill. 120—*Hentig v. Redden*, 46 Kan. 236, 26 Am. St. Rep. 91, 26 Pac. 701—*Wisconsin v. Torinus*, 28 Minn. 182, 9 N. W. 725—*Hunt v. O'Neill*, 44 N. J. L. 566—*King v. Townshend*, 65 Hun. 572, 20 N. Y. Supp. 602—*Dawley v. Brown*, 79 N. Y. 397—*Gore v. Gore*, 101 Tenn. 623, 49 S. W. 737—*Western Min. & Mfg. Co. v. Virginia Cannel Coal Co.* 10 W. Va. 286—*Lewis v. Childers*, 18 W. Va. 11.

614-15. A judgment in ejectment is conclusive as to matters necessarily proved, as the validity of the lease, the possession of the defendant, his obligation to pay the rent reserved, and the amount due. *Sheets v. Selden*, 7 Wall. 416, 19: 166
Cited in *Rowell v. Klein*, 44 Ind. 295, 15 Am. Rep. 235—*Neil v. Tolman*, 12 Or. 294, 7 Pac. 103.

616. A judgment rendered in an ejectment suit against the occupant of land is not a bar to a subsequent suit to vacate the patent under which the plaintiff in the ejectment suit claimed, where judgment passed in his favor on the ground that the court could not, in that form of action, go behind the patent. *Hughes v. United States*, 4 Wall. 232, 18: 303
Distinguished in *Hambleton v. Glenn*, 72 Md. 356, 20 Atl. 121.

Cited in *Durant v. Essex Co.* 7 Wall. 109, 9 L. ed. 156—*Smith v. McNeal*, 109 U. S. 430, 27 L. ed. 987, 3 Sup. Ct. Rep. 319—*Baker v. Cummings*, 181 U. S. 125, 45 L. ed. 780, 21 Sup. Ct. Rep. 578—*Spicer v. United States*, 5 Ct. Cl. 49—*Williams v. United States*, 26 Ct. Cl. 142—*Stevens v. The Railroads*, 4 Fed. 100—*Ex parte Houghton*, 8 Fed. 898—*Keller v. Stolzenbach*, 20 Fed. 48—*Tyler Min. Co. v. Sweeney*, 4 C. C. A. 334, 7 U. S. App. 463, 54 Fed. 288—*Colorado E. R. Co. v. Union P. R. Co.* 36 C. C. A. 264, 94 Fed. 313—*Bunker Hill & S. Min. & Concentrating Co. v. Shoshone, Min. Co.* 47 C. C. A. 203, 109 Fed. 507—*McCall v. Jones*, 72 Ala. 372—*De Loach Hill Mfg. Co. v. Little Rock*

Hill & Elevator Co. 65 Ark. 470, 67 Am. St. Rep. 942, 47 S. W. 118—*Oakland v. Oakland Water Front Co.* 118 Cal. 222, 50 Pac. 277—*Cummings v. Baker*, 16 App. D. C. 17—*Pepper v. Donnelly*, 87 Ky. 262, 8 S. W. 441—*Blitzer v. O'Bryan*, 107 Ky. 598, 54 S. W. 951—*Orendorff v. Utz*, 48 Md. 303—*Martin v. Evans*, 85 Md. 13, 86 L.R.A. 220, 60 Am. St. Rep. 292, 36 Atl. 258—*Stearns v. Wiborg*, 123 Mich. 589, 82 N. W. 283—*Swanson v. Great Northern R. Co.* 73 Minn. 107, 75 N. W. 1033—*Springfield v. Plummer*, 89 Mo. App. 530—*Kleinschmidt v. Binzel*, 14 Mont. 56, 43 Am. St. Rep. 604, 35 Pac. 460—*Henninger v. Heald*, 51 N. J. Eq. 75, 26 Atl. 449—*Pittsburgh, C. C. & St. L. R. Co. v. Bemis*, 64 Ohio St. 31, 59 N. E. 745—*Brakefield v. Lucas*, 10 Okla. 587, 64 Pac. 10—*Gelser Mfg. Co. v. Berry*, 12 Okla. 194, 70 Pac. 202—*Pruitt v. Muldrick*, 39 Or. 358, 65 Pac. 20—*Welgley v. Coffman*, 144 Pa. 499, 28 W. N. C. 456, 27 Am. St. Rep. 667, 22 Atl. 919—*Burton v. Burton*, 58 Vt. 420, 5 Atl. 281—*Chrisman v. Harman*, 29 Gratt. 499, 26 Am. Rep. 387—*Wilcher v. Robertson*, 78 Va. 618—*Payne v. Grant*, 81 Va. 173—*Justice v. Com.* 81 Va. 216—*Washington, O. & W. R. Co. v. Cazenove*, 83 Va. 753, 3 S. E. 433—*Miller v. Willis*, 95 Va. 354, 28 S. E. 337—*Tate v. Bank of the State*, 96 Va. 770, 32 S. E. 476—*Tracey v. Shumate*, 22 W. Va. 510—*Rogers v. Rogers*, 37 W. Va. 420, 16 S. E. 633—*Bodkin v. Arnold*, 45 W. Va. 96, 30 S. E. 154—*Taylor v. Matteson*, 86 Wis. 122, 56 N. W. 829.

617. In an action for breach of covenant of warranty in a deed, a judgment and execution against plaintiff's grantor, in ejectment for the same land, since the deed, is evidence to establish paramount title, though plaintiff was a witness in the suit to obtain such judgment for the plaintiff therein. *Griffin v. Reynolds*, 17 How. 609, 15: 229

618. Division of opinion as to whether a recovery in ejectment is, of itself, prima facie evidence of title paramount. *Somerville v. Hamilton*, 4 Wheat. 230, 4: 558
Cited in *Salle v. Light*, 4 Ala. 707, 39 Am. Dec. 317—*Clements v. Collins*, 59 Ga. 128—*Rhode v. Green*, 26 Ind. 88—*Fields v. Hunter*, 8 Mo. 132—*Randolph v. Meek, Mart & Y.* 63—*Knaapp v. Marlboro*, 84 Vt. 241.

619. A judgment in ejectment, where there is no further right to a new trial, is conclusive between the same parties in interest on the same question of title. Inferable in *Equator Min. & Smelting Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. Rep. 128, 27: 114
Cited in *Barber v. Pittsburgh, Ft. W. & C. R. Co.* 166 U. S. 99, 41 L. ed. 933, 17 Sup. Ct. Rep. 488—*Capital Traction Co. v. Hof*, 174 U. S. 13, 43 L. ed. 877, 19 Sup. Ct. Rep. 580—*Carlisle v. Killebrew*, 89 Ala. 334, 6 L.R.A. 619, 6 So. 756.

620. Where, in an ejectment suit, the plaintiff's title is based on a mortgage foreclosure sale, and the jury finds there is no fraud in the mortgage, and that another mortgage under which the defendant claims was satisfied, such finding and the judgment in ejectment thereon are conclusive as between the same parties in another action. *Miles v. Caldwell*, 2 Wall. 35, 17: 755

621. A special verdict for plaintiff in ejectment is not, after reversal of the judg-

ment entered upon it because it did not show title in plaintiff, although judgment was entered thereon for defendant because of plaintiff's lack of title, evidence for the plaintiff in another suit for the same premises upon after-acquired title, to prove the heirship of one of the parties under whom he claimed. *Smith v. McCool*, 16 Wall. 560, 21: 324

622. Under the laws of Pennsylvania a single judgment in ejectment is not a bar to a subsequent action. *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. Rep. 129, 29: 440

623. Under the statute of Pennsylvania of April 13, 1807, enacting that two concurring verdicts and judgments thereon, between the same parties in ejectment, shall be conclusive and bar the right, one judgment on a special verdict is not conclusive of any fact found by the verdict; and two verdicts and judgments are not conclusive upon a title not therein adjudicated. *Britton v. Thornton*, 112 U. S. 526, 5 Sup. Ct. Rep. 291, 28: 816

Cited in Gibson v. Lyon, 115 U. S. 446, 29 L. ed. 442, 6 Sup. Ct. Rep. 129—*Dishong v. Finkbinder*, 46 Fed. 17.

624. Two concurring verdicts and judgment thereon, in ejectment, in Pennsylvania, are conclusive as to title between the real parties, although one action is brought in the name of the original warrantee for the benefit of the real owner. *Evans v. Patterson*, 4 Wall. 224, 18: 393
Cited in Britton v. Thornton, 112 U. S. 535, 28 L. ed. 819, 5 Sup. Ct. Rep. 291—*Herron v. Dater*, 120 U. S. 471, 30 L. ed. 751, 7 Sup. Ct. Rep. 620—*Murphy v. Packer*, 152 U. S. 399, 38 L. ed. 490, 14 Sup. Ct. Rep. 636.

625. As one judgment in ejectment is not conclusive on the right of either possession or property in the premises in controversy, the plaintiff has a right to bring a new suit; and the court must consider the case, even if it is in all respects identical with the former, though they may hold it to be decided by the opinion therein given. When the second case presents a plaintiff's or defendant's right on matters of law or fact material to its decision, not appearing in the record before, it becomes the duty of the court to decide all pertinent questions arising on the record in the same manner as if the case came before them for the first time, save such as arise on evidence identical as to the merits. *Strother v. Lucas*, 12 Pet. 410, 9: 1137

626. In Texas a judgment against a plaintiff in an action for the possession of lands is conclusive, unless he commences a second action within a year. Held, that in an action for the same lands, commenced within a year, by the former defendant against the grantees of the former plaintiff, the latter are not precluded by that judgment from setting up their claim to them. *Brownsville v. Cavazos*, 100 U. S. 138, 25: 574
Cited in Slanson v. Goodrich Transp. Co. 99 Wis. 26, 40 L.R.A. 829, 74 N. W. 574.

627. [The recovery of damages in eject-

ment, given for mesne profits, may be pleaded in bar of an action for trespass. *Boyd v. Cowan* (Pa. Sup. Ct.) 4 Dall. 138, 1: 774]

628. In a suit for mesne profits against third persons, the record of the ejectment is not evidence to establish the plaintiff's title, but is admissible to show the possession of the plaintiff. *Chirac v. Reinecker*, 2 Pet. 613, 7: 538

Forcible entry and detainer.

629. In case of a forcible detainer against a tenant, a judgment for either party left his rights of property unaffected, except as to mere possession. *Peyton v. Stith*, 5 Pet. 485, 8: 200

630. A judgment of acquittal is conclusive on the landlord as to the forcible detainer, but in all other respects the rights of the parties remain as before the institution of the process. *Peyton v. Stith*, 5 Pet. 485, 8: 200

Partition.

Judgment by Consent, see *supra*, 281.

631. A record of partition between others is evidence as a muniment of plaintiff's title. *Webb v. Den ex dem. Weatherhead*, 17 How. 576, 15: 35

632. Proceedings in partition cannot conclude the title of a party to them, who, as the proceedings themselves show, had no interest in the question of partition. *Doe ex dem. McCall v. Carpenter*, 18 How. 297, 15: 389

633. The record of a suit of partition, under which the plaintiff derived his title as a purchaser, should not be excluded because the sale had not been conducted with regularity, and the decree of sale had been rendered against infants, by default, and because it did not prescribe the manner of the sale. Strangers to these proceedings cannot object to a result of which the parties to the decree have not complained. *Gregg v. Forsyth*, 24 How. 179, 16: 731
Cited in Wells v. Francis, 7 Colo. 418, 4 Pac. 49—*Newman v. Homes Ins. Co.* 20 Minn. 427, 11: 378—*Connell v. Galligher*, 36 Neb. 755, 55 N. W. 229.

634. Where a decree in partition, in Illinois, finds that due legal notice has been given to all the defendants, such a finding is prima facie evidence of the fact, although not conclusive, when the decree is offered in evidence in another suit. *Seerist v. Green*, 3 Wall. 744, 18: 153

635. In ejectment, it is competent to impeach a deed under which defendants claim, although they claimed under the same deed in a former action of partition between the same parties; two of the plaintiffs in that action having been nonresidents and not appearing, and another an infant when the partition suit was pending, and no question having been involved, or judgment given therein, upon the deed. The deed was not involved in the partition suit so as to be

res judicata. Doe ex dem. McCall v. Carpenter, 18 How. 297, 15: 389
Cited in Franklin v. Kelley, 2 Neb. 116.

Railroads.

Exemption from Taxation, see *infra*, 663.

See also *infra*, 687.

636. A decision as to the sufficiency of maps to make a definite location or designation of the route of a railroad, on which the title to lands included in a railroad grant depends, is conclusive in another action then pending between the same parties respecting other lands within the same grant. Southern P. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. Rep. 18, 42: 355

637. A determination in a suit to quiet title by the United States against the Southern Pacific Railroad Company, that such railroad, claiming under the grant of March 3, 1871, took no title to lands within the conflicting place limits of the grant to it under that act and of that made to the Atlantic & Pacific Railroad Company by act of July 27, 1866, inasmuch as the latter road had filed an approved map of definite location, is not a bar to a claim in another suit between the same parties that the Southern Pacific Railroad Company by virtue of the construction of a railroad under the said act of July 27, 1866, had an equal undivided moiety in all the odd numbered sections which lie within the conflicting place limits of the grant to it and to the Atlantic & Pacific Railroad Company by that act, such lands not being the same as those involved in the prior suit. Southern P. R. Co. v. United States, 183 U. S. 519, 22 Sup. Ct. Rep. 154, 46: 307
Cited in United States Min. Co. v. Lawson, 67 C. C. A. 594, 184 Fed. 776.

638. A judgment in an action between two railroad companies, denying the claim of one of them to lands granted by the United States, on the ground that they were granted to aid the other company, is conclusive against the former company in a subsequent suit against the United States after it has been decided that the other company is not entitled to the land as against the United States. Chicago, M. & St. P. R. Co. v. United States, 159 U. S. 372, 16 Sup. Ct. Rep. 26, 40: 185

639. A decree rendered on demurrer, dismissing, on the merits, a suit to establish a trust in certain lands in favor of a railway company, which set up, as a basis of its alleged title in fee simple, the railroad land grant act of July 2, 1864 (13 Stat. at L. 365, chap. 217), prevents the successor in interest of such railway company from asserting, in an action of ejectment involving the same property, brought by the defendant in the former suit, that such company had acquired title under the act of March 3, 1875 (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), or under the state statute of limitations. Northern P.

R. Co. v. Slaght, 205 U. S. 122, 27 Sup. Ct. Rep. 442, 51: 738
 Northern P. R. Co. v. Slaght, 205 U. S. 134, 27 Sup. Ct. Rep. 446, 51: 742
Cited in Yates v. Utica Bank, 206 U. S. 183, 51 L. ed. 1016, 27 Sup. Ct. Rep. 648.

c. Foreclosure.

Judgment by Confession, see *supra*, 287.

Decree of Dismissal, see *supra*, 320.

Failure to Set up Defense, see *supra*, 533, 533a.

See also *supra*, 606, 607; *infra*, III. k, 9; 774.

640. The question of a wife's ability to make a mortgage cannot be again raised by her in an action by a purchaser on foreclosure sale, after it has been determined in a foreclosure suit. Barrell v. Tilton, 119 U. S. 637, 7 Sup. Ct. Rep. 332, 30: 511

641. Where the court decreed that, on a sale under a trust deed, the several parcels therein described should be sold together, the decree on that point is *res judicata*, and both parties are barred from litigating it a second time. Hill v. Farmers & M. Nat. Bank, 97 U. S. 450, 24: 1051
Cited in Compton v. Jesup, 15 C. C. A. 430, 31 U. S. App. 486, 68 Fed. 298.

642. Where an error in the description of a mortgage is reformed, without notice to one who has a judgment lien on the property, whose lien thereby becomes a second lien, and the property is afterwards ordered, in bankruptcy proceedings, to be sold free from all encumbrances and the proceeds distributed, and the judgment creditor has notice of this order and distribution, and takes no steps to protect his rights, he cannot afterwards assert his claim against the purchaser. Fowler v. Hart, 13 How. 373, 14: 186

643. A contention that by reason of the pendency of a Federal court of a suit to enforce a mechanics' lien upon the plant of a waterworks company when proceedings to foreclose a mortgage executed by such company were instituted in the state court, the Federal court had exclusive jurisdiction of the *res*, and the state court was without power in the premises, must be raised in a controversy between the lienor and the mortgagees and their assigns in which the validity of title claimed by the latter to have resulted from a sale under foreclosure is an issue and decided, or it will be deemed waived and concluded and foreclosed by the judgment rendered on such issue. National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 22 Sup. Ct. Rep. 111, 46: 157

Title.

644. The record in a foreclosure suit is admissible in evidence, in establishing title, although one of the defendants has not been served with process in the case, it not ap-

pearing that said defendant was a necessary party. *Dirst v. Morris*, 14 Wall. 484,

20: 722

Cited in Compton v. Jesup, 15 C. C. A. 440, 31 U. S. App. 486, 68 Fed. 306—*Allison v. Corson*, 32 C. C. A. 16, 60 U. S. App. 387, 88 Fed. 586—*Greenebaum v. Davis*, 131 Cal. 148, 82 Am. St. Rep. 338, 63 Pac. 165—*Southard v. Smith*, 8 S. D. 236, 66 N. W. 316—*Adair v. Mergenthelm*, 114 Ind. 306, 16 N. E. 603—*Gaylord v. Lafayette*, 115 Ind. 433, 17 N. E. 899—*McLaughlin v. Nicholson*, 70 Minn. 76, 72 N. W. 827—*Plant v. Carpenter*, 19 Wash. 626, 53 Pac. 1107.

Railroads.

See also *supra*, 636–639.

645. A decree in foreclosure against the owner of a tax title, adjudging that he has no valid title, estops him from setting up such title in a subsequent action. *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 8 Sup. Ct. Rep. 337, 31: 309

646. A judgment establishing a lien against a railroad company is conclusive of the formality of the prior proceedings, in a subsequent action to foreclose the mortgage on the same property. *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25: 1057

647. A decree in a suit brought to foreclose a mortgage upon a railroad, which undertakes to declare and find the amount of bonds outstanding and due under each of several mortgages on the same property, before the bonds have been regularly produced and proved, is not final and conclusive on that point. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20: 199
Cited in Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 181.

648–9. An order confirming a master's report as to whether certain rolling stock was covered by a mortgage settled the right of the parties, and is conclusive until reversed or set aside. *Milwaukee & M. R. Co. v. Soutter (Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.)* 2 Wall. 609, 17: 886

d. Taxes and Assessments.

Inadequacy of Legal Remedy as Matter Conclusively Established by Former Decree Enjoining Collection, see *Injunction*, 7. See also *supra*, 90.

650. After a lapse of more than twenty years a city cannot question the validity of judgments against itself, to which it assented, for assessments upon its property for public improvements, upon the ground that such property was not subject to assessment,—especially where the assessments were approved by the legislature. *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44: 96

651. A judgment establishing the liability of the estate of a ward for taxes, in a suit by the guardian to restrain their collection, is *res judicata* as to that question in a subsequent action by the state against the sureties on the guardian's bond to col-

lect the unpaid taxes. *Baldwin v. Maryland use of Hull*, 179 U. S. 220, 21 Sup. Ct. Rep. 105, 45: 160

652. The reversal by the Supreme Court of the United States of an order which dismissed a petition claiming a lien for taxes, on the ground that it presented no claim against the property or the parties, is an adjudication that upon the face of the petition a valid claim was presented, and is conclusive of such *prima facie* validity, not only as against objections which were in fact made, but also as against those which might have been made. *United States Trust Co. v. New Mexico*, 183 U. S. 535, 22 Sup. Ct. Rep. 172, 46: 315

Taxes for different year.

See also *infra*, 655, 657, 658.

653. A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. Rep. 592, 38: 450

Cited in Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 186, 40 L. ed. 664, 16 Sup. Ct. Rep. 471—*New Orleans v. Citizens Bank*, 167 U. S. 399, 42 L. ed. 212, 17 Sup. Ct. Rep. 905—*Buchanan v. Knoxville & O. R. Co.* 18 C. C. A. 134, 37 U. S. App. 499, 71 Fed. 336—*St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co.* 32 C. C. A. 287, 60 U. S. App. 675, 89 Fed. 651—*Mercantile Nat. Bank v. Lander*, 109 Fed. 24—*Union & Planters Bank v. Memphis*, 49 C. C. A. 464, 111 Fed. 570—*Newport v. Com.* 106 Ky. 445, 45 L.R.A. 521, 50 S. W. 845—*Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 438, 74 S. W. 979—*Willoughby v. Northeastern R. Co.* 52 S. C. 175, 29 S. E. 629—*State v. Bank of Commerce*, 95 Tenn. 222, 31 S. W. 993—*Union & Planters Bank v. Memphis*, 101 Tenn. 168, 46 S. W. 567.

654. A judgment establishing a liability to pay taxes for certain years is *res judicata* as to the liability for the taxes of a succeeding year, when the facts affecting the liability are identical in the two cases. *Baldwin v. Maryland use of Hull*, 179 U. S. 220, 21 Sup. Ct. Rep. 105, 45: 160
Cited in First Nat. Bank v. Covington, 129 Fed. 704—*Georgia R. & Bkg. Co. v. Wright*, 124 Ga. 604, 53 S. E. 251—*Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 442, 74 S. W. 979—*State ex rel Kennedy v. Broatch*, 68 Neb. 609, 110 Am. St. Rep. 477, 94 N. W. 1016.

Exemption.

Failure to Set up Defense, see *supra*, 535.

Conclusiveness of State Judgment in Federal Court, see *infra*, 1053, 1054.

655. A judgment which determined that certain assessments for taxation on shares of stock in a national bank were illegal because stockholders' debts were not deducted therefrom, and moneyed capital invested in national banks was therefore unlawfully discriminated against by reason of the practical operation of Ohio Rev. Stat. § 2730, defining credits, in exempting from taxation moneyed capital in the hands of

individuals, is not conclusive as to the right of the stockholders in such bank to have their debts deducted from the value of their shares in determining their value for taxation in subsequent years. *Lander v. Mercantile Nat. Bank*, 186 U. S. 458, 22 Sup. Ct. Rep. 908, 46: 1247
Cited in Lander v. Mercantile Nat. Bank, 55 C. C. A. 524, 118 Fed. 786.

656. A judgment establishing an exemption of a corporation from taxes is not an estoppel against a later action based upon facts of a totally different nature, and after a change in the charter and business of the company. *Memphis City Bank v. Tennessee* use of Memphis, 161 U. S. 186, 16 Sup. Ct. Rep. 468, 40: 664

657. An adjudication that an irrevocable contract exists which precludes the enforcement of a tax law in conflict with the contract is *res judicata* as to an attempt to enforce such statute in a succeeding year. *Stone v. Farmers' Bank*, 174 U. S. 409, 19 Sup. Ct. Rep. 880, 43: 1027
Cited in First Nat. Bank v. Covington, 103 Fed. 531—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 457, 111 Fed. 563—*Coulter v. Weir*, 62 C. C. A. 437, 127 Fed. 905—*First Nat. Bank v. Covington*, 129 Fed. 796.

658. A decree enjoining the collection of taxes because of a contract exemption from taxation is as controlling on future taxes as on the particular taxes to which the suit related. *Gunter v. Atlantic Coast Line R. Co.* 200 U. S. 273, 26 Sup. Ct. Rep. 252, 50: 477

Cited in Rochester R. Co. v. Rochester, 205 U. S. 249, 51 L. ed. 790, 27 Sup. Ct. Rep. 469.

659. A decision establishing the existence of an irrevocable contract of exemption or limitation of taxation for the term of the charter of a corporation is not *res judicata* as to such exemption after that charter is renewed. *Third Nat. Bank v. Stone*, 174 U. S. 432, 19 Sup. Ct. Rep. 759, 43: 1035
Louisville v. Citizens' Nat. Bank, 174 U. S. 436, 19 Sup. Ct. Rep. 874, 43: 1037
New Orleans v. Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42: 202
Cited in Third Nat. Bank v. Stone, 174 U. S. 434, 43 L. ed. 1036, 19 Sup. Ct. Rep. 759—*Louisville v. Citizens' Nat. Bank*, 174 U. S. 437, 43 L. ed. 1038, 19 Sup. Ct. Rep. 874—*Bedford-Bowling Green Stone Co. v. Oman*, 134 Fed. 452.

660. A judgment establishing the exemption from taxation of the capital of a bank, its banking house, and furniture and from liability to pay a tax on its shareholders, is not *res judicata* as to the exemption of the shareholders themselves, or of real estate acquired by the bank on foreclosure of mortgages securing stock subscriptions, or of the exemption of the bank from a license tax. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42: 202
Cited in State v. Citizens' Bank, 52 La. Ann. 1091, 27 So. 709.

661. A decision that the tax for a certain year is void because the property is exempt is *res judicata* as to the tax of a subsequent

year when the same question of exemption is presented on the same facts. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42: 202
Distinguished in Gittings v. Baltimore, 95 Md. 424, 52 Atl. 937.

Cited in Baldwin v. Maryland, 179 U. S. 222, 45 L. ed. 162, 21 Sup. Ct. Rep. 105—*Mitchell v. First Nat. Bank*, 180 U. S. 481, 45 L. ed. 632, 21 Sup. Ct. Rep. 418—*Union & Planters' Bank v. Memphis*, 189 U. S. 75, 47 L. ed. 715, 23 Sup. Ct. Rep. 604—*Deposit Bank v. Frankfort*, 191 U. S. 513, 48 L. ed. 281, 24 Sup. Ct. Rep. 154—*Covington v. First Nat. Bank*, 198 U. S. 108, 49 L. ed. 967, 25 Sup. Ct. Rep. 562—*Bank of Kentucky v. Stone*, 88 Fed. 393—*Mercantile Nat. Bank v. Lander*, 109 Fed. 25—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 461, 111 Fed. 567—*First Nat. Bank v. Covington*, 129 Fed. 794—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 916—*Defries v. McMeans*, 121 Iowa, 543, 97 N. W. 65—*Newport v. Com.* 106 Ky. 451, 45 L.R.A. 523, 51 S. W. 433—*Penrose v. Chaffraix*, 106 La. 254, 30 So. 718—*State v. American Sugar Ref. Co.* 108 La. 611, 32 So. 965—*Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 437, 74 S. W. 979—*Hancock v. Singer Mfg. Co.* 62 N. J. L. 339, 42 L.R.A. 859, 41 Atl. 846—*Union & Planters' Bank v. Memphis*, 101 Tenn. 167, 46 S. W. 557—*Grunert v. Spalding*, 104 Wis. 215, 78 N. W. 606—*Hart v. Moulton*, 104 Wis. 355, 76 Am. St. Rep. 881, 80 N. W. 599.

662. A judgment that a tax is entirely void and must be canceled, without reducing the amount of the tax and when the only relief prayed was the cancellation upon the sole ground that the property was exempt, although there was an allegation that the assessments were excessive, is *res judicata* as to the existence of the exemption. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42: 202

663. A judgment that a railroad company's franchise and rolling stock are included in an exemption of all its property is not conclusive of the question whether such exemption extends to a branch road. *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. Rep. 72, 36: 972

664. Every question with respect to the assessment or nonpayment of the taxes, or the regularity of the proceedings of the sheriff and collector, is concluded by the petition of the purchaser of lands sold for taxes to the state court, and the decree confirming the sale, in which is set forth every requisite prescribed by the statute. *Thomas v. Lawson*, 21 How. 331, 16: 82
Cited in Sharpleigh v. Surdam, 1 Filipp. 472, Fed. Cas. No. 12,711—*Worthen v. Ratcliffe*, 42 Ark. 344—*Chauncey v. Wass*, 35 Minn. 20, 30 N. W. 826—*Re Douglass*, 41 La. Ann. 768, 6 So. 675.

Regularity of proceedings.

665. By the law of Arkansas, a judgment or decree confirming a tax sale operates as a bar against all persons thereafter claiming said land in consequence of informality or illegality in the proceedings. *Thomas v. Lawson*, 21 How. 331, 16: 82

c. Probate Matters.

Effect of Judicial Settlements of Estate to Confirm Title to Lands Claimed under Grant from Former Government, see Private Land Claims, 115.

See also *supra*, 529, 571-573; *infra*, 696.

Grant of letters.

666. The grant of letters of administration is not conclusive upon the question as to the death of the person whose estate is administered thereunder. *Griffith v. Frazier*, 8 Cranch, 9, 3: 471

Obited as obitor. in *Roderigas v. East River Sav. Inst.* 63 N. Y. 469, 20 Am. Rep. 555.

Cited in *Richmond & D. R. Co. v. Gorman*, 7 App. D. C. 110—*Tison v. McAfee*, 50 Ga. 287—*Koehler v. Hill*, 60 Iowa, 631, 15 N. W. 609.

667. An administration granted twenty-eight years after the death of the intestate is valid; it having been allowed by a court of competent and exclusive jurisdiction, whose decision is not reviewable by the Supreme Court. *Ricard v. Williams*, 7 Wheat. 59, 5: 398

Cited in *Griswold v. Bigelow*, 6 Conn. 267—*Jackson ex dem. Grignon v. Astor*, 1 Pinney (Wis.) 162, 39 Am. Dec. 281.

Domicil.

668-9. The appointment of an administrator in a state where the decedent died, and where there are immovable property and effects of the estate, does not constitute an adjudication that the decedent was domiciled there at the time of his death, where the court does not make and the letters do not recite any finding as to his domicil. *Thormann v. Frame*, 176 U. S. 350, 20 Sup. Ct. Rep. 446, 44: 500

Obited in *Overby v. Gordon*, 177 U. S. 224, 44 L. ed. 745, 20 Sup. Ct. Rep. 603—*National Exch. Bank v. Wiley*, 195 U. S. 270, 49 L. ed. 190, 25 Sup. Ct. Rep. 70—*Dunn v. Dilks*, 31 Ind. App. 679, 68 N. E. 1035—*Re Law*, 56 App. Div. 457, 67 N. Y. Supp. 857—*Maldaner v. Beurhaus*, 108 Wis. 33, 84 N. W. 25—*Jordan v. Chicago & N. W. R. Co.* 125 Wis. 589, 1 L.R.A.(N.S.) 889, 110 Am. St. Rep. 865, 104 N. W. 803.

Probate of will.

Foreign Probate, see *infra*, 998-1002. Conclusiveness of in Federal Court, see *infra*, 1055.

See also *supra*, 405.

670. Wherever the power to probate a will is given to a probate or surrogate's court, the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court. *Kieley v. McGlynn (Broderick's Will)* 21 Wall. 503, 22: 599

Obited in *United States v. Flint*, 4 Sawy. 74, Fed. Cas. No. 15,121—*Oakley v. Taylor*, 64 Fed. 246—*Blythe v. Hinckley*, 84 Fed. 250—*Williams v. Crabb*, 59 L.R.A. 429, 54 C. C. A. 218, 117 Fed. 198—*Eldred v. Warner*, 1 Ariz. 218, 25 Pac. 800—*Langdon v. Blackburn*, 109 Cal. 24, 41 Pac. 814—*Mitchell v. Hughes*, 8 Colo. App. 48, 32 Pac. 185—*Clough v. Clough*, 10 Colo. App. 444, 51 Pac. 513—*Beyer v. Le Fevre*, 17 App. D. C. 248

—*Proctor v. Dicklow*, 57 Kan. 125, 45 Pac. 86—*Newcomb v. Newcomb*, 108 Ky. 590, 51 L.R.A. 424, 57 S. W. 2—*Chase v. Winans*, 59 Md. 481—*Pierce v. Prescott*, 128 Mass. 143—*Stowe v. Stowe*, 140 Mo. 602, 41 S. W. 951—*Loosemore v. Smith*, 12 Neb. 844, 11 N. W. 493—*Union M. E. Church v. Wilkinson*, 36 N. J. Eq. 142—*Domestic & F. Missionary Soc. v. Ellis*, 68 Vt. 501, 54 Am. St. Rep. 888, 35 Atl. 463.

671. An original bill cannot be maintained to set aside the probate of a will, where the error, if any, in admitting the will to probate, could have been corrected by appeal. *Tarver v. Tarver*, 9 Pet. 174, 9: 91

Distinguished in *Trawick v. Davis*, 85 Ala. 347, 5 So. 83.

Obited in *Re Frazer*, 18 Alb. L. J. 354, Fed. Cas. No. 5,068—*Southworth v. Adams*, 9 Biss. 523, 4 Fed. 3—*Reed v. Reed*, 31 Fed. 53—*Re Cilley*, 58 Fed. 984—*Copeland v. Bruning*, 72 Fed. 8—*Wahl v. Franz*, 49 L.R.A. 67, 40 C. C. A. 645, 100 Fed. 687—*Hale v. Coffin*, 114 Fed. 574—*Thrasher v. Ingram*, 32 Atl. 659—*Ewell v. Tidwell*, 20 Ark. 142—*Belton v. Summer*, 31 Fla. 146, 21 L.R.A. 156, 12 So. 371—*Anderson v. Green*, 46 Ga. 384—*Ferguson v. Hunter*, 7 Ill. 680—*Luther v. Luther*, 122 Ill. 565, 13 N. E. 166—*Fuentes v. Gaines*, 25 La. Ann. 90—*Loosemore v. Smith*, 12 Neb. 344, 11 N. W. 493—*Norris v. Norris*, 63 How. Pr. 324—*Post v. Mason*, 26 Hun, 193.

672. A probate in Louisiana of the will of a person who died domiciled in New York is valid until set aside in the Louisiana court, though the probate of the will in New York, on which the Louisiana probate was founded, has been reversed in the supreme court of New York. *Foulke v. Zimmerman*, 14 Wall. 113, 20: 785

673. The probate of a will in the District of Columbia, where no assets or debts of the decedent were located, was directly attacked by heirs at law who were not cited in the probate proceeding, and whose title to testator's property located elsewhere was affected by the probate in the District of Columbia. *Carter v. Cutting*, 8 Cranch, 251, 3: 553

Obited in *Schultz v. Schultz*, 10 Gratt. 379, 60 Am. Dec. 835.

— Editorial note.

[Conclusiveness of probate as *res judicata*. 21 L.R.A. 680.]

Administrator's account.

What Parties Concluded, see *infra*, 830.

674. [A settlement of an administration account by referees is not conclusive in an action for a legacy. *Marriot v. Davey* (Ct. Com. Pl. Phila.) 1 Dall. 164, 1: 83]

675. Settlement of an administrator's account, by the decree of a probate court, does not conclude as to property accidentally or fraudulently withheld from the account. *Griffith v. Godey*, 113 U. S. 89, 5 Sup. Ct. Rep. 383, 28: 934

Obited in *Hubbard v. Urton*, 67 Fed. 425—*Tobelman v. Hildebrandt*, 72 Cal. 316, 14 Pac. 20—*Lataillade v. Orena*, 91 Cal. 576, 25 Am. St. Rep. 219, 27 Pac. 924—*Bergin*

v. Haight, 99 Cal. 56, 33 Pac. 760—Barnett v. Vannmeter, 7 Ind. App. 63, 33 N. E. 666—Tucker v. Stewart, 121 Iowa, 717, 97 N. W. 148—Gafford v. Dickinson, 37 Kan. 291, 15 Pac. 175—Leavens's Estate, 65 Wis. 451, 27 N. W. 824.

676. Final settlements of administrators and executors, showing payment of debts due the estate, are not conclusive evidence of payment in favor of the debtor, or as to anyone except the parties to the settlement. *Butterfield v. Smith*, 101 U. S. 570, 25: 868

Offed in *Litchfield v. Goodnow* (*Litchfield v. Crane*) 123 U. S. 551, 31 L. ed. 201, 8 Sup. Ct. Rep. 210—*Overby v. Gordon*, 177 U. S. 227, 44 L. ed. 746, 20 Sup. Ct. Rep. 603—*Johnson v. Richmond Beach Improv. Co.* 63 Fed. 496—*Hauke v. Cooper*, 48 C. C. A. 146, 108 Fed. 925—*Hampton v. Foster*, 127 Fed. 469—*Farrell v. St. Paul*, 62 Minn. 277, 29 L.R.A. 781, 54 Am. St. Rep. 641, 64 N. W. 809.

677. An executor, by charging himself with a note as part of the assets of the estate, and settling his accounts on that basis, shows that he supposed the debt to be valid in the hands of the testator. *Butterfield v. Smith*, 101 U. S. 570, 25: 868

677a. An administration account duly settled by a probate court, being prima facie evidence of its own verity and correctness, cannot be impeached in equity, unless within a reasonable time,—at furthest, within the period prescribed by the statute of limitations for actions at law upon matters of account,—or unless some ground of exception or disability, within the analogy of the statute, is shown to justify or excuse the delay. *Lupton v. Janney*, 13 Pet. 381, 10: 210

Distinguished in *Sharpe v. Rockwood*, 78 Va. 30.

Cited in *West v. Smith*, 8 How. 412, 12 L. ed. 1135—*Pulliam v. Pulliam*, 10 Fed. 29—*Stone v. Wood*, 16 Ill. 182—*Eckley v. Clark*, 24 Ill. App. 499—*Harper v. Archer*, 9 Smedes & M. 74—*Coles v. Vanneman*, 51 N. J. Eq. 329, 18 Atl. 468—*Leake v. Leake*, 75 Va. 801—*Bland v. Stewart*, 35 W. Va. 523, 14 S. E. 215.

Compensation; allowances.

678. The decision of an orphans' court, within its authority and jurisdiction, as to the compensation of an executor, is conclusive. *West v. Smith*, 8 How. 402, 12: 1130

679. Upon a bill filed in the District of Columbia against trustees, by the *cestui que trust*, charging breaches of trust and demanding an account, allowances made to the trustee for certain services, upon their accounting in the orphans' court, which were approved by that court, cannot be considered. A petition for revision in the orphans' court was the only remedy. *Barney v. Saunders*, 16 How. 535, 14: 1047

Discharge.

680. The judgment of discharge of an administrator, made by the court of ordinary, operates as a discharge from all liability on the part of the administrator, unless the same be impeached in that court for ir-

regularity, or in the superior court for fraud. *Veach v. Rice*, 131 U. S. 293, 9 Sup. Ct. Rep. 730, 33: 163

681. A probate decree distributing to the executrix the estate of her testator, and discharging her from further duties, but showing no adjudication of her interests as devisee, does not bar suits to compel the execution of the will, and the making of suitable provision for complainants as requested by testator. *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, 32: 138

Ancillary administration.

682. A judgment by a court of ancillary administration must be accepted as conclusive in the courts of primary administration only as to so much of the estate as is within the limits of the former, and as to such matters as are by the latter permitted to be litigated in the courts of another state. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35: 464
Cited in *Lawrence v. Nelson*, 143 U. S. 222, 36 L. ed. 134, 12 Sup. Ct. Rep. 440—*Johnston v. McKinnon*, 129 Ala. 227, 29 So. 696—*Taylor v. Gray*, 59 N. J. Eq. 630, 44 Atl. 668.

683. The decision of a probate court in the settlement of an estate, in a state where administration is merely ancillary, does not bar a claim of a party who is not a resident or citizen of that state or a party to the proceedings, or give legatees an indefeasible title as against him to what they have received under the sanction of that court. *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. Rep. 342, 30: 532

Review of administration.

684. In a suit to set aside a judgment at law rendered in favor of slaves manumitted by will, in a suit against the executor, and obtained on the admission by the executor of a sufficiency of assets, where it is claimed that the admission was made without foundation in fact, or in fraud, or mistake, to which suit the executor, the manumitted slaves, and all persons interested have been made parties, there may be an entire review of the administration of the estate, of the conduct of the executor and that of the creditors in regard to the estate, and in respect to the vigilance of the executor in paying, and of the creditors in the pursuit of, their debts. *Fenwick v. Chapman*, 9 Pet. 461, 9: 193

f. Corporate Matters.

Corporate Exemption from Taxation, see supra, 655-663.

Judgment of Sister State, see infra, 1025, 1026.

See also supra, 502.

685. The invalidity of a claim against a corporation for services is substantially established by a decree that stock issued therefor was invalid because issued without anything having been paid for it. *Townsend v. St. Louis & S. Coal & Min. Co.* 159 U. S. 21, 15 Sup. Ct. Rep. 997, 40: 61

686. The question whether a corporation organized pursuant to a combination of stockholders in two competing interstate railway companies to acquire a controlling interest in their capital stock holds the same as absolute owner, or as trustee or bailee, was not determined by a decree adjudging the combination to be illegal, enjoining the new corporation from acquiring any further stock, from voting such stock as it then held or might subsequently acquire, and from exercising any control over the railway companies by virtue of its holdings, and restraining the railway companies from permitting or suffering any such action on the part of the new corporation, and from paying any dividends on account of the stock held by it, and providing that nothing therein shall be construed as prohibiting the new corporation from returning the railway shares to the original stockholders, or to the holders and owners of its own stock issued in exchange for these shares. *Harriman v. Northern Securities Co.* 197 U. S. 244, 25 Sup. Ct. Rep. 493. 49: 739

687. Failure of one claiming a lien on a railroad to appeal from a decree of the United States circuit court for the district of Indiana declaring that his remedy is merely by redemption of a railroad in Indiana and Ohio does not estop him from enforcing his lien against the Ohio division only, under decrees of the state court and of the United States circuit court in that state establishing his right to a sale of the Ohio division, or to some equivalent remedy. *Compton v. Jesup*, 167 U. S. 1, 17 Sup. Ct. Rep. 795, 42: 55

k. As to Parties.

1. In General: Miscellaneous.

Necessity of Jurisdiction over Person to Render Judgment Valid, see *supra*, III. b, 1.

Necessity of Service or Appearance to Render Judgment Valid Against Party, see *supra*, III. c, 1.

Conclusiveness of Judgment of Dismissal, see *supra*, III. f, 1.

Conclusiveness of Judgment of Nonsuit, see *supra*, III. f, 2.

Collateral Attack, see *supra*, III. i.

What Matters Concluded Between the Parties, see *supra*, III. j.

Claiming against Bankrupt's Estate, see Bankruptcy, 18.

Federal Courts Following State Laws or Decisions Determining Conclusiveness, see Courts, 2126.

Conclusiveness Against Receiver of Stolen Property of Conviction of Principal, see Criminal Law, 111.

Who are Necessary and Proper Parties to Actions, see Parties, II. a, 2.

See also *supra*, 170, 264, 269, 340.

Editorial note.

[Conclusiveness of judgment in wife's suit for personal injuries, in husband's action

for loss of services and expenses. 10 L.R.A. (N.S.) 140.]

Parties.

Conclusiveness of Judgment in Federal Court, see *infra*, VII.

Judgment of Sister State, see *infra*, 1015-1019.

See also *infra*, 786.

688. A final judgment of this court is conclusive upon the parties, and cannot be re-examined as a matter of right. *Martin v. Hunter*, 1 Wheat. 304. 4: 97

Cited in *Sibbald v. United States*, 12 Pet. 492, 2 L. ed. 1169—*Holmes v. Jennison*, 14 Pet. 629, 10 L. ed. 628—*Bank of United States v. Beverly*, 1 How. 149, 11 L. ed. 81—*Washington Bridge Co. v. Stewart*, 3 How. 425, 11 L. ed. 684—*Bank of United States v. Moss*, 6 How. 40, 12 L. ed. 335—*Williams v. Oliver*, 12 How. 124, 13 L. ed. 921—*Corning v. Troy Iron & Nail Factory*, 15 How. 466, 14 L. ed. 775—*Noonan v. Bradley*, 12 Wall 279, 20 L. ed. 281—*Etna F. Ins. Co. v. Boon*, 95 U. S. 143, 24 L. ed. 403—*Gaines v. Rugg (Gaines v. Caldwell)* 148 U. S. 242, 37 L. ed. 437, 13 Sup. Ct. Rep. 611—*Illinois v. Illinois C. R. Co.* 184 U. S. 92, 46 L. ed. 447, 22 Sup. Ct. Rep. 300—*Akerly v. Villas*, 1 Abb. (U. S.) 294, Fed. Cas. No. 119—*Allen v. Blunt*, 2 Woodb. & M. 133, Fed. Cas. No. 217—*The Illinois*, 1 Brown. Adm. 21, Fed. Cas. No. 7,003—*Poole v. Nixon*, 9 Pet. 771 Appx. Fed. Cas. No. 11,270—*United States v. Leng*, 18 Fed. 26—*Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 32, 43 U. S. App. 47, 72 Fed. 552—*Balch v. Haas*, 20 C. C. A. 153, 36 U. S. App. 693, 73 Fed. 976—*Republican Min. Co. v. Tyler Min. Co.* 25 C. C. A. 180, 48 U. S. App. 213, 79 Fed. 735—*Mutual Reserve Fund Life Assn. v. Beatty*, 35 C. C. A. 580, 93 Fed. 754—*Texas v. P. R. Co. v. Wilder*, 41 C. C. A. 306, 101 Fed. 199—*Stoll v. Loving*, 120 Fed. 806—*Real Estate Bank v. Hartfield*, 5 Ark. 577—*Davidson v. Dallas*, 15 Cal. 84—*Leese v. Clark*, 20 Cal. 419—*Sanderson v. Sanderson*, 20 Fla. 299—*Lovett v. State*, 29 Fla. 401, 16 L.R.A. 314, 11 So. 176—*Sample v. Anderson*, 9 Ill. 562—*International Bank v. Jenkins*, 104 Ill. 150—*Ogle v. Turpin*, 8 Ill. App. 455—*Wolfe v. Crawford*, 54 Miss. 623—*Mechanics & T. Bank v. Dakin*, 8 Hun, 436—*People ex rel. Atty. Gen. v. New York*, 25 Wend. 255—*Cox v. Breedlove*, 2 Yerg. 508—*Oakley v. Hibbard*, 2 Pinney (Wis.) 22, 52 Am. Dec. 139—*State v. Waupaca County Bank*, 20 Wis. 643—*Akerly v. Villas*, 24 Wis. 174, 1 Am. Rep. 166.

689. A judgment of a court of competent jurisdiction, while unreversed, concludes the subject-matter between the parties. *United States v. Nourse*, 9 Pet. 8, 9: 31
Cited in *Adams v. United States*, 3 Ct. Cl. 340—*Melgs v. United States*, 20 Ct. Cl. 185—*Farmers' Loan & T. Co. v. McKinney*, 6 McLean, 9, Fed. Cas. No. 4,667—*United States v. Bolton*, Fed. Cas. No. 14,623—*Wales v. Lyon*, 2 Mich. 282—*Offutt v. John*, 8 Mo. 127, 40 Am. Dec. 125—*Schnader v. Bender*, 8 Northampton Co. Rep. 261—*McGavock v. Bell*, 3 Coldw. 523—*Jackson ex dem. Grignon v. Astor*, 1 Pinney (Wis.) 158, 39 Am. Dec. 281.

690. A decree against a party which remains unreversed, and is in full force, is conclusive against him. *Wager v. Provi-*

dence Ins. Co. 150 U. S. 99, 14 Sup. Ct. Rep. 55, 37: 1013
Cited in Young v. Byrd, 124 Mo. 598, 46 Am. St. Rep. 461, 28 S. W. 83.

691. The doctrine of the conclusiveness of judgments and decrees as between parties is not applicable to the United States in proceedings before the land officers in granting patents for public land. United States v. Minor, 114 U. S. 233, 5 Sup. Ct. Rep. 836, 29: 110

692. If a foreigner brings an action against a citizen, both may be held bound by a judgment against either. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

693. Relief granted in chancery will always be modified so as not to affect parties whose interests are not involved in the issue. Mechanics' Bank v. Seton, 1 Pet. 299, 7: 152

694. A decree annulling a lease and a judgment operates only between the parties to the action, and does not make the agreement and judgment void as to the parties to them or bar the latter in another action. Graham v. LaCrosse & M. R. Co. (Milwaukee & M. R. Co. v. Chamberlain) 3 Wall. 704, 18: 247
Cited in First Nat. Bank v. Knowles, 67 Wis. 392, 28 N. W. 225.

695. Condemnation of a vessel as enemy's property for want of a claim does not preclude the claimants to her cargo from asserting her American character in the same proceedings, where they had no interest in the vessel which they could have asserted. The Mary, 9 Cranch, 126, 3: 678
Cited in Alabama & C. R. Co. v. Jones, 7 Nat. Bankr. Reg. 171, Fed. Cas. No. 127—Burnham v. Webster, 1 Woodb. & M. 178, Fed. Cas. No. 2,179—Brigham v. Fayerweather, 140 Mass. 413, 5 N. E. 265—Hunt v. Searcy, 167 Mo. 182, 67 S. W. 206—Townsend v. Van Buskirk, 22 App. Div. 445, 48 N. Y. Supp. 260—Brown v. Brown, 86 Tenn. 319, 7 S. W. 640.

696. A transcript of the record in the orphans' court of Prince George's county, Maryland, is competent evidence as to parties to the proceedings. Blackburn v. Crawford, 3 Wall. 175, 18: 186

697. Where parties voluntarily intervene in a suit, and their demand is rejected by the decree, with costs against them, they are concluded thereby, and not at liberty to maintain suit against either of the parties to the action on the same claim. Ingraham v. Dawson, 20 How. 486, 15: 984

Parties and privies.

What Matters Concluded as Between the Parties, see *supra*, III. j.

Judgment by Consent, see *supra*, 275
 Admissibility in Evidence, see Evidence, 1258, 1259, 1264.

See also *supra*, 166, 180, 476, 512, 514, 518, 526, 562, 595, 613; *infra*, 729, 753, 756, 802, 807, 845, 849, 1044.

698. Judgments bind only parties and

privies. Hollingsworth v. Barbour, 4 Pet. 466, 7: 922

699. Judgments bind parties and privies, but they do not bind strangers. Simms v. Guthrie, 9 Cranch, 19, 3: 642
 [W. B. v. Latimer (Ct. Er. & Ap. Del.) 4 Dall. Appx. 1, 1: 915]
 Gaines v. Relf, 12 How. 472, 13: 1071
 Smith v. Orton, 131 U. S. lxxv. Appx. and 18: 62

Williams v. Bankhead, 19 Wall. 563, 22: 184

Humes v. Scruggs, 94 U. S. 22, 24: 51
 Sessions v. Johnson, 95 U. S. 347, 24: 596
Cited in Gaines v. Hennen, 24 How. 571, 16 L. ed. 776—Gaines v. New Orleans, 6 Wall. 711, 18 L. ed. 963—Kelly v. Milan, 21 Fed. 868—Foo Long v. American Surety Co. 76 Hun, 267, 27 N. Y. Supp. 743.

700. In general, judgments and decrees are evidence only in suits between parties and privies. Barr v. Gratz, 4 Wheat. 213, 4: 553

Tappan v. Beardsley, 10 Wall. 427, 19: 974
Cited in Burnham v. Webster, 1 Woodb. & M. 174, Fed. Cas. No. 2,179—Wyman v. Campbell, 6 Port. (Ala.) 237, 31 Am. Dec. 677—Samuel v. Hall, 6 B. Mon. 376—Cheshire Bank v. Robinson, 2 N. H. 128.

701. Those who are neither parties, privies, nor purchasers *pendente lite* are not bound by a former decree. Kerr v. Watts, 6 Wheat. 550, 5: 323

702. A judgment *in personam* binds only parties and privies. Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. Rep. 525, 35: 112
Cited in Shemeld & B. Coal, Iron & R. Co. v. Newman, 23 C. C. A. 466, 41 U. S. App. 766, 77 Fed. 794.

703. An estoppel by judgment is equally conclusive upon all the parties to the action and their privies, and may not be invoked or repudiated at the pleasure of one of them, as his interest may require. Brooklyn City & N. R. Co. v. National Bank of New York, 102 U. S. 14, 26: 61
Cited in Litchfield v. Goodnow (Litchfield v. Crane) 123 U. S. 551, 31 L. ed. 201, 8 Sup. Ct. Rep. 210—Davis v. Wakelee, 156 U. S. 691, 39 L. ed. 585, 15 Sup. Ct. Rep. 555—Johnson v. Richmond Beach Improv. Co. 63 Fed. 496—Norton v. San Jose Fruit-Packing Co. 25 C. C. A. 196, 48 U. S. App. 295, 79 Fed. 794—Hauke v. Cooper, 48 C. C. A. 146, 108 Fed. 925.

704. An estoppel by judgment upon title to real property runs with the land against the parties and all claiming under them. Kinney v. Clark, 2 How. 76, 11: 185
Cited in Atlantic Dock Co. v. Leavitt, 54 N. Y. 40, 13 Am. Rep. 556.

705. Where a state statute authorizes any person in possession of real property to institute a suit against anyone who claims an estate or interest therein adverse to him, for the purpose of determining such adverse estate or interest in such suit, the title of both parties is involved, and the determination of the court is conclusive upon them both and all claiming under them. Doe ex

dem Parrish v. Ferris (Parrish v. Ferris) 2 Black, 606, 17: 317
Cited in Burton v. Huma, 37 Fed. 742—Indiana, B. & W. R. Co. v. Allen, 113 Ind. 588, 15 N. E. 446—Davis v. Lennen, 125 Ind. 188, 24 N. E. 885—Finney v. Boyd, 26 Wis. 370.

706. One not concluded by a decree cannot invoke it as an estoppel. Keokuk & W. R. Co. v. Scotland County Court, 152 U. S. 318, 14 Sup. Ct. Rep. 605. 38: 457

Cited in Davenport v. Lord (Davenport v. United States) 9 Wall. 414, 19 L. ed. 707—Tloga R. Co. v. Blossburg & C. R. Co. 20 Wall. 143, 22 L. ed. 334—Gould v. Evansville & C. R. Co. 91 U. S. 533, 23 L. ed. 418—Cromwell v. Sac County, 94 U. S. 370, 24 L. ed. 204—Meigs v. United States, 20 Ct. Cl. 185—Van Duzee v. United States, 35 Ct. Cl. 217—Blandy v. Griffith, 3 Fisher, Pat. Cas. 614, Fed. Cas. No. 1,529—Dubois v. Philadelphia, W. & B. R. Co. 5 Fisher, Pat. Cas. 210, Fed. Cas. No. 4,109—Nesbit v. Independent School District, 25 Fed. 637—Oregonian R. Co. v. Oregon R. & Nav. Co. 27 Fed. 283—Holladay Case, 27 Fed. 836—Eagle Mfg. Co. v. David Bradley Mfg. Co. 50 Fed. 195—Fessenden v. Barrett, 50 Fed. 691—Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting R. Co. 51 Fed. 859—Lindsley v. Union Silver Star Min. Co. 52 C. C. A. 644, 115 Fed. 50—Hurd v. McClellan, 1 Colo. App. 331, 29 Pac. 181—Meiers v. Pinover, 21 Ill. App. 555—Schmidt v. Louisville, C. & L. R. Co. 99 Ky. 152, 35 S. W. 135—Kolb v. Swann, 68 Md. 521, 13 Atl. 379—Plainview v. Winona & St. P. R. Co. 36 Minn. 513, 32 N. W. 745—Philadelphia v. Ridge Ave. R. Co. 142 Pa. 493, 24 Am. St. Rep. 512, 21 Atl. 982—Schwan v. Kelly, 27 Pittsb. L. J. N. S. 69, 33 Atl. 1107.

707. A judgment is a bar to a subsequent action, in the same or any other court, between the same parties or their privies, including all who had the right to make defense, as to any fact or matter actually put in issue and determined or admitted in the prior action. Beloit v. Morgan, 7 Wall. 619, 19: 205

Cocomplainants or codefendants.

708. A complainant can have a decree against another complainant upon a supplemental or amended bill only upon notice to the latter. No decree can be had by one complainant against another without notice, if at all. Smith v. Woolfolk, 115 U. S. 143, 5 Sup. Ct. Rep. 1177. 29: 357
Cited in Meyer v. Kuhn, 13 C. C. A. 304, 25 U. S. App. 174, 65 Fed. 711—Re Glass, 119 Fed. 511.

709. In chancery suits, adverse interests between codefendants may be decided; and if the parties have had an opportunity of asserting their rights, they are concluded by the decree. Corcoran v. Chesapeake & O. Canal Co. 94 U. S. 741, 24: 190
Louis v. Brown Twp. 109 U. S. 162, 3 Sup. Ct. Rep. 92. 27: 892
Distinguished in Gilmer v. Billings, 55 Fed. 781.

Cited in Louis v. Brown Twp. 109 U. S. 167, 27 L. ed. 594, 3 Sup. Ct. Rep. 92—Flanagan v. Thompson, 9 Fed. 183—Snell v. Campbell, 24 Fed. 884—South Covington & C. S. R. Co. v. Gent, 84 Fed. 636—Gilmer v. Morris, 35

Fed. 687—Edwards v. Bates County, 55 Fed. 438—Stearns v. Lawrence, 28 C. C. A. 70, 54 U. S. App. 532, 83 Fed. 742—Montgomery v. McDermott, 99 Fed. 504—Stocton Bldg. & L. Asso. v. Chalmers, 75 Cal. 334, 7 Am. St. Rep. 173, 17 Pac. 229—Emack v. Campbell, 14 App. D. C. 192—Keefe v. Malone, 8 MacArth, 244—Harmon v. Auditor, 123 Ill. 130, 5 Am. St. Rep. 502, 13 N. E. 161—Chandler v. O'Neill, 62 Ill. App. 420—Bernard v. Merrill, 91 Me. 363, 40 Atl. 136—National Marine Bank v. Heller, 94 Md. 219, 50 Atl. 521—Shryock v. Hensel, 95 Md. 628, 53 Atl. 412—Case v. Gorton, 33 Mo. App. 606—Glasner v. Welsberg, 43 Mo. App. 221—Owens v. South Omaha, 2 Neb. (Unof.) 473, 89 N. W. 285—Philadelphia v. Ridge Ave. R. Co. 142 Pa. 493, 24 Am. St. Rep. 512, 21 Atl. 982—Philadelphia v. Ridge Ave. Pass. R. Co. 48 Phila. Leg. Int. 362.

Joint contractors or debtors.

710. Judgment against one or more joint contractors, although remaining unsatisfied, is a bar to an action against the others. United States v. Ames, 99 U. S. 35, 25: 295

Cited in Connecticut F. Ins. Co. v. Oldendorf, 19 C. C. A. 381, 44 U. S. App. 487, 73 Fed. 90—McFarlane v. Kipp, 206 Pa. 322, 55 Atl. 986.

711. A judgment against one of two joint contractors is a bar to an action against the other, within the maxim *Transit in rem judicatam*. Sessions v. Johnson, 95 U. S. 347, 24: 596
Cited in United States v. Ames, 99 U. S. 45, 25 L. ed. 300—Connecticut F. Ins. Co. v. Oldendorf, 19 C. C. A. 381, 44 U. S. App. 487, 73 Fed. 90—McFarlane v. Kipp, 206 Pa. 322, 55 Atl. 986.

712. A judgment against one of several persons upon a joint contract bars an action against the others, at common law although the latter were dormant partners. Mason v. Eldred, 6 Wall. 231, 18: 783
Distinguished in McVeigh v. Bank of Old Dominion, 26 Gratt. 828—Pitts v. Spotts, 86 Va. 72, 9 S. E. 501.

Cited in Sessions v. Johnson, 95 U. S. 348, 24 L. ed. 597, 17 Nat. Bankr. Reg. 65—United States v. Ames, 99 U. S. 45, 25 L. ed. 301—Hanley v. Donoghue, 116 U. S. 3, 29 L. ed. 536, 6 Sup. Ct. Rep. 242—Abendroth v. Van Dolsen, 131 U. S. 74, 33 L. ed. 60, 9 Sup. Ct. Rep. 619—Lawrence v. Remington, 6 Biss. 46, Fed. Cas. No. 8,141—Re Mansfield, 6 Nat. Bankr. Reg. 394, Fed. Cas. No. 9,049—United States v. Ames, Fed. Cas. No. 14,440—United States v. Dewey, 6 Biss. 503, Fed. Cas. No. 14,956—Card v. Hines, 35 Fed. 601—Larson v. Hager, 44 Fed. 50—Holt v. Given, 43 Ala. 616—Israel v. Arthur, 7 Colo. 11, 1 Pac. 438—Harris v. Leonhardt, 2 App. D. C. 321—Hutchinson v. Brown, 8 Mackey, 151—Ellis v. Bone, 71 Ga. 468—Lingenfelter v. Simon, 49 Ind. 85—Tootle v. Otis, 1 Neb. (Unof.) 362, 95 N. W. 681—Enterprise Lumber Co. v. Mundy, 62 N. J. L. 23, 55 L.R.A. 203, 42 Atl. 1063—Russell v. McCall, 141 N. Y. 450, 38 Am. St. Rep. 807, 36 N. E. 498—McFarlane v. Kipp, 206 Pa. 321, 55 Atl. 986—Wooters v. Smith, 56 Tex. 204.

713. A statute of Michigan, that a judgment against one upon a joint contract of several persons, as against every other defendant, shall be evidence only of the ex-

tent of the plaintiff's demand, alters the general rule that such a judgment bars an action against the others, although they are dormant partners of the judgment debtor. *Mason v. Eldred*, 6 Wall. 231, 18: 783

714. Under a statute providing that a judgment against one upon a joint contract of several persons shall be evidence only of the extent of the plaintiff's demand after the liability of such defendant shall have been established by other evidence, a judgment against one partner is not admissible in evidence in bar of, and to defeat a recovery against, the other. *Mason v. Eldred*, 6 Wall. 231, 18: 783

715. In an action on a note given for goods brought against the maker jointly with another, alleged to have been a secret partner, a prior unsatisfied judgment against the maker only is not a bar. *Sheehy v. Mandeville*, 6 Cranch. 253, 3: 215
Overruled in Mason v. Eldred, 6 Wall. 231, 18 L. ed. 783.

716. In Alabama in a suit against an alleged partnership, the failure to recover against one of the alleged partners cannot defeat a right to recover against the other who did business alone in the firm name. *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. Rep. 950, 37: 819
Disapproved in Lee v. Wimberly, 102 Ala. 550, 15 So. 444.

Cited in Presbrey v. Thomas, 1 App. D. C. 176.

Joint tortfeasors or trespassers.

717. A judgment against one joint trespasser, or the judgment and part payment, is not a bar to an action against another joint trespasser. *Lovejoy v. Murray*, 3 Wall. 1, 18: 129
Cited in Cleveland v. Bangor, 87 Me. 263, 47 Am. St. Rep. 328, 32 Atl. 892.

718. A judgment against one wrongdoer without satisfaction is no bar to an action against any one of the other joint tortfeasors; but the injured party can have only one satisfaction. *Sessions v. Johnson*, 95 U. S. 347, 24: 596
Cited in Wolfe v. State, 79 Ala. 208, 58 Am. Rep. 590—*Re Blackford*, 35 App. Div. 331, 54 N. Y. Supp. 972—*Russell v. McCall*, 141 N. Y. 448, 38 Am. St. Rep. 807, 36 N. E. 498.

719. A judgment against one joint trespasser is no bar to a suit against another for the same trespass. Nothing short of satisfaction, or its equivalent, can make a former judgment in trespass a bar in an action against another joint trespasser who was not a party to the first judgment. *Lovejoy v. Murray*, 3 Wall. 1, 18: 129
Cited in Sessions v. Johnson, 95 U. S. 349, 24 L. ed. 597—*Birdsell v. Shaliol*, 112 U. S. 489, 28 L. ed. 770, 5 Sup. Ct. Rep. 244—*United States v. Foster*, 6 Fed. 247—*Child v. Boston & F. Iron Works*, 19 Fed. 260—*Albright v. McTighe*, 49 Fed. 820—*DuBose v. Marx*, 52 Ala. 609—*Vincent v. McNamara*, 70 Conn. 341, 39 Atl. 444—*Norfolk Lumber Co. v. Simmons*, 2 Marv. (Del.) 329, 43 Atl. 163—*Cushing v. Hederman*, 117 Iowa, 639,

94 Am. St. Rep. 320, 91 N. W. 940—*United Society of Shakers v. Underwood*, 11 Bush. 270, 21 Am. Rep. 214—*State use of Bashe v. Boyce*, 72 Md. 143, 7 L.R.A. 273, 20 Am. St. Rep. 458, 19 Atl. 366—*Welsh v. Carder*, 95 Mo. App. 44, 68 S. W. 580—*Russell v. McCall*, 141 N. Y. 451, 38 Am. St. Rep. 807, 36 N. E. 498—*Martin v. Buffalo*, 128 N. C. 308, 83 Am. St. Rep. 679, 38 S. E. 902—*Derosa v. Hamilton*, 14 Pa. Co. Ct. 317—*Parmenter v. Barstow*, 21 R. I. 412, 43 Atl. 1035.

720. A recovery against one only of several defendants charged with joint and concurring negligence does not deprive such defendant of any Federal right because, if it had been sued alone, the diversity of citizenship existing between it and the plaintiff would have authorized the removal of the cause from the state court to a Federal circuit court. *Southern R. Co. v. Carson*, 194 U. S. 136, 24 Sup. Ct. Rep. 609, 48: 907

Cited in Alabama G. S. R. Co. v. Thompson, 200 U. S. 216, 50 L. ed. 447, 26 Sup. Ct. Rep. 161—*Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 224, 50 L. ed. 450, 26 Sup. Ct. Rep. 166—*Davenport v. Southern R. Co.* 68 C. C. A. 447, 135 Fed. 963—*Able v. Southern R. Co.* 73 S. C. 177, 52 S. E. 962.

Patents.

721. A decree for damages in an infringement suit brought and prosecuted in the name of the patentee alone, but with the licensee's consent and concurrence, will preclude a subsequent bill brought by both patentee and licensee. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244, 28: 768
Cited in Gentry v. Singleton, 63 C. C. A. 235, 128 Fed. 683.

722. A decree in favor of a patentee, upon a bill against one person for making and selling a patented machine, does not bar a subsequent suit against another person for afterwards using the same article within the term of the patent. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244, 28: 768
Cited in Fay v. Allen, 25 Fed. 202—*Jennings v. Dolan*, 29 Fed. 862—*Kelley v. Y. Dress-Stay Mfg. Co.* 10 L.R.A. 687, 44 Fed. 21—*New York Filter Co. v. Schwarzwald*, 58 Fed. 579—*Westinghouse Electric & Mfg. Co. v. Mutual L. Ins. Co.* 129 Fed. 222—*Eldred v. Breitwieser*, 132 Fed. 252.

Bonds.

Persons not Parties or Notified, see infra, 749, 750.

723. When the obvious purpose of a bill in equity is to establish and adjudicate the entire rights and title of the parties to bonds and their proceeds in all the forms in which they can be identified, the decree is final and conclusive upon all the rights of all the parties actually before the court. *Texas v. White (Re Chiles)* 22 Wall. 157, 22: 819

Cited in Patterson v. Wold, 33 Fed. 792

724. Where a judgment has been rendered by the state supreme court against the validity of coupons of county bonds, the

owner, who was a party to such judgment, cannot, while still owning them, recover upon them in another action in a third person's name. Such judgment is a bar to the second suit. *Bourbon County v. Block* (*Block v. Bourbon County*) 99 U. S. 686, 25: 491

Cited in *Louis v. Brown Twp.* 109 U. S. 166, 27 L. ed. 893, 8 Sup. Ct. Rep. 92—*Washington Improv. Co. v. Kansas P. R. Co.* 5 Dill. 490, Fed. Cas. No. 17,242—*Snell v. Campbell*, 24 Fed. 883—*David Bradley Mfg. Co. v. Eagle Mfg. Co.* 6 C. C. A. 670, 18 U. S. App. 349, 57 Fed. 990—*Sauls v. Freeman*, 24 Fla. 224, 12 Am. St. Rep. 190, 4 So. 525.

725. A proceeding in court, as authorized by California Stat. 1889, 212, for a judicial determination of the validity of proceedings in respect to the issue of bonds by irrigation districts, binds nobody. *Tregea v. Modesto Irrig. District*, 164 U. S. 179, 17 Sup. Ct. Rep. 52, 41: 395

Cited in *Perris Irrig. District v. Thompson*, 54 C. C. A. 340, 116 Fed. 836—*Re Central Irrig. District*, 117 Cal. 386, 49 Pac. 354—*People v. Linda Vista Irrig. District*, 128 Cal. 479, 61 Pac. 86.

726-7. Any judgment that would have bound the property if it had remained under attachment in the hands of the marshal will bind the obligors of the bond. *Inbusch v. Farwell*, 1 Black. 566, 17: 188
Cited in *Lehman v. Berdin*, 5 Dill. 347, Fed. Cas. No. 8,215—*Noyes v. Barnard*, 11 C. C. A. 429, 15 U. S. App. 527, 63 Fed. 787—*Jayne v. Platt*, 47 Ohio St. 275, 21 Am. St. Rep. 810, 24 N. E. 262.

As to land titles.

Judgment against Persons not Parties or Notified, see *infra*, 756-764.

See also *supra*, 624, 724, 725; *infra*, 766, 767, 774, 776, 777, 1068.

728. A partition suit cannot conclude the title of even a party where the proceedings show that he had no interest or concern in the question of partition. *Doe ex dem. McCall v. Carpenter*, 18 How. 297, 15: 389

729. A decree to quiet title to land in another state is purely in *personam*, so as to bind only the parties who were personally brought before the court and their privies. *Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. Rep. 333, 42: 733
Cited in *Miller v. Bickey*, 127 Fed. 580—*Kerns v. McAulay*, 8 Idaho, 565, 69 Pac. 580—

730. A decree that the plaintiff is owner in fee of one third of the land in question, and that he holds the other two thirds in trust, is *res judicata* as to the original owner of the land, who was a party defendant in the case and disclaimed all interest in the property. *Dunham v. Jones* (*Hilton v. Jones*) 159 U. S. 584, 16 Sup. Ct. Rep. 108, 40: 267

731. An order of the probate court for the sale of a minor's real estate is not conclusive on the parties where obtained by fraud. *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. Rep. 237, 32: 630
Owed in *Kurts v. Philadelphia & E. R. Co.* 187 Pa. 68, 40 Atl. 988.

732. A party is not bound by a prior decree which is so uncertain in describing real property as to be inoperative and void. *Shepherd v. Pepper*, 133 U. S. 626, 10 Sup. Ct. Rep. 438, 33: 706

733. A special verdict which shows an adverse possession long enough to bar an action by a husband does not justify a conclusion that the wife was also barred, where the statute gave her ten years after removal of the disability of coverture, provided the whole time did not exceed thirty years; and a deed executed by the husband and wife after the husband was thus barred was not, therefore, necessarily inoperative as to the wife's interest. *Collins v. Riley*, 104 U. S. 322, 26: 752

2. Persons Not Parties or Notified Generally.

Necessity of Acquiring Jurisdiction Over Person, see *supra*, III. b, 1.

Persons not Served and not Appearing, see *supra*, III. c, 1.

Conclusiveness of Decree of Dismissal for Lack of Parties, see *supra*, 313, 314.

Conclusiveness against Stockholder of Judgment against Corporation, see *infra*, III. k, 5.

Person Represented by Party, see *infra*, 806-810.

Conclusiveness against Unborn Children, see *infra*, 824-827.

Foreign Judgment, see *infra*, 989.

Judgment of Sister State, see *infra*, 960.

Conclusiveness of State Judgment in Federal Court, see *infra*, 1052a.

Who are Necessary or Proper Parties to Actions, see Abatement and Revival, 76; Parties, II. a, 2.

See also *supra*, 11, 210, 484, 676, 683, 694; *infra*, 829, 833.

734. A person not notified of an action, nor a party thereto, and who had no opportunity or right to control the defense, introduce or cross-examine witnesses, or to prosecute a writ of error, is not bound by the judgment therein rendered. *Hale v. Finch*, 104 U. S. 261, 26: 732
Morgan County v. Allen, 103 U. S. 498, 26: 498

Cited in *Litchfield v. Goodnow* (*Litchfield v. Crane*) 123 U. S. 551, 31 L. ed. 201, 8 Sup. Ct. Rep. 210—*Johnson v. Richmond Beach Improv. Co.* 63 Fed. 496—*Hauke v. Cooper*, 48 C. C. A. 146, 108 Fed. 925—*Cartin v. South Bound R. Co.* 43 S. C. 223, 49 Am. St. Rep. 829, 20 S. E. 979.

735. A judgment against a stranger to the proceeding is void. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35: 464

Cited in *Pendleton v. Russell*, 144 U. S. 845, 36 L. ed. 578, 12 Sup. Ct. Rep. 743—*Meyer v. Kuhn*, 18 C. C. A. 304, 25 U. S. App. 174, 65 Fed. 712—*Murray v. American Surety Co.* 17 C. C. A. 143, 44 U. S. App. 43, 70 Fed. 346—*Baltimore & O. R. Co. v. Flaherty*, 87 Md. 107, 39 Atl. 524.

736. As respects third persons, whatever

has been done under the judgment is valid and binding while it remains in full force. *Bank of United States v. Bank of Washington*, 6 Pet. 8, 8: 299

Cited in United States v. Edmondston, 181 U. S. 508, 45 L. ed. 978, 21 Sup. Ct. Rep. 718—*Thomas v. American Freehold Land & Mortg. Co.* 12 L.R.A. 687, 47 Fed. 556—*Consumers' Cotton-Oil Co. v. Ashburn*, 26 C. C. A. 440, 52 U. S. App. 258, 81 Fed. 335—*Camp v. Moseley*, 2 Fla. 186—*Dorsey v. Thompson*, 37 Md. 45—*Klinker v. Third Ave. R. Co.* 33 App. Div. 558, 53 N. Y. Supp. 1012—*Dewey v. Niagara County*, 2 Hun, 399—*Colvin v. Holbrook*, 2 N. Y. 130—*Houston v. Walsh*, 27 Tex. Civ. App. 125, 68 S. W. 106—*Singly v. Warren*, 18 Wash. 439, 63 Am. St. Rep. 896, 51 Pac. 1066—*Dunfee v. Childs*, 45 W. Va. 166, 30 S. E. 102.

737. All acts done under a judgment which is merely voidable for fraud are valid as to third persons. *Simms v. Slacum*, 3 Cranch, 300, 2: 446
Cited in Burnham v. Stone, 101 Cal. 174, 35 Pac. 627—*Camp v. Moseley*, 2 Fla. 195—*Ponder v. Moseley*, 2 Fla. 268, 48 Am. Dec. 194—*Hoffman v. Coster*, 2 Whart. 473—*Buchanan v. Ruff*, 47 S. C. 554, 58 Am. St. Rep. 907, 25 S. E. 65.

738. The record of a case in which one was defendant is *res inter alios acta*, and not admissible as evidence in a case where he is plaintiff against a third party. *Owings v. Hull*, 9 Pet. 607, 9: 246
Cited in Hallum v. Dickinson, 47 Ark. 124, 14 S. W. 477.

739. The invalidity of an adjudication as against one who had no notice of it cannot be set up by another person who has no privity with him. *Hussman v. Durham*, 165 U. S. 144, 17 Sup. Ct. Rep. 253, 41: 664

740. A decree making void an agreement and a judgment operates only between the parties to the action, and does not make the agreement and judgment void as to other parties, or bar the latter in another action. *Graham v. La Crosse & M. R. Co. (Milwaukee & M. R. Co. v. Chamberlain)* 3 Wall. 704, 18: 247

741-2. Judgment against the indorsers of negotiable paper is not a bar to a subsequent action against the maker, who was not notified of the pendency of the first action. *Brooklyn City & N. R. Co. v. National Bank of New York*, 102 U. S. 14, 26: 61
Cited in Hale v. Finch, 104 U. S. 265, 26 L. ed. 733.

743. The record of a divorce suit is not evidence against one who is not a party to it, in a suit for libel. *Tappan v. Beardsley*, 10 Wall. 427, 19: 974

744. A decree dismissing, with a bill against a city upon drainage warrants, an intervening petition filed by the owner of some of a series of warrants issued in payment of property purchased, is not binding upon the owners of other warrants of that series, who were neither parties nor privies to the suit. *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44: 96

745. Where there is but one claimant of the property libeled in a prize case, a decree in his favor is not conclusive against other persons who may thereafter assert title to it. *Cushing v. Laird*, 107 U. S. 69, 2 Sup. Ct. Rep. 196, 27: 391

746. Where insurers were not parties to a suit upon the decree in which a vessel was sold for repairs, the record of the suit is not evidence against them to prove an acceptance or abandonment. *Richelieu & O. Nav. Co. v. Boston M. Ins. Co.* 136 U. S. 408, 10 Sup. Ct. Rep. 934, 34: 398

Attachment.

747. A judgment recovered in a proceeding by attachment, without notice to the defendant, does not bind him personally. *Providence Rubber Co. v. Goodyear*, 9 Wall. 807, 19: 587

Cited in Schenck v. Griffin, 38 N. J. L. 465—*Baldwin v. Woodbridge & T. Engineering Co.* 59 N. J. L. 319, 36 Atl. 683.

748. Upon the trial in attachment, under the Missouri statute, of an issue raised by interplea by preferred creditors as mortgagees, the record of proceedings in a trial on a plea in abatement, including verdict and judgment for the plaintiff, to which the interpleaders were not parties, is inadmissible against them. *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 7 Sup. Ct. Rep. 899, 30: 971

Bonds.

See also *supra*, 723-726.

749. A judgment by which negotiable bonds are declared to be null and void cannot affect a bona fide purchaser, for value, who had no knowledge of the action. *Orleans v. Platt*, 99 U. S. 676, 25: 404
Warren County v. Marcy, 97 U. S. 96, 24: 977

Cass County v. Gillett, 100 U. S. 585, 25: 585
Cited in Meyer v. Richards, 168 U. S. 413, 41 L. ed. 210, 16 Sup. Ct. Rep. 1148—*Tregear v. Modesto Irrig. District*, 164 U. S. 187, 41 L. ed. 398, 17 Sup. Ct. Rep. 52—*Stevens v. Railroads*, 4 Fed. 102—*Meyer v. Richards*, 46 Fed. 728—*Pugh v. Moore*, 44 La. Ann. 245, 10 So. 710—*State ex rel. Ferguson v. Caffery*, 49 La. Ann. 1769, 22 So. 1008.

750-1. An injunction against the collection of a tax by municipal officers for the payment of railroad aid bonds is not binding upon the holder of such bonds, who was not a party to the injunction proceedings. *Hawley v. United States (Hawley v. Fairbanks)* 108 U. S. 543, 2 Sup. Ct. Rep. 846, 27: 820

Cited in Kinney v. Eastern Trust & Bkg. Co. 59 C. C. A. 589, 128 Fed. 800.

Status of child.

See also *supra*, 569.

752. A judgment of a court in proceedings for administration, wherein one of the issues was whether any lawful marriage ever existed between a party's parents, is conclusive upon him, but not upon other children who were not parties to that proceeding. *Blackburn v. Crawford*, 3 Wall. 175, 18: 186
Cited in Caujolle v. Ferrié (Caujolle v. Curtiss)

13 Wall. 474, 20 L. ed. 512—*Kearney v. Denn*, 15 Wall. 57, 21 L. ed. 43—*Overby v. Gordon*, 177 U. S. 226, 44 L. ed. 746, 20 Sup. Ct. Rep. 603.

753. A record showing a verdict in favor of the freedom of a woman, against one who had purchased her as a slave, is not evidence in favor of her child, in a suit against one who sold the mother to the defendant in the former suit. Verdicts are evidence between parties and privies only. *Davis v. Wood*, 1 Wheat. 6, 4: 22

Cited in *Vigel v. Naylor*, 24 How. 211, 16 L. ed. 647—*Fulkerson v. Holmes*, 117 U. S. 397, 29 L. ed. 918, 6 Sup. Ct. Rep. 780—*Burnham v. Webster*, 1 Woodb. & M. 174, Fed. Cas. No. 2,179—*Dent v. Ashley*, Hempst. 55, Fed. Cas. No. 3,809a—*Greely v. Smith*, 1 Woodb. & M. 182, Fed. Cas. No. 5,749—*United States v. Mills*, 124 Fed. 833—*Bloodgood v. Grasey*, 31 Ala. 591—*Burien v. Shannon*, 3 Gray, 390—*Stone v. Com.* 181 Mass. 441, 63 N. E. 1074—*Cheshire Bank v. Robinson*, 2 N. H. 128—*Chamberlain v. Carlisle*, 26 N. H. 552—*McGwen v. Portland*, 1 Or. 305—*Chambers v. Lapsley*, 7 Pa. 25.

Defective sidewalk.

See also *infra*, 770, 771.

754. One who leaves the sidewalk in front of his premises in a defective condition is not estopped by a judgment against the city from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened. *Chicago v. Robbins*, 2 Black, 418, 17: 298

Cited in *Lyon v. Northrup*, 17 Iowa, 316—*Lansing v. Detroit*, L. & N. R. Co. 129 Mich. 406, 89 N. W. 54—*Richmond v. Sitterding*, 101 Va. 358, 65 L.R.A. 452, 99 Am. St. Rep. 879, 43 S. E. 562.

755. A judgment against a municipal corporation for personal injuries sustained on the public streets does not preclude a third person from showing that it was not through his fault that the injury was received. *Robbins v. Chicago*, 4 Wall. 657, 18: 427

Cited in *Frank v. Wedderin*, 16 C. C. A. 5, 30 U. S. App. 329, 68 Fed. 822—*Wilgus v. Germain*, 19 C. C. A. 190, 44 U. S. App. 369, 72 Fed. 775—*Knox v. Sterling*, 78 Ill. 216—*Brink v. Brink*, 8 Kulp, 369—*Merchants & M. Bank v. Pizor*, 24 Pa. Co. Ct. 278—*Read v. Allen*, 56 Tex. 180.

Title; matters affecting real property.

Admissibility in Evidence, see Evidence, 1258.

Order Setting Aside Will as Affecting Purchaser From Devisee Without Knowledge of Revocation of Probate, see Vendor and Purchaser, 139.

See also *supra*, 591, 728-733; *infra*, 766, 767, 776, 777, 813a.

756. A judgment in a suit in which the title to land was adjudicated is of no force and effect in favor of one not a party to the suit or a privy to a party. *Bedon v. Davie*, 144 U. S. 142, 12 Sup. Ct. Rep. 665, 36: 380

Cited in *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 466, 41 U. S. App. 766, 77 Fed. 794.

757. One who was not a party to any of

the proceedings by which a private land claim was confirmed, surveyed, or patented, is not bound or concluded by either the decree, survey, or patent. *Rodrigues v. United States*, 1 Wall. 582, 17: 689

Cited in *Henshaw v. Bissell*, 18 Wall. 269, 21 L. ed. 840—*Bissell v. Henshaw*, 1 Sawy. 565, Fed. Cas. No. 1,447—*Boyle v. Hinds*, 2 Sawy. 530, Fed. Cas. No. 1,759—*Mora v. Munez*, 7 Sawy. 465, 10 Fed. 641—*Semple v. Wright*, 32 Cal. 666—*Yates v. Smith*, 38 Cal. 63—*Hale v. Akers*, 69 Cal. 166, 10 Pac. 385—*Davis v. California Powder-Works*, 84 Cal. 620, 24 Pac. 387.

758. A decree is admissible in a suit not between parties or their privies, where it is not introduced as *per se* binding upon any rights of the other party, but as an introductory link in a chain of title, and constituting a part of the muniments of the estate. *Barr v. Gratz*, 4 Wheat. 213, 4: 553

Distinguished in *Tierney v. Phoenix Ins. Co.* 4 N. D. 573, 36 L.R.A. 763, 62 N. W. 642—*Connell v. Galligher*, 36 Neb. 755, 55 N. W. 229—*Kessler v. McConachy*, 1 Rawle, 447—*Masser v. Strickland*, 17 Serg. & R. 360, 17 Am. Dec. 668.

Cited in *Warner v. Brinton*, Fed. Cas. No. 17-179—*Pacific Bank v. Hannah*, 32 C. C. A. 529, 59 U. S. App. 457, 90 Fed. 79—*Snider v. Greathouse*, 16 Ark. 79, 68 Am. Dec. 54—*Wells v. Francis*, 7 Colo. 418, 4 Pac. 49—*Hardwick v. Hook*, 8 Ga. 359—*Wardlaw v. McNeill*, 108 Ga. 33, 31 S. E. 785—*Whitman v. Heneberry*, 78 Ill. 116—*Gage v. Goudy*, 141 Ill. 220, 30 N. E. 320—*Wiggins v. Holley*, 11 Ind. 7—*Lampton's Succession*, 35 La. Ann. 421—*Parr v. State*, 71 Md. 234, 17 Atl. 1020—*Newman v. Home Ins. Co.* 20 Min. 427, Gil. 378—*Greenleaf v. Brooklyn, F. & C. I. R. Co.* 132 N. Y. 414, 30 N. E. 762—*Railroad Equipment Co. v. Blair*, 145 N. Y. 611, 39 N. E. 962—*Skelly v. Jones*, 83 Misc. 305, 68 N. Y. Supp. 422—*Greenleaf v. Brooklyn, F. & C. I. R. Co.* 132 N. Y. 414, 30 N. E. 762—*Buckingham v. Hanna*, 2 Ohio St. 561—*McCoy v. Reed*, 5 Watts, 302—*Baylor v. DeJarnette*, 13 Gratt. 163.

759. A decision between citizens of different states as to right of soil, does not conclude the states as to soil or jurisdiction. *Fowler v. Lindsey*, 3 Dall. 411, 1: 658

760. A stranger to a suit in partition, the record of which is set up as a source of title by a plaintiff in another action, cannot object to the decree in partition for irregularities in the proceedings in that suit. *Gregg v. Forsyth*, 24 How. 179, 16: 731

Cited in *Secrist v. Green*, 8 Wall. 751, 18 L. ed. 155—*Compton v. Jesup*, 15 C. C. A. 434, 31 U. S. App. 486, 68 Fed. 300—*Lathrop v. American Emigrant Co.* 41 Iowa, 549.

761-2. The record of a judgment in ejectment, and an executed writ of possession under it, are admissible to prove the possession of real property, even against one not a party to the former suit. *Chirac v. Rejnicker*, 11 Wheat. 280, 6: 474

763. Where a voluntary deed is impeached as fraudulent, evidence of judgments against the grantor is admissible as proof (among other facts) that he was indebted at the time of making the deed, although

the grantee was not a party to the suits on which the judgments were obtained. *Hinde v. Longworth*, 11 Wheat. 199, 6: 454. *Cited in Gordon v. Tweedy*, 71 Ala. 210—*Arnett v. Coffey*, 1 Colo. App. 38, 27 Pac. 614—*Dunlap v. Hawkins*, 59 N. Y. 846—*Scoggin v. Schloath*, 15 Or. 383, 15 Pac. 635—*Johnston v. Gill*, 27 Gratt. 597.

764. A judgment canceling a conveyance in a suit to which all the persons known to the plaintiff as claiming an interest in or encumbrance on the property are made parties is effectual to divest the interest of a person who is not a party, but who claims under the grantee, of which the plaintiff had no actual or constructive notice. *Lynch v. Murphy*, 161 U. S. 247, 16 Sup. Ct. Rep. 523, 40: 688

3. Effect of Notice or of Participation in Action.

Notice.

See also *infra*, 807.

765. A person having actual notice of an injunction may be amenable thereto, although he was not a party to the suit in which the injunction was issued and has not been served with any process or notice in the proceedings. *Re Lennon*, 166 U. S. 548, 17 Sup. Ct. Rep. 658, 41: 1110. *Cited in Nashville C. & St. L. R. Co. v. McConnell*, 82 Fed. 87—*American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions*, Nos. 1 & 3, 90 Fed. 605—*United States Playing-Card Co. v. Spalding*, 92 Fed. 369—*Appleton Waterworks Co. v. Central Trust Co.* 35 C. C. A. 304, 93 Fed. 288—*United States v. Sweeney*, 95 Fed. 447—*Re Reese*, 47 C. C. A. 91, 107 Fed. 946—*Ex parte Richards*, 117 Fed. 662—*Union P. R. Co. v. Ruef*, 120 Fed. 116—*Chisalm v. Caines*, 121 Fed. 402—*Christensen Engineering Co. v. Westinghouse Air Brake Co.* 68 C. C. A. 480, 135 Fed. 778—*Sloan v. People*, 115 Ill. App. 91—*Anderson v. Indianapolis Drop Forging Co.* 34 Ind. App. 103, 72 N. E. 277—*Re Coggsall*, 100 Mo. App. 588, 75 S. W. 183.

766. A recovery in ejectment is conclusive evidence in an action for mesne profits against the tenants in possession who were served with notice in the suit, but not against third persons. *Chirac v. Reinicker*, 11 Wheat. 280, 6: 474. *Cited in Chirac v. Reinicker*, 2 Pet. 617, 7 L. ed. 539—*Tyler v. Magwire*, 17 Wall. 292, 21 L. ed. 586—*Gaines v. New Orleans*, 4 Woods, 234, 17 Fed. 29—*Rigney v. De Graw*, 100 Fed. 214—*Smith v. Gayle*, 58 Ala. 604—*Yount v. Howell*, 14 Cal. 468—*Llmborg v. Higenbotham*, 11 Colo. 162, 17 Pac. 481—*State v. Barrows*, 52 Conn. 326—*Ainslie v. New York*, 1 Barb. 181—*Thompson v. Clark*, 4 Hun, 165—*Jeffries v. Zane*, 1 Miles (Pa.) 290—*Reid v. Stanley*, 6 Watts & S. 375—*Hall v. Hall*, 11 Tex. 547.

767. A judgment against a possessor of land for the rents and revenues may be passed into account and decree against his warrantor after the death of the possessor, without revivor of the judgment against the heirs or representatives of the deceased, where the warrantor is the principal debtor, and has notice of the suit against the

possessor, and the possessor's rights against the warrantor have been transferred to plaintiff. *New Orleans v. Whitney* (New Orleans v. Gaines) 138 U. S. 595, 11 Sup. Ct. Rep. 428, 34: 1102

768. A judgment against a defendant who has a right of action to recover over against a third party is conclusive upon the latter, provided he has notice and full opportunity to defend. *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. Rep. 564, 40: 712

Cited in Lawrence v. Stearns, 79 Fed. 883—*American Surety Co. v. Ballman*, 104 Fed. 635—*Donald v. Guy*, 127 Fed. 230—*Lake Drummond Canal & Water Co. v. West End Trust & S. D. Co.* 181 Fed. 149—*Carpenter v. Romer & T. S. B. Co.* 48 App. Div. 370, 63 N. Y. Supp. 274—*Prescott v. Le Conte*, 83 App. Div. 487, 82 N. Y. Supp. 411.

769. In a case of warranty and indemnity, a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible evidence in a suit against the latter on his contract of indemnity. *Clark v. Carrington*, 7 Cranch, 308, 3: 354. *Cited in Smeltzer v. White*, 92 U. S. 394, 23 L. ed. 509—*New York State M. Ins. Co. v. Protection Ins. Co.* 1 Story, 462, Fed. Cas. No. 10,216—*The Alert*, 40 Fed. 837—*Salle v. Light*, 4 Ala. 707, 39 Am. Dec. 317—*New Haven v. Childsey*, 68 Conn. 400, 36 Atl. 800—*Love v. Gibson*, 2 Fla. 316—*Brown v. Chaney*, 1 Ga. 414—*Holbrook v. Holbrook*, 15 Me. 12—*Thomas v. Hubbell*, 18 Barb. 12—*Comstock v. Dowham*, 8 Hun, 376—*Lacock v. Com.* 99 Pa. 210—*Lacock v. Riggie*, 39 Phila. Leg. Int. 289—*Kessler v. McConachy*, 1 Rawle, 445—*Middleton v. Thompson*, 1 Speers, L. 74—*Carpenter v. Pier*, 30 Vt. 87, 73 Am. Dec. 288—*Gear v. Parlah, Burnett (Wis.)* 110.

770. A person in fault, whereby an injury is sustained on the public streets for which a municipal corporation is liable, is concluded by the judgment against the latter if he knew that the suit was pending and could have defended it, although no express notice to defend was served upon him. *Chicago v. Robbins*, 2 Black, 418, 17: 298

Cited in American Bell Teleph. Co. v. National Improved Teleph. Co. 27 Fed. 665—*The Alert*, 40 Fed. 837—*Gillingham v. Charleston Tow-Boat & Transp. Co.* 40 Fed. 652—*Bailey v. Sundberg*, 1 C. C. A. 391, 1 U. S. App. 101, 49 Fed. 586—*Frank v. Wedderlin*, 16 C. C. A. 5, 30 U. S. App. 329, 68 Fed. 822—*Stearns v. Lawrence*, 28 C. C. A. 70, 54 U. S. App. 532, 83 Fed. 742—*Western & A. R. Co. v. Atlanta*, 74 Ga. 777—*Drennan v. Bunn*, 124 Ill. 192, 7 Am. St. Rep. 354, 16 N. R. 100—*Bloomington v. Roush*, 13 Ill. App. 343—*Davis v. Smith*, 79 Me. 357, 10 Atl. 55—*McKinsie v. Baltimore & O. R. Co.* 28 Md. 174—*Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 225, 40 Am. Rep. 430—*Somerset County v. Minderlein*, 67 Md. 570, 11 Atl. 57—*Parr v. State*, 71 Md. 236, 17 Atl. 1020—*Chesapeake Lighterage & Towing Co. v. Western Assur. Co.* 99 Md. 442, 58 Atl. 16—*Elliot v. Hayden*, 104 Mass. 182—*Detroit v. Grant*, 135 Mich. 629, 98 N. W. 405—*Strong v. Phoenix Ins. Co.* 62 Mo. 296, 21 Am. Rep. 417—*Missouri P. R. Co. v. Twiss*, 35 Neb. 271, 37 Am. St. Rep. 437, 53 N. W.

76—Walton v. Campbell, 51 Neb. 793, 71 N. W. 737—Lebanon v. Mead, 64 N. H. 9, 4 Atl. 392—Marvin Safe Co. v. Ward, 46 N. J. L. 25—Hoadley v. Dumois, 11 Misc. 56, 31 N. Y. Supp. 853—Creed v. Hartmann, 29 N. Y. 597, 86 Am. Dec. 341—Helser v. Hatch, 86 N. Y. 615—Wallace v. Straus, 113 N. Y. 243, 21 N. E. 66—Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 465, 30 Am. St. Rep. 685, 31 N. E. 897—Oceanic Steam Nav. Co. v. Campana Transatlantica Espanola, 144 N. Y. 665, 39 N. E. 360—Carleton v. Lombard, A. & Co. 149 N. Y. 151—Carroll v. Nodine, 41 Or. 418, 93 Am. St. Rep. 743, 69 Pac. 51—Smith v. Moore, 7 S. C. N. S. 222, 24 Am. Rep. 479—Douthitt v. MacCulsky, 11 Wash. 610, 40 Pac. 186—Sackman v. Thomas, 24 Wash. 677, 64 Pac. 819—Somers v. Schmidt, 24 Wis. 420, 1 Am. Rep. 191—Saveland v. Green, 36 Wis. 623.

771. Express notice to a party, in fault for obstructing a street, to defend the prior suit against the corporation, is not necessary to render him liable to the corporation for the amount of the judgment paid by it to the injured party. If he knew that the suit was pending, and could have defended it, he is concluded by the judgment as to the amount of damages. *Robbins v. Chicago*, 4 Wall. 657, 18: 427

Cited in *Smeitzer v. White*, 92 U. S. 394, 23 L. ed. 509—*Litchfield v. Goodnow* (Litchfield v. Crane) 123 U. S. 551, 31 L. ed. 201, 8 Sup. Ct. Rep. 210—*Audenreid v. Woodward*, 4 Fed. 174—*American Bell Teleph. Co. v. National Improved Teleph. Co* 27 Fed. 665—*South Covington & C. S. B. Co. v. Gest*, 34 Fed. 637—*Eagle Mfg. Co. v. Miller*, 41 Fed. 357—*Bailey v. Sundberg*, 1 C. C. A. 891, 1 U. S. App. 101, 49 Fed. 586—*Eagle Mfg. Co. v. David Bradley Mfg. Co.* 50 Fed. 194—*David Bradley Mfg. Co. v. Eagle Mfg. Co.* 6 C. C. A. 666, 18 U. S. App. 349, 57 Fed. 985—*Johnson v. Richmond Beach Improv. Co.* 63 Fed. 496—*Bidwell v. Toledo Consol. Street R. Co.* 72 Fed. 12—*Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 154, 23 C. C. A. 456, 46 U. S. App. 619, 77 Fed. 777—*Stearns v. Lawrence*, 28 C. C. A. 70, 54 U. S. App. 532, 83 Fed. 742—*Maloy v. Duden*, 30 C. C. A. 139, 57 U. S. App. 161, 86 Fed. 404—*Theller v. Hershey*, 89 Fed. 576—*Hauke v. Cooper*, 48 C. C. A. 146, 108 Fed. 925—*Sacks v. Kupferle*, 127 Fed. 571—*Commercial Union Assur. Co. v. American Cent. Ins. Co.* 68 Cal. 482, 9 Pac. 712—*Gilde v. Dwyer*, 83 Cal. 487, 23 Pac. 706—*Boswell v. District of Columbia*, 21 D. C. 527—*District of Columbia v. Baltimore & P. R. Co.* 1 Mackey, 317—*District of Columbia v. Washington Gaslight Co.* 9 Mackey, 52—*Western & A. R. Co. v. Atlanta*, 74 Ga. 777—*Drennan v. Bunn*, 124 Ill. 192, 7 Am. St. Rep. 354, 16 N. E. 100—*McNaughton v. Elkhart*, 85 Ind. 392—*Wilson v. Brookshire*, 126 Ind. 503, 9 L.R.A. 797, 25 N. E. 131—*Stanton v. Kenrick*, 135 Ind. 392, 35 N. E. 19—*Gardner v. Cole*, 21 Iowa, 217—*Challiss v. McCrum*, 28 Kan. 127—*Schmidt v. Louisville, C. & L. R. Co.* 99 Ky. 153, 35 S. W. 135—*Bridges v. McAllister*, 106 Ky. 800, 45 L.R.A. 803, 90 Am. St. Rep. 267, 51 S. W. 603—*Costa v. Yochim*, 104 La. 172, 28 So. 992—*Davis v. Smith*, 79 Me. 357, 10 Atl. 55—*Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 225, 40 Am. Rep. 430—*Parr v. State*, 71 Md. 236, 17 Atl. 1020—*Albert v. U. S. Dig.*—231

Hamilton, 76 Md. 311, 25 Atl. 341—*Riley v. First Nat. Bank*, 81 Md. 28, 31 Atl. 685—*Chesapeake Lighterage & Towing Co. v. Western Assur. Co.* 99 Md. 442, 58 Atl. 16—*Elliott v. Hayden*, 104 Mass. 182—*Burns v. Dockray*, 156 Mass. 140, 30 N. E. 551—*People use of Clinton v. Laning*, 73 Mich. 288, 41 N. W. 424—*Lansing v. Detroit, L. & N. R. Co.* 129 Mich. 405, 89 N. W. 54—*State ex rel. Wilson v. Rainey*, 74 Mo. 239—*Missouri P. R. Co. v. Twiss*, 35 Neb. 271, 37 Am. St. Rep. 437, 53 N. W. 76—*Towle v. Lane*, 61 N. H. 589—*Lebanon v. Mead*, 64 N. H. 9, 4 Atl. 392—*Hoppaugh v. McGrath*, 53 N. J. L. 89, 21 Atl. 106—*Kelly v. Forty-second Street, M. & St. N. Ave. R. Co.* 37 App. Div. 507, 55 N. Y. Supp. 1096—*Prescott v. LeConte*, 88 App. Div. 487, 82 N. Y. Supp. 411—*Coboes v. Morrison*, 42 Hun, 218—*Browning v. Stillwell*, 42 Misc. 347, 86 N. Y. Supp. 707—*Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 481, 7 Am. Rep. 469—*Helser v. Hatch*, 86 N. Y. 615—*Ash-ton v. Rochester*, 133 N. Y. 193, 28 Am. St. Rep. 619, 30 N. E. 965—*Martin v. Buffalo*, 128 N. C. 308, 83 Am. St. Rep. 679, 38 S. E. 902—*First Nat. Bank v. First Nat. Bank*, 68 Ohio St. 49, 67 N. E. 91—*Carroll v. Nodine*, 41 Or. 418, 93 Am. St. Rep. 743, 69 Pac. 51—*Smith v. Moore*, 7 S. C. N. S. 222, 24 Am. Rep. 479—*Howe v. Chesley*, 56 Vt. 733—*Dillard v. Dillard*, 78 Va. 210—*Sullivan v. Brown*, 8 Wash. 351, 36 Pac. 273—*Douthitt v. MacCulsky*, 11 Wash. 610, 40 Pac. 186—*Saveland v. Green*, 36 Wis. 624—*Daskam v. Ullman*, 74 Wis. 478, 43 N. W. 321.

772. Mere knowledge by, or notice to, a railway company or its directors, officers, or some of its stockholders of the unfaithful conduct of its solicitor and directors in the conduct of the defense in a suit to foreclose a mortgage executed by the corporation will not defeat the right of the corporation to file a bill to set aside the decree of sale, where the bill showed hostile control of the corporate affairs by the directors during the period covered by the foreclosure suit, and no acquiescence, assent, or ratification, or intervention of the rights of innocent purchasers is shown, and the corporation acted promptly when freed from the control of such directors. *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 4 Sup. Ct. Rep. 583, 28: 498

773. A decree of the Choctaw and Chickasaw citizenship court in the test case against ten persons who had been admitted to citizenship or enrolment by the United States courts in the Indian territory, vacating, for certain irregularities, the judgments of those courts, is binding on a person similarly situated who was not made a party, but who did not avail himself of his privilege, under the act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), to transfer his individual case from the territorial court to the citizenship court, but chose to abide the outcome of the case against the ten representatives of his class. *Wallace v. Adams*, 204 U. S. 415, 27 Sup. Ct. Rep. 363, 51: 547

774. Where defendants in proceedings to foreclose a mortgage were within the Confederate lines at the time, and it was unlawful for them to cross those lines, a notice

directed to them and published in a newspaper was a mere idle form. As to them, the proceedings were wholly void and inoperative. *Lasere v. Rochereau*, 17 Wall. 437, 21: 694
Dean v. Nelson, 10 Wall. 158, 19: 926
Cited in Washington University v. Finch, 18 Wall. 110, 21 L. ed. 821—*Dorr v. Gibboney*, 3 Hughes, 389, Fed. Cas. No. 4,006—*Kimball v. Taylor*, 2 Woods, 41, Fed. Cas. No. 7,775—*Ogden v. Leland University*, 49 La. Ann. 192, 21 So. 685—*De Jarnette v. De Giverville*, 56 Mo. 461—*Fairfax v. Alexandria*, 28 Gratt. 37—*Dorr v. Rohr*, 82 Va. 363, 3 Am. St. Rep. 106—*Haymond v. Camden*, 22 W. Va. 194.

Participation.

Assignee or Trustee in Bankruptcy Defending in State Court, see Bankruptcy, 32.

See also *infra*, 813b, 1061.

775. Prior adjudication is not binding on one not a party to the suit in which it was had, although he interested himself in securing the adjudication, and paid part of the expenses of the suit. *Litchfield v. Crane* (*Litchfield v. Goodnow*) 123 U. S. 549, 8 Sup. Ct. Rep. 210, 31: 199
Distinguished in Plumb v. Goodnow (*Plumb v. Crane*) 123 U. S. 560, 31 L. ed. 269, 8 Sup. Ct. Rep. 216.

Cited in Bailey v. Sundberg, 1 C. C. A. 390, 1 U. S. App. 101, 49 Fed. 586—*Johnson v. Richmond Beach Improv. Co.* 63 Fed. 406—*Lichty v. Lewis*, 63 Fed. 536—*Wilgus v. Germain*, 19 C. C. A. 190, 44 U. S. App. 369, 72 Fed. 775—*Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 466, 41 U. S. App. 766, 77 Fed. 794—*Hauke v. Cooper*, 48 C. C. A. 146, 108 Fed. 925—*Westinghouse Electric & Mfg. Co. v. Jefferson Electric Light, Heat & P. Co.* 128 Fed. 752—*Australian Knitting Co. v. Gormly*, 138 Fed. 97—*Williams v. Barkley*, 185 N. Y. 58, 58 N. E. 765.

776. A judgment in ejectment is admissible, but not conclusive, evidence, in an action for mesne profits, against one who was in fact the landlord of the defendant in ejectment, and employed counsel in that case, although not a party on the record. *Chirac v. Reinecker*, 2 Pet. 613, 7: 538

Cited in Jones v. Miller, 1 McCrary, 537, 3 Fed. 385—*Carlisle v. Killebrew*, 89 Ala. 384, 6 L.R.A. 619 6 So. 756—*Wilson v. Brookshire*, 126 Ind. 505, 9 L.R.A. 797, 25 N. E. 131—*Lochner v. Garborina*, 3 Ind. Terr. 669, 64 S. W. 570—*McNamee v. Moreland*, 26 Iowa, 113—*Masten v. Olcott*, 101 N. Y. 161, 4 N. E. 274—*Samuel v. Dinkins*, 12 Rich. L. 175, 75 Am. Dec. 729.

777. Judgments against parties in possession, for the recovery of lands and for rents and revenues, are binding not only on the parties to them but also on their grantor with warranty who defended the suits, and was represented by counsel therein. *New Orleans v. Whitney* (*New Orleans v. Gaines*) 138 U. S. 595, 11 Sup. Ct. Rep. 428, 34: 1102

778. A brief filed at the hearing in the Supreme Court of the United States by one interested in the question to be decided does not make him a party to the suit, or estop

him by decree. *Stryker v. Crane* (*Stryker v. Goodnow*) 123 U. S. 527, 8 Sup. Ct. Rep. 203, 31: 194

779. One who defends a vessel libeled as a prize, in the name and with the consent of another as claimant, is not thereby estopped from setting up his own title thereafter against such claimant or his creditors. *Cushing v. Laird*, 107 U. S. 69, 2 Sup. Ct. Rep. 196, 27: 391

780-1. A rule on A to pay the costs of a suit in the name of B is no judicial decision that B had any interest in the subject, or that the suit was identical with one afterwards brought by A in his own name for the same property. *Henderson v. Griffin*, 5 Pet. 151, 8: 79

4. Principal and Surety.

Admissibility Against Guarantor to Show that Judgment was Obtained, see Evidence, 1255.

As Evidence against Surety, see Evidence, 1257.

782. Sureties in a bond are bound to the full extent to which their principal is bound. *Stovall use of Eubanks v. Banks*, 10 Wall. 583, 19: 1036

Cited in Washington Ice Co. v. Webster, 125 U. S. 446, 31 L. ed. 807, 8 Sup. Ct. Rep. 947—*Moses v. United States*, 166 U. S. 600, 41 L. ed. 1130, 17 Sup. Ct. Rep. 682—*Martin v. Ellerbe*, 70 Ala. 335—*Territory v. Cook*, 2 Ariz. 389, 17 Pac. 10—*Wycough v. State*, 50 Ark. 105, 6 S. W. 598—*Chaquette v. Ortel*, 60 Cal. 601—*Whealan v. McCullough*, 4 App. D. C. 65—*American Bonding & T. Co. v. United States*, 23 App. D. C. 543—*Robinson v. Epping*, 24 Fla. 251, 4 So. 812—*Chicago v. Gage*, 95 Ill. 630, 35 Am. Rep. 182—*Nevitt v. Woodburn*, 160 Ill. 210, 52 Am. St. Rep. 315, 43 N. E. 385—*Parr v. State*, 71 Md. 235, 17 Atl. 1020—*McKim v. Glover*, 161 Mass. 422, 37 N. E. 443—*Pasewalk v. Bollman*, 29 Neb. 526, 26 Am. St. Rep. 399, 45 N. W. 780—*Probate Judge v. Sulloway*, 68 N. H. 515, 49 L.R.A. 349, 73 Am. St. Rep. 619, 44 Atl. 720—*Bralden v. Mercer*, 44 Ohio St. 343, 7 N. E. 155—*Greer v. McNeal*, 11 Okla. 529, 69 Pac. 893—*United Brethren v. Akin*, 45 Or. 250, 66 L.R.A. 656, 77 Pac. 748—*Belcher v. Branch*, 11 R. I. 227—*Bopp v. Hansford*, 18 Tex. Civ. App. 345, 45 S. W. 744—*Hornung v. Schramm*, 22 Tex. Civ. App. 329, 54 S. W. 615—*Gentry v. Allen*, 32 Gratt. 258—*Paxton v. Steele*, 86 Va. 314, 10 S. E. 1—*State v. Nutter*, 44 W. Va. 389, 30 S. E. 67—*Crim v. England*, 46 W. Va. 482, 76 Am. St. Rep. 826, 33 S. E. 310—*Shepard v. Pebbles*, 38 Wis. 378—*Meyer v. Barth*, 97 Wis. 355, 65 Am. St. Rep. 124, 72 N. W. 748.

783. The decree in an action to restrain the enforcement of bonds, holding that sureties are not liable, concludes creditors from further proceedings against them on the bonds. *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 8 Sup. Ct. Rep. 718, 31: 567

784. A judgment confessed by the principal debtor is admissible, but not conclusive evidence against his surety. *Drummond v. Prestman*, 12 Wheat. 515, 6: 712
Cited in Smeltzer v. White, 92 U. S. 394, 23

L. ed. 509—Washington Ice Co. v. Webster, 125 U. S. 446, 31 L. ed. 807, 8 Sup. Ct. Rep. 947—Moses v. United States, 166 U. S. 600, 41 L. ed. 1130, 17 Sup. Ct. Rep. 682—Berger v. Williams, 4 McLean, 578. Fed. Cas. No. 1,341—United States v. Cutter, 2 Curt. C. C. 628 Fed. Cas. No. 14,911—Firemen's Ins. Co. v. McMillan, 29 Ala. 166—Bissell v. Ames, 17 Conn. 127—Agricultural Ins. Co. v. Keeler, 44 Conn. 166—Howgate v. United States, 3 App. D. C. 294—Taylor v. Johnson, 17 Ga. 537—Grommes v. St. Paul Trust Co. 147 Ill. 646, 37 Am. St. Rep. 248, 35 N. E. 820—Wanack v. People, 187 Ill. 122, 58 N. E. 242—Charles v. Hoskins, 14 Iowa, 473, 83 Am. Dec. 378—Iglehart v. State, 2 Gill & J. 245—Griffith v. Turner, 4 Gill, 114—McClellan v. Kennedy, 8 Md. 252—Commercial Bank v. Eddy, 7 Met. 184—State use of Griffith v. Holt, 27 Mo. 341, 72 Am. Dec. 273—La Fayette Mut. Bldg. Assn. v. Kleinhoffer, 40 Mo. App. 404—Lacock v. Com. 99 Pa. 210—Strong v. Giltinan, 7 Phila. 177, 26 Phila. Leg. Int. 340—Lacock v. Riggle, 39 Phila. Leg. Int. 289—Seat v. Cannon, 1 Humph. 472—Spencer v. Dearth, 43 Vt. 106—Stephens v. Shafer, 48 Wis. 60, 33 Am. Rep. 793, 3 N. W. 835.

785. The verdict and judgment against a principal, fixing the amount of his liability, are competent evidence, on behalf of the surety, to show such amount, although an error has been committed as to the amount in the case against the principal. The surety's liability cannot exceed that of the principal. *United States v. Burbank (United States v. Allsbury)* 4 Wall. 186, 18: 321 *Cited in Moses v. United States*, 166 U. S. 600, 41 L. ed. 1130, 17 Sup. Ct. Rep. 682—*Howgate v. United States*, 3 App. D. C. 294—*Roberts v. Laramie County*, 8 Wyo. 223 56 Pac. 915.

In replevin bond.

See also *supra*, 651.

786. The finding of the jury, in a replevin suit, of the value of the goods replevied, where a judgment has been entered on their verdict, is conclusive on the parties to the replevin suit, and also upon those who became sureties by the bond, to abide its event. *Washington Ice Co. v. Webster*, 125 U. S. 426, 8 Sup. Ct. Rep. 947, 31: 799 *Cited in Moses v. United States*, 166 U. S. 600, 41 L. ed. 1130, 17 Sup. Ct. Rep. 682.

In injunction bond.

787. Sureties in a bond for injunction cannot go behind the decree in the case in which their bonds were given. *Oelrichs v. Williams (Oelrichs v. Spain)* 15 Wall. 211, 21: 43 *Cited in Brackebush v. Dorselt*, 37 Ill. App. 585.

In official bond.

As *Prima Facie Evidence Against Sureties*, see *Evidence*, 1254.

788. Plaintiff, by suing the sheriff alone, recovering judgment against him, and receiving from him a partial satisfaction of said judgment, did not thereby preclude himself from maintaining a suit for the same trespass against those who gave the bond of indemnity. *Lovejoy v. Murray*, 3 Wall. 1, 18: 129

789. The dockets and records of a court, showing that money had been received by the marshal under executions, are evidence in a suit against his sureties. *Williams v. United States*, 1 How. 290, 11: 135

— Editorial note.

[Effect against surety on official bond of judgment against officer. 52 L.R.A. 165.]

5. Corporation and Stockholders.

Judgment of Sister State, see *infra*, 978-982.

Adjudication of Bankruptcy against Corporation, see *Bankruptcy*, 87.

789a. After full relief has been given in a suit by shareholders to set aside a contract with a corporation and compel the issue of shares, and new directors have been elected in accordance with the decree, a bill filed by other shareholders for a receiver, charging fraud upon such officers, although called a supplemental bill, begins a new litigation in which the decree will not be binding upon parties to the original suit unless they have notice of the latter proceeding. *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. Rep. 810, 40: 986

Conclusiveness against stockholders.

790. A stockholder is bound by a decree against the corporation, such as making an assessment in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. Rep. 867, 34: 262 *Cited in Great Western Teleg. Co. v. Purdy*, 162 U. S. 337, 40 L. ed. 990, 16 Sup. Ct. Rep. 810—*Hancock Nat. Bank v. Farnum*, 176 U. S. 644, 44 L. ed. 621, 20 Sup. Ct. Rep. 506—*Glenn v. Liggett*, 47 Fed. 473—*Glenn v. Priest*, 48 Fed. 20—*Priest v. Glenn*, 2 C. C. A. 306, 4 U. S. App. 478, 51 Fed. 401—*Bennett v. Glenn*, 5 C. C. A. 353, 8 U. S. App. 419, 55 Fed. 957—*Rood v. Whorton*, 67 Fed. 438—*National Foundry & Pipe Works v. Oconto Water Co.* 68 Fed. 1007—*McVickar v. Jones*, 70 Fed. 759—*Willig v. Germain*, 19 C. C. A. 190, 44 U. S. App. 369, 72 Fed. 776—*Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 151, 22 C. C. A. 117, 46 U. S. App. 281, 76 Fed. 172—*Sheafe v. Larimer*, 79 Fed. 923—*American Freehold Land Mortg. Co. v. Woodworth*, 79 Fed. 952—*Hale v. Hardon*, 37 C. C. A. 280, 95 Fed. 786—*Hambleton v. Glenn*, 72 Md. 349, 20 Atl. 115—*Childs v. Cleaves*, 95 Me. 509, 50 Atl. 714—*Great Western Teleg. Co. v. Barker*, 56 Ill. App. 416—*Howarth v. Lombard*, 175 Mass. 577, 49 L.R.A. 306, 56 N. E. 888—*Mutual F. Ins. Co. v. Phoenix Furniture Co.* 108 Mich. 176, 34 L.R.A. 697, 62 Am. St. Rep. 693, 66 N. W. 1095—*Warner v. Delbridge & C. Co.* 110 Mich. 593, 34 L.R.A. 702, 64 Am. St. Rep. 367, 68 N. W. 283—*Nickum v. Burckhardt*, 30 Or. 474, 60 Am. St. Rep. 822, 48 Pac. 474—*McLaughlin v. O'Neill*, 7 Wyo. 207, 51 Pac. 251.

791. A decree against a corporation, making an assessment on its stock in the discharge of a duty resting on the corporation,

binds its members in the absence of fraud, although it has assigned its property and rights in trust for the payment of its debts and has ceased to exist. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739, 33: 184 *Distinguished* in *Swing v. Bentley & G. Furniture Co.* 45 W. Va. 287, 31 S. E. 925.

Cited in *Glenn v. Liggett*, 135 U. S. 542, 34 L. ed. 266, 10 Sup. Ct. Rep. 867—*Hancock Nat. Bank v. Farnum*, 176 U. S. 644, 44 L. ed. 621, 20 Sup. Ct. Rep. 506—*Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co.* 46 Fed. 587—*Liggett v. Glenn*, 2 C. C. A. 206, 4 U. S. App. 438, 51 Fed. 391—*Foote v. Glenn*, 52 Fed. 529—*Bennett v. Glenn*, 5 C. C. A. 353, 8 U. S. App. 419, 55 Fed. 957—*Furnald v. Glenn*, 56 Fed. 373—*Furnald v. Glenn*, 12 C. C. A. 31, 26 U. S. App. 202, 64 Fed. 53—*Rood v. Whorton*, 67 Fed. 438—*National Foundry & Pipe Works v. Oconto Water Co.* 68 Fed. 1007—*Wilgus v. Germain*, 19 C. C. A. 190, 44 U. S. App. 369, 72 Fed. 776—*The Rosalie*, 75 Fed. 31—*Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 151, 22 C. C. A. 117, 46 U. S. App. 281, 76 Fed. 172—*Wilson v. Seymour*, 22 C. C. A. 481, 40 U. S. App. 567, 76 Fed. 681—*Sheafe v. Larimer*, 79 Fed. 922—*Columbia Nat. Bank v. Mathews*, 29 C. C. A. 499, 56 U. S. App. 636, 85 Fed. 943—*Howarth v. Ellwanger*, 86 Fed. 55—*Central Trust Co. v. Western North Carolina R. Co.* 89 Fed. 29—*Hale v. Haddon*, 37 C. C. A. 250, 95 Fed. 786—*James v. Central Trust Co.* 39 C. C. A. 129, 98 Fed. 493—*Hale v. Tyler*, 104 Fed. 761—*Hale v. Allinson*, 45 C. C. A. 271, 106 Fed. 259—*Ball v. Warrington*, 47 C. C. A. 448, 108 Fed. 473—*Re Miller Electrical Maintenance Co.* 111 Fed. 516—*Lehman v. Glenn*, 87 Ala. 626, 6 So. 44—*Fish v. Smith*, 73 Conn. 382, 84 Am. St. Rep. 161, 47 Atl. 711—*Great Western Teleg. Co. v. Barker*, 56 Ill. App. 416—*Mallen v. Langworthy*, 70 Ill. App. 377—*Singer v. Hutchinson*, 83 Ill. App. 682—*Calloway v. Glenn*, 103 Ky. 653, 49 S. W. 440—*Castleman v. Templeman*, 87 Md. 549, 41 L.R.A. 367, 67 Am. St. Rep. 363, 40 Atl. 275—*Howarth v. Lombard*, 175 Mass. 577, 49 L.R.A. 306, 56 N. E. 888—*Hanson v. Davison*, 73 Minn. 462, 76 N. W. 254—*Langworthy v. Saxony Mills*, 72 Mo. App. 370—*Pfaff v. Gruen*, 92 Mo. App. 583—*Commonwealth Mut. F. Ins. Co. v. Hayden Bros.* 60 Neb. 638, 83 Am. St. Rep. 545, 83 N. W. 922—*Tompkins v. Blakey*, 70 N. H. 587, 49 Atl. 111—*Meley v. Whitaker*, 61 N. J. L. 604, 68 Am. St. Rep. 719, 40 Atl. 593—*Stoddard v. Lum*, 32 App. Div. 577, 153 N. Y. Supp. 607—*Alexander v. Donohoe*, 143 N. Y. 211, 38 N. E. 263—*Bear v. Brunswick County*, 122 N. C. 436, 65 Am. St. Rep. 711, 29 S. E. 719—*Crumlish v. Shenandoah Valley R. Co.* 40 W. Va. 654, 22 S. E. 90—*Parker v. Stoughton Mill Co.* 91 Wis. 181, 51 Am. St. Rep. 881, 64 N. W. 751.

792. When the suit in which a judgment was recovered was not commenced until after a bank went into liquidation, the judgment against the corporation is not binding on the stockholders in the sense that it cannot be re-examined, where the facts of the case were not known to the stockholders of the bank when the judgment was rendered. *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 10 Sup. Ct. Rep. 238, 33: 564 *Cited* in *Ward v. Joslin*, 186 U. S. 152, 46 L.

ed. 1099, 22 Sup. Ct. Rep. 807—*Wilgus v. Germain*, 19 C. C. A. 190, 44 U. S. App. 369, 72 Fed. 776—*Ball v. Warrington*, 87 Fed. 698—*Dexter v. Edmonds*, 89 Fed. 472—*Hale v. Haddon*, 37 C. C. A. 251, 95 Fed. 758—*Ward v. Joslin*, 100 Fed. 679—*Moss v. Whitzel*, 108 Fed. 580—*Hanson v. Davison*, 73 Minn. 463, 76 N. W. 254—*Langworthy v. Garding*, 74 Minn. 382, 77 N. W. 207.

793. Stockholders, when sued for their individual liability for corporate debts, are precluded from denying the validity of a guaranty made by a corporation, when it has been established by a judgment thereon against the corporation. *Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. 392, 19: 117 *Cited* in *Glenn v. Williams*, 60 Md. 116.

794. A judgment against a corporation is not so conclusive on a stockholder, in an action to enforce his individual liability for a corporate obligation under the Kansas Constitution and laws, as to prevent his showing that because such corporate obligation was *ultra vires* he was not liable under such Constitution and laws. *Ward v. Joslin*, 186 U. S. 142, 22 Sup. Ct. Rep. 807, 46: 1093 *Obtd* in *Johnson v. Stebbins-Thompson Realty Co.* 177 Mo. 601, 76 S. W. 1021.

795-6. A decree of a court of equity that the trustee of an insolvent corporation has fully executed his trust, and that the trust fund is exhausted, is a bar to any equitable proceeding by a creditor who was a party to a prior suit to subject unpaid stock subscriptions to the payment of his debt, which he has not reduced to judgment. *Terry v. Anderson*, 95 U. S. 628, 24: 365 *Cited* in *Brown, B. & Co. v. Lake Superior Iron Co.* 134 U. S. 534, 33 L. ed. 1024, 10 Sup. Ct. Rep. 604—*National Tube Works v. Ballou*, 146 U. S. 524, 36 L. ed. 1072, 13 Sup. Ct. Rep. 166—*Hollins v. Briarfield Coal & I. Co.* 150 U. S. 381, 37 L. ed. 1116, 14 Sup. Ct. Rep. 127—*Atlanta & F. R. Co. v. Western R. Co.* 1 C. C. A. 679, 2 U. S. App. 227, 50 Fed. 793—*Kittel v. Augusta, T. & G. R. Co.* 65 Fed. 863—*Droop v. Ridenour*, 9 App. D. C. 105—*Patterson v. Lynde*, 112 Ill. 205—*Brabrook Tailoring Co. v. Belding Bros.* 40 Ill. App. 330—*E. Remington & Sons v. Samana Bay Co.* 140 Mass. 502, 5 N. E. 292—*Atlas Nat. Bank v. John Moran Packing Co.* 138 Mo. 92, 39 S. W. 71—*Albright v. Texas, S. F. & N. R. Co.* 8 N. M. 426, 46 Pac. 448.

Conclusiveness on officers.

797. In an action to enforce the liability of trustees of a corporation, under a statute making the trustees liable for the debts of the company for their failure to file and publish an annual report, a judgment against the corporation is, as against the trustees, evidence neither conclusive nor prima facie of the existence of the debt due from the corporation, for the payment of which they can be charged. *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. Rep. 554, 28: 1038 *Cited* in *Brown v. Clow*, 158 Ind. 422, 62 N. E. 1006.

6. Trustees, Beneficiaries, Representatives, and Others.

Bondholders Bound by Sale on Foreclosure,
see Mortgage, 446.

Trustees in mortgage.

Trustee's Power to Bind Bondholders,
see Mortgage, 158-162.

See also *infra*, 803, 808.

798. A judgment in a suit in a state court establishing a lien on a railroad for labor does not bind the trustee under a mortgage or the bondholders of the road who are not made parties to it. *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. Rep. 590, 32: 1001

799. Where trustees of a state fund had sold certain railroads under authority of law, and claimed as part of the purchase money certain mortgage bonds of said roads; and, during the pendency of a suit to establish their title, other parties proceeded to foreclose a mortgage junior to theirs, and it became necessary to fix the amount of their prior lien; and the trustees, to save themselves from loss in case their claim to the ownership of the bonds should be defeated, took a decree in such foreclosure suit for what would be their due if their title should fail,—such action on their part, and the ascertainment of the amount so due, will not estop them, in the pending proceedings, to establish their title to the mortgage bonds. *Littlefield v. Bloxham* (*Littlefield v. Internal Improv. Fund*) 117 U. S. 419, 6 Sup. Ct. Rep. 793, 29: 930

Beneficiaries.

800-1. The *cestui que trust* is bound by a decree against his trustee in the matter of the trust, where the trustee has power to represent the beneficiary in all things. *Kerrison v. Stewart*, 93 U. S. 155, 23: 843
Corcoran v. Chesapeake & O. Canal Co. 94 U. S. 741, 24: 190
Distinguished in *Keefe v. Malone*, 3 MacArth. 244—*Bockfinger v. Foster*, 10 Okla. 493, 62 Pac. 799.

Cited in *Corcoran v. Chesapeake & O. Canal Co.* 94 U. S. 745, 24 L. ed. 192—*Richter v. Jerome*, 123 U. S. 246, 31 L. ed. 137, 8 Sup. Ct. Rep. 106—*Vetterlein v. Barnes*, 124 U. S. 172, 31 L. ed. 401, 8 Sup. Ct. Rep. 441—*Beals v. Illinois, M. & T. R. Co.* 138 U. S. 295, 33 L. ed. 611, 10 Sup. Ct. Rep. 314—*Kent v. Lake Superior Ship Canal, R. & Iron Co.* 144 U. S. 90, 36 L. ed. 358, 12 Sup. Ct. Rep. 650—*Manson v. Duncanson*, 166 U. S. 543, 41 L. ed. 1109, 17 Sup. Ct. Rep. 647—*Steinkuhl v. York*, 2 Flipp. 380, Fed. Cas. No. 13,356—*Taylor v. Rockefeller*, 6 Rep. 229, Fed. Cas. No. 13,802—*Taylor v. Holmes*, 14 Fed. 510—*Credit Co. v. Arkansas C. R. Co.* 5 McCrary, 30, 15 Fed. 52—*Chaffin v. Hull*, 49 Fed. 526—*Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. 185—*Talley v. Curtain*, 4 C. C. A. 182, 8 U. S. App. 347, 54 Fed. 48—*Clyde v. Richmond & D. R. Co.* 55 Fed. 448

—*Phinley v. Augusta & K. R. Co.* 56 Fed. 277—*Alger v. Anderson*, 78 Fed. 734—*Rejall v. Greenhood*, 35 C. C. A. 99, 92 Fed. 947—*Woods v. Woodson*, 40 C. C. A. 529, 100 Fed. 519—*Fletcher v. Ann Arbor R. Co.* 53 C. C. A. 649, 116 Fed. 481—*Union Trust Co. v. Walker Electric Co.* 122 Fed. 815—*Bowling Green Trust Co. v. Virginia Pass. & Power Co.* 132 Fed. 924—*McKleroy v. Gadsden Land & Improv. Co.* 126 Ala. 192, 28 So. 660—*Watkins v. Bryant*, 91 Cal. 504, 27 Pac. 775—*Keefe v. Malone*, 3 MacArth. 245—*Duncanson v. Manson*, 3 App. D. C. 270—*Craighead v. Dalton*, 105 Ind. 76, 4 N. E. 425—*Robertson v. Van Cleave*, 129 Ind. 220, 15 L.R.A. 70, 26 N. E. 899—*Farmers' Loan & T. Co. v. Essex*, 66 Kan. 109, 71 Pac. 268—*Baltimore & O. R. Co. v. Flaherty*, 87 Md. 114, 39 Atl. 524, 1076—*F. G. Oxley Stave Co. v. Butler County*, 121 Mo. 637, 26 S. W. 367—*Robinson v. Kind*, 23 Nev. 339, 47 Pac. 1—*Merrill v. Farmers' Loan & T. Co.* 24 Hun, 299—*Re Straut*, 126 N. Y. 212, 27 N. E. 259—*Oklahoma City v. Mc-Masters*, 12 Okla. 584, 73 Pac. 1012—*Harrisburg & E. R. Co.'s Appeal*, 1 Monaghan (Pa.) 693, 15 Atl. 459—*Baker v. Small*, 17 Pa. Super. Ct. 425—*Jones v. McKenna*, 4 Lea, 636—*Galveston, H. & S. A. R. Co. v. Butler*, 56 Tex. 512—*Ebell v. Bursinger*, 70 Tex. 122, 8 S. W. 77—*Preston v. Carter Bros.* 80 Tex. 391, 16 S. W. 17—*Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* 88 Tex. 484, 27 S. W. 100—*Smith v. Ford*, 48 Wis. 144, 2 N. W. 134—*Ray v. Hixon*, 90 Wis. 45, 48 Am. St. Rep. 899, 62 N. W. 922.

802. Persons cannot avoid the effect of a decree on the ground that they were not parties, when their trustees and privies litigated the questions involved, in their interest. *Green v. Bogue*, 158 U. S. 478, 15 Sup. Ct. Rep. 975, 39: 1061
Cited in *National Foundry & Pipe Works v. Oconto City Water Supply Co.* 51 C. C. A. 475, 113 Fed. 803—*Australian Knitting Co. v. Gormly*, 138 Fed. 97—*Re Buttrick*, 185 Mass. 113, 69 N. E. 1044.

803. The beneficiaries under a trust deed for the benefit of creditors are bound by a judgment declaring the trust deed void as to certain creditors, although such beneficiaries were not parties to the suit, where the trustee was a party and had power to represent the beneficiaries in all things relating to the trust property. *Kerrison v. Stewart*, 93 U. S. 155, 23: 843

804. Where, by the laws of New York, the assignee of a bond and mortgage who holds it as collateral security is the "trustee of an express trust," and may sue without joining the assignor, the judgment is conclusive against the assignor as to the amount of the debt, not only in that state but in all other states. *Chew v. Brumagen*, 13 Wall. 497, 20: 663

Cited in *Rejall v. Greenhood*, 35 C. C. A. 99, 92 Fed. 947—*Watkins v. Bryant*, 91 Cal. 504, 27 Pac. 775—*People v. Ingersoll*, 67 Barb. 483.

805. [A party cannot, by employing the name of a trustee in a subsequent suit,

avoid the legal effect of a judgment against him. *Calhoun v. Dunning* (Pa. Sup. Ct.) 4 Dall. 120, 1: 767]

Representatives.

Representation of Surety by Principal, see supra, III. k, 4.

Representation of Stockholder by Corporation, see supra, III. k, 5.

Representation of Unborn Children, see infra, 824-827.

See also infra, 813, 840; Limitation of Actions, 574.

806. Where one not named as a party is represented by one who is a party and under whom he claims and puts in an answer in the name of such party, and pays part of the expenses of the litigation, he is bound by the decree therein. *Plumb v. Crane* (*Plumb v. Goodnow*) 123 U. S. 560, 8 Sup. Ct. Rep. 216, 31: 268
Cited in *Lichty v. Lewis*, 63 Fed. 536—*Springfield v. Plummer*, 89 Mo. App. 532.

807. All persons are bound by a judgment who are represented by the parties and claim under them or in privity with them, or who are directly interested in the subject-matter and were notified of the suit and had a right to make defense or to control the proceedings and to appeal from the judgment. *Lovejoy v. Murray*, 3 Wall. 1, 18: 129
Cited in *Robbins v. Chicago*, 4 Wall. 672, 18 L. ed. 430—*Smeltzer v. White*, 92 U. S. 394, 23 L. ed. 509—*Litchfield v. Goodnow* (*Litchfield v. Crane*) 123 U. S. 551, 31 L. ed. 201, 8 Sup. Ct. Rep. 210—*New England Mut. M. Ins. Co. v. Dunham*, 3 Cliff. 337, Fed. Cas. No. 10,155—*Eagle Mfg. Co. v. Miller*, 41 Fed. 357—*David Bradley Co. v. Eagle Mfg. Co.* 6 C. C. A. 666, 18 U. S. App. 349, 57 Fed. 985—*Johnson v. Richmond Beach Improv. Co.* 63 Fed. 496—*Bidwell v. Toledo Consol. Street R. Co.* 72 Fed. 12—*Maloy v. Duden*, 30 C. C. A. 139, 57 U. S. App. 161, 86 Fed. 404—*Theller v. Hershey*, 89 Fed. 576—*Tootle v. Coleman*, 57 L.R.A. 125, 46 C. C. A. 137, 107 Fed. 46—*James v. Germania Iron Co.* 46 C. C. A. 492, 107 Fed. 613—*Hauke v. Cooper*, 48 C. C. A. 146, 108 Fed. 925—*Sacks v. Kupferle*, 127 Fed. 571—*District of Columbia v. Washington Gaslight Co.* 9 Mackey, 52—*Viele v. Germania Ins. Co.* 26 Iowa, 46, 96 Am. Dec. 83—*Schmidt v. Louisville, C. & L. R. Co.* 99 Ky. 153, 35 S. W. 135—*Bernard v. Merrill*, 91 Me. 363, 40 Atl. 136—*McKinzie v. Baltimore & O. R. Co.* 28 Md. 174—*Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 225, 40 Am. Rep. 430—*Landis v. Hamilton*, 77 Mo. 565—*Port Jervis v. First Nat. Bank*, 98 N. Y. 559—*Wallace v. Straus*, 113 N. Y. 243, 21 N. E. 66—*Smith v. Moore*, 7 S. C. N. S. 220, 24 Am. Rep. 479—*Hanrick v. Gurley*, 93 Tex. 481, 56 S. W. 330—*Sullivan v. Brown*, 8 Wash. 351, 36 Pac. 273—*Sackman v. Thomas*, 24 Wash. 677, 64 Pac. 819.

808. Where a former judgment was rendered by a court of competent jurisdiction, to which a railroad company that issued bonds, and the surviving trustee under the mortgage made to secure the bonds, were made parties, the bondholders, being represented by the trustee, are bound by the de-

creed canceling and annulling the bonds and mortgage, unless the decree was fraudulently obtained. *Beals v. Illinois, M. & T. R. Co.* 133 U. S. 290, 10 Sup. Ct. Rep. 314, 33: 608

Cited in *Pollitz v. Farmers' Loan & T. Co.* 53 Fed. 211—*Woods v. Woodson*, 40 C. C. A. 529, 100 Fed. 519—*Grant v. Winona & S. W. R. Co.* 85 Minn. 430, 89 N. W. 60.

809. Whatever binds or forecloses a trustee for bondholders who is a party to a foreclosure binds and forecloses the bondholders, in the absence of fraud or bad faith, although they are not parties to the suit. *Kent v. Lake Superior Ship Canal R. & Iron Co.* 144 U. S. 75, 12 Sup. Ct. Rep. 650, 36: 352
Cited in *Pollitz v. Farmers' Loan & T. Co.* 53 Fed. 212—*Fletcher v. Ann Arbor R. Co.* 53 C. C. A. 649, 116 Fed. 481—*London & S. F. Bank v. Dexter Horton & Co.* 61 C. C. A. 530, 126 Fed. 608—*Rumsey v. Peoples R. Co.* 154 Mo. 246, 55 S. W. 615.

810. A mortgagee is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or some one authorized to represent him, like the trustee of a mortgage bondholder, is made party to the litigation. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. Rep. 592, 38: 450
Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. Rep. 659, 36: 368
Cited in *Keokuk & W. R. Co. v. Scotland County Court*, 152 U. S. 322, 38 L. ed. 461, 14 Sup. Ct. Rep. 608—*Abraham v. Casey*, 179 U. S. 217, 45 L. ed. 159, 21 Sup. Ct. Rep. 88—*Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 337, 47 U. S. App. 38, 76 Fed. 299—*Andrews v. National Foundry & Pipe Works*, 38 L.R.A. 154, 23 C. C. A. 456, 46 U. S. App. 619, 77 Fed. 777—*Norton v. San Jose Fruit Packing Co.* 27 C. C. A. 578, 48 U. S. App. 590, 83 Fed. 514—*Bancroft v. Wilcomico County*, 121 Fed. 875—*Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson*, 130 Fed. 165—*Lacassagne v. Abraham*, 51 La. Ann. 843, 25 So. 441.

Receivers and assignees.

Foreign Judgment, see infra, 1003.

Conclusiveness of State Judgment in Federal Court, see infra, 1061.

Representation of Creditors by Trustee or Assignee in Bankruptcy, see Bankruptcy, 92-96.

See also supra, 318, 587, 803; infra, 815; Parties, 321.

811. A judgment against an insurance company which has been dissolved, and its franchises forfeited by a state decree, and a receiver appointed of its effects, is not valid, nor binding upon the receiver, as the company has no legal existence. *Pendleton v. Russell*, 144 U. S. 640, 12 Sup. Ct. Rep. 743, 36: 574
Cited in *Avery v. Boston Safe Deposit & T. Co.* 72 Fed. 701—*Weller Mfg. Co. v. Eaton*, 81 Mo. App. 661—*Taylor v. Gray*, 59 N. J. Eq. 630, 44 Atl. 668—*People v. Mercantile Credit Guarantee Co.* 65 App. Div. 312, 72

N. Y. Supp. 858—*State v. Port Royal & A. R. Co.* 45 S. C. 456, 23 S. E. 363.

812. A judgment is conclusive upon a corporation and upon its receivers, when they were parties and contested the claim, and, subsequently, the attorney for the receivers consented to its entry. *Habich v. Folger*, 20 Wall. 1, 22: 307

Cited in Mutual L. Ins. Co. v. Harris, 97 U. S. 336, 24 L. ed. 962—*Kelley v. Mississippi* C. R. Co. 2 Filpp. 586, 1 Fed. 588—*Graham v. Spencer*, 14 Fed. 606—*Whiting v. Burger*, 78 Me. 295, 4 Atl. 694—*Barry v. Mutual L. Ins. Co.* 49 How. Pr. 510.

813. A receiver of a national bank has no authority to submit the rights of the government to litigation, but represents only the bank, its stockholders and creditors. *Case v. Terrell*, 11 Wall. 199, 20: 134
Cited in Bank of Bethel v. Pahquioque Bank, 14 Wall. 400, 20 L. ed. 844—*Movius v. Lee*, 30 Fed. 300—*Gibson v. Peters*, 35 Fed. 725—*Thompson v. German Ins. Co.* 78 Fed. 894—*Brown v. Schleier*, 112 Fed. 579—*Brown v. Schleier*, 55 C. C. A. 481, 118 Fed. 987—*Murphy v. Gumaer*, 18 Colo. App. 190, 70 Pac. 800—*Bridges v. Stephens*, 132 Mo. 547, 34 S. W. 555—*Davis v. Knipp*, 92 Hun. 301, 36 N. Y. Supp. 705.

813a. A decree in a suit between husband and wife, confirming and ratifying a conveyance of property to her by her husband, is not conclusive upon the husband's assignee in bankruptcy, in a suit to set aside the conveyance as fraudulent. *Humes v. Scruggs*, 94 U. S. 22, 24: 51
Cited in Re Campbell, 8 Hughes, 288, Fed. Cas. No. 2,348—*Van Kleeck v. Miller*, Fed. Cas. No. 16,860—*Re Anderson*, 23 Fed. 496—*Hinkle v. Wilson*, 53 Md. 291—*Engel v. State*, 65 Md. 547, 5 Atl. 249—*Brooks v. Wilson*, 125 N. Y. 262, 26 N. E. 258—*Old Folk's Soc. v. Millard*, 86 Tenn. 658, 8 S. W. 851.

813b. Where a defendant to whom land was adjudged to belong, by a decree in a state court, became bankrupt pending the suit, his assignee, who became a party and asked to have the amount of his attorneys' lien adjudicated, was bound by what was done, although had he not appeared the attorneys might have been compelled to bring a new suit. *Winchester v. Heiskell*, 119 U. S. 450, 7 Sup. Ct. Rep. 281, 30: 462

813c. If an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt, he is bound by the judgment. *Thatcher v. Rockwell*, 105 U. S. 467, 26: 949

Cited in Dimock v. Revere Copper Co. 117 U. S. 565, 29 L. ed. 996, 6 Sup. Ct. Rep. 855—*Giffin v. Mutual L. Ins. Co.* 119 Ga. 665, 46 S. E. 870.

Administrators.

What Matters Concluded by Judgment, see supra, 571-573, 674-677a.

Judgment of Sister State, see infra, 918a, 988-997.

See also infra, 829, 862.

814. A final account of an administrator settled with the orphans court, is not conclusive in his favor upon the issue of

devastavit vel non, as against a creditor of the estate who was not a party to the settlement of the account. *Beatty v. Maryland*, 7 Cranch, 281, 3: 343
Cited in Lupton v. Janney, 5 Cranch, C. C. 477, Fed. Cas. No. 8,607—*Nicholls v. Hodge*, 2 Cranch, C. C. 583, Fed. Cas. No. 10,231.

815. A judgment against an ancillary receiver or administrator binds only the property in his hands, and is inoperative against the receiver or administrator appointed by the court of original administration. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35: 464

Cited in New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 280—*Union Trust Co. v. Atchison, T. & S. F. R. Co.* 87 Fed. 531—*Scruggs v. Scruggs*, 105 Fed. 81—*Jefferson v. Beall*, 117 Ala. 439, 67 Am. St. Rep. 177, 23 So. 44—*Archambeau v. Platt*, 173 Mass. 251, 53 N. E. 816—*Bank Comrs. v. Granite State Provident Assn.* 70 N. H. 559, 85 Am. St. Rep. 646, 49 Atl. 124.

816-17. A judgment on an administration bond, that a certain sum of money is due, and awarding execution to collect it, is a final decree conclusive upon the parties, although it allows as a payment, to be deducted from the amount, any note held by defendant against plaintiff, and a deduction for fees. *McLaughlin v. Bank of Potomac*, 7 How. 220, 12: 675

Stovall v. Banks, 10 Wall. 583, 19: 1036
Cited in Carey v. Roosevelt, 91 Fed. 568.

818. An administrator who files a bill of review to have a decree set aside upon the ground that it should not have been rendered against him in a state where he was not appointed is concluded by the decision thereon. *Lawrence v. Nelson*, 143 U. S. 215, 12 Sup. Ct. Rep. 440, 36: 130
Cited in Hovey v. Elliott, 167 U. S. 446, 42 L. ed. 231, 17 Sup. Ct. Rep. 841—*Greer v. Ferguson*, 56 Ark. 332, 19 S. W. 966.

819. Where a plaintiff died pending an action, and the original suit did not abate, a scire facias in the name of the administratrix while a *feme sole* was no bar to a scire facias in the name of the husband and wife after her marriage, to enable her to prosecute the suit to a final judgment. *M'Coul v. Lekamp*, 2 Wheat. 111, 4: 197
Cited in Re Connaway, 178 U. S. 435, 44 L. ed. 1139, 20 Sup. Ct. Rep. 951.

Heirs.

Conclusiveness as to Distributees and Claimants, see infra, 828-831.

Conclusiveness of Record of Proceedings Against "Unknown Heirs" to Show Existence of Heirs, see Writ and Process, 86a.

820. Judgment against an administrator is not evidence against the heir. *Ingle v. Jones*, 9 Wall. 486, 19: 621
Cited in Carey v. Roosevelt, 81 Fed. 609—*Carey v. Roosevelt*, 43 C. C. A. 321, 102 Fed. 571—*Groot v. Hiltz*, 3 Mackey, 255—*Hunt v. Russ*, 7 Mackey, 531—*Keefe v. Malone*, 3 MacArth. 241—*Glenn v. Sothoron*, 4 App. D. C. 134—*Gauld v. Lipman*, 4 Misc. 80, 23 N. Y. Supp. 778.

821. In Virginia, no judgment against the executors can bind the heirs, or in any manner affect them. It could not be given in evidence against them. *Deneale v. Archer*, 8 Pet. 528, 8: 1033

Cited in *Ingle v. Jones*, 9 Wall. 496, 19 L. ed. 624—*Gwynn v. Hamilton*, 29 Ala. 236—*Keefe v. Malone*, 3 MacArth. 242—*Brewis v. Lawson*, 76 Va. 40—*Robertson v. Wright*, 17 Gratt. 540.

822. By the decisions of Louisiana, an extrajudicial statement by an executor, that he believes the debt to be due by the estate, does not bind the heir; nor is the heir bound by the approval of a court as to such a claim, if it be made *ex parte*. *Gaines v. Hennen*, 24 How. 553, 16: 770

823. In Louisiana, where an action against minors is brought directly against the tatrix, and the judgment is against her in that capacity, it is not error to declare the liability of the heirs for their share of the estate, although they are not named as parties to the suit. In such a case, a judgment for all the costs *in solido* is discretionary with the court. *Kittredge v. Race*, 92 U. S. 116, 23: 488

Unborn children.

824. Where no necessity exists, the court has no power to decree as to the future rights of parties not before the court or *in esse*. *Cross v. Del Valle* (*Cross v. De Valle*) 1 Wall. 1, 17: 515

Distinguished in *Davis v. Wakelee*, 156 U. S. 686, 39 L. ed. 583, 15 Sup. Ct. Rep. 555.

Cited in *May v. May*, 167 U. S. 323, 42 L. ed. 185, 17 Sup. Ct. Rep. 824—*Blythe Co. v. Blythe*, 172 U. S. 644, 43 L. ed. 1183, 19 Sup. Ct. Rep. 878—*Taylor v. Fisk*, 94 Fed. 243—*Bowditch v. Soltyk*, 99 Mass. 189—*Gordon v. Green*, 113 Mass. 260—*McCall v. McCall*, 1 Tenn. Ch. 502—*Pritchitt v. Kirkman*, 2 Tenn. Ch. 393.

825. Where a will devising a remainder in lands to grandchildren was set aside, in a suit in which no executor, trustee, or administrator with the will annexed was made a party, and partition was decreed among the heirs, and they conveyed portions of lands set off to them to purchasers for value and without actual notice of an adverse title, the decree annulling the probate was absolutely void as against grandchildren afterwards born, and they are entitled to recover their shares under the will, against the heirs and purchasers, and may, if the parties are citizens of different states, bring their suit in the circuit court of the United States. *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. Rep. 652, 28: 1015

Cited in *Emmert v. Stouffer*, 64 Md. 558, 6 Atl. 177—*Newman v. Waterman*, 63 Wis. 627, 53 Am. Rep. 310, 23 N. W. 696.

826. Contingent limitations and executory devises to persons not in being may be bound by decree against a person claiming a vested estate of inheritance; but a person in being claiming under an executory devise not subject to any preceding vested estate of inheritance by which it may be defeated must be made a party to a suit

affecting his rights. *Miller v. Texas & P. R. Co.* 132 U. S. 662, 10 Sup. Ct. Rep. 206, 33: 487

Cited in *Chaffin v. Hull*, 49 Fed. 526—*Gray v. Smith*, 76 Fed. 532—*Mayall v. Mayall*, 63 Minn. 516, 65 N. W. 942—*Fox v. Fee*, 24 App. Div. 322, 49 N. Y. Supp. 292.

827. In Virginia, parties in being, possessing an estate of inheritance, are regarded as so far representing all persons who, being afterwards born, may have interest in the same, that a decree binding them will also bind the after-born parties. *Knotts v. Stearns*, 91 U. S. 638, 23: 252

Cited in *Long v. Long*, 62 Md. 85—*De Leon v. Barrett*, 22 S. C. 422.

Distributees; claimants.

Conclusiveness against Heirs, see *supra*, 820-823.

Conclusiveness of State Judgment in Federal Court, see *infra*, 1052 a.

828. A decree of distribution will not preclude a claimant not embraced in its provisions, having rights similar to those of other claimants who are embraced, from asserting his right to share in the fund. *Williams v. Gibbs*, 17 How. 239, 15: 135

Re Howard, 9 Wall. 175, 19: 634

Distinguished in *George v. St. Louis Cable & W. R. Co.* 44 Fed. 122.

Cited in *Hall v. Sullivan R. Co.* 21 Month. L. Rep. 148, Fed. Cas. No. 5,948—*United States v. 18 Barrels of High Wines*, 8 Blatchf. 475, Fed. Cas. No. 15,033—*Wheaton v. United States*, 8 Blatchf. 475, Fed. Cas. No. 17,487—*Farmers Loan & T. Co. v. Missouri, I. & N. R. Co.* 21 Fed. 267—*Flash v. Wilkerson*, 22 Fed. 691—*Hunt v. Fisher*, 29 Fed. 807—*Martin v. Rainwater*, 5 C. C. A. 401, 12 U. S. App. 232, 56 Fed. 10—*Moran v. Hagerman*, 12 C. C. A. 245, 29 U. S. App. 71, 64 Fed. 505—*Burke v. Short*, 24 C. C. A. 424, 47 U. S. App. 576, 79 Fed. 8—*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 82 Fed. 646—*Kendall v. De Forest*, 41 C. C. A. 262, 101 Fed. 169—*Central Trust Co. v. Richmond, N. I. & B. R. Co.* 105 Fed. 808—*Mason v. Marine Ins. Co.* 54 L.R.A. 702, 49 C. C. A. 108, 110 Fed. 455—*United States v. Northern Securities Co.* 128 Fed. 812—*Nebraska Nat. Bank v. Hallowell*, 63 Neb. 319, 88 N. W. 556—*Hurley v. Murrell*, 2 Tenn. Ch. 626.

829. On the distribution, by a court, of a common fund, a person having an interest in the fund, not a party to the decree of distribution, is not concluded by such decree. He may, by bill or petition, subsequently assert his right against the trustee of the fund or the distributees. An executor who has distributed under order of the proper court is protected to that extent. *Williams v. Gibbs*, 17 How. 239, 15: 135

Cited in *Re Howard*, 9 Wall. 186, 19 L. ed. 637—*Public Works v. Columbia College*, 17 Wall. 531, 21 L. ed. 692—*Pulliam v. Pulliam*, 10 Fed. 74—*Flash v. Wilkerson*, 22 Fed. 691—*Hunt v. Fisher*, 29 Fed. 807—*George v. St. Louis Cable & W. R. Co.* 44 Fed. 122—*Martin v. Rainwater*, 5 C. C. A. 401, 12 U. S. App. 232, 56 Fed. 11—*Shaw v. Lyman*, 79 Fed. 5—*Continental Nat. Bank v. Hellman*, 81 Fed. 42—*Continental Nat. Bank v. Hellman*, 30 C. C. A. 234, 58 U. S. App. 475, 86 Fed. 516—*Bickford v. McComb*, 88 Fed.

432—Thompson v. Reno Sav. Bank, 19 Nev. 292, 9 Pac. 882.

830-31. The settlement of an administrator's account is not conclusive against creditors, although binding upon the distributees. *Beatty v. Maryland*, 7 Cranch, 281, 3: 343

7. Public Officers.

Conclusiveness as to Sureties on Bond of, see supra, 788, 789.

Inconclusiveness against United States, of Adjudication of Its Rights in Suit against Officer, see United States, 190.

832. A change in the person holding an office does not destroy the effect of a judgment against such officer as *res judicata*. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42: 202
Cited in *Starr v. Chicago, B. I. & P. R. Co.* 110 Fed. 9.

833. A judgment for the possession of real property, rendered against an individual claiming to hold as a state officer, is not conclusive against the state when that is not a party to the suit. *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. Rep. 770, 42: 137

834. A judgment of ejectment against defendants claiming to hold as officers and employees of the United States, and that the freehold belonged to the government, in which the question of title was gone into and decided, does not bind the United States, although the district attorney of the United States for the district where the trial was had, and other counsel employed by the Secretary of the Treasury of the United States, appeared as counsel for the government. *Carr v. United States*, 98 U. S. 433, 25: 209
Criticized in *Head v. Porter*, 48 Fed. 484.
Distinguished in *King v. La Grange*, 61 Cal. 229.

Cited in *James v. Campbell*, 104 U. S. 359, 26 L. ed. 787—*United States v. Lee*, 106 U. S. 216, 27 L. ed. 180, 1 Sup. Ct. Rep. 240—*Tindal v. Wesley*, 167 U. S. 223, 42 L. ed. 144, 17 Sup. Ct. Rep. 770—*Schillinger v. United States*, 24 Ct. Cl. 297—*United States v. Wickersham*, 10 Fed. 510—*Scranton v. Wheeler*, 6 C. C. A. 589, 16 U. S. App. 152, 57 Fed. 807—*Northern Bank v. Stone*, 88 Fed. 418—*Billigery v. Land Trust*, 48 La. Ann. 898, 19 So. 920—*Peck v. State*, 187 N. Y. 376, 33 Am. St. Rep. 738, 33 N. E. 317.

835. A sentence of condemnation or of acquittal of property seized and libeled is conclusive in an action of trespass against the officer for seizure. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381
Cited in *The Apollon*, 9 Wheat. 367, 6 L. ed. 112—*New Lamp Chimney Co. v. Ansonia Brass & Copper Co.* 91 U. S. 681, 23 L. ed. 339—*Stacey v. Emery*, 97 U. S. 643, 24 L. ed. 1035—*Coffey v. United States*, 116 U. S. 444, 29 L. ed. 687, 6 Sup. Ct. Rep. 437—*Stone v. United States*, 167 U. S. 185, 42 L. ed. 130, 17 Sup. Ct. Rep. 778—*Schmalz v. United States*, 4 Ct. Cl. 146—*Bradstreet*

v. Neptune Ins. Co. 3 Sumn. 605, Fed. Cas. No. 1,793—*Burnham v. Webster*, 1 Woodb. & M. 180, Fed. Cas. No. 2,179—*The Fortitude*, 3 Sumn. 230, Fed. Cas. No. 4,953—*Hall v. Warren*, 2 McLean, 334, Fed. Cas. No. 5,952—*Tompkins v. Tompkins*, 1 Story, 553, Fed. Cas. No. 14,091—*Williams v. Suffolk Ins. Co.* 3 Sumn. 275, Fed. Cas. No. 17,738—*McGuire v. Winslow*, 23 Blatchf. 427, 26 Fed. 305—*Bailey v. Sundberg*, 43 Fed. 82—*Bailey v. Sundberg*, 44 Fed. 809—*Bailey v. Sundberg*, 1 C. C. A. 389, 1 U. S. App. 101, 49 Fed. 585—*The Louis Olsen*, 74 Fed. 247—*Holcomb v. Phelps*, 16 Conn. 131—*Perry v. Sweeny*, 11 App. D. C. 416—*Lapham v. Almy*, 13 Allen, 304—*Williams v. Delano*, 155 Mass. 14, 28 N. E. 1122—*Cucullu v. Orleans Ins. Co.* 6 Mart. N. S. 14—*State ex rel. Wright v. Savage*, 64 Neb. 699, 90 N. W. 898—*Kittredge v. Emerson*, 15 N. H. 267—*Cromwell v. Gallup*, 17 Hun, 56—*People v. Klef*, 58 Hun, 343, 11 N. Y. Supp. 926—*Williams v. Saunders*, 5 Coldw. 78—*Pinson v. Ivey*, 1 Yerg. 350—*Hamilton v. Burum*, 3 Yerg. 363—*Schultz v. Schultz*, 10 Gratt. 370, 60 Am. Dec. 835.

Municipal officers.

836. Proceedings in mandamus do not abate by the expiration of the term of office of the defendant, where there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the municipality to which the office is attached. The proceedings may commence with one set of officers and terminate with another, the latter being bound by the judgment. *Thompson v. United States*, 103 U. S. 480, 26: 521
Cited in *Harshman v. County Court (United States ex rel. Harshman v. County Court)* 122 U. S. 318, 30 L. ed. 1155, 7 Sup. Ct. Rep. 1171—*Re Parker*, 131 U. S. 227, 33 L. ed. 125, 9 Sup. Ct. Rep. 708—*Knox County v. Harshman*, 133 U. S. 156, 33 L. ed. 588, 10 Sup. Ct. Rep. 257—*Warner Valley Stock Co. v. Smith*, 165 U. S. 31, 41 L. ed. 623, 17 Sup. Ct. Rep. 225—*United States ex rel. Bernardin v. Butterworth*, 169 U. S. 603, 42 L. ed. 874, 18 Sup. Ct. Rep. 441—*Murphy v. Utter*, 186 U. S. 102, 46 L. ed. 1075, 22 Sup. Ct. Rep. 776—*United States ex rel. Watts v. Lauderdale County Justices*, 10 Fed. 463—*Devereaux v. Brownsville*, 29 Fed. 750—*Hicks v. Cleveland*, 45 C. C. A. 486, 106 Fed. 466—*Fox v. Trinidad Waterworks Co.* 7 Colo. App. 405, 43 Pac. 1051—*Norwalk & S. N. Electric Light Co. v. South Norwalk*, 71 Conn. 390, 42 Atl. 82—*Howard v. Huron*, 6 S. D. 185, 26 L.R.A. 500, 60 N. W. 803—*Dabney v. Dabney*, 20 App. D. C. 451—*State ex rel. Matheson v. King*, 32 Fla. 420, 13 So. 891—*Elmore, Logan & Bingham Counties v. Alturas County*, 4 Idaho, 155, 95 Am. St. Rep. 53, 37 Pac. 349—*Kimerer v. State*, 129 Ind. 592, 29 N. E. 178—*People ex rel. Broderick v. Morton*, 156 N. Y. 159, 41 L.R.A. 239, 66 Am. St. Rep. 547, 50 N. E. 791—*People ex rel. Wooster v. Maher*, 64 Hun, 416, 19 N. Y. Supp. 758—*People ex rel. Lazarus v. Coleman*, 89 App. Div. 91, 91 N. Y. Supp. 432—*Hebb v. County Court*, 49 W. Va. 734, 37 S. E. 676.

837. Findings of a judgment against a municipal corporation in respect to the payment of bonds by taxation bind officers on a subsequent writ of mandamus, as well as the municipality itself. *United States ex rel. Harshman v. County Court (Harshman*

v. County Court) 122 U. S. 306, 7 Sup. Ct. Rep. 1171, 30: 1152
 Cited in Knox County v. Harshman, 133 U. S. 155, 33 L. ed. 588, 10 Sup. Ct. Rep. 257.

Sheriff.

Conclusiveness on Surety, see *supra*, 788.

838. A judgment against a sheriff as a trespasser, for mistakenly applying an attachment to property not the subject of the writ, is conclusive against his principals, giving him a bond of indemnity therefor, and defending the suit. *Lovejoy v. Murray*, 3 Wall. 1, 18: 129
 Cited in *Elliot v. Hayden*, 104 Mass. 182—*Friend v. Ralston*, 35 Wash. 433, 77 Pac. 794.

839. Where the bankrupt court ordered, on application of plaintiffs, that the sheriff should make sale of the property of a person afterwards declared a bankrupt, levied on by him, and deposit the proceeds in the bankrupt court to await its further order, the plaintiffs cannot maintain a suit against the sheriff for paying the money into court in pursuance of the order obtained by them. *O'Brien v. Weld*, 92 U. S. 81, 23: 675
 Distinguished in *Caulkins v. Memphis Gaslight Co.* 85 Tenn. 701, 4 Am. St. Rep. 786, 4 S. W. 287.

Cited in *National Bank & Loan Co. v. Babbitt*, 17 Hun, 456—*Dorrance v. Henderson*, 92 N. Y. 414.

840. A sheriff in possession of property under attachment is not bound by a judgment in a replevin suit, to which he was not a party, merely because his under sheriff, as an individual, was a party to the suit. *Geekie v. Kirby Carpenter Co.* 106 U. S. 379, 1 Sup. Ct. Rep. 315, 27: 157
 Cited in *Grand Lodge, A. O. U. W. v. Graham*, 96 Iowa, 612, 31 L.R.A. 140, 65 N. W. 837.

S. Vendor and Purchaser.

Purchaser Pendente Lite, see *Lis Pendens*, 14, 17, 21.

841. *Purchasers pendente lite* are as conclusively bound by the results of the litigation, whatever they may be, as if they had been parties from the outset. *Tilton v. Cofield*, 93 U. S. 163, 23: 858

Cited in *Lacassagne v. Chapuis*, 144 U. S. 125, 36 L. ed. 371, 12 Sup. Ct. Rep. 650—*Allen v. Halliday*, 28 Fed. 263—*Belmont Nail Co. v. Columbia Iron & Steel Co.* 46 Fed. 10—*McClaskey v. Barr*, 48 Fed. 133—*Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 466, 41 U. S. App. 766, 77 Fed. 794—*Malone v. Marriott*, 64 Ala. 490—*Elizabethport Cordage Co. v. Whitlock*, 37 Fla. 224, 20 So. 255—*Norris v. Ile*, 152 Ill. 200, 43 Am. St. Rep. 233, 38 N. E. 762—*Buser v. Shepard*, 107 Ind. 424, 8 N. E. 280—*Boyd v. Emmons*, 103 Ky. 401, 45 S. W. 364—*Bell v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 794—*Smith v. Hodsdon*, 78 Me. 183, 3 Atl. 276—*Ruggles v. First Nat. Bank*, 43 Mich. 197, 5 N. W. 257—*Mellwarth v. Hollander*, 73 Mo. 112, 39 Am. Rep. 484—*Nagle v. First Nat. Bank*, 57 Neb. 557, 77

N. W. 1074—*Hovey v. Elliott*, 118 N. Y. 134, 23 N. E. 475—*Flanagan v. Pearson*, 61 Tex. 304—*O'Connor v. O'Connor*, 45 W. Va. 362, 32 S. E. 276.

842. *Purchasers pendente lite*, of property in dispute in the action, are bound by the decree therein. *Whiteside v. Haselton*, 110 U. S. 296, 4 Sup. Ct. Rep. 1, 28: 152
 Cited in *Hargrove v. Cherokee Nation*, 63 C. C. A. 280, 129 Fed. 190—*Bryan v. Zimmerly*, 16 Pa. Co. Ct. 568.

843. One who purchases township bonds after maturity, and after they are adjudged void in the hands of the holder from whom the purchase is made, is bound by that judgment. *Louis v. Brown Twp.* 109 U. S. 162, 3 Sup. Ct. Rep. 92, 27: 892

844. A decree in accordance with the prayer of the bill, in a suit brought by citizens and taxpayers of a county to test the validity of its subscriptions to the stock of a railroad company, and the power of the county court to bind the county to pay the bonds which it was proposed to issue for the subscription, and to have them canceled, binds all who bought the bonds after the suit was begun, with actual notice of its pendency or of the decree which was rendered. *Scotland County v. Hill*, 112 U. S. 183, 5 Sup. Ct. Rep. 93, 28: 692

Cited in *Scotland County v. Hill*, 132 U. S. 113, 33 L. ed. 264, 10 Sup. Ct. Rep. 26—*Scotland County Court v. United States*, 140 U. S. 42, 35 L. ed. 352, 11 Sup. Ct. Rep. 697—*Lytle v. Lansing*, 147 U. S. 71, 37 L. ed. 84, 13 Sup. Ct. Rep. 254—*Tregea v. Modesto Irrig. District*, 164 U. S. 187, 41 L. ed. 398, 17 Sup. Ct. Rep. 52—*New Orleans v. Citizens' Bank*, 167 U. S. 389, 42 L. ed. 208, 17 Sup. Ct. Rep. 905—*Hill v. Scotland County*, 34 Fed. 209—*Phelps v. Elliott*, 35 Fed. 461—*Ransom v. Pierre*, 41 C. C. A. 588, 101 Fed. 668—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 462, 111 Fed. 568—*Slack v. Perrine*, 9 App. D. C. 153—*Harmon v. Auditor*, 123 Ill. 130, 5 Am. St. Rep. 502, 13 N. E. 161.

845. A grantee of land is not in privity with his grantor so as to be bound by a decree against the latter in a suit subsequently begun. *Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. Rep. 333, 42: 733
 Cited in *Lynch v. Burt*, 67 C. C. A. 316, 132 Fed. 428.

9. Mortgage Cases.

See also *supra*, 774, 798, 799, 808-810; *Mortgage*, 263, 300, 311, 497; *Parties*, 307.

846. Prior encumbrancers are not bound by a decree of foreclosure in a suit to which they are not made parties; and purchasers under the sale take subject to the prior liens. *Finley v. Bank of United States*, 11 Wheat. 304, 6: 480

Cited in *Hagan v. Walker*, 14 How. 37, 14 L. ed. 316—*Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 754, 31 L. ed. 312, 8 Sup. Ct. Rep. 337—*Shepherd v. Pepper*, 133 U. S. 631, 33 L. ed. 718, 10 Sup. Ct. Rep. 438—*Iron Cliffs Co. v. Negaunee Iron Co.* 197 U. S. 472, 49 L. ed. 840, 25 Sup.

Ct. Rep. 474—Phillips v. Mariner, 5 Bias. 28, Fed. Cas. No. 11,105—Sutherland v. Lake Superior Ship Canal R. & Iron Co. 9 Nat. Bankr. Reg. 302, Fed. Cas. No. 13,643—First Nat. Bank v. Salem Capital Flour Mills Co. 31 Fed. 583—Converse v. Michigan Dairy Co. 45 Fed. 19—State Trust Co. v. National Land Improv. & Mfg. Co. 72 Fed. 578—Shaw v. Lyman, 79 Fed. 5—Continental Nat. Bank v. Hellman, 81 Fed. 42—Wilson v. Biscoe, 11 Ark. 55—Wilson v. Hayward, 2 Fla. 30—Wilson v. Hayward, 6 Fla. 197—Helmstreet v. Winnie, 10 Iowa, 431—Fornshill v. Murray, 1 Bland, Ch. 484, 18 Am. Dec. 344—Brown v. Wallace, 2 Bland, Ch. 599—Walsh v. Smyth, 3 Bland, Ch. 26—Brown v. Wallace, 4 Gill & J. 492—Miller v. Finn, 1 Neb. 288—Globe Loan & T. Co. v. Eller, 61 Neb. 228, 85 N. W. 48—Mitchell v. Bogan, 11 Rich. L. 710—Young v. McClung, 9 Gratt. 359.

847. A proceeding in Louisiana to enforce payment of a special mortgage is not a proceeding *in rem*, and a judgment will not bind a prior mortgagee who is not made a party. Dupasseur v. Rochereau, 21 Wall. 130, 22: 588

848. Subsequent encumbrancers, when not made parties to a bill for foreclosure or sale, are not bound by the decree. Howard v. Milwaukee & St. P. R. Co. 101 U. S. 837, 25: 1081

Cited in Sheffield & B. Coal, Iron & B. Co. v. Newman, 23 C. C. A. 465, 41 U. S. App. 766, 77 Fed. 793—American Loan & T. Co. v. Atlanta Electric R. Co. 99 Fed. 318—Wheaton v. Dally Teleg. Co. 59 C. C. A. 428, 124 Fed. 62—Fidelity Title & T. Co. v. Schenley Park & H. R. Co. 189 Pa. 370, 69 Am. St. Rep. 815, 42 Atl. 140.

849. Where the mortgagor did not set up certain defenses in the foreclosure suit, he is concluded by the decree as to all such defenses, and so are his privies, including a judgment creditor who obtains a judgment against the mortgagor pending the foreclosure suit. Stout v. Lye, 103 U. S. 66, 26: 428

Cited in Snell v. Campbell, 24 Fed. 883—Norton v. San Jose Fruit-Packing Co. 25 C. C. A. 196, 48 U. S. App. 295, 79 Fed. 794—Temple v. Glasgow, 25 C. C. A. 546, 42 U. S. App. 417, 80 Fed. 448—Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 28 C. C. A. 204, 56 U. S. App. 208, 84 Fed. 541—Savings & T. Co. v. Bear Valley Irrig. Co. 93 Fed. 341—Savings & T. Co. v. Bear Valley Irrig. Co. 112 Fed. 704—National Foundry & Pipe Works v. Oconto City Water Supply Co. 51 C. C. A. 473, 113 Fed. 801—London & S. F. Bank v. Dexter Horton & Co. 61 C. C. A. 521, 126 Fed. 599—Gay v. Brierfield Coal & I. Co. 94 Ala. 313, 16 L.R.A. 573, 33 Am. St. Rep. 122, 11 So. 353—Randall v. Lower, 98 Ind. 261.

850. A grantee of mortgaged property is not so bound by a judgment against his grantor on the mortgaged debt, to which he was neither party nor privy, and which was rendered after he acquired his title, as to cut off his right to show that the decree in foreclosure should not bear interest at a rate greater than the legal rate. Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. Rep. 408, 27: 682

Cited in Blair v. Silver Peak Mines, 84 Fed.

739—Coe v. Finlayson, 41 Fla. 182, 26 So. 704—Cook v. Union Trust Co. (Cook v. Bramel) 106 Ky. 807, 45 L.R.A. 214, 51 S. W. 600.

851. Parties interested in the premises, who were not served with process, may redeem from a sale under a decree of foreclosure, just the same as if no such decree had been made. Noyes v. Hall, 97 U. S. 34, 24: 909

Cited in Romig v. Gillett, 187 U. S. 117, 47 L. ed. 100, 23 Sup. Ct. Rep. 40—Miller v. Merine, 43 Fed. 269—Wilson v. Tarter, 22 Or. 512, 30 Pac. 499.

IV. Lien upon Judgment.

Lien of Attorney on, see Attorneys, 87.
See also Claims, 226.

852-3. An agreement that a corporation shall have a lien upon drafts drawn for the proceeds of locks and keys manufactured and delivered to the government does not create a lien on a judgment subsequently recovered by the patentee of such locks against the government for a breach of contract, where all the drafts have been paid, and no claim exists except for breach of the contract. Gunton v. Nock (Bank of Washington v. Nock) 9 Wall. 373, 19: 717

V. Lien of Judgment.

a. In General; Nature.

Noninterference on Appeal with Lien of Decree against Stipulators, see Appeal and Error, 3736.

Joint Indorsers' Right to Judgment Lien to Enforce Contribution, see Bills and Notes, 85.

Of Federal Judgment as Affected by State Laws and Procedure, see Courts, 1318.

State Laws and Decisions as Determining Lien of Federal Judgments, see Courts, 2123, 2123b.

Bringing Creditors' Bill After Lien has Expired, see Creditors' Bill, 7.

Power of Equity to Subject other Property when Property Subject to Lien is Insufficient, see Equity, 185a.

See also *supra*, 642.

854-5. A judgment on lands does not constitute *per se* a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests subsequent to the judgment. Conard v. Atlantic Ins. Co. 1 Pet. 386, 7: 189

Massingill v. Downs, 7 How. 760, 12: 903
Pierce v. Brown (Brown v. Pierce) 7 Wall. 205, 19: 134

Cited in Ward v. Chamberlain, 2 Black. 437, 17 L. ed. 323—Brown v. Pierce, 7 Wall. 217, 19 L. ed. 138—Baker v. Morton, 12 Wall. 158, 20 L. ed. 265—Morsell v. First Nat. Bank, 91 U. S. 380, 23 L. ed. 437—Beebe

v. United States, 161 U. S. 111, 40 L. ed. 687, 16 Sup. Ct. Rep. 532—*Re Boyd*, 4 Sawy. 264, 16 Nat. Bankr. Reg. 139, Fed. Cas. No. 1,746—*Cropsey v. Crandall*, 10 N. Y. Legal Obs. 6, Fed. Cas. No. 3,418—*Ex parte Foster*, 2 Story, 145, Fed. Cas. No. 4,960—*Koning v. Bayard*, 2 Paine, 257, Fed. Cas. No. 7,924—*Shrew v. Jones*, 2 McLean, 83, Fed. Cas. No. 12,818—*United States v. The Arcola*, Fed. Cas. No. 14,464a—*United States v. Sturgis*, 14 Fed. 811—*Mansony v. United States Bank*, 4 Ala. 750—*McMahan v. Green*, 12 Ala. 74, 46 Am. Dec. 242—*Patton v. Hayter*, 15 Ala. 22—*Grigg v. Banks*, 59 Ala. 316—*Perkins v. Brierfield Iron & Coal Co.* 77 Ala. 410—*Bell v. Goetter*, 106 Ala. 471, 17 So. 709—*Whiting v. Beebe*, 12 Ark. 571—*Moseley v. Doe*, 2 Fla. 438—*Forsyth v. Marbury* (Ga.) R. M. Charl. 326—*Kollock v. Jackson*, 5 Ga. 157—*Illinois Nat. Bank v. Trustees of Schools*, 211 Ill. 511, 71 N. E. 1070—*Hopping v. Burnam*, 2 G. Greene, 53—*Norton v. Williams*, 9 Iowa, 533—*Coombs v. Jordan*, 3 Bland. Ch. 817, 22 Am. Dec. 236—*Dyson v. Simmons*, 48 Md. 215—*Burwell v. Tullis*, 12 Minn. 578, Gil. 486—*Ashton v. Slater*, 19 Minn. 350, Gil. 800—*State ex rel. Child v. District Court*, 85 Minn. 286, 88 N. W. 755—*Commercial Bank v. Yazoo County*, 6 How. (Miss.) 534, 38 Am. Dec. 447—*Walton v. Hargroves*, 42 Miss. 28, 97 Am. Dec. 429—*Warner v. Veitch*, 2 Mo. App. 462—*Vaughn v. Schmalse*, 10 Mont. 194, 10 L.R.A. 413, 25 Pac. 102—*Bowen v. Billings*, 13 Neb. 442, 14 N. W. 152—*Stanton v. Catron*, 8 N. M. 375, 45 Pac. 884—*Hutchinson v. Grout*, 40 Hun, 211—*Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 54, 20 Am. Rep. 451—*Ex parte Dudley*, 1 Clark (Pa.) 109—*Morris's Estate*, 6 Phila. 134, 23 Phila. Leg. Int. 141—*Crawford v. Carper*, 4 W. Va. 70—*Gilbert v. Stockman*, 81 Wis. 607, 29 Am. St. Rep. 922, 51 N. W. 1076.

Editorial note.

[Of Federal court. 47 L.R.A. 469.]

b. Extent.

856-8. The lien of judgments of the United States court is co-extensive with its jurisdiction. *Bayard v. Lombard*, 9 How. 530, 13: 245

Noted in Brown v. Pierce, 7 Wall. 217, 19 L. ed. 187—*United States v. Duncan*, 12 Ill. 527—*Kilbreth v. Dias*, 2 Cin. Sup. Ct. Rep. 558.

Editorial notes.

Territorial extent of lien of judgment. 6: 592

To what extent lien on land. 11: 518

c. On What Property.

State Laws and Decisions as Determining Lien of Federal Judgments, see Courts, 2123, 2123b.

Right of Debtor to Transfer or Alienate his Property before Lien Attaches, see Fraudulent Conveyances, 14.

On Homestead, see Homestead, 9.

On Interest of *Cestui Que Trust*, see Trust, 185.

See also Creditors' Bill, 9.

Personal property.

859. By the law of Mississippi a judg-

ment is a lien upon personal as well as real estate, from the time of its rendition. *Brown v. Clarke*, 4 How. 4, 11: 850
Cited in Buckingham v. McLean, 13 How. 167, 14 L. ed. 97—*Wilson Bros. v. Nelson*, 183 U. S. 201, 46 L. ed. 152, 22 Sup. Ct. Rep. 74.

860. Under the statute of Mississippi, one who obtains judgment against an administrator does not acquire a lien against the estate that will be valid if the estate is subsequently pronounced insolvent. *Williams v. Benedict*, 8 How. 107, 12: 1007

861. If, after there have been a judgment, an execution levied upon personal property, and a forthcoming bond, another judgment is entered against the original defendant in favor of another party, the second judgment is a lien upon the property which was released by the bond. *Brown v. Clarke*, 4 How. 4, 11: 850

862. A judgment of revivor against one as administrator who is, in reality, not such administrator, because of the existence of a qualified executor capable in law of acting as such, does not bind the estate, and will not support the levy of an execution on the property of the testator. *Griffith v. Frazier*, 8 Cranch, 9, 3: 471

Partnership property.

863. A judgment recovered upon a firm debt by service of process upon one or more of the partners binds the common property of the joint debtors and the separate property of the partners served, where the property is situated within the state where the judgment was rendered. *Hall v. Lanning*, 91 U. S. 160, 23: 271

Noted in Hanley v. Donoghue, 116 U. S. 3, 29 L. ed. 538, 6 Sup. Ct. Rep. 242—*United States v. American Bell Teleph. Co.* 29 Fed. 32—*Geo. W. McAlpin Co. v. Finsterwald*, 57 Ohio St. 545, 49 N. E. 784—*Cover v. Brown*, 7 Pa. Dist. R. 20—*Nathanson v. Spitz*, 19 E. I. 72, 81 Atl. 690.

Lands.

As to Equitable Interest, see also Execution, 13.

Right to Sell Lands on Judgment against Executor, see Executors and Administrators, 216, 217.

See also supra, 859.

864. A judgment gives to the judgment creditor a lien on the debtor's lands and a preference over all subsequent judgment creditors. *Thelsson v. Smith*, 2 Wheat. 396, 4: 271

Noted in Koning v. Bayard, 2 Paine, 257, Fed. Cas. No. 7,924—*Metz v. State Bank*, 7 Neb. 171—*Bowen v. Billings*, 13 Neb. 442, 14 N. W. 152—*Storm v. Waddell*, 2 Sandf. Ch. 528.

865. [A judgment in the supreme court of Pennsylvania in a cause removed from an inferior court is a lien on defendant's land throughout the state. *Ralston v. Bell* (Pa. Sup. Ct.) 2 Dall. 158, 1: 330]

866. Whatever estate descends to an heir, which was liable as assets to the bond debt of the ancestor, must be bound by a

judgment obtained against the ancestor in his lifetime. *Burton v. Smith*, 13 Pet. 464, 10: 248

867. A reversion after an estate for life is bound by a judgment obtained against the ancestor from whom it immediately descended. *Burton v. Smith*, 13 Pet. 464, 10: 248

868. A right to work coal pits in common with other heirs of the ancestor owner, and a partial interest in a mineral spring, are both subject to the lien of a recorded judgment. *Burton v. Smith*, 13 Pet. 464, 10: 248

869. The lien of a judgment is not valid, on lands obtained by duress, as against the real owner. *Baker v. Morton*, 12 Wall. 150, 20: 262

Cited in Lewis v. Atherton, 5 Okla. 94, 47 Pac. 1070—*Meier v. Kelly*, 22 Or. 139, 29 Pac. 266—*Borst v. Nalle*, 28 Gratt. 433—*Snyder v. Martin*, 17 W. Va. 300, 41 Am. Rep. 670.

870. A judgment creditor has no lien on lands, and can acquire none at law, but can obtain one only by filing a bill in equity for that purpose, where the legal title to the lands is in trustees for the purpose of serving the requirements of an active trust,—at common law, as modified by Illinois Rev. Stat. 1845, chap. 57, § 1, providing that judgments shall be a lien on the judgment debtor's real estate, the term "real estate" being construed to include all interest of the defendant or any person to his use, held or claimed by virtue of any deed, bond, covenant, or otherwise, for a conveyance, or as mortgagee or mortgagor of lands in fee, for life, or for years. *Brandies v. Cochrane*, 112 U. S. 344, 5 Sup. Ct. Rep. 194, 28: 760
Cited in Potter v. Couch, 141 U. S. 319, 35 L. ed. 733, 11 Sup. Ct. Rep. 1005—*Duncanson v. Manson*, 3 App. D. C. 272.

871. The lien of a judgment does not, in equity, attach to defendant's legal title, to the exclusion of a prior equitable title in a third person. The court of chancery will protect the equitable rights of third persons against the legal lien. *Pierce v. Brown* (*Brown v. Pierce*) 7 Wall. 205, 19: 134
Cited in First Nat. Bank v. Caldwell, 4 Dill. 316, Fed. Cas. No. 4,798—*Gates Iron Works v. Cohen*, 7 Colo. App. 348, 43 Pac. 687—*Dalrymple v. Security Improv. Co.* 11 N. D. 71, 88 N. W. 1033—*Hume v. Riggs*, 12 App. D. C. 367—*Manogue v. Bryant*, 15 App. D. C. 256—*Hays v. Reger*, 102 Ind. 527, 1 N. E. 386—*Howard v. Simmons*, 43 Miss. 88—*Foute v. Fairman*, 48 Miss. 550—*Story v. Black*, 5 Mont. 52, 51 Am. Rep. 87, 1 Pac. 1—*Princeton Min. Co. v. Butte First Nat. Bank*, 7 Mont. 539, 19 Pac. 210—*Galway v. Malchow*, 7 Neb. 290—*Norfolk State Bank v. Murphy*, 40 Neb. 750, 38 L.R.A. 254, 59 N. W. 706—*Dimmick v. Rosenfeld*, 34 Or. 104, 55 Pac. 100—*Floyd v. Harding*, 28 Gratt. 408—*Borst v. Nalle*, 28 Gratt. 433—*Snyder v. Martin*, 17 W. Va. 300, 41 Am. Rep. 670—*Smith v. Gott*, 51 W. Va. 145, 41 E. E. 175.

872. A decree in admiralty in a suit in *personam* cannot be made a lien on land by

a mere rule of court. *Ward v. Chamberlain*, 2 Black, 430, 17: 319
Cited in Gray v. Chicago, I. & N. R. Co. Woolw. 68, Fed. Cas. No. 5,713—*Smith v. Guckenheimer*, 42 Fla. 26, 27 So. 700.

873. Decrees in admiralty for the payment of money in a suit in *personam* stand upon the same footing as decrees in equity, under the act of May 29, 1828, chap. 67, § 3, providing that executions and other final process issued on decrees of any court of the United States, and the proceedings thereon, shall be the same as those used in the state courts, and they are a lien on land in a state in which such decrees in equity are a lien. *Ward v. Chamberlain*, 2 Black, 430, 17: 319
Cited in Hudson v. Parker, 156 U. S. 281, 39 L. ed. 425, 15 Sup. Ct. Rep. 450—*Carroll v. Watkins*, 1 Abb. (U. S.) 481, Fed. Cas. No. 2,457.

874-5. There is no statute in Virginia which expressly makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an elegit. During the existence of this, the lien is universally acknowledged. *United States v. Morrison*, 4 Pet. 124, 7: 804

Burton v. Smith, 13 Pet. 464, 10: 248
Cited in Burton v. Smith, 13 Pet. 479, 10 L. ed. 255—*Massingill v. Downs*, 7 How. 765, 12 L. ed. 905—*Morsell v. First Nat. Bank*, 91 U. S. 360, 23 L. ed. 437—*Re Boyd*, 4 Sawy. 264, Fed. Cas. No. 1,746—*Shrew v. Jones*, 2 McLean, 80, Fed. Cas. No. 12,818—*Manson v. United States Bank*, 4 Ala. 749—*Byers v. Fowler*, 12 Ark. 278, 54 Am. Dec. 271—*First Nat. Bank v. Morsell*, 1 MacArth. 159—*McAfee v. Reynolds*, 130 Ind. 39, 18 L.R.A. 214, 30 Am. St. Rep. 194, 28 N. E. 423—*Lisle v. Cheney*, 36 Kan. 585, 13 Pac. 816—*Coombs v. Jordan*, 3 Bland Ch. 324, 22 Am. Dec. 236—*Davidson v. Myers*, 24 Md. 556—*Ashton v. Slater*, 19 Minn. 350, Gil. 300—*McCullough v. Colby*, 5 Bosw. 490—*Love v. Harper*, 4 Humph. 115—*Taylor v. Spindle*, 2 Gratt. 57—*Findlay v. Toncray*, 2 Rob. (Va.) 378—*Hutcheson v. Grubbs*, 80 Va. 255—*Gilbert v. Stockman*, 81 Wis. 607, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922.

876. Prior to 1820, the law of Virginia regarding the lien of a judgment upon realty was the same as that of England. The lien resulted from the right of the plaintiff to sue out an elegit. An elegit executed discharged from liability the body of the defendant and the remaining moiety of his lands. A ca. sa. executed was *pro tanto* a satisfaction of the judgment, releasing any previous lien on the lands, and preventing any further recourse to the chattels or lands of the debtor, except in case of death while charged in execution, or of an escape, or rescue. *Snead v. McCoull*, 12 How. 407, 13: 1043
Cited in Rockhill v. Hanna, 15 How. 196, 14 L. ed. 659—*Magniac v. Thomson*, 15 How. 300, 14 L. ed. 704—*Merriman v. Chicago &*

E. I. R. Co. 12 C. C. A. 292, 24 U. S. App. 428, 64 Fed. 552—Berkley v. Lamb, 8 Neb. 404, 1 N. W. 320.

877. A discharge under the act of Congress for the relief of persons imprisoned for debt did not restore the lien on lands which had been created by the judgment and waived by the issue of a ca. sa. Snead v. M'Coull, 12 How. 407, 13: 1043

Effect of conveyance.

878. Judgments are no lien on lands which have been deeded by the judgment debtor before the judgments were obtained, although the deed was in fraud of creditors. Miller v. Sherry, 2 Wall. 237, 17: 827
Cited in Luhrs v. Hancock, 181 U. S. 573, 45 L. ed. 1008, 21 Sup. Ct. Rep. 726—Re Estes, 6 Sawy. 464, 3 Fed. 141—Brooks v. Wilson, 53 Hun, 181, 6 N. Y. Supp. 116—Sawtelle v. Weymouth, 14 Wash. 27, 43 Pac. 1101.

879. A judgment against a debtor does not become a lien on land fraudulently conveyed by him before the judgment. Luhrs v. Hancock, 181 U. S. 567, 21 Sup. Ct. Rep. 726, 45: 1005

880. A judgment at law is not a lien upon real estate in the city of Washington, which, before the judgment was rendered, had been conveyed to trustees, with a power of sale, to secure the payment of the debts of the grantor, described in the deed of trust. Morsell v. First Nat. Bank, 91 U. S. 357, 23: 436
Cited in Freedman's Sav. & T. Co. v. Earle, 110 U. S. 712, 28 L. ed. 302, 4 Sup. Ct. Rep. 226—Brandies v. Cochrane, 112 U. S. 350, 28 L. ed. 763, 5 Sup. Ct. Rep. 194—Cooke v. Avery, 147 U. S. 389, 37 L. ed. 214, 13 Sup. Ct. Rep. 340—Droop v. Ride-nour, 9 App. D. C. 108—Beyer v. LeFevre, 17 App. D. C. 249—Wilkes v. Wilkes, 18 App. D. C. 97.

881. A party purchasing a reversionary interest, after an estate for life, from an assignee for the benefit of creditors of the party entitled to such reversionary interest, takes the same subject to a judgment rendered against the debtor prior to the deed of assignment. Burton v. Smith, 13 Pet. 464, 10: 248
Cited in Fowler v. Repley, 15 Wall. 336, 21 L. ed. 37—Beall v. White, 94 U. S. 386, 24 L. ed. 175—Real Estate Bank v. Watson, 13 Ark. 80—Bryan v. May, 9 App. D. C. 389—Lisle v. Cheney, 36 Kan. 585, 13 Pac. 816—Lawrence v. Belger, 31 Ohio St. 181—Arzbacher v. Mayer, 53 Wis. 388, 10 N. W. 440.

882. A judgment rendered against the vendor between the execution and recording of a deed constitutes a lien upon the land sold, under the acts of Mississippi (H. & H. Coll. chap. 34, § 5, p. 344), providing that deeds of trust and mortgages are valid as against creditors and purchasers, only from the time of delivery to the recording officer, and (chap. 47, § 43, p. 621) that a judgment *proprio vigore* operates as a lien upon all the property of a defendant

from the time that it is rendered. Taylor v. Doe ex dem. Miller, 13 How. 287, 14: 149
Cited in National Metropolitan Bank v. Hiltz, 1 Mackey, 126—Ruppert v. Haske, 5 Mackey, 268.

883. In Louisiana a judgment rendered and recorded against the holder of a legal title, intermediate between a conveyance and recording of the same, binds the estate. McCoy v. Rhodes, 11 How. 131, 13: 634

— Editorial note.

[Lien on land fraudulently conveyed. 17 L.R.A. 345.]

Railroad property.

884. In a state where the rolling stock of a railroad is made a fixture by statute, and judgments are liens on real estate, a judgment is a lien on the road from the time of its rendition; and a sale and conveyance thereof may be decreed by a court of chancery. Milwaukee & M. R. Co. v. James, 6 Wall. 750, 18: 854
Cited in Gunnison v. Chicago, M. & St. P. R. Co. 117 Fed. 638—Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 511, 3 L.R.A. 440, 20 N. E. 432—Neilson v. Iowa Eastern R. Co. 51 Iowa, 188, 33 Am. Rep. 124, 1 N. W. 434—Williamson v. New Jersey Southern R. Co. 28 N. J. Eq. 283—Williamson v. New Jersey Southern R. Co. 29 N. J. Eq. 326—Vermont & C. R. Co. v. Vermont C. R. Co. 50 Vt. 590.

885. A judgment against a railroad company whose roadway had been sold under a decree upon a mortgage foreclosure, and the sale confirmed more than a year before the rendition of the judgment, is not a lien thereon, or a lien on the fund arising from the sale. Jeffrey v. Moran, 101 U. S. 285, 25: 785
Cited in Julian v. Central Trust Co. 193 U. S. 109, 48 L. ed. 638, 24 Sup. Ct. Rep. 399—Julian v. Central Trust Co. 53 C. C. A. 445, 115 Fed. 963—Sloan v. Central Iowa R. Co. 62 Iowa, 733, 16 N. W. 331—Brockert v. Iowa C. R. Co. 93 Iowa, 136, 61 N. W. 405.

d. When Attaches.

886. Judgments become liens only from the time they are rendered, or notice thereof is filed in the register's office of the county where the property is situated. They are subordinate to any prior mortgage upon the property. Fogg v. Blair, 133 U. S. 534, 10 Sup. Ct. Rep. 338, 33: 721
Cited in Fogg v. Blair, 139 U. S. 113, 35 L. ed. 106, 11 Sup. Ct. Rep. 476.

887. Where the amount of a judgment by default is entered by the calculation of the clerk, no further steps being necessary, by a jury or otherwise, to ascertain the amount, the judgment is final, and its lien attaches. Clements v. Berry, 11 How. 398, 13: 745
Cited in Davidson v. Myers, 24 Md. 556.

888. A judgment in itself imposes no lien upon the property of the judgment debtor in Alabama, but the issue of an execution and its delivery to the officer are necessary to create a lien. Beebe v. United States, 161 U. S. 104, 16 Sup. Ct. Rep. 532, 40: 633

889. In Maryland a judgment is a lien on land from the time of its rendition. *Taylor v. Thomson*, 5 Pet. 358, 8: 154
Cited in *Massingill v. Downs*, 7 How. 766, 12 L. ed. 905—*Owen v. Glover*, 2 Cranch, C. C. 579, Fed. Cas. No. 10,630—*Shrew v. Jones*, 2 McLean, 80, Fed. Cas. No. 12,818—*Forrest v. Camp*, 16 Ala. 647—*Byers v. Fowler*, 12 Ark. 278, 54 Am. Dec. 271—*Thompson v. Avery*, 11 Utah, 230, 39 Pac. 829.

890. It is the uniform practice of the Federal and state courts in Tennessee to test executions on the first day of the term; and, as between creditors, the lien attaches equally to all the judgments entered at the same term. *Clements v. Berry*, 11 How. 398, 13: 745

e. Duration and Determination of.

Effect of Judgment Debtor's Escape on Lien, see *infra*, 1106.

Avoidance by Bankruptcy Within Four Months Afterwards, see *Bankruptcy*, 202.

Release of Lien by Forthcoming Bond, see *Execution*, 79.

Effect of Execution against Person to Discharge Liens upon Estate, see *Execution*, 95-99.

Discharge by Sale of Land under Administrator's Sale, see *Executors and Administrators*, 249.

Effect of Execution Sale to Extinguish, see *Judicial Sale*, 55.

Effect of Determination of Judgment Lien on Mechanics' Lien, see *Mechanics' Liens*, 29.

Priority over Mortgage, see *Mortgage*, 205-207.

See also *supra*, 864.

891-2. A judgment in the United States circuit court, which was, when entered, a lien on lands of the debtor, cannot lose its lien by any subsequent state statute prescribing conditions and regulations as to filing, etc. *Massingill v. Downs*, 7 How. 760, 12: 903
Cited in *Ward v. Chamberlain*, 2 Black, 437, 17 L. ed. 323—*Cooke v. Avery*, 147 U. S. 387, 37 L. ed. 213, 13 Sup. Ct. Rep. 340—*Metcalf v. Watertown*, 153 U. S. 677, 38 L. ed. 864, 14 Sup. Ct. Rep. 947—*Carroll v. Watkins*, 1 Abb. (U. S.) 476, Fed. Cas. No. 2,457—*United States v. Humphreys*, 3 Hughes, 205, Fed. Cas. No. 15,422—*Griffith v. Baltimore & O. R. Co.* 44 Fed. 585—*Bonafee v. Fisk*, 18 Smedes & M. 684—*Smith v. Ande*, 46 Mo. App. 636.

893. The statute of limitations applicable to ejectment has no relation to the lien of a judgment creditor on the lands, though the judgment debtor may sell and convey them with possession to the party setting up the statute. That statute does not begin to run in such case until the lands have been sold under an execution sued out of the judgment, and the purchaser of them becomes entitled to a deed. That statute begins to run against the judgment creditor only when he is such purchaser, and can bring ejectment. *Pratt v. Pratt*, 96 U. S. 704, 24: 805
Cited in *Barrollbet v. Anspacher*, 68 Cal. 120, 8 Pac. 804—*Leonard v. Flynn*, 89 Cal. 542,

23 Am. St. Rep. 500, 26 Pac. 1007—*Robinson v. Thornton*, 102 Cal. 686, 34 Pac. 120—*Jordan v. Sayre*, 24 Fla. 14, 3 So. 329—*Barrell v. Title Guarantee Co.* 27 Or. 89, 39 Pac. 992—*Bickle v. Chrisman*, 76 Va. 685—*Hollingsworth v. Sherman*, 81 Va. 672—*Flanary v. Kane*, 102 Va. 557, 46 S. E. 312—*Parker v. Clarkson*, 39 W. Va. 191, 19 S. E. 481.

894. The statute of Mississippi which provides that "no judgment or decree shall be a lien on the property of the defendant therein for a longer period than seven years from the rendition thereof" does not apply to a decree of a court of chancery in Mississippi, establishing the arrears due on a life annuity as a specific lien on such land, by virtue of a will, in a suit in chancery brought by the life annuitant. *Canal Bank v. Hudson*, 111 U. S. 66, 4 Sup. Ct. Rep. 303, 28: 354

895. A promise to pay a judgment cannot extend its lien beyond the time fixed by law. *Norris v. Jackson*, 9 Wall. 125, 19: 608

896. The lien of a judgment in Wisconsin is cut off by the foreclosure of a prior mortgage. *Bronson v. La Crosse & M. R. Co.* 2 Wall. 283, 17: 725

897. The contingent lien of a junior judgment creditor is extinguished by a sale of the debtor's property under a trust deed executed by him subsequent to the judgment, and including such creditor among the beneficiaries, where the lien of the senior judgment creditor had not been extinguished at the time of the sale, to which the junior judgment creditor made no objection, and out of the proceeds of which the senior judgment was paid. *Bank of United States v. Peter*, 13 Pet. 123, 10: 89

898. The common-law lien of a judgment against a party having a power of appointment, with the estate vested in him until and in default of appointment, is defeated by the subsequent execution of the power. *Brandies v. Cochrane*, 112 U. S. 344, 5 Sup. Ct. Rep. 194, 28: 760
Spindle v. Shreve, 111 U. S. 542, 4 Sup. Ct. Rep. 522, 28: 512
Cited in *Scott v. Keane*, 87 Md. 718, 42 L.R.A. 361, 40 Atl. 1070.

899. The lien acquired by a second judgment upon property of the defendant which had been levied upon under a prior judgment and released upon the giving of a forthcoming bond is not destroyed by subsequently quashing the forthcoming bond. *Brown v. Clarke*, 4 How. 4, 11: 850

900. By the settled law of Pennsylvania, a judgment in an action of debt upon a previous judgment does not destroy the lien of the first judgment. *Livingston v. Moore*, 7 Pet. 469, 8: 751

901. [The purchaser of the lands of an intestate, sold by order of an orphans' court in Pennsylvania, holds them discharged from the lien of a judgment obtained against the intestate in his lifetime. *Moliere v. Noe* (Pa. Sup. Ct.) 4 Dall. 450, 1: 905]

902. In Virginia the right to take out an *elegit* is not suspended by suing out a writ of *hieri facias*; and the lien of the judgment continues pending the proceedings on that writ. *United States v. Morrison*, 4 Pet. 124, 7: 804
Cited in Mansony v. United States Bank, 4 Ala. 750—*Patton v. Hayter*, 15 Ala. 22.

Editorial notes.

How suspended or lost. 6: 592
 [Continuing lien of, on opening or setting aside to permit defense. 41 L.R.A. 222.
 Effect upon lien of proceedings of revive or extend. 53 L.R.A. 702.]

f. Priority of.

Federal Question as to, see Appeal and Error, 1704.

Priority over Assignment for Creditors, see Assignment for Creditors, 32.

Bank of Judgment Claim as Compared with Other Claims Against Decedent's Estate, see Executors and Administrators, 138, 139.

Priority of Purchase under Creditor's Bill to Subsequent Purchaser under Prior Judgment which was not a Lien, see Judicial Sale, 100.

As Against Unrecorded Deed, see Real Property, 97, 98.

Priority as between Judgment Lien and Right of United States as Creditor, see United States, 236.

See also Mortgage, 432.

903. [Judgments take priority from the dates of entry, without relation to preceding terms of court. *Welsh v. Murray* (Pa. Sup. Ct.) 4 Dall. 320, 1: 850]

904. [A judgment shall not relate to the first day of a term, so as to cut out a domestic attachment. *Hooton v. Will* (Ct. Com. Pl. Phila.) 1 Dall. 187, 1: 93]

904a. [A judgment will relate back to the first day of the term during which it was rendered, so as to take precedence of a domestic attachment levied upon lands of the judgment debtor prior to the actual rendition of the judgment. *Hooton v. Will* (Pa. Sup. Ct.) 1 Dall. 450, 1: 218]

905. Where one having a claim against the proceeds of a vessel sold in the admiralty court establishes the same by judgment, he has a precedence in payment over one having a similar claim which he has allowed to sleep until such judgment has been obtained. *Woodworth v. Corn Exchange, Inland Nav. & F. Ins. Co.* 5 Wall. 87, 18: 517

906. The statutory lien of a judgment on the lands of the debtor, limited to a certain period of time, is unaffected by the plaintiff's delay within that period in proceeding upon it until a subsequent lien has been obtained and carried into execution. It does not lose its priority. *Rankin v. Scott*, 12 Wheat. 177, 6: 592
Cited in Ex parte Dudley, 1 Clark (Pa.) 113,

Fed. Cas. No. 4,114—*Rockhill v. Hanna*, 4 McLean, 559, Fed. Cas. No. 11,980—*Darrington v. Borland*, 3 Port. (Ala.) 35—*Mansony v. United States Bank*, 4 Ala. 749—*De Vendell v. Doe*, 27 Ala. 165—*Lancaster v. Jordan*, 78 Ala. 199—*Trappall v. Richardson*, 13 Ark. 551, 58 Am. Dec. 338—*Watkins v. Wasell*, 15 Ark. 88—*Shall v. Blacoe*, 18 Ark. 156—*Lick v. Ray*, 43 Cal. 90—*Scrivener v. Dietz*, 68 Cal. 4, 8 Pac. 609—*Moseley v. Doe*, 2 Fla. 438—*Kimball v. Jenkins*, 11 Fla. 123, 89 Am. Dec. 237—*Forsyth v. Marbury*, R. M. Charit. (Ga.) 327—*Harrison v. McHenry*, 9 Ga. 170, 52 Am. Dec. 435—*McNair v. Bateman*, 27 Ga. 184—*Hopping v. Burnam*, 2 G. Greene, 53—*Coombs v. Jordan*, 3 Bland, Ch. 324, 22 Am. Dec. 236—*Cape Sable Co's Case*, 3 Bland, Ch. 655—*Foute v. Campbell*, 7 How. (Miss.) 383—*Smith v. Winston*, 2 How. (Miss.) 609—*Andrews v. Doe*, 6 How. (Miss.) 565, 38 Am. Dec. 450—*Wiggins v. McGimpsey*, 13 Smedes & M. 541—*Gould v. Luckett*, 47 Miss. 114—*Halyburton v. Greenlee*, 72 N. C. 820—*Sellers v. Corwin*, 5 Ohio, 403, 24 Am. Dec. 301—*Mayer v. Morgan*, 26 Wash. 78, 66 Pac. 128.

907. Where three judgments were rendered against the same defendant on the same day, and two of the judgment creditors issued *fi. fas.*, which were levied on the land of the debtor, their liens were prior to that of the third, who issued a *ca. sa.* under which the debtor was arrested; although the debtor was afterwards discharged by process of law, and a *fi. fa.* issued by the third creditor and levied on the same land. *Rockhill v. Hanna*, 15 How. 19, 14: 656
Cited in Freedman's Sav. & T. Co. v. Earle, 110 U. S. 717, 28 L. ed. 304, 4 Sup. Ct. Rep. 226—*Smith v. Lind*, 29 Ill. 31—*Elston v. Castor*, 101 Ind. 437, 51 Am. Rep. 754—*Jenks v. Horton*, 114 Mich. 52, 72 N. W. 20—*Bruce v. Vogel*, 88 Mo. 106—*Shirley v. Brown*, 86 Mo. 248.

908. If a forthcoming bond is shown to be void, the lien of the original judgment will remain unaffected as against a subsequent judgment which became a lien upon the property after its release, upon the giving of the forthcoming bond. *Brown v. Clarke*, 4 How. 4, 11: 850

909-10. If, after the recovery of a judgment and the levy of an execution issued thereunder upon property which is subsequently released on the execution of a forthcoming bond, another judgment is entered against the original defendant in favor of another party, this second judgment is a lien upon the property which has been released by the bond, and the lien thus acquired by the second judgment is not destroyed by subsequently quashing the forthcoming bond. *Brown v. Clarke*, 4 How. 4, 11: 850

Editorial notes.

[Priority as to conveyance during term. 38 L.R.A. 243.

Priority of liens of, on after-acquired property. 42 L.R.A. 209.]

VI. Foreign Judgments.**a. Of Foreign Country.**

Federal Question as to, see Appeal and Error, III. d, 9, h, 21.

Authentication, see Evidence, 1249, 1268, 1276-1281.

See also *infra*, 938.

Editorial note.

Extraterritorial effect. 6: 867

Enforcement.

910a. It may be assumed that, as the courts of a country will not enforce contracts made abroad in evasion or fraud of its own laws, so they will not enforce a foreign judgment upon such a contract. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

910b. Judgments are executory while unpaid, but in the United States execution is not given on a foreign judgment as such, it being enforced through a new judgment, obtained in an action brought for that purpose. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95
Cited in Wilmer v. Lewis, 24 Pa. Co. Ct. 618.

Conclusiveness.

Executory Judgment, see *infra*, 930-933.

Foreign Judgment Only Prima Facie Evidence, see Evidence, 2492.

Probative Effect of Condemnation of Vessel by Foreign Court of Admiralty, see Evidence, 2497.

911. [The decision of a foreign court of competent jurisdiction is conclusive. *Rapelje v. Emery* (Pa. Sup. Ct.) 2 Dall. 231, 1: 361]

912. The decision of a foreign court is conclusive as to its own jurisdiction, so far as depends on municipal rules. *Rose v. Himely*, 4 Cranch, 241, 2: 608
Cited in Bank of United States v. Moss, 6 How. 88, 12 L. ed. 384—*Pierce v. The Alberto*, Fed. Cas. No. 11,142—*Wyman v. Campbell*, 6 Port. (Ala.) 238, 31 Am. Dec. 677—*Holcomb v. Phelps*, 18 Conn. 131—*Rodgers v. Evans*, 8 Ga. 145, 52 Am. Dec. 890—*Hunt v. Hunt*, 72 N. Y. 234, 28 Am. Rep. 129.

913. The sentence of a foreign court is conclusive as to its own jurisdiction over a vessel seized, within that dominion, for breach of municipal laws. *Hudson v. Gues-tier*, 4 Cranch, 293, 2: 625
Cited in Wisconsin v. Pelican Ins. Co. 127 U. S. 291, 32 L. ed. 243, 8 Sup. Ct. Rep. 1370—*Cheriot v. Foussat*, 3 Binn. 257.

914. The sentence of a foreign court of admiralty is conclusive only when it has jurisdiction. Its jurisdiction may be examined as to its constitutional powers, the character in which it acted, and the situation of the subject. *Rose v. Himely*, 4 Cranch, 241, 2: 608
Cited in Hickey v. Stewart, 8 How. 762, 11 L. ed. 819—*Williamson v. Berry*, 8 How. 541, 12 L. ed. 1190—*Thompson v. Whitman*, 18 Wall. 461, 21 L. ed. 899—*Guaranty Trust U. S. Dig.*—232

& *S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 147, 35 L. ed. 120, 11 Sup. Ct. Rep. 512—*Bell v. Ohio Life & T. Co.* 1 Biss. 270, Fed. Cas. No. 1,260—*The Globe*, 13 Law Rep. 495, Fed. Cas. No. 5,484—*Stoughton v. Taylor* (*Juando v. Taylor*) 2 Paine, 678, Fed. Cas. No. 7,558—*Lincoln v. Tower*, 2 McLean, 477, Fed. Cas. No. 8,355—*The Tilton*, 5 Mason, 471, Fed. Cas. No. 14,054—*The Trenton*, 4 Fed. 661—*Moch v. Virginia F. & M. Ins. Co.* 4 Hughes, 119, 10 Fed. 706—*Polk v. The J. W. French*, 5 Hughes, 432, 13 Fed. 919—*Slocum v. Wheeler*, 1 Conn. 439—*Holcomb v. Phelps*, 18 Conn. 132—*Fritchett v. Clark*, 3 Harr. (Del.) 247—*Prescott v. Bennett*, 50 Ga. 274—*Beard v. Beard*, 21 Ind. 327—*Melhop v. Doane*, 31 Iowa, 400, 7 Am. Rep. 147—*Reed v. Wright*, 2 G. Greene, 35—*Seely v. Reid*, 3 G. Greene, 379—*Maguire v. Maguire*, 7 Dana, 183—*Cucullu v. Louisiana Ins. Co.* 5 Mart. N. S. 470, 16 Am. Dec. 199—*Palmer v. Oakley*, 2 Dougl. (Mich.) 490, 47 Am. Dec. 41—*Kittredge v. Emerson*, 15 N. H. 263—*Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 237—*Cummings v. Banks*, 2 Barb. 604—*Monroe v. Douglas*, 4 Sandf. Ch. 181—*Pennywit v. Foote*, 27 Ohio St. 616, 22 Am. Rep. 340—*Sipes v. Whitney*, 30 Ohio St. 74—*Trutch v. Bunnell*, 11 Or. 60, 50 Am. Rep. 456, 4 Pac. 588—*Cheriot v. Foussat*, 3 Binn. 261—*Thompson v. Whitman*, 31 Phila. Leg. Int. 157—*Miller v. Miller*, 1 Ball. L. 245—*Bailey v. South Carolina Ins. Co.* 1 Treadway, Const. 408—*Bailey v. South Carolina Ins. Co.* 3 Brev. 369—*Lyles v. Bolles*, 8 S. C. N. S. 262—*McCreery v. Davis*, 44 S. C. 211, 28 L.R.A. 661, 51 Am. St. Rep. 794, 22 S. E. 178—*Moren v. Killbrew*, 2 Yerg. 380—*Earthman v. Jones*, 2 Yerg. 493—*Horan v. Wahrenberger*, 9 Tex. 321, 58 Am. Dec. 145—*Carver v. Adams*, 38 Vt. 502—*Re Tarble*, 25 Wis. 398, 3 Am. Rep. 85.

915. Whether the sentence of condemnation of a foreign vice-admiralty court can be taken to be conclusive of the particular facts which it alleges or not, in an action on a policy of insurance, if those facts did not constitute a cause for condemnation, it does not prove a breach of a warranty of neutrality. *Fitzsimmons v. Newport Ins. Co.* 4 Cranch. 185, 2: 591

916-17. The sentence and condemnation of a foreign prize court of admiralty, condemning a vessel as prize for attempting to enter a blockaded port, is not conclusive evidence of that fact in an action upon a policy on property warranted neutral, "proof of which to be required in the United States only." *Maryland Ins. Co. v. Woods*, 6 Cranch, 29, 3: 143

918. In the courts of the several states it is assumed as undisputable that, by our law and that of England, foreign judgments for debts are not conclusive, but only prima facie, evidence of the matter adjudged. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

918a. Two suits, one in England between the executor and the administrator of an English claimant, acting under English letters, and the other in Pennsylvania, between the executor and another administrator of the claimant, are suits between different parties, and neither the decree nor proceed-

ing in the one is competent evidence in the other. *Aspden v. Nixon*, 4 How. 467,

11: 1059

Distinguished in *Nelson v. Chesapeake & O. R. Co.* 88 Va. 978, 15 L.R.A. 587, 14 S. E. 838.

Cited in *Stacy v. Thrasher*, 6 How. 58, 12 L. ed. 343—*Hill v. Tucker*, 13 How. 467, 14 L. ed. 226—*Johnson v. Powers*, 139 U. S. 159, 35 L. ed. 114, 11 Sup. Ct. Rep. 525—*Dent v. Ashley*, Hempst. 55, Fed. Cas. No. 3,809a—*Ingersoll v. Coram*, 127 Fed. 432—*Johnston v. McKinnon*, 129 Ala. 226, 29 So. 696—*Clarke's Appeal*, 70 Conn. 213, 39 Atl. 155—*Overby v. Gordon*, 13 App. D. C. 412—*Smith v. Smith*, 174 Ill. 62, 43 L.R.A. 408, 50 N. E. 1083—*Greenup v. Crooks*, 50 Ind. 421—*Turley v. Dreyfus*, 83 La. Ann. 887—*Low v. Bartlett*, 8 Allen, 264—*Braithwaite v. Harvey*, 14 Mont. 220, 27 L.R.A. 115, 43 Am. St. Rep. 625, 36 Pac. 38—*Taylor v. Barron*, 35 N. H. 497, 498—*Leonard v. Putnam*, 51 N. H. 253, 12 Am. Rep. 106—*Martin v. Hill*, 12 Barb. 634—*Price v. Mace*, 47 Wis. 27, 1 N. W. 336.

919. The extraterritorial effect of a judgment *in personam*, at law or in equity, between citizens or residents of the country in which the judgment was rendered, may be held conclusive as between them everywhere. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

920. A foreign judgment discharging obligations contracted in a foreign country, between its citizens or residents, is conclusive of the matter adjudged. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

924. A judgment rendered in Canada by a competent court against a citizen of the United States is conclusive as to the merits in an action thereon in this country, in the absence of fraud in procuring it, or any other special ground for not allowing it full effect, since by the law of England, prevailing in Canada, any judgment rendered by an American court under like circumstances would be allowed full and conclusive effect. *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. Rep. 171, 40: 133
Cited in *Harrison v. Graham*, 110 Fed. 896—*Fisher v. Fielding*, 67 Conn. 108, 32 L.R.A. 250, 52 Am. St. Rep. 270, 34 Atl. 714—*Tourigny v. Houle*, 88 Me. 409, 34 Atl. 158—*MacDonald v. Grand Trunk R. Co.* 71 N. H. 456, 59 L.R.A. 454, 93 Am. St. Rep. 550, 52 Atl. 982.

922. A judgment rendered in France against a citizen of this country is only prima facie evidence of the justice of the plaintiff's claim, in the absence of any statute or treaty on the subject, when sued upon in this country, since by the laws of France judgments of other countries are reviewable upon the merits. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95
Cited in *Lillenthal v. Drucklieb*, 80 Fed. 563—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 464, 111 Fed. 570—*Tourigny v. Houle*, 88 Me. 409, 34 Atl. 158—*MacDonald v. Grand Trunk R. Co.* 71 N. H. 454, 59 L.R.A. 453, 93 Am. St. Rep. 550, 52 Atl. 982.

923. A foreign judgment rendered after

opportunity for a full and fair trial before a court of competent jurisdiction, upon regular proceedings, after due citation or voluntary appearance of the defendant, under a system of jurisprudence likely to secure an impartial administration of justice between citizens and foreigners, is not subject to re-examination on the merits of the case, as on a new trial or appeal, upon the mere assertion that it is erroneous in law or in fact, when there is nothing to show prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of nations should not allow it full effect. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95
Cited in *Ritchie v. McMullen*, 159 U. S. 243, 40 L. ed. 136, 16 Sup. Ct. Rep. 171—*United States v. Gleeson*, 33 C. C. A. 273, 62 U. S. App. 311, 90 Fed. 778—*Lillenthal v. Drucklieb*, 34 C. C. A. 660, 92 Fed. 756—*Nashua Sav. Bank v. Anglo-American Land-Mortg. & Agency Co.* 48 C. C. A. 23, 108 Fed. 771—*Gloe v. Westervelt*, 116 Fed. 1017.

924. A foreign judgment *in rem*, rendered in a prosecution to forfeit specific property for violation of municipal law, will be recognized and upheld in any jurisdiction where title to the property is brought in issue. *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 8 Sup. Ct. Rep. 1370, 32: 239
Cited in *Hilton v. Guyot*, 159 U. S. 167, 40 L. ed. 109, 16 Sup. Ct. Rep. 139.

925. Judgments, not strictly *in rem*, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

— Editorial note.

[Conclusiveness of foreign judgment. 20 L.R.A. 668, 32 L.R.A. 236.]

Validity.

926. A judgment *in rem*, adjudicating the title of movable property within the custody of the court, is treated as valid everywhere. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95
Cited in *Hamilton v. Brown*, 161 U. S. 274, 40 L. ed. 699, 16 Sup. Ct. Rep. 585.

927. A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

928. A judgment recovered in the common pleas in England, wholly without jurisdiction of the person, can have no validity here. *Bischoff v. Wethered*, 9 Wall. 812, 19: 829
Cited in *Hart v. Sansom*, 110 U. S. 156, 28 L. ed. 103, 3 Sup. Ct. Rep. 586—*Hilton v. Guyot*, 159 U. S. 184, 40 L. ed. 115, 16 Sup. Ct. Rep. 139—*Graham v. Spencer*, 14 Fed. 605—*Citizens' Bank v. Brooks*, 23 Blatchf. 139, 23 Fed. 23—*Bunnell v. Bunnell*, 25 Fed. 216—*Ouseley v. Lehigh Valley Trust & S. D. Co.* 84 Fed. 603—*McEwan v. Zimmer*, 38 Mich. 776, 31 Am. Rep. 332—*Gofrode v. Gart-*

ner, 79 Mich. 346, 7 L.R.A. 515, 44 N. W. 623—Burton v. Burton, 45 Hun, 71—De Mell v. De Mell, 120 N. Y. 495, 17 Am. St. Rep. 652, 24 N. E. 996—Moore v. Gennett, 2 Tenn. Ch. 378—Smith v. Grady, 68 Wis. 218, 31 N. W. 477.

Reciprocity.

929. The rule of reciprocity in giving effect to foreign judgments is a part of international jurisprudence, in accordance with which a judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

Cited in Fisher v. Fielding, 67 Conn. 108, 32 L.R.A. 240, 52 Am. St. Rep. 270, 34 Atl. 714—Fred Miller Brewing Co. v. Capital Ins. Co. 111 Iowa, 600, 82 Am. St. Rep. 529, 82 N. W. 1023—MacDonald v. Grand Trunk R. Co. 71 N. H. 456, 59 L.R.A. 453, 93 Am. St. Rep. 550, 52 Atl. 982.

Executory judgment.

930. There is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money only. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

931. A judgment purely executory, rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, is not in all cases conclusive against the latter, in an action brought in his own country to enforce the judgment. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95
Cited in United States v. Gleason, 78 Fed. 398.

932. An executory judgment for the recovery of money, rendered by a French court in a suit between a citizen of France and a citizen of the United States, is not a bar to an equitable action between the same parties to restrain the prosecution of a suit in a state court to recover the amount of such French judgment. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

933. By the law of France no foreign judgment can be rendered executory in France without a review of the judgment *au fond*—to the bottom—including the whole merits of the cause of action on which the judgment rests. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

Impeachment.

For Fraud, see *infra*, 935.

Judgment of Sister State, see *infra*, 938, 976, 1014, 1020.

See also *supra*, 923.

934. In England a foreign judgment in *personam* may be impeached for a manifest and wilful disregard of the law of England. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

934a. Permitting plaintiff to testify without being sworn or being subject to cross-examination by the defendant, who is

a foreigner, if this is according to the laws of the country, is not a sufficient ground for impeaching the judgment in an action thereon against the defendant in his own country. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

Fraud.

Judgment of Sister State, see *infra*, 938, 976, 1014.

See also *supra*, 921.

935. A foreign judgment may be impeached for fraud. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95
Cited in Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 474, 47 U. S. App. 1, 76 Fed. 435.

936. A foreign judgment will be assumed to have been rendered in a court of competent jurisdiction, upon regular proceedings after due notice, and to be untainted with fraud. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40: 95

b. Of Sister State.

1. In General.

Federal Question as to, see Appeal and Error, 2249–2251.

What Law Governs Limitation of Action on, see Conflict of Laws, 211.

Authentication, see Evidence, 1250, 1272, 1274, 1276–1281.

Garnishment of, see Garnishment, 10.

937. The judgments of one state are considered as foreign judgments in a sister state of the Union. Buckner v. Finley, 2 Pet. 586, 7: 528
Cited in Simmons v. Saul, 138 U. S. 459, 34 L. ed. 1063, 11 Sup. Ct. Rep. 369—Everett v. Everett, 75 App. Div. 374, 78 N. Y. Supp. 193.

2. Conclusiveness and Validity Generally.

Conclusiveness of Judgment of Foreign County, see *supra*, 911, 925.

Conclusiveness of State Judgment in Federal Court, see *infra*, VII.

Conclusiveness on Appeal or Error, see Appeal and Error, III. d, 9, h, (21).

Extraterritorial Force, see Conflict of Laws, 4.

Sufficiency of Plea as to, see Pleading, 757, 759.

Admission by Demurrer of Allegations as to Legal Effect of Judgment, see Pleading, 912.

Issue Raised Upon Denial of Record is Triable By Jury, see Trial, 13a.

See also *supra*, 672, 804; *infra*, 975; Evidence, 31.

938. Judgments of state courts differ from judgments of a foreign country when proved in Federal or other state courts, only in that they cannot be re-examined on their merits or be impeached for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and parties. Wis-

consin v. Pelican Ins. Co. 127 U. S. 265, 8 Sup. Ct. Rep. 1370, 32: 239
Cited in Cole v. Cunningham, 133 U. S. 112, 33 L. ed. 541, 10 Sup. Ct. Rep. 269—Union & P. Bank v. Memphis, 49 C. C. A. 465, 111 Fed. 571—Grand County v. People, 8 Colo. App. 45, 46 Pac. 107.

939. To make a record of a state judgment valid upon its face, it is only necessary for it to appear that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment had in fact been rendered. Maxwell v. Stewart, 21 Wall. 71, 22 Wall. 77, 22: 564
Cited in Hanley v. Donoghue, 116 U. S. 3, 29 L. ed. 536, 6 Sup. Ct. Rep. 242—Woodbridge & T. Engineering Co. v. Ritter, 70 Fed. 678—Keyser v. Lowell, 54 C. C. A. 580, 117 Fed. 406—Lehman v. Glenn, 87 Ala. 626, 6 So. 44—Sammis v. Wightman, 31 Fla. 25, 12 So. 526—State ex rel. Hahn v. King, 109 La. 166, 33 So. 121—Mooney v. Hinds, 160 Mass. 471, 36 N. E. 484—Hubbardston Lumber Co. v. Covert, 35 Mich. 264—Dusenberry v. Abbott, 1 Neb. (Unof.) 105, 95 N. W. 466—Terry v. Berry, 13 Nev. 521—Pennywright v. Foote, 27 Ohio St. 647, 22 Am. Rep. 340—Shepard v. Akers, 3 Tenn. Ch. 218—Glenn v. Maguire, 3 Tenn. Ch. 697—Gilchrist v. West Virginia Oil & Oil Land Co. 21 W. Va. 118, 45 Am. Rep. 555.

Editorial notes.

[Effect in third state of decree upholding a foreign judgment. 2 L.R.A.(N.S.) 325.

Effect in other states, of judgment confessed on warrant of attorney. 3 L.R.A.(N.S.) 449.

Right to question judgment of court of sister state upon ground that defendant was induced by fraud to go within its jurisdiction. 12 L.R.A.(N.S.) 941.]

Inquiry into jurisdiction.

Burden of Proof, see Evidence, 574.

See also *infra*, 1011.

940. Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed May 26, 1790, in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment was rendered. Thompson v. Whitman, 18 Wall. 457, 21: 897
 Board of Public Works v. Columbia College, 17 Wall. 521, 21: 687
Cited in Wisconsin v. Pelican Ins. Co. 127 U. S. 292, 32 L. ed. 244, 8 Sup. Ct. Rep. 1370—Cole v. Cunningham, 133 U. S. 112, 33 L. ed. 541, 10 Sup. Ct. Rep. 269—Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 295, 34 L. ed. 672, 11 Sup. Ct. Rep. 92—Simmons v. Saul, 138 U. S. 448, 34 L. ed. 1059, 11 Sup. Ct. Rep. 369—Reynolds v. Stockton, 140 U. S. 265, 5 L. ed. 467, 11 Sup. Ct. Rep. 773—Huntington v. Attrill, 146 U. S. 685, 36 L. ed. 1134, 13 Sup. Ct. Rep. 224—Cooper v. Newell, 173 U. S. 566, 43 L. ed. 811, 19 Sup. Ct. Rep. 508—Thormann v. Frame, 176 U. S. 350, 44 L. ed. 503, 20 Sup. Ct. Rep. 446—Clarke v. Clarke, 178 U. S. 195, 44 L. ed. 1033, 20 Sup. Ct. Rep. 873—Lynde v. Lynde, 181 U. S. 187, 45 L. ed. 814, 21 Sup. Ct. Rep. 555—Merritt v. American Steel-Barge Co. 21 C. C. A. 529, 40 U. S. App. 127, 75 Fed. 818—Peel v. January, 35 Ark.

337, 37 Am. Rep. 27—Fisher v. Fielding, 67 Conn. 105, 32 L.R.A. 239, 52 Am. St. Rep. 270, 34 Atl. 714—Faber v. Hovey, 117 Mass. 108, 19 Am. Rep. 398—Gillman v. Gillman, 126 Mass. 28, 30 Am. Rep. 646—Wilbur v. Abbot, 60 N. H. 52—Jones v. Jones, 108 N. Y. 424, 2 Am. St. Rep. 477, 15 N. E. 707—Rigney v. Rigney, 127 N. Y. 415, 24 Am. St. Rep. 462, 28 N. E. 405—Foshier v. Narver, 24 Or. 443, 41 Am. St. Rep. 874, 34 Pac. 21—Cinch Valley Coal & Coke Co. v. Tonkin, 9 Kulp. 497—Price v. Schaeffer, 161 Pa. 534, 34 W. N. C. 443, 25 L.R.A. 700, 29 Atl. 279—Dormitzer v. German Sav. & L. Soc. 23 Wash. 203, 62 Pac. 862.

941. The act giving to all judgments the same effect in other states that they have in the state where rendered does not preclude an inquiry into the jurisdiction of the court in which the judgment was rendered. Pennoyer v. Neff, 95 U. S. 714, 24: 565
Cited in National Exch. Bank v. Wiley, 195 U. S. 270, 49 L. ed. 190, 25 Sup. Ct. Rep. 70—Holmes v. Oregon & C. R. Co. 6 Sawy. 279, 5 Fed. 528—Gude v. Dakota F. & M. Ins. Co. 7 S. D. 651, 58 Am. St. Rep. 860, 65 N. W. 27—Garrigue v. Arnott, 80 Ill. App. 26—Wanamaker v. Poorbaugh, 91 Ill. App. 561—Dunn v. Dilks, 31 Ind. App. 680, 68 N. E. 1035—Fred Miller Brewing Co. v. Capital Ins. Co. 111 Iowa, 600, 82 Am. St. Rep. 529, 82 N. W. 1023—Chicago, R. I. & P. R. Co. v. Campbell, 5 Kan. App. 424, 49 Pac. 321—Gregory v. Gregory, 78 Me. 190, 57 Am. Rep. 792, 3 Atl. 280—Phoenix Nat. Bank v. Batcheller, 151 Mass. 592, 8 L.R.A. 646, 24 N. E. 917—Boyle v. Musser-Sauntry Land Logging & Mfg. Co. 88 Min. 465, 97 Am. St. Rep. 538, 93 N. W. 520—Price v. Schaeffer, 161 Pa. 534, 25 L.R.A. 700, 29 Atl. 279—Cook v. Cook, 56 Wis. 215, 43 Am. Rep. 706, 14 N. W. 33—St. Sura v. Landsfelt, 82 Wis. 349, 19 L.R.A. 517, 33 Am. St. Rep. 50, 52 N. W. 308.

942. The constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other states does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject-matter or the parties affected by it, or into the facts necessary to give such jurisdiction. Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. Rep. 369, 34: 1054

Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33: 538
Cited in Thormann v. Frame, 176 U. S. 356, 44 L. ed. 503, 20 Sup. Ct. Rep. 446—Clarke v. Clarke, 178 U. S. 195, 44 L. ed. 1033, 20 Sup. Ct. Rep. 873—Gagnon v. United States, 38 Ct. Cl. 29—Nantahala Marble & Talc Co. v. Thomas, 76 Fed. 63—Hekking v. Pfaff, 33 C. C. A. 330, 43 L.R.A. 619, 50 U. S. App. 484, 91 Fed. 62—United States v. Eisenbeis, 50 C. C. A. 185, 112 Fed. 196—Hale v. Coffin, 114 Fed. 575—Godchaux v. Morris, 57 C. C. A. 437, 121 Fed. 485—Blue Mountain Iron & Steel Co. v. Portner, 65 C. C. A. 297, 131 Fed. 59—Phoenix Bridge Co. v. Castleberry, 65 C. C. A. 484, 131 Fed. 178—Slack v. Perrine, 9 App. D. C. 179—Overby v. Gordon, 13 App. D. C. 422—Brink's Exp. Co. v. O'Donnell, 88 Ill. App. 463—American Mut. L. Ins. Co. v. Mason, 159 Ind. 16, 64 N. E. 525—Sibley v. Miller, 3 Ind. Terr. 690, 64 S. W. 577—Vicksburg, S. & P. R. Co. v. Tibbs, 112 La. 58, 38 So. 223—Kelley v. Kelley, 161 Mass. 113, 25 L.R.A. 807, 42 Am. St. Rep.

539, 36 N. E. 837—Mutual F. Ins. Co. v. Phoenix Furniture Co. 108 Mich. 172, 34 L.R.A. 696, 62 Am. St. Rep. 693, 66 N. W. 1095—Wyeth Hardware & Mfg. Co. v. Lang, 54 Mo. App. 150—National Exch. Bank v. Wiley, 3 Neb. (Unof.) 719, 92 N. W. 582—Singer Mfg. Co. v. Fleming, 39 Neb. 688, 23 L.R.A. 213, 42 Am. St. Rep. 613, 58 N. W. 226—Stacks v. Crawford, 63 Neb. 663, 88 N. W. 852—Everett v. Everett, 75 App. Div. 874, 78 N. Y. Supp. 198—Garvey v. United States Fidelity & G. Co. 77 App. Div. 395, 70 N. Y. Supp. 837—Coleman v. Howell, 131 N. C. 127, 42 S. E. 555—McCreery v. Davis, 44 S. C. 211, 28 L.R.A. 661, 51 Am. St. Rep. 794, 22 S. E. 178—Babcock v. Marshall, 21 Tex. Civ. App. 150, 50 S. W. 728—Wood v. Augustins, 70 Vt. 640, 41 Atl. 583—St. Sure v. Lindsfelt, 82 Wis. 349, 19 L.R.A. 517, 33 Am. St. Rep. 50, 52 N. W. 308—Griggs v. Becker, 87 Wis. 317, 58 N. W. 896.

943. The jurisdiction of the court rendering a judgment or decree is open to inquiry under proper averments, where its conclusiveness is questioned in a court of another state. *Old Wayne Mut. L. Asso. v. McDonough*, 204 U. S. 8, 27 Sup. Ct. Rep. 236, 51: 345

Cited in Wetmore v. Karrick, 205 U. S. 149, 51 L. ed. 748, 27 Sup. Ct. Rep. 434.

944. A foreign judgment is open to attack upon the ground that the court in which it was procured had no jurisdiction. *Christmas v. Russell*, 5 Wall. 290, 18: 475

Cited in Turnbull v. Payson, 95 U. S. 422, 24 L. ed. 439—*Montgomery v. Samory*, 99 U. S. 488, 25 L. ed. 377—*Hilton v. Guyot*, 159 U. S. 184, 40 L. ed. 115, 16 Sup. Ct. Rep. 139—*Cooper v. Newell*, 173 U. S. 567, 43 L. ed. 812, 19 Sup. Ct. Rep. 506—*Burt v. Delano*, 4 Cliff. 616, Fed. Cas. No. 2,211—*Galpin v. Page*, 3 Sawy. 107, Fed. Cas. No. 5,206—*Logansport Gaslight & Coke Co. v. Knowles*, 2 Dill. 424, Fed. Cas. No. 8,467—*Moch v. Virginia F. & M. Ins. Co.* 4 Hughes, 120, 10 Fed. 706—*Downs v. Allen*, 23 Blatchf. 50, 22 Fed. 808—*Lamb v. Powder River Live Stock Co.* 67 L.R.A. 563, 65 C. C. A. 577, 132 Fed. 441—*Snow v. Mitchell*, 87 Kan. 641, 16 Pac. 737—*Marx v. Fore*, 51 Mo. 74, 11 Am. Rep. 432—*Thompson v. Whitman*, 31 Phila. Leg. Int. 157.

945. The jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry; and in this respect a court of another state is to be regarded as a foreign court. *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. Rep. 92, 34: 670

Distinguished in De la Montanya v. De la Montanya, 112 Cal. 114, 32 L.R.A. 86, 53 Am. St. Rep. 165, 44 Pac. 345.

Cited in Owens v. McCloskey, 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 698—*Great Western Teleg. Co. v. Purdy*, 162 U. S. 335, 40 L. ed. 990, 16 Sup. Ct. Rep. 810—*Thormann v. Frame*, 176 U. S. 586, 44 L. ed. 503, 20 Sup. Ct. Rep. 446—*Clarke v. Clarke*, 178 U. S. 195, 44 L. ed. 1033, 20 Sup. Ct. Rep. 873—*First Nat. Bank v. Cunningham*, 48 Fed. 515—*Central Trust Co. v. Chattanooga, R. & C. R. Co.* 68 Fed. 688—*Odell v. Reynolds*, 17 C. C. A. 324, 37 U. S. App. 447, 70 Fed. 662—*Moredock v. Kirby*, 118 Fed. 183—*Re James*, 99 Cal. 377, 37 Am. St. Rep. 60, 33 Pac. 1122—*Greenswieg v. Strelinger*, 103

Cal. 279, 37 Pac. 398—*Fisher v. Fielding*, 67 Conn. 105, 32 L.R.A. 239, 52 Am. St. Rep. 270, 34 Atl. 714—*National Bank v. Furtlick*, 2 Marv. (Del.) 52, 44 L.R.A. 118, 42 Atl. 479—*Robb v. Anderson*, 43 Ill. App. 576—*Pond v. Simons*, 17 Ind. App. 86, 45 N. E. 48—*Gates v. Newman*, 18 Ind. App. 394, 46 N. E. 654—*Anthony v. Masters*, 28 Ind. App. 247, 62 N. E. 505—*Fred Miller Brewing Co. v. Capital Ins. Co.* 111 Iowa, 600, 82 Am. St. Rep. 529, 82 N. W. 1023—*Crim v. Crim*, 162 Mo. 558, 54 L.R.A. 506, 85 Am. St. Rep. 521, 63 S. W. 489—*Weller Mfg. Co. v. Eaton*, 81 Mo. App. 663—*Kemper-Thomas Paper Co. v. Shyer*, 108 Tenn. 458, 58 L.R.A. 176, 67 S. W. 856—*Betts v. Johnson*, 68 Vt. 551, 35 Atl. 489—*Wood v. Augustins*, 70 Vt. 641, 41 Atl. 583.

946. A judgment in another state may be inquired into for the purpose of determining the court's jurisdiction over the person of the defendant or over the *res*, where the judgment is *in rem*. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35: 464
Cited in Thormann v. Frame, 176 U. S. 586, 44 L. ed. 503, 20 Sup. Ct. Rep. 446—*Richmond & D. R. Co. v. Gorman*, 7 App. D. C. 108—*Thum v. Pyke*, 8 Idaho, 21, 66 Pac. 157.

947. It is competent for a defendant in an action on a judgment of a sister state, as in an action on a foreign judgment, to set up as a defense want of jurisdiction in that he was not an inhabitant of the state in which the judgment was rendered, and had not been served with process, and did not appear. *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. Rep. 92, 34: 670

948. The jurisdiction of a foreign admiralty court cannot be questioned collaterally. *Hudson v. Guestier*, 6 Cranch, 281, 3: 224

Distinguished in Slocum v. Wheeler, 1 Conn. 439.

Cited in Rhode Island v. Massachusetts, 12 Pet. 738, 9 L. ed. 1266—*The Rio Grande (The Rio Grande v. Otis)* 23 Wall. 465, 23 L. ed. 159.

Jurisdictional recitals.

949. The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. *Thompson v. Whitman*, 18 Wall. 457, 21: 897

Distinguished in Ritchie v. Carpenter, 2 Wash. 523, 26 Am. St. Rep. 877, 28 Pac. 380.

Cited in Hill v. Mendenhall, 21 Wall. 454, 22 L. ed. 616—*Hall v. Lanning*, 91 U. S. 165, 23 L. ed. 273—*Bell v. Bell*, 181 U. S. 178, 45 L. ed. 807, 21 Sup. Ct. Rep. 551—*King v. United States*, 27 Ct. Cl. 533—*Hunt v. Woodward*, Fed. Cas. No. 6,901—*Re McKibben*, 12 Nat. Bankr. Reg. 101, Fed. Cas. No. 8,859—*Neff v. Pennoyer*, 3 Sawy. 301, Fed. Cas. No. 10,083—*McCarty v. The City of New Bedford*, 4 Fed. 832—*Holmes v. Oregon & C. R. Co.* 6 Sawy. 279, 5 Fed. 528—*Graham v. Spencer*, 14 Fed. 605—*Downs v. Allen*, 23 Blatchf. 59, 22 Fed. 808—*Citizens' Bank v. Brooks*, 23 Blatchf. 138, 23 Fed. 22—*Re Elmira Steel Co.* 109 Fed. 465—*Kingsbury v. Yllestia*, 59 Ala. 321—*Re James*, 99 Cal.

377, 37 Am. St. Rep. 60, 33 Pac. 1122—Greenzweig v. Strellinger, 103 Cal. 279, 37 Pac. 398—Wilson v. Hawthorne, 14 Colo. 533, 20 Am. St. Rep. 290, 24 Pac. 548—Hallack v. Loft, 19 Colo. 83, 34 Pac. 568—Mitchell v. Garrett, 5 Houst. (Del.) 41—Sammis v. Wightman, 31 Fla. 26, 12 So. 526—Issett v. Stuart, 80 Ill. 410, 22 Am. Rep. 194—Forsythe v. Hammond, 142 Ind. 519, 30 L. R.A. 583, 41 N. E. 950—Lowe v. Lowe, 40 Iowa, 224—Mastin v. Gray, 19 Kan. 463, 27 Am. Rep. 149—Abercrombie v. Abercrombie, 64 Kan. 37, 67 Pac. 539—Wood v. Wood, 78 Ky. 627—Gregory v. Gregory, 76 Me. 539—Gregory v. Gregory, 78 Me. 190, 57 Am. Rep. 792, 3 Atl. 280—Sewall v. Sewall, 122 Mass. 161, 23 Am. Rep. 299—Adams v. Adams, 154 Mass. 294, 13 L.R.A. 280, 28 N. E. 260—Andrews v. Andrews, 176 Mass. 94, 57 N. E. 333—Smalley v. Lightall, 37 Mich. 351—Reed v. Reed, 52 Mich. 121, 50 Am. Rep. 247, 17 N. W. 720—Michels v. Stork, 52 Mich. 264, 17 N. W. 833—Eager v. Stover, 59 Mo. 88—Weller Mfg. Co. v. Eaton, 81 Mo. App. 663—Hauswirth v. Sullivan, 6 Mont. 208, 9 Pac. 798—Bell v. Bell, 4 App. Div. 530, 40 N. Y. Supp. 443—Pennywit v. Foote, 27 Ohio St. 618, 22 Am. Rep. 340—Scobey v. Gano, 35 Ohio St. 553—Van Fossen v. State, 37 Ohio St. 320, 41 Am. Rep. 507—Kingsborough v. Tousley, 56 Ohio St. 457, 47 N. E. 541—Levison v. Blumenthal, 10 Kulp, 256—Tuggle v. Leath, 14 Luzerne Legal Rep. 42—McCreery v. Davis, 44 S. C. 211, 28 L.R.A. 661, 51 Am. St. Rep. 794, 22 S. E. 178—Berdanatti v. Sexton, 2 Tenn. Ch. 703—Montgomery v. Rich, 3 Tenn. Ch. 663—Re Amy, 12 Utah, 320, 42 Pac. 1121—Wood v. Augustus, 70 Vt. 639, 41 Atl. 583—Bowler v. Huston, 30 Gratt. 275, 32 Am. Rep. 673—Crumlish v. Central Improv. Co. 38 W. Va. 398, 23 L.R.A. 131, 45 Am. St. Rep. 872, 18 S. E. 456.

950. In an action in one state upon a judgment rendered in another, the recitals in the judgment of the jurisdiction of the court over the defendant and the subject-matter can be contradicted and disproved. *Hall v. Lanning*, 91 U. S. 160, 23: 271

951. The recital, in proceedings for divorce, of the facts necessary to give jurisdiction, may be contradicted in a suit between the same parties in another state. *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. Rep. 551, 45: 804
Cited in *National Exch. Bank v. Wiley*, 195 U. S. 270, 49 L. ed. 190, 25 Sup. Ct. Rep. 70—*National Exch. Bank v. Wiley*, 3 Neb. (Unof.) 719, 92 N. W. 582—*Jordan v. Chicago & N. W. R. Co.* 125 Wis. 592, 1 L.R.A. (N. S.) 890, 110 Am. St. Rep. 805, 104 N. W. 803.

952. In an action on a judgment rendered in another state, the defendant, notwithstanding the record shows a return of the sheriff that he was personally served with process, may show the contrary. *Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 58, 22: 70
Cited in *Hall v. Lanning*, 91 U. S. 165, 23 L. ed. 273—*Hart v. Sansom*, 110 U. S. 156, 28 L. ed. 103, 3 Sup. Ct. Rep. 586—*Renaud v. Abbott*, 116 U. S. 287, 29 L. ed. 632, 6 Sup. Ct. Rep. 1194—*Goldrey v. Morning News*, 156 U. S. 521, 39 L. ed. 518, 15 Sup. Ct. Rep. 559—*National Exch. Bank v. Wiley*, 195 U. S. 270, 49 L. ed. 190, 25 Sup. Ct. Rep. 70—

Hunt v. Woodward, Fed. Cas. No. 6,901—*Graham v. Spencer*, 14 Fed. 605—*Downs v. Allen*, 23 Blatchf. 60, 22 Fed. 808—*Citizens' Bank v. Brooks*, 23 Blatchf. 138, 23 Fed. 22—*Rose v. Northwest F. & M. Ins. Co.* 67 Fed. 440—*Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 477, 47 U. S. App. 1, 76 Fed. 438—*Re Elmira Steel Co.* 109 Fed. 405—*Cady v. Associated Colonies*, 119 Fed. 424—*Marr v. Wetzel*, 3 Colo. 5—*Mitchell v. Ferria*, 5 Houst. (Del.) 41—*Issett v. Stuart*, 80 Ill. 410, 22 Am. Rep. 194—*Litowich v. Litowich*, 19 Kan. 455, 27 Am. Rep. 145—*Mastin v. Gray*, 19 Kan. 461, 27 Am. Rep. 149—*Abercrombie v. Abercrombie*, 64 Kan. 37, 67 Pac. 539—*Wood v. Wood*, 78 Ky. 627—*Sears v. Dacey*, 122 Mass. 339—*Gilman v. Gilman*, 126 Mass. 28, 30 Am. Rep. 646—*Foshier v. Narver*, 24 Or. 443, 41 Am. St. Rep. 874, 34 Pac. 21—*Price v. Schaeffer*, 161 Pa. 534, 25 L.R.A. 700, 29 Atl. 279—*Tuggle v. Leath*, 14 Luzerne Legal Rep. 42—*Guthrie v. Lowry*, 34 Phila. Leg. Int. 320—*Berdanatti v. Sexton*, 2 Tenn. Ch. 703—*Fisher v. March*, 26 Gratt. 778—*Bowler v. Huston*, 30 Gratt. 276, 32 Am. Rep. 673—*Bowyer v. Knapp*, 15 W. Va. 290—*Crumlish v. Central Improv. Co.* 38 W. Va. 398, 23 L.R.A. 131, 45 Am. St. Rep. 872, 18 S. E. 456.

— Editorial note.

Conclusiveness of record as to jurisdiction in suit on judgment of another state.

18: 475

Power of Congress.

953. Const. art. 4, § 1, contemplated a power in Congress to give a conclusive effect to the judgments of other states. *Mills v. Duryee*, 7 Cranch, 481, 3: 411

954. Power of Congress under art. 4, § 1, of the Constitution, to prescribe the effect that a judgment recovered in one state shall have in another, recognized. *Renaud v. Abbott*, 116 U. S. 277, 6 Sup. Ct. Rep. 1194, 29: 629

Cited in *Crippen v. Loughton*, 69 N. H. 548, 46 L.R.A. 469, 76 Am. St. Rep. 192, 44 Atl. 538.

955. The right of Congress, under U. S. Const. art. 4, § 1, providing that Congress may, by general laws, prescribe the manner in which the public acts, records, and judicial proceedings of a state shall be proved in other states, and the effect thereof, to prescribe the effect of judgments of other states, recognized. *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. Rep. 242, 29: 535
Cited in *Crippen v. Loughton*, 69 N. H. 548, 46 L.R.A. 469, 76 Am. St. Rep. 192, 44 Atl. 538.

Scope of full faith and credit clause.

Effect Accorded Foreign Judgment Generally, see *infra*, VI. b, 3.

In Proceeding to Enforce Judgment, see *infra*, 1028, 1029.

Due Process in According Faith and Credit, see *Constitutional Law*, 702.

See also *supra*, 940-942; *infra*, 978, 1000, 1039, 1040.

956. [The provision of the Articles of Confederation, that full faith and credit shall be given in one state to the records, acts, and judicial proceedings of the others, seems

chiefly intended to oblige each state to receive the records of another as full evidence of such acts and judicial proceedings. *James v. Allen* (Ct. Com. Pl. Phila.) 1 Dall. 188, 1: 93

957. By the 4th Article of the Constitution of the United States, full faith and credit must be given in each state to the public acts, records, and judicial proceedings of every other state. *Mitchell v. Lenox*, 14 Pet. 49, 10: 349
Caldwell v. Carrington, 9 Pet. 86, 9: 60
Cheever v. Wilson, 9 Wall. 108, 19: 604
Chew v. Brumagen, 13 Wall. 497, 20: 663

958. The judgment of a state court, if that court had jurisdiction to render it, is entitled to the same full faith and credit in the courts of another state that it has in the state where rendered, as a valid domestic judgment. *Harris v. Balk*, 198 U. S. 215; 25 Sup. Ct. Rep. 625, 49: 1023

959. The clause of the Federal Constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of the courts only so far as they have jurisdiction, but wherever they want jurisdiction the records are not entitled to credit. *Board of Public Works v. Columbia College*, 17 Wall. 521, 21: 687

960. The act of Congress of May 26, 1790, giving judicial records such faith and credit in other states as they are entitled to in the state where they are taken; does not apply to judgments rendered against non-residents without notice. *D'Arcy v. Ketchum*, 11 How. 165, 13: 648

Offd in Lafayette Ins. Co. v. French, 18 How. 406, 15 L. ed. 452—*Christmas v. Russell*, 5 Wall. 301, 18 L. ed. 478—*Cheever v. Wilson*, 9 Wall. 123, 19 L. ed. 608—*Public Works v. Columbia College*, 17 Wall. 528, 21 L. ed. 691—*Hall v. Lanning*, 91 U. S. 168, 23 L. ed. 274—*Pennoyer v. Neff*, 95 U. S. 720, 24 L. ed. 568—*Hanley v. Donoghue*, 116 U. S. 4, 29 L. ed. 537, 6 Sup. Ct. Rep. 242—*Cole v. Cunningham*, 133 U. S. 112, 33 L. ed. 541, 10 Sup. Ct. Rep. 269—*Grover & B. Sewing Mach. Co. v. Radcliffe*, 187 U. S. 295, 34 L. ed. 672, 11 Sup. Ct. Rep. 92—*Simmons v. Saul*, 138 U. S. 459, 34 L. ed. 1063, 11 Sup. Ct. Rep. 369—*Huntington v. Attrill*, 146 U. S. 685, 36 L. ed. 1134, 13 Sup. Ct. Rep. 224—*Tenney v. Townsend*, 9 Blatchf. 277, Fed. Cas. No. 13,832—*De Kraft v. Barney*, 2 Hayw. & H. 409, Fed. Cas. No. 18,288—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 401, 9 Fed. 245—*Moch v. Virginia F. & M. Ins. Co.* 4 Hughes, 120, 10 Fed. 706—*Walker v. Cronkite*, 40 Fed. 135—*Merritt v. American Steel-Barge Co.* 21 C. C. A. 529, 40 U. S. App. 127, 75 Fed. 818—*Alkire Grocery Co. v. Richesin*, 91 Fed. 83—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 465, 111 Fed. 571—*Turner v. Turner*, 44 Ala. 450—*Eaton v. Pennywit*, 25 Ark. 151—*Gude v. Dakota F. & M. Ins. Co.* 7 S. D. 647, 58 Am. St. Rep. 860, 65 N. W. 27—*Mitchell v. Garrett*, 5 Houst. (Del.) 40—*National Bank v. Furtick*, 2 Marv. (Del.) 61, 44 L.R.A. 121, 69 Am. St. Rep. 99, 42 Atl. 479—*Cheever v. Wilson*, 6 D. C. 165—*Barney v. De Kraft*, 6 D. C. 364 Appx.—*Slack v. Perrine*, 9 App. D. C. 179—

Bowen v. Pope, 26 Ill. App. 235—*Beard v. Beard*, 21 Ind. 328—*Middleworth v. McDowell*, 49 Ind. 388—*Weaver v. Boggs*, 38 Md. 261—*Carleton v. Bickford*, 13 Gray, 596, 74 Am. Dec. 652—*Folger v. Columbian Ins. Co.* 99 Mass. 273, 98 Am. Dec. 747—*People v. Dawell*, 25 Mich. 269, 12 Am. Rep. 260—*Cofrode v. Gartner*, 79 Mich. 346, 7 L.R.A. 515, 44 N. W. 623—*Latimer v. Union P. R. Co.* 43 Mo. 110, 97 Am. Dec. 378—*Marx v. Fore*, 51 Mo. 79, 11 Am. Rep. 432—*Crim v. Crim*, 162 Mo. 557, 54 L.R.A. 506, 85 Am. St. Rep. 521, 63 S. W. 489—*Bennett v. Bennett*, 63 N. J. Eq. 308, 49 Atl. 501—*Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 281—*Everett v. Everett*, 75 App. Div. 374, 78 N. Y. Supp. 193—*Vischer v. Vischer*, 12 Barb. 647—*Fitzsimmons v. Marks*, 66 Barb. 335—*Bank of Commerce v. Rutland & W. R. Co.* 10 How. Pr. 6—*Pennywit v. Foote*, 27 Ohio St. 617, 22 Am. Rep. 340—*Kingsborough v. Tousley*, 56 Ohio St. 457, 47 N. E. 541—*Rogers v. Burns*, 27 Pa. 627—*Com v. Stevens*, 25 Pa. Co. Ct. 71—*Love v. Love*, 10 Phila. 456, 30 Phila. Leg. Int. 86—*Thompson v. Whitman*, 31 Phila. Leg. Int. 157—*Rebstock v. Rebstock*, 2 Pittsb. 127—*McCreery v. Davis*, 44 S. C. 211, 28 L.R.A. 661, 51 Am. St. Rep. 794, 22 S. E. 178—*Thouvenin v. Rodrigues*, 24 Tex. 477—*Price v. Hickok*, 39 Vt. 301—*Blain v. Blain*, 45 Vt. 544—*Bedell v. Scruton*, 54 Vt. 495—*Bowler v. Huston*, 30 Gratt. 275, 32 Am. Rep. 673—*Crumlish v. Central Improv. Co.* 38 W. Va. 398, 23 L.R.A. 131, 45 Am. St. Rep. 872, 18 S. E. 456—*Stewart v. Northern Assur. Co.* 45 W. Va. 741, 44 L.R.A. 104, 32 S. E. 218.

961. The provision of the Constitution of the United States requiring that full faith and credit shall be given in each state to the judicial proceedings of every other state does not embrace personal judgments against defendants who were neither personally served with process within the jurisdiction of the court nor who appeared in the proceedings. *Pennoyer v. Neff*, 95 U. S. 714, 24: 555

Offd in Commonwealth Mut. F. Ins. Co. v. Hayden Bros. 61 Neb. 457, 85 N. W. 443—*Felt v. Felt*, 59 N. J. Eq. 611, 83 Am. St. Rep. 612, 49 Atl. 1071.

962. A decree of an inferior state court from which an appeal is denied by the highest court of the state on the ground that it is interlocutory cannot, in an action thereon in the District of Columbia, be considered as having any greater effect than an interlocutory decree, under the full faith and credit clause of the Federal Constitution. *Board of Public Works v. Columbia College*, 17 Wall. 521, 21: 687

963. The provision of the Federal Constitution that full faith and credit shall be given in each state to the judicial proceedings of every other state does not require that a judgment rendered in a court of one state which is not responsive to the issues presented by the pleadings, and was rendered in the absence of the defendant, must be recognized as valid in the courts of any other state. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35: 464
Offd in Willis Valley Mln. & Mfg. Co. v. Gallo-way, 139 Ala. 279, 35 So. 850—*Ward v. Bayce*, 152 N. Y. 196, 36 L.R.A. 551, 46 N. E. 180—*St. Lawrence Room &*

Mfg. Co. v. Holt, 51 W. Va. 364, 41 S. E. 351.

964. Neither do the provisions of the Constitution and of the act of Congress, by which the judgments of one state are to have faith and credit given to them in another state, affect the jurisdiction of the court in which the judgment is offered in evidence. *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 8 Sup. Ct. Rep. 1370, 32: 239
Cited in Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 374, 48 L. ed. 227, 24 Sup. Ct. Rep. 92—*Lynde v. Lynde*, 41 App. Div. 287, 58 N. Y. Supp. 567—*Anglo-American Provision Co. v. Davis* Provision Co. 189 N. Y. 512, 88 Am. St. Rep. 608, 62 N. E. 587—*Wood v. Augustina*, 70 Vt. 640, 41 Atl. 533.

965. A decree of the chancery court of New Jersey upon an original bill, the process under which was served upon the defendant within the state, and upon a supplemental bill, a copy of which, with rule to plead, was served upon him without the state, must be deemed to express the law of the state, in the absence of any statutory direction on the subject, or any reported decision of the supreme court of that state. *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. Rep. 366, 40: 525
Cited in L'Engle v. Gatties, 74 Fed. 514—*Hekking v. Pfaff*, 82 Fed. 404—*Israel v. Israel*, 130 Fed. 239—*Fish v. Smith*, 78 Conn. 391, 84 Am. St. Rep. 161, 47 Atl. 711—*Slack v. Perrine*, 9 App. D. C. 153—*Starbuck v. Starbuck*, 62 App. Div. 447, 71 N. Y. Supp. 104—*People ex rel. Hickey v. Hickey*, 86 Ill. App. 26—*Van Norman v. Gordon*, 172 Mass. 580, 44 L.R.A. 841, 70 Am. St. Rep. 304, 53 N. E. 267—*Rigney v. Rigney*, 62 N. J. Eq. 12, 49 Atl. 460—*Bell v. Bell*, 4 App. Div. 531, 40 N. Y. Supp. 443—*Lacey v. Lacey*, 38 Misc. 203, 77 N. Y. Supp. 235.

966. The 4th Article of the Constitution of the United States, which declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," cannot, by any construction of its words, be held to embrace an alleged error in a decree of a state court, asserted to be in collision with a prior decision of the same court in the same case. *Mitchell v. Lenox*, 14 Pet. 49, 10: 349

967. A judgment taken under a warrant of attorney annexed to a promissory note, authorizing confession of judgment "in favor of the holder," is not protected by the Federal Constitution and laws, when sued on in another state, from collateral attack upon the ground that the party in whose behalf it was rendered was not in fact the holder, because not the real owner of the note. *National Exch. Bank v. Wiley*, 195 U. S. 257, 25 Sup. Ct. Rep. 70, 49: 184
Cited in Haddock v. Haddock, 201 U. S. 573, 50 L. ed. 871, 26 Sup. Ct. Rep. 525.

968. The act of 1790, providing for the mode of authenticating records and judicial proceedings of the state courts, is none the less effective to provide for the conclusiveness of such judgments because it does not

enable the courts of another state to issue execution directly on the original judgment. *Mills v. Duryee*, 7 Cranch, 481, 3: 411
Cited in Turnbull v. Payson, 95 U. S. 422, 24 L. ed. 439, 16 Nat. Bankr. Reg. 444.

Denial of full faith and credit.

In Proceeding to Enforce Judgment, see *infra*, 1025-1027.

Denial to Federal Judgment in State Court, see *infra*, 1078.

See also *supra*, 940. 943, 946-948; *infra*, 974, 977, 981, 982, 987.

969. A statute of Mississippi, that judgments of other states against the citizens of that state shall not be enforced if the cause of action which was the foundation of the judgment would have been barred in her tribunals by her statute of limitations, infringes the "full faith and credit" clause of the Federal Constitution, and is void. *Christmas v. Russell*, 5 Wall. 290, 18: 475
Distinguished in Great Western Teleg. Co. v. Purdy, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 810.

Cited in Terry v. Anderson, 95 U. S. 633, 24 L. ed. 366—*Koshkonong v. Burton*, 104 U. S. 675, 26 L. ed. 889—*McGahey v. Virginia*, 135 U. S. 705, 34 L. ed. 317, 10 Sup. Ct. Rep. 972—*Anglo-American Provision Co. v. Davis* Provision Co. 191 U. S. 375, 48 L. ed. 227, 24 Sup. Ct. Rep. 92—*Galpin v. Page*, 3 Sawy. 107, Fed. Cas. No. 5,206—*Nonce v. Richmond & D. R. Co.* 33 Fed. 433—*Packer v. Whittier*, 81 Fed. 336—*Keyser v. Lowell*, 54 C. C. A. 576, 117 Fed. 402—*Lamb v. Powder River Live Stock Co.* 67 L.R.A. 561, 65 C. C. A. 574, 132 Fed. 438—*Ambler v. Whipple*, 139 Ill. 324, 32 Am. St. Rep. 202, 28 N. E. 841—*Louisville & N. E. Co. v. Williams*, 103 Ky. 378, 45 S. W. 229—*Soper v. Lawrence Bros. Co.* 98 Me. 284, 99 Am. St. Rep. 397, 56 Atl. 908—*Furlong v. State*, 58 Miss. 784—*Strickland v. Draughan*, 91 N. C. 104—*Arrington v. Arrington*, 127 N. C. 195, 52 L.R.A. 203, 80 Am. St. Rep. 791, 37 S. E. 212—*McCreery v. Davis*, 44 S. C. 211, 28 L.R.A. 661, 51 Am. St. Rep. 794, 22 S. E. 178—*Gilchrist v. West Virginia Oil & Oil Land Co.* 21 W. Va. 118, 45 Am. Rep. 555.

970. Where a decree of a state court is entered by consent and in pursuance of an agreement, the court merely recording the agreement and ordering it to be binding, the supreme court of another state may determine that the validity of an article of the agreement was not in controversy or passed upon in making the decree; and in doing so that court does not refuse to give due effect to the final judgment of a court of another state. *Texas & P. R. Co. v. Southern P. Co.* 137 U. S. 48, 11 Sup. Ct. Rep. 10, 34: 614
Cited in Lawrence Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 562, 34 L. ed. 1009, 11 Sup. Ct. Rep. 402—*Miller v. Texas*, 153 U. S. 539, 38 L. ed. 813, 14 Sup. Ct. Rep. 874.

971 Full faith and credit to a judgment of another state, consisting of an entry stating that, the cause having been settled, it is discontinued by consent, without costs to either party, is not denied by admitting evidence that the discontinuance was not

intended as a satisfaction of the cause of action, but was the result of a promissory agreement which was never complied with. *Jacobs v. Marks*, 182 U. S. 583, 21 Sup. Ct. Rep. 865, 45: 1241
Cited in Commercial Pub. Co. v. Beckwith, 188 U. S. 569, 47 L. ed. 599, 23 Sup. Ct. Rep. 882.

972. Full faith and credit is not denied a judgment of an Illinois court taxing the entire inheritance under the will of a resident of that state, by a tax imposed under the New York inheritance-tax law on the transfer, under such will, of debts due the decedent by citizens of the latter state. *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47: 489

973. Due effect cannot be said to have been denied the decrees of courts of another jurisdiction by the construction placed upon them by a state court, where the construction contended for by those claiming that such decrees were not given the proper effect cannot be given without indulging in conjecture and giving to those making such contention the benefit of the doubts which arise as to the precise meaning of such decrees. *Commercial Pub. Co. v. Beckwith*, 188 U. S. 567, 23 Sup. Ct. Rep. 382, 47: 598

Attachment.

974. A judgment that proceedings in attachment, duly taken in accordance with the laws of the state in which the property is located, are not a bar to an action for conversion, brought in another state, does not give to such proceedings the "full faith and credit" required by the Federal Constitution. *Green v. Van Buskirk*, 7 Wall. 139, 19: 109

Cited in Crape v. Kelly, 16 Wall. 619, 21 L. ed. 434—*Hanley v. Donoghue*, 116 U. S. 3, 29 L. ed. 538, 6 Sup. Ct. Rep. 242—*Cole v. Cunningham*, 133 U. S. 132, 33 L. ed. 548, 10 Sup. Ct. Rep. 269—*Winona & St. P. R. Co. v. Plainview*, 143 U. S. 391, 36 L. ed. 199, 12 Sup. Ct. Rep. 530—*Huntington v. Attrill*, 146 U. S. 686, 36 L. ed. 1134, 18 Sup. Ct. Rep. 224—*The City of New Bedford*, 20 Fed. 62—*Merritt v. American Steel-Barge Co.* 21 C. C. A. 529, 40 U. S. App. 127, 75 Fed. 818—*Greene v. Bentley*, 52 C. C. A. 62, 114 Fed. 114—*Keyser v. Lowell*, 54 C. C. A. 580, 117 Fed. 406—*Keane v. Chamberlain*, 14 App. D. C. 108—*Harwell v. Sharp Bros.* 35 Ga. 128, 8 L.R.A. 516, 21 Am. St. Rep. 149, 11 S. E. 561—*Rhawn v. Pearce*, 110 Ill. 359, 51 Am. Rep. 691—*Cunningham v. Butler*, 142 Mass. 49, 56 Am. Rep. 667, 6 N. E. 782—*Warner v. Jaffray*, 30 Hun. 331.

975. The record of a judgment in one state is conclusive evidence in another, although it appears that the suit in which it was rendered was commenced by an attachment of the property, the defendant having afterwards appeared and taken defense. Any objection to the proceedings by attachment is cured by the appearance of the defendant. *Mayhew v. Thatcher*, 6 Wheat. 129, 5: 223
Distinguished in Hill v. Bowman, 14 La. 447.
Cited in Mutual L. Ins. Co. v. Harris, 97 U. S. 336, 24 L. ed. 962—*Sumner v. Marcy*,

3 Woodb. & M. 115, Fed. Cas. No. 13,609—*Taylor v. Carpenter*, 2 Woodb. & M. 4, Fed. Cas. No. 13,785—*Mills v. Stewart*, 12 Ala. 95—*Mitchell v. Garrett*, 5 Houst. (Del.) 40—*Whiting v. Burger*, 78 Me. 294, 4 Atl. 696—*Noyes v. Butler*, 6 Barb. 619—*Pepin v. Lachenmeyer*, 45 N. Y. 29—*Bennett v. Morley*, 10 Ohio, 103—*Miller v. Miller*, 1 Ball. L. 249—*Campbell v. Wilson*, 6 Tex. 393—*Black v. Smith*, 13 W. Va. 793—*Price v. Hickok*, 39 Vt. 801—*Hoxie v. Wright*, 2 Vt. 267.

Appearance.

See also *supra*, 975; *infra*, 1050.

976. The appearance of a defendant after service of a supplemental bill upon him outside of the jurisdiction, and his action in procuring the modification of a decree without attacking it in its main provisions, will prevent his making a collateral attack upon it in another jurisdiction. *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. Rep. 366, 40: 525

Cited in New Orleans v. Fisher, 180 U. S. 196, 45 L. ed. 492, 21 Sup. Ct. Rep. 347—*Lynde v. Lynde*, 181 U. S. 186, 45 L. ed. 814, 21 Sup. Ct. Rep. 555—*Phelps v. Mutual R. F. Life Assn.* 61 L.R.A. 725, 50 C. C. A. 349, 112 Fed. 462—*Slack v. Perrine*, 9 App. D. C. 155—*American Mut. L. Ins. Co. v. Mason*, 159 Ind. 21, 64 N. E. 525—*Lynde v. Lynde*, 162 N. Y. 414, 48 L.R.A. 683, 76 Am. St. Rep. 332, 56 N. E. 979.

Bankruptcy.

977. Full faith and credit are not denied an order of a court of bankruptcy refusing to set aside the sale by an assignee, for inadequacy of price and want of notice of sale, by the refusal to treat such order as *res judicata* as to the bankrupt's interest in the property, where the order of sale directed the assignee to sell simply "the interest of such bankrupt and of said assignee," without attempting to adjudicate the amount of that interest, if any. *Cramer v. Wilson*, 195 U. S. 408, 25 Sup. Ct. Rep. 94, 49: 256

Corporate matters.

978. An Ohio judgment against an Indiana corporation allowed by Ohio laws to do business there, and to receive service of process on its resident agent, upon a contract made in Ohio, is entitled to the same faith and credit in Indiana as in Ohio, under the Constitution and laws of the United States. Notice to such resident agent was notice to the corporation. Such judgment is entitled to the same faith and credit in Indiana as if the corporation had its habitat in Ohio. *Lafayette Ins. Co. v. French*, 18 How. 404, 15: 451

Cited in Baltimore & O. R. Co. v. Harris, 12 Wall. 81, 20 L. ed. 358—*Pennoyer v. Neff*, 95 U. S. 735, 24 L. ed. 573—*Baltimore & O. R. Co. v. Koontz*, 104 U. S. 10, 26 L. ed. 644—*St. Clair v. Cox*, 106 U. S. 356, 27 L. ed. 225, 1 Sup. Ct. Rep. 354—*New England Mut. Ins. Co. v. Woodworth*, 111 U. S. 146, 28 L. ed. 381, 4 Sup. Ct. Rep. 364—*Re Louisville Underwriters*, 134 U. S. 493, 33 L. ed. 994, 10 Sup. Ct. Rep. 587—*Wilson v. Seligman*, 144 U. S. 45, 36 L. ed. 339, 12 Sup. Ct. Rep. 541—*Shaw v. Quincy Min. Co. (Ex parte Shaw)* 145 U. S. 450, 30

L. ed. 771, 12 Sup. Ct. Rep. 935—Southern P. Co. v. Denton, 146 U. S. 207, 36 L. ed. 945, 13 Sup. Ct. Rep. 44—New York, L. E. & W. R. Co. v. Estill, 147 U. S. 608, 37 L. ed. 301, 13 Sup. Ct. Rep. 444—Goldey v. Morning News, 156 U. S. 522, 39 L. ed. 518, 15 Sup. Ct. Rep. 559—Barrow S. S. Co. v. Kane, 170 U. S. 108, 42 L. ed. 967, 18 Sup. Ct. Rep. 526—Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 613, 43 L. ed. 572, 19 Sup. Ct. Rep. 308—Fonda v. British-American Assur. Co. 6 Cent. L. J. 306, Fed. Cas. No. 4,904—Pomeroy v. New York & N. H. R. Co. 4 Blatchf. 122, Fed. Cas. No. 11,261—Stillwell v. Empire F. Ins. Co. 4 Cent. L. J. 463, Fed. Cas. No. 13,449—Williams v. Empire Transp. Co. 3 Bann. & Ard. 537, Fed. Cas. No. 17,720—Hayden v. Androscoggin Mills, 1 Fed. 95—Runkle v. Lamar Ins. Co. 2 Fed. 12—Merchants' Mfg. Co. v. Grand Trunk R. Co. 21 Blatchf. 111, 18 Fed. 359—Boston Electric Co. v. Electric Gas Lighting Co. 23 Fed. 839—United States v. American Bell Teleph. Co. 29 Fed. 34—Zambrino v. Galveston, H. & S. A. R. Co. 38 Fed. 452—Consolidated Store-Service Co. v. Lamson Consolidated Store-Service Co. 41 Fed. 835—Chapman v. Alabama G. S. R. Co. 59 Fed. 371—Dinzy v. Illinois C. R. Co. 61 Fed. 53—Youmans v. Minnesota Title Ins. & T. Co. 67 Fed. 284—United States Graphite Co. v. Pacific Graphite Co. 68 Fed. 444—Mooney v. Buford & G. Mfg. Co. 18 C. C. A. 430, 34 U. S. App. 581, 72 Fed. 41—Sparks v. National Masonic Accl. Asso. 73 Fed. 286—McCord Lumber Co. v. Doyle, 38 C. C. A. 36, 97 Fed. 23—Denver & R. G. R. Co. v. Roller, 49 L.R.A. 80, 41 C. C. A. 26, 100 Fed. 742—United States v. S. P. Shotter Co. 110 Fed. 2—Frawley v. Pennsylvania Casualty Co. 124 Fed. 262—Smith v. Empire State-Idaho Min. & Development Co. 127 Fed. 464—Equitable Life Assur. Soc. v. Vogel, 76 Ala. 448, 52 Am. Rep. 344—Wright v. Lee, 2 S. D. 609, 51 N. W. 706—Caldwell v. Armour & Co. 1 Penn. (Del.) 549, 43 Atl. 517—Pennsylvania Co. v. Sloan, 1 Ill. App. 373—Mutual Reserve Fund Life Asso. v. Boyer, 62 Kan. 34, 50 L.R.A. 539, 61 Pac. 387—German Ins. Co. v. Hall, 1 Kan. App. 46, 41 Pac. 69—Wilson v. Martin-Wilson Automatic Fire Alarm Co. 149 Mass. 27, 20 N. E. 318—Wilson v. Martin-Wilson Automatic Fire Alarm Co. 151 Mass. 527, 8 L.R.A. 313, 24 N. E. 784—Reyer v. Odd Fellows' Fraternal Accl. Asso. 157 Mass. 372, 34 Am. St. Rep. 288, 32 N. E. 469—Aldrich v. E. W. Blatchford & Co. 175 Mass. 371, 56 N. E. 700—Smith v. Mutual L. Ins. Co. 14 Allen, 340—McNichol v. United States Mercantile Reporting Agency, 74 Mo. 473—Pringle v. Woolworth, 90 N. Y. 509—Merchants' Mfg. Co. v. Grand Trunk R. Co. 63 How. Pr. 461—Barnett v. Chicago & L. H. R. Co. 4 Hun, 116—Fisher v. Traders' Mut. L. Ins. Co. 136 N. C. 223, 48 S. E. 667—New York L. Ins. Co. v. Best, 23 Ohio St. 113—Baltimore & O. R. Co. v. Cary, 28 Ohio St. 223—Albright v. Empire Transp. Co. 35 Phila. Leg. Int. 440—Schollenberger v. 45 Foreign Ins. Cos. 5 W. N. C. 408—Abbeville Electric Light & P. Co. v. Western Electrical Supply Co. 61 S. C. 372, 55 L.R.A. 150, 85 Am. St. Rep. 890, 39 S. E. 559—Connecticut Mut. L. Ins. Co. v. Spratley, 99 Tenn. 327, 44 L.R.A. 444, 42 S. W. 145—Osborne v. Shawmut Ins. Co. 51 Vt. 282—Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. 17 W. Va. 878.

979. A judgment against a corporation.

which by the laws of the state in which it is rendered is binding on the stockholders, must be given by a court of another state the same conclusive effect against a stockholder who is sued therein; and the only defenses which he can make against it are those which he could make in the courts of the state in which it is rendered. Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. Rep. 506, 44: 619

Cited in Ward v. Joslin, 186 U. S. 152, 46 L. ed. 1099, 22 Sup. Ct. Rep. 807—Hale v. Allinson, 188 U. S. 67, 47 L. ed. 388, 23 Sup. Ct. Rep. 244—Finney v. Guy, 189 U. S. 345, 47 L. ed. 845, 23 Sup. Ct. Rep. 558—Haddock v. Haddock, 201 U. S. 632, 50 L. ed. 896, 26 Sup. Ct. Rep. 525—Hale v. Allinson, 102 Fed. 792—Ward v. Joslin, 44 C. C. A. 461, 105 Fed. 228—Hale v. Allinson, 45 C. C. A. 271, 106 Fed. 259—Ball v. Warrington, 47 C. C. A. 448, 108 Fed. 473—Hale v. Coffin, 114 Fed. 571—American Nat. Bank v. Supplee, 52 C. C. A. 294, 115 Ind. 658—Martin v. Wilson, 58 C. C. A. 185, 120 Fed. 206—Burget v. Robinson, 59 C. C. A. 266, 123 Fed. 268—Anglo-American Land, Mortg. & Agency Co. v. Lombard, 68 C. C. A. 97, 132 Fed. 729—People's Nat. Bank v. Saville, 25 App. D. C. 143—Childs v. Cleaves, 95 Me. 508, 50 Atl. 714—Broadway Nat. Bank v. Baker, 176 Mass. 296, 57 N. E. 603—Clark v. Knowles, 187 Mass. 40, 72 N. E. 352—Putman v. Misochl, 189 Mass. 423, 109 Am. St. Rep. 648, 75 N. E. 956—Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 136, 83 N. W. 36—Johnson v. Stebbins-Thompson Realty Co. 177 Mo. 602, 76 S. W. 1021—Commonwealth Mut. F. Ins. Co. v. Hayden Bros. 61 Neb. 457, 85 N. W. 443—Tompkins v. Blakey, 70 N. H. 585, 49 Atl. 111—First Nat. Bank v. Darlington, 25 Pa. Super. Ct. 443—Miller v. Smith, 26 R. I. 150, 66 L.R.A. 476, 58 Atl. 634—Childs v. Blethen, 40 Wash. 351, 82 Pac. 405.

980. Sustaining a defense of the statute of limitations to an action for assessments upon stock ordered by a court in another state does not deny to the judicial proceeding in the other state the full faith and credit to which it was entitled, as such order for assessments does not constitute a judgment against the shareholders. Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. Rep. 810, 40: 986

Cited in Warner v. Delbridge & C. Co. 110 Mich. 593, 34 L.R.A. 702, 64 Am. St. Rep. 367, 68 N. W. 283.

981. The decision of a state court with reference to the effect which the charter and by-laws of a foreign building and loan association and the statutes of the state of its incorporation, together with the decisions of the courts of that state thereon, have upon the absolute promise of such association to mature its shares in a specified time, can involve no denial of the full faith and credit which, by U. S. Const. art. 4, § 1, must be given by the courts of each state to the public acts, records and judicial proceedings of other states. Eastern Bldg. & L. Asso. v. Williamson, 189 U. S. 122, 23 Sup. Ct. Rep. 527, 47: 735

Cited in Finney v. Guy, 189 U. S. 342, 47 L. ed. 844, 23 Sup. Ct. Rep. 558—Hendryx v. Evans, 120 Iowa, 319, 94 N. W. 853—Mar-

shall v. Columbia & E. C. Electric Street
R. Co. 73 S. C. 253, 53 S. E. 417.

982. Full faith and credit are not denied an Illinois judgment by N. Y. Code Civ. Proc. § 1780, which, as construed by the New York courts, precludes the maintenance of an action on such judgment by one foreign corporation against another, because it is not upon a cause of action which arose within the state. *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 373, 24 Sup. Ct. Rep. 92, 48: 225

— Editorial note.

[Assessment by court of other state. 34 L.R.A. 694.]

Divorce.

Effect of Decree as Freeing Both Parties, see *supra*, 570a.

Enforcement of Decree, see *infra*, 1028, 1029, 1034.

Jurisdiction of Divorce Suit Generally, see Divorce and Separation, II.

Property Rights of Wife under Divorce Decree, see Divorce and Separation, 19.

See also *supra*, 276, 927, 951; Conflict of Laws, 95.

983. The parties to a cause for a divorce and for alimony are bound by a decree for both, which has been given by a state court having jurisdiction of the subject-matter and parties. Such a judgment or decree will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given. For such a purpose, the equity courts both of the United States and of the States have jurisdiction. *Barber v. Barber*, 21 How. 582, 16: 228
Distinguished in *Barrett v. Failing*, 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. Rep. 598.

Cited in *Cheever v. Wilson*, 9 Wall. 124, 19 L. ed. 608—*Audubon v. Shufeldt*, 181 U. S. 578, 45 L. ed. 1010, 21 Sup. Ct. Rep. 735—*Wetmore v. Markoe*, 196 U. S. 73, 49 L. ed. 392, 25 Sup. Ct. Rep. 172—*Bennett v. Bennett*, *Deady*, 306, Fed. Cas. No. 1,318—*De Brimont v. Penniman*, 10 Blatchf. 440, Fed. Cas. No. 3,715—*Putnam v. New Albany*, 4 Biss. 370, Fed. Cas. No. 11,481—*Hekking v. Pfaff*, 82 Fed. 404—*Israel v. Israel*, 130 Fed. 240—*Glynn v. Glynn*, 8 N. D. 240, 77 N. W. 594—*Slack v. Perrine*, 9 App. D. C. 153—*Droop v. Ridenour*, 11 App. D. C. 239—*Alexander v. Alexander*, 13 App. D. C. 352, 45 L.R.A. 812—*Gibson v. Patterson*, 75 Ga. 553—*Ray v. Ray*, 1 Idaho, 574—*Dow v. Blake*, 148 Ill. 87, 39 Am. St. Rep. 156, 35 N. E. 761—*Leyland v. Leyland*, 186 Mass. 422, 71 N. E. 794—*Brisbane v. Dobson*, 50 Mo. App. 174—*Bullock v. Bullock*, 51 N. J. Eq. 447, 27 Atl. 435—*Bennett v. Bennett*, 63 N. J. Eq. 308, 49 Atl. 501—*Lynde v. Lynde*, 41 App. Div. 286, 58 N. Y. Supp. 567—*France v. France*, 79 App. Div. 295, 79 N. Y. Supp. 579—*Wood v. Wood*, 7 Misc. 580, 28 N. Y. Supp. 154—*McGlynn v. McGlynn*, 37 Misc. 14, 74 N. Y. Supp. 744—*Lynde v. Lynde*, 162 N. Y. 418, 48 L.R.A. 684, 76 Am. St. Rep. 332, 58 N. E. 979—*Arrington v. Arrington*, 127 N. C. 195, 52 L.R.A. 204, 80 Am. St. Rep. 791, 37 S. E. 212—*Conrad v. Everich*, 50 Ohio St. 481, 40 Am. St. Rep. 679, 35 N. E. 58—*Wag-*

ner v. Wagner (*Wagener v. Latham*) 26 R. I. 27, 65 L.R.A. 816, 57 Atl. 1058—*Trowbridge v. Spinning*, 23 Wash. 63, 54 L.R.A. 210, 83 Am. St. Rep. 806, 62 Pac. 125—*Stewart v. Stewart*, 27 W. Va. 175—*Barker v. Dayton*, 28 Wls. 379—*Kempster v. Evans*, 81 Wis. 252, 15 L.R.A. 393, 51 N. W. 327—*Kunze v. Kunze*, 94 Wls. 58, 59 Am. St. Rep. 857, 68 N. W. 391.

984. A decree of divorce obtained by a husband in a state court, upon notice to his absent wife by publication insufficient to support the jurisdiction to grant the divorce under the statutes of such state, is invalid. *Cheely v. Clayton*, 110 U. S. 701, 4 Sup. Ct. Rep. 328, 28: 298
Distinguished in *Williams v. Williams*, 130 N. Y. 198, 14 L.R.A. 222, 27 Am. St. Rep. 517, 29 N. E. 98.

Cited in *Atherton v. Atherton*, 181 U. S. 164, 45 L. ed. 800, 21 Sup. Ct. Rep. 544—*Sloane v. Martin*, 28 L.R.A. 356—*Peaslee v. Peaslee*, 147 Mass. 180, 17 N. E. 506—*Wallace v. Wallace*, 65 N. J. Eq. 363, 54 Atl. 433—*Sloane v. Martin*, 77 Hun, 283, 24 N. Y. Supp. 661—*Hull v. Hull*, 23 Pa. Co. Ct. 77—*Com. v. Stevens*, 25 Pa. Co. Ct. 73.

985. A decree of divorce may be impeached collaterally in the courts of another state by proof that the court granting it had no jurisdiction because of the plaintiff's want of domicile, even when the record purports to show such jurisdiction and the appearance of the other party. *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 125, 24 Sup. Ct. Rep. 221, 48: 373
Cited in *Rogers v. Alabama*, 192 U. S. 231, 48 L. ed. 419, 24 Sup. Ct. Rep. 257—*Burt v. Smith*, 203 U. S. 135, 51 L. ed. 126, 27 Sup. Ct. Rep. 37—*German Sav. & L. Soc. v. Tull*, 69 C. C. A. 8, 136 Fed. 8—*Ingram v. Ingram*, 143 Ala. 130, 111 Am. St. Rep. 31, 42 So. 24—*Watkinson v. Watkinson*, 67 N. J. Eq. 146, 58 Atl. 384—*Watkinson v. Watkinson*, 68 N. J. Eq. 638, 69 L.R.A. 400, 60 Atl. 931.

986. A decree in favor of the wife in a suit for her separate maintenance under Ill. Laws 1877, p. 115, authorizing such relief where the wife is living separate and apart from her husband without her fault, is conclusive upon the husband in the courts of California on the issue whether the same separation constitutes wilful desertion on her part. *Harding v. Harding*, 198 U. S. 317, 25 Sup. Ct. Rep. 679, 49: 1066
Cited in *Haddock v. Haddock*, 201 U. S. 567, 50 L. ed. 868, 26 Sup. Ct. Rep. 525—*Israel v. Israel*, 148 Fed. 580—*Hardin v. Harding*, 148 Cal. 398, 83 Pac. 434.

987. The full faith and credit clause of the Federal Constitution is not violated by the refusal of the Massachusetts courts, acting in accordance with Mass. Pub. Stat. chap. 146, § 41, to give effect to a decree of divorce rendered by a court of another state in a suit instituted by one who temporarily left the state of Massachusetts, where he was domiciled, for the purpose of obtaining a divorce for a cause which occurred in that state while the parties resided there, but which was not a ground for divorce in

that state. *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. Rep. 237, 47: 366
Cited in South Dakota v. North Carolina, 192 U. S. 340, 48 L. ed. 470, 24 Sup. Ct. Rep. 269—*National Exch. Bank v. Wiley*, 195 U. S. 270, 49 L. ed. 190, 25 Sup. Ct. Rep. 70—*United States v. Ju Toy*, 198 U. S. 276, 49 L. ed. 1050, 25 Sup. Ct. Rep. 644—*Percival v. Percival*, 106 App. Div. 113, 94 N. Y. Supp. 909.

— Editorial note.

[Effect, in third state, of decree, upholding a foreign divorce. 2 L.R.A. (N.S.) 325.]

Executors and administrators.

Judgment of Foreign Country, see supra, 918a.

Judgment Against Administrator as Evidence in Action in Other State, see Evidence, 2493.

See also Limitation of Actions, 574.

988. An adjudication of the fact of the domicile of a deceased person, made in the grant of letters of administration, has no probative force upon the question of domicile in a contest in a court outside the state in proceedings for the administration of assets within that jurisdiction, where the adjudication was made without any contest *inter partes*, but in a proceeding *in rem* on an application under Ga. Code 1895, §§ 3393, 3394, under which the statutory notice is given by publication, and is not directed against named individuals, and does not have for its object the obtaining of specific relief against anyone, but in general and for the purpose of warning all persons of the proposal to determine the question of appointing a legal representative. *Overby v. Gordon*, 177 U. S. 214, 20 Sup. Ct. Rep. 603, 44: 741

Cited in Scripps v. Wayne Probate Judge, 131 Mich. 270, 100 Am. St. Rep. 614, 90 N. W. 1061—*Re Barandon*, 41 Misc. 381, 84 N. Y. Supp. 937—*Re Neubert*, 58 S. C. 475, 36 S. E. 908—*Maldaner v. Beurhaus*, 108 Wis. 83, 84 N. W. 25—*Jordan v. Chicago & N. W. R. Co.* 125 Wis. 589, 1 L.R.A. (N.S.) 889, 110 Am. St. Rep. 865, 104 N. W. 803—*Re Box*, 127 Wis. 270, 106 N. W. 1063.

989. A decree of the circuit court of the United States that an administrator appointed in another state, but who appears and defends the suit, is indebted to plaintiffs in a certain amount payable from the assets of the estate, where a bill of review by the administrator is dismissed for want of equity, binds the administrator and the assets in the state of his appointment, without further action against him or the estate; and the plaintiffs' claim is not barred by the settlement of the estate and discharge of the administrator in the state of his appointment, in proceedings of which plaintiffs received no notice and to which they did not become parties. *Lawrence v. Nelson*, 143 U. S. 215, 12 Sup. Ct. Rep. 440, 36: 130

990. A judgment of a state court in favor

of a creditor against an executrix, for the recovery of moneys against the estate, the parties being citizens of the state of the testator's domicile and the court having jurisdiction of the parties and the subject-matter, is conclusive against the executrix in another state in which she afterwards takes out letters testamentary, in a suit between the same parties for the same purpose. *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. Rep. 960, 35: 640
Cited in Ingersoll v. Coram, 127 Fed. 433.

991. A judgment in a state court against an executrix, declaring a deed from the testator to her of land in another state void as to a debt due from the testator to the plaintiff, but not directing a conveyance of the land, does not annul the title to the land, and it is not binding upon the courts of the other state so far as to compel them to surrender jurisdiction over the land, which is exclusively subject to the laws and jurisdiction of the courts of the latter state. *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. Rep. 960, 35: 640

992. A judgment against an executor in one state is admissible in evidence in an action against an executor of the same estate in another state to bar the statute of limitations. *Goodall v. Tucker*, 13 How. 469, 14: 227

993. Executors in different states are in privity as regards the creditors of the testator; but a judgment against an executor obtained in one state is not conclusive against an executor of the same estate in another state. *Hill v. Tucker*, 13 How. 458, 14: 223

Distinguished in Conolly v. Wells, 33 Fed. 211. *Cited in Mellus v. Thompson*, 1 Cliff. 181, Fed. Cas. No. 9,405—*Heydenfeldt v. Towns*, 27 Ala. 430—*Turley v. Dreyfus*, 33 La. Ann. 888—*Low v. Bartlett*, 8 Allen, 264—*Creighton v. Murphy*, 8 Neb. 356, 1 N. W. 138—*Taylor v. Barron*, 35 N. H. 498—*Hopper v. Hopper*, 53 Hun, 397, 6 N. Y. Supp. 271—*Tyler v. Thompson*, 44 Tex. 499, 23 Am. Rep. 600.

994. An administrator under grant of administration in one state stands in no relation of privity to another administrator in another state. Each is privy to the intestate, and would be estopped by a judgment against him, but they have no privity with each other, in law or in estate. *Stacy v. Thrasher use of Sellers*, 6 How. 44, 12: 337
Distinguished in Heydenfeldt v. Towns, 27 Ala. 430.

Cited in Hill v. Tucker, 13 How. 467, 14 L. ed. 226—*McLean v. Meek*, 18 How. 18, 15 L. ed. 278—*Turner v. Risor*, 54 Ark. 36, 15 S. W. 13—*Hummel v. First Nat. Bank*, 2 Colo. App. 581, 32 Pac. 72—*McGarvey v. Darnall*, 134 Ill. 370, 10 L.R.A. 862, 25 N. E. 1006—*Taylor v. Barron*, 35 N. H. 498—*Leonard v. Putnam*, 51 N. H. 253, 12 Am. Rep. 106.

995. A judgment against an administrator in one state is no evidence of debt, in a subsequent suit by the same plaintiff in another state, either against an administrator

(whether the same or a different person) appointed there or against any other person having assets of the deceased. *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. Rep. 525, 35: 112
Distinguished in *Lawrence v. Nelson*, 143 U. S. 222, 36 L. ed. 134, 12 Sup. Ct. Rep. 440.
Cited in *Reynolds v. Stockton*, 140 U. S. 272, 35 L. ed. 470, 11 Sup. Ct. Rep. 773—*Ingersoll v. Coram*, 127 Fed. 433—*Johnston v. McKinnon*, 129 Ala. 226, 29 So. 696—*Johnson v. Johnson*, 63 Hun. 4, 17 N. Y. Supp. 570.

996. A judgment obtained against an administrator in one state will not support an action of debt against another administrator of the same intestate appointed in another state, and is not even prima facie evidence; there being no such privity as to require full faith and credit to be given to the prior foreign judgment, although there is a common liability to pay a debt. *Stacy v. Thrasher use of Sellers*, 6 How. 44,

12: 337
Distinguished in *Conolly v. Wells*, 33 Fed. 211.
Cited in *Borer v. Chapman*, 119 U. S. 600, 30 L. ed. 537, 7 Sup. Ct. Rep. 342—*Lawrence v. Nelson*, 143 U. S. 222, 36 L. ed. 134, 12 Sup. Ct. Rep. 440—*Dent v. Ashley*, *Hempst.* 55, Fed. Cas. No. 3,809a—*Ingersoll v. Coram*, 127 Fed. 433—*Johnston v. McKinnon*, 129 Ala. 226, 29 So. 696—*Overby v. Gordon*, 13 App. D. C. 416—*McGarvey v. Darnall*, 32 Ill. App. 228—*Slanter v. Chenowith*, 7 Ind. 212—*Creswell v. Slack*, 68 Iowa, 114, 26 N. W. 42—*Newcomb v. Newcomb*, 108 Ky. 598, 51 L. R.A. 424, 57 S. W. 2—*Turley v. Dreyfus*, 33 La. Ann. 887—*Low v. Bartlett*, 8 Allen, 265—*Braithwaite v. Harvey*, 14 Mont. 220, 27 L.R.A. 115, 43 Am. St. Rep. 625, 36 Pac. 38—*Creighton v. Murphy*, 3 Neb. 356, 1 N. W. 138—*Taylor v. Barron*, 35 N. H. 494—*Haynes v. Colvin*, 19 Ohio, 396—*Olney v. Angell*, 5 R. I. 204, 73 Am. Dec. 62—*Cherry v. Speight*, 28 Tex. 516—*Carrigan v. Semple*, 72 Tex. 308, 12 S. W. 178—*Price v. Mace*, 47 Wis. 27, 1 N. W. 836.

997. An account on which a recovery has been had against an administrator in one state remains, notwithstanding such recovery, an open account against an administrator of the same person, in another state, and is governed by the statute of limitations in regard to accounts in the latter state. *McLean v. Meek*, 18 How. 16, 15: 277

— Editorial note.

[Judgments of other state or country against executors, etc. 27 L.R.A. 101.]

Wills; probate.

998. The probate of a will in another state or country is of no validity as affecting the title to lands, nor can it be considered as constructive notice to any person of the devise of the lands mentioned in the will. *McCormick v. Sullivant*, 10 Wheat. 192, 6: 300

Cited in *Robertson v. Pickrell*, 109 U. S. 611, 27 L. ed. 1050, 3 Sup. Ct. Rep. 407—*Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 289, 42 L. ed. 1041, 18 Sup. Ct. Rep. 594—*Readman v. Ferguson*, 13 App. D. C. 71—*Lucas v. Tucker*, 17 Ind. 45—*Evansville Ice*

& Cold Storage Co. v. Winsor, 148 Ind. 688, 48 N. E. 592—*Cabanne v. Skinker*, 56 Mo. 367—*Emmons v. Gordon*, 140 Mo. 500, 62 Am. St. Rep. 734, 41 S. W. 998—*Fenderson v. Missouri Tie & Timber Co.* 104 Mo. App. 295, 78 S. W. 819—*Nelson v. Potter*, 50 N. J. L. 326, 15 Atl. 375—*Re Clayson*, 24 Or. 545, 34 Pac. 858.

999. The probate of a will of real property in one state is of no force in establishing the validity of the will as to real property in another state. That must be determined by the laws of the state where the property is situated. *McCormick v. Sullivant*, 10 Wheat. 192, 6: 300

Robertson v. Pickrell, 109 U. S. 603, 3 Sup. Ct. Rep. 407, 27: 1049

Offed in *Langdon v. Sherwood*, 124 U. S. 82, 31 L. ed. 346, 8 Sup. Ct. Rep. 429—*Arndt v. Griggs*, 134 U. S. 821, 33 L. ed. 920, 10 Sup. Ct. Rep. 557—*Wilson v. Pierce*, 15 Month. L. Rep. 145, Fed. Cas. No. 17,826—*McClaskey v. Barr*, 47 Fed. 169—*Billings v. Aspen Min. & Smelting Co.* 2 C. C. A. 258, 10 U. S. App. 1, 51 Fed. 344—*Leavens v. Butler*, 8 Port. (Ala.) 401—*Apperson v. Bolton*, 29 Ark. 427—*Chappell v. Jardine*, 51 Conn. 66—*Harrison v. Weatherby*, 180 Ill. 435, 54 N. E. 237—*Keith v. Keith*, 97 Mo. 228, 10 S. W. 597—*Emmons v. Gordon*, 140 Mo. 499, 62 Am. St. Rep. 734, 41 S. W. 998—*Miller v. Miller*, 18 Hun. 514—*La Selle v. Woolery*, 14 Wash. 71, 32 L. R.A. 75, 53 Am. St. Rep. 855, 44 Pac. 115.

1000. A duly certified copy of a will of land, and the probate thereof in the orphans' court of Maryland, are not rendered evidence of a devise of lands in Tennessee, in an action of ejectment in the latter state, by the full faith and credit clause of the Federal Constitution, where the laws of Maryland do not give the probate of a will any such effect. *Darby v. Mayer*, 10 Wheat. 465, 6: 367

1001. A decision by the courts of the domicile of a testatrix, that her will works a conversion into personalty of all her real property, wherever situated, is not conclusive upon the courts of a sister state in respect to the effect of the will upon the title to real property in that state. *Clarke v. Clarke*, 178 U. S. 186, 20 Sup. Ct. Rep. 873, 44: 1028

1002. The probate of a will in North Carolina established that the will was executed according to the law of that state, but did not establish that the will was executed according to the law of South Carolina, nor that it was a good execution of a power of appointment given by the will of a citizen of South Carolina. *Blount v. Walker*, 134 U. S. 607, 10 Sup. Ct. Rep. 606, 33: 1036

— Editorial notes.

[Effect of probate of will in another state. 48 L.R.A. 130.]

Conclusiveness of foreign probate as affecting real property. 6 L.R.A.(N.S.) 617.]

Receivers.

1003. Neither a receiver of an estate appointed by a court of one state which has primary jurisdiction, nor the estate in his hands, is bound by a judgment in a suit in

another state in reference to the estate to which he is not a party and is not represented. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35: 464

Interlocutory decree.

See also *supra*, 962.

1004. An interlocutory decree rendered in one state, fixing the provisional indebtedness of a firm to the creditor bringing the action, and the individual liability of a particular member of the firm, does not prevent a re-examination of the question of his liability in a subsequent suit, brought by such creditor in another state, against the heirs of such partner, after his death, to reach real property vesting in them. *Board of Public Works v. Columbia College*, 17 Wall. 521, 21: 687

Cited in Johnson v. Culbertson, 79 Fed. 5—*Fairbanks, M. & Co. v. Welshans*, 55 Neb. 380, 75 N. W. 865.

3. Effect Accorded to Generally.

Scope of Full Faith and Credit Clause, see *supra*, 956-968.

Denial of Full Faith and Credit, see *supra*, 969-973.

Effect Accorded to the State Judgment in Federal Court, see *infra*, VII.

Effect of Federal Judgment in State Court, see *infra*, 1072-1075.

Inefficacy of Decree Concerning Foreign Lands to Pass Title thereto, see *Courts*, 70-73.

See also *supra*, 941.

1005. The judgment of a foreign state is *prima facie* only, and, but for constitutional and legislative provisions, the judgment of a state, when sued upon in another state, would have no greater effect. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139 40: 95

1006. A judgment of a state court must, under U. S. Const. art. 4, § 1, and the act of Congress of May 26, 1790, be given the same effect in every other court as it receives in the court where rendered. *Mills v. Duryee*, 7 Cranch, 481, 3:411

Cited in Hampton v. McConnel, 3 Wheat. 235, 4 L. ed. 379—*Christmas v. Russell*, 5 Wall. 802, 18 L. ed. 478—*Green v. Van Buskirk*, 7 Wall. 148, 19 L. ed. 112—*Cheever v. Wilson*, 9 Wall. 123, 9 L. ed. 608—*Crape v. Kelly*, 16 Wall. 619, 21 L. ed. 434—*Thompson v. Whitman*, 18 Wall. 462, 21 L. ed. 899—*Mutual L. Ins. Co. v. Harris*, 97 U. S. 336, 24 L. ed. 962—*Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 622, 30 L. ed. 522, 7 Sup. Ct. Rep. 398—*Bryar v. Campbell*, 177 U. S. 654, 44 L. ed. 928, 20 Sup. Ct. Rep. 794—*Barras v. Bidwell*, 3 Woods, 7 Fed. Cas. No. 1,039—*Burnham v. Webster*, 1 Woodb. & M. 175, Fed. Cas. No. 2,179—*Burt v. Delano*, 4 Cliff. 616, Fed. Cas. No. 2,211—*Lincoln v. Tower*, 2 McLean, 478, Fed. Cas. No. 8,355—*Slack v. Walcott*, 3 Mason, 519, Fed. Cas. No. 12,932—*Taylor v. Carpenter*, 2 Woodb. & M. 4, Fed. Cas.

No. 13,785—*Tenney v. Townsend*, 9 Blatchf. 277, Fed. Cas. No. 13,832—*Warren Mfg. Co. v. Aetna Ins. Co.* 2 Paine, 508, Fed. Cas. No. 17,206—*Westerwelt v. Lewis*, 2 McLean, 513, Fed. Cas. No. 17,446—*Moch v. Virginia F. & M. Ins. Co.* 4 Hughes, 119, 10 Fed. 760—*The City of New Bedford*, 20 Fed. 62—*Sharon v. Hill*, 26 Fed. 346—*Merritt v. American Steel-Barge Co.* 21 C. C. A. 529, 40 U. S. App. 127, 75 Fed. 818—*Alkire Grocery Co. v. Richesin*, 91 Fed. 83—*Bidwell v. Huff*, 103 Fed. 376—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 465, 111 Fed. 571—*Keyser v. Lowell*, 54 C. C. A. 576, 117 Fed. 402—*Wyman v. Campbell*, 6 Port. (Ala.) 237, 31 Am. Dec. 677—*May v. Jameson*, 11 Ark. 373—*Holcomb v. Phelps*, 16 Conn. 132—*Bank of North America v. Wheeler*, 28 Conn. 439, 73 Am. Dec. 683—*Sammis v. Wightman*, 31 Fla. 25, 12 So. 526—*Latine v. Clements*, 3 Ga. 429—*Dearing v. Bank of Charleston*, 5 Ga. 512, 48 Am. Dec. 300—*Tucker v. Harris*, 13 Ga. 10, 58 Am. Dec. 488—*Joice v. Scales*, 18 Ga. 727—*McCauley v. Hargroves*, 48 Ga. 52, 15 Am. Rep. 680—*McJilton v. Love*, 13 Ill. 493, 54 Am. Dec. 440—*Dunbar v. Hallowell*, 34 Ill. 169—*Ambler v. Whipple*, 139 Ill. 324, 32 Am. St. Rep. 202, 28 N. E. 841—*Olson v. Mackolite Fire Proofing Co.* 116 Ill. App. 575—*Jackson v. Baxter*, 1 Ind. 44—*American Mut. L. Ins. Co. v. Mason*, 159 Ind. 16, 64 N. E. 525—*Barbee v. Shannon*, 1 Ind. Terr. 208, 40 S. W. 584—*Melhop v. Doane*, 31 Iowa, 400, 7 Am. Rep. 147—*Mastin v. Gray*, 19 Kan. 464, 27 Am. Rep. 149—*Dudley v. Lindsey*, 9 B. Mon. 488, 50 Am. Dec. 522—*Fletcher v. Ferrel*, 9 Dana, 377, 35 Am. Dec. 143—*Mackee v. Cairnes*, 2 Mart. N. S. 601—*West Feliciana R. Co. v. Thornton*, 12 La. Ann. 738, 68 Am. Dec. 778—*Scott v. Bogart*, 14 La. Ann. 260—*Harding v. Alden*, 9 Me. 149, 23 Am. Dec. 549—*McKim v. Odom*, 12 Me. 96—*Whiting v. Burger*, 78 Me. 294, 4 Atl. 694—*Mutual Safety Ins. Co. v. Cohen*, 3 Gill, 477, 43 Am. Dec. 341—*Bank of United States v. Merchants Bank*, 7 Gill, 432—*Wernwag v. Pawling*, 5 Gill & J. 507, 25 Am. Dec. 317—*Cole v. Flitcraft*, 47 Md. 320—*Haggerty v. Amory*, 7 Allen, 459—*Harrington v. Harrington*, 154 Mass. 519, 28 N. E. 903—*Willcox v. Kassick*, 2 Mich. 168—*Bonesteel v. Todd*, 9 Mich. 376, 80 Am. Dec. 90—*People v. Dawell*, 25 Mich. 269, 12 Am. Rep. 260—*Mutual F. Ins. Co. v. Phoenix Furniture Co.* 108 Mich. 172, 34 L.R.A. 696, 62 Am. St. Rep. 693, 66 N. W. 1093—*Robinson v. Prescott*, 4 N. H. 453—*Dunlap v. Waldo*, 6 N. H. 453—*Emery v. Berry*, 28 N. H. 486, 61 Am. Dec. 622—*Hollister v. Abbott*, 31 N. H. 448, 64 Am. Dec. 342—*Leith v. Leith*, 39 N. H. 41—*Rogers v. Odell*, 39 N. H. 458—*Wilbur v. Abbot*, 60 N. H. 51—*Crippen, L. & Co. v. Loughton*, 69 N. H. 548, 46 L.R.A. 469, 76 Am. St. Rep. 192, 44 Atl. 538—*Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 230—*Everett v. Everett*, 75 App. Div. 373, 78 N. Y. Supp. 193—*Noyes v. Butler*, 6 Barb. 616—*Wyman v. Mitchell*, 1 Cow. 319—*Wheeler v. Raymond*, 8 Cow. 314—*Morton v. Naylor*, 1 Hill, L. 440—*Besley v. Palmer*, 1 Hill, 484—*Green v. Van Buskirk*, 33 How. Pr. 19—*Green v. Van Buskirk*, 38 How. Pr. 57—*Jones v. Jones*, 36 Hun, 420—*Andrews v. Montgomery*, 19 Johns. 163, 10 Am. Dec. 213—*Plant v. Harrison*, 36 Misc. 677, 74 N. Y. Supp. 411—*Garvey v. Horgan*, 38 Misc. 167, 77 N. Y. Supp. 290—*Cochran v. Fitch*, 1 Sandf. Ch. 146—*Thomas v. Robinson*, 3 Wend. 269—*Starbuck v. Murray*, 5 Wend. 155, 21 Am. Dec. 172—*Shumway v. Stillman*, 6 Wend. 450, 15 Am. Dec. 374—

- Mervin v. Kumbel, 23 Wend. 303—Suydam v. Marker, 18 N. Y. 471, 75 Am. Dec. 234—Kinnler v. Kinnler, 45 N. Y. 541, 6 Am. Rep. 132—Ferguson v. Crawford, 70 N. Y. 261, 26 Am. Rep. 589—Hunt v. Hunt, 72 N. Y. 225, 28 Am. Rep. 129—Van Cleaf v. Burns, 133 N. Y. 542, 15 L.R.A. 543, 30 N. E. 661—Gray v. Richmond Bicycle Co. 167 N. Y. 355, 82 Am. St. Rep. 720, 60 N. E. 663—Miller v. Leach, 95 N. C. 231—Morris v. Burgess, 116 N. C. 42, 21 S. E. 27—Arrington v. Arrington, 127 N. C. 194, 52 L.R.A. 203, 80 Am. St. Rep. 791, 37 N. E. 212—Silver Lake Bank v. Harding, 5 Ohio, 547—Goodrich v. Jenkins, 6 Ohio, 44—Burnley v. Stevenson, 24 Ohio St. 479, 15 Am. Rep. 621—Hopkins v. Ludlow, 5 Clark (Pa.) 143, 1 Phila. 272—Schell v. Stetson, 12 Phila. 187, 34 Phila. Leg. Int. 114—Baxley v. Linah, 16 Pa. 248, 55 Am. Dec. 494—Ohio v. Hinchman, 27 Pa. 483—Rogers v. Burns, 27 Pa. 526—Wetherill v. Stillman, 65 Pa. 115—Price v. Schaeffer, 161 Pa. 534, 25 L.R.A. 700, 29 Atl. 279—Rathbone v. Terry, 1 R. I. 77—Paine v. Schenectady Ins. Co. 11 R. I. 413—McCreery v. Davis, 44 S. C. 211, 28 L.R.A. 661, 51 Am. St. Rep. 794, 22 S. E. 178—Dickson v. Dickson, 1 Yerg. 114, 24 Am. Dec. 444—Earthman v. Jones, 2 Yerg. 485—Piedmont & A. L. Ins. Co. v. Ray, 75 Va. 823—Hoxie v. Wright, 2 Vt. 267—Newcomb v. Peck, 17 Vt. 308, 44 Am. Dec. 340—McGillivray v. Avery, 30 Vt. 540—Wood v. Augustins, 70 Vt. 639, 41 Atl. 533—Ritchie v. Carpenter, 2 Wash. 523, 26 Am. St. Rep. 877, 28 Pac. 380—Trowbridge v. Spinning, 23 Wash. 60, 54 L.R.A. 208, 83 Am. St. Rep. 806, 62 Pac. 125—Glichrist v. West Virginia Oil & Oil Land Co. 21 W. Va. 118, 45 Am. Rep. 555—Crumlish v. Central Improv. Co. 38 W. Va. 398, 28 L.R.A. 131, 45 Am. St. Rep. 872, 18 S. E. 456—Rape v. Heaton, 9 Wis. 386, 76 Am. Dec. 289—Jarvis v. Robinson, 21 Wis. 525, 94 Am. Dec. 560—Sanborn v. Perry, 86 Wis. 366, 56 N. W. 387—Anderson v. Chicago Title & T. Co. 101 Wis. 391, 77 N. W. 710.
1007. The Constitution and laws of the United States give a judgment or decree of one state the same legal effect in other states which it has in the state where rendered. Cheever v. Wilson, 9 Wall. 108, 19: 604
- Chew v. Brumagen, 13 Wall. 497, 20: 663
- Limited in Bullock v. Bullock, 51 N. J. Eq. 447, 27 Atl. 435.
- Distinguished in People v. Baker, 76 N. Y. 83, 32 Am. Rep. 274—Com. v. Stevens, 25 Pa. Co. Ct. 72—McCreery v. Davis, 44 S. C. 220, 28 L.R.A. 664, 51 Am. St. Rep. 794, 22 S. E. 178.
- Cited in Cheely v. Clayton, 110 U. S. 705, 28 L. ed. 299, 4 Sup. Ct. Rep. 328—Atherton v. Atherton, 181 U. S. 164, 45 L. ed. 800, 21 Sup. Ct. Rep. 544—Reis v. Lawrence, 63 Cal. 137, 49 Am. Rep. 83—Slack v. Perrine, 9 App. D. C. 153—Alexander v. Alexander, 13 App. D. C. 352, 45 L.R.A. 812—Both v. Roth, 104 Ill. 44, 44 Am. Rep. 81—Van Matre v. Sankey, 148 Ill. 554, 23 L. R.A. 667, 39 Am. St. Rep. 196, 36 N. E. 623—Dunham v. Dunham, 57 Ill. App. 497—Benton's Succession, 106 La. 502, 59 L. R.A. 147, 31 So. 123—Adams v. Adams, 154 Mass. 295, 13 L.R.A. 281, 28 N. E. 260—People v. Dawell, 25 Mich. 261, 12 Am. Rep. 260—Nichols v. Nichols, 25 N. J. Eq. 63—Starbuck v. Starbuck, 62 App. Div. 443, 71 N. Y. Supp. 104—Jones v. Jones, 36 Hun. 421—Munson v. Munson, 60 Hun. 105, 14 N. Y. Supp. 692—Davis v. Davis, 2 Misc. 550, 22 N. Y. Supp. 191—Hoffman v. Hoffman, 46 N. Y. 83, 7 Am. Rep. 299—Hunt v. Hunt, 72 N. Y. 228, 28 Am. Rep. 129—Jones v. Jones, 108 N. Y. 425, 2 Am. St. Rep. 447, 15 N. E. 707—Rigney v. Rigney, 127 N. Y. 413, 24 Am. St. Rep. 462, 28 N. E. 405—Arrington v. Arrington, 127 N. C. 195, 52 L.R.A. 203, 37 N. E. 212—Van Fossen v. State, 37 Ohio St. 319, 41 Am. Rep. 507—McGill v. Deming, 44 Ohio St. 656, 11 N. E. 118—Thomas v. King, 95 Tenn. 70, 31 S. W. 983—Cook v. Cook, 56 Wis. 219, 43 Am. Rep. 706, 14 N. W. 443.
1008. The act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several states does not require that they shall have any greater force and efficacy in other courts than in courts of the states from which they are taken, but only such faith and credit as, by law or usage, they have there. Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. Rep. 407, 27: 1049
- Cited in Overby v. Gordon, 177 U. S. 228, 44 L. ed. 745, 20 Sup. Ct. Rep. 603—Winslow v. Donnelly, 119 Ind. 566, 22 N. E. 12—Plant v. Harrison, 38 Misc. 678, 74 N. Y. Supp. 411—Tarbell v. Walton, 71 Vt. 409, 45 Atl. 748—Frame v. Thormann, 102 Wis. 670, 79 N. W. 39.
1009. No greater effect can be given to any judgment of a court of one state in another state than is given to it in the state where rendered. Board of Public Works v. Columbia College, 17 Wall. 521, 21: 687
- Cited in Robertson v. Pickrell, 109 U. S. 611, 27 L. ed. 1050, 3 Sup. Ct. Rep. 407—Larson v. Hager, 44 Fed. 50—Pickett v. Ferguson, 45 Ark. 192, 55 Am. Rep. 545—Weiner v. Rumble, 11 Colo. 609, 19 Pac. 760—Doe ex dem. Pritchard v. Roe, 2 Penn. (Del.) 557, 47 Atl. 376—Sammis v. Wightman, 31 Fla. 25, 12 So. 526—Middleworth v. McDowell, 47 Ind. 388—Barbee v. Shannon, 1 Ind. Terr. 208, 40 S. W. 584—Chicago, R. I. & P. R. Co. v. Campbell, 5 Kan. App. 424, 49 Pac. 321—Van Norman v. Gordon, 172 Mass. 578, 44 L.R.A. 840, 70 Am. St. Rep. 304, 53 N. E. 267—Nelson v. Potter, 50 N. J. L. 326, 15 Atl. 375—Lindley v. O'Reilly, 50 N. J. L. 643, 1 L.R.A. 82, 7 Am. St. Rep. 802, 15 Atl. 379—Plant v. Harrison, 38 Misc. 678, 74 N. Y. Supp. 411—Rigney v. Rigney, 127 N. Y. 414, 24 Am. St. Rep. 462, 28 N. E. 405—Bowler v. Huston, 30 Gratt. 275, 32 Am. Rep. 673.
1010. The authentication of public acts, records, and judicial proceedings in each state, provided for by the act of Congress, is intended as evidence only of the existence of such public acts, records, and judicial proceedings, and not to give them any greater validity or effect than that which they had in the state from which they were thus accredited. South Ottawa v. Perkins, 94 U. S. 260, 24: 154
1011. The judgment of a state court should have the same credit, validity, and effect in every other court of the United States which it had in the court where it was pronounced; it is conclusive as to the merits of the case, but not as to the juris-

diction of the court. *M'Elmoyle v. Cohen*, 13 Pet. 312, 10: 177

Distinguished in Drake v. Granger, 22 Fla. 353.

Cited in Booth v. Clark, 17 How. 338, 15 L. ed. 171—*Pennoyer v. Neff*, 95 U. S. 729, 24 L. ed. 571—*Embry v. Palmer*, 107 U. S. 10, 27 L. ed. 349, 2 Sup. Ct. Rep. 25—*Hanley v. Donoghue*, 116 U. S. 4, 29 L. ed. 537, 6 Sup. Ct. Rep. 242—*Wisconsin v. Pelican Ins. Co.* 127 U. S. 292, 32 L. ed. 244, 8 Sup. Ct. Rep. 1370—*Simmons v. Saul*, 188 U. S. 459, 34 L. ed. 1063, 11 Sup. Ct. Rep. 369—*Bauserman v. Blunt*, 147 U. S. 8, 652, 37 L. ed. 318, 13 Sup. Ct. Rep. 466—*Balkam v. Woodstock Iron Co.* 154 U. S. 183, 38 L. ed. 957, 14 Sup. Ct. Rep. 1010—*Hilton v. Guyot*, 159 U. S. 183, 40 L. ed. 115, 16 Sup. Ct. Rep. 139—*Amory v. Amory*, 3 Biss. 271, Fed. Cas. No. 834—*Ex parte Kinney*, 3 Hughes, 22, Fed. Cas. No. 7,825—*Taylor v. Carpenter*, 2 Woodb. & M. 4, Fed. Cas. No. 13,785—*United States v. 129 Packages*, 2 Am. L. Reg. N. S. 430, Fed. Cas. No. 15,941—*United States v. 1,500 Bales of Cotton*, Fed. Cas. No. 15,958—*Clafin v. McDermott*, 20 Blatchf. 524, 12 Fed. 376—*Walser v. Sellgman*, 21 Blatchf. 133, 13 Fed. 417—*Butler v. Poole*, 44 Fed. 586—*Merritt v. American Steel-Barge Co.* 21 C. C. A. 528, 40 U. S. App. 127, 75 Fed. 817—*Keyser v. Lowell*, 54 C. C. A. 577, 117 Fed. 403—*Frye-Bruhn Co. v. Meyer*, 58 C. C. A. 531, 121 Fed. 535—*Mills v. Stewart*, 12 Ala. 95—*Howell v. Hair*, 15 Ala. 200—*Turner v. Turner*, 44 Ala. 450—*Litchfield's Appeal*, 28 Conn. 136, 73 Am. Dec. 662—*Bank of North America v. Wheeler*, 28 Conn. 439, 73 Am. Dec. 683—*Fisher v. Fielding*, 67 Conn. 105, 32 L. R.A. 239, 52 Am. St. Rep. 270, 34 Atl. 714—*National Bank v. Furtick*, 2 Marv. (Del.) 61, 44 L.R.A. 121, 69 Am. St. Rep. 99, 42 Atl. 479—*Sammis v. Wightman*, 31 Fla. 25, 12 So. 526—*Matthews v. Poythress*, 4 Ga. 304—*McCauley v. Hargroves*, 48 Ga. 52, 15 Am. Rep. 660—*Davis v. Lane*, 2 Ind. 550—*Scobey v. Gibson*, 17 Ind. 581, 79 Am. Dec. 490—*Perkins v. Rogers*, 35 Ind. 156, 9 Am. Rep. 639—*Melhop v. Doane*, 31 Iowa, 400, 7 Am. Rep. 147—*Longueville v. May*, 115 Iowa, 711, 87 N. W. 432—*McArthur v. Goddin*, 12 Bush, 280—*Geopard v. Garnier*, 12 Bush, 325, 23 Am. Rep. 721—*Sweet v. Brackley*, 53 Me. 347—*Bank of United States v. Merchants Bank*, 7 Gill, 433—*Duvall v. Fearson*, 18 Md. 505—*Gleason v. Dodd*, 4 Met. 337—*Wilcox v. Kassick*, 2 Mich. 171—*Marx v. Kilpatrick*, 25 Neb. 110, 41 N. W. 111—*Leith v. Leith*, 39 N. H. 42—*Rogers v. Odell*, 39 N. H. 458—*Willbur v. Abbot*, 60 N. H. 52—*Metcalf v. Gilmore*, 63 N. H. 190—*Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 237—*Everett v. Everett*, 75 App. Div. 374, 78 N. Y. Supp. 193—*Plant v. Harrison*, 36 Misc. 677, 74 N. Y. Supp. 411—*Suydam v. Barber*, 18 N. Y. 478, 75 Am. Dec. 254—*Rice v. Harbeson*, 63 N. Y. 503—*Lynde v. Lynde*, 162 N. Y. 418, 48 L.R.A. 684, 76 Am. St. Rep. 332, 56 N. E. 979—*Miller v. Leach*, 95 N. C. 231—*Arrington v. Arrington*, 127 N. C. 195, 52 L. R.A. 203, 80 Am. St. Rep. 791, 37 S. E. 212—*Pelton v. Platner*, 13 Ohio, 217, 42 Am. Dec. 197—*Pennywit v. Foote*, 27 Ohio St. 615, 22 Am. Rep. 340—*Sipes v. Whitney*, 30 Ohio St. 74—*Rebstock v. Rebstock*, 2 Pittsb. 126, 7 Pittsb. L. J. 337—*Colt's Estate, 4 Watts & S. 315*—*Wilmer v. Lewis*, 24 Pa. Co. Ct. 617—*Woods v. Appell*, 27 Pa. Co. Ct. 506, 8 Del. Co. Rep. 555—*Thompson v. Whitman*, 31 Phila. Leg. Int. 157—*Baxley v. Linah*, 16 Pa. 248, 55 Am. Dec. 494—*Napier v. Gidiere*, Speers, Eq. 229,

40 Am. Dec. 613—*Hyatt v. McBurney*, 18 S. C. 210—*McCreery v. Davis*, 44 S. C. 211, 28 L.R.A. 661, 51 Am. St. Rep. 794, 22 S. E. 178—*Harper v. Nichol*, 13 Tex. 158—*Cook v. Thornhill*, 13 Tex. 297, 65 Am. Dec. 63—*Babcock v. Marshall*, 21 Tex. Civ. App. 148, 50 S. W. 728—*Sanborn v. Perry*, 86 Wis. 366, 56 N. W. 337.

1011a. A judgment of a state court has the same credit, validity, and effect in every other court within the United States which it had in the state where it was rendered, and whatever pleas would be good to a suit thereon in such state, and no others, can be pleaded in any other court within the United States. *Hampton v. McConnel*, 3 Wheat. 234, 4: 378

Cited in M'Elmoyle v. Cohen, 13 Pet. 326, 10 L. ed. 184—*Christmas v. Russell*, 5 Wall. 302, 18 L. ed. 478—*Thompson v. Whitman*, 18 Wall. 463, 21 L. ed. 900—*Michaels v. Post*, 21 Wall. 428, 22 L. ed. 526—*New Lamp Chimney Co. v. Ansonia Brass & Copper Co.* 91 U. S. 661, 23 L. ed. 339—*United States v. Reese*, 92 U. S. 251, 23 L. ed. 576—*Barras v. Bidwell*, 8 Woods, 7, Fed. Cas. No. 1,039—*Burnham v. Webster*, 1 Woodb. & M. 175, Fed. Cas. No. 2,179—*Jacquette v. Hugunot*, 2 McLean, 129, Fed. Cas. No. 7,169—*Moore v. Paxton*, Hempst. 51, Fed. Cas. No. 9,772a—*Sumner v. Marcy*, 3 Woodb. & M. 117, Fed. Cas. No. 13,609—*Taylor v. Carpenter*, 2 Woodb. & M. 4, Fed. Cas. No. 13,785—*Tenney v. Townsend*, 9 Blatchf. 277, Fed. Cas. No. 13,832—*Warren Mfg. Co. v. Aetna Ins. Co.* 2 Paine 508, Fed. Cas. No. 17,206—*Westerwelt v. Lewis*, 2 McLean, 513, Fed. Cas. No. 17,446—*Whitaker v. Bramson*, 2 Paine, 222, Fed. Cas. No. 17,526—*Moch v. Virginia F. & M. Ins. Co.* 4 Hughes, 119, 10 Fed. 706—*Sharon v. Hill*, 26 Fed. 346—*Amy v. Manning*, 38 Fed. 868—*First Nat. Bank v. Cunningham*, 48 Fed. 514—*Lynde v. Columbus, C. & I. C. R. Co.* 57 Fed. 996—*Hearfield v. Bridges*, 21 C. C. A. 217, 44 U. S. App. 574, 75 Fed. 51—*Turner v. Hamilton*, 88 Fed. 469—*Alkire Grocery Co. v. Richesin*, 91 Fed. 83—*Bidwell v. Huff*, 103 Fed. 376—*Glencove Granite Co. v. City Trust, S. D. & Surety Co.* 55 C. C. A. 214, 118 Fed. 388—*Wyman v. Campbell*, 6 Port. (Ala.) 237, 31 Am. Dec. 677—*Hunt v. Wayfield*, 2 Stew. (Ala.) 129—*Lucas v. Copeland*, 2 Stew. (Ala.) 153—*Lucas v. Bank of Darien*, 2 Stew. (Ala.) 309—*Mills v. Stewart*, 12 Ala. 95—*Aldrich v. Kinney*, 4 Conn. 383, 10 Am. Dec. 151—*Bank of North America v. Wheeler*, 28 Conn. 439, 73 Am. Dec. 683—*Pritchett v. Clark*, 3 Harr. (Del.) 525—*Sammis v. Wightman*, 31 Fla. 25, 12 So. 526—*Latine v. Clements*, 3 Ga. 429—*Davis v. Smith*, 5 Ga. 297, 48 Am. Dec. 279—*Dearing v. Bank of Charleston*, 5 Ga. 512, 48 Am. Dec. 300—*Sharman v. Morton*, 31 Ga. 45—*McCauley v. Hargroves*, 48 Ga. 52, 15 Am. Rep. 660—*Blmeyer v. Dawson*, 5 Ill. 540, 39 Am. Dec. 430—*McJilton v. Love*, 13 Ill. 493, 54 Am. Dec. 440—*Firemen's Ins. Co. v. Thompson*, 155 Ill. 209, 46 Am. St. Rep. 335, 40 N. E. 488—*American Mut. L. Ins. Co. v. Mason*, 159 Ind. 18, 64 N. E. 525—*Barbee v. Shannon*, 1 Ind. Terr. 208, 40 S. W. 584—*Baltzell v. Nosler*, 1 Iowa, 589, 63 Am. Dec. 466—*Blackman v. Wright*, 96 Iowa, 551, 65 N. W. 843—*Dudley v. Lindsey*, 9 B. Mon. 488, 50 Am. Dec. 522—*Fletcher v. Ferrel*, 9 Dana, 377, 35 Am. Dec. 143—*Williams v. Preston*, 3 J. J. Marsh. 604, 20 Am. Dec. 179—*Mackee v. Cairnes*, 2 Mart. N. S. 601—*West Feliciana R. Co. v. Thornton*, 12 La. Ann. 738, 68 Am. Dec. 778—

Scott v. Bogart, 14 La. Ann. 260—Wright v. White, 14 La. Ann. 592—Louisiana Citizens' Bank v. Hancock, 35 La. Ann. 44—Harding v. Alden, 9 Me. 149, 23 Am. Dec. 540—Hall v. Williams, 10 Me. 286—McKim v. Odom, 12 Me. 110—Middlesex Bank v. Butman, 20 Me. 23—Bank of United States v. Merchants Bank, 7 Gill, 433—Wernwag v. Pawling, 5 Gill & J. 507, 25 Am. Dec. 317—Haggerty v. Amory, 7 Allen, 460—Carleton v. Bickford, 13 Gray, 595, 74 Am. Dec. 652—Gleason v. Dodd, 4 Met. 337—Hall v. Williams, 6 Pick. 242, 17 Am. Dec. 356—Bartlet v. Knight, 1 Mass. 411, 2 Am. Dec. 36—Wilcox v. Kasick, 2 Mich. 169—Miller v. Ewing, 8 Smedes & M. 431—Sallee v. Hays, 3 Mo. 118—Warren v. Lusk, 16 Mo. 111—Robinson v. Prescott, 4 N. H. 453—Dunlap v. Waldo, 6 N. H. 453—Kittredge v. Emerson, 15 N. H. 263—Emery v. Berry, 28 N. H. 486, 61 Am. Dec. 622—Jenkins v. Union Mut. F. Ins. Co. 37 N. H. 477—Leith v. Leith, 39 N. H. 41—Rogers v. Odell, 39 N. H. 458—Besley v. Palmer, 1 Hill, 484—Cromwell v. Gallup, 17 Hun, 56—Plant v. Harrison, 36 Misc. 677, 74 N. Y. Supp. 411—Mervin v. Kumbel, 23 Wend. 303—Dobson v. Pearce, 12 N. Y. 167, 62 Am. Dec. 152—Suydam v. Barker, 18 N. Y. 471, 75 Am. Dec. 254—Ferguson v. Crawford, 70 N. Y. 261, 26 Am. Rep. 589—Revere Copper Co. v. Dimmock, 90 N. Y. 37—Rigney v. Rigney, 127 N. Y. 415, 24 Am. St. Rep. 462, 28 N. E. 405—Gray v. Richmond Bicycle Co. 167 N. Y. 355, 82 Am. St. Rep. 720, 60 N. E. 663—Morris v. Burgess, 116 N. C. 42, 21 S. E. 27—Arrington v. Arrington, 127 N. C. 195, 52 L.R.A. 203, 80 Am. St. Rep. 791, 37 S. E. 212—Arndt v. Arndt, 15 Ohio, 43—Burnley v. Stevenson, 24 Ohio St. 479, 15 Am. Rep. 621—Pennywit v. Foote, 27 Ohio St. 615, 22 Am. Rep. 340—Clinch Valley Coal & Coke Co. v. Tonkin, 9 Kulp, 497—Schnader v. Bender, 8 Northampton Co. Rep. 263, 19 Lanc. L. Rev. 198—Thompson v. Whitman, 31 Phila. Leg. Int. 157—Rebstock v. Rebstock, 2 Pittsb. 126—Benton v. Burgot, 10 Serg. & R. 242—Price v. Schaeffer, 161 Pa. 534, 25 L.R.A. 700, 34 W. N. C. 443, 29 Atl. 279—Barley v. Linah, 16 Pa. 248, 55 Am. Dec. 494—Ohio v. Hinchman, 27 Pa. 483—Wetherill v. Stillman, 65 Pa. 115—Rathbone v. Terry, 1 R. I. 77—Cameron v. Wurtz, 4 M'Cord, L. 280—Napier v. Gldiere, Speers Eq. 230, 40 Am. Dec. 613—McCreery v. Davis, 44 S. C. 211, 28 L.R.A. 661, 51 Am. St. Rep. 794, 22 S. E. 178—Estes v. Kyle, Meigs, 42—Moren v. Killbrew, 2 Yerg. 379—Cook v. Thornhill, 13 Tex. 297, 65 Am. Dec. 63—Hoxie v. Wright, 2 Vt. 267—Newcomb v. Peck, 17 Vt. 308, 44 Am. Dec. 340—Lapham v. Briggs, 27 Vt. 32—McGillivray v. Avery, 30 Vt. 541—Piedmont Iron & Coal Co. v. Green, 3 W. Va. 58, 98 Am. Dec. 799—Coleman v. Waters, 13 W. Va. 307—Black v. Smith, 13 W. Va. 792—Trowbridge v. Spinning, 23 Wash. 60, 54 L.R.A. 208, 83 Am. St. Rep. 806, 62 Pac. 125—Sanborn v. Perry, 86 Wis. 360, 56 N. W. 337—Anderson v. Chicago Title & T. Co. 101 Wis. 391, 77 N. W. 710.

1012. Where the judgment is conclusive between the parties in the state where it was rendered, it is equally so in every other state and court in the United States. Christmas v. Russell, 5 Wall. 290, 18: 475 Cited in Green v. Van Buskirk, 5 Wall. 310, 18 L. ed. 600—Green v. Van Buskirk, 7 Wall. 148, 19 L. ed. 112—Cheever v. Wilson, 9 Wall. 123, 19 L. ed. 608—Crapo v. Kelly, 16 Wall. 619, 21 L. ed. 434—Habich v. Folger, 20 Wall. 7, 22 L. ed. 308—Dow v. Johnson, U. S. Dig.—233

100 U. S. 186, 25 L. ed. 642—Colt v. Coit, 111 U. S. 578, 28 L. ed. 525, 4 Sup. Ct. Rep. 553—Hanley v. Donoghue, 116 U. S. 4, 29 L. ed. 536, 6 Sup. Ct. Rep. 242—Cole v. Cunningham, 133 U. S. 112, 33 L. ed. 541, 70 Sup. Ct. Rep. 269—Kent v. Lake Superior Ship Canal R. & Iron Co. 144 U. S. 88, 36 L. ed. 357, 12 Sup. Ct. Rep. 650—Huntington v. Attrill, 146 U. S. 686, 36 L. ed. 1134, 13 Sup. Ct. Rep. 224—Mississippi Mills v. Cohn, 150 U. S. 208, 37 L. ed. 1055, 14 Sup. Ct. Rep. 75—Colt v. Colt, 19 Blatchf. 466—Burt v. Delano, 4 Cliff. 616, Fed. Cas. No. 2,211—Swift v. Meyers, 37 Fed. 43—Amy v. Manning, 38 Fed. 868—Buller v. Sidell, 43 Fed. 117—Colt v. Colt, 48 Fed. 427—Lehman v. Glenn, 87 Ala. 626, 6 So. 44—Richmond & D. R. Co. v. Gorman, 7 App. D. C. 112—Slack v. Perrine, 9 App. D. C. 153—Sammis v. Wightman, 31 Fla. 25, 12 So. 526 United States Exp. Co. v. Smith, 35 Ill. App. 94—American Mut. L. Ins. Co. v. Mason, 159 Ind. 17, 64 N. E. 525—Perry v. Miller, 54 Iowa, 284, 5 N. W. 727—Longueville v. May, 115 Iowa, 711, 87 N. W. 432—Glenn v. Williams, 60 Md. 113—Sewall v. Sewall, 122 Mass. 161, 23 Am. Rep. 299—Engstrom v. Sherburne, 137 Mass. 155—Mooney v. Hinds, 160 Mass. 471, 36 N. E. 484—Shelby v. Creighton, 65 Neb. 495, 101 Am. St. Rep. 630, 91 N. W. 369—Stewart v. Maxwell, 1 N. M. 570—Everett v. Everett, 75 App. Div. 374, 78 N. Y. Supp. 193—Green v. Van Buskirk, 38 How. Pr. 57—Stanton v. Crosby, 9 Hun, 375—Jones v. Jones, 36 Hun, 420—Plant v. Harrison, 36 Misc. 677, 74 N. Y. Supp. 411—Hoffman v. Hoffman, 46 N. Y. 33, 7 Am. Rep. 299—Van Cleef v. Burns, 133 N. Y. 542, 15 L.R.A. 544, 30 N. E. 661—Williams v. Saunders, 5 Coldw. 78—Anderson v. Chicago Title & T. Co. 101 Wis. 391, 77 N. W. 710—Frame v. Thormann, 102 Wis. 670, 79 N. W. 39.

1013. A judgment or decree of one state, made by a court having jurisdiction of the parties and the subject, has the same force when pleaded or offered in evidence in the courts of any other state as in the state where it was rendered. Mutual L. Ins. Co. v. Harris, 97 U. S. 331, 24: 959 Distinguished in Ferry v. Miltimore Elastic Car Wheel Co. 71 Vt. 459, 76 Am. St. Rep. 787, 45 Atl. 1035.

Cited in Hanley v. Donoghue, 116 U. S. 3, 29 L. ed. 536, 6 Sup. Ct. Rep. 242—Huntington v. Attrill, 146 U. S. 686, 36 L. ed. 1134, 13 Sup. Ct. Rep. 224—Merritt v. American Steel-Barge Co. 24 C. C. A. 535, 49 U. S. App. 85, 79 Fed. 233—Keyser v. Lowell, 54 C. C. A. 580, 117 Fed. 406—Barber Asphalt Paving Co. v. Morris, 67 L.R.A. 767, 66 C. C. A. 61—132 Fed. 951—Whiting v. Burger, 78 Me. 294, 4 Atl. 694.

1014. Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them if rendered by a court having jurisdiction of the cause and of the parties. Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. Rep. 242, 29: 535

Cited in Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 623, 30 L. ed. 522, 7 Sup. Ct. Rep. 398—Wisconsin v. Pelican Ins. Co. 127 U. S. 292, 32 L. ed. 244, 8 Sup. Ct. Rep. 1370—Simmons v. Saul, 138 U. S. 459, 34 L. ed.

1062, 11 Sup. Ct. Rep. 369—Hilton v. Guyot, 159 U. S. 185, 40 L. ed. 115, 16 Sup. Ct. Rep. 139—Andrews v. Andrews, 188 U. S. 37, 47 L. ed. 371, 23 Sup. Ct. Rep. 237—Hilton v. Guyot, 42 Fed. 255—Garrett v. Boeing, 15 C. C. A. 218, 37 U. S. App. 42, 68 Fed. 60—Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. 474, 47 U. S. App. 1, 76 Fed. 435—Union & Planters' Bank v. Memphis, 49 C. C. A. 465, 111 Fed. 571—Richmond & D. R. Co. v. Gorman, 7 App. D. C. 112—Arkansas use of Faulkner County v. Bowen, 9 Mackey, 297—Sammis v. Wightman, 31 Fla. 30, 12 So. 526—Ambler v. Whipple, 139 Ill. 324, 32 Am. St. Rep. 202, 28 N. E. 841—Tourigny v. Houle, 88 Me. 409, 34 Atl. 158—Hambleton v. Glenn, 72 Md. 341, 20 Atl. 115—Mooney v. Hinds, 160 Mass. 471, 36 N. E. 484—Mutual F. Ins. Co. v. Phoenix Furniture Co. 108 Mich. 172, 34 L.R.A. 696, 62 Am. St. Rep. 693, 66 N. W. 1095—Everett v. Everett, 75 App. Div. 374, 78 N. Y. Supp. 193—Plant v. Harrison, 36 Misc. 654, 74 N. Y. Supp. 411—Anglo-American Provision Co. v. Davis Provision Co. 169 N. Y. 513, 88 Am. St. Rep. 608, 62 N. E. 587—McCreery v. Davis, 44 S. C. 211, 28 L.R.A. 661, 51 Am. St. Rep. 794, 22 S. E. 178.

1015. A judgment in a state court which has jurisdiction of the subject-matter and the parties is binding upon the parties thereto, in a suit in another state between the same parties, where the subject-matter and the issues are the same as in the former suit. *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. Rep. 960, 35: 640

1016. A judgment is presumed conclusive between the parties in the state where rendered, and in the courts of other states, when it appears that the defendant had legal notice of the suit. *Mills v. Duryee*, 7 Cranch, 481, 3: 411

1017. A judgment of a state court, in a cause within its jurisdiction and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another state, as it has in the state in which it was rendered. *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. Rep. 242, 29: 535
Cited in *Merritt v. American Steel-Barge Co.* 21 C. C. A. 529, 40 U. S. App. 127, 75 Fed. 818—*Keyser v. Lowell*, 54 C. C. A. 576, 117 Fed. 402—*American Mut. L. Ins. Co. v. Mason*, 159 Ind. 17, 64 N. E. 525—*New York L. Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 288, 61 S. W. 336.

1018. A personal judgment rendered in one state against several parties jointly, upon service of process on some of them and upon publication against the others, is not evidence, outside of the state where rendered, of any personal liability of the parties proceeded against by publication. *Board of Public Works v. Columbia College*, 17 Wall. 521, 21: 687
Cited in *Middleworth v. McDowell*, 49 Ind. 388—*Crumlish v. Shenandoah Valley R. Co.* 28 W. Va. 637—*Renler v. Hurlbut*, 81 Wis. 28, 14 L.R.A. 564, 29 Am. St. Rep. 850, 50 N. W. 783.

1019. A judgment of another state is record evidence of demand, which, standing alone, is conclusive between the parties to it. *Bank of Alabama v. Dalton*, 9 How. 522, 13: 242

Cited in *Metcalf v. Gilmore*, 63 N. H. 190—*Suydam v. Barber*, 18 N. Y. 478, 75 Am. Dec. 254.

1020. Judgments of other state courts are record evidence of a debt or judgment of record, to be contested only as judgments of record may be, and consequently are conclusive upon the parties in every state and in every form in which the same matters are drawn in question, except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it was rendered. *Embry v. Palmer*, 107 U. S. 3, 2 Sup. Ct. Rep. 25, 27: 346
Cited in *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 185, 40 L. ed. 664, 16 Sup. Ct. Rep. 471—*Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 510, 43 L. ed. 533, 19 Sup. Ct. Rep. 238—*Hancock Nat. Bank v. Farnum*, 176 U. S. 645, 44 L. ed. 622, 20 Sup. Ct. Rep. 506—*First Nat. Bank v. Cunningham*, 48 Fed. 514—*Staunton v. Goshorn*, 30 C. C. A. 83, 94 Fed. 60—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 466, 111 Fed. 572—*Ambler v. Whipple*, 139 Ill. 323, 32 Am. St. Rep. 202, 28 N. E. 841—*Chicago & A. Bridge Co. v. Fowler*, 55 Kan. 36, 30 Pac. 727—*Carlisle v. Carlisle*, 96 Mich. 131, 55 N. W. 673—*First Nat. Bank v. Sloman*, 42 Neb. 354, 47 Am. St. Rep. 707, 60 N. W. 539—*Plant v. Harrison*, 36 Misc. 677, 74 N. Y. Supp. 411—*Ballin v. Loeb (Ballin v. J. & E. B. Friend Lace Importing Co.)* 78 Wis. 414, 10 L.R.A. 746, 47 N. W. 714—*Stein v. Benedict*, 83 Wis. 615, 53 N. W. 891.

1021. Where the contract was made in Kentucky, and is sought to be enforced in the state of Virginia, the decision of the case in favor of the defendant on a plea of the statute of limitations will operate as a bar to a subsequent suit in the same state, but not as an extinguishment of the contract elsewhere, especially in Kentucky. *Bank of United States v. Donnally*, 8 Pet. 361, 8: 974
Cited in *Brent v. Bank of Washington*, 10 Pet. 617, 9 L. ed. 556—*Townsend v. Jemison*, 9 How. 414, 13 L. ed. 197—*Farmers' Loan & T. Co. v. Denver, L. & G. R. Co.* 60 C. C. A. 594, 126 Fed. 52—*Auld v. Butcher*, 2 Kan. 150—*Brand v. Brand*, 116 Ky. 798, 63 L.R.A. 211, 76 S. W. 868—*Perkins v. Guy*, 55 Miss. 176, 30 Am. Rep. 610.

1022. A judgment of a parish court of Louisiana, rendered within the sphere of its jurisdiction, is binding upon the courts of the several states and of the United States. *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. Rep. 369, 34: 1054

4. Enforcement.

Judgment of Foreign Country, see *supra*, 921.

Due Process in, see *Constitutional Law*, 720.

Burden of Proof in Action on, see *Evidence*, 574.

Limitation of Action on, see Limitation of Actions, 513, 516.
See also supra, 996; infra, 1110.

1023. In an action brought in one state upon a judgment recovered in another, it must be proved that the judgment is valid in the latter state, and that process was personally served upon defendant, or that he had legal notice of the suit, and was subject to the laws of the latter state. *Lafayette Ins. Co. v. French*, 18 How. 404,

15: 451

Cited in Pennoyer v. Neff, 95 U. S. 730, 24 L. ed. 571—*Moch v. Virginia F. & M. Ins. Co.* 4 Hughes, 119, 10 Fed. 706—*Castlairs v. Mechanics' & T. Ins. Co.* 13 Fed. 824—*Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 427, 34 U. S. App. 581, 72 Fed. 38—*Moredock v. Klrby*, 118 Fed. 182—*Gude v. Dakota F. & M. Ins. Co.* 7 S. D. 647, 58 Am. St. Rep. 860, 65 N. W. 27—*National Bank v. Furtick*, 2 Marv. (Del.) 61, 44 L.R.A. 121, 69 Am. St. Rep. 99, 42 Atl. 479—*Clarkson v. Erie & N. S. Despatch*, 6 Ill. App. 286—*Earle v. Earle*, 91 Ind. 43—*Gravelly v. Southern Ice Mach. Co.* 47 La. Ann. 392, 16 So. 886—*March v. Eastern R. Co.* 40 N. H. 582, 77 Am. Dec. 732—*Huntley v. Baker*, 33 Hun, 580—*Cunnius v. Reading School District*, 21 Pa. Super. Ct. 349—*Kemper-Thomas Paper Co. v. Shyer*, 108 Tenn. 461, 58 L.R.A. 177, 67 S. W. 656—*Randall v. Collins*, 58 Tex. 232.

1024a. No execution can be issued in one state upon a judgment of another, without a new suit. *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33: 538
Cited in Wilmer v. Lewis, 24 Pa. Co. Ct. 618.

1024a. A judgment of a state court cannot be enforced out of the state by execution issued within the state; but only by an action brought in a court of the second state. *M'Elmoyle v. Cohen*, 13 Pet. 312,

10: 177

Cited in Cole v. Cunningham, 133 U. S. 112, 33 L. ed. 541, 10 Sup. Ct. Rep. 269—*National Tube Works Co. v. Ballou*, 146 U. S. 523, 36 L. ed. 1072, 13 Sup. Ct. Rep. 185—*Lynde v. Lynde*, 181 U. S. 187, 45 L. ed. 814, 21 Sup. Ct. Rep. 555—*Andrews v. Andrews*, 188 U. S. 37, 47 L. ed. 371, 23 Sup. Ct. Rep. 237—*Lamb v. Powder River Live Stock Co.* 67 L. R.A. 562, 65 C. C. A. 576, 132 Fed. 440—*Meek v. Meek*, 45 Iowa, 297—*Barrow v. Wilson*, 39 La. Ann. 408, 2 So. 809—*Bullock v. Bullock*, 51 N. J. Eq. 446, 27 Atl. 435—*Bennett v. Bennett*, 63 N. J. Eq. 308, 49 Atl. 501—*Lynde v. Lynde*, 41 App. Div. 287, 58 N. Y. Supp. 567—*Anglo American Provision Co. v. Davis Provision Co.* 169 N. Y. 513, 88 Am. St. Rep. 608, 62 N. E. 587—*Arndt v. Arndt*, 15 Ohio, 43—*Needles v. Frost*, 2 Okla. 23, 35 Pac. 574.

Editorial notes.

[Action to recover instalments of alimony accruing under a decree rendered in another state. 9 L.R.A.(N.S.) 1168.

Action in one state upon a judgment recovered under a penal statute in another. 12 L.R.A.(N.S.) 873.]

Full faith and credit clause.

See also supra, 969.

1025. Where the court of appeals of Maryland refused to enforce a judgment recovered in New York against the officers

of a corporation by a creditor thereof, for making a false certificate of the amount of its capital stock paid in, under a law of that state making such officers liable by reason of such false certificate for the debts of the corporation, which refusal was upon the ground that the judgment was not one which the court was bound to enforce, it denied to the judgment the full faith, credit, and effect to which it was entitled under the Constitution and laws of the United States. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36: 1123

Cited in Mobile & O. R. Co. v. Tennessee, 153 U. S. 494, 38 L. ed. 796, 14 Sup. Ct. Rep. 968—*National Bank v. Dillingham*, 147 N. Y. 613, 49 Am. St. Rep. 692, 42 N. E. 338—*Anglo-American Provision Co. v. Davis Provision Co.* 169 N. Y. 514, 62 N. E. 587—*Wilmer v. Lewis*, 24 Pa. Co. Ct. 618—*Pater-son v. Smith*, 72 Vt. 294, 47 Atl. 1088.

1026. Full faith and credit are not denied to a judgment of a Minnesota court against resident stockholders of a domestic corporation in an action to enforce their statutory liability, by the judgment of a court of another state denying the right to maintain a further action to enforce such liability outside the state of incorporation, where, under the Minnesota laws as construed by its courts, the only remedy provided for the enforcement of the liability of stockholders in domestic corporations is a suit in equity in that state by a creditor in behalf of himself and all other creditors against the stockholders who can be served with process. *Finnery v. Guy*, 189 U. S. 335, 23 Sup. Ct. Rep. 558, 47: 839
Cited in Bernheimer v. Converse, 206 U. S. 524, 51 L. ed. 1172, 27 Sup. Ct. Rep. 755—*Hendryx v. Perkins*, 59 C. C. A. 268, 123 Fed. 279—*Clark v. Knowles*, 187 Mass. 38, 105 Am. St. Rep. 376, 72 N. E. 352.

1027. The refusal of the Nebraska courts to permit an action to be maintained on an Ohio judgment denies the full faith and credit guaranteed by U. S. Const. art. 4, § 1, when based on the alleged fraud in acquiring jurisdiction of the defendant in the Ohio suit, in that the service of process therein was only made possible by giving defendant notice in Nebraska that plaintiff's deposition would be taken in Ohio for use in an action for the same cause then pending in Nebraska, in the hope that defendant would attend, and would delay his return to Nebraska after the deposition was taken long enough to permit service. *Jaster v. Currie*, 198 U. S. 144, 25 Sup. Ct. Rep. 614, 49: 988

1028. A decree for alimony made by a court of competent jurisdiction imposes a specific obligation to enforce the natural and legal duty of the husband, which decree may be altered by the court granting it, and, as a judgment for a definite amount, is entitled to full faith and credit in another state, and may be there enforced by suit. *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. Rep. 735, 45: 1009
Cited in Dunbar v. Dunbar, 190 U. S. 344, 47 L. ed. 1090, 23 Sup. Ct. Rep. 757—*Re Le*

Claire, 124 Fed. 657—Leyland v. Leyland, 186 Mass. 421, 71 N. E. 704—McKnight v. McKnight, 5 Neb. (Unof.) 270, 98 N. W. 62.

1029. The mere domicile within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the Federal Constitution against a nonresident who did not appear and was only constructively served with notice of the pendency of the action. *Haddock v. Haddock*, 201 U. S. 202, 26 Sup. Ct. Rep. 525, 50: 867

— Editorial notes.

Full faith and credit as to judgments of courts of another state. 3:411; 7:923; 13:648; 36: 1123

Joint judgment.

1030. Where a judgment of a state court in an action against joint defendants, one of whom has not been duly summoned, is, by the law of that state, valid as to those who are summoned or who appear, it will sustain an action against such defendants in another state. *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. Rep. 242, 29:535
Cited in *Allnut v. Lancaster*, 76 Fed. 132—*Holt v. Johnson*, 50 Mo. App. 377.

1031. Under U. S. Rev. Stat. § 905, if a joint judgment recovered in a state court against two, of whom but one was served, is enforceable within that state against him severally, it will sustain an action against him in another state, whatever rule may there prevail as to similar domestic judgments. *Renaud v. Abbott*, 116 U. S. 277, 6 Sup. Ct. Rep. 1194, 29: 629
Cited in *Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co.* 46 Fed. 587—*Merritt v. American Steel-Barge Co.* 21 C. C. A. 529, 40 U. S. App. 127, 75 Fed. 818—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 466, 111 Fed. 572—*Sammis v. Wightman*, 31 Fla. 29, 12 So. 526—*Ambler v. Whipple*, 139 Ill. 324, 32 Am. St. Rep. 202, 28 N. E. 841—*Holt v. Johnson*, 50 Mo. App. 377—*Babcock v. Marshall*, 21 Tex. Civ. App. 147, 50 S. W. 728.

1032. A judgment rendered against two partners on service upon one only, under the statute of New York, which provides for judgment in such cases against all, but allows execution thereon against the joint property only, is not such a judgment that the party not served can be sued upon it in any other state. *D'Arcy v. Ketchum*, 11 How. 165, 13: 648
Cited in *Inbusch v. Farwell*, 1 Black, 571, 17 L. ed. 190—*Mason v. Eldred*, 6 Wall. 239, 18 L. ed. 785—*Providence Rubber Co. v. Good-year*, 9 Wall. 810, 19 L. ed. 589—*Thompson v. Whitman*, 18 Wall. 464, 21 L. ed. 900—*Michaels v. Post*, 21 Wall. 428, 22 L. ed. 526—*Hall v. Lanning*, 91 U. S. 168, 23 L. ed. 274—*New Lamp Chimney Co. v. Ansonia Brass & Copper Co.* 91 U. S. 661, 23 L. ed. 339—*Renaud v. Abbott*, 116 U. S. 287, 29 L. ed. 632, 6 Sup. Ct. Rep. 1194—*Michaels v. Post*, 12 Nat. Bankr. Reg. 168—*Galpin v. Page*, 3 Sawy. 110, Fed. Cas. No. 5,206—*Neff v. Pennoyer*, 3 Sawy. 278, Fed. Cas. No. 10,083—*Graham v. Spencer*, 14 Fed. 605—

United States v. American Bell Teleph. Co. 29 Fed. 32—*Iglehart v. Moore*, 16 Ark. 54—*Conley v. Chapman*, 74 Ga. 712—*Phelps v. Brewer*, 9 Cush. 306, 57 Am. Dec. 56—*Wilbur v. Abbot*, 60 N. H. 52—*Harker v. Brink*, 24 N. J. L. 349—*Hoffman v. Wight*, 1 App. Div. 517, 37 N. Y. Supp. 262—*Frothingham v. Barnes*, 9 R. I. 475—*Norwood v. Cobb*, 15 Tex. 503—*Easley v. McClinton*, 33 Tex. 295.

Conclusiveness.

Full Faith and Credit Provision, see *supra*, 1025–1029.

See also *supra*, 1021.

1033. [A judgment, prior to the Constitution, in a court of another state, in foreign attachment, obtained without personal notice or defense, was not conclusive evidence of the debt, in an action brought to enforce it. *Phelps v. Holker* (Pa. Sup. Ct.) 1 Dall. 261, 1: 128]

1034. An Illinois decree for the separate maintenance of the wife cannot be denied conclusiveness in the courts of another state on the question of her desertion, on the theory that it was rendered by consent, where to assume that it was a consent decree disregards the rule of public policy of Illinois and the express terms of the decree, and gives to the *ex parte* stipulation of the husband that the wife was living separate and apart from him without her fault the effect of a consent to the decree, while the Illinois courts regarded it as an admission concerning the state of the proof on the record, which, though rendering it unnecessary for the court to analyze the proof, did not deprive it of the power to make a judicial finding of the fact. *Harding v. Harding*, 198 U. S. 317, 25 Sup. Ct. Rep. 679, 49: 1066

Defenses.

1035. A plea of *nil debet* is no defense to an action on a judgment rendered in another state. *Hampton v. McConnel*, 3 Wheat. 234, 4: 378
Cited in *Hilton v. Guyot*, 159 U. S. 183, 40 L. ed. 115, 16 Sup. Ct. Rep. 139—*Davis v. Lane*, 2 Ind. 540, 54 Am. Dec. 458—*Buchanan v. Port*, 5 Ind. 265—*Indianapolis, B. & W. R. Co. v. Risley*, 50 Ind. 62—*Risley v. Indianapolis, B. & W. R. Co.* Wilson Super. Ct. (Ind.) 575—*Lanning v. Shute*, 5 N. J. L. 780—*Boston India Rubber Factory v. Holt*, 14 Vt. 98—*Draper v. Gorman*, 8 Leigh, 638.

1035a. Fraud in obtaining a judgment is not a good plea to an action upon a judgment in another state. *Maxwell v. Stewart*, 21 Wall. 71, 22 Wall. 77, 22: 564
Christmas v. Russell, 5 Wall. 290, 18: 475
Cited in *Simmons v. Saul*, 138 U. S. 459, 34 L. ed. 1062, 11 Sup. Ct. Rep. 369—*Barras v. Bidwell*, 3 Woods, 7, Fed. Cas. No. 1,039—*Union Trust Co. v. Rochester & P. R. Co.* 29 Fed. 610—*Peninsular Iron Co. v. Eells*, 15 C. C. A. 201, 32 U. S. App. 348, 68 Fed. 35—*Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 474, 47 U. S. App. 1, 76 Fed. 435—*Lake County v. Platt*, 25 C. C. A. 93, 49 U. S. App. 216, 79 Fed. 573—*Alvire Grocery Co. v. Richesin*, 91 Fed. 84—*Ambler v. Whipple*, 139 Ill. 324, 32 Am. St. Rep. 202, 28 N. E. 841—*Barbee v. Shannon*, 1 Ind. Terr. 208, 40 S. W. 584—*Hambleton*

v. Glenn, 72 Md. 348, 20 Atl. 115—Sewall v. Sewall, 122 Mass. 181, 23 Am. Rep. 290—Knapp v. Thomas, 39 Ohio St. 387, 45 Am. Rep. 462—Johnson v. Dobbins, 12 Phila. 620—Johnson v. Dobbins, 35 Phila. Leg. Int. 242—Johnson v. Dobbins, 5 W. N. C. 588.

1036. Want of jurisdiction to set aside a judgment after the term, and render, without notice, a new and different judgment, is available as a defense to an action on such judgment in a foreign jurisdiction, whatever remedy the local practice may afford a person against whom judgment is rendered in his absence and without his knowledge. Wetmore use of McKay v. Karrick, 205 U. S. 141, 27 Sup. Ct. Rep. 434, 51: 745

— Editorial note.

Fraud as plea to judgment of another state. 18: 475

VII. State Judgment in Federal Court.

Collateral Attack, see supra, 371.

Power of Federal Court to Review or Enforce, see Courts, VI. f.

Power of National or State Court over Its Own Judgments Independent of the Other, see Courts, 1472, 1520-1532.

Necessity of Resorting to State rather than Federal Court if Relief there Granted is Adequate, see Courts, 1531.

1037. The judgments of a state court are to be treated by a Federal court, although sitting in the state, as foreign judgments the same as they would be by the courts of another state, as the Federal courts are tribunals of a different sovereignty and exercise an independent jurisdiction. Cooper v. Newell, 173 U. S. 555, 19 Sup. Ct. Rep. 506, 43: 808
Cited in International & G. N. R. Co. v. Barton, 24 Tex. Civ. App. 123, 57 S. W. 292.

Necessity of service.

1038. The United States courts regard judgments of the state courts establishing personal demands as having validity or as importing verity only where they have been rendered upon personal citation of the party or of those empowered to receive process for him, or upon his voluntary appearance. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. Rep. 354, 27: 222
Cooper v. Reynolds, 10 Wall. 308, 19: 931
Pennoyer v. Neff, 95 U. S. 714, 24: 565
Distinguished in People ex rel. Jones v. House, 4 Utah, 384, 10 Pac. 843.

Cited in Pana v. Bowler, 107 U. S. 545, 27 L. ed. 430, 2 Sup. Ct. Rep. 704—Hanley v. Donoghue, 116 U. S. 3, 29 L. ed. 536, 6 Sup. Ct. Rep. 242—Robinson v. Fair, 128 U. S. 87, 32 L. ed. 423, 9 Sup. Ct. Rep. 30—Wilson v. Seligman, 144 U. S. 45, 36 L. ed. 339, 12 Sup. Ct. Rep. 541—Swan Land & Cattle Co. v. Frank, 148 U. S. 614, 37 L. ed. 581, 13 Sup. Ct. Rep. 691—Robb v. Vos, 155 U. S. 38, 39 L. ed. 61, 15 Sup. Ct. Rep. 4—Cooper v. Newell, 173 U. S. 587, 43 L. ed. 812, 19 Sup. Ct. Rep. 506—Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 120, 10 Fed. 706—The

City of New Bedford, 20 Fed. 60—Good Hope Co. v. Railway Barb Fencing Co. 23 Blatchf. 45, 22 Fed. 637—Henning v. Planters' Ins. Co. 28 Fed. 441—United States v. American Bell Teleph. Co. 29 Fed. 36—Maxwell v. Atchison, T. & S. F. R. Co. 34 Fed. 288—Neptune Steam Nav. Co. v. Sullivan Timber Co. 37 Fed. 159—Brooks v. Dun, 51 Fed. 146—Vermilya v. Brown, 65 Fed. 150—Re Dana, 68 Fed. 895—Austin v. Hamilton County, 22 C. C. A. 181, 46 U. S. App. 260, 76 Fed. 211—Follett v. Tillinghast, 82 Fed. 243—Dexter H. & Co. v. Sayward, 84 Fed. 300—Cady v. Associated Colonies, 119 Fed. 424—Phoenix Bridge Co. v. Castleberry, 65 C. C. A. 483, 131 Fed. 177—Cooper v. Brazelton, 68 C. C. A. 191, 135 Fed. 480—Exchange Nat. Bank v. Clement, 109 Ala. 280, 19 So. 814—Keyser v. Lowell, 54 C. C. A. 580, 117 Fed. 406—Pickett v. Ferguson, 45 Ark. 192, 55 Am. Rep. 545—McMillan v. Lovejoy, 115 Ill. 501, 4 N. E. 772—Williams v. Metropolitan Street R. Co. 68 Kan. 21, 64 L.R.A. 797, 104 Am. St. Rep. 377, 74 Pac. 600—Smith v. Kreager, 6 Kan. App. 273, 51 Pac. 813—State ex rel. Mathews v. Eddy, 10 Mont. 318, 25 Pac. 1032—Eastman v. Dearborn, 63 N. H. 366—Elsasser v. Haines, 52 N. J. L. 28, 18 Atl. 1095—Huntley v. Baker, 33 Hun, 580—Sloane v. Martin, 77 Hun, 282, 28 N. Y. Supp. 332—Rigney v. Rigney, 127 N. Y. 414, 24 Am. St. Rep. 462, 28 N. E. 403—Mahon v. Luzerne County, 197 Pa. 11, 46 Atl. 894—Dorr v. Rohr, 82 Va. 365, 3 Am. St. Rep. 106.

Full faith and credit.

To Federal Judgment in State Court, see infra, 1078.

1039. The courts of the District of Columbia are within the act of 1790, providing for the mode of authenticating the records and judicial proceedings of the state courts, since it provides for the giving of faith and credit in "every court within the United States." Mills v. Duryee, 7 Cranch, 481, 3: 411
Cited in Draper v. Gorman, 8 Leigh, 631.

1040. The courts of the United States are bound to give to a judgment of a state court only the same faith and credit to which it is entitled in the courts of another state. Pennoyer v. Neff, 95 U. S. 714, 24: 565
Cited in Connor v. Hanover Ins. Co. 28 Fed. 551—Swift v. Meyers, 37 Fed. 44—Hekking v. Pfaff, 43 L.R.A. 619, 33 C. C. A. 330, 50 U. S. App. 484, 91 Fed. 62—Union & Planters' Bank v. Memphis, 49 C. C. A. 466, 111 Fed. 572.

Effect.

Effect of Federal Judgment in State Court, see infra, 1072, 1075.

1041. Courts of the United States, in a special statutory proceeding, will not give to a judgment of a state court any other or greater effect, either as a matter of evidence or as ground of action, than must be lawfully given to it in the courts of the state whose laws are invoked to enforce it. Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. Rep. 554, 28: 1038
Cited in Allen v. Fairbanks, 45 Fed. 447.

Conclusiveness generally.

State Judgment as Bar to Subsequent Suit in Federal Court, see *infra*, 1062-1068.

Conclusiveness of Federal Judgment in State Court, see *infra*, 1076, 1077.

See also *supra*, 1012, 1022.

1042. An adjudication in a state court which binds the plaintiff, whether it was right or wrong, concludes him until it has been reversed or set aside. It cannot be disregarded any more in the courts of the United States than in those of the state. *Scotland County v. Hill*, 132 U. S. 107, 10 Sup. Ct. Rep. 26, 33: 251
Cited in Slack v. Perrine, 9 App. D. C. 155.

1043. Where a point has been decided in a state court, it is *res judicata* between the parties, and cannot be litigated anew on the same contract in a Federal court. *Tloga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 22: 331

Cited in Willson v. Deen (Milne v. Deen) 121 U. S. 534, 30 L. ed. 982, 7 Sup. Ct. Rep. 1004—*New Orleans v. Citizens' Bank*, 167 U. S. 306, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Fessenden v. Barrett*, 50 Fed. 691—*Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co.* 5 C. C. A. 255, 12 U. S. App. 320, 55 Fed. 696—*Eau Claire Nat. Bank v. Benson*, 63 C. C. A. 593, 128 Fed. 279—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 916—*Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 442, 74 S. W. 979—*Fleming v. Gillespie*, 7 Okla. 440, 54 Pac. 653—*Nell v. Tolman*, 12 Or. 295, 7 Pac. 103.

1044. The judgment of a state court declaring that a debt is null and void as against a certain party, and equally void as a contract to convey, is conclusive between the parties and those in privity with them in a suit in a circuit court. *Minneapolis Agri. & M. Asso. v. Canfield*, 121 U. S. 295, 7 Sup. Ct. Rep. 887, 30: 962

1045. A decree of the supreme court of a state, settling the rights of property and questions in controversy, is *res judicata* and conclusive in the Supreme Court of the United States as to those who were parties to it. *Nichol v. Levy*, 5 Wall. 433, 18: 596

1046. The decree of a state court is not binding on a party to an action in the Federal state court, if the record contains nothing to show him to have been a party except two orders, in the title of one of which appeared only the name of his partner and in the other the name of the same partner "et al." and also allegations in the answer to said party's cross bill, but not responsive thereto, that he and his partners were parties to that action. *Williams v. Bankhead*, 19 Wall. 563, 22: 184
Cited in Boyd v. Roane, 40 Ark. 412, 5 S. W. 704—*Randall v. Lower*, 98 Ind. 262—*McPike v. Wells*, 54 Miss. 147.

1047. Where a state court had jurisdiction of the parties and the subject-matter, a Federal court has no jurisdiction to set aside its decree and a sale made under it. *Randall v. Howard*, 2 Black, 585, 17: 269

1048. The denial by an inferior state court of a motion to vacate the service of summons is not *res judicata* on the question of the validity of such service, when raised in the Federal circuit court to which the cause has been removed. *Remington v. Central P. R. Co.* 198 U. S. 95, 25 Sup. Ct. Rep. 577, 49: 959

1049. The United States courts only regard judgments of the state courts establishing personal demands as having validity, or as importing verity, where they have been rendered upon personal citation of the party, or upon his voluntary appearance. *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704, 27: 424
Cited in Clark v. Bever, 139, U. S. 117, 35 L. ed. 97, 11 Sup. Ct. Rep. 468—*Rollins v. Lake County*, 34 Fed. 846.

1050. An appearance in a state court of a claimant against an insolvent's estate, whose claim is denied by the highest court of the state, precludes the claimant from thereafter proceeding against the insolvent in a Federal court in a suit begun before the proceedings were instituted in the state court, although the claimant was compelled to present the claim in the state court in order to be entitled to share in the estate there administered. *Michell v. First Nat. Bank*, 180 U. S. 471, 21 Sup. Ct. Rep. 418, 45: 627

Cited in Gorham v. Broad River Twp. 109 Fed. 776—*United States v. Eisenbels*, 50 C. C. A. 185, 112 Fed. 196—*Gilbert v. American Surety Co.* 61 L.R.A. 257, 57 C. C. A. 622, 121 Fed. 502—*Kittel v. Internal Improv. Fund*, 139 Fed. 955.

1051. Rights under a patent must be regarded as a question to be passed upon as an original one in a suit in a court of the United States, brought under the provision of an act of Congress for the infringement of letters patent, as against the decision in a former suit in a state court for breach of contract between the patentee's transferee and another, with reference to the use of the right. *Oliver v. Rumford Chemical Works*, 109 U. S. 75, 3 Sup. Ct. Rep. 61, 27: 862

1052. The state courts are not independent in respect to the powers granted to the United States: they are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty. *Martin v. Hunter*, 1 Wheat. 304, 4: 97
Cited in Com. ex rel. Price v. Dale, 3 Pa. Co. Ct. 33—*Draper v. Gorman*, 8 Leigh, 633.

1052a. Settlement, in a Mississippi state court, of estate of decedent, is no bar to a judgment in a United States court in favor of a citizen of another state, who did not appear in the former proceeding. The surplus of the estate must be applied to pay

the judgment, in preference to claims of heirs or distributees. *Union Bank v. Vaiden*, 18 How. 503, 15: 472
Limited in Green v. Creighton (Kendall v. Creighton) 23 How. 107, 16 L. ed. 423—
Walker v. Brown, 58 Fed. 30.

Cited in Hyde v. Stone, 20 How. 175, 15 L. ed. 576—*Payne v. Hook*, 7 Wall. 430, 19 L. ed. 262—*Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 287, 20 L. ed. 577—*Rorer v. Chapman*, 119 U. S. 600, 30 L. ed. 537, 7 Sup. Ct. Rep. 342—*Gellinger v. Philippi*, 133 U. S. 257, 33 L. ed. 617, 10 Sup. Ct. Rep. 266—*Chicot County v. Sherwood*, 148 U. S. 534, 37 L. ed. 548, 13 Sup. Ct. Rep. 695—*Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 227, 47 L. ed. 155, 23 Sup. Ct. Rep. 52—*Green v. Collins*, 3 Cliff. 507, Fed. Cas. No. 5755—*Demeritt v. Exchange Bank*, 20 Month. L. Rep. 607, Fed. Cas. No. 3780—*Lee v. Aetna Ins. Co. Fed. Cas. No. 8181*—*Re Murray*, 3 Nat. Bankr. Reg. 767, Fed. Cas. No. 9354—*National Bank v. Sebastian County*, 5 Dill. 417, Fed. Cas. No. 10,040—*Phelps v. O'Brien County*, 2 Dill. 519, Fed. Cas. No. 11,078—*Warren v. Wisconsin Valley R. Co.* 6 Biss. 430, Fed. Cas. No. 17,204—*Andrews v. Smith*, 19 Blatchf. 109, 5 Fed. 842—*Hutchison v. Green*, 2 McCrary. 476, 6 Fed. 838—*McDermott v. Copeland*, 9 Fed. 539—*Griswold v. Central Vermont R. Co.* 20 Blatchf. 217, 9 Fed. 800—*Black v. Scott*, 9 Fed. 191—*Pulliam v. Pulliam*, 10 Fed. 30—*Logan v. Greenlaw*, 12 Fed. 19—*Claffin v. Lisso*, 4 Woods. 253, 16 Fed. 808—*Chewett v. Moran*, 17 Fed. 822—*Hartman v. Fishbeck*, 18 Fed. 294—*Hull v. Dills*, 19 Fed. 659—*Dodd v. Ghiselin*, 27 Fed. 408—*May v. Saginaw County*, 32 Fed. 630—*Hoover v. Crawford County*, 39 Fed. 9—*Ball v. Tompkins*, 41 Fed. 489—*Edwards v. Hill*, 8 C. C. A. 235, 19 U. S. App. 493, 59 Fed. 725—*The James Roy*, 59 Fed. 740—*The Willamette Valley*, 62 Fed. 297—*Walker v. Brown*, 11 C. C. A. 140, 27 U. S. App. 291, 63 Fed. 209—*Missouri, K. & T. Trust Co. v. Krumseig*, 23 C. C. A. 12, 40 U. S. App. 620, 77 Fed. 43—*Brendel v. Charch*, 82 Fed. 263—*Martin v. Fort*, 27 C. C. A. 432, 54 U. S. App. 316, 83 Fed. 23—*Brown v. Ellis*, 86 Fed. 358—*Eastern Bldg. & L. Asso. v. Bedford*, 88 Fed. 20—*Shepard v. Tulare Irrig. District*, 94 Fed. 4—*Great Western Min. & Mfg. Co. v. Harris*, 96 Fed. 504—*Wahl v. Franz*, 49 L.R.A. 71, 40 C. C. A. 658, 100 Fed. 698—*Security Trust Co. v. Dent*, 43 C. C. A. 598, 104 Fed. 384—*Re Delafield*, 109 Fed. 579—*United States v. Elsenbeis*, 50 C. C. A. 186, 112 Fed. 197—*Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 760, 66 C. C. A. 59, 132 Fed. 948—*Horner v. Hanks*, 22 Ark. 589—*Ames v. Slater*, 27 Minn. 74, 6 N. W. 418—*Pittsburgh v. Delafield*, 31 Pittsb. L. J. N. S. 426.

As to taxes.

1053. A judgment of a state court sustaining the exemption claimed by a bank, under its charter, from municipal taxation on its capital stock, which, under the local law of the state, is only *res judicata* in respect to the identical taxes litigated in the suit, can be accorded no greater efficacy in the Federal courts. *Union & Planter's Bank v. Memphis*, 189 U. S. 71, 23 Sup. Ct. Rep. 604, 47: 712
Cited in Deposit Bank v. Frankfort, 191 U. S. 517, 48 L. ed. 283, 24 Sup. Ct. Rep. 154—*Covington v. First Nat. Bank*, 198 U. S. 109, 49 L. ed. 968, 25 Sup. Ct. Rep. 562—*First Nat. Bank v. Covington*, 129 Fed. 803.

1054. An adjudication of a state court that a bank has a contract exemption from taxation on its capital stock is not *res judicata* in the Federal courts as to taxes for years other than the one directly involved in the judgment, where, by the settled law of the state, an adjudication in respect of taxes for one year cannot be pleaded as an estoppel in suits involving taxes of other years. *Covington v. First Nat. Bank*, 198 U. S. 100, 25 Sup. Ct. Rep. 562, 49: 963

1054a. An injunction from a state court against officers of a town forbidding them to levy any tax for the payment of either interest or principal of certain township bonds, issued before a judgment of the Federal circuit court against the town on interest coupons of some of these bonds was rendered, and in a suit to which the judgment creditor was not a party, cannot stand in the way of the enforcement of a tax by the circuit court to carry its judgment into execution. *Hawley v. United States (Hawley v. Fairbanks)* 108 U. S. 543, 2 Sup. Ct. Rep. 846, 27: 820

Distinguished in Selbert v. Lewis (Selbert v. United States) 122 U. S. 298, 30 L. ed. 1166, 7 Sup. Ct. Rep. 1190.

Cited in Holt County v. National L. Ins. Co. 25 C. C. A. 474, 49 U. S. App. 376, 80 Fed. 691—*Clapp v. Otoe County*, 45 C. C. A. 582, 104 Fed. 476—*McCullough v. Hicks*, 63 S. C. 546, 41 S. E. 701.

As to wills.

1055. When a will is duly probated by a state court of competent jurisdiction, that probate is conclusive of the validity and contents of the will in this court. *Gaines v. New Orleans*, 6 Wall. 642, 18: 950
Cited in Gaines v. Fuentes, 92 U. S. 21, 23 L. ed. 528—*Amory v. Amory*, 12 Am. L. Reg. N. S. 589, Fed. Cas. No. 333—*Ellis v. Davis*, 4 Woods, 14, Fed. Cas. No. 4,402—*Fuentes v. Gaines*, 1 Woods, 115, Fed. Cas. No. 5,145—*Southworth v. Adams*, 9 Biss. 523, 4 Fed. 3—*Fuentes v. Gaines*, 25 La. Ann. 80—*Ward v. Logan County*, 12 Okla. 278, 70 Pac. 378.

1056. A decision of a state court in an action to determine adverse claims to land depending on the construction of a will under which both parties claim is conclusive in a subsequent action in a Federal court between the same parties, or those claiming under them, involving the same question. *Doe ex dem. Parrish v. Ferris (Parrish v. Ferris)* 2 Black, 606, 17: 317

Cited in Johnson Steel Street Rail Co. v. Wharton, 152 U. S. 258, 38 L. ed. 433, 14 Sup. Ct. Rep. 608—*Dowell v. Appelgate*, 152 U. S. 344, 38 L. ed. 470, 14 Sup. Ct. Rep. 611—*Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 687, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—*New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Southern P. R. Co. v. United States*, 168 U. S. 51, 42 L. ed. 378, 18 Sup. Ct. Rep. 18—*Amory v. Amory*, 3 Biss. 271, Fed. Cas. No. 334—*Hay v. Alexandria & W. R. Co.* 4 Hughes, 352, Fed. Cas. No. 6,254a—*Samuels v. Revlere*, 47 C. C. A. 637, 109 Fed. 720—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 917—*Boyle v. Wallace*, 81 Ala. 355, 8 So.

194—Pritchard v. Madren, 31 Kan. 48, 2 Pac. 691—Magwire v. Tyler, 40 Mo. 442.

Collateral attack.

On Federal Judgment in State Court, see *infra*, 1077a.

Evidence to Contradict Jurisdiction or Recitals, see *Evidence*, 1738.

1057. The jurisdiction of a state court is open to inquiry, in a Federal court sitting in the same state, when the judgment of the state court comes under consideration therein. *Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. Rep. 506, 43: 808

Cited in *Thormann v. Frame*, 176 U. S. 356, 44 L. ed. 503, 20 Sup. Ct. Rep. 446—*Clarke v. Clarke*, 178 U. S. 195, 44 L. ed. 1033, 20 Sup. Ct. Rep. 873—*Union & Planters' Bank v. Memphis*, 189 U. S. 75, 47 L. ed. 715, 23 Sup. Ct. Rep. 604—*Calderhead v. Downing*, 103 Fed. 30—*Phelps v. Mutual Reserve Fund Life Assn.* 61 L.R.A. 728, 50 C. C. A. 354, 112 Fed. 467—*McDowell v. McCormick*, 57 C. C. A. 406, 121 Fed. 66—*First Nat. Bank v. Covington*, 129 Fed. 804—*Cooper v. Brazelton*, 68 C. C. A. 191, 135 Fed. 479—*Harrison v. Wallis*, 44 Misc. 496, 90 N. Y. Supp. 44—*Kilmer v. Brown*, 28 Tex. Civ. App. 422, 67 S. W. 1000.

1058. A Federal court may take jurisdiction of a suit to set aside a judgment of a state court in the same state, when it is attacked for fraud and want of jurisdiction because it was rendered on service by publication, the order for which was obtained by a false affidavit. *Howard v. DeCordova*, 177 U. S. 609, 20 Sup. Ct. Rep. 817, 44: 908

Cited in *Johnson v. Hunter*, 77 C. C. A. 361, 147 Fed. 135.

1058a. A decree of a state court providing for sale of a railroad is binding upon all the parties to the suit in which it was rendered until modified or reversed, and is not open to collateral attack by any of those parties in a separate suit brought by them in the circuit court of the United States. After the jurisdiction of the state court attached, no order of the circuit court could interfere with or suspend the sale which the state court had ordered to be made. *Central Trust Co. v. Seasongood*, 130 U. S. 482, 9 Sup. Ct. Rep. 575, 32: 985

Cited in *Sipe v. Copwell*, 8 C. C. A. 420, 16 U. S. App. 704, 59 Fed. 971.

1059. In ejectment to recover land, the Supreme Court, conformably to its established doctrine, recognizes the validity and binding operation of the orders and decrees in a partition action of a court of the state in which the land is situated, and will not inquire, in a collateral action, whether there are errors or irregularities in such orders and decrees. *Parker v. Kane*, 22 How. 1, 16: 286

1060. A state judgment cannot be impeached collaterally in the United States courts, by showing that if due effect had been given to the laws it would have been the other way. The United States courts must give it the same effect as the state courts. *Chicago & A. R. Co. v. Wiggins*

Ferry Co. 103 U. S. 18, 1 Sup. Ct. Rep. 614, 617, 27: 636

Cited in *Union & Planters' Bank v. Memphis*, 189 U. S. 75, 47 L. ed. 715, 23 Sup. Ct. Rep. 604—*Sipe v. Copwell*, 8 C. C. A. 420, 16 U. S. App. 704, 59 Fed. 971—*Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 221, 36 U. S. App. 480, 72 Fed. 882—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 466, 111 Fed. 572—*First Nat. Bank v. Covington*, 129 Fed. 804—*Manley v. Park*, 62 Kan. 563, 64 Pac. 28.

1061. Assignees in bankruptcy cannot question collaterally the proceedings in a state court, to which they voluntarily became parties, as they were at liberty to do, consistently with their duties under the bankrupt law. *Davis v. Friedlander*, 104 U. S. 570, 26: 818

Cited in *Winchester v. Heiskell*, 119 U. S. 453, 30 L. ed. 464, 7 Sup. Ct. Rep. 281—*Re Litchfield*, 13 Fed. 869.

1062. One who has voluntarily sought the judgment of the supreme court of a state to declare that a decree of a lower court was not only erroneous, but void, although not a voluntary litigant in the trial court, is bound by the judgment of the supreme court as *res judicata*, and cannot attack it collaterally in a circuit court of the United States. *Forsyth v. Hammond*, 166 U. S. 506, 17 Sup. Ct. Rep. 665, 41: 1035

Cited in *Garner v. Second Nat. Bank*, 89 Fed. 636.

Plea in bar.

Failure to Plead Federal Judgment in Bar in State Court, see *infra*, 1075.
See also *infra*, 1069.

1062a. The judgment of a state court upon a question is conclusive upon the same question in a subsequent suit in the United States circuit court between the same parties, and is pleadable in bar to the subsequent suit. *Caujolle v. Curtiss* (*Caujolle v. Ferrie*) 13 Wall. 465, 20: 507

Distinguished in *Re Patterson*, 146 N. Y. 331, 40 N. E. 990.

Cited in *Veach v. Rice*, 131 U. S. 314, 33 L. ed. 170, 9 Sup. Ct. Rep. 730—*Overby v. Gordon*, 177 U. S. 227, 44 L. ed. 746, 20 Sup. Ct. Rep. 603—*Holmes v. Oregon & C. R. Co.* 6 Sawy. 285, 5 Fed. 534—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 387, 9 Fed. 234—*Berney v. Drexel*, 12 Fed. 394—*Comstock v. Herron*, 5 C. C. A. 275, 6 U. S. App. 626, 55 Fed. 812—*Howell v. Budd*, 91 Cal. 349, 27 Pac. 747—*Conery v. New Orleans Waterworks Co.* 41 La. Ann. 945, 7 So. 8—*Sly v. Hunt*, 159 Mass. 153, 21 L.R.A. 688, 38 Am. St. Rep. 403, 34 N. E. 187—*Burgess v. Stribling*, 134 Mich. 39, 95 N. W. 1001—*Smith v. Central Trust Co.* 154 N. Y. 338, 48 N. E. 553—*Re Patterson*, 79 Hun. 379, 29 N. Y. Supp. 451—*King v. Ross*, 21 R. I. 417, 45 Atl. 146—*Williams v. Williams*, 63 Wis. 71, 53 Am. Rep. 253, 23 N. W. 110—*Frame v. Thormann*, 102 Wis. 671, 79 N. W. 39.

1063. Where suits between the same parties, in relation to the same subject-matter, are pending at the same time in state and Federal courts of concurrent jurisdiction, a judgment on the merits in the state court may be used as a bar to fur-

ther proceedings in the Federal court.
Stout v. Lye, 103 U. S. 66, 26: 428

Cited in *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 386, 37 L. ed. 1117, 14 Sup. Ct. Rep. 127—*Johnson Steel Street Rail Co. v. Wharton*, 152 U. S. 259, 38 L. ed. 433, 14 Sup. Ct. Rep. 608—*Dowell v. Applegate*, 152 U. S. 344, 38 L. ed. 470, 14 Sup. Ct. Rep. 611—*Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 688, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—*Forsyth v. Hammond*, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665—*New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Bruce v. Manchester & K. R. Co.* 19 Fed. 345—*Hurst v. Everett*, 21 Fed. 221—*Hospes v. O'Brien*, 24 Fed. 146—*Patterson v. Wold*, 33 Fed. 792—*Fuller v. Hamilton County*, 53 Fed. 414—*Gates v. Buckl*, 4 C. C. A. 125, 12 U. S. App. 69, 53 Fed. 966—*Compton v. Jesup*, 15 C. C. A. 430, 31 U. S. App. 486, 68 Fed. 296—*Fayerweather v. Ritch*, 34 C. C. A. 65, 63 U. S. App. 112, 91 Fed. 725—*Memphis & C. R. Co. v. Grayson*, 88 Ala. 579, 16 Am. St. Rep. 69, 7 So. 122—*Gay v. Brierfield Coal & I. Co.* 94 Ala. 313, 16 L.R.A. 573, 33 Am. St. Rep. 122, 11 So. 353—*Davis v. Barton*, 130 Ind. 402, 30 N. E. 512—*Harrington v. Latta*, 23 Neb. 100, 36 N. W. 364—*Jones v. New York*, 37 Hun, 514—*Brooks v. Wilson*, 53 Hun, 178, 6 N. Y. Supp. 116—*Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 371, 12 N. E. 763—*Parkes v. Clift*, 9 Lea, 529—*State v. Fredlock*, 52 W. Va. 241, 94 Am. St. Rep. 932, 43 S. E. 153.

1064. A decree of the state court entered by consent, in part performance of an agreement of settlement, is not a bar to a suit for an appropriation of the fruits of the settlement. *Union P. R. Co. v. Stewart*, 95 U. S. 279, 24: 431

1065. A judgment of a state court that a debt had been extinguished, given in an action which was not brought for the recovery of the debt, and which action, moreover, had been discontinued by the plaintiff, cannot be set up in bar of proceedings in the circuit court for the recovery of the debt, which proceedings had been commenced when the judgment of the state court was given. *Shelton v. Tiffin*, 6 How. 163, 12: 387

1066. A chancery decree in a state court declaring a mortgage void is a bar to an action of ejectment, brought in the United States court, and in which the right to recover depends upon the force and validity of the mortgage. *Smith v. Kernochen*, 7 How. 198, 12: 666

Cited in *Johnson Steel Street Rail Co. v. Wharton*, 152 U. S. 257, 38 L. ed. 432, 14 Sup. Ct. Rep. 608—*Dowell v. Applegate*, 152 U. S. 344, 38 L. ed. 469, 14 Sup. Ct. Rep. 611—*Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 687, 39 L. ed. 862, 15 Sup. Ct. Rep. 733—*New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Southern P. R. Co. v. United States*, 168 U. S. 49, 42 L. ed. 377, 18 Sup. Ct. Rep. 18—*Mitchell v. First Nat. Bank*, 180 U. S. 480, 45 L. ed. 632, 21 Sup. Ct. Rep. 418—*Murray v. Lovejoy*, 2 Cliff. 201, Fed. Cas. No. 9,963—*Tyler v. Hyde*, 2 Blatchf. 313, Fed. Cas. No. 14,300—*New Orleans, M. & C. R. Co. v. New Orleans*, 4 Woods, 5, 14 Fed. 376—*Norton v. House of*

Mercy, 41 C. C. A. 400, 101 Fed. 386—*Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 917—*Strang v. Moog*, 72 Ala. 465—*Boyle v. Wallace*, 81 Ala. 355, 8 So. 194—*McGrant v. Baggett*, 128 Ala. 485, 29 So. 199—*Wales v. Lyon*, 2 Mich. 282—*Land v. Keirn*, 52 Miss. 347—*Garton v. Botts*, 73 Mo. 276—*Territory ex rel. Jones v. Hopkins*, 9 Okla. 150, 59 Pac. 976—*Tilson v. Davis*, 32 Gratt. 104—*Tracey v. Shumate*, 22 W. Va. 509.

1067. A decree of a state court for the removal of a cloud upon the title of land within the state, and for the cancellation of deeds and recovery of the land, rendered against a citizen of another state, who has been cited by publication only, as directed by the local statutes, is no bar to an action by him in the circuit court of the United States, to recover the same land, against the plaintiff in the former suit. *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586, 28: 101

Cited in *Dull v. Blackman*, 169 U. S. 248, 42 L. ed. 734, 18 Sup. Ct. Rep. 333—*Cooper v. Newell*, 178 U. S. 567, 46 L. ed. 812, 19 Sup. Ct. Rep. 506—*Roller v. Holly*, 176 U. S. 403, 44 L. ed. 522, 20 Sup. Ct. Rep. 410—*Pitts v. Clay*, 27 Fed. 637—*Stang v. Redden*, 28 Fed. 12—*Henning v. Planters' Ins. Co.* 28 Fed. 443—*Palmer v. McCormick*, 28 Fed. 543—*Lockett v. Rumbaugh*, 45 Fed. 30—*Brooks v. Dun*, 51 Fed. 146—*Central Trust Co. v. Chattanooga, R. & C. R. Co.* 68 Fed. 688—*Aetna L. Ins. Co. v. Lyon County*, 95 Fed. 332—*Ralya Market Co. v. Armour & Co.* 102 Fed. 532—*Spencer v. Houghton*, 68 Cal. 87, 8 Pac. 679—*Loalza v. Superior Court*, 85 Cal. 28, 9 L.R.A. 380, 20 Am. St. Rep. 197, 24 Pac. 707—*Gude v. Dakota F. & M. Ins. Co.* 7 S. D. 651, 58 Am. St. Rep. 860, 65 N. W. 27—*National Bank v. Furtick*, 2 Marv. (Del.) 52, 44 L.R.A. 118, 69 Am. St. Rep. 99, 42 Atl. 479—*Knudson v. Litchfield*, 87 Iowa, 120, 54 N. W. 199—*Amsbaugh v. Exchange Bank*, 33 Kan. 105, 5 Pac. 384—*Beebe v. Doster*, 36 Kan. 671, 14 Pac. 150—*Bardwell v. Collins* (Bardwell v. Anderson) 44 Minn. 104, 9 L.R.A. 154, 20 Am. St. Rep. 547, 46 N. W. 315—*Corson v. Shoemaker*, 55 Minn. 399, 57 N. W. 154—*Robinson v. Kind*, 23 Nev. 340, 47 Pac. 977—*Elsasser v. Haines*, 52 N. J. L. 29, 18 Atl. 1095—*Jones v. Jones*, 36 Hun. 416—*Conover v. Wright*, 9 Pa. Dist. R. 689—*State v. Nathans*, 49 S. C. 225, 27 S. E. 52—*Kemper-Thomas Paper Co. v. Shyer*, 108 Tenn. 463, 58 L.R.A. 178, 67 S. W. 856—*York v. State*, 73 Tex. 654, 11 S. W. 869—*Murphy v. Wallace*, 3 Tex. App. Civ. Cas. (Willson) § 430.

1068. After final hearing in a circuit court of the United States involving more parties and other lands than those involved in another action in a state court, the decision in the latter case cannot be set up as a bar. *Roberts v. Northern P. R. Co.* 158 U. S. 1, 15 Sup. Ct. Rep. 756, 39: 873

Nonsuit.

1069. A judgment of nonsuit in a state court, although after reversal of a prior judgment for plaintiff, is no bar to a new action in a Federal court, and is no estoppel in the latter court. *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 14 Sup. Ct. Rep. 140, 37: 1107

Cited in *National Park Bank v. Remsen*, 158 U. S. 343, 39 L. ed. 1010, 15 Sup. Ct. Rep. 891—

Atlanta, K. & N. R. Co. v. Hooper, 44 C. C. A. 587, 105 Fed. 551—Connor v. Knott, 10 S. D. 385, 73 N. W. 264—Hooper v. Atlanta, K. & N. R. Co. 107 Tenn. 722, 63 S. W. 405—Illinois C. R. Co. v. Bentz, 108 Tenn. 675, 58 L.R.A. 693, 91 Am. St. Rep. 763, 69 N. W. 317.

1070-1. A nonsuit in the state court does not operate to estop the parties from raising the questions raised therein upon the removal of the cause to the circuit court of the United States. *Bucher v. Cheshire R. Co.* 125 U. S. 555, 8 Sup. Ct. Rep. 974,

31:795

Distinguished in *Giles v. Little*, 134 U. S. 649, 33 L. ed. 1063, 10 Sup. Ct. Rep. 623.

Cited in *Gardner v. Michigan C. R. Co.* 150 U. S. 357, 37 L. ed. 1100, 14 Sup. Ct. Rep. 140—*Cleaver v. Traders' Ins. Co.* 40 Fed. 714—*Smith v. Floyd County*, 85 Ga. 423, 11 S. E. 850—*McIver v. Florida C. & P. R. Co.* 110 Ga. 225, 65 L.R.A. 459, 36 S. E. 773—*Kerrigan v. Chicago, M. & St. P. R. Co.* 86 Minn. 410, 90 N. W. 976.

VIII. Federal Judgment in State Court.

Federal Question as to, see Appeal and Error, III. d, 9, h, 21.

Power of State Court to Review or Enforce, see Courts, VI. f.

Nature and Grade of Federal Courts and their Jurisdiction, see Courts, 440, 441, 465, 466.

Power of National or State Court over Its Own Judgments Independent of the Other, see Courts, 1472, 1520-1532.

Right of Foreign Creditor of Insolvent Estate to Prove Federal Judgment notwithstanding State Bar of Claims against Insolvent Estates, see Insolvency, 63.

Removal from State Court of Suit on Federal Judgment, see Removal of Causes, 223, 224.

Removal from State Court of Suit against Marshal for Levy under Federal Judgment, see Removal of Causes, 241, 242.

Validity; effect.

Sufficiency of Prospective Defense of Limitations as Federal Question in Suit on Federal Judgment, see Courts, 505.

Power of State Court to Suspend Federal Judgment Founded on a Previous Decree Since Vacated, see Courts, 1488, 1489.

Federal Decisions as Binding Rules of Decision in Federal Courts, as to Effect of Federal Judgment, see Courts, 1710.

1072. The judgments and decrees of the circuit court of the United States sitting in a particular state are to be accorded such effect, in the courts of that state, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S.*

H. & L. S. L. Co. 120 U. S. 141, 7 Sup. Ct. Rep. 472, 30:614

Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. Rep. 506, 44:619

Cited in *Carson v. Dunham*, 121 U. S. 428, 30 L. ed. 994, 7 Sup. Ct. Rep. 1030—*Winona & St. P. R. Co. v. Plainview*, 143 U. S. 301, 36 L. ed. 199, 12 Sup. Ct. Rep. 530—*Huntington v. Attrill*, 146 U. S. 686, 38 L. ed. 1134, 13 Sup. Ct. Rep. 224—*Metcalf v. Watertown*, 153 U. S. 676, 38 L. ed. 863, 14 Sup. Ct. Rep. 947—*Hancock Nat. Bank v. Farnum*, 176 U. S. 645, 44 L. ed. 621, 20 Sup. Ct. Rep. 506—*Northern Assur. Co. v. Grand View Bldg. Asso.* 203 U. S. 107, 51 L. ed. 111, 27 Sup. Ct. Rep. 27—*Borchertling v. United States*, 35 Ct. Cl. 342—*Staunton v. Goshorn*, 36 C. C. A. 83, 94 Fed. 60—*James v. Central Trust Co.* 39 C. C. A. 131, 98 Fed. 494—*Whitman v. Citizens Bank*, 49 C. C. A. 130, 110 Fed. 511—*Chicago & A. Bridge Co. v. Fowler*, 55 Kan. 36, 39 Pac. 727—*Howarth v. Lombard*, 175 Mass. 572, 49 L.R.A. 307, 56 N. E. 888—*Wonderly v. Lafayette County*, 150 Mo. 653, 45 L.R.A. 391, 73 Am. St. Rep. 474, 51 S. W. 745—*Stevens v. Central Nat. Bank*, 69 Hun. 467, 24 N. Y. Supp. 219—*Plant v. Harrison*, 36 Misc. 677, 74 N. Y. Supp. 411—*Johnstown Min. Co. v. Morse*, 44 Misc. 508, 90 N. Y. Supp. 107—*Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 468, 30 Am. St. Rep. 685, 31 N. E. 897—*Stevens v. Central Nat. Bank*, 144 N. Y. 61, 39 N. E. 68.

1073. No higher sanctity or effect can be claimed for a judgment of a circuit court of the United States in the administration of state laws, than is due to the judgment of state courts in like cases, where jurisdiction is derived solely from the citizenship of the parties. *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 19 Sup. Ct. Rep. 238, 43:528
Cited in *Hancock Nat. Bank v. Farnum*, 176 U. S. 645, 44 L. ed. 622, 20 Sup. Ct. Rep. 506

1074. If jurisdiction of a case in a circuit court was acquired only by reason of the citizenship of the parties, and the state law alone was administered, then only such validity and effect can be claimed in a state court for the judgment as would be due to a judgment of the state courts under like circumstances. *Dupassee v. Rochereau*, 21 Wall. 130, 22:588
Cited in *Crescent City L. S. L. & S. H. Co. v. Butchers' Union*, S. H. & L. S. L. Co. 120 U. S. 146, 30 L. ed. 617, 7 Sup. Ct. Rep. 472—*Metcalf v. Watertown*, 153 U. S. 676, 38 L. ed. 864, 14 Sup. Ct. Rep. 947—*Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 185, 40 L. ed. 664, 16 Sup. Ct. Rep. 471—*Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 510, 43 L. ed. 533, 19 Sup. Ct. Rep. 238—*Hancock Nat. Bank v. Farnum*, 176 U. S. 645, 44 L. ed. 622, 20 Sup. Ct. Rep. 506—*Deposit Bank v. Frankfort*, 191 U. S. 515, 48 L. ed. 282, 24 Sup. Ct. Rep. 154—*Staunton v. Goshorn*, 36 C. C. A. 83, 94 Fed. 60—*Ex parte Norvell*, 9 Mackey, 352—*Stevens v. Central Nat. Bank*, 69 Hun. 467, 24 N. Y. Supp. 219—*Stevens v. Central Nat. Bank*, 144 N. Y. 60, 39 N. E. 68.

1075. A judgment rendered by a state court against plaintiff in an action of equitable ejectment, sustaining a defense based on title obtained through sales under mort-

gages, was not without jurisdiction because the plaintiff had obtained a prior decree in a Federal court against one of the ejectment defendants before the defense sustained by the state court had arisen, when this decree was not set up in the state court as a bar. *Bryar v. Campbell*, 177 U. S. 649, 20 Sup. Ct. Rep. 794, 44: 926
Cited in Fayerweather v. Ritch, 195 U. S. 301, 49 L. ed. 211, 25 Sup. Ct. Rep. 58—*Union & Planters' Bank v. Memphis*, 49 C. C. A. 464, 111 Fed. 570—*Tampa Waterworks Co. v. Tampa*, 124 Fed. 936—*Ridge v. Manker*, 67 C. C. A. 598, 132 Fed. 601—*Brown v. Fletcher*, 140 Fed. 646—*Mills v. Allen*, 26 R. I. 179, 58 Atl. 622.

Conclusiveness.

1076. The supreme court of the District of Columbia is a court of the United States, and its judgment is conclusive upon the parties in every state, except for such causes as would be sufficient to set it aside in the courts of the District. *Embry v. Palmer*, 107 U. S. 3, 2 Sup. Ct. Rep. 25, 27:346
Cited in Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 147, 30 L. ed. 617, 7 Sup. Ct. Rep. 472—*Metcalf v. Watertown*, 153 U. S. 676, 38 L. ed. 864, 14 Sup. Ct. Rep. 947—*Ballin v. Loeb* (*Ballin v. J. & E. B. Friend Lace Importing Co.*) 78 Wis. 414, 10 L.R.A. 746, 47 N. W. 516.

1077. A final decree of a Federal court enjoining the collection of certain taxes, and adjudging that an irrevocable contract of exemption from taxation which, under the Federal Constitution, cannot be impaired by subsequent legislation, was constituted by Ky. Sess. Laws 1885-6, pp. 140, 144-7, 201, which decree rests upon the effect as *res judicata* of a similar judgment of an inferior state court respecting taxes of other years, is, while it remains in force, conclusive in the further proceedings had in the state court, notwithstanding the reversal of its original judgment by the highest state court after the decree of the Federal court was rendered, and the repudiation both by the highest state court and, in another case, by the Federal Supreme Court, of the view that there was a contract exemption, and the fact that by the settled law of Kentucky an adjudication in respect of taxes for one year cannot be pleaded as an estoppel in suits involving taxes of other years. *Deposit Bank v. Frankfort*, 191 U. S. 499, 24 Sup. Ct. Rep. 154, 48: 278
Cited in Citizens' Bank v. Parker, 192 U. S. 80, 48 L. ed. 354, 24 Sup. Ct. Rep. 181—*Covington v. First Nat. Bank*, 198 U. S. 107, 49 L. ed. 967, 25 Sup. Ct. Rep. 562—*Gunter v. Atlantic Coast Line R. Co.* 200 U. S. 291, 50 L. ed. 486, 26 Sup. Ct. Rep. 252—*Burt v. Smith*, 203 U. S. 133, 51 L. ed. 126, 27 Sup. Ct. Rep. 37—*Northern P. R. Co. v. Slaght*, 205 U. S. 131, 51 L. ed. 741, 27 Sup. Ct. Rep. 442—*Georgia R. & Bkg. Co. v. Wright*, 124 Ga. 604, 53 S. E. 251—*Rew v. Independent School District*, 125 Iowa, 35, 106 Am. St. Rep. 232, 98 N. W. 802.

Collateral attack.

On State Judgment in Federal Court, see *supra*, 1057-1062.

1077a. Judgments or decrees of a Federal court whose jurisdiction is invoked on the ground of diverse citizenship, which is alleged and admitted, cannot be collaterally assailed in a state court on the ground that there was in fact no diverse citizenship. *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.* 198 U. S. 188, 25 Sup. St. Rep. 629, 49: 1008

Full faith and credit.

Of State Judgment in Federal Court, see *supra*, 1039-1040.

See also Courts, 1004, 1370.

1078. A judgment of the Supreme Court of the United States to the effect that a policy of fire insurance could not be recovered upon as it stood nor be helped out by any doctrine of the common law is not denied full faith and credit by an adjudication of a state court that such judgment is not a bar to a suit in equity to reform the policy so that it will express consent to concurrent insurance, and to recover upon such policy as reformed. *Northern Assur. Co. v. Grand View Bldg. Assn.* 203 U. S. 106, 27 Sup. Ct. Rep. 27, 51: 109

IX. Assignment; Discharge; Payment.

a. Assignment.

Rescission of Contract of Assignment, see Contracts, 638.

Remedy at Law or in Equity against Assignor Holding Money Collected for Assignee, see Equity, 153.

Superiority of Assignee upon Record, to Subsequent Judicial Purchaser of Assigned Judgment, see Judicial Sale, 101.

Necessity of Answering Allegation of Fraudulent Recording of Release of Judgment, see Pleading, 784.

Rights and Duties of one Holding Judgment as Collateral Security, see Pledge, 37, 38.

Right of Indorser Tendering Amount of Judgment to Obtain Assignment, see Subrogation, 24.

See also Assignment, 16; Mortgage, 240.

1079. An indorsement on an execution, for the "use and benefit of" a certain bank, merely confers authority to receive the money, and does not amount to an assignment of the judgment. *Bank of United States v. Bank of Washington*, 6 Pet. 8, 8: 299

1080. Where one assigned to another certain judgments, upon his paying \$5,000, and gave him a power of attorney to dispose of the judgments for him and in his name, the judgments do not pass to such other without the payment of said sum. *French v. Hay*, 22 Wall. 231, 22: 799
Cited in Beardsley v. Beardsley, 138 U. S. 267,

34 L. ed. 929, 11 Sup. Ct. Rep. 318—Hay v. Washington & A. R. Co. 4 Hughes, 329, Fed. Cas. No. 6,255a.

1081. Where notes are left by a debtor in the hands of attorneys for collection, their proceeds to be applied in payment of debts, the creditors acquire an equitable interest in judgments obtained upon the notes, which may be assigned. *Hinkle v. Wanzer*, 17 How. 353, 15: 173

1082. Where a judgment was assigned to a bank, as collateral security for the payment of certain notes, with authority, in case said notes were not paid at maturity, to sell the judgment and apply the proceeds to their payment, the bank was under no obligation to collect the judgment before the maturity of the notes. *Bast v. First Nat. Bank*, 101 U. S. 93, 25: 794

1083. One who takes an assignment of a demand from an attorney to whom it has been assigned and who claims that he is entitled to get his fees out of it, can hold the proceeds thereof as against the true owner of the judgment, only to the amount that he has paid therefor. *Baker v. Wood*, 157 U. S. 212, 15 Sup. Ct. Rep. 577, 39: 677

1084. An assignee of a judgment is not affected by an entry of satisfaction made by the assignor after the assignment. *Gardner v. Brown*, 21 Wall. 36, 22: 527

1085. After judgment a claim ceases to be litigious within the meaning of the Code, and an assignee of the judgment is not subject to such provision concerning settlement. *Cucullu v. Hernandez*, 103 U. S. 105, 26: 322

Editorial note.

[Assignability of decree for alimony. 7 L.R.A. (N.S.) 179.]

Notice.

1086. Notice of the fraud in recovering a judgment on a policy of life insurance which induces the payment into court of the amount of recovery, out of which the clerk of court pays over the sums called for in certain assignments by way of contingent fees for professional services in collecting the insurance, cannot be established by the mere fact that, while the assignees held an interest in the policy only, they were assignees of a chose in action, and took it subject to the equities. *Fidelity Mut. L. Ins. Co. v. Clark*, 203 U. S. 64, 27 Sup. Ct. Rep. 19, 51: 91

1087. Notice of the denial of the death of the insured in the answer in an action on a policy of insurance is not notice of the fraud in recovering judgment on the policy while the insured was alive which will impeach such judgment as to the parties to whom the clerk of court pays over, out of the money paid into court in satisfaction of such judgment, the sums called for in certain assignments of an interest in the policy by way of contingent fees for professional services, rendered in good faith in

collecting the insurance. *Fidelity Mut. L. Ins. Co. v. Clark*, 203 U. S. 64, 27 Sup. Ct. Rep. 19, 51: 91

1088. The sale of a judgment for much less than its face value, by the attorney of record who procured it and to whom it had been assigned, puts the purchaser on inquiry as to the title of such attorney. *Baker v. Wood*, 157 U. S. 212, 15 Sup. Ct. Rep. 577, 39: 677

Defenses.

1089. Assignees of a judgment take it subject to all defenses that existed against it in the hands of the assignor. But a secret agreement between the plaintiff and a part of the defendants, who were jointly liable, to collect the judgment, if obtained, entirely of the other defendants, will not be any defense against an assignee of the judgment. *Selz v. Unna*, 6 Wall. 327, 18: 799

b. Discharge; Payment.

As Waiver of Right to Appeal, see Appeal and Error, 2438-2441.

Effect on Appellate Jurisdiction of Part Payment Reducing below Jurisdictional Amount, see Appeal and Error, 415-418.

By Seizing Property Under Attachment, see Attachment, 47.

By Attorney, Ratification of, see Attorneys, 69.

Judgment for Fraud not Discharged in Bankruptcy, see Bankruptcy, 423.

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Relief in Equity against Unconscionable Attempt to Enforce Second Payment, see Equity, 261.

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Judgment Roll as Evidence of Payment, see Evidence, 1263.

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Sufficiency of Allegations of Discharge in Injunction Bill, see Injunction, 216.

Right to Have Amount of Judgment Credited on Judicial Sale, see Judicial Sale, 143.

Mandamus to Compel Payment of Judgment against Municipality, see Mandamus, II. d. 6.

Sufficiency of Plea of Payment before Rendition of Judgment, see Pleading, 764.

Necessity of Answer by Assignee to Allegation of Fraudulent Recording of Release, see Pleading, 784.

Discharge of Surety by Payment of Judgment, see Principal and Surety, 21.

Duty of Railroad Lessee to Pay Judgment against Lessor, see Railroads, 120.

Payment of Judgment against National Bank Receiver, see Receivers, 100.

Judgment in Replevin, see Replevin, 20.

Effect of Performing Decree on Right to Bill of Review, see Review, 53, 55.

Specific Performance of Agreement to Discharge Judgment, see Specific Performance, 47.

Repeal of Statute as to, see Statutes, 651.

Duty of City to Levy Tax to Pay Judgment, see Taxes, 491, 496, 503, 504.

Duty of County to Levy Tax to Pay Judgment, see Taxes, 493.

See also *supra*, 164, 718, 719, 1084.

1090. The payment of a judgment of the court of claims satisfies the demand of a judgment creditor against the United States, and he is only required to enter satisfaction on receipt of the money. *United States v. Frerichs*, 124 U. S. 315, 8 Sup. Ct. Rep. 514, 31: 471
Cited in *Michot v. United States*, 31 Ct. Cl. 303
—*Vaughn v. United States*, 34 Ct. Cl. 344.

1091. No matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause. *Lovejoy v. Murray*, 3 Wall. 1, 18: 129
Cited in *The Custer* (*Pendergast v. The General Custer*) 10 Wall. 218, 19 L. ed. 945—*The Beaconsfield*, 158 U. S. 307, 39 L. ed. 993, 15 Sup. Ct. Rep. 860—*Jennings v. Dolan*, 29 Fed. 862—*Balcock & W. Co. v. Pioneer Iron Works*, 34 Fed. 341—*Chils v. Gronlund*, 41 Fed. 505—*Carey v. Bilby*, 129 Fed. 205—*Donaldson v. Carmichael*, 102 Ga. 43, 29 S. E. 135—*Miller v. Beck*, 108 Iowa, 587, 79 N. W. 344—*Stimpson v. Poole*, 141 Mass. 505, 6 N. E. 705—*Hartigan v. Dickson*, 81 Minn. 286, 63 N. W. 1091—*Dulaney v. Buffum*, 173 Mo. 15, 73 S. W. 125—*Arnett v. Missouri P. R. Co.* 64 Mo. App. 374—*Kennealy v. Leary*, 67 N. J. L. 437, 51 Atl. 475—*Mitchell v. Allen*, 25 Hun. 545—*Delong v. Curtis*, 35 Hun. 95—*Terry v. Munger*, 49 Hun. 564, 2 N. Y. Supp. 348—*City Nat. Bank v. Colgin*, 21 Tex. Civ. App. 489, 51 S. W. 856—*Bloss v. Plymale*, 3 W. Va. 408, 100 Am. Dec. 752—*Ellis v. Esson*, 50 Wis. 151, 36 Am. Rep. 830, 6 N. W. 518.

1092. By the law of Missouri, a judgment is conclusively presumed to be paid after twenty years. This presumption is a rule in evidence, and not a limitation, and is not subject to the exceptions and incidents of an act of limitation. *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. Rep. 426, 28: 466
Cited in *Chiles v. School District*, 103 Mo. App. 246, 77 S. W. 82.

1093. A seizure of personal property under an attachment is not necessarily a satisfaction of the judgment when afterwards obtained. *Maxwell v. Stewart*, 21 Wall. 71, 22 Wall. 77, 22: 564
Cited in *Chapman v. H. D. Lee Mercantile Co.* 7 Kan. App. 258, 53 Pac. 778—*Taylor v. Felder*, 5 Tex. Civ. App. 423, 23 S. W. 480.

1094. A judgment is satisfied by a sale of lands on execution issued thereon,—the bid

being sufficient to cover the amount of the judgment and costs,—and a deed executed thereon. *Walker v. Powers*, 104 U. S. 245, 26: 729

1095. When the execution has been so used by the officer that the title to the goods is changed, or the goods are lost to the debtor, the judgment is extinguished, and the creditor must take his remedy against the officer. *United States v. Dashiell*, 3 Wall. 688, 18: 268

1096. Levy on sufficient personal property to satisfy an execution does not extinguish the judgment, if the levy is overreached by a prior lien, or is abandoned at the debtor's request, or defeated by his misconduct. *United States v. Dashiell*, 3 Wall. 688, 18: 268

1096a. Accord and satisfaction is a good defense to a proceeding on a judgment. *Farmers' Bank v. Groves*, 12 How. 51, 13: 839

Cited in *Savage v. Everman*, 70 Pa. 318, 10 Am. Rep. 676.

1097. A formal discharge of judgments against the possessors of land does not discharge their warrantor any more than a personal discharge by settlement. *New Orleans v. Whitney* (*New Orleans v. Gaines*) 138 U. S. 595, 11 Sup. Ct. Rep. 428, 34: 1102

Editorial notes.

[Right of surety who has paid judgment to enforce it for his own benefit. 16 L.R.A. 115.

Extinction of judgment against principal by surety's payment. 68 L.R.A. 513.]

Partial satisfaction or release.

Estoppel to Claim Partial Payment, see Pleading, 603.

See also *supra*, 717.

1098. A partial satisfaction of a judgment, without issue of execution, by a sheriff, liable, as a joint trespasser, for proceeding under a bond attachment, is no bar to an action against his cotrespasser. *Lovejoy v. Murray*, 3 Wall. 1, 18: 129

1099. The absence of the clerk's signature and the seal of his office from a blank attestation of a release of part of a judgment, which is otherwise duly executed according to the requirements of the Arizona Revised Statutes, authorizing it to be filed in the supreme court, will not prevent the release from being valid and effective. *Sims v. Sims*, 175 U. S. 162, 20 Sup. Ct. Rep. 58, 44: 115

Capias ad satisfaciendum.

Effect of Execution against the Person to Discharge Liens upon Estate, see Execution, 95-99.

1100. [At common law the release of a debtor whose person is in execution is a release of the judgment itself. *United States v. Stansbury*, 1 Pet. 573, 7: 267
Magniac v. Thomson, 15 How. 281, 14: 696
M'Fadden v. Parker (Pa. Sup. Ct.) 4 Dall. 275, 1: 831]
Cited in *Harden v. Campbell*, 4 Gill, 31—Bam-

ford v. Keefer, 68 Pa. 391—Hyde v. Long, 4 Vt. 533.

1101. The omission of the words, "that the judgment shall remain good," which are in the general act, from a special act of Congress releasing the principal debtor from imprisonment, does not release the judgment, or affect the right of the United States against the surety. *Hunter v. United States*, 5 Pet. 173, 8: 86

1102. The greatest effect which the law gives to a commitment on a ca. sa. is a suspension of the other remedies during its continuance. It is not a discharge of the debt. *Taylor v. Thomson*, 5 Pet. 358, 8: 154

Cited in Queen Annes County v. Pratt, 10 Md. 12.

1103. The rule that the service of a *capias ad satisfaciendum*, by taking into custody the body of the debtor, operates a satisfaction of the debt, applied in a case where, after the arrest of the defendant, he was discharged in pursuance of a compromise with the plaintiff. *Magniac v. Thompson*, 15 How. 281, 14: 696

Cited in Steam Stone Cutter Co. v. Sheldon, 22 Blatchf. 487, 21 Fed. 878.

1104. [A ca. sa. was held to operate as a discharge of the debt, where the defendant had been discharged from imprisonment under the Pennsylvania laws for relief of imprisoned debtors. *Freeman v. Ruston* (Pa. Sup. Ct.) 4 Dall. 214, 1: 806]

1105. The plaintiff in a judgment has a right to an execution against the person and the personal and real property of the defendant; he has his election, but his adoption of any one does not preclude him from restoring to the other, if he does not obtain satisfaction of the debt on the first execution. *Taylor v. Thomson*, 5 Pet. 358, 8: 154

Cited in Merrill v. National Bank, 173 U. S. 146, 43 L. ed. 646, 19 Sup. Ct. Rep. 360—*Dobbin v. Allegheny*, 2 Pittsb. 123, Fed. Cas. No. 3,941—*Biscoe v. Sandefur*, 14 Ark. 591—*Becker v. Walworth*, 45 Ohio St. 177, 12 N. E. 1.

1106. If the defendant escape or is discharged by operation of law, the judgment retains its lien, and may be enforced on the property of the defendant; the creditor may retake him if he escape, or sue the sheriff. *Taylor v. Thomson*, 5 Pet. 358, 8: 154
Hunter v. United States, 5 Pet. 173, 8: 86
Cited in United States v. Watkins, 4 Cranch. C. C. 288, Fed. Cas. No. 16,650—*Wiltshire v. Lambert*, 44 Ill. App. 474—*Harden v. Campbell*, 4 Gill, 3—*State. David. Prosecutor. v. Blundell*, 40 N. J. L. 375—*McManan's Petition*, 16 R. I. 360, 1 L.R.A. 562, 16 Atl. 148.

X. Merger of Cause of Action in Judgment.

Merger of Cause of Action in Contract, see Contracts, III.

Merger of Mechanics' Lien in Judgment, see Mechanics' Liens, 29.

Effect of Merger as Entitling Plaintiff to Sue by Reason of Citizenship in Federal Courts, see Courts, 830.
See also *supra*, 150.

1107. Upon the recovery of a judgment, the original cause of action passes in *rem judicatam*. *Biddle v. Wilkins*, 1 Pet. 686, 7: 315

Cited in Brown v. Equitable Life Assur. Soc. 112 Fed. 846—*Weeks v. Pearson*, 5 N. H. 325.

1107a. An original cause of action is merged and gone forever when a judgment thereupon remains in full force, unreversed. *United States v. Leffler*, 11 Pet. 86, 9: 642
Cited in Sleeper v. Union Ins. Co. 65 Me. 304, 20 Am. Rep. 706—*Brigel v. Creed*, 65 Ohio St. 44, 60 N. E. 901.

1108. A judgment merges the demand on which it is rendered, and a second suit by the same party cannot be brought upon it, but his only remedy is to enforce the judgment or to bring another suit upon it. *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. Rep. 426, 28: 466

1109. The cause of action involved was not regarded as being so merged in the judgment as to preclude an examination of its nature. *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. Rep. 763, 33: 193
Cited in Packer v. Whittier, 33 C. C. A. 660, 63 U. S. App. 37, 91 Fed. 513.

1110. The nature of a cause of action is not changed by recovering a judgment upon it, and may be inquired into in an action in another jurisdiction on the judgment to determine the question of jurisdiction. *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 8 Sup. Ct. Rep. 1370, 32: 239
Cited in Huntington v. Attrill, 146 U. S. 664, 36 L. ed. 1120, 13 Sup. Ct. Rep. 224—*Dey v. Chicago, M. & St. P. R. Co.* 45 Fed. 84—*United States v. Shapleigh*, 4 C. C. A. 241, 12 U. S. App. 26, 54 Fed. 130—*Central Trust Co. v. Charlotte, C. & A. R. Co.* 65 Fed. 263—*Packer v. Whittier*, 33 C. C. A. 660, 63 U. S. App. 37, 91 Fed. 513—*Guardian Trust & Deposit Co. v. Greensboro Water Supply Co.* 115 Fed. 189—*Rio Grande County v. Burpee*, 24 Colo. 59, 48 Pac. 539—*Grande County v. People*, 16 Colo. App. 224, 64 Pac. 675—*Whyte v. McGovern*, 51 N. J. L. 358, 17 Atl. 957—*Paterson v. Smith*, 72 Vt. 294, 47 Atl. 1088.

1111. The rendition of a judgment on a debt does not change its character as the same debt which existed against a bankrupt at the time action was brought thereon. *Boynton v. Ball*, 121 U. S. 457, 7 Sup. Ct. Rep. 981, 30: 985
Cited in Wisconsin v. Pelican Ins. Co. 127 U. S. 293, 32 L. ed. 244, 8 Sup. Ct. Rep. 1370—*The Cerro Gordo*, 54 Fed. 395—*Turner v. Turner*, 3 N. B. N. Rep. 824, 108 Fed. 789—*Arkansas v. Bowen*, 9 Mackey, 297—*Courtney v. Beale*, 84 Va. 694, 5 S. E. 708.

1112. A judgment in which a cause of action is merged may be pleaded as a defense in another court to a suit on the same cause

of action. *Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. Rep. 648, 30: 707
Cited in McMullen v. Richtle, 8 L.R.A. 269, 41 Fed. 503.

Deed of trust.

1113. A collateral remedy upon a deed of trust given to secure a note is not extinguished by an unsatisfied judgment upon the note. *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19, 10: 335
Cited in Re Crawford, 3 Nat. Bankr. Reg. 707, Fed. Cas. No. 3,363—*Wells v. Edmlson*, 4 Dak. 57, 22 N. W. 497—*Coles v. Withers*, 33 Gratt. 196.

1114. A judgment on notes secured by a deed of trust does not extinguish the remedy on the deed; and this may survive, although the judgment becomes barred by the statute of limitations. *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19, 10: 335
Distinguished in Duke v. Story, 116 Ga. 390, 42 S. E. 722.

Cited in Eubanks v. Leveridge, 4 Sawy. 279, Fed. Cas. No. 4,544—*Ware v. Curry*, 67 Ala. 286—*Conway v. Caswell*, 121 Ga. 259, 48 S. E. 956—*Bush v. Cooper*, 26 Miss. 611, 59 Am. Rep. 270—*Miller v. Helm*, 2 Smedes & M. 697—*Wood v. Augustine*, 61 Mo. 51—*Paxton v. Rich*, 85 Va. 382, 1 L.R.A. 640, 7 S. E. 531—*Gibson v. Green*, 89 Va. 527, 37 Am. St. Rep. 888, 16 S. E. 661—*Hayes v. Frey*, 54 Wis. 520, 11 N. W. 695.

Note or contract.

See also *supra*, 1113, 1114.

1115. The obligation of a promissory note is merged in a judgment rendered thereon. *Ober v. Gallagher*, 93 U. S. 199, 23: 829
Cited in Connecticut Mut. L. Ins. Co. v. Jones, 1 McCrary, 389, 8 Fed. 304.

1116. A judgment on a note or contract merges the note or contract, and no other suit can be maintained on the same instrument. *Eldred v. Michigan Ins. Bank*, 17 Wall. 545, 21: 685
Cited in Hanley v. Donoghue, 116 U. S. 3, 29 L. ed. 536, 6 Sup. Ct. Rep. 242—*Schuler v. Israel*, 120 U. S. 509, 30 L. ed. 708, 7 Sup. Ct. Rep. 648—*Lawrence v. Remington*, 6 Biss. 46, Fed. Cas. No. 8,141—*Michigan Ins. Bank v. Eldred*, 6 Biss. 371, Fed. Cas. No. 9,528—*United States v. Dewey*, 6 Biss. 503, Fed. Cas. No. 14,956—*Wilkinson v. Culver*, 23 Blatchf. 417, 25 Fed. 640—*Ellis v. Bone*, 71 Ga. 468—*Gapen v. Bretternitz*, 31 Neb. 304, 47 N. W. 918.

Bonds; coupons.

1117. A court of equity will not look behind a joint judgment and see that the bond on which recovery was had was, in fact, joint and several. The bond was merged in the judgment, and the obligor is bound thereby. *United States v. Price*, 9 How. 83, 13: 56

Cited in Ferguson v. Dent, 29 Fed. 8—*Pugh v. Russell*, 27 Gratt. 799—*Grant v. Burgyon*, 88 N. C. 100—*Union Bank v. Hodges*, 11 Rich. L. 726.

1118. Although coupons are merged in the judgment recovered thereupon against the county, they carry with them into the judgment all the remedies which in law form a part of their contract obligations, and these remedies may still be enforced in all appro-

priate ways, notwithstanding the change in the form of the debt. *County Court v. United States*, 105 U. S. 733, 26: 1220
Cited in United States ex rel. Harshman v. County Court, 5 McCrary, 79, 15 Fed. 706—*United States ex rel. Morton v. King*, 74 Fed. 497—*King v. Grand County*, 23 C. C. A. 350, 40 U. S. App. 614, 77 Fed. 586—*Smith v. Broderick*, 107 Cal. 651, 48 Am. St. Rep. 167, 40 Pac. 1033—*Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 399, 34 L.R.A. 843, 71 Am. St. Rep. 926, 45 Pac. 494.

XI. Suspension; Enforcement; Revival.

a. Suspension.

By Motion to Set Aside, see *infra*, 1188.
 Stay of Execution, see Executions, 68—71.
 Effect of Injunction against Judgment, see Executions, 70.

Of Judicial Sale for Prescribed Period by Death of Debtor and Administration of his Estate, see Judicial Sale, 20.

1119. An order merely suspending the execution of the judgment until the next term of the court, there being no proceeding pending to rehear, reconsider, or modify it, does not give the court power, at its next term, to reconsider the whole case or to set aside the judgment. *United States v. Pile*, 130 U. S. 280, 9 Sup. Ct. Rep. 523, 32: 904

b. Enforcement.

Judgment of Sister State, see *supra*, III. b, 4.

Judgment on Appeal, see Appeal and Error, IX. m.

Claim for Unpaid Portion by Judgment of Court of Claims, see Claims, 169.

Due Process in, see Constitutional Law, 720.

Power of Enforcement as Incidental Jurisdiction, see Courts, 43—45, 291.

Ancillary Jurisdiction in Federal Court, of Bill to Aid or Supplement Decree, see Courts, 1048—1056.

State Limitations and Prescriptions as Rules of Decision in Federal Courts, see Courts, 2050.

State Decisions on Right of Enforcement as Precedents in Federal Courts, see Courts, 2133.

By Creditors' Bill, see Creditors' Bill.

General Jurisdiction of Equity to Enforce Judgments, see Equity, I. d, 12.

Power of Equity to Subject other Property when Property Subject to Lien is Insufficient, see Equity, 185a.

Mandamus, and not Injunction, as Remedy to Enforce Levy of Tax to Pay Judgment against Municipality, see Injunction, 180.

Enforcement of Order or Decision of Interstate Commerce Commission, see Interstate Commerce Commission, 10—14.

Limitation of Action against, see Limitation of Actions, II. j.; III. i.

Sufficiency of Plea in Action to Enforce Judgment, see Pleading, III. h, 5.

Profect in Action on Judgment, see Pleading, 305.

Special Demurrer to Plea Failing to Set out Fraud in Obtaining Judgment, see Pleading, 859.

Delay Preventing Stay of Enforcement, see Prohibition, 4.

Suit to Require Levy of Tax to Meet Public Debt, as Suit against State, see States, 304-308.

See also *supra*, 529, 1108-1110; *infra*, 1207.

1120. In an action upon a judgment of a court of general jurisdiction, the jurisdiction of the cause and of the parties in the original action will be presumed until the contrary appears. Knowles v. Logansport Gaslight & Coke Co. 19 Wall. 58, 22: 70 *Cited in* Hill v. Mendenhall, 21 Wall. 454, 22 L. ed. 616—Kilbourn v. Thompson, 103 U. S. 198, 26 L. ed. 389—Hanley v. Donoghue, 116 U. S. 5, 29 L. ed. 537, 6 Sup. Ct. Rep. 242—Adams v. Terrell, 4 Woods, 341, 4 Fed. 800—Runkle v. Citizens' Ins. Co. 6 Fed. 148—Holmes v. Oregon & C. R. Co. 7 Sawy. 401, 9 Fed. 245—Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 119, 10 Fed. 706—Citizens' Bank v. Brooks, 23 Blatchf. 138, 23 Fed. 22—Tallman v. Baltimore & O. R. Co. 45 Fed. 157—First Nat. Bank v. Cunningham, 48 Fed. 514—Hatch v. Ferguson, 57 Fed. 971—Reinach v. Atlantic & G. W. R. Co. 58 Fed. 43—Sammis v. Wightman, 81 Fla. 25, 12 So. 526—Thomas v. Morrisett, 76 Ga. 397—Gregory v. Gregory, 76 Me. 539—Faber v. Hovey, 117 Mass. 108, 19 Am. Rep. 398—Sewall v. Sewall, 122 Mass. 161, 23 Am. Rep. 299—Reed v. Reed, 52 Mich. 121, 50 Am. Rep. 247, 17 N. W. 720—Michels v. Stork, 52 Mich. 264, 17 N. W. 833—Hauswirth v. Sullivan, 6 Mont. 207, 9 Pac. 798—Elaasser v. Haines, 52 N. J. L. 25, 18 Atl. 1095—Hoffheimer v. Stiefel, 17 Misc. 237, 39 N. Y. Supp. 714—Vilas v. Plattsburg & M. R. Co. (Vilas v. Butler) 123 N. Y. 455, 9 L.R.A. 849, 20 Am. St. Rep. 771, 25 N. E. 941—Slipes v. Whitney, 30 Ohio St. 74—Van Fossen v. State, 37 Ohio St. 320, 41 Am. Rep. 507—Guthrie v. Lowry, 84 Pa. 537—Montgomery v. Rich, 3 Tenn. Ch. 663—Gilechrist v. West Virginia Oil & Oil Land Co. 21 W. Va. 118, 45 Am. Rep. 555—Crumlish v. Central Improv. Co. 38 W. Va. 398, 23 L.R.A. 131, 45 Am. St. Rep. 872, 18 S. E. 456—Griggs v. Becker, 87 Wis. 317, 58 N. W. 396.

1121-2. A judgment in a proceeding against a nonresident defendant, without personal service, by attachment of property, cannot be enforced in a subsequent suit, either at law or in equity. Providence Rubber Co. v. Goodyear, 9 Wall. 807,

19: 587

1123. Where the enforcement of a judgment is sought by proceedings which were authorized by legislation existing at its date, but subsequently repealed, the court may inquire whether the judgment was founded upon a contract, the obligation of which the state was prohibited from impairing, but cannot re-examine the validity of the contract or the propriety of the judgment. Louisiana ex rel. Nelson v. St. Martins Parish, 111 U. S. 716, 4 Sup. Ct. Rep. 648,

28: 574

Cited in Wisconsin v. Pelican Ins. Co. 127 U. S. 293, 32 L. ed. 244, 8 Sup. Ct. Rep. 1370—Board of Liquidation v. United States, 47

C. C. A. 591, 108 Fed. 692—Arkansas use of Faulkner v. Bowen, 9 Mackey, 297.

1124-5. Where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when, upon the face of the record, it appears, not that mere error intervened in the rendition of such judgments, but that they rest upon no cause of action whatever. Comrs. of Taxing District v. Loague, 129 U. S. 493, 9 Sup. Ct. Rep. 327, 32: 780

Distinguished in Franklin County v. German Sav. Bank, 142 U. S. 100, 35 L. ed. 950, 12 Sup. Ct. Rep. 147.

Cited in Lawrence Mtg. Co. v. Janesville Cotton Mills, 138 U. S. 562, 34 L. ed. 1009, 11 Sup. Ct. Rep. 402—Ward v. Joslin, 186 U. S. 152, 46 L. ed. 1089, 22 Sup. Ct. Rep. 807—Wilder v. Rio Grande County, 41 Fed. 514—Lake County v. Platt, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 573—Central Trust Co. v. Clark, 26 C. C. A. 402, 49 U. S. App. 453, 81 Fed. 273—Smith v. Broderick, 107 Cal. 651, 48 Am. St. Rep. 167, 40 Pac. 1033—Rio Grande County v. Burpee, 24 Colo. 60, 48 Pac. 539—Grand County v. People, 16 Colo. App. 225, 64 Pac. 675—Howard v. Huron, 6 S. D. 189, 26 L.R.A. 498, 60 N. W. 803—Bradstreet Co. v. Jackson, 81 Miss. 236, 32 So. 999—Water Comrs. v. Cramer, 61 N. J. L. 273, 68 Am. St. Rep. 705, 39 Atl. 671—Union Bank v. Oxford, 110 N. C. 228, 34 L.R.A. 491, 25 S. E. 960—Bear v. Brunswick County, 122 N. C. 437, 65 Am. St. Rep. 711, 29 S. E. 719—State ex rel. Clyde v. Bristol, 109 Tenn. 319, 70 S. W. 1031—Harkness v. Hutcherson, 90 Tex. 386, 38 S. W. 1120.

1126. The extent of plaintiff's interest in a judgment recovered upon notes held only as collateral security is equal only to the amount of the debt secured, where he was a bona fide holder to that extent only, and, in an action brought to obtain satisfaction of the judgment, he is entitled to recover no greater sum. Pearce v. Rice, 142 U. S. 28, 12 Sup. Ct. Rep. 130, 35: 925

1127. A suit in equity will not lie to charge an incorporated company with a judgment recovered against another company. Gray v. National S. S. Co. 115 U. S. 116, 5 Sup. Ct. Rep. 1166, 29: 303

1128. The judgment creditor is in fact without remedy, where mandamus will not lie by reason of want of officers authorized to levy a tax, and he can only apply to the legislature for relief. Barkley v. Board of Levee Comrs. 93 U. S. 258, 23: 893 *Cited in* Thompson v. Allen County, 115 U. S. 557, 29 L. ed. 474, 6 Sup. Ct. Rep. 140—Marra v. San Jacinto & P. V. Irrig. District, 131 Fed. 790—Bates v. Gregory, 89 Cal. 395, 26 Pac. 891—Boody v. Watson, 64 N. H. 197, 9 Atl. 794.

Editorial note.

[Power of Federal court to enforce its own judgment against a decedent's estate. 12 L. R.A.(N.S.) 154.]

Decrees in equity.

Enforcement by Action of Debt, see Debt, 12.

See also *supra*, 339.

1129. Equity decrees are primarily in *personam*, and may be enforced whenever the parties affected thereby are before the court. *Massie v. Watts*, 6 Cranch, 148, 3: 181 Cited in *Worthington v. Lee*, 61 Md. 542—Com. ex rel. *Smith v. Dffenbach*, 5 Phila. 237.

1130. A court of equity has jurisdiction by supplemental bill to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings. A supplemental bill may also be brought by or against an assignee of a party to the decree. *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. Rep. 136, 37: 1123 Cited in *White v. Ewing*, 159 U. S. 39, 40 L. ed. 68, 15 Sup. Ct. Rep. 1018—*New Orleans v. Fisher*, 180 U. S. 196, 45 L. ed. 492, 21 Sup. Ct. Rep. 347—*Ross v. Ft. Wayne*, 11 C. C. A. 293, 24 U. S. App. 113, 63 Fed. 471—*Shalnwald v. Lewis*, 69 Fed. 493—*Walte v. O'Neil*, 72 Fed. 356—*McDonald v. Selgman*, 81 Fed. 757—*Widaman v. Hubbard*, 88 Fed. 812—*Central Trust Co. v. Western North Carolina R. Co.* 89 Fed. 28—*Walter Baker & Co. v. Baker*, 89 Fed. 676—*James v. Central Trust Co.* 39 C. C. A. 130, 98 Fed. 493—*Riverdale Cotton Mills v. Alabama & G. Mfg. Co.* 111 Fed. 432—*Central Trust Co. v. Western North Carolina R. Co.* 112 Fed. 476—*United States v. Northern Securities Co.* 128 Fed. 810—*La Junta & L. Canal Co. v. Hess*, 31 Colo. 14, 71 Pac. 415—*Emerick v. Miller*, 159 Ind. 322, 64 N. E. 28—*First Nat. Bank v. Kingman & Co.* 62 Kan. 575, 64 Pac. 65.

1131. An action of debt can be maintained upon a decree in equity for a specific sum, the same as upon a judgment at law, as decrees of courts of equity are to every intent as binding as judgments in courts of law. *Pennington v. Gibson*, 16 How. 65, 14: 847 Cited in *Nations v. Johnson*, 24 How. 203, 16 L. ed. 631—*Johnson Steel Street Rail Co. v. Wharton*, 152 U. S. 258, 38 L. ed. 433, 14 Sup. Ct. Rep. 608—*Dowell v. Applegate*, 152 U. S. 344, 38 L. ed. 470, 14 Sup. Ct. Rep. 611—*Hilton v. Guyot*, 159 U. S. 183, 40 L. ed. 115, 16 Sup. Ct. Rep. 139—*New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905—*Corbin v. Graves*, 27 Fed. 645—*Mellin v. Horlick*, 31 Fed. 867—*Johnston v. Western U. Teleg. Co.* 33 Fed. 364—*Lynde v. Columbus, C. & I. C. R. Co.* 57 Fed. 995—*Knapp v. Knapp*, 59 Fed. 642—*Israel v. Israel*, 9 L.R.A. (N.S.) 1168, 79 C. C. A. 32, 148 Fed. 578—*Du Bois v. Seymour*, 81 C. C. A. 590, 152 Fed. 603—*Blattner v. Frost*, 44 Ill. App. 581—*Davidson v. Nebaker*, 21 Ind. 335—*Boyle v. Schindel*, 52 Md. 4—*Glenn v. Williams*, 60 Md. 113—*Allen v. Allen*, 100 Mass. 374—*Hockaday v. Lawther*, 17 Mo. App. 644—*Brisbane v. Dobson*, 50 Mo. App. 175—*Mutual L. Ins. Co. v. Newton*, 50 N. J. L. 574, 14 Atl. 756—*Thompson v. Owen*, 8 Kulp. 41—*Wagner v. Latham*, 26 R. I. 27, 65 L.R.A. 816, 57 Atl. 1058—*Stuart v. Hurt*, 88 Va. 343, 13 S. E. 438—*Kunze v. Kunze*, 94 Wis. 58, 68 N. W. 391.

1132. No action at law will lie on the decree. U. S. Dig.—234

cretal order of a court of equity. *Hugh v. Higgs*, 8 Wheat. 697, 5: 719 Cited in *Pennington v. Gibson*, 16 How. 79, 14 L. ed. 852—*Knapp v. Knapp*, 59 Fed. 642—*Green v. Foley*, 2 Stew. & P. (Ala.) 443—*Phillips v. Thompson*, 3 Stew. & P. (Ala.) 382—*Blattner v. Frost*, 44 Ill. App. 581—*The Governor use of Newman v. Shelby*, 2 Blackf. 31—*Woodruff v. Clark*, 6 Blackf. 338—*Boyle v. Schindel*, 52 Md. 4—*Van Buskirk v. Mulock*, 18 N. J. L. 191—*New York Mut. L. Ins. Co. v. Newton*, 50 N. J. L. 574, 14 Atl. 756—*Thrall v. Waller*, 13 Vt. 234, 37 Am. Dec. 592.

1133. A decree directing the alteration or abatement of a bridge over a navigable river between states cannot be carried into execution, where an act of Congress has been passed declaring it a lawful structure; but such act does not affect that portion of the decree which directs the payment of costs. *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 15: 435 Cited in *Mills v. Green*, 159 U. S. 656, 40 L. ed. 294, 16 Sup. Ct. Rep. 132.

1134-6. A decree in partition in chancery will not be aided by compelling conveyances twelve years after it is made, even though it was entered by consent, if it erroneously stated the interest of one party, and has been repudiated or ignored by the parties during all the meantime. *Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. Rep. 456, 27: 256 Cited in *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 562, 34 L. ed. 1009, 11 Sup. Ct. Rep. 402—*Kelly v. Milan*, 21 Fed. 869—*Oakland v. Oakland Water Front Co.* 118 Cal. 228, 50 Pac. 277—*Bruce v. Osgood*, 113 Ind. 363, 14 N. E. 563—*Tate v. Foshee*, 117 Ind. 323, 20 N. E. 241—*Union Bank v. Oxford*, 119 N. C. 228, 34 L.R.A. 491, 25 S. E. 966.

c. Revival; Scire Facias.

Revival of Action, see Abatement and Revival, III.

Citizenship in Bill of Revivor, see Courts, 1075, 1076.

Of Judgment as Necessary to Issue of Execution, see Executions, 64-67.

Expiration and Renewal of Injunctive Order, see Injunction, 233, 234.

Mode of Taking Advantage of Defendant's Death, see Pleading, 855.

What may be Pleaded by Administrator on Scire Facias, see Pleading, 674.

Questions Raised by Demurrer to Scire Facias, see Pleading, 896.

1137. A scire facias upon a judgment is, to some purposes, only a continuation of the former suit; but an action of debt on a judgment is an original suit. *Davis v. Packard*, 7 Pet. 276, 8: 684

1137a. To a scire facias to revive a judgment in ejectment, it is not necessary to make the executors or administrators of deceased defendants parties. *Walden v. Craig*, 14 Pet. 147, 10: 393

1138. A judgment in ejectment must be

revived against both the heirs and the tenants. *Walden v. Craig*, 14 Pet. 147.

10: 393

Erwin v. Dundas, 4 How. 58, 11: 875

1139. In a scire facias to revive a judgment in ejectment, where it is stated that the term recovered is yet unexpired, this is sufficient. It does not require that the term as laid in the declaration, and that facts showing its continuance, should be stated. *Walden v. Craig*, 14 Pet. 147.

10: 393

1140. The bankruptcy of the plaintiff cannot be set up by a defendant to show error in reviving a judgment in favor of plaintiff's executrix, especially when the assignee in bankruptcy has ratified the action of the executrix by becoming a party to the proceedings. *Brown v. Wygant*, 163 U. S. 618, 16 Sup. Ct. Rep. 1159, 41: 284

1141. By the law of South Carolina, the thirty-day rule to show cause is substituted for a scire facias to a judgment only in cases where lapse of time prevents plaintiffs from suing out execution; not in cases where defendant is deceased, to revive a judgment against his representatives. *Griffith v. Frazier*, 8 Cfanch, 9, 3: 471

1142. Under the laws of Virginia, an execution issued on a judgment against an executrix is not an execution against her testator, so as to preserve the right to revive the judgment against the testator by scire facias after ten years. *Deneale v. Archer*, 8 Pet. 528, 8: 1033
Cited in *Laidley v. Kilne*, 23 W. Va. 579.

1143. A revival of a judgment for purposes of execution, by scire facias without service of process upon or appearance by the defendant, who was outside of the state, cannot operate to remove the statutory bar of the law of another state in which he resides. *Owens v. McCloskey* (*Owens v. Henry*) 161 U. S. 642, 16 Sup. Ct. Rep. 693, 40: 837

Cited in *Browne v. Chavez*, 181 U. S. 71, 45 L. ed. 754, 21 Sup. Ct. Rep. 14—*Betts v. Johnson*, 68 Vt. 554, 35 Atl. 489.

1144. A scire facias, if it lies at all, under the Code of New Mexico, to revive a judgment, is included in the word "action" as used in § 3086, authorizing execution without an action to revive a judgment; and also as that word is used in the act of February 24, 1891, § 2, providing for actions upon judgments within seven years after their rendition, and that "all actions upon such judgments not commenced within the time limited by this act shall be forever barred." *Browne v. Chavez*, 181 U. S. 68, 21 Sup. Ct. Rep. 514, 45: 752
Cited in *Hollister v. United States*, 76 C. C. A. 344, 145 Fed. 780.

XII. Relief against; Amendment; Re-hearing.

a. In General.

Conclusiveness of Decree Annulling Judgment, see *supra*, 694.

Reviewability of Decision, see Appeal and Error, I. d, 9.

Review of Discretion as to, see Appeal and Error, VIII. i, 7.

Error in Refusing to Vacate, see Appeal and Error, 4973.

Effect of Vacation on Proceeding in Appellate Court, see Appeal and Error, 5202.

Prejudicial Error in, see Appeal and Error, 5170.

General Appearance by Challenging Judgment, see Appearance, 62.

Relief by Writ of *Audita Querela*, see *Audita Querela*.

Effect of Setting Aside Judgment by Confession on Indictment, see Bail and Recognizance, 33.

Power to Set Aside Orders Made before Lack of Jurisdiction was Discovered, see Courts, 34.

Ancillary Jurisdiction in Federal Court, of Bills to Impeach Decree, see Courts, 1057-1060.

Ancillary Jurisdiction in Federal Courts, of Bill for Relief against Judgment, see Courts, 1061-1068.

State Decisions and Practice not Binding on Federal Courts, see Courts, 2134a.

General Jurisdiction of Equity to Enforce Judgments, see Equity, I. d, 12.

Necessity of Interest in Complainant, see Equity, 237, 237a.

Necessity of Defense to Support Equitable Jurisdiction, see Equity, 238, 238a.

Right in Equity to Relief against Confessed or Default Judgment, see Equity, 256-258.

Power of Equity to Impose Terms, see Equity, 310.

Injunctive Relief, see Injunctions, I. i, 2.

Laches as Bar to Relief, see Limitation of Actions, 161, 162.

Mandamus to Compel Vacation of Judgment, see Mandamus, 82-85.

Right to Remove Proceeding to Federal Court, see Removal of Causes, 33.

By Bill of Review, see Review.

See also *supra*, 1036.

1145-6. There was no ratification of an unauthorized judgment of compromise entered in favor of the United States, nor any laches in attacking it, where there was a delay of a little more than five years after the judgment was entered before steps were taken to set it aside, but this was due to the fact that no one having authority to act had any knowledge of the facts until that time. *United States v. Beebe*, 180 U. S. 343, 21 Sup. Ct. Rep. 371, 45: 563
Cited in *United States v. Michigan*, 190 U. S. 405, 47 L. ed. 1113, 23 Sup. Ct. Rep. 742—*Jorgenson v. Young*, 89 C. C. A. 225, 136 Fed. 381—*Drainage Commission v. National Contracting Co.* 136 Fed. 787.

1147. Though a Federal court cannot render adequate relief, on account of want of jurisdiction of some of the parties, it will stay proceedings on a judgment rendered by itself until the complainant shall have time to seek relief from a state court. *Dunn v. Clark*, 8 Pet. 1, 8: 845
Cited in Brooks v. Memphis, 3 Cent. L. J. 357, Fed. Cas. No. 1,954—*City Bank v. Skelton*, 2 Blatchf. 19, Fed. Cas. No. 2,739—*Christmas v. Russell* (*Christmas v. Gaines*) 14 Wall. 82, 20 L. ed. 764—*Edwards Mfg. Co. v. Sprague*, 76 Me. 62—*Schuyler v. Pellsler*, 3 Edw. Ch. 193—*Gale v. Snapp*, 9 Baxter, 87.

Editorial notes.

[Relief from, when rendered on publication of process. 16 L.R.A. 361.]

Who may sue to set aside. 54 L.R.A. 758.

Contesting validity of divorce after death of party. 57 L.R.A. 583.

Vacating decree after death of party. 1 L.R.A.(N.S.) 551.]

b. Power of Court During and After Term.

1. During Term.

Power to Remit Part of Judgment, see *infra*, 1219, 1220.

Orders and Decrees in Bankruptcy, see *Bankruptcy*, 73, 74.

Amendment of Record to Show Ground in Controversy, see *Courts*, 1149.

See also *infra*, 1209, 1213.

1148. Objection to a survey should be urged upon the trial at law, in an action of ejectment, and it is too late, after judgment upon the title, to employ it to contest the issuing of execution, in an action to enjoin. *Ballance v. Forsyth*, 24 How. 183, 16: 733

1149. It is a general rule of law that all the judgments, decrees, or other orders of courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by that court. *Bronson v. Schulten*, 104 U. S. 410, 26: 797

Cited in United States v. Barger, 20 Fed. 500—*Christ v. Schell*, 31 Fed. 550—*Klever v. Seawall*, 12 C. C. A. 658, 42 U. S. App. 458, 65 Fed. 378—*Celina v. Eastport Sav. Bank*, 15 C. C. A. 498, 37 U. S. App. 164, 68 Fed. 403—*United States v. 1,621 Pounds of Fur* (*Hippings*), 45 C. C. A. 264, 106 Fed. 163—*Empire Min. Co. v. Propeller Tow-Boat Co.* 108 Fed. 904—*United States v. Linnler*, 125 Fed. 80—*Tyler v. Aspinwall*, 73 Conn. 497, 54 L.R.A. 765, 47 Atl. 755—*Virginia F. & M. Ins. Co. v. Bohnke*, 4 App. D. C. 376—*Schwartz v. Costello*, 11 App. D. C. 556—*Lovett v. State*, 29 Fla. 392, 16 L.R.A. 314, 11 So. 176—*Clowser v. Noland*, 72 Mo. App. 219—*Woodward v. Woodward*, 84 Mo. App. 330—*State ex rel. Root v. McHattton*, 10 Mont. 378, 25 Pac. 1046—*Horton v. State*, 63 Neb. 38, 88 N. W. 146—*Fraleigh v. Feather*, 46 N. J. L. 430—*Hood v. Spaeth*, 51 N.

J. L. 131, 16 Atl. 163—*Territory v. Kinney*, 3 N. M. 657, 9 Pac. 599.

1150. The court has power, during the same term in which a judgment was rendered, to set it aside. *Bassett v. United States*, 9 Wall. 38, 19: 548
Memphis v. Brown, 94 U. S. 715, 24: 244
Phillips v. Ordway (*Goddard v. Ordway*) 101 U. S. 745, 25: 1040
Explained in Ex parte Lange, 18 Wall. 167, 21 L. ed. 876.

Cited in Ex parte Lange, 18 Wall. 192, 21 L. ed. 884—*Goddard v. Ordway* (*Phillips v. Ordway*) 101 U. S. 752, 25 L. ed. 1043—*Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 40, 35 L. ed. 338, 11 Sup. Ct. Rep. 691—*Judson v. Gage*, 39 C. C. A. 159, 98 Fed. 543—*Virginia, F. & M. Ins. Co. v. Bohnke*, 4 App. D. C. 376—*Bates v. State*, 63 Ohio St. 13, 57 N. E. 957.

1151. A court has power during the same term to set aside a judgment rendered on confession in an action against the sureties on a recognizance. *Bassett v. United States*, 9 Wall. 38, 19: 548
Cited in Re Graves, 117 Fed. 799—*Lange v. Benedict*, 8 Hun. 366—*Lee v. State*, 32 Ohio St. 115—*People v. Reggel*, 8 Utah, 25, 28 Pac. 955.

1152. During the term at which it was rendered, a court of equity has full power to amend, correct, or vacate its decree for error of fact or law. *Doss v. Tyack*, 14 How. 297, 14: 428
Sun Cheong-Kee v. United States, 3 Wall. 320, 18: 72

Cited in Ex parte Lange, 18 Wall. 192, 21 L. ed. 884—*Goddard v. Ordway* (*Phillips v. Ordway*) 101 U. S. 752, 25 L. ed. 1043—*Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 40, 35 L. ed. 338, 11 Sup. Ct. Rep. 691—*Union Trust Co. v. Rockford, R. I. & St. L. R. Co.* 6 Biss. 199, Fed. Cas. No. 14,401—*Burnside v. Eanls*, 43 Ind. 413—*Com. v. Soderquest*, 183 Mass. 200, 66 N. E. 801—*State ex rel. Smith v. Fourth Dist. Court*, 16 Nev. 372—*Chesterman v. Seeley*, 19 Pa. Co. Ct. 194, 9 Pa. Dist. R. 160—*Mound City Mut. L. Ins. Co. v. Hamilton*, 3 Tenn. Ch. 235—*Seaton v. Brooking*, 1 Tex. Civ. App. Cas. (*White & W.*) § 1041.

1153. A court of equity has full power over its orders and decrees during the term in which they are entered, and during that term may vacate its decree and grant a rehearing. *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 25, 11 Sup. Ct. Rep. 691, 35: 332

Cited in Central Trust Co. v. Marletta & N. G. R. Co. 21 C. C. A. 305, 41 U. S. App. 339, 75 Fed. 206—*Mahler v. Animarium Co.* 64 C. C. A. 332, 129 Fed. 900.

2. After Term.

Power to Grant Rehearing, see *infra*, 1228, 1229.

Pending Appeal, see *Appeal and Error*, 2805, 2806.

Lack of Power to Reconsider, as Presenting Certifiable Division of Opinion, see *Cases Certified*, 19.

Due Process in Setting aside Dismissal after Term, see *Constitutional Law*, 699.

See also *supra*, 1119; *infra*, 1202-1205a, 1208.

1154. The court, subsequent to the term when a final judgment or decree is rendered, possesses no power to review it. *Cameron v. M'Roberts*, 3 Wheat. 591, 4: 467
Sibbald v. United States, 12 Pet. 488, 9: 1167

Bank of United States v. Moss, 6 How. 31, 12: 331

Brown v. Aspden, 14 How. 25, 14: 311

McMicken v. Perin, 18 How. 507, 15: 504

Noonan v. Bradley use of *Towsley*, 12 Wall. 121, 20: 279

Roemer v. Simon, 91 U. S. 149, 23: 267

Brooks v. Burlington & S. W. R. Co. 102 U. S. 107, 26: 91

Distinguished in Thomas v. American Freehold Land & Mortg. Co. 12 L.R.A. 687, 47 Fed. 556.

Cited in Sibbald v. United States, 12 Pet. 492, 9 L. ed. 1169—*Bank of United States v. Beverly*, 1 How. 149, 11 L. ed. 81—*Washington Bridge Co. v. Stewart*, 3 How. 426, 11 L. ed. 664—*Bank of United States v. Moss*, 6 How. 38, 12 L. ed. 334—*Coffee v. Planters Bank*, 13 How. 189, 14 L. ed. 107—*Corning v. Troy Iron & Nail Factory*, 15 How. 466, 14 L. ed. 775—*McMicken v. Perin*, 18 How. 511, 15 L. ed. 506—*Legal Tender Cases*, 12 Wall. 603, 20 L. ed. 329—*Tyler v. Magwire*, 17 Wall. 285, 21 L. ed. 584—*Ex parte Lange*, 18 Wall. 192, 21 L. ed. 884—*Edwards v. Elliott*, 21 Wall. 552, 22 L. ed. 490—*French v. Hay (French v. Stewart)* 22 Wall. 245, 22 L. ed. 856—*Etna F. Ins. Co. v. Boon*, 95 U. S. 143, 24 L. ed. 403—*Bronson v. Schulten*, 104 U. S. 415, 26 L. ed. 799—*Schell v. Dodge*, 107 U. S. 630, 27 L. ed. 601, 2 Sup. Ct. Rep. 830—*Phillips v. Negley*, 117 U. S. 674, 29 L. ed. 1015, 6 Sup. Ct. Rep. 901—*Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 224, 34 L. ed. 104, 10 Sup. Ct. Rep. 736—*Re Washington & G. R. Co.* 140 U. S. 97, 35 L. ed. 342, 11 Sup. Ct. Rep. 673—*Bank of Lewisburg v. Sheffey*, 140 U. S. 451, 35 L. ed. 496, 11 Sup. Ct. Rep. 755—*Hickman v. Ft. Scott*, 141 U. S. 419, 35 L. ed. 776, 12 Sup. Ct. Rep. 9—*Gaines v. Rugg (Gaines v. Caldwell)* 148 U. S. 242, 37 L. ed. 437, 13 Sup. Ct. Rep. 611—*Bushnell v. Croke Min. & Smelting Co.* 150 U. S. 83, 37 L. ed. 1007, 14 Sup. Ct. Rep. 2—*Belknap v. United States*, 150 U. S. 590, 37 L. ed. 1192, 14 Sup. Ct. Rep. 214—*Dowell v. Applegate*, 152 U. S. 339, 38 L. ed. 467, 14 Sup. Ct. Rep. 611—*Illinois v. Illinois C. R. Co.* 184 U. S. 91, 46 L. ed. 446, 22 Sup. Ct. Rep. 300—*Tillou v. United States*, 1 Ct. Cl. 228—*Russell v. United States*, 15 Ct. Cl. 171—*Seaton v. United States*, 18 Ct. Cl. 468—*Campbell v. United States*, 19 Ct. Cl. 428—*Northern Bank v. Labitut*, 1 Woods, 13, Fed. Cas. No. 842—*Brush v. Robbins*, 3 McLean, 487, Fed. Cas. No. 2,059—*Crabtree v. Neff*, 1 Bond, 555, Fed. Cas. No. 3,315—*Eagle Mfg. Co. v. Draper*, 14 Blatchf. 336, Fed. Cas. No. 4,234—*The Illinois*, Brown Adm. 23, Fed. Cas. No. 7,003—*Jenkins v. Eldredge*, 1 Woodb. & M. 63, Fed. Cas. No. 7,269—*The Lizzie Weston*, Blatchf. Prize Cas. 265, Fed. Cas. No. 8,425—*McClellan v. Fobender*, Fed. Cas. No. 8,695—*The Major Barbour*, Blatchf. Prize Cas. 315, Fed. Cas. No. 8,984—*The Nabob*, Brown, Adm. 123, Fed. Cas. No. 10,002—*Parkhurst v. Kinsman*, 3 Woodb. & M. 174, Fed. Cas. No. 10,761—*Poole v. Nixon*, 9 Pet. 771 Appx. Fed. Cas. No. 11,270—

Scott v. Hore, 1 Hughes, 167, Fed. Cas. No. 12,535—*Sloman v. Wyssman*, Fed. Cas. No. 12,955a—*Snow v. Edwards*, 2 Low. Dec. 276, Fed. Cas. No. 13,145—*Re Troy Woolen Co.* 5 Ben. 416, 6 Nat. Bankr. Reg. 18, Fed. Cas. No. 14,200—*United States v. The Glamorgan*, 2 Curt. C. C. 239, Fed. Cas. No. 15,214—*United States v. Peralta*, Fed. Cas. No. 16,030—*West v. Davis*, 4 McLean, 242, Fed. Cas. No. 17,422—*Grames v. Hawley*, 4 McCrary, 64—*Flischer v. Hayes*, 19 Blatchf. 18, 6 Fed. 69—*United States v. Millinger*, 19 Blatchf. 204, 7 Fed. 189—*United States v. Malone*, 20 Blatchf. 139, 9 Fed. 899—*Coleman v. Neill*, 11 Fed. 462—*Newman v. Newman*, 4 McCrary, 295, 14 Fed. 635—*Heckling v. Allen*, 4 McCrary, 305, 15 Fed. 197—*Newman v. Moody*, 19 Fed. 860—*Allen v. Wilson*, 21 Fed. 883—*Moore v. Edgefield*, 32 Fed. 501—*Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 32 Fed. 530—*Kimberly v. Arms*, 40 Fed. 551—*Glenn v. Dimmock*, 43 Fed. 531—*Ex parte Friday*, 43 Fed. 918—*Easton v. Houston & T. C. R. Co.* 44 Fed. 10—*United States v. Wallace*, 46 Fed. 570—*Harmon v. Struthers*, 48 Fed. 261—*Grames v. Hawley*, 50 Fed. 320—*Austin v. Riley*, 55 Fed. 836—*Doe v. Waterloo Min. Co.* 60 Fed. 643—*Ex parte Lennon*, 12 C. C. A. 137, 22 U. S. App. 561, 64 Fed. 322—*Klever v. Seawall*, 12 C. C. A. 659, 22 U. S. App. 458, 65 Fed. 378—*Schofield v. Horse Springs Cattle Co.* 65 Fed. 434—*Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 32, 43 U. S. App. 47, 72 Fed. 553—*Central Trust Co. v. Marietta & N. G. R. Co.* 21 C. C. A. 305, 41 U. S. App. 339, 75 Fed. 206—*McGregor v. Vermont Loan & T. Co.* 44 C. C. A. 147, 104 Fed. 710—*Manning v. German Ins. Co.* 46 C. C. A. 146, 107 Fed. 55—*Empire Min. Co. v. Propeller Tow-Boat Co.* 108 Fed. 904—*Reynolds v. Manhattan Trust Co.* 48 C. C. A. 251, 109 Fed. 99—*Halsted v. Forest Hill Co.* 109 Fed. 822—*Re Ives*, 111 Fed. 496—*Hendryx v. Perkins*, 52 C. C. A. 456, 114 Fed. 822—*Burget v. Robinson*, 59 C. C. A. 262, 123 Fed. 264—*United States v. Four Lorgnette Holders*, 132 Fed. 565—*Johnson v. Glascock*, 2 Ala. 522—*Ex parte Cresswell*, 60 Ala. 379—*Woffenden v. Woffenden*, 1 Ariz. 335, 25 Pac. 666—*Borden v. State*, 11 Ark. 541, 54 Am. Dec. 217—*Roberts v. Haggart*, 4 Dak. 211, 29 N. W. 656—*Wright v. Sherman*, 3 S. D. 367, 53 N. W. 425—*Re Seydel*, 14 S. D. 118, 84 N. W. 397—*Schwartz v. Costello*, 11 App. D. C. 557—*Stribling v. Hart*, 20 Fla. 242—*Hart v. Stribling*, 25 Fla. 445, 6 So. 455—*Styles v. State*, 28 Ga. 391—*Prescott v. Bennett*, 50 Ga. 274—*Cook v. Wood*, 24 Ill. 297—*Lilly v. Shaw*, 59 Ill. 76—*Perteet v. People*, 70 Ill. 184—*Reynolds v. Anspeach*, 14 Ill. App. 40—*J. M. W. Jones Stationary & Paper Co. v. Hentig*, 31 Kan. 323, 1 Pac. 529—*Loney v. Bailey*, 43 Md. 16—*Mason v. Pearson*, 118 Mass. 63—*Goodrich v. Wilson*, 135 Mass. 33—*Com. v. Soderquest*, 183 Mass. 200, 66 N. E. 801—*Giddings v. Whittlesey*, 2 Mich. N. P. 241—*Reynolds v. Reynolds*, 115 Mich. 380, 73 N. W. 425—*Grant v. Schmidt*, 22 Minn. 4—*Boshyshell v. Emanuel*, 12 Smedes & M. 67—*Sagory v. Bayless*, 13 Smedes & M. 156—*State ex rel. Ozark County v. State*, 109 Mo. 271, 32 Am. St. Rep. 664, 18 S. W. 1088—*Garlot v. Missouri P. R. Co.* 116 Mo. 472, 21 S. W. 1094—*Fredericks v. Davis*, 6 Mont. 463, 13 Pac. 125—*Territory v. Clayton*, 8 Mont. 16, 19 Pac. 293—*Pope v. Hooper*, 6 Neb. 183—*Cook v. Moore*, 100 N. C. 295, 6 Am. St. Rep. 587, 6 S. E. 795—*State v. Marsh*, 134 N. C. 201, 67 L.R.A. 192, 47 S. E. 6—*Bates v. State*, 63 Ohio St. 13, 57

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—*Edwards v. Janesville*, 14 Wis. 27—*Ætna*
L. Ins. Co. v. McCormick, 20 Wis. 268—*Gramm v. Fisher*, 4 Wyo. 3, 31 Pac. 767.

1155. After the term in which a case has been disposed of by a judgment of dismissal of the writ of error, the court has no power to alter its judgment to one of affirmance, although the application, if made in the same term, would have been granted, and thereupon the defendant in error would have been entitled to interest on the judgment below. *Schell v. Dodge*, 107 U. S. 629, 2 Sup. Ct. Rep. 830, 27: 601

Cited in *Phillips v. Negley*, 117 U. S. 674, 29 L. ed. 1015, 6 Sup. Ct. Rep. 901—*Wade v. United States*, 21 Ct. Cl. 143.

1156. A judgment by default, rendered against one who was never a party in court, may be set aside at a subsequent term, especially where it is not yet completely executed, but is in progress of execution. *Harris v. Hardeman*, 14 How. 334, 14: 444

Cited in *Albree v. Johnson*, 1 Flipp. 344, Fed. Cas. No. 146—*Galpin v. Page*, 1 Sawy. 331, Fed. Cas. No. 5,205—*Mathewson v. Sprague*, 1 Curt. C. C. 461, Fed. Cas. No. 9,278—*Shuford v. Cain*, 1 Abb. (U. S.) 309, Fed. Cas. No. 12,823—*Smith v. Ontario*, 17 Blatchf. 242, Fed. Cas. No. 13,086—*The Elmira*, 16 Fed. 138—*Hunt v. Ellison*, 32 Ala. 203—*Phillips v. Negley*, 2 Mackey. 246—*Taylor v. Elliott*, 52 Ind. 593—*Wright v. Simpson*, 200 Ill. 62, 65 N. E. 628—*Foreman v. Carter*, 9 Kan. 679—*Harvey v. Whitlatch*, 2 Mont. 59—*Winship v. Conner*, 42 N. H. 346—*Re College Street*, 11 R. I. 475—*Fowler v. Lewis*, 36 W. Va. 126, 14 S. E. 447.

1157. Where no final judgment had been passed, but, after general verdict in favor of an administrator on two counts, in one of which he sued as administrator, and in the other in his own right, judgment was arrested on account of the misjoinder of counts, it was not error for the court, more than a year after it was made, to set aside the order arresting judgment, and to allow the verdict to be maintained by entering it *nunc pro tunc* on the first count only. It was not necessary that the amendment should have been made at the term when the order for the arrest of judgment was made. *Murphy v. Stewart*, 2 How. 263, 11: 261

Cited in *Bank of United States v. Moss*, 6 How. 37, 12 L. ed. 334—*Washington, A. & G. Steam Packet Co. v. Sickles*, 24 How. 345, 16 L. ed. 654—*Ætna F. Ins. Co. v. Boon*, 95 U. S. 126, 24 L. ed. 397—*Re Welty*, 123 Fed. 127—*Real State Bank v. Rawdon*, 5 Ark. 584—*Bobo v. State*, 40 Ark. 231—*Doane v. Glenn*, 1 Colo. 459—*Fletcher Bros. v. Nelson*, 6 N. D. 107, 69 N. W. 53—*Plano Mfg. Co. v. Person*, 12 S. D. 455, 81 N. W. 897—*Gaffney v. Hoyt*, 2 Idaho, 203, 10 Pac. 34—*Johnson v. Moore*, 112 Ind. 92, 13 N. E. 106—*Sweetzer v. Mead*, 5 Mich. 34—*Farrand v. Bentley*, 6 Mich. 284—*Crich v. Williamsburg City F. Ins. Co.* 45 Minn. 445, 48 N. W. 198—*Acton v. Dooley*, 16 Mo. App. 449—*McKean v. Cutler*, 48 N. H. 376—*Brigham v. Gilmartin*, 58 N. H. 347—*D. M. Osborne & Co. v. Morris*, 21 Or. 369, 28 Pac. 70—*Chouteau v. Hoove*, 1 Pinney (Wis.) 666.

Interlocutory order.

Necessity of Resorting to State rather than Federal Court if Relief there Granted is Adequate, see Courts, 1531.

Adherence to, or Change of Opinion on Final Decree, see Courts, 1675.

1158. The order of confirmation of a report of commissioners to fix the boundary line between states will be vacated if it was made without notice to one of the states; and if the consent of the state to such boundary was signified to the Supreme Court of the United States through mistake and inadvertence, such order, being interlocutory only, may be set aside at a term of court subsequent to that at which it was entered. *Iowa v. Illinois*, 151 U. S. 238, 14 Sup. Ct. Rep. 333, 38: 145
Cited in *Roller v. Clarke*, 19 App. D. C. 547.

Errors; irregularities.

Arrest of Judgment for, see infra, 1174.

Setting Aside for Irregularity, see infra, 1189, 1191, 1194.

See also infra, 1206, 1214.

1159. Clerical errors, mere irregularities, mistakes in entries, and any amendments permissible under the statute of jeofails, may be corrected at a term subsequent to entry of judgment. *Bank of United States v. Moss*, 6 How. 31, 12: 331
Cited in *Lincoln Nat. Bank v. Perry*, 14 C. C. A. 274, 32 U. S. App. 15, 66 Fed. 888—*Post v. Wise Twp.* 101 Fed. 205—*McClellan v. Binkley*, 78 Ind. 504.

1160. After the term at which judgments were rendered, the power of the court over the parties and over the record remains only in certain excepted cases (when, on motion, it may be purged of clerical errors, or the judgment reversed by proceedings for errors of fact, in analogy to the practice in cases of writs of error *coram vobis*), unless it be invoked by bill in equity. *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. Rep. 901, 29: 1013

Sibbald v. United States, 12 Pet. 488, 9: 1167

Distinguished in *Christ v. Schell*, 31 Fed. 550.
Cited in *Hickman v. Ft. Scott*, 141 U. S. 419, 35 L. ed. 776, 12 Sup. Ct. Rep. 9—*Hume v. Bowie*, 148 U. S. 255, 37 L. ed. 440, 13 Sup. Ct. Rep. 582—*Campbell v. James*, 31 Fed. 526—*Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 32 Fed. 530—*Easton v. Houston & T. C. R. Co.* 44 Fed. 10—*United States v. Wallace*, 46 Fed. 570—*Van Doren v. Pennsylvania R. Co.* 35 C. C. A. 293, 93 Fed. 271—*A. B. Dick & Co. v. Wichelman*, 106 Fed. 637—*Re Ives*, 51 C. C. A. 543, 113 Fed. 913—*Re Henschel*, 114 Fed. 970—*Brown v. Arnold*, 127 Fed. 393—*United States v. Four Lorgnette Holders*, 132 Fed. 565—*District of Columbia v. Humphries*, 11 App. D. C. 79—*Schwartz v. Costello*, 11 App. D. C. 557—*District of Columbia v. Humphries*, 12 App. D. C. 129—*Anderson v. Tinney*, 5 Mackey, 343.

1161. After the term at which a judgment has been rendered, the power of the court to correct the record remains only in cer-

tain excepted cases, when, on motion, it may be amended by inserting what has been omitted by the act of the clerk or of the court, or the judgment reversed by proceedings for errors in fact,—as by writ of error *coram vobis*.—unless such power be invoked by bill of equity. *Hickman v. Ft. Scott*, 141 U. S. 415, 12 Sup. Ct. Rep. 9, 35: 775

Cited in Northern P. R. Co. v. Ellis, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 724—*Gainey v. Rugg* (*Gainey v. Caldwell*) 148 U. S. 242, 37 L. ed. 437, 13 Sup. Ct. Rep. 611—*Colvin v. Jacksonville*, 158 U. S. 458, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866—*The Bayonne*, 139 U. S. 693, 40 L. ed. 309, 16 Sup. Ct. Rep. 185—*Kingman & Co. v. Western Mfg. Co.* 170 U. S. 680, 42 L. ed. 1194, 18 Sup. Ct. Rep. 786—*United States v. New York Indians*, 173 U. S. 471, 43 L. ed. 772, 19 Sup. Ct. Rep. 464—*Craven v. Canadian P. R. Co.* 62 Fed. 171—*Klever v. Seawall*, 12 C. C. A. 659, 22 U. S. App. 458, 65 Fed. 378—*Sanford v. White*, 108 Fed. 939—*Ex parte Mansfield*, 11 App. D. C. 562—*Farrow v. Eclipse Bicycle Co.* 18 App. D. C. 112—*Pursley v. Wickle*, 4 Ind. App. 386, 30 N. E. 1115.

1162. The appropriate use of a writ of error *coram vobis* is to enable the court to correct its own errors which precede the rendition of the judgment. *Pickett v. Legerwood*, 7 Pet. 144. 8: 638

Cited in Ex parte Lange, 18 Wall. 196, 21 L. ed. 885—*French v. Hay* (*French v. Stewart*) 22 Wall. 249, 22 L. ed. 857—*Bronson v. Schulten*, 104 U. S. 416, 26 L. ed. 799—*Phillips v. Negley*, 117 U. S. 673, 29 L. ed. 1015, 6 Sup. Ct. Rep. 901—*Albree v. Johnson*, 1 Filpp. 343, Fed. Cas. No. 146—*United States v. Plumer*, 3 Cliff. 59, Fed. Cas. No. 16,066—*The Elmira*, 16 Fed. 138—*Klever v. Seawall*, 12 C. C. A. 658, 22 U. S. App. 458, 65 Fed. 378—*Billups v. Freeman*, 5 Ariz. 272, 52 Pac. 367—*Emeric v. Alvarado*, 64 Cal. 599, 2 Pac. 418—*Phillips v. Negley*, 2 Mackey, 246—*Peak v. Shasted*, 21 Ill. 138, 74 Am. Dec. 83—*Gould v. Watson*, 80 Ill. App. 246—*Brady v. Washington Ins. Co.* 82 Ill. App. 383—*Consolidated Coal Co. v. Oeltjen*, 91 Ill. App. 131—*Rundles v. Jones*, 3 Ind. 38—*Huntington County v. Brown*, 14 Ind. 192—*Sanders v. State*, 85 Ind. 326, 44 Am. Rep. 29—*Marble v. Vanhorn*, 53 Mo. App. 364—*Hadley v. Bernero*, 103 Mo. App. 562, 78 S. W. 64—*Wentz v. Bealor*, 14 Pa. Co. Ct. 339—*Cruger v. McCracken*, 87 Tex. 588, 30 S. W. 537—*Wallis v. Stuart*, 92 Tex. 574, 50 S. W. 567—*Park v. Higbee*, 6 Utah. 417, 24 Pac. 524—*Second Ward Bank v. Upman*, 14 Wis. 593.

1163. Bills of review in cases of equity, and writs of error *coram vobis* at law, are exceptions to the rule that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes or to reinstate a cause dismissed by mistake. *Sibbald v. United States*, 12 Pet. 488, 9: 1167
Cited in Bank of United States v. Moss, 6 How. 38, 12 L. ed. 334—*Ex parte Dubuque & P. R. Co.* (*Dubuque & P. R. Co. v. Litchfield*) 1 Wall. 73, 17 L. ed. 515—*Bushnell v. Crooke Min. & Smelting Co.* 150 U. S. 83, 37 L. ed. 1007, 14 Sup. Ct. Rep. 2—*Re Sanford Fork & Tool Co.* 160 U. S. 256, 40 L. ed. 416, 16 Sup. Ct. Rep. 291—*Ex parte Union S. B. Co.*

178 U. S. 318, 44 L. ed. 1084, 20 Sup. Ct. Rep. 904—*Allen v. Blunt*, 2 Woodb. & M. 133, Fed. Cas. No. 217—*Doggett v. Emerson*, 1 Woodb. & M. 5, Fed. Cas. No. 3,961—*The Illinois*, 1 Brown, Adm. 22, Fed. Cas. No. 7,003—*Jenkins v. Eldredge*, 1 Woodb. & M. 63, Fed. Cas. No. 7,269—*West v. Davis*, 4 McLean, 242, Fed. Cas. No. 17,422—*Third Nat. Bank v. Gordon*, 53 Fed. 473—*Billings v. Aspen Min. & Smelting Co.* 53 Fed. 562—*Klever v. Seawall*, 12 C. C. A. 659, 22 U. S. App. 458, 65 Fed. 378—*Potts v. Creager*, 71 Fed. 575—*Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 28, 43 U. S. App. 47, 72 Fed. 549—*Balch v. Haas*, 20 C. C. A. 153, 36 U. S. App. 693, 73 Fed. 976—*Republican Min. Co. v. Tyler Min. Co.* 25 C. C. A. 180, 48 U. S. App. 213, 79 Fed. 735—*Farmers' Loan & T. Co. v. Iowa Water Co.* 80 Fed. 468—*Oregon R. & Nav. Co. v. Balfour*, 33 C. C. A. 63, 61 U. S. App. 150, 90 Fed. 301—*Mutual Reserve Fund Life Asso. v. Beatty*, 35 C. C. A. 580, 93 Fed. 754—*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 176—*Texas & P. R. Co. v. Wilder*, 41 C. C. A. 306, 101 Fed. 199—*Haley v. Kilpatrick*, 44 C. C. A. 103, 104 Fed. 648—*Manning v. German Ins. Co.* 46 C. C. A. 146, 107 Fed. 54—*Reynolds v. Manhattan Trust Co.* 48 C. C. A. 251, 109 Fed. 99—*Stoll v. Loving*, 120 Fed. 806—*Burget v. Robinson*, 50 C. C. A. 282, 123 Fed. 264—*United States v. Four Lorgnette Holders*, 132 Fed. 565—*Keenan v. Strange*, 12 Ala. 294—*Goodwin v. McGehee*, 15 Ala. 230—*Gibson v. Wilson*, 18 Ala. 65—*Jones v. Dyer*, 20 Ala. 377—*Jesse v. Cater*, 28 Ala. 481—*Matthews v. Sands*, 29 Ala. 140—*Fortenberry v. Frazier*, 5 Ark. 202, 39 Am. Dec. 373—*Davidson v. Dallas*, 15 Cal. 83—*Leese v. Clark*, 20 Cal. 417—*Sharon v. Sharon*, 79 Cal. 688, 22 Pac. 26—*Sanderson v. Sanderson*, 20 Fla. 290—*Palmer v. Utah & N. R. Co.* 2 Idaho, 384, 16 Pac. 553—*Temple v. Anderson*, 9 Ill. 562—*Ogle v. Turpin*, 8 Ill. App. 455—*Gutperle v. Koehler*, 84 Ind. 239—*Duffitt v. Crozier*, 30 Kan. 152, 1 Pac. 69—*Gibson v. Chouteau*, 45 Mo. 173, 100 Am. Dec. 366—*Davenport v. Kleinschmidt*, 8 Mont. 480, 20 Pac. 823—*Rector v. Rotton*, 3 Neb. 178—*Hastings v. Foxworthy*, 45 Neb. 694, 34 L.R.A. 348, 63 N. W. 955—*State v. Omaha Nat. Bank*, 60 Neb. 239, 82 N. W. 850—*Blackburn v. Reilly*, 48 N. J. L. 84, 2 Atl. 817—*Mechanics & T. Bank v. Dakin*, 8 Hun, 436—*Germania F. Ins. Co. v. Francis*, 43 Hun. 628—*Stevens v. Central Nat. Bank*, 24 Misc. 348, 53 N. Y. Supp. 193—*Cook v. Moore*, 100 N. C. 295, 6 Am. St. Rep. 587, 6 S. E. 795—*Longworth v. Sturges*, 4 Ohio St. 714—*Philadelphia v. Fricke*, 6 Phila. 579, 25 Phila. Leg. Int. 60—*Leach v. Jones*, 11 R. I. 387—*State v. Bank of Commerce*, 96 Tenn. 597, 36 S. W. 719—*Chambers v. Hodges*, 3 Tex. 529—*Wood v. Wheeler*, 9 Tex. 128—*Silva v. Pickard*, 14 Utah, 249, 47 Pac. 144—*Warren v. Robinson*, 21 Utah, 444, 61 Pac. 28—*Tilson v. Davis*, 32 Gratt. 104—*Wolferman v. Bell*, 8 Wash. 144, 35 Pac. 603—*Richardson v. Carbon Hill Coal Co.* 18 Wash. 375, 51 Pac. 1046—*Cady v. Gale*, 5 W. Va. 507.

1164. After the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps are taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can be corrected only by such proceeding, by writ of error or appeal, as may be allowed in a court which by law

can review the decision. *Bronson v. Shulten*, 104 U. S. 410, 26: 797

Cited in Phillips v. Negley, 117 U. S. 672, 29 L. ed. 1014, 6 Sup. Ct. Rep. 901—*Hickman v. Ft. Scott*, 141 U. S. 418, 35 L. ed. 770, 12 Sup. Ct. Rep. 9—*Rio Grande Irrig. & Colonization Co. v. Gildersleeve*, 174 U. S. 609, 43 L. ed. 1105, 19 Sup. Ct. Rep. 781—*Tubman v. Baltimore & O. R. Co.* 190 U. S. 39, 47 L. ed. 947, 23 Sup. Ct. Rep. 777—*Gagnon v. United States*, 193 U. S. 456, 48 L. ed. 747, 24 Sup. Ct. Rep. 510—*Campbell v. United States*, 19 Ct. Cl. 428—*Wade v. United States*, 21 Ct. Cl. 143—*Allen v. Wilson*, 21 Fed. 884—*United States v. Walsh*, 22 Fed. 648—*Campbell v. James*, 31 Fed. 526—*The Comfort*, 23 Blatchf. 372, 32 Fed. 328—*Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 32 Fed. 530—*Easton v. Houston & T. C. R. Co.* 44 Fed. 10—*Harmon v. Struthers*, 48 Fed. 261—*Bigelow v. Chatterton*, 2 C. C. A. 408, 10 U. S. App. 267, 51 Fed. 618—*Bound v. South Carolina R. Co.* 55 Fed. 188—*Austin v. Riley*, 55 Fed. 835—*Elder v. Richmond Gold & S. Min. Co.* 7 C. C. A. 357, 19 U. S. App. 118, 58 Fed. 539—*Doe v. Waterloo Min. Co.* 80 Fed. 643—*Stuart v. St. Paul*, 63 Fed. 645—*Elder v. McClaskey*, 17 C. C. A. 278, 37 U. S. App. 199, 70 Fed. 556—*Petersburg Sav. & Ins. Co. v. Dellatorre*, 17 C. C. A. 312, 30 U. S. App. 504, 70 Fed. 645—*Farmers' Loan & T. Co. v. Iowa Water Co.* 80 Fed. 468—*Van Doren v. Pennsylvania*, 35 C. C. A. 293, 93 Fed. 271—*McGregor v. Vermont Loan & T. Co.* 44 C. C. A. 147, 104 Fed. 710—*A. B. Dick Co. v. Wichelmann*, 106 Fed. 637—*Manning v. German Ins. Co.* 46 C. C. A. 146, 107 Fed. 55—*Reynolds v. Manhattan Trust Co.* 48 C. C. A. 251, 109 Fed. 99—*Phelps v. Mutual Reserve Fund Life Assn.* 61 L.R.A. 725, 50 C. C. A. 349, 112 Fed. 463—*Re Ives*, 51 C. C. A. 543, 113 Fed. 913—*Walker v. Moser*, 54 C. C. A. 264, 117 Fed. 232—*United States v. Four Lignite Holders*, 132 Fed. 565—*Banks v. Wilson*, 1 Alaska, 244—*Tyler v. Aspinwall*, 73 Conn. 497, 54 L.R.A. 765, 47 Atl. 755—*Goldreyer v. Cronan*, 76 Conn. 116, 55 Atl. 594—*Phillips v. Negley*, 2 Mackey, 243—*District of Columbia v. Humphries*, 12 App. D. C. 129—*Birmingham v. Leonhardt*, 2 Kan. App. 514, 43 Pac. 996—*Kingman & Co. v. Chubb*, 8 Kan. App. 168, 55 Pac. 474—*Powers v. Mitchell*, 75 Me. 370—*Reynolds v. Reynolds*, 115 Mich. 380, 73 N. W. 425—*Cook v. Moore*, 100 N. C. 295, 6 Am. St. Rep. 587, 6 S. E. 795—*Deering v. Quivey*, 26 Or. 560, 38 Pac. 710—*Henrichsen v. Smith*, 29 Or. 480, 44 Pac. 496—*Holland v. Preston*, 12 Tex. Civ. App. 590, 34 S. W. 975—*Gramm v. Fisher*, 4 Wyo. 3, 31 Pac. 767.

1165. By a statute of Alabama, the court of original jurisdiction may correct any error in the calculation of interest, or other mistake of the clerk, within three years from the rendition of the judgment. *Smith v. Clapp*, 15 Pet. 125, 10: 684

Fraud.

1166. A final judgment or decree of the Supreme Court is conclusive upon the parties, and it cannot be re-examined at a subsequent term, except in cases of fraud. *Magwire v. Tyler* (*Tyler v. Magwire*) 17 Wall. 253, 21: 576
Cited in Goodrich v. Wilson, 135 Mass. 33.

1167. A judgment dismissing a case for want of prosecution cannot be set aside on application made after the close of the term

at which it is entered, where no showing of fraud or surprise is made. *Tubman v. Baltimore & O. R. Co.* 190 U. S. 38, 23 Sup. Ct. Rep. 777, 47: 946
Cited in Brown v. Arnold, 127 Fed. 393.

Power of certain courts.

Power of Congress to Authorize Review by Indian Courts, of Federal Judgments in Indian Citizenship Cases, see Courts, 402.

State Decisions as to Power of Court as Binding in Federal Courts, see Courts, 2134.

See also *infra*, 1200.

1168. The rule that the jurisdiction of a court over its decrees terminates with the close of the term at which they were rendered has an exception under the 88th rule in equity of the Supreme Court of the United States, in cases where no appeal lies to that court from the decree of the circuit court. *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. Rep. 426, 37: 350

1169. The circuit court of the United States cannot of its own motion vacate its final decrees after the close of the term at which they were made. *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. Rep. 736, 34: 97

1170. A judgment in the circuit court where jurisdiction appeared in three of the counts in the declaration cannot be set aside on motion at a subsequent term for want of jurisdiction or mere error of law of any kind. The power of the court is exhausted. *Bank of United States v. Moss*, 6 How. 31, 12: 331

1171. Circuit courts have no power to set aside their decrees in equity on motion, after the term at which they are rendered. *Cameron v. McRoberts*, 3 Wheat. 591, 4: 467
Cited in Emerson v. Davies, 1 Woodb. & M. 23, Fed. Cas. No. 4,437—*Re Troy Woolen Co.* 5 Ben. 416, Fed. Cas. No. 14,200—*Glenn v. Dimmock*, 43 Fed. 551—*Gullett v. Housh*, 5 Blackf. 34—*Burch v. Scott*, 1 Bland Ch. 120—*Pipkin v. Haun*, *Freem. Ch. (Miss.)* 257—*Leach v. Jones*, 11 R. I. 387.

1172-3. The supreme court of the District of Columbia has not, at a special term, the same discretionary power over its judgments rendered at a previous term, without any motion or other proceeding to that end made or taken at that term, to set them aside and grant new trials, which it has over judgments when such proceedings are taken during the term at which they were rendered. *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. Rep. 901, 29: 1013

Cited in Humphries v. District of Columbia, 174 U. S. 193, 43 L. ed. 945, 19 Sup. Ct. Rep. 637—*Tubman v. Baltimore & O. R. Co.* 190 U. S. 39, 47 L. ed. 947, 23 Sup. Ct. Rep. 777—*United States v. 1,621 Pounds of Fur Clipping*, 45 C. C. A. 264, 106 Fed. 163—*Re Ives*, 111 Fed. 496—*Hendryx v. Perkins*, 52 C. C. A. 443, 114 Fed. 809—*Moss v. United States*, 23 App. D. C. 483—*Singer Mfg. Co. v. Cole*, 11 Pa. Co. Ct. 216, 1 Pa. Dist. R. 362.

c. Arrest of Judgment.

Raising Federal Question by, see Appeal and Error, 1231, 1269, 1349.

Review of Discretion as to, see Appeal and Error, 4478.

Certification of Question Arising on Motion, see Cases Certified, 22.

In Criminal Case, see Criminal Law, III. e. Right to Move for New Trial after, see New Trial, 27.

Computation of Time for Making Motion, see Time, 19.

Defendant Taking Advantage of Defective Pleading By, After Demurrer to Evidence, see Trial, 556.

See also *supra*, 1157; Pleading, 942; Trial, 872.

1174. A judgment can be arrested only for errors apparent on the record. *United States v. Klintock*, 5 Wheat. 144, 5: 55
Carter v. Bennett, 15 How. 354, 14: 727
Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. Rep. 296, 28: 835
Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 128, 12 Sup. Ct. Rep. 181, 35: 961
Brown v. Massachusetts, 144 U. S. 573, 12 Sup. Ct. Rep. 757, 36: 546
Cited in Bond v. Dustin, 112 U. S. 608, 28 L. ed. 836, 5 Sup. Ct. Rep. 296—*Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 135, 35 L. ed. 904, 12 Sup. Ct. Rep. 181—*Brown v. Massachusetts*, 144 U. S. 580, 36 L. ed. 550, 12 Sup. Ct. Rep. 757—*Shuford v. Cain*, 1 Abb. (U. S.) 309, Fed. Cas. No. 12,823—*United States v. Barnhart*, 9 Sawy. 163, 17 Fed. 581—*Kentucky Life & Acci. Ins. Co. v. Hamilton*, 11 C. C. A. 51, 22 U. S. App. 548, 63 Fed. 102—*State v. Bledsoe*, 47 Ark. 234, 1 S. W. 140.

1175-6. The evidence is no part of the record for this purpose. *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. Rep. 296, 28: 835
Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 128, 12 Sup. Ct. Rep. 181, 35: 961
Brown v. Massachusetts, 144 U. S. 573, 12 Sup. Ct. Rep. 757, 36: 546
Cited in Davenport v. Paris, 136 U. S. 581, 34 L. ed. 548, 10 Sup. Ct. Rep. 1064—*Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 135, 35 L. ed. 904, 12 Sup. Ct. Rep. 181—*Claassen v. United States*, 142 U. S. 147, 35 L. ed. 968, 12 Sup. Ct. Rep. 169—*Kentucky Life & Acci. Ins. Co. v. Hamilton*, 11 C. C. A. 48, 22 U. S. App. 548, 63 Fed. 99—*McElwee v. Metropolitan Lumber Co.* 16 C. C. A. 250, 37 U. S. App. 266, 69 Fed. 319—*Burrows v. Niblack*, 28 C. C. A. 131, 53 U. S. App. 712, 84 Fed. 112—*Clary v. Hardeeville Brick Co.* 100 Fed. 915—*State v. Bledsoe*, 47 Ark. 234, 1 S. W. 149—*Floyd v. Colorado Fuel & Iron Co.* 10 Colo. App. 57, 50 Pac. 864.

1177. A statute providing that judgment will not be reversed or arrested for any defect or want of form is applicable to informants of seizure for forfeitures under the customs laws. *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. Rep. 838, 31: 736
Cited in Origet v. United States, 125 U. S. 245, 31 L. ed. 746, 8 Sup. Ct. Rep. 846—*United States v. Ortega*, 66 Fed. 715.

1178. For the nonjoinder of joint obligees, judgment may be arrested under plea of the general issue. *Farni v. Tesson*, 1 Black, 309, 17: 67

1179. [Any exception that may be taken advantage of on writ of error may be on motion to arrest judgment. *Barriere v. Nairac* (Pa. Sup. Ct.) 2 Dall. 249, 1: 368]

1180. [Judgment may be arrested when taken by an indorsee on a promissory note made payable simply to the maker, not to order. *Barriere v. Nairac* (Pa. Sup. Ct.) 2 Dall. 249, 1: 368]

1181. In a suit on a bond, that the verdict was for the amount due, instead of for the penalty of the bond, is a mere informality, and no ground for arresting the judgment. *Huff v. Hutchinson use of Hurlbut*, 14 How. 586, 14: 553

1182. The *ad damnum* clause in a declaration in debt is only to cover interest. A judgment will not be arrested merely because the recovery is greater than the sum claimed by the *ad damnum*. *Huff v. Hutchinson use of Hurlbut*, 14 How. 586, 14: 553

1183. [Upon breach assigned, that defendant was not seized of a good estate in fee, etc., and a plea of *non infregit conventionem*, issue joined, though informal, is, after verdict, sufficient to enter judgment upon. *Bender v. Fromberger* (Sup. Ct. Pa.) 4 Dall. 436, 1: 898]

1184. A motion in arrest of judgment, made upon the ground that, by reason of the defendant's citizenship, the case was transferred to a Federal court by the act of Congress of February 22, 1847, did not, where the pleadings did not show such citizenship, present the question to the state court in a manner that would enable it judicially to notice or decide it. *Carter v. Bennett*, 15 How. 354, 14: 727

1185. [In computing the time in which a motion in arrest must be made, the day on which the verdict was given must be included. *Burrall v. Du Blois* (Pa. Sup. Ct.) 2 Dall. 229, 1: 360]

Editorial note.

[Amendment of record to cure defect for which motion in arrest of judgment has been made. 67 L.R.A. 179.]

d. Motion to Set Aside.

Power of Court to Set Judgment aside after Term, see *supra*, XII. b. 2.

Raising Federal Question by, see Appeal and Error, III. d, 9, e, (3).

Effect of, on Reviewability of Judgment, see Appeal and Error, 47, 48.

Motion for, Pending Appeal, see Appeal and Error, 2806.

See also *supra*, 1119, 1149-1153, 1156-1158.

1186. Where a decree *pro confesso* has been improperly entered against one, the proper method of relief is by motion to the

court to vacate it. *French v. Stewart* (French v. Hay) 22 Wall. 238, 22: 854

1187. A court properly vacated its judgment as to two partners, after the third, the solvent partner, had been released from it, when it was confessed by one partner without authority, and the whole arrangement to secure the debt had been in fact annulled. The original indebtedness was thereupon revived. *Clark v. Bowen*, 22 How. 270, 16: 337

1188. A motion to set aside does not suspend the decree, where the movers were not parties to the suit and had no right to intervene. *Sage v. Central R. Co.* 93 U. S. 412, 23: 933

Cited in Farmers' Loan & T. Co. v. Central R. Co. 4 Dill. 341, Fed. Cas. No. 4,863—*Rutherford v. Penn Mut. L. Ins. Co.* 1 McCrary, 123, 1 Fed. 459—*Pearce v. Strickler*, 9 N. M. 48, 49 Pac. 727.

1189. If the proceedings against a party are not conducted according to the rules of law and the court, he must move to set them aside for irregularity. *Voorhees v. Jackson ex dem. Bank of United States*, 10 Pet. 449, 9: 490

1190. A general appearance to contest a judgment on account of irregularities will, if the grounds therefor are not sustained, conclude the parties as to any further questioning of the judgment. *Sugg v. Thornton*, 132 U. S. 524, 10 Sup. Ct. Rep. 163, 33: 447
Cited in Hambleton v. Glenn, 72 Md. 357, 20 Atl. 121—*Speer v. Burlingame*, 61 Mo. App. 84.

1191. A court has a right to set aside a decree dismissing a bill, at the same term at which the decree was rendered, on discovering its error or that the consent of the complainant to such dismissal was obtained by fraud; or to amend, correct, or vacate any decree for error of fact or law. *Doss v. Tyack*, 14 How. 297, 14: 428
Cited in Bishop v. Aborn, 16 R. I. 569, 18 Atl. 203—*Manion v. Fahy*, 11 W. Va. 496.

1192. The proof ought to be very clear to set aside a decree collusively obtained, at the instance of strangers to the suit, though incidentally affected by the decision. *Cochrane v. Deener*, 95 U. S. 355, 24: 514

1193. Where a bill alleged fraud, and the answer denied it in the abstract, but admitted all facts necessary to constitute it, a verdict of a jury was unnecessary to inform the conscience of the chancellor; but where a verdict had been rendered, and decree entered, it should not be set aside upon a certificate of some of the jurors specifying what they meant by their verdict. *Doss v. Tyack*, 14 How. 297, 14: 428

1194. The absence of the foreman of a jury, who is ill, when the rest of the jury is polled and a sealed verdict, which all signed, is opened, does not render a judgment entered on the verdict a nullity or subject to a motion to vacate it at a succeeding term of court. *Humphries v. District of*

Columbia, 174 U. S. 190, 19 Sup. Ct. Rep. 637, 43: 944

Cited in Macfarland v. Brown, 187 U. S. 243, 47 L. ed. 161, 23 Sup. Ct. Rep. 105—*Judson v. Gage*, 39 C. C. A. 159, 98 Fed. 543.

1195. Where a decree of foreclosure and sale was made and executed at the suit of a subsequent mortgagee, and with the consent of the mortgagor, it not appearing to the court that there was any prior encumbrance, the proceedings will not be set aside upon the application of the mortgagor in order to let in the prior mortgagee, unless it be necessary to prevent irremediable mischief. *Finley v. Bank of United States*, 11 Wheat. 304, 6: 480

1196. An assignee of notes which have been previously transferred by his assignor to a third party for a gambling consideration is authorized, under the Illinois statute, to proceed by suit in equity or by motion to set aside a judgment obtained upon the notes by such third party. *Pearce v. Rice*, 142 U. S. 28, 12 Sup. Ct. Rep. 130, 35: 925

1197. Where a declaration contained special and general counts, and a demurrer was filed to the special counts, a verdict and judgment obtained on a plea of the general issue to the general counts will not be set aside because the demurrer was undisposed of, where the statute of the state in which the cause was tried allowed one good count to sustain a judgment, and especially where the demurrer was apparently waived by failure to obtain joinder. *Townsend v. Jemison*, 7 How. 706, 12: 880
Cited in Morsell v. Hall, 13 How. 215, 14 L. ed. 118—*Bond v. Dustin*, 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 290.

1197a. The repugnancy of a state statute to the Federal Constitution cannot be successfully invoked in support of a motion to set aside a judgment as void, where the invalidity of such statute would have been available to defeat the recovery of a valid judgment, if it had been pleaded or otherwise presented in the state court as a defense in the proceedings in the original action. *Manley v. Park*, 187 U. S. 547, 23 Sup. Ct. Rep. 208, 47: 296
Cited in Manley v. Mayer, 68 Kan. 382, 75 Pac. 550.

1198. Where an order was made vacating a judgment on payment of costs, and on condition that case should be made and motion for new trial made in a short time, plaintiff's attorney, by not making out his costs and having them taxed, and demanding them before motion for new trial, waived such condition, and cannot afterwards set it up to invalidate the order vacating the judgment. *Ransom v. New York*, 20 How. 581, 15: 1000

Entry nunc pro tunc.

State Decision on Question of Power as Binding Federal Courts, see Courts, 2135.

1199. A decree *nunc pro tunc* is properly entered on rehearing, in lieu of the former

decree, which is set aside because a fact was overlooked, when the petitioner has died in the meantime. *New Orleans v. Warner*, 176 U. S. 92, 20 Sup. Ct. Rep. 280, 44: 385

Continuance; adjourned term.

1200. The Wisconsin courts have jurisdiction of a motion to set aside a judgment made at one term and continued to another term by consent or by direction of the court. *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. Rep. 530, 32: 946
Cited in Empire Min. Co. v. Propeller Tow-Boat Co. 108 Fed. 904—*Childs v. Kansas City, St. J. & C. B. R. Co.* 117 Mo. 428, 23 S. W. 373.

1201. A judgment duly recovered is not affected, nor the right to take out execution upon it impaired, by an application made to the court to set it aside, and "continue until the next term, without prejudice to either party." *Freeman v. Dawson*, 110 U. S. 264, 4 Sup. Ct. Rep. 94, 28: 141

1202. An adjourned term of the district court for the District of Columbia is considered as the same term for the purpose of the exercise of the right, under the Virginia practice, to have a default judgment set aside, and a plea made to the issue at any time up to the last day of the term next succeeding that in which the judgment was rendered. *Mechanics' Bank v. Withers*, 6 Wheat. 106, 5: 217

Delay.

See also Limitation of Actions, 520.

1203. An application to set aside a judgment made nearly two years after its rendition and more than a year after the sale of land thereunder, where no excuse for such delay is shown, is too late, especially where the charge of wrongdoing is general, no distinct act being charged. *Société Foncière et Agricole des États Unis v. Milliken*, 135 U. S. 304, 10 Sup. Ct. Rep. 823, 34: 208
Cited in Boone County v. Burlington & M. River R. Co. 139 U. S. 693, 35 L. ed. 323, 11 Sup. Ct. Rep. 687—*Gallagher v. Cadwell*, 145 U. S. 373, 38 L. ed. 740, 12 Sup. Ct. Rep. 873—*Richardson v. Walton*, 49 Fed. 896—*Lemolne v. Dunklin County*, 2 C. C. A. 348, 10 U. S. App. 227, 51 Fed. 492—*Jones v. Perkins*, 76 Fed. 84—*Callvada Colonization Co. v. Hays*, 119 Fed. 209—*Patterson v. Hewitt*, 11 N. M. 33, 55 L.R.A. 668, 66 Pac. 552—*Wamsley v. H. L. Horton Co.* 17 Misc. 327, 39 N. Y. Supp. 963.

1204. Whether a court has the power to set aside a nonsuit more than two years after the judgment has been rendered depends somewhat on the facts. *Loring v. Frue*, 104 U. S. 223, 26: 713

1205. Parties seeking to vacate an alleged excessive judgment will be denied relief where the error was due to their carelessness and inattention, and they have waited seventeen years before asserting their rights. *Bronson v. Schulten*, 104 U. S. 410, 26: 797
Cited in Dale v. Redfield, 23 Blatchf. 18, 22 Fed. 515—*Re Herdic*, 40 Fed. 361.

1205a. Under the laws of the territory of New Mexico, a judgment of a probate court

in that territory admitting a will to probate cannot be annulled by the same court in a proceeding instituted by an heir more than twenty years after the original judgment was rendered, and more than four years after the heir became of age. *Bent v. Thompson*, 138 U. S. 114, 11 Sup. Ct. Rep. 238, 34: 902

e. Amendment; Modification.

Effect of Procuring, see *supra*, 976.

Modification because of Errors or Irregularities, see *supra*, 1159-1165.

Effect on Appellate Jurisdiction of Amendment Bringing Case within Jurisdictional Amount, see *Appeal and Error*, I. f, 4, e, (4).

Modification Pending Appeal, see *Appeal and Error*, 2805-2807.

Rendering Modified Judgment on Appeal, see *Appeal and Error*, IX. d, e.

Modification of Judgment of Appellate Court, see *Appeal and Error*, IX. k.

Procedure to Amend Bankruptcy Orders, see *Bankruptcy*, 73.

Petition to Set Aside Bankruptcy Decree, see *Bankruptcy*, 90.

Power of Congress as to, see *Constitutional Law*, 131.

Amendment of Record to Show Ground in Controversy, see *Courts*, 1149.

Modification of Sentence, see *Criminal Law*, 180-182.

Mandamus to Compel, see *Mandamus*, 80, 81. See also *supra*, 88, 89, 492, 1149, 1152, 1155, 1157, 1159; *Pleading*, 233.

1206. The writ of error *coram vobis* brought before the court of original jurisdiction certain mistakes of fact not put in issue or passed upon; it did not lie, however, to correct errors in the judgment itself. The relief thereby sought is, in modern practice, attained by motion, supported, when necessary, by affidavits. *Bronson v. Schulten*, 104 U. S. 410, 26: 797

Cited in The Elmira, 16 Fed. 139—*Howard v. State*, 58 Ark. 231, 24 S. W. 8—*State v. Marsh*, 134 N. C. 201, 67 L.R.A. 192, 47 S. E. 6—*McAnulty v. National Life Asso.* 6 Lack. Legal News, 129—*Singer Mfg. Co. v. Cole*, 11 Pa. Co. Ct. 215—*Silberman v. Shulausky*, 16 Pa. Co. Ct. 135—*Park v. Higbee*, 6 Utah. 417, 24 Pac. 524—*Elliot v. Bastian*, 11 Utah, 463, 40 Pac. 713.

1207. After the judgment the parties are still in court for all the purposes of giving effect to the judgment. Defendant may be considered in court on a motion to amend, as well as on any other motion to carry the judgment into effect. *Walden v. Craig*, 14 Pet. 147, 10: 393

Cited in Selders v. Boyle, 5 Kan. App. 455, 49 Pac. 320.

1208. A court may at any time amend a decree which has, by inadvertence or mistake, been entered in a different form from that in which the court intended. *Elizabeth v. American Nicholson Pav. Co.* 131 U. S. cxlviii. Appx. and, 24: 1059

1209. Where a judgment in ejectment does

not sufficiently describe the land, plaintiff can, at the time the finding is made, or during the same term, procure its reformation. *Morgan v. Eggers*, 127 U. S. 63, 8 Sup. Ct. Rep. 1041, 32: 56

1210. A decree of the circuit court dismissing a bill generally, in a suit in which it is without jurisdiction, will be modified so that the dismissal will be without prejudice to complainant's right to proceed at law. *Smith v. Bourbon County*, 127 U. S. 105, 8 Sup. Ct. Rep. 1043, 32: 73

1211. An order cannot be made to amend, *nunc pro tunc*, a decree of which there is no evidence of entry. *Brignardello v. Gray* (*Gray v. Brignardello*) 1 Wall. 627, 17: 692

1212. A decree altering a previous one made in a case during the same term is not invalid because it does not refer to the first one and state the differences; these are disclosed by comparison. *Barrell v. Tilton*, 119 U. S. 637, 7 Sup. Ct. Rep. 332, 30: 511

1213. The amendment of a judgment in favor of the United States for duties entered "payable in gold coin for duties," so that it shall read "payable in gold and silver coin for duties," is within the power of the court if made during the term at which judgment was rendered. *Sun Cheong-Kee v. United States*, 3 Wall. 320, 18: 72
Cited in *Basset v. United States*, 9 Wall. 41, 19 L. ed. 549—*Edwards v. Elliott*, 21 Wall. 552, 22 L. ed. 490—*Lange's Case*, 13 Blatchf. 563, Fed. Cas. No. 18,307—*Lange v. Benedict* 8 Hun, 366.

1214. Where, by error of the court, judgment against an executor was rendered *de bonis propriis*, instead of *de bonis testatoris*, it was within the discretion of the court to correct the error by a new judgment against the executor *nunc pro tunc*, seven years afterwards, while the case was still before the court on a mandate from the Supreme Court reversing the judgment for that error, although the executor had died in the meantime. *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. Rep. 342, 30: 532

1215. A court will not amend its decree by inserting points not embraced in the pleadings. *Adams v. Law*, 17 How. 417, 15: 149

1216. Where the writ, pleadings, and contract spoke of *Frederic D. Conrad*, and the judgment was against "Daniel Frederic Conrad, the defendant," the words prefixed to "the defendant" should be rejected as surplusage. *Conrad v. Griffey*, 11 How. 480, 13: 779

1217. The findings of fact made in a case which is set up as *res judicata* cannot be changed by stipulation. *United States v. Bliss*, 172 U. S. 321, 19 Sup. Ct. Rep. 216, 43: 463

1218. A motion, on the foot of the decree, for additional relief not within the scope

or tenor of the decree, will be denied. *Texas v. Chiles* (*Texas v. White*) 10 Wall. 127, 19: 971

Remittitur; reduction.

To Make Judgment Conform to Writ, see *supra*, 107.

Remittitur on Appeal, see Appeal and Error, 5271-5279.

Pending Appeal, see Appeal and Error, 2807.

Widow's Right to Remit Part of Recovery for Causing Husband's Death, see Death, 9.

Rendering Judgment after Remittitur as Denial of Right to Jury Trial, see Jury, 68.

On Motion for New Trial, see New Trial, V. c.

See also New Trial, 25.

1219. Under the statutes of Texas, a party recovering a judgment may remit any part of it; and where the remitter does not appear to have been made in open court, the court may, at the same term and before any writ of error is sued out, correct the record in that particular according to the fact. *Pacific Exp. Co. v. Malin*, 132 U. S. 531, 10 Sup. Ct. Rep. 166, 33: 450
Cited in *Denny v. Pironi*, 141 U. S. 126, 35 L. ed. 659, 11 Sup. Ct. Rep. 966.

1220-1. It is within the discretion of the circuit court, if a plaintiff appears in open court during the term and before error brought, and remits a part of a verdict in his favor, to make the proper reduction and enter judgment accordingly. *Alabama Gold L. Ins. Co. v. Nichols*, 109 U. S. 232, 3 Sup. Ct. Rep. 120, 27: 915
Cited in *Robostelli v. New York, N. H. & H. R. Co.* 34 Fed. 721—*Nussbaum v. Northern Ins. Co.* 40 Fed. 337.

1222. [Judgment entered on an agreement that it be entered "for what may be due" will be stayed for the deduction of part payments, where it has been taken for too much. *Hancock v. Hillegas* (C. Ct.) 2 Dall. 380, 1: 424]

f. Opening; Rehearing.

Opening.

Mandamus to Compel, see Mandamus, 83.

See also *supra*, 92.

1223. It is within the sound discretion of the court to open a prior decree and grant a rehearing. *Brockett v. Brockett*, 2 How. 238, 11: 251
Wyle v. Coxe, 14 How. 1, 14: 301
McMicken v. Perin, 18 How. 507, 15: 504
Steines v. Franklin County, 14 Wall. 15, 20: 846

Cited in *McMicken v. Perin*, 18 How. 511, 15 L. ed. 506—*Bank of Lewisburg v. Sheffey*, 140 U. S. 453, 35 L. ed. 496, 11 Sup. Ct. Rep. 755—*Hendryx v. Perkins*, 52 C. C. A. 457, 114 Fed. 823—*Babbington v. Washington Brewery Co.* 13 App. D. C. 533—*Stribling v. Hart*, 20 Fla. 244.

1224. [A judgment by default will be

opened where the defendant had notice of trial for the wrong day. *Jackson v. Vanhorn* (Ct. Com. Pl. Phila.) 1 Dall. 241, 1: 118]

1225. [The court will never open a regular judgment to let in a plea of the statute of limitations. *Brown v. Sutter* (Ct. Com. Pl. Phila.) 1 Dall. 239, 1: 118]

1226-7. [An affidavit to open a judgment may be made by a third person, when the defendant is disabled by sickness. *James v. Young* (Ct. Com. Pl. Phila.) 1 Dall. 248, 1: 121]

— Editorial notes.

[Opening default judgment to let in defense of statute of limitations. 61 L.R.A. 746.

Right to open judgment to let in defense of usury. 12 L.R.A.(N.S.) 659.]

Rehearing.

Federal Question as to, see Appeal and Error, 1625.

Motion for, Pending Appeal, see Appeal and Error, 2806.

Reviewability of Order on Motion for, see Appeal and Error, I. d, 9.

Review of Discretion as to, see Appeal and Error, VIII. i, 9.

Presumption on Appeal as to Term at which Rehearing Granted, see Appeal and Error, 4111.

Raising Objection to, after Grant of, see Appeal and Error, 4523.

When Motion for, Proper Remedy, see Appeal and Error, 4224.

After Remand by Appellate Court, see Appeal and Error, 5563.

Compelling Trial Court to Grant, see Appeal and Error, 5588.

Ex Post Facto Law Requiring Test Oath as Condition of Granting, see Constitutional Law, 971.

Power of Legislature to Direct, see Constitutional Law, 1005.

Power of Congress to Authorize Review by Indian Courts, of Federal Judgments in Indian Citizenship Cases, see Courts, 402.

Presumption from Failure of Guardian *Ad Litem* to Apply for, see Infants, 43.

See also *supra*, 1153, 1199, 1223.

1226. A circuit court cannot grant a rehearing after the term at which the final decree was rendered. *Roemer v. Simon*, 91 U. S. 149, 23: 267

Cited in *Ætna F. Ins. Co. v. Boon*, 95 U. S. 143, 24 L. ed. 403—*Bank of Lewisburg v. Sheffey*, 140 U. S. 451, 35 L. ed. 496, 11 Sup. Ct. Rep. 755—*Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.* 32 Fed. 530—*Glenn v. Noonan*, 43 Fed. 404—*Glenn v. Dimmock*, 43 Fed. 551—*Easton v. Houston & T. C. R. Co.* 44 Fed. 10—*Standard Elevator Co. v. Crane Elevator Co.* 22 C. C. A. 553, 46 U. S. App. 411, 76 Fed. 771—*First Nat. Bank v. Woodrum*, 86 Fed. 1005—*Halsted v. Forest Hill Co.* 109 Fed. 823—*Beard's Appeal*, 64 Conn. 536, 30 Atl. 775.

1229. The court cannot grant a rehearing in an equity case after the term at which

the final decree was entered. *Bank of Lewisburg v. Sheffey*, 140 U. S. 445, 11 Sup. Ct. Rep. 755, 35: 493
Cited in *Re Ives*, 111 Fed. 497.

g. Grounds for.

1. In General.

Power of Court to Correct Error or Irregularity, see *supra*, 1159-1165.

For Modifying Judgment of Appellate Court, see Appeal and Error, 5518-5524.

Ground for Reviewing Order in Bankruptcy, see Bankruptcy, 455-457.

New Trial or Continuance rather than Bill in Equity as Remedy for Absence of Counsel or Witnesses, see Equity, 235.

Jurisdiction of Equity to Cancel Decree Predicated on Contract which has Expired, see Equity, 236a.

Necessity of Defense to Support Equitable Jurisdiction, see Equity, 238, 238a.

Effect of Intervening Rights of Bona Fide Purchasers, see Equity, 254, 255.

Unconscionable Use as Ground for Relief in Equity, see Equity, 259-263.

Injunctive Relief Generally, see Injunctions, I. i, 2.

Grounds for Review by Bill of Review, see Review, 2.

Grounds for Setting Aside Decree on Bill of Review, see Review, 59.

See also Judicial Sale, 117; Mortgage, 428a; Trial, 872.

1230. Where a deficiency decree was obtained on a foreclosure, in violation of the statute in regard to bankruptcy and without notice to the bankrupt, a decree vacating it and enjoining its enforcement was right. *Scott v. Ellery*, 142 U. S. 381, 12 Sup. Ct. Rep. 233, 35: 1050

1231. An unsworn statement of the complainant, who does not even sign in person his bill attacking a prior decree on the ground that an attorney represented him therein without authority, is insufficient as against the decree, when this must necessarily have found that the attorney was authorized. *Dunham v. Jones* (*Hilton v. Jones*) 159 U. S. 584, 16 Sup. Ct. Rep. 108, 40: 267

2. For Mistake or Fraud.

Relief in Admiralty for Mistake, see Admiralty, 290.

Injunctive Relief Generally, see Injunctions, I. i, 2.

See also *supra*, 1159.

1232. An agreement to confess judgment, made a rule of court, in a court of common law, chancery, or prize, made under a clear mistake, will be set aside. *The Hiram*, 1 Wheat. 440, 4: 131

Cited in *Walden v. Skinner*, 101 U. S. 584, 25 L. ed. 966—*Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 444, 46 L. ed. 989, 22 Sup. Ct. Rep. 608—*Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co.* 22 C. C. A. 285, 42 U. S. App.

123, 76 Fed. 481—*Roberts v. Haggart*, 4 Dak. 212, 29 N. W. 656—*Knobloch v. Mueller*, 123 Ill. 566, 17 N. E. 696—*Hunt v. Brennan*, 1 Hun, 214—*Barry v. New York Mut. L. Ins. Co.* 53 N. Y. 540.

Fraud.

Power of Court after Term, see *supra*, 1166, 1167.

As Ground for Jurisdiction in Equity, see Equity, 240-245.

Averment of Jurisdictional Ground and not Truth of Averments as Giving Jurisdiction, see Equity, 244, 245.

As Ground for Bill of Review, see Review, II. c.

See also *supra*, 1191.

1233. The fraud which entitles a party to impeach a judgment must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents and testimony, the truth of which was contested before the court. *Moffat v. United States*, 112 U. S. 24, 5 Sup. Ct. Rep. 10. 28: 623

Cited in *Hilton v. Guyott*, 159 U. S. 207, 40 L. ed. 123, 16 Sup. Ct. Rep. 130—*United States v. American Bell Teleph. Co.* 167 U. S. 240, 42 L. ed. 154, 17 Sup. Ct. Rep. 809—*Hilton v. Guyott*, 42 Fed. 252—*United States v. Winona & St. P. R. Co.* 15 C. C. A. 107, 32 U. S. App. 272, 67 Fed. 959.

1234. The frauds for which a bill to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, will be sustained, are those which are extrinsic or collateral to the matter tried, and not a fraud which was in issue in the former suit. *United States v. Throckmorton*, 98 U. S. 61, 25: 93
Distinguished in *Moffat v. United States*, 112 U. S. 32, 28 L. ed. 626, 5 Sup. Ct. Rep. 10—*Ritchie v. McMullen*, 25 C. C. A. 59, 47 U. S. App. 470, 79 Fed. 531—*United States Electric Lighting Co. v. Leiter*, 8 Mackey, 583.

Cited in *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 454, 27 L. ed. 229, 1 Sup. Ct. Rep. 389—*Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 520, 28 L. ed. 504, 4 Sup. Ct. Rep. 583—*Mahn v. Harwood*, 112 U. S. 365, 28 L. ed. 689, 6 Sup. Ct. Rep. 451—*United States v. Minor*, 114 U. S. 241, 29 L. ed. 113, 5 Sup. Ct. Rep. 836—*Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.)* 121 U. S. 379, 30 L. ed. 958, 7 Sup. Ct. Rep. 1015—*United States v. San Jacinto Tin. Co.* 125 U. S. 281, 31 L. ed. 750, 8 Sup. Ct. Rep. 850—*Cragin v. Powell*, 128 U. S. 699, 32 L. ed. 566, 9 Sup. Ct. Rep. 203—*Leavenworth County v. Chicago, R. I. & P. R. Co.* 134, U. S. 710, 33 L. ed. 1074, 10 Sup. Ct. Rep. 708—*Marshall v. Holmes*, 141 U. S. 596, 35 L. ed. 873, 12 Sup. Ct. Rep. 62—*United States v. Des Moines Nav. & R. Co.* 142 U. S. 540, 35 L. ed. 1107, 12 Sup. Ct. Rep. 308—*Hilton v. Guyott*, 159 U. S. 207, 40 L. ed. 123, 16 Sup. Ct. Rep. 139—*Graver v. Faurot*, 162 U. S. 436, 40 L. ed. 1031, 16 Sup. Ct. Rep. 790—*United States v. Beebe*, 180 U. S. 349, 45 L. ed. 568, 21 Sup. Ct. Rep. 371—*Brooks v. O'Hara*, 2 McCrary, 650, 8 Fed. 533—*McDermott v. Copeland*, 9 Fed. 537—*Pacific R. Co. v. Missouri P. R. Co.* 2 McCrary, 229, 12 Fed. 642—*Graham v. Boston, H. & E. R. Co.* 14 Fed. 760—*United States v. San Jacinto Tin Co.* 10 Sawy, 641, 23 Fed. 280—*United States v. Hancock*, 30 Fed. 853—*Kimberley v. Arms*,

40 Fed. 558—*Hilton v. Guyott*, 42 Fed. 252—*United States v. Wallamet Valley & C. M. Wagon Road Co.* 42 Fed. 358—*United States v. Wallamet Valley & C. M. Wagon-Road Co.* 44 Fed. 240—*Yeatman v. Bradford*, 44 Fed. 538—*Young v. Sigler*, 48 Fed. 184—*Daniels v. Benedict*, 50 Fed. 352—*Smith v. Worthington*, 4 C. C. A. 134, 10 U. S. App. 616, 53 Fed. 981—*Hatch v. Ferguson*, 57 Fed. 971—*Graver v. Faurot*, 64 Fed. 242—*Andes v. Millard*, 70 Fed. 517—*United States v. Chung Shee*, 71 Fed. 282—*Graver v. Faurot*, 22 C. C. A. 159, 46 U. S. App. 268, 76 Fed. 260—*United States v. Chung Shee*, 22 C. C. A. 644, 44 U. S. App. 751, 76 Fed. 950—*Society of Shakers v. Watson*, 23 C. C. A. 266, 47 U. S. App. 170, 77 Fed. 515—*McNeill v. McNeill*, 78 Fed. 836—*Golden Reward Min. Co. v. Buxton Min. Co.* 79 Fed. 874—*Hendrickson v. Bradley*, 29 C. C. A. 308, 55 U. S. App. 715, 85 Fed. 514—*Miller v. Perris Irrig. District*, 85 Fed. 701—*Reed v. Stanly*, 89 Fed. 433—*United States v. Beebe*, 34 C. C. A. 322, 92 Fed. 245—*De Weese v. Smith*, 97 Fed. 313—*Deweese v. Smith*, 66 L.R.A. 979, 45 C. C. A. 415, 106 Fed. 446—*Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 46 C. C. A. 644, 107 Fed. 786—*Holton v. Davis*, 47 C. C. A. 258, 108 Fed. 149—*King v. McAndrews*, 50 C. C. A. 33, 111 Fed. 865—*Re Roukous*, 128 Fed. 646—*Humphreys v. Burleson*, 72 Ala. 6—*Hall v. Pegram*, 85 Ala. 529, 5 So. 209—*Adler v. Van Kirk Land & Constr. Co.* 114 Ala. 562, 62 Am. St. Rep. 133, 21 So. 490—*Weir v. Vall*, 65 Cal. 470, 4 Pac. 422—*Zellerbach v. Allenberg*, 67 Cal. 299, 7 Pac. 908—*California Beet Sugar Co. v. Porter*, 68 Cal. 373, 9 Pac. 313—*Re Griffith*, 84 Cal. 113, 25 Pac. 528—*Pico v. Cohn*, 91 Cal. 134, 13 L.R.A. 339, 25 Am. St. Rep. 159, 25 Pac. 970—*Dunlap v. Steere*, 92 Cal. 347, 16 L.R.A. 363, 27 Am. St. Rep. 143, 28 Pac. 563—*Fealey v. Fealey*, 104 Cal. 359, 43 Am. St. Rep. 111, 38 Pac. 49—*Langdon v. Blackburn*, 109 Cal. 26, 41 Pac. 814—*Hanley v. Hanley*, 114 Cal. 693, 46 Pac. 736—*Sullivan v. Lumsden*, 118 Cal. 668, 50 Pac. 777—*Curtis v. Schell*, 129 Cal. 216, 79 Am. St. Rep. 107, 61 Pac. 951—*Willson v. Willson*, 18 Colo. 620, 34 Pac. 175—*Snider v. Rinehart*, 20 Colo. 460, 39 Pac. 408—*Harter v. Shull*, 17 Colo. App. 167, 67 Pac. 911—*Porter v. Bishop*, 25 Fla. 760, 6 So. 863—*Ward v. Durham*, 134 Ill. 202, 25 N. E. 745—*Telford v. Brinkerhoff*, 163 Ill. 443, 45 N. E. 156—*Merritt v. Merritt*, 33 Ill. App. 64—*Guthrie v. Doud*, 33 Ill. App. 71—*Adamski v. Wleczorek*, 93 Ill. App. 363—*Welss v. Guerinneau*, 109 Ind. 444, 9 N. E. 399—*Emerick v. Miller*, 159 Ind. 328, 64 N. E. 28—*Peplin v. Lautman*, 28 Ind. App. 78, 62 N. E. 60—*Haverty v. Haverty*, 35 Kan. 445, 11 Pac. 364—*Lazarus v. McGuirk*, 42 Ia. Ann. 201, 8 So. 253—*Foss v. Whitehouse*, 94 Me. 497, 48 Atl. 109—*Maryland Steel Co. v. Marney*, 91 Md. 375, 46 Atl. 1077—*Payne v. Payne*, 97 Md. 684, 55 Atl. 368—*Re Brigham*, 176 Mass. 226, 57 N. E. 328—*Keyes v. Brackett*, 187 Mass. 308, 72 N. E. 936—*Irvine v. Leyh*, 102 Mo. 207, 14 S. W. 715—*Nichols v. Stevens*, 123 Mo. 116, 45 Am. St. Rep. 514, 25 S. W. 578—*Hamilton v. McLean*, 139 Mo. 687, 41 S. W. 224—*Hamilton v. McLean*, 169 Mo. 70, 68 S. W. 930—*Hyatt v. Wolfe*, 22 Mo. App. 199—*Munro v. Callahan*, 55 Neb. 81, 70 Am. St. Rep. 368, 75 N. W. 151—*Dringer v. Erie R. Co.* 42 N. J. Eq. 580, 8 Atl. 811—*United States v. San Pedro & C. D. A. Co.* 4 N. M. 591, 17 Pac. 337—*Young v. Leach*, 27 App. Div. 296, 50 N. Y. Supp. 670—*Bearnes v. Bearnes*, 66 How. Pr. 450—*Douglass v. Low*, 36 Hun, 500—*Rich-*

ardson v. Trimble, 38 Hun, 417—White v. Reid, 70 Hun, 199, 24 N. Y. Supp. 290—Reid v. Defendorf, 87 Hun, 43, 33 N. Y. Supp. 954—Baker v. Byrn, 89 Hun, 118, 35 N. Y. Supp. 55—Ward v. Southfield, 102 N. Y. 293, 6 N. E. 660—Cummings v. McDermid, 4 Okla. 277, 44 Pac. 276—Thornton v. Perry, 7 Okla. 450, 54 Pac. 649—Estes v. Timmons, 12 Okla. 542, 73 Pac. 303—Morrill v. Morrill, 20 Or. 105, 11 L.R.A. 161, 23 Am. St. Rep. 95, 25 Pac. 362—Fraser v. Charleston, 19 S. C. 403—Earle v. Earle, 33 S. C. 504, 12 S. E. 164—Maddox v. Apperson, 14 Lea, 615—Mosby v. Glsborn, 17 Utah, 282, 54 Pac. 121—Camp v. Ward, 69 Vt. 289, 60 Am. St. Rep. 929, 37 Atl. 747—Wiseman v. Eastman, 21 Wash. 171, 57 Pac. 398—McDougall v. Wailling, 21 Wash. 487, 75 Am. St. Rep. 849, 58 Pac. 669—Spokane Co-Op. Min. Co. v. Pearson, 28 Wash. 124, 68 Pac. 165—Farmers' & S. Leaf Tobacco Warehouse Co. v. Pridemore, 55 W. Va. 463, 47 S. E. 258.

1235. The cases where a judgment or decree has been set aside for fraud are those in which, by fraud or deception practised on the unsuccessful party, he has been prevented from exhibiting fully his case; by reason of which there has never been a real contest before the court of the subject-matter of the suit. *United States v. Throckmorton*, 98 U. S. 61, 25: 93 *Cited in* *Marquez v. Frisbie*, 101 U. S. 479, 25 L. ed. 802—*Vance v. Burbank*, 101 U. S. 520, 25 L. ed. 931—*United States v. White*, 9 Sawy. 127, 17 Fed. 562—*United States v. Minor*, 10 Sawy. 155, 26 Fed. 672—*Graham v. Loh*, 32 Ind. App. 188, 69 N. E. 474.

1235a. Where fraud is such as to prevent a party from presenting the merits of his case to the court, or works an imposition upon the jurisdiction of the court, direct proceedings to impeach the judgment rendered may be instituted. *Steele v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 1 Sup. Ct. Rep. 389, 27: 226 *Cited in* *Hilton v. Guyot*, 159 U. S. 207, 40 L. ed. 123, 16 Sup. Ct. Rep. 139—*Peplin v. Lautman*, 28 Ind. App. 78, 62 N. E. 60—*Keyes v. Brackett*, 187 Mass. 308, 72 N. E. 986.

1235b. Where no real defense was made in a foreclosure suit, because of the unfaithful conduct of the solicitor and directors of the defendant in that suit, a court of equity will take cognizance of an action by such defendant to set the decree aside. *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 4 Sup. Ct. Rep. 583, 28: 498 *Cited in* *Kingsbury v. Buckner*, 134 U. S. 670, 33 L. ed. 1055, 10 Sup. Ct. Rep. 638—*Leavenworth County v. Chicago, R. I. & P. R. Co.* 134 U. S. 710, 33 L. ed. 1074, 10 Sup. Ct. Rep. 708—*Kirk v. United States*, 124 Fed. 341—*United States Electric Lighting Co. v. Leiter*, 8 Mackey, 582—*Lamb v. San Pedro & C. D. A. Co.* 3 N. M. 645, 9 Pac. 525.

1236. A compromise judgment will not be set aside on the ground of fraud, because of representations by the defendants that they were without property and that nothing could be realized by execution against them, when no representations are made with respect to the merits of the cause of action, and especially where the complaint itself is based upon the fact of their insolvency.

United States v. Beebe, 180 U. S. 343, 21 Sup. Ct. Rep. 371. 45: 563
Cited in *Bailey v. Willeford*, 126 Fed. 807.

JUDICIAL ACTS.

As Distinguished from Administrative Acts, see Officers, 42.

JUDICIAL CUSTODY.

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As Predicate for Exclusive and Complete Jurisdiction, see Courts, 1543-1555.

JUDICIAL CUSTOM.

As Equivalent to Formal Rule, see Courts, 1213, 1214.

JUDICIAL DECISIONS.

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JUDICIAL SALE.

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 Sale of Infant's Real Estate, see Infants, 26-33.
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 Effect of Death of Party, see Abatement and Revival, 8.
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 Under Federal Judgment, Federal Question as to Faith and Credit to be Given by State Courts, see Appeal and Error, 1993-2001.
 Reviewability of Decrees Relating to, see Appeal and Error. I. d, 15.
 Remedy of Tenant Where Original Purchaser Does Not Complete Purchase, see Appeal and Error, 636.
 By-bidding at Auction, see Auction, 2-4.
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 Power of Legislature to Authorize Sale of Land on Which State has Lien, see Constitutional Law, 136.
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 Carrying Out Stipulation between Parties for, see Stipulations, 1.

I. The Sale Generally.

a. In General.

Necessity of Deed, see *infra*, 147-149.
 Right to Adjourn Auction Sale, see Auction, 1.
 Injunction against Sale, see Injunction, I. i, 3.
 Transfer in Payment of Debts as a "Sale", see Sale, 2.

1,2. By judicial sale is meant one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell. *Williamson v. Berry*, 8 How. 495, 12: 1170. *Cited in Blittz v. Moran*, 17 Colo. App. 257, 67 Pac. 1020—*Noland v. Noland*, 12 Bush. 428.

3. In order that a sale of real property conveyed by a person under order of the court in payment of his debts should be a judicial sale, it is requisite that the chancellor should have had the authority to direct a sale of the premises to the grantor's creditors for their demands, and that it should have been approved by the master in the way the order directed it to be done. *Williamson v. Berry*, 8 How. 495, 12: 1170.

Status of master.

4. The master at a special sale under direction of a court of chancery is a representative of the court, and not the agent of either party. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. Rep. 887.

36: 732

Cited in Guarantee Trust & S. D. Co. v. Delta & P. Land Co. 43 C. C. A. 400, 104 Fed. 9.

Decree or order.

Sale in Advance of Final Decree by Order of Court, see *infra*, 21.

As to Sale Pending Adjudication of Claims, see *infra*, 25.

Decree or Order after Sale, see *infra*, 44.

Sale of Decedent's Lands to Pay Debts, see *Executors and Administrators*, 233.

5. A decree which is interlocutory, in which no authority is given to sell until a commissioner had reported and the court had passed on the report, does not authorize a sale. *Brignardello v. Gray* (Gray v. Brignardello) 1 Wall. 627, 17: 692
Cited in *State Bank v. Green*, 10 Neb. 134, 4 N. W. 942.

b. What may be Sold.

Other Judgments belonging to Debtor and already Assigned by Him, see *infra*, 101.

Property Requiring Litigation to Establish Title, see *Bankruptcy*, 315.

Copyrights, see *Copyright*, 44.

Lands in Another State, see *Courts*, 65.

Property Seized for Violation of Customs Laws, see *Duties*, 572.

Leviable Property Generally, see *Execution*, II. a.

Homestead, see *Homestead*, 9.

Incompetent Person's Property, see *Incompetent Persons*, III.

Lots in Town Site Entries on Public Lands, see *Public Lands*, 598.

Enemy's Property, see *War*, 37.

6. [A vested remainder in tail may be sold on execution. *Humphrey v. Humphries* (Pa. Sup. Ct.) 2 Dall. 223, 1: 357]

7. Where one person conveyed to another for a term of fifty years all the mineral coal upon and under a described tract of land, with the exclusive right to enter on the land to dig the coal and remove it, and to occupy with buildings as might be necessary for the development of the coal, the interest of the lessee may be sold on judgment and execution against him as real estate, together with the machinery, buildings, fixtures, and improvements placed on the premises by him. *Hyatt v. Vincennes Nat. Bank*, 113 U. S. 408, 5 Sup. Ct. Rep. 573.

28: 1009

Cited in *Raynolds v. Hanna*, 55 Fed. 800.

8. The statutory requirement in Indiana that the fee simple of real estate shall not be sold on execution until the rents and profits for a stated term shall have first been offered for sale is not directory merely, but inhibits a sale of the fee simple until this prior step has been taken. *Gantley v. Ewing*, 3 How. 770, 11: 794
Cited in *Collier v. Stanbrough*, 6 How. 22, 12 L. ed. 327—*Morss v. Doe*, 2 Ind. 67.

Description in writ or order.

Effect of Decree of Confirmation to Cure Sale of Property not Included, see *infra*, 65, 66.

9. [In Pennsylvania, lands may be sold on an execution which directs the sale of goods and chattels. *Andrew v. Fleming* (Pa. N. P.) 2 Dall. 93, 1: 303]

Franchises and rights of way.

10. A franchise granted to a canal company to take toll on boats passing through, together with a wharf, locks, and lots, comprise its whole value to its stockholders, and a single creditor under fi. fa. cannot destroy a fund to which other creditors have a right to look for payment. *Gue v. Tide Water Canal Co.* 24 How. 257, 16: 635

Cited in *Milwaukee & M. R. Co. v. James*, 6 Wall. 752, 18 L. ed. 856—*Jackson v. Ludeling*, 21 Wall. 623, 22 L. ed. 495—*Hammock v. Farmers' Loan & T. Co.* 105 U. S. 90, 26 L. ed. 1115—*East Alabama R. Co. v. Doe*, 114 U. S. 353, 29 L. ed. 141, 5 Sup. Ct. Rep. 869—*Buncombe County v. Tommey*, 115 U. S. 135, 29 L. ed. 309, 5 Sup. Ct. Rep. 1186—*Steers v. Daniel*, 4 Fed. 590—*National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 45—*Detroit v. Detroit City R. Co.* 56 Fed. 882—*Holland v. State*, 15 Fla. 542—*Nelson v. Iowa Eastern R. Co.* 51 Iowa, 188, 33 Am. Rep. 124, 1 N. W. 434—*Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 313, 51 L.R.A. 769, 83 N. W. 1074—*McColgan v. Baltimore Belt R. Co.* 85 Md. 521, 36 Atl. 1026—*Richardson v. Sibley*, 11 Allen 72, 87 Am. Dec. 700—*Selbert v. Minneapolis & St. L. R. Co.* 58 Minn. 67, 59 N. W. 826—*Overton Bridge Co. v. Means*, 33 Neb. 859, 29 Am. St. Rep. 514, 51 N. W. 240—*Williamson v. New Jersey Southern R. Co.* 28 N. J. Eq. 283—*Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 325—*Water Comrs. v. Westchester County Waterworks Co.* 71 App. Div. 552, 76 N. Y. Supp. 11—*People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 79 App. Div. 107, 80 N. Y. Supp. 85—*New York Cement Co. v. Consolidated Rosendale Cement Co.* 38 Misc. 523, 77 N. Y. Supp. 1003—*People v. O'Brien*, 111 N. Y. 47, 2 L.R.A. 263, 7 Am. St. Rep. 684, 18 N. E. 602—*Syracuse Water Co. v. Syracuse*, 116 N. Y. 182, 5 L.R.A. A. 552, 22 N. E. 381—*McNeal Pipe & Foundry Co. v. Howland*, 111 N. C. 633, 20 L.R.A. 751, 16 S. E. 857—*People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 442, 63 L.R.A. 892, 105 Am. St. Rep. 674, 67 N. E. 69—*New York Cement Co. v. Consolidated Rosendale Cement Co.* 178 N. Y. 177, 70 N. E. 451—*Gooch v. McGee*, 83 N. C. 63, 35 Am. Rep. 558—*Marr v. Bank of West Tennessee*, 4 Coldw. 477—*Marr v. Union Bank*, 4 Coldw. 486—*Palestine v. Barnes*, 50 Tex. 553—*Walla v. Norfolk & W. R. Co.* 52 W. Va. 488, 64 L.R.A. 505, 94 Am. St. Rep. 948, 44 S. E. 294—*Yellow River Improv. Co. v. Wood County*, 81 Wis. 560, 17 L.R.A. 95, 51 N. W. 1004—*Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 514, 28 L.R.A. 254, 62 N. W. 417—*State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 563, 63 N. W. 746.

11. The mere right of way of a railroad corporation cannot be sold on execution to one who does not own the franchise. *East*

Alabama R. Co. v. Doe ex dem. Visscher, 114 U. S. 340, 5 Sup. Ct. Rep. 869, 29: 136
Ottid in Connor v. Tennessee C. R. Co. 54 L.R.A. 695, 48 C. C. A. 740, 109 Fed. 940—
 United States v. Certain Lands, 112 Fed. 625
 —National Foundry Pipe Works v. Oconto City Water Supply Co. 51 C. C. A. 473, 113 Fed. 801—Eufaula Water Co. v. Addyston Pipe & Steel Co. 89 Ala. 560, 8 So. 25—
 Gardner v. Mobile & N. W. R. Co. 102 Ala. 647, 48 Am. St. Rep. 84, 15 So. 271—Purifoy v. Lamar, 112 Ala. 132, 20 So. 975—
 Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 507, 3 L.R.A. 438, 20 N. E. 432—Farmers Loan & T. Co. v. Canada & St. L. R. Co. 127 Ind. 261, 11 L.R.A. 745, 26 N. E. 784—
 Chicago, B. I. & P. R. Co. v. Ottumwa, 112 Iowa, 312, 51 L.R.A. 769, 83 N. W. 1074—
 Northern P. R. Co. v. Townsend, 84 Minn. 154, 87 Am. St. Rep. 342, 86 N. W. 1007—
 Ft. Worth & R. G. R. Co. v. Jennings, 76 Tex. 377, 8 L.R.A. 182, 13 S. W. 270—Sulphur Springs & Mt. P. R. Co. v. St. Louis, A. & T. R. Co. 2 Tex. Civ. App. 655, 22 S. W. 107
 —Wall v. Norfolk & W. R. Co. 52 W. Va. 488, 64 L.R.A. 505, 94 Am. St. Rep. 948, 44 S. E. 294—Yellow River Improv. Co. v. Wood County, 81 Wis. 562, 17 L.R.A. 95, 51 N. W. 1004—State ex rel. Milwaukee Street R. Co. v. Anderson, 90 Wis. 568, 68 N. W. 746.

—Editorial note.

[Of corporate franchise or property necessary to its enjoyment. 20 L.R.A. 737.]

Public property.

Injunction against Judicial Sale of Exempt City Property, see Injunction, 115.

12. Waterworks owned by a municipal corporation are held in trust for the use of its citizens, and are not liable to sale under execution for ordinary debts of the corporation. *New Orleans v. Morrie*, 105 U. S. 600, 26: 1184
Cited in *Huron Waterworks Co. v. Huron*, 7 S. D. 23, 30 L.R.A. 856, 58 Am. St. Rep. 817, 62 N. W. 975—*Lake County Water & Light Co. v. Walsh*, 160 Ind. 44, 98 Am. St. Rep. 264, 65 N. E. 530—State ex rel. Board of Liquidation v. *New Orleans*, 36 La. Ann. 525—*Brockenbrough v. Water Comra*. 184 N. C. 17, 46 S. E. 23.

c. Bids and Bidding.

Right to Compel Performance of Bid, see *infra*, 70, 71.

Resale and Liability of Purchaser on Refusal to Complete Purchase, see *infra*, 131-134.

Right to Retract Bid, see Auction, 5.

Right of Bankrupt to Buy in at His Own Sale, see Bankruptcy, 324, 325.

Contract as to Bids, see Contracts, 415.

Form of Judgment on Rescinding Auction Sale for By-bidding, see Judgment, 95.

13. The acceptance or rejection of a bid at a sale under a chancery decree is within the sound equitable discretion of the court, to be exercised with due regard to the special circumstances of the case and to the stability of judicial sales. *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. Rep. 246, 32: 608
Cited in *Tennessee v. Quintard*, 26 C. C. A. 171, U. S. Dig.—235

47 U. S. App. 621, 80 Fed. 835—*Phelan v. Downs*, 59 App. Div. 287, 69 N. Y. Supp. 375.

14. At a public judicial sale made by a special master under the directions of a court of chancery, either party may bid without leave given by the court. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. Rep. 887, 36: 732
Cited in *Deck v. Whitman*, 96 Fed. 879—*McMillan v. Harris*, 110 Ga. 83, 48 L.R.A. 350, 78 Am. St. Rep. 93, 35 S. E. 334.

15. [A sheriff in Pennsylvania must sell, not merely to the highest, but to the best bidder; and therefore, if the highest bidder was unable to pay, the sheriff might make an offer to the next highest, and, if not paid for after a sale, the return should be that the property remains unsold. *Zantzinger v. Pole* (Pa. Sup. Ct.) 1 Dall. 419, 1: 204]

Joint and combined bids.

16. Creditors of a common debtor may combine to purchase the debtor's property at a judicial sale, though they may not combine to prevent others from purchasing. *Ketchum v. Duncan*, 96 U. S. 659, 24: 868
Cited in *Kropholler v. St. Paul, M. & M. R. Co.* 1 McCrary, 301, 2 Fed. 304—*Maxwell v. Co. v. Henderson*, 12 Colo. App. 434, 56 Pac. 67—*Pennsylvania Transp. Co's Appeal*, 101 Pa. 582.

17. The formation of an association for the purpose of bidding off property at auction for the joint benefit is not unlawful as tending to prevent competition. *Kearney v. Taylor*, 15 How. 494, 14: 787
Cited in *Hyer v. Richmond Traction Co.* 168 U. S. 478, 42 L. ed. 549, 18 Sup. Ct. Rep. 114—*Thames v. Miller*, 2 Woods, 569, Fed. Cas. No. 13,860—*Terbell v. Lee*, 40 Fed. 42—*United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 137, 29 C. C. A. 163, 54 U. S. App. 723, 85 Fed. 293—*McMillan v. Harris*, 110 Ga. 83, 48 L.R.A. 350, 78 Am. St. Rep. 93, 35 S. E. 334—*Smith v. Ullman*, 58 Md. 190, 42 Am. Rep. 329—*Hopkins v. Ensign*, 122 N. Y. 150, 9 L.R.A. 733, 25 N. E. 306—*Barnes v. Morrison*, 97 Va. 380, 34 S. E. 93.

d. Mode and Requisites; Appraisal.

Invalidity of Sale on Credit, see *infra*, 63.

Sale of Decedent's Lands to Pay Debts, see Executors and Administrators, 234-237.

Estoppel of Purchaser to Deny Authority to Sell Subject to Encumbrance, see Estoppel, 256.

Recital in Record of Sale as Evidence of Court Order, see Evidence, 2488.

Impairment of Contract Obligations as to, see Constitutional Law, IV. g, 4, i (9).

18. Property is liable to be sold on account of an undischarged obligation of its owner to the public or to his creditors. But it can only be done in either case where there has been a substantial compliance with the prerequisites of the sale as these are fixed by law. *Early v. Doe ex dem. Homans*, 16 How. 610, 14: 1079
Cited in *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 148, 35 L. ed. 120, 11 Sup. Ct. Rep. 512—*United States v. Pacific R. Co.* 1 McCrary, 7, 1 Fed.

102—United States v. Allen, 14 Fed. 265—
Re O'Sullivan, 84 Cal. 448, 24 Pac. 281—
Dorrance v. Raynford, 67 Conn. 6, 52 Am.
Am. St. Rep. 266, 34 Atl. 708—Coombs v.
Steere, 8 Ill. App. 150—Gavin v. Shuman, 23
Ind. 34—Morrow v. Weed, 4 Iowa, 95, 76 Am.
Dec. 122—Tidd v. Grimes, 66 Kan. 402, 71
Pac. 844—Hopper v. Malleeson, 16 N. J. Eq.
384—Blackwell v. First Nat. Bank, 10 N. M.
561, 63 Pac. 43—McDermott v. Board of Pol-
lice, 25 Barb. 644—Stewart v. Pergusson,
133 N. C. 281, 45 S. E. 585—Sealing v. Law-
rence, 27 Ohio St. 449—Cooke v. Pennington,
15 S. C. 193.

19. Auction sales under a decretal order
are under the control of the court, and sub-
ject to the power of the court to set aside the
sale or open it before it has been confirmed.
Such sales are usually conducted under the
advice of the solicitor of the complainant;
but his instructions, if oppressive to the re-
spondent, or unreasonable, cannot control the
officer. Blossom v. Milwaukee & C. R. Co.
3 Wall. 196, 18: 43
Cited in Butterfield v. Usher, 91 U. S. 248, 23
L. ed. 319—Camden v. Mayhew, 129 U. S. 85,
32 L. ed. 611, 9 Sup. Ct. Rep. 246—Gager v.
Henry, 5 Sawy. 247, Fed. Cas. No. 5,172—
Sampson v. Camperdown Cotton Mills, 64
Fed. 94—Tennessee v. Quintard, 26 C. C. A.
171, 47 U. S. App. 621, 80 Fed. 835—Texas
& P. R. Co. v. Gay, 86 Tex. 592, 25 L.R.A.
59, 26 S. W. 599—Brock v. Rice, 27 Gratt
816—Berlin v. Melhorn, 75 Va. 642—Terry
v. Coles, 80 Va. 704—Virginia F. & M. Ins.
Co. v. Cottrell, 85 Va. 861, 17 Am. St. Rep.
108, 9 S. E. 132—Carr v. Carr, 88 Va. 739, 14
S. E. 368.

Time and order of procedure.

Postponement, see *infra*, I. e.

20. A sale by a sheriff May 1, 1821, on
executions previously issued on property of
an intestate, for which letters of administra-
tion were issued November 1, 1819, is not
void because made too soon, under a statute
prohibiting such sale within eighteen months
from the date of the letters. At least such
must be the decision where the statute is so
construed by the courts of the state. Griffith
v. Bogert, 18 How. 158, 15: 307

21. Whether the condition of property
was such as to require, for the protection of
the parties, that it be sold, was a matter for
the court, in its discretion, to determine. If
the circumstances justified immediate action,
the court had power to order a sale in ad-
vance of a final decree. Mellen v. Moline
Malleable Iron Works, 131 U. S. 352, 9 Sup.
Ct. Rep. 781, 33: 178
Cited in Compton v. Jesup, 15 C. C. A. 416, 31
U. S. App. 486, 68 Fed. 289.

22-3. A sale under a *fi. fa.* is legal as re-
spects the purchaser, whether the marshal
sells before or after the return, whether he
makes a correct return, or any return at all,
provided the writ was duly issued and the
levy made before the return. Wheaton v.
Sexton, 4 Wheat. 503, 4: 626
Distinguished in Borden v. State, 11 Ark. 564,
54 Am. Dec. 217.

Cited in Kelly v. Herrall, 10 Sawy. 172, 20 Fed.
371—Mason v. Bennett, 52 Fed. 345—Ware
v. Bradford, 2 Ala. 682, 36 Am. Dec. 427—
Wyatt v. Stewart, 34 Ala. 720—Ritter v.

Scannell, 11 Cal. 248, 70 Am. Dec. 775—
Brooks v. Rooney, 11 Ga. 427, 56 Am. Dec.
430—Hazard v. Cole, 1 Idaho, 289—Phillips
v. Coffee, 17 Ill. 157, 63 Am. Dec. 357—Jack-
son v. Spink, 59 Ill. 409—Splahn v. Gillespie,
48 Ind. 408—Tiffany v. Glover, 3 G. Greene,
397—Butterfield v. Walsh, 21 Iowa, 101, 89
Am. Dec. 557—Wright v. Howell, 35 Iowa,
295—Aubert v. Buhler, 3 Mart. N. S. 497—
Caldwell v. Blake, 69 Me. 470—Crane v.
Hardy, 1 Mich. 65—Blair v. Compton, 33
Mich. 424—Vroman v. Thompson, 51 Mich.
459, 16 N. W. 808—Barrett v. McKenzie, 24
Minn. 23—Hombs v. Corbin, 20 Mo. App. 511
—Johnson v. Bemis, 7 Neb. 226—Wyant v.
Tuthill, 17 Neb. 496, 23 N. W. 342—Whiting
v. Bradley, 2 N. H. 82—Southern California
Fruit Exchange v. Stamm, 9 N. M. 371, 54
Pac. 845—Day v. Kent, 1 Or. 128—Sheriff v.
Welborn, 14 S. C. 483—Lea v. Maxwell, 1
Head, 369—Rogers v. Cawood, 1 Swan, 148,
55 Am. Dec. 729—Mitchell v. Lipe, 8 Yerg.
183, 29 Am. Dec. 116—Ballard v. Whitlock,
18 Gratt. 289—O'Bannon v. Saunders, 24
Gratt. 142—Allan v. Hoffman, 83 Va. 135, 2
S. E. 602.

24. If property, real or personal, is seized
under a *fi. fa.* before the return day of the
writ, the marshal may proceed to sell at
any time afterward, without new process
from the court; and the marshal is author-
ized to make the indorsement, after the
regular return term, in cases where the sale
was made afterwards. Remington v. Lin-
thicum, 14 Pet. 84, 10: 364
Distinguished in Sheriff v. Welborn, 14 S. C.
483.

Cited in Kelly v. Herrall, 10 Sawy. 172, 20 Fed.
371—Mason v. Bennett, 52 Fed. 345—United
States v. Hogg, 50 C. C. A. 609, 112 Fed.
910—Blair v. Compton, 33 Mich. 424—Vro-
man v. Thompson, 51 Mich. 459, 16 N. W.
808—Hombs v. Corbin, 20 Mo. App. 510—
Johnson v. Bemis, 7 Neb. 226—Wyant v. Tut-
hill, 17 Neb. 496, 23 N. W. 342.

25. Where a decree directed that all the
assets of a mining company be sold at public
vendue for cash to the highest bidder, and
referred it to a master to ascertain the as-
sets, and directed him after the confirma-
tion of his report to make the sale after giv-
ing the usual notice, it was not necessary to
delay the sale until every claim arising since
the commencement of the suit had been
passed to final judgment, where ample pro-
vision was made in the orders for the rights
of all creditors. Pewabic Min. Co. v. Mason,
145 U. S. 349, 12 Sup. Ct. Rep. 887, 36: 732

Notice and advertisement.

Notice of Foreclosure Sale, see Mort-
gage, 381, 382.

Of Sale for Taxes, see Taxes, III. i, 2.

Laches Barring Relief for Improper De-
scription in Advertisement, see
Limitation of Actions, 173.

Publication of Notice, see Publication, 2.
See also Duties, 572.

26. The act of March 2, 1867, § 7, con-
cerning a publication of notice of sale, etc.,
when ordered by a Federal court or judge,
in the rebel states, applies only to notice in
behalf of the government, not to those in
suits between individuals. Dunlop v. Zunts
(Moncure v. Zunts) 11 Wall. 416, 20: 181

27. Under the act of 1824, adopting the state modes of proceeding, a judicial sale of land in Louisiana must be advertised according to the state practice, requiring publication of notice of sale in the parish where the land is situated; and, if this is not done, the sale will be set aside. *Dunlop v. Zunts* (Moncure v. Zunts) 11 Wall. 416, 20: 181

Appraisal.

Applicability of State Statutes in Federal Courts, see Courts, 1336, 1337.

28. The Kansas Civil Code of Procedure requires the appraisal of property taken on execution, and a sale at two thirds of the appraised value. *Smith v. Cockrill*, 6 Wall. 756, 18: 973

29. [An estate for life may be sold on execution without an inquest on its value. *Howell v. Woolfort* (Ct. Com. Pl. Phila.) 2 Dall. 75, 1: 295]

30. Under the laws of Louisiana, adopted by a rule of the circuit court, debts due to the defendant, like other movable property, if seized, must be appraised and sold for not less than two thirds of the appraised value. *Collier v. Stanbrough*, 6 How. 14, 12: 324

31. A sale in Louisiana by a marshal of the circuit court, upon the first bidding, for less than one third of their face value, of notes and mortgages which had not been appraised as required by the state statute, is void, that statute having been adopted by a rule of the circuit court. *Collier v. Stanbrough*, 6 How. 14, 12: 324
Cited in *Erwin v. Lowry*, 7 How. 180, 12 L. ed. 658—*German Sav. & Loan Soc. v. Cannon*, 65 Fed. 544—*Capital Bank v. Huntoon*, 35 Kan. 592, 11 Pac. 369.

In parcels or en masse.

Necessity of First Offering Rents and Profits before Selling Fee, see *supra*, 8.

Sale for Taxes, see Taxes, 662-668.

32. Under a decree for the sale of railroad property which, with respect to the ownership and interests involved, includes five separate parcels or divisions, and requires first an offer of each party separately and then of the whole *en masse*, and provides that, if the bid for the entirety shall exceed the bid for the separate parts, it shall all be sold together and the proceeds divided in the proportion of the separate bids, all parties have substantially the benefit of a separate sale, and none of them can get less by the sale in gross. *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29: 963
Cited in *Compton v. Jesup*, 15 C. C. A. 460, 31 U. S. App. 486, 68 Fed. 327—*Low v. Blackford*, 31 C. C. A. 25, 58 U. S. App. 737, 87 Fed. 402.

33. The real estate, personalty, and franchise of a railroad company cannot be sold separately under an execution, but should be sold as an entirety. *Hammock v. Farmers' Loan & T. Co.* 105 U. S. 77, 26: 1111
Cited in *Chicago & P. R. Co. v. Third Nat. Bank*, 26 Fed. 822—*National Foundry & Pipe*

Works v. Oconto Water Co. 52 Fed. 45—*Central Trust Co. v. Sheffield & B. Coal, Iron & R. Co.* 60 Fed. 17—*Compton v. Jesup*, 15 C. C. A. 461, 31 U. S. App. 486, 68 Fed. 327—*Pacific Northwest Packing Co. v. Allen*, 54 C. C. A. 851, 116 Fed. 315—*McKenzie v. Blsmarck Water Co.* 6 N. D. 380, 71 N. W. 608—*McFadden v. Mays Landing & E. H. City R. Co.* 49 N. J. Eq. 191, 22 Atl. 932—*People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 79 App. Div. 203, 80 N. Y. Supp. 85—*People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 442, 63 L.R.A. 892, 105 Am. St. Rep. 674, 67 N. E. 69—*Yellow River Improv. Co. v. Wood County*, 81 Wia. 562, 17 L.R.A. 95, 51 N. W. 1004.

34. A judicial sale cannot be objected to because the property was sold in bulk, and not in parcels, where the sheriff first offered the property separately, and received no bids, and then offered and sold it *en masse*. *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. Rep. 71, 28: 113
Cited in *Nevada Nickel Syndicate v. National Nickel Co.* 103 Fed. 402—*Connick v. Hill*, 127 Cal. 165, 59 Pac. 832.

Writing; statute of frauds.

35. Sheriffs' sales of land are within the statute of frauds, and some memorandum in writing is necessary to be made. *Remington v. Linthicum*, 14 Pet. 84, 10: 364
Cited in *Ruckle v. Barbour*, 48 Ind. 281.

36. An imperfect return of a sale cannot be completed by a reference to the private memorandum book of his sales kept by the marshal; it is not a sufficient memorandum of a sale within the statute. *Remington v. Linthicum*, 14 Pet. 84, 10: 364

Procedure for confirmation.

Necessity and Effect of Confirmation, see *infra*, III.

Power of Federal District Court to Confirm Sale, see Courts, 872.

37. General equity rule No. 83 relating to proceedings to confirm masters' reports has no reference to a report by a master of a sale, but the sale will be confirmed upon application, unless cause is shown against it within eight days after service of the order. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. Rep. 887, 36: 732
Cited in *Central Trust Co. v. Sheffield & B. Coal, Iron & R. Co.* 60 Fed. 15—*Godchaux v. Morris*, 57 C. C. A. 436, 121 Fed. 484—*Talbot v. Mason*, 80 C. C. A. 146, 125 Fed. 102—*Coltrane v. Baltimore Bldg. & L. Asso.* 126 Fed. 840.

e. Postponement.

Postponement of Foreclosure Sale, see Mortgage, 386-388.

38. The marshal may adjourn a sale to another day than that named in the writ. *Semmes v. United States*, 91 U. S. 21, 23: 193

39. Officers appointed under decrees of the court to sell property are invested with a reasonable discretion as to the time and manner of effecting the sale and may ad-

journal the same from time to time as they think proper. *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18: 43

Cited in Semmes v. United States, 91 U. S. 26, 23 L. ed. 195 — *Pewabic Min. Co. v. Mason*, 145 U. S. 362, 36 L. ed. 736, 12 Sup. Ct. Rep. 887—*Southern California Lumber Co. v. Ocean Beach Hotel Co.* 94 Cal. 222, 28 Am. St. Rep. 115, 29 Pac. 627—*Moses v. Taylor*, 8 Mackey, 468—*Head v. Clark*, 88 Ky. 366, 11 S. W. 203—*Noland v. Barrett*, 122 Mo. 192, 43 Am. St. Rep. 572, 26 S. W. 692—*Coleman v. Lord*, 72 Tex. 292, 10 S. W. 91—*Long v. Perline*, 41 W. Va. 319, 23 S. E. 611.

40. An officer having charge of a judicial sale of property of much value at the end of a prolonged litigation is not obliged at the last moment, in response to a despatch from a stranger, to postpone the sale. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. Rep. 887, 36: 732
Cited in Dazet v. Landry, 21 Nev. 298, 30 Pac. 1064.

II. Validity and Effect Generally.

Sale before or after Return or in Absence of Return, see *supra*, 22-24.

Sale without Appraisal, see *supra*, 31.

Necessity of Deed, see *infra*, 147-149.

In Confiscation Proceedings, see Confiscation and Sequestration, 73.

Invalidity of Sale to Satisfy Judgment at Law of Property in Chancery Receiver's Hands, see Courts, 1554.

State Decisions as to Validity as Binding Rules in Federal Courts, see Courts, 2138.

Presumption and Burden of Proof, see Evidence, 558-565.

Sale of Land after Seizure, see Execution, 50.

Effect of Death of Party Pending Execution and Sale, see Executions, 56-63.

Who May Object to Validity of Foreclosure Sale, see Mortgage, 372.

Validity of Tax Sale, see Taxes, III. i.

Question of Law or Fact as to Presuming Existence of Necessary Precept, see Trial, 454.

Power of Trustee to Purchase at, see Trusts, 155.

Under erroneous or void decree.

Jurisdiction in Chancellor as Essential, see *supra*, 3.

Decree or Order for Sale, see *supra*, 5.

Inefficacy of Confirmation to Cure Sale made without Order or upon Void Order, see *infra*, 67, 68.

Grounds for Collateral Attack, see Generally, *infra*, VI.

Insufficiency of Mere Error as Ground for Setting Aside, see *infra*, 114, 115.

Invalidity of Decree Setting Aside Confirmation Sale and Reselling Property without Notice to Purchaser, see *infra*, 130.

Effect on Jurisdiction of Main Proceeding, see Courts, 36.

Notice of Want of Jurisdiction by Court *Sua Sponte*, see Courts, 37a.

Invalidity of Judgment as Avoiding Execution, see Execution, 5.

On Judgment on Forged Note without Service of Process, see Judgment, 222.

By Trustee, see Trusts, 121.

41. The fact that a judgment was erroneous and might have been reversed upon a writ of error does not destroy a sale made under the judgment while remaining in full force and unreversed. *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. Rep. 129, 29: 440
Cited in Andrews v. National Foundry & Pipe Works, 36 L.R.A. 154, 23 C. C. A. 456, 46 U. S. App. 619, 77 Fed. 776—*National Nickel Co. v. Nevada Nickel Syndicate*, 106 Fed. 116.

42. No title passes on an execution sale under a judgment against an administrator holding office under a void appointment. *Griffith v. Frazier*, 8 Cranch, 9, 3: 471
Distinguished in Levy v. Riley, 4 Or. 395.

Sale without authority.

Power of Court to Cure Sale by Confirmation, see *infra*, 64, 65.

As to Rights of Bona Fide Purchasers, see *infra*, 95.

43. Although an officer may suppose that the power to sell is given by a decree, yet, if it is not given, and if he does sell, the sale will be void. *Brignardello v. Gray* (*Gray v. Brignardello*) 1 Wall. 627, 17: 692
Cited in Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. (*Milwaukee & M. R. Co. v. Soutter*) 2 Wall. 641, 17 L. ed. 898.

44. A decree made subsequent to a sale cannot bolster up the authority to make it. *Brignardello v. Gray* (*Gray v. Brignardello*) 1 Wall. 627, 17: 692

45. The sheriff's authority to sell is conferred by statute, and he takes no title in the land by the levy, as he does in goods, and can confer none on the purchaser, if power to sell it is wanting. *Gantly v. Ewing*, 3 How. 707, 11: 794

Sale under void process.

46-7. Void process confers no right on an officer to sell property, and all acts done under it are absolute nullities. *Mitchell v. De St. Maxent* (*Mitchell v. St. Maxent*) 4 Wall. 237, 18: 326
Ætna Ins. Co. v. Doe ex dem. Hallock (*Ætna Ins. Co. v. Hallock*) 6 Wall. 556, 18: 948

Cited in Citizens' Bank v. Parker, 192 U. S. 90, 48 L. ed. 358, 24 Sup. Ct. Rep. 181—*Pennsylvania R. Co. v. Allegheny Valley R. Co.* 48 Fed. 142—*Spring Valley Waterworks v. Schottler*, 62 Cal. 110—*Bank of California v. San Francisco*, 142 Cal. 282, 64 L.R.A. 921, 100 Am. St. Rep. 130, 75 Pac. 832—*McKeon v. Wolf*, 77 Ill. App. 334—*Brown v. United States*, Macabon, 230—*Com. v. Delaware, S. & S. R. Co.* 14 Pa. Co. Ct. 445—*Randolph v. Metcalf*, 6 Coldw. 410—*Jackson v. Deslonde*, 1 Posey Unrep. Cas. (Tex.) 685.

48. The sale of property under an invalid

execution confers no title. *Lamaster v. Keeler*, 123 U. S. 376, 8 Sup. Ct. Rep. 197, 31: 238

Sale under alias writ.

49. A sale of land under an alias execution in Alabama, which was duly issued on the return of a prior valid execution, relates back and defeats a conveyance made by the judgment debtor after the original execution was delivered to the officer. *Beebe v. United States*, 161 U. S. 104, 16 Sup. Ct. Rep. 532, 40: 633

50. The fact of the levy of an original execution does not make a sale under an alias execution issued and levied on the same property invalid. *Beebe v. United States*, 161 U. S. 104, 16 Sup. Ct. Rep. 532, 40: 633

Fraudulent sale.

Effect of Confirmation to Conclude Question of Fraud, see *infra*, 69.

Validity of Sale to Bona Fide Purchaser under Decree Voidable for Fraud, see *infra*, 89.

Inadequacy of Price as Ground for Setting Aside, see *infra*, 120-125.

Fraud as Ground to Set Aside, see *infra*, 126, 127.

Will by Personal Representative to Himself or for his Benefit, see *Executors and Administrators*, 72-76.

Property Described as Worthless though of Great Value and Sold for Nominal Price, see *Bankruptcy*, 327.

Sale under Judgment Confessed in Fraud of Creditors, see also *Fraudulent Conveyances*, 134.

51. Where lands of great value belonging to one member of a firm were sold long after its dissolution, upon a judgment for costs in a small sum rendered against the firm in a suit by another member in the name of the firm, of which the owner of the lands had no notice, and the purchaser, who was attorney in the judgment, refused to accept in redemption a sum more than equal to the costs and expenses, the sale was held fraudulent and void. *Byers v. Surget*, 19 How. 303, 15: 670
Cited in Graffam v. Burgess, 117 U. S. 192, 29 L. ed. 843, 6 Sup. Ct. Rep. 686—*Schroeder v. Young*, 161 U. S. 338, 40 L. ed. 724, 16 Sup. Ct. Rep. 512—*Fahrney v. Kelly*, 102 Fed. 411—*Barstow v. Beckett*, 122 Fed. 146—*Fletcher v. McGill*, 110 Ind. 402, 10 N. E. 661—*Grover v. Fox*, 38 Mich. 466—*Adair v. Cummin*, 48 Mich. 382, 12 N. W. 493—*Russell v. Pew*, 12 Mont. 516, 31 Pac. 75—*Michigan v. Phoenix Bank*, 33 N. Y. 25—*Alldrich v. Wilcox*, 10 R. I. 413—*Weeks v. Galveston*, 21 Tex. Civ. App. 108, 51 S. W. 544—*Young v. Schroeder*, 10 Utah, 167, 37 Pac. 252.

Waiver of defects.

52. If the sheriff did not actually seize property sold under execution, the informality was cured by possession for five years. *Pike v. Evans*, 94 U. S. 6, 24: 40

Revival of rights on avoidance of sale.
 Reimbursement of Purchaser on Avoidance of Sale, see *infra*, 72-74.

53. Where real estate held as partnership assets is sold under a decree, and purchased by a firm creditor, who thereupon cancels his indebtedness, and such sale is subsequently held void, its incidents and consequences are also void. *Clay v. Freeman*, 118 U. S. 97, 6 Sup. Ct. Rep. 964, 30: 104

Effect on liens.

Effect on Tax Lien, see *Taxes*, 489.

54. A sale of property by one having only a subsequent lien will not supersede or displace a prior lien held by another; and a sale in equity under a prior lien will not impair any rights which belong to the holder of the subsequent lien, if the latter duly asserts his rights in proper season. *Howard v. Milwaukee & St. P. R. Co.* 101 U. S. 837, 25: 1081

55. Sale of property under execution exhausts the lien of the judgment as to a subsequent mortgage; and redemption by the subsequent lienholder does not restore the lien of the judgment. *Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 267, 7 Sup. Ct. Rep. 1206, 30: 1210
Cited in Hervey v. Krost, 116 Ind. 276, 19 N. E. 125—*Anderson v. Anderson*, 129 Ind. 575, 28 Am. St. Rep. 211, 29 N. E. 35—*Flanders v. Aumack*, 32 Or. 27, 67 Am. St. Rep. 504, 51 Pac. 447.

56. In Louisiana the lien or obligation of the original debt is not extinguished by a sale of the property on twelve months' credit. *Union Bank v. Stafford*, 12 How. 327, 13: 1008

Cited in Evans v. Pike, 118 U. S. 246, 30 L. ed. 236, 6 Sup. Ct. Rep. 1090—*Sparks v. Pico*, McAll. 490, Fed. Cas. No. 13,211—*Criss v. Criss*, 28 W. Va. 398.

57. [The lien of a prior mortgage is not divested by execution and sale upon a judgment. *Febeiger v. Craighead* (Pa. Sup. Ct.) 4 Dall. 151, 1: 778]
Florentine v. Barton, 2 Wall. 210, 17: 783

58. Where certain lands were sold under execution in Louisiana on a credit of twelve months, with bond, and within that time the purchaser made a gratuitous donation of the lands to the plaintiff, without surrendering possession; but, the bond not being paid, the lands were sold under execution issued thereon to one of the sureties,—Held, that the lands remained, after the first sale, subject to the judgment, and liable to an execution either on such judgment or on the bond; that the donee took the property subject to all charges, in the same manner as the donor held it; and that said donee was not entitled to the delay and formalities of the hypothecary action, and is bound by the sale under execution on the bond. It seems that the remedy of the plaintiff, if any, is by a bill to redeem. *Evans v. Pike*, 118 U. S. 241, 6 Sup. Ct. Rep. 1090, 30: 234

On rights and liens not brought under decree.

Rights Concealed at Bankrupt's Sale, see Bankruptcy, 326.

In Bankruptcy Sales, see Bankruptcy, 330-332.

59-60. The interest of mortgagees in property sold under execution is not cut off by such sale when made in a suit to which the trustees of the mortgage were not at the time parties served with process. *Meyer v. Delaware R. Constr. Co. (Removal Cases)* 100 U. S. 457, 25: 593
Cited in Rufe v. Commercial Bank, 40 C. C. A. 29, 99 Fed. 653—*Johnston v. Huff, A. & M. Co.* 66 C. C. A. 536, 138 Fed. 706.

61. A sale of real estate under judicial proceedings does not conclude one who is not a party to those proceedings; and whatever title he had to the property so sold remains unaffected by the sale. *United Lines Teleg. Co. v. Boston Safe Deposit & T. Co.* 147 U. S. 431, 13 Sup. Ct. Rep. 396, 37: 231
Cited in Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 515, 43 L. ed. 535, 19 Sup. Ct. Rep. 238—*James v. Central Trust Co.* 39 C. C. A. 130, 98 Fed. 493.

III. Confirmation and Approval.

Power to Set Aside Sale, see also *supra*, 19, *infra*, 119.
 Procedure for Confirmation, see *supra*, 37.
 Right to Move for Confirmation, see *infra*, 70.
 Necessity of Confirmation to Charge Purchaser on Refusal to Complete his Bid, see *infra*, 132.
 Vacation of Confirmation as Avoiding Deed, see *infra*, 155.
 Reviewability of Decree of, see *Appeal and Error*, 189-191.
 Power of Federal District Court to Confirm Sale, see *Courts*, 872.
 Necessity of Conformity in Federal Court, see *Courts*, 1210, 1212.
 Evidence of Ratification, see *Evidence*, 1800.
 Sale of Decedent's Lands to Pay Debts, see *Executors and Administrators*, 238.
 Conclusiveness of Judgment Confirming Sale, see *Judgment*, 605.
 Confirmation of Foreclosure Sale, see *Mortgage*, VII. g, 5.
 Procedure on Motion to Confirm, see *Motions and Orders*, 2.
 Confirmation of Partition Sale, see *Partition*, 17.
 Effect of Confirmation on Deed Previously Given by Receiver, see *Receivers*, 54.
 Of Sale by Trustee, see *Trusts*, 124.

62. A sale ordered, decreed, or permitted by a chancellor, subject to the approval of a master, requires the master's approval and confirmation by the court before the purchaser can acquire a legal title. *Williamson v. Berry*, 8 How. 495, 12: 1170
Cited in Gager v. Henry, 5 Sawy. 247, Fed. Cas. No. 5,172—*Lathrop v. Nelson*, 4 Dill. 196,

Fed. Cas. No. 8,111—*Blackburn v. Selma, M. & M. R. Co.* 3 Fed. 686—*Deck v. Whitman*, 96 Fed. 880—*Re Shea*, 61 C. C. A. 222, 126 Fed. 156—*Coltrane v. Baltimore Bldg. & L. Asso.* 126 Fed. 840—*Smith v. Wert*, 64 Ala. 39—*Davis v. Ives*, 75 Conn. 615, 54 Atl. 922—*Knox v. Spratt*, 19 Fla. 834—*Brown v. Marzyck*, 19 Fla. 842—*Powers v. Bergen*, 6 N. Y. 368—*Brevoort v. Grace*, 53 N. Y. 252—*Morse v. Morrison*, 114 N. Y. 621, 21 N. E. 416—*Miller v. Feezor*, 82 N. C. 194—*Alexander v. Howe*, 85 Va. 201, 7 S. E. 248.

63. Ratification by the general council of the Choctaw Nation of a sheriff's sale to enforce a forfeiture incurred by a railway company by reason of its erection of buildings outside its right of way through the Indian territory, which sale, because made on credit, was a clear violation of the law under which the sheriff assumed to sell, was not accomplished by subsequent legislation which appropriates money to defend the Nation in all suits "in any manner relative to the full and complete execution of the laws of the Choctaw Nation by the sheriffs of each and every county in the confiscation of the property of noncitizens who are now occupying lands or buildings, or who may hereafter occupy, not in conformity to the laws of the Choctaw Nation." *Walker v. McLoud*, 204 U. S. 302, 27 Sup. Ct. Rep. 293, 51: 495

Defects cured.

Effect of Decree Made after Sale, see *supra*, 44.

64. A sale by a marshal, unauthorized by the decree, is a nullity, and it is doubtful if a court can make it valid by a mere general order of confirmation. *Milwaukee & M. R. Co. v. Soutter (Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.)* 2 Wall. 609, 17: 886

65. Where a marshal's sale included property not covered by the order of the court, and was confirmed by the court without attention being called to that fact, it was held that no title passed by the sale. *Milwaukee & M. R. Co. v. Soutter (Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.)* 2 Wall. 609, 17: 886
Cited in Terbell v. Lee, 40 Fed. 43—*Sayre v. Elyton Land Co.* 73 Ala. 101—*Hershy v. Latham*, 42 Ark. 307—*Moore v. Jeffers*, 53 Iowa, 208, 4 N. W. 1084.

66. A sale of land not prayed for in a petition, though the sale be ratified by the chancellor, is an unauthorized proceeding. *Shriver v. Lynn*, 2 How. 43, 11: 172
Cited in Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. (Milwaukee & M. R. Co. v. Soutter) 2 Wall. 641, 17 L. ed. 898—*Ex parte Bryan*, 2 Hughes, 282, 14 Nat. Bankr. Reg. 81, Fed. Cas. No. 2,061—*Wills v. Chandler*, 1 McCrary, 279, 2 Fed. 275—*Nantabala Marble & Talc Co. v. Thomas*, 45 C. C. A. 341, 106 Fed. 383—*Boykin v. Rain*, 28 Ala. 342, 65 Am. Dec. 349—*Duncanson v. Manson*, 3 App. D. C. 275—*Doe ex dem. Haine v. Smith*, Smith (Ind.) 388—*Bell v. Shaffer*, 154 Ind. 420, 58 N. E. 217—*Reed v. Wright*, 2 G. Greene, 37—*First Nat. Bank v. Hyer*, 46 W. Va. 17, 32 S. E. 1000.

67. A sale which has been made without

a decree or order of the court is a nullity, though the court ratified the sale. *Shriver v. Lynn*, 2 How. 43, 11: 172

68. Confirmation of sale does not cure the invalidity of an execution upon which it was made, growing out of the nullity of the judgment. *Lamaster v. Keeler*, 123 U. S. 376, 8 Sup. Ct. Rep. 197, 31: 238
Cited in *Pullman's Palace Car Co. v. Washburn*, 66 Fed. 794.

69. The proceeding to homologate a sheriff's sale in Louisiana, which cuts off exceptions to informalities, does not conclude the question whether the purchasers have obtained their title by fraud, or whether they are trustees *mala fide* for others. *Jackson v. Ludeling*, 21 Wall. 616, 22: 492
Cited in *Johnson v. Waters*, 111 U. S. 668, 28 L. ed. 557, 4 Sup. Ct. Rep. 619—*Leavenworth County v. Chicago*, R. I. & P. R. Co. 134 U. S. 708, 33 L. ed. 1078, 10 Sup. Ct. Rep. 708.

IV. Rights and Duties of Purchaser.

a. In General.

Necessity that Irregularities be Injurious to Plaintiff in Order to Justify Setting Aside Sale, see *infra*, 115, 116.

Right of Purchaser to Notice of Proceedings to Cancel Sale, see *infra*, 130.

Resale on Refusal to Complete Purchase, see *infra*, 131-134.

Application of Proceeds, see *infra*, 144.

Right to Deed, see *infra*, 149.

Rights of One Purchasing under Judgment Which is Subsequently Reversed, see Appeal and Error, 5607-5610.

Right to Writ of Assistance, see Assistance, 3.

Prerequisites to Liability to Suit of Purchaser Failing to Comply, see Auction, 7.

Rights of Purchaser of Copper Plate from Which Copyrighted Maps are Printed, see Copyright, 47.

Ancillary Jurisdiction of Federal Courts to Enforce Rights Growing out of Sale, see Courts, 1053.

Rights on Covenant of Warranty, see Covenant, 35.

Right to Maintain Ejectment, see Ejectment, 48.

Right to Acquire Possession from Lessee, see Estoppel, 53.

Estoppel of Purchaser, see Estoppel, 118, 119.

Right to Assail Previous Deed by Debtor as Fraudulent, see Fraudulent Conveyances, 148.

Laches as Bar to Assertion of Claim, see Limitation of Actions, 176.

Right to Set up Statute of Limitations, see Limitation of Actions, 501.

On Foreclosure Sale, see Mortgage, VII. g. 4.

Right to Redeem from Foreclosure Sale, see Mortgage, 526.

Duty of Purchaser from Receiver, see Receivers, 51.

Right to Continuation of Exemption from Taxation, see Taxes, 443-449.

Attorney's Right to Purchase at Sale, see Attorneys, II. d.

Auctioneer's Right to Purchase at Sale, see Auction, 6.

See also Pleading, 868.

70. A purchaser on execution sale can move for confirmation or to set the sale aside, and can appeal from the order thereon, and may be compelled to perform his bid, and is concluded by the result of proceedings to confirm or annul the same. *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. Rep. 539, 33: 923

71. Where a purchaser refuses, without cause, to make his bid good, he may be compelled to do so by rule or attachment issuing out of the court under whose decree the sale is had. It is not necessary that his liability for a deficiency on a resale should be ascertained and enforced by an independent suit. *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. Rep. 246, 32: 608

Editorial note.

Protection of purchaser against irregularities in proceedings. 21: 465

Reimbursement of purchaser on avoidance of sale.

Revival of Debt on Avoidance of Sale, see *supra*, 53.

Right of Defaulting Purchaser to be Allowed for Payments Made, see *infra*, 133, 134.

72. In an action to enforce a deed of trust of land and to sell the land, defendants in possession, who claim to own the land under a title founded on a sale made under a judgment held by this court to be void as against the plaintiff, may, on being deprived of possession, be allowed for the amount they had paid in discharge of a lien or charge on the land. *Canal Bank v. Hudson*, 111 U. S. 66, 4 Sup. Ct. Rep. 303, 28: 354

Cited in *Lawrence v. United States*, 71 Fed. 232—*McIntire v. Pryor*, 10 App. D. C. 440—*Anderson v. Reid*, 14 App. D. C. 73—*Pettit v. Flint & P. M. R. Co.* 110 Mich. 494, 52 Am. St. Rep. 417, 78 N. W. 554—*Cleland v. Clark*, 123 Mich. 184, 81 Am. St. Rep. 161, 81 N. W. 1086.

73. A fraudulent purchaser of property at a judicial sale when deprived of its possession, cannot recover for his repairs or improvements, or for encumbrances paid by him while in possession. *Milwaukee & M. R. Co. v. Soutter*, 13 Wall. 517, 20: 543
Cited in *Jackson v. Ludeling* (*Jackson v. Vicksburg, S. & T. B. Co.*) 99 U. S. 537, 25 L. ed. 469—*German Bank v. United States*, 148 U. S. 581, 37 L. ed. 569, 13 Sup. Ct. Rep. 702—*Barnes v. Chicago, M. & St. P. R. Co.* 8 Bliss. 518, Fed. Cas. No. 1,016—*Re Mead*, Fed. Cas. No. 9,365—*Pulliam v. Pulliam*, 10 Fed. 73—*Allen v. Galloway*, 30 Fed. 467—*Burt v. C. Gotzian & Co.* 43 C. C. A. 69, 102 Fed. 947—*The Livingstone*, 104 Fed. 925—*Millington v. Hill*, 47 Ark. 311, 1 S. W. 547—*Daisy Roller Mills v. Ward*, 6 N. D. 327, 70 N. W. 271—*Johnson v. Moore*, 33 Kan. 99,

5 Pac. 406—*Funkhouser v. Lay*, 78 Mo. 464—*Johnson v. Goldsby*, 32 Mo. App. 565—*Lampkin v. People's Nat. Bank*, 98 Mo. App. 244, 71 S. W. 715—*Goble v. O'Connor*, 43 Neb. 60, 61 N. W. 131—*Heintze v. Bentley*, 34 N. J. Eq. 566—*Weiser v. Kling*, 38 App. Div. 271, 57 N. Y. Supp. 48—*Loos v. Wilkinson*, 51 Hun, 80, 5 N. Y. Supp. 410—*Hamilton Nat. Bank v. Halsted*, 56 Hun, 533, 9 N. Y. Supp. 852—*Carpentier v. Min-turn*, 65 Barb. 296—*Loos v. Wilkinson*, 113 N. Y. 491, 4 L.R.A. 356, 10 Am. St. Rep. 495, 21 N. E. 392—*Cunningham v. Campbell*, 3 Tenn. Ch. 710—*Almond v. Wilson*, 75 Va. 627—*Bates v. Swiger*, 40 W. Va. 430, 21 S. E. 874—*Hoffman v. Fleming*, 43 W. Va. 764, 28 S. E. 790—*Powers-Taylor Drug Co. v. Faulconer*, 52 W. Va. 607, 44 S. E. 204—*Hawley v. Tesch*, 88 Wis. 241, 59 N. W. 670—*Larson v. Olsefos*, 118 Wis. 372, 95 N. W. 399.

74. Property was sold to H by order of a court of bankruptcy. He not paying for it, the court, without notice to him, vacated the order of sale, and made an order selling it to C, who paid for it and went into possession. On review, the sale to C was set aside, and the sale to H reinstated. H, having paid for the property, received possession of it, and the money paid by C was repaid to him. *Held*, that C was not liable to pay H the profits derived by him from the use of the property while he had it. *Conro v. Crane*, 110 U. S. 403, 4 Sup. Ct. Rep. 102, 28: 191

b. Title Acquired.

Necessity of Deed, see *infra*, 147-149.
What Law Governs as to Title Acquired, see *Conflict of Laws*, 170, 171.
Purchaser of Choses in Action as Assignee Disabled to Sue in Federal Court by Reason of Citizenship, see *Courts*, 787.
State Decision as to Title of Purchaser under Federal Decree as Precedent in Federal Court, see *Courts*, 1956.
Sufficiency of Title to Enable Purchaser to Bring Action to Quiet Title, see *Cloud on Title*, 28.
Priority as between Purchase under State Levy and Federal Levy, not made until after Sale, see *Execution*, 84.
Form of Injunction against Levy upon Property as that of Debtor, see *Injunction*, 229.
Mode of Assailing Title, see *Pleading*, 828.
Judicial Sale under Former Government as Creating Perfect Title Not Subject to Judicial Confirmation, see *Private Land Claims*, 417.
Right of Purchaser as "Assign" of Debtor Entitling Purchaser to Reimbursement on Cancellation of Right in Public Lands, see *Public Lands*, 1125.
Rights as Against Unrecorded Deed, see *Real Property*, 94, 97-99.
Sales in Bankruptcy, see *Bankruptcy*, 320-323.
In Confiscation Proceedings, see *Confiscation and Sequestration*, 80, 85-89.
Of Decedent's Lands to Pay Debts, see *Executors and Administrators*, IX. d.

On Foreclosure Sale, see *Mortgage*, VII. g. 4.

On Sale of Railroad Right of Way, see *Railroads*, 100.

On Sale by Receiver, see *Receivers*, 52, 53.
At Tax Sale, see *Taxes*, III. i. 4.

75. A purchaser at a sheriff's sale buys precisely the interest which the debtor has, and takes subject to all outstanding equities. *Osterman v. Baldwin*, 6 Wall. 116, 18: 730
Cited in The Vigilancia, 19 C. C. A. 530, 38 U. S. App. 563, 73 Fed. 455—*Polhemus v. Empson*, 27 N. J. Eq. 194—*Murch v. J. O. Smith Mfg. Co.* 47 N. J. Eq. 196, 20 Atl. 213—*Rodgers v. Burchard*, 34 Tex. 453, 7 Am. Rep. 283—*McNeeley v. South Penn Oil Co.* 52 W. Va. 632, 62 L.R.A. 571, 44 S. E. 508.

76. A judicial sale operates as a transfer of an existing title, and not as an original grant. *Strother v. Lucas*, 12 Pet. 410, 9: 1137

77. A purchaser, although for a valuable consideration, can acquire a valid title only from one who has a valid title. *Williamson v. Irish Presby. Congregation*, 8 How. 565, 12: 1200

78. The purchase by a director at sheriff's sale, of bonds delivered by him to the sheriff as the property of the company, although they had in fact never been delivered by the company so as to take effect, vests in him no title. *Washburn v. Green (Richardson v. Green)* 133 U. S. 30, 10 Sup. Ct. Rep. 280, 33: 516

Editorial note.

[Nature of title or estate of holder of sheriff's certificate before obtaining deed. 15 L.R.A. 68.]

Procedure requisite to title.

See also *supra*, 18.

79. A purchaser at a judicial sale does not acquire a good title unless the formalities prescribed by law for the alienation of property were observed. *Gaines v. De la Croix*, 6 Wall. 719, 18: 965
Erwin v. Lowry, 7 How. 172, 12: 655
Cited in Davis v. Gaines, 104 U. S. 393, 26 L. ed. 760—*Steele v. Renn*, 50 Tex. 481, 32 Am. Rep. 605.

Caveat emptor; warranties.

Effect of Sale in Good Faith under Decree not Actually Giving Power to Make it, see *supra*, 43.

State Decisions, Whether Rules of Decisions in Federal Court, see *Courts*, 2139.

Personal Liability of Marshal, see *Marshal*, 37.

80. The rule of *caveat emptor* applies to purchasers at judicial sales. *Osterberg v. Union Trust Co.* 93 U. S. 424, 23: 964
Cited in Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 84 Fed. 746—*Terre Haute & L. R. Co. v. Harrison*, 37 C. C. A. 619, 96 Fed. 916—*First Nat. Bank v. Ewing*, 43 C. C. A. 171, 103 Fed. 189—*Watson v. Jones*, 41 Fla. 261, 25 So. 678.

81. The rule of *caveat emptor* applies up-

on a judicial sale of the cargo of a captured vessel. The Monte Allegre, 9 Wheat. 616, 6: 174

82. Upon an admiralty proceeding *in rem*, where the proceeds of the sale are brought into court, they are not liable to make good a loss sustained by the purchaser in consequence of a defect discovered in the article sold, where, but for his own negligence, the purchaser might have discovered the condition of the article before buying it. The Monte Allegre, 9 Wheat. 616, 6: 174

83. In judicial sales there is no warranty, express or implied, by either the officer or the auctioneer conducting them, while acting within the scope of their authority. The Monte Allegre, 9 Wheat. 616, 6: 174
Cited in Rockwell v. Allen, 3 McLean, 357, Fed. Cas. No. 11,983—Searcy v. McChord, 1 Fed. 262—Fidelity Ins. T. & S. D. Co. v. Roanoke Iron Co. 84 Fed. 746—Terre Haute & L. R. Co. v. Harrison, 37 C. C. A. 619, 96 Fed. 910—Boykin v. Cook, 61 Ala. 478—Branham v. San Jose, 24 Cal. 607—Worthy v. Johnson, 8 Ga. 240, 52 Am. Dec. 399—McWhorter v. Beavers, 8 Ga. 302—England v. Clark, 5 Ill. 490—Helms v. Franciscus, 2 Bland, Ch. 569, 20 Am. Dec. 402—Brown v. Wallace, 4 Gill & J. 492—Johnson v. Laybourn, 56 Minn. 333, 57 N. W. 933—Stephens v. Ellis, 65 Mo. 460—Phillips v. Hudson, 31 N. J. L. 152—Ellis v. Adderton, 88 N. C. 477—Westfall v. Dungan, 14 Ohio St. 281—Freeman v. Caldwell, 10 Watts, 10—Lynch v. Baxter, 4 Tex. 437, 51 Am. Dec. 785—Stearns v. Edson, 63 Vt. 263, 25 Am. St. Rep. 758, 22 Atl. 420—Bowyer v. Hughart, 9 Gratt. 859—Petersmans v. Laws, 6 Leigh, 529—Saunders v. Pate, 4 Rand. (Va.) 13.

84. In judicial sales under Federal decrees there is no warranty expressed or implied. Waples v. United States, 110 U. S. 630, 4 Sup. Ct. Rep. 225, 28: 272

Cited in Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 84 Fed. 746—First Nat. Bank v. Ewing, 43 C. C. A. 173, 103 Fed. 191.

—Editorial note.

[Effect of misrepresentation to purchasers by sheriff. 18 L.R.A. 88.]

Bona fides and notice generally.

Knowledge of Insolvency of Debtor Subsequently Declared a Bankrupt, see Bankruptcy, 142.

Title of Purchaser from Executor with Knowledge of Existence of Later Will, see Executors and Administrators, 250a.

Effect of Reconveyance to Grantor Under Decree Annuling Conveyance for Fraud, see Vendor and Purchaser, 140.

85. Where there has been a fair sale, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. Thompson v. Tolmie, 2 Pet. 157, 7: 381

Cited in Williamson v. Berry, 8 How. 554, 12 L. ed. 1195—Davis v. Gaines, 104 U. S. 391, 26 L. ed. 759—Thaw v. Ritchie (Thaw v. Falls) 136 U. S. 648, 34 L. ed. 538, 10 Sup.

Ct. Rep. 1037—Simmons v. Saul, 138 U. S. 455, 34 L. ed. 1061, 11 Sup. Ct. Rep. 369—Lincoln v. Tower, 2 McLean, 485, Fed. Cas. No. 8,355—Cole v. Conolly, 16 Ala. 281—Thaw v. Ritchie, 5 Mackey, 224—Duncanson v. Manson, 3 App. D. C. 274—Price v. Winter, 15 Fla. 106—Cavender v. Smith, 1 Iowa, 348—Mills v. Ralston, 10 Kan. 212—McCullough v. Minor, 3 La. Ann. 468—Jeanne v. Ricker, 10 La. Ann. 67—Long v. Long, 62 Md. 63—Howard v. Moore, 2 Mich. 232—Trumble v. Williams, 18 Neb. 154, 24 N. W. 716—Gordon v. Gordon, 55 N. H. 405—Hents v. Ward, 1 Cin. Sup. Ct. Rep. 392—Lynch v. Baxter, 4 Tex. 446, 51 Am. Dec. 785—Sydnor v. Roberts, 13 Tex. 620, 65 Am. Dec. 84—Burdett v. Silsbee, 15 Tex. 618—George v. Watson, 19 Tex. 370—Hawley v. Bullock, 29 Tex. 224—Hudson v. Jurnigan, 39 Tex. 588—Zirkle v. McCue, 26 Gratt. 528—Allan v. Hoffman, 83 Va. 137, 2 S. E. 602—Ryan v. Ferguson, 3 Wash. 368, 28 Pac. 910—Hull v. Hull, 26 W. Va. 30—Dunfee v. Childs, 45 W. Va. 165, 30 S. E. 102.

86. An innocent purchaser of realty, purchasing upon faith of a decree where the court had jurisdiction of all the parties and subject-matter, cannot be disturbed in his title by mere errors and irregularities in the proceedings. Voorhees v. Jackson ex dem. Bank of United States, 10 Pet. 449, 9: 490

Distinguished in Murphy v. Montandon, 3 Idaho, 331, 35 Am. St. Rep. 279, 29 Pac. 851.

Cited in May v. Logan County, 30 Fed. 255—Phelps v. Elliott, 35 Fed. 460—Gest v. Packwood, 39 Fed. 532—The Elxena, 53 Fed. 366—Seelye v. Smith, 85 Ala. 30, 4 So. 664—Horner v. Hanks, 22 Ark. 587—Stansbury v. Inglehart, 9 Mackey, 160—Duncanson v. Manson, 3 App. D. C. 275—Price v. Winter, 15 Fla. 106—Tucker v. Harris, 18 Ga. 10, 58 Am. Dec. 488—Howard v. Jones, Ga. Dec. pt. 2, p. 196—Bybee v. Ashby, 7 Ill. 164, 43 Am. Dec. 47—Gilman v. Hamilton, 16 Ill. 232—Thorn v. West Chicago Park, 130 Ill. 603, 22 N. E. 520—Stults v. Brown, 112 Ind. 372, 2 Am. St. Rep. 190, 14 N. E. 230—Shaffer v. Bolander, 4 G. Greene, 203—Cavender v. Smith, 1 Iowa, 348—Cooper v. Sunderland, 8 Iowa, 184, 66 Am. Dec. 52—Denegre v. Haun, 14 Iowa, 248, 81 Am. Dec. 480—Good v. Norley, 28 Iowa, 209—Hill v. Baker, 32 Iowa, 307, 7 Am. Rep. 193—Mills v. Ralston, 10 Kan. 212—Head v. Daniels, 38 Kan. 13, 15 Pac. 911—Hebard's Succession, 18 La. Ann. 494—Wisdom v. Parker, 31 La. Ann. 59—Greenvault v. Farmers' & M. Bank, 2 Doug. (Mich.) 511—Hiller v. Lamkin, 54 Miss. 22—McNair v. Biddle, 8 Mo. 264—Jones v. Talbot, 9 Mo. 123—Gott v. Powell, 41 Mo. 420—Parker v. Courtney, 28 Neb. 609, 26 Am. St. Rep. 360, 44 N. W. 863—Sutton v. Schonwald, 86 N. C. 203, 41 Am. Rep. 455—Eason v. Witcofskey, 29 S. C. 244, 7 S. E. 291—Buchanan v. Ruff, 47 S. C. 553, 53 Am. St. Rep. 907, 25 S. E. 65—McGavock v. Bell, 3 Coldw. 519—Dancy v. Strickling, 15 Tex. 560, 65 Am. Dec. 179—Dodd v. Templeman, 76 Tex. 62, 13 S. W. 187—Zirkle v. McCue, 26 Gratt. 528—Parker v. Dacres, 1 Wash. 194, 24 Pac. 192—Hull v. Hull, 26 W. Va. 30—Turk v. Skiles, 38 W. Va. 408, 18 S. E. 561.

87. A purchaser at a judicial sale held under the decree of a court is not bound to look beyond the decree; if there is error in it of the most palpable kind,—if the court which rendered it has, in the exercise of

jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave it the power to hear and determine the case before it,—the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error. *Grignon v. Astor*, 2 How. 319, 11: 283

Distinguished in Phelps v. Elliott, 35 Fed. 460. *Cited in Berrian v. Rogers*, 43 Fed. 469—*Godchaux v. Morris*, 57 C. C. A. 437, 121 Fed. 485—*Cole v. Conolly*, 16 Ala. 281—*Apel v. Kelsey*, 47 Ark. 419, 2 S. W. 102—*Thaw v. Ritchie*, 5 Mackey, 224—*Goudy v. Hall*, 36 Ill. 320, 87 Am. Dec. 217—*Grevemberg v. Bradford*, 44 La. Ann. 420, 10 So. 786—*Howard v. Moore*, 2 Mich. 231—*Overton v. Johnson*, 17 Mo. 450—*Valle v. Fleming*, 19 Mo. 480, 61 Am. Dec. 566—*Monroe v. Douglas*, 4 Sandf. Ch. 205—*Schneider v. McFarland*, 2 N. Y. 461—*Roderigas v. East River Sav. Inst.* 63 N. Y. 464, 20 Am. Rep. 535—*Eason v. Witcofskey*, 29 S. C. 244, 7 S. E. 291—*Mason v. Tinsley*, 1 Tenn. Ch. 155—*Dancy v. Stricklinge*, 15 Tex. 560, 65 Am. Dec. 179—*Hudson v. Jurnigan*, 39 Tex. 588—*Wilcher v. Robertson*, 78 Va. 616—*Turnbull v. Mann*, 99 Va. 46, 37 S. E. 288—*Sitzman v. Pacquette*, 13 Wis. 314—*Blodgett v. Hitt*, 29 Wis. 179.

88. A purchaser at a judicial sale may rely upon the judgment, levy, and execution for the validity of his title. *Wheaton v. Sexton*, 4 Wheat. 503, 4: 626

Cited in Voorhees v. Jackson, 10 Pet. 477, 9 L. ed. 501—*McNitt v. Turner*, 16 Wall. 365, 21 L. ed. 347—*Bank of United States v. Voorhees*, 1 McLean, 224, Fed. Cas. No. 939—*Sumner v. Moore*, 2 McLean, 66, Fed. Cas. No. 13,610—*Thompson v. Phillips*, Baldw. 272, Fed. Cas. No. 13,974—*Barclay v. Plant*, 50 Ala. 518—*Byers v. Fowler*, 12 Ark. 273, 54 Am. Dec. 271—*Newton v. State Bank*, 22 Ark. 28—*Swiggart v. Harber*, 5 Ill. 374, 39 Am. Dec. 418—*Seely v. Reid*, 3 G. Greene, 379—*Shaffer v. Bolander*, 4 G. Greene, 203—*Hill v. Baker*, 32 Iowa, 307, 7 Am. Rep. 193—*Mills v. Ralston*, 10 Kan. 212—*Tillman v. Jackson*, 1 Minn. 188, Gil. 157—*Thompson v. Lelnard*, *Wright (Ohio)* 459—*Ewing v. Higby*, 7 Ohio, pt. 1, p. 203, 28 Am. Dec. 633—*Stall v. Macalester*, 9 Ohio, 24—*Adams v. Jeffries*, 12 Ohio, 265, 40 Am. Dec. 477—*McRae v. Daviner*, 8 Or. 65—*Wilcox v. Emerson*, 10 R. I. 274, 14 Am. Rep. 683—*Leland v. Wilson*, 34 Tex. 91.

89. A bona fide purchaser on execution sale under a judgment voidable for fraud cannot be compelled to relinquish the property. *Simms v. Slacum*, 3 Cranch, 300, 2: 446

Cited in Ex parte Freedley, *Crabbe*, 550, Fed. Cas. No. 5,079—*Gilman v. Hamilton*, 16 Ill. 232—*Wadhams v. Gay*, 73 Ill. 422.

90. A purchaser at a sheriff's sale cannot protect himself against a prior claim of which he had no notice, or be held a bona fide purchaser, unless he has paid the money. *Swayze v. Burke*, 12 Pet. 11, 9: 980 *Cited in Lytle v. Lansing*, 147 U. S. 70, 37 L. ed. 84, 13 Sup. Ct. Rep. 254—*Doe v. Latimer*, 2 Fla. 33—*Merritt v. Northern R. Co.* 12 Barb. 610.

91. The protection which the law gives to a purchaser at a judicial sale is not extended to the attorney of the party causing

it to be sold; he is presumed to be cognizant of all the proceedings. *Galpin v. Page*, 18 Wall. 350, 21: 959

Cited in Marks v. Cowles, 61 Ala. 308—*McDonald v. Mobile L. Ins. Co.* 65 Ala. 362—*Johnson v. Dooly*, 72 Ga. 300—*Powell v. Rogers*, 11 Ill. App. 103—*Ritchie v. Carter*, 89 Mo. App. 293—*Mullin v. Atherton*, 61 N. H. 22—*Von Wallhoffen v. Newcombe*, 10 Hun, 241—*Winterson v. Hitchings*, 9 Misc. 324, 80 N. Y. Supp. 260—*Winterson v. Hitchings*, 10 Misc. 398, 31 N. Y. Supp. 127—*Singly v. Warren*, 18 Wash. 441, 63 Am. St. Rep. 896, 51 Pac. 1066—*Ammons v. Ammons*, 50 W. Va. 401, 40 S. E. 490—*Childers v. Loudin*, 51 W. Va. 568, 42 S. E. 637—*Stewart v. Tennant*, 52 W. Va. 574, 44 S. E. 223.

92. Purchasers at a judicial sale must allege that their want of notice continued up to the time of making actual payment; a want of notice extending merely to the time of making the purchase is not enough. *Fowler v. Merrill*, 11 How. 375, 13: 736

93. In Texas the purchaser at a judicial sale on execution acquires a title superior to that of a prior mortgagee, where, at the time of the levy of the execution, the plaintiff in the execution had no notice of the prior mortgage, which was then unrecorded. The purchaser, even with notice, succeeds to the rights of the creditor who had no notice. *Stevenson v. Texas & P. R. Co.* 105 U. S. 703, 26: 1215

— Editorial note.

[Protection of bona fide purchaser. 21 L. R. A. 33.]

What facts imputed to knowledge.

94. A purchaser of real estate at a sale under execution is charged with notice of the failure of the sheriff to offer first for sale the rents and profits, which is made by a state statute a condition precedent to a sale of the fee simple. *Gantly v. Ewing*, 3 How. 707, 11: 794 *Cited in Cuyler v. Ferrill*, 1 Abb. (U. S.) 176, Fed. Cas. No. 3,523—*Scott v. Babcock*, 3 G. Greene, 140—*Laraby v. Reid*, 3 G. Greene, 421—*Cavender v. Smith*, 1 Iowa, 351.

95. A bona fide purchaser of land under a sale made without authority is not protected. *Williamson v. Ball*, 8 How. 566, 12: 1200 *Gaines v. New Orleans*, 6 Wall. 642, 18: 950 *Gantly v. Ewing*, 3 How. 707, 11: 794 *Cited in Hughes v. Burriss*, 85 Mo. 667—*Steele v. Renn*, 50 Tex. 481, 32 Am. Rep. 605.

96. A purchaser at a judicial sale is not bound to see to the application of the purchase money; and his title is not affected, however unwise or illegal the disposition of the money. *Long v. O'Fallon*, 19 How. 116, 15: 550

Knotts v. Stearns, 91 U. S. 638, 23: 252

97. In any sale under a decree or order in chancery, the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order. If

he takes under an imperfect sale, he must abide the consequences. *Williamson v. Berry*, 8 How. 495, 12: 1170

98. The purchaser at a judicial sale is not protected when the sale was made under an interlocutory decree requiring a report as to rights of parties interested, without waiting for confirmation of the report, especially where an infant was an interested party. *Brignardello v. Gray* (*Gray v. Brignardello*) 1 Wall. 627, 17: 692
Owed in Blackburn v. Selma, M. & M. R. Co. 3 Fed. 699.

99. The rule has never been questioned that where a defendant was in custody under a ca. sa., and a fi. fa. was afterwards taken out on the same judgment and real estate taken and sold, the purchaser, as he was a stranger, should hold it; as the fi. fa., though irregular and erroneous, was not void. *Taylor v. Thomson*, 5 Pet. 358, 8: 154

Cited in Voorhees v. Bank of United States, 10 Pet. 478, 9 L. ed. 502—*Bank of United States v. Voorhees*, 1 McLean, 225, Fed. Cas. No. 939—*Thompson v. Phillips, Baldw.* 272, Fed. Cas. No. 13,974—*Borden v. State*, 11 Ark. 565, 54 Am. Dec. 217—*Cavender v. Smith*, 1 Iowa, 347—*Kennedy v. Dunklee*, 1 Gray, 71—*Jackson ex dem. Grignon v. Astor*, 1 Pinney (Wis.) 161, 39 Am. Dec. 281.

Outstanding equities.

Rights not Brought under Decree, see *supra*, 59-61.

In Bankruptcy Sales, see *Bankruptcy*, 330-332.

Bringing in Parties to Judicial Sale in Order to Sell Clear Title, see *Equity*, 29.

Curative Order in Case of Void Administrator's Sale, see *Executors and Administrators*, 256.

See also *supra*, 75; *Bankruptcy*, 328-332.

100. Where the judgments are not liens on the premises, by reason of the debtor having deeded the premises to another (by a deed fraudulent as to creditors), a purchaser under a decree in a creditors' suit on a junior judgment will have a good title as against a subsequent purchaser under a decree in a similar suit upon a prior judgment, of which the former purchaser has no notice. *Miller v. Sherry*, 2 Wall. 237, 17: 827

Freedman's Sav. & T. Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. Rep. 226, 28: 301
Cited in Swift's Iron & Steel Works v. Johnson, 26 Fed. 830—*Southern Loan & T. Co. v. Benbow*, 96 Fed. 521—*Lyon v. Robbins*, 46 Ill. 279—*Hallom v. Trum*, 125 Ill. 252, 17 N. E. 823—*Young v. Clapp*, 40 Ill. App. 319—*Taylor v. Taylor*, 59 N. J. Eq. 89, 45 Atl. 440—*Kinmouth v. White*, 61 N. J. Eq. 362, 48 Atl. 952.

101. A sale on execution against a judgment creditor, of a judgment which had been recorded, passes no title, where, previous to the rendering of the judgment under which the execution issued, the judgment sold has been assigned bona fide as security to a creditor of the judgment creditor, and

notice of such assignment filed. *Stockton v. Ford*, 11 How. 232, 13: 676

Fixtures.

102. In Wisconsin the rolling-stock of a railroad company is made a fixture by statute, and a purchaser, upon a sale of the road under a decree ordering sale, to satisfy a judgment, takes the whole interest of the debtor company existing at the rendition of the judgment. *Milwaukee & M. R. Co. v. James*, 6 Wall. 750, 18: 854

Cited in Howard v. Milwaukee & St. P. R. Co. 101 U. S. 845, 25 L. ed. 1083—*Barnes v. Chicago, M. & St. P. R. Co.* 122 U. S. 17, 30 L. ed. 1133, 7 Sup. Ct. Rep. 1043—*Howard v. Milwaukee & St. P. R. Co.* 7 Biss. 84, Fed. Cas. No. 6,761—*National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 58—*Louisville, N. A. & C. R. Co. v. Boney*, 117 Ind. 511, 3 L.R.A. 440, 20 N. E. 432—*People v. O'Brien*, 45 Hun, 532.

Rents.

103. Where premises leased are sold at sheriff's sale on a judgment against the owner, the sheriff's deed conveys the reversion, and the rent follows it as an incident. *Butt v. Ellett*, 19 Wall. 544, 22: 183
Cited in Chandler v. Pittsburgh Plate Glass Co. 20 Ind. App. 166, 50 N. E. 400—*Orr v. Broad*, 52 Neb. 498, 72 N. W. 850.

Copyrights.

104. The right to print and publish a map which has been copyrighted does not pass to the purchaser on execution sale of the plate on which the map is printed. *Stevens v. Gladding*, 17 How. 447, 15: 155

Cited in Patterson v. Kentucky, 97 U. S. 506, 24 L. ed. 1117—*Keene v. Wheatley*, 5 Clark (Pa.) 532, Fed. Cas. No. 7,644—*Parton v. Prang*, 3 Cliff. 551, Fed. Cas. No. 10,784—*Non-Magnetic Watch Co. v. Association Horlogere Suisse*, 44 Fed. 7—*Morrison v. Pettibone*, 87 Fed. 331—*Re McDonnell*, 101 Fed. 239—*Murray v. Ager*, 1 Mackey, 89—*Hankey v. Downey*, 116 Ind. 119, 1 L.R.A. 448, 18 N. E. 271—*Chisholm Bros. v. Forny*, 65 Iowa, 335, 21 N. W. 664—*Leon Loan & Abstract Co. v. Board of Equalization*, 86 Iowa, 135, 17 L.R.A. 201, 41 Am. St. Rep. 486, 53 N. W. 94—*Chadwick v. Covell*, 151 Mass. 193, 6 L.R.A. 841, 21 Am. St. Rep. 442, 23 N. E. 1068—*Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 151 Mass. 520, 8 L.R.A. 310, 24 N. E. 784—*People ex rel. Edison Electric Light Co. v. Wemple*, 63 Hun. 450, 18 N. Y. Supp. 511—*Bryan v. University Pub. Co.* 112 N. Y. 386, 2 L.R.A. 639, 19 N. E. 825.

Partnership property.

105. The remedy of the purchaser upon execution sale of a partner's interest in partnership property is to go into equity and call for an account, and thus entitle himself to the interest, if any, of the judgment debtor, after the settlement of the partnership liabilities. *Claggett v. Kilbourne*, 1 Black, 346, 17: 213

Cited in McNichol v. Phelps, 16 Fed. 10—*Butterfield v. Beardsley*, 28 Mich. 421—*Weld v. Johnson Mfg. Co.* 86 Wis. 560, 57 N. W. 374.

106. The purchaser of partnership property on sale under execution against one partner takes the same interest in the prop-

erty which the judgment debtor would have upon a final adjustment of all the accounts of the partnership. It is not only an undivided, but an unascertained, interest. The purchaser is substituted to the rights and interests of the judgment debtor in the property sold. *Claggett v. Kilbourne*, 1 Black, 346, 17: 213
Cited in New York Commercial Co. v. Francis, 41 C. C. A. 169, 101 Fed. 18—*Daniel v. Owens*, 70 Ala. 301.

107. The sale of partnership property under execution against one partner does not transfer any part of the joint property to the purchaser, so as to entitle him to take it from the other partners. *Claggett v. Kilbourne*, 1 Black, 346, 17: 213

108. The real property of a partnership sold under execution against one partner is treated in equity as partnership assets; the legal title is in the trustees; the equity of the judgment creditor is an interest in the land after a sufficient portion of it has been disposed of to pay the debts of the partnership. A purchaser can obtain no title, legal or equitable, to particular lots, by such sale on execution. *Claggett v. Kilbourne*, 1 Black 346, 17: 213

109. The fact that the property of a partnership sold under execution against one partner consists of real estate does not change the law governing the rights and interests concerned. *Claggett v. Kilbourne*, 1 Black, 346, 17: 213

— Editorial note.

[Purchase by partner at. 28 L.R.A. 104.]

Grantees of purchaser.

110. A new company formed by the purchasers of the property of a railroad corporation at an illegal and void judicial sale has no other or better title than that of the purchasers. *Jackson v. Ludeling*, 21 Wall. 616, 22: 492

When title passes.

Relation of Title to Time of Levy, see Executions, 73.

111. By the laws of Colorado, title to land sold under execution remains in the judgment debtor until the deed is executed. *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. Rep. 192, 37: 1189

Rights under defective or void sale.

Right to Levy on Land as Property of Judgment Defendant; Necessity of First Setting Aside Sale, see Execution, 16.

112. If a judicial sale be void, the court having confirmed it upon terms not authorized by law, the purchaser is without title upon which to base an action of ejectment. *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. Rep. 129, 29: 440
Cited in Davis v. Gaines, 104 U. S. 406, 26 L. ed. 764—*Meher v. Cole*, 50 Ark. 365, 7 Am. St. Rep. 101, 7 S. W. 451—*Venner v. Denver Union Water Co.* 15 Colo. App. 508, 63 Pac. 1061—*Beyer v. Le Fevre*, 17 App. D. C. 249—*Jordan v. Sayre*, 29 Fla. 115,

10 So. 823—*Dutcher v. Hobby*, 86 Ga. 201, 10 L.R.A. 473, 22 Am. St. Rep. 444, 12 S. E. 356—*Bruschke v. Wright*, 166 Ill. 195, 57 Am. St. Rep. 125, 46 N. E. 813—*Muir v. Berkshire*, 52 Ind. 152—*Ray v. Detchon*, 79 Ind. 60—*Curtis v. Gooding*, 99 Ind. 51—*Equitable Mortg. Co. v. Gray*, 68 Kan. 102, 74 Pac. 614—*Morrell v. Miller*, 28 Or. 370, 45 Pac. 246—*Brewer v. Nash*, 16 R. I. 462, 27 Am. St. Rep. 749, 17 Atl. 857—*Jennings v. Farr*, 51 S. C. 212, 28 S. E. 82—*Jackson ex dem. Grignon v. Astor*, 1 Pinney (Wis.) 161, 39 Am. Dec. 281.

113. An irregular or a void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee has, even though the equity of redemption be not foreclosed. *Doe ex dem. Brobst v. Roe (Brobst v. Brock)* 10 Wall. 519, 19: 1002

V. Setting Aside and Resale.

Effect of Avoidance to Revive Indebtedness Canceled by Sale, see *supra*, 53.

Grounds for Collateral Attack, see *infra*, VI. Vacation of Confirmation as Avoiding Deed, see *infra*, 155.

Reviewability of Order Setting Aside, see Appeal and Error, 192, 193.

For By-bidding at Auction, see Auction, 2-4.

Notice of Want of Jurisdiction by Court *Sua Sponte*, see Courts, 37a.

Jurisdiction of Federal Courts to Relief against Void Sale under State Order, see Courts, 1526, 1529.

Remedy to Set Aside Sale in Favor of Purely Legal Title, see Equity, 111.

Right of Purchaser under Void Administrator's Sale to Stand in Right of Creditors, see Executors and Administrators, 252.

Necessity of Rebating or Tendering Back Purchase Price, see Executors and Administrators, 255.

Sale of Infant's Lands, see Infants, 32.

Effect of Judgment Setting Aside Auction Sale for By-bidding, see Judgment, 160.

Sale under Judgment on Forged Note without Service of Process, see Judgment, 222.

Laches as Bar to Suit to Set Aside, see Limitation of Actions, I. b, 2, g.

Limitation of Suit to Set Aside Sale, see Limitation of Actions, 502.

Setting Aside Foreclosure Sale, see Mortgage, VII. g, 6.

Necessary Parties in Action for, see Parties, 247.

Setting Aside Tax Sale, see Taxes, III. i, 5. See also *supra*, 19.

114. In a collateral proceeding to set aside a judicial sale, mere errors and irregularities in the original proceeding will not suffice; it must be shown that the court had no jurisdiction. *Ludlow v. Ramsey*, 11 Wall. 581, 20: 216
Thompson v. Tolmie, 2 Pet. 157, 7: 381
Cited in Hamilton v. Brown, 161 U. S. 274,

40 L. ed. 699, 16 Sup. Ct. Rep. 585—Walker v. Sturbans, 38 Fed. 300—Johnson v. Hunter, 127 Fed. 225—Held v. Ebner, 66 C. C. A. 224, 133 Fed. 158—Bush v. Glover, 47 Ala. 174—Nachtrieb v. Stoner, 1 Colo. 430—Bray v. McClury, 55 Mo. 139—Bank of Colfax v. Richardson, 34 Or. 531, 75 Am. St. Rep. 664, 54 Pac. 359—Schnader v. Bender, 19 Lanc. L. Rev. 198—Schnader v. Bender, 8 Northampton Co. Rep. 263—Gutman v. Virginia Iron Co. 5 W. Va. 23—Grinnan v. Edwards, 21 W. Va. 362—De Camp v. Carnahan, 26 W. Va. 843—Miller v. White, 46 W. Va. 71, 76 Am. St. Rep. 791, 33 S. E. 332.

115. Mere informalities or irregularities in a judicial sale do not constitute, in Louisiana, sufficient ground to set it aside, unless the plaintiff can show that he has suffered injury thereby. Stockmeyer v. Tobin, 139 U. S. 176, 11 Sup. Ct. Rep. 504, 35: 123
Cited in Nalle v. Young, 160 U. S. 637, 40 L. ed. 564, 16 Sup. Ct. Rep. 420—Nevada Nickel Syndicate v. National Nickel Co. 103 Fed. 403—Dennis v. Moses, 18 Wash. 584, 40 L.R.A. 312, 52 Pac. 338.

116. Irregularities in a judicial sale cannot be established by affidavits based upon hearsay testimony. Where there is no substantial error in the proceedings of the sale, it cannot be set aside for frivolous objections. Leadville Coal Co. v. McCreery, 141 U. S. 475, 12 Sup. Ct. Rep. 28, 35: 824

117. Where a judgment was obtained, without actual service of process, on a forged note, in a time of civil war, when the defendant was within the lines of the enemy, it will be set aside, together with a sale made thereunder. Monger v. Shirley, 131 U. S. cxxxi., Appx. and, 22: 449

118. If a party voluntarily leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot complain of a judicial sale of his property regularly made against him as an absentee. Ludlow v. Ramsey, 11 Wall. 581, 20: 216

Cited in Montgomery v. Samory, 99 U. S. 489, 25 L. ed. 377—Dorr v. Gibboney, 3 Hughes, 389, Fed. Cas. No. 4,006—Jenkins v. Hannan, 26 Fed. 664—Harper v. Ely, 56 Ill. 183—Seymour v. Bailey, 66 Ill. 296—Hall v. Connecticut Mut. L. Ins. Co. 68 Ill. 361—Foreman v. Carter, 9 Kan. 680—Head v. Daniels, 38 Kan. 13, 15 Pac. 911—Thomas v. Mahone, 9 Bush, 128—Dorsey v. Thompson, 37 Md. 44—Dorsey v. Gary, 37 Md. 80, 11 Am. Rep. 528—De Jarnette v. De Giverville, 56 Mo. 447—Pennywit v. Foote, 27 Ohio St. 626, 22 Am. Rep. 340—McVeigh v. Bank of Old Dominion, 26 Gratt. 811—Walker v. Beauchier, 27 Gratt. 521—Naymond v. Camden, 22 W. Va. 194—Crim v. Harmon, 38 W. Va. 601, 18 S. E. 753.

119. In Nebraska the title of a purchaser at an execution sale depends, not alone upon his bid or payment of the purchase money, but upon the confirmation of the sale; and the sale, though temporarily confirmed, may be set aside, where no rights of a third party accrue in the meantime. Deputron v. Young, 134 U. S. 241, 10 Sup. Ct. Rep. 539, 33: 923

Editorial notes.

When judicial sale will be set aside.

40: 721
 [Relief of purchaser on annulling. 69 L.R. A. 33.]

Inadequacy of price.

Fraud of Bankrupt by Buying in at his own Sale, see Bankruptcy, 325.

Refusal of Equity to Aid Purchaser for Grossly Inadequate Price, see Equity, 320.

As Evidence of Fraud, see Evidence, 281.
 Sufficiency of Opinion Evidence to Establish, see Evidence, 2519.

Foreclosure Sale, see Mortgage, 469, 471.

Setting Aside Tax Sale for, see Taxes, 703.

120. Mere inadequacy of price is rarely held sufficient in itself to justify setting aside a judicial sale. Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. Rep. 512, 40: 721
Cited in Phillips v. Hyland, 102 Wis. 255, 78 N. W. 481.

121. A judicial sale will not be set aside for mere inadequacy of price, unless so great as to shock the conscience. Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. Rep. 887, 36: 732
Cited in Fidelity Trust & Safety Vault Co. v. Mobile Street R. Co. 54 Fed. 28—Mason v. Pewabic Min. Co. 13 C. C. A. 538, 22 U. S. App. 685, 66 Fed. 397—Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 84 Fed. 765—Magann v. Segal, 84 C. C. A. 326, 92 Fed. 256—Fidelity Ins. & S. D. Co. v. Roanoke Street R. Co. 98 Fed. 476—Nevada Nickel Syndicate v. National Nickel Co. 103 Fed. 394—Blanks v. Farmers' Loan & T. Co. 122 Fed. 851—Filles v. Brown, 59 C. C. A. 407, 124 Fed. 137—Re Shea, 61 C. C. A. 221, 126 Fed. 155—Bass v. McDonald, 29 Ind. App. 603, 64 N. E. 934—Central Trust Co. v. Gate City Electric Street R. Co. 96 Iowa, 650, 65 N. W. 982—Spaulding v. O'Connor, 119 Mich. 49, 77 N. W. 323.

122. Mere inadequacy of price does not, of itself, make void a purchase at an execution sale, or furnish a sufficient reason for dismissing a bill in chancery based on such purchase. Erwin v. Parham, 12 How. 197, 13: 952
Cited in Hunt v. Fisher, 29 Fed. 809—Coker v. Dawkins, 20 Fla. 155.

123. Execution sales of real property, made for grossly inadequate prices, may be canceled where the property was purchased by one of the plaintiff's attorneys, either directly or through their client, and the sales were made in pursuance of a plan to obtain the property by successive sales for the least possible sum, and at the same time to sell all the debtor's property, while the levies were made under specific directions of the attorney, who was the sole bidder at the sales and the only person present except the officer conducting the sales,—especially where an offer to redeem the property by payment of more than was due has been

refused. *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. Rep. 512, 40: 721
Cited in Nevada Nickel Syndicate v. National Nickel Co. 103 Fed. 398—*Horse Springs Cattle Co. v. Schofield*, 9 N. M. 142, 49 Pac. 934.

124. A master's sale made at a time of severe financial depression will not necessarily be set aside for that reason; and when the sale is made at the end of a long litigation, the court will not disturb it for any light or technical reason. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. Rep. 887, 36: 732

125. In judicial, as well as private sales, great inadequacy of price is a circumstance which a court of equity will always regard with suspicion, unless it appears that it was no fault of the buyer. *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. Rep. 686, 29: 839

Fraudulent and fictitious sales.

Slander of Title as Evidence of Fraud, see Evidence, 283.

Validity of Purchase and Transfer to Debtor's Widow or Children, see Fraudulent Conveyances, 15, 16.

Right of Purchaser in Good Faith to Permit Judgment Debtor to Retain Possession as against other Creditors, see Fraudulent Conveyances, 82, 83.

Laches as Bar to Rescission of Auction Sale, see Limitation of Actions, 170, 171.

Foreclosure Sale, see Mortgage, 470, 471, 473, 474.

Setting Aside Sale by Receiver, see Receivers, 56.

See also *supra*, 51.

126. A sale which the law requires to be made at public auction after due notice may be set aside at the instance of persons interested in having the property bring its full value, where the sale was in reality a mere form for the purpose of carrying out a private contract of sale; but it may be doubted whether such a sale can be set aside at the instance of the purchaser at both the public and the private sale. *Porter v. Graves*, 104 U. S. 171, 26: 691

127. A tenant of property who bought it at a judicial sale for a trifle, in the absence of his landlord, by unfair practices which prevented persons from bidding, may be compelled in equity to reconvey to his landlord. *Cocks v. Izard*, 7 Wall. 559, 19: 275
Cited in Robb v. Vos, 155 U. S. 38, 39 L. ed. 61, 15 Sup. Ct. Rep. 4—*Terbell v. Lee*, 40 Fed. 43—*Hoffman v. McMullen*, 45 L.R.A. 147, 28 C. C. A. 183, 48 U. S. App. 596, 83 Fed. 377—*Capital Bank v. Huntoon*, 35 Kan. 588, 11 Pac. 369—*People v. Lord*, 6 Hun, 396—*Underwood v. McVeigh*, 23 Gratt. 428—*Camp v. Bruce*, 96 Va. 525, 43 L.R.A. 147, 70 Am. St. Rep. 873, 31 S. E. 901—*Corrothers v. Harris*, 23 W. Va. 181—*Horn v. Star Foundry Co.* 23 W. Va. 540.

Procedure to set aside.

Right of Purchaser to Move or Set Aside, see *supra*, 70.

Ejectment against Purchaser at Sale under Void Judgment as Precluding Relief in Equity, see Equity, 253b.
 Necessary Parties to Action to Set Aside Sale, see Parties, 171, 175.
 Tax Sale, see Taxes, 704, 705.

128. In sales by masters under decrees, purchasers who have bid off the property are entitled to a hearing upon the question whether the sales shall be set aside. *Blossom v. Milwaukee & C. R. Co.* 1 Wall. 655, 17: 673

129. The owner of property is not confined to the summary mode, by petition or motion of the court, to have a judicial sale set aside, but may proceed in equity. *Cocks v. Izard*, 7 Wall. 559, 19: 275

130. A purchaser at a judicial sale which was made and deed executed with the consent of the parties to the suit, who was not notified of any steps taken to annul his purchase and cancel his deed, is not affected by a sale under a subsequent decree setting aside the former sale. *Halliday v. Stuart*, 151 U. S. 229, 14 Sup. Ct. Rep. 302, 38: 141

Resale.

Necessity of Resale to Charge Defaulting Purchaser, see *supra*, 71.

Invalidity where Cancellation of Former Sale was made without Notice to Purchaser, see *supra*, 130.

In Bankruptcy, see also Bankruptcy, 333.

Resale on Foreclosure, see Mortgage, 440-442

See also *supra*, 15.

131. Upon the refusal of a purchaser at a judicial sale to fulfil his contract, the estate may be resold and the purchaser held liable for and deficiency in price arising upon the second sale. *Stuart v. Gay*, 127 U. S. 518, 8 Sup. Ct. Rep. 1279, 32: 191
Cited in Kneeland v. American Loan & T. Co. 136 U. S. 95, 34 L. ed. 882, 10 Sup. Ct. Rep. 950—*Grape Creek Coal Co. v. Farmers' Loan & T. Co.* 25 C. C. A. 378, 53 U. S. App. 99, 80 Fed. 201—*Tennessee v. Quintard*, 26 C. C. A. 171, 47 U. S. App. 621, 80 Fed. 835—*Bayne v. Brewer Pottery Co.* 90 Fed. 628—*Columbus, S. & H. R. Co's Appeal*, 109 Fed. 204, 48 C. C. A. 302.

132. Upon the bidder refusing to pay the amount bid, the court, without confirming the sale by a formal order, where a distinct offer is made in open court to confirm the sale to him upon his complying with the terms thereof, may hold him to his bid and order a resale at his risk, both in respect to the expenses of the resale and any deficiency resulting therefrom. *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. Rep. 246, 32: 608
Cited in Central Trust Co. v. Cincinnati, J. & M. R. Co. 58 Fed. 503—*Central Trust Co. v. Sheffield & B. Coal, I. & R. Co.* 60 Fed. 15—*Bayne v. Brewer Pottery Co.* 90 Fed. 623—*Pelrson v. Fisk*, 99 Mich. 47, 57 N. W. 1080—*Kershaw v. Dyer*, 6 Utah, 243, 21 Pac. 1000.

133. Under the act of Congress of Aug. 18, 1856, where a purchaser at a sale of

real estate limited by will to certain lives, with contingent limitation over, makes default in payment of consideration, a resale should be made only on failure to pay the unpaid portion of the consideration within some reasonable time fixed by the court. *District of Columbia v. McBlair*, 124 U. S. 320, 8 Sup. Ct. Rep. 547, 31: 449

134. A decree ordering a resale, without regard to previous payments and the right to make additional payments, is erroneous. *District of Columbia v. McBlair*, 124 U. S. 320, 8 Sup. Ct. Rep. 547, 31: 449

VI. Collateral Attack.

Right to Assail Previous Deed by Debtor as Fraudulent, see *Fraudulent Conveyances*, 148.

Form of Injunction against Order of Property as that of Debtor, see *Injunction*, 229.

On Foreclosure Sale, see *Mortgage*, 394, 395, 428.

On Tax Deed or Title, see *Taxes*, 701, 702.

135. If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question. *Thompson v. Tolmie*, 2 Pet. 157, 7: 381
Griffith v. Frazier, 8 Cranch, 9, 3: 471
Cited in United States v. Arredondo, 6 Pet. 730, 8 L. ed. 561—*Decatur v. Paulding*, 14 Pet. 600 Appx. 10 L. ed. 609 Appx.—*Harvey v. Tyler*, 2 Wall. 345, 17 L. ed. 874—*Cooper v. Reynolds*, 10 Wall. 318, 19 L. ed. 932—*Cook v. United States*, 9 Ct. Cl. 290—*Swan v. United States*, 19 Ct. Cl. 65—*Bell v. Ohio Life & T. Co.* 1 Biss. 270, Fed. Cas. No. 1260—*Re McKibben*, 12 Nat. Bankr. Reg. 101, Fed. Cas. No. 8,859—*Thornhill v. Bank of Louisiana*, 1 Woods, 5, Fed. Cas. No. 13,992—*Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 27, 1 Fed. 665—*Puckett v. Pope*, 3 Ala. 555—*Bishop v. Hampton*, 15 Ala. 787—*Venner v. Denver Union Water Co.* 15 Colo. App. 502, 68 Pac. 1061—*Holcomb v. Phelps*, 16 Conn. 182—*Camp v. Moseley*, 2 Fla. 189—*Swiggart v. Harber*, 5 Ill. 371, 39 Am. Dec. 418—*Reed v. Wright*, 2 G. Greene, 35—*Seely v. Reid*, 3 G. Greene, 379—*Ex parte Holman*, 28 Iowa, 178, 4 Am. Rep. 159—*Lowry v. Erwin*, 6 Rob. (La.) 205, 39 Am. Dec. 556—*Vick v. Vicksburg*, 1 How. (Miss.) 440, 31 Am. Dec. 167—*Kittredge v. Emerson*, 15 N. H. 266—*Newcomb v. Smith*, 5 Ohio, 451—*Love v. Love*, 10 Phila. 455—*James v. Smith*, 2 S. C. N. S. 188—*Bull v. Rowe*, 13 S. C. 368—*Armstrong v. Craig*, 13 S. C. 373—*Adams v. Agnew*, 15 S. C. 42—*Jackson ex dem. Grignon v. Astor*, 1 Pinney (Wis.) 161, 39 Am. Dec. 281.

135a. If a judicial sale be void, the court having confirmed it upon terms not authorized by law, the purchaser is without title upon which to base an action of ejectment; if it be erroneous merely, and therefore only voidable, it cannot be questioned collaterally. *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. Rep. 129, 29: 440

136. Technical objections to the regularity of a judicial sale had during the Spanish control of Florida will not be permitted to defeat the operation of the sale and the conveyance thereunder to pass title,—especially where a sale of the lands has been made under the title undertaken to be passed by the proceedings, and this sale has subsequently been held sufficient to convey the title by the commissioners appointed under the act of Congress of May 8, 1822 (3 Stat. at L. 709, chap. 129), for ascertaining titles to lands within the territory of Florida. *McGuire v. Blount*, 199 U. S. 142, 26 Sup. Ct. Rep. 1, 50: 125

137. A judicial sale and title acquired thereunder, under proceedings of a court of competent jurisdiction, cannot be questioned collaterally, except for fraud in which the purchaser is participant. *Grignon v. Astor*, 2 How. 319, 11: 283

138. In judicial sales, where the owner is a party, objections to the regularity of the proceedings will not be heard to invalidate the deed, in a collateral suit. *Parker v. Overman*, 18 How. 137, 15: 318

139. A judicial sale and title acquired thereunder, under proceedings of a court of competent jurisdiction, cannot be questioned collaterally, except for fraud in which the purchaser is participant. *Griffith v. Bogert*, 18 How. 158, 15: 307
Cited in Davis v. Gaines, 104 U. S. 392, 28 L. ed. 760—*Elliot v. Van Voorst*, 3 Wall. Jr. 304, Fed. Cas. No. 4,390—*Re McKibben*, 12 Nat. Bankr. Reg. 103, Fed. Cas. No. 8,859—*Dally v. Doe*, 3 Fed. 915—*Reinach v. Atlantic & G. W. R. Co.* 58 Fed. 43—*Graff v. Louis*, 71 Fed. 594—*Bush v. Glover*, 47 Ala. 174—*Jackson v. Spink*, 59 Ill. 409—*Mathews v. Eddy*, 4 Or. 234—*Moore v. Frazer*, 15 Or. 637, 16 Pac. 869.

140. Where there is a sufficient writ and levy, a judgment of the court, a sale, and sheriff's deed, they must be held valid when given in evidence in another action. *Cooper v. Reynolds*, 10 Wall. 308, 19: 931
Cited in Pennoyer v. Neff, 95 U. S. 744, 24 L. ed. 577—*Miller v. Sullivan*, 4 Dill. 348, Fed. Cas. No. 9,592.

141. A railway company and its receiver did not, by building outside its right of way through the Indian territory, lose the right to assert that a sheriff's sale to enforce a forfeiture to the Choctaw Nation, so incurred, was invalid because made on credit, in clear violation of the Choctaw law of October 30, 1888, under which the sheriff assumed to sell. *Walker v. McLond*, 204 U. S. 302, 27 Sup. Ct. Rep. 293, 51: 495

142. A sale on foreign attachment, by order of a court of competent jurisdiction, cannot be attacked for irregularities in collateral proceedings. *Voorhees v. Jackson ex dem. Bank of United States*, 10 Pet. 449, 9: 490
Cited in Murphy v. Montandon, 3 Idaho, 331, 35 Am. St. Rep. 279, 29 Pac. 851—*Lane v. Bommelmann*, 17 Ill. 98—*Schenck v. Griffin*, 38 N. J. L. 465—*Remsen v. Hilgert*, 41 Phila. Leg. Int. 64.

142a. A sale by a court of competent jurisdiction cannot be declared a nullity in a collateral action, although the record does not show affirmatively the evidence of a compliance with the terms prescribed by law in making such sale. *Voorhees v. Jackson*, ex dem. Bank of United States, 10 Pet. 449, 9: 490

Cited in Bank of United States v. Voorhees, 1 McLean, 226, Fed. Cas. No. 939—*Graff v. Louis*, 71 Fed. 595—*Woods v. Woodson*, 40 C. C. A. 528, 100 Fed. 519—*Borden v. State*, 11 Ark. 552, 54 Am. Dec. 217—*Nachtrieb v. Stoner*, 1 Colo. 430—*Van Wagenen v. Carpenter*, 27 Colo. 452, 61 Pac. 698—*Sessions v. Stevens*, 1 Fla. 279, 46 Am. Dec. 339—*Camp v. Moseley*, 2 Fla. 196—*Buckmaster v. Carlin*, 4 Ill. 108—*Valrin v. Edmonson*, 10 Ill. 272—*Ralston v. Hughes*, 13 Ill. 482—*Gray v. Gillilan*, 15 Ill. 458, 60 Am. Dec. 761—*Logan v. Williams*, 76 Ill. 183—*Dodd v. State*, 18 Ind. 63—*Greenvault v. Farmers' & M. Bank*, 2 Dougl. (Mich.) 511—*Duxbury v. Dahle*, 78 Minn. 431, 79 Am. St. Rep. 408, 81 N. W. 198—*Natches v. Minor*, 10 Smedes & M. 266—*Hardy v. Gholson*, 26 Miss. 73—*Cason v. Cason*, 81 Miss. 593—*Brown v. Levee Comrs.* 50 Miss. 483—*Freeman v. Thompson*, 53 Mo. 190—*Raley v. Guinn*, 76 Mo. 272—*Blanchard v. Webster*, 62 N. H. 468—*Young v. Rathbone*, 16 N. J. Eq. 227, 84 Am. Dec. 151—*Stokes v. Middleton*, 28 N. J. L. 37—*Graham v. Houghtalin*, 30 N. J. L. 576—*Monroe v. Douglas*, 4 Sandf. Ch. 192—*Cadwallader v. Evans*, 1 Disney (Ohio) 593—*Paine v. Mooreland*, 15 Ohio, 445, 45 Am. Dec. 585—*Cochran v. Loring*, 17 Ohio, 432—*Sheldon v. Newton*, 8 Ohio St. 499—*Cason v. Stone*, 1 Or. 41—*Remsen v. Hilgert*, 17 Phila. 187—*Bellias v. McCarty*, 10 Watts, 22—*Wilcox v. Emerson*, 10 R. I. 275, 14 Am. Rep. 683—*Sutherland v. De Leon*, 1 Tex. 809, 46 Am. Dec. 100—*Be Amy*, 12 Utah, 325, 42 Pac. 1121—*Lancaster v. Wilson*, 27 Gratt. 629—*Duesenberry v. Barbour*, 31 Gratt. 500—*Hall v. Hall*, 12 W. Va. 16.

VII. Payment and Proceeds.

Right to Compel Performance of Bill, see supra, 70, 71.

Right of Defaulting Purchaser to be Allowed on Resale for Payments Made, see supra, 133, 134.

Trust in Proceeds of, see Trusts, 112.

Editorial note.

[Sheriff's duty as to adverse claims to proceeds, except rival executions. 47 L.R.A. 737.]

Crediting debt on purchase by creditor.

Landlord's Lien on Proceeds, see Landlord and Tenant, 65.

See also Payment, 12.

143. Where the sale is directed to be for cash, and the property is purchased on the sale by a trustee of a part of the creditors, the court is not bound, in deference to their wishes, to depart from the terms of the sale, and apply their claims in payment of the purchase money required at the sale. *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. Rep. 246, 32: 608

Distribution.

Duty of Purchaser to See to Application, see supra, 96.

Right of Trustee in Bankruptcy to Proceeds of Voidable Attachment Sale, see Bankruptcy, 134, 135.

Right as Affected by Insolvency of Debtor, see Insolvency, 38.

144. A purchaser at a judicial sale, bound to pay specific sums at given dates, is not interested in the distribution of the proceeds among creditors, or in the method of computing interest on such distribution. *Stuart v. Gay*, 127 U. S. 518, 8 Sup. Ct. Rep. 1279, 32: 191

Cited in Central Trust Co. v. Grant Locomotive Works, 135 U. S. 223, 84 L. ed. 103, 10 Sup. Ct. Rep. 736.

VIII. Redemption.

Effect of Redemption upon Rights of Lienors Inferior to Decree for Sale, see supra, 55.

Letter from Creditor to Attorney as Evidence, see Evidence, 1372.

Relief in Equity of Person Desiring to Redeem after Time Prescribed, see Equity, 188, 189.

Amending Bill so as to Pray for, see Pleading, 209.

Affirmance of Redemption by Giving of Notes to Creditor's Attorney, see Principal and Agent, 129.

Redemption from Mortgage Foreclosure, see Mortgage, VIII.

145. The Indiana statute authorizes redemption of railroad property from sale under execution. *Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 267, 7 Sup. Ct. Rep. 1206, 38: 1210

146. The legal title obtained by purchase at a sale under a valid judgment and execution is not divested by a subsequent decree giving the right to redeem, but which also provided that if no redemption was made the title of the purchaser at the execution sale should be quieted in him, where the conditions of the redemption prescribed in the decree were never performed and no redemption made, and where the decree was subsequently, by consent of the parties, modified, and the conditional right to redeem denied. *Miller v. Courtney*, 152 U. S. 172, 14 Sup. Ct. Rep. 517, 38: 401

IX. The Deed.

As Color of Title, see Adverse Possession, 110-112.

Mode of Reviewing Marshal's Refusal to Execute, see Appeal and Error, 656.

Estoppel by Recital in, see Estoppel, 20.

Admissibility in Evidence, see **Evidence**, 1039.

Deeds on Partition, see **Partition**, IV.

Tax Deed, see **Taxes**, III. i, 4.

See also **Statutes**, 316.

Editorial note.

Sheriff's deeds, and deeds by masters.

6: 155

Necessity and right.

Time of Passing Title, see *supra*, 111.

147. The sale of lands by a sheriff, seized under a *fi. fa.*, transfers the legal estate to the vendee by operation of law; and a deed from the sheriff is not necessary to perfect the title of the purchaser. *Remington v. Linthicum*, 14 Pet. 84, 10: 364
Cited in *Knowles v. Sullivan*, 182 Mass. 319, 65 N. E. 889—*State*, *Joslin*, *Prosecutor v. Ervien*, 50 N. J. L. 41, 12 Atl. 136.

148. Where a deed is declared fraudulent on a creditors' bill, and the premises ordered to be sold and a conveyance made by a master, the deed of the latter is as effectual as that of a sheriff on sale under an execution. No deed from the fraudulent grantee is necessary. *Miller v. Sherry*, 2 Wall. 237, 17: 827

Cited in *Re Rugheimer*, 86 Fed. 373—*Deck v. Whitman*, 96 Fed. 880—*Witter v. Dudley*, 42 Ala. 626—*Petty v. Mays*, 19 Fla. 658—*Brown v. Marzyck*, 19 Fla. 842—*Powell v. Campbell*, 20 Nev. 248, 2 L.R.A. 621, 19 Am. St. Rep. 350, 20 Pac. 156.

149. On payment of the amount due by the purchaser, he is entitled to a decree of the court for conveyance to him of title. *District of Columbia v. McBlair*, 124 U. S. 320, 8 Sup. Ct. Rep. 547, 31: 449

Requisites and form.

Necessity of Writing under Statute of Frauds to Prove Sale, see *supra*, 35, 36.

Validity of Deed by New Marshal after Predecessor's Removal, see *Marshall*, 10.

150. In Louisiana a sheriff's deed is good if executed by a deputy sheriff in his own name. *Flournoy v. Lastrapes*, 131 U. S. cxi. Appx. and, 25: 406

151. Where a deed was delivered in obedience to the decree of the court, proof of the decree is not necessary to support the delivery. *Hanrick v. Neely*, 10 Wall. 364, 19: 947

152. The same rules as to description of property in a deed apply to a deed by an officer of the court as to a deed of a party. *White v. Luning*, 93 U. S. 514, 23: 938
Cited in *Farmers Loan & T. Co. v. Eno*, 35 Fed. 90—*Carroll v. Miner*, 1 Pa. Super Ct. 434—*Middleton v. Middleton*, 106 Pa. 262.

Invalid deeds.

153. In a sale on foreign attachment, making the deed to a person other than the one who purchased at the sale is immaterial matter and does not affect the proceedings. U. S. Dig.—236

Voorhees v. Jackson ex dem. United States, 10 Pet. 449, 9: 490
Cited in *McClure v. Englehardt*, 17 Ill. 50—*Phillips v. Coffee*, 17 Ill. 157, 63 Am. Dec. 357—*Splahn v. Gillespie*, 48 Ind. 404—*Hall v. Hall*, 12 W. Va. 19.

154. The supreme court of New Jersey having decided that a deed made by commissioners in partition to anyone other than the person reported as the purchaser was void, an act by the legislature, providing that upon proof of certain facts such deed should, when offered in evidence, have the same effect as deeds to the purchasers, cured such defect. *Kearney v. Taylor*, 15 How. 494, 14: 787

Cited in *Drehman v. Stiffe*, 8 Wall. 603, 19 L. ed. 510—*Randall v. Kreiger*, 23 Wall. 149, 23 L. ed. 126—*Weed v. Donovan*, 114 Mass. 183—*Prentice v. Worcester*, 129 Mass. 565—*Norris v. Thomson*, 19 N. J. Eq. 316—*Maxwell v. Goetschius*, 40 N. J. L. 391, 29 Am. Rep. 242—*Central Baptist Church v. Manchester*, 21 R. I. 359, 43 Atl. 845—*Johnson v. Taylor*, 60 Tex. 369—*Huffman v. Alderson*, 9 W. Va. 627.

Avoidance of deed.

155. Where an order of confirmation was vacated before there was any change in the relation of the parties, a sheriff's deed fell with it. *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. Rep. 539, 33: 923
Cited in *Gubbins v. Laughtenschlager*, 75 Fed. 621—*Nevada Nickel Syndicate v. National Nickel Co.* 103 Fed. 396—*Fowler v. Krutz*, 54 Kan. 626, 38 Pac. 808.

JUDICIARY.

See **Courts**.

JUDICIARY ACTS.

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JURAT.

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JURIDICAL POSSESSION.

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- I. Right to Trial By, 1-88.**
 - a. In General, 1-15.**
 - b. When Right Exists, 16-46.**
 - 1. In Civil Actions and Proceedings, 16-40.**
 - a. In General, 16-31.**
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Review of Discretion in Refusing to Discharge, see Appeal and Error, 4410.

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Time to Object to Form of Oath to, see Appeal and Error, 1272.

What Record must Show as to, see Appeal and Error, 3210-3212.

Necessity that Record Contain Names of Jurors, see Appeal and Error, 3210.

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Refusal to Review Question Whether Officers in Charge of Jury were Sworn, see Constitutional Law, 827.

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Former Jeopardy by Discharge of, see Criminal Law, 64-67.

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In Eminent Domain Proceedings, see Eminent Domain, IV. b.

Competency of Jurors to Testify as to Issues and Findings, see Evidence, 1736.

Criminal Proceedings by, in Hawaii, see Grand Jury, 1.

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I. Right to Trial By.**a. In General.**

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Right to Jury Trial as Affecting Power of Federal Equity Court to Try Title of Plaintiff out of Possession, see Courts, 2067.

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Constitutional Provision for, as Abolishing Wager of Law, see Wager of Law.

1. The right to trial by jury is regarded as fundamental in English law, and guarded with utmost care. *Parsons v. Bedford*, 3 Pet. 433, 7: 732*Cited in* *Maxwell v. Dow*, 176 U. S. 811, 44 L. ed. 609, 20 Sup. Ct. Rep. 494—*Dorr v. United States*, 195 U. S. 157, 49 L. ed. 186, 24 Sup. Ct. Rep. 808—*Denver v. Hyatt*, 28 Colo. 143, 68 Pac. 403.2. By "common law" in the 7th Amendment of the Constitution, preserving the right of trial by jury, is meant what in the third article of the Constitution is denominated "law," not merely suits which the common law recognizes among its old and settled proceedings, but suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized and equitable remedies administered, or where, as in admiralty, a mixture of public and of maritime law and equity are often found in the same suit. *Parsons v. Bedford*, 3 Pet. 433, 7: 732*Cited in* *Brent v. Bank of Washington*, 10 Pet. 613, 9 L. ed. 554—*Parish v. Ellis*, 16 Pet. 454, 10 L. ed. 1029—*Waring v. Clarke*, 5 How. 481, 12 L. ed. 245—*Illipp v. Babin*, 19 How. 278, 15 L. ed. 635—*Irvine v. Marshall*, 20 How. 503, 15 L. ed. 998—*Fenn v. Holme*, 21 How. 486, 16 L. ed. 200—*Root v. Lake Shore & M. S. R. Co.* 105 U. S. 206, 28 L. ed. 981—*Capital Traction Co. v. Hof*, 174 U. S. 8, 43 L. ed. 876, 19 Sup. Ct. Rep. 580—*Allen v. Blunt*, 1 Blatchf. 486, Fed. Cas. No. 215—*The Atlas*, 4 Ben. 35, Fed. Cas. No. 633—*Bains v. The James & Catharine, Baldw.* 554, Fed. Cas. No. 756—*Baker v. Biddle, Baldw.* 405, Fed. Cas. No. 764—*Clark v. Sobler*, 1 Woodb. & M. 372, Fed. Cas. No. 2,835—*Magill v. Brown, Brightly* (Pa.) 357, Fed. Cas. No. 8,952—*Re Oregon Bulletin Printing & Pub. Co.* 14 Nat. Bankr. Reg. 396, Fed. Cas. No. 10,560—*Quantity of Manufactured Tobacco*, 10 Ben. 448, Fed. Cas. No. 11,499—*Shuford v. Cain*, 1 Abb. (U. S.) 305, Fed. Cas. No. 12,823—*Tufts v. Tufts*, 3 Woodb. & M. 483, Fed. Cas. No. 14,233—*United States v. Block* 121, 3 Biss. 214, Fed. Cas. No. 14,610—*United States v. Inlots*, Fed. Cas. No. 15,441—*United States v. New Bedford Bridge*, 1 Woodb. & M. 459, Fed. Cas. No. 15,867—*United States v. 130 Barrels of Whiskey*, 1 Bond, 590, Fed. Cas. No. 15,938—*United States v. Power*, 14 Blatchf. 225, Fed. Cas. No. 16,080—*United States v. The Queen*, 4 Ben. 243, Fed. Cas. No. 16,107—*Keith v. Rockingham*, 18 Blatchf. 247, 2 Fed. 835—*Boyd v. Clark*, 13 Fed. 910—*Ex parte Tweedy*, 22 Fed. 88—*Sulzer v. Watson*, 39 Fed. 415—*Brisenden v. Chamberlain*, 53 Fed. 309—*Klever v. Seawall*, 12 C. C. A. 663, 22 U. S. App. 715, 65 Fed. 395—*Smith v. American Nat. Bank*, 32 C. C. A. 375, 60 U. S. App. 431, 89 Fed. 839—*Alger v. Anderson*, 92 Fed. 700—*Kirby v.*

Chicago & N. W. R. Co. 106 Fed. 555—
Duncan v. Landis, 45 C. C. A. 670, 3 N. B.
Rep. 673, 106 Fed. 843—Jones v. Mutual
Fidelity Co. 123 Fed. 523—Levin v. United
States, 63 C. C. A. 482, 128 Fed. 832—
Ashley v. Little Rock, 56 Ark. 396, 19 S.
W. 1058—United States ex rel. Brightwood
R. Co. v. O'Neal, 10 App. D. C. 231—Fitz-
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Neb. 580—Browning v. Browning, 3 N. M.
668, 9 Pac. 677—New York Ice Co. v. North
Western Ice Co. 31 Barb. 76—Bradford v.
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berlain v. Warburton, 1 Utah, 270—Mackey
v. Enzensperger, 11 Utah, 159, 39 Pac. 541
—Dacres v. Oregon R. & Nav. Co. 1 Wash.
520, 20 Pac. 601—Stevens v. Baker, 1 Wash.
Terr. 319—Barlow v. Daniels, 25 W. Va.
516—Re Booth, 3 Wis. 40.

3. "Suits at common law" in which the
right to trial by jury is preserved, embrace
all suits which are not of equity or ad-
miralty jurisdiction. Knickerbocker Ins.
Co. v. Comstock, 16 Wall. 258, 21: 493
Cited in Bradford v. Territory, 1 Okla. 370,
34 Pac. 66.

4. A trial by the court without the waiv-
er of a jury is at most only error. Such
error cannot be taken advantage of collat-
erally. Maxwell v. Stewart, 21 Wall. 71, 22
Wall. 77, 22: 564

Editorial notes.

Right to trial by. 19: 658; 33: 801
39: 727; 41: 3

Applicability of Federal Constitution generally.

Applicability to State of Provisions of
Federal Constitution as to, see
Constitutional Law, 79-80a.

See also Constitutional Law, 63.

5. The effect of the 7th Amendment is to
prohibit the courts of the United States
from re-examining facts tried by a jury
except in the granting of a new trial by the
court where the issue was tried, or to which
the record was properly returnable; or the
award of a venire facias de novo by an ap-
pellate court, for some error of law which
intervened in the proceedings. Lincoln v.
Power, 151 U. S. 436, 14 Sup. Ct. Rep. 387,
38: 224

Cited in Grayson v. Lynch, 163 U. S. 475, 41
L. ed. 233, 16 Sup. Ct. Rep. 1064—Capital
Traction Co. v. Hof, 174 U. S. 9, 43 L. ed.
876, 19 Sup. Ct. Rep. 580.

6-10. The 7th Amendment secures una-
nimity in finding a verdict as an essential
feature of trial by jury in common-law
cases: and an act of Congress cannot im-
part the power to change the constitutional
rule, and cannot be treated as attempting to

do so. Springville v. Thomas, 166 U. S. 707,
17 Sup. Ct. Rep. 717, 41: 1172
Cited in Bauman v. Ross, 167 U. S. 593, 42 L.
ed. 289, 17 Sup. Ct. Rep. 968—Holloway v.
Dunham, 170 U. S. 618, 42 L. ed. 1166, 18
Sup. Ct. Rep. 784—Maxwell v. Dow, 176 U.
S. 586, 44 L. ed. 599, 20 Sup. Ct. Rep. 448.

To District of Columbia.

See also *infra*, 44, 70.

11. The right of trial by jury is secured
to the people of the District of Columbia
by the United States Constitution. Callan
v. Wilson, 127 U. S. 540, 8 Sup. Ct. Rep.
1301, 32: 223

Cited in American Pub. Co. v. Fisher, 166 U.
S. 467, 41 L. ed. 1081, 17 Sup. Ct. Rep. 618
—Thompson v. Utah, 170 U. S. 347, 42 L. ed.
1065, 18 Sup. Ct. Rep. 620—Capital Traction
Co. v. Hof, 174 U. S. 9, 43 L. ed. 874,
19 Sup. Ct. Rep. 580—Maxwell v. Dow, 176
U. S. 586, 44 L. ed. 599, 20 Sup. Ct. Rep.
448—Downes v. Bidwell, 182 U. S. 262, 45
L. ed. 1096, 21 Sup. Ct. Rep. 770—Humes
v. Ft. Smith, 98 Fed. 865—Kerr v. Ross, 5
App. D. C. 247—Craighill v. Van Rielwick, 8
App. D. C. 214—Lansburgh v. District of
Columbia, 11 App. D. C. 521—Moses v. United
States, 16 App. D. C. 433, 50 L.R.A. 535
—Queenan v. Territory, 11 Okla. 266, 61
L.R.A. 326, 71 Pac. 218—Mackey v. Enzens-
perger, 11 Utah, 169, 39 Pac. 541.

12. The provisions of the Constitution of
the United States, securing the right of
trial by jury, whether in civil or in crim-
inal cases, are applicable to the District of
Columbia. Capital Traction Co. v. Hoff,
174 U. S. 9, 19 Sup. Ct. Rep. 580, 43: 873
Cited in Downes v. Bidwell, 182 U. S. 293, 45
L. ed. 1109, 21 Sup. Ct. Rep. 770—Rassmus-
sen v. United States, 197 U. S. 526, 49 L.
ed. 865, 25 Sup. Ct. Rep. 514.

To territories and colonies.

In Creditors' Bill under Organic Act of
Montana, see Courts, 382.

Validity of Act of Territorial Legis-
lature Dispensing with Jury, see
Courts, 385.

Preservation of Right to Jury Trial
notwithstanding Abolition of Dis-
tinction between Forms of Law and
Equity, see Equity, 276.

See also *infra*, 83.

13. The 7th Amendment, so far as it se-
cures the right of trial by jury, applies to
judicial proceedings in the territories of the
United States. Black v. Jackson, 177 U. S.
349, 20 Sup. Ct. Rep. 648, 44: 801
Cited in Downes v. Bidwell, 182 U. S. 293, 45
L. ed. 1109, 21 Sup. Ct. Rep. 770—Rass-
mussen v. United States, 197 U. S. 526, 49
L. ed. 866, 25 Sup. Ct. Rep. 514—Carlson
v. Sullivan, 77 C. C. A. 35, 146 Fed. 479.

14. The right of trial by jury was not ex-
tended by the Federal Constitution, without
legislation, and of its own force, to the
Philippine Islands, ceded to the United
States by Spain, and not incorporated into
the United States by congressional action.
Dorr v. United States, 195 U. S. 138, 24
Sup. Ct. Rep. 808, 49: 128
Cited in Rassmussen v. United States, 197 U.
S. 520, 49 L. ed. 863, 25 Sup. Ct. Rep.
514.

15. Congress, under the power to govern territory of the United States, implied in the right to acquire it, and expressly conferred by U. S. Const. art. 4, § 3, was not bound to include the right of trial by jury in the system of laws enacted by the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), for the temporary civil government of the Philippine Islands, ceded to the United States by Spain, and not incorporated into the United States by congressional action. *Dorr v. United States*, 195 U. S. 138, 24 Sup. Ct. Rep. 808, 49: 128

b. When Right Exists.

1. In Civil Actions and Proceedings.

a. In General.

Denial or Infringement of Right, see *infra*, I. d, 1.

In *Replevin Case*, see *Appeal and Error*, 5149.

In *Confiscation Proceedings*, see *Confiscation and Sequestration*, 70, 76.

In *Proceedings to Determine Adverse Mining Claims*, see *Mines*, 152.

In *Adverse Suits upon Mining Claims*, see *Mines*, 154a.

Jury Trial as Due Process, see *Constitutional Law*, 650-662.

Right to Jury Trial of Question of Duty Value, see *Duties*, 400.

16. A jury to find facts is never required, where there is no traverse of those alleged, and where a defendant has defaulted. *United States v. Clarke* (*Confiscation Cases*) 20 Wall. 92, 22: 320

17. By the laws of Louisiana, questions of fact in civil cases are tried by the court, unless one of the parties demands a jury. *Mayhew v. Thatcher*, 6 Wheat. 129, 5: 223
Cited in Aurora v. West, 7 Wall. 104, 19 L. ed. 50.

Editorial notes.

[Constitutional right to jury for assessment of damages on default. 15 L.R.A. 614.

Right to jury in *quo warranto*. 24 L.R.A. 806.]

Under Constitution and statutes generally.

In *Chinese Exclusion Proceedings*, see *Aliens*, 156.

Applicability to State of Provisions of Federal Constitution as to, see *Constitutional Law*, 79.

See also *Constitutional Law*, 375; *Trial*, 889.

18. The amendment to the Constitution of the United States by which the trial by jury was secured may be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. *Parsons v. Bedford*, 3 Pet. 433, 7: 732

19. A statutory proceeding before a special tribunal, to determine claims against a city which have no legal obligation, is not a suit at common law, within the meaning of U. S. Const. 7th Amend. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 19 Sup. Ct. Rep 513, 43: 795

20-1. A trial by jury in a proceeding as to adverse mining claims under U. S. Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, is not made necessary by the act of Congress of March 3, 1881 (21 Stat. at L. 505), chap. 140, providing for a finding by jury on a question of title. *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. Rep. 971, 41: 113

Cited in Providence Gold Min. Co. v. Burke, 6 Ariz. 331, 57 Pac. 641—*Bernier v. Anderson*, 8 Idaho, 681, 70 Pac. 1027.

Inquest of office.

Right to Jury as Essential to Due Process, see *Constitutional Law*, 659.

22. The right to trial by jury does not extend to a mere inquest of office. *Livingston v. Moore*, 7 Pet. 469, 8: 751
Cited in Barnard & L. Mfg. Co. v. Monett Mill Co. 79 Mo. App. 155—*Raleigh & Gaston R. Co. v. Davis*, 19 N. C. (2 Dev. & B. Law) 466.

Writ of inquiry.

23. [Assessment of damages will not be made by the court. A writ of inquiry is the regular mode; but plaintiff may enter judgment generally, and issue execution at his own peril. *Armstrong v. Carson* (C. Ct.) 2 Dall. 302, 1: 391]

24. Where the action is brought for a sum certain, or which may be made certain by computation, judgment for damages may be entered by the court without a writ of inquiry. *Renner v. Marshall*, 1 Wheat. 215, 4: 74

Cited in Aurora v. West, 7 Wall. 104, 19 L. ed. 50—*McLain v. Rutherford*, Hempst. 48, Fed. Cas. No. 8,868a—*People ex rel. Highway Comrs. v. Madison County*, 125 Ill. 21, 17 N. E. 147—*Price v. Dearborn*, 34 N. H. 485—*Dyson v. Rhode Island Co.* 25 R. I. 625, 65 L.R.A. 249, 57 Atl. 771.

Revenue actions.

Right to Jury Trial of Question of Duty Value, see *Duties*, 400.

25. Claimants of distilled spirits seized upon land in forfeiture proceedings under 15 Stat. at L. 140, § 36, chap. 186, who have answered, denying all the material allegations of the information, are entitled to trial by jury. *Garnhart v. United States*, 16 Wall. 162, 21: 275

26. In revenue cases, default entered establishes facts averred in the libel or information, and warrants a decree of condemnation, if the information contains the necessary averments; and a jury trial is unnecessary. *Page v. United States* (*Miller v. United States*) 11 Wall. 268, 20: 135
Distinguished in The Lopez, 43 Fed. 96.

Cited in Confiscation Cases (*United States v. Clarke*) 20 Wall. 104, 22 L. ed. 322—*Con-*

seizure Cases, 1 Woods, 225, Fed. Cas. No. 3,097—United States v. The Mollie, 2 Woods, 319, Fed. Cas. No. 15,795—Rostron v. The Water Witch, 44 Fed. 96—The Rabboul, 28 C. C. A. 520, 50 U. S. App. 294, 84 Fed. 683—Cape Fear Towing & Transp. Co. v. Pearsall, 33 C. C. A. 164, 61 U. S. App. 521, 90 Fed. 438.

Bankruptcy.

27. When a jury trial is demanded under the bankruptcy act providing that "a person against whom an involuntary petition has been filed shall be entitled to have a trial by jury in respect to the question of his solvency," it is demanded as of right, and the trial is a trial according to the course of the common law. *Elliott v. Toepfer*, 187 U. S. 327, 23 Sup. Ct. Rep. 133, 47: 200

Cited in *Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co.* 66 C. C. A. 547, 133 Fed. 717.

Seizure on land.

See also *infra*, 40.

28. In the trial of all cases of seizure on land, the court proceeds as a court of common law, and the trial of issues of fact must be by jury. *The Sarah*, 8 Wheat. 391, 5: 644

Morris v. United States (Morris's Cotton) 8 Wall. 507, 19: 481

Cited in *Union Ins. Co. v. United States*, 6 Wall. 765, 18 L. ed. 881—*Confiscation Cases*, 7 Wall. 462, 19 L. ed. 199—*Ex parte Graham*, 10 Wall. 543, 19 L. ed. 982—*Garnhart v. United States*, 16 Wall. 165, 21 L. ed. 276—*Confiscation Cases (United States v. Clarke)* 20 Wall. 113, 22 L. ed. 325—*United States v. Winchester*, 99 U. S. 374, 25 L. ed. 480—*Coffey v. United States*, 116 U. S. 485, 29 L. ed. 684, 6 Sup. Ct. Rep. 432—*Coffey v. United States*, 117 U. S. 234, 29 L. ed. 891, 6 Sup. Ct. Rep. 717—*Leland v. The Medora*, 2 Woodb. & M. 109, Fed. Cas. No. 8,237—*United States v. Athens Armory*, 2 Abb. (U. S.) 188, Fed. Cas. No. 14,473—*United States v. Distillery No. 28*, 6 Biss. 490, Fed. Cas. No. 14,966—*United States v. Four Part Pieces of Woolen Cloth*, 1 Paine, 437, Fed. Cas. No. 15,150—*United States v. 130 Barrels of Whiskey*, 1 Bond, 590, Fed. Cas. No. 15,938—*United States v. 150 Head of Cattle*, 8 Ariz. 136—*United States v. Athens Armory*, 35 Ga. 352.

29. A seizure having been made on land, the case was tried by a jury, in *United States v. Hazard (United States v. 422 Casks of Wine)* 1 Pet. 547, 7: 257
Cited in *United States v. 130 Barrels of Whiskey*, 1 Bond, 590, Fed. Cas. No. 15,938.

In contempt cases.

Right to Jury as Essential to Due Process, see *Constitutional Law*, 657, 658.

See also *Congress*, 51.

30. Proceedings according to the common law for contempt of court are not subject to the right of trial by jury. *Eilenbecker v. District Court*, 134 U. S. 81, 10 Sup. Ct. Rep. 424, 33: 801
Cited in *Tinsley v. Anderson*, 171 U. S. 108, 43 L. ed. 97, 18 Sup. Ct. Rep. 805—*United States v. Sweeney*, 95 Fed. 450—*Re Perkins*,

100 Fed. 953—*Ripon Knitting Works v. Schreiber*, 2 N. B. N. Rep. 899, 101 Fed. 813—*State v. Markuson*, 5 N. D. 154, 64 N. W. 934—*State v. Mitchell*, 3 S. D. 226, 52 N. W. 1052—*Tindall v. Nisbet*, 113 Ga. 1133, 55 L.R.A. 229, 39 S. E. 450—*Davis v. Auld*, 96 Me. 568, 53 Atl. 118—*State ex rel. Crow v. Shepherd*, 177 Mo. 240, 99 Am. St. Rep. 624, 76 S. W. 79—*Smith v. Speed*, 11 Okla. 111, 55 L.R.A. 407—*Ex parte Keeler*, 45 S. C. 543, 31 L.R.A. 679, 55 Am. St. Rep. 785, 23 S. E. 865.

31. The constitutional right to a trial by jury does not extend to a proceeding to punish a person for contempt in violating an injunction. *Re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39: 1092
Cited in *United States v. Sweeney*, 95 Fed. 449—*Ripon Knitting Works v. Schreiber*, 2 N. B. N. Rep. 901, 101 Fed. 812—*O'Brien v. People*, 216 Ill. 370, 108 Am. St. Rep. 219, 75 N. E. 108—*Anderson v. Indianapolis Drop Forging Co.* 34 Ind. App. 106, 72 N. E. 277.

b. In Equity.

Enfringement of Right, see *infra*, 73-75.

In Proceedings to Determine Adverse Mining Claims, see *Mines*, 152.

In Adverse Suits upon Mining Claims, see *Mines*, 154a.

Disposition of Issues by Court or Jury, see *Trial*, 15, 17-25.

See also *supra*, 18.

32. The constitutional provision that, in suits at common law where the value exceeds \$20, the right of trial by jury shall be preserved, does not apply to equity courts. *Shields v. Thomas*, 18 How. 253, 15: 368

Barton v. Barbour, 104 U. S. 126, 26: 672
Cited in *Re Christensen*, 3 N. B. N. Rep. 140, 101 Fed. 244—*Home Ins. Co. v. Virginia Carolina Chemical Co.* 109 Fed. 691—*Early Times Distillery Co. v. Zeiger*, 9 N. M. 43, 49 Pac. 728—*Bradford v. Territory*, 1 Okla. 370, 34 Pac. 66.

33. The restoration of record titles, where the records have been burned, is a matter essentially of equitable cognizance; and a statute providing therefor is not unconstitutional because it does not provide for trial by jury. *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. Rep. 554, 33: 909
Cited in *Harding v. Fuller*, 141 Ill. 316, 30 N. E. 1053—*Morrissey v. Broomal*, 37 Neb. 779, 56 N. W. 383.

Editorial note.

[Right to jury in equity on account of demand for damages. 15 L.R.A. 287.]

c. In Admiralty.

In Cases of Seizure on Land, see *supra*, 28, 29.

Waiver of Jury, see *infra*, 56.

In Consular Tribunal, see *Diplomatic and Consular Officers*, 17, 18.

See also *supra*, 18, 26; *Admiralty*, 332.

34. The enabling act of 1845 is obsolete and of no effect with the exception of the

clause which gives to either party the right to trial by jury. The general jurisdiction in admiralty of the district courts upon the lakes and waters connecting them exists without it. *The Eagle v. Fraser* (The Eagle) 8 Wall. 15, 19: 365

Cited in *The Robert W. Parsons* (Perry v. Haines) 191 U. S. 81, 48 L. ed. 79, 24 Sup. Ct. Rep. 8—*Moir v. The Dubuque*, Fed. Cas. No. 9,696—*Re Scott*, 1 Abb. (U. S.) 840, Fed. Cas. No. 12,517—*The Empire*, 19 Fed. 538—*United States v. Burlington & H. C. Ferry Co.* 21 Fed. 338—*The F. & P. M. No. 2*, 33 Fed. 513—*The City of Toledo*, 73 Fed. 226—*The E. P. Dorr v. Waldron*, 62 Ill. 229, 14 Am. Rep. 86—*Chisholm v. Northern Transp. Co.* 61 Barb. 389—*Thorsen v. The J. B. Martin*, 26 Wis. 497, 7 Am. Rep. 91.

35. In cases of seizure made on water navigable by vessels of 10 tons burden and upwards, the court sits as a court of admiralty; the trial is by the court. *The Sarah*, 8 Wheat. 391, 5: 644

Cited in *Waring v. Clarke*, 5 How. 486, 12 L. ed. 247—*The Eagle* (The Eagle v. Fraser) 8 Wall. 26, 19 L. ed. 370—*The Wave*, Blatchf. & H. 240, Fed. Cas. No. 17,297—*Ten Cases v. United States*, 34 Fed. 100—*White v. Culver*, 10 Minn. 194, Gil. 155.

36. Cases of seizure upon waters navigable from the sea by vessels of more than 10 tons burden, for breach of the laws of the United States, are civil cases of admiralty and maritime jurisdiction, and are to be tried without a jury. *Whelan v. United States*, 7 Cranch, 112, 3: 286

Cited in *Waring v. Clarke*, 5 How. 486, 12 L. ed. 247—*The Meteor*, Fed. Cas. No. 9,498—*United States v. Arms & Ammunitions*, Fed. Cas. No. 14,466a—*The Wave*, Blatchf. & H. 240, Fed. Cas. No. 17,297.

37. All seizures for forfeitures, made under laws of impost, navigation, and trade, on waters navigable from the sea by vessels of 10 tons burden and upwards, are cases of admiralty and maritime jurisdiction, to be tried by the court. *The Margaret*, 9 Wheat. 421, 6: 125

38. A proceeding by information in the district court, to forfeit a vessel for illegal exportation of arms and ammunitions, is a maritime cause, triable without a jury, and appealable to the circuit court. *United States v. La Vengeance*, 3 Dall. 297, 1: 610
Cited in *United States v. The Sally*, 2 Cranch, 406, 2 L. ed. 320—*United States v. The Betsey*, 4 Cranch, 446, 2 L. ed. 674—*Whelan v. United States*, 7 Cranch, 112, 3 L. ed. 286—*The Samuel*, 1 Wheat. 14, 4 L. ed. 24—*The Sarah*, 8 Wheat. 394, 5 L. ed. 644—*The Margaret*, 9 Wheat. 428, 6 L. ed. 127—*Waring v. Clarke*, 5 How. 458, 12 L. ed. 234—*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 387, 12 L. ed. 484—*Jackson v. The Magnolia*, 20 How. 329, 15 L. ed. 924—*Union Ins. Co. v. United States*, 6 Wall. 766, 18 L. ed. 882—*The Belfast* (The Belfast v. Boon) 7 Wall. 638, 19 L. ed. 270—*The Eagle* (The Eagle v. Fraser) 8 Wall. 26, 19 L. ed. 370—*Confiscation Cases* (United States v. Clarke) 20 Wall. 113, 22 L. ed. 325—*Anonymous*, 1 Gall. 25, Fed. Cas. No. 444—*Clark v. United States*, 2 Wash. C. C. 524, Fed. Cas. No. 2,837—*De Lovio v. Boit*, 2 Gall. 474, Fed. Cas. No. 3,776—*The Hunt-*

ress, 2 Ware, 112, Fed. Cas. No. 6,914—*Leland v. The Medora*, 2 Woodb. & M. 109, Fed. Cas. No. 8,237—*The Missouri*, 3 Ben. 515, Fed. Cas. No. 9,652—*Roberts v. Skolfield*, 3 Ware, 187, Fed. Cas. No. 11,917—*United States v. Arms & Ammunition*, Fed. Cas. No. 14,466a—*United States v. Athens Armory*, 2 Abb. (U. S.) 143, Fed. Cas. No. 14,473—*United States v. The Good Friends*, 4 Am. L. J. 494, Fed. Cas. No. 15,227—*United States v. 1 Case of Silk*, 4 Ben. 541, Fed. Cas. No. 15,925—*The Wave*, Blatchf. & H. 240, Fed. Cas. No. 17,297—*United States v. Burlington & H. C. Ferry Co.* 21 Fed. 338—*The Idaho*, 29 Fed. 189—*Slocum v. Wheeler*, 1 Conn. 446—*United States v. Athens Armory*, 35 Ga. 357—*People v. Tyler*, 7 Mich. 273, 74 Am. Dec. 703—*Novlon v. Hallett*, 16 Johns. 346.

39. A libel to forfeit a vessel for violation of law is a proceeding *in rem*, and therefore a civil cause which does not require a jury. *United States v. La Vengeance*, 3 Dall. 297, 1: 610
Cited in *The Meteor*, Fed. Cas. No. 9,498—*Kirkland v. State*, 72 Ark. 179, 65 L.R.A. 80, 105 Am. St. Rep. 25, 78 S. W. 770.

40. Proceedings for the condemnation of property used in aid of the Rebellion, which, under the act of August 6, 1861, are to be had "in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized or into which the same may be taken and proceedings commenced," must, in general, conform to the course of proceedings in admiralty; but issues of fact, when the seizure was made on land, must, on the demand of either party, be tried by a jury. *Union Ins. Co. v. United States*, 6 Wall. 759, 18: 879
United States v. Davenport (United States v. Bales of Cotton) 154 U. S. 556 Appx. and 14 Sup. Ct. Rep. 1212, 18: 889
Distinguished in *Miller v. United States* (Page v. United States) 11 Wall. 304, 20 L. ed. 144.

Cited in *United States v. Hart*, 6 Wall. 772, 18 L. ed. 914—*Morris v. United States*, 7 Wall. 579, 19 L. ed. 282—*Morris's Cotton* (Morris v. United States) 8 Wall. 511, 19 L. ed. 482—*Ex parte Graham*, 10 Wall. 543, 19 L. ed. 982—*Coffey v. United States*, 116 U. S. 435, 29 L. ed. 684, 6 Sup. Ct. Rep. 432—*Coffey v. United States*, 117 U. S. 234, 29 L. ed. 891, 6 Sup. Ct. Rep. 717—*Confiscation Cases*, 1 Woods, 229, Fed. Cas. No. 3,097—*United States v. The Queen*, 4 Ben. 242, Fed. Cas. No. 16,107—*Polk v. The J. W. French*, 5 Hughes, 439, 18 Fed. 924—*Knoefel v. Williams*, 30 Ind. 6—*Pasteur v. Lewis*, 39 La. Ann. 9, 1 So. 307—*Salt Creek Valley Turnp. Co. v. Parks*, 50 Ohio St. 581, 28 L.R.A. 773, 85 N. E. 304.

2. In Criminal Prosecutions and Proceedings.

Applicability to State of Provisions of Federal Constitution, see Constitutional Law, 80.

Equal Privileges as to, see Constitutional Law, 386.

Validity of Conviction upon Trial without Jury as Question on Habeas Corpus, see Habeas Corpus, 170, 171.

Where Crime is Committed on American Vessel, see International Law, 18.
Summary Proceeding for Breach of Ordinance, see Summary Proceedings.
See also *supra*, 12, 14, 15; Criminal Law, 112.

41. A person accused of crime committed in a territory of the United States is, by the Constitution of the United States, entitled to a trial by an impartial jury. *Reynolds v. United States*, 98 U. S. 145, 25: 244
Cited in Callan v. Wilson, 127 U. S. 549, 32 L. ed. 226, 8 Sup. Ct. Rep. 1301—*American Pub. Co. v. Fisher*, 168 U. S. 466, 41 L. ed. 1081, 17 Sup. Ct. Rep. 618—*Thompson v. Utah*, 170 U. S. 847, 42 L. ed. 1065, 18 Sup. Ct. Rep. 620—*Downes v. Bidwell*, 182 U. S. 269, 45 L. ed. 1099, 21 Sup. Ct. Rep. 770—*Queenan v. Territory*, 11 Okla. 286, 61 L. R.A. 326, 71 Pac. 218.

42. The right of trial by jury is preserved to everyone accused of crime who is not attached to the Army or Navy, or militia in actual service. *Re Milligan*, 4 Wall. 2, 18: 281

43. No constitutional right is infringed by the denial of a jury trial in minor and petty offenses against local police regulations. *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. Rep. 1301, 32: 223
Cited in Natal v. Louisiana, 139 U. S. 624, 35 L. ed. 289, 11 Sup. Ct. Rep. 636—*Lawton v. Steele*, 152 U. S. 142, 38 L. ed. 390, 14 Sup. Ct. Rep. 499—*Taylor v. Reynolds*, 92 Cal. 575, 28 Pac. 688—*McInerney v. Denver*, 17 Colo. 309, 29 Pac. 516—*United States v. Green*, 8 Mackey, 238—*United States v. Jackson*, 9 Mackey, 427—*United States v. Herzog*, 9 Mackey, 431—*Re Robinson*, 9 Mackey, 571—*Knee v. Baltimore City Pass. R. Co.* 87 Md. 623, 42 L.R.A. 867, 40 Atl. 890—*Delaney v. Police Court*, 167 Mo. 678, 67 S. W. 589—*People ex rel. Eckerson v. Haverstraw*, 80 Hun, 389, 30 N. Y. Supp. 325—*Ex parte Keeler*, 45 S. C. 545, 31 L.R.A. 630, 55 Am. St. Rep. 785, 23 S. E. 865—*Ex parte Marx*, 86 Va. 49, 9 S. E. 475—*Miller v. Com.* 88 Va. 622, 15 L.R.A. 443, 14 S. E. 161—*Brown v. Epps*, 91 Va. 734, 27 L.R.A. 678, 21 S. E. 119—*Ogden v. Madison*, 111 Wis. 430, 55 L.R.A. 512, 87 N. W. 568.

44. One charged with the crime of conspiracy in the District of Columbia is entitled to a trial by jury. *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. Rep. 1301, 32: 223
Cited in Clune v. United States, 159 U. S. 595, 40 L. ed. 271, 16 Sup. Ct. Rep. 125—*Arthur v. Oakes*, 25 L.R.A. 429, 4 Inters. Com. Rep. 760, 11 C. C. A. 221, 24 U. S. App. 239, 63 Fed. 322—*Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 699—*Beck v. Railway Teamsters' Protective Union*, 118 Mich. 516, 42 L.R.A. 415, 74 Am. St. Rep. 421, 77 N. W. 13—*State v. Gerry*, 68 N. H. 508, 38 L.R.A. 234, 38 Atl. 272—*Matthews v. Shankland*, 25 Misc. 611, 56 N. Y. Supp. 123—*Longshore Printing Co. v. Howell*, 26 Or. 547, 28 L.R.A. 474, 46 Am. St. Rep. 640, 38 Pac. 547.

45. The guaranty of an impartial jury to one accused of crime, except in petty offenses which may at common law be proceeded against summarily, secures to him the right to a jury trial the first time and

in whatever court he is put on trial. *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. Rep. 1301, 32: 223
Cited in Capital Traction Co. v. Hof, 174 U. S. 18, 43 L. ed. 879, 19 Sup. Ct. Rep. 580—*McInerney v. Denver*, 17 Colo. 309, 29 Pac. 516—*United States ex rel. Brightwood R. Co. v. O'Neal*, 10 App. D. C. 242—*Danner v. State*, 89 Md. 228, 42 Atl. 965—*State ex rel. Rhodes v. Saunders*, 66 N. H. 75, 78 L.R.A. 651, 25 Atl. 588—*State v. Gerry*, 68 N. H. 508, 38 L.R.A. 234, 38 Atl. 272—*Miller v. Com.* 88 Va. 622, 15 L.R.A. 443, 14 S. E. 163.

46. A trial by jury in an appellate court, after conviction and sentence in the court of original jurisdiction without a jury, does not satisfy the Constitution. *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. Rep. 1301, 32: 223

c. Loss or Waiver of Right.

Trial by Court without Waiver, see *supra*, 4.

Stipulation Waiving Jury as Part of Record, see Appeal and Error, V. q.
Conclusiveness on Appeal of Finding in Case of Waiver, see Appeal and Error, VIII. 1, 3, d.

Federal Question as to, see Appeal and Error, 2163.

Presumption as to, see Appeal and Error, 4202.

By Failing to Object During Trial, see Appeal and Error, 4638, 4639.

In Proceeding to Assess Damages, see Damages, 362.

Presumption against Waiver, see Evidence, 795.

Waiver or Nonwaiver as Affecting Right to Retain Suit to Recover Possession of Homestead Claim, see Injunction, 42.

Collateral Attack on Judgment for Failure to Waive Jury, see Judgment, 407.

47. The trial of issues of fact in civil cases by the courts of the United States, without the intervention of a jury, can be had only when the parties waive their right to a jury by a stipulation in writing. *Baylis v. Travelers' Ins. Co.* 113 U. S. 316, 5 Sup. Ct. Rep. 494, 28: 989

48. Trial by jury is a fundamental guaranty of the rights and liberties of the people; consequently, every reasonable presumption should be indulged against its waiver. *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. Rep. 307, 27: 169

Cited in Madison County v. Warren, 106 U. S. 623, 27 L. ed. 811, 2 Sup. Ct. Rep. 86—*Baylis v. Travellers Ins. Co.* 113 U. S. 321, 28 L. ed. 991, 5 Sup. Ct. Rep. 494—*Chessman v. Hale*, 31 Mont. 591, 68 L.R.A. 416, 79 Pac. 254—*Gansberg v. Sagemohl*, 67 App. Div. 558, 73 N. Y. Supp. 984.

49. Without a waiver of the right of trial by jury, by consent of parties, a court of the United States errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment.

thereon. *Baylis v. Travelers' Ins. Co.* 113 U. S. 316, 5 Sup. Ct. Rep. 494, 28: 989
Noted in Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 515, 33 L. ed. 487, 10 Sup. Ct. Rep. 177—*Sulzer v. Watson*, 89 Fed. 415
 —*American Freehold Land & Mortg. Co. v. Thomas*, 12 L.R.A. 689, 47 Fed. 559.

50. Without a written agreement to waive a jury, and in the absence of the defendant's counsel, the court cannot try the case without a jury. *Morgan v. Gay*, 19 Wall. 81, 22: 100
Noted in Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 515, 33 L. ed. 487, 10 Sup. Ct. Rep. 177.

51. A court does not err in not submitting a case to a jury, where the issues to be tried are issues of law, or where the parties waive a jury trial. *Montgomery v. Samory*, 99 U. S. 482, 25: 375

52. Validity of a judgment rendered by the court after waiver of trial by jury, recognized. *Parsons v. Armor*, 3 Pet. 413, 7: 724
Cited in Kearney v. Case, 12 Wall. 281, 20 L. ed. 396.

Editorial note.

[Validity of waiver of jury trial in criminal action. 11 L.R.A.(N.S.) 1136.]

Right of parties to waive.

Propriety of Habeas Corpus to Try Question of Power to Waive, see Habeas Corpus, 171.

See also *infra*, 67, 87.

53. The right to a trial by jury may be waived. *Hiriart v. Ballon*, 9 Pet. 156, 9: 85
Noted in Kearney v. Case, 12 Wall. 281, 20 L. ed. 396.

54. The right to a jury trial can be waived by express agreement in open court and by implied consent. *Dunlop v. Zunts* (*Moncure v. Zunts*) 11 Wall. 416, 20: 181
Kearney v. Case, 12 Wall. 275, 20: 395

55. The constitutional guaranty of the right to trial by jury does not prevent a party from voluntarily waiving the same. *Bank of Columbia v. Okely*, 4 Wheat. 235, 4: 559
Explained in Ogden v. Saunders, 12 Wheat. 342, 6 L. ed. 650.

Cited in Belt v. United States, 4 App. D. C. 31—*Brewster v. People*, 183 Ill. 151, 55 N. E. 640—*Mille Lacs County v. Morrison*, 22 Min. 181—*New York L. Ins. Co. v. Best*, 23 Ohio St. 112—*Morse v. Home Ins. Co.* 30 Wis. 502, 11 Am. Rep. 580.

56. In a proceeding by information for forfeiture of goods under the internal revenue act of 1866, parties may, by stipulation, waive a jury, and submit the case to the court. *United States v. Henderson* (*Henderson's Distilled Spirits*) 14 Wall. 44, 20: 815

Cited in Rogers v. United States, 141 U. S. 554, 35 L. ed. 856, 12 Sup. Ct. Rep. 91—*Louisiana v. United States*, 22 Ct. Cl. 88—*Lyons v. Lyons Nat. Bank*, 19 Blatchf. 283, 8 Fed. 372.

57. Issues of fact in civil causes pending in the circuit courts may, if the parties so agree, be tried and determined by the court without the intervention of a jury. *Richmond v. Smith*, use of Clendenin, 15 Wall. 429, 21: 200

58. Persons prosecuted by information in a Federal district court, under the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 11, imposing a penalty of \$50 for the knowing purchase or receipt for sale of oleomargarine which has not been branded or stamped according to law, may waive the jury to which they are entitled by U. S. Const. Amend. VI., since the mandate of art. 3, § 2, cl. 3, that "the trial of all crimes, except in cases of impeachment, shall be by jury," does not include such petty offenses, and there is no congressional legislation or rule of public policy requiring a jury in such cases. *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. Rep. 826, 49: 99
Cited in Cliff v. United States, 195 U. S. 160, 49 L. ed. 140, 25 Sup. Ct. Rep. 1.

What constitutes waiver.

59. A party may waive his right to trial by jury, by giving a note payable at a bank the charter of which authorizes collection by summary process. *Bank of Columbia v. Okely*, 4 Wheat. 235, 4: 559
Cited in Kearney v. Case, 12 Wall. 281, 20 L. ed. 396—*United States v. Rathbone*, 2 Paine, 579, Fed. Cas. No. 16,121—*Mehlin v. Ice*, 5 C. C. A. 410, 12 U. S. App. 305, 56 Fed. 20—*Williams v. State*, 65 Ark. 174, 46 S. W. 186—*Russell v. Elliott*, 2 Cal. 247—*Re Lowrie*, 8 Colo. 513, 54 Am. Rep. 558, 9 Pac. 489—*Lewis v. Garrett*, 5 How. (Miss.) 456—*Hopton v. Swan*, 50 Miss. 550—*State ex rel. Caldwell v. Wilson*, 121 N. C. 456, 28 S. E. 554—*Lewis v. American Sav. & L. Assn.* 98 Wis. 227, 39 L.R.A. 568, 78 N. W. 793.

60. Where a party is present by counsel, and goes to trial before the court without objection or exception he has voluntarily waived his right to a jury; but if he is not present by himself or counsel, it is error for the court to try the case without a jury. *Kearney v. Case*, 12 Wall. 275, 20: 395
Cited in Morgan v. Gay, 19 Wall. 83, 22 L. ed. 100—*Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 614, 23 L. ed. 400—*Ryan v. Carter*, 93 U. S. 81, 23 L. ed. 808—*Phillips v. Moore*, 100 U. S. 213, 25 L. ed. 604—*Boogher v. New York L. Ins. Co.* 103 U. S. 95, 26 L. ed. 311—*Madison County v. Warren*, 106 U. S. 623, 27 L. ed. 311, 2 Sup. Ct. Rep. 86—*United States v. Harris*, 106 U. S. 635, 27 L. ed. 292, 1 Sup. Ct. Rep. 601—*Bond v. Dustin*, 112 U. S. 607, 28 L. ed. 836, 5 Sup. Ct. Rep. 296—*Perego v. Dodge*, 163 U. S. 166, 41 L. ed. 118, 16 Sup. Ct. Rep. 971—*Thistle v. Hamiltion*, 4 Dill. 164, Fed. Cas. No. 13,884—*Sulzer v. Watson*, 39 Fed. 415—*Duncan v. Atchison, T. & S. F. R. Co.* 19 C. C. A. 204, 44 U. S. App. 427, 72 Fed. 811—*Belt v. United States*, 4 App. D. C. 31—*Perego v. Dodge*, 9 Utah, 7, 38 Pac. 221.

61. A stipulation in writing that a cause be tried by the court is a waiver of a jury. *Bamberger v. Terry*, 103 U. S. 40, 26: 317
Cited in Brown v. Fehman, 55 S. C. 564, 33 S. E. 732.

62. A stipulation to submit a cause to the court for trial on agreed facts is a sufficient waiver of a jury to meet the requirements of Rev. Stat. § 649, U. S. Comp. Stat. 1901, p. 525, requiring a "stipulation in writing, waiving a jury." *Wayne County v. Kennicott*, 103 U. S. 554, 26: 488
Cited in Citizens' Bank v. Farwell, 6 C. C. A. 26, 12 U. S. App. 409, 58 Fed. 572—*Anglo-American Land, Mortg. & Agency Co. v. Lombard*, 68 C. C. A. 108, 132 Fed. 740.

Statutory provisions as to.

63. The provisions for the waiver of a jury, in Utah Code, § 3378, does not preclude a waiver of the right in another mode. *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. Rep. 971, 41: 113

d. Denial or Infringement of Rights.

1. In Civil Actions and Proceedings.

When Right to Trial Exists, see *supra*, I. b, 1.

Federal Question as to, see *Appeal and Error*, 1619.

Decision on Former Testimony without Reading to Jury, see *Appeal and Error*, 5061.

Outlawry as Infringement of Right, see *Attainder and Outlawry*, 1.

Equal Protection as to, see *Constitutional Law*, 376.

Appointment of Commissioners in Ejectment, see *Courts*, 1275.

Granting Involuntary Nonsuit Not Infringement of Right to Jury Trial, see *Trial*, 472.

64. The 5th section of the act of Congress of March 3, 1863, providing for the removal of a judgment in a state court, in a cause tried by a jury, to the circuit court of the United States, for a retrial on the facts and law, is unconstitutional and void. *Justices of Supreme Court v. United States (Supreme Justices v. Murray)* 9 Wall. 274, 19: 658

Cited in Stevenson v. Williams, 19 Wall. 576, 22 L. ed. 163—*Tennessee v. Davis*, 100 U. S. 295, 25 L. ed. 661—*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 243, 41 L. ed. 987, 17 Sup. Ct. Rep. 581—*Capital Traction Co. v. Hof*, 174 U. S. 9, 43 L. ed. 876, 19 Sup. Ct. Rep. 580—*Re Blake*, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 42—*Ex parte Reynolds*, 3 Hughes, 568, Fed. Cas. No. 11,720—*Waggener v. Cheek*, 2 Dill. 564, Fed. Cas. No. 17,035—*Sharp v. Gutscher*, 74 Ind. 363—*Bryant v. Rich*, 106 Mass. 193, 8 Am. Rep. 311—*Galpin v. Critchlow*, 112 Mass. 342, 17 Am. Rep. 176—*Stone v. Sargent*, 129 Mass. 506—*Barlow v. Daniels*, 25 W. Va. 516.

85. The constitutional provision that no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of common law is not violated by allowing an appeal for trial by a common-law jury from a judgment on the verdict of a jury of twelve men in a court of a justice of the peace, as that is not a common-law jury. *Capital Trac-*

tion Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. Rep. 580, 43: 873
Cited in Maxwell v. Dow, 176 U. S. 598, 44 L. ed. 603, 20 Sup. Ct. Rep. 494—*Richmond v. Henderson*, 48 W. Va. 395, 37 S. E. 653.

66. So much of the act of March 3, 1863, as invests the court of claims with power to render judgment in favor of the United States against a claimant, is not in violation of the 7th Amendment of the national Constitution, which provides for the right of trial by jury. *McElrath v. United States*, 102 U. S. 426, 26: 189

67. A court cannot, in an action at law, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a waiver, by the defendants, of a verdict by the jury. *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. Rep. 307, 27: 169

68. The remission by plaintiff of a part of the verdict, followed by a judgment for the remaining sum, as a condition of the denial of a new trial, does not deprive the defendant of his constitutional right to have the question of damages tried by a jury, or constitute a re-examination of the facts tried by the jury, in violation of U. S. Const. 7th Amend. *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. Rep. 458, 32: 854
Cited in Kennon v. Gilmer, 131 U. S. 29, 33 L. ed. 113, 9 Sup. Ct. Rep. 696—*Cantoni v. Foster*, 12 Misc. 344, 33 N. Y. Supp. 565—*Holmes v. Jones*, 121 N. Y. 467, 24 N. E. 701.

69. A statute authorizing special findings of fact by the jury, and providing for judgment upon them if they are inconsistent with the general verdict, does not violate the right of trial by jury. *Walker v. New Mexico & S. P. R. Co.* 165 U. S. 593, 17 Sup. Ct. Rep. 421, 41: 837
Cited in American Pub. Co. v. Fisher, 166 U. S. 467, 41 L. ed. 1081, 17 Sup. Ct. Rep. 618—*Providence Gold Min. Co. v. Burke*, 6 Ariz. 329, 57 Pac. 641.

70. The constitutional right of trial by jury is not denied by rule 73 of the supreme court of the District of Columbia, authorizing judgment for plaintiff for want of a sufficient affidavit of defense in actions *ex contractu* in which plaintiff has filed a supporting affidavit. *Fidelity & D. Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. Rep. 120, 47: 194

71. The ascertainment of the damages in the special proceeding provided by Porto Rico Code Civ. Proc. arts. 1409-1415, where an attachment has wrongfully been issued, does not encroach upon the right to a jury trial, secured by the Federal Constitution,—conceding that such guaranty is applicable and in force in Porto Rico. *Fernandez y Perez v. Perez y Fernandez (Perez v. Fernandez)* 202 U. S. 80, 26 Sup. Ct. Rep. 561, 50: 942

72. The general provisions for a jury trial as to issues of fact in the Federal circuit

courts, contained in U. S. Rev. Stat. § 648, U. S. Comp. Stat. 1901, p. 525, do not, in view of the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), § 8, continuing local laws in force in Porto Rico, prevent the district court for the district of Porto Rico, when exercising, under § 34 of that act, the jurisdiction of a circuit court, from enforcing the express provisions of Porto Rico Code Civ. Proc. arts. 1409-1415, for the recovery and assessment of damages for wrongful attachment. *Fernandez y Perez v. Perez y Fernandez* (*Perez v. Fernandez*) 202 U. S. 80, 26 Sup. Ct. Rep. 561, 50: 942

Editorial notes.

[Jury trial on appeal as satisfying the constitutional right to trial by jury. 15 L.R.A. 441.]

Compulsory reference as denial of right to jury. 25 L.R.A. 67.]

Actions in equity.

Right to Jury Trial, see *supra*, I. b, 1, b.

As Denial of Due Process, see Constitutional Law, 660, 661.

73. The determination by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of trust property in its possession, does not impair the constitutional right of trial by jury. *Barton v. Barbour*, 104 U. S. 126, 25: 672

Cited in Joy v. St. Louis, 138 U. S. 47, 34 L. ed. 858, 11 Sup. Ct. Rep. 248—*Kohn v. McNulta*, 147 U. S. 240, 37 L. ed. 152, 13 Sup. Ct. Rep. 298—*Re Tyler*, 149 U. S. 182, 37 L. ed. 695, 13 Sup. Ct. Rep. 785—*Evans v. Dillingham*, 48 Fed. 179—*Farmers' Loan & T. Co. v. Green Bay, W. & St. P. R. Co.* 45 Fed. 665—*Werner v. Murphy*, 60 Fed. 772—*Flippin v. Kimball*, 31 C. C. A. 284, 50 U. S. App. 1, 87 Fed. 259—*Re Christensen*, 3 N. B. N. Rep. 140, 101 Fed. 244—*Home Ins. Co. v. Virginia-Carolina Chemical Co.* 109 Fed. 691—*Morris v. Franklin Coal Co.* 125 Fed. 999—*Pacific R. Co. v. Wade*, 91 Cal. 456, 13 L.R.A. 757, 25 Am. St. Rep. 201, 27 Pac. 768—*Lroop v. Ridenour*, 9 App. D. C. 108—*Fedarwisch v. Alsop*, 18 App. D. C. 324—*State v. Sunapee Dam Co.* 72 N. H. 126, 55 Atl. 899—*Vanderbilt v. Central R. Co.* 43 N. J. Eq. 682, 12 Atl. 188—*Early Times Distillery Co. v. Zeiger*, 9 N. M. 40, 49 Pac. 723—*Raymond v. Flavel*, 27 Or. 231, 40 Pac. 158—*La Crosse Nat. Bank v. Wilson*, 74 Wis. 399, 43 N. W. 153.

74. In the Federal courts the right of trial by jury secured by the Constitution cannot be impaired by blending with a claim cognizable at law a demand for equitable relief. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. Rep. 712, 35: 358
Distinguished in McBride v. State Revenue Agent, 70 Miss. 721, 12 So. 699.

Over in North British & M. Ins. Co. v. Lathrop, 63 Fed. 511—*United States v. Debs*, 5 Intern. Com. Rep. 210, 64 Fed. 753—*Grether v. Wright*, 23 C. C. A. 503, 48 U. S. App. 770, 75 Fed. 747—*D. A. Tompkins Co. v. Catawba Mills*, 82 Fed. 733—*Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 479, 101 Fed. 515—*Southern Pine Co. v. Hall*, 44 C. C. A. 367, 105 Fed. 88—*McGuire v. Pensacola City Co.* 44 C. C. A. 672, 105 Fed. 679—*Ameri-*

can Waterworks & Guarantee Co. v. Home Water Co. 115 Fed. 181—*United States Min. Co. v. Lawson*, 115 Fed. 1009—*Lillenthal v. McCormick*, 54 C. C. A. 484, 117 Fed. 98—*Safford v. Ensign Mfg. Co.* 56 C. C. A. 632, 120 Fed. 482—*Thiel Detective Service Co. v. McClure*, 130 Fed. 57—*United States v. Bitter Root Development Co.* 66 C. C. A. 658, 133 Fed. 280—*Wiggins v. Williams*, 36 Fla. 657, 30 L.R.A. 760, 18 So. 859—*Hughes v. Hannah*, 39 Fla. 374, 22 So. 613—*Rockland v. Rockland Water Co.* 86 Me. 58, 29 Atl. 985—*Early Times Distillery Co. v. Zeiger*, 9 N. M. 41, 49 Pac. 723—*Zell Guano Co. v. Heatherly*, 38 W. Va. 416, 18 S. E. 611.

75. A state statute giving a simple contract creditor a right to maintain a bill in equity to set aside a fraudulent conveyance by his debtor, wherein the validity and extent of his claim may be adjudged, cannot be enforced in the courts of the United States, because in conflict with the constitutional provision by which the right to a trial by jury is secured. *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. Rep. 977, 37: 804
Cited in Smyth v. Ames, 189 U. S. 517, 42 L. ed. 839, 18 Sup. Ct. Rep. 418—*Grether v. Wright*, 23 C. C. A. 504, 48 U. S. App. 770, 75 Fed. 748—*Southern Pine Co. v. Hall*, 44 C. C. A. 367, 105 Fed. 88—*McGuire v. Pensacola City Co.* 44 C. C. A. 672, 105 Fed. 679—*Jacobs v. Mexican Sugar Co.* 130 Fed. 592—*Courtney v. Pradt*, 135 Fed. 821—*Hughes v. Hannah*, 39 Fla. 374, 22 So. 613—*Early Times Distillery Co. v. Zeiger*, 9 N. M. 41, 49 Pac. 723—*Flournoy v. Bullock* (*Flournoy v. Champion*) 11 N. M. 104, 55 L.R.A. 750, 66 Pac. 547—*Dittmar v. Gould*, 60 App. Div. 112, 69 N. Y. Supp. 708—*Montgomery v. Boyd*, 78 App. Div. 73, 79 N. Y. Supp. 879—*Cantoni v. Forster*, 12 Misc. 344, 33 N. Y. Supp. 505—*Zell Guano Co. v. Heatherly*, 38 W. Va. 416, 18 S. E. 611.

Aliens on jury.

As Denial of Due Process, see Constitutional Law, 662.

76. The fact that an alien sat upon a jury, when no exception to him was taken until after he was sworn, where statutes allow exceptions on account of citizenship or other disability only before a juror is sworn or affirmed, does not invade the constitutional and common-law right of trial by jury. *Kohl v. Lehlback*, 160 U. S. 293, 16 Sup. Ct. Rep. 304, 40: 432

Cited in McClaughry v. Deming, 186 U. S. 66, 46 L. ed. 1056, 22 Sup. Ct. Rep. 786—*Raub v. Carpenter*, 187 U. S. 163, 47 L. ed. 121, 23 Sup. Ct. Rep. 72—*Queenan v. Oklahoma*, 190 U. S. 551, 47 L. ed. 1178, 23 Sup. Ct. Rep. 762—*Deming v. McClaughry*, 51 C. C. A. 361, 113 Fed. 651—*State v. Coleman*, 17 S. D. 619, 98 N. W. 175—*Bussey v. State*, 85 Md. 118, 36 Atl. 257—*Com. v. Wong Chung*, 186 Mass. 236, 71 N. E. 292—*State v. Durnam*, 78 Minn. 162, 75 N. W. 1127—*Dickerson v. North Jersey Street R. Co.* 68 N. J. L. 46, 52 Atl. 214.

Jurisdiction of justices of peace.

See also *supra*, 65.

77. A trial by a jury of twelve men before a justice of the peace, having been unknown in England or America before the Declaration of Independence, is not a trial

by jury, within the meaning of U. S. Const. 7th Amend. *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. Rep. 580, 43: 873 *Cited in Luce v. Garrett*, 4 Ind. Terr. 56, 64 S. W. 613.

78. A common-law trial by jury in a court of record upon appeal from a judgment of a justice of the peace in a civil action after giving bond with surety to prosecute the appeal and to abide the judgment of the appellate court, is sufficient to satisfy the constitutional right of trial by jury. *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. Rep. 580, 43: 873 *Cited in McMaster v. Peoples Bank*, 18 Okla. 330, 73 Pac. 946—*Ogden v. Madison*, 111 Wis. 430, 55 L.R.A. 512, 87 N. W. 568.

79. The right of trial by jury is not unduly obstructed by enlarging the civil jurisdiction of justices of the peace to \$300, and requiring every appellant to give security to pay and satisfy the judgment of the appellate court in order to obtain a trial by a common-law jury on appeal. *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. Rep. 580, 43: 873

Summary process.

See also *supra*, 45, 59.

80. A bank's charter right to collect, by summary process, notes indorsed to it and made payable at the bank, does not violate the right to trial by jury, guaranteed by the Federal and Maryland Constitutions. *Bank of Columbia v. Okely*, 4, Wheat. 235, 4: 559

Distinguished in Home Ins. Co. v. Morse, 20 Wall. 457, 22 L. ed. 370.

Cited in Capital Traction Co. v. Hof, 174 U. S. 20, 43 L. ed. 880, 19 Sup. Ct. Rep. 580 —*Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 20, 1 Fed. 658—*Hays v. Bank of the State*, Mart. & Y. 182—*Pratt v. Donovan*, 10 Wis. 383.

81. The constitutional right to trial by jury does not prevent a summary proceeding to disbar an attorney for an indictable offense. *Re Wall*, 107 U. S. 265, 2 Sup. Ct. Rep. 569, 27: 552

Number of jurors sitting or concurring.

Federal Question as to, Giving Appellate Jurisdiction to Supreme Court, see *Appeal and Error*, 1027.

Prejudicial Error in Instruction as to, see *Appeal and Error*, 5117.

See also *supra*, 6; *infra*, 86-88.

82. Unanimity being one of the peculiar and essential features of trial by jury at the common law, a constitutional guaranty of the right to a jury trial is violated by a statute attempting to authorize a verdict by the concurrence of nine or more members of the jury. *American Pub. Co. v. Fisher*, 166 U. S. 464, 17 Sup. Ct. Rep. 618, 41: 1079 *Cited in Salt Lake City v. Tucker*, 166 U. S. 708, 41 L. ed. 1173, 17 Sup. Ct. Rep. 717 —*Holloway v. Dunham*, 170 U. S. 618, 42 L. ed. 1166, 18 Sup. Ct. Rep. 784—*Maxwell v. Dow*, 176 U. S. 586, 44 L. ed. 599, 20

Sup. Ct. Rep. 448—*Rhyne v. Lipscombe*, 122 N. C. 654, 29 S. E. 57.

83. A provision for a verdict in a civil case on concurrence of nine or more members of the jury, made by Utah act March 10, 1892, is invalid, either by force of the 7th Amendment of the Constitution of the United States, or, if that does not apply in and of itself, by the act of Congress establishing a territorial government for Utah (9 Stat. at L. 458, § 17), extending the Constitution and laws of the United States over the territory, and by 18 Stat. at L. p. 27, chap. 80, confirming various territorial statutes regulating procedure, with a proviso that no party shall be deprived of the right of trial by jury in cases cognizable at common law. *American Pub. Co. v. Fisher*, 166 U. S. 464, 17 Sup. Ct. Rep. 618, 41: 1079 *Cited in Bauman v. Ross*, 107 U. S. 593, 42 L. ed. 289, 17 Sup. Ct. Rep. 960—*Thompson v. Utah*, 170 U. S. 346, 42 L. ed. 1065, 18 Sup. Ct. Rep. 620—*Guthrie Nat. Bank v. Guthrie*, 173 U. S. 538, 43 L. ed. 800, 19 Sup. Ct. Rep. 513—*Black v. Jackson*, 177 U. S. 363, 44 L. ed. 807, 20 Sup. Ct. Rep. 648—*Downes v. Bidwell*, 182 U. S. 270, 45 L. ed. 1100, 21 Sup. Ct. Rep. 770—*Jackson v. United States*, 42 C. C. A. 457, 102 Fed. 477—*Croco v. Oregon Short Line R. Co.* 18 Utah, 321, 44 L.R.A. 288, 54 Pac. 985.

84. Trial by jury under the Constitution means a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence. *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. Rep. 580, 43: 873 *Cited in Schick v. United States*, 195 U. S. 79, 49 L. ed. 106, 24 Sup. Ct. Rep. 826—*Hodges v. Kimball*, 44 C. C. A. 197, 104 Fed. 750—*Dennet v. Cromer*, 52 C. C. A. 404, 114 Fed. 624—*Archer v. Chicot County*, 128 Fed. 128—*Howe v. Raymond*, 74 Conn. 72, 49 Atl. 854—*Horne v. Rogers*, 110 Ga. 371, 49 L.R.A. 180, 35 S. E. 715—*Dennet v. McCoy*, 4 Ind. Terr. 238, 69 S. W. 858 —*State v. Means*, 95 Me. 369, 85 Am. St. Rep. 421, 50 Atl. 30—*Re Brenner*, 35 Misc. 217, 70 N. Y. Supp. 744—*Gunn v. Union R. Co.* (R. I.) 2 L.R.A.(N.S.) 366, 62 Atl. 118—*Lovings v. Norfolk & W. R. Co.* 47 W. Va. 586, 35 S. E. 962.

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[Constitutionality of verdict by less than all the jurors. 24 L.R.A. 272.

Number and agreement of jurors necessary to valid verdict. 43 L.R.A. 33.]

2. In Criminal Cases.

85. The proceeding in New Jersey to ascertain by examination of witnesses by the court the degree of the crime, where, in an indictment for murder, the defendant enters a plea of guilty, is constitutional and valid. *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. Rep. 105, 36: 986

Number of jurors.

Due Process as to, see Constitutional Law, 808.

Ex Post Facto Law as to, see Constitutional Law, 985.

86. The jury referred to in the Federal Constitution and in the 6th Amendment thereto is a jury constituted as it was at common law, of twelve persons, neither more nor less. *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. Rep. 620, 42: 1061 *Distinguished in State v. Cook*, 52 La. Ann. 115, 28 So. 751.

Cited in Maxwell v. Dow, 176 U. S. 586, 44 L. ed. 599, 20 Sup. Ct. Rep. 448—*Downes v. Bidwell*, 182 U. S. 293, 45 L. ed. 1108, 21 Sup. Ct. Rep. 770—*West v. Gammon*, 39 C. C. A. 272, 98 Fed. 427—*Brown v. State*, 62 N. J. L. 678, 42 Atl. 811—*Staté v. Ellis*, 22 Wash. 132, 60 Pac. 136—*Lovings v. Norfolk & W. R. Co.* 47 W. Va. 588, 35 S. E. 962—*Richmond v. Henderson*, 48 W. Va. 398, 37 S. E. 658.

87. It is not in the power of one accused of felony, by consent expressly given or by silence, to authorize a jury of only eight persons, instead of the constitutional jury of twelve. *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. Rep. 620, 42: 1061 *Cited in State v. Simons*, 61 Kan. 753, 60 Pac. 1052—*State v. Thompson*, 104 La. 189, 28 So. 882.

88. Alaska was so incorporated into the United States by the treaty under which it was acquired, and by such subsequent congressional legislation as the act of July 20, 1868, chap. 186, § 107 (15 Stat. at L. 167, U. S. Comp. Stat. 1901, p. 2277), concerning internal revenue taxation, and the act of July 27, 1868, chap. 273 (15 Stat. at L. 240), extending the laws of the United States relating to customs, commerce, and navigation over Alaska and establishing a collection district therein, as to render repugnant to U. S. Const. 6th Amend. the provision of the act of June 6, 1900, § 171 (31 Stat. at L. 358, chap. 786), that in trials for misdemeanors in Alaska six jurors shall constitute a legal jury. *Rasmussen v. United States*, 197 U. S. 516, 25 Sup. Ct. Rep. 514, 49: 862 *Cited in Gurvich v. United States*, 198 U. S. 581, 49 L. ed. 1172, 25 Sup. Ct. Rep. 803—*Guis v. United States*, 73 C. C. A. 273, 141 Fed. 957—*Carlson v. Sullivan*, 77 C. C. A. 35, 146 Fed. 479.

II. Impaneling; Selection; Competency.**a. In General.**

Effect of Impaneling, see Admiralty, 448.

Federal Question as to, see Appeal and Error, 2214, 2215.

Necessity of Exception to Refusal to Quash Venire, see Appeal and Error, 3671a.

First Raising Objection as to Mode of Impaneling on Appeal, see Appeal and Error, 4640.

Prejudicial Error in, see Appeal and Error, 5149a-5152.

Per Diem of Clerk for Attendance on Drawing of, see Clerks, 19.

Fees of Clerk for Administering Oaths on Voir Dire, see Clerks, 11.

Fee of Clerk for Entering Order Excusing Juror, see Clerks, 37.

Clerk's Fee for Issuing Subpoenas for, see Clerks, 75.

Exclusion of Colored Person from, see Civil Rights, 21-33, 38, 39.

Equal Protection and Privileges as to, see Constitutional Law, 387-390.

Due Process in Selection, see Constitutional Law, 788.

Mode Applicable to Territories Generally, see Courts, 384, 386, 388.

Mode of Federal Procedure in Impaneling Jury, see Courts, 1349, 1350.

Exclusion of Persons from Panel as Ground for Review of Conviction of Habeas Corpus, see Habeas Corpus, 167, 168.

Discrimination against Negroes in Selection of, see Indictment, etc., 186.

Remedy for Discrimination in Selection, see Habeas Corpus, 52.

Removal of Prosecution to Federal Court for Exclusion of Negroes, see Removal of Causes, 187-193, 322.

Confirmation of Territorial Statute as to Manner of Drawing Jurors, see Territories, 41.

Selecting Juror to Replace One Taken Ill, see Trial, 27.

Raising Objection to Selection in Advance of Trial, see Trial, 29.

89 90. [A trial *per medietatem lingue* was allowed to a foreigner, in Pennsylvania, in 1783. *Respublica v. Mesca* (Ct. O. & T. Phila.) 1 Dall. 73, 1: 42]

91. The judiciary act of 1789, in regard to the selection of jurors, has no reference to territories, but to the states only. *Clinton v. Englebrecht*, 13 Wall. 434, 20: 659

92. A venire not authorized by law is a nullity. *Clinton v. Englebrecht*, 13 Wall. 434, 20: 659

93. An open venire may be issued and the jury completed, where the names of two hundred jurors provided for by the act of June 23, 1873, § 4, "concerning courts and judicial officers in Utah," have been exhausted. *Clawson v. United States*, 114 U. S. 477, 5 Sup. Ct. Rep. 949, 29: 179 *Cited in Lovejoy v. United States*, 128 U. S. 173, 32 L. ed. 390, 9 Sup. Ct. Rep. 57—*Re Moran*, 203 U. S. 104, 51 L. ed. 108, 27 Sup. Ct. Rep. 25—*Territory v. Harding*, 6 Mont. 330, 12 Pac. 750—*Territory v. Carmody*, 8 N. M. 384, 45 Pac. 881—*State v. Hart*, 19 Utah, 450, 57 Pac. 415—*Carter v. Territory*, 3 Wyo. 195, 18 Pac. 750.

94. After a juror is sworn, no exception can be taken to him on account of his being a resident of another county. *Queen v. Hepburn*, 7 Cranch, 290, 3: 348 *Cited in Turner v. Hahn*, 1 Colo. 28—*People v. Wintermute*, 1 Dak. 79, 46 N. W. 694—

United States v. Angney, 6 Mackey, 89—Costly v. State, 19 Ga. 628—Croy v. State, 82 Ind. 889—Presbury v. Com. 9 Dana, 205—Livingston v. Heerman, 9 Mart. (La.) 701—Tide Water Canal Co. v. Archer, 9 Gill & J. 499 Appx.—Johns v. Hodges, 60 Md. 222, 45 Am. Rep. 722—Page v. Danvers, 7 Met. 328—Com. v. Parker, 2 Pick. 563—Wentworth v. Farmington, 51 N. H. 136—People v. Bodine, 1 Denio, 309—Hull v. Albro, 2 Disney (Ohio) 150—Baird v. Otte, 2 Pa. Dist. R. 449—State v. Stephens, 11 S. C. 320.

95. [A court in Pennsylvania cannot order a jury to be drawn from any particular part of a county, although repeated trials have resulted in a disagreement. *Hartshorne v. Patton* (Pa. Sup. Ct.) 2 Dall. 252, 1: 369]

96. [A panel of jurors by the circuit court is not vitiated by the sheriff's returning a greater number than the state law fixed. *United States v. The Insurgents* (C. Ct.) 2 Dall. 335, 1: 404]

97. U. S. Rev Stat. § 804, U. S. Comp. Stat. 1901, p. 625, as to summoning talesmen, where there is a defect of jurors, is not repealed by the act of June 30, 1879; and when at the trial such defect occurs, the court may call the talesmen from the bystanders. *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. Rep. 1002, 38: 936
Cited in *United States v. Davis*, 103 Fed. 465.

98-9. The act of Congress of June 30, 1879, chap. 52, § 2 (21 Stat. at L. 43) as to drawing of jurors, does not touch the power of the court, wherever the panel of jurors is exhausted, to call in talesmen from the bystanders to supply the deficiency, and does not, either expressly or by implication, repeal U. S. Rev. Stat. § 804, relating to that subject. *Lovejoy v. United States*, 128 U. S. 171, 9 Sup. Ct. Rep. 57, 32: 389

Cited in *St. Clair v. United States*, 154 U. S. 147, 38 L. ed. 941, 14 Sup. Ct. Rep. 1002.

100. The right, under Rev. Stat. § 821, to require the panel of the jurors called to serve for a term to take the oath therein prescribed, to the effect that they have not given aid to the rebellion, or to be discharged from the panel, is limited to the district attorney, and is not a right of individual suitors, in a case about to be tried. *Atwood v. Weems*, 99 U. S. 183, 25: 471

Editorial notes.

Quashing venire of jurors. 39: 727
[Exemption of consul from. 45 L.R.A. 587.]

b. Qualifications; Competency.

Federal Question as to, see Appeal and Error, 2188.

Review of Discretion as to, see Appeal and Error, 4473, 4474.

Waiver of Objection as to, see Appeal and Error, 4640a, 4675.

Rights of Colored Persons to Serve as Jurors. see Citizens. 10. 11. 14, 21-29, 33, 38, 39.

Alienage, see Constitutional Law, 390.

Ex Post Facto Law as to, see Constitutional Law, 984.

Qualification of Grand Jurors, see Grand Jury, 7, 8, 10.

New Trial for Disqualification, see New Trial, 17.

Evidence of Jurors as to Bias on Motion for New Trial, see New Trial, 30.

Raising Question of Disqualification by Plea in Abatement, see Pleading, 653.

Waiver of Incompetency, see Trial, 66.

See also *supra*, 94.

101. It rests with each state to prescribe such qualifications as it deems proper for juryment, taking care only that no discrimination in respect to such service be made against any class of citizens solely because of their race. *Shibuya Jugiro v. Brush* (Re *Shibuya Jugiro*) 140 U. S. 291, 11 Sup. Ct. Rep. 770, 35: 510

102. Where a juror, on being examined, said that, the evidence being equal, he would find for the plaintiff, on account of a bias, —although it might not be positively improper,—the court exercised a sound discretion in not permitting him to be sworn as a juror. *Queen v. Hepburn*. 7 Cranch. 290, 3: 348

Cited in *Connors v. United States*, 158 U. S. 413, 39 L. ed. 1035, 15 Sup. Ct. Rep. 951—*Milan v. State*, 24 Ark. 354—*Smith v. Eames*, 4 Ill. 77, 36 Am. Dec. 515—*Stoots v. State*, 108 Ind. 417, 9 N. E. 380—*Choteau v. Plerre*, 9 Mo. 7—*Doherty v. Lord*, 8 Misc. 229, 28 N. Y. Supp. 720.

103. A juror who has conscientious scruples which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror, and may be challenged for cause. *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. Rep. 617, 36: 429
Cited in *Horton v. United States*, 15 App. D. C. 318.

104. Prejudice against the business of a saloon-keeper who is on trial for murder does not make one incompetent to act as a juror, when he does not know or have any prejudice against the defendant personally. *Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. Rep. 62, 40: 237

Cited in *Dolan v. United States*, 54 C. C. A. 38, 116 Fed. 582—*State v. Haworth*. 24 Utah, 409, 68 Pac. 155.

Editorial notes.

Qualifications of jurors. 20: 659
[Personal knowledge of facts as affecting competency of juror. 63 L.R.A. 807.

Competency of jurors who have served in the same or a similar case. 68 L.R.A. 871.]

Opinions and Impressions.

Affidavits of Jurors as to, on Motion for New Trial, see New Trial, 31.

105. It is good ground for a challenge for principal cause, that a juror has formed an opinion as to the issue to be tried; but it must be founded on some evidence, and be more than a mere impression. *Reynolds v. United States*, 98 U. S. 145, 25: 244

106. That a juror believed he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony, does not necessarily disqualify him. *Reynolds v. United States*, 98 U. S. 145, 25: 244

Cited in Williams v. United States, 35 C. C. A. 371, 93 Fed. 398—*Dolan v. United States*, 54 C. C. A. 38, 116 Fed. 582—*Long v. State*, 86 Ala. 42, 5 So. 443—*Jarvis v. State*, 138 Ala. 36, 34 So. 1025—*Territory v. Davis*, 2 Ariz. 63, 10 Pac. 359—*Haugen v. Chicago, M. & St. P. R. Co.* 3 E. D. 400, 53 N. W. 769—*United States v. Schneider*, 21 D. C. 397—*United States v. Barber*, 21 D. C. 470—*United States v. Langford*, 2 Idaho, 563, 21 Pac. 409—*People v. Mol*, 137 Mich. 706, 68 L.R.A. 889, 100 N. W. 918—*State v. Walton*, 74 Mo. 275—*State v. Culler*, 82 Mo. 635—*State v. Boyle*, 104 N. C. 833, 10 S. E. 1023—*Huntley v. Territory*, 7 Okla. 68, 54 Pac. 314—*Ex parte Spies*, 44 Phila. Leg. Int. 514—*Conatser v. State*, 12 Lea, 448—*People v. Thiede*, 11 Utah, 273, 39 Pac. 837—*Carter v. Territory*, 8 Wyo. 199, 18 Pac. 750.

107. Evidence, or what purports to be evidence, in a criminal case printed in a newspaper, is "a statement in a published journal," within the meaning of the act of Utah declaring that an expression of opinion founded upon statements in published journals shall not disqualify a juror, provided that it appear to the court that he can and will act impartially and fairly. *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. Rep. 614, 30: 708

Cited in Williams v. United States, 35 C. C. A. 372, 93 Fed. 399—*Dolan v. United States*, 54 C. C. A. 38, 116 Fed. 582—*United States v. Barber*, 21 D. C. 470—*Burke v. McDonald*, 3 Idaho, 301, 29 Pac. 98—*Coughlin v. People*, 144 Ill. 193, 19 L.R.A. 76, 33 N. E. 1—*State v. Frelinghuysen*, 43 Minn. 266, 45 N. W. 432—*State v. Sawtelle*, 66 N. H. 537, 32 Atl. 831—*State v. Haworth*, 24 Utah, 409, 68 Pac. 155.

108. Jurors who have formed an opinion based upon newspaper statements, about the truth of which they have expressed no opinion, and who state that they can determine the case upon the proof presented, regardless of such opinion, are competent. *Re Spies (Spies v. Illinois)* 123 U. S. 131, 8 Sup. Ct. Rep. 21, 31: 80

Cited in Thiede v. Utah, 159 U. S. 516, 40 L. ed. 241, 16 Sup. Ct. Rep. 62—*Gallot v. United States*, 81 C. C. A. 48, 58 U. S. App. 243, 87 Fed. 450—*Williams v. United States*, 35 C. C. A. 372, 93 Fed. 399—*United States v. Davis*, 103 Fed. 467—*Hawkins v. United States*, 53 C. C. A. 669, 116 Fed. 575—*Dolan v. United States*, 54 C. C. A. 38, 116 Fed. 582—*Haugen v. Chicago, M. & St. P. R. Co.* 3 E. D. 400, 53 N. W. 769—*Horton v. United States*, 15 App. D. C. 319—*United States v. Barber*, 21 D. C. 471—*Burke v. McDonald*, 3 Idaho, 301, 29 Pac. 98—*Coughlin v. People*, 144 Ill. 180, 19 L.R.A. 72, 33 N. E. 1—*Garlits v. State*, 71 Md. 301, 4 L.R.A. 604, 18 Atl. 39—*Territory v. Roberts*, 9 Mont. 14, 22 Pac. 182—*Territory v. Bryson*, 9 Mont. 39, 22 Pac. 147—*People v. Larubla*, 140 N. Y. 91, 85 N. E. 412—*Knights of Pythias v. Steele*, 108 Tenn. 628, 69 S. W. 336—*People v. Thiede*, 11 Utah, 272, 39 Pac. 837—*State v. Baker*, 33 W.

Va. 330, 10 S. E. 639—*Baker v. State*, 88 Wis. 152, 59 N. W. 570.

109. Persons who have read accounts of a homicide in a newspaper, and formed some impression from such reading, are not incompetent as jurors under Utah Comp. Laws, § 5024, when they state that they can lay aside any such impression, and try the case fairly and impartially upon the evidence presented. *Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. Rep. 62, 40: 237

110. A juror who has conversed with another person in relation to the facts of the cause, and received an impression as to them, but expresses his willingness and ability to render a verdict in accordance with the evidence, is competent in a civil action. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24: 648

111. Inquiry to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried is largely within the sound discretion of the court. *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. Rep. 951, 39: 1033
Cited in Thiede v. Utah, 159 U. S. 516, 40 L. ed. 241, 16 Sup. Ct. Rep. 62—*Dolan v. United States*, 54 C. C. A. 38, 116 Fed. 582—*Horton v. United States*, 15 App. D. C. 319.

— Editorial note.

Disqualification of jurors by reason of previously formed opinions. 40: 237

Disloyalty to government.

Requiring Test Oath, see Appeal and Error, 2288.

See also supra, 100.

112. Avowed present disloyalty to the government is a sufficient cause for the discharge of a juror, irrespective of his refusal to take the test oath prescribed by the Constitution of Missouri. *Klinger v. Missouri*, 13 Wall. 257, 20: 635

Belief in polygamy.

Disqualification of Grand Juror, see Grand Jury, 7, 8.

113. On a trial for bigamy in Utah, it is sufficient objection to a juror that he was or had been living in polygamy. *Reynolds v. United States*, 98 U. S. 145, 25: 244

114. A person who has a conscientious belief that polygamy is rightful may be challenged for cause in a trial for polygamy. *Miles v. United States*, 103 U. S. 304, 26: 481

Cited in Logan v. United States, 144 U. S. 298, 36 L. ed. 441, 12 Sup. Ct. Rep. 617.

c. Examination Generally.

Prejudicial Error in, see Appeal and Error, 5149a.

115. A person offered as a juror is not compelled to disclose under oath his guilt of a crime which would work his disqualification. If he declines to answer, the objecting

party must prove such disqualification by other evidence. *Burt v. Panjaud*, 99 U. S. 180, 25: 451
Cited in Atwood v. Weems, 99 U. S. 184, 25 L. ed. 471.

116. Questions to a juror as to his political affiliations are properly rejected in a trial for an election offense; and even the question whether the political affiliations or party predilections of the juror would tend to bias his judgment should not be permitted in the absence of any special reason or ground therefor. *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. Rep. 951, 39: 1033

d. Challenges.

Challenge for Incompetency, see *supra*, II. b, 116.

Prejudicial Error in, see Appeal and Error, 5150, 5151.

Adoption of State Practice in Federal Courts, see Courts, 1351, 1352.

In Presence of Accused, see Criminal Law, 106.

Of Grand Jurors, see Grand Jury, 7-9.

For Alienage, see Trial, 871.

See also Pleading, 653.

117. The making of challenges to jurors is an essential part of the trial, and it is one of the substantial rights of the prisoner in a felony case to be brought face to face with the jurors at the time when the challenges are made. *Lewis v. United States*, 146 U. S. 370, 13 Sup. Ct. Rep. 136, 36: 1011
Cited in Pointer v. United States, 151 U. S. 405, 38 L. ed. 213, 14 Sup. Ct. Rep. 410—*St. Clair v. United States*, 154 U. S. 147, 38 L. ed. 941, 14 Sup. Ct. Rep. 1002—*United States v. Davis*, 103 Fed. 465.

118. The law of a Territorial legislature prescribing the mode of obtaining panels of jurors, and challenges to them, is obligatory upon the district courts of the Territory. *Miles v. United States*, 103 U. S. 304, 26: 481

Distinguished in United States v. Jones, 5 Utah, 553, 18 Pac. 233.

Cited in Thiede v. Utah, 159 U. S. 515, 40 L. ed. 241, 16 Sup. Ct. Rep. 62—*United States v. Tenney*, 2 Ariz. 41, 8 Pac. 295—*Ex parte Murphy*, 1 Okla. 291, 29 Pac. 652—*United States v. Jones*, 5 Utah, 564, 18 Pac. 233—*Mackey v. Enzensperger*, 11 Utah, 174, 39 Pac. 541.

119. Defendants in different actions cannot be deprived of their several challenges to jurors, by the order of the court that the cases shall be tried together. *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. Rep. 909, 36: 706
Cited in Times Pub. Co. v. Carlisle, 36 C. C. A. 493, 94 Fed. 780—*Betts v. United States*, 65 C. C. A. 459, 132 Fed. 235—*Proprietors of Mills v. Randolph*, 157 Mass. 348, 32 N. E. 153—*Waggoner v. Dodson*, 96 Tex. 6, 68 S. W. 813.

120. It is not error on a criminal trial, for the court to require that a juror shall be challenged or accepted and sworn as soon as his examination is ended and before the

examination of any other juror. *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. Rep. 1002, 38: 936
Cited in Com. v. Brown, 23 Pa. Super. Ct. 501.

Editorial notes.

Challenges to jurors. 39: 727; 41: 104

Challenge to array.

121. Challenge to the array because the summoning officer has an interest in other land under the same title that is in controversy is good; but not because such officer is a citizen of the state which is the grantor of one party. *Fowler v. Lindsey*, 3 Dall. 411, 1: 658

122. A challenge to the array should be allowed where a jury is not selected and summoned in conformity with the territorial law. *Clinton v. Englebrecht*, 13 Wall. 434, 20: 659
Distinguished in United States v. Kuntze, 2 Idaho, 484, 21 Pac. 407.

Cited in United States v. Collins, 1 Woods, 515, Fed. Cas. No. 14,837—*United States v. Antz*, 4 Woods, 180, 16 Fed. 124—*Dupont v. McAdow*, 6 Mont. 230, 9 Pac. 925—*Ex parte Murphy*, 1 Okla. 290, 29 Pac. 652—*McCann v. United States*, 2 Wyo. 289.

123. A challenge to the array is not waived by exercising the right to peremptory challenges and challenges for cause, where there is an inherent and fatal objection to the entire panel. *Clinton v. Englebrecht*, 13 Wall. 434, 20: 659

Peremptory challenges.

Presumption as to, see Appeal and Error, 4202.

Prejudicial Error in, see Appeal and Error, 5152.

Equal Protection as to, see Constitutional Law, 389.

See also *supra*, 123.

124. The right of peremptory challenge at common law, given one on trial for a capital offense, is not of itself a right of selection, but a right to reject, jurors. *United States v. Marchant*, 12 Wheat. 480, 6: 700

Cited in United States v. Shackelford, 18 How. 590, 15 L. ed. 490—*Lewis v. United States*, 146 U. S. 376, 36 L. ed. 1014, 13 Sup. Ct. Rep. 136—*Pointer v. United States*, 151 U. S. 412, 38 L. ed. 215, 14 Sup. Ct. Rep. 410—*United States v. Douglass*, 2 Blatchf. 210, Fed. Cas. No. 14,989—*United States v. Wilson*, Baldw. 82, Fed. Cas. No. 16,730—*United States v. Hall*, 10 L.R.A. 323, 44 Fed. 883—*United States v. Davis*, 103 Fed. 465—*Betts v. United States*, 65 C. C. A. 460, 132 Fed. 236—*Barber v. State*, 13 Fla. 679—*Mathis v. State*, 31 Fla. 317, 12 So. 681—*Cruce v. State*, 59 Ga. 88—*State v. Durein*, 29 Kan. 691—*State v. Caseau*, 8 La. Ann. 115—*State v. Durr*, 39 La. Ann. 754, 2 So. 546—*State v. Cady*, 80 Me. 417, 14 Atl. 940—*Biddle v. State*, 67 Md. 306, 10 Atl. 794—*Smith v. State*, 57 Miss. 823—*Vojta v. Pelikan*, 15 Mo. App. 477—*Brooks v. Howard*, 58 N. H. 92—*People v. Ransom*, 7 Wend. 428—*Capehart v. Stewart*, 80 N. C. 102—*State v. Jacobs*, 106 N. C. 697, 10 S. E. 1031—*Com. v. Twitchell*, 1 Brewst. (Pa.) 601—*Gore v. Scranton*, 5 Pa. Co. Ct. 547—*Scranton v. Gore*, 124

Pa. 605, 17 Atl. 144—*State v. Cardoso*, 11 S. C. 249—*Loggins v. State*, 12 Tex. App. 80.

125. A selection of twelve jurors is not necessary unless required by statute, before requiring both prosecution and defense to proceed with the peremptory challenges; but they may be required to challenge from a larger list of those found not liable to objection for cause. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. Rep. 410, 38: 208

126. Where the subject is not controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. Rep. 410, 38: 208

127. By common law, the King had a qualified right of challenge by setting aside jurors, without assigning cause, till the panel was exhausted, when, if there was not a full jury without the person challenged, cause must be assigned, or the juror would be sworn. *United States v. Shackelford*, 18 How. 588, 15: 495

128. By act of 1790, the challenges are thirty-five in treason, and twenty in felony punishable with death. *United States v. Shackelford*, 18 How. 588, 15: 495

129. [On an indictment, under the act of Congress of March 26, 1804, for scuttling a ship to defraud insurers, the accused has the right of thirty-five peremptory challenges, under the common-law rule for a capital charge. *United States v. Johns (C. Ct.)* 4 Dall. 412, 1: 388]

130. The offense of receiving and concealing smuggled property, under U. S. Rev. Stat. § 3082, U. S. Comp. Stat. 1901, p. 2014, is only a misdemeanor; and peremptory challenges cannot be allowed as in case of felony, under U. S. Rev. Stat. § 819, U. S. Comp. Stat. 1901, p. 629, as it is subordinate to the offense of smuggling, which, by § 2865 (U. S. Comp. Stat. 1901, p. 1905) is expressly declared to be a misdemeanor. *Reagan v. United States*, 157 U. S. 301, 15 Sup. Ct. Rep. 610, 39: 709
Cited in *Howard v. United States*, 84 L.R.A. 515, 21 C. C. A. 594, 48 U. S. App. 678, 75 Fed. 993—*Re Kirby*, 84 Fed. 607.

131. The offense of robbing a mail carrier and putting his life in jeopardy, in violation of U. S. Rev. Stat. § 5472, U. S. Comp. Stat. 1901, p. 3694, is a felony, on the prosecution of which the defendant is entitled to ten peremptory challenges under U. S. Rev. Stat. § 819, U. S. Comp. Stat. 1901, p. 629. *Harrison v. United States*, 163 U. S. 140, 16 Sup. Ct. Rep. 961, 41: 104

132. The word "rob" used in U. S. Rev. Stat. § 5472, U. S. Comp. Stat. 1901, p. 3694, is employed in the common-law sense, and one indicted for robbing a mail carrier under that section is entitled to ten peremptory challenges of jurors under Rev. Stat. § 819, U. S. Comp. Stat. 1901, p. 629.
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Harrison v. United States, 163 U. S. 140, 16 Sup. Ct. Rep. 961, 41: 104
Cited in *Considine v. United States*, 50 C. C. A. 274, 112 Fed. 345.

133. The power of the legislature of a state to prescribe the number of peremptory challenges in criminal cases is limited only by the necessity of having an impartial jury; if such jury is obtained from those that remain, the constitutional rights of the accused are protected. *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. Rep. 350, 30: 578

Cited in *Spies v. Illinois (Ex parte Spies)* 123 U. S. 168, 31 L. ed. 87, 8 Sup. Ct. Rep. 21
—*Pointer v. United States*, 151 U. S. 412, 38 L. ed. 215, 14 Sup. Ct. Rep. 410—*Thiede v. Utah*, 159 U. S. 516, 40 L. ed. 241, 16 Sup. Ct. Rep. 62—*Brown v. New Jersey*, 175 U. S. 175, 44 L. ed. 121, 20 Sup. Ct. Rep. 77—*United States v. Davis*, 103 Fed. 467—*Horton v. United States*, 15 App. D. C. 819—*Woolfolk v. State*, 85 Ga. 90, 11 S. E. 814—*Biddle v. State*, 67 Md. 308, 10 Atl. 794—*O'Neil v. Lake Superior Iron Co.* 67 Mich. 561, 35 N. W. 162—*State v. Freilaghuyesen*, 48 Minn. 266, 45 N. W. 432
—*State ex rel. Kansas City & S. E. Co. v. Glover*, 124 Mo. 613, 36 S. W. 50—*Territory v. Roberts*, 9 Mont. 14, 22 Pac. 132—*Brown v. State*, 62 N. J. L. 683, 42 Atl. 811—*People v. Dunn*, 31 App. Div. 144, 52 N. Y. Supp. 968—*Ex parte Spies*, 44 Phila. Leg. Int. 514—*Wooten v. State*, 99 Tenn. 190, 41 S. W. 813—*Knights of Pythias v. Steele*, 108 Tenn. 628, 69 S. W. 336.

134. The number of peremptory challenges may be varied for different communities. *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. Rep. 350, 30: 578

135. The allowance by Missouri statutes for fifteen peremptory challenges in capital cases in cities of over 100,000 inhabitants, and eight in other parts of the state, is a valid exercise of legislative discretion. *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. Rep. 350, 30: 578

136. When a challenge to a juror for bias is disallowed, and the juror is peremptorily challenged and excused, and an impartial juror is obtained in his place, the constitutional right of the accused is maintained. *Re Spies (Spies v. Illinois)* 123 U. S. 131, 8 Sup. Ct. Rep. 21, 31: 80
Criticized in *United States v. Schneider*, 21 D. C. 387.

Cited in *State v. Sawtelle*, 66 N. H. 503, 82 Atl. 831—*Wooten v. State*, 99 Tenn. 199, 41 S. W. 813.

137. The conditional or qualified right of challenge on behalf of the Federal government in a criminal case, which has the effect of setting aside a juror until the panel is exhausted, without assigning any cause, still exists in those states where such practice obtains, notwithstanding the enactment of the acts of March 3, 1865 (13 Stat. at L. 500, chap. 86), and June 8, 1872 (17 Stat. at L. 282, chap. 333), giving peremptory challenges to the government, if such practice has, conformably to the act of July 20, 1840 (5 Stat. at L. 394, chap. 47, U.

S. Rev. Stat. § 800, U. S. Comp. Stat. 1901, p. 623), been adopted by a court rule in the Federal courts. *Sawyer v. United States*, 202 U. S. 150, 26 Sup. Ct. Rep. 575, 50: 972

138. There has been no unreasonable exercise of the conditional or qualified right of challenge on behalf of the Federal government in a criminal case, which has the effect of setting aside a juror until the panel is exhausted, without assigning cause, where neither the government nor the defendants had exhausted all their peremptory challenges when the jury was obtained. *Sawyer v. United States*, 202 U. S. 150, 26 Sup. Ct. Rep. 575, 50: 972

III. Special Jury.

Due Process in Trial by Struck Jury, see Constitutional Law, 809.

Power of Territorial Courts of Oklahoma to Adopt Rules as to Organizing Jury, see Courts, 384.

139. [The court has power to order tales in special jury causes. *Anonymous* (C. Ct.) 2 Dall. 382, 1: 425]

IV. Compensation.

Fees of Clerk for Filing Orders to Pay Jurors, see Clerks, 45.

Clerk's Fee for Report of Fees Due to Jurors, see Clerks, 73.

140. Jurors attending the circuit court for the Pennsylvania district are entitled to a fee of \$1.25 each, per day. *Re Lewis*, 4 Cranch, 433, 2: 670

JURY COMMISSIONERS.

Equal Protection in Selection of Jury by, see Constitutional Law, 387, 388.

Presumption as to Acts, see Evidence, 554.

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Authority to Protest Bill or Note, see Bills and Notes, 233.

Estoppel to Deny Authority to Administer Oath, see Estoppel, 279.

Exemption of, from Militia Duty, see Militia, 13.

Jurisdiction of the Supreme Court to Review Commitment by Habeas Corpus, see Supreme Court of the United States, 47.

Participation by, in Act of County Judge in Levying Tax, see Taxes, 571.

In District of Columbia as Officer of United States, see United States, 79.

1. A justice of the peace in the District of Columbia is an officer of the government of the United States, and is exempt from militia duty. *Wise v. Withers*, 3 Cranch, 331, 2: 457

Editorial notes.

[Personal liability for exceeding jurisdiction. 14 L.R.A. 138, 27 L.R.A. 92.]

Resignation; removal; filling vacancy. Presumption of Appointment, see Evidence, 488.

2. A justice of the peace in the District of Columbia, appointed under the act of Congress of February 27, 1801, § 11, was not removable at the will of the President. *Marbury v. Madison*, 1 Cranch, 137, 2: 60

3. In Illinois a justice of the peace is not relieved from his office by a resignation which is accepted, until his successor has qualified. *Badger v. United States ex rel. Bolles*, 93 U. S. 599, 23: 991

4. Where a justice of the peace in Illinois has resigned, although his successor has not been chosen, he is out of office so far as respects acting as a justice in the appointment of a supervisor to fill a vacancy. *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. Rep. 124, 30: 323

Jurisdiction; procedure.

Taking Recognizance before Two Justices, see Bail and Recognizance, 29.

Quashing Proceedings of, by Certiorari, see Certiorari, 6.

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Effect of Judgment before, see Judgment, 157.

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Trial by Jury, see Jury, 77.

Enlarging Jurisdiction as Violation of Right to Jury Trial, see Jury, 79.

Prohibition to Restrain Excess of Jurisdiction, see Prohibition, 19.

5. It is essential to support a justice's judgment, that the statutory grounds of jurisdiction appear on the face of the proceedings before him, or they will be regarded as *coram non judice*. *Den ex dem. Walker v. Turner*, 9 Wheat. 541, 6: 155
Cited in *Davis v. United States*, 17 Ct. Cl. 300
—*Swan v. United States*, 19 Ct. Cl. 65—*Burnham v. Webster*, 2 Ware, 248, Fed. Cas. No. 2,178—*Tolmie v. Thompson*, 3 Cranch, C. C. 130, Fed. Cas. No. 14,080—*Grier v. McLendon*, 7 Ga. 364—*Macon & W. R. Co. v. Davis*, 13 Ga. 76—*Smith v. Simpson*, 80 Mo. 637—*Gregor v. Slingluff*, 1 Miles (Pa.) 213—*Mayer v. Adams*, 27 W. Va. 254.

6. The power of justices of the peace to arrest deserting seamen and to deliver them on board their vessel is not within the defi-

dition of "judicial power" as defined by the Constitution of the United States; and it may lawfully be conferred by Congress upon state officers. *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. Rep. 326, 41: 715

Cited in Re Isagil, 79 Fed. 755.

7. [Express exception from the jurisdiction of justices of the peace, in Pennsylvania, of actions of trover, includes an action of trespass which might be the foundation of an action of trover. *Lawrence v. Doublebower* (Ct. Com. Pl. Phila.) 2 Dall. 73, 1: 294]

8. In Idaho, on a trial before a justice of the peace, if it appear from the sworn answer of the defendant that the action involves the title to real property, the justice must suspend proceedings and certify the case to the district court. *Langford v. Monteith*, 102 U. S. 145, 26: 53
Cited in People ex rel. Ducheneau v. House, 4 Utah, 377, 10 Pac. 838—*Pleasant Grove City v. Holman*, 18 Utah, 342, 54 Pac. 1013.

—Editorial note.

[Voluntary credits to give jurisdiction to. 28 L.R.A. 221.]

Appeal.

As Infringement of Right to Trial by Jury, see Jury, 65.

Provision for Trial by Jury on, as Denial of Right to Jury Trial, see Jury, 78, 79.

9. If a justice of the peace in Idaho as-

sumes to try a cause after a sworn answer is filed from which it appears that the action involves the question of real property, an appeal from his decision on the merits must be dismissed because the decision was made without jurisdiction. *Langford v. Monteith*, 102 U. S. 145, 26: 53
Cited in Cereghino v. Third Dist. Court, 8 Utah, 459, 32 Pac. 697.

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By the common law the term "kindred,"

when used in a statute, includes only those who are legitimate, unless a different intention is clearly manifested. *McCool v. Smith*, 1 Black, 459, 17: 218
Distinguished in Hutchinson Invest. Co. v. Caldwell, 152 U. S. 70, 38 L. ed. 358, 14 Sup. Ct. Rep. 504.

Cited in Pinkston v. Semple, 92 Ala. 568, 9 So. 329—*Re Magee*, 63 Cal. 416—*Re Jessup*, 81 Cal. 439, 21 Pac. 976—*Caldwell v. Miller*, 44 Kan. 20, 23 Pac. 946

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I. Creation and Existence of Relation.

Impairment of Contract Obligations as to, see Constitutional Law, 1453.

By Contract Executed to Convey Estate in Fee, see Vendor and Purchaser, 4.

See also Husband and Wife, 45.

1. No implication as to the relation of landlord and tenant exists when there is an express contract or agreement between the parties, showing that such relation was not contemplated. *Carpenter v. United States*, 17 Wall. 489, 21: 680
Cited in *Bradley v. United States*, 13 Ct. Cl. 178.

2. The relation of landlord and tenant will never be implied when the acts and conduct of the parties are inconsistent with its existence. *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 396, 12 Sup. Ct. Rep. 188, 35: 1055

3. An occupant of a house of a railroad company, on its line of railroad, under an agreement with the company to board its employees, the price of board to be paid by them, and the company to aid her in collecting her pay for board by retaining the same for her out of the wages of such employees,—is not a servant or employee of the company, but the relation of the parties is that of landlord and tenant. *Doyle v. Union P. R. Co.* 147 U. S. 413, 13 Sup. Ct. Rep. 333, 37: 223

4. The relation of landlord and tenant in no sense exists between vendor and vendee. *Watkins v. Holman*, 16 Pet. 25, 10: 873
Cited in *Burnett v. Caldwell (Roe v. Doe)* 9 Wall. 293, 19 L. ed. 718—*Averill v. Wilson*, 4 Barb. 187—*Dollittle v. Eddy*, 7 Barb. 79—*Coakley v. Perry*, 3 Ohio St. 346—*Gardner v. Greene*, 5 R. I. 110.

Editorial notes.

[Effect of possession under agreement for lease not executed. 20 L.R.A. 33.]

Effect of stipulation that vendee or mortgagor shall, on default, become tenant. 49 L.R.A. 435.

Effect of tax sale to create relation of landlord and tenant between purchaser and prior lessee. 6 L.R.A.(N.S.) 260.]

Attornment.

5. A tenant may attorn to the party holding a valid title, to avoid litigation. This operates to extinguish the relation of landlord and tenant, and make him a trespasser, as to the lessor. *Merryman v. Bourne*, 9 Wall. 592, 19: 683
Cited in *McIntyre v. Thompson*, 4 Hughes, 570, 10 Fed. 538.

II. Leases.**a. In General.**

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 Explaining Demise by General Custom, see Custom and Usage, 40.
 Good Will of Lease as Property, see Equity, 9.
 Presumption of Execution and Loss, see Evidence, 689.
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 Effect of Lease on Validity of Insurance, see Insurance, 226.
 Interest of Lessee as Real Property Subject to Judicial Sale, see Judicial Sale, 7.
 Right to Possession of Land as Making Ore Purchasing Contract a Lease, see Mines, 23.
 Sufficiency of Allegation of Breach of Agreement to Lease, see Pleading, 523.

6-7. The legal understanding of a lease for years is a contract for the possession and profits of land for a determinate period, with the recompense of rent. *United States v. Gratiot*, 14 Pet. 526, 10: 573
Cited in *Raynolds v. Hanna*, 55 Fed. 800—*Pelton v. Minah Consol. Min. Co.* 11 Mont. 283, 28 Pac. 310—*Coogan v. Parker*, 2 S. C. N. S. 287, 16 Am. Rep. 659.

Editorial note.

[Distinction between a lease and license. 18 L.R.A. 491.]

b. Covenants and Conditions.

Waiver of Breach of, see *infra*, 18.
 Equitable Relief against Forfeiture of Lease for Breach of, see *infra*, 23-26, 51.
 Covenant to Pay Rent, see *infra*, 45, 46.
 For Re-entry, see *infra*, 78.
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 Jurisdiction of Equity to Enforce Covenants, see Equity, 104.
 Covenant by One of Several Lessors, see Parties, 15.
 Who may Sue for Breach of Covenant, see Parties, 96, 100.
 Specific Performance of, see Specific Performance, 70, 71.

8. [A covenant generally to deliver up premises in good repair does not bind a tenant to make good damages done by the

public enemy. *Pollard v. Shaffer* (Pa. Sup. Ct.) 1 Dall. 210, 1: 104]

9. A lessee's covenant to insure the property has sufficient consideration in the lessor's covenant to rebuild and repair in case of fire, with the suspension of rent when the premises are uninhabitable. *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. Rep. 379, 40: 515

10. At common law the grantee of a reversion could enter or bring ejectment for breach of the covenants of a lease; and the statute of 32 Henry VIII., giving the right to enter and of action to such grantee, was confined to leases under seal. That statute, adopted in Indiana in 1818, was altered in 1843 to extend its remedies to all leases. *Sheets v. Selden*, 2 Wall. 177, 17: 822

11. A covenant in a lease giving the tenant the right to purchase the leased premises constitutes a contract of sale when accepted. *Willard v. Tayloe*, 8 Wall. 557, 19: 501

Cited in *Mathews Slate Co. v. New Empire Slate Co.* 122 Fed. 980—*Milwaukee Mechanics' Ins. Co. v. Rhea*, 60 C. C. A. 105, 123 Fed. 11—*Linn v. McLean*, 80 Ala. 364—*Perry v. Paschal*, 103 Ga. 138, 29 S. E. 703—*Hayes v. O'Brien*, 149 Ill. 411, 23 L.R.A. 558, 37 N. E. 73—*Guyer v. Warren*, 175 Ill. 335, 51 N. E. 580—*Flynn v. White Breast Coal & Min. Co.* 72 Iowa, 741, 32 N. W. 471—*King v. Raab*, 123 Iowa, 634, 99 N. W. 306—*Chadsey v. Condley*, 62 Kan. 855, 62 Pac. 663—*McMillan v. Ames*, 33 Minn. 259, 22 N. W. 612—*Clarno v. Grayson*, 30 Or. 120, 46 Pac. 426—*Bradford v. Foster*, 87 Tenn. 9, 9 S. W. 195—*Peterson v. Chase*, 115 Wis. 242, 91 N. W. 687.

12. A covenant in a lease to renew at its expiration with the same covenants and privileges as contained in the original lease is satisfied by one renewal without the insertion of another covenant to renew. *Winslow v. Baltimore & O. R. Co.* 188 U. S. 646, 23 Sup. Ct. Rep 443, 47: 635

Implied covenants.

13. A covenant for quiet enjoyment is implied by law in case of a demise. *Lutz v. Linthicum*, 8 Pet. 165, 8: 904

14. The words "grant" and "demise," in a lease for years, create an implied warranty of title and covenant for quiet enjoyment. *Stott v. Rutherford*, 92 U. S. 107, 23: 486
Cited in *Conrad v. Morehead*, 89 N. C. 35.

15. The law does not imply any warranty on the part of a landlord that the house is reasonably fit for occupation, or a warranty that no accident shall befall the tenant from external forces,—such as storms, tornadoes, earthquakes, or snowslides. *Doyle v. Union P. R. Co.* 147 U. S. 413, 13 Sup. Ct. Rep. 333, 37: 223

Cited in *Thum Bros. v. Rhodes*, 12 Colo. App. 249, 55 Pac. 264—*Borggard v. Gale*, 107 Ill. App. 132—*Franklin v. Tracey*, 117 Ky. 273, 63 L.R.A. 652, 77 S. W. 1113—*O'Malley v. Twenty-Five Associates*, 178 Mass. 559,

60 N. E. 387—*Davis v. George*, 67 N. H. 395, 39 Atl. 979.

16. A covenant that the lessor will make any repairs is never implied. *Sheets v. Selden*, 7 Wall. 416, 19: 166
Cited in Moyer v. Mitchell, 53 Md. 176—*Gluck v. Baltimore*, 81 Md. 326, 48 Am. St. Rep. 515, 32 Atl. 515—*Clifton v. Montague*, 40 W. Va. 212, 33 L.R.A. 454, 52 Am. St. Rep. 872, 21 S. E. 858—*Cheuvront v. Bee*, 44 W. Va. 108, 28 S. E. 751.

— Editorial note.

[Implied covenant of fitness of property for use. 33 L.R.A. 449.]

c. Holding Over.

Under Lease of Wharf, see *Wharves*, 10, 12.

17. Under the charter of a market company, giving the right to sell the privilege of occupying stalls for one or more years, and subsequent sales or leases to be made in the same manner, a lessee who had bid off a stall for two years did not acquire a tenancy at will after the expiration of his term, under another clause in the charter that such a lessee should be "considered as having the goodwill and right to retain the possession thereof so long as he chooses to occupy the same and pay rent therefor." The latter clause refers only to possession during the term. *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25: 782

d. Termination; Forfeiture.

Covenant for Renewal, see *supra*, 12.
 See also *infra*, 51.

18. Receiving rent with knowledge of the breach of an agreement not to remove goods, which was to terminate the lease at the landlord's option, or levying a distress for the rent, or in any other way consenting to a continuance of the term, is a waiver of the breach. *Ingle v. Wallach (Dermott v. Wallach)* 1 Wall. 61, 17: 680

19. The right of a lessor to terminate a lease for nonpayment of rent will not give the lessee any right to avoid the lease or his liability for agreed rent. *Lehigh Zinc & I. Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. Rep. 219, 37: 1215

20. A surrender is yielding the estate to the landlord, so that the leasehold interest becomes extinct by agreement. *Beall v. White*, 94 U. S. 382, 24: 173
Cited in Hoerd v. Hahne, 91 Ill. App. 520—*Walls v. Long*, 2 Ind. App. 205, 28 N. E. 101—*Martin v. Stearns*, 52 Iowa. 347, 3 N. W. 92—*Biggs v. Stueler*, 93 Md. 112, 48 Atl. 727—*Huling v. Roll*, 43 Mo. App. 239—*Churchill v. Lammers*, 60 Mo. App. 249—*Felker v. Richardson*, 67 N. H. 511, 32 Atl. 830—*Vandekar v. Reeves*, 40 Hun. 433—*Gray v. Kaufman Dairy & Ice Cream Co.* 162 N. Y. 395, 49 L.R.A. 583, 76 Am. St. Rep. 327, 56 N. E. 903—*Holman v. Dellin-River-Finley Co.* 30 Or. 437, 47 Pac. 708—*Texas Loan Agency v. Fleming*, 92 Tex. 465, 44 L.R.A. 283, 49 S. W. 1039.

21. One condition essential to the forfeiture of a lease by the lessor is a demand of the rent. *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 25, 11 Sup. Ct. Rep. 691, 35: 332
Cited in Lamson Consol. Store Service Co. v. Bowland, 52 C. C. A. 339, 114 Fed. 643—*Foley v. Grand Hotel Co.* 57 C. C. A. 632, 121 Fed. 512—*Johnson v. Lehigh Valley Traction Co.* 130 Fed. 942.

22. A demand for the rent, describing an entirely different lease from the one given in evidence, does not lay the foundation for a decree of forfeiture for nonpayment of rent. *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 25, 11 Sup. Ct. Rep. 691, 35: 332

23. A court of equity cannot, in the exercise of its general power to relieve from a forfeiture, endow a tenant with the right to create, at the risk of the owner, a contest involving the validity of an irredeemable tax sale, for the purpose of giving such tenant the right, if the tax title be held invalid, to pay the taxes and thus be relieved of a forfeiture for his breach of his covenant to pay such taxes. *Kann v. King*, 204 U. S. 43, 27 Sup. Ct. Rep. 213, 51: 360

24. Equity will not relieve from the forfeiture of a lease for the breach by a tenant of his covenant to pay the taxes on any theory that his default was due to the misleading conduct of the landlord or to his own temporary oversight, where the testimony conclusively demonstrates the tenant's gross negligence. *Kann v. King*, 204 U. S. 43, 27 Sup. Ct. Rep. 213, 51: 360

25. Relief from a forfeiture of a lease, incurred by a tenant because of his breach of his covenant to pay the taxes, cannot be given by a court of equity on the ground of accident or mistake, where the relief sought cannot be afforded without subjecting the lessor to the peril of contesting the validity of an outstanding *prima facie* irredeemable tax title. *Kann v. King*, 204 U. S. 43, 27 Sup. Ct. Rep. 213, 51: 360

26. The act of the landlord in accepting as a new tenant the purchaser of an irredeemable tax title to the property is not such a fraud on the tenant in possession as entitles him to relief in equity from a forfeiture of the lease for his breach of his covenant to pay the taxes,—especially where the landlord offered to condone the forfeiture if the tenant would commence proceedings to have the outstanding tax title declared invalid, and would secure the landlord from loss in the event that such title should be sustained, which offer the tenant declined. *Kann v. King*, 204 U. S. 43, 27 Sup. Ct. Rep. 213, 51: 360

27. The opening of a crevasse in Louisiana levees by the waters of the Mississippi river, causing a plantation to be overflowed must be considered as a fortuitous or unforeseen event, within the meaning and scope of La. Code, art. 2697 (2667) 2699 (2669), entitling the lessee, if thereby the planta-

tion is wholly or partly destroyed or is rendered unfit for the purpose for which it was leased, to have the lease annulled. *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. Rep. 962, 30: 776

28. The inundation of a sugar plantation covering it with water for three months, filling up canals and ditches for drainage, sweeping away bridges and leaving a deposit from 3 to 6 inches deep over the whole land, destroying the whole crop for that year and leaving the plantation without any cane upon it, either to make sugar of or to get seed cane from for planting in succeeding years,—amounted to a partial destruction of the plantation, for which the lessee is entitled to have the lease annulled. *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. Rep. 962, 30: 776

Editorial note.

[Effect of death on contract of. 23 L.R. A. 707.]

Eviction.

29. If a party who has entered into possession of land as a tenant under another is threatened with suit upon a paramount title, the threat, under such circumstances, is equivalent to eviction. *Merryman v. Bourne*, 9 Wall. 592, 19: 683
Cited in Thompson v. Pioche, 44 Cal. 514—*Lyon v. Washburn*, 8 Colo. 206—*Turpin v. Saunders*, 82 Gratt. 33—*Frasier v. Campbell*, 1 Va. Dec. 171.

— Editorial note.

[Eviction by admitting inconsistent business into building. 5 L.R.A. (N.S.) 855.]

c. Assignment; Subletting.

Effect of Assignment on Liability to Pay Rent, see *infra*, 46.

Assignability for Purpose of Suit in Federal Court, see *Courts*, 794.

Provision for Liquidation of Damages in Case of, see *Damages*, 49.

Validity of Assignment of Lease under which United States is Lessee, see *United States*, 360.

See also *infra*, 55.

30. Where a lessee underlets the premises, whereby rent is to accrue to him therefor, and subsequently assigns all his interest in the lease, in the premises, and in the rents, he cannot set up against the sublessee a counterclaim for rent due from the latter at the time of such assignment. *United States v. Hickey*, 17 Wall. 9, 21: 559
Distinguished in Love v. Van Every, 18 Mo. App. 204.

Cited in St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. R. Co. 135 Mo. 191, 38 L.R.A. 612, 36 S. W. 602.

Editorial notes.

[Assignability of lease. 15 L.R.A. 754.

Effect of surrender of original lease on rights of sublessee. 7 L.R.A. (N.S.) 221.]

III. Rights and Liabilities of Parties.

a. In General.

Covenant as to Condition of Premises, see *supra*, 8.

Tenant Acquiring Title by Adverse Possession, see *Adverse Possession*, I. d.

Rights of Lessee to Surplus Waters of Canal, see *Canals*, 10.

Costs Against Tenants, see *Costs and Fees*, 18.

After-Acquired Title Inuring to Lessee's Benefit, see *Estoppel*, 50.

Estoppel of Tenant to Contest Landlord's Title, see *Estoppel*, 316–321.

Declarations of Tenant as Evidence Against Owner, see *Evidence*, 1976.

Liability of Lessor for Violation of Revenue Laws by Tenant, see *Internal Revenue*, 295.

Charging Tenant Who Purchased at Judicial Sale as Trustee for Landlord, see *Judicial Sale*, 127.

Rights of Lessee Cannot Be Destroyed by Military Order, see *War*, 79.

31. In Louisiana the lessor must secure to the lessee the possession, use, and enjoyment of the thing leased, against everything but the fault of the latter, and any loss of the thing or deprivation of its use or enjoyment by accidents or fortuitous events must be borne by the lessor. *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. Rep. 962, 30: 776
Cited in Losecco v. Gregory, 108 La. 655, 32 So. 985.

31a. Where the lease of surplus waters provided but one remedy for a failure of water, which was an abatement of the rent in proportion to the deficiency, claims for offset, repairs, recoupment, and damages will not be considered. *Sheets v. Selden*, 7 Wall. 416, 19: 166
Cited in Skillen v. Waterworks Co. 49 Ind. 196—*Fishback v. Woodruff*, 51 Ind. 105—*Hoagland v. New York, C. & St. L. R. Co.* 111 Ind. 448, 12 N. E. 83.

32. Destroying ornamental trees, tearing down fences and walls, quarrying stone, and digging gravel, and taking them away, is voluntary waste for which a tenant is liable. *United States v. Bostwick*, 94 U. S. 53, 24: 65
Cited in Carlin v. Ritter, 68 Md. 482, 6 Am. St. Rep. 467, 13 Atl. 370—*Chalmers v. Smith*, 152 Mass. 564, 11 L.R.A. 771, 26 N. E. 95—*Powell v. Dayton, S. & G. R. Co.* 16 Or. 36, 8 Am. St. Rep. 251, 16 Pac. 863.

33. The relation of landlord and tenant implies reasonable care to prevent damage to the inheritance. But the tenant is liable only for voluntary waste; not to replace a building accidentally burned. *United States v. Bostwick*, 94 U. S. 53, 24: 65
Distinguished in Warren v. Wagner, 75 Ala. 200, 51 Am. Rep. 446—*Williams v. Kearny County*, 61 Kan. 718, 60 Pac. 1046—*Lothrop v. Thayer*, 138 Mass. 474, 52 Am. Rep. 286.
Cited in Hughes v. Vanstone, 24 Mo. App. 640

—*Earle v. Arbogast*, 180 Pa. 417, 36 Atl. 923, 40 W. N. C. 398—*Sampson v. Grogan* (*Sampson v. Bagley*) 21 R. I. 182, 44 L.R.A. 714, 42 Atl. 712—*Rogers v. Coal River Boom & Driving Co.* 39 W. Va. 278, 19 S. E. 401.

34. The use of premises, without objection, for a smallpox hospital, is no ground for a recovery, where all the receipts for rent state it is so used. *United States v. Bostwick*, 94 U. S. 53, 24: 65

Editorial notes.

[Landlord's liability to tenant for forcible expulsion after termination of tenancy. 16 L.R.A. 798.

Rights on condemnation of premises. 21 L.R.A. 212.

Rights and liabilities of tenant on destruction of leased building. 22 L.R.A. 613.

Rights in manure. 31 L.R.A. 698.

Damage by element in case of lease. 53 L.R.A. 673.

Ejecting sick tenant, lodger, or other occupant. 55 L.R.A. 258.

Tenant's duty to leave premises in good condition. 64 L.R.A. 648.

Right of tenant to cut wood for fires or fences. 68 L.R.A. 641.

Right of owner to recover damages to property from nuisance not of a permanent character, while in possession of tenant. 3 L.R.A. (N.S.) 1060.

Occupation of premises as servant and as tenant. 4 L.R.A. (N.S.) 698.

Validity of statute holding property owners liable for water and light furnished tenant. 6 L.R.A. (N.S.) 198.

Implied duty of lessor to put lessee in possession of leased premises, 9 L.R.A. (N. S.) 1127.]

b. As to Fixtures and Property on Premises.

What Constitutes Fixtures as Between Landlord and Tenant, see *Fixtures*, 5, 6.

35. The common-law doctrine of England that the trade-fixture rule does not apply to erections solely for agricultural purposes has not been adopted in this country. *Van Ness v. Pacard*, 2 Pet. 137, 7: 374
Cited in *Charleston & W. C. R. Co. v. Hughes*, 105 Ga. 24, 70 Am. St. Rep. 17, 30 S. E. 972—*M'Kim v. Mason*, 3 Md. Ch. 195—*Conner v. Coffin*, 22 N. H. 541—*Dubois v. Kelly*, 10 Barb. 501—*Teaff v. Hewitt*, 1 Ohio St. 532, 59 Am. Dec. 634—*Crocker v. Donovan*, 1 Okla. 174, 30 Pac. 374—*Winans v. Beidler*, 6 Okla. 606, 52 Pac. 405—*Leland v. Gassett*, 17 Vt. 410—*Hill v. Wentworth*, 28 Vt. 436.

36. At common law, fixtures which were erected for carrying on trade were allowed to be removed by the tenant during the term, and where deemed personalty for this purpose. *Van Ness v. Pacard*, 2 Pet. 137, 7: 374

Cited in *Freeman v. Dawson*, 110 U. S. 270, 28 L. ed. 143, 4 Sup. Ct. Rep. 94—*Searl v. School Dist. No. 2*, 133 U. S. 561, 33 L. ed.

746, 10 Sup. Ct. Rep. 374—*Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 416, 35 L. ed. 1063, 12 Sup. Ct. Rep. 188—*Steers v. Daniel*, 4 Fed. 599—*Brown v. Reno Electric Light & P. Co.* 55 Fed. 234—*Sampson v. Camperdown Cotton Mills*, 64 Fed. 942—*Mercantile Trust & D. Co. v. Roanoke & S. R. Co.* 109 Fed. 11—*Western U. Tele. Co. v. Pennsylvania Co.* 125 Fed. 70—*Mitchell v. Billingsley*, 17 Ala. 393—*Jones v. New Orleans & S. R. Co. & Immigration Asso.* 70 Ala. 231—*Hensley v. Brodie*, 16 Ark. 523—*Ross v. Campbell*, 9 Colo. App. 40, 47 Pac. 465—*Tilley v. Montellus Piano Co.* 15 Colo. App. 305, 61 Pac. 483—*Western & A. R. Co. v. Slate* (Ga.) 14 L.R.A. 452—*Carr v. Georgia R. Co.* 74 Ga. 81—*La Salle County Mfg. Co. v. Ottawa*, 16 Ill. 421—*Baker v. McClurg*, 96 Ill. App. 172—*State v. Bonham*, 18 Ind. 233—*Hamilton v. Huntley*, 78 Ind. 524, 41 Am. Rep. 593—*Dostal v. McCadden*, 35 Iowa, 321—*Davis v. Eastham*, 81 Ky. 118—*Doak v. Wiswell*, 88 Me. 572—*George Bauernschmidt Brewing Co. v. McColgan*, 89 Md. 137, 42 Atl. 907—*Hanrahan v. O'Reilly*, 102 Mass. 204—*Collamore v. Gillis*, 149 Mass. 581, 5 L.R.A. 152, 14 Am. St. Rep. 460, 22 N. E. 46—*Crippen v. Morrison*, 18 Mich. 31—*Perkins v. Swank*, 43 Miss. 361—*Bircher v. Parker*, 40 Mo. 120—*Switzer v. Allen*, 11 Mont. 164, 27 Pac. 408—*Ombony v. Jones*, 19 N. Y. 243—*Western North Carolina R. Co. v. Deal*, 90 N. C. 112—*Horne v. Smith*, 105 N. C. 325, 18 Am. St. Rep. 903, 11 S. E. 373—*Allen v. Wilmington & W. R. Co.* 106 N. C. 528, 11 S. E. 826—*Oregon R. & Nav. Co. v. Mosier*, 14 Or. 522, 58 Am. Rep. 321, 13 Pac. 800—*White's Appeal*, 10 Pa. 253—*Padgett v. Cleveland*, 33 S. C. 848, 11 S. E. 1069—*Cannon v. Hare*, 1 Tenn. Ch. 26—*Henderson v. Ownby*, 56 Tex. 649, 42 Am. Rep. 691—*Texas & P. R. Co. v. Hays*, 3 Tex. App. Civ. Cas. (Willson) § 58—*Wing v. Gray*, 36 Vt. 268—*Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 511, 34 N. W. 514.

37. Where a large house was built by a tenant, who used it partly for carrying on a trade, and for the residence of his family for the purpose of more beneficially exercising the trade, he was entitled to remove it. *Van Ness v. Pacard*, 2 Pet. 137, 7: 374

Cited in *Carr v. Georgia R. Co.* 74 Ga. 82—*Baker v. McClurg*, 198 Ill. 84, 59 L.R.A. 134, 92 Am. St. Rep. 261, 64 N. E. 701—*Central Branch R. Co. v. Frits*, 20 Kan. 436, 27 Am. Rep. 175—*Goodman v. Hannibal & St. J. R. Co.* 45 Mo. 35, 100 Am. Dec. 336—*Gregg v. Union P. R. Co.* 48 Mo. App. 498—*Treadway v. Sharon*, 7 Nev. 49—*Firth v. Rowe*, 53 N. J. Eq. 525, 82 Atl. 1064—*Buckley v. Buckley*, 11 Barb. 62—*Lemar v. Miles*, 4 Watts, 332—*Ross's Appeal*, 9 Pa. 494.

38. As between landlord and tenant, whatever is affixed to the land by the tenant for the purpose of trade, whether it be made of wood or brick, is removable at the end of the term. *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 396, 12 Sup. Ct. Rep. 188, 35: 1055

Cited in *Brown v. Reno Electric Light & P. Co.* 55 Fed. 285—*Sampson v. Camperdown Cotton Mills*, 64 Fed. 942—*Updegraff v. Le-sem*, 15 Colo. App. 305, 62 Pac. 342—*Baker v. McClurg*, 198 Ill. 84, 59 L.R.A. 134, 92 Am. St. Rep. 261, 64 N. E. 701—*Baker v.*

McClurg, 96 Ill. App. 172—Young v. Consolidated Implement Co. 23 Utah, 593, 65 Pac. 720.

39. Trade fixtures put up by the lessee, although real estate as between the lessor and himself, while annexed to the land, may be severed by the lessee, and, at any time before the expiration of the term, may be taken on execution against him, like other personal property. *Freeman v. Dawson*, 110 U. S. 264, 4 Sup. Ct. Rep. 94, 28: 141 *Cited in United States v. Stowell*, 133 U. S. 20, 33 L. ed. 561, 10 Sup. Ct. Rep. 244—*Sampson v. Camperdown Cotton Mills*, 64 Fed. 942.

40. The act of the lessor in re-entering and possessing himself of the premises for the tenant's failure to pay the rent, before expiration of the ten years provided in the lease, imposes no obligation upon the lessor to pay the tenant the value of the buildings erected by him, under a provision in the lease permitting the lessor to purchase such buildings, or renew the lease at the expiration of ten years. *Kutter v. Smith*, 2 Wall. 491, 17: 830 *Cited in Freeman v. Dawson*, 110 U. S. 270, 28 L. ed. 143, 4 Sup. Ct. Rep. 94—*United States v. Stowell*, 133 U. S. 20, 33 L. ed. 561, 10 Sup. Ct. Rep. 244—*Steers v. Daniel*, 4 Fed. 599—*Sampson v. Camperdown Cotton Mills*, 64 Fed. 943—*Bass v. Metropolitan West Side Elev. R. Co.* 39 L.R.A. 714, 27 C. C. A. 151, 53 U. S. App. 542, 82 Fed. 862—*Swift v. Sheehy*, 88 Fed. 926—*Felton v. Cincinnati*, 37 C. C. A. 92, 95 Fed. 340—*Goclo v. Day*, 51 Ark. 48, 9 S. W. 433—*Morey v. Hoyt*, 62 Conn. 547, 19 L.R.A. 614, 26 Atl. 127—*Skillen v. Waterworks Co.* 49 Ind. 199—*Collamore v. Gillis*, 149 Mass. 581, 5 L.R.A. 152, 14 Am. St. Rep. 480, 22 N. E. 46—*Brush v. Beecher*, 110 Mich. 604, 64 Am. St. Rep. 373, 68 N. W. 420—*Switzer v. Allen*, 11 Mont. 164, 27 Pac. 408—*People ex rel. Van Nest v. Tax & A. Comrs.* 80 N. Y. 576—*Parker v. Page*, 41 Or. 583, 69 Pac. 822—*Cannon v. Hare*, 1 Tenn. Ch. 26—*Wilson v. Scruggs*, 7 Lea, 640—*Hunter v. Johnston*, 23 Gratt. 301.

41. Where the covenant for re-entry in a lease provides that, in default of payment of rent, the lessor may enter "and the said premises repossess and enjoy, as in his first the former estate," the lessor becomes owner, by virtue of the re-entry, of a brick building erected by the tenant on the premises. *Kutter v. Smith*, 2 Wall. 491, 17: 830

42. Where a party in possession had built improvements, on an agreement to surrender on payment therefor, to be fixed by arbitrators, and the value fixed to be a lien upon the property, when the sum is fixed by arbitration the lessee must be treated as a mortgagee in possession, and, while entitled to interest on the sum, must account for rents and profits. *Matthews v. Memphis & C. R. Co.* (Scruggs v. Memphis & C. R. Co.) 108 U. S. 368, 2 Sup. Ct. Rep. 780, 27: 756 *Cited in Franklin Land, Mill & W. Co. v. Card*, 84 Me. 534, 24 Atl. 960—*Moshassuck Encampment No. 2 v. Arnold*, 25 R. I. 68, 54 Atl. 771.

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Fixtures as between landlord and tenant. 7: 374

[Mortgage on buildings on leased premises. 21 L.R.A. 347.

Mechanic's lien on building erected by lessee on lessor's land. 62 L.R.A. 375.

Right of tenant to remove electric chandeliers, etc. 3 L.R.A. (N.S.) 69.]

c. Dangerous Premises.

43. A railroad company is not liable for an injury to the occupant of its house, by a snowslide, or for the death of her children by the same accident, where the house was situated on its line, near the base of a high and steep mountain, and in a place subject to snowslides and dangerous on that account, although the company was aware of the danger, of which the occupant was ignorant, and did not notify the occupant thereof. *Doyle v. Union P. R. Co.* 147 U. S. 413, 13 Sup. Ct. Rep. 333, 37: 223

Cited in Walte v. O'Neill, 72 Fed. 358—*Schwalbach v. Shinkle, W. & K. Co.* 97 Fed. 485—*Whitmore v. Orono Pulp & Paper Co.* 91 Me. 308, 40 L.R.A. 380, 64 Am. St. Rep. 229, 39 Atl. 1032—*Smith v. State*, 92 Md. 530, 51 L.R.A. 775, 48 Atl. 92—*Schmalzried v. White*, 97 Tenn. 40, 32 L.R.A. 783, 36 S. W. 393—*Willcox v. Hines*, 100 Tenn. 542, 41 L.R.A. 279, 66 Am. St. Rep. 770, 46 S. W. 297.

Editorial notes.

[Responsibility of landlord for injuries resulting from defects in portions of building in his possession. 14 L.R.A. 238.

Liability of landlord as to condition of part of premises not controlled by tenant. 23 L.R.A. 155.

Landlord's liability to third persons for condition of premises. 26 L.R.A. 197.

Liability to tenant's guest and servants for such defects. 34 L.R.A. 609.

Liability to tenant for defect in premises. 34 L.R.A. 824.

Landlord's liability to servants of other person for defect in premises. 46 L.R.A. 83.

Right of tenant to recover for personal injuries received through landlord's breach of contract to repair. 11 L.R.A. (N.S.) 504.]

d. As to Rent.

1. In General.

Waiver of Breach of Covenant by Receiving Rent, see *supra*, 18.

Right to Terminate Lease for Nonpayment, see *supra*, 19.

Demand for, as Prerequisite to Forfeiture of Lease, see *supra*, 21, 22.

Setting up Counterclaim for Rent against Sublessee, see *supra*, 30.

Right to Sue for Instalments of Rent, see *Action or Suit*, 54.

Waiver of Objections to Irregularity in Action for, see *Appeal and Error*, 4703.

Assumpsit for Use and Occupation, see *Assumpsit*, 12, 13.

Impairing Obligation of Contract as to Ground Rent, see Constitutional Law, 1463.

Provision for Liquidated Damages as to, see Damages, 49.

Liability for Rents and Profits in Case of Ejectment, see Ejectment, VI.

Acceptance of Reduced Rent as Evidence of Modification of Lease, see Evidence, 2508.

Conclusiveness of Judgment for, see Judgment, 492, 493, 507.

Rights of Purchaser of Landlord's Reversion, see Judicial Sale, 103.

Limitation of Action for, see Limitation of Actions, 451.

Assignee's Right to Sue for, see Parties, 42.

Right of Partner Wrongfully Permitting Sale for Taxes to Allowance for Rent Paid Tax Purchaser, see Partnership, 142.

Agent's Authority to Receive Rent, see Principal and Agent, 79, 82.

Set-off in Action for, see Set-Off and Counterclaim, 15.

Vendor's Right to Set Off Rent in Action by Vendee to Recover back Purchase Money, see Set-Off and Counterclaim, 12a.

Specific Performance of Railroad Company's Agreement to Pay Rent, see Specific Performance, 17.

Receipt of Rent as Specific Performance of Contract to Renew, see Specific Performance, 70, 71.

Right to Arrears of Rent on Enforcing Agreement to Convey to Lessee, see Specific Performance, 159.

When Rent Becomes Due under Lease, see Time, 16.

Direction of Verdict in Action for, see Trial, 520.

Liability of United States as Tenant Restricted to Amount of Appropriation, see United States, 336.

Liability for Use and Occupation of Premises Generally, see Use and Occupation.

Liability for, Under Entry Made Under Illegal Agreement to Purchase, see Vendor and Purchaser, 55.

Interest as Rent, see Vendor and Purchaser, 56.

During Possession Under Rescinded Contract, see Vendor and Purchaser, 100. See also *supra*, 42.

44. At common law, the lessee under a lease for years is bound to pay the stipulated rent, notwithstanding injury to premises by flood, fire, or other unavoidable violence. *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. Rep. 962, 30: 776. Cited in *Waite v. O'Neill*, 72 Fed. 358—*Waite v. O'Neill*, 34 L.R.A. 556, 22 C. C. A. 256, 47 U. S. App. 248, 76 Fed. 416—*Felton v. Cincinnati*, 37 C. C. A. 92, 95 Fed. 340—*Taylor v. Hart*, 73 Miss. 32, 30 L.R.A. 718, 18 So. 546—*Willcox v. Hines*, 100 Tenn. 543, 41 L.R.A. 279, 66 Am. St. Rep. 770, 46 S. W. 297.

45. The accidental destruction of the premises by fire does not relieve the lessee

from his covenant to pay rent. *Sheets v. Selden*, 7 Wall. 416, 19: 166. Cited in *Stevens v. Wadleigh*, 5 Ariz. 94, 46 Pac. 70—*Cowell v. Lumley*, 39 Cal. 153, 2 Am. Rep. 430—*Whitaker v. Hawley*, 25 Kan. 683, 37 Am. Rep. 277.

46. [A lessee is bound by an express covenant to pay rent, even after assignment by him and acceptance of rent by the lessor from the assignee. *Kunkle v. Wynick* (Ct. Com. Pl. Phila.) 1 Dall. 305, 1: 149]

47. [Interruption, by the landlord, of the tenant's enjoyment of demised premises, suspends the rent. *Vaughan v. Blanchard* (Pa. Sup. Ct.) 4 Dall. 124, 1: 769]

48-9. In Virginia, judgment for double rent is positively directed by statute, in an action of replevin, upon verdict for the defendant on a jury stating that the property was taken by bailiff for rent due. *Alexander v. Harris*, 4 Cranch, 299, 2: 627

50. Rent after re-entry cannot be recovered by the lessors unless a reasonable effort has been made to relet the premises where the lease provides that after re-entry for breach of any covenant the lessors "may, at their discretion, relet the premises, at the risk of the lessee, who shall remain, for the residue of said term, responsible for the rent herein reserved, and shall be credited with such amounts only as shall be, by the lessors, actually realized." *International Trust Co. v. Weeks*, 203 U. S. 364, 27 Sup. Ct. Rep. 69, 51: 224

51. The purchase of an irredeemable tax title with a view to securing a lease of the property is not such a fraud on the tenant in possession as entitles him to relief in equity from a forfeiture of the lease for a breach of his covenant to pay the taxes. *Kann v. King*, 204 U. S. 43, 27 Sup. Ct. Rep. 213, 51: 360

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Landlord's duty to relet on defaulting tenant's account. 51: 224

[Liability of assignee of leasehold for rent. 14 L.R.A. 151.]

Effect of partial eviction upon liability for rent. 17 L.R.A. 275.

Liability for rent of premises occupied by receiver or assignee for creditors. 59 L.R.A. 673.]

Effect of military dispossession.

52. [The dispossession of a tenant by the public enemy does not excuse him from paying the agreed rent. *Pollard v. Shaffer* (Pa. Sup. Ct.) 1 Dall. 210, 1: 104]

53. Lessees, when dispossessed by military authority, and deprived of the use and control of the leased property, are discharged from liability to the lessors for rent accruing during the period of such dispossession. *Gates v. Goodloe*, 101 U. S. 612, 25: 895

54. It is a good defense to an action for the rent, that the military authorities of the United States seized the premises, and that

lessee was compelled to pay rent to those authorities during the whole period for which rent is claimed. *Harrison v. Myer*, 92 U. S. 111, 23: 606
Cited in Gates v. Goodloe, 101 U. S. 616, 25 L. ed. 896—*Mitchell v. Clark*, 110 U. S. 645, 28 L. ed. 283, 4 Sup. Ct. Rep. 170.

2. Landlord's Lien.

Measure of Damages for Sale of Goods on which Lien Exists, see Damages, 148.
 Necessary Parties to Suit to Establish Lien, see Parties, 217.

55. The transfer of a stock of ice by a tenant who is in arrears for rent, to an assignee of the term, and a transfer by the latter to one to whom he assigns the balance of the term, does not, where the ice is not removed from the premises, affect the lien of the landlord for such rent, under the act of Congress of Feb. 22, 1867, giving a tacit lien on such chattels situated on the premises as are subject to execution, to commence with the tenancy and continue for three months after the rent becomes due. *Fowler v. Rapley*, 15 Wall. 328, 21: 35
Cited in Joyce v. Wilkenning, 1 MacArth. 570—*Hempstead Real Estate Bldg. & Bkg. Assn. v. Cochran*, 60 Tex. 624.

56. The order of a district judge of New Orleans, having jurisdiction of the subject-matter and of the parties, accepting a *cessio bonorum* for creditors and staying proceedings against the debtor's property, is not absolutely void simply because the debtor, a corporation, was incapacitated to sue for such relief as a "person," within the intent and meaning of the insolvent laws; and excuses a lessor of the debtor from making a seizure of his property as a means of retaining the privilege for rent, given by La. Civ. Code, arts. 2675, 2679, if the property is seized while on the leased premises, or within fifteen days thereafter. *Holdane v. Sumner*, 15 Wall. 600, 21: 255

Editorial notes.

[Availability of exemptions against claim for rent. 24 L.R.A. 812.

Waiver of landlord's lien by attachment. 50 L.R.A. 717.]

Lien on chattels.

Priority of Lien, see *infra*, 68.

Effect of Removal into Another State, see Conflict of Laws, 153.

57. A printing press is subject to execution under the act of February 22, 1867 (14 Stat. at L. 404), giving a landlord a lien upon such of a tenant's chattels upon the premises as are subject to execution for debt. *Webb v. Sharp*, 13 Wall. 14, 20: 478

58. Under the act of February 22, 1867, for the District of Columbia, providing for a landlord's lien on chattels on the premises, the lien commences with the tenancy, or whenever personal chattels owned by the tenant and subject to execution for debt are brought on the premises, and continues for

three months after the rent is due. *Fowler v. Rapley*, 15 Wall. 328, 21: 35
Webb v. Sharp, 13 Wall. 14, 20: 478
Cited in Beall v. White, 94 U. S. 383, 24 L. ed. 173.

59. The landlord's lien for rent provided by act of Congress of Feb. 22, 1867, when it once attaches to the chattels, continues, into whosoever hands the chattels may come, during the three months allowed for instituting proceedings, unless within that time the lien is displaced by the removal of the goods, or by the sale of the chattels by the tenant in the ordinary course of mercantile transactions. *Fowler v. Rapley*, 15 Wall. 328, 21: 35
Cited in Hussey v. Peebles, 53 Ala. 435—*Westmoreland v. Foster*, 60 Ala. 455—*Ex parte Barnes*, 84 Ala. 543, 4 So. 769—*Flinney v. Harding*, 136 Ill. 578, 12 L.R.A. 607, 27 N. E. 289—*Howe v. Clark*, 23 Ill. App. 148—*Flinney v. Harding*, 32 Ill. App. 101—*Smith v. Shell Lake Lumber Co.* 68 Wis. 95, 81 N. W. 694.

60. A lessor has a right of pledge on the chattels of the lessee which are found on the premises, for the payment of his rent and of other obligations of the lease, under La. Civ. Code, arts. 2675, 2679. *Holdane v. Sumner*, 15 Wall. 600, 21: 255

61. Where goods are in the hands of a syndic in Louisiana, under a *cessio bonorum*, a lessor cannot exercise his right of pledge on the movable effects of his lessee, given by La. Civ. Code, arts. 2675, 2679, if exercised while they are on the premises, or within fifteen days after they are taken away, and does not lose his privilege by not exercising it, but the privilege attaches to the proceeds of the property in the officer's hands. *Holdane v. Sumner*, 15 Wall. 600, 21: 255
Cited in Gibson v. Gautier, 1 Mackey, 44.

62. The lessor and the sheriff had the right, under the law of Louisiana giving a lien for rent, to the possession of goods for the payment of rent, which had been seized for that purpose before proceedings in bankruptcy; and the assignee in bankruptcy could not take them from their possession, under § 14 of the bankrupt act, vesting in him all the property and estate of the bankrupt, although they are attached on mesne process, and dissolving any such attachment made within four months next preceding the commencement of the bankruptcy proceedings, as such section refers to attachments requiring a judgment to perfect them. *Marshall v. Knox*, 16 Wall. 551, 21: 481

Cited in Mays v. Fritton, 20 Wall. 419, 22 L. ed. 390—*Eyster v. Gaff*, 91 U. S. 526, 23 L. ed. 405—*Jerome v. McCarter*, 94 U. S. 737, 24 L. ed. 187—*Myer v. Crystal Lake Pickling & Preserving Works*, 14 Nat. Bankr. Reg. 17—*Davis v. Alabama & F. R. Co.* 1 Woods, 664, 13 Nat. Bankr. Reg. 261, Fed. Cas. No. 3,648—*Sage v. Wynkoop*, 16 Nat. Bankr. Reg. 368, Fed. Cas. No. 12,215—*Townsend v. Leonard*, 8 Dill. 372, Fed. Cas. No. 14,117—*Wilson v. Childs*, 8 Nat. Bankr. Reg. 527, Fed. Cas. No. 17,796—*Kimberling v. Hartly*, 1 McCrary, 141, 1 Fed. 575—*Re Easley*, 93

Fed. 421—National Bank v. Hobbs, 118 Fed. 628—O'Harra v. Stone, 48 Ind. 421—McCabe v. Goodwine, 65 Ind. 302—Goodrich v. Wilson, 119 Mass. 434, 14 Nat. Bankr. Reg. 562—Hurlbutt v. Currier, 68 N. H. 95, 38 Atl. 502—Ansonia Brass & Copper Co. v. Babbitt, 8 Hun. 161—Francisco v. Shelton, 85 Va. 788, 8 S. E. 789.

63. The "other obligations of the lease" in addition to the rent, for which a right of pledge on the movable effects of the lessee is given to the lessor by La. Civ. Code, art. 2705, do not include the purchase price of cane grown on other lands and sold by the lessors to the lessees by a separate and distinct contract included in the lease, which expressly provides for the termination of that contract on a certain condition before the lease terminates, although the lease includes a provision that it is an entire contract, each stipulation and obligation being a part of the consideration of every other. Burdon Cent. Sugar Ref. Co. v. Payne, 167 U. S. 127, 17 Sup. Ct. Rep. 754, 42: 105

Lien on crops.

Priority of Lien, see *infra*, 69.

64. When a state statute confers upon the landlord a lien upon the crops upon the demised premises, in any year, for the rent of that year, but gives no specific lien upon other property of the tenant, prior to the levy of a distress warrant by the landlord, he has no lien on property of the tenant on the premises except the crops. Morgan v. Campbell, 22 Wall. 381, 22: 796
Distinguished in Cowan v. Dunn, 1 Lea. 72.

Cited in Re Robinson, Fed. Cas. 11,944—Bryan v. Sanderson, 3 MacArth. 437—Gibson v. Gautier, 1 Mackey, 43—First Nat. Bank v. Adam, 138 Ill. 499, 28 N. E. 955—Kellogg Newspaper Co. v. Peterson, 162 Ill. 161, 53 Am. St. Rep. 300, 44 N. E. 411—Felton v. Strong, 37 Ill. App. 60—Smith v. Wheeler, 4 Okla. 144, 44 Pac. 203—Rosenberg v. Shaper, 51 Tex. 142.

65. Where a tenant sold crops covered by a mortgage clause in the lease to a vendee who had full notice of such clause, the crops went into his hands impressed with the lien thereof; and when he sold them, he took the proceeds in trust for the purchaser of said premises at the sheriff's sale, and became liable to him for the amount. Butt v. Ellett, 19 Wall. 544, 22: 183

66. Where, in a lease in Arkansas, it is provided that the lessor shall have his lien on the crop for the payment of his rent, the lien referred to is the lien given by the statute of Arkansas. Watworth v. Harris, 129 U. S. 355, 9 Sup. Ct. Rep. 340, 32: 712

67. In Louisiana the privilege or pledge of the landlord on the crops for his rent is superior to the pledge of one who advances money or necessary supplies to the planter, even where the planter pledges the crops for such advances. Saloy v. Bloch, 136 U. S. 323, 10 Sup. Ct. Rep. 996, 34: 468

Priority.

Preference in Proceeds Realized by Assignee in Bankruptcy, see Bankruptcy, 302, 303.

See also *supra*, 67.

68. In the District of Columbia the lien of a landlord for rent is superior to that of a mortgage on a tenant's chattels subject by law to execution so long as they remain on the demised premises, and for three months after rent is due, and continue to be the property of the tenant. Webb v. Sharp, 13 Wall. 14, 20: 478

Beall v. White, 94 U. S. 382, 24: 173
Cited in Fowler v. Rapley, 15 Wall. 386, 21 L. ed. 37—Beall v. White, 94 U. S. 383, 24 L. ed. 173—Hechtman v. Sharp, 3 MacArth. 94—The Richmond v. Cake, 1 App. D. C. 462—Chicago & A. R. Co. v. Dunn, 28 Ill. App. 148—Finney v. Harding, 32 Ill. App. 101—Wooten v. Gwin, 56 Miss. 427—Hempstead Real Estate, Bldg. & Bkg. Asso. v. Cochran, 60 Tex. 624—Smith v. Shell Lake Lumber Co. 68 Wis. 94, 31 N. W. 694.

69. The landlord is not prevented by waiver of the priority of his lien in favor of one who has made advances, from instituting suit and seizing the crop for the rent, although the net proceeds of the crop in his hands are subject to the lien for such advances. Saloy v. Block, 136 U. S. 338, 10 Sup. Ct. Rep. 996, 34: 468
Cited in Finney v. Harding, 32 Ill. 578, 12 L.R.A. 607, 27 N. E. 289—Howe v. Clark, 23 Ill. App. 148—Finney v. Harding, 32 Ill. App. 101—Becker v. Brown, 65 Neb. 269, 91 N. W. 178—Hempstead Real Estate, Bldg. & Bkg. Asso. v. Cochran, 60 Tex. 624—Berkey & G. Furniture Co. v. Sherman Hotel Co. 81 Tex. 142, 16 S. W. 807—Smith v. Shell Lake Lumber Co. 68 Wis. 95, 31 N. W. 694.

3. Distress.

Prior Right of Trustee in Bankruptcy to Property Unlawfully Distrained, see Bankruptcy, 204.

Summary Proceedings to Call in Distrained Chattels as Assets in Bankruptcy, see Bankruptcy, 227.

Measure of Damages for Officer's Default in Making, see Damages, 146, 147.

Replevy of Goods Distrained, as Subjecting them to Levy against Replevying Tenant, see Execution, 25.

Replevin for Goods Distrained, see Replevin, 27.

See also *supra*, 64; *infra*, 77.

70. [Distraint of goods elsewhere than upon the premises is not an objection that can be raised to avoid the sale. Water v. McClellan (C. Ct.) 4 Dall. 208, 1: 803]

71. [Goods distrained for rent, upon replevin and security given by the tenant, are released from the lien of the distrainer, so that a writ of de retorno habendo will be subsequent to an intervening distress upon the same goods. Woglom v. Cowperthwaite (Ct. Com. Pl. Phila.) 2 Dall. 68, 1: 292]

72. [In Pennsylvania, the right of pur-

seizing and goods after their removal from the premises, on distress for rent, does not extend to the goods of a stranger. *Adams v. La Comb* (Ct. Com. Pl. Phila.) 1 Dall. 440, 1: 214]

73. An execution is the end of the law; it gives the successful party the fruits of his judgment; and the distress warrant is a most effective execution; it may act on the body and estate of the individual against whom it is directed. *United States v. Nourse*, 9 Pet. 8, 9: 31
Cited in *Central Nat. Bank v. Stevens*, 169 U. S. 464, 42 L. ed. 819, 18 Sup. Ct. Rep. 403—*United States v. Drennen*, Hempst. 325, Fed. Cas. No. 14,992—*Sedwick v. Ritter*, 128 Ind. 212, 27 N. E. 610—*McKinster v. Sager*, 163 Ind. 686, 68 L.B.A. 280, 72 N. E. 854—*Webber v. Harshbarger*, 5 Kan. App. 187, 47 Pac. 166.

74. A distress warrant issued by one who had no authority cannot be a waiver of a notice to quit, where it was not known to or ratified by the person for whom the unauthorized action had been taken. *Lucas v. Brooks*, 18 Wall. 436, 21: 779

Editorial note.

Distress for rent. 22: 796

e. Re-entry; Recovery of Possession.

Waiver of Breach of Agreement by Levying, see *supra*, 18.

Recovery of Rent after, see *supra*, 50.

Necessity that Tenant do Equity by Paying Rent in Order to Procure Injunction against Dispossession Proceedings, see Equity, 308.

Conclusiveness of Judgment in Forcible Detainer, see Judgment, 629, 630.

Oath before Notary Public in Proceedings for Recovery, see Oath.

Re-entry as Affecting Right to Demand Conveyance Under Covenant in Lease, see Vendor and Purchaser, 39.

Matters as to Writ of Right, see Writ of Right.

See also *supra*, 40, 41; Damages, 49.

75. The tenant cannot make his disclaimer and adverse claim so as to protect himself during the unexpired time of the lease. *Willison v. Watkins*, 3 Pet. 43, 7: 596

76. If the tenant disclaims the tenure, claims the fee adversely in right of a third person or in his own right, or attorns to another, his possession then becomes a tortious one by the forfeiture of his right; and the landlord's right of entry is complete, and he may sue at any time within the period of limitation. *Willison v. Watkins*, 3 Pet. 43, 7: 596
Peyton v. Stith, 5 Pet. 485, 8: 200
Walden v. Bodley, 14 Pet. 156, 10: 398
Cited in *Woodward v. Brown*, 13 Pet. 4, 10 L. ed. 32—*Walden v. Bodley*, 14 Pet. 162, 10 L. ed. 401—*Smythe v. Henry*, 41 Fed. 709—*Henley v. Branch Bank*, 16 Ala. 558—*Doe ex dem. Kennedy v. Reynolds*, 27 Ala. 376—*Wells v. Sheerer*, 78 Ala. 146—*Merrick v. Hutt*, 15 Ark. 342—*Goodman v. Malcolm*, 5 Kan. App. 297, 48 Pac. 439—

Byrne v. Beeson, 1 Dougl. (Mich.) 181—*Amick v. Brubaker*, 101 Mo. 477, 14 S. W. 627—*Mattis v. Robinson*, 1 Neb. 8—*Emerick v. Tavener*, 9 Gratt. 226, 58 Am. Dec. 217—*Miller v. Williams*, 15 Gratt. 218—*Swann v. Thayer*, 36 W. Va. 52, 14 S. E. 423—*Evans v. Enloe*, 70 Wis. 349, 34 N. W. 918.

77. Under statute 4 Geo. II., it must be alleged and proved that there was not sufficient distress upon the premises at some period between the time the rent was due and the day of demise; and it must be shown that there was an examination of every part of the premises; and if the time when there was not sufficient distress is subsequent to day of demise, it will not establish a right to re-enter. *Connor v. Bradley*, 1 How. 211, 11: 105

78. The use of the word "estate" in a covenant for re-entry, providing that, in default of rent, the lessor may enter, "and the said premises repossess and enjoy as in his first and former estate," has reference to the nature of the lessor's interest in the property, and not to the extent of improvements on the soil. *Kutter v. Smith*, 2 Wall. 491, 17: 830

79. Where recovery was had in ejectment for the nonpayment of the rents reserved in a lease, courts may stay the proceedings on payment of the rent due, with interest and costs. *Sheets v. Selden*, 7 Wall. 416, 19: 166

80. Tenants in possession under one from whom a conveyance is claimed cannot, on the ground that he holds by a fraudulent title, be deprived of their interest by a court of equity, where they are not shown to have been parties to the fraud. *Ringo v. Binns*, 10 Pet. 269, 9: 420

Notice to quit; demand.

Waiver of, by Issuing Distress Warrant, see *supra*, 74.

Admission as to, by Failure to Plead, see Pleading, 158.

Sufficiency of Allegation, see Pleading, 524.

81. A tenant who disclaims his landlord's title is not entitled to a notice to quit. *Woodward v. Brown*, 13 Pet. 1, 10: 31

82. Where a right of re-entry is claimed on the ground of forfeiture for the nonpayment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset upon the day when the rent is due, at the most notorious place upon the land, although there is no one there to pay. *Connor v. Bradley*, 1 How. 211, 11: 105

Prout v. Roby, 15 Wall. 471, 21: 58
Cited in *Prout v. Roby*, 15 Wall. 476, 21 L. ed. 60—*Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 33, 35 L. ed. 336, 11 Sup. Ct. Rep. 691—*Wildman v. Taylor*, 4 Ben. 51, Fed. Cas. No. 17,654—*Lamson Consol. Store Service Co. v. Bowland*, 52 C. C. A. 339, 114 Fed. 643—*Rogers v. Wentworth*, 58 N. H. 319—*Smith v. Whitbeck*, 13 Ohio St. 484—*Rea v. Eagle Transfer Co.* 31 Pittsb. L. J. N. S. 416—*Johnston v. Hargrove*, 81 Va. 122.

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To Half-Breed Indians, see Public Lands, I. c. 17.

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Embezzlement, see Embezzlement.

1. The crime of feloniously taking and carrying away personal property of the United States is, by U. S. Rev. Stat. § 5456, U. S. Comp. Stat. 1901, p. 3683, made a distinct and separate offense from that of robbery, mentioned in the same section. *Jolly v. United States*, 170 U. S. 402, 18 Sup. Ct. Rep. 624, 42: 1085

2. Postage stamps which have not been issued or sold, and are in the possession of the government, are personal property belonging to the United States, within the meaning of U. S. Rev. Stat. § 5456, U. S. Comp. Stat. 1901, p. 3683, making it a crime to feloniously take and carry away such property. *Jolly v. United States*, 170 U. S. 402, 18 Sup. Ct. Rep. 624, 42: 1085

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[Of property found. 37 L.R.A. 121.

Of money or property delivered by mistake. 52 L.R.A. 136.

Homicide in attempting to prevent. 67 L.R.A. 537.

By fraudulent conversion of property by one legally in charge or custody thereof. 2 L.R.A.(N.S.) 248.

When larceny deemed continuous. 7 L.R.A.(N.S.) 520.

Taking of property by general owner for purpose of defeating a lien thereon as larceny. 12 L.R.A.(N.S.) 94.]

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Master's Duty as to, see Master and Servant, 29, 30.

LATERAL SUPPORT.

1. The right of lateral support extends only to the soil in its natural condition; it does not protect whatever is placed upon the soil increasing the downward and lateral pressure. *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25: 336

2. An adjoining owner excavating on his own land must not remove the earth so near to the land of his neighbor that the latter's soil will crumble away under its own weight and fall upon his land. *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25: 336
Cited in *Colton v. Onderdonk*, 69 Cal. 159, 58 Am. Rep. 556, 10 Pac. 395—*Ulrick v. Dakota Loan & T. Co.* 2 S. D. 291, 49 N. W. 1054—*Costigan v. Pennsylvania R. Co.* 54 N. J. L. 240, 23 Atl. 810—*Fyfe v. Turtle Creek*, 22 Pa. Super. Ct. 296—*Tunstall v. Christian*, 80 Va. 4, 56 Am. Rep. 581—*Stearns v. Richmond*, 88 Va. 997, 29 Am. St. Rep. 758, 14 S. E. 847—*Parke v. Seattle*, 5 Wash. 19, 20 L.R.A. 74, 34 Am. St. Rep. 839, 31 Pac. 310.

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Liability for injuries to buildings on adjoining land by negligent removal of lateral support of the soil. 6 L.R.A.(N.S.) 243.

Liability of municipal corporation for injury to lateral support in making street improvements. 12 L.R.A.(N.S.) 696.]

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The term "legal representatives" is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons who, with respect to his property, stand in his place, and represent his interests, whether transferred to them by his act or by operation of law. It may include assigns, as well as executors and administrators. *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. Rep. 877, 29: 997
Cited in Robinson v. Hurst (Mutual Reserve Fund Life Asso. v. Hurst) 78 Md. 71, 20 L.R.A. 764, 44 Am. St. Rep. 266, 26 Atl. 956—*Ewing v. Shannahan*, 113 Mo. 194, 20

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 Delegation of Power by, see Constitutional Law, III. b.
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 Validity of Contract to Influence Action of, see Contracts, VI. d, 3.
 Relative Functions of Court and Legislative Departments, see Generally, Courts, I. e, 3.
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Extent of Constitutional Power, see States, 22-26.

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Enactment of Statutes by, see Statutes, I.
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Construing Statute in Accordance with Intent of, see Statutes, II. c.

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Editorial notes.

[Extra session. 15 L.R.A. 847.
 Governor's power as to adjournment of. 22 L.R.A. 716.]

General subjects of legislative control.

Power to Authorize Issuance of Municipal Bonds, see Bonds, 171, 172, 421, 424, 433.

Power to Validate Municipal Bond, see Bonds, V. j.

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Power to Grant Exclusive Privilege, see Bridges, 6.

Power to Prescribe and Decide as to Rates of Carriers, see Carriers, III. c.

Power to Regulate Common Carriers, see Carriers, 217.

Power to Require Sale of Thousand Mile Tickets, see Carriers, 220, 221.

Power over Charities, see Charities, 95.

Exercise of Police Power by, see Constitutional Law, IV. c.

Power to Devest Itself of Police Power, see Constitutional Law, 842.

Power of, to Contract Against Future Exercise of Police Power, see Constitutional Law, IV. g, 2, b.

Power to Pass Curative Acts, see Constitutional Law, IV. f, 2, b.

Power to Impair Obligations of Contract, see Constitutional Law, IV. g.

Power to Punish for Contempt, see Contempt, 49.

Power to Regulate Corporations, see Corporations, I. c, 3.

Power to Amend Corporate Charter, see Corporations, 172, 176, 177.

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Power to Divide Counties and Towns, see Counties, 7.

Power to Bind Successor, see Counties, 8.

Power to Compel County to Incur Debt, see Counties, 21.

Power to Declare Acts Criminal, see Criminal Law, I. b.

Power to Prescribe Cumulative Punishments, see Criminal Law, 208.

Power to Grant Divorce, see Divorce and Separation, 1.

Power to Establish Rules of Evidence, see Evidence, 2044.

Power to Make Forthcoming Bonds Stand as New Judgment in Case of Breach, see Execution, 81.

Power to Subject Lands to Payment of Decedent's Debts, see Executors and Administrators, 136.

Power to Regulate Mode of Enforcing Fines and Penalties, see Forfeitures and Penalties, 16.

Power to Remit Penalty, see Forfeitures and Penalties, 19.

Power to Supervise Guardianship of Infants, see Guardian and Ward, 15, 23, 25.

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Power to Take Away Right to Office, see Officers, 3.

Power to Change or Abolish Office, see Officers, 3, 4.

Power to Reduce Compensation of Officers, see Officers, 23.

Power to Change Authority of Public Officers, see Officers, 40.

Power as to Pueblo Lands, see Pueblo Lands, 34.

Power to Authorize Municipal Aid to Railroad Company, see Railroads, III.

Power to Release Lien of State on Railroad, see Railroads, 145.

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Power to Prevent Repeal of Statute by Subsequent Legislature, see Statutes, 580.

Power to Charter Street Railway, see Street Railways, 7.

Power as to Taxation, see Taxes, I.

Power to Exempt from Taxation, see Taxes, I. c, 8, c.

Power to Modify or Abolish Powers, Rights and Duties of Towns, see Towns, 2.

Power to Regulate Warehouse Charges, see Warehouseman, 2.

Power to Provide for Quieting Title to Land, see Writ and Process, 85b.

1. Civil institutions, which are instruments of the government and created for its purposes, are at all times subject to legislative control. *Dartmouth College v. Woodward*, 4 Wheat. 518. 4: 629
Cited in *East Hartford v. Hartford Bridge Co.*

10 How. 536, 13 L. ed. 529—*Aspinwall v. Davless County*, 22 How. 377, 16 L. ed. 300—*Re Hobbs*, 1 Woods, 540, Fed. Cas. No. 6,550—*Jones v. Pensacola*, Fed. Cas. No. 7,488—*State v. Curran*, 12 Ark. 353—*Moses v. Kearney*, 31 Ark. 266—*Pearson v. State*, 56 Ark. 152, 35 Am. St. Rep. 91, 19 S. W. 499—*State v. Burk*, 63 Ark. 64, 37 S. W. 406—*Hart v. Burnett*, 15 Cal. 612—*Johnson v. People*, 6 Colo. App. 167, 40 Pac. 576—*Coyle v. Gray*, 7 Houst. (Del.) 90, 41 Am. St. Rep. 109, 30 Atl. 728—*Beckwith v. St. Philip's Parish*, 69 Ga. 574—*Armstrong v. Dearborn County*, 4 Blackf. 217—*Lucas v. Tippecanoe County*, 44 Ind. 541—*Clinton v. Cedar Rapids & M. River R. Co.* 24 Iowa, 475—*Dubuque v. Illinois C. R. Co.* 39 Iowa, 95—*Cumberland & O. R. Co. v. Barren County Court*, 10 Bush. 612—*Bradford v. Cary*, 5 Me. 342—*Frederick v. Groshon*, 30 Md. 444, 96 Am. Dec. 591—*People ex rel. LeRoy v. Hurlbut*, 24 Mich. 104, 9 Am. Rep. 103—*State ex rel. Slipp v. McFadden*, 23 Minn. 43—*Conner v. Bent*, 1 Mo. 239—*St. Louis v. Russell*, 9 Mo. 511—*Esser v. Spalding*, 17 Nev. 304, 30 Pac. 896—*Farnum's Petition*, 51 N. H. 382—*Baldwin v. New York*, 2 Keyes, 414—*Darlington v. New York*, 28 How. Pr. 363—*Baldwin v. New York*, 30 How. Pr. 811—*Milbau v. Sharp*, 15 Barb. 211—*People v. Kerr*, 37 Barb. 422—*Baldwin v. New York*, 45 Barb. 380—*Bronk v. Barclay*, 13 App. Div. 93, 43 N. Y. Supp. 400—*Mills v. Williams*, 33 N. C. (11 Ired. L.) 564—*Marietta v. Fearing*, 4 Ohio, 432—*Portland & W. Valley R. Co. v. Portland*, 14 Or. 193, 58 Am. Rep. 299, 12 Pac. 265—*Bridgeport v. Schnelpp*, 15 Pa. Co. Ct. 152—*State ex rel. Atty. Gen. v. State Bank*, 1 S. C. N. S. 67—*Bass v. Fontleroy*, 11 Tex. 704—*Kirkman v. Bird*, 22 Utah, 115, 58 L.R.A. 672, 83 Am. St. Rep. 774, 61 Pac. 338—*Wilson v. Ross*, 40 W. Va. 282, 21 S. E. 868—*Milwaukee v. Milwaukee*, 12 Wis. 101.

2. The purposes for which men enter into society will determine the nature and terms of the social compact; and, as they are the foundations of the legislative power, they will decide what are the proper objects of it. *Calder v. Bull*, 3 Dall. 386. 1: 648
Cited in *Williams v. Port Chester*, 72 App. Div. 525, 76 N. Y. Supp. 631—*Kelly v. Pittsburgh*, 85 Pa. 182, 27 Am. Rep. 683.

3. It might well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power. *Satterlee v. Matthewson*, 2 Pet. 380. 7: 458

Cited in *Re Smith*, 8 Nat. Bankr. Reg. 407, 2 Woods, 460, 14 Nat. Bankr. Reg. 298, Fed. Cas. No. 12,996—*Payne v. Treadwell*, 16 Cal. 238—*Campbell's Case*, 2 Bland. Ch. 232, 20 Am. Dec. 360—*Todman v. Purdy*, 5 Nev. 299—*Dover v. Portsmouth Bridge*, 17 N. H. 227—*Washington, A. & G. R. Co. v. Alexandria & W. R. Co.* 20 Gratt. 110.

4. There are certain vital principles in our free Republican government which will determine and overrule an apparent and flagrant abuse of legislative power; as, to authorize manifest injustice by positive law, or to take away that security as to personal liberty or private property for the protection whereof the government was established. *Calder v. Bull*, 3 Dall. 386. 1: 648
Cited in *Atchison, T. & S. F. R. Co. v. Mat-*

thews, 174 U. S. 114, 43 L. ed. 916, 19 Sup. Ct. Rep. 609—North Bloomfield Gravel Min. Co. v. United States, 32 C. C. A. 99, 59 U. S. App. 377, 88 Fed. 679—Dale v. The Governor, 3 Stew. (Ala.) 418—Re Dorsey, 7 Port. (Ala.) 375—Billings v. Hall, 7 Cal. 23—Bank of St. Mary's v. State, 12 Ga. 498—State ex rel. Hernandez v. Flanders, 24 La. Ann. 71—Hepburn's Case, 3 Bland, Ch. 96—Hague v. Powers, 39 Barb. 478—People v. Toynbee, 12 How. Pr. 267—Hague v. Powers, 25 How. Pr. 57—Wynehamer v. People, 13 N. Y. 481.

— Editorial notes.

[Power to grant pardon. 34 L.R.A. 251.
Power to appoint a committee to sit after close of session. 10 L.R.A.(N.S.) 172.]

Natural limitations.

Limitation on Power to Take Private Property, see Eminent Domain, 42.

5. The nature and ends of the legislative power will limit the exercise of it. *Calder v. Bull*, 3 Dall. 386, 1: 648
Cited in *Duanesburgh v. Jenkins*, 46 Barb. 308.

— Editorial note.

[Implied restrictions on power of. 17 L.R.A. 838.]

Nonuser of power.

See also Carriers, 233.

6. A legislative power which actually exists is not lost by nonuser. *Chicago, B. & Q. R. Co. v. Cutts* (Chicago, B. & Q. R. Co. v. Iowa) 94 U. S. 155, 24: 94
Cited in *Union P. R. Co. v. Mason City & Ft. D. R. Co.* 64 C. C. A. 357, 128 Fed. 239.

LEGITIMACY.

Presumption as to, see Evidence, 206–210.
Evidence to Disprove, see Evidence, 2366.
Conclusiveness of Judgment as to, see Judgment, 570.
Legitimation of Illegitimate Child, see Parent and Child, 3–7.
See also Descent and Distribution, 16, 17.

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Of Railroads, Liability to Passengers, see Carriers, 11, 12.

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Presumption of Receipt from Mailing, see Evidence, 590–594.
Of Guaranty, see Guaranty.
Liability of Writer of Libelous Letter, see Libel and Slander, 20.
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Embezzlement by, see Postoffice, 106–112.
See also Postoffice, III.

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As Certificate of Deposit, see Banks, 127.

LETTER OF CREDIT.

As Promise to Accept Bill of Exchange, see Bills and Notes, 68.
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Construction of, see Contracts, 284.
Evidence to Show Margin on, see Evidence, 1625.
Parol Evidence to Vary, see Evidence, 1678.
See also Guaranty.

LETTER OF INTRODUCTION.

As Guaranty, see Guaranty, 2.

LETTERS OF MARQUE.

Liability of Owners of, see Prize and Capture, 159a.
In General, see Prize and Capture, I. a.

LETTERS OF RECOMMENDATION.

As Guaranty, see Guaranty, 1.

LEVEE.

Bonds for Building of, see Bonds, 181.
Issuance of Bonds to Fund Indebtedness for Levee Warrants, see Bonds, 195.
Due Process in Assessing Levee Taxes, see Constitutional Law, 757–760.
Due Process in Enforcing Payment of Levee Taxes, see Constitutional Law, 577, 671.
Contracts with Holders of Levee Bonds, see Constitutional Law, 1261.

Erection of, for Draining Marshy Lands, see Drains, 1.
 Right to Construct, on Land Held under Patent from United States, see Easements, 2.
 Estoppel as to Assessment for, see Estoppel, 194.
 Recitals in Tax Deed as Evidence of Payment of Levee Taxes, see Evidence, 2436.
 Liability of Public Wharf to Levy of Execution, see Execution, 33, 34.
 Opening of Crevasse, as Ground for Terminating Lease, see Landlord and Tenant, 27.
 Effect of Limitation of Claims against, see Limitation of Actions, 508.
 Power of Municipality to Establish, see Waters, 95, 102.
 Erection by Public Authority, see Waters, 107.

The work of constructing a great levee along the bank of a river subject to overflow, and independent of a system of drainage, is not embraced within the Illinois act of April 24, 1871, authorizing the construction of drains and ditches for agricultural and sanitary purposes, and of levees if deemed necessary for drainage. *O'Brien v. Wheelock*, 184 U. S. 450, 22 Sup. Ct. Rep. 354, 46: 636

LEVY.

Of Attachment, see Attachment, IV.
 Of Execution, see Execution.
 Of Taxes, see Taxes, III.

LEVY COURT.

Liability of, to be Sued, see District of Columbia, 45.
 Right to Share of Penalties, Forfeiture, and Fines, see Forfeiture and Penalties, 1.

LEWDNESS.

Libel in Charging Woman with, see Libel and Slander, 7.

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See Conflict of Laws.

LEX LOCI.

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 See also Conflict of Laws.

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LIBEL AND SLANDER.

- I. Who Liable, 1-2.*
- II. What Actionable, 3-17.*
 - a. In General, 3-8.*
 - b. Privileged Communications, 9-17.*
- III. Actions; Defenses, 18-23.*

Delegation of Power to Enact Libel Law for Philippines, see Constitutional Law, 146, 156.

I. Who Liable.

1. So far as a corporate body authorized the publication of a libel, it is responsible in damages. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16: 73
Otford in Scott v. Donald, 165 U. S. 88, 41 L. ed. 638, 17 Sup. Ct. Rep. 265—*United States v. John Kelso Co.* 86 Fed. 306—*Maynard v. Fireman's Fund Ins. Co.* 84 Cal. 52, 91 Am. Dec. 672—*Washington Gaslight Co. v. Lansden*, 9 App. D. C. 530—*Reed v. Home Sav. Bank*, 130 Mass. 445, 39 Am. Rep. 468—*De Senancour v. Societe la Prevoyance*, 146 Mass. 618, 16 N. E. 553—*Fogg v. Boston & L. R. Corp.* 148 Mass. 516, 12 Am. St. Rep. 583, 20 N. E. 109—*Gillett v. Missouri Valley R. Co.* 55 Mo. 321, 17 Am. St. Rep. 653—*Vance v. Erie R. Co.* 32 N. J. L. 336, 90 Am. Dec. 665—*Van Aernam v. McCune*, 32 Hun. 317—*Fenton v. Wilson Sewing Mach. Co.* 9 Phila. 194, 31 Phila. Leg. Int. 132—*Missouri P. R. Co. v. Richmond*, 73 Tex. 572, 4 L.R.A. 282, 15 Am. St. Rep. 794, 11 S. W. 555—*Missouri P. R. Co. v. Behee*, 2 Tex. Civ. App. 109, 21 S. W. 384—*State v. Baltimore & O R. Co.* 15 W. Va. 373, 36 Am. Rep. 803.

2. A gas company is not liable for the act of its general manager in writing a personal letter, which he copied into the official copybook in the company's office, and which was used as the basis of a libelous publication respecting the testimony of the former manager of the company as to the price of gas. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. Rep. 296, 43: 543

Editorial notes.

[Liability of newspaper proprietor for libel published without his knowledge or consent. 26 L.R.A. 779

Liability of officers of corporation for its libels. 28 L.R.A. 427.

Liability of telegraph company for handling libelous message. 9 L.R.A.(N.S.) 140.

Liability of editor or manager of newspaper for libel published without his knowledge. 10 L.R.A.(N.S.) 332.]

II. What Actionable.

a. In General.

3. [To charge one with taking a false oath before a justice of the peace in a pending suit is actionable. *Rue v. Mitchell* (Ct. Com. Pl. Phila.) 2 Dall. 58, 1: 288]

4. [The sense in which words are received by the world is the sense which courts should ascribe to them in actions of slander. *Rue v. Mitchell* (Ct. Com. Pl. Phila.) 2 Dall. 58, 1: 288]

5. Every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous or odious or ridiculous, is prima facie a libel, and implies malice in the author or publisher towards the person concerning whom such publication is made. *White v. Nicholls*, 3 How. 266, 11: 591

Cited in *McDonald v. Woodruff*, 2 Dill. 246, Fed. Cas. No. 8,770—*Pfützinger v. Dubs*, 12 C. C. A. 402, 24 U. S. App. 376, 64 Fed. 698—*Times Pub. Co. v. Carlisle*, 36 C. C. A. 484, 94 Fed. 771—*Republican Pub. Co. v. Miner*, 3 Colo. App. 575, 34 Pac. 485—*Bailey v. Holland*, 7 App. D. C. 189—*Montgomery v. Knox*, 23 Fla. 599, 3 So. 211—*Johnson v. Stebbins*, 5 Ind. 367—*Hetherington v. Sterry*, 28 Kan. 420, 42 Am. Rep. 169—*Snyder v. Fulton*, 34 Md. 135, 6 Am. Rep. 314—*Richardson v. State*, 68 Md. 210, 7 Atl. 43—*Thompson v. Powning*, 15 Nev. 208—*Van Ingen v. Newton*, 1 Disney (Ohio) 483—*Cole v. Neustadter*, 22 Or. 198, 29 Pac. 550—*Com. v. Westervelt*, 11 Phila. 469—*Com. v. McClure*, 83 Phila. Leg. Int. 382—*Lowe v. Herald Co.* 6 Utah, 178, 21 Pac. 991.

6. [Philippine Commission, act No. 277, § 1, defines libel as malicious defamation, expressed either in writing or printing, or by signs or pictures or the like, or public theatrical exhibitions, tending to blacken the memory of one who is dead, or to impeach the honesty, virtue, or reputation, or publish the alleged or natural defects, of one who is alive, and thereby expose him to public hatred, contempt, or ridicule. Held, that headlines above an article published in a newspaper, reading: "Traitor, Seducer, and Perjurer. Sensational Allegations against Commissioner Legarda. Made of Record and Read in English. Spanish Reading Waived. Wife would have Killed Him. Legarda Pale and Nervous"—were libelous, under the act. *United States v. Dorr* (Philippine Sup. Ct.) 47: 1187]

Editorial notes.

[Charging solicitation to crime as slander. 25 L.R.A. 434.

By opinions or comment. 28 L.R.A. 667. Libel by charging the raising or disbursing of campaign funds. 2 L.R.A. (N.S.) 691.

Laudatory or ironical article as libel. 4 L.R.A. (N.S.) 861.

Giving or refusing information affecting character or reputation of servant. 4 L.R.A. (N.S.) 1092.]

Lewdness.

7. Words charging an unmarried woman with fornication are not in themselves actionable. Special damages must be alleged and proved. *Pollard v. Lyon*, 91 U. S. 225, 23: 308

Cited in *Walker v. Tribune Co.* 29 Fed. 829—*Grand v. Dreyfus*, 122 Cal. 61, 54 Pac. 389—*Jarman v. Rea*, 137 Cal. 344, 70 Pac. 216—*Bush v. McMann*, 12 Colo. App. 507, 55 Pac. 956—*Page v. Merwin*, 54 Conn. 434, 8 Atl. 675—*Kennenberg v. Neff*, 74 Conn. 63, 49 Atl. 853—*Cahn v. Chesapeake & P. Teleph. Co.* 3 App. D. C. 556—*Douglas v. Douglas*, 4 Idaho, 295, 38 Pac. 934—*Gerald v. Inter Ocean Pub. Co.* 90 Ill. App. 209—*McDonald v. Nugent*, 122 Iowa, 653, 98 N. W. 506—*May v. Wood*, 172 Mass. 13, 51 N. E. 191—*Mains v. Whiting*, 87 Mich. 180, 49 N. W. 559—*Wilson v. Dubois*, 35 Minn. 473, 59 Am. Rep. 335, 29 N. W. 68—*Legg v. Dunleavy*, 80 Mo. 564, 50 Am. Rep. 512—*Baldwin v. Walser*, 41 Mo. App. 252—*Chaplin v. Lee*, 18 Neb. 441, 25 N. W. 609—*Cady v. Brooklyn Union Pub. Co.* 23 Misc. 411, 51 N. Y. Supp. 198—*Gates v. New York Recorder Co.* 155 N. Y. 234, 49 N. E. 769—*Quigley v. McKee*, 12 Or. 24, 53 Am. Rep. 320, 5 Pac. 347—*Ex parte Mason*, 29 Or. 21, 54 Am. St. Rep. 772, 43 Pac. 651—*J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 8, 51 L.R.A. 258, 80 Am. St. Rep. 857, 58 S. W. 281—*Womack v. Circle*, 29 Gratt. 198—*Moore v. Rolin*, 89 Va. 111, 16 L.R.A. 627, 15 S. E. 520.

— Editorial note.

Imputing unchastity to a female. 23: 308

Damaging business.

8. Words not otherwise actionable may form the basis of an action for slander when spoken of a party in respect of his office, profession, or business; and this principle embraces all temporal offices or trusts without limitation. *White v. Nicholls*, 3 How. 266, 11: 591

— Editorial notes.

[By statements concerning property. 13 L.R.A. 707.

By filing lien. 16 L.R.A. 625.

Imputing incompetency to physician. 26 L.R.A. 325.

By blacklisting dealer. 49 L.R.A. 612.

Charging one with refusal to pay debt as. 3 L.R.A. (N.S.) 339.

Oral charge of insolvency against a merchant. 4 L.R.A. (N.S.) 973.

Written charge with reference to plaintiff's business. 4 L.R.A. (N.S.) 977.]

b. Privileged Communications.

9. A letter to the President of the United States, containing charges both false and malicious, is not privileged, but will sustain an action of libel. *White v. Nicholls*, 3 How. 266, 11: 591

10. If the publication declared upon is to be regarded as an instance of privileged publications, malice is an indispensable characteristic which the plaintiff is bound to establish in relation to it. *White v. Nicholls*, 3 How. 266, 11: 591

Cited in *White v. Nicholls*, 1 Hayw. & H. 124, Fed. Cas. No. 17,534—*Myers v. Longstaff*,

14 S. D. 106, 84 N. W. 233—Jones v. Townsend, 21 Fla. 449—Coogler v. Rhodes, 38 Fla. 249, 56 Am. St. Rep. 170, 21 So. 109—Rall v. Donnelly, 56 Ill. App. 431—Nichols v. Eaton, 110 Iowa, 512, 47 L.R.A. 485, 80 Am. St. Rep. 319, 81 N. W. 792—Pendleton v. Hawkins, 11 App. Div. 606, 42 N. Y. Supp. 626—McGaw v. Hamilton, 28 Pittsb. L. J. N. S. 265—Johnson v. Brown, 13 W. Va. 120—Evison v. Cramer, 47 Wis. 662, 3 N. W. 392.

11. In every case where a communication would otherwise be privileged, falsehood and the absence of probable cause will amount to proof of malice. *White v. Nicholls*, 3 How. 266. 11: 591

Cited in Masterson v. Brown, 18 C. C. A. 486, 30 U. S. App. 730, 72 Fed. 140—Gabe v. McGinnis, 68 Ind. 546—Neeb v. Hope, 111 Pa. 154, 2 Atl. 568—Knapp v. Campbell, 14 Tex. Civ. App. 207, 36 S. W. 765—People v. Glassman, 12 Utah, 243, 42 Pac. 950—Clemmons v. Danforth, 67 Vt. 625, 48 Am. St. Rep. 836, 32 Atl. 626.

12. [Philippine Commission act No. 277, § 7, provides that no reporter, editor, or proprietor of a newspaper is liable to prosecution for a fair and true report of any judicial, legislative, or other public proceedings, or of any special argument or debate in the course of such proceedings, except upon proof of malice in making the report, which shall not be implied from the mere fact of publication. Section 8 provides that libelous remarks or comments connected with matters privileged by the last section receive no privilege by reason of being so connected. *Held*, that libelous headlines were not privileged because appended to a privileged report of judicial proceedings. *United States v. Dorr* (Philippine Sup. Ct.) 47: 1187]

13. [The privileged report was a written statement prepared by an attorney in a prosecution for libel, in which he made an offer to prove the truth of certain statements regarded as material in the defense, and which was by the court excluded. *Held*, that the headlines could not be considered as a fair index to the report. *United States v. Dorr* (Philippine Sup. Ct.) 47: 1187]

Editorial note.

Privileged communications. 11: 591

In course of duties or business.

14. Whenever the author and publisher of an alleged slander acts in a bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests, it is privileged. *White v. Nicholls*, 3 How. 266. 11: 591

Cited in Trussell v. Scarlett, 18 Fed. 216—Union Mut. L. Ins. Co. v. Thomas, 28 C. C. A. 97, 48 U. S. App. 575, 83 Fed. 804—Merchants' Ins. Co. v. Buckner, 39 C. C. A. 29, 98 Fed. 231—McGehee v. Insurance Co. of N. A. 30 C. C. A. 552, 112 Fed. 854—Stallings v. Newman, 26 Ala. 811, 62 Am. Dec. 723—Republican Pub. Co. v. Conroy, 5 Colo. App. 264, 38 Pac. 423—Blakeslee v. Carroll, 64 Conn. 233, 25 L.R.A. 108, 29 Atl. 473—Harlow v. Carroll, 6 App. D. C. 138—Norfolk & W. S. B. Co. v. Davis, 12 App. D. C. 326—Comfort v. Young, 100 Iowa, 629, 69 N. W. 1032—State v. Balch, 31 Kan. 472, 2 Pac. 609—Evening Post Co.

v. Richardson, 113 Ky. 649, 68 S. W. 665—Beals v. Thompson, 149 Mass. 410, 21 N. E. 959—Aldrich v. Press Printing Co. 9 Minn. 137, 86 Am. Dec. 84, Gil. 123—Sherwood v. Powell, 61 Minn. 481, 29 L.R.A. 154, 52 Am. St. Rep. 614, 68 N. E. 1103—Jarnigan v. Fleming, 43 Miss. 722, 5 Am. Rep. 514—Weber v. Lane, 99 Mo. App. 82, 71 S. W. 1099—Perkins v. Mitchell, 31 Barb. 468—Smith v. Smith, 26 Hun, 577—Van Wyck v. Aspinwall, 17 N. Y. 193—Kilnck v. Colby, 46 N. Y. 431, 7 Am. Rep. 360—Byam v. Collins, 111 N. Y. 150, 2 L.R.A. 136, 7 Am. St. Rep. 726, 19 N. E. 75—John W. Lovell Co. v. Houghton, 116 N. Y. 526, 6 L.R.A. 365, 22 N. E. 1066—Sheffer v. Gooding, 47 N. C. (2 Jones, L.) 181—Hudnell v. Eureka Lumber Co. 133 N. C. 174, 45 S. E. 532—Warden v. Whalen, 8 Pa. Co. Ct. 661—Fenstermaker v. Tribune Pub. Co. 13 Utah, 536, 35 L.R.A. 619, 45 Pac. 1097—Dillard v. Collins, 25 Gratt. 351—Chaffin v. Lynch, 83 Va. 118, 1 S. E. 803—Johnson v. Brown, 13 W. Va. 119—Evison v. Cramer, 47 Wis. 577, 15 N. W. 760—Brown v. Vannaman, 85 Wis. 456, 39 Am. St. Rep. 860, 55 N. W. 183.

15. While the communication by a corporation to its constituents of the evidence collected as to the conduct of its officers and agents, and its conclusion upon the evidence, is a privileged communication in the absence of malice or bad faith, yet the privilege does not extend to the preservation of the report and evidence in the permanent form of a book for distribution. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16: 73
Cited in Montgomery v. Knox, 23 Fla. 609, 3 So. 211—Casey v. Hulan, 118 Ind. 592, 21 N. E. 322—King v. Patterson, 49 N. J. L. 426, 60 Am. Rep. 622, 9 Atl. 705—Rothholz v. Dunkle, 53 N. J. L. 440, 13 L.R.A. 656, 26 Am. St. Rep. 432, 22 Atl. 193—Kilnck v. Colby, 46 N. Y. 433, 7 Am. Rep. 360—Com. v. Godshalk, 13 Phila. 579, 84 Phila. Leg. Int. 322.

— Editorial note.

[Official report by executive or administrative officer. 5 L.R.A.(N.S.) 163.]

Judicial proceeding.

See also *infra*, 23.

16. A communication made to a state's attorney, whose duty is to "commence and prosecute" all criminal prosecutions, by a person who inquires of the attorney whether the facts communicated make out a case of larceny for a criminal prosecution, is an absolutely privileged communication, and cannot, in a suit against such person to recover damages for speaking words charging larceny, be testified to by the state's attorney, even although there be evidence of the speaking of the same words to other persons than such attorney. *Vogel v. Gruaz*, 110 U. S. 311, 4 Sup. Ct. Rep. 12, 28: 158
Cited in Re Quarles, 158 U. S. 536, 39 L. ed. 1081, 15 Sup. Ct. Rep. 959—McGehee v. Insurance Co. of N. A. 50 C. C. A. 553, 112 Fed. 855—Langdon v. People, 183 Ill. 409, 24 N. E. 874—Abbott v. National Bank, 20 Wash. 555, 56 Pac. 376.

17. Striking headlines prefixed to a newspaper report of a judicial proceeding, which held the prosecuting witness up to the public as "traitor, seducer, and perjurer," with the

additional phrase "wife would have killed him," are not privileged, even if the report itself was privileged, under act No. 277 of the Philippine Commission, § 7, as a fair and true report of judicial proceedings,—especially in view of the provision of the following section of that act, that "libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of being so connected." *Dorr v. United States*, 195 U. S. 138, 24 Sup. Ct. Rep. 808, 49: 128

— Editorial notes.

Privileged communication to magistrate or grand jury charging a crime. 28: 158
[By defamatory words in pleading. 22 L.R.A. 649.

Privilege of witness as to defamatory testimony. 22 L.R.A. 836.

Is the publication of pleadings or other papers, before any hearing has been had thereon, privileged. 12 L.R.A.(N.S.) 188.]

III. Actions; Defenses.

Exemplary Damages for, see Damages, 32.
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Denying Right to Sue for, as Deprivation of Reputation, see Constitutional Law, 680.

Evidence of Intent to Furnish Information for Publication of Libel, see Evidence, 2370.

Judgment in Divorce Suit as Evidence in Action for, see Judgment, 743.

Slander of Title as Evidence of Fraud, see Evidence, 283.

Mode of Reviewing Decree in Action for Slander of Title, see Appeal and Error, 674.

Pleading in Action for Libel, see Pleading, II. i.

Allegation of Special Damages, see Pleading, 450.

Existence of Malice as Question for Jury, see Trial, 264.

Defendant as Competent Witness, see Witnesses, 91.

18. [Actions of slander for trifling causes should be discouraged. *Rue v. Mitchell* (Ct. Com. Pl. Phila.) 2 Dall. 58, 1: 288]

19. Publication which took place after commencement of the suit cannot sustain a verdict. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16: 73

20. The writer of a letter which is used as the basis of a libel and is written for that purpose cannot escape liability therefor because of the fact that other matters, not contained in his letter, are included in the same article as published. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. Rep. 296, 43: 543

21. [No attempt having been made to show a justifiable motive, the publication of

libelous headlines was "malicious defamation," within the meaning of the act, as § 3 provides that an injurious publication is presumed to have been malicious if no justifiable motive for making it is shown. *United States v. Orr* (Philippine Sup. Ct.)

47: 1187]

22. [The fact that libelous headlines were inserted in a newspaper to aid the reader in determining whether he cared to read the article was no defense. *United States v. Orr* (Philippine Sup. Ct.)

47: 1187]

23. [The fact that headlines were no worse than the matter contained in a privileged report was immaterial. *United States v. Orr* (Philippine Sup. Ct.)

47: 1187]

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LICENSE.

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I. As to Real Property.

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 Negligence as to Licensee, see Negligence, I. c, 2.
 By Patentee, see Patents, XIII. d.
 Right of Licensee of Patent to Sue for Infringement, see Patents, 1107, 1113, 1115-1118.
 To Use Patented Article, Measure of Recovery, see Damages, 262-271, 289, 315.
 Distinction between Grant of Public Right and License to Occupy same, see Private Land Claim, 79-82.
 Rights of Mere Licensees under Former Government, see Private Land Claims, 428-430.
 Entry upon and Use of Public Lands, see Public Lands, I. d.
 Requested Instruction Not Supported by Evidence, see Trial, 779.
 To Use Pier, see Wharves, 15, 16.

1. A license is a personal privilege, and is revocable at the pleasure of the party making it; it ceases with the death of either party, and cannot be transferred or alienated by the licensee. *De Haro v. United States*, 5 Wall. 599, 18: 681
Cited in Bixby v. Bent, 59 Cal. 529—*Spacy v. Evans*, 152 Ind. 432, 52 N. E. 605.

2. An implied license from the state to use land under water for oyster cultivation is subject to revocation, and is revoked by a notice served upon the licensee by one to whom the state has ceded all its rights. *Lowndes v. Huntington*, 153 U. S. 1, 14 Sup. Ct. Rep. 758, 38: 615

3. The proviso in the act of Pennsylvania and New Jersey of 1771, regarding the Delaware river, that the commissioners thereby provided for should not have authority to remove a certain dam, or to prevent its owner from maintaining or raising it, did not constitute a grant, but only a revocable license. *Rundle v. Delaware & R. Canal Co.* 14 How. 80, 14: 335
Cited in St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 373, 42 L. ed. 506, 18 Sup. Ct. Rep. 157—*Lindsay & P. Co. v. Mullen*, 176 U. S. 152, 44 L. ed. 411, 20 Sup. Ct. Rep. 325—*Lewis v. Portland*, 25 Or. 168, 22 L.R.A. 744, 42 Am. St. Rep. 772, 35 Pac. 256—*Kilne v. Craig*, 65 Pa. 411—*Re Twenty-Second Street*, 15 Phila. 410, 39 Phila. Leg. Int. 128, 11 W. N. C. 467—*J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 98, 7 Am. St. Rep. 837, 38 N. W. 529.

4. A license from the owner of land to cut timber upon it terminates upon his conveyance of the land. *Northern P. R. Co. v. Paine*, 119 U. S. 561, 7 Sup. Ct. Rep. 323, 30: 513
Cited in Bruley v. Garvin, 105 Wis. 629, 48 L.R.A. 841, 81 N. W. 1038.

5. The whole right conferred by the Guano Islands act of August 18, 1856, upon the discoverer of an island and his assigns, is a license to occupy the island for the purpose of removing the guano. His right cannot last after the guano is removed. *Duncan v.*

Navassa Phosphate Co. 137 U. S. 647, 11 Sup. Ct. Rep. 242, 34: 825

6. The term "provisional," used in a license to pasture cattle on common lands, means something temporary and for the occasion, excluding the idea of permanency. *De Haro v. United States*, 5 Wall. 599, 18: 681

7. A license to occupy common lands for pasturage until measured, given by a Mexican official, is not a contract on consideration, to the licensee and his heirs, of a right of occupancy until the happening of this event. *De Haro v. United States*, 5 Wall. 599, 18: 681

Editorial notes.

[Revocability of, to maintain burden on land after expense incurred. 49 L.R.A. 497.
 Effect of license to plant shell fish. 6 L.R.A. (N.S.) 247.]

II. For Occupation and Business.

Proceeding for Violation of Statute Requiring, as a Criminal Case, see Appeal and Error, 1014.

Appellate Jurisdiction over Decree in Proceeding to Obtain, see Appeal and Error, 1003.

Federal Question as to, see Appeal and Error, 1593, 1664, 1665.

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As Affecting Commerce, see Commerce, III. d; IV.

License Fee as Tonnage Tax, see Commerce, 560.

Equal Protection and Privileges as to, see Constitutional Law, IV. a, 5, e; 228-230.

Due Process as to, see Constitutional Law, IV. b, 7.

Impairment of Contract Obligations as to, see Constitutional Law, IV. g, 2, c (8) (f); 1129, 1407, 1448, 1449, 1465, 1466.

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Liability of Municipality for Acts of Person Improperly Licensed, see Municipal Corporations, 153, 154.

Right to Pay License Fee in Tax Receivable Coupons, see Payment, 30, 33, 34.

Right to Pursue Occupation without License after Making Valid Tender for Same, see Payment, 32, 33.

Of Physicians, see Constitutional Law, 768.

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Marriage License, see Marriage, 1.

Validity of Marriage License Signed by *De Facto* Officer, see Officers, 79.

Presumption of Regularity of Marriage License, see Evidence, 484.

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For Permit to Trade in Enemy's Country, see Estoppel, 156.

Use of Enemy's License as Ground for Condemnation, see Prize and Capture, 136-139.

Use of Enemy's License as Ground for Capture, see Prize and Capture, 150.

8. The word "license" means permission or authority. *Gibbons v. Ogden*, 9 Wheat. 1, 6: 23

Cited in United States v. The Wm. Pope, Newberry, Adm. 259, Fed. Cas. No. 16,703.

9. The exaction of a license tax as a condition of doing a particular business is a tax on the occupation: and a tax on the occupation of doing a business is a tax on the business. *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, 32: 311

Cited in Asher v. Texas, 128 U. S. 132, 32 L. ed. 369, 2 Inters. Com. Rep. 243, 9 Sup. Ct. Rep. 1—*Crutcher v. Kentucky*, 141 U. S. 58, 35 L. ed. 652, 11 Sup. Ct. Rep. 851—*Pacific Exp. Co. v. Selbert*, 142 U. S. 349, 35 L. ed. 1038, 3 Inters. Com. Rep. 813, 12 Sup. Ct. Rep. 250—*Brennan v. Titusville*, 153 U. S. 303, 38 L. ed. 723, 4 Inters. Com. Rep. 662, 14 Sup. Ct. Rep. 829—*Pollock v. Farmers' Loan & T. Co.* 157 U. S. 582, 39 L. ed. 819, 15 Sup. Ct. Rep. 673—*Pollock v. Farmers' Loan & T. Co.* 158 U. S. 665, 39 L. ed. 1135, 15 Sup. Ct. Rep. 912—*Fairbank v. United States*, 181 U. S. 297, 45 L. ed. 868, 21 Sup. Ct. Rep. 648—*Williams v. Fears*, 110 Ga. 589, 50 L.R.A. 688, 35 S. E. 699—*South Bend v. Martin*, 142 Ind. 43, 29 L.R.A. 535, 41 N. E. 315—*People v. Bunker*, 128 Mich. 163, 87 N. W. 90—*Hancock v. Singer Mfg. Co.* 62 N. J. L. 341, 42 L.R.A. 860, 41 Atl. 846—*Arnold v. Yanders*, 56 Ohio St. 420, 60 Am. St. Rep. 753, 47 N. E. 50—*New Castle v. Cutler*, 15 Pa. Super. Ct. 627—*South Bethlehem v. Hackett*, 12 Lanc. L. Rev. 200—*State v. Scott*, 98

Tenn. 258, 36 L.R.A. 462, 39 S. W. 1—*Adkins v. Richmond*, 98 Va. 95, 47 L.R.A. 585, 81 Am. St. Rep. 702, 34 S. E. 967.

10. A citizen doing a general business at the place of his domicile cannot escape payment of his share of the burdens of municipal government because the amounts of his tax is arrived at by reference to his profits. *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1, 12 Sup. Ct. Rep. 810, 36: 601

11. The payment required as a preliminary to a license for pursuing a business or profession is an occupation tax, for which the license is merely a receipt, and not an authority, except in that sense; because it is laid and collected as revenue, and not merely as incident to the general police power of the state, which, under certain circumstances and conditions, regulates certain employments with a view to the public health, comfort, and convenience. *Royall v. Virginia*, 116 U. S. 572, 6 Sup. Ct. Rep. 510, 29: 735

Cited in Gundling v. Chicago, 177 U. S. 189, 44 L. ed. 729, 20 Sup. Ct. Rep. 633—*Snyder v. Bettman*, 190 U. S. 253, 47 L. ed. 1037, 23 Sup. Ct. Rep. 803—*United States v. Boyer*, 85 Fed. 435—*Southern Exp. Co. v. Ensley*, 116 Fed. 759.

12. As the sum demanded for a license for pursuing a profession is a tax, a provision for the punishment of one who pursues such profession without a license is a part of the revenue system of the state, and a means merely of enforcing payment of the tax itself or of the penalty for not paying it, and is legally equivalent to a civil action of debt upon the statute; and its substantial character is not changed by calling the default a misdemeanor, and providing for its prosecution by information. *Royall v. Virginia*, 116 U. S. 572, 6 Sup. Ct. Rep. 510, 29: 735

Cited in Camden Interstate R. Co. v. Catlettburg, 129 Fed. 430.

13. Where an applicant for a license has tendered coupons in payment thereof, he need not resort to a mandamus to compel its issue when wrongfully withheld; but may, without a license, pursue the business of his calling, which is not unlawful in itself, and which he has a constitutional right to prosecute. *Royall v. Virginia*, 116 U. S. 572, 6 Sup. Ct. Rep. 510, 29: 735

Cited in Com. v. Jones, 82 Va. 791, 1 S. E. 84.

14. License fees imposed on certain lines of business by Alaska Pen. Code (30 Stat. at L. 1253, 1337, chap. 429), tit. 2, § 460. as amended by the act of June 6, 1900 (31 Stat. at L. 321, 330, chap. 786), are not "excises" levied "to pay the debts and provide for the common defense and general welfare" which, under U. S. Const. art. 1, § 8, must be uniform throughout the United States, although the proceeds are, by § 463 of such Code, to be paid into the Treasury of the United States, and are not specifically appropriated to the expenses of the territory; but such fees must be deemed local taxes, imposed under the plenary power of Congress over

the territories, for the purpose of defraying the expense of the territorial government, where the total sum derived from these and all other revenues of the territory does not equal the cost of maintaining such government. *Binns v. United States*, 194 U. S. 486, 24 Sup. Ct. Rep. 816. 48: 1087
Cited in *Rasmussen v. United States*, 197 U. S. 524, 49 L. ed. 865, 25 Sup. Ct. Rep. 514.

15. The acceptance of a license under a state law does not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or any regulations prescribed by state authorities that are repugnant to the Constitution of the United States. *W. W. Cargill Co. v. Minnesota ex rel. Railroad & W. Commission*. 180 U. S. 452, 21 Sup. Ct. Rep. 423, 45: 619
Cited in *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 333, 46 L. ed. 935, 22 Sup. Ct. Rep. 662—*Carroll v. Greenwich Ins. Co.* 199 U. S. 409, 50 L. ed. 249, 26 Sup. Ct. Rep. 66.

Editorial notes.

[Power of municipality to make constituent elements or operations of a business independent subjects of license tax. 5 L.R.A. (N.S.) 619.

Liability of agent or employee in case license tax is not paid by employer. 12 L.R.A. (N.S.) 946.]

On what business.

Federal Question as to Validity of Tax on Cigarettes, see Appeal and Error, 2161.

Recovery Back of Amount Paid for, see Assumpsit, 53.

16. A charge imposed by a city for the privilege of using the streets, alleys, and public places of the city, by a telegraph company, and which is graduated by the amount of such use, is not a privilege or license tax. *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 13 Sup. Ct. Rep. 485, 37: 380

Cited in *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 388, 20 L.R.A. 135, 26 Atl. 510—*Postal Teleg. Cable Co. v. Adams*, 71 Miss. 560, 4 Inters. Com. Rep. 417, 42 Am. St. Rep. 476, 14 So. 36—*Hodges v. Western U. Teleg. Co.* 72 Miss. 912, 29 L.R.A. 770, 18 So. 84.

17. A state may impose a license fee, either directly or through a municipal corporation, upon keepers of ferries living in the state, for boats owned by them and used in ferrying passengers and goods from a landing in the state, across a navigable river, to a landing in another state. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 2 Sup. Ct. Rep. 257. 27: 419

18. A license for a ferry, granted by a municipal corporation, need not be by an ordinance unless the municipal charter requires it. *Fanning v. Gregoire*, 16 How. 524, 14: 1043

19. The power to license auctioneers, and to take bonds for their good behavior in of-

fice, is not incident to a municipal corporation. *Fowle v. Alexandria*, 3 Pet. 398,

7: 719

Cited in *Cambridge v. Cambridge Water Co.* 99 Md. 503, 58 Atl. 442.

Reasonableness.

Question for Jury, see Trial, 153.

20. A municipal charge of \$2 per pole for the use of a street by telegraph poles does not violate the privileges of a telegraph company which has accepted the benefits of the act of Congress of 1866, giving it the right to use post roads. *Postal Teleg. Cable Co. v. Baltimore*, 156 U. S. 210, 15 Sup. Ct. Rep. 356, 39: 399

— Editorial notes.

Graduation of license fees according to extent of business. 46: 569

[Limit of amount of fee. 30 L.R.A. 415.

Right to grade license tax according to number of animals or vehicles employed in the business. 12 L.R.A. (N.S.) 568.]

Payment under compulsion.

21. Payment under protest, of a license fee for the use of steam tugs in a harbor, in order to prevent the stoppage of their use, is a payment on compulsion. *Harmon v. Chicago*, 147 U. S. 396, 13 Sup. Ct. Rep. 306, 37: 216

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Of Attorney, see Attorneys, III. c.

Of Banker, see Banks, I. h.

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Of State Bonds, see Constitutional Law, 1350.

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Of Importers' Bonds, see Duties, 447.

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Mechanics' Liens, see Mechanics' Liens.

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Of Receivers' Certificates, see Receivers, III. c. 3.

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Of Foreign Receiver, *see* Receivers, 214.
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 From Pledge of Stock Certificates, *see* Corporations, 490.
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 Subrogation to Rights of, *see* Subrogation.
 Interest of State to Foreclose Railroad Lien in Supreme Court, *see* Supreme Court of the United States, 108.
 Enforcement against Property of United States, *see* United States, 176.

I. In General.

1. A mere agreement to pay a creditor out of a particular fund is insufficient to create a lien thereon, but an order to pay the debt out of such fund does create a lien. *Burke v. Child* (Trist v. Child) 21 Wall. 441,

22: 623

Cited in Peugh v. Porter, 112 U. S. 742, 28 L. ed. 860, 5 Sup. Ct. Rep. 361—Porter v. White, 127 U. S. 245, 32 L. ed. 116, 8 Sup. Ct. Rep. 1217—Dowell v. Cardwell, 4 Sawy. 227, Fed. Cas. No. 4,039—Ex parte Tremont Nail Co. 16 Nat. Bankr. Reg. 451, Fed. Cas. No. 14,168—Burdon Cent. Sugar Ref. Co. v. Ferris Sugar Mfg. Co. 78 Fed. 418—Terre Haute & I. R. Co. v. Cox, 42 C. C. A. 860, 102 Fed. 831—Re Oliver, 182 Fed. 590—Carroll v. Kelly, 111 Ala. 665, 20 So. 456—Silent Friend Min. Co. v. Abbot, 7 Colo. App. 77, 42 Pac. 318—Central Nat. Bank v. Spratlen, 7 Colo. App. 434, 43 Pac. 1048—Weiss v. Gullett, 18 Colo. App. 128, 70 Pac. 442—Alfred Richards Brick Co. v. Rothwell, 19 App. D. C. 545—Woods v. Dickinson, 7 Mackey, 307—Lamon v. McKee, 7 Mackey, 461—Story v. Hull, 143 Ill. 511, 32 N. E. 265—Cameron v. Boeger, 200 Ill. 92, 93 Am. St. Rep. 165, 65 N. E. 690—Cameron v. Boeger, 102 Ill. App. 654—Franklin v. Browning, 3 Ind. Terr. 647, 64 S. W. 563—Foss v. Cobler, 106 Iowa, 782, 75 N. W. 516—Phillips v. Hogue, 63 Neb. 198, 88 N. W. 180—Randel v. Vanderbilt, 75 App. Div. 318, 78 N. Y. Supp. 124—Domovan v. Middlebrook, 95 App. Div. 368, 88 N. Y. Supp. 607—Fairbanks v. Sargent, 39 Hun, 590—Williams v. Ingersoll, 89 N. Y. 518—Fairbanks v. Sargent, 117 N. Y. 330, 6 L.R.A. 477, 22 N. E. 1039—Thomas v. New York & G. L. R. Co. 139 N. Y. 179, 34 N. E. 877—Bank of New Hanover v. Williams, 79 N. C. 137—Gelst's Appeal, 104 Pa. 355—Higgins v. Grindrod, 16 Phila. 202—Gelst's Appeal, 41 Phila. Leg. Int. 501—Hicks v. Roanoke Brick Co. 94 Va. 746, 27 S. E. 596—Hossack v. Graham, 20 Wash. 192, 55 Pac. 36—Dirimple v. State Bank, 91 Wis. 606, 65 N. W. 501—Baillie v. Stephenson, 95 Wis. 502, 70 N. W. 660.

2. No lien arises where, from the nature of the contract between the parties, it would be inconsistent with the express terms or the clear intent of the contract; as, where goods were deposited in the possession of the party for a particular purpose inconsistent with the notion of a lien,—as to hold them or the proceeds for the owner or a third person. *Randel v. Brown*, 2 How. 406, 11: 318
Cited in Bank of Washington v. Nock (Guntton v. Nock) 9 Wall. 382, 19 L. ed. 719—Holt v. Bank of Augusta, 13 Ga. 351.

3. No person can acquire a lien founded upon his own illegal or fraudulent acts or breach of duty. *Randel v. Brown*, 2 How. 406, 11: 318
Cited in Berry v. Glnaca, 5 Fed. 480.

4. An insurance broker is entitled to a lien on the policy for premiums paid by him on account of his principal; and, though he parts with the possession, if the policy afterwards comes into his hands again, his lien is revived, unless the manner of his parting with it manifests his intention to abandon the lien, and in such a case, an intermediate

assignee takes *cum onere*. Spring v. South Carolina Ins. Co. 8 Wheat. 268, 5: 614
Cited in Johnson v. McDonough, Gilpin, 105, Fed. Cas. No. 7,395—Packard v. The Louisa, 2 Woodb. & M. 58, Fed. Cas. No. 10,652.

5. Where the interest on a decree represents the income of certain real property, a court of equity having jurisdiction over the enforcement of the decree may satisfy liens on such income out of such interest. Matthews v. Memphis & C. R. Co. (Scruggs v. Memphis & C. R. Co.) 108 U. S. 368, 2 Sup. Ct. Rep. 780, 27: 756

6. It is the very nature and essence of a lien that, no matter into whose hands the property goes, it passes *cum onere*. Burton v. Smith, 13 Pet. 464, 10: 248

Editorial notes.

[Under contract made in other state. 38 L.R.A. 410.

Personal liability of purchaser of personal property subject to. 59 L.R.A. 737.]

On property generally.

On Bank Stock, see Banks, 21-29.

For Advances by Bank on Bill of Lading, see Bills of Lading, 21.

On Sugar Bounty, see Bounties, 9.

On Canal, see Canals, 4.

Where Conveyance is Set Aside for Undue Influence, see Cancellation of Instruments, 4.

Of Corporation on Stock, see Corporations, IX. c.

Of Corporation on Stock Certificates, see Corporations, 492, 494.

Of Agent on Stock Certificates, see Corporations, 478.

On Corporate Property for Simple Contract Creditors, see Corporations, 718.

On Property Insured in Mutual Company, see District of Columbia, 16, 17.

On Homestead, see Homestead, IV.

Of Mortgagee on Insurance Money, see Insurance, 641, 642.

On Judgment, see Judgment, IV.

On Partnership Assets for Payment of Partnership Debts, see Limitation of Actions, 328.

Of Creditors on Partnership Property, see Partnership, 84.

Of Infant on Property of Partnership of which he was a Member, see Partnership, 88.

7. To create, for future services of a contractor, a lien upon particular funds of his employer, there must not only be the express promise of the employer to apply them in payment of such services, upon which the contractor relies, but there must be some act of appropriation of the fund on the part of the employer. Dillon v. Barnard, 21 Wall. 430, 22: 673
Cited in Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 283, 30 L. ed. 1211, 7 Sup. Ct. Rep. 1206—Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 300, 33 L. ed. 907, 10 Sup. Ct. Rep. 546—Phoenix Iron Works Co. v. New York Secur. & T. Co. 28 C. C. A. 78, 84 U. S. App. 408, 83 Fed. 759—Harris v.

Youngstown Bridge Co. 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328—Terre Haute & I. R. Co. v. Cox, 42 C. C. A. 660, 102 Fed. 831—Columbus, S. & H. R. Co.'s Appeal, 48 C. C. A. 295, 109 Fed. 197—Johnston v. Huff, A. & M. Co. 66 C. C. A. 536, 133 Fed. 706—Morgan v. Donovan, 58 Ala. 263—McKee v. gan v. Donovan, 58 Ala. 263—McKee v. Cochrane, 7 Mackey, 461—Alfred Richards Brick Co. v. Rothwell, 18 App. D. C. 545—Franklin v. Browning, 3 Ind. Terr. 647, 64 S. W. 563—Elmore v. Symonds, 183 Mass. 323, 67 N. E. 314—Missouri P. R. Co. v. Bradbury, 106 Mo. App. 458, 79 S. W. 966—General Electric Co. v. Transit Equipment Co. 57 N. J. Eq. 474, 42 Atl. 101—Lawrence v. Phy, 27 Or. 514, 41 Pac. 671.

8. A party may, by agreement, create a charge or claim in the nature of a lien on real, as well as on personal, property, whereof he is the owner or in possession, which a court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement. Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. Rep. 439, 41: 855
Cited in Walker v. Brown, 165 U. S. 604, 41 L. ed. 871, 17 Sup. Ct. Rep. 458—Clark v. Sigma Iron Co. 26 C. C. A. 425, 39 U. S. App. 753, 81 Fed. 312, 27 Pittsb. L. J. N. S. 465—Farmers' Loan & T. Co. v. Penn Plate-Glass Co. 56 L.R.A. 716, 43 C. C. A. 185, 103 Fed. 152—Corbitt v. Farmers' Bank, 114 Fed. 604—Fortier v. Delgado, 122 Fed. 607—Booz v. Philadelphia & L. Transp. Co. 124 Fed. 435—Wildner v. Watts, 138 Fed. 432—Dexter v. Gordon, 11 App. D. C. 66—Sanborn v. Maxwell, 18 App. D. C. 252—Johnson v. Gordon, 102 Ga. 364, 30 S. E. 507—Pittsburg, C. C. & St. L. R. Co. v. Volkert, 58 Ohio St. 371, 50 N. E. 924.

9. One cannot have a lien upon his own property except where equity interposes, and, to prevent a failure of justice, keeps the lien outstanding. Gould v. Day, 94 U. S. 405, 24: 232
Cited in Jones v. Lamar, 34 Fed. 468—Clay v. Banks, 71 Ga. 372—Bearden v. Carter Merchandise Co. 101 Ga. 172, 28 S. E. 678—Chard v. Holt, 136 N. Y. 44, 32 N. E. 740.

10. To create a lien on a chattel, the party claiming it must show the just possession of the thing claimed. Randel v. Brown, 2 How. 406, 11: 318

11. A person having a lien upon property does not lose it by taking a bill of sale of the same property, although the bill of sale is voidable and is subsequently avoided under the bankrupt act, where there is no evidence of intent to abandon the lien. Avery v. Hackley, 20 Wall. 407, 22: 385
Cited in Hutchinson v. Murchie, 74 Me. 190—Fowler v. Parsons, 143 Mass. 407, 9 N. E. 799—Enright v. Amsden, 70 Vt. 188, 40 Atl. 37—Carr v. Summerfield, 47 W. Va. 177, 34 S. E. 804.

12. Where property bound for a debt is in fact used to pay it, with the consent of a junior encumbrancer, no lien upon other property for the security of the debt can be kept alive for the benefit of the releasing junior encumbrancer, without the consent of those whose interests in the other property

are to be affected. *Richardson v. Traver*, 112 U. S. 423, 5 Sup. Ct. Rep. 201, 28: 804

13. A lien on bonds to secure a claim against a third person is created by a letter from the owner of the bonds to a creditor, stating that he has loaned the bonds to the debtor, with the understanding that any indebtedness that may be owing to such creditor at any time shall be paid before the return of the bonds or the value thereof to the owner, and that they or their value are at the risk of the debtor's business so far as any claim the creditor may have against such debtor is concerned. *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. Rep. 453, 41: 865

Cited in *Burdon Cent. Sugar Ref. Co. v. Payne*, 167 U. S. 147, 42 L. ed. 112, 17 Sup. Ct. Rep. 754—*Burdon Cent. Sugar-Ref. Co. v. Payne*, 28 C. C. A. 563, 52 U. S. App. 312, 81 Fed. 674—*Brown v. Walker*, 84 Fed. 533—*Walker v. Brown*, 86 Fed. 364—*Brown v. Howard*, 92 Fed. 538—*Nevada Nickel Syndicate v. National Nickel Co.* 96 Fed. 151—*Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 480, 101 Fed. 516—*Chattanooga Nat. Bank v. Rome Iron Co.* 102 Fed. 758—*Farmers' Loan & T. Co. v. Penn Plate-Glass Co.* 56 L.R.A. 715, 43 C. C. A. 134, 103 Fed. 151—*Re Olzendam Co.* 117 Fed. 181—*Goad v. Hart*, 128 Cal. 200, 60 Pac. 761—*Hume v. Riggs*, 12 App. D. C. 364—*Sanborn v. Maxwell*, 18 App. D. C. 252.

14. A contribution to the assets of a debtor, for which a debt exists to a person who had loaned bonds to the debtor and agreed with another creditor that they should not be returned or the value thereof until any claim the latter might have against the debtor should be paid, cannot affect the lien on the bonds for the latter's claim against the debtor. *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. Rep. 453, 41: 865

15. Where a decree establishes a lien for a certain amount upon real estate, in favor of an insolvent party in possession, on proceeding to collect the decree with interest, he may be compelled by bill in equity to credit on the decree the value of the rents and occupancy of the property since the decree was rendered. *Matthews v. Memphis & C. R. Co.* (*Scruggs v. Memphis & C. R. Co.*) 108 U. S. 368, 2 Sup. Ct. Rep. 780, 27: 756

— Editorial note.

[On public property. 35 L.R.A. 141.]

On logs.

As Affecting Commerce, see Commerce, 105.

State Laws as Rule in Federal Courts, see Courts, 1968.

See also Constitutional Law, 466.

16. A lien upon logs of private parties for inspecting and scaling logs run through chartered booms is given to the surveyor general by Minn. Stat. 1894, § 2400, declaring that he "shall survey all logs and timber running out of any boom" now chartered, or which may hereafter be chartered

by law in his district. *Lindsay & P. Co. v. Mullen*, 176 U. S. 126, 20 Sup. Ct. Rep. 325, 44: 400

Cited in *Nester v. Diamond Match Co.* 52 L.R.A. 953, 44 C. C. A. 610, 105 Fed. 571—*Mandeville v. Courtwright*, 126 Fed. 1008

17. A record of scale bills in the books of the surveyor general as prescribed by Minn. Stat. 1894, § 2400, is not a necessary preliminary to his right to a lien under § 2402. *Lindsay & P. Co. v. Mullen*, 176 U. S. 126, 20 Sup. Ct. Rep. 325, 44: 400

Equitable liens.

Created by Equitable Assignment, Prerequisites to, see Assignment, 28.

Of Pledge of Invalid Warehouse Receipt, see Bankruptcy, 195.

Power to Charge Payment upon Foreign Lands, see Courts, 64.

Remedy at Law or in Equity to Recover Value of Buildings Erected on Land Belonging to Another, see Equity, 184.

Laches as a Bar, see Limitation of Actions, 143.

Equitable Mortgage, see Mortgage, I. b, 3.

By Mortgage of After-Acquired Property, see Mortgage, 82.

Equitable Lien of Mortgage for Improvements, see Mortgage, 113.

Vendor's Lien for Purchase Money, see Vendor and Purchaser, V.

18. It is indispensable to a lien created by an equitable assignment that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it. *Wright v. Ellison*, 1 Wall. 16, 17: 555

19. An express appropriation of a fund by order or other transfer is necessary to establish an equitable lien thereon in favor of a creditor. *Porter v. White*, 127 U. S. 235, 8 Sup. Ct. Rep. 1217, 32: 112
Cited in *Woods v. Dickinson*, 7 Mackey, 307—*Lamon v. McKee*, 7 Mackey, 462.

Common-law liens.

Waiver of, see *infra*, 27.

Of Carrier for Advances, see Carriers, 141, 142.

20. Liens for the construction of canals were unknown to the common law, and are the creatures of local legislation, and are governed in everything by the statutes under which they arise. *South Fork Canal Co. v. Gordon*, 6 Wall. 561, 18: 894

Cited in *Withrow Lumber Co. v. Glasgow Invest Co.* 42 C. C. A. 66, 101 Fed. 368—*Sheffield City Co. v. Tradesmans Nat. Bank*, 131 Ala. 187, 32 So. 593.

21. A shipwright who has taken a ship into his possession to repair while in the home port, is not bound to part with possession until paid for the repairs. *The General Smith*, 4 Wheat. 438, 4: 609
Cited in *Scott v. Delahunt*, 5 Lans. 374.

22. If a shipwright parts with the possession of a domestic ship, or has not taken possession of it, he has no claim on the ship

itself for repairs made in the home port.
The General Smith, 4 Wheat. 438, 4: 609

II. Priorities.

Of Lien for Advances to Purchase Goods for Manufacture, see Bankruptcy, 200, 201.
Preservation of Prior Lien in Bankruptcy, see Bankruptcy, 279-283, 296-304.
Inception of Lien Prior, and Enforcement Subsequent to Bankruptcy, see Bankruptcy, 217.
Subjectation of Title of Trustee in Bankruptcy to Valid Prior Liens, see Bankruptcy, 268-274, 279-283.
Of Bank on its Stock, see Banks, 24.
Remedy at Law or in Equity to Enforce Priority of Government Lien on Distillery, see Equity, 185.
Estoppel to Claim Priority, see Estoppel, 138.
As between Levy of Execution on Personal Property and Lien of General Railroad Mortgage, see Execution, 23.
Between Maritime Liens, see Maritime Liens, III.
Of Mechanics' Liens, see Mechanics' Liens, III.
Priority between Mortgage and Other Liens, see Mortgage, III.
Of Liens on Railroad, see Railroads, 148, 149.
Priority as against Receiver, see Receivers, III. c. 2.
Distinction between Lien and Priority in Right of Payment, see United States, 209, 210.
Superiority of Perfected Specific Lien to Right of United States to Priority in Payment, see United States, 226-230.

23. Priority of lien gives priority of legal right. Howard v. Milwaukee & St. P. R. Co. 101 U. S. 837, 25: 1081

24. A prior lien is entitled to prior satisfaction out of the thing it binds, unless the lien be intrinsically defective, or is displaced by some act of the party holding it, which shall postpone him at law or in equity to a subsequent claimant. Rankin v. Scott, 12 Wheat. 177, 6: 592
Cited in Ex parte City Bank, 3 How. 332, 11 L. ed. 622—The Alida, Abb. Adm. 172, Fed. Cas. No. 199—Harris v. The Henrietta, Newberry, Adm. 287, Fed. Cas. No. 6,121—The N. W. Thomas, 1 Biss. 218, Fed. Cas. No. 10,386—Rockhill v. Hanna, 4 McLean. 559, Fed. Cas. No. 11,980—Thompson v. Phillips, Baldw. 279, Fed. Cas. No. 13,974—McMahan v. Green, 12 Ala. 74, 46 Am. Dec. 242—Lawson v. Jordan, 19 Ark. 305, 70 Am. Dec. 596—Newton v. Munnally, 4 Ga. 357—Denson v. Shuler, 47 Mich. 602, 41 Am. Rep. 734, 11 N. W. 402—Presbyterian Corporation v. Wallace, 3 Rawle, 158—Wells, F. & Co. v. Smith, 2 Utah, 50.

25. A lien which is given for the preservation or betterment of the common pledge is, in natural equity, fairly entitled to a preference. Provident Inst. for Savings v.

Jersey City, 113 U. S. 506, 5 Sup. Ct. Rep. 612, 28: 1102

26. An owner of state bonds issued for canal purposes, which, if a lien at all on the canal, were at most a secondary one, did not, by surrendering them, pursuant to an action of the legislature, in exchange for canal stock certificates and state stock certificates, destroy the priority of the lien of other bonds in his possession, for whose payment the canal, its lands and revenues, were pledged. Wabash & E. Canal Co. v. Beers, 2 Black, 448, 17: 327

— Editorial note.

[Priority between agister's lien and chattel mortgage. 17 L.R.A. 792.]

III. Loss, Waiver, or Discharge.

How Lien of Bank on its Stock Defeated, see Banks, 23.
Effect of Removal of Property into Another State, see Conflict of Laws, 153.
Power of Federal Courts to Cancel Probate Decree Embracing Lien on Lands, see Courts, 865.
Effect of Judicial Sales under Prior or Subsequent Liens, see Judicial Sale, 54 57.
Effect of Judicial Sale to Extinguish Lien on which Decree Rests, see Judicial Sale, 55, 56, 58.
Effect on Lien for Charter Party, of Taking Note for Amount, see Payment, 53.
Of Maritime Liens, see Maritime Liens, IV.
Of Mechanics' Lien, see Mechanics' Liens, VI.
Of Vendor of Personal Property, see Sale, 139a-141.
Waiver of Lien for Freight, see Shipping, 292-303.

27. Plaintiff, by perfecting his claim for a lien under the Indiana act of 1887, waived any right he had to assert his common-law lien on the personal property and earnings of the corporation. Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 128, 12 Sup. Ct. Rep. 181, 35: 961

28. One who prevents the discharge of a lien by his own fraud cannot avail himself of it. Carey v. Brown, 92 U. S. 171, 23: 469

29. In the case of liens acquired on an insurance policy, if it be assigned bona fide for a valuable consideration while out of the possession of the person acquiring the lien, and afterwards return into his hands, the lien does not revive as against the assignee. Spring v. South Carolina Ins. Co. 8 Wheat. 268, 5: 614

Editorial notes.

[Waiver of lien by execution or attachment. 50 L.R.A. 714.]

Effect of partition deed on. 57 L.R.A. 332.

Waiver of junior lien by failure to assert it in foreclosure proceedings. 68 L.R.A. 323.]

LIEU LANDS.

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To Private Land Claimant Whose Tract has Previously been Granted by United States, see Private Land Claims, 368.
Under Railroad Grant, see Public Lands, I. c, 2, f.
Passing of Title and Prerequisites thereto, see Public Lands, 125-131.
To States to Make up Loss under School Grant, see Public Lands, 378-384.
To Homesteaders in Place of Lands Taken for Forest Reserve, see Public Lands, 813-815.
Powerlessness of Equity to Grant Equivalent Lands, see Public Lands, 1064.

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LIFE ESTATE.

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Creation of, by Deed, see Deeds, 61.

LIFE INSURANCE.

As Exempt from Bankruptcy, see Bankruptcy, 103.
Exemption from Execution, see Execution, 36, 37.
Insurable Interest in Life, see Insurance, III. b.
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I. Possession, Enjoyment, and Use of Property, 1-6.
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Adverse Possession against Remaindermen, see Adverse Possession, I. g.
Estate by the Curtesy, see Curtesy.
Estoppel of, see Estoppel, 257.

Estoppel by Deed Executed by, see Estoppel, 67.

Right in Proceeds of Policy Taken out in Name of, see Insurance, 645.

Rights in Insurance Money under Joint Mortgage by Life Tenant and Remainderman, see Mortgage, 129.

Purchase by, at Federal Tax Sale as Redemption on Behalf of Remainderman, see Internal Revenue, 285.

Conclusiveness of Decree Against Creditor's Right to Reach Vested Remainderman, see Judgment, 173.

Conclusiveness of Judgment Authorizing Sale or Mortgage of Property, see Judgment, 343.

Lien of Judgment on Reversion, see Judgment, 867.

Necessity of Inquest on Value before Selling Estate Judicially, see Judicial Sale, 29.

Limitation of Actions against, see Limitation of Actions, 390.

Life Estate in Trust Property, see Trusts, 180.

As to Life Estates and Remainders Generally, see Real Property, I. c; Wills, III. g.

Estate for Life or in Fee under Will, see Wills, III. g, 2.

I. Possession, Enjoyment, and Use of Property.

Power to Mortgage Property, see Powers, 13.

Power of Disposal, see Powers, 7, 8.

1. Under a power given by statute, to one who has a life interest in property, to sell or mortgage a part of it, with the assent of the chancellor, because of his inability to support himself and his children, who were entitled upon his death to the property in fee, he cannot mortgage or sell to pay his own debts, even with the assent of the chancellor. *Williamson v. Berry*, 8 How. 495, 12: 1170

Cited in Williamson v. Ball, 8 How. 568, 12 L. ed. 1201—*Williamson v. Suydam*, 6 Wall. 729, 18 L. ed. 969—*Hoyt v. Sprague*, 8 Rep. 618, Fed. Cas. No. 6,810—*Territory v. Delinquent Tax List*, 3 Ariz. 91, 21 Pac. 888—*Stansbury v. Inglehart*, 9 Mackey, 155—*Price v. Winter*, 15 Fla. 101—*Haywood v. Collins*, 60 Ill. 336—*Cooper v. Sunderland*, 3 Iowa, 123, 66 Am. Dec. 52—*McCabe v. Ward*, 13 Md. 509—*Chumasero v. Potts*, 2 Mont. 290—*Bent v. Maxwell Land Grant & R. Co.* 3 N. M. 252, 3 Pac. 721—*Powers v. Bergen*, 6 N. Y. 368—*Metcalfe v. Union Trust Co.* 181 ton, 6 R. I. 301—*Re Van Horne*, 18 R. I. 394, 28 Atl. 341—*Cohen v. Shyer*, 1 Tenn. Ch. 194—*Thompson v. Mebane*, 4 Helsk. 376—*Messner v. Giddings*, 65 Tex. 310—*Openheimer v. Reed*, 11 Tex. Civ. App. 363, 32 S. W. 325—*McCampbell v. Durst*, 15 Tex. Civ. App. 534, 40 S. W. 315—*Langyher v. Patterson*, 77 Va. 473.

2. A statute appointing a life tenant trustee for the estate in which he has an

interest, with power to sell or mortgage with the assent of the chancellor, and which discharges the trustees named in the will creating the estate, does not vest an estate in fee in the life tenant. *Williamson v. Berry*, 8 How. 495, 12: 1170

3. [Premises belonging to a widow for life, and to children in remainder, having been sold on a mortgage, the surplus may be given to the widow on security to account for it by her executors, etc., at her death, or given to the children on security to account to the widow for the use of it. *Bloomfield v. Budden* (Pa. Sup. Ct.) 2 Dall. 183, 1: 341]

4. It is a breach of trust against the eventual distributees for one who has the beneficial interest for life in certain mortgage securities, with power to consent to change or reinvestment, to give consent to an investment without security. *Caldwell v. Taggart*, 4 Pet. 190, 7: 828

Editorial note.

[Rights of tenants and remaindermen on condemnation of land. 21 L.R.A. 212.]

Corporate stock; dividends.

5. The interest in reserved or accumulated earnings of a corporation, represented by each share, is capital, and not income of that share, as between the tenant for life and the remainderman thereof. *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. Rep. 1057, 34: 525

Cited in Spooner v. Phillips, 62 Conn. 73, 16 L.R.A. 467, 24 Atl. 524—*Mills v. Britton*, 64 Conn. 24, 24 L.R.A. 541, 29 Atl. 231—*McLane v. Cropper*, 5 App. D. C. 297—*Thomas v. Gregg*, 78 Md. 552, 44 Am. St. Rep. 310, 28 Atl. 565—*Quinn v. Safe Deposit & T. Co.* 93 Md. 298, 53 L.R.A. 171, 48 Atl. 835—*Hemenway v. Hemenway*, 181 Mass. 411, 63 N. E. 919—*Knapp v. Publishers Geo. Knapp & Co.* 127 Mo. 72, 29 S. W. 885—*Re Rogers*, 22 App. Div. 432, 48 N. Y. Supp. 175—*Chester v. Buffalo Car Mfg. Co.* 70 App. Div. 452, 75 N. Y. Supp. 428—*People ex rel. Singer Mfg. Co. v. Wemple*, 150 N. Y. 51, 44 N. E. 787—*McLouth v. Hunt*, 154 N. Y. 194, 39 L.R.A. 236, 48 N. E. 548—*State v. Mitchell*, 104 Tenn. 343, 58 S. W. 365.

6. Where a will gives the dividends of certain stocks to a daughter of the testatrix for life, a stock dividend thereon is capital, and does not go to the daughter, but to the legatee in remainder. *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. Rep. 1057, 34: 525

Cited in Mercer v. Buchanan, 132 Fed. 502.

— Editorial notes.

[Right to increase stock and stock dividends, as between owner of capital and income. 16 L.R.A. 461.]

Right as between life tenant and remainderman in distribution made by corporation. 12 L.R.A. (N.S.) 768.]

II. Liability for Expenses.

7. Tenants for life are bound to pay the U. S. Dig.—239

taxes upon the property during the continuance of their estate. *Pike v. Wassell*, 94 U. S. 711, 24: 307

Cited in Newby v. Brownlee, 23 Fed. 322—*New York Guaranty & Indemnity Co. v. Tacoma R. & Motor Co.* 35 C. C. A. 197, 93 Fed. 56—*Shringley v. Black*, 66 Kan. 225, 71 Pac. 301—*Defreese v. Lake*, 109 Mich. 429, 32 L.R.A. 754, 63 Am. St. Rep. 584, 67 N. W. 505—*Reyburn v. Wallace*, 93 Mo. 320, 3 S. W. 482.

8. Heirs apparent, during the life of an ancestor whose life estate has been confiscated, may maintain a bill for appropriate relief, where the tenants for life refused to pay the taxes. *Pike v. Wassell*, 94 U. S. 711, 24: 307

Cited in Avegno v. Schmidt, 113 U. S. 298, 28 L. ed. 977, 5 Sup. Ct. Rep. 487—*United States v. Dunnington*, 146 U. S. 347, 36 L. ed. 1000, 13 Sup. Ct. Rep. 79.

Editorial note.

[Must life tenant or remainderman bear the cost of a public improvement. 10 L.R.A. (N.S.) 342.]

LIGHTED MATCH.

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LIGHTERAGE.

Deduction of, from Freight, see Shipping, 180.

Liability for Loss of Goods on Lighter, see Shipping, 188.

LIGHTHOUSE.

Claims for Use of Land for Site, see Claims, 32.

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Nature and object.

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1. Statutes of limitations are in their nature arbitrary, and rest upon no other foundation than the judgment of a state as to what will promote the interests of its citizens. Each state determines such limits and imposes such restraints as it thinks proper. *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137. 22: 831
Cited in *Campbell v. Holt*, 115 U. S. 628, 29 L. ed. 486, 6 Sup. Ct. Rep. 209.

2. Statute of limitations are laws for administering justice and constitute part of the *lex fori* of every country, and are within the power of each sovereignty to enact. *Hawkins v. Barney*, 5 Pet. 457. 8: 190
Cited in *Amy v. Dubuque*, 98 U. S. 470, 25 L. ed. 229—*Munos v. Southern P. Co.* 2 C. C. A. 165, 2 U. S. App. 222, 51 Fed. 190—*Brunswick Terminal Co. v. National Bank*, 88 Fed. 610—*State ex rel. Savannah v. Dewa, R. M. Charlt. (Ga.)* 420—*Paine v. Drew*, 44 N. H. 320—*Smith v. Tucker*, 17 N. J. L. 86—*Bullock v. Bullock*, 51 N. J. Eq. 451, 27 Atl. 435—*Dikes v. Miller*, 24 Tex. 424.

3. The statute of limitations is intended to protect those who have remained in possession under color of title believed to be good; not to punish those who neglect to bring a suit. *M'lver v. Ragan*, 2 Wheat. 25. 4: 175

Cited in *Rhode Island v. Massachusetts*, 12 Pet. 746, 9 L. ed. 1269—*Mitchell v. Wilson*, 3 Cranch, C. C. 248. Fed. Cas. No. 9,672—*Roberts v. Pillow*, Hempst. 634, Fed. Cas. No. 11,909—*United States v. Brown*, 2 Low. Dec. 269, Fed. Cas. No. 14,665—*Amy v. Watertown*, 22 Fed. 420—*Tynan v. Walker*, 35 Cal. 640, 95 Am. Dec. 152—*Gardner v. Cumming*, 1 Ga. Dec. pt. 1, p. 9—*English v. Doe*, 7 Ga. 390—*Webb v. Carter*, 62 Ga. 421—*Baker v. Brown*, 18 Ill. 92—*Hickman v. Galtner*, 2 Yerg. 204.

4. The statute of limitations is made for the purpose of shutting out stale and fraudulent claims. *Shipp v. Miller*, 2 Wheat. 316. 4: 248

Cited in *Beard v. Smith*, 6 T. B. Mon. 491.

5. Rights accruing under acts of limitations are recognized as *prima facie* originating in wrong, although among the best protections of right. *Jackson ex dem. Bradstreet v. Huntington*, 5 Pet. 402. 8: 170
Cited in *Miller v. State*, 38 Ala. 606—*Moody v. Fleming*, 4 Ga. 121, 48 Am. Dec. 210—*Woodward v. Blanchard*, 16 Ill. 483.

Statute of repose.

See also *supra*, 5; *infra*, 21, 624.

6. The statute of limitations is a statute of repose, and does not rest merely on presumption of payment. *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. Rep. 1229, 30: 1156

Cited in *Bullion & E. Bank v. Hegler*, 93 Fed. 894.

7. The statute of limitations, instead of being viewed in an unfavorable light, as an unjust and discreditable defense, should receive such support as will make it what it was intended to be,—a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. *Bell v. Morrison*, 1 Pet. 351, 7: 174

Cited in *Willison v. Watkins*, 3 Pet. 54, 7 L. ed. 600—*United States v. Wilder*, 13 Wall. 256, 20 L. ed. 683—*Shepherd v. Thompson*, 122 U. S. 237, 30 L. ed. 1157, 7 Sup. Ct. Rep. 1229—*Campbell v. Haverhill*, 155 U. S. 617, 39 L. ed. 283, 15 Sup. Ct. Rep. 217—*Wilson v. Isenlinger*, 185 U. S. 62, 46 L. ed. 807, 22 Sup. Ct. Rep. 573—*Central P. R. Co. v. United States*, 24 Ct. Cl. 152—*Southard v. Brady*, 36 Fed. 560—*Merrill v. Monticello*, 66 Fed. 166—*Bullion & E. Bank v. Hegler*, 93 Fed. 894—*Hatfield v. Montgomery*, 2 Port. (Ala.) 77—*Harrison v. Heflin*, 54 Ala. 560—*Wheeler v. Castor*, 11 N. D. 354, 61 L.R.A. 755, 92 N. W. 381—*Knoedler v. Meley*, 2 MacArth. 243—*Paschal v. Davis*, 3 Ga. 265—*Fain v. Garthright*, 5 Ga. 13—*Adams v. Davis*, 47 Ga. 341—*Tate v. Hawkins*, 81 Ky. 581, 50 Am. Rep. 181—*McLellan v. Crofton*, 6 Me. 347—*Whitaker v. Rice*, 9 Minn. 18, 86 Am. Dec. 78, Gil. 1—*McLean v. Thorp*, 4 Mo. 259—*Meredith Bridge Sav. Bank v. Ladd*, 40 N. H. 472—*Gullick v. Princeton & K. Branch Turnp. Co.* 14 N. J. L. 548—*Peck v. Mallams*, 10 N. Y. 522—*Kaufman v. Fisher*, 3 Grant. Cas. 305—*Shaw v. Newell*, 2 K. I. 267—*Snoddy v. Cage*, 5 Tex. 111—*Kuhn v. Mount*, 13 Utah, 113, 44 Pac. 1036—*Sutton v. Burruss*, 9 Leigh, 385, 33 Am. Dec. 246—*Johnston v. Wilson*, 29 Gratt. 388—*Coles v. Martin*, 99 Va. 232, 37 S. E. 907—*Whereatt v. Worth*, 108 Wis. 299, 81 Am. St. Rep. 899, 84 N. W. 441.

8. Statutes of limitations are statutes of repose, enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue; but the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. *United States v. Wiley*, 11 Wall. 508, 20: 211

Cited in *Bauserman v. Blunt*, 147 U. S. 658, 37 L. ed. 320, 13 Sup. Ct. Rep. 466—*Re Cornwall*, 9 Blatchf. 127, 6 Nat. Bankr. Reg. 318—*Andrae v. Redfield*, 12 Blatchf. 411, Fed. Cas. No. 367—*Greenwald v. Appell*, 5 McCrary, 341, 17 Fed. 141—*Jackson v. Fidelity & C. Co.* 21 C. C. A. 400, 41 U. S. App. 552, 75 Fed. 365—*Barclay v. Blackinton*, 127 Cal. 196, 59 Pac. 834—*Mutual Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L. 467, 18 Am. Rep. 741—*Williams v. Port Chester*, 72 App. Div.

515, 76 N. Y. Supp. 631—Brown County v. Martin, 50 Ohio St. 204, 33 N. E. 1112—Ahnert v. Zaun, 40 Wis. 629.

9. Statutes of limitations are rules of property, favored in law and vital to the welfare of society. They promote repose by giving security and stability to human affairs. Wood v. Carpenter, 101 U. S. 135,

25: 807

Cited in Nichols v. Randall, 136 Cal. 432, 69 Pac. 26—Louisville & N. B. Co. v. Hall, 115 Ky. 576, 74 S. W. 280—Peters v. Stewart, 2 Misc. 380, 21 N. Y. Supp. 993—Morgan v. Morgan, 10 Wash. 104, 38 Pac. 1054—McClaine v. Fairchild, 23 Wash. 764, 63 Pac. 517—Deering v. Holcomb, 28 Wash. 594, 67 Pac. 240—Whereatt v. Worth, 108 Wis. 299, 81 Am. St. Rep. 899, 84 N. W. 441—Thomas v. Price, 33 Wash. 462, 99 Am. St. Rep. 961, 74 Pac. 563.

Extinguishing claim or barring remedy.

10. The statute of limitations operates to extinguish the cause of action. Bell v. Morrison, 1 Pet. 351, 7: 174
Cited in Reid v. McNaughton, 15 Barb. 175.

11. Statutes of limitations proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period. Hanger v. Abbott, 6 Wall. 532,

18: 939

Levy v. Stewart, 11 Wall. 244, 20: 86
Cited in Andrae v. Redfield, 12 Blatchf. 411, Fed. Cas. No. 367—Re Cornwall, 9 Blatchf. 127, 6 Nat. Bankr. Reg. 319, Fed. Cas. No. 3,250—Foreman v. Carter, 9 Kan. 679—Broadfoot v. Fayetteville, 124 N. C. 495, 70 Am. St. Rep. 610, 32 S. E. 804—Morgan v. Camden & A. R. Co. 18 W. N. C. 128—James v. Milne, 3 Pennyp. 397—Milne's Appeal, 99 Pa. 490.

12. After the lapse of sufficient time, the law will presume payment of a debt, surrender of a deed, or extinguishment of a trust, when circumstances reasonably justify it. Prevost v. Gratz, 6 Wheat. 481,

5: 311

Cited in Platt v. Vattler, 9 Pet. 417, 9 L. ed. 178—Bowman v. Wathen, 1 How. 194, 11 L. ed. 99—Badger v. Badger, 2 Cliff, 155, Fed. Cas. No. 718—Bowman v. Wathen, 2 McLean, 396, Fed. Cas. No. 1,740—Ferson v. Sanger, 1 Woodb. & M. 148, Fed. Cas. No. 4,752—Fisher v. Boody, 1 Curt. C. C. 219, Fed. Cas. No. 4,814—Magill v. Brown, Brightly (Pa.) 365 note, Fed. Cas. No. 8,952—Ruggles v. Eddy, 11 Blatchf. 530, Fed. Cas. No. 12,118—Hinchman v. Kelley, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—Holmes v. Cleveland, C. & C. R. Co. 93 Fed. 107—Perkins v. Cartmell, 4 Harr. (Del.) 280, 42 Am. Dec. 753—Akins v. Hill, 7 Ga. 579—McDearmon v. Burnham, 158 Ill. 63, 41 N. E. 1094—Carpenter v. Carpenter, 70 Ill. 465—Rochester v. Levering, 104 Ind. 570, 4 N. E. 203—Beard v. Smith, 6 T. B. Mon. 491—White v. Loring, 24 Pick. 322—Houston v. Matthews, 1 Yerg. 121—Clark v. Potter, 32 Ohio St. 59—Blake v. Davis, 20 Ohio, 242—Townsend v. Downer, 32 Vt. 205—Edwards v. Van Bibber, 1 Leigh, 194—Bargamin v. Clarke, 20 Gratt. 551.

13. A statute of limitations operates only to bar the remedy, not to extinguish the

right or cause of action. Brent v. Bank of Washington, 10 Pet. 596, 9: 547
Cited in Farmers' Loan & T. Co. v. Denver, L. & G. R. Co. 60 C. C. A. 594, 126 Fed. 52—Brand v. Brand, 116 Ky. 798, 63 L.R.A. 212, 76 S. W. 868—Farmers Bank v. Iglehart, 6 Gill, 58—Donaldson v. Raborg, 26 Md. 327—Newberry v. Detroit & L. S. Iron Mfg. Co. 17 Mich. 157.

14. When the statute of limitations has once run against a partnership debt, the cause of action against the partnership is gone. Bell v. Morrison, 1 Pet. 351, 7: 174

15. Statutes of limitation, while vesting rights to real and personal property adversely held, operate only to defeat the remedy in debt or assumpsit on the contract. Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209, 29: 483

Cited in Sharon v. Tucker, 144 U. S. 544, 36 L. ed. 535, 12 Sup. Ct. Rep. 720—Toltec Ranch Co. v. Cook, 191 U. S. 538, 48 L. ed. 292, 24 Sup. Ct. Rep. 166—Davis v. Milla, 194 U. S. 457, 48 L. ed. 1071, 24 Sup. Ct. Rep. 692—Linton v. Heye, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 856—Northern P. R. Co. v. Ely, 197 U. S. 8, 49 L. ed. 642, 25 Sup. Ct. Rep. 302—Nonce v. Richmond & D. R. Co. 33 Fed. 432—McClaskey v. Barr, 42 Fed. 613—Wilson v. Brookshire, 126 Ind. 506, 9 L.R.A. 798, 25 N. E. 131—Chapin v. Freeland, 142 Mass. 386, 56 Am. Rep. 701, 8 N. E. 128—Currier v. Studley, 159 Mass. 22, 33 N. E. 709—Hindley v. Metropolitan Elev. R. Co. 42 Misc. 65, 85 N. Y. Supp. 561—Lewis v. New York & H. R. Co. 162 N. Y. 224, 56 N. E. 540—Pate v. Hazell, 107 N. C. 190, 11 S. E. 1089—Knauer v. McKoon, 19 Pa. Super. Ct. 544—Busby v. Florida C. & P. R. Co. 45 S. C. 314, 23 S. E. 50—Sutton v. Clark, 59 S. C. 448, 82 Am. St. Rep. 848, 38 S. E. 150—Brock v. Kirkpatrick, 69 S. C. 251, 48 S. E. 72—Landa v. Obert, 78 Tex. 46, 14 S. W. 297—Merrill v. Bullard, 59 Vt. 391, 8 Atl. 157—Morris v. Lyon, 84 Va. 334, 4 S. E. 734.

16. Ga. act March 16, 1869, § 6, declaring debts accrued prior to June 1, 1865, barred after Jan. 1, 1870, is a mere statute of limitations, not destroying the right of action, but barring it only when pleaded. Sanger v. Nightingale, 122 U. S. 176, 7 Sup. Ct. Rep. 1109, 30: 1105

Constitutionality.

Due Process in Legislation, see Constitutional Law, 686-688.

Impairment of Contract Obligations by Statute of Limitation, see Constitutional Law, IV. g, 4, i (8); 1466.

17. It was within the power of Congress to prescribe, by the act of March 3, 1863, § 7, the two years' limitation applicable to both state and Federal courts, for suits for wrongs done or committed, or acts omitted to be done, during the Civil War, by virtue or under color of authority derived from, or exercised by or under, the President. Mitchell v. Clark, 110 U. S. 633, 4 Sup. Ct. Rep. 170, 312, 28: 279

Construction.

Conformity of Federal Courts to Construction by State Courts, see Courts, 2032-2046.

Construing Limitation Act as Prospective Only, see Statutes, 548, 550.

See also Courts, 158.

18-20. Statutes of limitations do not dispense with the performance of contracts, but make certain circumstances evidence of such performance. *Sturges v. Crowninshield*, 4 Wheat. 122, 4: 529
Cited in Williams v. Port Chester, 72 App. Div. 515, 76 N. Y. Supp. 631—*Myer v. Beal*, 5 Or. 130.

21. Statutes of limitations are statutes of repose, and should not be evaded by a forced construction. *United States v. Hodge*, 13 How. 478, 14: 231

22. The statute of limitations is entitled to the same respect as other statutes, and ought not to be explained away. *Clementson v. Williams*, 8 Cranch, 72, 3: 491
United States v. Wilder, 13 Wall. 254, 20: 681

Cited in United States v. Wilder, 13 Wall. 256, 20 L. ed. 682—*Campbell v. Holt*, 115 U. S. 632, 29 L. ed. 488, 6 Sup. Ct. Rep. 209—*Central P. R. Co. v. United States*, 24 Ct. Cl. 152—*The Sam Slick*, 2 Curt. C. C. 485, Fed. Cas. No. 12,282—*Merrill v. Monticello*, 66 Fed. 166—*Wilson v. Torbert*, 3 Stew. (Ala.) 306, 21 Am. Dec. 632—*Knoedler v. Meloy*, 2 MacArth. 243—*Beard v. Smith*, 6 T. B. Mon. 491—*Ten Eyck v. Wing*, 1 Mich. 45—*Leach v. Asher*, 20 Mo. App. 660—*Gulick v. Princeton & K. Branch Turnp. Co.* 14 N. J. L. 548—*Hale v. Lawrence*, 21 N. J. L. 743, 47 Am. Dec. 190—*Fries v. Boisselet*, 9 Serg. & R. 132, 11 Am. Dec. 683—*Eckert v. Wilson*, 12 Serg. & R. 397—*Hannum's Appeal*, 9 Pa. 472—*Faysoux v. Prather*, 1 Nott. & M'C. 305, 9 Am. Dec. 691—*Whereatt v. Worth*, 108 Wis. 298, 81 Am. St. Rep. 899, 84 N. W. 441.

22a. Statutes of limitation are entitled to favorable construction, since they rest on sound policy, and tend to the peace and welfare of society. *M'Cluney v. Silliman*, 3 Pet. 270, 7: 676

Cited in United States v. Wilder, 13 Wall. 256, 20 L. ed. 683—*Merrill v. Monticello*, 66 Fed. 166—*Bullion & E. Bank v. Hegler*, 93 Fed. 894—*Crawford v. Childress*, 1 Ala. 489—*Brown v. State Bank*, 10 Ark. 137—*Knoedler v. Meloy*, 2 MacArth. 243—*Bennett v. Herring*, 1 Fla. 392—*Fain v. Garthright*, 5 Ga. 13—*Bishop v. Sanford*, 15 Ga. 11—*Adams v. Davis*, 47 Ga. 341—*Webb v. Carter*, 62 Ga. 421—*Bedell v. Janney*, 9 Ill. 208—*Davis v. Minor*, 1 How. (Miss.) 191, 28 Am. Dec. 325—*Meredith Bridge Sav. Bank v. Ladd*, 40 N. H. 472—*Salmon v. Huff*, 9 Tex. Civ. App. 168, 28 S. W. 1044—*Whereatt v. Worth*, 108 Wis. 299, 81 Am. St. Rep. 899, 84 N. W. 441.

22b. State statutes of limitations, modeled upon the statute of James, are to be construed the same as that statute. *Walden v. Gratz*, 1 Wheat. 292, 4: 94
Cited in J. B. Streeter Jr. Co. v. Frederickson, 11 N. D. 303, 91 N. W. 692—*Clarke v. Cross*, 2 R. I. 449.

23. The statute of limitations of Ken-

tucky is substantially the same as the statute of 21 James, chap. 16, with the exception that it substitutes the term of five years instead of six; and in construing it the English decisions are entitled to great consideration. *Bell v. Morrison*, 1 Pet. 351, 7: 174

Cited in Bissell v. Jandon, 16 Ohio St. 509.

24. Where a statute of limitations prescribes the time within which suit shall be brought or an act done, and a part of the time has elapsed, effect may be given to the act; and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases. *Ross v. Duval*, 13 Pet. 45, 10: 51

Cited in Lewis v. Lewis, 7 How. 779, 12 L. ed. 911—*Sohn v. Waterson*, 17 Wall. 600, 21 L. ed. 738—*Wilson v. Iseminger*, 185 U. S. 64, 46 L. ed. 808, 22 Sup. Ct. Rep. 573—*Cleveland Ins. Co. v. Reed*, 1 Biss. 186, Fed. Cas. No. 2,889—*Re Kirkland*, 12 Am. L. Reg. N. S. 302, Fed. Cas. No. 7,842—*Perelles v. Watertown*, 6 Biss. 82, Fed. Cas. No. 10,980—*Sayles v. Richmond, F. & P. R. Co.* 3 Hughes, 174, 4 Bann. & Ard. 241, Fed. Cas. No. 12,424—*Billings v. Hall*, 7 Cal. 5—*Spencer v. McBride*, 14 Fla. 418—*Pritchard v. Spencer*, 2 Ind. 486—*McLaughlin v. Hoover*, 1 Or. 34—*Gautier v. Franklin*, 1 Tex. 745—*Sheldon v. Sheldon*, 3 Wis. 707.

25. The statute of limitations of Maine conveys the same meaning as if it had been, "all actions of account, and all actions on the case other than such as are founded on such accounts as concern the trade of merchandise." The action must be founded on an account, not a contract. *Spring v. Gray*, 6 Pet. 151, 8: 352

Cited in Bispham v. Price, 15 How. 178, 14 L. ed. 651—*McCulloch v. Judd*, 20 Ala. 708—*Brackenbridge v. Baltzell*, 1 Ind. 334—*Coudrey v. Gilliam*, 60 Mo. 94—*Mattern v. McDivitt*, 113 Pa. 410, 6 Atl. 63.

26. The fact that complainant's title was on record at the time the defendants acquired their title does not render such title subject to the charge of "want of intrinsic fairness and honesty," within the meaning of a statute prescribing the time within which an action must be brought against persons in possession under color of title, and defining color of title as being constituted by a consecutive chain of transfers down to the person in possession, and which are irregular by reason of certain specified defects, "or such like defect as may not extend to or include the want of intrinsic fairness and honesty." *Davila v. Mumford*, 24 How. 214, 16: 619

Exceptions.

Necessity of Proving, see Evidence, 182.

27. The courts cannot insert into the statute of limitations an exception thereto which the statute does not contain. *M'Iver v. Ragan*, 2 Wheat. 25, 4: 175
Cited in Bank of the State v. Dalton, 9 How. 529, 13 L. ed. 245—*French v. Spencer*, 21 How. 238, 16 L. ed. 99—*Cross v. United States*, 4 Ct. Cl. 278—*Andrews v. Dole*, 11 Nat. Bankr. 363, Fed. Cas. No. 373—*Meeks*

v. Vassault, 3 Sawy. 217, Fed. Cas. No. 9-303—Norton v. De la Villebeuve, 1 Woods, 164, 13 Nat. Bankr. Reg. 306, Fed. Cas. No. 10,350—The Sam Slick, 2 Curt. C. C. 483, Fed. Cas. No. 12,282—United States v. Mallard, 4 Ben. 465, Fed. Cas. No. 15,709—Copp v. Louisville & N. R. Co. 50 Fed. 165—Morgan v. Des Moines, 54 Fed. 460—Madden v. Lancaster County, 12 C. C. A. 573, 27 U. S. App. 528, 65 Fed. 195—Shreve v. Cheesman, 16 C. C. A. 417, 32 U. S. App. 676, 69 Fed. 789—Pearsall v. Great Northern R. Co. 73 Fed. 940—Stryker v. Grand County, 23 C. C. A. 301, 40 U. S. App. 583, 77 Fed. 582—United States v. American Lumber Co. 80 Fed. 320—Robert J. Boyd Paving & Contracting Co. v. Ward, 28 C. C. A. 675, 55 U. S. App. 730, 85 Fed. 35—Wrightman v. Boone County, 31 C. C. A. 572, 60 U. S. App. 100, 88 Fed. 436—Savings & T. Co. v. Bear Valley Irrig. Co. 89 Fed. 40—Webber v. St. Paul City R. Co. 38 C. C. A. 82, 97 Fed. 143—Chauncey v. Dyke Bros. 55 C. C. A. 594, 119 Fed. 16—St. Louis Cotton Compress Co. v. American Cotton Co. 60 C. C. A. 83, 125 Fed. 199—Bennett v. Worthington, 24 Ark. 493—Hibernian Bkg. Asso. v. Commercial Nat. Bank, 157 Ill. 538, 41 N. E. 919—De Moss v. Newton, 31 Ind. 222—Auld v. Butcher, 2 Kan. 151—Atchison, T. & S. F. R. Co. v. Atchison Grain Co. 68 Kan. 588, 75 Pac. 1051—Cox v. Von Ashlefeldt, 105 La. 583, 30 So. 175—Coffin v. Rich, 45 Me. 512, 71 Am. Dec. 559—Erickson v. Johnson, 22 Min. 383—Robertson v. Alford, 13 Smedes & M. 512—Killpatrick v. Byrne, 25 Miss. 582—Dozier v. Ellis, 28 Miss. 736—Rogers v. Brown, 61 Mo. 194—Garrett v. Conklin, 52 Mo. App. 659—Somerset County v. Veghte, 44 N. J. L. 513—Randall v. Richmond & D. R. Co. 107 N. C. 754, 11 L.R.A. 462, 12 S. E. 605—Hudson v. Carey, 11 Serg. & R. 14—Matteson v. Dederkey, 12 E. I. 71—Cocke v. McGinnis, Mart. & Y. 365, 17 Am. Dec. 809—Lawrence v. Bridleman, 3 Yerg. 502—Bowen v. Kirkland, 17 Tex. Civ. App. 353, 44 S. W. 189—Bickle v. Chrisman, 76 Va. 685—Wyatt v. Morris, 2 W. Va. 577—Laidley v. Smith, 32 W. Va. 391, 25 Am. St. Rep. 825, 9 S. E. 209—Woodbury v. Shackleford, 19 Wis. 60—Buffham v. Racine, 26 Wis. 463.

28. Exceptions to the operation of the statute of limitations are not favored. Richards v. Maryland Ins. Co. 8 Cranch, 84, 3: 496

Cited in Adams v. Davis, 47 Ga. 341—Webb v. Carter, 62 Ga. 421.

b. Equitable Remedy; Laches.

1. Enforcement of Statute of Limitations in Equity.

Editorial notes.

In equity cases. 12: 928; 36: 135; 39: 1037; 42: 711

Giving effect to statute.

See also *infra*, 143, 177-179, 508.

29. Courts of equity are no more exempt from obedience to statutes of limitations than courts of law. Bank of United States v. Daniel, 12 Pet. 32, 9: 989

30. A statute of limitations may be set up in defense in equity as well as at law. Lewis v. Marshall, 5 Pet. 470, 8: 195
Cited in Leffingwell v. Warren, 2 Black, 606, 17 L. ed. 263—Clark v. Sohler, 1 Woodb. &

M. 374, Fed. Cas. No. 2,835—Merrill v. Monticello, 66 Fed. 166—Buhl v. Stephens, 84 Fed. 926—Sis v. Boorman, 11 App. D. C. 121—Bowman v. Cockrill, 6 Kan. 342—York's Appeal, 110 Pa. 83, 2 Atl. 65.

31. Courts of equity give effect to the statute of limitations, as a defense to an equitable right, when, at law, it would have been properly pleaded as a bar to a legal right. Curtner v. United States, 149 U. S. 662, 13 Sup. Ct. Rep. 985, 1041, 37: 890
Cited in Moran v. Horsky, 178 U. S. 214, 44 L. ed. 1041, 20 Sup. Ct. Rep. 856—Southern P. R. Co. v. Groeck, 68 Fed. 617—United States v. Des Moines Valley R. Co. 70 Fed. 439—Southern P. R. Co. v. Groeck, 74 Fed. 588.

32. The courts apply the statute of limitations in chancery to bar an equitable right, when at law it would have operated against a grant. Miller v. McIntyre, 6 Pet. 61, 8: 320

Cited in Platt v. Vattier, 9 Pet. 417, 9 L. ed. 178—Boone v. Chiles, 10 Pet. 221, 9 L. ed. 404—Jenkins v. Pye, 12 Pet. 262, 9 L. ed. 1079—Bowman v. Watthen, 1 How. 194, 11 L. ed. 99—Ferson v. Sanger, 1 Woodb. & M. 148, Fed. Cas. No. 4,752—Hall v. Russell, 3 Sawy. 515, Fed. Cas. No. 5,943—Manning v. Hayden, 5 Sawy. 379, Fed. Cas. No. 9,043—Pierpont v. Fowle, 2 Woodb. & M. 36, Fed. Cas. No. 11,152—Fussell v. Hughes, 8 Fed. 306—Lakin v. Sierra Buttes Gold Min. Co. 25 Fed. 344—Norris v. Haggin, 28 Fed. 278—Holmes v. Cleveland, C. & C. R. Co. 93 Fed. 111—Haskell v. Bailey, 22 Conn. 572—Sis v. Boorman, 11 App. D. C. 121—Akins v. Hill, 7 Ga. 579—Moore v. Moore, 103 Ga. 528, 30 S. E. 535—Manning v. Warren, 17 Ill. 268—Wright v. Leclair, 3 Iowa, 232—McLean v. Barton, Harr. Ch. (Mich.) 288—Perry v. Craig, 3 Mo. 525—Tuttle v. Wilson, 10 Ohio, 27—Clark v. Potter, 32 Ohio St. 59—York's Appeal, 110 Pa. 83, 2 Atl. 65—Kennedy v. Baker, 59 Tex. 157—New York & T. Land Co. v. Hyland, 8 Tex. Civ. App. 616, 28 S. W. 206—Baker v. Morris, 10 Leigh, 328.

33. When the cause of action is legal and the statute has barred the remedy at law, the defense is as complete in equity as at law; but when the case falls within the exclusive jurisdiction of a court of equity, the statute is not necessarily applied. Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. Rep. 924, 34: 282

34. The Indiana statutory limitation of six years, in relation to suits at law for fraud, applies to an equity action, where no excuse is shown for the delay. New Albany v. Burke, 11 Wall. 96, 20: 155

35. When the complainant has been compelled to sue in chancery, because the corporation no longer exists in whose name an action at law could be sustained, he is subject to the same rules of prescription as if in a court of law. Bacon v. Howard, 20 How. 22, 15: 811

36. Where a claim is barred at law by lapse of time, it will not be revived in equity, without special circumstances. Ware v. Galveston City Co. 111 U. S. 170, 4 Sup. Ct. Rep. 337, 28: 393
Cited in Sis v. Boorman, 11 App. D. C. 121.

37. So long as demands secured by mortgage are not barred by the statute of limitations, there can be no laches in prosecuting a suit upon the mortgage to enforce them. *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. Rep. 67, 35: 843

38. The plea of prescription cannot prevail in the case of antichresis if the time has not elapsed which the law of Louisiana gives to a person to sue for immovable property. *Livingston v. Story*, 11 Pet. 351, 9: 746

Cited in Ferson v. Sanger, 1 Woodb. & M. 148, Fed. Cas. No. 4,752.

Concurrent jurisdiction.

39. Equity courts, in cases of concurrent jurisdiction, usually consider themselves bound by the statute of limitations which govern courts of law in like cases. *Godden v. Kimmell*, 99 U. S. 201, 25: 431
Badger v. Badger, 2 Wall. 87, 17: 836
Putnam v. New Albany & S. C. Junction R. Co. (*Burke v. Smith*) 16 Wall. 390, 21: 361

Metropolitan Nat. Bank v. St. Louis Despatch Co. 149 U. S. 436, 13 Sup. Ct. Rep. 944, 37: 799

Baker v. Cummings, 169 U. S. 189, 18 Sup. Ct. Rep. 367, 42: 711

Bank of United States v. Daniel, 12 Pet. 32, 9: 989

Coulson v. Walton, 9 Pet. 62, 9: 51
New Albany v. Burke, 11 Wall. 96, 20: 155

Cited in Taylor v. Benham, 5 How. 263, 12 L. ed. 145—*Hanger v. Abbott*, 6 Wall. 537, 18 L. ed. 942—*Pritchard v. Norton*, 106 U. S. 141, 27 L. ed. 110, 1 Sup. Ct. Rep. 102—*Leather Mfrs. Nat. Bank v. Merchants' Nat. Bank*, 128 U. S. 36, 32 L. ed. 345, 9 Sup. Ct. Rep. 3—*Metropolitan Nat. Bank v. St. Louis Despatch Co.* 149 U. S. 448, 37 L. ed. 803, 13 Sup. Ct. Rep. 944—*Baker v. Cummings*, 169 U. S. 189, 42 L. ed. 712, 18 Sup. Ct. Rep. 367—*Lakin v. Sierra Buttes Gold Min. Co.* 25 Fed. 344—*Barden v. Duluth*, 28 Fed. 15—*Norris v. Haggin*, 28 Fed. 278—*Lemoine v. Dunklin County*, 38 Fed. 570—*Rugan v. Sabin*, 3 C. C. A. 582, 10 U. S. App. 519, 53 Fed. 420—*Caulk v. Pace*, 3 C. C. A. 639, 2 U. S. App. 531, 53 Fed. 714—*Percy v. Cockrill*, 4 C. C. A. 81, 10 U. S. App. 574, 53 Fed. 876—*Scheffelt v. Hays*, 7 C. C. A. 312, 19 U. S. App. 220, 58 Fed. 460—*Dugan v. O'Donnell*, 68 Fed. 992—*Lant v. Manley*, 71 Fed. 19—*Bartlett v. Ambrose*, 24 C. C. A. 402, 42 U. S. App. 381, 78 Fed. 844—*Miles v. Vivian*, 25 C. C. A. 212, 51 U. S. App. 194, 79 Fed. 853—*Kelley v. Boettcher*, 29 C. C. A. 21, 56 U. S. App. 363, 85 Fed. 62—*Williamson v. Monroe*, 101 Fed. 329—*Nash v. Ingalls*, 41 C. C. A. 549, 101 Fed. 649—*Higgins Oil & Fuel Co. v. Snow*, 51 C. C. A. 271, 113 Fed. 437—*Hale v. Coffin*, 114 Fed. 576—*Calvada Colonization Co. v. Hays*, 119 Fed. 208—*Hale v. Coffin*, 57 C. C. A. 532, 120 Fed. 474—*Moore v. Nickey*, 66 C. C. A. 670, 133 Fed. 292—*Williams v. Neely*, 69 L.R.A. 242, 67 C. C. A. 183, 134 Fed. 13—*Marsh v. Whitmore*, 1 Haskell, 405, Fed. Cas. No. 9,122—*Sullivan v. Portland & K. R. Co.* 4 Cliff. 226, Fed. Cas. No. 13,596—*Love v. Watkins*, 40 Cal. 571, 6 Am. Rep. 624—*Sis v. Boorman*, 11 App. D. C. 121—*Browne v. Browne*, 17 Fla. 624, 35 Am. Rep. 96—*Schultz v. Cass County*, 95 Ind. 324—

Parks v. Satterthwaite, 182 Ind. 414, 32 N. E. 82—*Johnson v. Hopkins*, 19 Iowa, 53—*Mathews v. Culbertson*, 83 Iowa, 441, 50 N. W. 201—*Bacon v. Chase*, 83 Iowa, 530, 50 N. W. 23—*German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa, 745, 98 N. W. 606—*Fowler v. True*, 76 Me. 45—*Bangs v. Hall*, 2 Pick. 372, 13 Am. Dec. 437—*Harlow v. Lake Superior Iron Co.* 41 Mich. 590, 2 N. W. 913—*Hannum v. West Chester*, 63 Pa. 478—*York's Appeal*, 110 Pa. 83, 2 Atl. 65—*Sessions v. Richmond*, 1 R. I. 302—*Smith v. Fly*, 24 Tex. 351, 76 Am. Dec. 109—*New York & T. Land Co. v. Hyland*, 8 Tex. Civ. App. 616, 28 S. W. 206—*Helskell v. Powell*, 23 W. Va. 723—*Van Winkle v. Blackford*, 33 W. Va. 584, 11 S. E. 26—*Merchants' Nat. Bank v. Spates*, 41 W. Va. 33, 56 Am. St. Rep. 828, 23 S. E. 681—*Kropp v. Kropp*, 97 Wis. 145, 72 N. W. 881.

Acting in analogy to statute.

Rule that Equity Follows Law, see Equity, 285.

In Determining Time to Bring Bill of Review, see Review, IV. b.

See also *infra*, 119, 121, 137, 141, 159, 168, 190, 193.

40. The settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. *Wagner v. Baird*, 7 How. 234, 12: 681

Cited in Abraham v. Ordway, 158 U. S. 420, 39 L. ed. 1039, 15 Sup. Ct. Rep. 894—*Badger v. Badger*, 2 Cliff. 145, Fed. Cas. No. 718—*Bedillan v. Seaton*, 3 Wall. Jr. 287, Fed. Cas. No. 1,218—*Sullivan v. Portland & K. R. Co.* 4 Cliff. 226, Fed. Cas. No. 13,596—*Rugan v. Sabin*, 3 C. C. A. 582, 10 U. S. App. 519, 53 Fed. 420—*Percy v. Cockrill*, 4 C. C. A. 81, 10 U. S. App. 574, 53 Fed. 876—*Kelley v. Boettcher*, 29 C. C. A. 21, 56 U. S. App. 363, 85 Fed. 62—*Williamson v. Monroe*, 101 Fed. 329—*Boynnton v. Haggart*, 57 C. C. A. 312, 120 Fed. 830—*Williams v. Neely*, 69 L.R.A. 242, 67 C. C. A. 183, 134 Fed. 13—*Hayes' Appeal*, 113 Pa. 886, 18 W. N. C. 324, 6 Atl. 144.

41. A court of equity is governed by the analogies of the statute of limitations of a court of law. *Norris v. Haggin*, 136 U. S. 386, 10 Sup. Ct. Rep. 942, 34: 424

Cited in De Estrada v. San Felipe Land & Water Co. 46 Fed. 282—*Southern P. R. Co. v. Groeck*, 68 Fed. 618—*Southern P. R. Co. v. Groeck*, 74 Fed. 587—*Miles v. Vivian*, 25 C. C. A. 212, 51 U. S. App. 194, 79 Fed. 853—*Sis v. Boorman*, 11 App. D. C. 121—*Loomis v. Missouri P. R. Co.* 165 Mo. 493, 65 S. W. 962.

42-3. The limitation of a cause of action against a grantee by reason of his acceptance of a deed in the execution of which he does not join, but which recites his covenant to assume a mortgage, is fixed in equity, by analogy, at the time that an action at law would be barred. *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. Rep. 176, 41: 531
Cited in Hale v. Coffin, 114 Fed. 576—*Hale v. Coffin*, 57 C. C. A. 531, 120 Fed. 473.

44. It is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery re-

fuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court. *McKnight v. Taylor*, 1 How. 161, 11: 86

Cited in *Maxwell v. Kennedy*, 8 How. 222, 12 L. ed. 1055—*Godden v. Kimmell*, 99 U. S. 211, 25 L. ed. 434—*Landadale v. Smith*, 106 U. S. 393, 27 L. ed. 219, 1 Sup. Ct. Rep. 350—*Spedel v. Henrich*, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—*Mackall v. Casilear*, 137 U. S. 566, 34 L. ed. 779, 11 Sup. Ct. Rep. 178—*Badger v. Badger*, 2 Cliff. 154, Fed. Cas. No. 718—*Cleveland Ins. Co. v. Reed*, 1 Biss. 188, Fed. Cas. No. 2,889—*Ferson v. Sanger*, 1 Woodb. & M. 148, Fed. Cas. No. 4,752—*Sullivan v. Portland & K. R. Co.* 4 Cliff. 212, Fed. Cas. No. 13,596—*Sullivan v. Sullivan*, 21 Month. L. Rep. 547, Fed. Cas. No. 13,598—*Etting v. Marx*, 4 Hughes, 323, 4 Fed. 684—*Pulliam v. Pulliam*, 10 Fed. 26—*Pickering v. Leberman*, 41 Fed. 378—*Van Vleet v. Sledge*, 45 Fed. 750—*Naddo v. Bardon*, 47 Fed. 790—*Richardson v. Walton*, 49 Fed. 896—*Hinchman v. Kelley*, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—*Reed v. Dingess*, 56 Fed. 176—*Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 652, 17 U. S. App. 145, 57 Fed. 944—*Schlawig v. Purslow*, 8 C. C. A. 319, 19 U. S. App. 501, 59 Fed. 853—*Davis v. Tarwater*, 15 Ark. 296—*Wilson v. Anthony*, 19 Ark. 22—*Bell v. Hudson*, 73 Cal. 288, 2 Am. St. Rep. 791, 14 Pac. 791—*Perkins v. Cartmell*, 4 Harr. (Del.) 277, 42 Am. Dec. 753—*Rice v. Pennypacker*, 5 Houst. (Del.) 354—*Blder v. White*, 3 Mackey, 312—*Sis v. Boorman*, 11 App. D. C. 124—*King v. Hamilton*, 16 Ill. 195—*Bacon v. Chase*, 88 Iowa, 529, 50 N. W. 23—*Courtney v. Staudenmayer*, 56 Kan. 397, 54 Am. St. Rep. 592, 43 Pac. 758—*Old Times Distillery Co. v. Casey*, 104 Ky. 620, 42 L.R.A. 468, 84 Am. St. Rep. 480, 47 S. W. 610—*Hawkins v. Chapman*, 36 Md. 100—*Hagerty v. Mann*, 56 Md. 526—*Wiggin v. Swamscot Mach. Co.* 68 N. H. 16, 38 Atl. 727—*Smith v. Drake*, 23 N. J. Eq. 305—*Patterson v. Hewitt*, 11 N. M. 18, 55 L.R.A. 662, 66 Pac. 552—*Hart's Estate*, 9 Pa. Dist. R. 275, 23 Pa. Co. Ct. 642—*Newland's Estate*, 23 Pittsb. L. J. N. S. 386—*German Roman Catholic St. Vincent's Orphan Asylum's Appeal*, 115 Pa. 165, 10 Atl. 37—*Summers v. Wilson*, 2 Coldw. 473—*Scott v. Crouch*, 24 Utah, 389, 67 Pac. 1068—*King v. White*, 63 Vt. 165, 25 Am. St. Rep. 752, 21 Atl. 535—*Covington v. Griffin*, 98 Va. 128, 34 S. E. 974—*Helskell v. Powell*, 23 W. Va. 724—*Sheldon v. Rockwell*, 9 Wis. 181, 76 Am. Dec. 265.

Disregarding statute.

45. Courts of equity often treat a lapse of time less than that prescribed by the statute of limitations as a presumptive bar. *Hayward v. Elliott Nat. Bank*, 96 U. S. 611, 24: 855

Cited in *Richards v. Mackall*, 124 U. S. 188, 31 L. ed. 399, 8 Sup. Ct. Rep. 437—*Bryan v. Kales*, 134 U. S. 135, 33 L. ed. 833, 10 Sup. Ct. Rep. 435—*Alsop v. Riker*, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. Rep. 162—*Abraham v. Ordway*, 158 U. S. 420, 39 L. ed. 1039, 15 Sup. Ct. Rep. 894—*Whitney v. Fox*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 713—*Patterson v. Hewitt*, 195 U. S. 319, 49 L. ed. 218, 25 Sup. Ct. Rep. 35—*Fraker v. Houck*, 36 Fed. 406—*Teall v. Slaven*, 40 Fed. 781—*Van Vleet v. Sledge*, 45 Fed. 748—*Lemolne*

v. Dunklin County, 2 C. C. A. 348, 10 U. S. App. 227, 51 Fed. 492—*Halsey v. Cheney*, 15 C. C. A. 662, 34 U. S. App. 50, 68 Fed. 768—*Jones v. Perkins*, 76 Fed. 84—*Kessler v. Ensley Land Co.* 123 Fed. 563—*Gibson v. Herriott*, 55 Ark. 93, 29 Am. St. Rep. 17, 17 S. W. 589—*Hill v. Finigan*, 77 Cal. 272, 11 Am. St. Rep. 279, 19 Pac. 494—*Logansport v. La Rose*, 99 Ind. 132—*Joseph v. Davenport*, 116 Iowa, 274, 89 N. W. 1081—*Bayne v. State*, 62 Md. 125—*Morse v. Hill*, 136 Mass. 66—*Sedlak v. Sedlak*, 14 Or. 542, 13 Pac. 452.

46. In matters of account, although not barred by the statute, courts of equity will not interfere after considerable lapse of time, from public policy. *McKnight v. Taylor*, 1 How. 161, 11: 86

47. Equity, in the exercise of its inherent power to do justice between parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations. *Alsop v. Riker*, 155 U. S. 448, 15 Sup. Ct. Rep. 162, 39: 218
Cited in *Godkin v. Cohn*, 25 C. C. A. 565, 53 U. S. App. 4, 80 Fed. 466—*Hanchett v. Blair*, 41 C. C. A. 87, 100 Fed. 827.

48. Under appropriate circumstances a bill may be dismissed for laches, though the statutory period of limitation may not have run against the claim. *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. Rep. 437, 31: 396
Cited in *Parker v. Dacres*, 130 U. S. 49, 32 L. ed. 851, 9 Sup. Ct. Rep. 433—*Alsop v. Riker*, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. Rep. 162—*Whitney v. Fox*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 713—*Simmons v. Taylor*, 38 Fed. 608—*Mathews v. Burdick*, 38 Fed. 896—*Billing v. Gilmer*, 8 C. C. A. 631, 23 U. S. App. 168, 60 Fed. 337—*Kemp v. Nickerson*, 66 Fed. 683—*Lant v. Manley*, 71 Fed. 19—*Nantahala Marble & Talc Co. v. Thomas*, 76 Fed. 65—*Miles v. Vivian*, 25 C. C. A. 213, 51 U. S. App. 194, 79 Fed. 853—*McMonagle v. McGlinn*, 85 Fed. 92—*De Roux v. Girard*, 50 C. C. A. 143, 112 Fed. 96—*Nelson v. Worthington*, 3 App. D. C. 507—*Willoughby v. Mackall*, 5 App. D. C. 166—*Mathews v. Culbertson*, 83 Iowa, 441, 50 N. W. 201—*Frenche v. Kitchen*, 53 N. J. Eq. 39, 30 Atl. 815—*Patterson v. Hewitt*, 55 L.R.A. 664, 66 Pac. 552—*Chezum v. McBride*, 21 Wash. 564, 58 Pac. 1067.

49. Expiration of the period of limitation regarded as not a bar to relief in equity from a judicial sale vitiated by fraud. *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. Rep. 686, 29: 839
Cited in *Schroeder v. Young*, 161 U. S. 343, 40 L. ed. 727, 16 Sup. Ct. Rep. 512—*Tenant v. Dunlop*, 97 Va. 239, 33 S. C. 620.

2. Laches as an Equitable Defense.

a. In General.

Laches as Ground for Refusing to Dismiss Appeal or Error, see Appeal and Error. 3919, 3920.

Laches Preventing Reinstatement of Appeal, see Appeal and Error. 3972.

Necessity of Prompt Action in Bankruptcy Proceedings, see Bankruptcy, 2.

Discharge of Indorser by Laches, see Bills and Notes, III. c.
 In Suit to Recover Back Duties, see Duties, 510, 511.
 Estoppel by Laches, see Estoppel, III. b, 6.
 Loss of Right to Garnishment by Laches, see Garnishment, 3.
 Laches as Equitable Defense Making Injunction Proper against Action at Law, see Injunction, 78.
 Effect of Laches on Right to Interest, see Interest, 41, 80, 81.
 Delay as Abandonment or Waiver of Right to Reissued Patent, see Patents, 684-693.
 Delay in Disclaiming, see Patents, 773, 775-779.
 Delay as Ground for Denying Leave to Withdraw Answer, see Pleading, 257.
 Allegations as to, see Pleading, 444-446.
 Necessity of Alleging Laches, see Pleading, 712-715.
 Raising Bar of Laches by Demurrer, see Pleading, 865, 866.
 Discharge of Surety by Laches, see Principal and Surety, 20.
 Discharge of Surety by Failure to Proceed against or Indulgence to Principal, see Principal and Surety, III. d, e.
 Excepting to Master's Report, see Reference, 86.
 Time to Bring Bill of Review, see Review, IV. b.
 Availability of Defense on Bill of Review, see Review, 59.
 Effect of Laches on Right to Specific Performance, see Specific Performance, VI.
 See also *infra*, 337; Judgment, 905, 906.

50. There is a defense peculiar to the courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases, courts of equity, acting upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. *Badger v. Badger*. 2 Wall. 87, 17: 836

Wagner v. Baird, 7 How. 234, 12: 681
Godden v. Kinnell, 99 U. S. 201, 25: 431
Cited in Speldel v. Henriel, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—*Mackall v. Castlear*, 137 U. S. 368, 34 L. ed. 779, 11 Sup. Ct. Rep. 178—*Boone County v. Burlington & M. River R. Co.* 139 U. S. 693, 35 L. ed. 323, 11 Sup. Ct. Rep. 687—*Ware v. Galveston City Co.* 146 U. S. 116, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Willard v. Wood*, 164 U. S. 524, 41 L. ed. 540, 17 Sup. Ct. Rep. 176—*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 697, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*James v. Atlantic Delaine Co.* 3 Cliff. 620, Fed. Cas. No. 7,177—*Marsh v. Whitmore*, 1 Haskell, 404, Fed. Cas. No. 9,122—*Etting v. Marx*, 4 Hughes, 323, 4 Fed. 684—*United States v. Beebe*, 4 McCrary, 17, 17 Fed. 40—*Kittle v. Hall*, 20 Fed. 511—*Etna L. Ins. Co. v. Middleport*, 31 Fed. 876—*Kenney v. Contner*, 43 Fed. 711—*Naddo v. Bardon*, 47 Fed.

790—*St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 259, 4 U. S. App. 160, 49 Fed. 318—*Hinchman v. Kelley*, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—*Reed v. Dingess*, 56 Fed. 176—*Wetzel v. Minnesota R. Transfer Co.* 12 C. C. A. 494, 27 U. S. App. 594, 65 Fed. 26—*Kemp v. Nickerson*, 66 Fed. 683—*Lant v. Manley*, 71 Fed. 13—*Post v. Beacon Vacuum Pump & Electrical Co.* 32 C. C. A. 153, 50 U. S. App. 407, 89 Fed. 4—*Nash v. Ingalls*, 41 C. C. A. 549, 101 Fed. 649—*Kessler v. Ensley Land Co.* 123 Fed. 563—*Werner Co. v. Encyclopaedia Britannica Co.* 134 Fed. 1024—*James v. James*, 55 Ala. 533—*Wilson v. Anthony*, 19 Ark. 22—*Gibson v. Herriott*, 55 Ark. 93, 29 Am. St. Rep. 17, 17 S. W. 589—*Lux v. Haggin*, 69 Cal. 280, 10 Pac. 674—*Bell v. Hudson*, 73 Cal. 287, 2 Am. St. Rep. 791, 14 Pac. 791—*Hagerman v. Bates*, 5 Colo. App. 402, 38 Pac. 1100—*Mayse v. Gaddis*, 2 App. D. C. 27—*Nelson v. Worthington*, 3 App. D. C. 507—*McGee v. Welch*, 18 App. D. C. 184—*Sanchez v. Dow*, 23 Fla. 449, 2 So. 842—*Bliss v. Prichard*, 67 Mo. 186—*Kelly v. Hurt*, 74 Mo. 566—*Peck v. Girard F. & M. Ins. Co.* 16 Neb. 122, 67 Am. St. Rep. 600, 51 Pac. 255—*Ballou v. Sherwood*, 32 Neb. 695, 49 N. W. 790—*Barton v. Long*, 45 N. J. Eq. 850, 19 Atl. 623—*Patterson v. Hewitt*, 11 N. M. 18, 55 L.R.A. 663, 66 Pac. 552—*Peters v. Stewart*, 2 Misc. 360, 21 N. Y. Supp. 993—*Loomis v. Rosenthal*, 34 Or. 600, 57 Pac. 55—*Packer v. Noble*, 103 Pa. 226—*York's Appeal*, 110 Pa. 83, 17 W. N. C. 36, 43 Phila. Leg. Int. 416, 2 Atl. 65—*Hayes's Appeal*, 113 Pa. 380, 386, 18 W. N. C. 324, 6 Atl. 144—*Hayes v. Bald Eagle Valley R. Co.* 48 Phila. Leg. Int. 519—*Scott v. Crouch*, 24 Utah, 389, 67 Pac. 1068—*Coles v. Ballard*, 73 Va. 147—*Wissler v. Craig*, 80 Va. 29—*Perkins v. Lane*, 82 Va. 64—*Riely v. Kinzel*, 85 Va. 486, 7 S. E. 907—*Doggett v. Helm*, 17 Gratt. 97—*Wilson v. Barclay*, 22 Gratt. 542—*Phillips v. Piney Coal Co.* 53 W. Va. 546, 97 Am. St. Rep. 1040, 44 S. E. 774—*Melms v. Pabst Brewing Co.* 93 Wis. 174, 57 Am. St. Rep. 899, 66 N. W. 518.

51. The doctrine of laches is based upon grounds of public policy, which requires for the peace of society the discouragement of stale demands. *Mackall v. Casilear*, 137 U. S. 556, 11 Sup. Ct. Rep. 178, 34: 776
Cited in Boone County v. Burlington & M. River R. Co. 139 U. S. 693, 35 L. ed. 323, 11 Sup. Ct. Rep. 687—*Hammond v. Hopkins*, 143 U. S. 250, 36 L. ed. 145, 12 Sup. Ct. Rep. 418—*Hoyt v. Latham*, 143 U. S. 567, 36 L. ed. 265, 12 Sup. Ct. Rep. 568—*St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 269, 4 U. S. App. 160, 49 Fed. 324—*Holladay v. Land & River Improv. Co.* 6 C. C. A. 577, 18 U. S. App. 308, 57 Fed. 792—*New York Security & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 233—*Sandwich Mfg. Co. v. Earl*, 56 Minn. 390, 57 N. W. 935—*St. Paul, M. & M. R. Co. v. Eckel*, 82 Minn. 282, 84 N. W. 1008—*Patterson v. Hewitt (N. M.)* 55 L.R.A. 664, 66 Pac. 552—*Kelly v. Green Bay, W. & St. P. R. Co.* 80 Wis. 335, 50 N. W. 187.

52. A court of equity is bound to give due weight to lapse of time. *United States v. Moore*, 12 How. 209, 13: 958
Cited in Sena v. United States, 189 U. S. 241, 47 L. ed. 791, 23 Sup. Ct. Rep. 596.

53. What constitutes laches in any case

depends upon the peculiar circumstances of the case. *Stearns v. Page*, 7 How. 819,

12: 928

Cited in *Godden v. Kimmell*, 99 U. S. 202, 25 L. ed. 431—*Martin v. Smith*, 1 Dill. 98, 4 Nat. Bankr. Reg. 286, Fed. Cas. No. 9,164—*United States v. White*, 9 Sawy. 131, 17 Fed. 565—*Kemp v. Nickerson*, 66 Fed. 683—*Stansbury v. Inglehart*, 9 Mackey, 161—*Bonney v. Stoughton*, 122 Ill. 544, 13 N. E. 833—*Jenny v. Perkins*, 17 Mich. 33—*De Grauw v. Mechan*, 48 N. J. Eq. 225, 21 Atl. 193.

54. The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the statute of limitations, subject to an arbitrary rule. *Alsop v. Riker*, 155 U. S. 448, 15 Sup. Ct. Rep. 162,

39: 218

Cited in *Bartlett v. Ambrose*, 24 C. C. A. 399, 42 U. S. App. 381, 78 Fed. 841—*Miles v. Vivian*, 25 C. C. A. 212, 51 U. S. App. 194, 79 Fed. 853—*Hubbard v. Manhattan Trust Co.* 30 C. C. A. 528, 57 U. S. App. 730, 87 Fed. 59—*Patterson v. Hewitt*, 11 N. M. 34, 55 L.R.A. 668, 66 Pac. 552.

55. The question of laches depends upon whether, under all the circumstances, plaintiff is wanting in due diligence in commencing his action. *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. Rep. 258,

40: 383

Cited in *McIntire v. Pryor*, 173 U. S. 59, 43 L. ed. 614, 19 Sup. Ct. Rep. 352—*Brainard v. Buck*, 184 U. S. 109, 46 L. ed. 453, 22 Sup. Ct. Rep. 458—*Maine v. United States*, 38 Ct. Cl. 556—*Old Colony Trust Co. v. Dubuque Light & Traction Co.* 89 Fed. 807—*Reavis v. Reavis*, 103 Fed. 818—*Hendryx v. Perkins*, 52 C. C. A. 461, 114 Fed. 827—*Potts v. Alexander*, 118 Fed. 892—*Morgan v. King*, 27 Colo. 549, 63 Pac. 416—*Patterson v. Hewitt*, 11 N. M. 23, 55 L.R.A. 664, 66 Pac. 552.

Editorial notes.

Laches as defense. 3: 627; 36: 135; 36: 720; 39: 1037

As barring relief.

Laches or Want of Diligence in Presenting Defense as Defeating Equitable Relief against Judgment, see Equity, 246-250.

Relief against Judgment, see Judgment, 1145, 1203-1205a.

As Bar to Stay of Enforcement of Decree, see Prohibition, 4.

See also *supra*, 4, 36, 44-49; *infra*, 209.

56. Though a good defense in equity, laches is no defense in law. *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. Rep. 129,

39: 167

Cited in *Abraham v. Ordway*, 158 U. S. 422, 39 L. ed. 1040, 15 Sup. Ct. Rep. 894—*Cleveland v. Cleveland*, C. C. & St. L. R. Co. 93 Fed. 123—*Barbour v. Moore*, 10 App. D. C. 48.

57. It is an established rule with courts of equity, independent of any statute of limitations, that they will not entertain

stale demands. *Crosby v. Beale* (*Hume v. Beale*) 17 Wall. 336,

21: 602

Godden v. Kimmell, 99 U. S. 201,

25: 431

Cited in *Speidel v. Henrich*, 120 U. S. 387, 30

L. ed. 720, 7 Sup. Ct. Rep. 610—*Richards v.*

Mackall, 124 U. S. 188, 31 L. ed. 399, 8

Sup. Ct. Rep. 437—*Whitney v. Fox*, 106

U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep.

713—*Maine v. United States*, 38 Ct. Cl.

556—*Partee v. Thomas*, 11 Fed. 773—*Teall*

v. Slaven, 40 Fed. 781—*Pickering v. Lelberman*,

41 Fed. 378—*Naddo v. Bardon*, 47

Fed. 790—*St. Paul, S. & T. F. E. Co. v.*

Sage, 1 C. C. A. 269, 4 U. S. App. 160, 49

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492—*Prince's Metallic Paint Co. v. Prince*

Mfg. Co. 6 C. C. A. 652, 17 U. S. App. 145,

57 Fed. 944—*Schlawig v. Purslow*, 8 C. C.

A. 319, 19 U. S. App. 501, 59 Fed. 851—

Kemp v. Nickerson, 66 Fed. 683—*Church of*

Christ v. Church of Jesus Christ of L. D. S.

17 C. C. A. 395, 36 U. S. App. 110, 70 Fed.

188—*Mueller v. Mueller*, 37 C. C. A. 395,

95 Fed. 159—*Richardson v. Olivier*, 53 L.

R.A. 115, 44 C. C. A. 472, 105 Fed. 281—

De Roux v. Girard, 50 C. C. A. 143, 112

Fed. 96—*Seculovich v. Morton*, 101 Cal. 677,

40 Am. St. Rep. 106, 36 Pac. 387—*Hager-*

man v. Bates, 5 Colo. App. 402, 38 Pac.

1100—*Old Times Distillery Co. v. Casey*,

104 Ky. 620, 42 L.R.A. 468, 84 Am. St.

Rep. 480, 47 S. W. 610—*Frost v. Wallis*,

93 Me. 412, 45 Atl. 287—*Horbach v. Marsh*,

37 Neb. 38, 55 N. W. 286—*De Grauw v.*

Mechan, 48 N. J. Eq. 225, 21 Atl. 193—

Coles v. Vanneman, 51 N. J. Eq. 329, 18

Atl. 468—*Patterson v. Hewitt*, 11 N. M. 41,

55 L.R.A. 670, 66 Pac. 552—*Hodges v.*

Council, 86 N. C. 184—*Bolton v. Dickens*,

4 Lea, 577—*Rowe v. Bentley*, 29 Gratt.

763—*Wickham v. Sprague*, 18 Wash. 471,

51 Pac. 1055.

58. When there is no statute of limita-

tions governing a case, a defense founded

upon the lapse of time and the staleness of

the claim is available in equity. *Metropol-*

itan Nat. Bank v. St. Louis Despatch Co.

149 U. S. 436, 13 Sup. Ct. Rep. 944, 37: 799

Cited in *Wood v. Perkins*, 57 Fed. 261—*Kemp*

v. Nickerson, 66 Fed. 683.

59. Equity always refuses to interfere

where there has been gross laches in the

prosecution of rights. There is no artificial

rule on such a subject, but each case, as

it arises, must be determined by its own

particular circumstances. *McQuiddy v.*

Ware, 20 Wall. 14,

22: 311

Brown v. Buena Vista County, 95 U. S. 157,

24: 422

Hearst v. Halligan, 154 U. S. 669 Appx. and

14 Sup. Ct. Rep. 1203,

26: 715

Cited in *Godden v. Kimmell*, 99 U. S. 212, 25

L. ed. 435—*Mercantile Nat. Bank v. Car-*

penter, 101 U. S. 568, 25 L. ed. 816—*Kirby*

v. Lake Shore & M. S. R. Co. 120 U. S.

136, 30 L. ed. 572, 7 Sup. Ct. Rep. 430—

Bryan v. Kales, 134 U. S. 135, 33 L. ed.

833, 10 Sup. Ct. Rep. 435—*Boone County v.*

Burlington & M. River R. Co. 139 U. S. 693,

35 L. ed. 323, 11 Sup. Ct. Rep. 687—*Gallher*

v. Cadwell, 145 U. S. 372, 36 L. ed. 740,

12 Sup. Ct. Rep. 873—*Johnson v. Atlantic*,

G. & W. I. Transit Co. 156 U. S. 648, 39

L. ed. 566, 15 Sup. Ct. Rep. 520—*Abraham*

v. Ordway, 158 U. S. 420, 39 L. ed. 1039,

15 Sup. Ct. Rep. 894—*Pennsylvania v. United*

States, 36 Ct. Cl. 525—*Maine v. United*

States, 36 Ct. Cl. 556—Hoyt v. Sprague, 8 Rep. 618, Fed. Cas. No. 6,810—Ketchum v. Mobile & O. R. Co. 2 Woods, 542, Fed. Cas. No. 7,737—Etting v. Marx, 4 Hughes, 323, 4 Fed. 684—Speldell v. Henrich, 15 Fed. 767—United States v. Beebe, 4 McCrary, 16, 17 Fed. 40—Leavenworth County v. Chicago, R. I. & P. R. Co. 5 McCrary, 511, 18 Fed. 211—Kittle v. Hall, 29 Fed. 511—Lemoine v. Dunklin County, 38 Fed. 568—Teall v. Slaven, 40 Fed. 781—Lemoine v. Dunklin County, 46 Fed. 221—Naddo v. Bardon, 47 Fed. 788—Lemoine v. Dunklin County, 2 C. C. A. 348, 10 U. S. App. 227, 51 Fed. 492—Naddo v. Bardon, 2 C. C. A. 339, 4 U. S. App. 642, 51 Fed. 497—Hinchman v. Kelley, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—Elfert v. Craps, 7 C. C. A. 322, 8 U. S. App. 436, 58 Fed. 473—Furnald v. Glenn, 12 C. C. A. 33, 26 U. S. App. 202, 64 Fed. 54—Kemp v. Nickerson, 66 Fed. 683—Halsey v. Cheney, 15 C. C. A. 662, 34 U. S. App. 50, 68 Fed. 768—Jones v. Perkins, 76 Fed. 84—Denton v. Baker, 35 C. C. A. 190, 93 Fed. 49—Guarantee Trust & S. D. Co. v. Delta & Pine-Land Co. 43 C. C. A. 406, 104 Fed. 15—Hendryx v. Perkins, 52 C. C. A. 460, 114 Fed. 826—Lux v. Haggins, 69 Cal. 280, 10 Pac. 674—Bell v. Hudson, 73 Cal. 288, 2 Am. St. Rep. 791, 14 Pac. 791—Snider v. Rinehart, 20 Colo. 460, 39 Pac. 408—Levis v. Kengla, 8 App. D. C. 237—Stansbury v. Inglehart, 9 Mackey, 161—Reynolds v. Summer, 126 Ill. 70, 1 L.R.A. 330, 9 Am. St. Rep. 523, 18 N. E. 334—Logansport v. Uhl, 99 Ind. 545, 50 Am. Rep. 109—Withrow v. Walker, 81 Iowa, 657, 47 N. W. 893—Bacon v. Chase, 83 Iowa, 529, 50 N. W. 23—Horr v. French, 99 Iowa, 81, 68 N. W. 581—Royal Bank v. Grand Junction R. & Depot Co. 125 Mass. 495—Harlow v. Lake Superior Iron Co. 41 Mich. 390, 2 N. W. 913—Bausman v. Kelley, 38 Minn. 209, 8 Am. St. Rep. 661, 36 N. W. 333—Bliss v. Prichard, 67 Mo. 186—Bradshaw v. Yates, 67 Mo. 232—Vantilburg v. Black, 3 Mont. 470—Wiggin v. Swamscot Mech. Co. 68 N. H. 16, 38 Atl. 727—Coles v. Vanneman, 51 N. J. Eq. 329, 18 Atl. 468—Patterson v. Hewitt, 11 N. M. 18, 55 L. R.A. 662, 66 Pac. 552—United States Rolling Stock Co. v. Atlantic & G. W. R. Co. 34 Ohio St. 463, 32 Am. Rep. 380—Loomis v. Rosenthal, 34 Or. 600, 37 Pac. 55—Colleton County v. Hampton County, 52 S. C. 604, 30 S. E. 484—Hamilton v. Dooly, 15 Utah, 294, 48 Pac. 769—Perkins v. Lane, 82 Va. 64—Morgan v. Fisher, 82 Va. 423—Perry v. Fontaine, 83 Va. 455, 2 S. E. 743—Orr v. Pennington, 93 Va. 271, 24 S. E. 928—Wickham v. Sprague, 18 Wash. 471, 51 Pac. 1055—Chezum v. McBride, 21 Wash. 563, 58 Pac. 1067—Cranmer v. McSwords, 24 W. Va. 602—Mullan v. Carper, 37 W. Va. 222, 16 S. E. 527—Rogers v. Van Nortwick, 87 Wis. 429, 58 N. W. 757—Meims v. Pabst Brewing Co. 93 Wis. 173, 57 Am. St. Rep. 899, 66 N. W. 518—McCann v. Welch, 106 Wis. 151, 81 N. W. 996.

60. A court of equity has always refused its aid to stale demands, where the party has slept on his rights for a great length of time. It has always discountenanced laches, and from the beginning there was always a limitation of suit. Bowman v. Wathen, 1 How. 189, 11: 97
Cited in Maxwell v. Kennedy, 8 How. 222, 12 L. ed. 1056—Ferson v. Sanger, 1 Woodb. & M. 148, Fed. Cas. No. 4,752—Amy v. Watertown, 22 Fed. 420—Naddo v. Bardon, 47 Fed. 790—Kemp v. Nickerson, 66 Fed. 683—

Howell v. Hair, 15 Ala. 199—Gibson v. Herriott, 55 Ark. 93, 29 Am. St. Rep. 17, 17 S. W. 589—Gibbons v. Duley, 7 Mackey, 328—Sanchez v. Dow, 28 Fla. 449, 2 So. 842—McDearmon v. Burnham, 158 Ill. 63, 41 N. E. 1094—Logansport v. Uhl, 99 Ind. 545, 50 Am. Rep. 109—Pierson v. David, 1 Iowa, 32—Courtney v. Staudenmayer, 56 Kan. 397, 54 Am. St. Rep. 592, 43 Pac. 758—Frazier v. Gelston, 35 Md. 314—Chew v. Farmers' Bank, 2 Md. Ch. 251—Barton v. Long, 45 N. J. Eq. 850, 19 Atl. 623—York's Appeal, 110 Pa. 83, 17 W. N. C. 36, 2 Atl. 65—Sheldon v. Rockwell, 9 Wis. 183, 76 Am. Dec. 266.

61. A court of equity will not interfere to assist a party to obtain redress for an injury which he might, by ordinary diligence, have avoided. Bend v. Hoyt, 13 Pet. 263, 10: 154

61a. It is the recognized doctrine of courts of equity to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims, Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. Rep. 350, 27: 219

Cited in Wollensak v. Rether, 115 U. S. 102, 29 L. ed. 352, 5 Sup. Ct. Rep. 1137—Speldell v. Henrich, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—Mackall v. Caslebar, 137 U. S. 566, 34 L. ed. 779, 11 Sup. Ct. Rep. 178—Underwood v. Dugan, 139 U. S. 383, 35 L. ed. 199, 11 Sup. Ct. Rep. 618—Hammond v. Hopkins, 143 U. S. 249, 36 L. ed. 145, 12 Sup. Ct. Rep. 418—Hardt v. Heldweyer, 152 U. S. 560, 38 L. ed. 538, 14 Sup. Ct. Rep. 671—Abraham v. Ordway, 158 U. S. 421, 39 L. ed. 1039, 15 Sup. Ct. Rep. 894—Willard v. Wood, 164 U. S. 524, 41 L. ed. 540, 17 Sup. Ct. Rep. 176—Whitney v. Fox, 168 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 713—Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 697, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—Foster v. Mansfield, C. & L. M. R. Co. 36 Fed. 639—Kenney v. Contner, 43 Fed. 710—Van Vleet v. Sledge, 45 Fed. 748—Naddo v. Bardon, 47 Fed. 786—St. Paul, S. & T. F. R. Co. v. Sage, 1 C. C. A. 269, 4 U. S. App. 160, 49 Fed. 324—Naddo v. Bardon, 2 C. C. A. 341, 4 U. S. App. 642, 51 Fed. 498—Hinchman v. Kelley, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—Edison Electric Light Co. v. Equitable Life Assur. Soc. 55 Fed. 479—Holladay v. Land & River Improv. Co. 6 C. C. A. 577, 18 U. S. App. 308, 57 Fed. 792—Halsey v. Cheney, 15 C. C. A. 662, 34 U. S. App. 50, 68 Fed. 768—McMonagle v. McGlinn, 85 Fed. 92—Mueller v. Mueller, 37 C. C. A. 395, 95 Fed. 159—De Roux v. Girard, 50 C. C. A. 143, 112 Fed. 96—Kessler v. Ensley Land Co. 123 Fed. 563—Bell v. Hudson, 73 Cal. 280, 2 Am. St. Rep. 791, 14 Pac. 791—Wampol v. Kountz, 14 S. D. 338, 86 Am. St. Rep. 765, 85 N. W. 595—Cammack v. Carpenter, 3 App. D. C. 229—Old Times Distillery Co. v. Casey, 104 Ky. 620, 42 L.R.A. 468, 84 Am. St. Rep. 480, 47 S. W. 610—Yearley v. Cockey, 68 Md. 179, 11 Atl. 586—Dierks v. Martin, 16 Neb. 122, 19 N. W. 598—Patterson v. Hewitt, 11 N. M. 23, 55 L.R.A. 664, 66 Pac. 552—Bruner v. Finley, 187 Pa. 407, 41 Atl. 334—Wood v. Fox, 8 Utah, 401, 32 Pac. 48—Scott v. Crouch, 24 Utah, 389, 67 Pac. 1068—Perkins v. Lane, 82 Va. 64—Terry v. Fontaine, 83 Va. 456, 2 S. E. 743—Kelly v. Green Bay, W. & St. P. R. Co. 80 Wis. 335, 50 N. W. 187—Rogers v. Van Nortwick, 87 Wis. 429, 58 N. W. 757—Meims v.

Pabst Brewing Co. 93 Wis. 174, 57 Am. St. Rep. 899, 66 N. W. 518.

62. Long acquiescence in transactions, and delay in taking steps to set them aside, will preclude equitable relief. Hoyt v. Sprague, 103 U. S. 613, 26: 585
Cited in Ware v. Galveston City Co. 146 U. S. 116, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Ives v. Sargent*, 21 Blatchf. 421, 17 Fed. 450—*New York Security & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 233—*Quimby v. Uhl*, 130 Mich. 212, 89 N. W. 722.

63. Nothing can call a court of equity in to activity but conscience, good faith, and reasonable diligence; and when a party, with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights, equity will not aid him. *Hayward v. Elliot Nat. Bank*, 96 U. S. 611, 24: 855
Cited in Gilmer v. Morris, 43 Fed. 460—*Calivada Colonization Co. v. Hays*, 119 Fed. 208—*State ex rel. Brown v. Pierre*, 15 S. D. 570, 90 N. W. 1047—*McDowell v. Chicago Steel Works*, 124 Ill. 499, 7 Am. St. Rep. 381, 16 N. E. 854—*Shartzler v. Mountain Lake Park Asso.* 86 Md. 342, 37 Atl. 786—*Reynolds v. Cridge*, 181 Pa. 195, 18 Atl. 1010—*Marrow v. Brinkley*, 85 Va. 62, 6 S. E. 605—*Wroten v. Armat*, 31 Gratt. 256—*Kuhn v. Port Townsend*, 12 Wash. 614, 29 L.R.A. 448, 50 Am. St. Rep. 911, 41 Pac. 923—*Cranmer v. McSwords*, 24 W. Va. 602—*Connell v. Connell*, 82 W. Va. 325, 9 S. E. 252.

64. Equity will not assist a man whose condition is attributable only to a want of that diligence which may be fairly expected from a reasonable person. *Upton v. Tribilcock*, 91 U. S. 45, 23: 203
Cited in Ware v. Galveston City Co. 146 U. S. 115, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Livingston v. Ore Bed*, 16 Blatchf. 560, Fed. Cas. No. 8,418—*Horne v. Lowe*, 159 Ind. 411, 64 N. E. 218—*Higgins v. Crouse*, 63 Hun, 140, 17 N. Y. Supp. 696.

65. In equity an unreasonable delay in asserting rights is a bar to relief. *Martin v. Gray*, 142 U. S. 236, 12 Sup. Ct. Rep. 186, 35: 997

66. If, at the hearing in equity, a case appears liable to the objection of laches, relief will be refused. *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. Rep. 437, 31: 396

67. It is within the discretion of a court of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time, though the laches are not pleaded or the bill demurred to. *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. Rep. 176, 41: 531
Cited in Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 697, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Ledoux v. Lavedan*, 52 La. Ann. 332, 27 So. 196—*Coleman v. Akers*, 87 Minn. 494, 92 N. W. 408—*Mantle v. Speculator Min. Co.* 27 Mont. 478, 71 Pac. 665—*Patterson v. Hewitt*, 11 N. M. 23, 55 L.R.A. 664, 66 Pac. 552.

68. Mere delay or acquiescence cannot defeat the remedy for invasion of a right, unless it has been continued so long and under such circumstances as to defeat the right

itself. *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. Rep. 143, 32: 528
Cited in Galway v. Metropolitan Elev. R. Co. 128 N. Y. 156, 13 L.R.A. 795, 28 N. E. 479.

69. An unexplained delay of over six years after a land grant has been confirmed by the court of private land claims will defeat the right to recover a money judgment against the United States, under § 14 of the court of private land claims act, for the value of lands within the grant, disposed of and patented by the United States to third parties before the filing of the original petition. *United States v. Martinez*, 184 U. S. 441, 22 Sup. Ct. Rep. 422, 46: 632
Cited in Sena v. United States, 189 U. S. 241, 47 L. ed. 791, 23 Sup. Ct. Rep. 596.

70. Equity will not entertain a suit by creditors seeking to have a married woman's separate estate, managed by her husband, declared his property and liable for debts contracted thirteen years before. *Aldridge v. Muirhead*, 101 U. S. 397, 25: 1013
Cited in De Grau v. Mechan, 48 N. J. Eq. 225, 21 Atl. 193—*Coyne v. Sayre*, 54 N. J. Eq. 709, 36 Atl. 96.

71. Equity will not enforce a claim based upon an indorsement, of which there is grave doubt as to whether it is genuine or not, after a silence of thirteen years from the supposed origin of the claim, without demand upon the alleged maker or his executor. *Dade v. Irwin*, 2 How. 383, 11: 308

72. An action by a creditor of a state against its debtors to secure an appropriation of their debts to the satisfaction of its obligations to him, brought thirty-six years after the settlement between the state and its debtors and nineteen years after the time fixed by that settlement for the last payment by them, cannot be sustained on account of laches. *Cressey v. Meyer*, 138 U. S. 525, 11 Sup. Ct. Rep. 387, 34: 1018

73. Fifty years' delay by a person leaving an unincorporated association, in claiming a share of its property, is fatal to relief. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610, 30: 718
Cited in Richards v. Mackall, 124 U. S. 183, 31 L. ed. 399, 8 Sup. Ct. Rep. 437—*Hanner v. Moulton*, 138 U. S. 495, 34 L. ed. 1036, 11 Sup. Ct. Rep. 408—*Leggett v. Standard Oil Co.* 149 U. S. 294, 37 L. ed. 742, 13 Sup. Ct. Rep. 902—*Metropolitan Nat. Bank v. St. Louis Despatch Co.* 149 U. S. 448, 37 L. ed. 803, 13 Sup. Ct. Rep. 944—*Empire State Nail Co. v. Faulkner*, 55 Fed. 825—*Patterson v. Hewitt*, 11 N. Mex. 23, 55 L.R.A. 664, 66 Pac. 552—*Bruner v. Finley*, 187 Pa. 405, 41 Atl. 334—*Terry v. Fontaine*, 83 Va. 456, 2 S. E. 743.

74. An attorney selling on another's account cannot become the buyer on his own, at the sale: but where his client has adopted such a transaction, and given long acquiescence to it, he is concluded from questioning it. *Marsh v. Whitmore*, 21 Wall. 178, 22: 482
Distinguished in Lemoine v. Dunklin County.

38 Fed. 569—*Gilmer v. Morris*, 43 Fed. 460—*Richardson v. Green*, 9 C. C. A. 574, 15 U. S. App. 488, 61 Fed. 432—*Cranmer v. McSwords*, 24 W. Va. 602.

Cited in *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 392, 23 L. ed. 331—*Hayward v. Elliot Nat. Bank*, 96 U. S. 618, 24 L. ed. 858—*Indianapolis Rolling Mill v. St. Louis, F. S. & W. R. Co.* 120 U. S. 260, 30 L. ed. 641, 7 Sup. Ct. Rep. 542—*Speidel v. Henrich*, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—*Hammond v. Hopkins*, 143 U. S. 250, 36 L. ed. 145, 12 Sup. Ct. Rep. 418—*Hoyt v. Latham*, 143 U. S. 566, 36 L. ed. 264, 12 Sup. Ct. Rep. 568—*Fraker v. Houck*, 36 Fed. 407—*Van Vleet v. Sledge*, 45 Fed. 748—*Naddo v. Bardon*, 47 Fed. 790—*St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 269, 4 U. S. App. 160, 49 Fed. 324—*Empire State Nail Co. v. Faulkner*, 55 Fed. 825—*Holladay v. Land & River Improv. Co.* 6 C. C. A. 577, 18 U. S. App. 308, 57 Fed. 792—*Kemp v. Nickerson*, 66 Fed. 683—*Laut v. Manley*, 71 Fed. 15—*New York Secur. & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 233—*Alaska & C. Commercial Co. v. Solner*, 59 C. C. A. 667, 123 Fed. 860—*Nappanee Canning Co. v. Reid*, 159 Ind. 624, 59 L.R.A. 202, 64 N. E. 870—*Barr v. Randall*, 35 Kan. 132, 10 Pac. 515—*Bilas v. Prichard*, 67 Mo. 189—*Pearson v. Concord R. Corp.* 62 N. H. 543, 13 Am. St. Rep. 590—*Barton v. Long*, 45 N. J. Eq. 845, 19 Atl. 623—*Patterson v. Hewitt*, 11 N. M. 41, 55 L.R.A. 670, 66 Pac. 552—*Loomis v. Rosenthal*, 34 Or. 600, 57 Pac. 55—*Shaaber's Appeal*, 2 Monaghan (Pa.) 438, 17 Atl. 209—*Bruner v. Finley*, 187 Pa. 407, 41 Atl. 334—*Bolton v. Dickens*, 4 Lea, 577—*Connolly v. Hammond*, 51 Tex. 647—*Riely v. Kinzel*, 85 Va. 486, 7 S. E. 907—*Rogers v. Van Nortwick*, 87 Wis. 429, 58 N. W. 757—*Melms v. Pabst Brewing Co.* 93 Wis. 174, 57 Am. St. Rep. 899, 66 N. W. 518.

75. Relief against a mistake in an agreement should not be granted where the party seeking it has unreasonably delayed bringing suit, or where he acquiesced in the written agreement after becoming aware of the mistake. *Snell v. Atlanta F. & M. Ins. Co.* 98 U. S. 85, 25: 52

76. A surety is not guilty of laches in instituting a suit to have a bond canceled or reformed, which by mutual mistake made him personally liable for the amount of a judgment, until an attempt is made to hold him personally liable for such amount on the bond. *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. Rep. 972, 999, 35: 678

77. One who left his state to join The Rebellion, who failed to invoke a statutory remedy and was guilty of laches in seeking relief in equity, is entitled to no equitable relief because his creditors collected their debts by publication, without personal service. *McQuiddy v. Ware*, 20 Wall. 14, 22: 311

Distinguished in *Haymond v. Camden*, 22 W. Va. 194.
Cited in *Jenkins v. Hannan*, 26 Fed. 664—*Bush v. Sherman*, 80 Ill. 174.

78. In reference to reissues made for the purpose of enlarging the scope of the patent, the rule of laches should be strictly applied. *Miller v. Bridgeport Brass Co.* 104 U. S. 350, 26: 783
Cited in *Johnson v. Flushing & N. S. R. Co.*

105 U. S. 547, 26 L. ed. 1165—*Turner & S. Mfg. Co. v. Dover Stamping Co.* 111 U. S. 327, 28 L. ed. 444, 4 Sup. Ct. Rep. 401—*Mahn v. Harwood*, 112 U. S. 357, 28 L. ed. 667, 5 Sup. Ct. Rep. 174—*White v. Dunbar*, 119 U. S. 52, 30 L. ed. 305, 7 Sup. Ct. Rep. 72—*Hartshorn v. Saginaw Barrell Co.* 119 U. S. 673, 30 L. ed. 542, 7 Sup. Ct. Rep. 421—*Electric Gas Lighting Co. v. Boston Electric Co.* 139 U. S. 501, 35 L. ed. 260, 11 Sup. Ct. Rep. 586—*Pope Mfg. Co. v. Marqua*, 15 Fed. 400—*Electric Gas Lighting Co. v. Tiltonson*, 22 Blatchf. 483, 21 Fed. 570—*Matthews v. Iron Clad Mfg. Co.* 22 Blatchf. 432, 21 Fed. 643—*Shirley v. Mayer*, 23 Blatchf. 250, 25 Fed. 39—*Archer v. Arnd*, 31 Fed. 476—*Jenkins v. Stetson*, 82 Fed. 400—*Kane v. Huggins Cracker & Candy Co.* 44 Fed. 289—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 735—*Carpenter Straw-Sewing Mach. Co. v. Searle*, 52 Fed. 815—*Featherstone v. George R. Bidwell Cycle Co.* 53 Fed. 118—*Office Specialty Mfg. Co. v. Globe Co.* 65 Fed. 605—*Horn & B. Mfg. Co. v. Pelzer*, 34 C. C. A. 49, 62 U. S. App. 528, 91 Fed. 669.

79. Laches is no defense to a suit by the United States to compel the state of Michigan to account for surplus moneys over and above the cost of the ship canal at Saint Marys Falls, arising from sales of the public lands granted by the act of August 26, 1852, (10 Stat. at L. 35, chap. 92), to that state in aid of its construction on a right of way therein granted to the state for that purpose, and for any surplus tolls remaining after the formal transfer of such canal to the United States, and for all tools and machinery on hand at the time of such transfer. *United States v. Michigan*, 190 U. S. 379, 23 Sup. Ct. Rep. 742, 47: 1103

As bar to injunctive relief.

Right to Injunction Notwithstanding Accounting of Profits may be Barred, see Injunction, 197.

As Cutting Down Complainant's Relief from Absolute Injunction to Injunction Alternative in Payment of Taxes, see Injunction, 222.

See also *infra*, 220.

80. Delay in seeking relief from the infringement of a patent right, though such as to bar an account of profits, does not preclude a claimant, otherwise entitled, from an injunction against future infringement. *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. Rep. 143, 32: 526

Cited in *Saxlehner v. Elsner & M. Co.* 179 U. S. 39, 45 L. ed. 76, 21 Sup. Ct. Rep. 7—*Gilmore v. Anderson*, 38 Fed. 848—*Edison Electric Light Co. v. Equitable Life Assur. Soc.* 55 Fed. 480—*Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 662, 17 U. S. App. 145, 57 Fed. 944—*Imperial Chemical Mfg. v. Stein*, 69 Fed. 618—*Taylor v. Sawyer Spindle Co.* 22 C. C. A. 206, 39 U. S. App. 257, 75 Fed. 304—*Richardson v. D. M. Osborne & Co.* 82 Fed. 97—*Saxlehner v. Elsner & M. Co.* 33 C. C. A. 293, 63 U. S. App. 139, 91 Fed. 538—*Church & D. Co. v. Russ*, 99 Fed. 279—*Ide v. Trorlicht, D. & R. Carpet Co.* 53 C. C. A. 353, 115 Fed. 148—*Gannett v. Ruppert*, 119 Fed. 224—*Old Times Distillery Co. v. Casey*, 104 Ky. 620, 42 L. R.A. 468, 47 S. W. 610—*Tracy v. Banker*, 170 Mass. 271, 39 L.R.A. 510, 49 N. E. 308—

Burne v. Partridge, 61 N. J. Eq. 437, 48 Atl. 770—Galway v. Metropolitan Elev. R. Co. 128 N. Y. 132, 13 L.R.A. 795, 28 N. E. 479—Verdolite Co. v. Richards, 7 Northampton Co. Rep. 121—Jackson v. State Belt Electric Street R. Co. 7 Northampton Co. Rep. 295—Bigney v. Tacoma Light & Water Co. 9 Wash. 576, 26 L.R.A. 430, 38 Pac. 147—Rogers v. Van Nortwick, 87 Wis. 480, 58 N. W. 757.

81. The state of Georgia has not been guilty of such laches as bars her right to injunctive relief against the pollution of air over large tracts of her territory, and the destruction of forests and vegetable life therein by sulphurous gases discharged by foreign corporations from their works in Tennessee, where such conditions have not obtained until recent years, and the dismissal, without prejudice, of a similar bill filed in 1904, was due to the mistaken belief that changes in the process of manufacture then in progress would remove the evil. *Georgia v. Tennessee Copper Co.* 206 U. S. 230, 27 Sup. Ct. Rep. 618, 51: 1038

—Editorial note.

Laches or abandonment as defense in suits for infringement of trademark or trade name, or in suits for unfair competition. 45: 60

Inequity; change in condition or relation.

Increase in Value of Lands, see *infra*, 126-128.

See also *infra*, 112, 118, 131, 154, 162, 163, 167, 168, 181, 194, 198.

82. Laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced; an inequity founded upon some change in the condition or relations of the property or the parties. *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. Rep. 873, 36: 738

Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 18 Sup. Ct. Rep. 223, 42: 626

Cited in Leggett v. Standard Oil Co. 149 U. S. 294, 37 L. ed. 742, 13 Sup. Ct. Rep. 902—*Johnson v. Atlantic, G. & W. I. Transit Co.* 156 U. S. 647, 39 L. ed. 506, 15 Sup. Ct. Rep. 520—*Gildersleeve v. New Mexico Min. Co.* 161 U. S. 578, 40 L. ed. 814, 16 Sup. Ct. Rep. 663—*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 697, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Moran v. Horsky*, 178 U. S. 208, 44 L. ed. 1039, 20 Sup. Ct. Rep. 856—*New York v. Pine*, 185 U. S. 99, 46 L. ed. 823, 22 Sup. Ct. Rep. 592—*Ward v. Sherman*, 192 U. S. 176, 48 L. ed. 398, 24 Sup. Ct. Rep. 227—*Pennsylvania v. United States*, 36 Ct. Cl. 526—*Maine v. United States*, 3 Ct. Cl. 556—*Lemoine v. Dunklin County*, 2 C. C. A. 348, 10 U. S. App. 227, 51 Fed. 492—*Naddo v. Bardon*, 2 C. C. A. 341, 4 U. S. App. 642, 51 Fed. 499—*Northern P. R. Co. v. Amacker*, 53 Fed. 55—*Edison Electric Light Co. v. Equitable Life Assur. Soc.* 55 Fed. 480—*Amacker v. Northern P. R. Co.* 7 C. C. A. 545, 15 U. S. App. 279, 58 Fed. 854—*Wetzel v. Minnesota R. Transfer Co.* 12 C. C. A. 494, 27 U. S. App. 594, 65 Fed. 26—*Lasher v. McCreery*, 66 Fed. 841—*Imperial Chemical Mfg. Co. v. Stein*, 69 Fed. 618—*Church of Christ v. Church of Jesus Christ of L. D. S.* 17 C. C. A. 395, 36 U. S. App. 110, 70 Fed.

188—*Pelzer Mfg. Co. v. Hamburg-Bremen F. Ins. Co.* 71 Fed. 832—*Coosaw Min. Co. v. Carolina Min. Co.* 75 Fed. 868—*Nantahala Marble & Talc Co. v. Thomas*, 76 Fed. 64—*Jones v. Perkins*, 76 Fed. 84—*Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co.* 22 C. C. A. 287, 42 U. S. App. 123, 76 Fed. 483—*O'Brien v. Wheelock*, 78 Fed. 677—*Bartlett v. Ambrose*, 24 C. C. A. 399, 42 U. S. App. 381, 78 Fed. 841—*Cockrill v. Cockrill*, 79 Fed. 149—*Providence Steam-Engine Co. v. Hathaway Mfg. Co.* 79 Fed. 517—*Miles v. Vivian*, 25 C. C. A. 213, 51 U. S. App. 194, 79 Fed. 853—*Godkin v. Cohn*, 25 C. C. A. 564, 53 U. S. App. 4, 80 Fed. 465—*Richardson v. D. M. Osborne & Co.* 82 Fed. 97—*Hubbard v. Manhattan Trust Co.* 30 C. C. A. 528, 57 U. S. App. 730, 87 Fed. 59—*South-ern P. R. Co. v. Groeck*, 31 C. C. A. 339, 59 U. S. App. 366, 87 Fed. 975—*Post v. Beacon Vacuum Pump & Electrical Co.* 32 C. C. A. 153, 50 U. S. App. 407, 89 Fed. 4—*Old Colony Trust Co. v. Dubuque Light & Traction Co.* 89 Fed. 807—*Wheeling Bridge & Terminal R. Co. v. Reymann Brewing Co.* 32 C. C. A. 577, 61 U. S. App. 531, 90 Fed. 195—*Cockrill v. Cockrill*, 34 C. C. A. 260, 92 Fed. 817—*Curtis v. Lakin*, 36 C. C. A. 226, 94 Fed. 255—*Ryan v. Newark Spring Mattress Co.* 96 Fed. 104—*Hanchett v. Blair*, 41 C. C. A. 87, 100 Fed. 827—*Guarantee Trust & S. D. Co. v. Delta & P. Land Co.* 43 C. C. A. 406, 104 Fed. 15—*Hendryx v. Perkins*, 52 C. C. A. 446, 114 Fed. 812—*Hendryx v. Perkins*, 52 C. C. A. 460, 114 Fed. 826—*Potts v. Alexander*, 118 Fed. 887—*London & S. F. Bank v. Dexter Horton & Co.* 61 C. C. A. 523, 126 Fed. 601—*Encyclopaedia Britannica Co. v. American Newspaper Asso.* 130 Fed. 467—*First Nat. Bank v. Nelson*, 106 Ala. 542, 18 So. 154—*Duke v. State*, 56 Ark. 497, 20 S. W. 600—*Morgan v. King*, 27 Colo. 550, 63 Pac. 416—*Hagerman v. Bates*, 5 Colo. App. 402, 38 Pac. 1100—*Sis v. Boardman*, 11 App. D. C. 123—*Quirk v. Liebert*, 12 App. D. C. 402—*Grand Lodge, A. O. U. W. v. Graham*, 96 Iowa, 615, 31 L.R.A. 140, 65 N. W. 837—*Ledoux v. Lavedan*, 52 La. Ann. 333, 27 So 196—*St. Louis Safe Deposit & Sav. Bank v. Kennett*, 101 Mo. App. 398, 74 S. W. 474—*Patterson v. Hewitt*, 11 N. M. 21, 55 L.R.A. 663, 66 Pac. 552—*Penrhyn Slate Co. v. Granville Electric Light & P. Co.* 181 N. Y. 90, 73 N. E. 566—*Loomis v. Rosenthal*, 34 Or. 601, 57 Pac. 55—*Westhaeffer v. Lebanon & A. Street R. Co.* 35 W. N. C. 34, 3 Pa. Dist. R. 57—*Taylor v. Slater*, 21 R. I. 109, 41 Atl. 1001—*Gay v. Havermale*, 27 Wash. 398, 67 Pac. 804—*Williamson v. Jones*, 39 W. Va. 268, 25 L.R.A. 236, 19 S. E. 436—*Williamson v. Jones*, 43 W. Va. 572, 38 L.R.A. 700, 64 Am. St. Rep. 891, 27 S. E. 410—*Lowther Oil Co. v. Miller-Sibley Oil Co.* 53 W. Va. 510, 97 Am. St. Rep. 1027, 44 S. E. 433—*Carberry v. German Ins. Co.* 86 Wis. 328, 56 N. W. 920—*State ex rel. Schintgen v. La Crosse*, 101 Wis. 215, 77 N. W. 167.

83. Equity may refuse relief after undue and unexplained delay, when to grant it would cause injustice, independently of any limitation prescribed by courts of law. *Abraham v. Ordway*, 158 U. S. 416, 15 Sup. Ct. Rep. 894, 39: 1036
Cited in Simmons v. Burlington, C. R. & N. R. Co. 159 U. S. 291, 40 L. ed. 154, 16 Sup. Ct. Rep. 1—*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 698, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Halsey v. Cheney*, 15 C. C. A. 662, 34 U. S. App. 50, 68 Fed. 768—*Miles v. Vivian*, 25 C. C. A. 213, 51 U. S. App. 194, 79 Fed. 853—

Richardson v. Osborne, 82 Fed. 97—*Wabash R. Co. v. Lumley*, 37 C. C. A. 586, 96 Fed. 774—*Potts v. Alexander*, 118 Fed. 887—*Pryor v. McIntire*, 7 App. D. C. 433—*Sis v. Boardman*, 11 App. D. C. 124—*Leavenworth v. Douglass*, 59 Kan. 421, 53 Pac. 123—*Loomis v. Rosenthal*, 34 Or. 691, 57 Pac. 55.

84. Equitable powers will not be exercised to discover whether one has been wronged, when, with full knowledge of the alleged wrong, he has allowed the bar of the statute of limitations to arise, and has slept upon his rights until such a situation has arisen as to render it inequitable to afford him relief. *Baker v. Cummings*, 169 U. S. 189, 18 Sup. Ct. Rep. 367, 42: 711
Cited in *Baker v. Cummings*, 181 U. S. 126, 45 L. ed. 780, 21 Sup. Ct. Rep. 578—*Cummings v. Baker*, 16 App. D. C. 17.

85. The application of the doctrine of courts of equity, to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time, does not depend upon mere lapse of time, but upon change of situation during neglectful repose, rendering it inequitable to afford relief. *O'Brien v. Wheelock*, 184 U. S. 450, 22 Sup. Ct. Rep. 354, 46: 636
Cited in *Thurmond v. Chesapeake & O. R. Co.* 72 C. C. A. 193, 140 Fed. 699.

86. Where there was an unquestionable pledge of the faith and credit of a city, it would, after the lapse of twenty years in which no such question has been raised, be contrary to good faith and common justice to permit the city to allege a newly discovered construction of an equivocal power, to avoid its obligations. *Savannah v. Kelly*, 108 U. S. 184, 2 Sup. Ct. Rep. 468, 27: 696

87. Equity forbids that a homestead right created fourteen years before the suit was brought to establish it, for which land office fees only were paid, which was once absolutely terminated, and which may never have been resurrected, should after so long delay, be permitted to disturb a title legally perfect, created by the general government after a decision adverse to such homestead right, for which full value was paid, and on the faith of which costly improvements have been made, and which now represents enormous value, to the creation of which the claimant of title under the homestead right has contributed nothing. *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. Rep. 873, 36: 738

88. Several years' delay in taking steps to contest the validity of an ordinance for the construction of public works will preclude relief, where in the meantime the city has incurred great expense in the work and has sold bonds therefor. *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. Rep. 223, 42: 626

89-92. When the property forming the subject of the suit is speculative in character, thereby rendering it liable to great and rapid fluctuations in value, prompt action by the party claiming to have been defrauded by its transfer is necessary to

repel the imputation of laches which a court of equity invokes from any unreasonable delay in applying to it for relief. *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24: 855

Cited in *Hoyt v. Latham*, 143 U. S. 567, 36 L. ed. 265, 12 Sup. Ct. Rep. 568—*Gallihier v. Cadwell*, 145 U. S. 372, 36 L. ed. 740, 12 Sup. Ct. Rep. 873—*Pratt v. California Min. Co.* 9 Sawy. 367, 24 Fed. 878—*Klane v. Webb*, 4 C. C. A. 174, 12 U. S. App. 137, 54 Fed. 38—*Scheffel v. Hays*, 7 C. C. A. 312, 19 U. S. App. 220, 58 Fed. 460—*Sagadahoc Land Co. v. Ewing*, 13 C. C. A. 86, 31 U. S. App. 102, 65 Fed. 705—*Patterson v. Hewitt*, 11 N. M. 20, 55 L.R.A. 663, 66 Pac. 552—*Loomis v. Rosenthal*, 34 Or. 602, 57 Pac. 55—*Raht v. Sevier Min. & Mill. Co.* 18 Utah, 303, 54 Pac. 889—*Thomas v. McCue*, 19 Wash. 293, 53 Pac. 161.

93. Long and unexplained lapse of time before instituting legal proceedings is a bar to their maintenance as against innocent third parties whose rights have intervened. *Johnson v. Atlantic, G. & W. I. Transit Co.* 156 U. S. 618, 15 Sup. Ct. Rep. 520, 39: 556
Cited in *Earl v. Van Natta*, 29 Ind. App. 544, 64 N. E. 901.

94. Equitable powers will not be exerted to save a person from the consequences of his own neglect, after the position of the parties has so changed that equitable relief cannot be afforded without doing injustice or destroying or impairing the intervening rights of third parties. *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. Rep. 223, 42: 626

Cited in *New York v. Plne*, 185 U. S. 100, 46 L. ed. 824, 22 Sup. Ct. Rep. 592—*Meyrowitz Mfg. Co. v. Eccleston*, 98 Fed. 440—*First Nat. Bank v. Ewing*, 43 C. C. A. 168, 103 Fed. 186—*Los Angeles City Water Co. v. Los Angeles*, 103 Fed. 716—*Guarantee Trust & S. D. Co. v. Delta & P. Land Co.* 43 C. C. A. 406, 104 Fed. 15—*Louisville Trust Co. v. Stone*, 46 C. C. A. 303, 107 Fed. 309—*Ledoux v. Lavedan*, 52 La. Ann. 332, 27 So. 196—*Mantle v. Speculator Min. Co.* 27 Mont. 478, 71 Pac. 665—*Patterson v. Hewitt* (N. M.) 55 L.R.A. 664, 66 Pac. 652—*State ex rel. Schltingen v. La Crosse*, 101 Wis. 215, 77 N. W. 167.

95. Courts of equity will refuse their aid to those who have neglected, for an unreasonable length of time, to assert their claims, especially where the legal estate has been transferred to purchasers, without notice. *Elmendorf v. Taylor*, 10 Wheat. 152, 6: 289

Cited in *Fisher v. Boody*, 1 Curt. C. C. 219, Fed. Cas. No. 4,814—*Merrill v. Monticello*, 66 Fed. 167—*Dugan v. O'Donnell*, 68 Fed. 989—*Haskell v. Bailey*, 22 Conn. 572—*Wright v. Leclair*, 3 Iowa, 232—*Clark v. Potter*, 32 Ohio St. 61—*Bank of United States v. Bidle*, 2 Pars. Sel. Eq. Cas. 47.

96. Laches and acquiescence would themselves defeat any right of the original stockholders in two competing interstate railway companies to rescind the contract under which they had delivered their stock to a corporation formed in pursuance of a combination under which such corporation was to acquire a controlling interest in the capital stock of the railway companies in exchange for its own capital stock, where

such stockholders stood upon their rights as shareholders in the new corporation until nearly a year after the Supreme Court of the United States had adjudged the combination to be illegal, and until the directors of the new corporation resolved upon a ratable distribution of its corporate assets, during which time stock in the new corporation had passed into many hands. *Harri-man v. Northern Securities Co.* 197 U. S. 244, 25 Sup. Ct. Rep. 493, 49: 739

97. One who sleeps upon his rights for many years, without any demand upon his claim against another, while the latter, who denies the claim, is in proper mental condition and until he is deprived of his reason and faculties, will be barred by laches from any relief in equity. *Whitney v. Fox*, 166 U. S. 637, 17 Sup. Ct. Rep. 713, 41: 1145
Wood v. Fox, 166 U. S. 648, 17 Sup. Ct. Rep. 1003, 41: 1149

Cited in Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 697, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Wabash R. Co. v. Lumley*, 37 C. C. A. 586, 96 Fed. 774—*Patterson v. Hewitt* (N. M.) 55 L.R.A. 664, 66 Pac. 552.

98. The rule as to laches is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. Rep. 418, 36: 134
Mackall v. Casilear, 137 U. S. 556, 11 Sup. Ct. Rep. 178, 34: 776
Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 13 Sup. Ct. Rep. 28, 36: 899
Distinguished in Nelson v. Worthington, 3 App. D. C. 507.

Cited in Hoyt v. Latham, 143 U. S. 568, 36 L. ed. 265, 12 Sup. Ct. Rep. 568—*Foster v. Mansfield, C. & L. M. R. Co.* 146 U. S. 101, 36 L. ed. 903, 13 Sup. Ct. Rep. 28—*Ware v. Galveston City Co.* 146 U. S. 116, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Johnston v. Standard Min. Co.* 148 U. S. 371, 37 L. ed. 486, 13 Sup. Ct. Rep. 585—*Root v. Woolworth*, 150 U. S. 414, 37 L. ed. 1126, 14 Sup. Ct. Rep. 136—*Halstead v. Grinnan*, 152 U. S. 416, 38 L. ed. 497, 14 Sup. Ct. Rep. 641—*Hardt v. Heldweyer*, 152 U. S. 560, 38 L. ed. 553, 14 Sup. Ct. Rep. 671—*Alsop v. Riker*, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. Rep. 162—*Gildersleeve v. New Mexico Min. Co.* 161 U. S. 578, 40 L. ed. 814, 16 Sup. Ct. Rep. 662—*Whitney v. Fox*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 713—*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 697, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*McIntire v. Pryor*, 173 U. S. 57, 43 L. ed. 613, 19 Sup. Ct. Rep. 352—*Pennsylvania v. United States*, 36 Ct. Cl. 526—*Naddo v. Bardon*, 2 C. C. A. 340, 4 U. S. App. 642, 51 Fed. 498—*Edison Electric Light Co. v. Equitable Life Assur. Soc.* 55 Fed. 480—*Holladay v. Land & River Improv. Co.* 6 C. C. A. 577, 18 U. S. App. 308, 57 Fed. 791—*Eiffert v. Craps*, 7 C. C. A. 322, 8 U. S. App. 436, 58 Fed. 473—*Kemp v. Nickerson*, 66 Fed. 683—*Halsey v. Cheney*, 15 C. C. A. 662, 34 U. S. App. 68, 68 Fed. 768—*Dugan v. O'Donnell*, 68 Fed. 993—*Cockrill v. Cockrill*, 79 Fed. 149—*Miles v. Vivian*, 25 C. C. A. 213, 51 U. S. App. 194, 79 Fed. 853—*Richardson v. D. M. Osborne*

& Co. 82 Fed. 97—*McMonagle v. McGinn*, 85 Fed. 92—*Robb v. Day*, 33 C. C. A. 94, 62 U. S. App. 173, 90 Fed. 347—*Cockrill v. Cockrill*, 34 C. C. A. 260, 92 Fed. 817—*Gunnison v. Chicago, M. & St. P. B. Co.* 117 Fed. 646—*Potts v. Alexander*, 118 Fed. 887—*American Street Car Advertising Co. v. Jones*, 122 Fed. 808—*Stevens v. Grand Central Min. Co.* 67 C. C. A. 287, 183 Fed. 31—*Burling v. Newlands*, 112 Cal. 502, 44 Pac. 810—*Pryor v. McIntire*, 7 App. D. C. 433—*Levis v. Ken-gia*, 8 App. D. C. 239—*Benson v. Dempster*, 183 Ill. 309, 55 N. E. 651—*Ledoux v. Lave-dan*, 52 La. Ann. 332, 27 So. 196—*Whitridge v. Whitridge*, 76 Md. 85, 24 Atl. 645—*Good-son v. Goodson*, 140 Mo. 217, 41 S. W. 737—*Manderfield v. Field*, 7 N. M. 26, 32 Pac. 146—*Patterson v. Hewitt*, 11 N. M. 23, 55 L.R. A. 664, 66 Pac. 552—*Greagan v. Buchanan*, 15 Misc. 586, 37 N. Y. Supp. 83—*Loomis v. Rosenthal*, 34 Or. 602, 57 Pac. 55—*Bruner v. Finley*, 187 Pa. 406, 41 Atl. 334—*Wood v. Fox*, 8 Utah, 401, 32 Pac. 48—*Cecil v. Clark*, 44 W. Va. 687, 30 S. E. 216—*Rogers v. Van Nortwick*, 87 Wis. 428, 58 N. W. 757—*Melms v. Pabst Brewing Co.* 93 Wis. 178, 57 Am. St. Rep. 899, 66 N. W. 518.

99. A claim brought forward after the lapse of thirty years, the original parties and their agents being dead, is too stale to be enforced in a court of equity. *Paterson, J., in Randolph v. Ware*, 3 Cranch, 503, 2: 512
Cited in Gibbons v. Duley, 7 Mackey, 329.

To whom imputable.

When Laches Imputable to Heirs, see infra, 198, 199.

To State, see infra, 245.

To United States, see infra, 247, 251, 256, 258, 260.

Running of Limitations against United States, see infra, I. c, 5.

See also supra, 79, 81, 86; infra, 414.

100. Laches is not imputable to the government. *United States v. Kirkpatrick*, 9 Wheat. 720, 6: 199

United States v. Vanzandt, 11 Wheat. 184, 6: 448

United States v. Nicholl, 12 Wheat. 505, 6: 709

Doe v. Postmaster-General, 1 Pet. 318, 7: 160

Armstrong v. Morrill, 14 Wall. 120, 20: 765
Gausson v. United States, 97 U. S. 584, 24: 1009

United States v. Boyd, 15 Pet. 187, 10: 706

United States ex rel. McLeod v. Sherman, 98 U. S. 565, 25: 235

Cited in United States v. Buchanan, 8 How. 106, 12 L. ed. 1006—*Gibbons v. United States*, 8 Wall. 274, 19 L. ed. 454—*Cooke v. United States*, 91 U. S. 398, 23 L. ed. 243—*Hart v. United States*, 95 U. S. 318, 24 L. ed. 480—*United States v. Thompson*, 98 U. S. 489, 25 L. ed. 195—*Minturn v. United States*, 106 U. S. 444, 27 L. ed. 210, 1 Sup. Ct. Rep. 402—*Robertson v. Sichel*, 127 U. S. 515, 32 L. ed. 208, 8 Sup. Ct. Rep. 1286—*Badeau v. United States*, 130 U. S. 452, 32 L. ed. 1001, 9 Sup. Ct. Rep. 579—*Boone County v. Burlington & M. River R. Co.* 139 U. S. 693, 35 L. ed. 323, 11 Sup. Ct. Rep. 687—*United States v. Dalles Military Road Co.* 140 U. S. 632, 35 L. ed. 571, 11 Sup. Ct. Rep. 988—*German Bank v. United States*, 148 U. S. 579, 37 L. ed. 569, 13 Sup. Ct. Rep.

702—United States v. Verdler, 164 U. S. 219, 41 L. ed. 409, 17 Sup. Ct. Rep. 42—United States v. Beebe, 180 U. S. 354, 45 L. ed. 370, 21 Sup. Ct. Rep. 371—Jones v. United States, 2 Ct. Cl. 609—Kimball v. United States, 5 Ct. Cl. 262—Silvey v. United States, 7 Ct. Cl. 340—McElrath v. United States, 12 Ct. Cl. 216—Postmaster General Reeder, 4 Wash. C. C. 680, Fed. Cas. No. 11,311—Raymond v. United States, 14 Blatchf. 52, Fed. Cas. No. 11,596—United States v. Homer, Fed. Cas. No. 15,394—United States v. Minturn, Fed. Cas. No. 15,783—United States v. Potter, 7 Rep. 676, Fed. Cas. No. 16,076—United States v. Sowers, 14 Phila. 526, Fed. Cas. No. 16,363—United States v. Alexandria, 4 Hughes, 549, 19 Fed. 611—United States v. Barnes, 31 Fed. 709—United States v. Adams, 54 Fed. 116—Church of Christ v. Church of Jesus Christ, L. D. S. 17 C. C. A. 398, 36 U. S. App. 379, 71 Fed. 251—Meads v. United States, 26 C. C. A. 233, 54 U. S. App. 150, 81 Fed. 688—United States v. Pine River Logging & Improv. Co. 32 C. C. A. 416, 61 U. S. App. 69, 89 Fed. 917—Pond v. United States, 49 C. C. A. 589, 111 Fed. 996—Christie-Street Commission Co. v. United States, 129 Fed. 509—State v. Brewer, 64 Ala. 298—Hill v. State, 23 Ark. 610—Woodruff v. Berry, 40 Ark. 260—Ramsey v. People, 197 Ill. 592, 90 Am. St. Rep. 177, 64 N. E. 549—Gross v. Whitley County, 158 Ind. 537, 58 L.R.A. 397, 64 N. E. 25—Terre Haute & I. R. Co. v. State, 159 Ind. 479, 65 N. E. 401—New Orleans v. Blache, 6 La. 517—State v. Dunn, 11 La. Ann. 551—Bass v. State, 34 La. Ann. 502—Murdock Parlor Grate Co. v. Com. 152 Mass. 32, 8 L.R.A. 402, 24 N. E. 854—Ellis v. State Auditors, 107 Mich. 537, 65 N. W. 577—Hennepin County v. Dickey, 86 Minn. 342, 90 N. W. 775—Clements v. Anderson, 46 Miss. 598—Parks v. State, 7 Mo. 196—State use of Carroll County v. Roberts, 68 Mo. 237, 30 Am. Rep. 788—Morris Canal & Bkg. Co. v. Van Vorst, 21 N. J. L. 117—Seymour v. Van Slyck, 8 Wend. 422—People v. Stephens, 71 N. Y. 560—Stemmler v. New York, 45 App. Div. 573, 61 N. Y. Supp. 403—Looney v. Hughes, 30 Barb. 614—Hayden v. Auburn Prison, 1 Sandf. Ch. 198—People v. Russell, 4 Wend. 575—Seymour v. VanSlyck, 8 Wend. 422—Lee v. Sturges, 46 Ohio St. 176, 2 L.R.A. 56, 19 N. E. 560—Porter v. Com. 17 Pa. 18—United States v. Sowers, 14 Phila. 526, 36 Phila. Leg. Int. 488—Nessinger v. Clay & H. Turnpike Co. 19 Lanc. L. Rev. 140—Com. v. Coovert, 1 Pearson (Pa.) 165—Bank of Washington v. Barrington, 2 Pennr. & W. 44—Com. v. Baldwin, 1 Watta, 55, 26 Am. Dec. 33—Com. v. Philadelphia, 157 Pa. 569, 33 W. N. C. 110, 27 Atl. 553—Erwin v. Davenport, 9 Helsk. 47—State v. Ward, 9 Helsk. 121—Levasser v. Washburn, 11 Gratt. 577—Hoge v. Brookover, 28 W. Va. 310—Cecil v. Clark, 44 W. Va. 676, 30 S. E. 216—Myers v. Miller, 45 W. Va. 616, 31 S. E. 976—State v. Chilton, 49 W. Va. 457, 39 S. E. 612.

101. The defenses of stale claim and laches cannot be set up against the government. United States v. Dalles Military Road Co. 140 U. S. 599, 11 Sup. Ct. Rep. 988, 35: 560

Cited in San Pedro & C. D. A. Co. v. United States, 146 U. S. 135, 36 L. ed. 916, 13 Sup. Ct. Rep. 94—United States v. California & O. Land Co. 1 C. C. A. 330, 7 U. S. App. 128, 49 Fed. 497—United States v. Dalles Military Road Co. 2 C. C. A. 422, 7 U. S. App. 297, 51 Fed. 631—United States v. Wil-

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lamette Valley & C. M. Wagon Road Co. 54 Fed. 809—Young v. Charnquist, 114 Iowa, 123, 86 N. W. 205.

102. When the government has a direct pecuniary interest in the subject-matter of litigation, the defenses of stale claim and laches cannot be set up as a bar. San Pedro & C. del A. Co. v. United States, 146 U. S. 120, 13 Sup. Ct. Rep. 94, 36: 911

103. Laches of the officers or agents of the government is no bar to the assertion of its rights: Gaussen v. United States, 97 U. S. 584, 24: 1009

Cited in Boone County v. Burlington & M. River R. Co. 139 U. S. 693, 35 L. ed. 323, 11 Sup. Ct. Rep. 687—United States v. Dalles Military Road Co. 140 U. S. 632, 35 L. ed. 571, 11 Sup. Ct. Rep. 988—United States v. Verdler, 164 U. S. 219, 41 L. ed. 409, 17 Sup. Ct. Rep. 42—United States v. Beebe, 180 U. S. 354, 45 L. ed. 370, 21 Sup. Ct. Rep. 371—United States v. McCartney, 1 Fed. 106—United States v. Beebe, 4 McCrary, 13, 17 Fed. 38—United States v. Southern Colorado Coal & Town Co. 5 McCrary, 573, 18 Fed. 279—United States v. Adams, 54 Fed. 116—Church of Christ v. Church of Jesus Christ, L. D. S. 17 C. C. A. 398, 36 U. S. App. 379, 71 Fed. 251—Pond v. United States, 49 C. C. A. 589, 111 Fed. 996.

104. Laches will not be imputed to the government in a suit against the sureties of a defaulting paymaster, for failure to adjust the paymaster's account for eight years, during which time he became insolvent. Smith v. United States, 5 Pet. 282, 8: 130

Cited in United States v. National Bank, 2 Mackey, 295—State v. Smith, 16 Fla. 189—Com. v. Porter, 21 Pa. 389.

105. Laches in not objecting to the settlement of an account cannot be imputed to the United States, and set up as a bar to the recovery of the value of property unlawfully appropriated. Steele use of Corn Exch. Nat. Bank v. United States, 113 U. S. 128, 5 Sup. Ct. Rep. 396, 28: 952

Cited in United States v. Dalles Military Road Co. 140 U. S. 632, 35 L. ed. 571, 11 Sup. Ct. Rep. 988—United States v. Adams, 54 Fed. 116—Pond v. United States, 49 C. C. A. 589, 111 Fed. 996.

106. The rule of *nullum tempus* cannot be invoked by the French Republic to answer the defense of laches in a suit to enforce an exclusive right to the use of the word "Vichy" in connection with mineral waters as against persons using that word to denote a water not drawn from springs in the commune of France of that name, where it has entered into an eighty-year lease of such springs to its co-plaintiff for a fixed annual rental, which lease has still thirty years to run. La Republique Francaise v. Saratoga Vichy Spring Co. (French Republic v. Saratoga Vichy Spring Co.) 191 U. S. 427, 24 Sup. Ct. Rep. 145, 48: 247

107. No exemption from the defense of laches to a suit by the French Republic and its lessee of the Vichy springs to enforce an exclusive right to the use of the word

"Vichy" in connection with mineral waters as against persons using that word to denote waters not drawn from springs in the commune of France of that name was effected by the declaration in the treaty with France of June 11, 1887, art. 8, that "the commercial name shall be protected in all the countries of the Union without obligation of deposit, whether it forms part or not of a trade or commercial mark." *La Republique Francaise v. Saratoga Vichy Spring Co. (French Republic v. Saratoga Vichy Spring Co.)* 191 U. S. 427, 24 Sup. Ct. Rep. 145, 48: 247

108. Conceding that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statute, they lose such immunity when their relations with their tribe are dissolved by accepting allotments of land in severalty under a treaty which provides that the organization and relation of such Indians with the United States as an Indian tribe shall be dissolved and terminated on the ratification of such treaty, and that such Indians shall be deemed to be citizens of the United States, and entitled to all rights, privileges, and immunities as such. *Schrimpscher v. Stockton*, 183 U. S. 290, 2 Sup. Ct. Rep. 107, 46: 203
Cited in *Dunbar v. Green*, 66 Kan. 566, 72 Pac. 243.

109. Complainants in an equity suit are not chargeable with the laches caused by the defendants therein. *Gunton v. Carroll*, 101 U. S. 426, 25: 985
Cited in *Townsend v. Vanderwerker*, 160 U. S. 180, 40 L. ed. 387, 16 Sup. Ct. Rep. 258—*Cleaver v. Taylor*, 39 C. C. A. 345, 98 Fed. 907—*Reavis v. Reavis*, 103 Fed. 818—*Hendryx v. Perkins*, 52 C. C. A. 461, 114 Fed. 827—*Duke v. State*, 56 Ark. 497, 20 S. W. 600.

b. Deeds; Assignments for Creditors; Recovery of Real Property.

Effect of Delay in Entering Public Lands Caused by Want of Office to Receive Entry, see Public Lands, 713.

Deeds; assignments for creditors.

110. A daughter twenty-three years old conveyed all her remainder in the real estate which had belonged to her mother, to her father for a nominal consideration. No complaint was made during the lifetime of the father (who lived eighteen years after) or the daughter. Held, the lapse of time was sufficient to establish the deed. *Jenkins v. Pye*, 12 Pet. 241, 9: 1070

111. A bill in equity by a stockholder in a corporation to correct a deed made nearly thirty years before, during a part of which time the corporation was in existence and operation, is barred by the statute of limitations and by the general doctrine of laches applicable in courts of equity. *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. Rep. 1192, 32: 179

111a. More than twenty years after a mistake in a deed of trust to secure creditors

occurred, it cannot be reformed against the intervening rights of others acquired in good faith. *New Orleans Canal & Bkg. Co. v. Montgomery*, 95 U. S. 16, 24: 346

111b. A bill to set aside a general assignment should, on demurrer, be dismissed on the ground of laches, when filed nearly five years after the transaction complained of, by one who had not previously challenged its integrity. *Hardt v. Heidweyer*, 152 U. S. 547, 14 Sup. Ct. Rep. 671, 38: 548
Cited in *Post v. Beacon Vacuum Pump & Electrical Co.* 32 C. C. A. 154, 50 U. S. App. 407, 89 Fed. 4.

112. Lapse of time and the death of the parties to the deed have always been considered in a court of chancery entitled to great weight, and almost controlling circumstances, in cases where an attempt is made to impeach a deed for fraud. *Jenkins v. Pye*, 12 Pet. 241, 9: 1070
Cited in *Godden v. Kimmell*, 99 U. S. 210, 25 L. ed. 434—*Mackall v. Castlear*, 137 U. S. 566, 34 L. ed. 779, 11 Sup. Ct. Rep. 178—*Badger v. Badger*, 2 Cliff. 154, Fed. Cas. No. 718—*Sullivan v. Portland & K. R. Co.* 4 Cliff. 226, Fed. Cas. No. 13,596—*Kenney v. Contner*, 43 Fed. 711—*Hinchman v. Kelley*, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—*De Roux v. Girard*, 50 C. C. A. 144, 112 Fed. 97—*Van Houten v. Van Winkle*, 46 N. J. Eq. 384, 20 Atl. 34—*Scott v. Crouch*, 24 Utah, 389, 67 Pac. 1068—*Pusey v. Gardner*, 21 W. Va. 480.

113. Mere inertness or silence, for a period less than that prescribed by the statute of limitations, unless accompanied by voluntary affirmative acts manifesting an intention to assent to a deed, will not bar an infant's right to avoid it. *Sims v. Everhardt*, 102 U. S. 300, 26: 87
Cited in *Wells v. Seixas*, 23 Blatchf. 242, 24 Fed. 83—*St. Louis, I. M. & S. R. Co. v. Higgins*, 44 Ark. 296—*Utermehle v. McGreal*, 1 App. D. C. 371—*Sayles v. Christie*, 187 Ill. 438, 58 N. E. 480—*Rice v. Boyer*, 108 Ind. 475, 58 Am. Rep. 53, 9 N. E. 420—*Buchanan v. Hubbard*, 119 Ind. 194, 21 N. E. 538—*Amey v. Cockey*, 73 Md. 306, 20 Atl. 1071—*Shipp v. McKee*, 80 Miss. 748, 92 Am. St. Rep. 616, 32 So. 281—*Harris v. Ross*, 86 Mo. 102, 56 Am. Rep. 411—*Englebert v. Troxell*, (Englebert v. Pritchett) 40 Neb. 203, 26 L.R. A. 183, 42 Am. St. Rep. 665, 58 N. W. 852—*Gibson v. Western N. Y. & P. R. Co.* 164 Pa. 151, 44 Am. St. Rep. 586, 30 Atl. 304—*Birch v. Linton*, 78 Va. 588, 49 Am. Rep. 381.

Effect of possession.
See also *infra*, 180.

114. Laches cannot be imputed to one in the peaceable possession of land, for delay in resorting to a court of equity to correct a mistake in the description of premises in a conveyance through which title must be deduced. The possession is notice to all of the possessor's equitable rights, and he needs to assert them only when he may find occasion to do so. *Ruckman v. Cory*, 129 U. S. 387, 9 Sup. Ct. Rep. 316, 32: 728
Cited in *Brainard v. Buck*, 184 U. S. 109, 46 L. ed. 455, 22 Sup. Ct. Rep. 458—*Lemoline v. Dunklin County*, 38 Fed. 569—*Balkham v. Woodstock Iron Co.* 11 L.R.A. 232, 43 Fed.

652—Gunnison Gas & Water Co. v. Whittaker, 21 Fed. 195—Ponder v. Cheeves, 90 Ala. 119, 7 So. 512—Brainard v. Buck, 16 App. D. C. 600—Hayes v. Carroll, 74 Minn. 139, 76 N. W. 1017—Nutter v. Brown, 51 W. Va. 603, 42 S. E. 661.

115. One who is in possession of land, having the title, is not guilty of laches by mere delay until his rights are invaded to bring an action to set aside deeds as clouds upon his title, unless by reason of such delay an equitable estoppel is created in favor of the adverse claimant. Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. Rep. 239, 35: 1063
Cited in Quirk v. Liebert, 12 App. D. C. 401—Nutter v. Brown, 51 W. Va. 603, 42 S. E. 661.

116. The lapse of six years before suit to cancel a conveyance obtained by undue influence cannot avail defendant, where he has had possession of the land, and a reasonable rent equal to the value of the improvements, and there has been no loss of evidence. Allore v. Jewell, 94 U. S. 506, 24: 260

Cited in Abraham v. Ordway, 158 U. S. 422, 39 L. ed. 1039, 15 Sup. Ct. Rep. 894—McIntire v. Pryor, 173 U. S. 55, 43 L. ed. 612, 19 Sup. Ct. Rep. 352—Sayre v. Elyton Land Co. 73 Ala. 103—Match v. Hunt, 38 Mich. 9.

Recovery of real property generally.

When Statute begins to Run, see *infra*, 383-388, 420.

Laches As Defense in Ejectment, see Ejectment, 79.

See also Adverse Possession, 177, 180, 207-209.

117. The doctrine of laches applies to suits relating to land as well as to other cases. Abraham v. Ordway, 158 U. S. 416, 15 Sup. Ct. Rep. 894, 39: 1036

118. Where the legal title was vested by the grant, and has thus stood a number of years, and important rights have grown up under it, a court of equity will not interfere, on general principles of justice. Lea v. Polk County Copper Co. 21 How. 493, 16: 203

119. Where the object of the suit is to do what could be done at law,—namely, recover possession of real estate,—and the plaintiff is guilty of the laches which a court of equity regards equivalent to the statute of limitation, such unexplained delay is a bar to the suit. Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. Rep. 942, 34: 424
Cited in Boone County v. Burlington & M. River R. Co. 139 U. S. 693, 35 L. ed. 323, 11 Sup. Ct. Rep. 687—Fuller v. Montague, 8 C. C. A. 108, 16 U. S. App. 391, 59 Fed. 220—Lant v. Manley, 71 Fed. 16—Robb v. Day, 33 C. C. A. 94, 62 U. S. App. 173, 90 Fed. 347.

120. An action to recover prior possession must be brought within a reasonable time after its loss. Garcia de Sabariego v. Maverick (Sabariego v. Maverick) 124 U. S. 261, 8 Sup. Ct. Rep. 461, 31: 430

121. A suit in equity brought for the determination of title and the possession of real estate, after the period prescribed by statute as a bar to an action of ejectment, will not be entertained, as it is founded on a stale claim. Hall v. Law, 102 U. S. 461, 26: 217

Cited in Dibble v. Bellingham Bay Land Co. 163 U. S. 72, 41 L. ed. 75, 16 Sup. Ct. Rep. 939—United States v. Beebe, 4 McCrary, 17, 17 Fed. 40—Fuller v. Montague, 8 C. C. A. 108, 16 U. S. App. 391, 59 Fed. 218—Bartlett v. Ambrose, 24 C. C. A. 401, 42 U. S. App. 381, 78 Fed. 844—Horr v. French, 99 Iowa, 82, 68 N. W. 581.

122. When real estate was in fact partnership assets, and the interest of heirs and the right to dower therein were subject to the lien of partnership debts, but, nearly three years before the filing of a bill to enforce the lien, dower was actually assigned, the court refused to disturb the assignment. Clay v. Freeman, 118 U. S. 97, 6 Sup. Ct. Rep. 964, 30: 104

123. In Arizona the limitation for the commencement of an action to recover real property or its possession is five years. An equitable action to set aside deeds and recover real property is not barred by such statute by a delay of four years in suing. Bryan v. Kales, 134 U. S. 126, 10 Sup. Ct. Rep. 435, 33: 829

124. Where an antenuptial contract was made between a man and a widow with children, and the husband, who survived the wife, died seventeen years after the marriage, and there was no effort by the wife's children to recover the property covered by the contract, for eight years after his death, and a suit then brought was dismissed for want of prosecution, a bill filed four years later against the former defendants' representatives, who had meanwhile distributed their testator's estate, should be dismissed for delay, and because allowing the dismissal of the former suit gave permission to the defendants to distribute the estate. De Lane v. Moore, 14 How. 253, 14: 409

125. Laches is a good defense to a suit in equity to set aside a survey which has stood unchallenged for over twenty-five years, where all the facts alleged to sustain the suit have been known to plaintiff for more than twenty years before suit brought. Halstead v. Grinnan, 152 U. S. 412, 14 Sup. Ct. Rep. 641, 38: 495

Increase in value.

Increase in Value of Mining Claim, see *infra*, 150-152.

See also *infra*, 162, 167, 168, 181, 194.

126. Equity will not entertain a suit to recover lands granted to railroad companies in aid of the construction of their roads, with the payment of state bonds loaned a prior railroad corporation, whose property and franchises the state had acquired on foreclosure, and granted to the defendant companies, where the complainant has de-

layed for twelve years to assert any claim to the lands, and the defendant companies have, in the meantime, expended large sums thereon, and which the complainant had urged them to do. *Chamberlain v. St. Paul & S. C. R. Co.* 92 U. S. 299, 23: 715

126a. Where a claim for land lay dormant for eighteen years after the entry was set aside, and for fourteen years after a patent to another person was issued, and the land was again conveyed, and the grantee and those holding under him have held possession for thirteen years, and the land is greatly increased in value, a court of equity cannot decree that the holder of the legal title shall convey the property to the complainant. *Harkness v. Underhill*, 1 Black, 316, 17: 208

Cited in Gibson v. Herriott, 55 Ark. 94, 29 Am. St. Rep. 17, 17 S. W. 589.

127. A suit to set aside defendants' title to land and establish title in plaintiffs, brought twenty-five years after the wrongful transfer complained of, and twenty years after knowledge of the wrong by the party under whom plaintiffs claim, when the parties to such transfer are dead, and the land has increased in value, and defendants, who have occupied the land, were not parties to or cognizant of the wrong,—is barred on the ground of laches. *Underwood v. Dugan*, 139 U. S. 380, 11 Sup. Ct. Rep. 618, 35: 197

128. Failure of a widow to procure the consent of the orphans' court to a sale of a land warrant belonging to her and her children, which is sold for full value and the proceeds of which are used for their benefit, will not entitle the heirs forty-four years afterward and thirty years after the youngest child became of age to impeach the transaction and claim the land on which the warrant was located by the purchaser, which has increased in value in the meantime from \$100, or \$200, to at least \$1,000,000. *Wetzel v. Minnesota R. Transfer Co.* 169 U. S. 237, 18 Sup. Ct. Rep. 307, 42: 730

Cited in Ware v. Galveston City Co. 146 U. S. 118, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Massenberg v. Denison*, 46 C. C. A. 124, 107 Fed. 23.

c. Fraud.

When Statute of Limitation Begins to Run, see *infra*, II. e.

Fraudulent By-bidding at Auction Sale, see *infra*, 170, 171.

See also *supra*, 34; *infra*, 161–165.

129. Laches as a defense in a case of an active and continuing fraud must amount to assent or acquiescence. *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 21 Sup. Ct. Rep. 7, 45: 60

Cited in French Republic v. Saratoga Vichy Spring Co. 191 U. S. 439, 48 L. ed. 253, 24 Sup. Ct. Rep. 145.

130. In a case of fraud upon the part of an administrator, in which each of the de-

fendants participated, a court of equity should be slow in denying relief upon the mere ground of laches in bringing suit. *Bryan v. Kales*, 134 U. S. 126, 10 Sup. Ct. Rep. 435, 33: 829

Cited in Anderson v. Northop, 30 Fla. 637, 12 So. 318—*Carberry v. German Ins. Co.* 86 Wis. 328, 56 N. W. 920.

131. In all cases where actual fraud is not made out, but the imputation rests upon conjecture, after the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. Rep. 418, 36: 134

132. On the question of laches in filing a bill to set aside a decree for fraud, the time during which an appeal to this court was pending cannot be counted against the plaintiff. *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 4 Sup. Ct. Rep. 583, 28: 498

Knowledge of fraud.

When Action Barred by Limitation, see *infra*, III. e.

Ignorance of Fraud as Excuse for Laches, see *infra*, 210–212.

Running of Limitations on Discovery of Fraud, see *infra*, 370–377, 378–380.

Allegations as to, see *Pleading*, 445, 543, 549.

See also *infra*, 161, 178, 185–187.

133. Time does not begin to run against rights of action concealed by fraud, till after the fraud is discovered. *Badger v. Badger*, 2 Wall. 87, 17: 836

Cited in Phillippi v. Phillippi, 115 U. S. 157, 29 L. ed. 340, 5 Sup. Ct. Rep. 1181—*Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.* 120 U. S. 260, 30 L. ed. 641, 7 Sup. Ct. Rep. 542—*Pearsall v. Smith*, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 833—*Lehman v. LeForge*, 42 Fed. 495.—*Dugan v. O'Donnell*, 68 Fed. 989—*Kelley v. Boettcher*, 29 C. C. A. 22, 56 U. S. App. 363, 85 Fed. 63—*Williamson v. Monroe*, 101 Fed. 330—*McGauhey v. Brown*, 46 Ark. 36—*Lataillade v. Orena*, 91 Cal. 578, 25 Am. St. Rep. 219, 27 Pac. 924—*De Mares v. Gilpin*, 15 Colo. 83, 24 Pac. 568—*Wells v. Child*, 12 Allen, 335.

134. In courts of the United States where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, it will not run against a suit in equity until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered. *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 7 Sup. Ct. Rep. 430, 30: 569

Cited in Boone County v. Burlington & M. River R. Co. 139 U. S. 693, 35 L. ed. 823, 11 Sup. Ct. Rep. 687—*Pearsall v. Smith*, 149 U. S. 233, 37 L. ed. 716, 13 Sup. Ct. Rep. 833—*Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 638—*Jones v. Smith*, 88 Fed. 381—*Rugan v. Sabin*, 3 C. C. A. 582, 10 U. S. App. 519, 53 Fed. 420—*Percy v. Cockrill*, 4 C. C. A. 80, 10 U. S. App. 574, 53 Fed. 876—*Scheffel v. Hays*, 7 C. C. A. 812.

19 U. S. App. 220, 58 Fed. 460—Lant v. Manley, 21 C. C. A. 466, 43 U. S. App. 623, 75 Fed. 635—Frishmuth v. Farmers' Loan & Tr. Co. 46 C. C. A. 228, 107 Fed. 174—McKneely v. Terry, 61 Ark. 543, 83 S. W. 953—Higgins v. Crouse, 63 Hun, 140, 17 N. Y. Supp. 696.

135. Lapse of time as a defense to a suit by the United States to annul a patent to land for fraud does not begin to run until the fraud is discovered. *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. Rep. 836, 29: 110

Cited in *United States v. San Pedro & C. D. A. Co.* 4 N. M. 590, 17 Pac. 337.

136. There must be reasonable diligence in commencing an action after the discovery of fraud; and the means of knowledge are the same thing, in effect, as knowledge itself; and the circumstances of the discovery must be fully stated and proved; and the delay which has occurred must be shown to be consistent with the requisite diligence. *Wood v. Carpenter*, 101 U. S. 135, 25: 807

Cited in *Boone County v. Burlington & M. River R. Co.* 139 U. S. 693, 35 L. ed. 323, 11 Sup. Ct. Rep. 687—*Ware v. Galveston City Co.* 146 U. S. 116, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Johnston v. Standard Min. Co.* 148 U. S. 370, 37 L. ed. 486, 13 Sup. Ct. Rep. 585—*Bates v. Preble*, 151 U. S. 162, 38 L. ed. 111, 14 Sup. Ct. Rep. 277—*Fitting v. Marx*, 4 Hughes, 323, 4 Fed. 684—*Dannmeyer v. Coleman*, 8 Sawy. 58, 11 Fed. 102—*Credit Co. v. Arkansas C. R. Co.* 5 McCrary, 31, 15 Fed. 53—*Amy v. Watertown*, 22 Fed. 420—*Norris v. Haggins*, 24 Fed. 280—*Yancy v. Cothran*, 32 Fed. 690—*Jones v. Smith*, 38 Fed. 381—*Teall v. Slaven*, 40 Fed. 778—*Jesup v. Illinois C. R. Co.* 43 Fed. 503—*St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 264, 4 U. S. App. 169, 49 Fed. 319—*Mercantile Trust Co. v. Kanawha & O. R. Co.* 50 Fed. 877—*Rugan v. Sabin*, 3 C. C. A. 583, 10 U. S. App. 519, 53 Fed. 418—*Percy v. Cockrill*, 4 C. C. A. 81, 10 U. S. App. 574, 53 Fed. 875—*Scheffel v. Hays*, 7 C. C. A. 313, 19 U. S. App. 220, 58 Fed. 461—*Fuller v. Montague*, 8 C. C. A. 108, 16 U. S. App. 301, 59 Fed. 220—*Bangs v. Loveridge*, 60 Fed. 968—*Dugan v. O'Donnell*, 68 Fed. 992—*Lant v. Manley*, 71 Fed. 14—*Swift v. Smith*, 25 C. C. A. 158, 49 U. S. App. 181, 79 Fed. 713—*Curtis v. Lakin*, 36 C. C. A. 226, 94 Fed. 255—*Horner v. Perry*, 112 Fed. 908—*Dar-nold v. Simpson*, 114 Fed. 370—*Thornton v. Natchez*, 63 C. C. A. 529, 129 Fed. 87—*Burnes v. Burnes*, 132 Fed. 495—*Williams v. Neely*, 69 L.R.A. 342, 67 C. C. A. 183, 134 Fed. 13—*Stanwood v. Wishard*, 134 Fed. 963—*Kansas City Southern R. Co. v. Stevenson*, 135 Fed. 558—*Dyer v. Taylor*, 50 Ark. 320, 7 S. W. 258—*Bland v. Fleeman*, 54 Ark. 91, 23 S. W. 4—*Thomas v. Syper*, 61 Ark. 589, 33 S. W. 1059—*Moore v. Boyd*, 74 Cal. 171, 15 Pac. 670—*Shain v. Sresovich*, 104 Cal. 405, 38 Pac. 51—*Burling v. Newlands*, 112 Cal. 500, 44 Pac. 810—*Truett v. Onderdonk*, 120 Cal. 589, 53 Pac. 26—*Smith v. Martin*, 135 Cal. 255, 67 Pac. 779—*Simpson v. Dalziel*, 135 Cal. 603, 67 Pac. 1080—*De Mares v. Gilpin*, 15 Colo. 84, 24 Pac. 568—*German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa, 745, 98 N. W. 606—*Lewis v. Duncan*, 66 Kan. 309, 71 Pac. 577—*Mecosta County v. Vincent*, 65 Mich. 507, 33 N. W. 44—*Dole v. Wilson*, 39 Minn. 332, 40 N. W. 161—*Duxbury v. Boice*, 70 Minn.

121, 72 N. W. 838—*Eaton v. Cass County*, 11 Neb. 231, 9 N. W. 60—*Campbell v. Roe*, 32 Neb. 349, 49 N. W. 452—*Webster v. Bates Mach. Co.* 64 Neb. 311, 89 N. W. 789—*Kansas Moline Plow Co. v. Sherman*, 8 Okla. 214, 32 L.R.A. 62, 41 Pac. 623—*Effinger v. Hall*, 81 Va. 106—*Perkins v. Lane*, 82 Va. 64—*Lennig v. White*, 1 Va. Dec. 901, 20 S. E. 831—*Wickham v. Sprague*, 18 Wash. 471, 51 Pac. 1055—*Deering v. Holcomb*, 26 Wash. 598, 67 Pac. 240—*Rogers v. Van Nortwick*, 87 Wis. 429, 58 N. W. 757—*Melms v. Pabat Brewing Co.* 93 Wis. 173, 57 Am. St. Rep. 899, 66 N. W. 518.

137. A court of equity will not set aside a fraudulent transaction, at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge, or the means of knowledge, of the fraud. *Putnam v. New Albany & S. C. Junction R. Co.* (*Burke v. Smith*) 16 Wall. 390, 21: 361 Cited in *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 139, 30 L. ed. 573, 7 Sup. Ct. Rep. 430—*Pearsall v. Smith*, 149 U. S. 283, 37 L. ed. 716, 13 Sup. Ct. Rep. 833—*Phelps v. Elliott*, 35 Fed. 462—*Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 639—*Jones v. Smith*, 38 Fed. 381—*Rugan v. Sabin*, 3 C. C. A. 582, 10 U. S. App. 519, 53 Fed. 420—*Percy v. Cockrill*, 4 C. C. A. 81, 10 U. S. App. 574, 53 Fed. 876—*Scheffel v. Hays*, 7 C. C. A. 312, 19 U. S. App. 220, 58 Fed. 460—*Swift v. Smith*, 25 C. C. A. 160, 49 U. S. App. 181, 79 Fed. 715.

138. Where the party interested had notice in his lifetime of all the facts which constituted the ground of fraud alleged in the bill, and, for eight years that he lived after the cause of action accrued to him, with notice of his right and of the whole transaction, brought no suit nor set up any claim, his heirs are not entitled to the benefit of an exemption from the bar of the statute on the ground of recent discovery of the fraud. *Clark v. Johnston* (*Clarke v. Boorman*) 18 Wall. 493, 21: 904 Cited in *Taylor v. Holmes*, 127 U. S. 493, 32 L. ed. 180, 8 Sup. Ct. Rep. 1192—*Taylor v. Holmes*, 14 Fed. 509—*United States v. Beebe*, 4 McCrary, 16, 17 Fed. 39—*United States v. Dalles Military Road Co.* 41 Fed. 500—*Smith v. McIntire*, 83 Fed. 467.

When action barred.

Bar by Limitation, see *infra*, III. e.

See also *supra*, 112; *infra*, 168, 520.

139. Where a failing debtor appropriates all his property to the payment of a few of his creditors, another creditor who makes no inquiry as to the integrity of the transaction for nearly five years is guilty of laches which will prevent his setting aside the transaction on the ground that such creditors received more than was due them. *Hardt v. Heidweyer*, 152 U. S. 547, 14 Sup. Ct. Rep. 671, 38: 548

140. Where the main charge of fraud consists in an alleged conspiracy to obtain the property for less than it was worth, if all the circumstances relied on to sustain it were actually known to the plaintiffs, or they were chargeable with such knowledge, then after the lapse of nineteen years the

suit is too late. *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. Rep. 418, 36: 134

141. Where the cause of action arose either in December, 1841, or in March, 1842, and in 1844 the plaintiffs or those whom they represent had information sufficient to make it their duty to make further inquiry in regard to the fraud alleged, and in 1854 and 1858 an agent representing the rights of the plaintiff obtained information sufficient to put him upon inquiry, and the suit was not commenced until twenty-three years afterwards, the action is barred by laches and also by the statute of limitation of the state, the longest period of limitation therein being ten years. *Ware v. Galveston City Co.* 146 U. S. 102, 13 Sup. Ct. Rep. 33, 36: 904

Cited in Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 698, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Darnold v. Simpson*, 114 Fed. 370—*Shalin v. Sresovich*, 104 Cal. 405, 38 Pac. 51—*Patterson v. Hewitt* (N. M.) 55 L. R.A. 664, 66 Pac. 552.

When action not barred.

See also *supra*, 49.

142. A bill filed by the United States more than seven years and five months after the issuance of a patent, to set it aside on the ground of fraud, does not show such laches as will justify the court in dismissing the bill. *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. Rep. 836, 29: 110

d. Liens; Taxes.

Time to Redeem from Tax Sale, see *Taxes*, 713, 714.

Equitable lien.

143. A purchaser of property, with knowledge of an equitable claim prior to his own, cannot defend a suit in equity to enforce the prior lien, on the ground of laches for a time less than the statute of limitations. *Connecticut General L. Ins. Co. v. Eldredge*, 102 U. S. 545, 26: 245
Cited in Johnson v. Elkins, 1 App. D. C. 443.

Maritime lien.

144. The delay which will defeat a suit to enforce a maritime lien must, in every case, depend upon the peculiar equitable circumstances of the case. *Young v. The Key City* (The Key City) 14 Wall. 653, 20: 896

Cited in Harwood v. Cincinnati & C. Air-Line R. Co. 17 Wall. 81, 21 L. ed. 559—*The Alaska*, 33 Fed. 112—*The Nebraska*, 17 C. C. A. 98, 34 U. S. App. 119, 69 Fed. 1012—*Edwards v. Mercantile Trust Co.* 124 Fed. 392—*Bryan v. Pinney*, 3 Ariz. 33, 20 Pac. 311—*Bacon v. Chase*, 83 Iowa. 530, 50 N. W. 23—*French v. Kitchen*, 53 N. J. Eq. 39, 30 Atl. 815.

145. Where a maritime lien is to be enforced to the detriment of a purchaser for value without notice of the lien, the defense of laches will be held valid under shorter time than when the claimant is the owner at the time the lien accrues. *Young*

v. The Key City (The Key City) 14 Wall. 653, 20: 896

Cited in The Columbia, 13 Blatchf. 523, Fed. Cas. No. 3,036—*Re Herman*, 9 Ben. 448, Fed. Cas. No. 6,405—*The Wexford*, 7 Fed. 681—*The Bristol*, 11 Fed. 163—*The Rapid Transit*, 11 Fed. 335—*The Alfred J. Murray*, 60 Fed. 927—*Marrow v. Brinkley*, 85 Va. 62, 6 S. E. 605.

145a. While courts of admiralty are not governed, in cases for the enforcement of maritime liens, by any statute of limitation, yet laches or delay in their enforcement will often be a valid defense. *Young v. The Key City* (The Key City) 14 Wall. 653, 20: 896
Cited in Reed v. Merchants' Mut. Ins. Co. 95 U. S. 33, 24 L. ed. 351—*Workman v. New York*, 179 U. S. 560, 45 L. ed. 320, 21 Sup. Ct. Rep. 212—*The Artisan*, 8 Ben. 541, Fed. Cas. No. 567—*The Columbia*, 13 Blatchf. 523, Fed. Cas. No. 3,036—*Fitzgerald v. The H. A. Richmond*, Fed. Cas. No. 4,839—*The Harriet Ann*, 6 Bliss. 15, Fed. Cas. No. 6,101—*Re Herman*, Fed. Cas. No. 6,405—*The Norfolk*, 2 Hughes, 127, Fed. Cas. No. 10,297—*Southard v. Brady*, 36 Fed. 561—*The Queen of the Pacific*, 81 Fed. 215—*The H. N. Emille*, 70 Fed. 512—*The Queen*, 78 Fed. 138—*The Tiger*, 90 Fed. 827—*Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* 36 C. C. A. 143, 94 Fed. 188—*Norfolk Sand & Cement Co. v. Owen*, 53 C. C. A. 99, 115 Fed. 781.

Compelling levy of tax.

146. Where an action at law for the enforcement of claims against the county would be barred by the statute, a suit in equity to compel the levying and collection of taxes to pay such demands will be barred. *Meath v. Phillips County*, 108 U. S. 553, 2 Sup. Ct. Rep. 869, 27: 819
Cited in Sis v. Boardman, 11 App. D. C. 121.

147. Mandamus to compel the levy of a tax to satisfy municipal warrants will not be refused on the theory that the relators have slept upon their rights for an unreasonable time, to the prejudice of the rights of respondents, or of other interested persons, where, in some form, legal proceedings for the collection of these warrants have been prosecuted by various holders in different courts up to the commencement of the mandamus proceedings, without beneficial results. *Duke v. Turner*, 204 U. S. 623, 27 Sup. Ct. Rep. 316, 51: 652

e. Mines.

See also *infra*, 189.

148. Laches may defeat a suit in equity to enforce rights in a mining location, although the time fixed in N. M. Comp. Laws, § 2938, for the prosecution of actions or suits "in law or equity" for any lands, tenements, or hereditaments has not expired. *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. Rep. 35, 49: 214
Cited in Ballard v. Golob, 34 Colo. 427, 83 Pac. 376—*Ryason v. Duntun*, 164 Ind. 94, 73 N. E. 74.

149. A party cannot be permitted to re-

main silent for more than eight years after he has abandoned the contest for a mining claim and submitted to the decision of the matter at issue, although it may have been erroneous, and then come forward in a court of equity after the title has passed to the United States, and seek to correct the errors which occurred during the progress of the proceeding in the Land Office. *United States v. Marshall Silver Min. Co.* 129 U. S. 579, 9 Sup. Ct. Rep. 343, 32: 734
Cited in *Lawrence v. Potter*, 22 Wash. 47, 60 Pac. 147—*Mettler v. Donahue*, 96 Wis. 507, 71 N. W. 900.

Increase in value.

150. Acquiescence by heirs in the possession of a mine and the privileges connected therewith, by the widow of their ancestor and those claiming under her, from his death in 1848 until 1880, during which time they witnessed the expenditure of large sums of money upon the property without exhibiting an intention to assert their supposed rights,—is fatal to any claim on their part to equitable relief. *Gildersleeve v. New Mexico Min. Co.* 161 U. S. 573, 16 Sup. Ct. Rep. 663, 40: 812

Cited in *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 698, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Bartlett v. Ambrose*, 24 C. C. A. 399, 42 U. S. App. 381, 78 Fed. 842—*Godkin v. Cohn*, 25 C. C. A. 505, 53 U. S. App. 4, 80 Fed. 466—*Patterson v. Hewitt* (N. M.) 55 L.R.A. 664, 66 Pac. 552.

151. A delay of eight years after the right to a deed of an interest in a mining claim has accrued by reason of a proportionate contribution to the work and expense necessary to obtain a patent will defeat a suit to enforce such right, where complainants contributed nothing further to the subsequent development of the mine and the consequent discovery of a rich ore deposit. *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. Rep. 35, 49: 214

152. Where mining property has been developed by the courage and energy and at the expense of a party until it has become of enormous value, courts will look with disfavor upon the claims of another thereto who has lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of such rights. *Johnston v. Standard Min. Co.* 148 U. S. 360, 13 Sup. Ct. Rep. 585, 37: 480

Cited in *Curtis v. Lakin*, 36 C. C. A. 227, 94 Fed. 250—*Moore v. Nickey*, 66 C. C. A. 670, 133 Fed. 292.

1. Mortgages.

153. Where the question is whether alleged properties should on equitable grounds be brought within the operation of a mortgage, the laches of the complainant is an insuperable obstacle to a decree in its favor. *Metropolitan Nat. Bank v. St. Louis Dispatch Co.* 149 U. S. 436, 13 Sup. Ct. Rep. 944, 37: 799

Assumption.

154. A grantee's covenant assuming a mortgage will not be enforced in equity after sixteen years' delay to issue process against him, during seven of which he resided in the jurisdiction and for as long a period had resided in a state not far distant in which an action could have been maintained, although several years before process was issued against him suit was brought against another party, but subsequently dismissed, and during the delay the remedy against several other parties who were liable on the mortgage had been lost by bankruptcy, death, and lapse of time, while the property had diminished in value one half and had passed into the ownership of the heirs of the mortgagee. *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. Rep. 176, 41: 531

Setting aside.

See also *infra*, 201.

155. A bill to set aside a mortgage is subject to the defense of laches when made several years after the foreclosure of the mortgage, and as long after an adjudication in bankruptcy against the mortgagor, during which time complainant had access to records showing the facts upon which he predicated his complaint. *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 6 Sup. Ct. Rep. 1009, 30: 196

Distinguished in *Marshall v. Holmes*, 141 U. S. 600, 35 L. ed. 874, 12 Sup. Ct. Rep. 62.
Cited in *Boone County v. Burlington & M. River R. Co.* 139 U. S. 693, 35 L. ed. 323, 11 Sup. Ct. Rep. 687—*St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 270, 4 U. S. App. 160, 49 Fed. 325—*Furnald v. Glenn*, 12 C. C. A. 33, 26 U. S. App. 202, 64 Fed. 54—*Denton v. Baker*, 35 C. C. A. 191, 93 Fed. 49—*Kemerrer v. Markie*, 14 Pa. Co. Ct. 496—*Coon v. Seymour*, 71 Wis. 345, 37 N. W. 243.

Transfer to mortgagee.

156. A delay of three and a half years before questioning the completeness of the title acquired by a mortgagee by virtue of a delivery to him of the mortgaged property, during which time he has successfully dealt with it as his own, is fatal to the right to rescind the contract under which the delivery was made, and to treat him as a mortgagee in possession because of the breach of his agreement to cancel the mortgage and surrender certain notes, although he has brought an action upon one of the notes to recover a sum equal to the value of that portion of the property which was not delivered as agreed, instead of an action in form for the value of such undelivered property. *Ward v. Sherman*, 192 U. S. 168, 24 Sup. Ct. Rep. 227, 48: 391

157. Where a debtor, for the purpose of delaying his creditors until he can make a favorable sale, conveys his real estate to one of three persons to whom he has executed a mortgage, but who has transferred his interest in the mortgage to his co-mortgagees, and the debtor then enters into a verbal contract authorizing his grantee to

convey the property to junior mortgage creditors upon certain conditions; and after such subsequent conveyance has been executed under a written contract (purporting to embrace the verbal agreement) entered into by his grantee and the persons to whom such grantee conveys, and after he has examined the written contract and allowed the execution of deeds based upon it, without expressing dissent therewith to the grantees, who accept the deed under its provisions, and expend large sums upon the property,—he cannot, after a delay of four years, be permitted in a court of equity to assert that the written contract and conveyance was not in accordance with the verbal agreement, and demand an accounting and reconveyance of the property to himself; nor can he demand a cancellation of the original mortgage, without proof that the other two mortgagees were interested in his dealings with their co-mortgagee. *Hunt v. Oliver*, 118 U. S. 211, 6 Sup. Ct. Rep. 1083, 30: 128

Payment.

158. Where bonds secured by a trust deed were paid off during the late war in Confederate currency, which was the only currency in the locality where the parties resided, and the trust deed was discharged, one entitled to a share of said moneys cannot, after the lapse of fifteen years, recover over again his said share from the estate of the maker of the trust deed, although at the close of the war the Confederate currency was valueless. *Washington v. Opie*, 145 U. S. 214, 12 Sup. Ct. Rep. 822, 36: 680

Foreclosure.

159. A right to foreclose is barred by the running of the statutory period of limitation. *Hughes v. Edwards*, 9 Wheat. 489, 6: 142

Cited in *Peyton v. Stith*, 5 Pet. 494, 8 L. ed. 203—*Platt v. Vattier*, 9 Pet. 417, 9 L. ed. 178—*Boone v. Chiles*, 10 Pet. 221, 9 L. ed. 404—*Jenkins v. Pye*, 12 Pet. 262, 9 L. ed. 1079—*Bowman v. Wathen*, 1 How. 194, 11 L. ed. 99—*Zeller v. Eckert*, 4 How. 297, 11 L. ed. 983—*Bowman v. Wathen*, 2 McLean, 396, Fed. Cas. No. 1,740—*Clarke v. Southwick*, 1 Curt. C. C. 304, Fed. Cas. No. 2,863—*Dexter v. Arnold*, 3 Sumn. 155, Fed. Cas. No. 3,859—*Ferson v. Sanger*, 1 Woodb. & M. 148, Fed. Cas. No. 4,752—*Sparks v. Pico*, McAll. 500, Fed. Cas. No. 13,211—*Wyman v. Babcock*, 2 Curt. C. C. 399, Fed. Cas. No. 18,113—*Holmes v. Cleveland*, C. & C. R. Co. 93 Fed. 111.

160. A bill to avoid a sale of corporate property, under a mortgage given to a director of the corporation to secure money loaned, must be brought within a reasonable time. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23: 328

Cited in *Hayward v. Elliot Nat. Bank*, 96 U. S. 618, 24 L. ed. 858—*Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.* 120 U. S. 260, 30 L. ed. 641, 7 Sup. Ct. Rep. 542—*Hoyt v. Latham*, 143 U. S. 567, 36 L. ed. 265, 12 Sup. Ct. Rep. 568—*Gallagher v. Cadwell*, 145 U. S. 372, 36 L. ed. 740, 12 Sup. Ct. Rep. 873—*Johnson v. Standard Min. Co.* 148 U. S. 370, 37 L. ed. 486, 13

Sup. Ct. Rep. 585—*Alsop v. Riker*, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. Rep. 162—*Johnson v. Atlantic, G. & W. I. Transit Co.* 156 U. S. 547, 39 L. ed. 566, 15 Sup. Ct. Rep. 520—*Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co.* 178 U. S. 278, 44 L. ed. 1068, 20 Sup. Ct. Rep. 931—*Patterson v. Hewitt*, 195 U. S. 319, 40 L. ed. 218, 25 Sup. Ct. Rep. 35—*Taylor v. Holmes*, 14 Fed. 513—*Credit Co. v. Arkansas C. R. Co.* 5 McCrary, 32, 15 Fed. 53—*Pratt v. California Min. Co.* 9 Sawy. 366, 24 Fed. 877—*Fraker v. Houck*, 36 Fed. 407—*Johnston v. Standard Min. Co.* 39 Fed. 300—*Gilmer v. Morris*, 43 Fed. 450—*Kinne v. Webb*, 49 Fed. 515—*Lemolne v. Dunklin County*, 2 C. C. A. 348, 10 U. S. App. 227, 51 Fed. 492—*De Martin v. Phelan*, 2 C. C. A. 524, 7 U. S. App. 233, 51 Fed. 807—*Kinne v. Webb*, 4 C. C. A. 174, 12 U. S. App. 137, 54 Fed. 38—*Provisional Municipality v. Lehman*, 6 C. C. A. 357, 13 U. S. App. 411, 57 Fed. 332—*Scheffel v. Hays*, 7 C. C. A. 312, 19 U. S. App. 220, 58 Fed. 460—*Symmes v. Union Trust Co.* 60 Fed. 864—*Mudslill Min. Co. v. Watrous*, 9 C. C. A. 438, 22 U. S. App. 12, 61 Fed. 186—*Sagadahoc Land Co. v. Ewing*, 13 C. C. A. 86, 31 U. S. App. 102, 65 Fed. 705—*Olcott v. Rice*, 16 C. C. A. 101, 30 U. S. App. 461, 69 Fed. 203—*Jones v. Perkins*, 76 Fed. 84—*Curtis v. Lakin*, 36 C. C. A. 227, 94 Fed. 256—*Duffield v. Michaels*, 97 Fed. 832—*Huggins v. Daley*, 48 L.R.A. 325, 40 C. C. A. 19, 99 Fed. 613—*Rigney v. DeGraw*, 100 Fed. 220—*Rothchild v. Memphis & C. R. Co.* 51 C. C. A. 314, 113 Fed. 482—*Kessler v. Ensley Land Co.* 123 Fed. 558—*Alaska & C. Commercial Co. v. Solner*, 59 C. C. A. 667, 123 Fed. 860—*Socrates Quicksilver Mines v. Carr Realty Co.* 64 C. C. A. 544, 130 Fed. 298—*Gilmer v. Morris*, 80 Ala. 85, 60 Am. Rep. 85—*Gibson v. Herriott*, 55 Ark. 94, 29 Am. St. Rep. 17, 17 S. W. 589—*Santa Cruz R. Co. v. Spreckles*, 65 Cal. 199, 3 Pac. 661—*Sayre v. Citizens' Gaslight & Heat Co.* 69 Cal. 214, 10 Pac. 408—*Colton v. Stanford*, 82 Cal. 408, 16 Am. St. Rep. 137, 23 Pac. 16—*Great West Min. Co. v. Woodmas of Alston Min. Co.* 14 Colo. 97, 23 Pac. 908—*Hagerman v. Bates*, 5 Colo. App. 402, 38 Pac. 1100—*Graft v. Portland Town & Mineral Co.* 12 Colo. App. 115, 54 Pac. 854—*Owens v. Stapp*, 32 Ill. App. 600—*Kellogg v. Western Electric Co.* 67 Ill. App. 63—*Joseph v. Davenport*, 116 Iowa, 275, 80 N. W. 1081—*Mendelsohn v. Armstrong*, 52 La. Ann. 1304, 27 So. 735—*Urner v. Sollenberger*, 89 Md. 332, 43 Atl. 810—*Snow v. Boston Blank Book Mfg. Co.* 153 Mass. 458, 26 N. E. 1116—*Harlow v. Lake Superior Iron Co.* 41 Mich. 590, 2 N. W. 918—*Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co.* 118 Mich. 132, 76 N. W. 395—*Kelly v. Hurt*, 74 Mo. 566—*Kilne v. Vogel*, 90 Mo. 249, 1 S. W. 733—*Burgess v. St. Louis C. R. Co.* 99 Mo. 508, 12 S. W. 1050—*Mantle v. Speculator Min. Co.* 27 Mont. 478, 71 Pac. 665—*Lang Syne Gold Min. Co. v. Ross*, 20 Nev. 139, 19 Am. St. Rep. 337, 18 Pac. 358—*South End Min. Co. v. Tinney*, 22 Nev. 36, 35 Pac. 89—*Patterson v. Hewitt (N. M.)* 55 L.R.A. 663, 66 Pac. 552—*Drake v. New York Suburban Water Co.* 26 App. Div. 513, 50 N. Y. Supp. 826—*Darrow v. Bush*, 45 App. Div. 267, 61 N. Y. Supp. 2—*Hart v. Ogdensburg & L. C. R. Co.* 89 Hun, 322, 35 N. Y. Supp. 566—*United States Rolling Stock Co. v. Atlantic & G. W. R. Co.* 34 Ohio St. 463, 32 Am. Rep. 380—*Loomis v. Rosenthal*, 34 Or. 602, 57 Pac. 55—*Shaber's Appeal*, 2

Monaghan (Pa.) 438, 17 Atl. 200—Brunner v. Finley, 187 Pa. 405, 41 Atl. 334—Raht v. Sevier Min. & Mill. Co. 18 Utah, 803, 54 Pac. 889—Murphy v. Ganey, 23 Utah, 641, 66 Pac. 190—Hatch v. Lucky Bill Min. Co. 25 Utah, 418, 71 Pac. 865—Hearst v. Putman Min. Co. 28 Utah, 198, 66 L.R.A. 791, 107 Am. St. Rep. 898, 77 Pac. 753—Blythe v. Lewis, 75 Va. 708—Marrow v. Brinkley, 85 Va. 62, 6 S. E. 605—Griffith v. Blackwater Boom & Lumber Co. 55 W. Va. 619, 69 L.R.A. 149, 48 S. E. 442—Rogers v. Van Nortwick, 87 Wis. 429, 58 N. W. 757—Melms v. Pabst Brewing Co. 93 Wis. 173, 57 Am. St. Rep. 899, 66 N. W. 518.

161. Five years' delay in filing a bill to set aside a decree of foreclosure and sale of a railroad, on the ground of fraud, is too much, when the plaintiffs were aware of the proceedings as they progressed and do not allege when they acquired knowledge of the fraud, nor satisfactorily explain why it was not sooner obtained. Harwood v. Cincinnati & C. Air-Line R. Co. 17 Wall. 78,

21: 558

Distinguished in Hubbard v. Manhattan Trust Co. 30 C. C. A. 528, 57 U. S. App. 730, 87 Fed. 59.

Cited, as to laches—what constitutes, in Hume v. Beale (Crosby v. Beale) 17 Wall. 348, 21 L. ed. 605—Twin-Lick Oil Co. v. Marbury, 91 U. S. 592, 23 L. ed. 381—Hayward v. Elliot Nat. Bank, 96 U. S. 618, 24 L. ed. 858—Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co. 120 U. S. 260, 30 L. ed. 641, 7 Sup. Ct. Rep. 542—Bryan v. Kalea, 134 U. S. 135, 33 L. ed. 833, 10 Sup. Ct. Rep. 435—Gallher v. Cadwell, 145 U. S. 372, 36 L. ed. 740, 12 Sup. Ct. Rep. 873—St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 408, 36 L. ed. 754, 12 Sup. Ct. Rep. 953—Alsop v. Riker, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. Rep. 162—Abraham v. Ordway, 158 U. S. 420, 39 L. ed. 1039, 15 Sup. Ct. Rep. 894—Sullivan v. Portland & K. R. Co. 4 Cliff. 226, Fed. Cas. No. 13,596—Credit Co. v. Arkansas C. R. Co. 5 McCrary, 31, 15 Fed. 53—United States v. Beebe, 4 McCrary, 16, 17 Fed. 40—Fraker v. Houck, 36 Fed. 407—Terbell v. Lee, 40 Fed. 43—Gilmer v. Morris, 43 Fed. 460—Lemoine v. Dunklin County, 2 C. C. A. 348, 10 U. S. App. 227, 51 Fed. 492—Halsey v. Cheney, 15 C. C. A. 662, 34 U. S. App. 50, 68 Fed. 768—Lant v. Manley, 71 Fed. 15—Jones v. Perkins, 76 Fed. 84—Alaska & C. Commercial Co. v. Solner, 59 C. C. A. 667, 123 Fed. 860—Bryan v. Pinney, 3 Ariz. 32, 20 Pac. 311—Bell v. Hudson, 73 Cal. 287, 2 Am. St. Rep. 791, 14 Pac. 791—Stansbury v. Inglehart, 9 Mackey, 161—Gunderson v. Illinois Trust & Sav. Bank, 100 Ill. App. 472—Somerset R. Co. v. Pierce, 84 Me. 93, 33 Atl. 772—Harlow v. Lake Superior Iron Co. 41 Mich. 590, 2 N. W. 913—Bliss v. Prichard, 67 Mo. 186—Barton v. Long, 45 N. J. Eq. 845, 19 Atl. 623—Frenche v. Kitchen, 53 N. J. Eq. 39, 30 Atl. 815—Patterson v. Hewitt, 11 N. M. 20, 55 L.R.A. 663, 66 Pac. 552—Shaaber v. Angelica Water Co. 2 Monaghan (Pa.) 438, 17 Atl. 209—Lamar v. Hale, 79 Va. 164—Terry v. Fontaine, 83 Va. 456, 2 S. E. 743—Marrow v. Brinkley, 85 Va. 62, 6 S. E. 605—Rowe v. Bentley, 29 Gratt. 763—Walker v. Ruffner, 32 W. Va. 309, 9 S. E. 215—Whittaker v. Southwest Virginia Improv. Co. 24 W. Va. 230, 12 S. E. 507—Duffield v. Butler, 34 W. Va. 630, 12 S. E. 776—Swann v. Thayer, 36 W. Va. 55, 14 S. E. 423.

—*As to unexplained delay,* in Johnson v. Atlantic, G. & W. I. Transp. Co. 156 U. S. 647, 39 L. ed. 566, 15 Sup. Ct. Rep. 520—Kemp v. Nickerson, 66 Fed. 683—Bill v. Schilling, 39 W. Va. 122, 19 S. E. 514—Tennant v. Tennant, 43 W. Va. 561, 27 S. E. 334—Shields v. Tarleton, 48 W. Va. 348, 37 S. E. 589—Bailey v. Calfee, 40 W. Va. 646, 39 S. E. 642.

—*As to where new rights and interests have arisen,* in Rothchild v. Memphis & C. R. Co. 51 C. C. A. 316, 113 Fed. 482.

—*As to ignorance as excuse,* in Kessler v. Ensley Co. 123 Fed. 566—Edwards v. Mercantile Trust Co. 124 Fed. 392.

162. A delay of nine years and four months is not fatal to a suit to annul a foreclosure on the ground of fraud, where the plaintiff is an ignorant colored woman, defrauded by one in whom she placed entire confidence, who assumed to act as her agent and professed that the sale was in her interest, and who obtained title for little more than a nominal sum by the false personation of a fictitious person, when he still controls and probably owns the property, the situation of which has not materially changed, and there has been no rapid rise in value or the intervention of the rights of any bona fide purchaser. McIntire v. Pryor, 173 U. S. 38, 19 Sup. Ct. Rep. 352,

43: 606

Cited in Saxlehner v. Elsner & M. Co. 179 U. S. 89, 45 L. ed. 76, 21 Sup. Ct. Rep. 7—French Republic v. Saratoga Vichy Spring Co. 191 U. S. 439, 48 L. ed. 253, 24 Sup. Ct. Rep. 145—Barstow v. Beckett, 122 Fed. 146—Stanwood v. Wishard, 134 Fed. 964—Darlington v. Turner, 24 App. D. C. 594—Gaines v. E. Whyte Grocery, Fruit & Wine Co. 107 Mo. App. 526, 81 S. W. 648.

163. One who has permitted a foreclosure sale of a railroad to take place and the road to pass into the hands of a new corporation which has operated it for ten years without objection, while in the meantime the principal witnesses to the alleged fraud are dead, is barred by laches from setting aside the sale. Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 13 Sup. Ct. Rep. 28,

36: 899

164. A bill to vacate an alleged fraudulent foreclosure sale made more than ten years before shows a presumption of laches. Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 13 Sup. Ct. Rep. 28,

36: 899

Cited in Johnston v. Standard Min. Co. 148 U. S. 370, 37 L. ed. 486, 13 Sup. Ct. Rep. 585—Halstead v. Grinnan, 152 U. S. 416, 38 L. ed. 497, 14 Sup. Ct. Rep. 641—Hardt v. Heldwayer, 152 U. S. 560, 38 L. ed. 532, 14 Sup. Ct. Rep. 671—Edison Electric Light Co. v. Equitable Life Assur. Soc. 55 Fed. 480—Quirk v. Liebert, 12 App. D. C. 401.

165. A bill in equity in another court, to attack foreclosure proceedings for fraudulent conspiracy in conducting them, being filed fourteen years after the making of the mortgage, ten years after the commencement of the bankruptcy proceedings, nine years after the entry of the decree of foreclosure, and seven years after the foreclosure became absolute and the road was conveyed to a new corporation, composed of

the holders of bonds secured by the mortgage, who had received no interest for eleven years,—the court records having been always open to disclose the alleged fraudulent proceedings, and the object sought being to appoint receivers for the benefit of the old stockholders,—will be dismissed for laches on demurrer. *Graham v. Boston*, H. & E. R. Co. 118 U. S. 161, 6 Sup. Ct. Rep. 1009, 30: 196

166. Where a trust deed gave power to sell, upon the application of any one of the creditors secured by it, who were named in a schedule, after a certain time, it was held that the lapse of nineteen years after that time, with no proceedings or steps taken, and with the delay unaccounted for, was a bar to any claim to the execution of the trust by a court of equity. *McKnight v. Taylor*, 1 How. 161, 11: 86

Redemption.

167. A right to redeem from a deed of trust which conveyed the legal title is barred by laches when twenty-nine years have elapsed since the breach of condition, and the land has been held all the time under the deed,—especially when the land, which was worth perhaps \$120 when the deed was given, has suddenly become worth about \$12,000. *Harter v. Twohig*, 158 U. S. 448, 15 Sup. Ct. Rep. 883, 39: 1049
Cited in *Horr v. French*, 99 Iowa, 83, 68 N. W. 581.

— Editorial note.

Equity of redemption barred by time.

6: 287

g. Sales; Judicial Sales.

Sales.

Sale by Trustee, see *infra*, 194.

See also *supra*, 145; *infra*, 202.

168. A suit to set aside the sale of a land certificate, brought nearly thirteen years—more than the longest state period of limitation—after the sale, where the value of the land located thereunder has largely increased, and parties interested and witnesses have died, and no person now interested in the land is implicated in the fraud alleged as the ground of relief, is barred on account of laches. *Hanner v. Moulton*, 138 U. S. 486, 11 Sup. Ct. Rep. 408, 34: 1032

169. A bill to cancel a sale of the interest of one partner in a law firm to another in fees for cases of a certain class cannot be maintained where the complainant has for three years, with full knowledge of the facts, chosen to remain silent and permit the other party to go on and expend time and labor in prosecuting the claims. *Baker v. Cummings*, 169 U. S. 139, 18 Sup. Ct. Rep. 367, 42: 711

Auction.

170. Mere lapse of time will not preclude equity from rescinding a sale for fraud in by-bidding. *Veazie v. Williams*, 8 How. 134, 12: 1018

171. A purchaser at auction is not precluded by laches from seeking a rescission for fraudulent by-bidding, where the sale occurred January 1, 1836, the fraud was discovered after January 1, 1840, and the bill to rescind was filed July 23, 1841, after demanding redress in January, 1841: although the purchaser may have been aware of the excess of price. *Veazie v. Williams*, 8 How. 134, 12: 1018
Cited in *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 136, 30 L. ed. 572, 7 Sup. Ct. Rep. 430—*McKneely v. Terry*, 61 Ark. 543, 33 S. W. 953—*Felt v. Bell*, 205 Ill. 220, 68 N. E. 794—*Bell v. Felt*, 102 Ill. App. 228.

Judicial sales.

Foreclosure Sale, see *supra*, 159–166.

When Action Barred by Limitations, see *infra*, 500–502.

See also *infra*, 201.

172. Delay for four years, during which the property involved has been sold, presumptively to purchasers without notice, is fatal to a suit to set aside a judicial sale. *Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. Rep. 430, 39: 520
Cited in *Callivada Colonization Co. v. Hays*, 119 Fed. 209.

173. An acquiescence by plaintiff for twelve years in an execution sale of his property estops him from asking to have it set aside because of improper description of the premises in the advertisement of sale and in the conveyance. *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. Rep. 437, 31: 395
Cited in *Mackall v. Mackall*, 135 U. S. 175, 34 L. ed. 87, 10 Sup. Ct. Rep. 705—*Underwood v. Dugan*, 139 U. S. 383, 35 L. ed. 199, 11 Sup. Ct. Rep. 618—*Ware v. Galveston City Co.* 146 U. S. 116, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Pearsall v. Smith*, 140 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 833—*Mackall v. Willoughby*, 167 U. S. 688, 42 L. ed. 325, 17 Sup. Ct. Rep. 954—*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 698, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Cornell v. Green*, 43 Fed. 109.

174. After fifteen years' delay a trustee of an insolvent cannot impeach the validity of the sale of certain property of the insolvent, which sale was ratified and confirmed by the consent of all the parties. *Kennedy v. Bank of Georgia*, 8 How. 586, 12: 1209

175. A bill charging a fraudulent account by an administrator and fraudulent procurement of the signature of a widow, by which an order to sell real estate of the decedent for payment of debts was obtained; sale thereof to a third person, and purchase from him by the administrator,—is properly dismissed for staleness where it was filed by the heirs more than twenty-five years after the occurrence of the events alleged; the whole transaction was public, without any concealment of the facts; the purchase by the administrator could have been avoided at once; and the widow has since died. *Badger v. Badger*, 2 Wall. 87, 17: 836

176. A claim against a corporation for

services, asserted against purchasers at a judicial sale more than seven years after their purchase and after long litigation, is too stale to receive favor in equity. *Townsend v. St. Louis & S. Coal & Min. Co.* 159 U. S. 21, 15 Sup. Ct. Rep. 997, 40: 61

Distinguished in *Richardson v. Green*, 9 C. C. A. 574, 15 U. S. App. 488, 61 Fed. 431.

Cited in *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 592, 23 L. ed. 331—*Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.* 120 U. S. 280, 30 L. ed. 641, 7 Sup. Ct. Rep. 542—*Whitney v. Fox*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 713—*Forbes v. Murray*, 4 Hughes, 444, Fed. Cas. No. 4,928a—*United States v. White*, 9 Sawy. 131, 17 Fed. 565—*Norris v. Hagglin*, 28 Fed. 281—*Mathews v. Burdick*, 38 Fed. 896—*Church of Christ v. Church of Jesus Christ of L. D.* S. 17 C. C. A. 395, 36 U. S. App. 110, 70 Fed. 188—*Guarantee Trust & S. D. Co. v. Delta & Pina-Land Co.* 43 C. C. A. 406, 104 Fed. 15—*De Roux v. Girard*, 50 C. C. A. 143, 112 Fed. 96—*Alaska & C. Commercial Co. v. Solner*, 59 C. C. A. 667, 123 Fed. 860—*Nelson v. Worthington*, 3 App. D. C. 507—*Horr v. French*, 99 Iowa, 83, 68 N. W. 581—*Patterson v. Hewitt*, 11 N. M. 23, 55 L.R. A. 664, 66 Pac. 552—*Combs v. Watson*, 2 Cin. Sup. Ct. Rep. 525—*Sedlak v. Sedlak*, 14 Or. 541, 13 Pac. 452—*Raymond v. Flavel*, 27 Or. 238, 40 Pac. 158—*Shaaber's Appeal*, 2 Monaghan (Pa.) 438, 17 Atl. 209—*Baggott v. Sawyer*, 25 S. C. 413—*Ogden Paint, Oil & Glass Co. v. Child*, 10 Utah, 485, 37 Pac. 734—*Bargamin v. Clarke*, 20 Gratt. 553—*Castleman v. Dorsey*, 78 Va. 348—*Perkins v. Lane*, 82 Va. 63—*Morgan v. Fisher*, 82 Va. 423—*Terry v. Fontaine*, 83 Va. 454, 2 S. E. 743—*Riely v. Kinzel*, 85 Va. 476, 7 S. E. 907—*Orr v. Pennington*, 93 Va. 271, 24 S. E. 928—*Gay v. Havermale*, 27 Wash. 396, 67 Pac. 804—*Pusey v. Gardner*, 21 W. Va. 485—*Lafferty v. Lafferty*, 42 W. Va. 792, 26 S. E. 262—*McCann v. Welch*, 106 Wis. 149, 81 N. W. 996.

h. Trusts.

When Statute of Limitations begins to Run, see *infra*, II. d.

Applicability of Statute, see *infra*, 317.

See also *supra*, 174; *infra*, 199.

177. When the case is one resting upon the enforcement of an implied trust, courts of equity follow the courts of law in applying the statute of limitations. *Beaubien v. Beaubien*, 23 How. 190, 16: 484

Cited in *Hall v. Russell*, 3 Sawy. 506, Fed. Cas. No. 5,943—*Manning v. Hayden*, 5 Sawy. 379, Fed. Cas. No. 9,043—*Re O'Neale*, 6 Nat. Bankr. Reg. 428, Fed. Cas. No. 10,512—*McMonagle v. McGilinn*, 85 Fed. 91—*Kennedy v. Baker*, 59 Tex. 157.

178. In case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law; and in case of an express trust limitations begin to run as soon as the trust is openly disavowed. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610, 30: 718

Cited in *Riddle v. Whitehill*, 135 U. S. 634, 34 L. ed. 287, 9 Sup. Ct. Rep. 924—*Alsop v. Riker*, 155 U. S. 460, 39 L. ed. 222, 15 Sup. Ct. Rep. 162—*Lemoine v. Dunklin County*,

38 Fed. 569—*Lemoine v. Dunklin County*, 46 Fed. 221—*Naddo v. Bardon*, 47 Fed. 786—*Naddo v. Bardon*, 2 C. C. A. 340, 4 U. S. App. 642, 51 Fed. 498—*Wood v. Perkins*, 57 Fed. 261—*Merrill v. Monticello*, 66 Fed. 167—*Swift v. Smith*, 25 C. C. A. 159, 49 U. S. App. 181, 79 Fed. 714—*Miles v. Vivian*, 25 C. C. A. 212, 51 U. S. App. 194, 79 Fed. 852—*Curtis v. Larkin*, 36 C. C. A. 228, 94 Fed. 257—*Roach v. Caraffa*, 85 Cal. 446, 25 Pac. 22—*Luco v. De Toro*, 91 Cal. 418, 27 Pac. 1082—*Morris v. Wheat*, 11 App. D. C. 218—*Currier v. Studley*, 159 Mass. 20, 33 N. E. 709—*Raymond v. Flavel*, 27 Or. 235, 40 Pac. 158—*Campbell v. McRadden*, 9 Tex. Civ. App. 394, 31 S. W. 436—*Fawcett v. Fawcett*, 85 Wis. 337, 39 Am. St. Rep. 844, 55 N. W. 405.

179. The New York statute of limitations is binding on courts of chancery when complainants seek an account of rents and profits out of a legal estate. *Harpending v. Reformed Protestant Dutch Church*, 16 Pet. 455, 10: 1029

Cited in *Levy v. Mentz*, 23 La. Ann. 262—*Yorks's Appeal*, 110 Pa. 83, 17 W. N. C. 35, 2 Atl. 65.

Editorial notes.

Statute of limitations and lapse of time as bar to trusts. 3: 311; 6: 287; 29: 336; 34: 1091; 35: 1029

Suit to establish trust.

180. Delay in commencing a suit to establish a resulting trust is not such laches as will bar the relief sought, where complainant first learned the facts shortly before the death of the resulting trustee, and, after the death of the latter's wife, who was complainant's sister and who conveyed the premises to him and was by him permitted to remain thereon until her death, took and retained possession with no reason to believe that his title was not perfect until ejectment was brought against him, when he discovered that the legal title to the premises did not pass to his sister under the will of her husband because it was after-acquired property, and commenced the suit within a year after the ejectment suit was begun. *Brainard v. Buck*, 184 U. S. 99, 22 Sup. Ct. Rep. 458, 46: 449

181. A suit to establish a resulting trust in lands conveyed by a married woman, on the ground of her lack of capacity to make the deed, is barred by laches after nearly nineteen years from the conveyance, and nearly thirteen years after she became a *feme sole*, where there is nothing to explain the delay and the property may be assumed to have appreciated in value. *Abraham v. Ordway*, 158 U. S. 416, 15 Sup. Ct. Rep. 894, 39: 1036

182. A suit to establish the equitable title to land, brought twenty-seven years after the legal title was wrongfully acquired by defendant, will fail on the ground of laches. *Felix v. Patrick*, 145 U. S. 317, 12 Sup. Ct. Rep. 862, 36: 719

Cited in *Foster v. Mansfield, C. & L. M. R. Co.* 146 U. S. 101, 36 L. ed. 903, 13 Sup. Ct. Rep. 28—*Johnston v. Standard Min. Co.*

148 U. S. 371, 37 L. ed. 486, 13 Sup. Ct. Rep. 585—Halstead v. Grinnan, 152 U. S. 416, 38 L. ed. 497, 14 Sup. Ct. Rep. 641—Hardt v. Heldweyer, 152 U. S. 560, 38 L. ed. 553, 14 Sup. Ct. Rep. 671—Wetzel v. Minnesota R. Transfer Co. 169 U. S. 242, 42 L. ed. 732, 18 Sup. Ct. Rep. 307—McIntire v. Pryor, 173 U. S. 58, 43 L. ed. 613, 19 Sup. Ct. Rep. 352—Moran v. Horsky, 178 U. S. 208, 44 L. ed. 1039, 20 Sup. Ct. Rep. 856—Lemoine v. Dunklin County, 2 C. C. A. 348, 10 U. S. App. 227, 51 Fed. 492—Wetzel v. Minnesota Transfer R. Co. 56 Fed. 924—Wetzel v. Minnesota R. Transfer Co. 12 C. C. A. 494, 27 U. S. App. 594, 65 Fed. 26—Church of Christ v. Church of Jesus Christ of L. D. S. 17 C. C. A. 395, 36 U. S. App. 110, 70 Fed. 188—Gilkinson v. Miller, 74 Fed. 134—Swift v. Smith, 25 C. C. A. 158, 49 U. S. App. 181, 79 Fed. 713—Hubbard v. Manhattan Trust Co. 80 C. C. A. 529, 57 U. S. App. 730, 87 Fed. 60—DeRoux v. Girard, 50 C. C. A. 143, 112 Fed. 96—Darnold v. Simpson, 114 Fed. 370—Kimbell v. Chicago Hydraulic Press Brick Co. 55 C. C. A. 168, 119 Fed. 106—Robertson v. Burrell, 110 Cal. 578, 42 Pac. 1086—Murphy v. Kirby, 3 App. D. C. 216—Jopling v. Chachere, 107 La. 536, 32 So. 243—Loomis v. Rosenthal, 84 Or. 601, 57 Pac. 55—Sackman v. Campbell, 15 Wash. 65, 45 Pac. 895.

Enforcement of trust.

See also *supra*, 166.

183. Lapse of time is not a bar to the enforcement of a clearly established trust. *Prevost v. Gratz*, 6 Wheat. 481, 5: 311 *Distinguished in* *Merrill v. Monticello*, 64 Fed. 166.

Cited in *Michoud v. Glrod*, 4 How. 561, 11 L. ed. 1102—*Speldel v. Henrich*, 120 U. S. 386, 30 L. ed. 719, 7 Sup. Ct. Rep. 610—*Hayden v. Thompson*, 17 C. C. A. 600, 36 U. S. App. 361, 71 Fed. 69—*Robb v. Day*, 33 C. C. A. 89, 62 U. S. App. 173, 90 Fed. 342—*Armstrong's Estate*, Coffey, P. D. (Cal.) 185—*Pryor v. McIntire*, 7 App. D. C. 431—*Patterson v. Hewitt* (N. M.) 55 L.R.A. 670, 66 Pac. 552—*Paschall v. Hinderer*, 28 Ohio St. 581.

184. Lapse of time is no bar to a subsisting trust in real property. The bar does not begin to run until knowledge of some overt act of an adverse claim or right, set up by the trustee, is brought home to the *cestui que trust*. A lapse of any period less than twenty years will not bar a *cestui que trust* of his remedy in equity, although he may have been guilty of some negligence, where the suit is brought against his trustee, who is guilty of the breach of trust, or others claiming under him with notice. *Oliver v. Piatt*, 3 How. 333, 11: 622

Cited in *Phillippi v. Philippe*, 115 U. S. 157, 29 L. ed. 340, 5 Sup. Ct. Rep. 1181—*Speldel v. Henrich*, 120 U. S. 386, 30 L. ed. 719, 7 Sup. Ct. Rep. 610—*New Orleans v. Warner*, 175 U. S. 130, 44 L. ed. 103, 20 Sup. Ct. Rep. 44—*New Orleans v. Fisher*, 180 U. S. 196, 45 L. ed. 491, 21 Sup. Ct. Rep. 347—*Lemoine v. Dunklin County*, 38 Fed. 568—*Percy v. Cockrill*, 4 C. C. A. 84, 10 U. S. App. 574, 53 Fed. 879—*New Orleans v. Fisher*, 34 C. C. A. 26, 63 U. S. App. 455, 91 Fed. 584—*Curtis v. Lakin*, 36 C. C. A. 226, 94 Fed. 255—*James v. Throckmorton*, 57 Cal. 388—*Anderson v. Northrop*, 30 Fla. 662, 12 So. 318—*Hancock v. Harper*, 86

Ill. 451—*Chicago & E. I. R. Co. v. Hay*, 110 Ill. 502, 10 N. E. 29—*Reynolds v. Sumner*, 126 Ill. 71, 1 L.R.A. 330, 9 Am. St. Rep. 523, 18 N. E. 334—*Cunningham v. McKindley*, 22 Ind. 151—*Albert v. State*, 65 Ind. 421—*Cutsinger v. Ballard*, 115 Ind. 97, 17 N. E. 206—*Cowan v. Henika*, 19 Ind. App. 43, 48 N. E. 809—*Goodwin v. Goodwin*, 69 Mo. 621—*Tyman v. Warren*, 53 N. J. Eq. 320, 31 Atl. 596—*Lutjen v. Lutjen*, 64 N. J. Eq. 784, 53 Atl. 625—*Flint v. Bell*, 27 Hun, 157—*Wingate v. Wingate*, 11 Tex. 438—*Charter Oak L. Ins. Co. v. Glasborne*, 5 Utah, 331, 15 Pac. 253.

185. Lapse of time is no bar to the enforcement of a trust, where concealed fraud on the part of the trustee is imputed and proved; the length of time during which the fraud was successfully concealed aggravates the offense, and calls more loudly for relief. *Prevost v. Gratz*, 6 Wheat. 481.

5: 311

Distinguished in *Clarke v. Boorman* (Clarke v. Johnston) 18 Wall. 506, 21 L. ed. 907—*Naddo v. Bardon*, 2 C. C. A. 340, 4 U. S. App. 642, 51 Fed. 498.

Cited in *Badger v. Badger*, 2 Wall. 92, 17 L. ed. 838—*Phillippi v. Philippe*, 115 U. S. 157, 29 L. ed. 340, 5 Sup. Ct. Rep. 1181—*Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 136, 30 L. ed. 572, 7 Sup. Ct. Rep. 430—*McIntire v. Pryor*, 173 U. S. 55, 43 L. ed. 612, 19 Sup. Ct. Rep. 352—*French Republic v. Saratoga Vichy Spring Co.* 191 U. S. 439, 48 L. ed. 253, 24 Sup. Ct. Rep. 145—*Baker v. Whiting*, 3 Sumn. 486, Fed. Cas. No. 787—*Bunnel v. Stoddard*, Fed. Cas. No. 1,135—*James v. Atlantic Delaine Co.* 3 Cliff. 621, Fed. Cas. No. 7,177—*Naddo v. Bardon*, 47 Fed. 789—*Dugan v. O'Donnell*, 68 Fed. 989—*Kelley v. Boettcher*, 29 C. C. A. 22, 56 U. S. App. 363, 85 Fed. 63—*Williamson v. Monroe*, 101 Fed. 330—*Barstow v. Beckett*, 122 Fed. 146—*Kennedy v. Kennedy*, 2 Ala. 588—*McKneely v. Terry*, 61 Ark. 543, 33 S. W. 953—*Farwell v. Great Western Teleg. Co.* 161 Ill. 596, 44 N. E. 891—*Bruner v. Finley*, 187 Pa. 406, 41 Atl. 334.

186. Length of time is no bar to a trust clearly established, where the facts have been fraudulently concealed by the trustee from the *cestui que trust*. *Badger v. Badger*, 2 Wall. 87, 17: 836.

Cited in *Lemoine v. Dunklin County*, 38 Fed. 570—*Rugan v. Sablin*, 3 C. C. A. 583, 10 U. S. App. 519, 53 Fed. 420—*Percy v. Cockrill*, 4 C. C. A. 81, 10 U. S. App. 574, 53 Fed. 875—*James v. James*, 41 Ark. 305—*Johnson v. Elkins*, 1 App. D. C. 443—*Anderson v. Northrop*, 30 Fla. 646, 12 So. 318—*Kline v. Vogel*, 90 Mo. 248, 1 S. W. 733—*Dierks v. Martin*, 16 Neb. 122, 19 N. W. 598—*Yorks's Appeal*, 110 Pa. 83, 2 Atl. 65—*Harris v. Bratton*, 34 S. C. 267, 13 S. E. 447—*Wickham v. Sprague*, 18 Wash. 471, 51 Pac. 1055—*Cranmer v. McSwords*, 24 W. Va. 603.

187. Where there is actual fraud and concealment, greater liberality in regard to the lapse of time is allowed than in cases of constructive fraud, in the dealing by a trustee with the subject of the trust through an intervening person, for the acquisition of the title. *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. Rep. 418, 36: 134.

188. An express voluntary trust cannot

be enforced after its known disavowal for such time and under such circumstances as would make an adverse possession a bar. Boone v. Chiles, 10 Pet. 177. 9: 388

Cited in Wright v. Ross, 36 Cal. 433—Thomas v. Brinsfield, 7 Ga. 159—Keeton v. Keeton, 20 Mo. 539—New Market v. Smart, 45 N. H. 103.

189. The refusal of a trustee to execute a deed of an interest in a mining location in compliance with the trust agreement is a repudiation of the trust, which, if known to the complainants, opens the door to the defense of laches to a suit to enforce the trust. Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. Rep. 35, 49: 214

190. The general rule that, in the absence of a statute of limitations, if twenty years are allowed to elapse from the commencement of proceedings or the recognition or admission of the trust, a presumption of settlement arises, is sustained by the decisions of the supreme court of Alabama. Philippi v. Philippe, 115 U. S. 151, 5 Sup. Ct. Rep. 1181, 29: 336

When rights of beneficiaries barred by laches.

See also infra, 203, 213.

191. If there be a clear breach of trust by a trustee, yet if the *cestui que trust* or beneficiary has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a court of equity will not relieve him, but leave him to bear the fruits of his own negligence. Crosby v. Beale (Hume v. Beale) 17 Wall. 336, 21: 602

192. Holders of bonds of a corporation are barred by laches from claiming an interest in a trust formed by those interested in the company, by which it was eventually reorganized, where they have permitted the trust to be wound up without making any appeal to the court until six out of the seven original trustees have died, although they had full knowledge of all the transactions and knew for years that their claims were denied and repudiated by the trustees. Al-op v. Riker, 155 U. S. 448, 15 Sup. Ct. Rep. 162, 39: 218

193. The laches and nonclaim of the rightful owner of an equitable estate for a period of twenty years will constitute a bar to equitable relief by analogy to the statute of limitations, when the owner was under no disability, and where there has been no fraud, if, during all that period, the possession has been held under a claim unequivocally adverse, and without anything having been done or said, directly or indirectly, to recognize the title of such rightful owner by the adverse possessor. Elmendorf v. Taylor, 10 Wheat. 152, 6: 289

Cited in Speidel v. Henrich, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—Merrill v. Monticello, 18 C. C. A. 637, 34 U. S. App. 615, 72 Fed. 464—Bartlett v. Ambrose, 24 C. C. A. 402, 42 U. S. App. 381, 78 Fed. 844—Doe ex dem. Duval v. McLoskey, 1 Ala. 746—Tillotson v. Doe, 5 Ala. 412, 39 Am. Dec. 330—Danley v. Danley, 22 Ark. 272

—Phalen v. Clark, 19 Conn. 435, 50 Am. Dec. 253—Perkins v. Cartmell, 4 Harr. (Del.) 274, 42 Am. Dec. 753—Johnson v. Elkins, 1 App. D. C. 443—Cropley v. Eyster, 9 App. D. C. 378—Sis v. Boardman, 11 App. D. C. 121—Fillyau v. Lavery, 3 Fla. 108—Moore v. Moore, 103 Ga. 528, 30 S. E. 535—Doe ex dem. Dunn v. Hearick, 14 Ind. 240—Perkins v. Rogers, 35 Ind. 141, 9 Am. Rep. 639—Johnson v. Hopkins, 19 Iowa, 53—Fenwick v. Macey, 1 Dana, 291—Ralls v. Hughes, 1 Dana, 408—Dugan v. Gittings, 3 Gill, 161, 43 Am. Dec. 306—Drummond v. Green, 35 Md. 151—Coles v. Vanneman, 51 N. J. Eq. 329, 18 Atl. 468—Iler v. Routh, 3 How. (Miss.) 296—McCoy v. Nichols, 4 How. (Miss.) 38—Hallett v. Hallett, 2 Paige, 19—Humbert v. Trinity Church, 7 Paige, 197—Varick v. Edwards, Hoffm. Ch. 417—Jackson ex dem. Varick v. Waldron, 13 Wend. 204—Humbert v. Trinity Church, 24 Wend. 615—Strimpfner v. Roberts, 18 Pa. 302, 57 Am. Dec. 606—Brock v. Savage, 31 Pa. 421—Yorks's Appeal, 110 Pa. 83, 17 W. N. C. 35, 2 Atl. 65—Mowry v. Providence, 10 R. I. 56—Glezen v. Haskins, 23 R. I. 604, 51 Atl. 219—Sullivan v. Latimer, 35 S. C. 430, 14 S. E. 933—Patton v. McClure, Mart. & Y. 345—Kennedy v. Baker, 59 Tex. 157—Allen v. Smith, 1 Leigh, 256—Cresap v. McLean, 5 Leigh, 390—Williams v. Lewis, 5 Leigh, 691—Baker v. Morris, 10 Leigh, 326—Straughan v. Wright, 4 Rand. 497—Fawcett v. Fawcett, 85 Wis. 338, 30 Am. St. Rep. 844, 55 N. W. 405.

194. The right of *cestuis que trust* to set aside a sale of the trust property in which the trustee is interested is lost by their unexplained delay, with knowledge of the facts, for several years, during which the value of the property increased. Hoyt v. Latham, 143 U. S. 553, 12 Sup. Ct. Rep. 569, 36: 259

Cited in Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 101, 36 L. ed. 903, 13 Sup. Ct. Rep. 28—Johnston v. Standard Min. Co. 148 U. S. 371, 37 L. ed. 486, 13 Sup. Ct. Rep. 585—Penn Mut. L. Ins. Co. v. Austin, 163 U. S. 698, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—Jones v. Concord & M. R. Co. 67 N. H. 146, 38 Atl. 120—Patterson v. Hewitt (N. M.) 55 L.R.A. 664, 66 Pac. 552—Murphy v. Ganey, 23 Utah, 641, 66 Pac. 190.

195. Fourteen years' delay after the right acquired under a marriage settlement, during which a demand had been made and abandoned, was held a bar to relief against executors who had distributed the property claimed and had been discharged of their trust. De Lane v. Moore, 14 How. 253, 14: 409

Cited in Greene v. Bishop, 1 Cliff. 203, Fed. Cas. No. 5,763.

196. The fact that no intention to hold a trustee for the defalcation of a cotrustee was ever disclosed until more than two years after the former's death and nearly six years after the latter's death tends to show that the effort to so hold him was an afterthought, not entitled to the approval of a court of equity. Colburn v. Grant, 181 U. S. 601, 21 Sup. Ct. Rep. 737, 45: 1021

197. An accounting against a trustee for breach of trust will be denied on the ground of laches, where the breach took

place thirty-seven years, and all the grounds of action occurred between twenty and thirty years, before the filing of the bill, although the *cestuis que trust* were all women, and the trustee was a lawyer, and had married their half-sister. Crosby v. Beale (Hume v. Beale) 17 Wall. 336. 21: 602
Cited in Speidel v. Henrici, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—United States v. Beebe, 4 McCrary, 17, 17 Fed. 40—Lemoine v. Dunklin County, 38 Fed. 569—Lemoine v. Dunklin County, 46 Fed. 221—Naddo v. Bardon, 47 Fed. 790—Kemp v. Nickerson, 66 Fed. 683—Nettles v. Nettles, 67 Ala. 601—James v. James, 41 Ark. 305—Seculorich v. Morton, 101 Cal. 677, 40 Am. St. Rep. 106, 36 Pac. 387—Newton v. Rebenack, 90 Mo. App. 670.

When laches imputable to heirs.

Suit to Surcharge or Falsify Executor's Account, see Executors and Administrators, 201, 202.

198. The general doctrine of courts of equity concerning lapse of time, laches, and stale claims will protect the executors of a trustee, sued after his death for matters growing out of the trust, which occurred forty years before suit was brought, which were known to the ancestor under whom plaintiffs claim for twelve years before his death, where the suit is brought by those heirs fourteen years after his death, and two years after the death of the trustee, and where no person connected with the transaction complained of remains alive. Clarke v. Johnston (Clarke v. Boorman) 18 Wall. 493, 21: 904

199. Laches cannot be imputed to the heirs of an alleged *cestui que trust* because of her failure to bring suit to have the deed to the alleged trustee reformed so as to disclose the trust, until after ejectment has been brought against her, when she was then in possession, and her rights had not, up to that time, been called in question. Walden v. Skinner, 101 U. S. 577, 25: 963

3. Excuses for Delay.

Necessity of excusing delay.

200. Courts of equity will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them. Lane & B. Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. Rep. 78. 37: 1049

Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. Rep. 610, 30: 718

Cited in Underwood v. Dugan, 139 U. S. 383, 35 L. ed. 199, 11 Sup. Ct. Rep. 618—Keyes v. Eureka Consol. Min. Co. 158 U. S. 154, 39 L. ed. 931, 15 Sup. Ct. Rep. 772—Abraham v. Ordway, 158 U. S. 421, 39 L. ed. 1039, 15 Sup. Ct. Rep. 894—Thorn Wire Hedge Co. v. Washburn & M. Mfg. Co. 159 U. S. 444, 40 L. ed. 212, 16 Sup. Ct. Rep. 94—Gill v. United States, 160 U. S. 432, 40 L. ed. 482, 16 Sup. Ct. Rep. 322—Gilldorsleeve v. New Mexico Min. Co. 161 U. S. 578, 40 L. ed. 814, 16 Sup. Ct. Rep. 663—Whitney v. Fox, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 713—Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 606, 42 L. ed. 630, 18 Sup. Ct. Rep. 223—Waddell v. Unit-

ed States, 7 L.R.A. 863, 25 Ct. Cl. 328—De Estrada v. San Felipe Land & Water Co. 46 Fed. 282—Galbes v. Girard, 46 Fed. 301—St. Paul, S. & T. F. R. Co. v. Sage, 1 C. C. A. 269, 4 U. S. App. 160, 49 Fed. 324—Caulk v. Pace, 3 C. C. A. 639, 2 U. S. App. 531, 53 Fed. 715—Reed v. Dingess, 56 Fed. 176—Kemp v. Nickerson, 66 Fed. 683—Woodmanse & H. Mfg. Co. v. Williams, 15 C. C. A. 525, 37 U. S. App. 109, 68 Fed. 493—Withington-Coley Mfg. Co. v. Kinnov, 15 C. C. A. 537, 37 U. S. App. 117, 68 Fed. 506—Southern P. R. Co. v. Goeck, 68 Fed. 618—Halsey v. Cheney, 15 C. C. A. 662, 34 U. S. App. 50, 68 Fed. 768—Dugan v. O'Donnell, 68 Fed. 990—Hayden v. Thompson, 17 C. C. A. 601, 36 U. S. App. 361, 71 Fed. 69—Merrill v. Monticello, 18 C. C. A. 637, 34 U. S. App. 615, 72 Fed. 464—Southern P. R. Co. v. Groeck, 74 Fed. 588—Nantabala Marble & Talc Co. v. Thomas, 76 Fed. 65—Miles v. Vivian, 25 C. C. A. 213, 51 U. S. App. 194, 79 Fed. 853—Richardson v. D. M. Osborne & Co. 82 Fed. 97—Schwartz v. Duss, 93 Fed. 530—La Republique Francalse v. Schultz, 94 Fed. 501—Meyrowitz Mfg. Co. v. Eccleston, 98 Fed. 439—First Nat. Bank v. Ewing, 43 C. C. A. 168, 103 Fed. 186—Schwartz v. Duss, 43 C. C. A. 330, 103 Fed. 567—Guarantee Trust & S. D. Co. v. Delta & P. Land Co. 43 C. C. A. 406, 104 Fed. 15—Adriance v. National Harrow Co. 111 Fed. 639—Kimbrell v. Chicago Hydraulic Press Brick Co. 55 C. C. A. 166, 119 Fed. 106—Plass v. Plass, 122 Cal. 15, 54 Pac. 372—Levis v. Kengia, 8 App. D. C. 239—Courtney v. Staudenmayer, 56 Kan. 397, 54 Am. St. Rep. 592, 43 Pac. 758—St. Paul's Church v. Atty. Gen. 164 Mass. 200, 41 N. E. 231—Patterson v. Hewitt, 11 N. M. 23, 55 L. R.A. 664, 66 Pac. 552—Crawford v. Schaeffer, 8 Pa. Dist. R. 32, 43 W. N. C. 360, 22 Pa. Co. Ct. 79—Re Miller, 26 Pittsb. L. J. N. S. 346—Schwartz v. Duss, 29 Pittsb. L. J. N. S. 274—Taylor v. Slater, 21 R. I. 106, 41 Atl. 1001—Peyton v. Peyton, 28 Wash. 312, 68 Pac. 757—Gapen v. Gapen, 41 W. Va. 427, 23 S. E. 579—Thompson v. Whitaker Iron Co. 41 W. Va. 582, 23 S. E. 795.

201. A suit to set aside a foreclosure sale, brought eleven years after the purchaser has taken possession, upon the ground of imperfect service of process, without excuse for delay, should not be entertained when it may be inferred that plaintiff knew of all the proceedings and where the presumptions are in favor of jurisdiction and proper service. Martin v. Gray, 142 U. S. 236, 12 Sup. Ct. Rep. 186, 35: 997

202. A claim based on the invalidity of a purchase made by one to whom property had been intrusted for sale cannot be brought twelve years after, without showing some excuse for the delay. Marsh v. Whitmore, 21 Wall. 178, 22: 482

Cited in Godden v. Kimmell, 99 U. S. 212, 25 L. ed. 435—Wollensak v. Reither, 115 U. S. 102, 29 L. ed. 352, 5 Sup. Ct. Rep. 1137—Richards v. Mackall, 124 U. S. 188, 31 L. ed. 390, 8 Sup. Ct. Rep. 437—Teall v. Slaven, 40 Fed. 781—Naddo v. Bardon, 2 C. C. A. 341, 4 U. S. App. 642, 51 Fed. 408—Elfert v. Craps, 7 C. C. A. 322, 8 U. S. App. 436, 58 Fed. 473—Jones v. Perkins, 76 Fed. 84—Kansas City Southern R. Co. v. Stevenson, 135 Fed. 557—McGaughey v. Brown, 46 Ark. 36—Gibson v. Herriott, 55 Ark. 95, 29 Am. St. Rep. 17, 17 S. W. 589—Bell v. Hudson, 73 Cal. 289, 2 Am. St.

Rep. 791, 14 Pac. 791—Kerfoot v. Billings, 160 Ill. 570, 43 N. E. 804—Perkins v. Lane, 82 Va. 63.

Promises.

203. It is not a sufficient excuse for not earlier suing a stale demand, that the trustee put the complainants off from time to time with promise to settle his trusteeship. *Crosby v. Beale* (Hume v. Beale) 17 Wall. 336, 21: 602
Cited in *Nash v. Ingalls*, 41 C. C. A. 549, 101 Fed. 649—*Patterson v. Hewitt*, 11 N. M. 28, 55 L.R.A. 666, 66 Pac. 552.

Lack of opportunity.

204. A claim will not become stale for lapse of time when the owner is prevented from enforcing it. *Buchannon v. Upshaw*, 1 How. 56, 11: 46
Distinguished in *Bowman v. Wathen*, 1 How. 196, 11 L. ed. 100.

Prudential reasons.

205. A long period of delay in attacking a release is not excused by the fact that for prudential reasons the party chose to abide by it for a period of years, rather than to assert his demands. *Thorn Wire Hedge Co. v. Washburn & M. Mfg. Co.* 159 U. S. 423, 16 Sup. Ct. Rep. 94, 40: 205

Possession.

206. Assuming possession of a tract of land does not excuse one from prosecuting within the prescribed period of limitation a suit against a person holding an adverse title thereto. *Hanner v. Moulton*, 138 U. S. 486, 11 Sup. Ct. Rep. 408, 34: 1032
Cited in *Underwood v. Dugan*, 139 U. S. 383, 35 L. ed. 190, 11 Sup. Ct. Rep. 618—*Hammond v. Hopkins*, 143 U. S. 250, 36 L. ed. 145, 12 Sup. Ct. Rep. 418—*Ware v. Galveston City Co.* 146 U. S. 116, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 698, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Naddo v. Bardon*, 2 C. C. A. 341, 4 U. S. App. 642, 51 Fed. 498—*Holladay v. Land & River Improv. Co.* 6 C. C. A. 577, 18 U. S. App. 308, 57 Fed. 792—*Kemp v. Nickerson*, 66 Fed. 683—*Nantahala Marble & Talc Co. v. Thomas*, 76 Fed. 65—*Miles v. Vivian*, 25 C. C. A. 213, 51 U. S. App. 194, 79 Fed. 853—*New York Security & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 233—*Wampol v. Kountz*, 14 S. D. 339, 86 Am. St. Rep. 765, 85 N. W. 595—*Patterson v. Hewitt* (N. M.) 55 L.R.A. 664, 66 Pac. 552—*Loomis v. Rosenthal*, 34 Or. 601, 57 Pac. 55—*Rogers v. Van Nortwick*, 87 Wis. 429, 58 N. W. 757—*Melms v. Pabst Brewing Co.* 93 Wis. 174, 57 Am. St. Rep. 899, 66 N. W. 518.

Poverty; Insolvency.

207. Poverty or pecuniary embarrassment is not a sufficient excuse for laches in the assertion of one's rights. *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24: 855
Cited in *Leggett v. Standard Oil Co.* 149 U. S. 294, 37 L. ed. 742, 13 Sup. Ct. Rep. 902—*Whalen v. Sheridan*, 18 Blatchf. 325, 10 Fed. 662—*Naddo v. Bardon*, 2 C. C. A. 339, 4 U. S. App. 642, 51 Fed. 497—*Lumley v. Wabash R. Co.* 71 Fed. 28—*Sayre v. Citizens' Gaslight & Heat Co.* 69 Cal. 213, 10 Pac. 408—*Levis v. Kengla*, 81 App. D. C. 239—*Rogers v. Van Nortwick*, 87 Wis. 431, 58 N. W. 757.

208. It is not a sufficient excuse for laches in bringing a suit, that plaintiff was financially unable during the time of the delay to bring the suit or to carry it on. *Washington v. Opie*, 145 U. S. 214, 12 Sup. Ct. Rep. 822, 36: 680
Leggett v. Standard Oil Co. 149 U. S. 287, 13 Sup. Ct. Rep. 902, 37: 737
Cited in *Naddo v. Bardon*, 2 C. C. A. 339, 4 U. S. App. 642, 51 Fed. 497—*Woodmanse & H. Mfg. Co. v. Williams*, 15 C. C. A. 524, 37 U. S. App. 109, 68 Fed. 493—*Lumley v. Wabash R. Co.* 71 Fed. 28—*Levis v. Kengla*, 8 App. D. C. 239.

209. Forty-six years' delay in prosecuting a debtor, for which the only excuse is a belief, not justified by the facts, that the debtor was all that time insolvent, is a bar to relief in equity, independently of any statute of limitations. *Maxwell v. Kennedy*, 8 How. 210, 12: 1051
Cited in *Landsdale v. Smith*, 106 U. S. 392, 27 L. ed. 219, 1 Sup. Ct. Rep. 350—*Pulliam v. Pulliam*, 10 Fed. 26—*United States v. Beebe*, 4 McCrary, 16, 17 Fed. 39—*Kittle v. Hall*, 29 Fed. 511—*Woodmanse & H. Mfg. Co. v. Williams*, 15 C. C. A. 524, 37 U. S. App. 109, 68 Fed. 493—*Coles v. Vanneman*, 51 N. J. Eq. 329, 18 Atl. 468—*Livingston v. Wells*, 8 S. C. N. S. 350.

Fraud.

210. Long acquiescence and laches can be excused only by showing some actual hindrance or impediment caused by the fraud or concealment of the opposite party, which will appeal to the conscience of the chancellor. *Wagner v. Baird*, 7 How. 234, 12: 681

Cited in *Hammond v. Hopkins*, 143 U. S. 263, 36 L. ed. 150, 12 Sup. Ct. Rep. 418—*Abraham v. Ordway*, 158 U. S. 421, 30 L. ed. 1039, 15 Sup. Ct. Rep. 894—*Scheftel v. Hays*, 7 C. C. A. 312, 19 U. S. App. 220, 58 Fed. 460—*Halsey v. Cheney*, 15 C. C. A. 662, 34 U. S. App. 50, 68 Fed. 768—*Richardson v. Olivier*, 53 L.R.A. 115, 44 C. C. A. 472, 105 Fed. 281—*Potts v. Alexander*, 118 Fed. 887—*Johnson v. Toulmin*, 18 Ala. 62, 52 Am. Dec. 212—*Martin v. Branch Bank*, 31 Ala. 122—*Woolfolk v. Beatty*, 18 Ga. 524—*Harlow v. Lake Superior Iron Co.* 41 Mich. 500, 2 N. W. 913—*Clark v. Potter*, 32 Ohio St. 61—*Bargamin v. Clarke*, 20 Gratt. 553—*Scott v. Isaacs*, 85 Va. 719, 8 S. E. 678—*Pusey v. Gardner*, 21 W. Va. 485—*Swann v. Thayer*, 36 W. Va. 54, 14 S. E. 423—*Balley v. Calfee*, 49 W. Va. 646, 39 S. E. 642.

211. Absence of complainant from the state, and late discovery of the fraud, are excuses for delay. *Hallett v. Collins*, 10 How. 174, 13: 376
Cited in *Andrae v. Redfield*, 98 U. S. 238, 25 L. ed. 163—*Amory v. Lawrence*, 3 Cliff. 532, Fed. Cas. No. 336—*Sears v. Hicklin*, 13 Colo. 154, 21 Pac. 1022.

212. Ignorance of a fraud is no excuse for laches, where the circumstances of the fraud were public and generally known. *Kiely v. McGlynn* (Broderick's Will) 21 Wall. 503, 22: 599

213. The *cestui que trust* does not lose his rights by laches where the evidence shows that the delay was due to the fault and mis-

statements of the trustee. *Loring v. Palmer*, 118 U. S. 321, 6 Sup. Ct. Rep. 1073, 30: 211

Cited in Wood v. Perkins, 64 Fed. 820—*Duke v. State*, 56 Ark. 497, 20 S. W. 600.

Knowledge or ignorance.

Knowledge or Ignorance of Fraud, see *supra*, 133-138, 210-212.

See also *supra*, 191.

214. There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend. *Halstead v. Grinnan*, 152 U. S. 412, 14 Sup. Ct. Rep. 641, 38: 495

Cited in Alsop v. Riker, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. Rep. 162—*Lasher v. McCreery*, 66 Fed. 841—*Godkin v. Cohn*, 25 C. C. A. 564, 53 U. S. App. 4, 80 Fed. 466—*Wheeling Bridge & Terminal R. Co. v. Reymann Brewing Co.* 32 C. C. A. 577, 61 U. S. App. 531, 90 Fed. 195—*Ritchie v. Sayers*, 100 Fed. 537—*Gunnison v. Chicago, M. & St. P. R. Co.* 117 Fed. 646—*Murphy v. Kirby*, 3 App. D. C. 217—*Pryor v. McIntire*, 7 App. D. C. 431—*Somerset R. Co. v. Pierce*, 88 Me. 93, 33 Atl. 772—*Trowbridge v. Stone*, 42 W. Va. 459, 26 S. E. 363.

215. Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry. *Johnston v. Standard Min. Co.* 148 U. S. 360, 13 Sup. Ct. Rep. 585, 37: 480

Distinguished in Wood v. Perkins, 57 Fed. 261. *Cited in Johnson v. Atlantic, G. & W. I. Transit Co.* 156 U. S. 648, 39 L. ed. 566, 15 Sup. Ct. Rep. 520—*Streight v. Junk*, 8 C. C. A. 140, 16 U. S. App. 608, 59 Fed. 323—*Mudstill Min. Co. v. Watrous*, 9 C. C. A. 438, 22 U. S. App. 12, 61 Fed. 186—*Wood v. Perkins*, 64 Fed. 818—*E. Bement & Sons v. La Dow*, 66 Fed. 195—*Swift v. Smith*, 25 C. C. A. 158, 49 U. S. App. 181, 79 Fed. 713—*Kessler v. Ensley Land Co.* 123 Fed. 567—*Graff v. Portland Town & Mineral Co.* 12 Colo. App. 116, 54 Pac. 854—*Gunderson v. Illinois Trust & Sav. Bank*, 100 Ill. App. 472—*Horner v. Lowe*, 159 Ind. 411, 64 N. E. 218—*Coleman v. Akers*, 87 Minn. 494, 92 N. W. 408—*Mantle v. Speculator Min. Co.* 27 Mont. 478, 71 Pac. 665—*Patterson v. Hewitt*, 11 N. M. 28, 55 L.R.A. 666, 66 Pac. 552—*Loomis v. Rosenthal*, 34 Or. 601, 57 Pac. 55—*Rabt v. Sevier Min. & Mill. Co.* 18 Utah, 303, 54 Pac. 889—*Hatch v. Lucky Bill Min. Co.* 25 Utah, 418, 71 Pac. 865—*Rogers v. Van Nortwick*, 87 Wis. 430, 58 N. W. 757—*Melms v. Pabst Brewing Co.* 93 Wis. 174, 57 Am. St. Rep. 899, 66 N. W. 518.

216. If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest and knows that proceedings are pending the result of which may be prejudicial to such interest, he is bound to look into such proceedings so far as to see that no action is taken to his detriment. *Foster*

v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 13 Sup. Ct. Rep. 28, 36: 899

Cited in Johnston v. Standard Min. Co. 148 U. S. 370, 37 L. ed. 486, 13 Sup. Ct. Rep. 585—*Halstead v. Grinnan*, 152 U. S. 416, 38 L. ed. 497, 14 Sup. Ct. Rep. 641—*Johnson v. Atlantic, G. & W. I. Transit Co.* 156 U. S. 648, 39 L. ed. 567, 15 Sup. Ct. Rep. 520—*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 698, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Sagadahoc Land Co. v. Ewing*, 13 C. C. A. 86, 31 U. S. App. 102, 65 Fed. 703—*Hubbard v. Manhattan Trust Co.* 30 C. C. A. 528, 57 U. S. App. 730, 87 Fed. 59—*Nash v. Ingalls*, 41 C. C. A. 548, 101 Fed. 648—*Potts v. Alexander*, 118 Fed. 887—*Gunderson v. Illinois Trust & Sav. Bank*, 100 Ill. App. 472—*Lafferty v. Lafferty*, 42 W. Va. 792, 26 S. E. 262—*Herold v. Barlow*, 47 W. Va. 764, 36 S. E. 8.

217. The interests of public order and tranquility demand that parties shall acquaint themselves with their rights within a reasonable time, and, although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable. *Wetzel v. Minnesota R. Transfer Co.* 169 U. S. 237, 18 Sup. Ct. Rep. 307, 42: 730

Cited in Curtis v. Lakin, 36 C. C. A. 226, 94 Fed. 255.

218. Laches is not excused by ignorance of the facts, resulting from residence in a remote and secluded region. *Kieley v. McGlynn (Broderick's Will)* 21 Wall. 503, 22: 599

Cited in Livingston v. Ore Bed, 16 Blatchf. 561, Fed. Cas. No. 8,418—*Kemp v. Nickerson*, 66 Fed. 683—*Dugan v. O'Donnell*, 68 Fed. 990—*Elder v. McClaskey*, 17 C. C. A. 265, 37 U. S. App. 1, 70 Fed. 542—*Rudland v. Mastic*, 77 Fed. 690—*Hale v. Coffin*, 114 Fed. 578—*Re Reese*, 115 Fed. 994—*Hale v. Coffin*, 57 C. C. A. 532, 120 Fed. 474—*Kessler v. Ensley Co.* 123 Fed. 566—*Castro v. Gell*, 110 Cal. 296, 52 Am. St. Rep. 84, 42 Pac. 804—*De Mares v. Gilpin*, 15 Colo. 84, 24 Pac. 568—*Quirk v. Liebert*, 12 App. D. C. 400—*Townsend v. Elchelberger*, 51 Ohio St. 216, 38 N. E. 207—*Ransome v. Bearden*, 50 Tex. 127—*Merchants' Nat. Bank v. Spates*, 41 W. Va. 32, 56 Am. St. Rep. 828, 23 S. E. 681—*Lafferty v. Lafferty*, 42 W. Va. 792, 26 S. E. 262—*Seymour v. Alkire*, 47 W. Va. 307, 34 S. E. 953—*Herold v. Barlow*, 47 W. Va. 765, 36 S. E. 8—*Weadock v. Ray*, 111 Wis. 493, 87 N. W. 477.

219. Where the agent of the original proprietor resided in the neighborhood, and had knowledge of the existence of a ferry, by public statute, for thirty-eight years, it is too late for the original proprietor to interfere with the ferry privilege under claim of prior right. *Bowman v. Wathen*, 1 How. 189, 11: 97

Cited in Jeffersonville v. The John Shallcross, 35 Ind. 21—*Lippencott v. Allander*, 27 Iowa, 464, 1 Am. Rep. 299.

220. Unexplained delay for seventeen years in bringing suit for the known use of a patent shows such laches as will disentitle one to a preliminary injunction. *Keyes v. Eureka Consol. Min. Co.* 158 U. S. 150, 15 Sup. Ct. Rep. 772, 39: 929

Cited in Russell v. Kern, 16 C. C. A. 157, 34

U. S. App. 90, 69 Fed. 97—Blauvelt v. Interior Conduit & Insulation Co. 26 C. C. A. 246, 51 U. S. App. 291, 80 Fed. 909—McDonald v. Miller, 84 Fed. 345—Meyrowitz Mfg. Co. v. Eccleston, 98 Fed. 440—Miller v. Schwarner, 130 Fed. 563.

Indians.

221. That plaintiffs are members of an Indian nation is not a sufficient excuse for laches. *Felix v. Patrick*, 145 U. S. 317, 12 Sup. Ct. Rep. 862. 36: 719
Cited in *Schrimscher v. Stockton*, 183 U. S. 296, 46 L. ed. 206, 22 Sup. Ct. Rep. 107—*Hannon v. Taylor*, 57 Kan. 15, 45 Pac. 51.

Assertion of claim; institution of suit.

222. The mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded. *Mackall v. Casilear*, 137 U. S. 556, 11 Sup. Ct. Rep. 178, 34: 776

Cited in *Gildersleeve v. New Mexico Min. Co.* 161 U. S. 579, 40 L. ed. 814, 16 Sup. Ct. Rep. 663—*Whitney v. Fox*, 166 U. S. 648, 41 L. ed. 1140, 17 Sup. Ct. Rep. 713—*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 697, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Naddo v. Bardon*, 2 C. C. A. 341, 4 U. S. App. 642, 51 Fed. 498—*Kemp v. Nickerson*, 66 Fed. 683—*Van Euren v. Stocking*, 86 Mich. 252, 49 N. W. 50—*Wilson v. St. Louis & W. R. Co.* 120 Mo. 57, 25 S. W. 527—*Loomis v. Rosenthal*, 34 Or. 601, 57 Pac. 55—*Bruner v. Finley*, 187 Pa. 407, 41 Atl. 334—*Prewitt v. Bunch*, 101 Tenn. 740, 50 S. W. 748—*Scott v. Crouch*, 24 Utah. 389, 67 Pac. 1068—*Rogers v. Van Nortwick*, 87 Wis. 429, 58 N. W. 757—*Melms v. Pabst Brewing Co.* 93 Wis. 174, 57 Am. St. Rep. 899, 66 N. W. 518.

223. The mere institution of a suit does not of itself relieve a person from the charge of laches; and if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun. *Johnston v. Standard Min. Co.* 148 U. S. 360, 13 Sup. Ct. Rep. 585. 37: 480
Cited in *Halstead v. Grinnan*, 152 U. S. 416, 38 L. ed. 497, 14 Sup. Ct. Rep. 641—*Willard v. Wood*, 164 U. S. 525, 41 L. ed. 540, 17 Sup. Ct. Rep. 176—*O'Brien v. Wheelock*, 184 U. S. 482, 46 L. ed. 651, 22 Sup. Ct. Rep. 354—*Sagadahoc Land Co. v. Ewing*, 13 C. C. A. 86, 31 U. S. App. 102, 65 Fed. 705—*Lumley v. Wabash R. Co.* 71 Fed. 28—*O'Brien v. Wheelock*, 37 C. C. A. 337, 95 Fed. 911—*Hagerman v. Bates*, 24 Colo. 80, 49 Pac. 139—*Hagerman v. Bates*, 5 Colo. App. 404, 38 Pac. 1100—*Re Crum*, 7 N. D. 321, 75 N. W. 257—*Taylor v. Carroll*, 89 Md. 36, 44 L.R.A. 481, 42 Atl. 920—*Waring Bros. v. Pennsylvania R. Co.* 25 Pittsb. L. J. N. S. 271, 12 Lanc. L. Rev. 366, 38 W. N. C. 522, 16 Pa. Co. Ct. 286, 16 Pa. Co. Ct. 59—*Carberry v. German Ins. Co.* 86 Wis. 329, 56 N. W. 920.

224. In a suit by a creditor of a state to subject debts due to it to the payment of his claim, brought nineteen years after the payment of such debts was due to it, the fact that much litigation had intervened during those years, and that bankruptcy proceedings were pending to which plaintiff was not a party, is no answer to the de-

fense of staleness of the claim. *Cressey v. Meyer*, 138 U. S. 525, 11 Sup. Ct. Rep. 387, 34: 1018

225. The mere fact that a bill is left on the files will not relieve from the effect of laches where there is failure in diligent prosecution. *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. Rep. 176, 41: 531

c. By and Against Whom Available.

1. In General.

To Whom Laches Imputable, see *supra*, 79, 81, 86, 100-109.

Laches as Bar against Municipality, see *supra*, 86.

When Laches Imputable to Heirs, see *supra*, 198, 199.

Effect of Disability on Running of Statute, see *infra*, II. 1.

See also Pleading, 707.

Editorial note.

[Estoppel to plead defense. 63 L.R.A. 193.]

To whom available.

See also Husband and Wife, 103.

226-7. The right to plead the statute of limitations is a personal privilege, of which the debtor may avail himself or not, as he may choose. *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. Rep. 1109, 30: 1105
Cited in *Blair v. Silver Peak Mines*, 84 Fed. 740—*Fish v. Farwell*, 160 Ill. 242, 43 N. E. 367—*Roberts v. Tunnell*, 65 Ill. App. 193—*Sheppard's Estate*, 180 Pa. 61, 36 Atl. 422—*Hartford v. School Dist. No. 13*, 69 Vt. 149, 37 Atl. 252—*Bettman v. Cowley*, 19 Wash. 222, 40 L.R.A. 821, 53 Pac. 52.

228. A defense of the statute of limitations, interposed by an administrator, cannot avail those who represent the real estate, and who are the only parties in interest, in an action to subject the real estate to the payment of a debt. *Ingle v. Jones*, 9 Wall. 486, 19: 621

229. Under the charter of a bank giving summary process for the collection of debts, but allowing all defenses except those for mere delay, the defendant may avail himself of the statute of limitations; and the issuing of the process is equivalent to the commencement of an action. *Bank of Columbia v. Sweeney*, 2 Pet. 671, 7: 557

230. A defendant who removes from one county to another, in Virginia, is not thereby prevented from pleading the statute of limitations, unless the plaintiff has been, by such removal, actually defeated or obstructed in bringing or maintaining his action. *Wilson v. Koontz*, 7 Cranch, 202, 3: 315
Cited in *McDonald v. Underhill*, 10 Bush. 590—*Nelson v. Beveridge*, 21 Mo. 25—*Brown v. Butler*, 87 Va. 625, 13 S. E. 71—*Cheatham v. Alstrop*, 97 Va. 461, 34 S. E. 57.

231. [A defendant who has lived in Pennsylvania six years can plead the statute of limitations against a citizen of another

state. *Ward v. Hallam* (Pa. Sup. Ct.) 2 Dall. 217, 1: 355]

Agents.

232. Agents, when treated as principals, may rely upon the protection of the statutes of limitation. *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. Rep. 418, 37: 259

Mortgagees or grantees.

Purchaser of Mortgaged Premises, see *infra*, 235, 236.

233. A mortgagee not having the title to real estate in Georgia, if out of possession, cannot plead the statute of limitations as a defense to debts secured by prior encumbrances. *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. Rep. 1109, 30: 1105

234. A mortgagee out of possession, in foreclosing his mortgage, cannot avail himself of the statute of limitations to attack a prior foreclosure of such prior encumbrances. *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. Rep. 1109, 30: 1105
Cited in Gault v. Equitable Trust Co. 100 Ky. 583, 38 S. W. 1065.

Purchasers.

State Decision as Binding Federal Courts, see Courts, 2042.

235. A grantee of mortgaged property, to avail himself of the Texas statute of limitations in a foreclosure suit, must show that the mortgaged debt is barred as between the parties to it. *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. Rep. 408, 27: 682

236. A party purchasing, or in possession of, mortgaged property, may, under the Georgia law, plead the statute of limitations against the mortgage debt, although his right arose subsequent to such debt. *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. Rep. 1109, 30: 1105
Distinguished in Hanchett v. Blair, 41 C. C. A. 84, 100 Fed. 825.

237. An alienee *pendente lite* (ejectment) cannot avail himself of the statute of limitations unless the alienor could do so, but is bound by the proceedings against his alienor. *Walden v. Bodley*, 9 How. 34, 13: 36

238. The prescription of five years, under art. 3543 of the Civil Code of Louisiana, against all informalities connected with or growing out of a public sale by a person authorized to sell at auction, may be pleaded by one who purchases in good faith at the sale of an executor or a register of wills, and holds by a just title. *Davis v. Gaines*, 104 U. S. 386, 26: 757

2. Corporations.

Federal Courts Following State Decision on Construction of Statute of Limitation, see Courts, 2040.

239. A corporation in New York, whether by law capable of taking and holding real estate or not, can set up the defense of adverse possession under the statute of lim-

itations. *Harpending v. Reformed Protestant Dutch Church*, 16 Pet. 455, 10: 1029
Distinguished in Re McGraw, 11 N. Y. 101, 2 L.R.A. 394, 19 N. E. 233.

Cited in House of Mercy v. Institution of Mercy, 3 Bush, 384—*Davidson College v. Chambers*, 56 N. C. (3 Jones Eq.) 281.

240. In New York the statute of limitations does not operate as a defense to a foreign corporation, although it has property in the state, and an office there, and resident directors, officers, and agents within the state. *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 22: 337

Cited in Hanchett v. Blair, 41 C. C. A. 86, 100 Fed. 827—*Pennsylvania Co. v. Sloan*, 1 Ill. App. 373—*Wall v. Chicago & N. W. R. Co.* 69 Iowa, 502, 29 N. W. 427—*Williams v. Metropolitan Street R. Co.* 68 Kan. 23, 64 L.R.A. 798, 104 Am. St. Rep. 377, 74 Pac. 600—*Slidway v. Missouri Land & Live Stock Co.* 187 Mo. 673, 86 S. W. 150—*Larson v. Aultman & T. Co.* 86 Wis. 285, 39 Am. St. Rep. 893, 56 N. W. 915.

241. The statutes of limitation of Nevada do not protect foreign corporations. *Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25: 54†
Cited in Taylor v. Union P. R. Co. 123 Fed. 156.

Editorial note.

[Right of foreign corporation to plead statute. 18 L.R.A. 524.]

3. District of Columbia.

242. The District of Columbia is embraced in the terms of the statute of limitations in force in that district. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 10 Sup. Ct. Rep. 19, 33: 231
Cited in District of Columbia v. Bailey, 171 U. S. 175, 43 L. ed. 125, 18 Sup. Ct. Rep. 868—*District of Columbia v. Metropolitan R. Co.* 8 App. D. C. 369.

4. States.

Laches as Bar to Relief, see *supra*, 81.
Adverse Possession against, see Adverse Possession, I. h.
See also *infra*, 495.

243. Statutes of limitation do not run against a state. *Lindsey v. Miller*, 6 Pet. 666, 8: 538
Cited in United States v. Insley, 130 U. S. 266, 32 L. ed. 969, 9 Sup. Ct. Rep. 485—*Redfield v. Parks*, 132 U. S. 244, 33 L. ed. 329, 10 Sup. Ct. Rep. 83—*United States v. Dalles Military Road Co.* 140 U. S. 632, 35 L. ed. 571, 11 Sup. Ct. Rep. 988—*United States v. Winona & St. P. R. Co.* 15 C. C. A. 119, 32 U. S. App. 306, 67 Fed. 971—*Laughton v. Nadeau*, 75 Fed. 794—*Wood v. Missouri, K. & T. R. Co.* 11 Kan. 349—*Crane v. Reeder*, 21 Mich. 77, 4 Am. Rep. 430—*Cook v. Alpin*, 79 Mich. 108, 44 N. W. 420—*Armstrong v. Dalton*, 15 N. C. (4 Dev. L.) 570—*Sulphen v. Norris*, 44 Tex. 243.

244. Statutes of limitations do not embrace the state, unless it is expressly designated, or necessarily included by the nature

of the mischiefs to be remedied. *Gibson v. Chouteau*, 13 Wall. 92, 20: 534
Cited in Hays v. United States, 175 U. S. 260, 44 L. ed. 155, 20 Sup. Ct. Rep. 80—*United States v. Rand*, 4 Sawy. 273, Fed. Cas. No. 16,116—*Moore v. Miller*, 43 Fed. 349—*Stimson Land Co. v. Rawson*, 62 Fed. 430—*McCune v. Essig*, 122 Fed. 591—*Wilhoit v. Tubbs*, 83 Cal. 287, 23 Pac. 386—*People ex rel. Stone v. Jeffers*, 126 Cal. 301, 58 Pac. 704—*Catlett v. People*, 151 Ill. 23, 37 N. E. 855—*State v. Lake St. Clair Fishing & Shooting Club*, 127 Mich. 599, 87 N. W. 117—*Houston & T. C. R. Co. v. Travis County*, 62 Tex. 17—*Brown v. Sneed*, 77 Tex. 475, 14 S. W. 248.

245. Although a state may enforce all obligations due to it, no matter what period of time may have intervened, yet that right is personal to the sovereign, and does not pass to any of its creditors; and its intervention and appearance in a suit brought by a creditor against its debtors does not give to such creditor its sovereign exemption from liability to the statute of limitations and the defense of laches. *Cressey v. Meyer*, 138 U. S. 525, 11 Sup. Ct. Rep. 387, 34: 1018

Editorial notes.

Neither time nor statute of limitations runs against the state. 20: 534

[Claims against state as affected by. 42 L.R.A. 67.]

5. United States.

Laches as Bar, see *supra*, 79, 100-105, 135, 142.

When Action on Claim against Government Barred, see *infra*, III. k.

When Limitation Begins to Run to Recover Public Land, see *infra*, 387, 388.

Removal of Bar, see *infra*, 579-581.

Adverse Possession against, see *Adversary Possession*, I. h.

Authority to Waive Statute, see *United States*, 122.

See also *Estoppel*, 303.

Limitations not binding on United States.

246. Statutes of limitations do not run against the United States. *Gibson v. Chouteau*, 13 Wall. 92, 20: 534

Distinguished in Moran v. Horsky, 178 U. S. 214, 44 L. ed. 1042, 20 Sup. Ct. Rep. 836—*Schrimpscher v. Stockton*, 183 U. S. 299, 46 L. ed. 207, 22 Sup. Ct. Rep. 107.

Cited in United States v. Thompson, 98 U. S. 488, 25 L. ed. 195—*Steele v. United States*, 113 U. S. 135, 28 L. ed. 954, 5 Sup. Ct. Rep. 396—*United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 125, 30 L. ed. 83, 6 Sup. Ct. Rep. 1006—*United States v. Insley*, 130 U. S. 266, 32 L. ed. 969, 9 Sup. Ct. Rep. 495—*Redfield v. Parks*, 132 U. S. 246, 33 L. ed. 330, 10 Sup. Ct. Rep. 83—*United States v. Dalles Military Road Co.* 140 U. S. 632, 35 L. ed. 571, 11 Sup. Ct. Rep. 988—*Hays v. United States*, 175 U. S. 260, 44 L. ed. 155, 20 Sup. Ct. Rep. 80—*Kean v. Calumet Canal & Improv. Co.* 190 U. S. 486, 47 L. ed. 1147, 23 Sup. Ct. Rep. 651—420 Min. Co. v. Bullion Min. Co. 3 Sawy. 658, Fed. Cas. No. 4,989—*Shuffeton v. Nelson*, 2 Sawy. 543,

Fed. Cas. No. 12,822—*Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 453, Fed. Cas. No. 14,370—*United States v. Rand*, 4 Sawy. 273, Fed. Cas. No. 16,116—*United States v. Beebe*, 4 McCrary, 13, 17 Fed. 38—*United States v. Southern Colorado Coal & Town Co.* 5 McCrary, 573, 18 Fed. 279—*United States v. Adams*, 54 Fed. 116—*United States v. Winona & St. P. R. Co.* 15 C. C. A. 119, 32 U. S. App. 306, 67 Fed. 911—*Pond v. United States*, 49 C. C. A. 589, 111 Fed. 996—*Re Stoevers*, 127 Fed. 397—*Nichols v. Council*, 51 Ark. 83, 14 Am. St. Rep. 20, 9 S. W. 305—*Gardiner v. Miller*, 47 Cal. 574—*Jatunn v. Smith*, 95 Cal. 157, 30 Pac. 200—*Wood v. Missouri, K. & T. R. Co.* 11 Kan. 349—*McGannon v. Straightliege*, 32 Kan. 525, 4 Pac. 1042—*Hammond v. Johnston*, 93 Mo. 222, 6 S. W. 83—*Cummings v. Powell*, 97 Mo. 537, 10 S. W. 819—*Smith v. McCorkle*, 105 Mo. 142, 16 S. W. 602—*Hammond v. Coleman*, 4 Mo. App. 315—*Gibson v. Chouteau*, 7 Mo. App. 3—*Mills v. Traver*, 35 Neb. 296, 53 N. W. 67—*Cook v. McCord*, 13 Okla. 510, 75 Pac. 294—*Steele v. Boley*, 6 Utah, 311, 22 Pac. 311.

247. Neither the statute of limitations nor the equitable doctrine of lapse of time can have any effect against the United States. *Simmons v. Ogle*, 105 U. S. 271, 26: 1087

Cited in United States v. Verdier, 164 U. S. 219, 41 L. ed. 409, 17 Sup. Ct. Rep. 42—*Tegarden v. LeMarchel*, 129 Fed. 489—*Nichols v. Council*, 51 Ark. 83, 14 Am. St. Rep. 20, 9 S. W. 305—*Mills v. Traver*, 35 Neb. 296, 53 N. W. 67.

248. Statutes of limitation have no force in actions brought by the Federal government to enforce a public right or to assert a public interest. *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. Rep. 1083, 32: 121
Distinguished in United States v. Adams, 54 Fed. 115.

Cited in United States v. Insley, 130 U. S. 265, 32 L. ed. 969, 9 Sup. Ct. Rep. 485—*United States v. American Bell Teleph. Co.* 159 U. S. 554, 40 L. ed. 258, 16 Sup. Ct. Rep. 69—*Maine v. United States*, 36 Ct. Cl. 558—*United States v. Southern P. R. Co.* 39 Fed. 142—*United States v. Winona & St. P. R. Co.* 15 C. C. A. 119, 32 U. S. App. 306, 67 Fed. 971—*State ex rel. Goodman v. Halter*, 149 Ind. 294, 47 N. E. 665, 40 N. E. 7—*State ex rel. West v. Des Moines*, 96 Iowa, 536, 31 L.R.A. 102, 59 Am. St. Rep. 381, 65 N. W. 818.

249. A state statute of limitations cannot bar the United States. *United States v. Thompson*, 98 U. S. 486, 25: 194

Armstrong v. Morrill, 14 Wall. 120, 20: 765
Cited in United States v. Lee, 106 U. S. 227, 27 L. ed. 184, 1 Sup. Ct. Rep. 240—*United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 125, 30 L. ed. 83, 6 Sup. Ct. Rep. 1006—*United States v. Insley*, 130 U. S. 266, 32 L. ed. 969, 9 Sup. Ct. Rep. 485—*Redfield v. Parks*, 132 U. S. 249, 33 L. ed. 331, 10 Sup. Ct. Rep. 83—*United States v. Verdier*, 164 U. S. 219, 41 L. ed. 409, 17 Sup. Ct. Rep. 42—*Maine v. United States*, 36 Ct. Cl. 558—*United States v. Little Miami, C. & X. R. Co.* 1 Fed. 701—*United States v. Beebe*, 4 McCrary, 13, 17 Fed. 38—*United States v. Southern Colorado Coal & Town Co.* 5 McCrary, 573, 18 Fed. 279—*United States v. Clinton Nat. Bank*, 28 Fed. 358—*United States v. Adams*, 54 Fed. 116—*United States*

v. Belknap, 73 Fed. 20—Bartlett v. Ambrose, 24 C. C. A. 401, 42 U. S. App. 381, 78 Fed. 843—United States v. Fidelity Trust Co. 58 C. C. A. 48, 121 Fed. 772—Tye Consol. Min. Co. v. Langstedt, 1 Alaska, 447—A. P. Cook Co. v. Applin, 79 Mich. 108, 44 N. W. 420—Brown v. Sneed, 77 Tex. 474, 14 S. W. 248—Stanley v. Schwalby, 85 Tex. 353, 19 S. W. 264.

250. A state statute of limitations cannot bar the United States. The judiciary act of 1789, that the laws of the several states shall be regarded as rules of decision in the courts of the United States, does not apply in such a case. *United States v. Thompson*, 98 U. S. 486, 25: 194

Cited in *Carlisle v. Cooper*, 12 C. C. A. 237, 26 U. S. App. 240, 64 Fed. 474—*United States v. Winona & St. P. R. Co.* 15 C. C. A. 119, 32 U. S. App. 306, 67 Fed. 971—*Pond v. United States*, 49 C. C. A. 589, 111 Fed. 996.

251. No state statute of limitations can affect the rights of the United States; it is not amenable to the statute of limitations or the doctrine of laches. *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. Rep. 83, 33: 327 *Cited in* *Hays v. United States*, 175 U. S. 260, 44 L. ed. 155, 20 Sup. Ct. Rep. 80—*Jopling v. Chachere*, 107 La. 528, 32 So. 243—*Horst v. Shea*, 23 Mont. 397, 59 Pac. 364.

252. Where money of the United States has been received by one public agent from another public agent, the United States has a right to treat the payer as its agent in the transaction, by making the payee its debtor; and to an action against him for money had and received the statute of limitations is no bar. *United States v. Buford*, 3 Pet. 12, 7: 585

Legal title in United States.

See also *infra*, 579.

253. Where the legal title to land is in the United States, the statute of limitations raises no bar to an action by the government, or by its grantee who receives its conveyance within the statutory period of limitations, to recover possession. *Doe ex dem. Oaksmith v. Johnston* (*Oaksmith v. Johnston*) 92 U. S. 343, 23: 682 *Magwire v. Tyler*, 8 Wall. 650, 19: 320 *Cited in* *Jopling v. Chachere*, 107 La. 528, 32 So. 243.

Public policy.

254. It is on the principle of public policy that the United States have been held not bound by statutes of limitation unless intention that they should be so bound is clearly manifested. *United States v. American Bell Teleph. Co.* 159 U. S. 546, 16 Sup. Ct. Rep. 69, 40: 255 *Cited in* *United States v. American Lumber Co.* 29 C. C. A. 436, 56 U. S. App. 655, 85 Fed. 832—*Pond v. United States*, 49 C. C. A. 589, 111 Fed. 996.

When statute binding.

255. The United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations unless Congress has clearly manifested its intention that they should be so bound.

Stanley v. Schwalby, 147 U. S. 508, 13 Sup. Ct. Rep. 418, 37: 259 *Cited in* *United States v. American Bell Teleph. Co.* 159 U. S. 554, 40 L. ed. 258, 16 Sup. Ct. Rep. 69—*Pond v. United States*, 49 C. C. A. 589, 111 Fed. 996—*El Paso v. Ft. Dearborn Nat. Bank*, 96 Tex. 500, 74 S. W. 21.

256. The United States is not bound by any statute of limitations, or barred by any laches of its officers, however gross, in a suit brought by it as a sovereign government to enforce a public right or to assert a public interest, unless Congress clearly manifested its intention that it should be so bound; and this doctrine is applicable with equal force, not only to the question of a statute of limitations in a suit at law, but also to the question of laches in a suit in equity. *United States v. Insley*, 130 U. S. 263, 9 Sup. Ct. Rep. 485, 32: 968

Cited in *United States v. Dalles Military Road Co.* 140 U. S. 632, 35 L. ed. 571, 11 Sup. Ct. Rep. 988—*United States v. Des Moines Nav. & R. Co.* 142 U. S. 538, 35 L. ed. 1107, 12 Sup. Ct. Rep. 308—*Stanley v. Schwalby*, 147 U. S. 515, 37 L. ed. 262, 13 Sup. Ct. Rep. 418—*United States v. American Bell Teleph. Co.* 167 U. S. 265, 42 L. ed. 163, 17 Sup. Ct. Rep. 809—*Maine v. United States*, 36 Ct. Cl. 558—*United States v. Bee*, 4 C. C. A. 221, 7 U. S. App. 459, 54 Fed. 114—*United States v. Adams*, 54 Fed. 116—*United States v. Insley*, 4 C. C. A. 208, 12 U. S. App. 125, 54 Fed. 222—*United States v. Willamette Valley & C. M. Wagon-Road Co.* 54 Fed. 810—*Church of Christ v. Church of Jesus Christ*, L. D. S. 17 C. C. A. 398, 36 U. S. App. 379, 71 Fed. 251—*United States v. Devereux*, 32 C. C. A. 568, 61 U. S. App. 548, 90 Fed. 186—*Pond v. United States*, 49 C. C. A. 588, 111 Fed. 995—*State ex rel. West v. Des Moines*, 96 Iowa, 536, 31 L.R.A. 192, 59 Am. St. Rep. 381, 65 N. W. 818—*Young v. Charnquist*, 114 Iowa, 122, 86 N. W. 205—*State v. Sponaugh*, 45 W. Va. 431, 43 L.R.A. 735, 32 S. E. 283.

257. The Federal government asserting rights vested in it as a sovereign is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it should be so bound. The right of the United States to sue on bonds and coupons purchased, before the statute of limitations had commenced to run against the right of any holder to sue thereon, with money held in trust received from the sale of lands ceded to the Chickasaw Nation of Indians, is not barred by the statute of limitations of the state of Tennessee. *United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 120, 6 Sup. Ct. Rep. 1006, 30: 81 *Cited in* *United States v. Insley*, 130 U. S. 263, 32 L. ed. 969, 9 Sup. Ct. Rep. 485—*United States v. Des Moines Nav. & R. Co.* 142 U. S. 538, 35 L. ed. 1107, 12 Sup. Ct. Rep. 308—*Stanley v. Schwalby*, 147 U. S. 514, 37 L. ed. 262, 13 Sup. Ct. Rep. 418—*United States v. American Bell Teleph. Co.* 159 U. S. 554, 40 L. ed. 258, 16 Sup. Ct. Rep. 69—*United States v. American Bell Teleph. Co.* 167 U. S. 265, 42 L. ed. 163, 17 Sup. Ct. Rep. 809—*United States v. Houston*, 48 Fed. 210—*United States v. Bee*, 4 C. C. A. 221, 7 U. S. App. 459, 54 Fed. 114—*United States v. Adams*, 54 Fed. 116—*United States v. Willamette Valley & C. M. Wagon-Road*

Co. 54 Fed. 811—United States v. Winona & St. P. R. Co. 15 C. C. A. 119, 32 U. S. App. 306, 67 Fed. 971—United States v. Belknap, 73 Fed. 20—United States v. Devereux, 32 C. C. A. 568, 61 U. S. App. 548, 90 Fed. 186—Pond v. United States, 49 C. C. A. 589, 111 Fed. 996—State v. Burk, 63 Ark. 57, 37 S. W. 406—State ex rel. Goodman v. Halter, 149 Ind. 294, 47 N. E. 665—A. P. Cook Co. v. Alpin, 79 Mich. 108, 44 N. W. 420—Stevens v. Lake George & M. River R. Co. 82 Mich. 433, 46 N. W. 730.

258. The United States is not bound by the statute of limitations, unless the language is such as to show clearly that such was the intent of the act, nor barred by the laches or negligence of its officers, in suits to enforce rights or protect interests vested in it as a sovereign government. *United States v. Knight*, 14 Pet. 301, 10: 465
Cited in *United States v. Herron*, 20 Wall. 255, 22 L. ed. 276—*Fink v. O'Neill*, 106 U. S. 280, 27 L. ed. 199, 1 Sup. Ct. Rep. 325—*United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 125, 30 L. ed. 83, 6 Sup. Ct. Rep. 1006—*United States v. Insley*, 130 U. S. 266, 32 L. ed. 969, 9 Sup. Ct. Rep. 485—*United States v. Herron*, 9 Nat. Bankr. Reg. 537—*United States v. Mallard*, 4 Ben. 464, Fed. Cas. No. 15,709—*United States v. Shaw*, 3 L.R.A. 234, 39 Fed. 436—*United States v. Winona & St. P. R. Co.* 15 C. C. A. 119, 32 U. S. App. 306, 67 Fed. 971—*State v. Williford*, 36 Ark. 159, 38 Am. Rep. 34—*Hendrick v. Posey*, 104 Ky. 19, 45 S. W. 525—*State v. Milburn*, 9 Gill, 109—*Washington County v. Clapp*, 83 Minn. 521, 86 N. W. 775—*Ren v. Driskell*, 11 Lea. 644—*State v. Polk*, 14 Lea. 5—*El Paso v. Ft. Dearborn Nat. Bank*, 96 Tex. 500, 74 S. W. 21—*Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co.* 110 Wis. 640, 84 Am. St. Rep. 948, 86 N. W. 592.

United States nominal party.

259. Where the government, although a nominal plaintiff, has no real interest in the litigation, the defense of the statute of limitations is available as between individuals. *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. Rep. 1083, 32: 121
Cited in *United States v. Marshall Silver Min. Co.* 129 U. S. 588, 32 L. ed. 738, 9 Sup. Ct. Rep. 343—*United States v. Des Moines Nav. & R. Co.* 142 U. S. 539, 35 L. ed. 1107, 12 Sup. Ct. Rep. 308—*Moran v. Horsky*, 178 U. S. 213, 44 L. ed. 1041, 20 Sup. Ct. Rep. 856—*United States v. Curtner*, 38 Fed. 7—*Kirby v. Lewis*, 39 Fed. 77—*Union P. R. Co. v. United States*, 15 C. C. A. 128, 32 U. S. App. 311, 67 Fed. 980—*United States v. Des Moines Valley R. Co.* 70 Fed. 439—*Church of Christ v. Church of Jesus Christ*, L. D. S. 17 C. C. A. 390, 36 U. S. App. 379, 71 Fed. 252—*United States v. Des Moines Valley R. Co.* 28 C. C. A. 271, 55 U. S. App. 246, 84 Fed. 43—*Pond v. United States*, 49 C. C. A. 588, 111 Fed. 995—*People ex rel. Moloney v. General Electric R. Co.* 172 Ill. 143, 50 N. E. 158—*Casey v. Anderson*, 17 Mont. 175, 42 Pac. 761—*Horsky v. Moran*, 21 Mont. 366, 53 Pac. 1064—*United States ex rel. Search v. Choctaw, O. & G. R. Co.* 3 Okla. 474, 41 Pac. 729.

260. Where the United States is only a nominal party, and the suit is brought in its name to enforce the right of individuals, and no interest of the government is in-

involved, the defense of laches and limitation, where the delay has been for thirty years and circumstances have changed will be sustained. *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 12 Sup. Ct. Rep. 308, 35: 1099

Cited in *United States v. American Bell Teleph. Co.* 167 U. S. 265, 42 L. ed. 163, 17 Sup. Ct. Rep. 809—*Moran v. Horsky*, 178 U. S. 214, 44 L. ed. 1041, 20 Sup. Ct. Rep. 856—*United States v. Des Moines Valley R. Co.* 70 Fed. 439—*United States v. Des Moines Valley R. Co.* 28 C. C. A. 271, 55 U. S. App. 246, 84 Fed. 43.

261. A suit brought by the United States on behalf of private persons, to cancel patents issued for land, although to correct a mistake of the Land Department which the government admits, is subject to the statute of limitations of the state in which the land is situated; and the exemption of the government from such statutes cannot apply. *Curtner v. United States*, 149 U. S. 662, 13 Sup. Ct. Rep. 985, 1041, 37: 890

Cited in *United States v. American Bell Teleph. Co.* 167 U. S. 265, 42 L. ed. 163, 17 Sup. Ct. Rep. 809—*United States v. Winona & St. P. R. Co.* 15 C. C. A. 120, 32 U. S. App. 306, 67 Fed. 972—*Union P. R. Co. v. United States*, 15 C. C. A. 128, 32 U. S. App. 311, 67 Fed. 980—*United States v. Des Moines Valley R. Co.* 28 C. C. A. 271, 55 U. S. App. 246, 84 Fed. 43—*Casey v. Anderson*, 17 Mont. 176, 42 Pac. 761—*Horsky v. Moran*, 21 Mont. 366, 53 Pac. 1064.

Statute available to United States.

United States as Holder of Note Barred when it Acquired the Same, see *United States*, 144.

262. The United States, although not bound by statutes of limitation, is entitled to take the benefit of them. *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. Rep. 418, 37: 259
Cited in *United States v. Schwalby*, 8 Tex. Civ. App. 683, 29 S. W. 90.

263. The United States and its officers are entitled to avail themselves of the statutes of limitations. *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. Rep. 754, 40: 960

d. To What Actions or Claims Applicable.

Statutory Actions of Assumpsit, see *Courts*, 417.

Suit to Recover Back Duties Paid, see *Duties*, 510, 511.

Action for Infringement of Trademark, see *Trademark*, 78-82.

See also *infra*, 547, 548; *Ejectment*, 17; *Judgment*, 1134.

264. The statute of limitations is applicable to actions in the Federal courts. *Ross v. Jones*, 22 Wall. 576, 22: 730
Cited in *Scovill v. Shaw*, 4 Cliff. 567, Fed. Cas. No. 12,552.

265. The act of Congress of June 11, 1864, concerning the limitation of actions, applies to causes and proceedings in the courts of

the states as well as to those in the courts of the United States. *Mayfield v. Richards*, 115 U. S. 137, 5 Sup. Ct. Rep. 1187, 29: 334 *Distinguished in Brown v. Walker*, 161 U. S. 623, 40 L. ed. 830, 5 Inters. Com. Rep. 387, 16 Sup. Ct. Rep. 644.

266. A statute remedy is within the purview of the statute of limitations. *Beatty v. Burnes*, 8 Cranch, 98, 3: 500 *Cited in Metropolitan R. Co. v. District of Columbia*, 132 U. S. 13, 33 L. ed. 236, 10 Sup. Ct. Rep. 19—*Brunswick Terminal Co. v. National Bank*, 88 Fed. 612—*Aldrich v. McClaine*, 45 C. C. A. 634, 106 Fed. 793—*Richards v. Bickley*, 13 Serg. & R. 402.

267. The statute of limitations has no application to a supplemental bill setting up strictly new matter arising after the filing of the original bill, in support of the relief therein prayed for. *Jenkins v. International Bank*, 127 U. S. 484, 8 Sup. Ct. Rep. 1196, 32: 189

268. A proceeding in mandamus cannot be deemed to be governed by the limitations prescribed by Okla. Code, §§ 18, 23, for civil actions, in view of the provision of § 694 of such Code, that pleadings in mandamus are to be construed and may be amended and issues joined and the proceedings had in the same manner as in a civil action, and of the declaration in § 687, that writs of mandamus may not be issued where there is a plain and adequate remedy in the ordinary course of law. *Duke v. Turner*, 204 U. S. 623, 27 Sup. Ct. Rep. 316, 51: 652

Editorial note.

In admiralty. 39: 1037

Anti-trust act.

269. The limitation of five years prescribed by U. S. Rev. Stat. § 1047, U. S. Comp. Stat. 1901, p. 727, for any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply to the action for threefold damages for injury to "business or property," authorized by the antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), § 7, in cases of violations of that act. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 27 Sup. Ct. Rep. 65, 51: 241

270. The ten years limitation prescribed by Tenn. Code, § 2776, for "all other cases not expressly provided for," rather than the one year limitation prescribed by § 2772 for "statute penalties," or the three years limitation prescribed by § 2773 for injuries to personal or real property, governs an action for threefold damages for injury to "business or property" brought under the antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), § 7, in which the right of recovery is based on the excessive price for iron water pipe which a municipality was led to pay by reason of an illegal arrangement between the members of a trust or combination formed in violation of that act. *Chattanooga*

Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 27 Sup. Ct. Rep. 65, 51: 241

Bankruptcy.

When Statute begins to Run, see *infra*, 324, 325, 346, 368, 369.

When Action Barred, see *infra*, III. j.

Time to Present Proofs in Bankruptcy, see Bankruptcy, 364.

See also Bankruptcy, 2.

271. The provision of the bankrupt law which requires that all suits by or against the assignee should be brought within two years from the time the cause of action accrued, relates only to suits by or against the assignee with respect to parties other than the bankrupt, and not to a suit against the bankrupt. *Phelps v. McDonald*, 99 U. S. 298, 25: 473

Distinguished in Adams v. Stern, 29 Hun, 284.

Cited in Dushane v. Beall, 161 U. S. 515, 40 L. ed. 792, 16 Sup. Ct. Rep. 637—*Leech v. Dawson*, 23 Fed. 656—*Phelps v. Elliott*, 35 Fed. 457—*Re Herdic*, 40 Fed. 361—*Thomas v. Blythe*, 5 C. C. A. 359, 8 U. S. App. 414, 55 Fed. 964—*Allen v. Woodruff*, 96 Ill. 31—*Bowen v. Delaware, L. & W. R. Co.* 153 N. Y. 488, 60 Am. St. Rep. 667, 47 N. E. 907.

272. The clause of the bankrupt law limiting the commencement of actions by and against the assignee to two years after the right of action accrues, applies to all judicial contests between the assignee and any person whose interest is adverse to his. *Bailey v. Glover*, 21 Wall. 342, 22: 636 *Distinguished in Gildersleeve v. Gaynor*, 4 Woods, 544, 15 Fed. 103—*Berry v. Sawyer*, 19 Fed. 288—*Bowen v. Delaware, L. & W. R. Co.* 82 Hun, 43, 31 N. Y. Supp. 286—*Buckingham v. Buckingham*, 38 Ohio St. 78.

Explained in Upton v. McLaughlin, 105 U. S. 642, 26 L. ed. 1198.

Cited in Gifford v. Helms, 98 U. S. 252, 25 L. ed. 59—*Rice v. United States*, 21 Ct. Cl. 416—*Foreman v. Bigelow*, 4 Cliff. 548, Fed. Cas. No. 4,934—*Mittenberger v. Phillips*, 2 Woods, 116, Fed. Cas. No. 9,621—*Scovill v. Shaw*, 4 Cliff. 567, Fed. Cas. No. 12,552—*Walker v. Towner*, 4 Dill. 167, Fed. Cas. No. 17,089—*Re Stalib*, 3 Fed. 211—*Re Churchman*, 5 Fed. 187—*Vetterlein v. Barnes*, 6 Fed. 703—*Smith v. Cincinnati, H. & D. R. Co.* 11 Fed. 290—*Phelan v. O'Brien*, 4 McCrary, 467, 13 Fed. 657—*Greenwald v. Appell*, 5 McCrary, 341, 17 Fed. 141—*Bartles v. Gibson*, 17 Fed. 298—*Taylor v. Irwin*, 20 Fed. 618—*Leech v. Dawson*, 23 Fed. 657—*Matthews v. Westphal*, 1 McCrary, 451, 48 Fed. 667—*International Bank v. Jenkins*, 104 Ill. 153—*Gage v. DuPuy*, 127 Ill. 220, 19 N. E. 878—*Ross v. Wilcox*, 134 Mass. 22—*Rock v. Dennett*, 155 Mass. 502, 30 N. E. 171—*Wisner v. Brown*, 50 Mich. 559, 15 N. W. 901—*Haven v. Place*, 28 Minn. 555, 11 N. W. 117—*Cobbs v. Gilchrist*, 80 Va. 510.

273. The two years' limitation prescribed by U. S. Rev. Stat. § 5057, for suits between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignee is not applicable to adverse claims arising out of an equitable attachment and an assignment of the bankrupt's interest under a testamen-

tary trust, where both attachment and assignment were subsequent to the assignment in bankruptcy. *Hammond v. Whittredge*, 204 U. S. 538, 27 Sup. Ct. Rep. 396, 51: 606

274. The limitation of the bankrupt act of 1841, § 8, could not affect any suit the cause of which accrued from an adverse possession taken after the bankruptcy, until after the expiration of two years from the taking of such possession. *Banks v. Ogden*, 2 Wall. 57, 17: 818

Cited in Amory v. Lawrence, Fed. Cas. No. 336—*Phelan v. O'Brien*, 4 McCrary, 468, 13 Fed. 657—*Gray v. Jones*, 4 McCrary, 521, 14 Fed. 87—*Harvey v. Gage*, 31 Fed. 276—*Webb v. Crawford*, 77 Ala. 442—*Minot v. Tappan*, 127 Mass. 339—*French v. Merrill*, 132 Mass. 527—*Rock v. Dennett*, 155 Mass. 503, 30 N. E. 171—*Bowen v. Delaware, L. & W. R. Co.* 82 Hun, 42, 31 N. Y. Supp. 286—*Bowen v. Delaware, L. & W. R. Co.* 153 N. Y. 481, 60 Am. St. Rep. 667, 47 N. E. 907—*Cheek v. Anderson*, 2 Lea, 189—*Moore v. State Ins. Co.* 2 Tenn. Ch. 382.

275. Suits in which an assignee sues to recover a debt due to a bankrupt, or defends against a debt due by the bankrupt, are suits concerning property, and are within the limitation of the bankrupt law of two years. *Jenkins v. International Bank*, 106 U. S. 571, 2 Sup. Ct. Rep. 1, 27: 304
Cited in Mitchell v. Clark, 110 U. S. 643, 28 L. ed. 283, 4 Sup. Ct. Rep. 170—*Reber v. Gundy*, 16 Fed. 803—*Leech v. Dawson*, 23 Fed. 657—*Scott v. Little*, 76 Fed. 564—*Webb v. Crawford*, 77 Ala. 442—*Gage v. Dupuy*, 127 Ill. 220, 19 N. E. 878—*Jolly v. Fitzgerald*, 23 Ill. App. 519—*Goodnow v. Oakley*, 66 Iowa, 660, 24 N. W. 263—*Kenny v. Wrisley*, 147 Mass. 477, 1 L.R.A. 349, 18 N. E. 227—*Bowen v. Delaware, L. & W. R. Co.* 153 N. Y. 481, 60 Am. St. Rep. 667, 47 N. E. 907—*Cobbs v. Gilchrist*, 80 Va. 510—*Smith v. Profit*, 82 Va. 858, 1 S. E. 67.

Bonds; coupons.

When Statute begins to Run, see *infra*, 333-335.

See also *supra*, 257.

276. The act of 1825 (4 Stat. at L. 102, chap. 64), limiting actions against sureties to two years after balance accrues, does not apply in case of a running account with a postmaster, because the balance due from the postmaster is thrown each time upon the last quarter. *Jones v. United States*, 7 How. 681, 12: 870

Distinguished in United States v. Marks, 3 Wall. Jr. 359, Fed. Cas. No. 15,722.

Cited in United States v. Ballard, 3 McLean, 470, Fed. Cas. No. 14,507—*United States v. Harrill*, McAll. 246, Fed. Cas. No. 15,310—*United States v. Kershner*, 1 Bond, 436, Fed. Cas. No. 15,527.

277. Where a consignee and his surety united in a bond to a manufacturing company, conditioned that the former should pay to it all moneys which should become due under or arise from a written agreement,—the liability of the surety arose on the bond, and that of the consignee on the bond or the written agreement, and the statute of limitations in regard to written instruments governs the case. *Streeper v.*

Victor Sewing Mach. Co. 112 U. S. 676, 5 Sup. Ct. Rep. 327, 28: 852

278. Interest coupons on municipal bonds, payable to the holder, are "payable to bearer," within the meaning of a statute of limitations covering municipal obligations. *Koshkonong v. Burton*, 104 U. S. 668, 26: 886

279. Interest coupons issued in aid of railroad enterprises are sealed instruments to which the Wisconsin limitation of twenty years is applicable. *Koshkonong v. Burton*, 104 U. S. 668, 26: 886
Cited in Rondot v. Rogers Twp. 39 C. C. A. 469, 99 Fed. 209—*Broadfoot v. Fayetteville*, 124 N. C. 493, 70 Am. St. Rep. 610, 32 S. E. 804.

Contracts; account.

When Statute begins to Run, see *infra*, II. b.

When Action Barred, see *infra*, III. b.

280. The fact that the duty to pay money for work and materials which defendant failed to perform was a statutory one does not make the action one upon the statute; such an action is on assumpsit, and within the statute of limitations. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 10 Sup. Ct. Rep. 19, 33: 231

281. The limitation in regard to an open account does not apply to a special contract. *New Orleans, O. & G. W. R. Co. v. Lindsay*, 4 Wall. 650, 18: 328

282. The article of the Louisiana Code prescribing the limitation of action for freight of vessels does not apply to a contract with one not a shipowner. *New Orleans, O. & G. W. R. Co. v. Lindsay*, 4 Wall. 650, 18: 328

283. All accounts current concerning trade of merchandise between merchants fall within the exceptions of the statute of limitations. *Mandeville v. Wilson*, 5 Cranch, 15, 3: 23

Cited in Spring v. Gray, 6 Pet. 167, 8 L. ed. 358—*Spring v. Gray*, 5 Mason, 505, Fed. Cas. No. 13,259—*McCulloch v. Judd*, 20 Ala. 708—*Bradford v. Spyker*, 32 Ala. 143—*Dyott v. Letcher*, 6 J. J. Marsh. 544—*Lowe v. Dowbarn*, 26 Tex. 510—*Coalter v. Coalter*, 1 Rob. (Va.) 85.

284. To bring a case within the exception of the act of limitation, it must be an account open or current, and it must be a direct concern of trade; liquidated demands, or bills and notes which are only traced up to the trade, are too remote to come within this description. *Toland v. Sprague*, 12 Pet. 300, 9: 1093

285. The case presented by the exception in the statute of limitations is not every transaction between merchant and merchant not every account which might exist between them, but it must concern the trade of merchandise. *Spring v. Gray*, 6 Pet. 151, 8: 352

286. In the statute of limitations the exceptions in favor of merchants' accounts ap-

plies as well to actions of assumpsit as to actions of account, and no items need to have been charged within the five years. *Mandeville v. Wilson*, 5 Cranch. 15. 3: 23
Cited in *Spring v. Gray*, 5 Mason, 524, Fed. Cas. No. 13,250—*Brackenridge v. Baltzell*, 1 Ind. 334—*McLellan v. Crofton*, 6 Me. 344—*Union Bank v. Knapp*, 3 Pick. 112, 15 Am. Dec. 182—*Murray v. Coster*, 20 Johns. 597, 11 Am. Dec. 333—*Marselles v. Kenton*, 8 Phila. Leg. Int. 64, 1 Phila. 181.

287. The exception in the Maryland statute of limitations, in favor of "such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants, which are not residents within the province," applies to dealings between a merchant creditor residing out of Maryland and a debtor residing in Maryland. *Bond v. Jay*, 7 Cranch, 350, 3: 367
Cited in *Didler v. Davison*, 2 Sandf. Ch. 69.

288. The owners of a vessel, who were merchants, signed a bill of lading to deliver certain articles of merchandise,—the property of the shipper,—at port of destination of the vessel, the owners to receive for freight part of the profits of the proceeds of the goods, which were to be invested in a return cargo. A portion of the cargo was left unsold, and a large balance was claimed to be due. *Held*, this was not an account concerning the trade of merchandise between merchant and merchant. *Spring v. Gray*, 6 Pet. 151. 8: 352
Cited in *Toland v. Sprague*, 12 Pet. 333, 9 L. ed. 1106—*Bradford v. Spyker*, 32 Ala. 142—*Mills v. Davies*, 42 Iowa, 98.

289. To bring a case within the exception of the statute of limitations, there must be mutual accounts and reciprocal demands between the two persons. *Spring v. Gray*, 6 Pet. 151. 8: 352
Cited in *Sayward v. Dexter, H. & Co.* 19 C. C. A. 184, 44 U. S. App. 376, 72 Fed. 767—*Blair v. Drew*, 6 N. H. 238—*McKelvy's Appeal*, 72 Pa. 412—*Mattern v. McDivitt*, 113 Pa. 410, 6 Atl. 83—*Price v. Upshaw*, 2 Humph. 143—*Whittlesey v. Spofford*, 47 Tex. 17—*Wortham v. Smith*, 15 Gratt. 494.

290. A claim for services as general manager for a corporation extending through a number of years, and a counterclaim of an account for pasturage of cattle and horses sold to him and for money loaned and paid out for him and goods furnished to him during those years, are open, mutual, and current accounts within the meaning of the statute of limitations. *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U. S. 405, 14 Sup. Ct. Rep. 632, 38: 493

291. The exception in a statute of limitations in favor of merchants' accounts does not include stated accounts. *Bispham v. Price*, 15 How. 162, 14: 644
Cited in *Coudrey v. Gilliam*, 60 Mo. 94.

292. An account closed by the cessation of dealings between the parties is not an account stated, so as to be withdrawn from the

statute of limitations. *Mandeville v. Wilson*, 5 Cranch, 15, 3: 23
Disapproved in *Van Rhyn v. Vincent*, 1 McCord, Eq. 315.

Cited in *Spring v. Gray*, 5 Mason, 527, Fed. Cas. No. 13,250—*Wilson v. Mandeville*, 1 Cranch, C. C. 455, Fed. Cas. No. 17,821—*Gunn v. Gunn*, 74 Ga. 568, 58 Am. Rep. 447—*White v. Campbell*, 25 Mich. 469—*Blair v. Drew*, 6 N. H. 238—*Volkening v. De Graaf*, 81 N. Y. 271—*Jayne v. Mickey*, 55 Pa. 262—*Whittlesey v. Spofford*, 47 Tex. 18—*Watson v. Lyle*, 4 Leigh, 249.

293. When an account is stated between the parties, or where anything is done by them which, by their implied admission, is equivalent to a settlement, it has then become an ascertained debt, and is not within the exception of the statute of limitations in favor of accounts between merchant and merchant. *Toland v. Sprague*, 12 Pet. 300, 9: 1093

Cited in *Sayward v. Dexter, H. & Co.* 19 C. C. A. 184, 44 U. S. App. 376, 72 Fed. 767—*Long-Bell Lumber Co. v. Stump*, 30 C. C. A. 266, 57 U. S. App. 546, 86 Fed. 580—*Re Huger*, 100 Fed. 807—*Hendrix v. Kirkpatrick*, 48 Neb. 672, 67 N. W. 745—*Lockwood v. Thorne*, 11 N. Y. 173, 62 Am. Dec. 81—*Truman v. Owens*, 17 Or. 526, 21 Pac. 665—*Radford v. Fowkes*, 85 Va. 852, 8 S. E. 817—*Engfer v. Roemer*, 71 Wis. 14, 36 N. W. 618.

Copyright.

294. An action to recover a penalty for infringement of a copyright, in the absence of a Federal statute of limitations, is governed by the statute existing for the class of actions to which it belongs, in the state where the action is brought. *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. Rep. 62, 44: 109
Cited in *Atlanta v. Chattanooga Foundry & Pipe Co.* 101 Fed. 902—*Green v. Barrett*, 123 Fed. 350—*Atlanta v. Chattanooga Foundry & Pipe Works*, 64 L.R.A. 731, 61 C. C. A. 392, 127 Fed. 28.

Corporations; stockholder's liability.

When Limitations Begin to Run, see *infra*, II. c.

When Action Barred, see *infra*, III. c.

295. In Louisiana the prescription of ten years applies to a suit against a corporation for damages for refusal to permit a transfer of shares on its books. *de St. Romes v. Levee Steam Cotton-Press Co. (St. Romes v. Levee Steam Cotton-Press Co.)* 127 U. S. 614, 8 Sup. Ct. Rep. 1335, 32: 289

296. The liability of the stockholders of a bank upon their unpaid subscriptions is governed by a state statute of limitations for actions upon debts or liabilities due the corporation. *Terry v. Anderson*, 95 U. S. 628, 24: 365

Cited in *Fourth Nat. Bank v. Franklyn*, 120 U. S. 756, 30 L. ed. 829, 7 Sup. Ct. Rep. 757—*Brunswick Terminal Co. v. National Bank*, 88 Fed. 609—*Hutchings v. Lamson*, 37 C. C. A. 566, 96 Fed. 721—*Brunswick Terminal Co. v. National Bank*, 48 L.R.A. 635, 40 C. C. A. 26, 99 Fed. 630.

297. The personal liability of shareholders in a national bank, under U. S. Rev. Stat. § 5151 (U. S. Comp. Stat. 1901, p.

3465), for the contracts, debts, and engagements of the bank, cannot be regarded as a contract liability, for the purpose of making applicable the limitation prescribed by Ballinger's (Wash.) Code, § 4800, subd. 3, for an "action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." *McClain v. Rankin*, 197 U. S. 154, 25 Sup. Ct. Rep. 410, 49: 702
Cited in Christopher v. Norvell, 201 U. S. 225, 50 L. ed. 736, 26 Sup. Ct. Rep. 502—*Bernheimer v. Converse*, 206 U. S. 535, 51 L. ed. 1176, 27 Sup. Ct. Rep. 755—*Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 58, 77 N. E. 877.

298. An action brought by a receiver of a national bank under U. S. Rev. Stat. § 5234, U. S. Comp. Stat. 1901, p. 3507, to enforce the individual liability of a shareholder prescribed by § 5151 (U. S. Comp. Stat. 1901, p. 3465) is not an action upon a "contract or promise in writing," within the meaning of the Nebraska statute of limitations, but is governed by the provision of that statute requiring actions "upon a contract not in writing, express or implied," or "upon a liability created by statute," to be begun within four years. *McDonald v. Thompson*, 184 U. S. 71, 22 Sup. Ct. Rep. 297, 46: 437
Cited in Christopher v. Norvell, 201 U. S. 229, 50 L. ed. 737, 26 Sup. Ct. Rep. 502.

299. The three years' statute of limitations prescribed by N. Y. Code Civ. Proc. § 394, for actions against directors or stockholders of a moneyed corporation to enforce a common-law or statutory liability is applicable to actions of that character brought within the state against directors and shareholders of foreign corporations. *Platt v. Wilmot*, 193 U. S. 602, 24 Sup. Ct. Rep. 542, 48: 809
Cited in Corry v. Baltimore, 196 U. S. 477, 49 L. ed. 562, 25 Sup. Ct. Rep. 297—*McCisne v. Rankin*, 197 U. S. 162, 49 L. ed. 706, 25 Sup. Ct. Rep. 410—*Bernheimer v. Converse*, 206 U. S. 535, 51 L. ed. 1176, 27 Sup. Ct. Rep. 755—*Whitman v. Atkinson*, 65 C. C. A. 187, 180 Fed. 761.

300. The double liability of a stockholder in a Kansas corporation is one created by common law or statute within the meaning of the three years' statute of limitation prescribed by N. Y. Code Civ. Proc. § 394, for actions to enforce a liability of that character against corporate directors or stockholders, since such liability, while contractual in its nature, arises out of the Kansas Constitution or statutes, or from a combination of both by virtue of the application of general principles of law to the facts in the case. *Platt v. Wilmot*, 193 U. S. 602, 24 Sup. Ct. Rep. 542, 48: 809

301. A Kansas trust company which is empowered to receive deposits and to loan money on real estate and personal security must be deemed a "moneyed corporation" within the meaning of N. Y. Code Civ. Proc. § 394, prescribing a three years' limitation for actions to enforce stockholders' liabilities, in view of the definition of that term

in 1 N. Y. Rev. Stat. 598, § 51, as one having the power to make loans upon pledges or deposits, and of the further definition of a moneyed corporation in the revised corporation act of 1890, as one formed under, or subject to, the banking or insurance law. *Platt v. Wilmot*, 193 U. S. 602, 24 Sup. Ct. Rep. 542, 48: 809

302. The limitation of the right to bring an action against a stockholder for a debt of the corporation to two years after he had ceased to be a stockholder, which is made by N. Y. Laws 1892, chap. 588, § 55, is not applicable to a suit to enforce the liability of a stockholder in a foreign corporation. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. Rep. 755, 51: 1163

Executors; heirs.

Time Allowable to Present Claim to Executor, see Executors and Administrators, 129.

See also Judgment, 677a.

303. A claim by an executor against his estate is not within the statute of limitations in force in the District of Columbia. *Glover v. Patten*, 165 U. S. 394, 17 Sup. Ct. Rep. 411, 41: 760

304. If an executor of an assignee in bankruptcy does not cause himself to be made a party to a suit brought in the lifetime and in the name of the testator, and pending at his death, it is to be considered a voluntary abandonment of the action, and excludes the claim from the equity of any exception in the statute of limitations. *Richards v. Maryland Ins. Co.* 8 Cranch, 84, 3: 496
Cited in Bauserman v. Blunt, 147 U. S. 657, 37 L. ed. 320, 13 Sup. Ct. Rep. 466—*Danenhower v. Ball*, 8 App. D. C. 141—*Lawrence v. Winifrede Coal Co.* 48 W. Va. 142, 35 S. E. 925.

305. The Mississippi Code of 1871, § 2173, by which any action to recover property, because of the invalidity of an administrator's sale by order of a probate court, must be brought within one year, does not apply to an action brought by the heir to recover land bid off by a creditor at such a sale for the payment of his debt, not otherwise paid for than by giving the administrator a receipt for the amount of the bid. *Clay v. Field*, 115 U. S. 260, 6 Sup. Ct. Rep. 36, 29: 375

Cited in Clay v. Freeman, 118 U. S. 105, 30 L. ed. 107, 6 Sup. Ct. Rep. 964.

Insurance.

306. The prescription of twenty years generally applicable to personal actions under the Spanish law prior to the promulgation of the Civil Code is the prior law which under the provision of that Code that a prescription which began to run before its publication shall be governed by the prior laws, must govern an action in Porto Rico for a loss under a policy of insurance occurring before the royal decree of 1889, extending the Civil Code to that island. *Royal Ins. Co. v. Miller*, 199 U. S. 353, 26 Sup. Ct. Rep. 46, 50: 226

Mesne profits.

307. The Louisiana Code does not limit a

claim for mesne profits against a *mala fide* possessor; there is no prescription of the rents and profits. *New Orleans v. Gaines*, 15 Wall. 624, 21: 215

308. The prescription of three years provided by the Louisiana Civil Code (art. 3503) is applicable only to actions which the party had the legal right to bring, and not to rent and profits allowed by a master which resulted from the determination of another action, as no cause of action to recover such mesne profits arose until the decree in the main suit. *New Orleans v. Gaines*, 15 Wall. 624, 21: 215
Distinguished in Davis v. Gaines, 104 U. S. 408, 26 L. ed. 764.

Cited in Gaines v. New Orleans, 4 Woods, 225, 17 Fed. 23.

309. A statute of limitations, that "all actions of debt grounded upon any contract in writing shall be commenced within four years," does not apply to a suit for the foreclosure of a mortgage and sale of the mortgaged property; such suits are not actions of debt grounded upon a contract in writing. *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. Rep. 408, 27: 682
Distinguished in Maynard v. Marshall, 91 Ga. 845, 18 S. E. 403.

Cited in Cross v. Allen, 141 U. S. 537, 35 L. ed. 849, 12 Sup. Ct. Rep. 67—*Rosenplaenter v. Provident Sav. Life Assur. Soc.* 91 Fed. 735—*Abbett v. Page*, 92 Ala. 576, 9 So. 382.

Mortgage.

When Statute Begins to Run, see *infra*, 345, 346.

When Action Barred, see *infra*, III. g.

310. A bill in equity to foreclose a mortgage has no analogy to an action of trover, detinue, or trespass; and a statute of limitations barring the latter class of actions has no effect on the former. The claim of a mortgagee is a *jus ad rem*, not a *jus in re*. *Union Bank v. Stafford*, 12 How. 327, 13: 1008

New Orleans Canal & Bkg. Co. v. Stafford, 12 How. 343, 13: 1015

— Editorial notes.

[Effect of statutory bar of principal debt on right to foreclose a mortgage or deed of trust. 21 L.R.A. 550.

Effect of debt becoming barred by statute of limitations upon rights and remedies under conveyance absolute on its face, but intended as a mortgage. 11 L.R.A. (N.S.) 825.]

Patents.

When Action Barred, see *infra*, 542.

311. Actions at law for the infringement of patents are within state statutes of limitations. *Campbell v. Haverhill*, 155 U. S. 610, 15 Sup. Ct. Rep. 217, 39: 280
Cited in Brady v. Daly, 175 U. S. 158, 44 L. ed. 113, 20 Sup. Ct. Rep. 62—*Van Orden v. Nashville*, 67 Fed. 333—*Gabrielson v. Waydell*, 67 Fed. 343—*United States v. Banister*, 70 Fed. 45—*Thompson v. German Ins. Co.* 76 Fed. 893—*National Cash-Register Co. v. Leland*, 77 Fed. 243—*Cockrill v. Butler*, 78 Fed. 681—*Computing Scale Co. v. Nation-*

al Computing Scale Co. 79 Fed. 966—*Edmunds v. Illinois C. R. Co.* 80 Fed. 85—*Campbell v. New York*, 81 Fed. 183—*Brunswick Terminal Co. v. National Bank*, 88 Fed. 610—*Bullion & E. Bank v. Hegler*, 93 Fed. 892—*Underwood v. Patrick*, 36 C. C. A. 333, 94 Fed. 471—*De Weese v. Smith*, 97 Fed. 318—*Aldrich v. Skinner*, 98 Fed. 377—*Aldrich v. McClaine*, 98 Fed. 379—*Hanchett v. Blair*, 41 C. C. A. 87, 100 Fed. 828—*McDonald v. Thompson*, 41 C. C. A. 291, 101 Fed. 184—*Atlanta v. Chattanooga Foundry & Pipe Co.* 101 Fed. 902—*American Pneumatic Tool Co. v. Pratt & W. Co.* 106 Fed. 230—*Ratican v. Terminal R. Asso.* 114 Fed. 663—*McEldowney v. Wyatt*, 44 W. Va. 714, 45 L.R.A. 615, 30 S. E. 239.

Pledge.

312. Prescription is inapplicable to an antichresis. *Livingston v. Story*, 11 Pet. 351, 9: 746

Public lands.

Limitation of Time to Redeem from Mortgage, see Mortgage, VIII. d.

313. No state statute of limitations can defeat the disposition of the public lands by Congress. *Jourdan v. Barrett*, 4 How. 169, 11: 924

314. In Kentucky a claimant who has not entered upon land claimed under a military warrant is subject to be barred by the statute of limitations. *Kinney v. Clark*, 2 How. 76, 11: 1785

315. An action for damages against the register of the United States land office in Ohio, for having refused to note on his books application made to him for the purchase of land within the district, is subject to the statute of limitations of Ohio. *McCluny v. Silliman*, 3 Pet. 270, 7: 676

Taxes.

When Action Barred, see *infra*, III. h.

316. Proceedings to enforce collection of personal-property taxes from property of a decedent are within Minn. Stat. 1894. § 5136, providing that actions "upon a liability created by statute shall be barred by the lapse of six years." *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. Rep. 585, 44: 701

Cited in Georgia R. & Bkg. Co. v. Wright, 124 Ga. 620, 53 S. E. 251—*Custer County v. Story*, 26 Mont. 521, 69 Pac. 56—*Miester v. Spartanburg*, 68 S. C. 36, 46 S. E. 539.

Trusts.

When Statute Begins to Run, see *infra*. II. d.

When Action Barred, see *infra*, III. d.

317. A violation of a trust, growing out of a mistaken construction of a will, by the executors, unaccompanied by fraudulent intent, is within the ten years' statute of limitations of the state of New York, concerning actions for relief in cases of trust not cognizable by courts of law. *Clarke v. Johnston* (*Clarke v. Boorman*) 18 Wall. 493, 21: 904

Cited in Pearsall v. Smith, 149 U. S. 233, 37 L. ed. 716, 13 Sup. Ct. Rep. 833—*Jones v. Smith*, 38 Fed. 381—*Miles v. Vivian*, 25 C.

C. A. 212, 51 U. S. App. 194, 79 Fed. 853—
H. B. Claflin Co. v. Middlesex Bkg. Co. 113
Fed. 961.

Warrants.

When Statute begins to Run, see *infra*,
343, 344, 360.

See also *supra*, 314.

318. The Nebraska statute of limitations of five years does not run against a county warrant. *King Iron Bridge & Mfg. Co. v. Otoe County*, 124 U. S. 459, 8 Sup. Ct. Rep. 582. 31: 514

Distinguished in Rollins v. Chaffee County, 34 Fed. 92.

Cited in New Orleans v. Warner, 175 U. S. 128, 44 L. ed. 102, 20 Sup. Ct. Rep. 44—*Robertson v. Blaine County*, 47 L.R.A. 466, 32 C. C. A. 522, 61 U. S. App. 242, 90 Fed. 72—*New Orleans v. Fisher*, 34 C. C. A. 26, 63 U. S. App. 455, 91 Fed. 584—*Forbes v. Grand County*, 23 Colo. 349, 47 Pac. 388.

319. Warrants drawn by the administrator of accounts upon the administrator of finance of a city, payable to the order of a third person out of any funds in the city treasury to the credit of a particular corporation, are not within the provisions of a statute limiting the time for bringing actions on bills of exchange, notes payable to order of bearer, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise. *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44: 96

Wills.

See also *supra*, 317.

320. The limitations of the New Mexico statute Jan. 23, 1890, that actions on unwritten contracts for injury to and conversion of property, and for fraud, and other actions not specified therein, must be brought within four years,—applied to a suit in probate court to set aside a probate of a will. *Bent v. Thompson*, 138 U. S. 114, 11 Sup. Ct. Rep. 238, 34: 902

Wrongs.

321. The limitations prescribed by the act of March 3, 1863, § 7 (12 Stat. at L. 755), to suits for acts done during the Rebellion, under color of authority derived from the President of the United States and an act of Congress, applies to wrongs to the estate, as well as to the arrest and imprisonment of the person. *Cutler v. Kouns*, 110 U. S. 720, 4 Sup. Ct. Rep. 274, 28: 305

322. An action in a state court to recover rents due on a contract in writing, which were confiscated by military order and paid over to the United States, is governed by the two years' statute of limitations prescribed by the act of Congress of March 3, 1863, § 7, for suits for wrongs done or committed, or acts omitted to be done, during the Civil War, by virtue or under color of authority derived from or exercised by or under the President. *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. Rep. 170, 312, 28: 279
Cited in Cutler v. Kouns, 110 U. S. 720, 28 L. ed. 308, 4 Sup. Ct. Rep. 274.

II. When Statute Runs.

a. In General.

323. Under a state statute of limitations the time of the limitation commences when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided; and as to causes of action existing at the passage of the act, the time will begin to run from the date when the act takes effect. *Sohn v. Waterson*, 17 Wall. 596, 21: 737

Distinguished in Osborne v. Lindstrom, 9 N. D. 6, 46 L.R.A. 718, 81 Am. St. Rep. 516, 81 N. W. 72.

Cited in Pereles v. Watertown, 6 Biss. 81, Fed. Cas. No. 10,980—*Sayles v. Richmond*, F. & P. R. Co. 8 Hughes, 174, 4 Bann. & Ard. 241, Fed. Cas. No. 12,424—*Herring v. Modesto Irrig. District*, 95 Fed. 721—*Re Stalker*, 123 Fed. 965—*Lamb v. Powder River Live Stock Co.* 67 L.R.A. 561, 65 C. C. A. 574, 132 Fed. 438—*Swamp Land Dist. No. 307 v. Glide*, 112 Cal. 90, 44 Pac. 451—*Friedmann v. McGowan*, 1 Penn. (Del.) 443, 42 Atl. 723—*Garrison v. Hill*, 81 Md. 557, 32 Atl. 191—*Gillette v. Hibbard*, 3 Mont. 416—*Schnell v. Jay*, 4 Okla. 158, 46 Pac. 598—*Richardson v. Mackay*, 4 Okla. 337, 46 Pac. 546—*Southgate v. Frier*, 8 Okla. 438, 57 Pac. 841—*Huber v. Zimmerman*, 8 Okla. 574, 58 Pac. 737—*Keagy v. Wellington Nat. Bank*, 12 Okla. 36, 69 Pac. 811—*Byers v. Pennsylvania R. Co.* 5 Pa. Dist. R. 686—*Lee v. Cook*, 1 Wyo. 416.

Editorial notes.

Demand, when necessary to put statute in motion. 33: 184

[When does statute begin to run against action upon obligations of municipal, or quasi municipal, body payable out of a particular fund? 10 L.R.A.(N.S.) 478.]

Assignee in bankruptcy.

Applicability of Statute, see *supra*, 271-275.

When Action Barred, see *infra*, III. j. Suspension or Interruption of Statute, see *infra*, 563, 605a.

Bar of Assignee's Suit as Giving Right to Creditor, see *Bankruptcy*, 244, 245.

See also *infra*, 346, 368, 369, 378-380.

324. The time within which an assignee in bankruptcy can commence an action begins to run when the assignee is appointed. *International Bank v. Sherman*, 101 U. S. 403, 25: 866

Cited in McCan v. Conery, 12 Fed. 319.

325. The cause of action to set aside a conveyance by a bankrupt as in fraud of creditors does not accrue to the assignee until his appointment, under the limitation prescribed by the 2d section of the bankrupt law, U. S. Rev. Stat. § 5057. *Buffington v. Harvey*, 95 U. S. 99, 24: 381

Partnership.

Interruption of Statute, see *infra*, 613, 614, 632, 634.

326. The right of action to sue for the settlement of partnership affairs does not, as matter of law, accrue at the time of the

dissolution of the firm, but depends on circumstances. *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 924, 34: 282
Cited in *Thomas v. Hurst*, 73 Fed. 374—*Lindholm v. Bailey*, 16 Colo. App. 198, 84 Pac. 586—*Gray v. Green*, 66 Hun, 476, 21 N. Y. Supp. 533—*Gilmore v. Ham*, 142 N. Y. 8, 40 Am. St. Rep. 554, 36 N. E. 826.

327. Where partnership affairs are being wound up without antagonism between the parties, and assets are being realized and debts paid, the statute of limitations has not begun to run. *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 924, 34: 282
Cited in *Alsop v. Piker*, 155 U. S. 460, 39 L. ed. 222, 15 Sup. Ct. Rep. 162—*Lant v. Manley*, 21 C. C. A. 465, 43 U. S. App. 623, 75 Fed. 635—*Currier v. Studley*, 159 Mass. 28, 33 N. E. 709—*Gilmore v. Ham*, 61 Hun, 5, 15 N. Y. Supp. 391.

328. A surviving partner in possession of partnership property, real or personal, has a right to hold it until the debts of the firm are paid, including any existing indebtedness to him; nor will his neglect to wind up the concern relieve the partnership assets in his hands from the lien of the partnership debts, or permit the statute of limitations to run in favor of the heirs of the deceased partner, so as to enable them to obtain an interest in the property without payment of the indebtedness. *Clay v. Freeman*, 118 U. S. 97, 6 Sup. Ct. Rep. 964, 30: 104

Cited in *Clay v. Field*, 138 U. S. 465, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419—*Churchill v. Buck*, 42 C. C. A. 153, 102 Fed. 43—*Henderson v. Ries*, 47 C. C. A. 630, 108 Fed. 714—*Maynard v. Richards*, 166 Ill. 479, 57 Am. St. Rep. 145, 46 N. E. 1138.

Eluding service of process.

See also *infra*, 572.

329. The courts cannot create an exception to the operation of the statute of limitations not made by the statute itself, where the party designedly eludes the service of process. *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. Rep. 537, 32: 953
Cited in *Bauserman v. Blunt*, 147 U. S. 658, 37 L. ed. 320, 13 Sup. Ct. Rep. 466—*Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 66, 92 Fed. 872.

330. A conspiracy of the officials and residents of a city, to prevent service of process upon it, by the resignation of the mayor, and by the secret meeting of the common council before qualifying and organizing, and by their immediately resigning their offices after the transaction of some necessary business; and the consequent inability to serve such process,—do not furnish an excuse for not commencing the action within the time limited by law. *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. Rep. 537, 32: 953
Cited in *Knowlton v. Watertown*, 130 U. S. 329, 32 L. ed. 959, 9 Sup. Ct. Rep. 530—*Thayer v. Kansas Loan & T. Co.* 41 C. C. A. 108, 100 Fed. 904—*Huysman v. Evening Star Newspaper Co.* 12 App. D. C. 595—*Lonkey v. Keyes Silver Min. Co.* 21 Nev. 317, 17 L.R.A. 352, 31 Pac. 57.

331. Under the law of Missouri, the absconding or concealing of himself, by a debtor, to prevent the commencement of an action, is available in an action at law to excuse a delay in bringing the action, and is not a ground of equity jurisdiction. *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. Rep. 426, 28: 466
Cited in *Amy v. Watertown*, 22 Fed. 420.

b. Contracts; Usury; Mortgages.

Applicability of Statute, see also *supra*, 276-293.

When Action Barred, see *infra*, III. b.

Interruption of Statute, see *infra*, 608, 615, 664.

See also *infra*, 571.

Account stated.

Applicability of Statute, see *supra*, 280-293.

Necessity of Denying that Account has been Stated, see *Pleading*, 811.

332. Where a person sells goods which have been placed in his hands by a consignee, and transmits an account of the sales, stating the balance of the proceeds, to the shipper of the goods, who directs him to remit the amount to him, but the former refuses to make the remittance, claiming the consignee is indebted to him, it is a stated account; and the statute of limitations begins to run from the time the shipper claimed the balance and the seller refused to make the remittance. *Toland v. Sprague*, 12 Pet. 300, 9: 1093
Cited in *Brackenridge v. Baltzell*, 1 Ind. 334—*Belchertown v. Bridgeman*, 118 Mass. 488.

Bonds; coupons.

Applicability of Statute to, see *supra*, 276-279.

When Action Barred, see *infra*, 455, 456.

333. Although the condition of a marshal's bond is broken by his neglect to bring money into court or to pay it over to a party when directed by the court, yet, if the proceedings are suspended by appeal, the right of action of the injured party has not accrued so as to start the running of the limitation prescribed by Congress for suits on marshals' bonds. *Montgomery v. Hernandez*, 12 Wheat. 129, 6: 575

334. The statute of a state which extends the same limitation to actions on all written contracts, sealed or unsealed, begins to run against detached interest coupons from their respective maturities. *Clark v. Iowa City*, 20 Wall. 583, 22: 427
Explained in *Amy v. Dubuque*, 98 U. S. 473, 25 L. ed. 230.

Cited in *Burton v. Koshkonong*, 4 Fed. 374—*Kershaw v. Hancock*, 18 Blatchf. 384, 10 Fed. 542—*Nash v. El Dorado County*, 24 Fed. 255—*Huey v. Macon County*, 35 Fed. 482—*Griffin v. Macon County*, 2 L.R.A. 355, 36 Fed. 887—*Mather v. San Francisco*, 52 C. C. A. 640, 115 Fed. 46—*Toothaker v. Boulder*, 13 Colo. 225, 22 Pac. 468—*May v. School Dist. No. 22*, 22 Neb. 206, 3.

Am. St. Rep. 266, 34 N. W. 377—State ex rel. Chemical Nat. Bank v. School Dist. No. 9, 30 Neb. 526, 27 Am. St. Rep. 420, 46 N. W. 613—Kelly v. Forty-second Street M. & St. N. Ave. R. Co. 37 App. Div. 508, 55 N. Y. Supp. 1096—Broadfoot v. Fayetteville, 124 N. C. 493, 70 Am. St. Rep. 610, 32 S. E. 504.

335. The Iowa statute of limitation of ten years applies equally to bonds and their coupons, although the coupons have never been severed from the bonds, and are held by the owner of the latter: it begins to run from the respective maturities of the coupons. *Amy v. Dubuque*, 98 U. S. 470,

25: 228

Cited in *Scovill v. Thayer*, 105 U. S. 153, 20 L. ed. 973—*Kershaw v. Hancock*, 18 Blatchf. 384, 10 Fed. 542—*Goldman v. Conway County*, 2 McCrary, 328, 10 Fed. 888—*Nash v. El Dorado County*, 24 Fed. 255—*Huey v. Macon County*, 35 Fed. 482—*Greene County v. Kortrecht*, 26 C. C. A. 381, 52 U. S. App. 250, 81 Fed. 241—*Keene Five-Cent Sav. Bank v. Lyon County*, 90 Fed. 536—*Reynolds v. Lyon County*, 97 Fed. 157—*Independent School District v. Rew*, 55 L. R.A. 369, 49 C. C. A. 201, 111 Fed. 4—*Mather v. San Francisco*, 52 C. C. A. 640, 115 Fed. 46—*Threadgill v. Anson County*, 116 N. C. 627, 21 S. E. 425—*Broadfoot v. Fayetteville*, 124 N. C. 493, 70 Am. St. Rep. 610, 32 S. E. 804—*Galveston v. Loonie*, 54 Tex. 526—*Mt. Mansfield Hotel Co. v. Bailey*, 64 Vt. 157, 16 L.R.A. 297, 24 Atl. 136.

Notes: checks.

When Action Barred, see *infra*, 452.

Interruption of Statute, see *infra*, 586, 606, 609, 614, 658.

336. Where notes containing a provision that if interest is not paid when due the principal shall become due are secured by a deed of trust which also provides that the whole debt shall become due at the option of the payee if the interest at any time is unpaid for ninety days after it becomes due, such option applies to the notes, and the notes are not due on default of payment of interest, so as to set the statute of limitations running, unless the payee exercise his option to make them due. *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. Rep. 100, 35: 879
Cited in *Mason v. Luce*, 110 Cal. 237, 48 Pac. 72.

337. The drawer of a check is not discharged by the laches of the holder in presenting it for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19: 1008
Cited in *Essex County Nat. Bank v. Bank of Montreal*, Fed. Cas. No. 4,532—*Andrus v. Bradley*, 102 Fed. 56—*Wright v. MacCarty*, 92 Ill. App. 122—*Exchange Bank v. Sutton Bank*, 78 Md. 587, 23 L.R.A. 176, 28 Atl. 563—*Shute v. Pacific Nat. Bank*, 136 Mass. 488—*Tripp v. Curtenius*, 36 Mich. 498, 24 Am. Rep. 610.

338. The right of action of a bank to recover back money paid on a forged check which both parties supposed genuine ac-

crued immediately upon the payment of the money; and the statute of limitations runs from that time. *Leather Mfrs. Nat. Bank v. Merchants Nat. Bank*, 128 U. S. 26, 9 Sup. Ct. Rep. 3, 32: 342
Distinguished in *White v. Meadowcroft*, 91 Ill. App. 295.

Cited in *Richardson v. Bales*, 66 Ark. 453, 51 S. W. 321—*Flower v. Beveridge*, 58 Ill. App. 433—*Shepard & M. Lumber Co. v. Eldridge*, 171 Mass. 533, 41 L.R.A. 624, 68 Am. St. Rep. 446, 51 N. E. 9—*Guthrie v. T. W. Harvey Lumber Co.* 9 Okla. 470, 60 Pac. 247—*Lehigh Coal & Nav. Co. v. Blakeslee*, 7 Pa. Dist. R. 33, 20 Pa. Co. Ct. 292—*Merchants' Nat. Bank v. Spates*, 41 W. Va. 33, 56 Am. St. Rep. 828, 23 S. E. 681.

Rescission.

See also Vendor and Purchaser, 106.

339. Where land is conveyed to a county for a poorhouse, under an agreement to pay for it at a definite time, made by county officers in excess of their authority, although they had authority to purchase for such purpose, the vendor may wait a reasonable time after default before bringing a suit to rescind the contract, to give opportunity for the collection of money by taxes to make the payment; and the statute does not run against him until after the expiration of such reasonable time. *Chapman v. Douglas County*, 107 U. S. 348, 17 Sup. Ct. Rep. 62, 27: 378
Cited in *King Iron Bridge & Mfg. Co. v. Otoe County*, 124 U. S. 464, 31 L. ed. 516, 8 Sup. Ct. Rep. 582.

Services.

340. The statute of limitations, as a bar to an action, begins to run from the date the services were completed and claimant was entitled to compensation. *United States v. Wilder*, 13 Wall. 254, 20: 681
Cited in *Bulkley v. United States*, 8 Ct. Cl. 519—*Patterson v. United States*, 21 Ct. Cl. 323—*Knoedler v. Meloy*, 2 MacArth. 243—*Christian v. State*, 7 Ind. App. 424, 34 N. E. 825—*Lang v. Gage*, 65 N. H. 175, 18 Atl. 795.

Usury.

When Action Barred, see *infra*, 457-459.

341. Under the statute of New Mexico, the limitation of three years within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and therefore the cause of action does not accrue, until the lender has actually collected or received more than the original debt with legal interest. *McBroom v. Scottish Mortg. & Land & Invest. Co.* 153 U. S. 318, 14 Sup. Ct. Rep. 852, 38: 729

342. The inclusion of usurious interest as principal in notes given to a national banking association does not constitute a payment of the interest within the meaning of U. S. Rev. Stat. §§ 5197, 5198, U. S. Comp. Stat. 1901, p. 3493, so as to start the running of the statute against a right of action to recover twice the amount of the interest paid; but "the usurious transaction"

from the date of which the statute begins to run is the time when the usurious interest is actually paid. *National Bank of Daingerfield v. Ragland* (Daingerfield Nat. Bank v. Ragland) 181 U. S. 45, 21 Sup. Ct. Rep. 536, 45: 738

Warrants.

Applicability of Statute, see *supra*, 318, 319.

See also *infra*, 360.

343. The cause of action upon a county warrant does not accrue when payment is refused. *King Iron Bridge & Mfg. Co. v. Otoe County*, 124 U. S. 459, 8 Sup. Ct. Rep. 582, 31: 514

344. The statute of limitations will not run against the liability of a city under its agreement, upon voluntarily purchasing with drainage warrants a plant for perfecting its drainage system, to facilitate the collection of assessments, and not to divert such collections from payment of the warrants, until it repudiates the trust, although judgments are substituted for the warrants against its own property. *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44: 96

Cited in New Orleans v. Fisher, 180 U. S. 196, 45 L. ed. 491, 21 Sup. Ct. Rep. 347—*New Orleans v. Warner*, 180 U. S. 202, 45 L. ed. 495, 21 Sup. Ct. Rep. 353—*New Orleans v. Warner*, 41 C. C. A. 676, 101 Fed. 1005—*Eddy v. San Francisco*, 148 Fed. 278.

Mortgages.

Laches as Bar to Relief, see *supra*, I. b, 2, b.

Applicability of Statute, see *supra*, 309, 310.

Interruption of Statute, see *infra*, 630, 663.

See also *supra*, 336; *infra*, 586.

345. Prescription of a mortgage and vendor's privilege, in Louisiana, cannot begin to run until the debt secured has matured. *Patterson v. De la Ronde*, 8 Wall. 292, 19: 415

346. Where the statute of limitations has begun to run against the right of an assignee in bankruptcy to redeem from a foreclosure sale and conveyance of real property of the bankrupt, the statute continues to run against the subsequent grantee of the same property by conveyance from the assignee. *Greene v. Taylor*, 132 U. S. 415, 10 Sup. Ct. Rep. 138, 33: 411

— Editorial note.

[Effect of acceleration provision in mortgage or note to start the statute of limitations running. 12 L.R.A. (N.S.) 1190.]

c. Corporations; Liability of Stockholders.

Applicability of Statute as to Liability of Stockholders, see *supra*, 296–302.

Corporations.

Applicability of Statute, see *supra*, 295. When Action Barred, see *infra*, 463–465.

347. In Illinois the statute of limitations begins to run, as against a foreign corporation, from the time it has a person within the state upon whom process to commence a suit may be served. *United States Exp. Co. v. Ware*, 20 Wall. 543, 22: 422

Cited in McCabe v. Illinois C. R. Co. 4 McCrary, 498, 13 Fed. 832—*Taylor v. Union P. R. Co.* 123 Fed. 156—*Huss v. Central R. & Bkg. Co.* 66 Ala. 476—*Wall v. Chicago & N. W. R. Co.* 69 Iowa, 501, 29 N. W. 427—*Sidway v. Missouri Land & Live Stock Co.* 187 Mo. 673, 86 S. W. 150—*Turcott v. Yazoo & M. Valley R. Co.* 101 Tenn. 109, 40 L.R.A. 769, 70 Am. St. Rep. 661, 45 S. W. 1067.

Unpaid subscriptions.

Applicability of Statute, see *supra*, 296.

Suspension of Statute, see *infra*, 575.

348. Unpaid subscriptions to stock are assets, and the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds held in trust, and statutes of limitation do not commence to run in respect to them until after a call and assessment has been made. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 759, 33: 184

Cited in Glenn v. Marbury, 145 U. S. 504, 36 L. ed. 792, 12 Sup. Ct. Rep. 914—*Glenn v. Abell*, 39 Fed. 12—*Glenn v. McAllister*, 46 Fed. 885—*Glenn v. Priest*, 48 Fed. 20—*Dorsheimer v. Glenn*, 2 C. C. A. 310, 4 U. S. App. 500, 51 Fed. 405—*Priest v. Glenn*, 2 C. C. A. 312, 4 U. S. App. 509, 51 Fed. 406—*Semple v. Glenn*, 91 Ala. 262, 24 Am. St. Rep. 894, 9 So. 265—*Hale v. Cushman*, 96 Me. 151, 51 Atl. 874—*Washington Sav. Bank v. Butchers & D. Bank*, 107 Mo. 142, 28 Am. St. Rep. 405, 17 S. W. 644.

349. The statute of limitations does not commence to run in favor of a stockholder of a company sued for an instalment due on his stock, until a formal call or assessment has been made by the company or by an order of the court. *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. Rep. 914, 36: 790

Glenn v. Liggett, 135 U. S. 533, 10 Sup. Ct. Rep. 867, 34: 262

Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. Rep. 739, 33: 184

Cited in Glenn v. Marbury, 145 U. S. 506, 36 L. ed. 793, 12 Sup. Ct. Rep. 914—*Great Western Tele. Co. v. Purdy*, 162 U. S. 337—40 L. ed. 900, 16 Sup. Ct. Rep. 810—*MacDonald v. Thompson*, 184 U. S. 72, 46 L. ed. 437, 22 Sup. Ct. Rep. 297—*Liggett v. Glenn*, 2 C. C. A. 296, 4 U. S. App. 438, 51 Fed. 391—*Thompson v. German Ins. Co.* 76 Fed. 894—*Carey v. Mayer*, 51 U. S. App. 184, 25 C. C. A. 240, 79 Fed. 927—*Dexter v. Edmonds*, 89 Fed. 473—*Aldrich v. Yates*, 95 Fed. 82—*De Weese v. Smith*, 97 Fed. 318—*MacDonald v. Thompson*, 41 C. C. A. 291, 101 Fed. 184—*De Weese v. Smith*, 66 L.R.A. 976, 45 C. C. A. 411, 106 Fed. 441—*Harris v. Gateway Land Co.* 128 Ala. 659, 29 So. 611—*West v. Topeka Sav. Bank*, 66 Kan. 533, 63 L.R.A. 143, 97 Am. St. Rep. 385, 72 Pac. 252—*Gillen v. Sawyer*, 93 Me. 166, 44 Atl. 677—*Langworthy v. Garding*, 74 Minn. 332, 77 N. W. 207—

Cooper v. Security Co. 127 N. C. 222, 37 S. E. 216—Crofoot v. Thatcher, 19 Utah, 229, 75 Am. St. Rep. 725, 57 Pac. 171—Gold v. Paynter, 101 Va. 718, 44 S. E. 920.

350. No cause of action accrues against a stockholder in a bankrupt company in favor of the assignees, to recover an assessment upon unpaid stock, until an order of the court is obtained, setting aside an agreement made between the company and its stockholders, that, after payment of 20 per cent on their shares, no further assessment should be made thereon, and until after an assessment or some authorized demand upon the stockholder to pay the balance due on his stock. Until then the limitation prescribed by § 2 of the bankrupt act does not begin to run in the stockholder's favor. *Scovill v. Thayer*, 105 U. S. 143, 26: 968 *Distinguished in* *Webber v. Hovey*, 108 Mich. 58, 65 N. W. 619.

Cited in *Hawkins v. Glenn*, 131 U. S. 333, 33 L. ed. 192, 9 Sup. Ct. Rep. 739—*Glenn v. Liggett*, 135 U. S. 545, 34 L. ed. 267, 10 Sup. Ct. Rep. 867—*Glenn v. Marbury*, 145 U. S. 507, 36 L. ed. 794, 12 Sup. Ct. Rep. 914—*McDonald v. Thompson*, 184 U. S. 76, 46 L. ed. 440, 22 Sup. Ct. Rep. 297—*Andrews v. Bacon*, 38 Fed. 778—*Glenn v. Abell*, 39 Fed. 12—*Gilchrist v. Helena*, H. S. & S. R. Co. 49 Fed. 522—*Priest v. Glenn*, 2 C. C. A. 308, 4 U. S. App. 478, 51 Fed. 403—*Bausman v. Denny*, 73 Fed. 72—*Carey v. Mayer*, 25 C. C. A. 240, 51 U. S. App. 184, 79 Fed. 927—*Deweese v. Smith*, 66 L.R.A. 976, 45 C. C. A. 411, 106 Fed. 441—*Glenn v. Semple*, 80 Ala. 162, 60 Am. Rep. 92—*Harris v. Gateway Land Co.* 128 Ala. 659, 29 So. 611—*West v. Topeka Sav. Bank*, 66 Kan. 533, 68 L.R.A. 143, 97 Am. St. Rep. 385, 72 Pac. 252—*Gillin v. Sawyer*, 93 Me. 166, 44 Atl. 77—*Hambleton v. Glenn*, 72 Md. 351, 20 Atl. 115—*French v. Merrill*, 152 Mass. 527—*Washington Sav. Bank v. Butchers & D. Bank*, 107 Mo. 142, 17 S. W. 644—*Kelly v. Clark* (Kelly v. Fourth of July Min. Co.) 21 Mont. 343, 42 L.R.A. 635, 69 Am. St. Rep. 668, 53 Pac. 959—*Christensen v. Quintard*, 36 Hun, 336—*Williams v. Meyer*, 41 Hun, 548—*Smith v. Mercer County Mut. F. Ins. Co.* 42 Phila. Leg. Int. 297—*Solly v. Moore*, 11 Pa. Co. Ct. 335—*Lexow v. Pennsylvania Diamond Drill Co.* 5 Pa. Dist. R. 500—*Smith v. Bell*, 107 Pa. 360—*Jones v. Whitworth*, 94 Tenn. 611, 30 S. W. 736—*Crofoot v. Thatcher*, 19 Utah, 229, 75 Am. St. Rep. 725, 57 Pac. 171—*Lewis v. Glenn*, 84 Va. 987, 6 S. E. 866—*Vanderwerken v. Glenn*, 55 Va. 11, 6 S. E. 806—*Gold v. Paynter*, 101 Va. 718, 44 S. E. 920—*Bennett v. Thorne*, 36 Wash. 270, 68 L.R.A. 118, 78 Pac. 936.

351. A cause of action to enforce the liability of a stockholder under the Minnesota Constitution and laws does not accrue so as to start the running of the six years' limitation prescribed by N. Y. Code Civ. Proc. § 382, until the receiver of the corporation can sue upon the assessment after the stockholder has failed to pay as required by an order of court. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. Rep. 755, 51: 1163

— Editorial notes.

[When statute begins to run against un-

paid balance of stock subscription. 1 L.R.A.(N.S.) 901.

Accrual of right of action to put statute of limitations into operation as to stockholder's liability for corporate debts. 10 L.R.A.(N.S.) 897.]

Bank stockholders.

When Action Barred, see *infra*, 466-468.

352. The statute of limitations, as to personal liability of stockholders of a bank for the redemption of its bills, begins to run when the bank refuses to redeem and is continuously insolvent. *Terry v. Anderson*, 95 U. S. 628, 24: 365
Terry v. Tubman, 92 U. S. 156, 23: 537
Distinguished in *Cherry v. Lamar*, 58 Ga. 544
—*Rentchler v. Kunkelman*, 17 Ill. App. 346.

Cited in *Terry v. Anderson*, 95 U. S. 632, 24 L. ed. 366—*Scovill v. Thayer*, 105 U. S. 157, 26 L. ed. 974—*Fourth Nat. Bank v. Franklyn*, 120 U. S. 756, 30 L. ed. 829, 7 Sup. Ct. Rep. 757—*Foreman v. Bigelow*, 18 Nat. Bankr. Reg. 467, 4 Cliff. 548, Fed. Cas. No. 4,934—*Payson v. Coffin*, 5 Dill. 476, Fed. Cas. No. 10,859—*Brunswick Terminal Co. v. National Bank*, 88 Fed. 609—*Hutchings v. Lamson*, 37 C. C. A. 566, 96 Fed. 721—*Brunswick Terminal Co. v. National Bank*, 48 L.R.A. 635, 40 C. C. A. 26, 99 Fed. 639—*Webber v. Hovey*, 108 Mich. 58, 65 N. W. 619—*Long v. Bank of Yanceyville*, 81 N. C. 46—*Long v. Bank of Yanceyville*, 90 N. C. 407—*Whitehurst v. Dey*, 90 N. C. 546—*Swearingen v. Sewickley Dairy Co.* 198 Pa. 74, 53 L.R.A. 473, 47 Atl. 941—*Bennett v. Thorne*, 36 Wash. 265, 68 L.R.A. 117, 78 Pac. 936—*Day v. Vinson*, 78 Wis. 200, 10 L.R.A. 206, 47 N. W. 260.

353. A state statute of limitations does not begin to run against the right to enforce the individual liability of stockholders in a national bank until the amount of such liability has been ascertained and assessed by the Comptroller of the Currency. *Rankin v. Barton*, 199 U. S. 228, 26 Sup. Ct. Rep. 29, 50: 163

354. A demand which starts the running of the statute of limitations against the right of a receiver of a national bank to enforce the statutory liability of its shareholders is shown by the allegations of the bill filed by the receiver to enforce such liability, that on a specified date the Comptroller of the Currency made an assessment upon the shareholders of such bank, and "did thereby made demand upon each and every share of the capital stock of the said association," and directed the receiver to take proceedings by suit to enforce the individual liability of the shareholders. *McDonald v. Thompson*, 184 U. S. 71, 22 Sup. Ct. Rep. 297, 46: 437

Cited in *Smith v. Brown*, 187 U. S. 637, 47 L. ed. 344, 23 Sup. Ct. Rep. 845—*McClaine v. Rankin*, 197 U. S. 160, 49 L. ed. 705, 25 Sup. Ct. Rep. 410—*Rankin v. Barton*, 199 U. S. 232, 50 L. ed. 167, 26 Sup. Ct. Rep. 29—*Hale v. Coffin*, 114 Fed. 578—*Hale v. Coffin*, 57 C. C. A. 532, 120 Fed. 474.

d. Trusts.

Laches as Bar, see *supra*, I. b, 2, h.

Applicability of Statute, see *supra*, 317.

Repudiation of trust.

When Action Barred, see *infra*, III. d.

355. The statute of limitations does not begin to run in the case of an express trust until the trustee, with the knowledge of the *cestui que trust*, has disavowed and repudiated the trust. *Gisborn v. Charter Oak L. Ins. Co.* 142 U. S. 326, 12 Sup. Ct. Rep. 277, 35: 1029

356. The statute of limitations does not begin to run in favor of or against a trustee until the trust is executed or disclaimed by clear and unequivocal acts or words brought to the notice or knowledge of the parties in interest, or until there has been an adverse holding. *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. Rep. 3, 27: 69
Boone v. Chiles, 10 Pet. 177, 9: 388
Badger v. Badger, 2 Wall. 87, 17: 336
Bank of United States v. Beverly, 1 How. 134, 11: 75
Seymour v. Freer, 8 Wall. 202, 19: 306
Distinguished in Wright v. Fullerton, 2 Biss. 340, Fed. Cas. No. 18,070.

Cited in Bowman v. Wathen, 1 How. 196, 11 L. ed. 100—*Michoud v. Girod*, 4 How. 561, 11 L. ed. 1102—*Taylor v. Benham*, 5 How. 276, 12 L. ed. 151—*Speidel v. Henrici*, 120 U. S. 386, 30 L. ed. 719, 7 Sup. Ct. Rep. 610—*Gisborn v. Charter Oak L. Ins. Co.* 142 U. S. 338, 35 L. ed. 1035, 12 Sup. Ct. Rep. 277—*New Orleans v. Warner*, 175 U. S. 130, 44 L. ed. 103, 20 Sup. Ct. Rep. 44—*Amory v. Lawrence*, 3 Cliff. 532, Fed. Cas. No. 336—*Hunter v. Marlboro*, 2 Woodb. & M. 199, Fed. Cas. No. 6,908—*Doe ex dem. Longworth v. Close*, 1 McLean, 293, Fed. Cas. No. 8,489—*Manning v. Hayden*, 5 Sawy. 380, Fed. Cas. No. 9,043—*Moore v. Greene*, 2 Curt. C. C. 210, Fed. Cas. No. 9,763—*Butler v. Douglass*, 1 McCrary, 632, 3 Fed. 614—*Pulliam v. Pulliam*, 10 Fed. 26—*Berry v. Sawyer*, 19 Fed. 288—*Prince v. Towns*, 33 Fed. 163—*Lemoine v. Dunklin County*, 38 Fed. 568—*Naddo v. Bardon*, 47 Fed. 790—*Thomas v. Hurst*, 73 Fed. 375—*Carrington v. Manning*, 13 Ala. 628—*Fox v. Tay*, 89 Cal. 349, 23 Am. St. Rep. 474, 24 Pac. 855—*Perkins v. Cartmell*, 4 Harr. (Del.) 277, 42 Am. Dec. 753—*Keaton v. Greenwood*, 8 Ga. 103—*Reynolds v. Sumner*, 126 Ill. 72, 1 L.R.A. 330, 9 Am. St. Rep. 523, 18 N. E. 334—*Grant v. Odiorne*, 43 Ill. App. 408—*Zunkel v. Colson*, 109 Iowa, 699, 81 N. W. 175—*Patterson v. Hewitt*, 11 N. M. 42, 55 L.R.A. 670, 66 Pac. 552—*Platt v. Longworth*, 27 Ohio St. 199—*Raymond v. Flavel*, 27 Or. 235, 40 Pac. 158—*Ray v. Goodman*, 1 Sneed, 593—*Hunter v. Hubbard*, 26 Tex. 547—*Charter Oak L. Ins. Co. v. Gisborne*, 5 Utah, 330, 15 Pac. 253—*Drake v. Wild*, 65 Vt. 614, 27 Atl. 427.

357. When a trust is repudiated by clear and unequivocal words and acts of the trustee, who claims the property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such a manner that he is called upon to assert his equitable rights, the general rule that the statute of limitations does not run against

an express trust does not apply, and the statute begins to run from the time of such notice to the beneficiary. *Philippi v. Philippe*, 115 U. S. 151, 5 Sup. Ct. Rep. 1181.

29: 336

Cited in Speidel v. Henrici, 120 U. S. 386, 30 L. ed. 719, 7 Sup. Ct. Rep. 610—*Ware v. Galveston City Co.* 146 U. S. 116, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Alsop v. Riker*, 155 U. S. 460, 39 L. ed. 222, 15 Sup. Ct. Rep. 162—*Naddo v. Bardon*, 47 Fed. 790—*Westenfelder v. Green*, 78 Fed. 895—*Girard v. Futterer*, 84 Ala. 324, 4 So. 292—*Semple v. Glenn*, 91 Ala. 262, 24 Am. St. Rep. 894, 9 So. 265—*Newton v. Rehennack*, 90 Mo. App. 659—*Starkey v. Fox*, 52 N. J. Eq. 768, 29 Atl. 211—*Stimes v. Stimes*, 54 N. J. Eq. 23, 33 Atl. 468—*Patterson v. Hewitt* (N. M.) 55 L.R.A. 671, 66 Pac. 552—*Raymond v. Flavel*, 27 Or. 235, 40 Pac. 158—*Wood v. Fox*, 8 Utah, 401, 32 Pac. 48.

358. Although length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, time begins to run as soon as the trust is openly disavowed by the trustee insisting upon an adverse right and interest which is clearly and unequivocally made known to the *cestui que trust*. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610, 30: 718
Cited in Maine v. United States, 36 Ct. Cl. 558—*Russell v. United States*, 37 Ct. Cl. 118.

359. Where there is an agreement that one partner shall close up the business of the firm and settle its affairs, which had been under his management, a trust is created, and the bar of the statute of limitations does not begin to run against the right to an account for partnership dealings so long as such partner acts under the trust, until he repudiates it. *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 92, 34: 282
Cited in Russell v. United States, 37 Ct. Cl. 118—*Holladay v. Land & River Improv. Co.* 6 C. C. A. 571, 18 U. S. App. 308, 57 Fed. 785—*Holmes v. Gilman*, 138 N. Y. 377, 20 L.R.A. 570, 34 Am. St. Rep. 463, 34 N. E. 205—*Felkner v. Dooly*, 28 Utah, 239, 78 Pac. 36.

360. Repudiation of its trust by a city which has purchased with drainage warrants a plant to perfect its drainage system, under an agreement to facilitate the collection of the drainage assessments and apply the fund to payment of the warrants, is not shown so as to start the running of the statute of limitations by abandonment of the drainage work soon after purchasing the plant. *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44: 96
Cited in Vickrey v. Sioux City, 104 Fed. 167.

Termination of trust.

361. When a trustee has terminated his trust and parted with control of the property, the statutes of limitation begin to run in his favor. *Clarke v. Johnston* (*Clarke v. Boorman*) 18 Wall. 493, 21: 904
Cited in Kansas City Southern R. Co. v. Stevenson, 135 Fed. 557—*McGaughy v. Brown*, 46 Ark. 35—*Talmage v. Russell*, 74 App. Div. 14, 76 N. Y. Supp. 854—*Wood v. Monroe County*, 50 Hun, 13, 2 N. Y.

Supp. 369—*Lammer v. Stoddard*, 103 N. Y. 673, 9 N. E. 328—*Stewart v. Welch*, 41 Ohio St. 500—*Beard v. Stanton* 15 S. C. 170—*Troll v. Carter*, 15 W. Va. 588.

Demand.

362. The statute of limitations does not begin to run in favor of an executor against a foreign *cestui que trust*, until a demand has been made. *Taylor v. Benham*, 5 How. 233, 12: 130
Cited in *Hunt v. Danforth*, 22 Month. L. Rep. 78, Fed. Cas. No. 6,888—*Pulliam v. Pulliam*, 10 Fed. 26—*Prince v. Towns*, 33 Fed. 163—*Bechtold v. Read*, 49 N. J. Eq. 115, 22 Atl. 1085.

e. Fraud; Concealment.

Laches as Bar, see supra, I. b, 2, c.
When Action Barred, see infra, III. e.
Necessity of Allegations as to, see Pleading, 439-442.

Fraudulent concealment.

Effect of Knowledge of Fraud, see supra, 133-138.

Laches as Bar, see supra, 185-187.

As Excuse for *Laches*, see supra, 210, 211.

Necessity of Alleging Concealment, see Pleading, 439, 440, 442, 445.

See also supra, 178; infra, 375, 378, 380, 450, 571, 572.

363. Although time does not begin to run against a party on whom fraud has been committed until that fraud has been discovered, yet to avoid the lapse of time or statute of limitations the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. *Norris v. Haggin*, 136 U. S. 386, 10 Sup. Ct. Rep. 942, 34: 424
Cited in *Hammond v. Hopkins*, 143 U. S. 250, 36 L. ed. 145, 12 Sup. Ct. Rep. 418—*Pearsall v. Smith*, 149 U. S. 236, 37 L. ed. 717, 13 Sup. Ct. Rep. 833—*McIntire v. Pryor*, 173 U. S. 58, 43 L. ed. 613, 19 Sup. Ct. Rep. 352—*Naddo v. Bardon*, 2 C. C. A. 341, 4 U. S. App. 642, 51 Fed. 498—*Holladay v. Land & River Improv. Co.* 6 C. C. A. 577, 18 U. S. App. 308, 57 Fed. 792—*Elfert v. Craps*, 7 C. C. A. 322, 8 U. S. App. 436, 58 Fed. 472—*Lant v. Manley*, 71 Fed. 19—*Kirkley v. Sharp*, 98 Ga. 489, 25 S. E. 562—*Black v. Black*, 64 Kan. 705, 68 Pac. 662—*Bruner v. Finley*, 187 Pa. 407, 41 Atl. 334—*Frost v. Bush*, 195 Pa. 554, 46 Atl. 80—*Woodfolk v. Marley*, 98 Tenn. 473, 40 S. W. 479—*Melms v. Pabst Brewing Co.* 93 Wis. 174, 57 Am. St. Rep. 809, 66 N. W. 518.

364. Mere silence is not sufficient concealment of fraud to prevent the running of the statute of limitations, where the facts of the fraud can be easily ascertained by inquiry. *Felix v. Patrick*, 145 U. S. 317, 12 Sup. Ct. Rep. 862, 36: 719
Cited in *Bates v. Preble*, 151 U. S. 162, 38 L. ed. 111, 14 Sup. Ct. Rep. 277—*Naddo v. Bardon*, 2 C. C. A. 341, 4 U. S. App. 642, 51 Fed. 499.

365. In Massachusetts the mere silence of the defendant, or his failure to inform U. S. Dig.—242

the plaintiff of the cause of action, if there is no fiduciary relation between the parties and plaintiff has the means of discovering the facts, is not such a fraudulent concealment of the cause of action as will prevent the bar of the statute of limitations; but if the fraud itself be secret in its nature, and such that its existence cannot be readily ascertained, or if there be fiduciary relations between the parties, there need be no evidence of a fraudulent concealment other than that implied from the transaction itself. *Bates v. Preble*, 151 U. S. 149, 14 Sup. Ct. Rep. 277, 38: 106
Cited in *Murphy v. Kirby*, 3 App. D. C. 218—*Cobb v. First Nat. Bank*, 91 Tex. 250, 42 S. W. 770.

366. A conspiracy between two persons to defraud a third does not imply necessarily that they fraudulently concealed the cause of action for the fraud, where there were no such confidential relations as would cause silence on their part to be imputed as a fraud. *Bates v. Preble*, 151 U. S. 149, 14 Sup. Ct. Rep. 277, 38: 106

367. A statute of limitations that bars a claim against an agent equally protects those on whose behalf he acted as agent, where there are no circumstances of equity to prevent the operation of the statute in their favor. The concealment of the fact of the agency, where there is no fraud on the part of the principals, is insufficient for that purpose. *Ware v. Galveston City Co.* 111 U. S. 170, 4 Sup. Ct. Rep. 337, 28: 393

368. That a bankrupt omitted to mention life policies in his schedules in bankruptcy, and that neither he nor his administrator informed the assignee of them, where they took no means to conceal them, does not establish fraudulent concealment of them so as to prevent the running of the statute of limitations. *Avery v. Cleary*, 132 U. S. 604, 10 Sup. Ct. Rep. 220, 33: 469
Cited in *Re Thomas*, 45 Fed. 793—*Scott v. Little*, 76 Fed. 564—*Bowen v. Delaware, L. & W. R. Co.* 82 Hun, 43, 81 N. Y. Supp. 286.

369. Fraudulent concealment from an assignee in bankruptcy of the conveyance of the bankrupt's property, so as to prevent the running of the statute of limitations, is not shown where full information of such conveyance is accessible by public record. *Greene v. Taylor*, 132 U. S. 415, 10 Sup. Ct. Rep. 138, 33: 411
Cited in *Pearsall v. Smith*, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 833.

Discovery of fraud.

When Action Barred, see infra, 476, 477.

Allegations as to, see Pleadings, 439-442.

See also supra, 365; infra, 378-380.

370. Where fraud is alleged, the statute of limitations does not begin to run till the fraud is discovered. *Moore v. Greene*, 19 How. 69, 15: 533
Meador v. Norton, 11 Wall. 442, 20: 184
Cited in *Bailey v. Glover*, 21 Wall. 348, 22

L. ed. 638, 12 Nat. Bankr. Reg. 28—Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 136, 30 L. ed. 572, 7 Sup. Ct. Rep. 430—Jones v. Van Doren, 130 U. S. 693, 32 L. ed. 1080, 9 Sup. Ct. Rep. 685—McIntire v. Pryor, 173 U. S. 56, 43 L. ed. 612, 19 Sup. Ct. Rep. 352—Baldwin v. Raplee, 4 Ben. 447, Fed. Cas. No. 801—Martin v. Smith, 1 Dill. 96, 4 Nat. Bankr. Reg. 285, Fed. Cas. No. 9,164—Tyler v. Angevine, 15 Blatchf. 541, Fed. Cas. No. 14,300—McAlpine v. Hedges, 21 Fed. 690—Lehman v. LaForge, 42 Fed. 495—Hodge v. Palms, 15 C. C. A. 223, 37 U. S. App. 61, 68 Fed. 64—McKneely v. Terry, 61 Ark. 543, 33 S. W. 953—Dorsey Mach. Co. v. McCaffrey, 139 Ind. 554, 47 Am. St. Rep. 290, 38 N. E. 208—Cutter v. Preston, 64 N. H. 468, 13 Atl. 874—Todd v. Rafferty, 30 N. J. Eq. 258—United States v. San Pedro & C. D. A. Co. 4 N. M. 590, 17 Pac. 337—Peck v. Bank of America, 16 R. I. 715, 7 L.R.A. 831, 19 Atl. 369—Weeks v. Milwaukee, L. S. & W. R. Co. 78 Wis. 515, 47 N. W. 737—Rogers v. Van Nortwick, 87 Wis. 431, 58 N. W. 757.

371. Where there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute of limitations does not begin to run until the fraud is discovered by, or becomes known to, the party suing or those in privity with him. Upton v. McLaughlin, 105 U. S. 640, 26: 1197

Cited in Rosenthal v. Walker, 111 U. S. 181, 28 L. ed. 397, 4 Sup. Ct. Rep. 382—Bartles v. Gibson, 17 Fed. 299—Yancy v. Cothran. 32 Fed. 689—Shainwald v. Davids, 69 Fed. 699.

372. The statute of limitations begins to run against a cause of action for fraud upon a discovery of the fraud by those under whom the plaintiff claims. Pearsall v. Smith, 149 U. S. 231, 13 Sup. Ct. Rep. 833, 37: 713

Cited in Scott v. Little, 76 Fed. 565—H. B. Claffin Co. v. Middlesex Bkg. Co. 113 Fed. 961.

373. Where a party injured by fraud is in ignorance of its existence, the duty to commence proceedings arises only upon discovery; and mere submission to an injury, after the act inflicting it is completed, cannot generally and in the absence of other circumstances take away a right of action, unless such acquiescence continues for the period limited by the statute for the enforcement of such right. Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. Rep. 594, 32: 1005

374. Where the plaintiff is not suing for her dower as such, the right to which accrued over twenty years before commencing the suit, but for property of which she has been defrauded, the statute of limitations begins to run only from the discovery of the fraud. Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. Rep. 685, 32: 1077

Cited in McKneely v. Terry, 61 Ark. 543, 33 S. W. 953—Parrish v. Parrish, 33 Or. 493, 54 Pac. 352.

375. In Indiana, actions for fraud must be commenced within six years. The statute begins to run when the fraud is perpetrated; or, where there is concealment by trick or contrivance intended to prevent inquiry, such actions may be brought within the time limited after the discovery of the cause of action. Wood v. Carpenter, 101 U. S. 135, 25: 807

New Albany v. Burke, 11 Wall. 96, 20: 155

Cited in Ware v. Galveston City Co. 148 U. S. 115, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—Dannmeyer v. Coleman, 8 Sawy. 58, 11 Fed. 102—Norris v. Haggins, 28 Fed. 281—Teall v. Slaven, 40 Fed. 778—Jesup v. Illinois C. R. Co. 43 Fed. 503—Naddo v. Bardon, 47 Fed. 789—Lant v. Manley, 71 Fed. 19—School District v. De Weese, 100 Fed. 710—McKneely v. Terry, 61 Ark. 545, 33 S. W. 953—Moore v. Boyd, 74 Cal. 171, 15 Pac. 670—Wier v. Johns, 14 Colo. 498, 24 Pac. 262—De Mares v. Gilpin, 15 Colo. 84, 24 Pac. 568—Rose v. Dunklee, 12 Colo. App. 419, 56 Pac. 342—Davis v. Boyett, 120 Ga. 651, 66 L.R.A. 259, 102 Am. St. Rep. 118, 48 S. E. 185—Means v. Jenkins, 18 Ill. App. 44—Shelby County v. Bragg, 135 Mo. 300, 36 S. W. 600—Loomis v. Rosenthal, 34 Or. 602, 57 Pac. 55—Bickle v. Chrisman, 76 Va. 688—Thompson v. Whitaker Iron Co. 41 W. Va. 584, 23 S. E. 795.

376. The six years' limitation of the New York Code of Civil Procedure of actions "to procure a judgment other than for a sum of money, on the ground of fraud," cannot begin to run as to a suit in equity in the courts of the United States until the discovery of the fraud. Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 130, 7 Sup. Ct. Rep. 430, 30: 569

Cited in Alsop v. Riker, 155 U. S. 460, 39 L. ed. 223, 15 Sup. Ct. Rep. 162—Dennis v. Bint, 122 Cal. 45, 68 Am. St. Rep. 17, 54 Pac. 378.

377. Records of a conveyance under a power of attorney, and reconveyance to the agent, charge all persons interested with notice of any fraud thereby committed, so as to set in motion a statute of limitations providing that a cause of action for fraud does not accrue until the discovery of the facts. Teall v. Schroder, 158 U. S. 172, 15 Sup. Ct. Rep. 768, 39: 938

Bankruptcy.

See also supra, 368, 369.

378. An action at law, by an assignee in bankruptcy, to recover money paid and property sold by the bankrupt in fraud of the bankrupt act, where the defendants concealed the fraud which was sought to be redressed, is not subject to the bar of the statute of limitations of two years from the transaction, but may be brought within two years after the discovery of the fraud. Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. Rep. 382, 28: 395

Bailey v. Glover, 21 Wall. 342, 22: 636

Distinguished in Avery v. Cleary, 132 U. S. 609, 33 L. ed. 472, 10 Sup. Ct. Rep. 220—Foster v. Mansfield C. & L. M. R. Co. 146 U. S. 100, 36 L. ed. 903, 13 Sup. Ct. Rep. 28—Pearsall v. Smith, 149 U. S. 236, 37 L. ed. 717, 13 Sup. Ct. Rep. 833—Pickett v. McGavick, 14 Nat. Bankr. Reg. 238, Fed.

Cas. No. 11,126—West Portland Homestead Assn. v. Lownsdale, 9 Sawy. 120, 17 Fed. 620—Simmons v. Bayard, 30 Fed. 537—Yancy v. Cothran, 32 Fed. 689—Phelps v. Elliott, 35 Fed. 462—Matthews v. Westphal, 48 Fed. 667—Despeaux v. Pennsylvania R. Co. 87 Fed. 795—Somerset County v. Veghte, 44 N. J. L. 521—Dee v. Hyland, 3 Utah, 313, 3 Pac. 388.

Cited in Rosenthal v. Walker, 111 U. S. 190, 28 L. ed. 397, 4 Sup. Ct. Rep. 382—Traer v. Clews, 115 U. S. 537, 29 L. ed. 470, 6 Sup. Ct. Rep. 155—Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 136, 30 L. ed. 372, 7 Sup. Ct. Rep. 430—Avery v. Cleary, 132 U. S. 610, 33 L. ed. 472, 10 Sup. Ct. Rep. 220—Harris v. Exchange Nat. Bank, 4 Dill. 185, Fed. Cas. No. 6,119—Hoyt v. Sprague, 8 Rep. 618, Fed. Cas. No. 6,810—Nicholas v. Murray, 5 Sawy. 324, Fed. Cas. No. 10,223—Tyler v. Angevine, 15 Blatchf. 540, Fed. Cas. No. 14,306—Van Bokkelen v. Cook, 5 Sawy. 593, Fed. Cas. No. 16,831—Wilt v. Stickney, 15 Nat. Bankr. Reg. 25, Fed. Cas. No. 17,854—Martin v. Fullings, 3 Fed. 208—Re Jackson, 9 Fed. 494—Re Pitts, 9 Fed. 544—McCan v. Conery, 12 Fed. 318—Sterling v. Barnwell, 12 Fed. 323—Duff v. First Nat. Bank, 18 Fed. 67—Leavenworth County v. Chicago, R. I. & P. R. Co. 5 McCrary, 511, 18 Fed. 211—Cook v. Sherman, 4 McCrary, 28, 20 Fed. 171—Friedman v. Israel, 26 Fed. 802—Phelps v. Elliott, 29 Fed. 54—Yancy v. Cothran, 32 Fed. 689—Foster v. Mansfield, C. & M. L. R. Co. 36 Fed. 638—Murray v. Chicago & N. W. R. Co. 62 Fed. 45—Shainwald v. Davids, 69 Fed. 699—Lant v. Manley, 21 C. C. A. 466, 43 U. S. App. 623, 75 Fed. 635—Little v. Holley-Brooks Hardware Co. 67 C. C. A. 52, 133 Fed. 880—McKneely v. Terry, 61 Ark. 543, 33 S. W. 953—Moore v. Boyd, 74 Cal. 171, 15 Pac. 670—Lewis v. Denison, 2 App. D. C. 392—Anderson v. Northrop, 30 Fla. 643, 12 So. 318—Jenkins v. Rosenberg, 105 Ill. 168—Athey v. Hunter, 65 Ill. App. 458—Dorsey Mach. Co. v. McCaffrey, 139 Ind. 558, 47 Am. St. Rep. 290, 38 N. E. 208—Jackson v. Jackson, 49 Ind. 245, 47 N. E. 963—Clews v. Trear, 57 Iowa, 466, 10 N. W. 838—Faust v. Hosford, 119 Iowa, 100, 93 N. W. 58—McMullen v. Winfield Bldg. & L. Asso. 64 Kan. 306, 56 L.R.A. 928, 91 Am. St. Rep. 236, 67 Pac. 892—Atchison, T. & S. F. R. Co. v. Atchison Grain Co. 68 Kan. 594, 75 Pac. 1051—Re Deake, 80 Me. 56, 12 Atl. 790—Rock v. Dennett, 155 Mass. 503, 30 N. E. 171—Snell v. Harrison, 104 Mo. 191, 16 S. W. 152—Gruber v. Baker, 20 Nev. 475, 9 L.R.A. 309, 23 Pac. 858—Smith v. Blachley, 198 Pa. 175, 53 L.R.A. 850, 47 Atl. 985.

379. Where fraud is the foundation of the action, the limitation of two years under the bankrupt act does not begin to run, in the absence of negligence or laches on the plaintiff, until the discovery of the fraud. *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. Rep. 155. 29: 467

Cited in Kirby v. Lake Shore & M. S. R. Co.

120 U. S. 137, 30 L. ed. 572, 7 Sup. Ct. Rep. 430—Avery v. Cleary, 132 U. S. 610, 33 L. ed. 472, 10 Sup. Ct. Rep. 220—Foster v. Mansfield, C. & L. M. R. Co. 36 Fed. 638—Lant v. Manley, 21 C. C. A. 466, 43 U. S. App. 623, 75 Fed. 635—McKneely v. Terry, 61 Ark. 544, 33 S. W. 953—Smith v. Pacific Bank, 137 Cal. 369, 70 Pac. 184—Lewis v. Denison, 2 App. D. C. 393—Anderson v. Northrop, 30 Fla. 643, 12 So. 318—Harrison v. Powers, 76 Ga. 243—McMullen v. Winfield Bldg. & L. Asso. 64 Kan. 306, 56 L.R.A. 928, 91 Am. St. Rep. 236, 67 Pac. 892—Atchison, T. & S. F. R. Co. v. Atchison Grain Co. 68 Kan. 594, 75 Pac. 1051—Re Deake, 80 Me. 56, 12 Atl. 790—Rock v. Dennett, 155 Mass. 503, 30 N. E. 171—Snell v. Harrison, 104 Mo. 191, 16 S. W. 152—Gruber v. Baker, 20 Nev. 475, 9 L.R.A. 309, 23 Pac. 858—Smith v. Blachley, 198 Pa. 175, 53 L.R.A. 850, 47 Atl. 985.

380. When there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and where the fraud has been concealed, or is of such character as to conceal itself, the statute of limitations as to suits by a bankrupt's assignee (U. S. Rev. Stat. § 5057) does not begin to run until the fraud is discovered by or becomes known to the party suing to those in privity with him, or ought to be so discovered or known. *Pearsall v. Smith*, 149 U. S. 231, 13 Sup. Ct. Rep. 833, 37: 713

Cited in Lant v. Manley, 21 C. C. A. 466, 43 U. S. App. 623, 75 Fed. 635.

f. Negligence.

See also Attorneys, 38.

381. The statute commences running against an action for malpractice on the part of an attorney from the date of the fatal error in pleading complained of, and not from the date when the action in which such error was made became barred by the statute of limitations. *Wilcox v. Plummer*, 4 Pet. 172, 7: 821

Distinguished in Smith v. Seattle, 18 Wash. 488, 63 Am. St. Rep. 910, 51 Pac. 1057.

Cited in Amy v. Dubuque, 98 U. S. 474, 25 L. ed. 230—Scovill v. Thayer, 105 U. S. 153, 26 L. ed. 973—Power v. Minger, 3 C. C. A. 262, 10 U. S. App. 289, 52 Fed. 710—Pinkston v. Brewster, 14 Ala. 320—Governor v. Gordon, 15 Ala. 78—Snedlcor v. Davis, 17 Ala. 480—Kimbro v. Waller, 21 Ala. 370—Denton v. Embury, 10 Ark. 238—White v. Reagan, 32 Ark. 290—Lattin v. Gillette, 95 Cal. 322, 29 Am. St. Rep. 115, 30 Pac. 545—Bank of Hartford County v. Waterman, 26 Conn. 336—Ware v. State, 74 Ind. 186—Steel v. Bryant, 49 Iowa, 117—Russell v. Polk County Abstract Co. 87 Iowa, 242, 43 Am. St. Rep. 381, 54 N. W. 212—Bartlett v. Bullene, 23 Kan. 612—Betts v. Norris, 21 Me. 323, 38 Am. Dec. 264—Shaw v. Alexander, 32 Miss. 233—Schade v. Gehner, 133 Mo. 259, 34 S. W. 576—J. Kennard & Sons Carpet Co. v. Dorman, 64 Mo. App. 25—Gardner v. Wood, 37 Misc. 95, 74 N. Y. Supp. 750—Baucum v. Streater, 50 N. C. 71 (5 Jones, L.)—State ex rel. Daniel v. Grizzard, 117 N. C. 111, 23 S. C. 93—Gillette v. Tucker, 67 Ohio St. 137, 93 Am. St. Rep. 639, 65 N. E. 865—Downey v. Garard, 24 Pa. 54—Campbell v. Boggs, 48 Pa. 525—Moore v.

Juvenal, 92 Pa. 490, 7 W. N. C. 376—Owen v. Western Sav. Fund, 97 Pa. 54, 9 W. N. C. 467, 39 Am. Rep. 794—Guarantee Trust & S. D. Co. v. Farmers & M. Nat. Bank, 202 Pa. 97, 51 Atl. 765—Glenn v. Cuttle, 2 Grant Cas. 274—Thomas v. Ervin, Cheves L. 24 34 Am. Dec. 586—M'Alexander v. Montgomery, 4 Leigh, 67.

382. The statute of limitations begins to run against the right of action for a loss due to the negligence of an attorney employed to collect a note, from the time of commencing an action against the indorser after ascertaining the maker's insolvency, which proved fatally defective by reason of a misnomer of plaintiffs. *Wilcox v. Plummer*, 4 Pet. 172, 7: 821
Cited in *Mardis v. Shackelford*, 4 Ala. 505.

g. Suits Relating to Real Property.

Purchaser's Right to Set up Statute of Limitations, see *supra*, 235-238.

Applicability of Statute to Claim for Mesne Property, see *supra*, 307, 308.

Effect of Disability, see *infra*, II. l.

Suspension of Statute, see *infra*, 576, 577.

Interruption of Statute, see *infra*, 588, 600.

Adverse Possession of Lands, see *Adverse Possession*.

Time Required to Cure Defects in Tax Sale, see *Taxes*, 691-693.

See also *supra*, 377.

383. Court of equity will not except a cause of action for the recovery of lands from the operation of the statute of limitations unless the courts of the country are so closed that the suit could not be brought. *M'iver v. Ragan*, 2 Wheat. 25, 4: 175
Cited in *Hanger v. Abbott*, 6 Wall. 542, 18 L. ed. 943—*Burdyne v. Mackey*, 7 Mo. 378.

384. The Texas act of 1841, § 15, requires suit to be instituted within three years next after the cause of action shall have accrued. Until the land of the plaintiff was trespassed upon, the action of trespass to try title could not be maintained. *White v. Burnley*, 20 How. 235, 15: 886

Editorial note.

[When right of action for injury to real estate, from a cause not immediately effective, accrues. 5 L.R.A.(N.S.) 379.]

Public lands.

Applicability of Statute, see *supra*, 313, 315.

Time to Sue to Confirm Private Land Claims, see *Private Land Claims*. III. a, 3.

385. In the courts of the United States, in an action of ejectment based on a title derived from the government, the statute of limitations does not begin to run until the date of the government patent for the land. *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. Rep. 83, 33: 327

386. The statute of limitations of Tennessee could not begin to run against the right to bring ejectment for a tract of land claimed both by Virginia and Tennessee un-

til 1802, when, by the compact, it fell within the limits of the latter state, where there was no proof that the land had always been within the limits of that state. *Robinson v. Campbell*, 3 Wheat. 212, 4: 372

387. The state statute of limitations in regard to action to recover land does not begin to run so long as the title is in the state or the United States. *Crilley v. Burrows*, 17 Wall. 167, note, 21: 624

388. A state statute of limitations for the recovery of real property does not begin to run in favor of a railway company as against a settler under the homestead laws of the United States until patent has issued. *Northern P. R. Co. v. Slaght*, 205 U. S. 122, 27 Sup. Ct. Rep. 442, 51: 738
Northern P. R. Co. v. Slaght, 205 U. S. 134, 27 Sup. Ct. Rep. 446, 51: 742

Tenant.

389. The statute of limitations will run in favor of a tenant after dissolution of the relation of landlord and tenant. *Willison v. Watkins*, 3 Pet. 43, 7: 596

Life tenant.

See also *infra*, 416.

390. Where a husband has a life estate in a lot, and is competent to sue for the remainder of it, the statute of limitations runs against him, and a purchaser from or through him takes the estate subject to the operation of this limitation. *Gregg v. Tesson*, 1 Black, 150, 17: 74
Cited in *Towns v. Towns*, 121 Ala. 424, 25 So. 715—*Shortall v. Hinckley*, 81 Ill. 228—*Talcott v. Draper*, 61 Ill. 58—*Dawson v. Edwards*, 189 Ill. 67, 59 N. E. 590—*Valle v. Obenhouse*, 62 Mo. 98.

Mexican title.

See also *infra*, 438.

391. The California statute of limitations did not begin to run against a Mexican title until its confirmation by the United States. *Palmer v. Low*, 98 U. S. 1, 25: 60

h. Tax Sales.

Applicability of Statute, see *supra*, 316.

When Action Barred, see *infra*, III. h.

See also *infra*, 439, 549.

392. Under the General Laws of Wisconsin of 1861, chap. 138, § 5, limiting to three years the time for an action to recover land sold for nonpayment of taxes, an illegal charge of five cents for a stamp does not so vitiate the sale that the statute will not run in favor of a purchaser. *Geekie v. Kirby Carpenter Co.* 106 U. S. 379, 1 Sup. Ct. Rep. 315, 27: 157
Cited in *Phillippi v. Phillippi*, 115 U. S. 157, 29 L. ed. 340, 5 Sup. Ct. Rep. 1181—*Bardon v. Land & River Improv. Co.* 157 U. S. 333, 39 L. ed. 721, 15 Sup. Ct. Rep. 650—*Brick v. Staten Island R. Co.* 25 Fed. 554—*Kittle v. Hall*, 29 Fed. 511—*Gates v. Kelsey*, 57 Ark. 525, 22 S. W. 162—*Simoneaux v. White Castle Lumber & Shingle Co.* 112 La. 224, 36 So. 328—*Bronson v. St. Croix Lumber Co.* 44 Minn. 352, 46 N. W. 570.

i. Decedent's Estate.

Effect of Party's Death to Suspend Statute, see *infra*, 428, 429, 433.

Suspension of Statute, see *infra*, 564, 565, 573, 574, 636, 638, 639, 658.

Repeal of Statute, see Statutes, 650.

Executors.

Applicability of Statute, see *supra*, 303, 304.

When Action Barred, see *infra*, 500.

See also *supra*, 362.

393. A decree in Alabama by a probate court, in 1864, ordering a payment in Confederate bonds, is void, and did not fix an executor's liability, so that the statute would begin to run in his favor. *Alexander v. Bryan*, 110 U. S. 414, 4 Sup. Ct. Rep. 107, 28: 195

Cited in Lamar v. Micou, 112 U. S. 476, 28 L. ed. 760, 5 Sup. Ct. Rep. 221—*Baldy v. Hunter*, 171 U. S. 402, 43 L. ed. 213, 18 Sup. Ct. Rep. 890.

394. In Alabama, by statute, an action against the surety of an executor, for any misfeasance or malfeasance of his principal, must be brought within six years after the cause of action has accrued, the time to be computed, from the act done or omitted by the principal, which fixes the liability of the surety; and, until there is a judicial ascertainment of the default of the principal, by a decree ordering payment by him, the liability of the surety is not fixed. *Alexander v. Bryan*, 110 U. S. 414, 4 Sup. Ct. Rep. 107, 28: 195

Cited in Fewlass v. Keeshan, 32 C. C. A. 11, 60 U. S. App. 133, 88 Fed. 576.

Administrator.

395. The Georgia statute of March 16, 1869, does not commence to run against administrators until twelve months from the date of their appointment and qualification. *Mills v. Scott*, 99 U. S. 25, 25: 294

Heirs.

Applicability of Statute, see *supra*, 305.

When Action Barred, see *infra*, 496-500.

396. Under the Statute of Kentucky, if adverse possession commences prior to the decease of the nonresident patentee, his heirs are limited to ten years from the time of the decease of their ancestor, for the assertion of their claims. *Lewis v. Marshall*, 5 Pet. 470, 8: 195

j. Judgment.

When Action Barred, see *infra*, III. 1.
See also Judgment, 893.

397. A judgment entered *nunc pro tunc* may have effect from different dates for different purposes. The right to enforce the judgment does not begin, so that the statute of limitations will commence to run, until after the judgment is actually entered, where in the meantime the case has been

pending on writ of error. *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. Rep. 342, 30: 532

Cited in Sharon v. Terry, 1 L.R.A. 586, 18 Sawy. 412, 36 Fed. 354—*Fewlass v. Keeshan*, 32 C. C. A. 11, 60 U. S. App. 133, 88 Fed. 576.

398. In a suit in equity brought in the circuit court of the United States to enforce a judgment under the laws of Maine against the property of a corporation whose charter has been surrendered, the cause of action does not accrue until the return of execution against the corporation, and the statute of limitations will not commence to run until that time. *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. Rep. 397, 28: 368
Cited in White Mountain Paper Co. v. Morse, 62 C. C. A. 871, 127 Fed. 645.

k. Absence from State or Beyond Seas.

Effect of Removing from one County to Another, see *supra*, 230.

Right of Foreign Corporation to Set up Protection of Statute, see *supra*, 240, 241.

Effect of Eluding Service of Process, see *supra*, 329-331.

Discrimination Against Nonresidents, see Constitutional Law, 224.

See also *supra*, 211, 231; *infra*, 491.

Presence within state.

399. Temporary presence within the state, not amounting to actual residence, is not sufficient to start the running of the statute of limitations against a foreign creditor, where the statute makes an exception in favor of nonresidents. *Bond v. Jay*, 7 Cranch, 350, 3: 367

400. A statute of limitations which excepts creditors "out of the commonwealth" begins to run as soon as a creditor enters the state, even temporarily, provided the debtor is then in the state. *Faw v. Roberdeau*, 3 Cranch, 174, 2: 402

Cited in United States v. Ellason, 16 Pet. 301, 10 L. ed. 972—*United States v. King*, 7 How. 865, 12 L. ed. 948—*Suydam v. Williamson*, 20 How. 434, 15 L. ed. 980—*Derby v. Jacques*, 1 Cliff. 433, Fed. Cas. No. 3,817—*Palmer v. Shaw*, 16 Cal. 96—*Hatch v. Spofford*, 24 Conn. 441—*Howell v. Burnett*, 11 Ga. 305—*Buckmaster v. Grundy*, 2 Ill. 313—*Byrne v. Crowlinsfield*, 1 Pick. 266—*Cole v. Jessup*, 10 N. Y. 104—*Dider v. Davison*, 2 Sandf. Ch. 66—*Powell v. Koehler*, 52 Ohio St. 120, 26 L.R.A. 483, 49 Am. St. Rep. 705, 39 N. E. 195—*Alexander v. Burnet*, 5 Rich. L. 202.

401. An agent merely for the collection of debts is not a factor of a foreign creditor, within the meaning of the Virginia statute of limitations, whose presence within the state would enable the statute to run, as against residents. *Hopkirk v. Bell*, 3 Cranch, 154, 2: 497

402. The Virginia act of limitations requiring an action in five years is no bar to a British creditor's demand in a suit brought January 4, 1803, on a promissory note dated

August 21, 1772, although one of the plaintiffs was in this country after the treaty of peace, viz., in 1784, and remained until his death, in 1785. *Hopkirk v. Bell*, 4 Cranch. 164, 2: 583

Residing out of state.

What Constitutes a Change of Residence, see Domicil, 14.

403. Where a cause of action accrued against a nonresident, and, as the law then stood, was excepted from the statute of limitations, but it was brought within it by a subsequent amendment, the statute begins to run against the claim only from the time of the amendment. *Lewis, use of Longworth, v. Lewis*, 7 How. 776, 12: 909

Cited in *Sohn v. Waterson*, 17 Wall. 600, 21 L. ed. 739—*Cleveland Ins. Co. v. Reed*, 1 Biss. 186, Fed. Cas. No. 2,889—*Pereles v. Watertown*, 6 Biss. 82, Fed. Cas. No. 10,980—*Sayles v. Richmond, F. & P. R. Co.* 3 Hughes, 174, 4 Bann. & Ard. 241, Fed. Cas. No. 12,424—*Lamb v. Powder River Live Stock Co.* 67 L.R.A. 561, 65 C. C. A. 574, 132 Fed. 438—*Friedmann v. McGowan*, 1 Penn. (Del.) 443, 42 Atl. 723—*Madison Ins. Co. v. Forsythe*, 2 Ind. 486—*Gillette v. Hibbard*, 3 Mont. 417—*Huber v. Zimmerman*, 8 Okla. 575, 58 Pac. 737—*Shelly v. Dampman*, 1 Pa. Super. Ct. 120, 38 W. N. C. 314—*Focht v. Reading Stove Works*, 21 Pa. Co. Ct. 527—*Parker v. Kane*, 4 Wis. 18, 65 Am. Dec. 283.

404. The provision in the Virginia statute of limitations, that the time during which a suit shall be obstructed by a resident of the state removing and remaining out of the state shall not be computed as part of the time within which the suit should be brought, does not apply where the removal from the state occurred before the contract sued upon was made, and, therefore, before any cause of action thereon accrued. *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. Rep. 776, 33: 172

Cited in *Lindauer Mercantile Co. v. Boyd*, 11 N. M. 476, 70 Pac. 568—*Griffin v. Woolford*, 100 Va. 479, 41 S. E. 949—*Walsh v. Schilling*, 33 W. Va. 110, 10 S. E. 54—*Fisher v. Hartley*, 48 W. Va. 341, 54 L.R.A. 217, 86 Am. St. Rep. 39, 37 S. E. 578.

405. The residence out of the state which suspended the running of the New York statute of limitations (N. Y. Code Proc. 1849, chap. 438, § 100) was a fixed abode, entered upon with the intention to remain permanently, at least for a time, for business or other purposes. *Barney v. Oelrichs*, 138 U. S. 529, 11 Sup. Ct. Rep. 414, 34: 1037

Offed in *Redfield v. Bartels*, 139 U. S. 700, 35 L. ed. 818, 11 Sup. Ct. Rep. 683—*Bauserman v. Blunt*, 147 U. S. 653, 37 L. ed. 318, 13 Sup. Ct. Rep. 466—*Balkam v. Woodstock Iron Co.* 154 U. S. 188, 38 L. ed. 957, 14 Sup. Ct. Rep. 1010—*Campbell v. Haverhill*, 155 U. S. 620, 39 L. ed. 284, 15 Sup. Ct. Rep. 217—*Howard v. Citizens' Bank & T. Co.* 12 App. D. C. 235—*Lawson v. Adlard*, 46 Minn. 246, 48 N. W. 1019—*Larson v. Aultman & T. Co.* 86 Wis. 285, 39 Am. St. Rep. 893, 56 N. W. 915—*Farr v. Durant*, 90 Wis. 343, 63 N. W. 274.

406. The words "to reside out of the state," in N. Y. Code Proc. 1849, chap. 438, § 100, meant the taking up of an actual

abode or dwelling place elsewhere, and not a mere temporary sojourn for transient purposes. *Barney v. Oelrichs*, 138 U. S. 529, 11 Sup. Ct. Rep. 414, 34: 1037

407. Where the plaintiff is a foreign corporation, the members of which are averred to be aliens and British subjects, the presumption is that they are residents abroad, and the statute of limitations does not run against them. *Society for Propagation of Gospel v. Pawlet*, 4 Pet. 480, 7: 927

— Editorial note.

[What constitutes "residence out of the state" within meaning of statute of limitations. 17 L.R.A. 225.]

Fugitive from justice.

408. The fleeing from justice, which by U. S. Rev. Stat. § 1045, U. S. Comp. Stat. 1901, p. 726, may extend the time for finding an indictment under the laws of the United States, need not be with intent to avoid the justice of the United States; but it is sufficient that there is an intent to avoid the justice of the state having criminal jurisdiction over the same territory and the same act. *Streep v. United States*, 160 U. S. 128, 16 Sup. Ct. Rep. 244, 40: 365

Cited in *United States v. Hewecker*, 79 Fed. 61—*Porter v. United States*, 33 C. C. A. 654, 62 U. S. App. 550, 91 Fed. 496.

Beyond seas.

State Construction as Rule in Federal Courts, see Courts, 2041.

Repeal of Statute as to, see Statutes, 652.

See also *infra*, 545.

409. The term "beyond seas," in the saving clause of a statute of limitations, is to be construed as equivalent to "without the limits of the state" where the statute is enacted. *Faw v. Roberdeau*, 3 Cranch, 174, 2: 402

Murray v. Baker, 3 Wheat. 541, 4: 454

Shelby v. Guy, 11 Wheat. 361, 6: 495

Bank of Alexandria v. Dyer, 14 Pet. 141, 10: 391

Cited in *Green v. Neal*, 6 Pet. 300, 8 L. ed. 406—*Davie v. Briggs*, 97 U. S. 637, 24 L. ed. 1089—*Fruseaux v. Welch*, Fed. Cas. No. 11,456—*United States v. Dustin*, Fed. Cas. No. 15,012—*Smith v. Bond*, 8 Ala. 390—*Thomason v. Odum*, 23 Ala. 486—*Hatch v. Spofford*, 24 Conn. 441—*Keech v. Enriquez*, 28 Fla. 610, 10 So. 91—*Stephenson v. Doe*, 8 Blackf. 515, 46 Am. Dec. 489—*Campbell v. Rankins*, 11 Me. 106—*Whitney v. Goddard*, 20 Pick. 808, 32 Am. Dec. 216—*State v. Johnson*, 12 Minn. 479, 93 Am. Dec. 241, Gil. 378—*Estis v. Rawlins*, 5 How. (Miss.) 266—*Marvin v. Bates*, 13 Mo. 220—*Galusha v. Cobleigh*, 13 N. H. 86—*Paine v. Drew*, 44 N. H. 314—*Earle v. Dickson*, 12 N. C. (1 Dev. L.) 17—*State v. Harris*, 71 N. C. 176—*Richardson v. Richardson*, 6 Ohio, 126, 25 Am. Dec. 745—*West v. Pickesimer*, 7 Ohio, pt. 2, p. 236—*Forbe v. Foot*, 2 M'Cord, L. 333, 13 Am. Dec. 732—*Pike v. Greene*, 1 Yerg. 468—*Snoddy v. Cage*, 5 Tex. 117—*Brown v. Bicknell*, 1 Pinney (Wis.) 229, 39 Am. Dec. 299.

409a. [A creditor who, for more than six years before instituting an action founded

upon a promissory note, has resided within another state, is not within the exception in favor of absentees contained in the Pennsylvania statute of limitations, which extends only to the case of creditors "beyond sea," and his action is barred by the statute. *Ward v. Hallam* (Pa. Sup. Ct.) 2 Dall. 217, 1: 355]

410. On a plea of the statute of limitations, it was held that residents of the county of Alexandria, in the District of Columbia, "were not beyond seas, in respect to the county of Washington." *Bank of Alexandria v. Dyer*, 14 Pet. 141, 10: 391

I. Coverture, Infancy, or Other Disability.

Effect of War to Suspend Limitations, see *infra*, IV. d.

When Heirs of Indian are Barred, see *infra*, 498.

Effect of Disability after Statute has Commenced to Run, see *infra*, 569.

Effect of Disability on Presumption of Payment from Lapse of Time, see Evidence, 821, 821a.

Sufficiency of Allegations of Disability, see Pleading, 744.

See also *infra*, 440.

Editorial notes.

Effect of disabilities. 33: 172

[Disability of some, but not all, of the joint tenants as affecting the statute of limitations. 7 L.R.A. (N.S.) 407]

Coverture.

Right of Wife's Grantee to Set up Disability of, see Husband and Wife, 103.

See also *infra*, 427-429; Husband and Wife, 127.

411. The exemptions from the operation of statutes of limitation to infants and married women rest upon express language in those statutes, giving them time after majority, or after cessation of coverture, to assert their rights. *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. Rep. 854, 27: 808

Cited in *Gillfillan v. Union Canal Co.* 109 U. S. 406, 27 L. ed. 979, 3 Sup. Ct. Rep. 304—*McGahey v. Virginia*, 135 U. S. 707, 34 L. ed. 318, 10 Sup. Ct. Rep. 972—*Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 439, 47 L. ed. 251, 23 Sup. Ct. Rep. 234—*Lerma v. Stevenson*, 40 Fed. 359—*Morgan v. Des Moines*, 54 Fed. 461—*Morgan v. Des Moines*, 8 C. C. A. 570, 19 U. S. App. 598, 60 Fed. 209—*Madden v. Lancaster County*, 12 C. C. A. 573, 27 U. S. App. 528, 65 Fed. 195—*Shreve v. Cheesman*, 16 C. C. A. 417, 32 U. S. App. 676, 69 Fed. 789—*Pearsall v. Great Northern R. Co.* 78 Fed. 940—*Stryker v. Grand County*, 23 C. C. A. 301, 40 U. S. App. 583, 77 Fed. 582—*Robert J. Boyd Paving & Contracting Co. v. Ward*, 28 C. C. A. 675, 55 U. S. App. 730, 85 Fed. 35—*Wrightman v. Boone County*, 31 C. C. A. 572, 60 U. S. App. 100, 88 Fed. 436—*Webber v. St. Paul City R. Co.* 38 C. C. A. 82, 97 Fed. 143—*Chauncey v. Dyke Bros.* 55 C. C. A. 594, 119 Fed. 16—*St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 83, 125 Fed.

199—*Lamb v. Powder River Live Stock Co.* 67 L.R.A. 561, 65 C. C. A. 575, 132 Fed. 439—*Tuttle v. Block*, 104 Cal. 449, 38 Pac. 109—*Swamp Land Dist. No. 307 v. Glide*, 112 Cal. 90, 44 Pac. 451—*Myers v. Wheelock*, 60 Kan. 753, 57 Pac. 956—*Garrison v. Hill*, 81 Md. 555, 32 Atl. 191—*Cranor v. School Dist. No. 2*, 151 Mo. 124, 52 S. W. 232—*Swaney v. Gage County*, 64 Neb. 632, 90 N. W. 542—*Bettman v. Cowley*, 19 Wash. 223, 40 L.R.A. 822, 53 Pac. 53—*Oshkosh Waterworks Co. v. Oshkosh*, 109 Wis. 219, 85 N. W. 376—*Pietsch v. Milbrath*, 123 Wis. 670, 68 L.R.A. 956, 107 Am. St. Rep. 1017, 102 N. W. 342.

412. If an infant, who is also a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended. *Sims v. Everhardt*, 102 U. S. 300, 26: 87

Cited in *Hitz v. Jenks*, 123 U. S. 302, 31 L. ed. 158, 8 Sup. Ct. Rep. 143—*MacGreal v. Taylor*, 167 U. S. 695, 42 L. ed. 330, 17 Sup. Ct. Rep. 961—*Berry v. Seawall*, 13 C. C. A. 116, 31 U. S. App. 30, 65 Fed. 757—*Gilkinson v. Miller*, 74 Fed. 134—*Sanger v. Hibbard*, 43 C. C. A. 636, 104 Fed. 457—*American Freehold Land Mortg. Co. v. Dykes*, 111 Ala. 194, 56 Am. St. Rep. 38, 18 So. 292—*Stull v. Harris*, 51 Ark. 299, 2 L.R.A. 742, 11 S. W. 104—*Fox v. Drewry*, 62 Ark. 319, 35 S. W. 533—*Stringer v. Northwestern Mut. L. Ins. Co.* 82 Ind. 108—*Sims v. Berdoner*, 86 Ind. 91, 44 Am. Rep. 263—*Sims v. Smith*, 86 Ind. 579—*Richardson v. Pate*, 93 Ind. 426, 47 Am. Rep. 374—*Buchanan v. Hubbard*, 96 Ind. 4—*Alvey v. Reed*, 115 Ind. 149, 7 Am. St. Rep. 418, 17 N. E. 265—*Cook v. Walling*, 117 Ind. 12, 2 L.R.A. 770, 10 Am. St. Rep. 17, 19 N. E. 532—*McClanahan v. Williams*, 136 Ind. 37, 35 N. E. 897—*Donovan v. Ward*, 100 Mich. 604, 59 N. W. 254—*Linville v. Greer*, 165 Mo. 398, 65 S. W. 579—*Charles v. Hastett*, 51 N. J. Eq. 175, 26 Atl. 564—*Lancaster v. Lancaster*, 13 Lea, 131—*Wilson v. Branch*, 77 Va. 73, 46 Am. Rep. 709—*Birch v. Linton*, 78 Va. 588, 49 Am. Rep. 881.

413. The statute of limitations does not commence to run against a bill by a *feme covert* until the removal of her disability by the death of her husband. *House v. Muller*, 22 Wall. 42, 22: 838

Cited in *Grant v. Anderson*, 1 Tex. App. Civ. Cas. (White & W.) § 191.

414. By the Missouri territory limitation act of 1818, no laches can be charged against *femes covert* until discovery. Such act does not begin to run against them until they become discover. *Meegan v. Boyle*, 19 How. 130, 15: 577

Cited in *Berry v. Seawall*, 13 C. C. A. 116, 31 U. S. App. 30, 65 Fed. 757.

415. By act of December 17, 1818, the Missouri territorial legislature abolished rules of prescription under the Spanish law, in real actions, and substituted a limitation of twenty years after action accrued, and, in case of disability by coverture, twenty years after it ceased. But this is declared by the Revised Code of March 10, 1835, § 2, not to apply to actions already commenced or rights of action accrued. *Meegan v. Boyle*, 19 How. 130, 15: 577

416. Where a woman, married at the date of the Illinois act of 1861, owned real property in which her husband was entitled to a life estate, her right of possession accrued only after his right was extinguished; and when he became barred by the statute of limitations her right accrued, and the statute began to run against her. *Kibbe v. Ditto*, 93 U. S. 674, 23: 1005
Distinguished in Mettler v. Miller, 129 Ill. 643, 22 N. E. 529.

Cited in Hershey v. Latham, 42 Ark. 308—*Garland County v. Gaines*, 47 Ark. 562, 2 S. W. 460—*Kling v. Merritt*, 67 Mich. 217, 34 N. W. 689—*Hicks's Estate*, 7 Pa. Super. Ct. 280.

417. In Massachusetts the entry of a married woman is barred by the statute of limitations after thirty years, notwithstanding her coverture. *Reed v. Proprietors of Locks & Canals*, 8 How. 274, 12: 1077

418. Under the statute of West Virginia, a woman is not barred of her right of entry into land by a judgment in her husband's lifetime, or by default or collusion. She is not barred necessarily so as to prevent her interest passing to her grantee, by reason of the fact that, at the date of a conveyance by her and her husband, her husband's right to recover was cut off by limitation. She had ten years, after the disability of coverture was removed, to assert her right of entry. *Collins v. Riley*, 104 U. S. 322, 26: 752

Infancy.

Time Allowed to Redeem from Tax Sale, see Taxes, 714.

See also *supra*, 411, 412; *infra*, 422, 428.

419. The right given an infant to bring an action, "notwithstanding" the expiration of the time limited to make entry, "within ten years next after attaining full age," does not extend the time limited if such ten years have elapsed before the expiration of the limitation. *Gregg v. Sayre*, 8 Pet. 244, 8: 932

420. The period of disability of minor plaintiffs in ejectment is not to be included in the statutory period of limitation where they continued to be minors, after descent of title, until within less than the statutory period before suit brought, and one of them was a minor in the year in which the appeal was heard. *Dexter v. Hall*, 15 Wall. 9, 21: 73

Cumulative disabilities.

421. Cumulative disabilities are not allowed. Only the one existing when right of action accrued can be availed of. *Mercer v. Selden*, 1 How. 37, 11: 38
Cited in Hogan v. Kurtz, 94 U. S. 779, 24 L. ed. 320—*Davis v. Coblens*, 174 U. S. 725, 43 L. ed. 1149, 19 Sup. Ct. Rep. 832—*Moore v. Greene*, 2 Curt. C. C. 208, Fed. Cas. No. 9,763—*East Tennessee Iron & Coal Co. v. Wiggin*, 15 C. C. A. 515, 37 U. S. App. 129, 68 Fed. 450—*Carter v. Cantrell*, 16 Ark. 164—*Scott v. Haddock*, 11 Ga. 264—*Kell v. Healey*, 84 Ill. 108, 25 Am. Rep. 434—

Dugan v. Gittings, 3 Gill, 160, 43 Am. Dec. 306—*Cozzens v. Farnan*, 30 Ohio St. 497, 27 Am. Rep. 470—*White v. Latimer*, 12 Tex. 62.

422. Where a right of action for lands in Virginia has accrued in favor of a person under disabilities, the time for bringing an action cannot be extended more than ten years beyond the ordinary period of limitation, either in favor of that person, or of his heirs, although they may be infants. *Mercer v. Selden*, 1 How. 37, 11: 38
Cited in Sims v. Everhardt, 102 U. S. 310, 26 L. ed. 89—*Harris v. McGovern*, 2 Sawy. 518, Fed. Cas. No. 6,125—*Sims v. Bardoner*, 86 Ind. 96, 44 Am. Rep. 263—*Trafton v. Hill*, 80 Me. 508, 15 Atl. 64—*De Mill v. Moffat*, 49 Mich. 130, 13 N. W. 387—*Wallace v. Fletcher*, 30 N. H. 454—*Wilson v. Branch*, 77 Va. 73, 46 Am. Rep. 709—*Caperton v. Gregory*, 11 Gratt. 515.

423. Under the statute of limitations of New York, cumulative disabilities are not allowed to prevent the statute running against the remedy by writ of right as well as by ejectment. *Thorp v. Raymond*, 16 How. 247, 14: 923

Cited in East Tennessee Iron & Coal Co. v. Wiggin, 15 C. C. A. 515, 37 U. S. App. 129, 68 Fed. 450—*Riggs v. Fuller*, 54 Ala. 149—*Murray v. Houghton*, 2 Ind. Terr. 507, 52 S. W. 48—*Nutter v. De Rochemont*, 46 N. H. 82—*Henry v. Carson*, 59 Pa. 304.

424. A disability to sue because of an impediment to the assertion of plaintiff's title, and which respects the title, not the institution of the suit, does not take the case out of the operation of the statute of limitations, although such disability was of statutory creation. *M'Iver v. Ragan*, 2 Wheat. 25, 4: 175

425. In order to avoid the plea of the statute of limitations to an action by tenants in common, it is necessary to show that all the plaintiffs were under disability to sue. *Marsteller v. M'Clean*, 7 Cranch, 156, 3: 300

426. In Texas, where the statute of limitations has commenced to run against a party, it is not suspended by his death, and the period of limitation cannot be extended by the connection of one disability with another. *Miller v. Texas & P. R. Co.* 132 U. S. 662, 10 Sup. Ct. Rep. 206, 33: 487
Cited in Elder v. McClaskey, 17 C. C. A. 262, 37 U. S. App. 1, 70 Fed. 540.

427. Where a married woman inherited land from her mother, who was insane when her right of entry accrued, the period of the daughter's coverture could not be added to that of the mother's insanity. *Thorp v. Raymond*, 16 How. 247, 14: 923
Cited in McDonald v. Hovey, 110 U. S. 624, 28 L. ed. 270, 4 Sup. Ct. Rep. 142—*Davis v. Coblens*, 174 U. S. 725, 43 L. ed. 1149, 19 Sup. Ct. Rep. 832—*Dowell v. Tucker*, 46 Ark. 452—*Dodge v. Gallatin*, 130 N. Y. 132, 29 N. E. 107.

428. The disability of coverture cannot be added to that of infancy, where an infant

was married before coming of age. *Mercer v. Selden*, 1 How. 37, 11: 38
Cited in McDonald v. Hovey, 110 U. S. 623, 28 L. ed. 270, 4 Sup. Ct. Rep. 142—*Billion v. Larimore*, 37 Mo. 387—*Nutter v. De Rochemont*, 46 N. H. 81.

429. The cumulative disability of an heir of a woman who died during coverture cannot arrest the running of the statute of limitations. *Davis v. Coblens*, 174 U. S. 719, 19 Sup. Ct. Rep. 832, 43: 1147

Subsequent disability.

430. When the statute of limitations once begins to run, it will continue without being impeded by the intervention of any subsequent disability. *Harris v. McGovern*, 99 U. S. 161, 25: 317
Braun v. Sauerwein, 10 Wall. 218, 19: 895
Hogan v. Kurtz, 94 U. S. 773, 24: 317
McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. Rep. 142, 28: 269
Cited in Bauserman v. Blunt, 147 U. S. 657, 37 L. ed. 320, 13 Sup. Ct. Rep. 466—*Davis v. Coblens*, 174 U. S. 725, 43 L. ed. 1149, 19 Sup. Ct. Rep. 832—*Ewell v. Chicago & N. W. R. Co.* 29 Fed. 58—*East Tennessee Iron & Coal Co. v. Wiggin*, 15 C. C. A. 515, 37 U. S. App. 129, 68 Fed. 451—*Mann v. Cooper*, 2 App. D. C. 237—*Wade v. Doyle*, 17 Fla. 527—*Smith v. Young*, 89 Iowa, 341, 56 N. W. 506—*Maurice v. Worden*, 52 Md. 295—*Gibbons v. Helskell*, 80 Md. 9, 44 Atl. 996—*De Mill v. Moffat*, 49 Mich. 130, 13 N. W. 387—*King v. Merritt*, 67 Mich. 217, 34 N. W. 689—*Everett v. Smith*, 62 N. H. 387—*Lennig v. White*, 1 Va. Dec. 893, 20 S. E. 831—*McAulliff v. Parker*, 10 Wash. 146, 38 Pac. 744.

431. It was not the intention of Congress, either in the act of 1789, or in the act of 1872, or in U. S. Rev. Stat. § 1008, U. S. Comp. Stat. 1901, p. 715, prescribing the time within which an appeal may be taken, to change the rule, which had always been applied to statutes of limitation, that no disability will postpone the operation of the statute unless it exists when the cause of action accrues, and that when the statute begins to run, no subsequent disability will interrupt it. *McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. Rep. 142, 28: 269

432. When the statute of limitations has once begun to run its operation is not suspended by a subsequent disability, such as mental incapacity. *De Arnaud v. United States*, 151 U. S. 483, 14 Sup. Ct. Rep. 374, 38: 244

Cited in McCutchen v. Currier, 94 Me. 363, 47 Atl. 923.

433. Intervening disabilities of heirs do not prevent the running of the statute of limitations against a bill to review a foreclosure decree and sale, where the mortgagor was alive at the date of the decree, though he died before sale thereunder. *Whiting v. Bank of United States*, 13 Pet. 6, 10: 33

— Editorial note.

Effect of disability occurring after statute of limitations begins to run. 25: 317

Disability pending appeal.

Effect on Time for Taking Appeal, see Appeal and Error, 2605.

See also *infra*, 509, 510.

434. Although the condition of a marshal's bond is broken by his neglect to bring money into court or to pay it over to a party when directed by the court, yet, if the proceedings are suspended by appeal, the right of action of the injured party has not accrued so as to start the running of the limitation prescribed by Congress for suits on marshals' bonds. *Montgomery v. Hernandez*, 12 Wheat. 129, 6: 575

Cited in Hanger v. Abbott, 6 Wall. 542, 18 L. ed. 943—*Devereaux v. Brownsville*, 29 Fed. 751—*Re Waties*, 39 Fed. 265—*Muse v. Arlington Hotel Co.* 68 Fed. 649—*Mercantile Trust Co. v. St. Louis & S. F. R. Co.* 69 Fed. 196—*Brown v. Merrick*, 16 Ark. 615—*Sanderson v. Sanderson*, 17 Fla. 848—*Fruitt v. Anderson*, 12 Ill. App. 430—*Ten Eyck v. Wing*, 1 Mich. 53—*State use of Morrison v. St. Gemme*, 23 Mo. 346—*Taylor v. Thorn*, 29 Ohio St. 574—*Brown County v. Martin*, 50 Ohio St. 204, 33 N. E. 1112—*Franklin v. Depriest*, 13 Gratt. 270.

435. Under the act of July 13, 1866, giving a right to recover back taxes illegally collected by an internal revenue collector, the interval between the appeal and its decision, where it is less than six months, is the entire period during which a party was disabled to sue. The statute of limitations of Maryland, which had begun to run before the act was passed, was suspended only during such disablement, and began to run again immediately after such decision. *Braun v. Sauerwein*, 10 Wall. 218, 19: 895
Distinguished in Gibson v. Ruff, 8 App. D. C. 269.

Cited in The Collector v. Hubbard (Brainard v. Hubbard) 12 Wall. 11, 20 L. ed. 275—*Cheatham v. United States* (Cheatham v. Norvekl) 92 U. S. 90, 23 L. ed. 563—*Amy v. Watertown*, 130 U. S. 323, 82 L. ed. 955, 9 Sup. Ct. Rep. 537—*Bauserman v. Blunt*, 147 U. S. 657, 37 L. ed. 320, 13 Sup. Ct. Rep. 466—*Francis v. Slack*, 4 Cliff. 189, Fed. Cas. No. 5,041—*Devereaux v. Brownsville*, 29 Fed. 751—*Brockway v. Oswego Twp.* 40 Fed. 615—*Muse v. Arlington Hotel Co.* 68 Fed. 649—*Jackson v. Fidelity & C. Co.* 21 C. C. A. 400, 41 U. S. App. 552, 75 Fed. 365—*Hawes v. Fette*, 42 Ark. 379—*Barton v. New Haven*, 74 Conn. 732, 52 Atl. 403—*St. Paul, M. & M. R. Co. v. Olson*, 87 Minn. 120, 94 Am. St. Rep. 693, 91 N. W. 294—*Hussey v. Davis*, 58 N. H. 318—*Broadfoot v. Fayetteville*, 124 N. C. 495, 70 Am. St. Rep. 610, 32 S. E. 804.

436. Under the act of 1866, § 19, a suit to recover an internal revenue tax as illegally assessed or collected may be brought at any time within six months after the commissioner's decision on appeal, or, before his decision, at any time within twelve months from the date of the appeal to the commissioner, if his decision is delayed more than six months from the date of the appeal. *James v. Hicks*, 110 U. S. 272, 4 Sup. Ct. Rep. 6, 28: 144

437. Under the act of June 6, 1872, a cause of action to recover back taxes ille-

gally collected by internal revenue collector did not accrue until the commissioner's decision, and was not barred by limitation until two years thereafter. *Wright v. Blakeslee*, 101 U. S. 174, 25: 1048

438. The statute of limitations of California could not begin to run against a claimant of land under a Mexican grant while proceedings for the confirmation of the claim were pending in the courts of the United States, in accordance with the requirements of an act of Congress, adopted in the discharge of treaty obligations with Mexico. *Henshaw v. Bissell*, 18 Wall. 255, 21: 835
Cited in Palmer v. Low, 98 U. S. 16, 25 L. ed. 64—*Le Roy v. Carroll*, 8 Sawy. 67, Fed. Cas. No. 8,286—*Manly v. Howlett*, 55 Cal. 98—*Riverside Land & Irrig. Co. v. Jansen*, 66 Cal. 301, 5 Pac. 486—*Wilhoit v. Tubbs*, 83 Cal. 288, 23 Pac. 386—*Ansar v. Miller*, 90 Cal. 345, 27 Pac. 299—*Ohm v. San Francisco*, 92 Cal. 455, 28 Pac. 580—*King v. Kingsbury*, 6 Mont. 415, 12 Pac. 865—*Altschul v. O'Neill*, 35 Or. 216, 58 Pac. 95.

m. Claims against United States.

Running of Limitations against United State, see *supra*, I. c. 5.

Running of Limitation in Favor of United States, see *supra*, 262, 263.

When Action Barred, see *infra*, III. k.

Removal of Bar, see *infra*, 580, 581.

Interruption of Statute, see *infra*, 598.

439. The statute of limitations runs against the owner of land sold for direct tax, under the act of June 5, 1861, as to his claim against the United States for the surplus proceeds deposited in the Treasury, only from the date of such application therefor. *United States v. Cooper*, 120 U. S. 124, 7 Sup. Ct. Rep. 459, 30: 606

Cited in United States v. Wardwell, 172 U. S. 57, 43 L. ed. 363, 19 Sup. Ct. Rep. 86—*Beaumont v. United States*, 25 Ct. Cl. 353.

440. Claimant's inability, by reason of his connection with the Rebellion, to comply with the terms required in order to bring a suit against the United States in the court of claims, until the amnesty proclamation of 1863, is not a disability which prevents his claim from being barred in six years. *Kendall v. United States*, 107 U. S. 123, 2 Sup. Ct. Rep. 277, 27: 437

441. The right of a disbursing officer to sue in the court of claims under §§ 1059-1062 to obtain relief from responsibility for loss of funds did not accrue until the accounting officers held him liable for the sum lost, by refusing to credit his account therewith. *United States v. Smith*, 105 U. S. 620, 26: 1191

United States v. Clark, 96 U. S. 37, 24: 696

442. A claim against the United States for moneys carried to the credit of the payee of a check drawn by a disbursing officer in pursuance of U. S. Rev. Stat. § 306, U. S. Comp. Stat. 1901, p. 181, for which, by §

308, U. S. Comp. Stat. 1901, p. 182, the proper officer of the treasury is required to give a warrant, does not accrue at the time the check is issued, or at the time when it may be lost or destroyed, so that the statute of limitations (U. S. Rev. Stat. § 1069, U. S. Comp. Stat. 1901, p. 740) will begin to run, but it will accrue only when the promise made by § 308 is broken,—as, by refusal of an application for a warrant. *United States v. Wardwell*, 172 U. S. 48, 19 Sup. Ct. Rep. 86, 43: 360

Cited in Miller v. United States, 84 Ct. Cl. 340—*Nelson v. United States*, 85 Ct. Cl. 430—*Pennsylvania v. United States*, 86 Ct. Cl. 524—*Russell v. United States*, 87 Ct. Cl. 117.

443. Where an appeal was rejected by the commissioner of internal revenue for mere informality, and he entertained a subsequent appeal, the latter is the appeal from which the time to bring such suit is to be reckoned. *James v. Hicks*, 110 U. S. 272, 4 Sup. Ct. Rep. 6, 28: 144

Cited in Sinking Fund Comrs. v. Buckner, 48 Fed. 535.

III. When Action is Barred.

a. In General; Penalty.

When Limitation for Penalty Begins to Run, see *supra*, 341, 342.

First Raising Bar on Appeal, see *Appeal and Error*, 4571-4573.

What Law Determines Bar of Action Begun in State other than where Cause of Action Arose, see *Conflict of Laws*, II. c.

Time Allowable to Present Claim to Executor, see *Executors and Administrators*, 129.

Collateral Attack on Judgment for Executor's Failure to Plead Statute, see *Judgment*, 460.

Taking Objection of Bar by Demurrer, see *Pleading*, 864.

See also *supra*, 14.

444. The statute of limitation in force when a suit is brought is the one which determines the right of the party to sue. *Patterson v. Gaines*, 6 How. 550, 12: 553
Cited in Hayden v. Oriental Mills, 22 Fed. 104—*Pritchard v. Spencer*, 2 Ind. 486—*Coady v. Reins*, 1 Mont. 429—*Gullotel v. New York*, 55 How. Pr. 117—*Flake v. Briggs*, 6 B. I. 564—*Oberreich v. Fond du Lac County*, 63 Wis. 221, 23 N. W. 421.

445. Where the statute of limitations is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred if not brought within a limited time, every cause for which such action may be prosecuted is within the statute. *McCluny v. Silliman*, 3 Pet. 270, 7: 676

Cited in Cockrill v. Cooper, 29 C. C. A. 532, 57 U. S. App. 576, 86 Fed. 11—*Aldrich v. McClaine*, 43 C. C. A. 634, 106 Fed. 798—

Morgan v. Camden & A. R. Co. 18 W. N. C. 130—*Houghton v. Tolman*, 74 Vt. 469, 52 Atl. 1032.

446. An existing right of action cannot be taken away by shortening the period of limitation to a time which has already run. *Chapman v. Douglas County*, 107 U. S. 348, 2 Sup. Ct. Rep. 62, 27: 378

447. The judgment of a court dismissing a suit for want of jurisdiction might perhaps, where the want of jurisdiction is so clear as to make it gross negligence to bring the action, deprive the party of the benefit of a statute extending the time for suing after a judgment not on its merits. Per *Woods, J. Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. Rep. 319, 27: 986
Cited in Hardin v. Cass County, 42 Fed. 655—*Alexander v. Gordon*, 41 C. C. A. 231, 101 Fed. 95—*Bunker Hill & S. Min. & Concentrating Co. v. Shoshone Min. Co.* 47 C. C. A. 203, 109 Fed. 507—*Little Rock, M. R. & T. R. Co. v. Manes*, 49 Ark. 252, 4 Am. St. Rep. 45, 4 S. W. 778—*Atlanta, K. & N. R. Co. v. Wilson*, 119 Ga. 787, 47 S. E. 366—*Pepper v. Donnelly*, 87 Ky. 262, 8 S. W. 441—*Pittsburgh, C. C. & St. L. R. Co. v. Bemis*, 64 Ohio St. 32, 59 N. E. 745.

448. The act of April 30, 1790, limiting prosecutions upon penal statutes, extends as well to penalties created after as before that act, and to actions of debt as well as to informations and indictments. *Adams v. Woods*, 2 Cranch, 336, 2: 297
Cited in Huntington v. Attrill, 146 U. S. 673, 36 L. ed. 1130, 13 Sup. Ct. Rep. 224—*Campbell v. Haverhill*, 155 U. S. 616, 39 L. ed. 282, 15 Sup. Ct. Rep. 217—*Johnson v. United States*, 3 McLean, 89, Fed. Cas. No. 7,418—*United States v. Ballard*, 3 McLean, 470, Fed. Cas. No. 14,507—*United States v. Brown*, 2 Low. Dec. 268, Fed. Cas. No. 14,665—*United States v. Dustin*, Fed. Cas. No. 15, 012—*United States v. Shorey*, Fed. Cas. No. 16,282—*Johnson v. Hughes*, 1 Stew. (Ala.) 265—*Western U. Teleg. Co. v. Nunnally*, 86 Ga. 505, 12 S. E. 578—*United States v. Tithing Yard*, 9 Utah, 277, 34 Pac. 55.

Principal and agent.

See also *infra*, 480; *Factors*, 1.

449. The law of Tennessee is that where an agent obtains money of his principal and converts it, and is not sued until three years elapse, the remedy by assumpsit is barred. *Mattingly v. Boyd*, 20 How. 128, 15: 845

450. A statute of limitations that bars a claim against an agent equally protects those on whose behalf he acted as agent, where there are no circumstances of equity to prevent the operation of the statute in their favor. The concealment of the fact of the agency, where there is no fraud on the part of the principals, is insufficient for that purpose. *Ware v. Galveston City Co.* 111 U. S. 170, 4 Sup. Ct. Rep. 337, 28: 393

b. Contracts; Usury.

Laches as Defense to Deed, see *supra*, 110-113.

Applicability of Statute, see *supra*, 276-293.

Interruption of Statute, see *infra*, 608, 615, 664.

Presumption of Payment from Lapse of Time, see *Evidence*, 815-825.

Rebuttal of Presumption of Payment, see *Evidence*, 2173.

451. The statute of limitations of North Carolina passed in 1715, in force in Tennessee does not bar actions of debt generally, but only those brought for arrearages of rent. *Kirkman v. Hamilton*, 6 Pet. 20, 8: 305
Cited in Tisdale v. Munroe, 8 Yerg. 322.

452. Under the Illinois decisions, checks are bills of exchange or orders, within the law of that state as to limitation of actions, and are barred unless suit thereon be brought within five years next after the cause of action accrued. *Rogers v. Durant*, 140 U. S. 298, 11 Sup. Ct. Rep. 754, 35: 481

Cited in Garrettson v. North Atchison Bank, 47 Fed. 870—*Johnson v. Wright*, 2 App. D. C. 219—*Connor v. Becker*, 56 Neb. 346, 76 N. W. 893—*German Nat. Bank v. Beatrice Nat. Bank*, 63 Neb. 248, 88 N. W. 480.

453. An action of assumpsit for money had and received is none the less barred by the Maryland statute of limitations because it was brought to try title under a statutory provision. *Beatty v. Burnes*, 8 Cranch, 98, 3: 500

454. Where heirs seek in assumpsit to recover damages for the failure of warranty to their ancestor, and the suit is commenced between eight and nine years after the right of action has accrued, the statute of limitations of Maryland prevents a recovery. *Flowers v. Foreman*, 23 How. 132, 16: 405

Editorial note.

[On bank checks. 22 L.R.A. 110.]

Bonds; coupons.

Applicability of Statute, see *supra*, 276-279.

When Statute begins to Run, see *supra*, 333-335.

Interruption of Statute, see *infra*, 607, 621.

Presumption of Payment of Bond from Lapse of Time, see *Evidence*, 818a, 821, 821a.

See also *infra*, 594.

455. A bond, in respect to the statute of limitations, is a specialty which is not barred by lapse of time short of twenty years. *Kenosha v. Lamson*, 9 Wall. 477, 19: 725

Cited in Toothaker v. Boulder, 18 Colo. 225, 22 Pac. 468—*Heffeman v. Pennington County*, 3 S. D. 167, 52 N. W. 851.

456. A suit upon a coupon is not barred by the statute of limitations, unless the lapse of time after its maturity would be sufficient to bar also a suit upon the bond if that had been due at the same time; and the coupon as well as the bond is, in respect to the statute of limitations, a specialty. *Lexington v. Butler*, 14 Wall. 282, 20: 809

Kenosha v. Lamson, 9 Wall. 477, 19: 725
Clark v. Iowa City, 20 Wall. 583, 22: 427
Explained in Clark v. Iowa City, 20 Wall. 587,
 22 L. ed. 428.

Cited in Lexington v. Butler, 14 Wall. 297,
 20 L. ed. 813—*Clark v. Iowa City*, 20 Wall.
 587, 22 L. ed. 428—*Amy v. Dubuque*, 98 U.
 S. 474, 25 L. ed. 280—*Kershaw v. Hancock*,
 18 Blatchf. 384, 10 Fed. 542—*Nash v.*
El Dorado County, 24 Fed. 255—*Huey v.*
Macon County, 35 Fed. 482—*Griffin v. Macon*
County, 2 L.R.A. 355, 36 Fed. 887—*Briggs*
v. Phelps, 70 Fed. 31—*Mather v. San*
Francisco, 52 C. C. A. 639, 115 Fed. 45—
Toothaker v. Boulder, 18 Colo. 225, 22 Pac.
 468—*Heffleman v. Pennington County*, 3 S.
 D. 167, 52 N. W. 851—*Park v. Candler*, 114
 Ga. 474, 40 S. E. 523—*Cushman v. Carver*
County, 19 Minn. 298, Gll. 252—*Kelly v.*
Forty-Second Street, M. & St. N. Ave. R.
Co. 37 App. Div. 508, 55 N. Y. Supp. 1096
 —*Philadelphia Trust, S. D. & Ins. Co. v.*
Philadelphia & E. R. Co. 160 Pa. 601, 28
 Atl. 960—*Wain v. Huntingdon & B. T. R.*
Co. 16 Phila. 21.

Usury.

457. Under Louisiana Rev. Stat. 1870 §
 1856, a reclamation of interest cannot be
 made, or the usurious interest imputed to
 the principal, unless the suit for the re-
 covery is begun, or plea of usury set up to
 the claim, within twelve months after the
 payment is made. *Cook v. Lillo*, 103 U. S.
 792, 26: 460

Cited in Walsh v. Mayer, 111 U. S. 37, 28
 L. ed. 340, 4 Sup. Ct. Rep. 260—*Carter v.*
Carusi, 112 U. S. 484, 28 L. ed. 822, 5 Sup.
 Ct. Rep. 281—*Gunby v. Armstrong*, 66 C.
 C. A. 644, 133 Fed. 434—*Matthews v. Paine*,
 47 Ark. 58, 14 S. W. 463—*Kleinendienst v.*
Johnson, 7 Mackey, 369—*Mumford v. Mc-*
Veigh, 92 Va. 458, 23 S. E. 857.

458. Where a State law authorized a re-
 covery, from the party taking usury, of
 threefold the amount above the legal rate,
 at any time within two years after the right
 of action accrued, and more than two years
 had elapsed before the suit was brought, the
 excess cannot be recovered in equity. *Hans-*
brough v. Peck, 5 Wall. 497, 18: 520
Cited in Swift v. Sheehy, 88 Fed. 928—*Sher-*
burne v. Hirst, 121 Fed. 1002—*Orr v. Zim-*
merman, 63 Mo. 77—*Myers v. Williams*, 85
 Va. 629, 8 S. E. 483.

459-60. A petition to recover back
 usurious interest from a national bank, un-
 der U. S. Rev. Stat. §§ 5197, 5198, U. S.
 Comp. Stat. 1901, p. 3493, which shows on
 its face that the action was not "commenced
 within two years from the time the usurious
 transactions occurred," as required by the
 latter section, cannot withstand a demurrer
 because of an allegation that the charge and
 reservation of the usurious interest were
 without plaintiff's knowledge or consent,
 since, even if the period of limitation of
 the statute does not begin until discovery of
 the wrong, the court will not indulge the
 presumption that plaintiff's consciousness of
 the wrong was not aroused until sometime
 within two years before the commencement
 of the action. *Talbot v. Sioux Nat. Bank*,
 185 U. S. 182, 22 Sup. Ct. Rep. 621, 46: 862

Assumption of mortgage.

Interruption of Statute, see *infra*, 612,
 630.

See also *supra*, 42.

461. If the liability of a grantee assuming
 payment of a mortgage is in assumpsit only,
 it is barred by the statute of limitations of
 the District of Columbia in three years.
Willard v. Wood, 135 U. S. 309, 10 Sup. Ct.
 Rep. 831, 34: 210

Cited in Willard v. Wood, 164 U. S. 519, 41
 L. ed. 538, 17 Sup. Ct. Rep. 176—*Under-*
wood v. Patrick, 36 C. C. A. 334, 94 Fed.
 472.

462. Liability by reason of the acceptance
 of a deed without executing it, in which a
 covenant of the grantee to assume a mort-
 gage is recited, is subject to the limitation
 prescribed as to simple contracts. *Willard*
v. Wood, 164 U. S. 502, 17 Sup. Ct. Rep.
 176, 41: 531
Cited in Taylor v. Forbes, 101 Va. 665, 44
 S. E. 888

c. Corporations; Liability of Stockhold- ers.

Corporations.

Applicability of Statute, see *supra*, 295.
 When Limitation begins to Run, see *supra*,
 347.

463. In Louisiana, in a suit against a cor-
 poration for damages for refusal to permit
 the transfer of shares on its books, where
 there has not been an uninterrupted period
 of ten years in which prescription could
 run, between suits brought for the dividends,
 the defense of the prescription of ten years
 fails. *de St. Romes v. Levee Steam Cotton*
Press Co. (St. Romes v. Levee Steam Cot-
ton Press Co.) 127 U. S. 614, 8 Sup. Ct.
 Rep. 1335, 32: 229

464. An action against a corporation for
 refusing to transfer shares on its books is
 not barred by the Louisiana prescription of
 one year. *Case v. Citizens' Bank*, 100 U.
 S. 446, 25: 695

Distinguished in Chemical Nat. Bank v. Arm-
strong, 50 Fed. 804.

Cited in St. Romes v. Levee Steam Cotton
Press Co. 127 U. S. 620, 32 L. ed. 292, 8
 Sup. Ct. Rep. 1335—*Conger v. New Orleans*,
 32 La. Ann. 1253—*Citizens' Bank v. Hyams*,
 42 La. Ann. 733, 7 So. 700—*Dayton Nat.*
Bank v. Merchants' Nat. Bank, 37 Ohio St.
 215—*Rio Grande Cattle Co. v. Burns*, 82
 Tex. 57, 17 S. W. 1043—*Re Klaus*, 67 Wis.
 408, 29 N. W. 682.

465. The state statute of limitations, run-
 ning after the closing up of a bank, does
 not release a state bank, which has been
 reorganized as a national bank, from pay-
 ing its bills issued while it was a state
 bank. *Metropolitan Nat. Bank v. Claggett*,
 141 U. S. 520, 12 Sup. Ct. Rep. 60, 35: 841
Cited in Clokey v. International Rubber Cloth-
ing & General Supply Co. 28 Misc. 328, 59
 N. Y. Supp. 878.

Liability of stockholders.

Applicability of Statute, see *supra*, 296-
 302.

Applicability of Statute to Public Lands,
see *supra*, 313-315.

When Statute Begins to Run, see *supra*, 348-354.

466. The statute of limitations of four years of South Carolina is a bar to an action to hold stockholders for debts of a bank, both at law and in equity. *Carrol v. Green*, 92 U. S. 509, 23: 738
Godfrey v. Terry, 97 U. S. 171, 24: 944
Terry v. McLure, 103 U. S. 442, 26: 403
Distinguished in Brunswick Terminal Co. v. National Bank, 88 Fed. 609.

Cited in Terry v. McLure, 103 U. S. 443, 26 L. ed. 404—*Fourth Nat. Bank v. Francklyn*, 120 U. S. 756, 30 L. ed. 829, 7 Sup. Ct. Rep. 757—*McDonald v. Thompson*, 184 U. S. 74, 46 L. ed. 439, 22 Sup. Ct. Rep. 297—*McClaire v. Rankin*, 197 U. S. 162, 49 L. ed. 706, 25 Sup. Ct. Rep. 410—*Hayden v. Thompson*, 17 C. C. A. 601, 36 U. S. App. 361, 71 Fed. 69—*Cockrill v. Butler*, 78 Fed. 681—*Miles v. Vivian*, 25 C. C. A. 212, 51 U. S. App. 194, 79 Fed. 853—*Hutchings v. Lampson*, 82 Fed. 961—*Hutchings v. Lamson*, 37 C. C. A. 566, 96 Fed. 721—*Brunswick Terminal Co. v. National Bank*, 48 L. R.A. 635, 40 C. C. A. 26, 99 Fed. 639—*McDonald v. Thompson*, 41 C. C. A. 291, 101 Fed. 184—*Aldrich v. McClaine*, 45 C. C. A. 633, 106 Fed. 792—*Baxter v. Moses*, 77 Me. 481, 52 Am. Rep. 783, 1 Atl. 350—*Long v. Bank of Yanceyville*, 90 N. C. 408—*Hodges v. Wilmington & W. R. Co.* 105 N. C. 172, 10 S. E. 917—*Terry v. Calman*, 13 S. C. 224—*Boyd v. Mutual Fire Asso.* 116 Wis. 170, 61 L.R.A. 926, 96 Am. St. Rep. 948, 90 N. W. 1086.

467. Where a bank failed in November, 1860, whose charter provided that stockholders at its failure, or who had been within twelve months previous thereto, should be liable for its debts, only those who were then shareholders, or who had been within twelve months before, are liable; and where a suit was not brought against them until December, 1870, the statute of limitations of four years was a bar thereto. *Godfrey v. Terry*, 97 U. S. 171, 24: 944
Cited in Terry v. McLure, 103 U. S. 443, 26 L. ed. 403—*Terry v. Bank of Cape Fear*, 20 Fed. 779.

468. The objection that the statute of limitations does not bar the right of the creditors of a national bank, under the act of June 30, 1876, § 2 (19 Stat. at L. 63, chap. 156, U. S. Comp. Stat. 1901, p. 3509), to enforce the individual liability of its shareholders prescribed by U. S. Rev. Stat. § 5151, U. S. Comp. Stat. 1901, p. 3465, so long as there are any outstanding claims against the bank, cannot be raised by the receiver of a national bank, in an action brought by him under § 5234 U. S. Comp. Stat. 1901, p. 3507, to recover an assessment upon a stockholder, with interest from the date when payable, in which a demurrer to the bill on the ground that it sets forth a cause of action barred by the statute of limitations has been sustained. *McDonald v. Thompson*, 184 U. S. 71, 22 Sup. Ct. Rep. 297, 46: 437
Cited in George v. Wallace, 68 C. C. A. 44, 135 Fed. 290.

— Editorial notes.

To enforce liability of stockholder.

40: 751; 48: 809

d. Trusts.

Laches as Bar, see *supra*, I. b, 2, h.

Applicability of Statute, see *supra*, 317.

When Statute Begins to Run, see *supra*, II.

d.

Adverse Possession by Trustee, see Adverse Possession, I. e.

469. The act of limitations of Wisconsin provides that "bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after that time. *Cleveland Ins. Co. v. Reed*, 24 How. 284, 16: 686

470. The statute of limitations cannot bar a grantor's right to the proceeds of land sold by his grantee, who held the land as security only. *Babcock v. Wyman*, 19 How. 289, 15: 644

471-2. The act of Congress of March 30, 1803, § 3, does not create any express or implied exception to the operation of the statute of limitations, by making the insolvent a trustee for his creditors in respect to his future property, or by making a demand included therein a debt of record. It simply releases his person, leaving all remedies against his property unaffected. *Bowie v. Henderson*, 6 Wheat. 514, 5: 319

Constructive trust.

Laches as Bar, see *supra*, 178.

473. Within what time a constructive trust will be barred must depend upon the circumstances of the case. *Michoud v. Girod*, 4 How. 503, 11: 1076
Distinguished in Stearns v. Page, 7 How. 829, 12 L. ed. 933—*Naddo v. Bardon*, 2 C. C. A. 340, 4 U. S. App. 642, 51 Fed. 498.
Cited in Taylor v. Benham, 5 How. 276, 12 L. ed. 151—*Clarke v. Boorman* (Clark v. Johnston) 18 Wall. 506, 21 L. ed. 907—*Andreae v. Redfield*, 98 U. S. 238, 25 L. ed. 163—*Godden v. Kimmell*, 99 U. S. 202, 25 L. ed. 431—*Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 186, 30 L. ed. 572, 7 Sup. Ct. Rep. 430—*Leavenworth County v. Chicago, R. I. & P. R. Co.* 134 U. S. 708, 33 L. ed. 1073, 10 Sup. Ct. Rep. 708—*McIntire v. Pryor*, 173 U. S. 54, 43 L. ed. 612, 19 Sup. Ct. Rep. 352—*Bunnell v. Stoddard*, Fed. Cas. No. 2,135—*Hunter v. Marlboro*, 2 Woodb. & M. 199, Fed. Cas. No. 6,908—*James v. Atlantic Delaine Co.* 3 Cliff. 621, Fed. Cas. No. 7,177—*Manning v. Hayden*, 5 Sawy. 379, Fed. Cas. No. 9,043—*Stevens v. Sharp*, 6 Sawy. 116, Fed. Cas. No. 13,410—*Kirby v. Lake Shore & M. S. R. Co.* 14 Fed. 263—*Lehman v. LaForge*, 42 Fed. 495—*Dugan v. O'Donnell*, 68 Fed. 992—*Kelley v. Boettcher*, 29 C. C. A. 22, 56 U. S. App. 363, 85 Fed. 63—*Williamson v. Monroe*, 101 Fed. 380—*Snodgrass v. Branch Bank*, 25 Ala. 171, 60 Am. Dec. 505—*Phalen v. Clark*, 19 Conn. 437, 50 Am. Dec. 253—*Pryor v. McIntire*, 7 App. D. C. 432—*McGee v. Welch*, 18 App. D. C. 184—*Reynolds v. Sumner*, 126 Ill. 71, 1 L.R.A. 330, 9 Am. St. Rep. 528, 18 N.

E. 834—Fisher v. Tuller, 122 Ind. 34, 23 N. E. 522—Zunkel v. Colson, 109 Iowa, 699, 81 N. W. 175—Morse v. Hill, 136 Mass. 66—Obert v. Obert, 10 N. J. Eq. 106—Williams v. Carle, 10 N. J. Eq. 548—Smith v. Drake, 23 N. J. Eq. 805—Hendrickson v. Hendrickson, 42 N. J. Eq. 661, 9 Atl. 742—Bechtold v. Read, 49 N. J. Eq. 115, 22 Atl. 1085—Piatt v. Longworth, 27 Ohio St. 199.

474. Where a constructive trust is made out in equity, time protects the trustee, though his purchase would have been repudiated for fraud. In few cases can a constructive trust be enforced after twenty years' peaceable possession by the person who claims in his own right, but whose acts have made him trustee by implication. Boone v. Chiles, 10 Pet. 177, 9: 388

Cited in Spidel v. Henrich, 120 U. S. 386, 30 L. ed. 719, 7 Sup. Ct. Rep. 610—Balmer v. United States, 26 Ct. Cl. 91—Bunuel v. Stoddard, Fed. Cas. No. 2,135—Prince v. Towns, 33 Fed. 163—Naddo v. Bardon, 47 Fed. 790—Westenfelder v. Green, 78 Fed. 895—James v. James, 55 Ala. 532—Farmers' & T. Bank v. Kimball Mill. Co. 1 S. D. 400, 36 Am. St. Rep. 739, 47 N. W. 402—Pryor v. McIntire, 7 App. D. C. 432—Anderson v. Northrop, 30 Fla. 639, 12 So. 318—Morgan v. Morgan, 10 Ga. 306—Reynolds v. Sumner, 126 Ill. 71 1 L.R.A. 330, 9 Am. St. Rep. 523, 18 N. E. 334—Gebhard v. Sattler, 40 Iowa, 157—Chiles v. Boon, 3 B. Mon. 84—Ruckman v. Decker, 23 N. J. Eq. 289—Hendrickson v. Hendrickson, 42 N. J. Eq. 661, 9 Atl. 742—Palmer v. Morrison, 104 N. Y. 138, 10 N. E. 144—Fulton v. Davidson, 3 Helsk. 635—Ray v. Goodman, 1 Sneed, 589—Clarke v. McClure, 10 Gratt. 311—St. Paul & T. Lumber Co. v. Bolton, 5 Wash. 766, 32 Pac. 787—Thornburg v. Bowen, 87 W. Va. 551, 16 S. E. 825.

Resulting trust.

475. The rule in Pennsylvania is that a resulting trust resting in parol is to be regarded as extinguished in twenty-one years, where the party having the legal title has, for twenty-one years, been in notorious and adverse possession, paying the taxes, and exercising all the usual rights of ownership, and his title has, for that time, been on record. King v. Pardee, 96 U. S. 90.

24: 666

e. Fraud.

Laches as Bar, see *supra*, I. b, 2, c.

When Limitation Begins to Run, see *supra*, II. e.

See also *supra*, 450; *infra*, 502, 520.

476. In Florida, an action brought for relief, on the ground of fraud, eight years after knowledge of the fraud by plaintiff, is barred by the three years' statute of limitations of that state. Coddington v. Pensacola & G. R. Co. 103 U. S. 409, 26: 400

477. By Neb. Laws 1873, an action for relief on the ground of fraud must be commenced within four years after cause of action accrued,—that is, after the discovery of the fraud. Boone County v. Burlington

& M. River R. Co. 139 U. S. 684, 11 Sup. Ct. Rep. 687, 35: 319

Editorial note.

In cases of fraud. 12: 928

f. Torts; Negligence.

When Action for Conversion Barred, see *supra*, 449.

Interruption of Statute, see *infra*, 600a–600c. Cause Completely Barred in Another State before Action Brought, see Conflict of Laws, 215.

478. Under the Indiana statute as to action for damages for death, the action must be commenced within two years from the death of the person injured, not from the time he received the injuries from which death resulted. Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 14 Sup. Ct. Rep. 579, 38: 422

479. A suit *in rem* in admiralty, if it can be brought at all, for negligence causing the death of a person, when the statutes of the state where the wrong was done or the vessel belonged create a cause of action for the wrong, must be brought within the time limited in such statutes. The Harrisburg v. Rickards (The Harrisburg) 119 U. S. 199, 7 Sup. Ct. Rep. 140, 30: 358

Cited in Woodward W. & Co. v. Dillworth. 21 C. C. A. 420, 41 U. S. App. 191, 75 Fed. 418—The Glendale, 77 Fed. 907—Laidlaw v. Oregon R. & Nav. Co. 26 C. C. A. 668, 48 U. S. App. 430, 81 Fed. 879—The Jane Grey, 95 Fed. 694—Brunswick Terminal Co. v. National Bank, 48 L.R.A. 632, 40 C. C. A. 25, 99 Fed. 638—Hale v. Coffin, 114 Fed. 580—The Northern Queen, 117 Fed. 905.

480. The law of Tennessee is that, where an agent obtains money of his principal, and converts it, and is not sued until three years elapse, the remedy by assumpsit is barred. Mattingly v. Boyd, 20 How. 123, 15: 845

481. The right of action based upon a nuisance, the continuance of which gives rise to a substantive cause of action every day, is not barred by the lapse of the statutory period since its origin. Wilcox v. Plummer, 4 Pet. 172, 7: 821
Cited in Savannah & O. Canal Co. v. Bourquin, 51 Ga. 889.

482–5. Where an attorney commits a mistake fatal to the case of his client, the statute of limitations, as to an action against him for malpractice, commences to run immediately, and not from the time the actual damage is sustained by judgment against the client on account of the mistake. Where the case was kept in court, and no judgment obtained until after the whole period of the statute of limitations had run after the attorney's mistake was committed, and upon the rendering of judgment against the client because of such mistake, he brought suit against the attorney for damages, it was held barred by the statute. Wilcox v. Plummer, 4 Pet. 172, 7: 821

g. Suits Relating to Real Property.

Laches as Bar, see *supra*, I. b, 2, b.

Purchaser's Right to Set up Statute of Limitations, see *supra*, 235-238.

Suspension of Statute, see *infra*, 576, 577, 588, 600.

Applicability of Statute to Claim for Mesne Profits, see *supra*, 307, 308.

Adverse Possession of Land, see *Adverse Possession*.

Defective Tax Deed as Evidence of Color of Title, see *Evidence*, 1223.

See also *supra*, 26; *infra*, 524.

486. The acts of Congress abolishing fictions in pleading in actions of ejectment do not convert the action into a writ of right, or extend the limitation to the same period as allowed for such writ. *Hogan v. Kurtz*, 94 U. S. 773, 24: 317

Cited in Willis v. Eastern Trust & Bkg. Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 347—*Morris v. Wheat*, 1 App. D. C. 239—*Stafran v. Zeust*, 10 App. D. C. 268—*Eastern Trust & Bkg. Co. v. American Ice Co.* 14 App. D. C. 329—*Crandall v. Lynch*, 20 App. D. C. 81.

487. The act of limitations of Texas provides that every suit instituted to recover real estate held under color of title shall be instituted within three years next after the cause of action shall have accrued, and not afterwards. *Davila v. Mumford*, 24 How. 214, 16: 619

Cited in Texas Land & Mortg. Co. v. State, 1 Tex. Civ. App. 620, 28 S. W. 258.

488. In the state of Michigan, the act of May 15, 1820, limits every possessory action to twenty years after the cause accrued, and the act of November 15, 1829, limits to ten years every such action which had accrued at the date of that act. *Beaubien v. Beaubien*, 23 How. 190, 16: 484

489. A possession of land in the District of Columbia from "prior to October, 1799," to date of bringing suit, in 1818, did not enable a party to plead the statute of limitations. *Greenleaf v. Birth*, 9 Pet. 292, 9: 132

490. Damages for wrongful acts in removing personal property from land of which defendant had possession, and for waste committed by him, in Louisiana, are prescribed in one year. *Lovell v. Cragin*, 136 U. S. 130, 10 Sup. Ct. Rep. 1024, 34: 372

491. By N. Y. Code Civ. Proc. § 390, an action which does not involve title or possession of real property in the state cannot be brought in the state against a non-resident, after the time limited by the laws of his residence for bringing a like action, except by a resident of the state or one who becomes so before the expiration of the time so limited. *Penfield v. Chesapeake, O. & S. W. R. Co.* 134 U. S. 351, 10 Sup. Ct. Rep. 566, 33: 940

492. Parties claiming a specific execution of a contract to convey lands in compliance with a bond executed many years before will

not be considered creditors within the meaning of the statute of North Carolina of 1815, barring suits by creditors of a decedent after ten years. *Coulson v. Walton*, 9 Pet. 62, 9: 51

493. Although a debt for unpaid purchase money is barred by limitation under the local law, the lien therefor on the land is not barred, where there has been no such open, adverse possession, for the period within which actions for the recovery of real estate must be brought, as would cut off the right to enforce the equitable lien for the purchase money. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. Rep. 771, 28: 1141

Cited in Smith v. Woolfolk, 115 U. S. 150, 29 L. ed. 360, 5 Sup. Ct. Rep. 1177—*Wheeling Bridge & Terminal R. Co. v. Reymann Brewing Co.* 32 C. C. A. 577, 61 U. S. App. 531, 90 Fed. 195—*Conway v. Caswell*, 121 Ga. 257, 48 S. E. 956—*Plett v. Willson*, 50 Hun, 62, 4 N. Y. Supp. 507—*Hulbert v. Clark*, 128 N. Y. 301, 14 L.R.A. 61, 28 N. E. 638—*Piet v. Willson*, 134 N. Y. 142, 31 N. E. 336—*Menzel v. Hinton*, 132 N. C. 666, 95 Am. St. Rep. 647, 44 S. E. 385a

494. A claim for land was held not barred by the statute of limitations, where the suit was commenced in less than five months after the official survey was made. *Magwire v. Tyler*, 8 Wall. 650, 19: 320

By state.

495. A statute of limitations declaring that the state cannot sue any person in respect to real property unless its right or title "shall have accrued" within ten years means titles which "shall have existed" within ten years, and does not bar the state's right of action although its title accrued more than ten years before suit brought. *Weber v. State Harbor Comrs.* 18 Wall. 57, 21: 798

Heirs.

Applicability of Statute, see *supra*, 305.
Suspension of Statute, see *infra*, 577.
See also *infra*, 500.

496. The statute of California which provides that no action for the recovery of real estate sold by order of a probate court "shall be maintained by any heir or other person claiming under the intestate," unless brought within three years after such sale, applies to the administrator who made the sale as well as to the heirs. When, by lapse of time, the action is barred against him, it is also barred against them because the right of possession is, by the law of California, in him, and he represents their interests. *Meeks v. Olpherts*, 100 U. S. 564, 25: 735

Cited in Trimble v. Woodhead, 102 U. S. 840, 26 L. ed. 291—*Partee v. Thomas*, 11 Fed. 778—*Walker v. Cronkite*, 40 Fed. 136—*Lloyd v. Ball*, 77 Fed. 368—*Williamson v. Beardsley*, 69 C. C. A. 615, 137 Fed. 471—*Bryan v. Pinney*, 3 Ariz. 40—*Chase v. Cartwright*, 53 Ark. 865, 14 S. W. 90—*McLeran v. Benton*, 73 Cal. 348, 14 Pac. 879—*Dennis v. Blint*, 122 Cal. 44, 54 Pac. 378—*Webb v. Winter*, 135 Cal. 458, 65 Pac. 1028, 67 Pac. 691—*Mathews v. Durkee*, 34 Fla. 563, 16 So. 411—*Willson v. Louisville Trust Co.*

102 Ky. 529, 19 Ky. L. Rep. 1,590—Nash v. Simpson, 78 Me. 153, 3 Atl. 53—Taft v. Decker, 182 Mass. 110, 65 N. E. 507—McCartin v. Perry, 39 N. J. Eq. 202—Brown v. Doherty, 93 App. Div. 195, 81 N. Y. Supp. 563—Jenkins v. Jensen, 24 Utah, 124, 66 Pac. 773—Hyde v. Heller, 10 Wash. 602, 89 Pac. 249.

497. The statute of limitations of Kentucky is a bar, after ten years from the death of the ancestor, to the claims of an heir to a nonresident patentee holding under a grant from the state of Kentucky, founded on warrants issued out of the land office of Virginia, prior to the separation of Kentucky from Virginia, if possession has been taken in the lifetime of the patentee. Had the land descended to the heirs before an adverse possession commenced, the statute could not operate against them until they came within the state. *Lewis v. Marshall*, 5 Pet. 470, 8: 195

Cited in East Tennessee Iron & Coal Co. v. Wiggins, 15 C. C. A. 515, 31 U. S. App. 129, 68 Fed. 450—*Dowell v. Tucker*, 46 Ark. 452—*Murray v. Houghton*, 2 Ind. Terr. 507, 52 S. W. 48—*Henry v. Carson*, 59 Pa. 304.

498-9. The heirs of a Wyandotte Indian to whom, as an incompetent, was allotted a tract of land, under the treaty of January 31, 1855, between the United States and the Wyandotte Indians, are bound to institute ejectment against those claiming to hold such land adversely under a grant from such incompetent within the period specified by the statute of limitations, after the date of ratification of the treaty of February 23, 1867, removing all restrictions upon sales of lands patented to incompetent Wyandottes which should thereafter be made. *Schrimscher v. Stockton*, 183 U. S. 290, 22 Sup. Ct. Rep. 107, 46: 203

Judicial sale.

Applicability of Statute, see *supra*, 305.
Sale by Assignee of Bankrupt, see *infra*, 525.

500. The statute of California which provides that no action for the recovery of real estate sold by order of a probate court "shall be maintained by any heir or other person claiming under the intestate," unless brought within three years after such sale, applies to the administrator who made the sale as well as to the heirs. When, by lapse of time, the action is barred against him, it is also barred against them, because the right of possession is, by the law of California, in him, and he represents their interests. *Meeks v. Olpherts*, 100 U. S. 564, 25: 735

Cited in Trimble v. Woodhead, 102 U. S. 648, 26 L. ed. 291—*Partee v. Thomas*, 11 Fed. 778—*Walker v. Cronkite*, 40 Fed. 136—*Chase v. Cartright*, 53 Ark. 385, 22 Am. St. Rep. 207, 14 S. W. 90—*McLean v. Benton*, 73 Cal. 343, 2 Am. St. Rep. 814, 14 Pac. 879—*Staples v. Connor*, 79 Cal. 15, 21 Pac. 380—*Dennis v. Blint*, 122 Cal. 44, 68 Am. St. Rep. 17, 54 Pac. 378—*Webb v. Winter*, 135 Cal. 458, 67 Pac. 691—*Mathews v. Durkee*, 84 Fla. 563, 16 So. 411—*Willson v. Louisville Trust Co.* 102 Ky. 529, 44 S. W.

121—*Nash v. Simpson*, 78 Me. 153, 3 Atl. 53—*Taft v. Decker*, 182 Mass. 110, 65 N. E. 507—*Mount v. Manhattan Co.* 41 N. J. Eq. 215, 3 Atl. 726—*Brown v. Doherty*, 93 App. Div. 195, 87 N. Y. Supp. 563—*Jenkins v. Jensen*, 24 Utah, 124, 91 Am. St. Rep. 783, 66 Pac. 773—*Hyde v. Heller*, 10 Wash. 602, 89 Pac. 249.

501. In Louisiana, if the sheriff has authority to sell land on execution, a purchaser in good faith may, although there are informalities, set up prescription of five years under statute of that state. *Pike v. Evans*, 94 U. S. 6, 24: 40

Cited in Evans v. Pike, 118 U. S. 244, 30 L. ed. 235, 6 Sup. Ct. Rep. 1090—*Nagel v. Clement*, 113 La. 198, 36 So. 935—*Landry v. Laplos*, 113 La. 701, 37 So. 606—*Munholland v. Scott*, 33 La. Ann. 1045.

502-4. The expiration of the statutory period for redemption from a sale of land under execution does not bar a suit in equity to annul the sale and a deed made thereon, because of fraudulent conduct of plaintiff's attorneys, who purchased at the sale, where they lulled the debtor into false security by assurances of permission to redeem irrespective of the statute, although these were not in writing and were made without consideration. *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. Rep. 512, 40: 721
Cited in Re McIntire, 142 Fed. 596—*Fields v. Killion*, 129 Ala. 876, 29 So. 797—*Benson v. Bunting*, 127 Cal. 537, 78 Am. St. Rep. 81, 59 Pac. 991—*Wallace v. Dodd*, 136 Cal. 211, 68 Pac. 698—*Turple v. Lowe*, 158 Ind. 323, 92 Am. St. Rep. 310, 62 N. E. 484.

Mortgages.

Mortgagee's Right to Set up Limitation as Defense, see *supra*, 233, 234.

Right of Grantee of Mortgaged Premises to Set up Statute, see *supra*, 235, 236.

Applicability of Statute, see *supra*, 309, 310.

When Statute begins to Run, see *supra*, 336, 345, 346.

Interruption of Statute, see *infra*, 663.

Presumption of Payment, see *Evidence*, 818.

Sufficiency of Evidence to Rebut Presumption of Payment, see *Evidence*, 2525.

See also *supra*, 37.

505. In Wisconsin, where a bill prays that the equity of redemption be foreclosed, or that an undivided interest in the quarter section alleged to be covered by a mortgage be sold, and the proceeds appropriated towards paying the debts secured, as neither of these modes of release are cognizable at law, and the only remedy is in equity, it is barred by the limitation of ten years for "bills for relief in case of the cognizance of a trust not cognizable by the courts of common law." *Cleveland Ins. Co. v. Reed*, 24 How. 284, 16: 686
Cited in Browne v. Browne, 17 Fla. 623, 35 Am. Rep. 96—*Hubbell v. Sibley*, 5 La. 60.

506. A subsequent purchaser of mortgaged

property, who is entitled to set up the statute of limitations against the mortgage debt, must show that it is barred between the parties thereto. *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. Rep. 1109,

30: 1105

Distinguished in *Cook v. Union Trust Co.* (*Cook v. Bramel*) 106 Ky. 807, 45 L.R.A. 214, 51 S. W. 600.

Cited in *Coe v. Finlayson*, 41 Fla. 182, 26 So. 704.

507. If the debt secured by the mortgage is barred by the statute of limitations, then, according to the law in Texas, the foreclosure suit is barred, but not otherwise, for the mortgage is a mere incident to the debt. *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. Rep. 408.

27: 682

Cited in *Sanger v. Nightingale*, 122 U. S. 184, 30 L. ed. 1106, 7 Sup. Ct. Rep. 1109—*Moline Plow Co. v. Webb*, 141 U. S. 626, 35 L. ed. 882, 12 Sup. Ct. Rep. 100—*Hanchett v. Blair*, 41 C. C. A. 84, 100 Fed. 825—*Stephens v. Shannon*, 43 Ark. 467—*Cook v. Union Trust Co.* (*Cook v. Bramel*) 106 Ky. 807, 45 L.R.A. 214, 51 S. W. 600.

h. Taxes and Tax Sales.

Taxes.

Laches as Bar, see *supra*, I. b, 2, d.

Applicability of Statute, see *supra*, 316.

Effect of Disability Pending Appeal, see *supra*, 435-437.

See also *infra*, 518, 541, 549.

508. The county court of a county cannot be required to levy and impose taxes on the levee districts to pay demands, when an action at law for the enforcement of the claims would have been barred by the statute of limitations. *Meath v. Phillips County*, 108 U. S. 553, 2 Sup. Ct. Rep. 869, 27: 819

509. Under the act of June 6, 1872, a cause of action to recover back illegal taxes did not accrue until the commissioner's decision, and is not barred by limitation until two years thereafter. *Wright v. Blakeslee*, 101 U. S. 174, 25: 1048

510. Where a person appealed from an income tax, and another assessment was ordered, and the new assessment was paid, —Held, that he could not recover it back because he had not brought suit within six months from the decision of the commissioner on his appeal, and had not appealed from the second assessment. *Cheatham v. Norvekl* (*Cheatham v. United States*) 92 U. S. 85, 23: 561

Cited in *Snyder v. Marks*, 100 U. S. 193, 27 L. ed. 903, 3 Sup. Ct. Rep. 157—*Arson v. Murphy*, 115 U. S. 585, 29 L. ed. 493, 6 Sup. Ct. Rep. 185—*Kings County Sav. Inst. v. Blair*, 116 U. S. 206, 29 L. ed. 659, 6 Sup. Ct. Rep. 353—*Beard v. Porter*, 124 U. S. 443, 31 L. ed. 494, 8 Sup. Ct. Rep. 556—*Aufmordt v. Hedden*, 137 U. S. 324, 34 L. ed. 678, 11 Sup. Ct. Rep. 103—*Hager v. Swayne*, 149 U. S. 244, 37 L. ed. 720, 13 Sup. Ct. Rep. 841—*Schoenfeld v. Hendricks*, 152 U. S. 693, 38 L. ed. 602, 14 Sup. Ct. Rep. 754—*Pollock v. Farmers' Loan & T. Co.* 157 U. S. 609, 39 L. ed. 829, 15 Sup. Ct. Rep. 673—*First Nat. Bank v. United U. S. Dig.*—243

States, 15 Ct. Cl. 229—*Sinking Fund Comrs. v. Buckner*, 48 Fed. 535—*Grether v. Wright*, 23 C. C. A. 506, 43 U. S. App. 770, 75 Fed. 750—*Christie Street Commission Co. v. United States*, 126 Fed. 995—*Christie Street Commission Co. v. United States*, 129 Fed. 508—*Balogh v. Lyman*, 6 App. Div. 275, 39 N. Y. Supp. 780.

Tax sales.

Impairment of Contract Obligations as to, see Constitutional Law, 1525a-1525c.

State Decision as Binding Federal Courts, see Courts, 2042.

511. In Iowa, one holding under a tax deed must within five years either himself take actual possession of the property, or bring a suit to recover possession, or his action upon his deed will be barred. It makes no difference whether the former owner remains in adverse possession during the whole of the five years, or only enters when the period has nearly expired. *Barrett v. Holmes*, 102 U. S. 651, 26: 291

Cited in *Jones v. Randle*, 68 Ala. 264—*Griffin v. Turner*, 75 Iowa, 253, 39 N. W. 294—*Begole v. Hazzard*, 81 Wis. 278, 51 N. W. 325—*Hiles v. Atlee*, 90 Wis. 81, 62 N. W. 940.

512. An action to set aside a tax sale in Arkansas for irregularities need not be brought within the two years after the sale prescribed by *Manuf. (Ark.) Dig. § 5791*, if the owner is prevented from bringing it within that time by dereliction of duty on the part of officers of the state. *Martin v. Barbour*, 140 U. S. 634, 11 Sup. Ct. Rep. 944, 35: 546

i. Judgment.

Duration of Lien of Judgment, see Judgment, V. e.

Scire Facias to Revive Judgment, see Judgment, 1142-1144.

See also *infra*, 526; Judgment, 893, 1092

Action on judgment.

Retroactive Effect of Statute Limiting Time for, see Statutes, 551.

See also Judgment, 969.

513-15. A limitation of actions on foreign judgments, which makes no exception in favor of any party, is applicable, though the judgment debtor on the day the act came into operation became a citizen of the state. Where the legislature makes no exception, the courts can make none. *Bank of Alabama v. Dalton*, 9 How. 522, 13: 242

Cited in *Dulles v. Jones*, 9 How. 530, 13 L. ed. 245—*United States v. Reese*, 92 U. S. 251, 23 L. ed. 576—*Cross v. United States*, 4 Ct. Cl. 278—*Andrews v. Dole*, 11 Nat. Bankr. Reg. 363, Fed. Cas. No. 373—*Cleveland Ins. Co. v. Reed*, 1 Biss. 185, Fed. Cas. No. 2,889—*Norton v. De le Villebeuvre*, 1 Woods, 164, 13 Nat. Bankr. Reg. 306, Fed. Cas. No. 10,350—*Randolph v. King*, 2 Bond, 108, Fed. Cas. No. 11,560—*The Sam Shick*, 2 Curt. C. C. 485, Fed. Cas. No. 12,282—*United States v. Maillard*, 4 Ben. 465, Fed. Cas. No. 15,709—*Madden v. Lancaster County*, 12 C. C. A. 573, 27 U. S. App. 528, 65 Fed. 195—*Shreve v. Cheesman*, 16 C. C. A. 417, 32 U. S. App. 676, 69 Fed. 789—

Pearsall v. Great Northern R. Co. 73 Fed. 940—Stryker v. Grand County, 23 C. C. A. 301, 40 U. S. App. 583, 77 Fed. 582—Robert J. Boyd Paving & Contracting Co. v. Ward, 28 C. C. A. 675, 55 U. S. App. 730, 85 Fed. 35—Wrightman v. Boone County, 31 C. C. A. 572, 60 U. S. App. 100, 88 Fed. 436—Webber v. St. Paul City R. Co. 38 C. C. A. 82, 97 Fed. 143—Chauncey v. Dyke Bros. 55 C. C. A. 594, 119 Fed. 16—St. Louis Cotton Compress Co. v. American Cotton Co. 60 C. C. A. 83, 125 Fed. 199—Lamb v. Powder River Live Stock Co. 67 L.R.A. 561, 65 C. C. A. 574, 132 Fed. 438—Martin v. Martin, 35 Ala. 567—Heard v. Jones, 37 Ga. 179—Meek v. Meek, 45 Iowa, 297—Carrier v. Chicago, R. I. & P. R. Co. 79 Iowa, 88, 6 L.R.A. 801, 44 N. W. 203—Swickard v. Bailey, 3 Kan. 511—Atchison, T. & S. F. R. Co. v. Atchison Grain Co. 68 Kan. 588, 75 Pac. 1051—Smith v. Stewart, 21 La. Ann. 77, 99 Am. Dec. 709—Rogers v. Brown, 61 Mo. 194—Coady v. Reins, 1 Mont. 428—Marx v. Kilpatrick, 25 Neb. 114, 41 N. W. 111—Metcalf v. Gilmore, 63 N. H. 190—Bennett v. Bennett, 63 N. J. Eq. 308, 49 Atl. 501—Levy v. Newman, 130 N. Y. 14, 28 N. E. 660—Wilmer v. Lewis, 24 Pa. Co. Ct. 618—Fliske v. Briggs, 6 R. I. 564—Bickle v. Chrisman, 76 Va. 688—Van Steenwyck v. Washburn, 59 Wis. 502, 48 Am. Rep. 532, 17 N. W. 289.

516-17. A statute of Mississippi providing that all suits on judgments obtained out of the state before the act was passed are barred unless a suit is brought within two years next after the date of the act, is valid and applicable to a case where judgment was recovered in Alabama, February 7, 1843, the defendant having removed to Mississippi in November, 1846, where he was immediately sued. *Bank of Alabama v. Dalton*, 9 How. 522, 13: 242
Dulles v. Jones, 9 How. 530, 13: 245

518. The ten years' statute of limitations is no bar to a suit by judgment creditors of a city school board, whose claims are payable out of the school taxes, to require the city to account for the amount of such taxes collected and held in trust by it for the payment of the expenses of the public schools, where the bill was filed within ten years after the judgments were rendered. *New Orleans v. Fisher*, 180 U. S. 185, 21 Sup. Ct. Rep. 347, 45: 485

519. The limitation of actions on judgments of a United States court in Wisconsin, under Wis. Rev. Stat. 1858, chap. 138, is governed by § 15, allowing twenty years for action upon a judgment "of any court of record of this state," and not by § 16, allowing ten years for action upon a judgment "of any court of the United States." *Metcalf v. Watertown*, 153 U. S. 671, 14 Sup. Ct. Rep. 947, 38: 861
Cited in *Great Western Teleg. Co. v. Purdy*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 810—*Hancock Nat. Bank v. Farnum*, 176 U. S. 645, 44 L. ed. 622, 20 Sup. Ct. Rep. 506—*Gabrielson v. Waydell*, 67 Fed. 343—*Metcalf v. Watertown*, 16 C. C. A. 39, 34 U. S. App. 107, 68 Fed. 860—*Bullion & E. Bank v. Hegler*, 93 Fed. 892—*Ratican v. Terminal R. Asso.* 114 Fed. 668.

Action to set aside decree.

520-1. In Nebraska an action to set aside a decree on the ground of fraud, commenced over five years after the entry of the decree, is barred by the statute of limitations of that state and by laches. *Boone County v. Burlington & M. River R. Co.* 139 U. S. 684, 11 Sup. Ct. Rep. 687, 35: 319
Cited in *St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 260, 4 U. S. App. 160, 49 Fed. 324—*Rugan v. Sablin*, 3 C. C. A. 582, 10 U. S. App. 519, 53 Fed. 420—*Percy v. Cockrill*, 4 C. C. A. 81, 10 U. S. App. 574, 53 Fed. 876—*Scheffel v. Hays*, 7 C. C. A. 312, 19 U. S. App. 220, 58 Fed. 461—*Miles v. Vivian*, 25 C. C. A. 212, 51 U. S. App. 194, 79 Fed. 853.

J. Bankruptcy Cases.

When Statute begins to Run, see *supra*, 324, 325, 346, 368, 369, 378-380.
 Time to Present Proofs in Bankruptcy, see *Bankruptcy*, 364.

522. Where a person delivered to an assignee a part of certain securities claimed, the cause of action in regard to those delivered accrued to him at the time of such delivery. It did not depend upon, or arise from, the existence or ascertainment of any deficiency of the other securities to meet the debt, and was barred by the two years' limitation prescribed in § 2 of the bankruptcy act of March 2, 1867. *Doe v. Hyde*, 114 U. S. 247, 5 Sup. Ct. Rep. 841, 29: 142

523. The 8th section of the bankruptcy law of 1841, limiting to two years from the date of instituting bankruptcy proceedings, or after the cause first accrued, the time for bringing actions against persons claiming an adverse interest respecting the property rights surrendered by the bankrupt, does not apply to actions by creditors to reach assets arising from claims fraudulently concealed by such bankrupt, and purchased by him, with his other property, at an auction sale by his assignee: nor does the right of action accrue until the fund arising in such case is in existence. *Clark v. Clark*, 17 How. 315, 15: 77

Cited in *Phelps v. McDonald*, 99 U. S. 306, 25 L. ed. 475—*Sessions v. Romadka*, 145 U. S. 40, 36 L. ed. 613, 12 Sup. Ct. Rep. 790—*Dushane v. Beall*, 161 U. S. 515, 40 L. ed. 792, 16 Sup. Ct. Rep. 637—*Leech v. Dawson*, 23 Fed. 656—*Re Herdic*, 40 Fed. 361—*Scott v. Devlin*, 89 Fed. 977—*United States ex rel. Halstead v. Wyman*, 2 Mackey, 383—*Phelps v. McDonald*, 2 MacArth. 388—*Beeson v. Shively*, 28 Kan. 580—*May v. New Orleans & C. R. Co.* 44 La. Ann. 454, 10 So. 769—*Minot v. Tappan*, 127 Mass. 339—*Bowen v. Delaware, I. & W. R. Co.* 153 N. Y. 488, 60 Am. St. Rep. 667, 47 N. E. 907—*Fenlon v. Loneragan*, 29 Pa. 474.

524. Discharge in bankruptcy releases a vendee from personal liability for his debt; but the statute of limitations cannot protect the land from the vendor's lien for purchase money, in the hands of a purchaser from vendee, where the legal title has been

retained by the vendor. *Lewis v. Hawkins*, 23 Wall. 119. 23: 113
Distinguished in Duke v. Story, 116 Ga. 380, 42 S. E. 722.

Limited in Merrill v. Monticello, 66 Fed. 166.
Cited in Spedel v. Henri, 120 U. S. 386, 30 L. ed. 719, 7 Sup. Ct. Rep. 610—*New Orleans v. Warner*, 175 U. S. 130, 44 L. ed. 103, 20 Sup. Ct. Rep. 44—*Butler v. Douglass*, 1 McCrary, 632, 3 Fed. 614—*Coos Bay Wagon Road Co. v. Crocker*, 6 Sawy. 580, 4 Fed. 583—*McConville v. Howell*, 5 McCrary, 324, 17 Fed. 107—*Lemoline v. Dunklin County*, 38 Fed. 568—*Daniels v. Benedict*, 50 Fed. 354—*Dugan v. O'Donnell*, 68 Fed. 989—*Hayden v. Thompson*, 17 C. C. A. 600, 36 U. S. 361, 71 Fed. 69—*Warner v. New Orleans*, 31 C. C. A. 245, 59 U. S. App. 131, 87 Fed. 837—*Wheeling Bridge & Terminal R. Co. v. Reymann Brewing Co.* 32 C. C. A. 575, 61 U. S. App. 531, 90 Fed. 193—*Frisshuth v. Farmers' Loan & T. Co.* 95 Fed. 11—*Whittington v. Flint*, 43 Ark. 513, 51 Am. Rep. 572—*Luco v. De Toro*, 91 Cal. 419, 27 Pac. 1082—*Fleishman v. Woods*, 135 Cal. 259, 67 Pac. 276—*Wells v. Francis*, 7 Colo. 415, 4 Pac. 49—*Williams v. Mitchell*, 112 Mo. 311, 20 S. W. 647—*Patterson v. Hewitt (N. M.)* 55 L.R.A. 670, 66 Pac. 552—*Plett v. Willson*, 50 Hun, 62, 4 N. Y. Supp. 507—*Hulbert v. Clark*, 128 N. Y. 301, 14 L.R.A. 61, 28 N. E. 638—*Piet v. Willson*, 134 N. Y. 142, 31 N. E. 336—*Ellege v. Cooke*, 5 Lea. 628—*Seat v. Knight*, 3 Tenn. Ch. 263—*Hurt v. Jones*, 75 Va. 347—*Hull v. Hull*, 35 W. Va. 165, 29 Am. St. Rep. 800, 13 S. E. 49.

525. A purchaser of land from the assignee of a bankrupt acquires no greater rights than those of his grantor, and is equally bound by the limitation of time within which to bring suit against an adverse claimant. *Wisner v. Brown*, 122 U. S. 214, 7 Sup. Ct. Rep. 1156. 30: 1205
Cited in Greene v. Taylor, 132 U. S. 442, 33 L. ed. 419, 10 Sup. Ct. Rep. 138—*Sessions v. Romadka*, 145 U. S. 51, 36 L. ed. 618, 12 Sup. Ct. Rep. 799—*Kenyon v. Wrisley*, 147 Mass. 478, 1 L.R.A. 350, 18 N. E. 227—*Rock v. Dennett*, 155 Mass. 501, 30 N. E. 171—*Lewis v. Prendergast*, 45 Minn. 535, 48 N. W. 439—*Bowen v. Delaware, L. & W. R. Co.* 153 N. Y. 481, 60 Am. St. Rep. 667, 47 N. E. 907.

526. A bill in equity to enjoin a judgment obtained in an action at law on a mere legal title is a continuation of that suit. Such a bill against an assignee in bankruptcy may be filed within the time limited by Rev. Stat. § 5057, after the complainant has been evicted or his title held insufficient, where he was in possession under what he supposed to be a good title. *Webb v. Barnwall*, 116 U. S. 193, 6 Sup. Ct. Rep. 350, 29: 595
Cited in McDonald v. Seligman, 81 Fed. 757—*Re Waukesha Water Co.* 116 Fed. 1011.

Suit by assignee.

Applicability of Statute, see *supra*, 271-275.

When Statute begins to Run, see *supra*, 324, 325, 346, 378-380.

Suspension of Statute, see *infra*, 563, 605a.

Bar of Assignee's Suit as Giving Right to Creditors, see *Bankruptcy*, 244, 245.

See also *Pardon and Amnesty*, 30.

527. A debt is "property" within the meaning of the limitation clause of the bankrupt law concerning suits about any property claimed by the assignee. *Jenkins v. International Bank*, 106 U. S. 571, 2 Sup. Ct. Rep. 1, 27: 304

528. The limitation of the time within which a suit may be maintained between an assignee in bankruptcy and a person claiming an adverse interest in the property transferred to the assignee, as prescribed by § 5057 of the Revised Statutes, applies to suits by the assignee to recover debts and other moneyed obligations, as well as to controversies concerning adverse interests in property, more strictly speaking. *Equator Min. & Smelting Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. Rep. 128, 27: 114

529. A suit by an assignee in bankruptcy, to recover the proceeds of policies on the life of the bankrupt, received by the defendant claiming under an assignment from the bankrupt, is a suit between the assignee in bankruptcy and one claiming an adverse interest within the meaning of U. S. Rev. Stat. § 5057; and such suit is therefore barred by the two years' limitation provided by such section. *Avery v. Cleary*, 132 U. S. 604, 10 Sup. Ct. Rep. 220, 33: 469
Cleary v. Ellis Foundry Co. 132 U. S. 612, 10 Sup. Ct. Rep. 223, 33: 473

530. The two years' limitation prescribed by U. S. Rev. Stat. § 5057, is applicable only to suits growing out of disputes in respect of property and of rights of property of a bankrupt which came to the hands of the assignee, in which adverse claims existed while in the hands of the bankrupt and before assignment. *Dushane v. Beall*, 161 U. S. 513, 16 Sup. Ct. Rep. 637, 40: 791
Cited in Bowen v. Delaware, L. & W. R. Co. 153 N. Y. 487, 60 Am. St. Rep. 667, 47 N. E. 907.

531-2. As the right of an assignee in bankruptcy to sue for property is barred by the two years' statute of limitations (U. S. Rev. Stat. § 5057), so the right of the purchaser from him is barred by the operation of the same statute. *Gifford v. Helms*, 98 U. S. 248, 25: 57

Cited in Upton v. McLaughlin, 105 U. S. 643, 26 L. ed. 1199—*Rosenthal v. Walker*, 111 U. S. 191, 28 L. ed. 397, 4 Sup. Ct. Rep. 382—*Re Churchman*, 5 Fed. 188—*Smith v. Cincinnati, H. & D. R. Co.* 11 Fed. 291—*Phelan v. O'Brien*, 4 McCrary, 487, 13 Fed. 657—*Gildersleeve v. Gaynor*, 4 Woods, 544, 15 Fed. 103—*Bartles v. Gibson*, 17 Fed. 299—*Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 598—*International Bank v. Jenkins*, 104 Ill. 155—*Jolly v. Fitzgerald*, 23 Ill. App. 520—*Ross v. Wilcox*, 134 Mass. 22—*Adams v. Stern*, 29 Hun, 284—*Bowen v. Delaware, L. & W. R. Co.* 82 Hun, 43, 31 N. Y. Supp. 286—*Bowen v. Delaware, L. & W. R. Co.* 153 N. Y. 481, 60 Am. St. Rep. 667, 47 N. E. 907.

533. Where a judgment in a state court is rendered against one who is shortly thereafter declared to be a bankrupt, a writ of error to that judgment, sued out by the assignee, is a suit brought by such assignee, within the meaning of § 5057 of the Revised Statutes, requiring suits to be brought within two years. *Equator Min. & Smelting Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. Rep. 128, 27: 114

534. U. S. Rev. Stat. § 5057, does not impose an absolute limit of two years after the appointment of the assignee in bankruptcy to his right of action in respect to transactions which occurred before such appointment. An objection that such an action is barred cannot be raised for the first time in an appellate court. *Upton v. McLaughlin*, 105 U. S. 640, 26: 1197
Upton v. Kent, 105 U. S. 646, note 26: 1200
Cited in Ross v. Wilcox, 134 Mass. 22—*Kent v. Upton*, 3 Wyo. 44, 2 Pac. 234—*McLaughlin v. Upton*, 3 Wyo. 49, 2 Pac. 534.

k. Claims against Government.

Running of Limitations against United States, see *supra*, I. c. 5.

When Claim begins to Run, see *supra*, II. m.

Running of Limitations in Favor of United States, see *supra*, 262, 263.

Removal of Bar, see *infra*, 580, 581.

Interruption of Statute, see *infra*, 598.

535. U. S. Rev. Stat. § 1069, U. S. Comp. Stat. 1901, p. 740, limiting the time within which action may be begun upon claims against the government, is jurisdictional. *Finn v. United States*, 123 U. S. 227, 8 Sup. Ct. Rep. 82, 31: 128
Cited in United States v. Wardwell, 172 U. S. 52, 43 L. ed. 362, 19 Sup. Ct. Rep. 86—*Savage v. United States*, 23 Ct. Cl. 267—*Balmer v. United States*, 26 Ct. Cl. 86—*Cotton v. United States*, 29 Ct. Cl. 228—*Pennsylvania v. United States*, 36 Ct. Cl. 524—*Russell v. United States*, 37 Ct. Cl. 118.

536. The clause of Rev. Stat. § 1059, U. S. Comp. Stat. 1901, p. 734, which invests the court of claims with jurisdiction of claims referred to it by either house of Congress, is subject to other clauses defining its jurisdiction, and fixing the period within which all claims must be asserted against the United States. Unless the act referring the claim provides that it may be determined upon its merits without reference to any previous bar by limitation, such limitation will be a good defense. *Ford v. United States*, 116 U. S. 213, 6 Sup. Ct. Rep. 360, 29: 608

Cited in Finn v. United States, 123 U. S. 231, 31 L. ed. 130, 8 Sup. Ct. Rep. 82—*Blair v. United States*, 21 Ct. Cl. 254—*Boehm v. United States*, 21 Ct. Cl. 295—*Balmer v. United States*, 26 Ct. Cl. 87—*Watts v. United States*, 123 Fed. 114.

537. A judgment in the court of claims for a claim which the record shows to be barred

by statute is erroneous. *Finn v. United States*, 123 U. S. 227, 8 Sup. Ct. Rep. 82, 31: 128

Six years' limitation.

Action for Proceeds of Land, see *infra*, 549-551.

Repeal of Statute, see *Statutes*, 652.

See also Court of Claims, 7.

538. A claim against the United States is barred within six years after suit could be commenced thereon against the government. *Finn v. United States*, 123 U. S. 227, 8 Sup. Ct. Rep. 82, 31: 128
Cited in United States v. Connor, 138 U. S. 66, 34 L. ed. 862, 11 Sup. Ct. Rep. 229—*United States v. Greathouse*, 166 U. S. 602, 41 L. ed. 1130, 17 Sup. Ct. Rep. 701—*Warder v. United States*, 25 Ct. Cl. 178—*Wilson v. United States*, 25 Ct. Cl. 345—*United States v. Utz*, 26 C. C. A. 187, 39 U. S. App. 630, 80 Fed. 851.

539-40. Claims against the United States, in the court of claims, are barred by statute unless filed within six years after the claim accrues. *Clark v. United States*, 99 U. S. 493, 25: 481
Kendall v. United States, 107 U. S. 123, 2 Sup. Ct. Rep. 277, 27: 437
Cited in Hammond v. Johnston, 93 Mo. 221, 6 S. W. 83.

541. The recovery for commissions allowed to a dealer in proprietary articles on stamps purchased by him must be limited to the amount accruing during the six years next preceding the commencement of the suit. *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 4 Sup. Ct. Rep. 244, 28: 341

542. Recovery for the use of a patented invention by the United States is limited to six years before the action was commenced, although the price was not fixed, where there was no agreement for deferring payment. *United States v. Berdan Firearms Mfg. Co.* 156 U. S. 552, 15 Sup. Ct. Rep. 420, 39: 530
Cited in Hartman v. United States, 35 Ct. Cl. 110.

543. The limitation prescribed by the act of March 3, 1863, amendatory of an act establishing the court of claims, does not bar in that court claims referred to it for determination by the head of an executive department, provided they were presented for settlement at the proper department within six years after they had first accrued. *United States v. Lippitt*, 100 U. S. 663, 25: 747

Distinguished in United States v. Utz, 26 C. C. A. 187, 39 U. S. App. 630, 80 Fed. 851.
Cited in Finn v. United States, 123 U. S. 231, 31 L. ed. 130, 8 Sup. Ct. Rep. 82—*United States v. New York*, 160 U. S. 617, 40 L. ed. 557, 16 Sup. Ct. Rep. 402—*McClure v. United States*, 19 Ct. Cl. 25—*Chesapeake & O. R. Co. v. United States*, 20 Ct. Cl. 69—*Savage v. United States*, 23 Ct. Cl. 266—*Warder v. United States*, 25 Ct. Cl. 178—*Balmer v. United States*, 26 Ct. Cl. 86—*Alexandria, L. & H. R. Co. v. United States*, 26 Ct. Cl. 330—*Winchester & C. R. Co. v. United States*, 27 Ct. Cl. 517—*Skelly v. United States*, 32

Ct. Cl. 229—*Maine v. United States*, 36 Ct. Cl. 551—*Utz v. United States*, 75 Fed. 650.

544. A claim presented to the Treasury Department before it was barred by limitation may be transmitted to the court of claims for adjudication, under U. S. Rev. Stat. § 1063, U. S. Comp. Stat. 1901, p. 738, after the expiration of six years from the time the cause of action accrued. *United States v. New York*, 160 U. S. 598, 16 Sup. Ct. Rep. 402, 40: 551
Cited in Pennsylvania v. United States, 36 Ct. Cl. 523—*Maine v. United States*, 36 Ct. Cl. 550—*United States v. Utz*, 26 C. C. A. 187, 39 U. S. App. 630, 80 Fed. 831.

545. A consul-general of the United States, so long as he remains abroad, is within the exception of "persons beyond the seas" from the six years' limitation as to prosecuting claims against the United States, and may maintain an action at any time within three years after such disability is removed. *United States v. Greathouse*, 166 U. S. 601, 17 Sup. Ct. Rep. 701, 41: 1130

546. Judgment holding an action brought on a claim against the United States under a special act more than six years thereafter to be barred—affirmed by a divided court. *Rice v. United States*, 122 U. S. 611, 7 Sup. Ct. Rep. 1377, 30: 793

Lost funds.

547. The statute of limitation of suits in the court of claims (U. S. Rev. Stat. § 1069, U. S. Comp. Stat. 1901, p. 740), is not applicable to a suit under §§ 1059–1062, U. S. Comp. Stat. 1901, pp. 734–737, which authorize that court to hear and determine the claim of any disbursing officer for relief from responsibility on account of capture or other loss of funds while in the line of his duty, and to decree the amount of such exemption to be allowed as a credit, by the accounting officers of the Treasury, where the funds have not been replaced and paid over by the officer, and his petition is not to establish a claim against the government, but a defense to their claim against him. *United States v. Clark*, 96 U. S. 37, 24: 696

Distinguished in United States v. Smith, 105 U. S. 620, 26 L. ed. 1191.

Cited in Smith v. United States, 14 Ct. Cl. 120—*Lippitt v. United States*, 14 Ct. Cl. 154—*Scott v. United States*, 18 Ct. Cl. 7—*Kinney v. United States*, 60 Fed. 886—*Dixon v. Baltimore & P. B. Co.* 1 Mackey, 84.

548. The limitation of six years by U. S. Rev. Stat. § 1069, U. S. Comp. Stat. 1901, p. 740, applies to a claim for relief by a paymaster in the Army, for money stolen from him, and which he has replaced and paid over to his superior officer, under orders of the paymaster-general. This claim amounts to a demand for repayment of a sum once paid, and the decision in the case of *United States v. Clark*, is not applicable. *United States v. Smith*, 105 U. S. 620, 26: 1191

Cited in Scott v. United States, 18 Ct. Cl. 7.

Proceeds of lands.

549. The court of claims had jurisdiction of a suit for proceeds of land sold for taxes, under the act of Congress of 1861 for the collection of direct taxes in insurrectionary districts, although the application to the Secretary of the Treasury and the bringing of suit were both more than six years after the sale. The claim first accrued upon demand for the proceeds made upon the Secretary, and the six years' limitation began from that time. *United States v. Taylor*, 104 U. S. 216, 26: 721

United States v. Lawton, 110 U. S. 146, 3 Sup. Ct. Rep. 545, 28: 100

Cited in Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 179, 29 L. ed. 855, 6 Sup. Ct. Rep. 670—*United States v. Wardwell*, 172 U. S. 56, 43 L. ed. 363, 19 Sup. Ct. Rep. 86—*Chaplin v. United States*, 19 Ct. Cl. 425—*White v. United States*, 19 Ct. Cl. 437—*Simons v. United States*, 19 Ct. Cl. 609—*Fripp v. United States*, 19 Ct. Cl. 668—*Harrison v. United States*, 20 Ct. Cl. 179—*Elliott v. United States*, 20 Ct. Cl. 331—*Graham v. United States*, 21 Ct. Cl. 48—*Ravesles v. United States*, 21 Ct. Cl. 248—*Rice v. United States*, 21 Ct. Cl. 423—*Ravenel v. United States*, 23 Ct. Cl. 190—*Wayne v. United States*, 26 Ct. Cl. 289—*Indiana v. United States*, 26 Ct. Cl. 616—*Hogarth v. United States*, 30 Ct. Cl. 351—*Mumford v. United States*, 31 Ct. Cl. 216—*Foster v. United States*, 32 Ct. Cl. 184—*Nelson v. United States*, 35 Ct. Cl. 430—*Maine v. United States*, 36 Ct. Cl. 557—*Ray v. United States*, 50 Fed. 168—*Miller v. Batz*, 142 Cal. 452, 76 Pac. 42—*Warren v. Adams*, 19 Colo. 525, 36 Pac. 604.

550. The limitation of six years in U. S. Rev. Stat. § 1069, U. S. Comp. Stat. 1901, p. 740, applies to a claim of the state of Louisiana against the United States for 5 per cent of the proceeds of sale of lands of the United States, under the act of February 20, 1811, § 5, authorizing the formation of a state government. *United States v. Louisiana*, 127 U. S. 182, 8 Sup. Ct. Rep. 1047, 32: 66

551. An action by a state for proceeds of swamp lands is not barred by time until six years after the amount is ascertained from proofs of sales before the Commissioner of the General Land Office. *United States v. Louisiana*, 123 U. S. 32, 8 Sup. Ct. Rep. 17, 31: 69
Cited in United States v. Louisiana, 127 U. S. 189, 32 L. ed. 70, 8 Sup. Ct. Rep. 1047.

I. Crimes.

Setting up Limitation by Demurrer, see Criminal Law, 134.
 Bar of Limitation as Ground for Quashing Indictment, see Indictment, etc., 182.
 Effect of Bar of Statute on Privilege of Witness, see Witnesses, 191.
 See also *supra*, 448.

Editorial note.

In criminal cases.

39: 983

Failure to indict.

552. The further prosecution of a criminal offense is not barred by the failure of the

grand jury to act within nine months from the date when the accused were held to bail to await such action, although it is provided by D. C. Code, § 939 (31 Stat. at L. 1189, 1342, chap. 854), that under such circumstances, unless the court enlarges the time, "the prosecution of such charge shall be deemed to have been abandoned, and the accused shall be set free, or his bail discharged, as the case may be," but this section must be deemed to operate merely as ending the pending prosecution, and not as repealing *pro tanto* the general statute of limitations contained in U. S. Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, prescribing three years as the limitation for all offenses not capital. *United States v. Cadarr*, 197 U. S. 475, 25 Sup. Ct. Rep. 487, 49: 842

Duties.

553. A conspiracy to defraud the United States out of duties on imported merchandise is not a crime arising under the revenue laws, and is barred by the three years statute of limitations. *United States v. Hirsch*, 100 U. S. 33, 25: 539

554. The crimes of a false classification of goods as to value and quality, and effecting an entry of goods at less than the true weight or measure, arise under the revenue laws, and are barred by the five years' statute of limitations. *United States v. Hirsch*, 100 U. S. 33, 25: 539

Embezzlement.

Determining Sufficiency of Appeal on Demurrer: see Criminal Law, 133.
See also *infra*, 556.

555. The crimes act, § 32, which prescribes the period of two years for such cases, enacts the only statute of limitations applicable to the offense of embezzlement by a public officer. *United States v. Cook*, 17 Wall. 168, 21: 538

Distinguished in *Bruce v. Rayner*, 62 C. C. A. 506, 124 Fed. 486.

Cited in *United States v. Reese*, 92 U. S. 225, 23 L. ed. 567—*United States v. Cruikshank*, 92 U. S. 558, 23 L. ed. 593—*United States v. Mann*, 95 U. S. 584, 24 L. ed. 532—*United States v. Britton*, 107 U. S. 665, 27 L. ed. 524, 2 Sup. Ct. Rep. 512—*Evans v. United States*, 153 U. S. 587, 38 L. ed. 832, 14 Sup. Ct. Rep. 934—*Moore v. United States*, 160 U. S. 270, 40 L. ed. 424, 16 Sup. Ct. Rep. 294—*Ledbetter v. United States*, 170 U. S. 610, 42 L. ed. 1163, 18 Sup. Ct. Rep. 774—*United States v. Schimer*, 5 Bliss. 198, Fed. Cas. No. 16,229—*United States v. Walsh*, 5 Dill. 61, Fed. Cas. No. 16,636—*United States v. Atkinson*, 34 Fed. 317—*United States v. Lehman*, 39 Fed. 771—*United States v. Kelsey*, 42 Fed. 887—*United States v. Burns*, 54 Fed. 360—*United States v. Potter*, 56 Fed. 90—*United States v. MacDonald*, 65 Fed. 488—*United States v. Tubbs*, 94 Fed. 358—*Wright v. United States*, 48 C. C. A. 45, 108 Fed. 814—*Millby v. United States*, 48 C. C. A. 577, 109 Fed. 641—*Terry v. United States*, 56 C. C. A. 636, 120 Fed. 486—*United States v. Stone*, 135 Fed. 395—*State v. Bartley*, 34 La. Ann. 149—*State v. Turnbull*, 78 Me. 396, 6 Atl. 1—*People v. Goldberg*, 39 Mich. 547—*State v. Hayward*, 83 Mo. 310—*State v. Hathaway*, 106 Mo. 240,

17 S. W. 299—*State v. Terry*, 109 Mo. 619, 19 S. W. 206—*State v. Meysenburg*, 171 Mo. 47, 71 S. W. 229—*Territory v. Burns*, 6 Mont. 75, 9 Pac. 432—*Parker v. Territory*, 9 Okla. 114, 59 Pac. 9—*Williams v. State*, 12 Tex. App. 400—*Huntsman v. State*, 12 Tex. App. 634—*Wilkerson v. State*, 44 Tex. Crim. Rep. 458, 72 S. W. 850—*State v. Williamson*, 22 Utah, 252, 83 Am. St. Rep. 780, 62 Pac. 1022—*State v. Parkersburg Brewing Co.* 53 W. Va. 594, 45 S. E. 924.

Postal offenses.

556. On an indictment for embezzlement of money of a money-order office, the defendant cannot be prosecuted or punished, unless the indictment is found within two years from the committing of the offenses, under the act of April 30, 1790. It is not a crime under the revenue laws, for which five years is allowed, under the act of March 26, 1804. *United States v. Norton*, 91 U. S. 566, 23: 454

557. The act to establish a postal money-order system is not a revenue law within the meaning of the act of 1804, § 3, allowing five years in which to bring indictments for breach of revenue laws. *United States v. Norton*, 91 U. S. 566, 23: 454
Cited in *Ward v. Congress Constr. Co.* 39 C. C. A. 676, 99 Fed. 605—*Re Magnes*, 32 Colo. 535, 77 Pac. 853—*State v. Bernheim*, 10 Mont. 517, 49 Pac. 441—*Laughlin v. Santa Fe County*, 3 N. M. 425, 5 Pac. 817—*Northern Counties Trust v. Sears*, 30 Or. 402, 35 L.R.A. 195, 41 Pac. 931—*Johnson v. Hanscom*, 90 Tex. 329, 38 S. W. 761.

Withholding money.

558. Whenever the act or series of acts necessary to constitute a criminal withholding of money has transpired, the crime is complete, and from that day the statute of limitations begins to run against the prosecution, which will be barred in two years thereafter. *United States v. Irvine*, 98 U. S. 450, 25: 193

559. The crime of wrongfully withholding pension money as agent or attorney is not a continuous one to the time of the indictment. Where defendant, in 1870, unlawfully withheld money after a demand, and the indictment was found in 1875, the two years' statute of limitations was a bar to the prosecution. *United States v. Irvine*, 98 U. S. 450, 25: 193

560. A defendant cannot be punished under the act of March 3, 1873, § 31, for wrongfully withholding bounty money, where the money had already been withheld five years before the act was passed. *United States v. Benecke*, 98 U. S. 447, 25: 192

IV. Interruption or Suspension of Statute; Removal of Bar.

a. In General.

Suspension of Statute by Absence from State, see *supra*, II. k.
Assertion of Claim as Excuse Against Laches, see *supra*, 222.

By Death of Party after Statute has Commenced to Run, see *supra*, 426, 429.

Suspension of Statute by Subsequent Disability, see *supra*, 430-433.

Interruption or Suspension of Time for Taking Appeal or Proceeding in Error, see *Appeal and Error*, IV. d, 4.

Federal Question as to, see *Appeal and Error*, 2035.

Effect of Pardon to Extend Period, see *Pardon and Amnesty*, 30.

See also *supra*, 383.

Editorial notes.

[Power of partner, after dissolution, to interrupt statute of limitations as to firm debt. 15 L.R.A. 656.

Interruption of statute by insolvency assignments. 26 L.R.A. 737.

Effect of overt act within limitation period where the conspiracy was originally formed and the first act committed beyond the period of limitation. 12 L.R.A.(N.S.) 1053.]

Suspension of statute.

561. The running of a statute of limitation may be suspended by causes not mentioned in the statute itself. *Braun v. Sauerwein*, 10 Wall. 218. 19: 895

Hanger v. Abbott, 6 Wall. 532, 18: 939
Cited in *Chauncey v. Dyke Bros.* 55 C. C. A. 588, 119 Fed. 10—*Brown County v. Martin*, 50 Ohio St. 204, 33 N. E. 1112.

562. Want of necessary parties plaintiff or defendant suspends the running of the statute of limitations against a cause of action. *Richards v. Maryland Ins. Co.* 8 Cranch. 84. 3: 496

Cited in *Cofer v. Thurmond*, 1 Ga. 542—*Baker v. Baker*, 13 B. Mon. 409—*Hernandez v. Montgomery*, 2 Mart. N. S. 433—*Hoguet v. Wallace*, 28 N. J. L. 526—*Matthews v. American Cent. Ins. Co.* 9 App. Div. 351, 41 N. Y. Supp. 304—*Sanford v. Sanford*, 62 N. Y. 555—*Taylor v. Thorn*, 29 Ohio St. 574—*Brown v. Brown*, 14 Lea, 292, 52 Am. Rep. 169.

563. A conveyance by an assignee in bankruptcy cannot prevent the operation of the bar of the statute against the grantee, when it has already run against the assignee, or bring into action a new period of limitation dating from the time of the conveyance; nor can it interrupt the running of the statute against the claim or right, when it has once commenced to run against the assignee. *Greene v. Taylor*, 132 U. S. 415, 10 Sup. Ct. Rep. 138. 33: 411

Distinguished in Sessions v. Romadka, 145 U. S. 51, 36 L. ed. 618, 12 Sup. Ct. Rep. 799.

Cited in *Coryell v. Klehm*, 157 Ill. 477, 41 N. E. 864—*Rock v. Dennett*, 155 Mass. 501, 30 N. E. 171—*Bowen v. Delaware L. & W. R. Co.* 153 N. Y. 481, 80 Am. St. Rep. 667, 47 N. E. 907.

564. As to an action by a creditor against an administrator the operation of the statute of limitations of Kansas is suspended after the death of the debtor for fifty days only, during which the creditor cannot apply for the appointment of an administrator, or, at most, for a reasonable time after the ex-

piration of the fifty days. *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. Rep. 466, 37: 316

Cited in *Alice E. Min. Co. v. Blanden*, 136 Fed. 256—*West v. Topeka Sav. Bank*, 86 Kan. 527, 63 L.R.A. 141, 97 Am. St. Rep. 385, 72 Pac. 252.

565. The provision of the New York Revised Statutes that the time, not exceeding six months, between the death of a person and the granting of letters and the period of six months after such letters, shall not be counted in limiting the time for commencement of actions by executors or administrators, gives only the actual time before letters, if less than six months, with six months in addition thereto. *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 7 Sup. Ct. Rep. 430, 30: 569

566. When payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided. *Lincoln County v. Luning*, 133 U. S. 529, 10 Sup. Ct. Rep. 363, 33: 766

Cited in *Robertson v. Blaine County*, 85 Fed. 738—*Robertson v. Blaine County*, 47 L.R.A. 465, 32 C. C. A. 521, 81 U. S. App. 242, 90 Fed. 71—*Apache County v. Barth*, 6 Ariz. 29, 53 Pac. 187—*School Dist. No. 5 v. First Nat. Bank*, 63 Kan. 670, 66 Pac. 630—*Greer County v. Clarke & Courts*, 12 Okla. 215, 70 Pac. 206.

567. The California state act creating harbor commissioners, and authorizing them to take possession and improve the water front, was a public act (of which all must take notice) asserting a claim of the state; and it prevented one who was the owner of a lot on San Francisco bay from acquiring the title of the state by operation of the statute of limitations, which that state permits to be set up against herself. *Weber v. State Harbor Comrs.* 18 Wall. 57, 21: 798

568. The Maryland statute of limitations was suspended by the act of Congress July 13, 1866 (14 Stat. at L. 152, § 19 chap. 184). *Braun v. Sauerwein*, 10 Wall. 218, 19: 895

When statute not suspended.

569. In the absence of express statute or controlling adjudication to the contrary, when the statute of limitations has once commenced to run, its operation is not suspended by a subsequent disability to sue. *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. Rep. 466, 37: 316

Cited in *De Arnaud v. United States*, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 374—*Fox v. First Nat. Bank*, 9 Kan. App. 23, 57 Pac. 241.

570. The bar of the statute of limitations cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim. *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. Rep. 466, 37: 316

Cited in *King v. Pomeroy*, 58 C. C. A. 219, 121 Fed. 297—*Whitman v. Atkinson*, 65 C. C. A. 188, 130 Fed. 762—*Dennis v. Blint*, 122 Cal. 45, 68 Am. St. Rep. 17, 54 Pac. 378—Mc-

Govney v. Gwillim, 16 Colo. App. 288, 65 Pac. 346—Kulp v. Kulp, 51 Kan. 348, 21 L.R.A. 558, 32 Pac. 1118—Wey v. Schofield, 53 Kan. 250, 36 Pac. 333—First Nat. Bank v. King, 60 Kan. 737, 57 Pac. 952—Rankin v. Barton, 69 Kan. 633, 77 Pac. 531—Travelers' Ins. Co. v. Stuchi, 4 Kan. App. 431, 46 Pac. 42.

571. In New York the concealment of a cause of action *ex contractu* does not, in courts of law, interrupt or delay the running of the statute of limitations as a bar to the action. *Andreae v. Redfield*, 98 U. S. 225,

25: 158

Cited in Amy v. Watertown, 22 Fed. 420.

572. Although concealment of fraud has been held ground for suspending the statute of limitations, yet the evasion of the service of process is not fraud in the legal sense of the term, and is no valid answer to the statutory bar. *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. Rep. 537,

32: 953

Cited in Brockway v. Oswego Twp. 40 Fed. 615—*Pickering v. Leberman*, 41 Fed. 377—*Morgan v. Des Moines*, 8 C. C. A. 570, 19 U. S. App. 593, 60 Fed. 209—*Leach v. Moore*, 57 Ark. 587, 22 S. W. 173—*Hibernian Bkg. Asso. v. Commercial Nat. Bank*, 157 Ill. 538, 41 N. E. 919—*Ennis v. Pullman Palace Car Co.* 165 Ill. 179, 46 N. E. 439—*Mereness v. First Nat. Bank*, 112 Iowa, 15, 51 L.R.A. 411, 84 Am. St. Rep. 318, 83 N. W. 410—*Powell v. Koehler*, 52 Ohio St. 119, 26 L.R.A. 483, 49 Am. St. Rep. 705, 39 N. E. 195.

573. A creditor's delay to apply for the appointment of an administrator for five months and twenty days after the debtor's death, being more than thrice the period allowed by statute for the next of kin to obtain administration, where it is not claimed that the creditor was ignorant of such death, was unreasonable, and could not prevent or postpone the running of the statute of limitations. *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. Rep. 466, 37: 316

574. A judgment against an executor in one state is admissible in evidence in an action against an executor of the same estate in another state to bar the statute of limitations. The executors in different states have a relation of privity with each other, which does not exist in case of administrators. *Hill v. Tucker*, 13 How. 458, 14: 223 *Cited in Borer v. Chapman*, 119 U. S. 600, 30 L. ed. 537, 7 Sup. Ct. Rep. 342—*Anderson v. Watt*, 138 U. S. 703, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449—*Carpenter v. Strange*, 141 U. S. 104, 35 L. ed. 647, 11 Sup. Ct. Rep. 960—*Goodall v. Tucker*, 13 How. 470, 14 L. ed. 227—*Hopper v. Hopper*, 125 N. Y. 406, 12 L.R.A. 239, 26 N. E. 457—*Garland v. Garland*, 84 Va. 189, 4 S. E. 334.

575. The running of the statute of limitations against an action to enforce an assessment on a subscription to stock of a corporation is not in Iowa suspended by delay in making the assessment, when a right to recover would arise by making a demand or giving notice. *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. Rep. 810,

40: 986

Cited in West v. Topeka Sav. Bank, 66 Kan. 532, 63 L.R.A. 143, 97 Am. St. Rep. 385, 72 Pac. 252.

576. It would be quite a new principle in the law of ejectment and limitations, that an intention to assert a right is equivalent to actually doing so. It is settled law that an entry on land by one having the right has the same effect in arresting the progress of the limitation as a suit; but it cannot be sustained as a legal proposition that an entry by one having no right is of any avail. *Henderson v. Griffin*, 5 Pet. 151,

8: 79

Cited in Schlossnagle v. Kolb, 97 Md. 293, 54 Atl. 1006—*Van Vleet v. Blackwood*, 39 Mich. 731—*New Shoreham v. Ball*, 14 R. I. 571.

577. The failure of the Secretary of the Interior to confirm or avoid a sale of land by an incompetent Indian in violation of the treaty of January 31, 1855, between the United States and the Wyandotte Indians, does not prevent the statute of limitations from beginning to run against the right of his heirs to maintain ejectment against his grantees at the date of ratification of the treaty of February 23, 1867, removing all restrictions upon sales of land patented to incompetent Wyandottes which should thereafter be made, and authorizing the Secretary of the Interior to investigate and confirm or avoid such sales theretofore made. *Schrimspeher v. Stockton*, 183 U. S. 290, 22 Sup. Ct. Rep. 107,

46: 203

Removal of bar.

Sufficiency of Evidence of, to Go to Jury, see Trial, 135.

578. A cause of action barred under the laws of Texas was not revived by the subsequent accession of Texas to the Union. *Bacon v. Howard*, 20 How. 22, 15: 811

579. Where, before the transfer to the United States of an instrument which was the evidence of a debt, the term of five years had elapsed,—the period after which the statute of limitations was a bar,—the transfer of such claim to the United States cannot give it any greater validity than it possessed before the transfer. *United States v. Buford*, 3 Pet. 12, 7: 585 *Distinguished in Levasser v. Washburn*, 11 Gratt. 580.

Cited in United States v. Thompson, 98 U. S. 488, 25 L. ed. 195—*United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 125, 30 L. ed. 83, 6 Sup. Ct. Rep. 1006—*South Dakota v. North Carolina*, 192 U. S. 345, 48 L. ed. 472, 24 Sup. Ct. Rep. 269—*Burke v. United States*, 13 Ct. Cl. 241—*Re Cooke*, 19 Fed. 94—*Martin v. Martin*, 35 Ala. 568—*McNamee v. United States*, 11 Ark. 150—*Atty. Gen. v. Revere Copper Co.* 152 Mass. 452, 9 L.R.A. 513, 25 N. E. 605—*Public Schools v. Trenton*, 30 N. J. Eq. 684—*United States v. White*, 2 Hill. 60, 37 Am. Dec. 374.

580. The act of Congress of June 22, 1860, was intended to provide a suit in the nature of ejectment against the United States, whether out of possession or in possession, and to remove the bar of the statute of limitations. *Scull v. United States*, 98 U. S. 410,

25: 164

581. Whether the bar of limitation was removed from a claim against the United

States by its transmission to the court of claims by the Interior Department,—*Quere. United States v. Jones* (United States v. McDougall) 121 U. S. 89, 7 Sup. Ct. Rep. 850, 30: 861
Cited in Finn v. United States, 123 U. S. 231, 31 L. ed. 130, 8 Sup. Ct. Rep. 82.

Editorial notes.

[Suspension of, by injunction. 30 L.R.A. 142.

The relation of new pleadings to statute of. 3 L.R.A. (N.S.) 260.]

b. By Suit.

As Relief against Charge of Laches, see *supra*, 223-225.

Right of Defendants in Private Land Suit to File Affirmative Claims as to Time when Original Petition was filed, see Private Land Claims, 458.

582. Under the statute of limitations of Tennessee, the running of the statute can only be stopped by actual suit, if the party claiming under it has had peaceable possession for seven years. *McClung v. Ross*, 5 Wheat. 116, 5: 46

583. Where a suit abates and is not revived, it takes no time out of the statute of limitations. *Alexander v. Pendleton*, 8 Cranch. 462, 3: 624
Cited in Lytle v. State, 17 Ark. 662—Null v. White Water Valley Canal Co. & Ind. 434—*Young v. Mackall*, 4 Md. 374—*Pergues v. Warley*, 14 S. C. 183—*Whitehead v. Foley*, 28 Tex. 283.

584. By the Louisiana Code, art. 3484, a legal interruption of the prescription takes place where the possessor has been called to appear before a court of justice, either on account of the property or the possession, whether the suit has been brought before a court of competent jurisdiction or not. That article of the Code contemplates a voluntary, intentional, and active abandonment of the suit, in order to restore the right of prescription. *Gaines v. Hennen*, 24 How. 553, 16: 770

585. Proceedings in the Louisiana district court held to be an interruption of the prescription pleaded, within the civil code of that state, where, in a suit between the parties embracing a portion of the matter in controversy, an agreement was made to arbitrate the matters and decide who was the creditor and the amount due on either part. *Martin v. Ihmsen*, 21 How. 394, 16: 134

586. In Louisiana an order for seizure and sale of mortgaged property is a judicial demand, and interrupts the prescription against an action on the notes secured. Setting aside the sale for irregularity does not affect the order of seizure and sale, but that remains valid, and a new writ may issue upon it. *Gordon v. Gilfoil*, 99 U. S. 168, 25: 383

587. Where, upon the trial of a suit, the court found that the plaintiff did not have the legal title to the claim sued on when

the action was commenced, the action was not defeated for any matter of form, so as to bring it within Miss. Code 1871, § 2163, allowing a new action for the same cause. *Meath v. Board of Mississippi Levee Comrs.* 109 U. S. 268, 3 Sup. Ct. Rep. 284, 27: 930

588. Prosecutions, to stop the operation of the statute of limitations as to real estate, must be successful, and lead to a change in the possession; the fact that renewed and continued claims and demands are made and litigated is not alone sufficient to interrupt the running of the statute. *Moore v. Greene*, 19 How. 69, 15: 533
Cited in Elder v. McClaskey, 17 C. C. A. 276, 37 U. S. App. 1, 70 Fed. 554—*Barrell v. Title Guarantee Co.* 27 Or. 89, 39 Pac. 992—*Workman v. Guthrie*, 29 Pa. 513, 72 Am. Dec. 654—*Barrett v. Stradl*, 73 Wis. 399, 9 Am. St. Rep. 795, 41 N. W. 439.

Commencement of action.

State Rule as to Commencement, as Binding Federal Courts, see Courts, 2043-2046.

Question of Law or Fact as to, see Trial, 432.

See also *supra*, 229; Statutes, 319.

589. [Writs of *habeas corpus* and *summons*, in Pennsylvania, are similar to the originals of the English practice; and therefore the entry of continuances is not necessary to prevent the running of the statute of limitations. *Schlosser v. Leshner* (Ct. Com. Pl. Phila.) 1 Dall. 411, 1: 200]

590. [Where a writ has not actually abated, it remains the commencement of the action as to the statute of limitations. *Schlosser v. Leshner* (Ct. Com. Pl. Phila.) 1 Dall. 411, 1: 200]

591. Under Wis. Rev. Stat. 1858, chap. 138, § 27, the service of the summons, or its delivery to an officer with intent that it shall be served, is the act by which the period of limitation must be computed. *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 9 Sup. Ct. Rep. 690, 32: 1080
Cited in People's Sav. Bank & T. Co. v. Batchelder Egg Case Co. 2 C. C. A. 132, 4 U. S. App. 603, 51 Fed. 136.

592. But this must be followed up by actual service or publication within sixty days. *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 9 Sup. Ct. Rep. 690, 32: 1080
Knowlton v. Watertown, 130 U. S. 327, 9 Sup. Ct. Rep. 539, 542, 32: 956

593. Depositing a process in a place provided or designated by the officer is equivalent to a manual delivery to him for the purpose of computing the time of the commencement of an action. *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 9 Sup. Ct. Rep. 690, 32: 1080

594. Where the summons in an action on bonds and coupons against a city in Wisconsin was never served upon the mayor, or upon any person having or exercising the powers of mayor, and there is no pretense that the directions of Wis. Rev. Stat. §

4240, concerning the commencement of an action, were followed, or attempted to be, the action was really not commenced, within the meaning of the statute, until the attorneys of the defendant voluntarily entered a general appearance; and as, at the time, more than ten and a half years had elapsed since the last coupon sued on became due, all the coupons sued on were barred by the statute of limitations. *Knowlton v. Watertown*, 130 U. S. 327, 9 Sup. Ct. Rep. 539, 542. 32: 956
Cited in *The Oregon*, 73 Fed. 851.

595-6. [Service of a declaration, in ejectment, upon the defendant, is the commencement of a suit. *Nicholson v. Wallis* (Pa. Sup. Ct.) 4 Dall. 154, 1: 779]

597. On a bill against a national banking association for the benefit of all the creditors, whenever a creditor comes in as a co-complainant, the beginning of the suit as to him is the date of the filing of the bill; and the statute of limitations, if applicable at all, ceases to run against him from that date. *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788. 30: 864

Distinguished in *Thompson v. German Ins. Co.* 76 Fed. 894.

Cited in *Newgass v. Atlantic & D. R. Co.* 72 Fed. 716—*Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 81 Fed. 453—*McDonald v. Nebraska*, 41 C. C. A. 288, 101 Fed. 181.

598. When a claim is one which may be settled by a head of a department, or referred by him to the court of claims, the filing of the petition relates back to the time when it was first presented to the department for allowance. *Finn v. United States*, 123 U. S. 227, 8 Sup. Ct. Rep. 82. 31: 128

Cited in *Balmer v. United States*, 26 Ct. Cl. 86—*Alexandria, L. & H. R. Co. v. United States*, 26 Ct. Cl. 330—*Finn v. United States*, 26 Ct. Cl. 441—*New York v. United States*, 26 Ct. Cl. 493—*Winchester & P. R. Co. v. United States*, 27 Ct. Cl. 516—*Armstrong v. United States*, 29 Ct. Cl. 169—*Skelly v. United States*, 32 Ct. Cl. 229—*Baltimore & O. R. Co. v. United States*, 34 Ct. Cl. 505—*Maine v. United States*, 36 Ct. Cl. 551.

Amendment.

Amended Petition Confirmed by the Land Claim, see *Private Land Claim*, 457.

See also *Pleading*, 236, 237.

599. A statutory limitation for the commencement of an action does not prevent the petition or complaint from being amended after the expiration thereof, where no independent cause of action is introduced by the amendment. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. Rep. 905. 36: 829

Cited in *Hodges v. Kimball*, 34 C. C. A. 110, 63 U. S. App. 688, 91 Fed. 852—*Whalen v. Gordon*, 37 C. C. A. 74, 95 Fed. 309—*McDonald v. Nebraska*, 41 C. C. A. 284, 201 Fed. 177—*Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L.R.A. 54, 41 C. C. A. 543, 201 Fed. 631—*Patillo v. Allen-West Commission Co.* 65 C. C. A. 509, 131 Fed. 681—*District of Columbia v. Frazer*, 21 App. D. C. 158—

Illinois C. R. Co. v. Campbell, 170 Ill. 168, 49 N. E. 314.

600. A new count in an amended declaration in ejectment, on a demise from a different party, asserting a different title, is not distinguishable, so far as respects the act of limitations, from a new action. *Sicard v. Davis*, 6 Pet. 124, 8: 342

Cited in *Texas & P. R. Co. v. Cox*, 145 U. S. 604, 36 L. ed. 833, 12 Sup. Ct. Rep. 905—*Union P. R. Co. v. Wyler*, 158 U. S. 297, 39 L. ed. 990, 15 Sup. Ct. Rep. 877—*Seymour v. Franklin*, 92 Fed. 127—*Whalen v. Gordon*, 37 C. C. A. 74, 95 Fed. 309—*Fidelity & C. Co. v. Freeman*, 54 L.R.A. 685, 48 C. C. A. 699, 109 Fed. 853—*Wood v. Wood*, 59 Ark. 447, 28 L.R.A. 159, 43 Am. St. Rep. 42, 27 S. W. 641—*Jeffers v. Cook*, 58 Cal. 151—*Durant v. Murdock*, 3 App. D. C. 126—*Morris v. Wheat*, 11 App. D. C. 220—*Missouri, K. & T. R. Co. v. Bagley*, 65 Kan. 199, 69 Pac. 189.

600a. An amendment merely dismissing one of two joint tortfeasors, and complaining of the remaining defendant only, does not introduce a new cause of action with respect to the statute of limitations. *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. Rep. 120, 41: 485

600b. Amendments to a complaint stating that plaintiff was traveling upon a "ticket," instead of a "first-class" ticket as originally stated, and that the defendant was chartered by Congress, instead of the laws of Massachusetts as first averred, do not state a new cause of action with respect to the statute of limitations. *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. Rep. 120, 41: 485

600c. An amended petition based on a statute making a railroad company liable for negligence of fellow servants states a new cause of action which is not protected from the statute of limitations by the original petition, when that was based on the general or common law of master and servant, although the facts alleged in both petitions are the same. *Union P. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. Rep. 877, 39: 983

Cited in *Atlantic & P. R. Co. v. Laird*, 164 U. S. 396, 41 L. ed. 486, 17 Sup. Ct. Rep. 120—*Cahill v. Chicago, M. & St. P. R. Co.* 20 C. C. A. 190, 46 U. S. App. 85, 74 Fed. 291.—*Bowen v. Needles Nat. Bank*, 79 Fed. 50—*Hobart v. Illinois C. R. Co.* 81 Fed. 6—*Matz v. Chicago & A. R. Co.* 88 Fed. 771—*Wyler v. Union P. R. Co.* 89 Fed. 43—*Whalen v. Gordon*, 37 C. C. A. 74, 95 Fed. 309—*Mutual L. Ins. Co. v. Dingley*, 49 L.R.A. 136, 40 C. C. A. 462, 100 Fed. 411—*United States v. Norton*, 46 C. C. A. 390, 107 Fed. 415—*Boston & M. R. Co. v. Hurd*, 56 L.R.A. 217, 47 C. C. A. 624, 108 Fed. 125—*H. B. Claflin Co. v. Middlesex Bkg. Co.* 113 Fed. 962—*Patillo v. Allen-West Commission Co.* 65 C. C. A. 509, 131 Fed. 681—*Despeaux v. Pennsylvania R. Co.* 133 Fed. 1010—*Box v. Chicago, R. I. & P. R. Co.* 107 Iowa, 667, 78 N. W. 694—*Atchison, T. & S. F. R. Co. v. Schroeder*, 56 Kan. 735, 44 Pac. 1093—*Kansas City v. Hart*, 60 Kan. 692, 57 Pac. 938—*Walker v. Hester*, 9 Kan. App. 206, 59 Pac. 662.

601. Where a title set up in an amended bill is a new right, the statute of limitations will run, as to that title, until the time of the amendment. *Holmes v. Trout*, 7 Pet. 171. 8: 647

Cited in *Wood v. Wood*, 59 Ark. 447, 28 L.R.A. 159, 43 Am. St. Rep. 42, 27 S. W. 641—*Jeffers v. Cook*, 58 Cal. 151—*Durant v. Murdock*, 3 App. D. C. 126—*Schwartz v. Stock*, 26 Nev. 157, 65 Pac. 357—*Montgomery v. Shaver*, 40 Or. 250, 66 Pac. 923.

602. Where new parties are brought into a suit by an amended bill, the statute of limitations will avail them at the period when the amendment was filed; and they are not to be affected by the proceeding during the time they were strangers to it. *Miller v. McIntyre*, 6 Pet. 61. 8: 320

Cited in *Sicard v. Davis*, 6 Pet. 140, 8 L. ed. 348—*French v. Hay* (*French v. Stewart*) 22 Wall. 246, 22 L. ed. 856—*Hewitt v. Pennsylvania Steel Co.* 24 Fed. 370—*Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 442, 113 Fed. 752—*King v. Avery*, 37 Ala. 173—*Adams v. Phillips*, 75 Ala. 463—*Selps v. Engelhardt*, 78 Ala. 511—*Wilson v. Holt*, 91 Ala. 209, 8 So. 794—*Lytle v. State*, 17 Ark. 662—*Jeffers v. Cook*, 58 Cal. 151—*Durant v. Murdock*, 3 App. D. C. 126—*Dunphy v. Riddle*, 86 Ill. 26—*Lagow v. Nellson*, 10 Ind. 185—*Hawthorne v. State*, 57 Ind. 287—*Smith v. Butler*, 176 Mass. 43, 57 N. E. 322—*Buel v. St. Louis Transfer Co.* 45 Mo. 564—*Jacks v. Sullivan*, 128 Mo. 185, 30 S. W. 800—*Green v. Sandford*, 34 Neb. 367, 51 N. W. 967—*Cogdell v. Exum*, 69 N. C. 467, 12 Am. Rep. 657—*Butt v. Carson*, 5 Okla. 164, 48 Pac. 182—*Montgomery v. Shaver*, 40 Or. 250, 66 Pac. 923—*Fergues v. Warley*, 14 S. C. 183.

— Editorial note.

Amendment of pleading as affecting statute of limitations. 39: 983

Supplemental bill.

See also Pleading, 244.

602a. A bill to subject real estate of heirs to debts of their ancestor, though called supplemental to a bill by a surviving partner to settle the affairs of a copartnership, must be regarded as a new proceeding with respect to the plea of the statute of limitations. *White v. Miller* (*White v. Joyce*) 158 U. S. 128, 15 Sup. Ct. Rep. 788, 39: 921

Nonsuit; dismissal or discontinuance.

See also Insurance, 692.

603. In Missouri, if an action is commenced within the statutory limitation of time, and the plaintiff suffers a nonsuit, he may commence a new action within one year after the nonsuit. *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. Rep. 867, 34: 262

Cited in *Alexander v. Gordon*, 41 C. C. A. 231, 101 Fed. 95.

604. The South Carolina act of 1744, giving two years after a nonsuit, etc., in which to bring a new action, is a part of the limitation act of 1812. *Henderson v. Griffin*, 5 Pet. 151. 8: 79

605. The dismissal of an action during

the pendency of which the limitation has run will bar the remedy in the absence of any statutory provision to the contrary. *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. Rep. 176, 41: 531

605a. Where an assignee in bankruptcy discontinued a suit in the district court and began another in the circuit court for a decree to surrender premises granted by the bankrupt to his children, the suit in the circuit court was a continuance of the former one, within the two years' limitation of U. S. Rev. Stat. § 5057. *Adams v. Collier*, 122 U. S. 382, 7 Sup. Ct. Rep. 1208. 30: 1207

Cited in *Bowen v. Delaware, L. & W. R. Co.* 153 N. Y. 481, 60 Am. St. Rep. 667, 47 N. E. 907.

c. By Payment, Acknowledgment, or Promise.

1. Payment.

606. A note given for the balance of a prior note, with interest and damages, is an actual payment thereof, so far as concerns the running of the statute of limitations against any remedy for wrongfully including therein more damages than the law required. *Bank of United States v. Daniel*, 12 Pet. 32. 9: 989

Distinguished in *Phoenix Ins. Co. v. Church*, 81 N. Y. 226, 37 Am. Rep. 494.

Cited in *Hoyt v. Sprague*, 8 Reporter, 618, Fed. Cas. No. 6,810—*Harvey v. First Nat. Bank*, 56 Neb. 333, 76 N. W. 870—*Phoenix Ins. Co. v. Church*, 59 How. Pr. 300—*Bank of Hamilton v. Mudgett*, 34 Hun, 103—*Bank of Charlotte v. Davidson*, 70 N. C. 122.

607. A payment of the principal or interest sufficient under Kan. Gen. Stat. chap. 80, art. 3, § 24, to take an action upon a municipal bond out of the limitation in § 18 of said act, is not made where a payment is made only upon another bond, and the only one which had been presented, although held by the same party. Such payment was made neither upon any other bond nor on the bonds as a whole. *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56, 28: 636

608. A payment in full of an admitted contract cannot be converted into an acknowledgment of one which was denied. *United States v. Wilder*, 13 Wall. 254, 20: 681

Editorial note.

What promise, acknowledgment, or payment takes case out of statute. 6: 481

Effect.

609. At common law a payment made upon a note by the principal debtor before the completion of the bar of the statute of limitations keeps the debt alive both as to himself and the surety; but where the payment is made after the completion of the bar of the statute, it revives the debt only as to the party making the payment. *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. Rep. 67, 35: 843

Cited in *Folsom v. Township Ninety-Six*, 59 Fed. 68—*Bergman v. Bly*, 13 C. C. A. 319, 27 U.

S. App. 650, 66 Fed. 43—Oleson v. Wilson, 20 Mont. 553, 63 Am. St. Rep. 639, 52 Pac. 372—Hinton v. Greenleaf, 113 N. C. 7, 18 S. E. 56—Hedrick v. Byerly, 119 N. C. 422, 25 S. E. 1020—Stubblefield v. McAuliff, 20 Wash. 445, 55 Pac. 637—George v. Butler, 26 Wash. 465, 57 L.R.A. 400, 90 Am. St. Rep. 756, 67 Pac. 263—Cowhick v. Shingle, 5 Wyo. 101, 25 L.R.A. 612, 63 Am. St. Rep. 17, 37 Pac. 689.

610. Where a surety is not personally liable for the debt, but has only given a mortgage to secure it, payment on the debt by the principal debtor after the death of the surety, but before the completion of the bar of the statute of limitations, will prevent the surety's executors from interposing the statute in a suit to foreclose the mortgage. *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. Rep. 67, 35: 843

611. When the statute of limitations has begun to run against a claim it will not be stopped by reason of a payment of that part of the debt admitted to be due, no presumption having been raised that it was a partial payment on account of the entire debt. *United States v. Wilder*, 13 Wall. 254, 20: 681

Cited in *Bulkley v. United States*, 8 Ct. Cl. 520—*Campbell v. United States*, 13 Ct. Cl. 109—*Kirk v. Williams*, 24 Fed. 447—*Merrill v. Monticello*, 66 Fed. 166—*Royston v. May*, 71 Ala. 400—*Ross v. Fickling*, 11 App. D. C. 451—*Knoedler v. Meloy*, 2 MacArth. 243—*Kalenbach v. Dickinson*, 100 Ill. 441, 39 Am. Rep. 47—*Good v. Ehrlich*, 67 Kan. 97, 72 Pac. 545—*Price v. Price*, 111 Ky. 786, 66 S. W. 529—*Leach v. Asher*, 20 Mo. App. 659—*Brown v. Latham*, 58 N. H. 34, 42 Am. Rep. 568—*Engel v. Brown*, 69 N. H. 185, 45 Atl. 402—*Stubblefield v. McAuliff*, 20 Wash. 447, 55 Pac. 637—*Cowhick v. Shingle*, 5 Wyo. 100, 25 L.R.A. 612, 63 Am. St. Rep. 17, 37 Pac. 689.

612. In Louisiana, payment by a purchaser of property, who assumes his vendor's debt as part of the purchase price, interrupts the prescription of such debt, as to both purchaser and vendor. *Cucullu v. Hernandez*, 103 U. S. 105, 26: 322

613. Under the civil code of Louisiana, a widow is not liable *in solido* with the surviving partners for the payment of a note made by the firm of which her husband was a member; and payments made on the note by the surviving partners cannot be given in evidence to show interruption of prescription running in her favor. *Henderson v. Wadsworth*, 115 U. S. 264, 6 Sup. Ct. Rep. 140, 29: 377

— Editorial notes.

[Revival of barred debt by application of general payment. 14 L.R.A. 208.

Payment on condition to take debt out of bar. 55 L.R.A. 320.

Effect of new promise or payment on barred judgment. 8 L.R.A.(N.S.) 440.

Effect of payment on security held as collateral to stay running of statute against principal obligation. 12 L.R.A.(N.S.) 1032.]

2. Acknowledgment or Promise.

Declarations and Indorsements of Credits as Evidence of, see Evidence, 2022.

Evidence of Acknowledgment Under Joinder in Issue on Plea of Statute and General Issue, see Evidence, 2705.

See also *infra*, 645.

Editorial notes.

[New promise after bar. 53 L.R.A. 362, 8 L.R.A.(N.S.) 440.]

Written acknowledgment.

614. A letter signed by the partnership name containing an acknowledgment of liability on a note made by the individual members, is sufficient, where the note, although in form that of the individual partners, is in reality a partnership obligation, and the firm is the agent of all the members. *Walsh v. Mayer*, 111 U. S. 31, 4 Sup. Ct. Rep. 260, 28: 338

Cited in *Shepherd v. Thompson*, 122 U. S. 237, 30 L. ed. 1158, 7 Sup. Ct. Rep. 1229—*Michigan Ins. Bank v. Eldred*, 130 U. S. 696, 32 L. ed. 1081, 9 Sup. Ct. Rep. 690—*Klein Dienst v. Johnson*, 7 Mackey, 369—*McElhone v. Massachusetts Ben. Assn.* 2 App. D. C. 403—*Nelson v. Hanson*, 92 Iowa, 358, 54 Am. St. Rep. 568, 60 N. W. 655—*Custy v. Donlan*, 159 Mass. 248, 38 Am. St. Rep. 419, 34 N. E. 360—*Rumsey v. Settle*, 120 Mich. 377, 79 N. W. 579—*Acers v. Acers*, 22 Tex. (Civ. App. 587, 56 S. W. 196—*Kuhn v. Mount*, 13 Utah, 116, 44 Pac. 1036—*Rowe v. Marchant*, 85 Va. 182, 9 S. E. 905.

615. Under the Code of Mississippi, declaring that in actions founded on contract no acknowledgment shall take any case out of the provisions of the limitation act, unless made in writing, signed by the party chargeable thereby, when the holder of a note wrote to the maker, requiring security by insurance, and the maker wrote the holder in answer, "We think you will run no risk in that time, as the property would be worth the amount due you if the building was to burn down,"—Held, that the two letters contain sufficient acknowledgment under such code. *Walsh v. Mayer*, 111 U. S. 31, 4 Sup. Ct. Rep. 260, 28: 338

616. A recital in a deed that a debt is due may be sufficient as an acknowledgment to take a case out of the statute of limitations. *King v. Riddle*, 7 Cranch. 168, 3: 304

Cited in *Shepherd v. Thompson*, 122 U. S. 235, 30 L. ed. 1157, 7 Sup. Ct. Rep. 1229.

617. A mere acknowledgment of the debt, although in writing, as having once existed, is not sufficient; it must be a distinct and unequivocal acknowledgment of it as still subsisting as a personal obligation of the debtor. *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. Rep. 1229, 30: 1156

618. A written pledge of a certain claim to the payment, so far as the proceeds thereof may be sufficient, of a former indebtedness, but containing no promise of the pledgor personally to pay the debt, and no acknowledgment or mention of it as an

existing liability, does not take the debt out of the statute. *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. Rep. 1229,

30: 1156

619. The measure of a debtor's liability under an agreement, the consideration for which is a debt barred by the statute of limitations, is fixed by the terms of such agreement, and not by the amount of the barred obligation. *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. Rep. 1229,

30: 1156

Cited in School District v. Cromer, 52 Ark. 456, 6 L.R.A. 511, 12 S. W. 878—*Hartley v. Regua*, 17 Misc. 76, 39 N. Y. Supp. 846.

620. An acknowledgment in writing of an existing liability, debt, or claim, signed by the party to be charged, sufficient, under Kan. Gen. Stat. chap. 80, art. 3, § 24, to take a case out of the limitation prescribed in § 18 of said act, is not made by mere entry upon the records of a city council of the adoption of a report recommending the sending of a circular to holders of bonds of other classes than those involved in such case, which circular includes the amount of such excepted bonds in a general summary of total indebtedness, where the record states distinctly that no report is made about such excepted bonds and that the circular is not to be sent their holders; the record as a whole not amounting to an acknowledgment to the holder of such excepted bonds,—especially where it is not found that the plaintiff ever knew of such record until after he brought suit. *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56,

28: 636

Cited in Houston v. Jankowskie, 76 Tex. 370, 18 Am. St. Rep. 57, 13 S. W. 269.

621. An acknowledgment in writing of an existing liability, debt, or claim, signed by the party to be charged, sufficient under Kan. Gen. Stat. chap. 80, art. 3, § 24, to take a case out of the limitation in § 18 of said act, is not made to a creditor holding a particular class of municipal bonds, by a circular intended by the city for, and sent to, holders of other classes of bonds, making a proposition for compromise, which circular contains a summary of municipal indebtedness which includes the amount of the particular class of bonds, without including it in the offer of compromise or otherwise mentioning it in the circular. *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56,

28: 636

622. The acknowledgment in writing, signed by the party to be charged, of an existing liability, debt, or claim, sufficient under Kan. Gen. Stat. chap. 80, art. 3, § 24, to take a case out of the limitation in § 18 of said act, is not made to a creditor by a letter to the debtor's fiscal agent stating that bonds of certain numbers, including those in suit, were then unpaid, or remitting funds to apply upon such bonds generally, as such letters are not addressed to the creditor or his agent. *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56,

28: 636

Sufficiency of acknowledgment.

623. An acknowledgment of a debt which will take a case out of the statute of limitations must be unqualified and unconditional. *Wetzell v. Bussard*, 11 Wheat. 309,

6: 481

Cited in Bell v. Morrison, 1 Pet. 362, 7 L. ed. 179—*Moore v. Bank of Columbia*, 6 Pet. 92, 8 L. ed. 331—*Ft. Scott v. Hickman*, 112 U. S. 164, 28 L. ed. 641, 5 Sup. Ct. Rep. 56—*Shepherd v. Thompson*, 122 U. S. 230, 30 L. ed. 1157, 7 Sup. Ct. Rep. 1229—*Cross v. United States*, 4 Ct. Cl. 279—*Archer v. Poor*, 5 Cranch, C. C. 542, Fed. Cas. No. 509—*Nicholls v. Warfield*, 2 Cranch, C. C. 429, Fed. Cas. No. 10,234—*Re Burton*, 29 Fed. 639—*Gaines v. McKinley*, 1 Ala. 448—*Bates v. Bates*, 33 Ala. 104—*Brown v. State Bank*, 10 Ark. 136—*De Forest v. Hunt*, 8 Conn. 185—*Thompson v. Shepherd*, 1 Mackey, 388—*Ruppert v. Beavans*, 2 App. D. C. 302—*Flannery v. Maine Red Granite Co.* 3 App. D. C. 399—*Johnson v. Gregg*, 7 D. C. 145—*Bean v. Wheatley*, 13 App. D. C. 480—*Dickinson v. McCamy*, 5 Ga. 488, 48 Am. Dec. 298—*Martin v. Broach*, 6 Ga. 32, 50 Am. Dec. 306—*Mellick v. De Seelhorst*, Breese (Ill.) 172, 12 Am. Dec. 171—*Kimmel v. Schwartz*, Breese (Ill.) 219—*Penley v. Waterhouse*, 8 Iowa, 430—*Stewart v. McFarland*, 84 Iowa, 57, 50 N. W. 221—*Head v. Manners*, 5 J. J. Marsh. 261—*Bangs v. Hall*, 2 Pick. 377, 13 Am. Dec. 437—*Bailey v. Crane*, 21 Pick. 324—*Ten Eyck v. Wing*, 1 Mich. 48—*Davis v. Minor*, 1 How. (Miss.) 191, 28 Am. Dec. 325—*McLean v. Thorp*, 4 Mo. 259—*Gulick v. Princeton & K. Branch Turnp. Co.* 14 N. J. L. 548—*Stewart v. Reckless*, 24 N. J. L. 429—*Dunham v. Dodge*, 10 Barb. 569—*Reid v. McNaughton*, 15 Barb. 175—*Tompkins v. Brown*, 1 Denio, 249—*Cocks v. Weeks*, 7 Hill, 47—*Purdy v. Austin*, 3 Wend. 190—*Bradley v. Field*, 3 Wend. 273—*Laforge v. Jayne*, 9 Pa. 413—*Boss v. Long*, 33 Phila. Int. 306—*Hayes v. Clinkscapes*, 9 S. C. N. S. 454—*Belote v. Wynne*, 7 Yerg. 541—*Thurmond v. Trammell*, 23 Tex. 380, 91 Am. Dec. 321—*Farmers Bank v. Clarke*, 4 Leigh, 606—*Aylett v. Robinson*, 9 Leigh, 49.

624. Statutes of limitation are statutes of repose, and not merely statutes of presumption of payment. An acknowledgment sufficient to bar such a statute must be to the creditor as to the particular claim, and must be intentional. *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56, 28: 636
Cited in Davis v. Davis, 98 Me. 136, 56 Atl. 588.

625. An acknowledgment cannot be regarded as an admission of indebtedness, where the accompanying circumstances are such as to repel that inference, or to leave it in doubt whether the party intended to prolong the time of legal limitation. *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56,

28: 636

Cited in Shepherd v. Thompson, 122 U. S. 238, 30 L. ed. 1158, 7 Sup. Ct. Rep. 1229—*Kirk v. Williams*, 24 Fed. 447—*Park v. Park*, 32 Ind. App. 644, 70 N. E. 493—*Williamson v. Williamson*, 50 Mo. App. 199—*Nelson v. Becker*, 32 Neb. 104, 48 N. W. 962—*Rowe v. Marchant*, 86 Va. 182, 9 S. E. 995.

626. An acknowledgment of the original justice of a claim is not sufficient to take

the case out of the statute of limitations. The acknowledgment must go to the fact that the claim is still due. *Clementson v. Williams*, 8 Cranch, 72, 3: 491

Cited in *Wetzell v. Bussard*, 11 Wheat. 314, 6 L. ed. 483—*Thompson v. Peter*, 12 Wheat. 587, 6 L. ed. 731—*Bell v. Morrison*, 1 Pet. 361, 7 L. ed. 179—*Moore v. Bank of Columbia*, 6 Pet. 91, 8 L. ed. 330—*Shepherd v. Thompson*, 122 U. S. 235, 30 L. ed. 1157, 7 Sup. Ct. Rep. 1229—*Cross v. United States*, 4 Ct. Cl. 279—*Jenkins v. Boyle*, 2 Cranch, C. C. 120, Fed. Cas. No. 7,262—*Nicholls v. Warfield*, 2 Cranch, C. C. 429, Fed. Cas. No. 10,234—*St. John v. Garrow*, 4 Port. (Ala.) 226, 29 Am. Dec. 280—*Crawford v. Childress*, 1 Ala. 488—*Brown v. State Bank*, 10 Ark. 186—*Lord v. Shaler*, 3 Conn. 133, 8 Am. Dec. 160—*Marshall v. Dalliber*, 5 Conn. 486—*De Forest v. Hunt*, 8 Conn. 185—*Thompson v. Shepherd*, 1 Mackey, 388—*Dickinson v. McCamy*, 5 Ga. 488, 48 Am. Dec. 298—*Penley v. Waterhouse*, 3 Iowa, 440—*Head v. Manners*, 5 J. J. Marsh. 261—*Perley v. Little*, 3 Me. 101—*Johnston v. Hussey*, 89 Me. 495, 36 Atl. 993—*Bangs v. Hall*, 2 Pick. 377, 13 Am. Dec. 437—*Davidson v. Morris*, 5 Smedes & M. 572—*McLean v. Thorp*, 4 Mo. 259—*Belles v. Belles*, 12 N. J. L. 347—*Roosevelt v. Mark*, 6 Johns. Ch. 290—*Stafford v. Bryan*, 1 Paige, 243—*Henry v. Root*, 33 N. Y. 531—*Montgomery v. Montgomery*, Rich. Eq. Cas. 70—*Russell v. Gass*, Mart. & Y. 273—*Steel v. Matthews*, 7 Yerg. 315—*Kuhn v. Mount*, 13 Utah, 115, 44 Pac. 1036—*Hayes v. Morse*, 8 Vt. 319—*Bell v. Crawford*, 8 Gratt. 129—*Farmers Bank v. Clarke*, 4 Leigh. 606—*Sutton v. Burruss*, 9 Leigh. 384, 33 Am. Dec. 246—*Rowe v. Marchant*, 86 Va. 181, 9 S. E. 995.

627. The admission by a party of the existence of an unliquidated account on which something is due to the plaintiff, but no specific balance is admitted, is not sufficient to take the case out of the statute. *Bell v. Morrison*, 1 Pet. 351, 7: 174

Cited in *Conway v. Reyburn*, 22 Ark. 291—*Ross v. Fickling*, 11 App. D. C. 451—*Webb v. Carter*, 62 Ga. 421—*Pray v. Garcelon*, 17 Me. 146—*Mask v. Philler*, 32 Miss. 238—*Davis v. Herring*, 6 Mo. 22—*Livermore v. Rand*, 26 N. H. 91—*Magee v. Magee*, 10 Watts, 173—*Sutton v. Burruss*, 9 Leigh. 385, 33 Am. Dec. 246—*Bell v. Crawford*, 8 Gratt. 117—*Quarrier v. Quarrier*, 36 W. Va. 317, 15 S. E. 154.

628. Evidence that the debtor, on being bantered about being so free of debt, exclaimed, "Yes, except one damned five hundred in the Bank of Columbia, which I can pay at any time,"—will not take such debt out of the statute of limitations. *Moore v. Bank of Columbia*, 6 Pet. 86, 8: 329

629. Where an action was brought to compel delivery of certain powder, and defendant stated that plaintiff need not have sued, for, if he had come forward and settled certain claims defendant had against him, defendant would have given him the powder; and again, that he was ready to deliver whenever plaintiff settled a certain suit,—this did not amount to an unqualified and unconditional acknowledgment which would remove the bar of the statute of

limitations. *Wetzell v. Bussard*, 11 Wheat. 309, 6: 481

Cited in *Bloodgood v. Bruen*, 8 N. Y. 388—*Wakeman v. Sherman*, 9 N. Y. 92—*Shoemaker v. Benedict*, 11 N. Y. 183, 62 Am. Dec. 95—*Henry v. Root*, 33 N. Y. 531.

630. Where a mortgagor brought suit against his grantee, to compel him to pay the mortgage debt which he had assumed, it was an acknowledgment, in the most explicit form, that the debt was unpaid, and of his liability to pay it. *Cucullu v. Hernandez*, 103 U. S. 105, 26: 322

631. Where one joint owner of a boat assumed and agreed to pay all debts due by the boat, such promise is an acknowledgment of the debt, to take the case out of the statute. *Newell v. Nixon*, 4 Wall. 572, 18: 305

631a. An acknowledgment by a partner that he had not paid a certain debt and did not know whether his co-partner had paid it or not is insufficient to remove the bar of the statute of limitations from a firm indebtedness. *Clementson v. Williams*, 8 Cranch, 72, 3: 491

Cited in *Lingan v. Henderson*, 1 Bland, Ch. 278.

632. The acknowledgment of a debt by one partner, after the dissolution of the co-partnership, is not sufficient to take the case out of the statute as to other partners. After dissolution, one can create no cause of action against the others, except by a new authority communicated to him for that purpose. *Bell v. Morrison*, 1 Pet. 351, 7: 174

Cited in *Grover v. Signor*, 10 N. D. 510, 88 N. W. 278—*Miller v. Miller*, MacArth. & M. 113, 48 Am. Rep. 738—*Tillinghast v. Nourse*, 14 Ga. 648—*Kallenbach v. Dickinson*, 100 Ill. 438, 39 Am. Rep. 47—*Meltzer v. Todd*, 12 Ind. App. 382, 54 Am. St. Rep. 531, 39 N. E. 1046—*Steele v. Souder*, 20 Kan. 41—*Shepley v. Waterhouse*, 22 Me. 499—*Leonard v. Hughlett*, 41 Md. 387—*Sigourney v. Drury*, 14 Pick. 397—*Foute v. Bacon*, 24 Miss. 166—*Chrisman v. Irwin*, 37 Mo. 175, 90 Am. Dec. 375—*Exeter Bank v. Sullivan*, 6 N. H. 134—*Lane v. Doty*, 4 Barb. 537—*Dunham v. Dodge*, 10 Barb. 567—*Reid v. McNaughton*, 15 Barb. 172—*Shoemaker v. Benedict*, 11 N. Y. 182, 62 Am. Dec. 95—*Harper v. Fairley*, 53 N. Y. 445—*Partlow v. Singer*, 2 Or. 310—*Goundy v. Gillam*, 6 Rich. L. 30—*Bowdre v. Hampton*, 6 Rich. L. 220—*Frazer v. Perdreau*, 1 Bail. L. 173—*Joslyn v. Smith*, 13 Vt. 357—*Turner v. Thom*, 89 Va. 747, 17 S. E. 323—*Stubblefield v. McAuliff*, 20 Wash. 446, 55 Pac. 637—*Cowhick v. Shingle*, 5 Wyo. 93, 25 L.R.A. 610, 63 Am. St. Rep. 17, 37 Pac. 689.

633. The acknowledgment by a partner after dissolution of the partnership of the original justice of a debt against the firm, and that he had not paid it, and did not know whether or not his partner had done so, will not take the case out of the statute of limitations. *Clementson v. Williams*, 8 Cranch, 72, 3: 491

Cited in *Bispham v. Patterson*, 2 McLean, 90, Fed. Cas. No. 1,441—*Biscoe v. Jenkins*, 10 Ark. 116—*Cooper v. Wood*, 1 Colo. App. 106, 27 Pac. 884—*Bound v. Lathrop*, 4

Conn. 339, 10 Am. Dec. 147—*Colt v. Tracy*, 8 Conn. 277, 20 Am. Dec. 110—*Warner v. Allee*, 1 Del. Ch. 54—*Farmer v. Stewart*, 2 N. H. 99—*Levy v. Cadet*, 17 Serg. & R. 129, 17 Am. Dec. 650—*Stubblefield v. McAuliff*, 20 Wash. 447, 55 Pac. 637.

634. A promise to render an account of partnership and trust affairs, and make a final settlement of the same, is not an acknowledgment that anything is due. *Philippi v. Philippe*, 115 U. S. 151, 5 Sup. Ct. Rep. 1181, 29: 336

635. The including of a demand in the schedule of the insolvent's debts is sufficient evidence to sustain an issue on a replication of a new promise to the plea of the statute of limitations, if the period of limitation has not elapsed after the date of the schedule. *Bowie v. Henderson*, 6 Wheat. 514, 5: 319
Cited in *Re Eldridge*, 2 Hughes, 258, Fed. Cas. No. 4,331.

636. An acknowledgment of the debt by the personal representatives of the original debtor, deceased, will not take the case out of the statute of limitations. *Thompson v. Peter*, 12 Wheat. 565, 6: 730
Cited in *Doe ex dem. Duval v. McLoskey*, 1 Ala. 742—*Peck v. Botsford*, 7 Conn. 180, 18 Am. Dec. 92—*Isaacs v. Stevens*, 13 Conn. 506—*Washington Market Co. v. Beckley*, 4 Mackey, 165—*Patterson v. Cobb*, 4 Fla. 487—*Riser v. Snoddy*, 7 Ind. 445, 65 Am. Dec. 740—*Hanson v. Towle*, 19 Kan. 282—*Oakes v. Mitchell*, 15 Me. 362—*Huntington v. Bobbitt*, 46 Miss. 535—*Allen v. Allen*, 26 Mo. 331—*Mayberry v. Willoughby*, 5 Neb. 373, 25 Am. Rep. 491—*Hodgdon v. White*, 11 N. H. 210—*Stark v. Hunton*, 3 N. J. Eq. 311—*Lane v. Doty*, 4 Barb. 535—*Dunham v. Dodge*, 10 Barb. 569—*Barger v. Durvin*, 22 Barb. 70—*Cayuga County Bank v. Bennett*, 5 Hill. 240—*Bloodgood v. Bruen*, 8 N. Y. 370—*Shoemaker v. Benedict*, 11 N. Y. 184, 62 Am. Dec. 95—*McLaren v. McMartin*, 36 N. Y. 91—*Schutz v. Morette*, 146 N. Y. 143, 40 N. E. 780—*Fritz v. Thomas*, 1 Whart. 72, 29 Am. Dec. 39—*Braxton v. Harrison*, 11 Gratt. 56—*Seig v. Acord*, 21 Gratt. 371, 8 Am. Rep. 605—*Findley v. Cunningham*, 53 W. Va. 4, 44 S. E. 472.

Effect of acknowledgment.

See also *supra*, 206; *infra*, 643, 648.

637. The original cause of action is revived by a sufficient acknowledgment of a debt barred by the statute of limitations. *Clementson v. Williams*, 8 Cranch, 72, 3: 491
Cited in *Reid v. McNaughton*, 15 Barb. 175.

638. The acknowledgment of a succession debt, by an executor, in Louisiana, suspends prescription as long as the property remains in his hands under administration. *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. Rep. 619, 28: 547
Cited in *Mayfield v. Richards*, 115 U. S. 141, 29 L. ed. 336, 5 Sup. Ct. Rep. 1187—*Washington Market Co. v. Beckley*, 4 Mackey, 167.

639. In Louisiana when a claim against a succession has been formally acknowledged by the executor or administrator, no suit should be brought upon it, and no suit or other proceeding is necessary to

prevent prescription as long as the property of the succession remains in the hands of the executor or the administrator under administration. *Mayfield v. Richards*, 115 U. S. 137, 5 Sup. Ct. Rep. 1187, 29: 334

Express promise.

Necessity of Allegation to Admit Evidence of, see Evidence, 2636.

Extension of Lien to Judgment by Promise, see Judgment, 895.

See also *supra*, 618.

640. To continue or revive a debt after it would otherwise be barred, an express promise of the debtor to pay must be made, or an express acknowledgment of the debt from which such promise may be inferred. *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. Rep. 1229, 30: 1156

Cited in *Bullion & E. Bank v. Hegler*, 93 Fed. 805—*Tridell v. Munhall*, 124 Fed. 805—*Re McGuire*, 132 Fed. 394—*National State Bank v. Rowland*, 1 Colo. App. 470, 29 Pac. 465—*Cunkle v. Heald*, 6 Mackey, 491—*Ruppert v. Beavens*, 2 App. D. C. 302—*Flannery v. Maine Red Granite Co.* 3 App. D. C. 390—*Johnston v. Hussey*, 89 Me. 495, 36 Atl. 993—*Reymond v. Newcomb*, 10 N. M. 175, 61 Pac. 205—*Fitch v. Richard*, 18 R. I. 617, 29 Atl. 689—*Kuhn v. Mount*, 13 Utah, 115, 44 Pac. 1036—*Rowe v. Marchant*, 86 Va. 182, 9 S. E. 995.

641. In addition to the admission of a present subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise may be fairly presumed, to take the case out of the statute of limitations. *Moore v. Bank of Columbia*, 6 Pet. 86, 8: 329

Cited in *Ft. Scott v. Hickman*, 112 U. S. 164, 28 L. ed. 641, 5 Sup. Ct. Rep. 56—*Shepherd v. Thompson*, 122 U. S. 237, 30 L. ed. 1158, 7 Sup. Ct. Rep. 1229—*Archer v. Poor*, 5 Cranch, C. C. 542, Fed. Cas. No. 509—*Georgia Ins. & T. Co. v. Ellcott*, Taney, 131, Fed. Cas. No. 5,354—*Kirk v. Williams*, 24 Fed. 446—*Crawford v. Childress*, 1 Ala. 489—*Alston v. State Bank*, 9 Ark. 458—*Brown v. State Bank*, 10 Ark. 137—*Thompson v. Shepherd*, 1 Mackey, 389—*Bean v. Wheatley*, 13 App. D. C. 479—*Johnson v. Gregg*, 7 D. C. 145—*Norton v. Colby*, 52 Ill. 202—*Boone v. A'Hern*, 98 Ill. App. 615—*Goldsby v. Gentle*, 5 Blackf. 438—*Penley v. Waterhouse*, 3 Iowa, 439—*Mumford v. Freeman*, 8 Met. 433, 41 Am. Dec. 532—*McNab v. Stewart*, 12 Minn. 409, Gil. 291—*Willoughby v. Irish*, 35 Minn. 66, 59 Am. Rep. 297, 27 N. W. 379—*Watkins v. Stevens*, 4 Barb. 172—*Cocks v. Weeks*, 7 Hill, 47—*Lane v. Richardson*, 79 N. C. 161—*Shaw v. Newell*, 2 R. I. 267—*Coles v. Kelsey*, 2 Tex. 557, 47 Am. Dec. 661—*Thurmond v. Trammell*, 28 Tex. 379, 91 Am. Dec. 321—*Farmers Bank v. Clarke*, 4 Leigh, 607—*Rowe v. Merchant*, 86 Va. 182, 9 S. E. 995—*Abrahams v. Swann*, 18 W. Va. 280, 41 Am. Rep. 692.

642. The assertion of ability to pay is not a promise to pay which will take a debt out of the statute of limitations. *Moore v. Bank of Columbia*, 6 Pet. 86, 8: 329

643. In Tennessee an acknowledgment, by the defendant, of an actual subsisting debt due to the plaintiff, within the period of

limitation, is equivalent to a new promise. *Mattingly v. Boyd*, 20 How. 123, 15: 845
Cited in Lynch v. Hartford F. Ins. Co. 17 Fed. 629—*Cox v. Montford*, 66 Ga. 64—*Boody v. Watson*, 64 N. H. 191, 9 Atl. 794.

644. If the bar of the statute is sought to be removed by the proof of a new promise, it ought to be proved in an explicit manner; if any conditions are annexed, they ought to be shown to be performed. *Bell v. Morrison*, 1 Pet. 351, 7: 174
Cited in Re McGulre, 132 Fed. 394—*Bates v. Bates*, 33 Ala. 105—*Sears v. Hicklin*, 8 Colo. App. 354, 33 Pac. 137—*Love v. Hackett*, 6 Ga. 490—*Braithwaite v. Harvey*, 14 Mont. 224, 27 L.R.A. 119, 43 Am. St. Rep. 625, 36 Pac. 38—*Stewart v. Reckless*, 24 N. J. L. 429—*Watkins v. Stevens*, 4 Barb. 171—*Cocks v. Weeks*, 7 Hill. 46—*Belote v. Wynne*, 7 Yerg. 542—*Leigh v. Linthecum*, 30 Tex. 103—*Liberman v. Gurensky*, 27 Wash. 416, 67 Pac. 998—*Stansbury v. Stansbury*, 20 W. Va. 29.

645. The acknowledgment of or promise to pay a barred debt is not deemed a mere continuation of the original promise, but a new contract, springing out of and supported by the original consideration. *Bell v. Morrison*, 1 Pet. 351, 7: 174
Cited in Kampshall v. Goodman, 6 McLean, 193, Fed. Cas. No. 7,605—*Bradford v. Spyker*, 32 Ala. 146—*Shelley v. Wescott*, 23 App. D. C. 139—*Brewster v. Hardeman*, Dudley (Ga.) 149—*Howe v. Saunders*, 38 Me. 352—*Briscoe v. Anketell*, 28 Miss. 372, 61 A.n. Dec. 553—*Craig v. Callaway County Court*, 12 Mo. 101—*Cape Girardeau County use of Road & Canal Fund v. Harblson*, 58 Mo. 95—*Exeter Bank v. Sullivan*, 6 N. H. 135; *Carshore v. Huyck*, 6 Barb. 587; *Phillips v. Peters*, 21 Barb. 358—*Johnson v. Albany & S. R. Co.* 54 N. Y. 427, 13 Am. Rep. 607—*Meggett v. Finney*, 4 Strobb. L. 229—*Woodlie v. Towles*, 9 Baxt. 593—*Coles v. Kelsey*, 2 Tex. 549, 47 Am. Dec. 661—*Grayson v. Taylor*, 14 Tex. 676—*Butcher v. Hixton*, 4 Leigh, 525.

646. The original debt is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is completed. *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. Rep. 1229, 30: 1156

647. Consideration for a promise to pay a debt barred by the statute of limitations is assumed in *Clementson v. Williams*, 8 Cranch, 72, 3: 491
Cited in Kegler v. Miles, Mart. & Y. 428, 17 Am. Dec. 819.

Implied promise.

See also *supra*, 641.

648. If there be no express promise, but a promise to be raised, by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt which the party is liable and willing to pay. *Bell v. Morrison*, 1 Pet. 351, 7: 174
Cited in Moore v. Bank of Columbia, 6 Pet. 92, 8 L. ed. 331—*Ft. Scott v. Hickman*, 112 U. S. 164, 28 L. ed. 641, 5 Sup. Ct. Rep. 56—*Cross v. United States*, 4 Ct. Cl. 279—*Cadmus v. Polhamus*, Fed. Cas. No. 2,282a—

Hamilton v. Carnes, 4 Cranch, C. C. 531, Fed. Cas. No. 5,977—*Young v. Wetzell*, 3 Cranch, C. C. 359, Fed. Cas. No. 18,170—*Re Harden*, 1 Nat. Bankr. Reg. 399, Fed. Cas. No. 6,048—*Green v. Coos Wagon Road Co.* 10 Sawy. 629, 23 Fed. 70—*Kirk v. Williams*, 24 Fed. 446—*Bullion & E. Bank v. Hegler*, 93 Fed. 895—*Crawford v. Childress*, 1 Ala. 489—*Lowther v. Chappell*, 8 Ala. 355, 42 Am. Dec. 643—*Smith v. Talbot*, 11 Ark. 670—*McCormick v. Brown*, 36 Cal. 185, 95 Am. Dec. 170—*Bid del v. Brizzolara*, 56 Cal. 382—*Toothaker v. Boulder*, 13 Colo. 227, 22 Pac. 468—*Thomas v. Carey*, 26 Colo. 490, 58 Pac. 1093—*De Forest v. Hunt*, 8 Conn. 185—*Otterback v. Brown*, 2 MacArth. 546—*Thompson v. Shepherd*, 1 Mackey, 388—*Soper v. Baum*, 6 Mackey, 32—*Ruppert v. Beavans*, 2 App. D. C. 302—*Bean v. Wheatly*, 13 App. D. C. 480—*Miller v. Nelmerick*, 19 Ill. 174—*Keener v. Crull*, 19 Ill. 191—*Norton v. Colby*, 52 Ill. 202—*Carroll v. Forsyth*, 69 Ill. 131—*Ennis v. Pullman Palace Car Co.* 165 Ill. 179, 46 N. E. 439—*Teesen v. Camblin*, 1 Ill. App. 428—*Hayward v. Gunn*, 4 Ill. App. 163—*Murphy v. Holway*, 25 Ill. App. 555—*Boone v. A'Hern*, 98 Ill. App. 613—*Goldsb y v. Gentle*, 5 Blackf. 438—*McNear v. Roberson*, 12 Ind. App. 93, 29 N. E. 896—*Penley v. Waterhouse*, 3 Iowa. 439—*Hanson v. Towle*, 19 Kan. 281—*Slaughter's Succession*, 108 La. 494, 58 L.R.A. 409, 32 So. 379—*Johnston v. Hussey*, 89 Me. 495, 36 Atl. 993—*Bailey v. Crane*, 21 Pick. 324—*Gillingham v. Brown*, 178 Mass. 421, 55 L.R.A. 323, 60 N. E. 122—*Smith v. Moulton*, 12 Minn. 354, Gll. 229—*McNab v. Stewart*, 12 Minn. 409, Gll. 291—*Russell v. Davis*, 51 Minn. 483, 53 N. W. 766—*Elliott v. Leake*, 5 Mo. 209, 32 Am. Dec. 314—*Boyd v. Hurlbut*, 41 Mo. 268—*Bridges v. Stephens*, 132 Mo. 537, 34 S. W. 555—*Wilcox v. Williams*, 5 Nev. 216—*Russell v. Copp*, 5 N. H. 155—*Blair v. Drew*, 6 N. H. 244—*Ventrils v. Shaw*, 14 N. H. 425—*Whipple v. Stevens*, 22 N. H. 226—*Holt v. Gage*, 60 N. H. 541—*Gage v. Dudley*, 64 N. H. 274, 9 Atl. 786—*Belles v. Belles*, 12 N. J. L. 347—*Ridgway v. English*, 22 N. J. L. 417—*Somerset County v. Veghte*, 44 N. J. L. 514—*Davenport v. Comstock*, 31 App. Div. 508, 52 N. Y. Supp. 177—*Watkins v. Stevens*, 4 Barb. 170—*Sherman v. Wakeman*, 11 Barb. 261—*Commercial Mut. Ins. Co. v. Brett*, 44 Barb. 494—*Hulbert v. Nichol*, 20 Hun. 458—*Hahn v. Crawford*, 23 Misc. 574, 59 N. Y. Supp. 853—*Purdy v. Austin*, 3 Wend. 190—*Bradley v. Field*, 3 Wend. 273—*Stafford v. Bryan*, 3 Wend. 536—*Hancock v. Bliss*, 7 Wend. 269—*Stafford v. Richardson*, 15 Wend. 306—*Bloodgood v. Bruen*, 8 N. Y. 360—*Wakeman v. Sherman*, 9 N. Y. 93—*Bissell v. Jaudon*, 16 Ohio St. 509—*Hidden v. Cozzens*, 2 R. I. 402, 60 Am. Dec. 93—*Kilton v. Providence Tool Co.* 22 R. I. 621, 48 Atl. 1039—*Young v. Monpoey*, 2 Bail. L. 281—*Crowder v. Nichol*, 9 Yerg. 454—*Broddie v. Johnson*, 1 Sneed. 468—*Belote v. Wynne*, 7 Yerg. 543—*Jordan v. Jordan*, 85 Tenn. 566, 3 S. W. 896—*Coles v. Kelsey*, 2 Tex. 573—*Webber v. Cochrane*, 4 Tex. 36—*Smith v. Fly*, 24 Tex. 353, 76 Am. Dec. 109—*Thurmond v. Trammell*, 28 Tex. 379, 91 Am. Dec. 321—*Aldrete v. Demitt*, 32 Tex. 578—*Hunter v. Kittredge*, 41 Vt. 368—*Hubbard v. Bugbee*, 58 Vt. 179, 2 Atl. 594—*Dinguld v. Schoolfield*, 32 Gratt. 807—*Farmers Bank v. Clarke*, 4 Leigh, 606—*Aylett v. Robinson*, 9 Leigh, 49—*Switzer v. Noffsinger*, 82 Va. 523—*Rowe v. Marchant*, 86 Va. 182, 9 S. E. 995—*Abrahams v. Swann*, 18 W. Va. 230, 41 Am. Rep. 692.

649. The statute of limitations is sus-

pendent during war, as to rights of action against citizens of the enemy country, for the period in which the creditor is deprived of the right to sue. *Hanger v. Abbott*, 6 Wall. 532, 18: 939

Levy v. Stewart, 11 Wall. 244, 20: 86

Ross v. Jones, 22 Wall. 576, 22: 730

Cited in The Protector (Freeborn v. The Protector) 9 Wall. 689, 19 L. ed. 812—*Braun v. Sauerwein*, 10 Wall. 222, 19 L. ed. 897—*Levy v. Stewart*, 11 Wall. 254, 20 L. ed. 89—*Stewart v. Kahn (Stewart v. Bloom)* 11 Wall. 503, 20 L. ed. 178—*United States v. Wiley*, 11 Wall. 513, 20 L. ed. 213—*Caperton v. Bowyer*, 14 Wall. 235, 20 L. ed. 884—*Adger v. Alston*, 15 Wall. 560, 21 L. ed. 236—*Washington University v. Finch*, 18 Wall. 110, 21 L. ed. 820—*Ross v. Jones*, 22 Wall. 586, 22 L. ed. 733—*Harrison v. Myer*, 92 U. S. 115, 23 L. ed. 607—*Amy v. Watertown*, 130 U. S. 326, 32 L. ed. 956, 9 Sup. Ct. Rep. 537—*Sierra v. United States*, 9 Ct. Cl. 230—*Bigler v. Waller*, Chase, Dec. 345, 4 Nat. Bankr. Reg. 293, Fed. Cas. No. 1,404—*Brown v. Hiatt*, 1 Dill. 387, Fed. Cas. No. 2,011—*Re Eldridge*, 2 Hughes, 258, 12 Nat. Bankr. Reg. 541, Fed. Cas. No. 4,331—*Jones v. Brittan*, 1 Woods, 672, Fed. Cas. No. 7,455—*Semmes v. City F. Ins. Co.* 6 Blatchf. 451, Fed. Cas. No. 12,651—*United States v. 1,500 Bales of Cotton*, Fed. Cas. No. 15,958—*Devereaux v. Brownsville*, 29 Fed. 751—*Re Waties*, 39 Fed. 265—*Brockway v. Oswego Twp.* 40 Fed. 615—*St. Louis & S. F. R. Co. v. O'Loughlin*, 1 C. C. A. 313, 4 U. S. App. 283, 49 Fed. 443—*Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 65, 92 Fed. 871—*Metropolitan Nat. Bank v. Gordon*, 28 Ark. 117—*Jones v. Johnson*, 28 Ark. 233—*Williamson v. McCrary*, 33 Ark. 472—*Stiles v. Easley*, 51 Ill. 276—*Perkins v. Rogers*, 35 Ind. 144, 9 Am. Rep. 639—*Selden v. Preston*, 11 Bush, 204—*Aby v. Brigham*, 23 La. Ann. 841—*Woods v. Elliott*, 49 Miss. 179—*Hammond v. Johnston*, 93 Mo. 221, 6 S. W. 83—*Rogers v. Wentworth*, 58 N. H. 318—*Boody v. Watson*, 64 N. H. 191, 9 Atl. 794—*Shellington v. Howland*, 53 N. Y. 375—*Hubbard v. Matthews*, 54 N. Y. 49, 13 Am. Rep. 562—*O'Hara v. State*, 112 N. Y. 154, 2 L.R.A. 605, 8 Am. St. Rep. 726, 19 N. E. 659—*Hubbard v. Harnden Exp. Co.* 10 R. I. 253—*Hill v. Phillips*, 14 R. I. 93—*Hammond v. Camden*, 22 W. Va. 189—*Ahnert v. Zaun*, 40 Wis. 628.

d. Suspension by War.

650-1. The period during which the courts are closed by war must be excluded from the computation of the time limited by law for the commencement of an action. *Caperton v. Bowyer*, 14 Wall. 216, 20: 882
Cited in Powell v. Brunswick County, 150 U. S. 439, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166—*Dunham v. Presby*, 121 Mass. 349.

Editorial note.

Suspension of statute of limitations during war. 18: 939

Revolutionary War.

See also *supra*, 402.

652. The act of limitations of North Carolina was suspended during the war of the Revolution, as to debts by citizens of the United States to British creditors and did U. S. Dig.—244

not begin to run until the final ratification of the treaty of peace. *Ogden v. Blackledge*, 2 Cranch, 272, 2: 276
Cited in Brown v. Hiatt, 1 Dill. 386, Fed. Cas. No. 2,011—*Caldwell v. Southern Exp. Co.* 1 Filipp. 90, Fed. Cas. No. 2,303.

653. The treaty of peace between Great Britain and the United States does not admit the counting of any time before the war, to any time subsequent to the treaty, to make a bar by the statute of limitations. *Hopkirk v. Bell*, 3 Cranch, 454, 2: 497
Cited in Pollard v. Kibbe, 14 Pet. 412, 10 L. ed. 519—*Hanger v. Abbott*, 6 Wall. 541, 18 L. ed. 943—*Braun v. Sauerwein*, 10 Wall. 222, 19 L. ed. 897—*Brown v. Hiatt*, 1 Dill. 386, Fed. Cas. No. 2,011—*Dunlop v. Alexander*, 1 Cranch, C. C. 498, Fed. Cas. No. 4,166.

Civil War.

See also *supra*, 440; Constitutional Law, 1532.

654. Statutes of limitation of the several states did not run, during the late Civil War, against the rights of action of the citizens of one of the belligerents against the citizens of the other, upon contracts made previous to and maturing after the commencement of the war. *Hiatt v. Brown (Brown v. Hiatt)*, 15 Wall. 177, 21: 128
Hanger v. Abbott, 6 Wall. 532, 18: 939
Levy v. Stewart, 11 Wall. 244, 20: 86
Caperton v. Bowyer, 14 Wall. 216, 20: 882
Batesville Institute v. Kauffman, 18 Wall. 151, 21: 775
Ross v. Jones, 22 Wall. 576, 22: 730
Distinguished in Gibson v. Ruff, 8 App. D. C. 269—*O'Neal v. Boone*, 53 Ill. 37.

Cited in Masterson v. Howard, 18 Wall. 106, 21 L. ed. 766—*Batesville Institute v. Kauffman*, 18 Wall. 155, 21 L. ed. 777—*Ross v. Jones*, 22 Wall. 587, 22 L. ed. 733—*United States v. Pacific R. Co.* 120 U. S. 233, 30 L. ed. 638, 7 Sup. Ct. Rep. 490—*Scovill v. Shaw*, 4 Cliff. 567, Fed. Cas. No. 12, 562—*Butler v. Douglass*, 1 McCrary, 632, 3 Fed. 614—*Mercantile Trust Co. v. St. Louis & S. F. R. Co.* 69 Fed. 196—*Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 65, 92 Fed. 871—*Coleman v. Hoopes*, 44 Ala. 127, 4 Am. Rep. 121—*Noble v. Cullum*, 44 Ala. 560—*Metropolitan Nat. Bank v. Gordon*, 28 Ark. 116—*Hall v. Denckla*, 28 Ark. 511—*Randolph v. Ward*, 29 Ark. 245—*Williamson v. McCrary*, 33 Ark. 471—*Barton v. New Haven*, 74 Conn. 732, 52 Atl. 403—*Western & A. R. Co. v. State (Ga.)* 14 L.R.A. 457—*Mixer v. Sibbey*, 53 Ill. 76—*Selden v. Preston*, 11 Bush, 208—*Shacklett v. Polk*, 51 Miss. 391—*DeJarnette v. De Giverville*, 56 Mo. 453—*Hammond v. Johnson*, 93 Mo. 221, 6 S. W. 83—*Hussey v. Davis*, 58 N. H. 318—*Cohen v. New York Mut. L. Ins. Co.* 50 N. Y. 622, 10 Am. Rep. 522—*Pennywit v. Kellogg*, 1 Ctn. Sup. Ct. Rep. 20—*Dunlap v. Linton*, 8 Lanc. L. Rev. 66—*Hill v. Biggart*, 7 Phila. 159, 26 Phila. Leg. Int. 317—*Milne's Appeal*, 99 Pa. 490, 11 W. N. C. 333—*Betts v. Hayward*, 7 Phila. 159—*Rice v. O'Keefe*, 6 Helsk. 644—*Harrison v. Henderson*, 7 Helsk. 346—*Billgerry v. Branch*, 19 Gratt. 408, 100 Am. Dec. 679—*McVeigh v. Bank of Old Dominion*, 28 Gratt. 835—*Walker v. Beauchler*, 27 Gratt. 515—*Fred v. Dixon*, 27 Gratt. 543—*Brewis v. Lawson*, 76 Va. 45—*Caperton v.*

Martin, 4 W. Va. 159, 6 Am. Rep. 270—Grinnan v. Edwards, 21 W. Va. 350—Haymond v. Camden, 22 W. Va. 189—Ahnert v. Zaun, 40 Wis. 629.

655. The statute of limitations was suspended in the rebellious states, as to rights of action in the Federal courts between their citizens, during the existence of the war. *Ross v. Jones*, 22 Wall. 576, 22: 730

656. The effect of the war was to suspend the running of statutes of limitation during its continuance, in suits between citizens of the different belligerents, and also in suits by the United States. The general rule, as above stated, was not changed by the act of Congress of June 11, 1864. *United States v. Wiley*, 11 Wall. 508,

20: 211

Cited in Harrison v. Myer, 92 U. S. 115, 23 L. ed. 607—*Re Eldridge*, 2 Hughes, 257, 12 Nat. Bankr. Reg. 540, Fed. Cas. No. 4,331—*Devereaux v. Brownsville*, 29 Fed. 751—*Barton v. New Haven*, 74 Conn. 732, 52 Atl. 403—*McKinzie v. Hill*, 51 Mo. 307, 11 Am. Rep. 450—*Sands v. New York L. Ins. Co.* 50 N. Y. 632, 10 Am. Rep. 535—*Broadfoot v. Fayetteville*, 124 N. C. 495, 70 Am. St. Rep. 610, 32 S. E. 804.

657. The act of June 11, 1864, requires all the time of the war, whether before or after its passage, to be deducted from the time which has elapsed since the cause of action accrued. It applies to the Federal and state courts, and is constitutional. *United States v. Wiley*, 11 Wall. 508,

20: 211

Stewart v. Bloom (Stewart v. Kahn) 11 Wall. 493,

20: 176

Cited in United States v. Wiley, 11 Wall. 515, 20 L. ed. 214—*Caperton v. Bowyer*, 14 Wall. 235, 20 L. ed. 884—*Harrison v. Myer*, 92 U. S. 116, 23 L. ed. 607—*Mayfield v. Richards*, 115 U. S. 142, 29 L. ed. 336, 5 Sup. Ct. Rep. 1187—*Brown v. Walker*, 161 U. S. 606, 40 L. ed. 824, 5 Inters. Com. Rep. 387, 16 Sup. Ct. Rep. 644—*United States v. 1,500 Bales of Cotton*, Fed. Cas. No. 15,958—*Metropolitan Nat. Bank v. Gordon*, 28 Ark. 117—*Jones v. Johnson*, 28 Ark. 233—*Long v. Templeman*, 24 La. Ann. 565—*Winn's Succession*, 33 La. Ann. 1398—*McKinzie v. Hill*, 51 Mo. 307, 11 Am. Rep. 450.

658. Where the payees of certain notes were domiciled in Louisiana after the authority of the United States was re-established, the executrix of the succession of the maker being domiciled within the Confederate lines, an action on said notes is within the act of June 11, 1864, excluding from the period of limitation the time in which any person, by reason of resistance to the execution of the laws of the United States or the interruption of the ordinary course of judicial proceedings, cannot be served with process. *Mayfield v. Richards*, 115 U. S. 137, 5 Sup. Ct. Rep. 1187, 29: 334

659. The period of time to be deducted for the interruption of the running of the statute of limitations during The Rebellion, against citizens of states adhering to the national government, having demands against citizens of the insurgent states, was, as to Alabama, that which elapsed between April 19, 1861, and April 2, 1866. Free-

born v. The Protector (The Protector) 12 Wall. 700, 20: 463

Distinguished in Turner v. Patton, 49 Ala. 411—*Amless v. McGinnis*, 12 W. Va. 397.

Cited in Brown v. Hiatt, 15 Wall. 183, 21 L. ed. 130—*Adger v. Alston*, 15 Wall. 560, 21 L. ed. 236—*Burke v. Miltenberger (Burke v. Tregre)* 19 Wall. 525, 22 L. ed. 159—*Ross v. Jones*, 22 Wall. 587, 22 L. ed. 733—*Harrison v. Myer*, 92 U. S. 115, 23 L. ed. 607—*Carroll v. Green*, 92 U. S. 511, 23 L. ed. 739—*Bird v. Louisiana State Bank*, 93 U. S. 99, 23 L. ed. 819—*Williams v. Bruffy*, 96 U. S. 192, 24 L. ed. 720—*Healy v. Mothershead*, Fed. Cas. No. 6,296—*United States v. Mullenbrink*, 1 Woods, 570, Fed. Cas. No. 15,831—*Randolph v. Ward*, 29 Ark. 245—*Seymour v. Bailey*, 66 Ill. 299—*Anhert v. Zaun*, 40 Wis. 629.

660. The statute of limitations was suspended in the rebellious states during the existence of the war, which, for Arkansas, was the period between April, 1861, when the war was recognized, and April, 1866, when it was by proclamation declared to be at an end in that state. *Batesville Institute v. Kauffman*, 18 Wall. 151, 21: 775 *Cited in Ross v. Jones*, 22 Wall. 587, 22 L. ed. 733—*Randolph v. Ward*, 29 Ark. 245—*Aby v. Brigham*, 28 La. Ann. 841—*Ahnert v. Zaun*, 40 Wis. 629.

661. The precise period of time to be deducted for the interruption in the running of the statute of limitations, in consequence of the Civil War, is different for different states, being determined by the proclamation of blockade of the particular state for its commencement, and the proclamation of peace in that state for its termination. For Louisiana the dates are, respectively, April 19, 1861, and April 2, 1866. An action begun February 29, 1868, to recover on a bond due January 1, 1858, is barred by five years' prescription. *Adger v. Alston*, 15 Wall. 555,

21: 234

Cited in Holdane v. Sumner, 15 Wall. 610, 21 L. ed. 259—*Masterson v. Howard*, 18 Wall. 106, 21 L. ed. 766—*Burke v. Miltenberger (Burke v. Tregre)* 19 Wall. 525, 22 L. ed. 159—*Ross v. Jones*, 22 Wall. 587, 22 L. ed. 733—*Harrison v. Myer*, 92 U. S. 115, 23 L. ed. 607—*Re Waties*, 39 Fed. 265—*Randolph v. Ward*, 29 Ark. 245—*Hammond v. Johnston*, 93 Mo. 221, 6 S. W. 83—*Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 628—*Simmons v. Trumbo*, 9 W. Va. 364.

662. All statutes of prescription and limitation were suspended during the period of the late Civil War, and the suspension terminated in Louisiana only by the President's proclamation of peace, April 2, 1866. *Holdane v. Sumner*, 15 Wall. 600, 21: 255

663. The statute of limitations of Kansas did not begin to run against a mortgage of lands in that state, executed by a citizen thereof to a citizen of Virginia prior to, but maturing after, the proclamation of the President declaring a blockade of the ports of Virginia, April 27, 1861, until by proclamation the war was declared ended in that state, April 2, 1866. *Hiatt v. Brown (Brown v. Hiatt)* 15 Wall. 177, 21: 128 *Cited in Hammond v. Johnston*, 93 Mo. 221, 6

8. W. 83—*Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 628.

664. The disability to sue imposed by the war relieves the assured wholly from the consequences of failing to bring suit within twelve months after the loss, as required by his policy. He was not barred by the fact that, between the commencement of the war and the date of the plaintiff's loss, a time elapsed which, added to that between the close of the war and the commencement of the action, amounted to more than twelve months. *Semmes v. City F. Ins. Co.* (*Semmes v. Hartford Ins. Co.*) 13 Wall. 158, 20: 490

Cited in Brown v. Hiatt, 15 Wall. 184, 21 L. ed. 130—*Ross v. Jones*, 22 Wall. 587, 22 L. ed. 733—*Jackson v. Fidelity & C. Co.* 21 C. C. A. 400, 41 U. S. App. 552, 75 Fed. 365—*Bean v. Chapman*, 62 Ala. 64—*Taber v. Royal Ins. Co.* 124 Ala. 694, 26 So. 252—*Chichester v. New Hampshire F. Ins. Co.* 74 Conn. 513, 51 Atl. 545—*Travelers Ins. Co. v. California Ins. Co.* 1 N. D. 156, 8 L.R.A. 771, 45 N. W. 703—*Fred Miller Brewing Co. v. Capital Ins. Co.* 111 Iowa, 598, 82 Am. St. Rep. 529, 82 N. W. 1023—*Blanks v. Hibernia Ins. Co.* 36 La. Ann. 603—*Metropolitan L. Ins. Co. v. Dempsey*, 72 Md. 295, 19 Atl. 642—*Elliot Nat. Bank v. Beal*, 141 Mass. 570, 6 N. E. 742—*Paul v. Fidelity & C. Co.* 186 Mass. 417, 104 Am. St. Rep. 594, 71 N. E. 801—*Mutual Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L. 467, 18 Am. Rep. 741—*Cohen v. New York Mut. L. Ins. Co.* 50 N. Y. 623, 10 Am. Rep. 522—*Sands v. New York L. Ins. Co.* 50 N. Y. 632, 10 Am. Rep. 535—*Shellington v. Howland*, 53 N. Y. 375—*Matthews v. American Cent. Ins. Co.* 154 N. Y. 458, 39 L.R.A. 436, 61 Am. St. Rep. 627, 48 N. E. 751—*Matthews v. American Cent. Ins. Co.* 9 App. Div. 351, 41 N. Y. Supp. 304—*Guthrie v. Connecticut Indemnity Assn.* 101 Tenn. 652, 49 S. W. 829—*Mutual Ben. L. Ins. Co. v. Atwood*, 24 Gratt. 508, 18 Am. Rep. 652—*Galloway v. Standard F. Ins. Co.* 45 W. Va. 244, 31 S. E. 969—*Mueller v. Bruss*, 112 Wla. 412, 88 N. W. 229.

LIMITATION OF INDEBTEDNESS.

Of Counties, see Counties, 20-22.

Of Municipality, see Municipal Corporations, II. e, 2.

Of School District, see Schools, 3.

LIMITATION OF LIABILITY.

Admiralty Jurisdiction as to, see Admiralty, I. f, 10.

By Carrier, see Carriers, II. a, 8, 9; II. b, 7; Shipping, IV. c, 4; V. c.

By Insurance Company, see Insurance, XII. b, 2, f.

LIMITATION OVER.

In Real Property Generally, see Real Property, I. c.

LIMITED JURISDICTION.

In General, see Courts.

LIMITED PARTNERSHIP.

See Partnership, VIII.

LINEN.

Duty on, see Duties, V. d, 12.

LIQUIDATED DAMAGES.

See Damages, V.

LIQUIDATION.

Of National Bank, see Banks, IV. h.

Of Municipal Debts, see Municipal Corporations, 90.

Liquidation of a debt means its payment. *Fleckner v. Bank of United States*, 8 Wheat. 338. 5: 631

Cited in Richmond v. Irons, 121 U. S. 61, 30 L. ed. 875, 7 Sup. Ct. Rep. 788—*Austin v. Tecumseh Nat. Bank*, 49 Neb. 418, 35 L. R.A. 446, 59 Am. St. Rep. 543, 68 N. W. 628.

LIQUOR LICENSE.

See Intoxicating Liquors, II.

LIQUORS.

Intoxicating Liquors, see Intoxicating Liquors.

LIS PENDENS.

I. In General, 1-13.

II. Purchasers Pending Suit, 14-36.

What Law Governs Rights of Bona Fide Takers before Maturity, see Conflict of Laws, 32.

I. In General.

1. The established rule is that a *lis pendens*, duly prosecuted and not collusive, is notice to a purchaser of land so as to affect and bind his interest; and the *lis pendens* begins from the service of the sub

poena after the bill is filed. *Warren County v. Marcy*, 97 U. S. 96, 24: 977
 Cited in *Union Trust Co. v. Southern Inland Nav. & Improv. Co.* 130 U. S. 570, 32 L. ed. 1044, 9 Sup. Ct. Rep. 606—*Thompson v. Baker*, 141 U. S. 656, 35 L. ed. 891, 12 Sup. Ct. Rep. 89—*Lacassagne v. Chapuis*, 144 U. S. 125, 36 L. ed. 371, 12 Sup. Ct. Rep. 659—*The Robert Gaskin*, 9 Fed. 63—*Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 606.

2. A suit not prosecuted to a decree or judgment is not constructive notice to a person not a *pendente lite* purchaser. *Alexander v. Pendleton*, 8 Cranch, 462, 3: 624
 Cited in *Snowden v. Tyler*, 21 Neb. 217, 31 N. W. 661.

3. In order to charge purchasers of property with notice of the pendency of a suit, it is necessary, under the statute of Dakota, to file a *lis pendens* with the register of deeds of the county in which the land is situated. *Smith v. Gale*, 144 U. S. 509, 12 Sup. Ct. Rep. 674, 36: 521
 Cited in *Pennington v. Martin*, 146 Ind. 638, 45 N. E. 1111.

4. In Iowa it is the filing of a petition affecting real estate, and not the delivery or service of process, that creates notice to third parties of the pendency of the action, and prevents them from acquiring an interest in the subject-matter thereof as against the lien so asserted. *Fisher v. Shropshire*, 147 U. S. 133, 13 Sup. Ct. Rep. 201, 37: 109

5. Failure of the clerk properly to index amended declarations in ejectment covering additional property, which were duly filed in his office, does not excuse the failure of a searcher to examine the files. *Armstrong v. Ashley*, 204 U. S. 272, 27 Sup. Ct. Rep. 270, 51: 482

6. A mortgage of land made by a grantee thereof by deed void as to creditors, and a sale under foreclosure of the mortgage, are subject to the rights of a creditor under a prior attachment of the land, and of the purchaser under the judgment in the attachment suit. *Thompson v. Baker*, 141 U. S. 648, 12 Sup. Ct. Rep. 89, 35: 889

Creditors' bills.

7. A creditors' bill which does not describe the property does not create a *lis pendens* operating as notice as to any real estate. *Miller v. Sherry*, 2 Wall. 237, 17: 827

Freedman's Sav. & T. Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. Rep. 226, 28: 301
 Cited in *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 60, 44 L. ed. 671, 20 Sup. Ct. Rep. 564—*Knott v. Evening Post Co.* 124 Fed. 357—*Weightman v. Washington Critic Co.* 4 App. D. C. 143—*Fulton v. Fletcher*, 12 App. D. C. 21—*May v. Bryan*, 17 App. D. C. 393—*Bigelow v. Stringfellow*, 25 Fla. 370, 5 So. 816—*Hayden v. Thrasher*, 28 Fla. 184, 9 So. 855—*Norris v. Ile*, 152 Ill. 202, 43 Am. St. Rep. 233, 38 N. E. 762—*Gardner v. Watson*, 18 Ill. App. 395—*Reid v. Sheffy*, 75 Ill. App. 143—*Ware v. Delahaye*, 95 Iowa. 681, 64 N. W. 640—*Jones v. McNarrin*, 68 Me. 341, 28

Am. Rep. 66—*Allen v. Poole*, 54 Miss. 333—*Hillebrand v. Nelson*, 1 Neb. (Unof.) 786, 95 N. W. 1068—*Turner v. Houpt*, 53 N. J. Eq. 561, 33 Atl. 28—*Iselin v. Goldstein*, 35 Misc. 485, 71 N. Y. Supp. 1069—*Walker v. Goldsmith*, 14 Or. 149, 12 Pac. 537—*Watson v. Wilcox*, 39 Wis. 648, 20 Am. Rep. 63.

8. An amended creditors' bill making the holder of the legal title a party is ineffectual as notice, or to sustain a decree against him, unless such holder be served with process. *Miller v. Sherry*, 2 Wall. 237, 17: 827

Freedman's Sav. & T. Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. Rep. 226, 28: 301

9. To make a creditors' bill constructive notice to a purchaser, it is necessary that it describe the particular real estate, and that the holder of the legal title be made a party to the bill. *Miller v. Sherry*, 2 Wall. 237, 17: 827

Freedman's Sav. & T. Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. Rep. 226, 28: 301

Extent of applicability.

See also *infra*, 18.

10. The doctrine of *lis pendens* cannot be made applicable by state law so as to affect nonresidents. *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358, 30: 523

11. Under the Utah statutes, the rule of *lis pendens* applies to an action to foreclose a mortgage of personal property, as well as to a similar action respecting real estate. *Broom v. Armstrong*, 137 U. S. 266, 11 Sup. Ct. Rep. 73, 34: 648

12. A suit in equity to enforce a judgment upon real property which, though standing upon the public records in the name of another than the judgment debtor, is alleged to have been paid for with his money, resulting in a decree that such judgment debtor is the owner of the equitable and beneficial title, is within the scope of the Porto Rico mortgage law, art. 42, which, in order to protect innocent purchasers *pendente lite*, provides for the giving of a cautionary notice in suits for the ownership of real property or for the creation, declaration, modification, or extinction of any property right. *Romeu v. Todd*, 206 U. S. 358, 27 Sup. Ct. Rep. 724, 51: 1093

13. The local statutory law of real property requiring the giving and recording of cautionary notice of a pending suit in order to affect innocent third parties dealing with the recorded owner is applicable to a suit brought on the equity side of the United States district court of Porto Rico, in view of the provision of the act of April 12, 1900 (31 Stat. at L. 79, chap. 191), § 8, continuing in force the local laws not inconsistent with the laws of the United States, although, by § 34, the district court of the United States for Porto Rico is given, in addition to the ordinary jurisdiction of Federal district courts, jurisdiction of all cases cognizant in the Federal circuit courts, with power to proceed therein in the same

manner as a circuit court. *Romeu v. Todd*,
206 U. S. 358, 27 Sup. Ct. Rep. 725,
51: 1093

II. Purchasers Pending Suit.

Conclusiveness of Judgment against, see
Judgment, 841, 842.

Effect of Bringing in a Party on Right to
Remove to Federal Court, see Removal
of Causes, 246.

Right of to Bring Replevin Suit, see Re-
plevin, 3.

14. A purchaser *pendente lite* cannot re-
litigate, in an original, independent suit,
the matters determined in a suit to which
his vendor was a party. *Mellen v. Moline*
Malleable Iron Works, 131 U. S. 352, 9 Sup.
Ct. Rep. 781, 33: 178
Cited in *Lacassagne v. Chapuis*, 144 U. S.
125, 36 L. ed. 371, 12 Sup. Ct. Rep. 659—
Belmont Nall Co. v. Columbia Iron & Steel
Co. 46 Fed. 11—*Sheffield & B. Coal, Iron &*
R. Co. v. Newman, 23 C. C. A. 466, 41 U. S.
App. 766, 77 Fed. 794

15. A *lis pendens* duly prosecuted and not
collusive is notice to a purchaser so as to
affect and bind his interest by the decree; and
the *lis pendens* begins from the service of the
subpoena after the bill is filed. *Union Trust*
Co. v. Southern Inland Nav. & Improv. Co.
130 U. S. 565, 9 Sup. Ct. Rep. 606, 32: 1043
Cited in *Mellen v. Moline Malleable Iron Works*,
131 U. S. 371, 33 L. ed. 184, 9 Sup. Ct. Rep.
781—*Thompson v. Baker*, 141 U. S. 656,
35 L. ed. 891, 12 Sup. Ct. Rep. 89—*Lacassagne*
v. Chapuis, 144 U. S. 125, 36 L. ed.
371, 12 Sup. Ct. Rep. 659—*Belmont Nall*
Co. v. Columbia Iron & Steel Co. 46 Fed.
11—*United States v. Chicago, M. & St. P.*
R. Co. 54 C. C. A. 549, 116 Fed. 973—
Mehler v. Cornwell, 3 App. D. C. 100—*Mc-*
Gregor v. White, 15 Tex. Civ. App. 304, 39
S. W. 1024.

16. All persons dealing with property
are bound to take notice of a suit pending
with regard to the title thereto, and will,
on their peril, purchase the same from any
of the parties to the suit. *Union Trust Co.*
v. Southern Inland Nav. & Improv. Co. 130
U. S. 565, 9 Sup. Ct. Rep. 606, 32: 1043

17. A purchaser of property pending a
suit, from one who was the owner when the
suit was instituted, but who had not been
made a party, is not affected by the judg-
ment in such suit any more than such owner
would be. *Terrell v. Allison*, 21 Wall. 289,
22: 634

18. The fact that a corporation was or-
ganized under the laws of another state
does not, where its president was a party to
the litigation, relieve it from the rule which
governs purchasers of property pending liti-
gation about the title. *Whiteside v. Hasel-*
ton, 110 U. S. 296, 4 Sup. Ct. Rep. 1,
28: 152

Lands.

See also *supra*, 3, 4, 6, 12, 13.

19. A *pendente lite* purchaser of lands

after the same have been levied upon by an
attachment takes subject to the attachment.
Thompson v. Baker, 141 U. S. 648, 12 Sup.
Ct. Rep. 89, 35: 889
Cited in *McGregor v. White*, 15 Tex. Civ. App.
303, 39 S. W. 1024.

20. A purchaser from the defendant when
a suit is pending in regard to land is subject
to the operation of a writ of possession, if
one is finally issued on a judgment in the
suit. *Lacassagne v. Chapuis*, 144 U. S. 119,
12 Sup. Ct. Rep. 659, 36: 368

21. While an ejectment suit is pending,
purchasers from the defendant take with
constructive notice, and are bound by the
proceedings in a suit after the alienation.
Waldon v. Bodley, 9 How. 34, 13: 36
Cited in *Lacassagne v. Chapuis*, 144 U. S. 125,
36 L. ed. 371, 12 Sup. Ct. Rep. 659—
Noyes v. Crawford, 118 Iowa, 20, 96 Am.
St. Rep. 363, 91 N. W. 799—*State ex rel.*
Planet Property & Financial Co. v. Harrington,
41 Mo. App. 445—*Haughwont v. Mur-*
phy, 22 N. J. Eq. 544—*Hovey v. Elliott*,
118 N. Y. 135, 23 N. E. 475.

22. A deed made in violation of an in-
junction previously issued and served, is
subject to the decree subsequently rendered
in the suit in which the injunction was
granted. *Union Trust Co. v. Southern In-*
land Nav. & Improv. Co. 130 U. S. 565, 9
Sup. Ct. Rep. 606, 32: 1043

23. A suit can in no sense be held con-
structive notice to one who receives a deed
after its commencement, unless process has
been served or publication made before the
deed is executed. *Games v. Stiles ex dem.*
Dunn, 14 Pet. 322, 10: 476
Cited in *The Emma L. Coyne*, Fed. Cas. No.
4,466—*Cotton v. Dacey*, 61 Fed. 483—*Mor-*
row v. Weed, 4 Iowa, 100, 76 Am. Dec. 122.

24. Where parties acquired their title
under a deed of trust executed after the
original bill in a suit was filed, and before
the grantor in such deed was served with
process, and are in fact purchasers in good
faith, they are not chargeable with notice
of the intention of the plaintiffs to bring
the suit, within the provisions of the Re-
vised Code of Mississippi in regard to allow-
ances for improvements on land made by
purchasers in good faith prior to being
served with notice of the suit. *Canal Bank*
v. Hudson, 111 U. S. 66, 4 Sup. Ct. Rep. 303,
28: 354

Negotiable paper and securities.

Bona Fides of, Purchase of County
Bonds Pending Suit, see *Bonds*,
495-498.

25. The pendency of a suit relating to
the validity of negotiable paper is not con-
structive notice to subsequent holders be-
fore maturity. *Enfield v. Jordan*, 119 U. S.
680, 7 Sup. Ct. Rep. 358, 30: 523
Scotland County v. Hill, 132 U. S. 107, 10
Sup. Ct. Rep. 26, 33: 261
Lytle v. Lansing, 147 U. S. 59, 13 Sup. Ct.
Rep. 254, 37: 78
Cited in *Fulton v. Andrea*, 70 Minn. 452, 73
N. W. 256.

26. The doctrine of *lis pendens* has no application to the transfer of negotiable securities to a bona fide purchaser. *Cass County v. Gillett*, 100 U. S. 585, 25: 585
Thompson v. Perrine, 103 U. S. 806, 26: 612

Orleans v. Platt, 99 U. S. 676, 25: 404
Cited in Tregoe v. Modesto Irrig. District, 164 U. S. 187, 41 L. ed. 398, 17 Sup. Ct. Rep. 52—*Stevens v. Railroads*, 4 Fed. 102—*Hauf v. Wilson*, 31 Fed. 388—*Pickens Twp. v. Post*, 41 C. C. A. 5, 99 Fed. 663.

27. The doctrine of *lis pendens* has no application to commercial securities, such as municipal bonds. *Warren County v. Marcy*, 97 U. S. 96, 24: 977
Cass County v. Gillett, 100 U. S. 585, 25: 585

28. A bona fide purchaser of a negotiable security before maturity is not affected with constructive notice of a suit respecting such paper. *Cass County v. Gillett*, 100 U. S. 585, 25: 585

Warren County v. Marcy, 97 U. S. 96, 24: 977

Cited in Orleans v. Platt, 99 U. S. 683, 25 L. ed. 406—*Cass County v. Gillett*, 100 U. S. 593, 25 L. ed. 586—*Thompson v. Perrine*, 103 U. S. 820, 25 L. ed. 618—*Green County v. Connors*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69—*Carroll County v. Smith*, 111 U. S. 562, 28 L. ed. 519, 4 Sup. Ct. Rep. 539—*Scotland County v. Hill*, 112 U. S. 185, 28 L. ed. 693, 5 Sup. Ct. Rep. 93—*Enfield v. Jordan*, 119 U. S. 692, 30 L. ed. 528, 7 Sup. Ct. Rep. 358—*Scotland County v. Hill*, 132 U. S. 114, 33 L. ed. 264, 10 Sup. Ct. Rep. 26—*Winona & St. P. R. Co. v. Plainview*, 143 U. S. 378, 36 L. ed. 196, 12 Sup. Ct. Rep. 530—*Tregoe v. Modesto Irrig. District*, 164 U. S. 187, 41 L. ed. 398, 17 Sup. Ct. Rep. 52—*Perrine v. Thompson*, 17 Blatchf. 20, Fed. Cas. No. 10,997—*Phelps v. Lewiston*, 15 Blatchf. 152, Fed. Cas. No. 11,076—*Stevens v. Railroads*, 4 Fed. 102—*Hauf v. Wilson*, 31 Fed. 388—*Hill v. Scotland County*, 34 Fed. 209—*Phelps v. Elliott*, 35 Fed. 461—*Farmers' Loan & T. Co. v. Toledo & S. H. R. Co.* 4 C. C. A. 574, 6 U. S. App. 469, 54 Fed. 772—*Wheeler v. Walton & W. Co.* 65 Fed. 722—*Pickens Twp. v. Post*, 41 C. C. A. 5, 99 Fed. 663—*Mayberry v. Morris*, 62 Ala. 117—*Weightman v. Washington Critic Co.* 4 App. D. C. 143—*State v. Wichita County*, 59 Kan. 519, 53 Pac. 526—*Carr v. Lewis Coal Co.* 15 Mo. App. 555—*Cagwin v. Hancock*, 22 Hun. 203—*Dovey's Appeal*, 97 Pa. 162—*McGregor v. White*, 15 Tex. Civ. App. 304, 39 S. W. 1024.

29. Purchasers of negotiable securities are not chargeable with constructive notice of the pendency of the suit affecting their title and validity, but those who buy such securities from litigating parties, with actual notice of the suit, do so at their peril, and must abide the result the same as the parties from whom they got their title. *Scotland County v. Hill*, 132 U. S. 107, 10 Sup. Ct. Rep. 26, 33: 261

Lytle v. Lansing, 147 U. S. 59, 13 Sup. Ct. Rep. 254, 37: 78
Cited in Hardy v. First Nat. Bank, 56 Kan. 497, 43 Pac. 1125—*Herman v. Gunter*, 83 Tex. 69, 18 S. W. 428.

30. A decree in a suit brought by citizens and taxpayers of a county to test the validity of its subscriptions to the stock of a railroad company, and the power of the county court to bind the county to pay the bonds which it was proposed to issue for the subscription, and to have them canceled, binds all who bought the bonds after the suit was begun, with actual notice of its pendency or of the decree which was rendered. *Scotland County v. Hill*, 112 U. S. 183, 5 Sup. Ct. Rep. 93, 28: 692

31. That bonds were issued by a county, pending a suit brought to enjoin their issuance for irregularities, does not, on the theory of *lis pendens*, affect the right of a bona fide holder to recover, where the legislature passed a confirmatory act curing the irregularities, and when those contesting the validity of the bonds brought several distinct and independent suits with considerable intervals of time between them. *Lee County v. Rogers*, 7 Wall. 181, 19: 160

Cited in Warren County v. Marcy, 97 U. S. 104, 24 L. ed. 980—*Mt. Pleasant v. Beckwith*, 100 U. S. 532, 25 L. ed. 704—*Stanton v. Alabama & C. R. Co.* 2 Woods. 512, Fed. Cas. No. 13,296—*Lansing v. Muscatine County*, 1 Dill. 528, 2 Abb. (U. S.) 60, Fed. Cas. No. 16,538—*National L. Ins. Co. v. Board of Education*, 10 C. C. A. 651, 27 U. S. App. 244, 62 Fed. 792—*Hughes County v. Livingston*, 43 C. C. A. 549, 104 Fed. 313—*Independent School District v. Rew*, 55 L.E.A. 371, 49 C. C. A. 205, 111 Fed. 8.

32. Where county bonds are negotiable there is no constructive notice of any fraud or illegality, by virtue of the doctrine of *lis pendens*. *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. Rep. 539, 28: 517

33. A judgment by which negotiable municipal bonds are declared to be null and void cannot affect a bona fide purchaser for value of the bonds who had no knowledge of the action. *Thompson v. Perrine*, 103 U. S. 806, 26: 612

Cited in Brunswick Terminal Co. v. National Bank, 112 Fed. 816—*Barnum v. Sullivan County*, 187 N. Y. 181, 33 N. E. 162—*Thompson v. Norris*, 63 How. Pr. 421.

34. The pendency of an injunction bill to prevent the issue and delivery of bonds does not affect the title of a bona fide holder of the bonds for value, who was no party to that suit. *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. Rep. 539, 28: 517

Cited in Enfield v. Jordan, 119 U. S. 692, 30 L. ed. 529, 7 Sup. Ct. Rep. 358—*Tregoe v. Modesto Irrig. District*, 164 U. S. 187, 41 L. ed. 398, 17 Sup. Ct. Rep. 52—*State v. Wichita County*, 59 Kan. 519, 53 Pac. 526.

35. The pendency of a foreclosure suit in a Federal court, in which the decree saves the rights secured by a prior mortgage, does not interfere with the negotiation of bonds secured by such prior mortgage, or impair in any degree the lien thereby created. *Pittsburgh, C. C. & St. L. R. Co. v. Long*

Island Loan & T. Co. 172 U. S. 493, 19 Sup. Ct. Rep. 238. 43: 528
Cited in James v. Central Trust Co. 39 C. C. A. 130, 98 Fed. 493—Illinois C. R. Co. v. Bentz, 108 Tenn. 675, 58 L.R.A. 693, 91 Am. St. Rep. 763, 60 S. W. 317.

36. A bona fide purchaser of interest coupons on county bonds before maturity is not affected by a judgment declaring such paper null and void, if he had no notice of the action. Cass County v. Gillett, 100 U. S. 585, 25: 585

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Cited in Coker v. State, 91 Ala. 94, 8 So. 874.

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State Laws as to Liens as Rule in Federal Courts, see Courts, 1968.
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A boom is "chartered by law" within Minn. Stat. 1894, § 2400, when it is owned by a corporation having authority to maintain a boom, whether it is incorporated under a general law or a special law. *Lindsay & P. Co. v. Mullen*, 176 U. S. 126, 20 Sup. Ct. Rep. 325, 44: 400

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 Impairment of Contract Obligations as to, see Constitutional Law, 1050, 1070, 1143, 1144, 1225.
 Place for Prosecution for Misuse of Mails, see Courts, 991.
 Infancy as Defense to Action for Fraudulently Procuring Money from Proprietor of, see Infants, 6.
Res Judicata as to, see Judgment, 485.
 Who may Sue on Bond by Mortgagor of, see Parties, 21.
 Inference as to Interference by Congress with Penal Laws of State as to, see Statutes, 433.
 Strict Construction of Statute against Lotteries, see Statutes, 447.

1. The grant to commissioners of the right to sell lottery tickets to obtain money for the repair of a turnpike, which is made by Va. act January 30, 1829, if a contract at all, is not a perpetual franchise. *Phalen v. Virginia*, 8 How. 163, 12: 1030
Cited in *Stone v. Mississippi*, 101 U. S. 818, 25 L. ed. 1080—*Reaves v. Territory*, 13 Okla. 405, 74 Pac. 951—*Ex parte Kameta*, 38 Or. 254, 78 Am. St. Rep. 775, 60 Pac. 394—*Justice v. Com.* 81 Va. 214.

2. The contracts which the Constitution protects are those that relate to property rights, not governmental. The right to suppress lotteries is governmental, to be exercised at all times by those in power, at their discretion. *Boyd v. Alabama*, 94 U. S. 645, 24: 302

Cited in *Boston Beer Co. v. Massachusetts*, 97 U. S. 33, 24 L. ed. 992—*Stone v. Mississippi*, 101 U. S. 818, 25 L. ed. 1079—*Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 751, 28 L. ed. 587, 4 Sup. Ct. Rep. 652—*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 700, 40 L. ed. 859, 16 Sup. Ct. Rep. 714—*Walla Walla v. Walla Walla Water Co.* 172 U. S. 16, 43 L. ed. 348, 19 Sup. Ct. Rep. 77—*Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 622, 43 L. ed. 576, 19 Sup. Ct. Rep. 308—*Deposit Bank v. Frankfort*, 191 U. S. 523, 48 L. ed. 286, 24 Sup. Ct. Rep. 154—*Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods, 249, Fed. Cas. No. 8,541—*Powell v. State*, 69 Ala. 14—*Dunlap v. State*, 76 Ala. 466—*Jones v. Motley*, 78 Ala. 372—*Odd Fellows' Cemetery Assn. v. San Francisco*, 140 Cal. 235, 73 Pac. 987—*Bagley v. State*, 103 Ga. 395, 32 S. E. 414—*Chicago v. Gunning System*, 214 Ill. 637, 70 L.R.A. 236, 73 N. E. 1035—*McKinney v. Salem*, 77 Ind. 214—*Moore v. Indianapolis*, 120 Ind. 491, 22 N. E. 424—*Shea v. Muncie*, 148 Ind. 29, 46 N. E. 138—*Crescent City L. S. L. & S. H. Co. v. New Orleans*, 33 La. Ann. 930—*State v. Canal & C. R. Co.*

50 La. Ann. 1205, 56 L.R.A. 294, 24 So. 265—*State ex rel. Laclede Gaslight Co. v. Murphy*, 130 Mo. 23, 31 L.R.A. 809, 31 S. W. 594—*Bronk v. Barclay*, 13 App. Div. 75, 43 N. Y. Supp. 400—*Stone v. Mississippi*, 37 Phila. Leg. Int. 256—*McCullough v. Brown*, 41 S. C. 279, 23 L.R.A. 433, 19 S. E. 458—*Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.* 25 W. Va. 365.

3. The Louisiana Constitution of 1879, expressly recognizing as a contract, except as to its monopoly clause, the charter of the Louisiana State Lottery Company which had been previously repealed, revived that charter as therein modified. *New Orleans v. Houston*, 119 U. S. 265, 7 Sup. Ct. Rep. 198, 30: 411

4. Question of the constitutionality of the anti-lottery act of 1895 (28 Stat. at L. 963) raised, but not decided. *France v. United States*, 164 U. S. 676; 17 Sup. Ct. Rep. 219, 41: 595

Cited in *United States ex rel. Champion v. Ames*, 95 Fed. 454.

What constitutes.

See also Postoffice, 57, 60.

5. Where the element of certainty goes hand in hand with the element of lot or chance in an enterprise offering prizes, the former element does not destroy the existence or effect of the latter. *Horner v. United States*, 147 U. S. 449, 13 Sup. Ct. Rep. 409, 37: 237

Cited in *United States v. Wallis*, 58 Fed. 944—*United States v. Jefferson*, 184 Fed. 300—*Atty. Gen. v. Preferred Mercantile Co.* 187 Mass. 519, 73 N. E. 669—*Irving v. Britton*, 8 Misc. 205, 28 N. Y. Supp. 529—*Quatsoe v. Eggleston*, 42 Or. 319, 71 Pac. 66—*State v. Dalton*, 22 R. I. 90, 48 L.R.A. 782, 84 Am. St. Rep. 818, 46 Atl. 234.

6. Bonds of the Austrian government, issued for the purpose of obtaining a loan, by which that government obligated itself to pay the principal, with interest and a premium named, and also any additional sum which the holder might become entitled to in case the number of his bond drew a prize in a drawing to be had as specified,—represented a lottery or similar scheme within the meaning of U. S. Rev. Stat. § 3894, U. S. Comp. Stat. 1901, p. 2659. *Horner v. United States*, 147 U. S. 449, 13 Sup. Ct. Rep. 409, 37: 237

Cited in *MacDonald v. United States*, 12 C. C. A. 345, 24 U. S. App. 25, 63 Fed. 431—*McLaughlin v. National Mut. Bond & Invest. Co.* 64 Fed. 911—*United States v. Fulkerson*, 74 Fed. 626—*Meyer v. State*, 112 Ga. 24, 51 L.R.A. 499, 81 Am. St. Rep. 17, 37 S. E. 96—*Equitable Loan & Secur. Co. v. Waring*, 117 Ga. 614, 62 L.R.A. 99, 97 Am. St. Rep. 177, 44 S. E. 320—*Lang v. Merwin*, 99 Me. 489, 59 Atl. 1021—*Roselle v. Farmers' Bank*, 141 Mo. 41, 64 Am. St. Rep. 501, 39 S. W. 274—*People v. Wolff*, 14 App. Div. 78, 43 N. Y. Supp. 421—*McLanahan v. Mott*, 73 Hun, 137, 25 N. Y. Supp. 892.

7. A list of the drawings by chance, determining the sum to be paid, in addition to principal and interest, for the redemption of Austrian bonds, is the list of the drawings

at a lottery or similar scheme within the meaning of U. S. Rev. Stat. § 3894, U. S. Comp. Stat. 1901, p. 2659. *Horner v. United States*, 147 U. S. 449, 13 Sup. Ct. Rep. 409, 37: 237

Liability to ticketholder.

8. Under the charter granted by Congress to the city of Washington, empowering the corporation "to authorize the drawing of lotteries" for effecting certain improvements in the city, the corporation was liable to the holder of a ticket in such lottery for a prize drawn, although the managers appointed by the corporation to superintend such lottery were empowered to sell, and had sold, the entire lottery, for a gross sum, to a lottery dealer, who was by his agreement with them to execute the details of the scheme, as to the sale of the tickets, the drawings, and the payment of the prizes. The power granted in the charter, "to authorize the drawing of lotteries," cannot be exercised so as to discharge the corporation from its liability, either by granting the lottery or selling the privilege to others, or in any other manner. *Clark v. Washington*, 12 Wheat. 40, 6: 544

Distinguished in *Shankland v. Washington*, 5 Pet. 391, 8 L. ed. 166.

Cited in *McCue v. Washington*, 3 Cranch, C. C. 643, Fed. Cas. No. 8,735—*Memphis v. Brown*, 1 Flipp. 198, Fed. Cas. No. 9,415—*Shankland v. Washington*, 3 Cranch, C. C. 328, Fed. Cas. No. 12,703—*Kyle v. Malin*, 8 Ind. 37—*Lucas v. Tippecanoe County*, 44 Ind. 572—*McGraw v. Marion*, 98 Ky. 683, 47 L.R.A. 597, 34 S. W. 18—*Anthony v. Adams*, 1 Met. 285—*Eastman v. Meredith*, 36 N. H. 293, 72 Am. Dec. 302.

Unlawfulness of.

Estoppel to Set up, see *Estoppel*, 232.

9. The sale of lottery tickets outside of the city of Washington in violation of a state statute cannot be justified under the act of Congress of May, 1812, empowering that city to authorize the drawing of lotteries for public improvements. *Cohen v. Virginia*, 6 Wheat. 264, 5: 257

Distinguished in *Lottery Case (Champion v. Ames)* 188 U. S. 369, 47 L. ed. 506, 23 Sup. Ct. Rep. 321.

Cited in *Horner v. United States*, 147 U. S. 462, 37 L. ed. 242, 13 Sup. Ct. Rep. 409.

10. A party employed to conduct a lottery, who fraudulently draws a ticket owned by himself, and receives the money, when sued by the proprietors of the lottery for money had and received, cannot defend against his fraud on the ground that the lottery was unlawful. He is in the same situation as if he had received the money of the proprietors by means of any other false pretense. *Catts v. Phalen*, 2 How. 376, 11: 306

Cited in *Northwestern Mut. L. Ins. Co. v. Elliott*, 7 Sawy. 22, 5 Fed. 237—*Wright v. Stewart*, 130 Fed. 925—*Martin v. Hodge*, 47 Ark. 384, 58 Am. Rep. 763, 1 S. W. 694—*Main v. Aukam*, 12 App. D. C. 383—*Martin v. Richardson*, 94 Ky. 189, 19 L. R.A. 693, 42 Am. St. Rep. 353, 21 S. W. 1039—*Central Trust & S. D. Co. v. Respass*, 112 Ky. 619, 56 L.R.A. 483, 99 Am. St. Rep. 317, 66 S. W. 421—*Knowlton v. Congress &*

E. Spring Co. 57 N. Y. 546—*Houston v. McNeer*, 40 W. Va. 370, 22 S. E. 80—*Robinson v. Welty*, 40 W. Va. 395, 22 S. E. 73—*Western Assur. Co. v. Towle*, 65 Wis. 258, 26 N. W. 104.

Drawing.

See also *supra*, 10.

11. The irregularity, if any, in drawing a lottery, arising out of the failure to restore to the wheel one of the tickets which were to be paid in part discharge of the stationary prizes, but which was itself drawn, does not avail the purchaser of the whole lottery, in an action brought by the managers against him for the purchase money. *Brent v. Davis*, 10 Wheat. 395, 6: 350

12. The purchaser of a lottery which provided for drawing prizes on several successive days cannot, in an action by the managers for the purchase money, avail himself of the fact that, in drawing on the last day, it was discovered that the wheel contained one blank less than it should, and that, to remedy this mistake, an additional blank was thrown in, since this irregularity did not vitiate the drawing if the managers acted in good faith. *Brent v. Davis*, 10 Wheat. 395, 6: 350

Cited in *Washington use of M'Cue v. Young*, 10 Wheat. 407, 6 L. ed. 353—*McCue v. Washington*, 3 Cranch, C. C. 642, Fed. Cas. No. 8,735—*M'Gimpsey v. Booker*, 5 Yerg. 142.

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Existence of Probable Cause as Question of Law or Fact, see Trial, 297.

1. Malice and the want of probable cause are both essential to the maintenance of an action for malicious prosecution. *Stewart v. Sonneborn*, 98 U. S. 187, 25: 116
Dinsman v. Wilkes, 12 How. 390, 13: 1036
Wheeler v. Nesbitt, 24 How. 544, 16: 765
Cited in *McCracken v. Covington City Nat. Bank*, 4 Fed. 606—*Jerman v. Stewart*, 12 Fed. 271—*Staunton v. Goshorn*, 36 C. C. A. 79, 94 Fed. 56—*Davis v. Johnson*, 42 C. C. A. 112, 101 Fed. 954—*Foster v. Pitts*, 63 Ark. 392, 38 S. W. 1114—*Whitehead v. Jessup*, 2 Colo. App. 79, 29 Pac. 916—*Richardson v. Dybedahl*, 14 S. D. 132, 84 N. W. 480—*Wilcox v. McKenzie*, 75 Ga. 75—*Atchison, T. & S. F. R. Co. v. Watson*, 37 Kan. 782, 15 Pac. 877—*Louque v. Drex*, 37 La. Ann. 85—*Severance v. Judkins*, 73 Me. 378—*Reed v. Home Sav. Bank*, 130 Mass. 445, 39 Am. Rep. 468—*LeClear v. Perkins*, 103 Mich. 139, 26 L.R.A. 631, 61 N. W. 357—*Burton v. St. Paul, M. & M. R. Co.* 33 Minn. 191, 22 N. W. 300—*Bartlett v. Hawley*, 38 Minn. 310, 37 N. W. 580—*Fenstermaker v. Page*, 20 Nev. 290, 21 Pac. 322—*McCormack v. Perry*, 47 Hun, 74—*Thaule v. Krekeler*, 81 N. Y. 434—*Gee v. Culver*, 12 Or. 233, 6 Pac. 775—*Mitchell v. Silver Lake Lodge*, 29 Or. 303, 45 Pac. 798—*Hamer v. First Nat. Bank*, 9 Utah, 221, 33 Pac. 941—*Womack v. Circle*, 32 Gratt. 344—*Lawrence v. Cleary*, 58 Wis. 475, 60 N. W. 793.

2. Malice and the want of probable cause are essential ingredients in malicious prosecution; if probable cause exists, the motive is immaterial. *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. L. & S. L. Co.* 120 U. S. 141, 7 Sup. Ct. Rep. 472, 30: 614
Cited in *Spitzer v. Friedlander*, 14 App. D. C. 562.

3. Malice alone is not sufficient to sustain an action for malicious prosecution, because a person actuated by the plainest malice may nevertheless prefer a well-founded accusation, and have a justifiable reason for the prosecution of the charge. *Wheeler v. Nesbitt*, 24 How. 544, 16: 765
Cited in *Spitzer v. Friedlander*, 14 App. D. C. 562.

4. Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. *Wheeler v. Nesbitt*, 24 How. 544, 16: 765
Cited in *Brewer v. Jacobs*, 22 Fed. 229—*Ex parte Morrill*, 35 Fed. 267—*Hicks v. Brantley*, 102 Ga. 269, 29 S. E. 459—*Lancaster v. McKay*, 103 Ky. 623, 45 S. W. 887—*Gann v. Varnado*, 51 La. Ann. 385, 25 So. 79—*Stansbury v. Fogle*, 37 Md. 361—*Hamilton v. Smith*, 39 Mich. 226—*Staley v. Turner*, 21 Mo. App. 251—*Parr v. Loder*, 85 App. Div. 100, 82 N. Y. Supp. 1040—*Halstead v. Nelson*, 36 Hun, 156—*Stamper v. Raymond*, 38

Or. 23, 62 Pac. 20—Landa v. Obert, 45 Tex. 544—Ramsey v. Arrott, 64 Tex. 323—Scott v. Shelor, 28 Gratt. 906—Vinal v. Core, 18 W. Va. 33.

5. Want of reasonable and probable cause is as much an element in an action for malicious prosecution as the evil motive; and though the averment is a negative one, it must be proved by the plaintiff by some affirmative evidence, unless the defendant dispenses with such proof by pleading singly the truth of the several facts involved in the charge. Wheeler v. Nesbitt, 24 How. 544, 16: 765

6. Want of probable cause is evidence of malice for the consideration of the jury, in an action for malicious prosecution; but malice is not evidence of want of probable cause. Wheeler v. Nesbitt, 24 How. 544, 16: 765

Cited in Stewart v. Sonneborn, 98 U. S. 193, 25 L. ed. 119—Johnson v. Ebberts, 6 Sawy. 539, 11 Fed. 130—Heyne v. Blair, 62 N. Y. 22—Rosenkrantz v. Hass, 1 Misc. 222, 20 N. Y. Supp. 880—Willard v. Holmes, 2 Misc. 306, 21 N. Y. Supp. 998.

7. If there is probable cause for the arrest of a person, he can be lawfully detained a reasonable time, till the warrant is issued and executed. Wheeler v. Nesbitt, 24 How. 544, 16: 765

8. A judgment in favor of a plaintiff in a circuit court of the United States is sufficient proof of probable cause, although contrary to a former decision of a state court, and although reversed subsequently by the Supreme Court of the United States. Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 7 Sup. Ct. Rep. 472, 30: 614

Cited in Staunton v. Goshorn, 86 C. C. A. 79, 94 Fed. 56—Blackman v. West Jersey & S. S. R. Co. 126 Fed. 253—Holliday v. Holliday, 123 Cal. 32, 55 Pac. 703—Kolka v. Jones, 6 N. D. 471, 66 Am. St. Rep. 615, 71 N. W. 558—Root v. Rose, 6 N. D. 581, 72 N. W. 1022—Short v. Spragins, 104 Ga. 629, 30 S. E. 810—Georgia Loan & T. Co. v. Johnston, 116 Ga. 633, 43 S. E. 27—Thomas v. Muehlmann, 92 Ill. App. 575—Gilmore v. Mastin, 115 Ill. App. 55—Louisville, N. A. & C. R. Co. v. Hendricks, 13 Ind. App. 13, 40 N. E. 82—Barber v. Scott, 92 Iowa, 59, 60 N. W. 497—Ross v. Hixon, 46 Kan. 554, 12 L.R.A. 762, 26 Am. St. Rep. 123, 26 Pac. 955—Clements v. Odorless Excavating Apparatus Co. 67 Md. 608, 13 Atl. 632—Heinekamp v. Beaty, 74 Md. 395, 21 Atl. 1098—LeClear v. Perkins, 103 Mich. 140, 26 L.R.A. 631, 61 N. W. 357—Nehr v. Dobbs, 47 Neb. 868, 66 N. W. 864—Mesnier v. Denike, 82 App. Div. 405, 81 N. Y. Supp. 818—Burt v. Smith, 84 App. Div. 48, 82 N. Y. Supp. 186—Burt v. Smith, 181 N. Y. 6, 73 N. E. 495—Macdonald v. Schroeder, 28 Pa. Super. Ct. 139—Giusti v. Del Papa, 19 B. I. 339, 33 Atl. 525—Illinois C. R. Co. v. Bentz, 108 Tenn. 675, 58 L.R.A. 693, 91 Am. St. Rep. 763, 69 S. W. 317—Sweepson v. Davis, 109 Tenn. 108, 59 L.R.A. 503, 70 S. W. 65.

II. Advice of Counsel.

9. That the defendants in an action for

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Cited in Brewer v. Jacobs, 22 Fed. 231—Cuthbert v. Galloway, 35 Fed. 470—Miller v. Chicago, M. & St. P. R. Co. 41 Fed. 908—Kemp v. Brown, 43 Fed. 392—Porter v. White, 5 Mackey, 188—Womack v. Fudikar, 47 L. Ann. 37, 16 So. 645—Monaghan v. Cox, 155 Mass. 488, 31 Am. St. Rep. 555, 30 N. E. 467—Leyser v. Field, 5 N. M. 362, 23 Pac. 173—Cooper v. Flemming, 114 Tenn. 49, 68 L.R.A. 851, 84 S. W. 801—St. Johnsbury & L. C. R. Co. v. Hunt, 59 Vt. 300, 7 Atl. 277—Billingsley v. Maas, 93 Wis. 181, 67 N. W. 49.

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See also *infra*, 205, 224.

1. The writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process to which every one is entitled where it is the appropriate process. *Kentucky v. Dennison*, 24 How. 66, 16: 717

Cited in Brown v. United States, 6 Ct. Cl. 190—*Riggs v. Johnson County* (United States ex rel. *Riggs v. Johnson County*) 6 Wall. 197, 18 L. ed. 777—*Virginia v. Rives* (Ex parte *Virginia*) 100 U. S. 328, 25 L. ed. 673—*Hartman v. Greenhow*, 102 U. S. 675, 26 L. ed. 273—*United States v. Union P. R. Co.* 4 Dill 496, Fed. Cas. No. 16,601—*King v. Mc-*

Lean Asylum, 26 L.R.A. 785, 12 C. C. A. 149, 21 U. S. App. 481, 64 Fed. 334—*Mystic Milling Co. v. Chicago, M. & St. P. R. Co.* 132 Fed. 291—*West Virginia N. R. Co. v. United States*, 67 C. C. A. 225, 134 Fed. 203—*Fitch v. McDiarmid*, 28 Ark. 486—*Barnes v. Glide*, 117 Cal. 5, 59 Am. St. Rep. 153, 48 Pac. 804—*State ex rel. Richardson v. Swift*, 7 Houst. (Del.) 159, 30 Atl. 781—*Swift v. State*, 7 Houst. (Del.) 358, 40 Am. St. Rep. 127, 32 Atl. 143—*Ex parte Holman*, 28 Iowa, 155, 4 Am. Rep. 159—*Brown v. Crego*, 29 Iowa, 323—*New England Mut. L. Ins. Co. v. Phillips*, 141 Mass. 546, 6 N. E. 534—*State ex rel. Klots v. Ross*, 118 Mo. 74, 23 S. W. 196—*Chumaseiro v. Potts*, 2 Mont. 261—*Howard v. Lamaster*, 13 Neb. 223, 13 N. W. 211—*State ex rel. Chemical Nat. Bank v. School Dist. No. 9*, 30 Neb. 527, 27 Am. St. Rep. 420, 46 N. W. 613—*Gillespie v. Lincoln*, 35 Neb. 41, 16 L.R.A. 352, 52 N. W. 811—*Gillespie v. Lincoln*, 35 Neb. 41, 16 L.R.A. 352, 52 N. W. 811—*State ex rel. McMullen v. Affholder*, 44 Neb. 498, 62 N. W. 871—*Atty. Gen. v. Taggart*, 66 N. H. 369, 25 L. R.A. 616, 29 Atl. 1027—*Deigado v. Chavez*, 5 N. M. 648, 25 Pac. 948—*Weidenfeld v. Keppler*, 84 App. Div. 237, 82 N. Y. Supp. 634—*People ex rel. Coppers v. St. Patrick's Cathedral*, 21 Hun, 196—*People ex rel. Ryan v. Green*, 58 N. Y. 301—*Brown v. Turner*, 70 N. C. 105—*Haymore v. Yaddin County*, 85 N. C. 271—*Rider v. Brown*, 1 Okla. 247, 32 Pac. 341—*Lord v. Bates*, 48 S. C. 103, 26 S. E. 218—*McCullough v. Hicks*, 63 S. C. 544, 41 S. E. 761—*Williams v. Saunders*, 5 Coldw. 80—*Houston & G. N. Co. v. Kuechler*, 36 Tex. 412—*Bledsoe v. International R. Co.* 40 Tex. 575—*Kuechler v. Wright*, 40 Tex. 620—*Fisher v. Charleston*, 17 W. Va. 604.

2. The writ of mandamus is a remedy to compel any person, corporation, public functionary or tribunal, to perform some duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable. *Knox County v. Aspinwall*, 24 How. 376, 16: 735

United States ex rel. Lewis v. Boutwell, 17 Wall. 604, 21: 721

Otted in Riggs v. Johnson County (United States ex rel. *Riggs v. Johnson County*) 6 Wall. 193, 18 L. ed. 775—*Thompson v. United States*, 103 U. S. 483, 26 L. ed. 523—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 164, 15 Sup. Ct. Rep. 97—*Grand County v. King*, 14 C. C. A. 432, 32 U. S. App. 1, 67 Fed. 209—*Farmers' Nat. Bank v. Jones*, 105 Fed. 465—*Seymour v. United States*, 10 App. D. C. 569—*State ex rel. Butler County Agri. Soc. v. Coufal*, 1 Neb. (Unof.) 132, 95 N. W. 362—*Territory ex rel. Crosby v. Crum*, 13 Okla. 11, 73 Pac. 297—*Lord v. Bates*, 48 S. C. 110, 26 S. E. 213.

3. The remedy by mandamus has been very much extended in modern times, and now is an established remedy to oblige inferior courts and magistrates to do that justice which they are in justice or by virtue of their office bound to do. It is the proper remedy when the case presented is outside of the exercise of judicial discretion, and outside the jurisdiction of the court or officers to which or to whom the writ is addressed. *Re Virginia* (*Virginia v. Rives*) 100 U. S. 313, 25: 667

Personal action at law.

As Remedy at Law Precluding Bill to Compel Issuance of Bonds, see Equity, 46.

4. Mandamus, in modern practice, is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. *Kentucky v. Dennison*, 24 How. 66, 16: 717

5. The writ of mandamus is in the nature of a personal action, being aimed exclusively against an officer as a person, even where the duty is an official one, and he only can be punished for disobedience. The writ does not reach the office, nor can it be directed to it. *United States ex rel. Lewis v. Boutwell*, 17 Wall. 604, 21: 721
Cited in *Robertson v. State*, 109 Ind. 100, 10 N. E. 582.

6. The proceeding by mandamus is an action in court, asserting a right, prosecuted according to forms of judicial procedure, and granted to a party where the law affords him no other adequate means of redress. *Kendall v. Stokes*, 3 How. 87, 11: 506
Cited in *Brown v. United States*, 6 Ct. Cl. 187
—*Kentucky v. Dennison*, 24 How. 97, 16 L. ed. 728—*Riggs v. Johnson County (United States ex rel. Riggs v. Johnson County)* 6 Wall. 207, 18 L. ed. 780—*United States v. Schurz*, 102 U. S. 395, 26 L. ed. 171—*Hartman v. Greenhow*, 102 U. S. 675, 26 L. ed. 273—*Cunningham v. Macon & B. R. Co.* 109 U. S. 453, 27 L. ed. 994, 3 Sup. Ct. Rep. 292
—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Barnes v. Glide*, 117 Cal. 6, 59 Am. St. Rep. 153, 48 Pac. 804—*Board of Education v. Purse*, 101 Ga. 446, 41 L.R.A. 609, 65 Am. St. Rep. 312, 38 S. E. 896—*Ex parte Holman*, 28 Iowa, 155, 4 Am. Rep. 159—*Brown v. Crego*, 29 Iowa, 323—*State ex rel. Atchison, T. & S. F. R. Co. v. Jefferson County*, 11 Kan. 69
—*Chumasero v. Potts*, 2 Mont. 261—*People ex rel. Weed-Parsons Printing Co.* 14 Misc. 46, 35 N. Y. Supp. 222—*Re Epley*, 10 Okla. 644, 64 Pac. 18—*Lord v. Bates*, 48 S. C. 103, 26 S. E. 213—*Glasscock v. General Land Office*, 3 Tex. 53—*Cullen v. Latimer*, 4 Tex. 332—*General Land Office v. Smith*, 5 Tex. 478—*Meyer v. Carolan*, 9 Tex. 253—*Houston & G. N. R. Co. v. Kuechler*, 36 Tex. 410—*Bledsoe v. International R. Co.* 40 Tex. 575
—*Taylor v. County Court*, 2 Utah, 409—*Fisher v. Charleston*, 17 W. Va. 605.

7. Mandamus is a remedy to be used where there is no other appropriate relief, and it is only resorted to on extraordinary occasions. *United States ex rel. Crawford v. Addison*, 22 How. 174, 16: 304

Original and appellate jurisdiction.

General Power of Federal Courts, see Courts, V. c, 10, c.

Jurisdiction of Courts of District of Columbia, see Courts, 420, 422.

8. A mandamus to an officer is the exercise of original jurisdiction; but a mandamus to an inferior court of the United States is in the nature of appellate jurisdiction. *Re Crane*, 5 Pet. 190, 8: 92
Cited in *Decatur v. Paulding*, 14 Pet. 608, 10 L. ed. 615 Appx.—*Decatur v. Paulding*, 14

Pet. 609, 10 L. ed. 615, Appx.—*Holmes v. Jennison*, 14 Pet. 629, 10 L. ed. 628 Appx.—*Wood v. Strother*, 76 Cal. 549, 9 Am. St. Rep. 249, 18 Pac. 766—*People ex rel. Barrett v. Bacon*, 18 Mich. 253—*Lake v. Lake*, 17 Nev. 240, 30 Pac. 878.

II. When may Issue.**a. In General.**

To Compel Issuance of Commission of Officer, see Replevin, 4.

Writ against Officer as Suit against State, see States, IX. c, 2.

In Supreme Court Generally, see Supreme Court of the United States, I. b, 2.

See also supra, 3.

9. Although in the courts of a state, a judgment may not be necessary to lay the foundation for a writ of mandamus, in courts of the United States such writ can be granted only in aid of an existing jurisdiction; and a judgment at law is necessary to support a writ of mandamus to enforce the levy and collection of taxes to pay bonds. *Chickaming v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. Rep. 620, 27: 307
Cited in *Jerome v. Rio Grande County* 5 McCrary, 639, 18 Fed. 874—*Wycker v. Francis*, 120 Ala. 520, 24 So. 895—*People ex rel. German Ins. Co. v. Freeport*, 137 Ill. 260, 34 N. E. 297.

Editorial notes.

When proper remedy. 39: 160; 46: 263

To compel performance of duty.

Mandamus to Public Officer or County, see infra, 100-103.

Mandamus by Corporation, see infra, 201-203.

See also infra, 21.

10. Mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act. *Comrs. of Taxing District v. Loague*, 129 U. S. 493, 9 Sup. Ct. Rep. 327, 32: 780

Cited in *United States ex rel. Boynton v. Blaine*, 139 U. S. 319, 35 L. ed. 188, 11 Sup. Ct. Rep. 607—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Missouri ex rel. Laclede Gaslight Co. v. Murphy*, 170 U. S. 95, 42 L. ed. 962, 18 Sup. Ct. Rep. 505—*United States ex rel. Baer v. Key West*, 23 C. C. A. 668, 41 U. S. App. 726, 78 Fed. 94—*Kansas & A. Valley R. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 208—*State v. Towers*, 71 Conn. 664, 42 Atl. 1083—*Seymour v. United States*, 10 App. D. C. 569—*Patton v. Williams*, 74 Mo. App. 455—*Territory ex rel. Gildersleeve v. Perea*, 6 N. M. 539, 30 Pac. 928—*Gloucester County v. Catlett*, 86 Va. 164, 9 S. E. 999—*Joint Free High School District v. Green Grove*, 77 Wis. 537, 46 N. W. 895—*Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 399, 34 L.R.A. 843, 71 Am. St. Rep. 926, 45 Pac. 494.

11. A writ of mandamus should be granted only where the duty or right is

clearly established. *Reeside v. Walker*, 11 How. 272, 13: 693

Cited in *Ansonia v. Studley*, 67 Conn. 180, 34 Atl. 1030—*People ex rel. Yates v. Canal Board*, 13 Barb. 439—*People ex rel. Hatzel v. Board of Supers*, 58 How. Pr. 147—*State ex rel. Pfister v. Mantiowoc*, 52 Wis. 428, 9 N. W. 607.

12. The obligation must be both peremptory and plainly defined, in order to sustain mandamus. *United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 303, 15 Sup. Ct. Rep. 97, 39: 160

13. The writ of mandamus is subject to the legal and equitable discretion of the court, and it ought not to be issued in cases of doubtful right. *Life & F. Ins. Co. v. Wilson*, 8 Pet. 291, 8: 949

Cited in *Chesebro v. Babcock*, 59 Conn. 218, 22 Atl. 145—*Ansonia v. Studley*, 67 Conn. 180, 34 Atl. 1030—*Jolley v. Roberts*, 50 Ind. 7—*People ex rel. Michigan University v. Auditor General*, 17 Mich. 182—*Re Prickett*, 20 N. J. L. 135—*People ex rel. Yates v. Canal Board*, 13 Barb. 444—*Free Press Asso. v. Nichols*, 45 Vt. 18—*Richardson v. Farrar*, 58 Va. 773, 15 S. E. 117.

As dependent upon existing facts.

14. The question whether a mandamus should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of facts has ceased to exist when the final judgment is rendered. *Northern P. R. Co. v. Washington ex rel. Dustin*, 142 U. S. 492, 12 Sup. Ct. Rep. 283, 35: 1092

Dependent upon nature of thing to be done.

15. The propriety of issuing a mandamus is determined, not by the office of the person to whom it is directed, but by the nature of the thing to be done. *Marbury v. Madison*, 1 Cranch, 137, 2: 60

Absence of other remedy.

Existence of Other Remedy, see *infra*, II. b.

16. A mandamus will be granted to correct an error of an inferior court, where there is no other adequate remedy, and no discretion to be exercised by such court. *Re Washington & G. R. Co.* 140 U. S. 91, 11 Sup. Ct. Rep. 673, 35: 339

Cited in *Gaines v. Rugg* (*Gaines v. Caldwell*) 148 U. S. 243, 37 L. ed. 437, 13 Sup. Ct. Rep. 611—*Re Humes* 149 U. S. 192, 37 L. ed. 699, 13 Sup. Ct. Rep. 836—*City Nat. Bank v. Hunter*, 152 U. S. 515, 38 L. ed. 536, 14 Sup. Ct. Rep. 675—*Re Sanford Fork & Tool Co.* 160 U. S. 256, 40 L. ed. 416, 16 Sup. Ct. Rep. 291—*Ex parte Union S. B. Co.* 178 U. S. 319, 44 L. ed. 1085, 20 Sup. Ct. Rep. 944—*Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 29, 43 U. S. App. 47, 72 Fed. 549—*Chapman v. Yellow Poplar Lumber Co.* 32 C. C. A. 403, 61 U. S. App. 499, 89 Fed. 904—*Baltimore Bldg. & L. Asso. v. Alderson*, 39 C. C. A. 611, 99 Fed. 491—*White v. Bruce*, 48 C. C. A. 408, 109 Fed. 364—*Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 328—*Ex parte Mansfield*, 11 App. D. C. 563—*State v. Omaha Nat. Bank*, 60 Neb. 243, 82 N. W. 850—*State ex rel. Bullard v. Norris*, 61 Neb. 463, 85 N. W. U. S. Dig.—245

435—*State ex rel. Horton v. Dickinson*, 63 Neb. 872, 89 N. W. 431—*Stevens v. Central Nat. Bank*, 24 Misc. 348, 53 N. Y. Supp. 193,

17. Mandamus lies to enforce an established right, for the invasion of which no other specific legal remedy exists. *Marbury v. Madison*, 1 Cranch, 137, 2: 60

Cited in *Reeside v. Walker*, 11 How. 292, 13 L. ed. 701—*State ex rel. Driver v. Road & Revenue Comrs.* 3 Port. (Ala.) 416—*Taylor v. The Governor*, 1 Ark. 23—*State ex rel. Moneure v. Dubuclet*, 28 La. Ann. 708—*Hatch v. City Bank*, 1 Rob. (La.) 495—*Crescent City Gaslight Co. v. New Orleans Gaslight Co.* 27 La. Ann. 143—*Baker v. Johnson*, 41 Me. 20—*State ex rel. Journal Pub. Co. v. Kenney*, 9 Mont. 396, 24 Pac. 96—*Wilder v. Kelley*, 88 Va. 281, 13 S. E. 483—*State ex rel. Kane v. Larrabee* 3 Chand. (Wis.) 181.

18. The remedy of mandamus is granted upon the ground that the party has no other adequate mode of redress. If he had another remedy, he abandons it by applying for and obtaining a mandamus. Where he has chosen his remedy by mandamus and pursued it to the end, he cannot afterwards have another remedy for the same cause, although he might have for disobedience to the mandate. *Kendall v. Stokes*, 3 How. 87, 11: 566

b. Existence of Other Remedy.

Absence of Other Remedy, see *supra*, 16–18.
Effect of Remedy or Defense at Law on Right to Proceed in Equity, see *Equity*, I. c.
See also *supra*, 6, 7, 18.

19. A writ of mandamus is not ordinarily granted when the party aggrieved has another adequate remedy. *Cox v. United States ex rel. McGarrahan* (*The Secretary v. McGarrahan*) 9 Wall. 298, 19: 579
Re Barksdale (*Re Virginia Comrs.*) 112 U. S. 177, 5 Sup. Ct. Rep. 421, 28: 691

20. Where a party has resorted to a mandamus, and received the benefits of it, he cannot afterwards proceed in a suit for the same cause of action. A mandamus is issued on the theory that the law does not afford the party any other adequate mode of redress, and if there is in fact another remedy, it is thereby abandoned. *Kendall v. Stokes*, 3 How. 87, 11: 506
Cited in *Walker v. Fuller*, 29 Ark. 466—*State ex rel. Chicago, B. & Q. R. Co. v. North Lincoln Street R. Co.* 34 Neb. 630, 52 N. W. 369—*Achey v. Creech*, 21 Wash. 321, 58 Pac. 208.

21. Mandamus lies to compel the performance of a statutory duty only when it is clear and indisputable and there is no other legal remedy. *Bayard v. United States ex rel. White*, 127 U. S. 246, 8 Sup. Ct. Rep. 1223, 32: 116
Re Connecticut Mut. L. Ins. Co. 131 U. S. clxxx. Appx. and 26: 561
Cited in *State ex rel. Comerford v. Fitzpatrick*, 45 La. Ann. 278, 12 So. 353.

22. The courts will not issue mandamus

while the litigants are in pursuit of another remedy. *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 9: 1181
Cited in *Hull v. Commissioner of Patents*, 2 MacArth. 108—*Morton v. Green*, 2 Neb. 455.

23. Mandamus to compel officers of the state of Virginia to receive coupons in the payment of taxes does not lie, another remedy having been provided by the act of January 4, 1882. *Moore v. Greenhow*, 114 U. S. 338, 5 Sup. Ct. Rep. 1020, 29: 240
Cited in *McCullough v. Virginia*, 172 U. S. 106, 43 L. ed. 383, 19 Sup. Ct. Rep. 134—*Moore v. Greenhow*, 25 Fed. 662.

Resort to legislature.

24. Mandamus will not issue to compel the Secretary of the Treasury to credit a specified amount on his books in favor of the petitioner, where the party may present the claim to Congress and ask for an appropriation to pay it. *Reese v. Walker*, 11 How. 272, 13: 693

25. Mandamus is the appropriate remedy for compelling the Postmaster General to credit, on contracts for carrying the mail, certain amounts allowed by the Solicitor of the Treasury, since an application to Congress for removal of the Postmaster General from office, or an action against him for damages, are not such adequate remedies as will supersede the right of resorting to a mandamus. *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 9: 1181
Cited in *United States ex rel. Tucker v. Seaman*, 17 How. 230, 15 L. ed. 227—*Mississippi v. Durham*, 4 Mackey, 239—*Skeen v. Monckelmer*, 21 Ind. 4—*Bryan v. Cattell*, 15 Iowa, 545—*State ex rel. New Orleans Canal & Bkg. Co. v. Heard*, 47 La. Ann. 1686, 47 L.R.A. 520, 18 So. 746—*Hall v. Somersworth*, 39 N. H. 518—*Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 341.

Remedy by appeal.

Choice Between Mandamus and Appellate Review, see *Appeal and Error*, 704-712.

See also *infra*, 39, 87, 88, 90-93.

26. A mandamus is never granted where the party asking it has another remedy, as, where the remedy is by an appeal. *Morrison v. District Court (Re Morrison)* 147 U. S. 14, 13 Sup. Ct. Rep. 246, 37: 60
Cited in *Re Atlantic City R. Co.* 164 U. S. 635, 41 L. ed. 580, 17 Sup. Ct. Rep. 208—*Ex parte Union S. B. Co.* 178 U. S. 319, 44 L. ed. 1085, 20 Sup. Ct. Rep. 944.

27. A writ of mandamus cannot issue to review a final judgment subject to review here on a writ of error. Mandamus cannot be used to perform the office of a writ of error. *Re Baltimore & O. R. Co.* 108 U. S. 566, 2 Sup. Ct. Rep. 876, 27: 812
Re Schwab, 98 U. S. 240, 25: 105
Denied in *Leroux v. Hudson*, 109 U. S. 476, 27 L. ed. 1002, 3 Sup. Ct. Rep. 309.

Distinguished in *State ex rel. Colcord v. Young*, 31 Fla. 601, 19 L.R.A. 638, 34 Am. St. Rep. 41, 12 So. 673.

Cited in *Ex parte Perry*, 102 U. S. 186, 26 L. ed. 44—*Re Pennsylvania*, 137 U. S. 453, 34 L. ed. 739, 11 Sup. Ct. Rep. 141—*Re Hawkins*, 147 U. S. 490, 37 L. ed. 252, 13 Sup.

Ct. Rep. 512—*Re Morrison (Morrison v. District Court)* 147 U. S. 26, 37 L. ed. 65, 13 Sup. Ct. Rep. 246—*American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758—*Virginia v. Paul*, 148 U. S. 124, 37 L. ed. 392, 13 Sup. Ct. Rep. 536—*Re Atlantic City R. Co.* 164 U. S. 635, 41 L. ed. 580, 17 Sup. Ct. Rep. 208—*Ex parte Union S. B. Co.* 178 U. S. 319, 44 L. ed. 1085, 20 Sup. Ct. Rep. 904—*Re Litchfield*, 13 Fed. 867—*State ex rel. Horch v. Civil Dist. Judge*, 33 La. Ann. 270—*United States ex rel. Mudsill Min. Co. v. Swan*, 13 C. C. A. 80, 31 U. S. App. 112, 65 Fed. 649—*State ex rel. Matheson v. King*, 32 Fla. 419, 13 So. 891—*State ex rel. Floral City Phosphate Co. v. Hocker*, 33 Fla. 287, 14 So. 586—*State ex rel. Burbridge v. Call*, 41 Fla. 461, 26 So. 1016—*People ex rel. Sayer v. Garnett*, 130 Ill. 342, 23 N. E. 331—*State v. Booth*, 21 Utah, 96, 59 Pac. 553.

28. This court cannot, by mandamus, correct the judicial errors committed by an inferior court in the progress of a cause; that is the office of a writ of error or an appeal.

Re Newman, 14 Wall. 152, 20: 877
Re Baltimore & O. R. Co. 108 U. S. 566, 2 Sup. Ct. Rep. 876, 27: 812
Re Burtis, 103 U. S. 238, 26: 392
Re Whitney, 13 Pet. 404, 10: 221
Re Flippin, 94 U. S. 348, 24: 194
Re Loring, 94 U. S. 418, 24: 165
Re Perry, 102 U. S. 183, 26: 43
Re Hoard, 105 U. S. 578, 26: 1176
Cited in *Holmes v. Jennison*, 14 Pet. 629 Appx. 10 L. ed. 628 Appx.—*Gaines v. Relf*, 15 Pet. 16, 10 L. ed. 644—*Ex parte Schwab*, 98 U. S. 241, 25 L. ed. 105—*Ex parte Denver & R. G. R. Co.* 101 U. S. 720, 25 L. ed. 875—*Ex parte Perry*, 102 U. S. 186, 26 L. ed. 44—*Davis v. Gaines*, 104 U. S. 406, 26 L. ed. 764—*Ex parte Hoard*, 105 U. S. 580, 26 L. ed. 1177—*Ex parte Baltimore & O. R. Co.* 108 U. S. 567, 27 L. ed. 812, 2 Sup. Ct. Rep. 876—*Ex parte Morgan*, 114 U. S. 175, 29 L. ed. 136, 5 Sup. Ct. Rep. 825—*American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758—*Virginia v. Paul*, 148 U. S. 124, 37 L. ed. 392, 13 Sup. Ct. Rep. 536—*Re Humes*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 836—*Re Parsons*, 150 U. S. 156, 37 L. ed. 1037, 14 Sup. Ct. Rep. 50—*Re Grossmayer*, 177 U. S. 50, 44 L. ed. 666, 20 Sup. Ct. Rep. 535—*Re Key*, 189 U. S. 85, 47 L. ed. 721, 23 Sup. Ct. Rep. 649—*People ex rel. Robinson v. Superior Court, Lockwood, Rev. Cas.* 354—*Hough v. Western Transp. Co.* 1 Bliss. 429, Fed. Cas. No. 6,724—*The Elmira*, 16 Fed. 135—*United States ex rel. Deimel v. Arnold*, 16 C. C. A. 579, 34 U. S. App. 177, 69 Fed. 991—*Stroheim v. Deimel*, 23 C. C. A. 469, 46 U. S. App. 639, 77 Fed. 805—*Indiana ex rel. Muncie v. Lake Erie & W. R. Co.* 83 Fed. 288—*United States ex rel. Harless v. United States Ct. App. Judges*, 29 C. C. A. 81, 56 U. S. App. 33, 85 Fed. 180—*Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 111, 104 Fed. 655—*United States ex rel. Strickley v. Marshall*, 58 C. C. A. 412, 122 Fed. 430—*Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 769, 66 C. C. A. 65, 132 Fed. 955—*Union Colony v. Elliott*, 5 Colo. 376—*People ex rel. Du Bois v. District Court* 32 Colo. 167, 75 Pac. 890—*Smyth v. Titcomb*, 31 Me. 280—*Detroit Tug & Wrecking Co. v. Gartner*, 75 Mich. 380, 42 N. W. 968—*State ex rel. Kranick v. Supple*, 22 Mont. 189, 56 Pac. 20—*State ex rel. Boeckler v. Thayer*, 10 Mo. App. 542—*People ex rel. Doughty v.*

Dutchess Common Pleas Judges, 20 Wend. 661—State ex rel. Hughes v. Walker, 25 Fla. 573, 6 So. 169—State ex rel. Colcord v. Young, 31 Fla. 601, 19 L.R.A. 638, 34 Am. St. Rep. 41, 12 So. 673—State ex rel. Phelan v. Engelmann, 86 Mo. 562—State v. Morris, 86 Tex. 229, 24 S. W. 393—Schlitz v. Morris, 13 Tex. Civ. App. 600, 36 S. W. 292—State v. Booth, 21 Utah, 95, 59 Pac. 553—Woodstock v. Gallup, 28 Vt. 593.

29. A writ of mandamus cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 13 Sup. Ct. Rep. 758, 37: 486

30. A writ of mandamus cannot be used as a writ of error to bring up for review the judgment of the circuit court upon a plea to the jurisdiction filed in the suit. *Re Des Moines & M. R. Co.* 103 U. S. 794, 26: 461

Distinguished in State ex rel. Colcord v. Young, 31 Fla. 601, 19 L.R.A. 638, 34 Am. St. Rep. 41, 12 So. 673.

Cited in *Re Baltimore & O. R. Co.* 108 U. S. 567, 27 L. ed. 812, 2 Sup. Ct. Rep. 876—*Re Pennsylvania Co.* 137 U. S. 453, 34 L. ed. 740, 11 Sup. Ct. Rep. 141—*Re Morrison (Morrison v. District Court)* 147 U. S. 26, 37 L. ed. 65, 13 Sup. Ct. Rep. 246—*Re Atlantic City R. Co.* 164 U. S. 635, 41 L. ed. 580, 17 Sup. Ct. Rep. 208—*Ex parte Union S. B. Co.* 178 U. S. 319, 44 L. ed. 1085, 20 Sup. Ct. Rep. 944—*State ex rel. Burbridge v. Call*, 41 Fla. 461, 26 So. 1016—*People ex rel. Sayer v. Garnett*, 130 Ill. 342, 23 N. E. 331—*State v. Booth*, 21 Utah, 95, 59 Pac. 553.

31. The court cannot issue the writ of mandamus in a case where the proper remedy is by appeal, merely because the appropriate remedy may involve an inconvenient delay. *Re Connecticut Mut. L. Ins. Co.* 131 U. S. clxxx. Appx. and 26: 561

32. A writ of mandamus will not be granted to compel the dismissal of a suit by the circuit court of the United States for want of jurisdiction, where the writ of prohibition is denied on the ground that there is an adequate remedy by appeal. *Re Huguley Mfg. Co.* 184 U. S. 297, 22 Sup. Ct. Rep. 455, 46: 549

33. The Supreme Court will not issue a writ of mandamus to compel a district judge to vacate an order denying a motion, in a cause of seizure depending before the judge, to strike out that clause of the common motion issued in that cause by which the marshal is directed to "detain the goods," etc., as not authorized by law. This is a matter which is examinable by writ of error or appeal to the circuit court. *Re Hoyt*, 13 Pet. 279, 10: 161

34. Mandamus will not be granted to compel the circuit court of the United States to dismiss a suit for lack of jurisdiction of the defendant, and to vacate an order overruling a demurrer raising the question of jurisdiction, since if a decree should pass against the defendant there is a

remedy by appeal. *Re Atlantic City R. Co.* 164 U. S. 633, 17 Sup. Ct. Rep. 208, 41: 579

Cited in *Ex parte Union S. B. Co.* 178 U. S. 319, 44 L. ed. 1085, 20 Sup. Ct. Rep. 904—*Re Huguley Mfg. Co.* 184 U. S. 301, 46 L. ed. 551, 22 Sup. Ct. Rep. 455—*Turnbull Wagon Co. v. Linthicum Carriage Co.* 80 Fed. 5—*Re Westervelt*, 39 C. C. A. 351, 98 Fed. 912—*Kimberlin v. Commission*, 44 C. C. A. 111, 104 Fed. 655—*State ex rel. Buchanan v. Kellogg*, 95 Wis. 679, 70 N. W. 300.

35. A writ of mandamus cannot be issued by the circuit court, in the nature of a writ of procedendo, to compel a district judge, while holding a circuit court, to proceed in the case according to the rules of practice prescribed by the courts of equity of the United States. The appropriate redress, if any, is to be obtained after the final decision shall be had on the case by appeal. *Re Whitney*, 13 Pet. 404, 10: 221

36. The act incorporating the Bank of Columbia authorizes a summary process for the collection of debts, etc., and directs that, if the defendant disputes the debt, then an issue be made up. In this case the court did direct an issue, and an application was made for a mandamus to order the court to withdraw that issue and direct another, which application was properly refused, the propriety of the issue directed being properly reviewable only by writ of error. *Bank of Columbia v. Sweeny*, 1 Pet. 567, 7: 265
Cited in *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758—*State ex rel. Walker v. Orphans Ct. Judge*, 15 Ala. 742—*Ex parte Hendree*, 49 Ala. 381—*Ex parte Williamson*, 8 Ark. 428—*People ex rel. Bristol v. Pearson*, 3 Ill. 204, 33 Am. Dec. 445—*Jelley v. Roberts*, 50 Ind. 7—*State ex rel. Ames v. Second Dist Judge*, 32 La. Ann. 303.

c. To Court or Court Officer.

1. To Compel or Restrain Action Generally.

As Exercise of Appellate Jurisdiction, see supra, 8.

Necessity of Supporting Affidavit, see infra, 225.

Hearing and Determination of Writ, see infra, 234, 235.

To Enforce Mandate or Judgment on Appeal, see Appeal and Error, IX. m.

Choice between Mandamus and Appellate Review, see Appeal and Error, 704-712.

To Compel Issuance of Supersedeas, see Appeal and Error, 2748-2749.

To Compel Allowance of Writ of Error, see Appeal and Error, 2650.

To Compel Signing or Settling of Bill of Exceptions, see Appeal and Error, 3517-3522.

After Remanding Cause to State Court, see Removal of Causes, 470.

Jurisdiction to Require Court of Admiralty to Examine into Sufficiency of Stipulation for Value, see Supreme Court of the United States, 70.

37. A rule upon judges of a lower court to show cause why mandamus should not

issue will not be granted, unless a prima facie case for the issue of a mandamus is shown. *Re Taylor*, 14 How. 3, 14: 302
Cited in Ex parte Bradley, 7 Wall. 386, 19 L. ed. 222—*Ex parte Denver & R. G. R. Co.* 101 U. S. 720, 25 L. ed. 875—*State v. Brown*, 10 Or. 223.

38. Petition for a mandamus to the circuit court, commanding it to deliver certain property,—denied, where, since the presentation of the petition, it had been decided in this court that the possession of the property did not belong to the petitioner. *Re Milwaukee & M. R. Co.* 154 U. S. 554 Appx. and 14 Sup. Ct. Rep. 1206, 18: 887

38a. A writ of mandamus was issued to the circuit court commanding it to proceed with the execution of an order made by it directing one railroad company to deliver certain rolling stock to another. *Milwaukee & M. R. Co. v. Judges of Circuit Court*, 5 Wall. 825, 18: 680

Editorial notes.

To control inferior courts. 29: 135
 [In exercise of superintending control over inferior court. 51 L.R.A. 33.]

To prevent change of venue from court having exclusive jurisdiction. 2 L.R.A.(N. S.) 568.]

To entertain and decide cause.

In Supreme Court, see Supreme Court of the United States, 68, 69.

See also *infra*, 86, 88.

39. The Supreme Court has power to issue writs of mandamus to any courts appointed under the authority of the United States, where such court, having jurisdiction, refuses to hear and decide a case, or where, having heard, it refuses to render judgment or enter a decree. But the writ will not be issued in any case if the party aggrieved may have a remedy by writ of error or appeal. *Re Newman*, 14 Wall. 152, 20: 877

40. A writ of mandamus may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for judicial determination, but not to control its decision. *Re Morgan*, 114 U. S. 174, 5 Sup. Ct. Rep. 825, 29: 135
Cited in Ex parte Brown, 116 U. S. 402, 29 L. ed. 677, 6 Sup. Ct. Rep. 587—*Re Parker*, 131 U. S. 226, 33 L. ed. 124, 9 Sup. Ct. Rep. 708—*Re Morrison* (*Morrison v. District Court*) 147 U. S. 26, 37 L. ed. 65, 13 Sup. Ct. Rep. 246—*Re Hawkins*, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 512—*American Constr. Co. v. Jacksonville T. & K. W. R. Co.* 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758—*Virginia v. Paul*, 148 U. S. 124, 37 L. ed. 392, 13 Sup. Ct. Rep. 536—*Hudson v. Parker*, 156 U. S. 289, 39 L. ed. 428, 15 Sup. Ct. Rep. 450—*United States ex rel. Harless v. United States Ct. App. Judges*, 29 C. C. A. 81, 56 U. S. App. 33, 85 Fed. 180—*Kimberlin v. Commission*, 44 C. C. A. 111, 104 Fed. 655—*State ex rel. Colcord v. Young*, 31 Fla. 601, 19 L.R.A. 638, 34 Am. St. Rep. 41, 12 So. 673—*State ex rel. Matheson v. King*, 32 Fla. 419, 13 So. 891—*State ex rel. Bayha v. Phillips* (*State ex rel. Bayha v. Kansas City Ct. of*

Appeals) 97 Mo. 343, 3 L.R.A. 480, 10 S. W. 855—*State ex rel. Mathews v. Eddy*, 10 Mont. 324, 25 Pac. 1032.

41. A writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its action, or to reverse its decisions when made. *United States ex rel. Crawford v. Addison*, 22 How. 174, 16: 304
Re Milwaukee & M. R. Co. 5 Wall. 188, 18: 676
Re Flippin, 94 U. S. 348, 24: 194
Life & F. Ins. Co. v. Wilson, 8 Pet. 291, 8: 949
United States v. Lawrence, 3 Dall. 42, 1: 502

Re Loring, 94 U. S. 418, 24: 165
Re Burtis, 103 U. S. 238, 26: 392
Kendall v. United States ex rel. Stokes, 13 Pet. 524, 9: 1181

Distinguished in State ex rel. Kranick v. Supple, 22 Mont. 189, 56 Pac. 20.

Cited in Ex parte Crane, 5 Pet. 207, 8 L. ed. 99—*Ex parte Hoyt*, 13 Pet. 290, 10 L. ed. 167—*Decatur v. Paulding*, 14 Pet. 516, 10 L. ed. 568—*Holmes v. Jennison*, 14 Pet. 629 Appx. 10 L. ed. 628 Appx.—*Kendall v. Stokes*, 3 How. 795 Appx. 11 L. ed. 793 Appx.—*Brashear v. Mason*, 6 How. 102, 12 L. ed. 861—*Wilkes v. Dinwman*, 7 How. 129, 12 L. ed. 636—*Reeside v. Walker*, 11 How. 289, 13 L. ed. 700—*United States ex rel. Goodrich v. Guthrie*, 17 How. 304, 15 L. ed. 106—*United States ex rel. Tucker v. Seaman*, 17 How. 231, 15 L. ed. 228—*United States ex rel. Crawford v. Addison*, 22 How. 183, 16 L. ed. 303—*Mississippi v. Johnson*, 4 Wall. 499, 18 L. ed. 441—*Riggs v. Johnson County* (*United States ex rel. Riggs v. Johnson County*) 6 Wall. 198, 18 L. ed. 777—*Ex parte DeGroot*, 6 Wall. 497, 18 L. ed. 888—*Gaines v. Thompson*, 7 Wall. 350, 19 L. ed. 64—*The Secretary v. McGarahan* (*Cox v. United States*) 9 Wall. 312, 19 L. ed. 583—*Bath County v. Amy*, 13 Wall. 249, 20 L. ed. 541—*Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 270, 21 L. ed. 498, 8 Nat. Bankr. Reg. 151—*United States v. Boutwell*, 17 Wall. 609, 21 L. ed. 722—*Heine v. Levee Comrs.* 19 Wall. 680, 22 L. ed. 226—*Ex parte Newman*, 14 Wall. 166, 20 L. ed. 879—*Ex parte Denver & R. G. R. Co.* 101 U. S. 720, 25 L. ed. 875—*United States v. Schurz*, 102 U. S. 395, 26 L. ed. 171—*Ex parte Burtis*, 103 U. S. 238, 26 L. ed. 392—*Louisiana v. Jumel*, 107 U. S. 763, 27 L. ed. 466, 2 Sup. Ct. Rep. 128—*Ex parte Morgan*, 114 U. S. 175, 29 L. ed. 136, 5 Sup. Ct. Rep. 825—*United States ex rel. Miller v. Black*, 128 U. S. 45, 32 L. ed. 356, 9 Sup. Ct. Rep. 12—*United States ex rel. Redfield v. Windom*, 137 U. S. 643, 34 L. ed. 814, 11 Sup. Ct. Rep. 197—*Re Hawkins*, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 512—*Re Parsons*, 150 U. S. 156, 37 L. ed. 1037, 14 Sup. Ct. Rep. 50—*Gordon v. United States*, 1 Ct. Cl. 5—*Carmick v. United States*, 2 Ct. Cl. 136—*Brown v. United States*, 6 Ct. Cl. 185—*Hough v. Western Transp. Co.* 1 Biss. 429, Fed. Cas. No. 6,724—*Lyell v. Lapeer County*, 6 McLean, 456, Fed. Cas. No. 8,618—*McElrath v. McIntosh*, 11 Month. L. Rep. 410, Fed. Cas. No. 8,781—*Litchfield v. Register & Receiver*, Woolw. 308, Fed. Cas. No. 8,388—*Ex parte Reeside*, Brunner, Col. Cas. 573, Fed. Cas. No. 11,656—*United States ex rel. Stokes v. Kendall*, 5 Cranch, C. C. 278, Fed. Cas. No. 15,517—*United States v. New Bedford Bridge*, 1

Woodb. & M. 438. Fed. Cas. No. 15,867—United States v. Plumer, 3 Cliff. 61, Fed. Cas. No. 16,056—Van Antwerp v. Hulburd, 7 Blatchf. 433, Fed. Cas. No. 16,826—Ex parte Van Orden, 3 Blatchf. 169, Fed. Cas. No. 16,870—Wheeling v. Baltimore, 1 Hughes, 94, Fed. Cas. No. 17,502—Wilson v. Rousseau, 1 Blatchf. 78, Fed. Cas. No. 17,832—Chaffratx v. Board of Liquidation, 11 Fed. 645—Koehler v. Barin, 25 Fed. 166—Enterprise Sav. Asso. v. Zumstein, 15 C. C. A. 159, 37 U. S. App. 71, 67 Fed. 1007—Hoover v. McChesney, 81 Fed. 482—Dudley v. James, 83 Fed. 349—United States ex rel. Harless v. United States Ct. App. Judges, 29 C. C. A. 80, 56 U. S. App. 33, 85 Fed. 179—Kimberlin v. Commission, 44 C. C. A. 111, 104 Fed. 656—Barber Asphalt Paving Co. v. Morris, 67 L. R. A. 767, 66 C. C. A. 62, 132 Fed. 952—Tennessee & C. R. Co. v. Moore, 36 Ala. 381—Ex parte Echols, 39 Ala. 700, 88 Am. Dec. 749—Ex parte Garland, 42 Ala. 561—Applying v. Bailey, 44 Ala. 335—Ex parte Thompson, 52 Ala. 99—Sessions v. Boykin, 78 Ala. 330—State ex rel. Driver v. Talladega Road & Revenue Comrs. 3 Port. (Ala.) 416—In sane Asylum v. Wolfy, 3 Ariz. 133, 8 L.R.A. 189, 22 Pac. 383—Danley v. Whiteley, 14 Ark. 703—Black v. State Auditor, 26 Ark. 239—Nongues v. Douglass, 7 Cal. 72—People ex rel. McCauley v. Brooks, 16 Cal. 42—Harpending v. Haight, 39 Cal. 210, 2 Am. Rep. 432—Kerr v. Superior Court, 130 Cal. 186, 62 Pac. 479—Freeman v. New Haven, 34 Conn. 416—American Casualty Ins. & Secur. Co. v. Fyler, 60 Conn. 459, 25 Am. St. Rep. 337, 22 Atl. 494—Ansonia v. Studley, 67 Conn. 180, 34 Atl. 1030—Swift v. State, 7 Houst. (Del.) 358, 40 Am. St. Rep. 127, 32 Atl. 143—United States v. Boutwell, 3 MacArth. 177—Mississippi v. Durham, 4 Mackey, 239—United States ex rel. White v. Bayard, 5 Mackey, 433—United States ex rel. Redfield v. Windom, 8 Mackey, 58—Seymour v. United States, 2 App. D. C. 246—United States International Contracting Co. v. Lamont, 2 App. D. C. 546—Roberts v. United States, 13 App. D. C. 46—Towle v. State, 3 Fla. 210—State ex rel. Weeks v. Gamble, 13 Fla. 24—State ex rel. Fleming v. Crawford, 28 Fla. 476, 14 L.R.A. 256, 10 So. 118—Bonner v. State, 7 Ga. 482—State ex rel. Low v. Towns, 8 Ga. 370—Burkhart v. Reed, 2 Idaho, 518, 22 Pac. 1—People ex rel. Bristol v. Pearson, 3 Ill. 204, 33 Am. Dec. 445—Hammond v. People, 32 Ill. 465—People ex rel. Dickinson v. Board of Trade, 193 Ill. 588, 62 N. E. 196—Jelley v. Roberts, 50 Ind. 7—Bryan v. Catell, 15 Iowa, 548—United States ex rel. Davenport v. Dubuque County, Morris (Iowa) 38—State v. Bordelon, 6 La. Ann. 70—Cockburn v. Union Bank, 13 La. Ann. 292—State ex rel. Hope v. Board of Liquidation, 42 La. Ann. 658, 7 So. 706—State ex rel. McEnery v. Nicholls, 42 La. Ann. 224, 7 So. 738—Badger v. New Orleans (State ex rel. Badger v. New Orleans) 49 La. Ann. 809, 37 L.R.A. 542, 21 So. 870—Page v. Hardin, 8 B. Mon. 652—Hatch v. City Bank, 1 Rob. (La.) 495—Re Kennebunk Toll Bridge, 11 Me. 266—Smyth v. Titcomb, 31 Me. 280—Baker v. Johnson, 41 Me. 21—Green v. Purnell, 12 Md. 335—State ex rel. Baltimore, C. & P. B. R. Co. v. Latrobe, 81 Md. 245, 31 Atl. 788—McCrea v. Roberts, 89 Md. 250, 44 L. R.A. 487, 43 Atl. 39—Robery v. Prince George's County, 92 Md. 158, 48 Atl. 48—Chase v. Blackstone Canal Co. 10 Pick. 246—Gibbs v. Hampden County, 19 Pick. 299—People ex rel. Brower v. Wayne County Ct. Judge, 1 Mich. 361—Detroit Tug & Wrecking Co. v. Gartner, 75 Mich. 377, 42 N. W. 968—

Swann v. Buck, 40 Miss. 290—Swan v. Gray, 44 Miss. 397—State ex rel. Register of Lands v. Secretary of State, 33 Mo. 304—State ex rel. Watkins v. Macon County Court, 68 Mo. 51—Chumaseo v. Potts, 2 Mont. 291—State ex rel. Journal Pub. Co. v. Kenney, 9 Mont. 396, 24 Pac. 96—State ex rel. Benton v. Elder, 31 Neb. 180, 10 L.R.A. 800, 47 N. W. 710—Farwell's Petition, 2 N. H. 125—Hall v. Somersworth, 39 N. H. 519—Atty. Gen. v. Taggart, 66 N. H. 367, 25 L.R.A. 615, 29 Atl. 1027—Laird v. Abrahams, 15 N. J. L. 25—Angle v. Runyon, 38 N. J. L. 409—State ex rel. Willson v. Swain, 60 N. J. L. 117, 36 Atl. 778—Territory v. Ortiz, 1 N. M. 15—Re Stewart, 24 App. Div. 206, 48 N. Y. Supp. 957—Delgado v. Chavez, 5 N. M. 648, 25 Pac. 948—People ex rel. Griffin v. Steele, 2 Barb. 418—Robertson v. Bullions, 9 Barb. 128—Woodruff v. Fisher, 17 Barb. 233—People ex rel. Robinson v. Superior Court, Lockwood Rev. Cas. 346—Common Pleas Judges v. People, 18 Wend. 94—People ex rel. Doughty v. Common Pleas Judges, 20 Wend. 660—People ex rel. Broderick v. Morton, 156 N. Y. 152, 41 L.R.A. 237, 66 Am. St. Rep. 547, 50 N. E. 791—Cotten v. Ellis, 52 N. C. (7 Jones, L.) 550—Raleigh & A. Air-Line R. Co. v. Jenkins, 68 N. C. 503—Brown v. Turner, 70 N. C. 106—Russell v. Ayer, 120 N. C. 186, 37 L.R.A. 247, 27 S. E. 133—Garner v. Worth, 122 N. C. 257, 29 S. E. 364—Re Turner, 5 Ohio, 544—Com v. Common Pleas Judges, 3 Binn. 275—Com. ex rel. Griffith v. Cochran, 5 Binn. 103—Re Mannheim Twp. 5 Clark (Pa.) 404—Com. ex rel. District Attorney v. West Chester, 8 Lanc. L. Rev. 239—Com. ex rel. Brackenridge v. Common Pleas Judges, 1 Serg. & R. 195—Re Mannheim Twp. 4 Am. L. Reg. 167—Com. ex rel. District Attorney v. West Chester, 9 Pa. Co. Ct. 548—United States v. Greiner, 4 Phila. 400, 18 Phila. Leg. Int. 149—Com. v. Floyd, 2 Pittsb. 432, 10 Pittsb. L. J. 273—State ex rel. Atty. Gen. v. State Bank, 1 S. C. N. S. 65—State v. Cardozo, 5 S. C. N. S. 312—McCullough v. Hicks, 63 S. C. 545, 41 S. E. 761—State v. Mitchell, 3 Brev. 522—State v. Mitchell, 2 Treadway, Const. 706—State ex rel. Stewart v. Marks, 6 Lea, 21—Glasscock v. General Land Office Commissioner, 3 Tex. 53—General Land Office v. Smith, 5 Tex. 478—Meyer v. Carolan, 9 Tex. 254—Houston, G. & N. R. Co. v. Kuechler, 36 Tex. 407—Houston, G. & N. R. Co. v. Kuechler, 36 Tex. 411—Bledsoe v. International R. Co. 40 Tex. 556—Kuechler v. Wright, 40 Tex. 631—Fannin County v. Hightower, 9 Tex. Civ. App. 299, 29 S. W. 187—Richards v. Wheeler, 2 Alk. (Vt.) 372—Richardson v. Farrar, 88 Va. 773, 15 S. E. 117—Page v. Clopton, 30 Gratt. 419—State ex rel. Lord v. Washington County, 2 Chand. (Wis.) 250—State ex rel. Lord v. Washington County, 2 Pinney (Wis.) 553—Mason County v. Minturn, 4 W. Va. 304—Craig v. McCulloch, 20 W. Va. 154—Roberts v. Paul, 50 W. Va. 533, 40 S. E. 470.

42. For the refusal of an inferior court to hear and decide a cause, the remedy is by mandamus to compel the court to entertain and decide the case, and not by writ of error. *Re Newman*, 14 Wall. 152, 20: 877 *Re Bradstreet*, 7 Pet. 634, 8: 810 *Criticized in State ex rel. McIntyre v. Superior Court*, 21 Wash. 110, 57 Pac. 352.

Cited in Bradstreet v. Thomas, 12 Pet. 64, 9 L. ed. 1001—*Holmes v. Jennison*, 14 Pet. 632 Appx. 10 L. ed. 630 Appx.—*Ex parte Bradley*, 7 Wall. 376, 19 L. ed. 218—*Litchfield v. Dubuque & P. R. Co.* 7 Wall. 271, 19

L. ed. 151—*Ex parte Newman*, 14 Wall. 166, 20 L. ed. 879—*Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 270, 21 L. ed. 498—*Chicago & A. R. Co. v. Wiswall*, 23 Wall. 508, 23 L. ed. 104—*Chicago & A. R. Co. v. Wiswall*, 23 Wall. 507, 23 L. ed. 103—*Ex parte Hord*, 105 U. S. 578, 26 L. ed. 1177—*Harrington v. Holler*, 111 U. S. 797, 28 L. ed. 603, 4 Sup. Ct. Rep. 697—*Harrington v. Holler (Crawford v. Haller)* 111 U. S. 797, 28 L. ed. 603, 4 Sup. Ct. Rep. 697—*United States ex rel. Redfield v. Windom*, 137 U. S. 643, 34 L. ed. 814, 11 Sup. Ct. Rep. 197—*Re Pennsylvania Co.* 137 U. S. 452, 34 L. ed. 739, 11 Sup. Ct. Rep. 141—*Knickerbocker Ins. Co. v. Comstock*, 8 Nat. Bankr. Reg. 151—*Re Dowd*, 133 Fed. 751—*Jones v. Oceanic Steam Nav. Co.* 11 Blatchf. 412, Fed. Cas. No. 7,485—*Sharon v. Terry*, 13 Sawy. 404, 1 L.R.A. 583, 36 Fed. 349—*Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 768, 66 C. C. A. 64, 132 Fed. 954—*Eslava v. Rigeaud*, 3 Ala. 365—*State ex rel. Pinney v. Williams*, 69 Ala. 316—*People ex rel. Mulford v. Turner*, 1 Cal. 147, 52 Am. Dec. 295—*United States ex rel. Redfield v. Windom*, 8 Mackey, 59—*State ex rel. Atty. Gen. v. Gleason*, 12 Fla. 203—*State ex rel. Hughes v. Walker*, 25 Fla. 573, 6 So. 169—*State ex rel. Colcord v. Young*, 31 Fla. 598, 19 L.R.A. 637, 34 Am. St. Rep. 41, 12 So. 673—*People ex rel. Bristol v. Pearson*, 3 Ill. 204, 38 Am. Dec. 445—*Jelley v. Roberts*, 50 Ind. 7—*State ex rel. Morris v. Webb*, 34 Kan. 711, 9 Pac. 770—*State ex rel. Sorrel v. Foster*, 106 La. 428, 31 So. 57—*Robey v. Prince George's County*, 92 Md. 158, 48 Atl. 48—*State ex rel. Bayha v. Philips (State ex rel. Bayha v. Kansas City Ct. of Appeals)* 97 Mo. 342, 3 L.R.A. 480, 10 S. W. 855—*State ex rel. King v. Second Judicial Dist. Court*, 25 Mont. 211, 64 Pac. 352—*Darnell v. Lyon*, 85 Tex. 471, 22 S. W. 304—*Aycock v. Clark*, 94 Tex. 377, 60 S. W. 665—*Schintz v. Morris*, 13 Tex. Civ. App. 595, 35 S. W. 516—*Cowan v. Fulton*, 23 Gratt. 585—*Page v. Clopton*, 30 Gratt. 424—*Page v. Clopton*, 30 Gratt. 419—*Richardson v. Farrar*, 88 Va. 774, 15 S. E. 117—*Richardson v. Farrar*, 88 Va. 768, 15 S. E. 117—*State ex rel. Shannon v. Hunter*, 3 Wash. 95, 27 Pac. 1076—*Roberts v. Paul*, 50 W. Va. 530, 40 S. E. 470.

43. This court will grant a writ of mandamus to compel a circuit court to hear and determine an action by a citizen of one state against a corporation of another state, begun by service of process on an agent in the state, under a state statute requiring the consent of the corporation to be so sued, as a condition of doing business in the state. *Re Schollenberger*, 96 U. S. 369,

24: 853

Cited in Re Pennsylvania Co. 137 U. S. 453, 34 L. ed. 739, 11 Sup. Ct. Rep. 141—*Re Hohorst*, 150 U. S. 664, 37 L. ed. 1215, 14 Sup. Ct. Rep. 221—*Re Grossmayer*, 177 U. S. 49, 44 L. ed. 666, 20 Sup. Ct. Rep. 535—*McCabe v. Illinois C. R. Co.* 4 McCrary, 497, 13 Fed. 830—*State ex rel. Morris v. Webb*, 34 Kan. 711, 9 Pac. 770—*State ex rel. Bayha v. Philips (State ex rel. Bayha v. Kansas City Ct. of Appeals)* 97 Mo. 343, 3 L.R.A. 480, 10 S. W. 855—*Raleigh v. First Judicial District*, 24 Mont. 313, 81 Am. St. Rep. 431, 61 Pac. 991—*Mahon v. Luzerne County*, 197 Pa. 11, 46 Atl. 894—*Schintz v. Morris*, 13 Tex. Civ. App. 595, 35 S. W. 516—*State v. Hart*, 19 Utah, 444, 57 Pac. 415—*Crooks v. Fourth Judicial Dist. Court*, 21 Utah, 108, 59 Pac. 529—*White v. Holt*, 20 W. Va. 813—

Wheeling Bridge & Terminal R. Co. v. Paul, 39 W. Va. 148, 19 S. E. 551.

44. Mandamus lies to compel the United States circuit court to take jurisdiction of a suit which it has wrongly dismissed for lack of jurisdiction. *Re Hohorst*, 150 U. S. 653, 14 Sup. Ct. Rep. 221, 37: 1211 *Cited in Re Atlantic City R. Co.* 164 U. S. 635, 41 L. ed. 580, 17 Sup. Ct. Rep. 208—*Re Grossmayer*, 177 U. S. 50, 44 L. ed. 666, 20 Sup. Ct. Rep. 535—*Re Westervelt*, 39 C. C. A. 351, 98 Fed. 912—*Raleigh v. First Judicial Dist. Court*, 24 Mont. 313, 81 Am. St. Rep. 431, 61 Pac. 991—*Schintz v. Morris*, 13 Tex. Civ. App. 594, 35 S. W. 516.

45. The writ of mandamus may be issued where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise. *Re Parker*, 131 U. S. 221, 9 Sup. Ct. Rep. 708,

33: 123

Re Parker, 120 U. S. 737, 7 Sup. Ct. Rep. 767, 30: 818

Cited in Craig v. Lelensdorfer (Downs v. Hubbard) 123 U. S. 209, 31 L. ed. 122, 8 Sup. Ct. Rep. 85—*Re Parker*, 131 U. S. 226, 33 L. ed. 124, 9 Sup. Ct. Rep. 708—*Re Pennsylvania Co.* 137 U. S. 453, 34 L. ed. 739, 11 Sup. Ct. Rep. 141—*Hudson v. Parker*, 156 U. S. 289, 39 L. ed. 428, 15 Sup. Ct. Rep. 450—*Norwalk & S. N. Electric Light Co. v. South Norwalk*, 71 Conn. 390, 42 Atl. 82—*State ex rel. Colcord v. Young*, 31 Fla. 598, 19 L.R.A. 638, 34 Am. St. Rep. 41, 12 So. 673—*State ex rel. Sanchez v. Call*, 86 Fla. 312, 18 So. 771—*Kimerer v. State*, 129 Ind. 592, 29 N. E. 178—*State ex rel. Bayha v. Philips (State ex rel. Bayha v. Kansas City Ct. App.)* 97 Mo. 343, 3 L.R.A. 480, 10 S. W. 855—*State ex rel. Mathews v. Eddy*, 10 Mont. 324, 25 Pac. 1032—*Raleigh v. First Judicial Dist. Court*, 24 Mont. 313, 81 Am. St. Rep. 431, 61 Pac. 991—*Schintz v. Morris*, 13 Tex. Civ. App. 594, 35 S. W. 516—*State v. Hart*, 19 Utah, 444, 57 Pac. 415—*Crooks v. Fourth Judicial Dist. Court*, 21 Utah, 108, 59 Pac. 529—*Isham v. Parker*, 3 Wash. 760, 29 Pac. 835—*State ex rel. Shannon v. Hunter*, 3 Wash. 95, 27 Pac. 1076—*State ex rel. McIntyre v. Superior Court*, 21 Wash. 110, 57 Pac. 352—*State ex rel. McIntyre v. Superior Court*, 21 Wash. 110, 57 Pac. 352—*Wheeling Bridge & Terminal R. Co. v. Paul*, 39 W. Va. 148, 19 S. E. 551—*Roberts v. Paul*, 50 W. Va. 530, 40 S. E. 470.

46-7. Mandamus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. *Re Brown*, 116 U. S. 401, 6 Sup. Ct. Rep. 587, 29: 676 *Cited in Ex parte Parker*, 120 U. S. 743, 30 L. ed. 820, 7 Sup. Ct. Rep. 767—*Craig v. Lelensdorfer (Downs v. Hubbard)* 123 U. S. 209, 31 L. ed. 122, 8 Sup. Ct. Rep. 85—*State ex rel. Colcord v. Young*, 31 Fla. 601, 19 L.R.A. 638, 34 Am. St. Rep. 41, 12 So. 673—*State v. King*, 32 Fla. 419, 13 So. 891—*State ex rel. Matheson v. King*, 32 Fla. 419, 3 So. 891—*State ex rel. Mathews v. Eddy*, 10 Mont. 324, 25 Pac. 1032—*State ex rel. McIntyre v. Superior Court*, 21 Wash. 110, 57 Pac. 352.

New parties.

48. Mandamus is the proper remedy to

compel a court to bring in a party to an action, when it has erroneously declined to make him a party on the ground that it has no jurisdiction to do so. *Re Connaway*, 178 U. S. 421, 20 Sup. Ct. Rep. 951, 44: 1134

49. A mandamus will not be granted to compel the district court to allow a claimant to intervene in a proceeding for confirmation of a Mexican land claim. *White v. United States*, 1 Wall. 660, 17: 698
Re Valentine (White v. United States) 1 Black, 501, 17: 227

Matters of discretion.

For Review or Control of Decisions, see *infra*, II. c. 3.

To Compel Reinstatement of Clerk, see *infra*, II. c. 4.

Mandamus to Public Officers, Boards and Municipalities, see *infra*, II. d. 3.

Reinstatement of Attorney, see *infra*, 98, 99.

See also *supra*, 46.

50. A mandamus does not lie to control judicial discretion, except when that discretion has been abused. But it may be used to restrain inferior courts and keep them within proper bounds. *Re Virginia (Virginia v. Rives)* 100 U. S. 313, 25: 667
Distinguished in United States ex rel. Roop v. Douglass, 8 Mackey, 115.

Cited in Barber Asphalt Paving Co. v. Morris, 67 L.R.A. 769, 66 C. C. A. 64, 132 Fed. 954—*Re Dowd*, 133 Fed. 751—*State ex rel. Brown v. Stewart*, 60 Wis. 592, 50 Am. Rep. 388, 19 N. W. 429.

51. A judge must exercise his discretion in the proceedings in a suit intermediate its commencement and trial; and if, in the performance of his duty, he acts oppressively, application cannot be made to the Supreme Court for relief. *Bradstreet v. Huntington*, 8 Pet. 588, 8: 1054

Cited in Life & F. Ins. Co. v. Adams, 9 Pet. 604, 9 L. ed. 245—*Holmes v. Jennison*, 14 Pet. 629 Appx. 10 L. ed. 628 Appx.—*Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 770, 66 C. C. A. 66, 132 Fed. 956—*Towle v. State*, 3 Fla. 210—*People ex rel. Bristol v. Pearson*, 3 Ill. 204, 33 Am. Dec. 445—*Jelley v. Roberts*, 50 Ind. 7—*Territory v. Ortiz*, 1 N. M. 14—*Richardson v. Farrar*, 88 Va. 768, 15 S. E. 117—*State v. Cunningham*, 33 W. Va. 618, 11 S. E. 76.

52. The allowance of double pleas and defenses is a matter of discretion; and as the court constantly exercises a control over the privilege, and will disallow incompatible and sham pleas, no mandamus will lie to the court for the exercise of its authority in such cases. *Re Davenport*, 6 Pet. 661, 8: 537

Cited in Towle v. State, 3 Fla. 210—*People ex rel. Bristol v. Pearson*, 3 Ill. 204, 33 Am. Dec. 445—*Jelley v. Roberts*, 50 Ind. 7—*Swan v. Gray*, 44 Miss. 308.

53. A writ of mandamus from a circuit court is not the appropriate remedy for any errors which may be made in a case by a judge in the exercise of his authority, although such authority may seem to bear

harshly or oppressively on the party. *Re Whitney*, 13 Pet. 404, 10: 221

54. Mandamus will not be granted to direct the hearing of further argument by a court on the ground that counsel has not had ample opportunity to present his views. *Re Rice*, 155 U. S. 396, 15 Sup. Ct. Rep. 149, 39: 198

55. A writ of mandamus does not lie to compel the judge of an inferior court to authorize the withdrawal of money from the registry of the court, where said court has expressly adjudged that the litigation is not ended, and has ordered that said money shall remain in the custody of the court until the final disposition of the case. *Re Hughes*, 114 U. S. 147, 5 Sup. Ct. Rep. 823, 29: 134

56. Mandamus does not lie to correct a decision of the circuit court upon the sufficiency of an affidavit to hold a defendant to bail, as such decision is within the discretion of the court, under the provision of the act of Congress of August 1, 1842 (5 Stat. L. 498, chap. 108), that the sufficiency of such affidavit, and the amount of bail to be given, shall, upon application of the defendant, be decided by the court in term, and by a single judge in vacation. *Re Taylor*, 14 How. 3, 14: 302
Cited in Hudson v. Parker, 156 U. S. 289, 39 L. ed. 428, 15 Sup. Ct. Rep. 450.

57. A judge may be compelled by mandamus to exercise his discretion in respect to the approval of a bail bond, where he has refused to act at all on the erroneous assumption that the order to submit the bond to him was without authority of law. *Hudson v. Parker*, 156 U. S. 277, 15 Sup. Ct. Rep. 450, 39: 424
Cited in State ex rel. Fuller v. Beall, 48 Neb. 820, 67 N. W. 868—*Schints v. Morris*, 13 Tex. Civ. App. 594, 35 S. W. 516.

58. This court will not interfere, by mandamus, with the discretion of a district judge in approving or rejecting a bond offered for his approval. *Re Milwaukee & M. R. Co.* 5 Wall. 188, 18: 676
Cited in Hudson v. Parker, 156 U. S. 289, 39 L. ed. 428, 15 Sup. Ct. Rep. 450—*Taylor v. Life Asso. of America*, 11 Cent. L. J. 208, 3 Fed. 470.

To hear and decide motions.

See also *Appeal and Error*, 708.

59. The Supreme Court may issue mandamus to the court of claims commanding it to hear and decide a motion for new trial and to stay judgment, after its judgment has been affirmed by this court. *Re United States*, 16 Wall. 699, 21: 507
Cited in Russell v. United States, 15 Ct. Cl. 171—*Re Pennsylvania Co.* 137 U. S. 452, 34 L. ed. 739, 11 Sup. Ct. Rep. 141—*Fuller v. United States (Ex parte Fuller)* 182 U. S. 571, 45 L. ed. 1235, 21 Sup. Ct. Rep. 871.

60. The Supreme Court has power to order a mandamus requiring the court of claims to hear, entertain, and decide a motion for a new trial, and also a motion to

correct the records of that court, where the court of claims has wrongfully denied the motions on the ground that it had no jurisdiction. *Re Roberts*, 15 Wall. 384,

21: 131

Cited in Re Pennsylvania Co. 137 U. S. 452, 34 L. ed. 739, 11 Sup. Ct. Rep. 141—*Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 769, 66 C. C. A. 64, 132 Fed. 954—*Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 770, 66 C. C. A. 66, 132 Fed. 956—*Re Dowd*, 133 Fed. 751.

Remand of cause or of persons to state court or authorities.

See also *supra*, 32, 34.

61. The Supreme Court of the United States cannot issue a mandamus to a circuit court, to set aside an order to remand a suit removed from a state court, on the ground that at the time of the hearing the court did not have the complaint before it. *Re Sherman*, 124 U. S. 364, 8 Sup. Ct. Rep. 505,

31: 423

Cited in State ex rel. Colcord v. Young, 31 Fla. 001, 19 L.R.A. 538, 34 Am. St. Rep. 41, 12 So. 673.

62. A mandamus cannot be used to compel a circuit court to remand a cause after it once has refused a motion to that effect. *Re Hoard*, 105 U. S. 578,

26: 1176

63. Mandamus will not lie to compel a Federal circuit court to remand to a state court a cause which the circuit court has refused to remand to the state court because of the opinion that the case presents a controversy between the removing defendant and the plaintiff which can be fully determined between them without the presence of the other defendants. *Re Politz*, 206 U. S. 323, 27 Sup. Ct. Rep. 729,

51: 1081

64. Mandamus, rather than prohibition, is the proper remedy where the circuit court of the United States refuses to remand to the state court from which it was removed a case over which the Federal court has no jurisdiction. *Re Wisner*, 203 U. S. 449, 27 Sup. Ct. Rep. 150,

51: 264

Cited in Re Pollitz, 206 U. S. 332, 51 L. ed. 1084, 27 Sup. Ct. Rep. 729.

65. Where the United States circuit court has without authority of law, assumed jurisdiction of an indictment found in the courts of a state, the state is entitled to have the prosecution remanded to its courts by a writ of mandamus issued to the judge who has so unlawfully assumed jurisdiction. No previous motion to him to remand the case is necessary. *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. Rep. 536,

37: 386

Cited in American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 386, 37 L. ed. 492, 13 Sup. Ct. Rep. 758.

66. Mandamus lies to compel the return of persons taken from the custody of state authorities by habeas corpus, in aid of proceedings to remove the cause from a state to a Federal circuit court, where the cause is not within the jurisdiction of the latter

court. *Re Virginia (Virginia v. Rives)* 100 U. S. 313,

25: 667

Cited in Re Washington & G. R. Co. 140 U. S. 95, 35 L. ed. 341, 11 Sup. Ct. Rep. 673—*Gaines v. Rugg (Gaines v. Caldwell)* 148 U. S. 243, 37 L. ed. 437, 13 Sup. Ct. Rep. 611—*United States ex rel. Roop v. Douglass*, 8 Mackey, 115—*State ex rel. Moody v. Barnea*, 25 Fla. 304, 23 Am. St. Rep. 516, 5 So. 722—*State ex rel. Klotz v. Ross*, 118 Mo. 77, 23 S. W. 196—*People ex rel. Sherwood v. State Canvassers*, 129 N. Y. 385, 14 L.R.A. 655, 29 N. E. 845—*State ex rel. Grinsfelder v. Spokane Street R. Co.* 19 Wash. 524, 41 L.R.A. 517, 67 Am. St. Rep. 789, 53 Pac. 719.

Reinstatement of cause.

To Whom Directed, see *infra*, 222.

See also *supra*, 44.

67. Writ of madamus issued to reinstate a case. *Bradstreet v. Cooper*, 6 Pet. 774,

8: 577

Cited in Stephenson v. Mansony, 4 Ala. 320—*Delgado v. Chavez*, 5 N. M. 648, 25 Pac. 948.

68. A writ of mandamus will not lie to compel the court of appeals of the District of Columbia to reinstate an appeal from the supreme court of the District, in an action originally brought before a justice of the peace, where such appeal was dismissed by the court of appeals for want of jurisdiction, although the decree of dismissal cannot be reviewed on appeal or writ of error. *Re Key*, 189 U. S. 84, 23 Sup. Ct. Rep. 624,

47: 720

To issue execution.

See also *infra*, 79.

69. Mandamus will issue to compel an inferior tribunal to execute its judgment in a cause within its jurisdiction. *United States v. Peters*, 5 Cranch, 115,

3: 53

Cited in Ex parte Crane, 5 Pet. 219, 8 L. ed. 103—*Holmes v. Jennison*, 14 Pet. 632 Appx. 10 L. ed. 630 Appx.—*Ex parte Newman*, 14 Wall. 166, 20 L. ed. 879—*People ex rel. Bristol v. Pearson*, 3 Ill. 204, 33 Am. Dec. 445—*Jelley v. Roberts*, 50 Ind. 7—*State ex rel. Sorrel v. Foster*, 106 La. 428, 31 So. 57—*Richards v. Wheeler*, 2 Ark. (Vt.) 370.

70. In the absence of mistake, misconduct, or neglect of duty, mandamus will not lie to compel the issuance of execution upon a judgment of an inferior court. *Postmaster General v. Trigg*, 11 Pet. 173,

9: 676

Cited in Ex parte Garland, 42 Ala. 561—*Towle v. State*, 3 Fla. 210—*People ex rel. Bristol v. Pearson*, 3 Ill. 204, 33 Am. Dec. 445—*Jelley v. Roberts*, 50 Ind. 7—*Swan v. Gray*, 44 Miss. 398.

71. Upon a *prima facie* case supported by affidavits showing the refusal of an inferior court to issue execution through its error, misconduct, or neglect of duty, a rule to show cause why mandamus should not issue will be granted. *Postmaster General v. Trigg*, 11 Pet. 173,

9: 676

Cited in Ex parte Taylor, 14 How. 12, 14 L. ed. 305—*Ex parte Sibert*, 67 Ala. 352—*Furbish v. Kennebec County*, 93 Me. 132, 44 Atl. 364—*Delgado v. Chavez*, 5 N. M. 648, 25 Pac. 948.

2. For Entry or Control of Judgment.

To Hear and Decide Motion, see *supra*, 59, 60.

To Issue Execution, see *supra*, 69-71.

For Review or Control of Decisions, see *infra*, II. c. 3.

Choice between Certiorari and Mandamus, see Certiorari, 40.

Directing judgment.

See also *supra*, 39.

72. A supervisory court will never, by writ of mandamus, prescribe what the decision of the subordinate court shall be, or control its judgment or discretion. *Re Newman*, 14 Wall. 152, 20: 877
Bradstreet v. Cooper, 6 Pet. 774, 8: 577
Life & F. Ins. Co. v. Adams, 9 Pet. 573, 9: 234

Distinguished in *State ex rel. Bayha v. Phillips*, (State ex rel. *Bayha v. Kansas City Ct. of Appeals*) 97 Mo. 342, 3 L.R.A. 480, 10 S. W. 855.

Cited in *Ex parte Hoyt*, 13 Pet. 290, 10 L. ed. 167—*Decatur v. Paulding*, 14 Pet. 608 Appx. 10 L. ed. 615 Appx.—*American Constr. Co. v. Jacksonville T. & K. W. R. Co.* 148 U. S. 379, 38 L. ed. 489, 13 Sup. Ct. Rep. 758—*Ex parte Denver & R. G. R. Co.* 101 U. S. 720, 25 L. ed. 875—*American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758—*State ex rel. Colcord v. Young*, 31 Fla. 601, 19 L. R.A. 638, 34 Am. St. Rep. 41, 12 So. 673—*State ex rel. Horsch v. Civil Dist. Judge*, 33 La. Ann. 269—*State ex rel. Ricardo v. Court of Common Pleas*, 38 N. J. L. 184—*Ewing v. Cohen*, 63 Tex. 485—*Hough v. Western Transp. Co.* 1 Bliss. 429, Fed. Cas. No. 6, 724—*State ex rel. Martin v. Lazarus*, 37 La. Ann. 612—*Delgado v. Chaves*, 5 N. M. 648, 25 Pac. 948—*Kleiber v. McManus*, 66 Tex. 52, 17 S. W. 249—*Darnell v. Lyon*, 85 Tex. 463, 22 S. W. 304.

73. A prayer for mandamus that the district court be directed to give judgment for a party specified cannot be granted, as the Supreme Court will not direct the manner in which the lower court's discretion shall be exercised. *Life & F. Ins. Co. v. Adams*, 9 Pet. 573, 9: 234

Cited in *Decatur v. Paulding*, 14 Pet. 605 Appx. 10 L. ed. 613 Appx.—*Holmes v. Jennison*, 14 Pet. 628 Appx. 10 L. ed. 627 Appx.—*Ex parte Newman*, 14 Wall. 166, 20 L. ed. 879—*Eslava v. Elgeaud*, 3 Ala. 365—*Ex parte Williamson*, 8 Ark. 428—*Howell v. Cooper*, 2 Colo. App. 533, 31 Pac. 523—*Towle v. State*, 3 Fla. 210—*People ex rel. Isaacson v. Pearson*, 3 Ill. 204, 33 Am. Dec. 445—*Jelley v. Roberts*, 50 Ind. 7—*State ex rel. Isaacson v. Civil Dist. Ct. Judge*, 34 La. Ann. 76—*Detroit Tug & Wrecking Co. v. Gartner*, 75 Mich. 378, 42 N. W. 968—*Territory v. Ortiz*, 1 N. M. 16—*Oneida Common Pleas Judges v. People*, 18 Wend. 95—*Page v. Clopton*, 30 Gratt. 419—*Richardson v. Farrar*, 88 Va. 773, 15 S. E. 117.

74. The Supreme Court will not by mandamus direct a judge what judgment to render; but will require only that he proceed to render judgment. *Re Hoyt*, 13 Pet. 279, 10: 161

Cited in *Holmes v. Jennison*, 14 Pet. 629 Appx. 10 L. ed. 628 Appx.—*United States ex*

rel. Crawford v. Addison, 22 How. 183, 16 L. ed. 305—*Ex parte Denver & R. G. R. Co.* 101 U. S. 720, 25 L. ed. 875—*Eslava v. Riggeaud*, 3 Ala. 365—*Stephenson v. Mansos*, 4 Ala. 320—*State ex rel. Walker v. Orphans' Ct. Judge*, 15 Ala. 742—*Ex parte Hendree*, 49 Ala. 361—*McMillen v. Smith*, 26 Ark. 614—*Towle v. State*, 3 Fla. 210—*Smyth v. Titcomb*, 31 Me. 280—*People ex rel. Brower v. Wayne County Ct. Judge*, 1 Mich. 361—*Detroit Tug & Wrecking Co. v. Gartner*, 75 Mich. 378, 42 N. W. 968—*Swan v. Gray*, 44 Miss. 397—*People ex rel. Robinson v. Superior Court*, Lockwood Rev. Cas. 354—*People ex rel. Doughty v. Dutchess Common Pleas Judges*, 20 Wend. 661—*Woodstock v. Gallup*, 28 Vt. 598—*White's Creek Turnp. Co. v. Marshall*, 2 Baxt. 122—*State v. Morris*, 86 Tex. 229, 24 S. W. 393—*Schintz v. Morris*, 13 Tex. Civ. App. 600, 36 S. W. 292—*Richardson v. Farrar*, 88 Va. 773, 15 S. E. 117.

75. A rule will not be granted to show cause why a mandamus should not issue for the purpose of ordering the judge to enter up judgment on a verdict, when the judgment is suspended for the purpose of considering a motion which had been made for a new trial. *Bradstreet v. Huntington*, 8 Pet. 588, 8: 1054

76. A writ of mandamus may issue to compel an inferior court to render judgment or enter a decree; but not unless it appears that the court refused to act in respect to a matter within its jurisdiction, and where it is the duty of the court to act in the premises. *Re Newman*, 14 Wall. 152, 20: 877

Cited in *Decatur v. Paulding*, 14 Pet. 608 Appx. 10 L. ed. 615 Appx.—*Holmes v. Jennison*, 14 Pet. 629, Appx. 10 L. ed. 628 Appx.

77. A writ of mandamus may lie to compel a court to enter judgment by default, where it erroneously declines to take jurisdiction of the case after sufficient service on the defendant, who does not appear, except specially to contest the jurisdiction. *Re Grossmayer*, 177 U. S. 48, 20 Sup. Ct. Rep. 535, 44: 665
Cited in *Re Pollitz*, 206 U. S. 331, 51 L. ed. 1084, 27 Sup. Ct. Rep. 729—*Re Connaway*, 178 U. S. 425, 44 L. ed. 1136, 20 Sup. Ct. Rep. 951.

Signing judgment.

Jurisdiction of Supreme Court, see Supreme Court of the United States, 67.

78. The district judge has no right to withhold his signature to a judgment when, in the exercise of his discretion, he does not set it aside, and may be compelled to sign it, by mandamus. The act of signing the judgment is a ministerial act. *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8: 949
Cited in *Grider v. Tally*, 77 Ala. 425, 54 Am. Rep. 63—*Asbridge's Succession*, 1 La. Ann. 208.

79. Mandamus will issue directing a judge of the district court to sign a judgment rendered by his predecessor, and to award execution thereon, unless he grants

a motion for a new trial. *Life & F. Ins. Co. v. Adams*, 8 Pet. 306, 8: 954
Life & F. Ins. Co. v. Wilson, 8 Pet. 291, 8: 949

Cited in Decatur v. Paulding, 14 Pet. 608 Appx. 10 L. ed. 614 Appx.—*Holmes v. Jennison*, 14 Pet. 629 Appx. 10 L. ed. 628 Appx.—*Holmes v. Jennison*, 14 Pet. 632 Appx. 10 L. ed. 630 Appx.—*Reeside v. Walker*, 11 How. 289, 13 L. ed. 700—*Re Pennsylvania Co.* 137 U. S. 452, 34 L. ed. 739, 11 Sup. Ct. Rep. 141—*United States ex rel. Redfield v. Windom*, 137 U. S. 644, 34 L. ed. 815, 11 Sup. Ct. Rep. 197—*Doggett v. Emerson*, 1 Woodb. & M. 7, Fed. Cas. No. 3,961—*Goddard v. Coffin*, 2 Ware, 393, Fed. Cas. No. 5,490—*Hough v. Western Transp. Co.* 1 Biss. 429, Fed. Cas. No. 6,724—*United States v. Garcia*, 1 Sawy. 388, Fed. Cas. No. 15,186—*Ex parte Thompson*, 52 Ala. 99—*People ex rel. Gesford v. Superior Court*, 114 Cal. 479, 46 Pac. 383—*Rhodes v. Public Works*, 10 Colo. App. 107, 49 Pac. 430—*State ex rel. Sanchez v. Call*, 36 Fla. 312, 18 So. 771—*State ex rel. Silver v. Kendall*, 15 Neb. 276, 18 N. W. 85—*Lloyd v. Brinck*, 33 Tex. 9—*Schintz v. Morris*, 13 Tex. Civ. App. 598, 35 S. W. 516.

Amending judgment.

80. The judgment of an inferior court upon a motion to amend its original judgment in a cause cannot be reviewed by mandamus. *Re Morgan*, 114 U. S. 174, 5 Sup. Ct. Rep. 825, 29: 135

81. The Supreme Court will not award a mandamus commanding the district judge to extend a judgment so as to cover money which became due to plaintiffs after judgment was entered, and also to require him to receive a confession of judgment against the defendants, by a party whom the district judge thought had not the legal power to confess it, and to award execution thereon. *Life & F. Ins. Co. v. Adams*, 9 Pet. 573, 9: 234

Vacation of judgment or decree.

Compelling Secretary of Interior to Vacate Decision, see *infra*, 153.
 See also *supra*, 33.

82. The United States Supreme Court cannot by mandamus, in a suit in which the amount involved is too small to come up to it by writ of error, compel the judge of the circuit court to set aside the judgment which he rendered. *Re Burdett*, 127 U. S. 771, 8 Sup. Ct. Rep. 1394, 32: 321
Cited in American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758.

82a. After denial of a motion to dismiss an appeal, a motion for a mandamus to vacate the decision of the court below from which the appeal was taken, will be denied. *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. 443, 17: 861

83. Mandamus does not lie to compel a lower court to open a judgment for the purpose of taxing costs, the court's denial of a motion to that effect being within its judicial discretion. *Re Many*, 14 How. 24, 14: 311

Cited in Ex parte Newman, 14 Wall. 166, 20 L. ed. 879—*Ex parte Denver & R. G. R. Co.*

101 U. S. 720, 25 L. ed. 875—*Hough v. Western Transp. Co.* 1 Biss. 429, Fed. Cas. No. 6,724—*Ex parte Thompson*, 52 Ala. 101—*State ex rel. King v. Second Judicial Dist. Court*, 25 Mont. 211, 64 Pac. 352—*Page v. Clopton*, 30 Gratt. 419—*Richardson v. Farrar*, 88 Va. 773, 15 S. E. 117—*Roberts v. Paul*, 50 W. Va. 530, 40 S. E. 470—*Fleshman v. McWhorter*, 54 W. Va. 165, 46 S. E. 116.

84. A judgment on a supersedeas bond, rendered without further evidence after dismissal of a writ of error, is not in excess of jurisdiction so as to make it subject to be vacated by mandamus. *Re Humes*, 149 U. S. 192, 13 Sup. Ct. Rep. 836, 37: 698

85. Mandamus will not be granted to set aside a judgment entered by default on an inquest finding a forfeiture of goods to the United States, against which an information had been filed for a violation of the revenue laws, since the application to set aside the default is addressed to the discretion of the court below. *Re Roberts*, 6 Pet. 216, 8: 375

Cited in Holmes v. Jennison, 14 Pet. 626, Appx. 10 L. ed. 626, Appx.—*Cape Fear Towing & Transp. Co. v. Pearsall*, 33 C. C. A. 163, 61 U. S. App. 521, 90 Fed. 437—*Towle v. State*, 3 Fla. 210—*People ex rel. Bristol v. Pearson*, 8 Ill. 204, 33 Am. Dec. 445—*Jelley v. Roberts*, 50 Ind. 7—*Page v. Clopton*, 30 Gratt. 419—*Richardson v. Farrar*, 88 Va. 773, 15 S. E. 117.

3. For Review or Control of Decisions.

Effect of Remedy by Appeal on Right to Mandamus, see *supra*, 26-36.

Directing Judgment, see *supra*, 72-77.

Mandamus to Compel Amendment, see *supra*, 80, 81.

Review of Decisions by Executive Officers, see *infra*, 126, 127.

Mandamus to Compel Allowance of Writ of Error, see *Appeal and Error*, 2650.

Mandamus to Compel Allowance of Appeal, see *Appeal and Error*, 2717-2719.

Scope of Review by Supreme Court, see *Supreme Court of the United States*, 73-75.

See also *supra*, 16, 35, 36, 40, 41, 56; *infra*, 98, 99; *Certiorari*, 31.

86. The Supreme Court of the United States cannot by writ of mandamus compel an inferior court below to decide a matter before it in a particular way, nor, through the instrumentality of that writ, review the judicial action of the court below had in the exercise of legitimate jurisdiction. *Re Parsons*, 150 U. S. 150, 14 Sup. Ct. Rep. 50, 37: 1034
Re Hawkins, 147 U. S. 486, 13 Sup. Ct. Rep. 512, 37: 251
Morrison v. District Court (Re Morrison) 147 U. S. 14, 13 Sup. Ct. Rep. 246, 37: 60

Cited in Re Haberman Mfg. Co. 147 U. S. 530, 37 L. ed. 267, 13 Sup. Ct. Rep. 527—*Re Hawkins*, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 512—*American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 386, 37 L. ed. 492, 13 Sup. Ct. Rep. 758

—*Virginia v. Paul*, 148 U. S. 124, 37 L. ed. 392, 13 Sup. Ct. Rep. 536—*Re Parsons*, 150 U. S. 156, 37 L. ed. 1037, 14 Sup. Ct. Rep. 50—*Re Rice*, 155 U. S. 403, 39 L. ed. 201, 15 Sup. Ct. Rep. 149—*Re Parsons*, 150 U. S. 156, 37 L. ed. 1037, 14 Sup. Ct. Rep. 50—*United States ex rel. Harless v. United States Ct. App. Judges*, 29 C. C. A. 81, 56 U. S. App. 33, 85 Fed. 180—*Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 111, 104 Fed. 655—*Robey v. Prince George's County*, 92 Md. 158, 48 Atl. 48.

87. The writ of mandamus cannot be used as a writ of error, to bring here for review the judgment of the circuit court, upon a plea to the jurisdiction filed in the suit. *Re Baltimore & O. R. Co.* 108 U. S. 566, 2 Sup. Ct. Rep. 876, 27: 812

88. The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction. The writ cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law. *Re Rice*, 155 U. S. 396, 15 Sup. Ct. Rep. 149, 39: 198 *Cited in Re Key*, 189 U. S. 85, 47 L. ed. 721, 23 Sup. Ct. Rep. 624—*United States ex rel. Harless v. United States Ct. App. Judges*, 29 C. C. A. 81, 56 U. S. App. 33, 85 Fed. 180—*Re Westervelt*, 39 C. C. A. 351, 98 Fed. 912—*Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 111, 104 Fed. 655.

89. Where notice has been given and hearing had, if jurisdiction exists the result cannot properly be interfered with by mandamus. *Re Rice*, 155 U. S. 396, 15 Sup. Ct. Rep. 149, 39: 198

90. A mandamus will not be issued by this court to the court below for the purpose of reversing its decision, and commanding it to issue a mandamus. The remedy, if any, is by writ of error to the court below to reverse the judgment there rendered. *Re De Groot*, 6 Wall. 497, 18: 887

91. A mandamus will not be issued by this court to the court below for the purpose of reversing its decision and commanding it to issue a mandamus, but the remedy, if any, is by writ of error to the court below to reverse the judgment. *Re De Groot*, 6 Wall. 497, 18: 887 *Cited in United States ex rel. Redfield v. Windom*, 137 U. S. 643, 34 L. ed. 814, 11 Sup. Ct. Rep. 197.

92. The decision by an inferior court upon any matter left open by the mandate and opinion of a higher court can be reviewed only upon a new appeal, and not by mandamus. *Re Union S. B. Co.* 178 U. S. 317, 20 Sup. Ct. Rep. 904, 44: 1084 *Cited in Murphy v. Utter*, 186 U. S. 99, 46 L. ed. 1074, 22 Sup. Ct. Rep. 776—*Erie R. Co. v. Erie v. W. Transp. Co.* 204 U. S. 224, 51 L. ed. 453, 27 Sup. Ct. Rep. 246—*The New York*, 47 C. C. A. 234, 108 Fed. 104—*Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 327—*People ex rel. Warren v. Carpenter*, 29 Colo. 371, 68 Pac. 221—*Utter v. Franklin*, 7 Ariz. 305, 64 Pac. 427.

93. Where an ordinary writ of habeas

corpus is issued by a district judge of the United States on the ground that the prisoner is in custody for an act done in pursuance of a law of the United States, the question whether good cause is shown for his discharge is to be judicially determined by the judge under U. S. Rev. Stat. §§ 751-753, U. S. Comp. Stat. 1901, p. 592, and his determination can be reviewed by appeal, but not by writ of mandamus. *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. Rep. 536, 37: 386 *Cited in Hudson v. Parker*, 156 U. S. 289, 39 L. ed. 428, 15 Sup. Ct. Rep. 450.

94. A motion for mandamus in the Supreme Court in a case where an order granting a motion to docket and dismiss a case had been vacated because it appeared that no appeal had been granted will not be considered, as the court had no jurisdiction of the case at the time of its dismissal. *United States v. Gomez*, 23 How. 326, 16: 552

4. To Reinstate Clerk.

95. Mandamus will not issue to compel a district judge to restore to his office a clerk of the district court, removed by the judge, although the clerk had fully and completely performed his duties; since the office is held at the will of either party. The clerk could resign the office if he chose to do so, and the court has a right to put an end to his term of office at its election. But if the judge is chargeable with any abuse of his power the Supreme Court can afford no redress. *Re Hennen*, 13 Pet. 230, 10: 138 *Cited in Re Yancey*, 28 Fed. 449—*People ex rel. Bristol v. Pearson*, 3 Ill. 204, 33 Am. Dec. 445—*Keenan v. Perry*, 24 Tex. 262.

5. To Reinstate Attorney.

96. Mandamus is the appropriate remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter. *Re Robinson*, 19 Wall. 505, 22: 205 *Distinguished in Re Orton*, 54 Wis. 380, 11 N. W. 584.

Cited in Virginia v. Rives (Ex parte Virginia) 100 U. S. 330, 25 L. ed. 673—*Ex parte Wall*, 107 U. S. 318, 27 L. ed. 572, 2 Sup. Ct. Rep. 569—*Re Neagle*, 5 L.R.A. 91, 14 Sawy. 267, 39 Fed. 850—*Re Adriaans*, 17 App. D. C. 51—*People ex rel. Hillel Lodge No. 72, I. O. B. B. v. Rose* 207 Ill. 376, 69 N. E. 762—*State v. Shumate*, 48 W. Va. 362, 37 S. E. 618.

97. Mandamus is the proper remedy to reinstate an attorney disbarred by an inferior court, when the case is outside the exercise of the discretion of the inferior court, and is one of irregularity, or against law, or of flagrant injustice, or without its jurisdiction. *Re Bradley*, 7 Wall. 364, 19: 214 *Cited in Ex parte Robinson*, 19 Wall. 513, 22 L. ed. 208—*Virginia v. Rives (Ex parte Virginia)* 100 U. S. 324, 25 L. ed. 671—*Ex parte Wall*, 107 U. S. 318, 27 L. ed. 572, 2 Sup. Ct. Rep. 569—*Re Washington*

& G. R. Co. 140 U. S. 95, 35 L. ed. 341, 11 Sup. Ct. Rep. 673—*Gaines v. Rugg* (Gaines v. Caldwell) 148 U. S. 243, 37 L. ed. 437, 13 Sup. Ct. Rep. 611—*Wood v. Strother*, 76 Cal. 549, 9 Am. St. Rep. 249, 18 Pac. 766—*Huron v. Campbell*, 3 S. D. 317, 53 N. W. 182—*United States ex rel. Wedderburn v. Bliss*, 12 App. D. C. 502—*State ex rel. Wolfe v. Kirke*, 12 Fla. 286, 95 Am. Dec. 314—*Walls v. Palmer*, 64 Ind. 496—*State ex rel. Thatcher v. Horner*, 16 Mo. App. 200—*State ex rel. Foerstel v. Higgins*, 76 Mo. App. 328—*State ex rel. Eaves v. Rickards*, 16 Mont. 158, 28 L.R.A. 302, 50 Am. St. Rep. 476, 40 F. 210—*State ex rel. Reynolds v. Graves*, 66 Neb. 23, 92 N. W. 144—*Delgado v. Chavez*, 5 N. M. 648, 25 Pac. 948—*State v. Shumate*, 48 W. Va. 362, 37 S. E. 618—*Re Orton*, 54 Wis. 380, 11 N. W. 584.

98. The decision of a territorial court, that a proceeding to remove an attorney did not require notice where the offense was committed in open court, being in the exercise of judicial authority, where the subject-matter was within their jurisdiction, cannot be revised and annulled by mandamus. *Re Secombe*, 19 How. 9, 15: 565

99. Although the power of a court to remove an attorney is not an arbitrary and despotic one, to be exercised at the pleasure of the court or from passion, prejudice, or personal hostility, but to be exercised by a sound and just judicial discretion,—where a decision is in its nature a judicial act, and within the scope of the jurisdiction and discretion of the court, mandamus will not issue to review it. *Re Secombe*, 19 How. 9, 15: 565

Cited in *Ex parte Bradley*, 7 Wall. 380, 19 L. ed. 220—*Ex parte Bradley*, 7 Wall. 377, 19 L. ed. 219—*Withers v. State*, 36 Ala. 261—*Ex parte Thompson*, 52 Ala. 101—*Beene v. State*, 22 Ark. 152—*Bradley v. Fisher*, 7 D. C. 53—*State ex rel. Weeks v. Gamble*, 13 Fla. 25—*Re Woolley*, 11 Bush, 99—*Re Day*, 181 Ill. 89, 50 L.R.A. 525, 54 N. E. 646—*State ex rel. Jones v. Laughlin*, 10 Mo. App. 2—*Mason County Supers v. Winturn*, 4 W. Va. 304.

d. To Public Officers, Boards, and Municipalities.

1. In General.

To Court Officer, see *supra*, II. c.

As Exercise of Original Jurisdiction, see *supra*, 8.

To whom Directed, see *infra*, III. b, 2.

Who may Maintain Proceeding, see *infra*, 213-215.

Nonexistence of Power to Compel Governor to Honor Requisition for Fugitive Criminal, see *Extradition*, 27.

Conclusiveness of Judgment against Successor in Office, see *Judgment*, 836.

To Compel Issuance of License, see *License*, 13.

Writ against Officer as Suit against State, see *States*, IX. c, 2.

State Writ to Federal Officer, see *States*, 76.

Against Federal Officer as Original Jurisdiction not Given to Supreme Court, see *Supreme Court of the United States*, 62, 63.

Editorial notes.

[To compel action of medical board, 20 L.R.A. 355.

To compel acceptance of office, 24 L.R.A. 492.

To enforce right of lowest bidder on contract. 26 L.R.A. 711.

To compel payment of salary to public officer whose title is disputed. 1 L.R.A. (N. S.) 588.]

Performance of official duty.

Dismissal of Appeal from Award of, see *Appeal and Error*, 3905.

Power of Courts in General to Control Action, see *Courts*, 228.

See also *supra*, 10-13, 24.

100. When a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance. *Noble v. Union River Logging R. Co.* 147 U. S. 165, 13 Sup. Ct. Rep. 271, 37: 123

Cited in *United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*American School of Magnetic Healing v. McAnulty*, 102 Fed. 566—*Sheriff v. Turner*, 119 Fed. 786—*United States ex rel. International Contracting Co. v. Lamont*, 2 App. D. C. 546—*Donaldson v. Wright*, 7 App. D. C. 59—*Roberts v. Bradfield*, 12 App. D. C. 458—*People ex rel. Weed-Parsons Printing Co. v. Palmer*, 14 Misc. 46, 35 N. Y. Supp. 222—*Segars v. Parrott*, 54 S. C. 42, 31 S. E. 677.

101. More cannot be required of a public officer by mandamus than the law has made it his duty to do. *Re Rowland*, 104 U. S. 604, 26: 861

Cited in *United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Re Vintschger*, 50 Fed. 461—*Grand County v. King*, 14 C. C. A. 432, 32 U. S. App. 1, 67 Fed. 209—*Re Comingore*, 96 Fed. 563—*Farmers' Nat. Bank v. Jones*, 105 Fed. 465.

102. Mandamus issued to enforce the performance of duty by public officer. *Badger v. United States ex rel. Bolles*, 93 U. S. 599, 23: 991

Cited in *People ex rel. German Ins. Co. v. Williams*, 145 Ill. 582, 24 L.R.A. 497, 36 Am. St. Rep. 514, 33 N. E. 849—*People ex rel. Raymond v. Chicago & A. R. Co.* 193 Ill. 367, 61 N. E. 1063.

103. Upon the supposition that a subscription by a county in aid of a railroad creates a legal obligation for its payment in bonds, the only remedy which the railroad company has against the county to compel the issuing and delivery of the bonds is by mandamus. *Smith v. Bourbon County*, 127 U. S. 105, 8 Sup. Ct. Rep. 1043, 32: 73

Acts without authority of law.See also *supra*, 103; *infra*, 189.

104. A mandamus will not be awarded to compel county officers to do any act which they are not authorized to do by the laws of the state from which they derive their powers. *Carroll County v. United States ex rel. Reynolds*, 18 Wall. 71, 21: 771
United States ex rel. Huidekoper v. County Court, 99 U. S. 582, 25: 331
United States ex rel. Johnston v. County Court (United States v. Clark County), 95 U. S. 769, 24: 545

Cited in United States v. County Court, 96 U. S. 217, 24 L. ed. 629—*Clews v. Lee County*, 2 Woods, 477, Fed. Cas. No. 2,892—*United States ex rel. Carhart v. Miller County*, 4 Dill. 235, Fed. Cas. No. 15,776—*Grand County v. King*, 14 C. C. A. 430, 32 U. S. App. 1, 67 Fed. 207—*Stryker v. Grand County*, 23 C. C. A. 293, 40 U. S. App. 583, 77 Fed. 574—*Cleveland v. United States*, 49 C. C. A. 385, 111 Fed. 343—*Kent v. United States*, 51 C. C. A. 191, 113 Fed. 234—*United States ex rel. Masslich v. Saunders*, 59 C. C. A. 398, 124 Fed. 128—*Vance v. Little Rock*, 30 Ark. 449—*Graham v. Parham*, 32 Ark. 683—*Chicot County v. Kruse*, 47 Ark. 85, 14 S. W. 469—*State v. Jacksonville*, 22 Fla. 27—*Clough v. Curtis*, 2 Idaho, 529, 22 Pac. 8—*Byrne v. East Carroll*, 45 La. Ann. 395, 12 So. 521—*Orr v. Quimby*, 54 N. H. 651—*Patton v. Williams*, 74 Mo. App. 455—*Miller v. Spartanburg*, 68 S. C. 33, 46 S. E. 539—*Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 400, 34 L.R.A. 843, 71 Am. St. Rep. 926, 45 Pac. 494.

105. After Congress has withdrawn the appropriation for refunding to states expenses incurred in raising volunteers during the late Rebellion, this court will not, by mandamus, order the Secretary to deliver a warrant to one of the states for the payment of such expenses. *Kentucky v. Boutwell*, 13 Wall. 526, 20: 631

106. Where the secretary of the Treasury was not asked to pay money until the time limited by the law had expired, a writ of mandamus to compel payment by him will not be issued. *Kentucky v. Boutwell*, 13 Wall. 526, 20: 631

Cited in United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Grand County v. King*, 14 C. C. A. 432, 32 U. S. App. 1, 67 Fed. 209—*Farmers' Nat. Bank v. Jones*, 105 Fed. 465—*Kuechler v. Wright*, 40 Tex. 632—*Lord v. Bates*, 48 S. C. 109, 26 S. E. 213.

107. Neither the circuit court of the United States nor the Supreme Court has power to compel the Secretary of the Treasury to pay the salary of a judge of a territory, after his removal. *United States ex rel. Goodrich v. Guthrie*, 17 How. 284, 15: 102

Cited in Parsons v. United States, 167 U. S. 338, 42 L. ed. 189, 17 Sup. Ct. Rep. 880—*District Attorney's Case*, 7 Am. L. Reg. N. S. 799, Fed. Cas. No. 3,924—*United States ex rel. Bigler v. Avery*, Deady, 208, Fed. Cas. No. 14,481—*State ex rel. Weeks v. Gamble*, 13 Fla. 26—*Kuechler v. Wright*, 40 Tex.

631—*Lynde v. Dibble*, 19 Wash. 330, 53 Pac. 370.

108. Mandamus to compel the Secretary of State to pay an award in favor of a citizen of the United States against Mexico cannot be awarded while the President is withholding payment pending an investigation of fraud in the claim. *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 11 Sup. Ct. Rep. 607, 35: 183

109. Mandamus will not lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do. *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25, 28: 656
Cited in State ex rel. Livingstone v. Williams, 45 Or. 338, 67 L.R.A. 174, 77 Pac. 965.

Duty dependent upon other action.See also *infra*, 153.

110. The execution by a public officer of a contract cannot be compelled by mandamus, when the other party has not executed a bond which is required by statute before the contract shall be binding. *Nugent v. Arizona Improv. Co.* 173 U. S. 338, 19 Sup. Ct. Rep. 461, 43: 721

111. A mandamus will not be issued to compel a state comptroller to issue his warrant for the payment of costs, until they have been taxed or if the bill contains costs for which the state is not liable. *United States ex rel. Phillips v. Gaines*, 131 U. S. clxix, Appx. and 25: 733

112. A court, by means of writs of mandamus operating upon the officers of legislative bodies, cannot make up the records of the proceedings of those bodies, or cause alterations to be made in such records as prepared by the officer whose duty it was to prepare them. *Clough v. Curtis*, 134 U. S. 361, 10 Sup. Ct. Rep. 573, 33: 945
Cited in Lyons v. Woods, 153 U. S. 669, 38 L. ed. 861, 14 Sup. Ct. Rep. 959—*State ex rel. Brickman v. Wilson*, 123 Ala. 287, 45 L.R.A. 780, 26 So. 482—*Re Gunn*, 19 L.R.A. 524, 50 Kan. 171, 32 Pac. 470.

Duty conditional.See also *supra*, 105.

113. A writ of mandamus will not issue to compel the Secretary of the Treasury to deliver a treasury draft for labor and material in constructing and repairing government buildings, where the draft was prepared for delivery upon condition that a part thereof should be applied to the claims of laborers and materialmen, and the petitioner refuses to perform that condition, and where he has incurred penalties for delays which would not have been remitted except for his agreement to said condition. *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 11 Sup. Ct. Rep. 197, 34: 811

Waiver of performance.

114. Mandamus to compel the Secretary of War to enter into a contract for certain work cannot be granted, where the relator has voluntarily entered into a subsequent

contract to do work at a lower price and on different terms. *United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 303, 15 Sup. Ct. Rep. 97, 39: 160

2. Ministerial Acts.

Mandamus to Judge, see *supra*, 78.

To Compel Issuance of License after Valid Tender, see *Payment*, 30.

See also *infra*, 136, 140, 143, 155, 157, 159.

115. The performance by public officers of ministerial acts prescribed by law may be compelled by mandamus. *Marbury v. Madison*, 1 Cranch, 137, 2: 60

Cited in Ex parte Crane, 5 Pet. 200. 8 L. ed. 96—*Mississippi v. Johnson*, 4 Wall. 498, 18 L. ed. 441—*United States v. Schurz*, 102 U. S. 395, 26 L. ed. 171—*United States ex rel. Redfield v. Windom*, 137 U. S. 643, 34 L. ed. 814, 11 Sup. Ct. Rep. 197—*Noble v. Union River Logging R. Co.* 147 U. S. 171, 37 L. ed. 125, 13 Sup. Ct. Rep. 271—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Choctaw Nation v. United States*, 21 Ct. Cl. 113—*Hoover v. McChesney*, 81 Fed. 482—*Ex parte Floyd*, 40 Ala. 120—*Pacheco v. Beck*, 52 Cal. 10—*Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 169, 15 L.R.A. 374, 31 Am. St. Rep. 284, 28 Pac. 1125—*People ex rel. Alexander v. District Court*, 29 Colo. 236, 68 Pac. 242—*Howell v. Cooper*, 2 Colo. App. 531, 31 Pac. 523—*State Land Comrs. v. Carpenter*, 10 Colo. App. 438, 66 Pac. 165—*Treat v. Middletown*, 8 Conn. 246—*State ex rel. Bisbee v. Drew*, 17 Fla. 86—*United States ex rel. White v. Bayard*, 5 Mackey, 434—*United States ex rel. Redfield v. Windom*, 8 Mackey, 60—*United States ex rel. West v. Hitchcock*, 19 App. D. C. 342—*United States ex rel. Holzendorf v. Hay*, 20 App. D. C. 581—*State ex rel. Fleming v. Crawford*, 28 Fla. 476, 14 L.R.A. 256, 10 So. 118—*Burkhart v. Reed*, 2 Idaho, 518, 22 Pac. 1—*People ex rel. Bristol v. Pearson*, 3 Ill. 204, 33 Am. Dec. 445—*People ex rel. Hubbard v. Anthony*, 129 Ill. 223, 21 N. E. 780—*Manor v. State*, 149 Ind. 318, 49 N. E. 160—*McCready v. Sexton*, 29 Iowa, 381, 4 Am. Rep. 214—*Martin v. Ingham*, 38 Kan. 653, 17 Pac. 162—*Page v. Hardin*, 8 B. Mon. 652—*Whiting v. Butler*, 29 Mich. 139—*Swann v. Buck*, 40 Miss. 290—*Fisk v. Cuthbert*, 2 Mont. 605—*State ex rel. Rotwitt v. Hickman*, 9 Mont. 377, 8 L.R.A. 405, 23 Pac. 740—*State ex rel. Robert Mitchell Furniture Co. v. Toole*, 26 Mont. 28, 55 L.R.A. 647, 91 Am. St. Rep. 388, 66 Pac. 496—*Cotten v. Ellis*, 52 N. C. (7 Jones, L.) 550—*Granville County Bd. of Edu. v. State Bd. of Edu.* 106 N. C. 83, 10 S. E. 1002—*Ducker v. Venable*, 126 N. C. 449, 35 S. E. 818—*White v. Ayer*, 126 N. C. 609, 36 S. E. 132—*State ex rel. Shaw v. Ware*, 13 Or. 384, 10 Pac. 885—*Philadelphia v. Bickley*, 2 Sadler (Pa.) 216, 18 W. N. C. 653, 3 Atl. 586—*Bickley v. Philadelphia*, 17 Phila. 381—*Philadelphia v. Bickley*, 18 W. N. C. 54, 3 Atl. 586—*State ex rel. Atty. Gen. v. State Bank*, 1 S. C. N. S. 65—*Hammarskold v. Bull*, 9 Rich. L. 488—*Kuechler v. Wright*, 40 Tex. 633—*Kuechler v. Wright*, 40 Tex. 650—*Wise v. Bigger*, 79 Va. 273—*Le Pointe v. O'Malley*, 46 Wis. 59, 50 N. W. 521—*State ex rel. Lamb v. Cunningham*, 83 Wis. 136, 17 L.R.A. 166, 25 Am. St. Rep. 27, 53 N. W. 35—*State ex rel. Wisconsin Teleph.*

Co. v. Janesville Street R. Co. 87 Wis. 79, 22 L.R.A. 763, 41 Am. St. Rep. 23, 57 N. W. 970.

116. Mandamus will only lie to enforce a ministerial duty, as contradistinguished from a duty which is merely discretionary, which exists at the time the application is made. *United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 303, 15 Sup. Ct. Rep. 97, 39: 160
Cited in Grand County v. King, 14 C. C. A. 431, 32 U. S. App. 1, 67 Fed. 209—*Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 114, 104 Fed. 658—*Farmers' Nat. Bank v. Jones*, 105 Fed. 465—*United States ex rel. Miles Planting & Mfg. Co. v. Carlisle*, 5 App. D. C. 142—*United States ex rel. Kerr v. Ross*, 5 App. D. C. 255—*Lord v. Bates*, 48 S. C. 109, 26 S. E. 213.

117. When executive officers refuse to act at all, where the law requires them to act, or when they refuse to perform a mere ministerial duty, a mandamus lies to compel them to act or to perform such ministerial duty. *United States ex rel. Miller v. Raum*, 135 U. S. 200, 10 Sup. Ct. Rep. 820, 34: 105
United States ex rel. Boynton v. Blaine, 139 U. S. 306, 11 Sup. Ct. Rep. 607, 35: 183
United States ex rel. Redfield v. Windom, 137 U. S. 636, 11 Sup. Ct. Rep. 197, 34: 811

Cited in United States ex rel. Boynton v. Blaine, 139 U. S. 319, 35 L. ed. 188, 11 Sup. Ct. Rep. 607—*United States v. Goldenberg*, 168 U. S. 101, 42 L. ed. 395, 18 Sup. Ct. Rep. 3—*Keim v. United States*, 177 U. S. 293, 44 L. ed. 775, 20 Sup. Ct. Rep. 574—*Johnston v. United States*, 37 Ct. Cl. 326—*McKay v. United States*, 27 Ct. Cl. 434—*Redfield v. United States*, 27 Ct. Cl. 400—*Enterprise Sav. Asso. v. Zumstein*, 64 Fed. 840—*Enterprise Sav. Asso. v. Zumstein*, 15 C. C. A. 159, 37 U. S. App. 71, 67 Fed. 1007—*Hoover v. McChesney*, 81 Fed. 483—*Dudley v. James*, 83 Fed. 349—*Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 114, 104 Fed. 658—*American Casualty Ins. & Secur. Co. v. Fyler*, 60 Conn. 459, 25 Am. St. Rep. 337, 22 Atl. 494—*United States ex rel. International Contracting Co. v. Lamont*, 2 App. D. C. 546—*Seymour v. United States*, 2 App. D. C. 256—*State ex rel. Fleming v. Crawford*, 28 Fla. 477, 14 L.R.A. 256, 10 S. E. 118—*Larcom v. Olin*, 160 Mass. 110, 35 N. E. 118—*Atty. Gen. v. Taggart*, 66 N. H. 371, 25 L.R.A. 617, 29 Atl. 1027—*State ex rel. Gericke v. Ahnapee*, 99 Wis. 326, 74 N. W. 783.

118. A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by mandamus, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist and imposed by law. *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 9: 1181

Cited in Noble v. Union River Logging R. Co. 147 U. S. 171, 37 L. ed. 125, 13 Sup. Ct. Rep. 271—*Lane v. Anderson*, 67 Fed. 566—*Bright v. Farmers' Highline Canal & R. Co.* 3 Colo. App. 174, 32 Pac. 433—*State ex rel. Chemical Nat. Bank v. School Dist. No.*

9, 30 Neb. 527, 27 Am. St. Rep. 420, 46 N. W. 613.

119. When executive officers of the government refuse to act in a case at all, or when by special statute or otherwise a mere ministerial duty is imposed upon them,—that is, a service which they are bound to perform without further question,—then, if they refuse, a mandamus may be issued to compel them. *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. Rep. 12, 32: 354

Cited in United States ex rel. Redfield v. Windom, 137 U. S. 643, 34 L. ed. 814, 11 Sup. Ct. Rep. 197—*United States ex rel. Boynton v. Blaine*, 139 U. S. 319, 35 L. ed. 188, 11 Sup. Ct. Rep. 607—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Roberts v. United States*, 176 U. S. 230, 44 L. ed. 446, 20 Sup. Ct. Rep. 376—*Keim v. United States*, 177 U. S. 293, 44 L. ed. 775, 20 Sup. Ct. Rep. 574—*D. M. Ferry & Co. v. United States*, 29 C. C. A. 351, 54 U. S. App. 705, 85 Fed. 556—*Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 111, 104 Fed. 656—*American Casualty Ins. & Secur. Co. v. Fyler*, 60 Conn. 459, 25 Am. St. Rep. 337, 22 Atl. 494—*United States ex rel. International Contracting Co. v. Lamont*, 2 App. D. C. 546—*Seymour v. United States*, 2 App. D. C. 246—*Lochren v. United States*, 8 App. D. C. 505—*Roberts v. United States*, 13 App. D. C. 46—*United States ex rel. Mutual Dist. Messenger Co. v. Wight*, 15 App. D. C. 469—*United States ex rel. West v. Hitchcock*, 19 App. D. C. 344—*Payne v. United States*, 20 App. D. C. 600—*State ex rel. Hope v. Board of Liquidation*, 42 La. Ann. 658, 7 So. 706—*Atty. Gen. v. Taggart*, 66 N. H. 371, 25 L.R.A. 617, 29 Atl. 1027—*People ex rel. Broderick v. Morton*, 156 N. Y. 153, 41 L.R.A. 237, 66 Am. St. Rep. 547, 50 N. E. 791—*State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 503, 15 L.R.A. 574, 51 N. W. 724.

120. A mandamus will not lie to compel the doing of a ministerial act connected with the liabilities of the government, unless the government is clearly liable and the officer has refused to act. *Reeside v. Walker*, 11 How. 272, 13: 693

Cited in The Secretary v. McGarrahan (Cox v. United States) 9 Wall. 312, 19 L. ed. 583—*United States ex rel. Redfield v. Windom*, 137 U. S. 643, 34 L. ed. 814, 11 Sup. Ct. Rep. 197—*Noble v. Union River Logging B. Co.* 147 U. S. 171, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Brown v. United States*, 6 Ct. Cl. 186—*Chesbro v. Babcock*, 59 Conn. 218, 22 Atl. 145—*United States ex rel. Work v. Boutwell*, 3 MacArth. 176—*Mississippi v. Durham*, 4 Mackey, 239—*People ex rel. Belden v. Contracting Board*, 27 N. Y. 381—*Brown v. Turner*, 70 N. C. 106—*Kuechler v. Wright*, 40 Tex. 672.

121. In Maryland a writ of mandamus might be issued to an executive officer, commanding him to perform a ministerial act required of him by the laws. *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 9: 1181

Particular duties imposed by law.

See also *supra*, 105, 106.

122. Mandamus is the proper remedy to compel the Secretary of State to deliver a commission to an appointee of the President, where the same has been signed by the President, and the law requires the seal of the United States to be attached thereto by the Secretary of State. *Marbury v. Madison*, 1 Cranch, 137, 2: 60
Distinguished in Parker v. State, 133 Ind. 185, 18 L.R.A. 571, 32 N. E. 836.

Cited in United States ex rel. Stokes v. Kendall, 5 Cranch, C. C. 175, Fed. Cas. No. 15,517—*Ex parte Crane*, 5 Pet. 210, 8 L. ed. 100—*Cunningham v. Macon & B. R. Co.* 109 U. S. 453, 27 L. ed. 994, 3 Sup. Ct. Rep. 292—*Brown v. United States*, 6 Ct. Cl. 186—*Barber Asphalt Paving Co. v. Morris*, 67 L. R.A. 769, 66 C. C. A. 65, 132 Fed. 935—*United States v. Boutwell*, 8 MacArth. 177—*People ex rel. Ewing v. Forquer, Breese (Ill.)* 83—*Harris v. State*, 2 Ga. 292—*French v. Cowan*, 79 Me. 438, 10 Atl. 335—*Harwood v. Marshall*, 9 Md. 98—*Brown v. Bragunier*, 79 Md. 236, 29 Atl. 7—*State ex rel. Priddy v. Gibson*, 187 Mo. 555, 86 S. W. 177—*Whitehead v. Gray*, 12 N. J. L. 40—*State v. Holliday*, 8 N. J. L. 206—*Re Weldenfeld*, 84 App. Div. 238, 82 N. Y. Supp. 634—*Bledsoe v. International E. Co.* 40 Tex. 575.

123. Where the state law provides for auditing town charges, including judgments, and for the levy of taxes to pay them, auditing a judgment is a mere ministerial act, which can be coerced by mandamus. *Lower v. United States ex rel. Marcy*, 91 U. S. 536, 23: 420

Cited in United States ex rel. Etta L. Ins. Co. v. Brooklyn, 10 Biss. 467, 8 Fed. 474—*Ohio & M. R. Co. v. People*, 121 Ill. 491, 13 N. E. 236—*Purcell v. Bear Creek*, 138 Ill. 530, 28 N. E. 1085—*People ex rel. Raymond v. Chicago & A. R. Co.* 193 Ill. 367, 61 N. E. 1063—*Board of Auditors v. People*, 88 Ill. App. 242—*Delgado v. Chavez*, 5 N. M. 648, 25 Pac. 948—*People ex rel. Benedict v. Oneida County*, 24 Hun, 421—*People ex rel. Sherrill v. Guggenheimer*, 28 Misc. 744, 59 N. Y. Supp. 913—*People ex rel. Reynolds v. Buffalo*, 140 N. Y. 307, 37 Am. St. Rep. 563, 35 N. E. 485.

124. The duty of the Treasurer of the United States to pay interest on audit certificates pursuant to the act of Congress of August 13, 1894, is plain, imperative, and entirely ministerial, and therefore may be enforced by mandamus, although it requires in some degree a construction of a statute by the officer. *Roberts v. United States ex rel. Valentine*, 176 U. S. 221, 20 Sup. Ct. Rep. 376, 44: 443

Cited in United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 325, 47 L. ed. 1078, 23 Sup. Ct. Rep. 698—*MacFarland v. United States*, 18 App. D. C. 564—*United States ex rel. Phillips v. Hitchcock*, 19 App. D. C. 243—*United States ex rel. West v. Hitchcock*, 19 App. D. C. 342—*Payne v. United States*, 20 App. D. C. 600—*United States ex rel. Rodriguez v. Bowyer*, 25 App. D. C. 123.

125. Mandamus will not issue to compel the Secretary of the Treasury to credit on the books of the Treasury and pay a sum

adjudged to a defendant in a suit where the United States were plaintiffs. Such a judgment for a set-off against the United States is not obligatory, and it would not be the duty of the Secretary to pay it, at least where there was no appropriation for the purpose. *Reeside v. Walker*, 11 How. 272, 13: 693

Cited in Van Antwerp v. Hulburd, 7 Blatchf. 433, Fed. Cas. No. 16,826—*Grand County v. King*, 14 C. C. A. 432, 32 U. S. App. 1, 67 Fed. 209—*Farmers' Nat. Bank v. Jones*, 105 Fed. 465—*Western & A. R. Co. v. State (Ga.)* 14 L.R.A. 448—*State ex rel. Journal Pub. Co. v. Kenney*, 9 Mont. 395, 24 Pac. 96—*Lord v. Bates*, 48 S. C. 110, 26 S. E. 213.

126. Mandamus lies to compel the Commissioner of Patents to require the primary examiner to forward to the board of examiners-in-chief the appeal to which an inventor is entitled, under U. S. Rev. Stat. § 4909, U. S. Comp. Stat. 1901, p. 3390, upon a second rejection of any of his claims by the primary examiner, where such examiner has twice denied his right to unite in one application process and apparatus claims which are essentially the same invention. *United States ex rel. Steinmetz v. Allen*, 192 U. S. 543, 24 Sup. Ct. Rep. 416, 48: 555

127. A mandamus cannot be used to review the decision of the Commissioner of Patents, but it may be issued, after he has decided that the applicants are entitled to a patent, to compel him to prepare it, to lay it before the Secretary for his signature, and to countersign it,—which duties are all purely ministerial. *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25, 28: 556

Cited in United States ex rel. Dunlap v. Black, 128 U. S. 48, 32 L. ed. 357, 9 Sup. Ct. Rep. 12—*United States ex rel. Redfield v. Windom*, 137 U. S. 643, 34 L. ed. 814, 11 Sup. Ct. Rep. 197—*Noble v. Union River Logging R. Co.* 147 U. S. 171, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Kimberlin v. Commission*, 44 C. C. A. 113, 104 Fed. 658—*Seymour v. United States*, 2 App. D. C. 256—*Ross v. United States*, 7 App. D. C. 10—*United States ex rel. Bernardin v. Seymour*, 10 App. D. C. 303—*United States ex rel. West v. Hitchcock*, 19 App. D. C. 344—*Payne v. United States*, 20 App. D. C. 597—*State ex rel. Fleming v. Crawford*, 28 Fla. 476, 14 L.R.A. 256, 10 So. 118—*McDaid v. Territory*, 1 Okla. 98, 30 Pac. 438.

128. The circuit court of the District of Columbia has power to order a mandamus directing the Postmaster General to allow, on contracts for carrying the mail, certain credits allowed by his predecessor, but which he has stricken out, where Congress has passed an act directing the Solicitor of the Treasury to adjust the claims, which he has done, but the Postmaster General has refused to comply with his directions. The Postmaster General is vested with no discretion or control over the decisions of the

Solicitor. *Kendall v. United States*, 12 Pet. 524, 9: 1181

Distinguished in Chorpenninz v. United States, 11 Ct. Cl. 628.

Cited in Re Hall, 6 D. C. ¶3—*People ex rel. Ryan v. Green*, 58 N. Y. 300—*McDaid v. Territory*, 1 Okla. 97, 30 Pac. 438—*Clay v. Ballard*, 87 Va. 789, 13 S. E. 262.

129. A mandamus directing the Postmaster General to credit contractors engaged in the transportation of mail with a certain sum awarded in their favor by the Solicitor of the Treasury under the direction of Congress, does not seek to direct or control the Postmaster General in the discharge of any official duty, but to enforce the performance of a mere ministerial act, which neither he nor the President of the United States had any authority to deny or control. *Kendall v. United States*, 12 Pet. 524, 9: 1181

130. Where the relator obtained a judgment against a city, founded on contracts, and thereafter made a compromise with the city, by which it was, in part, provided that the balance of the judgment, not otherwise provided for, should be funded under the provisions of a statute, and, although the city made no objection to the performance of the contract, the board of liquidation refused to issue the bonds,—Held, on a review of the constitutional and legislative provisions, that the relator was entitled to a mandamus compelling the issue of the bonds. *Board of Liquidation v. United States ex rel. Hart (New Orleans Board of Liquidation v. Hart)* 118 U. S. 136, 6 Sup. Ct. Rep. 995, 30: 65

Distinguished in United States v. Board of Liquidation, 20 C. C. A. 625, 41 U. S. App. 414, 74 Fed. 492.

Cited in United States ex rel. Siegel v. Board of Liquidation, 73 Fed. 772.

131. Mandamus may issue to compel a clerk of a county to discharge his duties as clerk, and to obey the commands, and to record the proceedings, of county commissioners *de facto* and to forbid him to assume to determine any contest between rival commissioners; it is a question of fact to be determined by the court hearing the application for the mandamus, whether the petitioners, rather than their contestants, are the commissioners *de facto*. *Delgado v. Chavez (Re Delgado)* 140 U. S. 586, 11 Sup. Ct. Rep. 874, 35: 578

Cited in State ex rel. Mercer v. Sullivan, 83 Wis. 419, 53 N. W. 677.

Compliance with decision of superior officer.

See also *supra*, 109.

132. When a subordinate officer is overruled by his superior having appellate jurisdiction over him, his duty to obey the decision of such superior is a ministerial duty, which he can be compelled by mandamus to perform. *United States ex rel. Miller v. Raum*, 135 U. S. 200, 10 Sup. Ct. Rep. 820, 34: 105

133. If the Commissioner of Pensions refuses to carry out the decision of the Secre-

tary of the Interior,—his superior officer,—he may be required to show cause why mandamus should not issue; for the reason that, so far as respects the matter decided, there is no discretion or exercise of judgment left. *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. Rep. 12,

32: 354

Cited in United States ex rel. Miller v. Raum, 135 U. S. 202, 34 L. ed. 106, 10 Sup. Ct. Rep. 820—*United States v. Lynch*, 137 U. S. 296, 34 L. ed. 702, 11 Sup. Ct. Rep. 114—*Knight v. United Land Assn.* 142 U. S. 182, 35 L. ed. 981, 12 Sup. Ct. Rep. 258—*Noble v. Union River Logging R. Co.* 147 U. S. 171, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*Enterprise Sav. Assn. v. Zumstein*, 64 Fed. 840—*Enterprise Sav. Assn. v. Zumstein*, 15 C. C. A. 159, 37 U. S. App. 71, 67 Fed. 1007—*Hoover v. McChesney*, 81 Fed. 432—*Dudley v. James*, 83 Fed. 349—*American Casualty Ins. & Secur. Co. v. Fyler*, 60 Conn. 459, 25 Am. St. Rep. 337, 22 Atl. 494—*United States ex rel. Phillips v. Hitchcock*, 19 App. D. C. 242—*Bockfinger v. Foster*, 10 Okla. 502, 62 Pac. 790—*State ex rel. Gericke v. Ahnapee*, 99 Wis. 326, 74 N. W. 783.

B. Matters of Discretion.

Mandamus to Court or Court Officers, see supra. 50-58.

See also supra, 24, 25, 116; infra, 155-157.

134. The acts of a public officer which are discretionary are not examinable by mandamus. *Narbury v. Madison*, 1 Cranch, 137,

Cited in Ex parte Crane, 5 Pet. 207, 8 L. ed. 99—*United States v. Arredondo*, 6 Pet. 729, 8 L. ed. 561—*Decatur v. Paulding*, 14 Pet. 608 Appx. 10 L. ed. 615, Appx.—*Re Kalne*, 14 How. 128, 14 L. ed. 855—*United States v. California & O. Land Co.* 148 U. S. 44, 37 L. ed. 360, 13 Sup. Ct. Rep. 458—*McElrath v. McIntosh*, 11 Month. L. Rep. 410, Fed. Cas. No. 8,781—*Ex parte Reeside*, 11 Month. L. Rep. 452, Fed. Cas. No. 11,656—*United States v. Watkins*, 3 Cranch, C. C. 589, Fed. Cas. No. 16,649—*Enterprise Sav. Assn. v. Zumstein*, 64 Fed. 840—*Lane v. Anderson*, 67 Fed. 566—*Enterprise Sav. Assn. v. Zumstein*, 15 C. C. A. 159, 37 U. S. App. 71, 67 Fed. 1007—*Taylor v. Kercheval*, 82 Fed. 499—*Dudley v. James*, 83 Fed. 349—*Kimberlin v. Commission*, 44 C. C. A. 111, 104 Fed. 655—*Bonbright v. Schoettler*, 1 L.R.A.(N.S.) 1094, 64 C. C. A. 216, 127 Fed. 324—*Ryder v. Innerarity*, 4 Stew. & P. (Ala.) 30—*Ex parte Harris*, 52 Ala. 90, 23 Am. Rep. 559—*Ex parte Screws*, 49 Ala. 66—*Insane Asylum v. Wolfy*, 3 Ariz. 133, 8 L.R.A. 189, 22 Pac. 383—*Hawkins v. The Governor*, 1 Ark. 584, 33 Am. Dec. 346—*Borden v. State*, 11 Ark. 548, 54 Am. Dec. 217—*Seymour v. United States*, 2 App. D. C. 245—*United States ex rel. Brown v. Root*, 18 App. D. C. 242—*United States v. Boutwell*, 3 MacArth, 177—*State ex rel. Low v. Towns*, 8 Ga. 369—*Jelley v. Roberts*, 50 Ind. 7—*Farrelly v. Cole*, 60 Kan. 378, 44 L.R.A. 471, 56 Pac. 492—*State ex rel. McNery v. Nicholls*, 42 La. Ann. 224, 7 So. 738—*Re Dennet*, 32 Me. 511, 54 Am. Dec. 602—*Miles v. Bradford*, 22 Md. 184, 85 Am. Dec. 643—*State ex rel. North & South R. Co. v. Meier*, 143 Mo. 446, 45 S. W. 306—*People ex rel. Tennant v. Parker*, 3 Neb. U. S. Dig.—246

429, 19 Am. Rep. 634—*State ex rel. Wright v. Savage*, 64 Neb. 696, 90 N. W. 898—*People ex rel. Broderick v. Morton*, 156 N. Y. 141, 41 L.R.A. 233, 68 Am. St. Rep. 547, 50 N. E. 791—*Brown v. Turner*, 70 N. C. 106—*State ex rel. Taylor v. Lord*, 28 Or. 525, 31 L.R.A. 480, 43 Pac. 471—*Re Beck*, 7 Pa. Dist. R. 633—*Re Legislative Adjournment*, 18 R. I. 831, 22 L.R.A. 720, 27 Atl. 324—*Lamb v. Taylor*, 1 Va. Dec. 571—*Burch v. Hardwicke*, 23 Gratt. 60—*Druecker v. Salomon*, 21 Wis. 629, 94 Am. Dec. 571—*State ex rel. Kane v. Larrabee*, 3 Pinney (Wis.) 168.

135. An officer is not subject to the control of the courts in the exercise of the discretion which the law reposes in him as a part of his official functions. *Decatur v. Paulding*, 14 Pet. 497,

10: 559

United States ex rel. Goodrich v. Guthrie, 17 How. 284,

15: 102

United States ex rel. Carrick v. Lamar (*Carrick v. Lamar*) 116 U. S. 423, 6 Sup. Ct. Rep. 424,

29: 677

United States ex rel. McConnell v. Edmunds (*United States v. The Commissioner*) 5 Wall. 563,

18: 692

Cited in Gaines v. Thompson, 7 Wall. 352, 19 L. ed. 65—*The Secretary v. McGarrahan* (*Cox v. United States*) 9 Wall. 312, 19 L. ed. 583—*Carrick v. Lamar* (*United States ex rel. Carrick v. Lamar*) 116 U. S. 426, 29 L. ed. 678, 6 Sup. Ct. Rep. 424—*Noble v. Union River Logging R. Co.* 147 U. S. 171, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Hough v. Western Transp. Co.* 1 Bliss. 429, Fed. Cas. No. 6,724—*Van Antwerp v. Hulburd*, 7 Blatchf. 433, Fed. Cas. No. 16,826—*Brown v. United States*, 6 Ct. Cl. 186—*United States ex rel. Seeger v. Pearson*, 32 Fed. 310—*Ruhm v. United States*, 66 Fed. 536—*Kimberlin v. Commission*, 44 C. C. A. 113, 104 Fed. 658—*Farmers' Independent Ditch Co. v. Maxwell*, 4 Colo. App. 480, 36 Pac. 556—*Hoover v. People*, 17 Colo. App. 392, 68 Pac. 679—*State ex rel. Dixon v. Internal Improv. Trustees Fund*, 20 Fla. 405—*Highway Comrs. v. People*, 66 Ill. 343—*Ohio & M. R. Co. v. People*, 120 Ill. 205, 11 N. E. 347—*State ex rel. Lloyd v. Rotwitt*, 15 Mont. 45, 37 Pac. 845—*Hart v. Folsom*, 70 N. H. 217, 47 Atl. 603—*Ham v. Toledo, W. & W. R. Co.* 29 Ohio St. 181—*Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 341—*Bledsoe v. International R. Co.* 40 Tex. 564—*Kuechler v. Wright*, 40 Tex. 632—*Thurston v. Hudgins*, 93 Va. 784, 20 S. E. 966.

136. A mandamus to a public officer can issue only when the act required to be done is merely ministerial. It cannot issue in a case where discretion and judgment are to be exercised by the officer. *United States ex rel. Goodrich v. Guthrie*, 17 How. 284,

15: 102

United States ex rel. Tucker v. Seaman, 17 How. 225.

15: 226

Cited in United States ex rel. Tucker v. Seaman, 17 How. 230, 15 L. ed. 227—*Ex parte De Groot*, 6 Wall. 497, 18 L. ed. 888—*Gaines v. Thompson*, 7 Wall. 352, 19 L. ed. 65—*The Secretary v. McGarrahan* (*Cox v. United States*) 9 Wall. 312, 19 L. ed. 583—*Carrick v. Lamar* (*United States ex rel. Carrick v. Lamar*) 116 U. S. 426, 29 L. ed. 678, 6 Sup. Ct. Rep. 424—*United States ex*

rel. *Dunlap v. Black*, 128 U. S. 48, 32 L. ed. 357, 9 Sup. Ct. Rep. 12—*United States ex rel. Redfield v. Windom*, 137 U. S. 643, 34 L. ed. 814, 11 Sup. Ct. Rep. 197—*McAllister v. United States*, 141 U. S. 193, 35 L. ed. 699, 11 Sup. Ct. Rep. 949—*Noble v. Union River Logging R. Co.* 147 U. S. 171, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Brown v. United States*, 6 Ct. Cl. 186—*Hough v. Western Transp. Co.* 1 Biss. 429, Fed. Cas. No. 6,724—*Van Antwerp v. Hulburd*, 7 Blatchf. 433, Fed. Cas. No. 16,826—*Chaffraix v. Board of Liquidation*, 11 Fed. 645—*Weil v. Calhoun*, 25 Fed. 875—*Re Yancey*, 28 Fed. 449—*Enterprise Sav. Assn. v. Zumstein*, 64 Fed. 840—*Grand County v. King*, 14 C. C. A. 431, 32 U. S. App. 1, 67 Fed. 209—*Ex parte Thompson*, 52 Ala. 100—*Taylor v. Kolb*, 100 Ala. 606, 13 So. 779—*People ex rel. McCauley v. Brooks*, 16 Cal. 42—*Farmers' Independent Ditch Co. v. Maxwell*, 4 Colo. App. 480, 36 Pac. 556—*Hover v. People*, 17 Colo. App. 392, 68 Pac. 679—*Freeman v. New Haven*, 34 Conn. 416—*Seymour v. Ely*, 37 Conn. 108—*American Casualty Ins. Co. v. Fyler*, 60 Conn. 459, 25 Am. St. Rep. 337, 22 Atl. 494—*State ex rel. Berger v. Hurley*, 73 Conn. 538, 48 Atl. 215—*Territory ex rel. Granburg v. Nowlin*, 3 Dak. 356, 20 N. W. 430—*United States ex rel. Work v. Boutwell*, 3 MacArth. 183—*Gurnee v. Speer*, 68 Ga. 714—*Kimberlin v. Commission*, 3 Ind. Terr. 25, 53 S. W. 467—*Bryan v. Cattell*, 15 Iowa, 546—*Milwaukee Malt Extract Co. v. Chicago*, R. I. & P. R. Co. 73 Iowa, 101 34 N. W. 761—*State ex rel. Hart v. Burke*, 33 La. Ann. 512—*Green v. Purnell*, 12 Md. 335—*Magruder v. Swann*, 25 Md. 212—*Wallis v. Smith*, 76 Md. 477, 25 Atl. 922—*State ex rel. Baltimore, C. & P. R. Co. v. Latrobe*, 81 Md. 245, 31 Atl. 788—*Duval v. Swann*, 94 Md. 618, 51 Atl. 617—*Henkel v. Millard*, 97 Md. 31, 54 Atl. 657—*State ex rel. Lloyd v. Rotwitt*, 15 Mont. 45, 37 Pac. 845—*State ex rel. Davison v. Bolte*, 151 Mo. 371, 74 Am. St. Rep. 536, 52 S. W. 262—*Anderson v. Colson*, 1 Neb. 173—*State ex rel. Silver v. Kendall*, 15 Neb. 267, 18 N. W. 85—*State ex rel. Bee Bldg. Co. v. Savage*, 65 Neb. 772, 91 N. W. 716—*Hart v. Folsom*, 70 N. H. 217, 47 Atl. 603—*People ex rel. Hammond v. Leonard*, 74 N. Y. 445—*Brown v. Turner*, 70 N. C. 105—*Burton v. Furman*, 115 N. C. 169, 20 S. E. 443—*State ex rel. Insurance Co. v. Moore*, 42 Ohio St. 108—*Com. ex rel. List v. Page*, 16 Phila. 50, 40 Phila. Leg. Int. 394—*State ex rel. Fouche v. Verner*, 30 S. C. 280, 9 S. E. 113—*White's Creek Turnp. Co. v. Marshall*, 2 Baxt. 123—*Kuechler v. Wright*, 40 Tex. 632—*Williams v. Dental Examiners*, 93 Tenn. 629, 27 S. W. 1019.

137. Mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 11 Sup. Ct. Rep. 607. 35: 183
United States ex rel. Redfield v. Windom, 137 U. S. 636, 11 Sup. Ct. Rep. 197. 34: 811

Cited in La Abra Silver Min. Co. v. United States, 175 U. S. 438, 44 L. ed. 229, 20 Sup. Ct. Rep. 168—*Keim v. United States*, 177 U. S. 203, 44 L. ed. 775, 20 Sup. Ct. Rep. 574—*United States v. La Abra Silver Min. Co.* 29

Ct. Cl. 508—*Johnston v. United States*, 37 Ct. Cl. 326—*Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 114, 104 Fed. 658—*United States v. Cooper*, 9 Mackey, 130—*State ex rel. Fleming v. Crawford*, 28 Fla. 477, 14 L.R.A. 256, 10 So. 118—*People ex rel. Broderick v. Morton*, 156 N. Y. 153, 41 L.R.A. 237, 66 Am. St. Rep. 547, 50 N. E. 791—*McDaid v. Territory*, 1 Okla. 98, 30 Pac. 438—*Thoreson v. State Examiners*, 19 Utah, 28, 57 Pac. 175—*State ex rel. Gericke v. Ahnapee*, 99 Wis. 326, 74 N. W. 783.

138. The Supreme Court of the United States will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law. *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. Rep. 12, 32: 354
Cited in Johnston v. United States, 37 Ct. Cl. 326—*State ex rel. Atty Gen. v. Cunningham*, 81 Wis. 508, 15 L.R.A. 574, 51 N. W. 724.

139. In matters which require the exercise of judgment and consideration by an executive officer of the government, or which are dependent upon his discretion, no rule for a mandamus to control his action will issue. *United States ex rel. Carrick v. Lamar (United States v. Lamar)* 116 U. S. 423, 6 Sup. Ct. Rep. 424, 29: 677

140. The writ of mandamus cannot issue to an executive officer where discretion and judgment are to be exercised by the officer. It can only issue in cases where the act required to be done is merely ministerial, and where the relator is without any other adequate remedy. *Cox v. United States ex rel. McGarrahan (The Secretary v. McGarrahan)* 9 Wall. 298. 19: 579

Cited in Litchfield v. The Register (Litchfield v. Richards) 9 Wall. 577, 19 L. ed. 682—*Bath County v. Amy*, 13 Wall. 249, 20 L. ed. 541—*Heine v. Levee Comrs.* 19 Wall. 660, 22 L. ed. 226—*Rosenbaum v. Bauer*, 120 U. S. 455, 30 L. ed. 745, 7 Sup. Ct. Rep. 633—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 164, 15 Sup. Ct. Rep. 97—*Brown v. United States*, 6 Ct. Cl. 186—*Electoral College Case*, 1 Hughes, 587, Fed. Cas. No. 4,336—*Whitely v. Fisher*, 4 Fisher, Pat. Cas. 251—*American Mortg. Co. v. Hopper*, 12 C. C. A. 296, 29 U. S. App. 12, 64 Fed. 555—*Grand County v. King*, 14 C. C. A. 432, 32 U. S. App. 1, 67 Fed. 209—*Diller v. Hawley*, 26 C. C. A. 515, 48 U. S. App. 462, 81 Fed. 653—*Sloan v. United States*, 95 Fed. 194—*Farmers' Nat. Bank v. Jones*, 105 Fed. 465—*Territory ex rel. Gramburg v. Nowlin*, 3 Dak. 357, 20 N. W. 430—*Vantongeren v. Heffernan*, 5 Dak. 202, 38 N. W. 52—*Barnes v. Wilkon County*, 135 N. C. 40, 47 S. E. 737—*Lord v. Bates*, 48 S. C. 110, 26 S. E. 213—*Porter v. Klahn*, 1 Tex. App. Civ. Cas. (White & W.) § 528—*Thurston v. Hudgins*, 93 Va. 784, 20 S. E. 966—*Empey v. Plugert*, 64 Wis. 612, 25 N. W. 560.

141. A writ of mandamus cannot be issued to compel the superintendent of public printing to deliver a document to the printer of the Senate to be printed, where it is necessary to make inquiries and examine evidence before determining whether it should be delivered to the printer of the

Senate or the printer of the House of Representatives. *United States ex rel. Tucker v. Seaman*, 17 How. 225, 15: 226

Decision upon question already determined.

See also *supra*, 126; *infra*, 188.

142. A mandamus will not be issued to compel the Commissioner of Patents to examine an application for the reissue of a patent to an assignee, when he has already done so, and decided against the applicant. *Holloway v. Whiteley* (Commissioner of Patents *v. Whiteley*) 4 Wall. 522, 18: 335
Cited in *Gaines v. Thompson*, 7 Wall. 351, 19 L. ed. 64—*Ex parte Bradley*, 7 Wall. 386, 19 L. ed. 221—*The Secretary v. McGarrahan* (Cox *v. United States*) 9 Wall. 312, 19 L. ed. 583—*United States v. Schurz*, 102 U. S. 395, 26 L. ed. 171—*Butterworth v. United States*, 112 U. S. 68, 28 L. ed. 662, 5 Sup. Ct. Rep. 25—*Craig v. Lelensdorfer* (Downs *v. Hubbard*) 123 U. S. 210, 31 L. ed. 122, 8 Sup. Ct. Rep. 85—*United States ex rel. Dunlap v. Black*, 128 U. S. 48, 32 L. ed. 357, 9 Sup. Ct. Rep. 12—*Noble v. Union River Logging R. Co.* 147 U. S. 171, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 808, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*United States ex rel. Steinmetz v. Allen*, 192 U. S. 563, 48 L. ed. 563, 24 Sup. Ct. Rep. 416—*Electoral College Case*, 1 Hughes, 582, Fed. Cas. No. 4336—*Hough v. Western Transp. Co.* 1 Biss. 429, Fed. Cas. No. 6,724—*Whitely v. Fisher*, 4 Fisher, Pat. Cas. 252—*Re Vintschger*, 50 Fed. 461—*Enterprise Sav. Asso. v. Zumstein*, 15 C. C. A. 159, 37 U. S. App. 71, 67 Fed. 1007—*Hoover v. McChesney*, 81 Fed. 482—*Dudley v. James*, 83 Fed. 349—*Kimberlin v. Commission*, 44 C. C. A. 113, 104 Fed. 658—*Ex parte Garland*, 42 Ala. 560—*American Casualty Ins. & Secur. Co. v. Fyler*, 60 Conn. 463, 25 Am. St. Rep. 337, 22 Atl. 404—*State ex rel. Berger v. Hurley*, 73 Conn. 538, 48 Atl. 215—*Ross v. United States*, 7 App. D. C. 10—*United States ex rel. Wedderburn v. Bliss*, 12 App. D. C. 502—*State ex rel. Lloyd v. Rotwitt*, 15 Mont. 44, 37 Pac. 845—*White's Creek Turnp. Co. v. Marshall*, 2 Baxt. 122—*Kuechler v. Wright*, 40 Tex. 650—*Porter v. Klahn*, 1 Tex. App. Civ. Cas. (White & W.) § 528.

Allowance of claims.

See also *supra*, 125.

143. The duty of the Secretary of the Navy in deciding whether a claim for a pension under a special act can be granted, and also another claim to the same person under a general act on the same subject, is not a ministerial duty, but requires the exercise of judgment and discretion, which cannot be controlled by mandamus. *Decatur v. Paulding*, 14 Pet. 497, 10: 559
Cited in *Brashear v. Mason*, 6 How. 101, 12 L. ed. 361—*Luther v. Borden*, 7 How. 56, 12 L. ed. 605—*Wilkes v. Dinsman*, 7 How. 129, 12 L. ed. 636—*Reeside v. Walker*, 11 How. 290, 13 L. ed. 700—*Bartlett v. Kane*, 16 How. 272, 14 L. ed. 935—*United States ex rel. Tucker v. Seaman*, 17 How. 230, 15 L. ed. 227—*United States ex rel. Goodrich v. Guthrie*, 17 How. 304, 15 L. ed. 106—*Commissioner of Patents v. Whiteley* (Holloway *v. Whiteley*) 4 Wall. 534, 18 L. ed. 338—*Ex parte De Groot*, 6 Wall. 497, 18

L. ed. 888—*Gaines v. Thompson*, 7 Wall. 350, 19 L. ed. 64—*United States v. Goldenberg*, 168 U. S. 101, 42 L. ed. 305, 18 Sup. Ct. Rep. 3—*Brown v. United States*, 6 Ct. Cl. 186—*Garfield v. United States*, 11 Ct. Cl. 605—*Hough v. Western Transp. Co.* 1 Biss. 429, Fed. Cas. No. 6,724—*Ex parte Reeside*, 11 Law. Rep. 452, Fed. Cas. No. 11,636—*Well v. Calhoun*, 25 Fed. 875—*Enterprise Sav. Asso. v. Zumstein*, 64 Fed. 840—*Enterprise Sav. Asso. v. Zumstein*, 15 C. C. A. 160, 37 U. S. App. 71, 67 Fed. 1007—*Hoover v. McChesney*, 81 Fed. 482—*Ex parte Echols*, 39 Ala. 700, 88 Am. Dec. 749—*Ex parte Garland*, 42 Ala. 561—*Nougues v. Douglass*, 7 Cal. 71—*People ex rel. McCauley v. Brooks*, 16 Cal. 42—*Seymour v. Ely*, 37 Conn. 108—*State ex rel. Berger v. Hurley*, 73 Conn. 538, 48 Atl. 215—*Forbes v. Driscoll*, 4 Dak. 349, 31 N. W. 633—*United States v. Boutwell*, 3 MacArth. 176—*Seymour v. United States*, 2 App. D. C. 246—*United States ex rel. International Contracting Co. v. Lamont*, 2 App. D. C. 546—*Holliday v. Henderson*, 67 Ind. 109—*Bryan v. Cattell*, 15 Iowa, 546—*Dever v. Humphrey*, 68 Kan. 764, 75 Pac. 1037—*State ex rel. Hope v. Board of Liquidation*, 42 La. Ann. 658, 7 So. 706—*Swann v. Buck*, 40 Miss. 278—*State ex rel. Lloyd v. Rotwitt*, 15 Mont. 46, 37 Pac. 845—*Brown v. Turner*, 70 N. C. 105—*White's Creek Turnp. Co. v. Marshall*, 2 Baxt. 123—*Lynn v. Polk*, 8 Lea, 284—*Bledsoe v. International R. Co.* 40 Tex. 559—*Kuechler v. Wright*, 40 Tex. 671—*De Poyster v. Baker*, 89 Tex. 159, 34 S. W. 106.

144. A writ of mandamus will not issue to compel the Secretary of the Navy to allow a claim for one-half pay to be paid out of the Navy pension fund, where the question involves a construction of the law and of a resolution passed by Congress, and requires the exercise of discretion and judgment. *Decatur v. Paulding*, 14 Pet. 497, 10: 559

Payment of disputed claims.

To Secretary of State Withholding Payment under Direction of President, Pending Re-examination, see *Claims*, 249.

See also *supra*, 105, 106, 113, 124.

145. Neither the circuit nor Supreme Court has power to issue mandamus to compel the payment, by the Secretary of the Treasury, of disputed claims against the United States. *United States ex rel. Goodrich v. Guthrie*, 17 How. 284, 15: 102
Cited in *South Dakota v. North Carolina*, 192 U. S. 319, 48 L. ed. 461, 24 Sup. Ct. Rep. 269—*Nougues v. Douglass*, 7 Cal. 71—*United States ex rel. Work v. Boutwell*, 3 MacArth. 182—*Mississippi v. Durham*, 4 Mackey, 238—*United States ex rel. Redfield v. Windom*, 8 Mackey, 67—*State ex rel. Weeks v. Gamble*, 13 Fla. 23—*Re Murphy*, 24 Hun. 597—*Brown v. Turner*, 70 N. C. 105—*Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 342—*Keehan v. Perry*, 24 Tex. 281—*Bledsoe v. International R. Co.* 40 Tex. 560.

146. Mandamus will not issue to compel the Secretary of State to pay money in his hands to one party which is claimed by another party, and the right to which is in litigation between them, since the remedy lies only where the duty sought to be en-

forced is clear and indisputable. Bayard v. United States ex rel. White, 127 U. S. 246, 8 Sup. Ct. Rep. 1223, 32: 116
 Re Connecticut Mut. L. Ins. Co. 131 U. S. clxxx. Appx. and 26: 561

147. A mandamus will not be issued to compel the Secretary of the Treasury to deliver and pay a draft, where the return of the Secretary raises disputed questions of law and fact, which ought not to be tried in the proceedings to obtain the writ. United States ex rel. Redfield v. Windom, 137 U. S. 636, 11 Sup. Ct. Rep. 197, 34: 811

148. Mandamus to the Secretary of the Navy will not lie, at the instance of an officer, to enforce the payment of his pay. Brashear v. Mason, 6 How. 92, 12: 357
Distinguished in Bryan v. Cattell, 15 Iowa, 546—*Houston & G. N. R. Co. v. Kuechler*, 36 Tex. 411—*Kuechler v. Wright*, 40 Tex. 665.

Often in Wilkes v. Dinsman, 7 How. 129, 12 L. ed. 636—*Reeside v. Walker*, 11 How. 290, 13 L. ed. 700—United States ex rel. Goodrich v. Guthrie, 17 How. 304, 15 L. ed. 106—United States ex rel. Tucker v. Seaman, 17 How. 230, 15 L. ed. 227—*Ex parte De Groot*, 6 Wall. 497, 18 L. ed. 888—*The Secretary v. McGarrahan (Cox v. United States)* 9 Wall. 312, 19 L. ed. 583—United States ex rel. Dunlap v. Black, 128 U. S. 48, 32 L. ed. 357, 9 Sup. Ct. Rep. 12—United States ex rel. Redfield v. Windom, 137 U. S. 643, 34 L. ed. 814, 11 Sup. Ct. Rep. 197—*Noble v. Union River Logging R. Co.* 147 U. S. 171, 37 L. ed. 125, 13 Sup. Ct. Rep. 271—United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Brown v. United States*, 6 Ct. Cl. 186—*McElrath v. McIntosh*, 11 Month. L. Rep. 414. Fed. Cas. No. 8,781—*Enterprise Sav. Assn. v. Zumstein*, 64 Fed. 840—*Ex parte Echols*, 39 Ala. 700, 88 Am. Dec. 749—*McMillen v. Smith*, 26 Ark. 614—*People ex rel. Fremont County v. Auditor*, 2 Colo. 100—United States ex rel. Work v. Boutwell, 3 McArthur. 182—*Towle v. State*, 3 Fla. 213—*Gurnee v. Speer*, 68 Ga. 713—*State ex rel. Hart v. Burke*, 33 La. Ann. 512—*Green v. Purnell*, 12 Md. 336—*Swann v. Buck*, 40 Miss. 278—*Brown v. Turner*, 70 N. C. 105—*Burton v. Furman*, 115 N. C. 169, 20 S. E. 443—*State ex rel. Fouché v. Verner*, 30 S. C. 280, 9 S. E. 113—*General Land Office v. Smith*, 5 Tex. 478—*Meyer v. Carolan*, 9 Tex. 253—*Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 342—*Bledsoe v. International R. Co.* 40 Tex. 556.

149. The Treasurer of the United States cannot be compelled by writ of mandamus to pay to an administrator, appointed in the District of Columbia, of the estate of an inhabitant of one of the states of the Union, the amount of a draft payable to the intestate at the Treasury out of an appropriation made by Congress, and held by such administrator. Wyman v. United States (Wyman v. Halstead) 109 U. S. 654, 3 Sup. Ct. Rep. 417, 27: 1068
Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. Rep. 441, 28: 64

150. The United States may pay a debt due to the estate of a deceased person, either to the administrator appointed in the State

of his domicile, or to an ancillary administrator duly appointed in the District of Columbia; and the exercise of their discretion in this regard cannot be controlled by mandamus. Wyman v. United States (Wyman v. Halstead) 109 U. S. 654, 3 Sup. Ct. Rep. 417, 27: 1068

Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. Rep. 441, 28: 64
Cited in King v. United States, 27 Ct. Cl. 538—*Taylor v. Bemiss*, 110 U. S. 45, 28 L. ed. 64, 3 Sup. Ct. Rep. 441—*Re Colt*, 3 App. D. C. 251—*Manning v. Leighton*, 65 Vt. 101, 24 L.R.A. 693, 26 Atl. 258—*Davis v. Chapman*, 83 Va. 73, 5 Am. St. Rep. 251, 1 S. E. 472.

4. Matters as to Public Lands.

Power of Courts as Dependent upon Passing of Title from United States, see Courts, 257, 258.

151. The courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus, unless those duties are of a character truly ministerial and involve no exercise of judgment. Litchfield v. Richards (Litchfield v. The Register) 9 Wall. 575, 19: 681

Cited in McCormick v. Hayes, 159 U. S. 342, 40 L. ed. 174, 16 Sup. Ct. Rep. 37—United States v. Goldenberg, 168 U. S. 101, 42 L. ed. 396, 18 Sup. Ct. Rep. 3—*Kirwan v. Murphy*, 189 U. S. 54, 47 L. ed. 705, 23 Sup. Ct. Rep. 599—*American Mortg. Co. v. Hopper*, 12 C. C. A. 296, 29 U. S. App. 12, 64 Fed. 555—*Lane v. Anderson*, 67 Fed. 566—*Diller v. Hawley*, 26 C. C. A. 515, 48 U. S. App. 462, 81 Fed. 653—*Sloan v. United States*, 95 Fed. 194—*Gilbert v. McNulta*, 96 Fed. 84—*Humbird v. Avery*, 110 Fed. 471—*Forbes v. Driscoll*, 4 Dak. 354, 31 N. W. 633—*Vantongeren v. Heffernan*, 5 Dak. 203, 33 N. W. 52—*Maese v. Hermann*, 17 App. D. C. 61—*Fuller v. Shedd*, 161 Ill. 491, 33 L.R.A. 161, 52 Am. St. Rep. 380, 44 N. E. 286—*Koehler v. Hill*, 60 Iowa, 625, 15 N. W. 609—*McHenry v. Nygaard*, 72 Minn. 13, 74 N. W. 1106—*Adams v. Couch*, 1 Okla. 34, 26 Pac. 1009—*Sproat v. Durland*, 2 Okla. 52, 35 Pac. 886—*Fitzgerald v. Keith*, 5 Okla. 263, 48 Pac. 110—*State ex rel. Fouché v. Verner*, 30 S. C. 280, 9 S. E. 113—*Kuechler v. Wright*, 40 Tex. 632—*Laramie Nat. Bank v. Steinhoff*, 11 Wyo. 307, 71 Pac. 992.

152. The Secretary of the Interior will not be compelled by mandamus to approve the relator's selection, as an adopted member of the Wichita tribe, or certain lands out of those ceded to the United States by the Wichita and affiliated bands of Indians, under the agreement of June 4, 1891, ratified by the act of March 2, 1895 (28 Stat. at L. 876, 895-897, chap. 188), where the Secretary's answer, though not in terms denying the averments of the petition as to the relator's membership in the tribe, alleges that he had, on a specified date, reached and announced a decision that such relator was not a member of the tribe, and therefore was not entitled to an allotment. United States ex rel. West v. Hitchcock, 205 U. S. 80, 27 Sup. Ct. Rep. 423, 51: 718

153. Mandamus will not lie against the Secretary of the Interior to compel him to vacate his decision that a selection of public land, under the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), in lieu of land relinquished in a forest reservation, must be rejected because of the failure of the selector to show in due and proper form that the land was, at the date of selection, subject to selection as "vacant land open to settlement," which the Secretary construed as meaning to exclude land in the actual possession of any person under the local customs or rules of miners which are by statute incorporated into and have become part of the laws of the United States. *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 Sup. Ct. Rep. 698, 47: 1074
Cited in Bates & G. Co. v. Payne, 194 U. S. 109, 48 L. ed. 895, 24 Sup. Ct. Rep. 595
 —*Allen v. United States*, 22 App. D. C. 274
 —*Payne v. Bates & G. Co.* 22 App. D. C. 252—*United States ex rel. Edwards v. Root*, 22 App. D. C. 429—*United States ex rel. West v. Hitchcock*, 28 App. D. C. 294—*Lindquist v. Maurepas Land & Lumber Co.* 112 La. 1043, 36 So. 843.

154. Mandamus in favor of a claimant of land, to compel the Secretary of the Interior to proceed with the hearing of a contest in which he has suspended the proceedings, will not be granted where he has issued a patent for the land to the other claimant, in pursuance of a direction given him by act of Congress, even if that act was unconstitutional. *Re Emblem*, 161 U. S. 52, 16 Sup. Ct. Rep. 487, 40: 613

Issue of patent.

155. The duty of the commissioner of the land office to issue a patent is not merely ministerial, but involves judgment and discretion, which cannot be controlled by writ of mandamus. *United States ex rel. McConnell v. Edmunds (United States v. Commissioner)* 5 Wall. 563, 18: 692

156. Mandamus will not lie to compel the Secretary of the Interior to issue to a claimant a patent for a certain tract of land, where the case requires proofs, hearing, and decision, and involves the exercise of judicial judgment and discretion. *Cox v. United States ex rel. McGarrahan (The Secretary v. McGarrahan)* 9 Wall. 298, 19: 579
Cited in French v. Fyan, 93 U. S. 173, 23 L. ed. 814—*Marquez v. Frisbie*, 101 U. S. 475, 25 L. ed. 801—*McCormick v. Hayes*, 159 U. S. 342, 40 L. ed. 174, 16 Sup. Ct. Rep. 37
 —*Kirwan v. Murphy*, 189 U. S. 55, 47 L. ed. 705, 23 Sup. Ct. Rep. 599—*Sioux City & St. P. R. Co. v. United States*, 36 Fed. 612—*Casey v. Vassor*, 50 Fed. 259—*Humbird v. Avery*, 110 Fed. 471—*Farmers' Independent Ditch Co. v. Maxwell*, 4 Colo. App. 480, 36 Pac. 556—*Forbes v. Driscoll*, 4 Dak. 354, 31 N. W. 633—*Vantongerren v. Heffernan*, 5 Dak. 202, 38 N. W. 52—*Maese v. Hermann*, 17 App. D. C. 62—*Fuller v. Shedd*, 161 Ill. 491, 33 L.R.A. 161, 52 Am. St. Rep. 380, 44 N. E. 286—*Koehler v. Hill*, 60 Iowa, 625, 15 N. W. 609—*Warner v. State Auditor*, 128 Mich. 502, 87 N. W. 638—*Atty. Gen. v. Taggart*, 66 N. H. 371, 25 L.R.A. 617, 29 Atl. 1027—*Adams v. Couch*,

1 Okla. 34, 26 Pac. 1009—*Sproat v. Durland*, 2 Okla. 52, 35 Pac. 886—*Fitzgerald v. Keith*, 5 Okla. 264, 48 Pac. 110—*Wilbourne v. Baldwin*, 5 Okla. 280, 47 Pac. 1045—*Kuechler v. Wright*, 40 Tex. 672—*Laramie Nat. Bank v. Steinhoff*, 11 Wyo. 307, 71 Pac. 992.

157. A mandamus will not be issued to command the Commissioner of the General Land Office to cause a patent to be prepared, signed, countersigned, recorded, and issued, where the merit of the case cannot then be determined upon the record. The duty is not merely ministerial, but involves judgment and discretion, which cannot be controlled by this writ. If the relator's title under the certificate presents a superior equity over the opposing title, the appropriate remedy is by bill in equity, not by mandamus. *United States ex rel. McConnell v. Edmunds (United States v. The Commissioner)* 5 Wall. 563, 18: 692
Cited in State ex rel. Dixon v. Internal Improv. Fund, Trustees, 20 Fla. 405.

158. Mandamus will not lie to compel either the Commissioner of the General Land Office or the Secretary of the Interior to issue a patent for land, which is required to be signed by the President and counter signed by the recorder. *Cox v. United States ex rel. McGarrahan (The Secretary v. McGarrahan)* 9 Wall. 298, 19: 579
Cited in McHenry v. Hygaard, 72 Minn. 14, 74 N. W. 1106.

159. When a patent to a citizen for a part of the public lands has been regularly signed by the President, and sealed with the seal of the government, countersigned by the recorder and duly recorded, the right to its possession by the grantee is perfect, and a writ of mandamus will lie to the officer in whose possession it is, to compel the performance of the ministerial duty of delivering the instrument. *United States ex rel. McBride v. Schurz*, 102 U. S. 378, 26: 167

Cited in Cunningham v. Macon & B. R. Co. 109 U. S. 453, 27 L. ed. 994, 3 Sup. Ct. Rep. 292—*Rosenbaum v. Bauer*, 120 U. S. 456, 30 L. ed. 745, 7 Sup. Ct. Rep. 633—*United States ex rel. Dunlap v. Black*, 128 U. S. 45, 32 L. ed. 356, 9 Sup. Ct. Rep. 12—*United States ex rel. Levey v. Stockslager*, 129 U. S. 477, 32 L. ed. 787, 9 Sup. Ct. Rep. 382—*United States ex rel. Redfield v. Windom*, 137 U. S. 643, 34 L. ed. 814, 11 Sup. Ct. Rep. 197—*Noble v. Union River Logging R. Co.* 147 U. S. 171, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 97—*Brown v. Hitchcock*, 173 U. S. 476, 43 L. ed. 774, 19 Sup. Ct. Rep. 485—*Kelm v. United States*, 177 U. S. 293, 44 L. ed. 775, 20 Sup. Ct. Rep. 574—*Moran v. Horsky*, 178 U. S. 210, 44 L. ed. 1040, 20 Sup. Ct. Rep. 856—*Choctaw Nation v. United States*, 21 Ct. Cl. 113—*Chaffraix v. Board of Liquidation*, 11 Fed. 645—*New Orleans Nat. Bank v. Merchant*, 18 Fed. 850—*Trinidad Asphalt Paving Co. v. Robinson*, 52 Fed. 349—*Kimberlin v. Commission*, 44 Ct. C. A. 113, 104 Fed. 658—*Power v. May*, 123 Cal. 153, 55 Pac. 796—*Seymour v. United States*, 2 App. D. C. 256—*Lochren v.*

United States, 6 App. D. C. 507—Ross v. United States, 7 App. D. C. 10—United States ex rel. White v. Bayard, 5 Mackey, 434—United States ex rel. Redfield v. Windom, 8 Mackey, 60—United States ex rel. West v. Hitchcock, 19 App. D. C. 344—Payne v. United States, 20 App. D. C. 600—Dabney v. Dabney, 20 App. D. C. 451—Grandin v. La Bar, 3 N. D. 448, 57 N. W. 241—State ex rel. Fleming v. Crawford, 28 Fla. 476, 14 L.R.A. 256, 10 So. 118—Robertson v. State, 109 Ind. 100, 10 N. E. 582—State ex rel. Hope v. Board of Liquidation, 42 La. Ann. 658, 7 So. 706—Adams v. Couch, 1 Okla. 35, 26 Pac. 1009—Flanagan v. Forsythe, 6 Okla. 239, 50 Pac. 152—People ex rel. Ducheneau v. House, 4 Utah, 331, 10 Pac. 838.

160. Suit for mandamus to compel the issuance of a patent to public lands where all prerequisites had been complied with, dismissed. *M'Clung v. Silliman*, 6 Wheat. 598, 5: 340
Cited in *Decatur v. Paulding*, 14 Pet. 606, Appx. 10 L. ed. 613, Appx.—General Land Office v. Smith, 5 Tex. 478—Meyer v. Carolan, 9 Tex. 253—Bledsoe v. International R. Co. 40 Tex. 556—Kuechler v. Wright, 40 Tex. 665.

5. Matters as to Taxes.

Compelling Levy of Taxes to Pay Municipal Obligations, see *infra*, II. d, 6.

Defenses, see *infra*, III. f.

Sufficiency of Return, see *infra*, 228, 229.

Finality of Judgment for Purpose of Appeal, see Appeal and Error, 170.

Jurisdictional Amount on Appeal, see Appeal and Error, 559.

Inefficacy of State Injunction against Execution of Federal Mandamus, see Courts, 1484—1486.

Conclusiveness of Judgment Requiring Taxation, see Judgment, 837.

Laches as Bar, see Limitation of Actions, 147.

See also *supra*, 123; Injunction, 180.

161. Right to mandamus as a remedy to compel municipal officers to perform their duty of levying a tax, recognized. *Barkley v. Board of Levee Comrs.* 93 U. S. 258, 23: 893

Cited in *Coquard v. Indian Grave Drainage District*, 16 C. C. A. 533, 34 U. S. App. 169, 69 Fed. 870.

162. Mandamus will lie to compel the board of supervisors to levy a tax upon taxable property of the county. *Lee County v. United States ex rel. Rogers* (*Lee County v. Rogers*) 7 Wall. 175, 19: 162

Cited in *United States v. New Orleans*, 98 U. S. 398, 25 L. ed. 227—*Campbellville Lumber Co. v. Hubbert*, 50 C. C. A. 438, 112 Fed. 721—*Vance v. Little Rock*, 30 Ark. 450—*Grand Rapids School Furniture Co. v. School Dist. No. 29*, 102 Ky. 559, 44 S. W. 98—*Boody v. Watson*, 64 N. H. 176, 9 Atl. 794.

Payment in coupons.

To Compel Issuance of License after Valid Tender, see Payment, 30.

See also *supra*, 23.

163. A practising lawyer in Virginia has

the right to pay his license tax in the coupons of bonds issued by the state; and the proper officer may be compelled by mandamus to receive coupons tendered to him for verification under the act of January 14, 1882. *Sands v. Edmunds*, 116 U. S. 585, 6 Sup. Ct. Rep. 516, 29: 739

164. Where a person in Virginia has the right to pay his license tax in the coupons of bonds issued by the state, the proper officer may be compelled by mandamus to receive coupons tendered to him for verification, under the act of January 14, 1882. *Sands v. Edmunds*, 116 U. S. 585, 6 Sup. Ct. Rep. 516, 29: 739

6. To Enforce Collection of Municipal Obligations.

Defenses, see *infra*, III. f.

Who may Maintain Proceeding, see *infra*, 215.

To Whom Directed, see *infra*, 218—221.

Issuance of New Writ, see *infra*, 233.

Hearing and Determination on Writ, see *infra*, 236.

See also *supra*, 103, 130; Bonds, 562; Constitutional Law, 1568.

Editorial notes.

Mandamus to compel city, town, or county to levy tax to pay bonds or interest on bonds. 19: 704

[To compel payment of municipal debt by custodian of municipal funds. 14 L.R.A. 773.]

As remedy for enforcement of judgments in general.

To Compel Liquidating Officers to Issue Bonds Authorized by City in Payment of Judgment, see Municipal Corporations, 90.

See also *supra*, 9; Taxes, 503.

165. Where municipal authorities refuse to levy a tax to pay a judgment against the municipality, the remedy is by writ of mandamus. *United States ex rel. Moses v. Keokuk*, 6 Wall. 514, 18: 933

Walkley v. Muscatine, 6 Wall. 481, 18: 930

Washington County v. United States ex rel. Durant (*Washington County v. Durant*) 9 Wall. 415, 19: 732

United States ex rel. Benbow v. Iowa City (*Benbow v. Iowa City*) 7 Wall. 313, 19: 79

United States ex rel. Renger v. New Orleans, 98 U. S. 381, 25: 225

Rogers v. Keokuk, 154 U. S. 546 Appx., 14 Sup. Ct. Rep. 1162, and 18: 74

Cited in *Helne v. Levee Comrs.* 19 Wall. 657, 22 L. ed. 225—*United States v. New Orleans*, 98 U. S. 398, 25 L. ed. 227—*Thompson v. Allen County*, 115 U. S. 553, 29 L. ed. 473, 6 Sup. Ct. Rep. 140—*Thompson v. United States*, 103 U. S. 484, 26 L. ed. 523—*Harshman v. County Court* (*United States ex rel. Harshman v. County Court*) 122 U. S. 318, 30 L. ed. 1155, 7 Sup. Ct. Rep. 1171—*Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods, 254, Fed. Cas. No. 8,541—*McCauley v. Kellogg*, 2 Woods, 20, Fed. Cas. No. 8,688

—*Ex parte Parsons*, 1 Hughes, 285, Fed.

Cas. No. 10,774—United States ex rel. Merchants' Nat. Bank v. Jefferson County, 5 Dill. 323, 1 McCrary, 370, Fed. Cas. No. 15,472—United States ex rel. Goelet v. Elizabeth, 24 Fed. 851—Coquard v. Indian Grave Drainage District, 16 C. C. A. 533, 34 U. S. App. 169, 69 Fed. 870—First Nat. Bank v. Society for Savings, 25 C. C. A. 468, 42 U. S. App. 517, 80 Fed. 582—Walte v. Santa Cruz, 89 Fed. 624—Safe-Deposit & T. Co. v. Anniston, 96 Fed. 662—Santa Cruz v. Walte, 39 C. C. A. 113, 98 Fed. 394—Anthony v. Burrow, 129 Fed. 789—Marra v. San Jacinto & P. V. Irrig. District, 131 Fed. 790—Leavenworth County v. Miller, 7 Kan. 511, 12 Am. Rep. 425—Commissioners Court v. Rather, 48 Ala. 450—Miller v. McWilliams, 50 Ala. 429, 20 Am. Rep. 297—East St. Louis v. Millard, 14 Ill. App. 487—Badger v. New Orleans (State ex rel. Badger v. New Orleans) 49 La. Ann. 839, 37 L.R.A. 554, 21 So. 870—State Bd. of Education v. West Point, 50 Miss. 647—State ex rel. Shackleton v. Guttenberg, 39 N. J. L. 661—Atlantic City Waterworks Co. v. Read, 50 N. J. L. 672, 15 Atl. 10—Thels v. Washita County, 9 Okla. 653, 60 Pac. 505—State ex rel. Pfister v. Manitowoc, 52 Wis. 428, 9 N. W. 607.

166. The appropriate remedy against a municipality, for neglect to collect a tax to pay a judgment against it, is a writ of mandamus commanding the municipality to levy and collect the tax. United States ex rel. Von Hoffman v. Quincy (Von Hoffman v. Quincy) 4 Wall. 535, 18: 403

167. Mandamus issues to compel a municipality to levy and collect a tax for the purpose of raising funds to satisfy a judgment upon a contract which stipulates for payment from the proceeds of taxes. Louisiana ex rel. Nelson v. St. Martins Parish, 111 U. S. 716, 4 Sup. Ct. Rep. 648, 28: 574 Cited in Gay v. New Whatcom, 26 Wash. 396, 67 Pac. 88.

168. The appropriate remedy against a municipality for neglect to collect the tax to pay a judgment against it is a writ of mandamus commanding the municipality to levy and collect the tax. United States ex rel. Butz v. Muscatine (Butz v. Muscatine) 8 Wall. 575, 19: 490

Lower v. United States ex rel. Marcy, 91 U. S. 536, 23: 420

United States ex rel. Ranger v. United States, 98 U. S. 381, 25: 225

United States ex rel. Johnston v. County Court (United States v. Clark County) 95 U. S. 769, 24: 545

County Court v. United States ex rel. Hill (Cape Girardeau County Court v. Hill) 118 U. S. 68, 6 Sup. Ct. Rep. 951, 30: 73

Rogers v. Keokuk, 154 U. S. 546 Appx., 14 Sup. Ct. Rep. 1162, and 18: 74

Galena v. United States (Galena v. Amy) 5 Wall. 705, 18: 560

Davenport v. United States ex rel. Lord (Davenport v. Lord) 9 Wall. 409, 19: 704

Rees v. Watertown, 19 Wall. 107, 22: 72

Louisiana ex rel. Nelson v. St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. Rep. 648, 28: 574

Board of Liquidation v. United States ex rel. Hart (New Orleans Board of Liquidation

v. Hart) 118 U. S. 136, 6 Sup. Ct. Rep. 995, 30: 65

Limited in Vance v. Little Rock, 36 Ark. 450. Distinguished in State ex rel. New Orleans Gaslight Co. v. New Orleans, 37 La. Ann. 439.

Cited in Walkley v. Muscatine, 6 Wall. 483, 18 L. ed. 931—Washington County v. Durant (Washington County v. United States) 9 Wall. 417, 19 L. ed. 733—Heine v. Levee Comrs. 19 Wall. 657, 22 L. ed. 225—Thompson v. United States, 103 U. S. 484, 26 L. ed. 523—Brooks v. Memphis, 3 Cent. L. J. 857, Fed. Cas. No. 1,054—Ex parte Parsons, 1 Hughes, 285, Fed. Cas. No. 10,774—Sibley v. Mobile, 3 Woods, 540, Fed. Cas. No. 12,829—United States ex rel. Merchants' Nat. Bank v. Jefferson County, 5 Dill. 323, Fed. Cas. No. 15,472—United States v. Sterling, 2 Biss. 411, Fed. Cas. No. 16,388—Welch v. Ste. Genevieve, 1 Dill. 138, Fed. Cas. No. 17,372—United States ex rel. Goelet v. Elizabeth, 24 Fed. 851—Fleming v. Trowsdale, 29 C. C. A. 107, 54 U. S. App. 574, 85 Fed. 190—Deuel County v. First Nat. Bank, 30 C. C. A. 32, 58 U. S. App. 679, 86 Fed. 266—Little Rock v. United States, 43 C. C. A. 268, 103 Fed. 425—Cleveland v. United States, 49 C. C. A. 389, 111 Fed. 347—Washington County v. Williams, 49 C. C. A. 632, 111 Fed. 812—Thompson v. Perris Irrig. District, 116 Fed. 770—Vance v. Little Rock, 36 Ark. 450—State v. Jacksonville, 22 Fla. 27—State ex rel. Wood v. Board of Liquidation, 40 La. Ann. 411, 4 So. 122—Badger v. New Orleans (State ex rel. Badger v. New Orleans) 49 La. Ann. 839, 37 L.R.A. 554, 21 So. 870—Darling v. Baltimore, 51 Md. 15—People v. Otsego County, 53 Barb. 567—Thels v. Washita County, 9 Okla. 653, 60 Pac. 505—Williams v. Saunders, 5 Coldw. 83—Voorbles v. Houston, 70 Tex. 341, 7 S. W. 679—Houston v. Emery, 76 Tex. 323, 13 S. W. 266—Gay v. New Whatcom, 26 Wash. 396, 67 Pac. 88—Fisher v. Charleston, 17 W. Va. 615—Wells v. Mason, 23 W. Va. 459.

169. Where the law has provided that a tax shall be levied to pay corporation bonds, a mandamus after judgment, to compel the levy of the tax, is the appropriate remedy. United States ex rel. Von Hoffman v. Quincy (Von Hoffman v. Quincy) 4 Wall. 535, 18: 403

United States ex rel. Riggs v. Johnson County (Riggs v. Johnson County) 6 Wall. 166, 18: 768

Heine v. Board of Levee Comrs. 19 Wall. 655, 22: 223

Explained in Walte v. Santa Cruz, 89 Fed. 624.

Cited in Riggs v. Johnson County (United States ex rel. Riggs v. Johnson County, 6 Wall. 198, 18 L. ed. 777—Walkley v. Muscatine, 6 Wall. 483, 18 L. ed. 931—Morgan v. Town Clerk (United States ex rel. Morgan v. Gates) 7 Wall. 613, 19 L. ed. 203—Morgan v. Beloit, 7 Wall. 619, 19 L. ed. 205—Washington County v. Durant (Washington County v. United States) 9 Wall. 417, 19 L. ed. 733—Heine v. Levee Comrs. 19 Wall. 657, 22 L. ed. 225—United States v. New Orleans, 98 U. S. 398, 25 L. ed. 227—Rosenbaum v. Bauer, 120 U. S. 455, 30 L. ed. 745, 7 Sup. Ct. Rep. 633—Thompson v. United States, 103 U. S. 484, 26 L. ed. 523—Wade v. Travis County, 174 U. S. 509, 43 L. ed. 1064, 19 Sup. Ct. Rep. 715—Ex parte Parsons, 1 Hughes, 285, Fed. Cas. No. 10,774—Sanford v. Portsmouth, 2 Flipp. 106, Fed. Cas. No. 12,315—United States ex rel. Merchants'

Nat. Bank v. Jefferson County, 5 Dill. 323, 1 McCrary, 370, Fed. Cas. No. 15,472—United States v. Sterling, 2 Biss. 411, Fed. Cas. No. 16,388—Weich v. Ste. Genevieve, 1 Dill. 138, Fed. Cas. No. 17,372—United States ex rel. Watson v. Mobile, 4 Woods, 541, 12 Fed. 771—United States ex rel. Hill v. Scotland County Judges, 82 Fed. 715—Grand County v. King, 14 C. C. A. 431, 32 U. S. App. 1, 67 Fed. 209—Coquard v. Indian Grave Drainage District, 16 C. C. A. 533, 34 U. S. App. 169, 69 Fed. 870—First Nat. Bank v. Society For Savings, 25 C. C. A. 468, 42 U. S. App. 517, 80 Fed. 582—Fleming v. Trowsdale, 29 C. C. A. 107, 54 U. S. App. 574, 85 Fed. 190—Indian ex rel. Muncie v. Lake Erie & W. R. Co. 85 Fed. 3—Deuel County v. First Nat. Bank, 30 C. C. A. 32, 58 U. S. App. 579, 86 Fed. 266—Walte v. Santa Cruz, 89 Fed. 624—Shepard v. Tulare Irrig. District, 94 Fed. 3—Herring v. Modesto Irrig. District, 95 Fed. 710—Santa Cruz v. Walte, 39 C. C. A. 113, 98 Fed. 394—Washington County v. Williams, 49 C. C. A. 632, 111 Fed. 812—Thompson v. Perris Irrig. District, 116 Fed. 770—Carter County v. Schmalstig, 62 C. C. A. 79, 127 Fed. 127—Marra v. San Jacinto & P. V. Irrig. District, 131 Fed. 789—Vance v. Little Rock, 30 Ark. 441—Graham v. Parham, 32 Ark. 683—Columbia County v. King, 13 Fla. 474—East St. Louis v. Millard, 14 Ill. App. 488—Connersville v. Connersville Hydraulic Co. 86 Ind. 185—St. Louis v. Shields, 52 Mo. 356—Chumasero v. Potts, 2 Mont. 294—Prugh v. Portsmouth Sav. Bank, 48 Neb. 418, 67 N. W. 300—Theis v. Washita County, 9 Okla. 653, 60 Pac. 505—Com. ex rel. Whelen v. Pittsburgh, 88 Pa. 83, 7 W. N. C. 416—Com. ex rel. Whelen v. Pittsburgh, 35 Phila. Leg. Int. 466—Com. ex rel. Whelen v. Pittsburgh, 88 Pa. 83, 7 W. N. C. 416—McCullough v. Hicks, 63 S. C. 545, 41 S. E. 761—Merchants of Memphis v. Memphis, 9 Baxt. 88—State ex rel. Pfister v. Manitowoc, 52 Wis. 428, 9 N. W. 607.

170. The proper remedy of a judgment creditor in a state court or in the circuit court to collect a judgment against a county or municipal corporation is mandamus to compel the proper officers of the county or municipal corporation to levy a tax to pay it. *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. Rep. 398, 29: 620
Rogers v. Keokuk, 154 U. S. 546 Appx. and 14 Sup. Ct. Rep. 1162, 18: 74

Cass County v. Jordan, 95 U. S. 373, 24: 419

Cass County v. Johnston, 95 U. S. 360, 24: 416

United States ex rel. Ranger v. New Orleans, 98 U. S. 381, 25: 225

Rock Island County v. United States ex rel. State Bank, 4 Wall. 435, 18: 419

United States ex rel. Weber v. Lee County (Weber v. Lee County) 6 Wall. 210, 18: 781

United States ex rel. Moses v. Keokuk, 6 Wall. 514, 18: 933

171. An obligation to levy a tax to pay a judgment against a municipal corporation can be enforced by mandamus; and where there is a large accumulation of debt which should have been paid in instalments, the court may order a single levy to meet the entire judgment. *East St. Louis v. United*

States ex rel. Amy (East St. Louis v. Amy) 120 U. S. 600, 7 Sup. Ct. Rep. 739, 30: 798
Cited in Galena v. Amy (Galena v. United States) 5 Wall. 709, 18 L. ed. 562—*Washington County v. Durant (Washington County v. United States)* 9 Wall. 417, 19 L. ed. 738—*Heine v. Levee Comrs.* 19 Wall. 667, 22 L. ed. 225—*Barnes v. District of Columbia*, 91 U. S. 551, 23 L. ed. 443—*Thompson v. United States*, 103 U. S. 483, 26 L. ed. 523—*Goelet v. Elizabeth*, Fed. Cas. No. 5,502—*Ex parte Parsons*, 1 Hughes, 285, Fed. Cas. No. 10,774—*United States ex rel. Merchants' Nat. Bank v. Jefferson County*, 5 Dill. 323, 1 McCrary, 370; Fed. Cas. No. 15,472—*United States v. Sterling*, 2 Biss. 411, Fed. Cas. No. 16,388—*Laird v. DeSoto*, 25 Fed. 77—*First Nat. Bank v. Society for Savings*, 25 C. C. A. 468, 42 U. S. App. 517, 80 Fed. 582—*Deuel County v. First Nat. Bank*, 30 C. C. A. 32, 58 U. S. App. 579, 86 Fed. 266—*Little Rock v. United States*, 43 C. C. A. 269, 103 Fed. 426—*Thompson v. Perris Irrig. District*, 116 Fed. 770—*Vance v. Little Rock*, 30 Ark. 450—*Bowen v. West*, 10 Colo. App. 326, 50 Pac. 1035—*Chicago & A. R. Co. v. People*, 177 Ill. 93, 52 N. E. 439—*Atchison, T. & S. F. R. Co. v. Jefferson County*, 12 Kan. 138—*Delgado v. Chavez*, 5 N. M. 648, 25 Pac. 948—*Lenzen v. New Braunfels*, 13 Tex. Civ. App. 351, 35 S. W. 341—*Gelesvton v. Posnalasky*, 62 Tex. 129, 50 Am. Rep. 517—*Baltimore & O. R. Co. v. Skeels*, 3 W. Va. 560—*Gay v. New Whatcom*, 26 Wash. 396, 67 Pac. 88.

172. A mandamus may be issued to compel a town clerk to levy a tax to pay a judgment against the town, where there is a statute authorizing him to levy such tax. *United States ex rel. Morgan v. Gates (Morgan v. Town Clerk)* 7 Wall. 610, 19: 202
Cited in Vance v. Little Rock, 30 Ark. 450.

173. When a judgment against a municipal corporation is founded on contract, by which it was payable from the proceeds of taxes, the judgment creditor and the party succeeding to his interest are entitled to a writ commanding the levy and collection of a sufficient tax to pay the judgment, according to the assessment roll of the year in which the levy is made, at any time until the judgment is satisfied. *Louisiana ex rel. Nelson v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. Rep. 648, 28: 574

Nature of remedy.

Nature of Remedy Generally, see *supra*, I.

See also *infra*, 184.

174. Mandamus to enforce the payment of a municipal judgment is not a new suit, but becomes a substitute for the ordinary process of execution for the purpose of collecting the judgment. *Washington County v. United States ex rel. Durant (Washington County v. Durant)* 9 Wall. 415, 19: 732

Cited in Howard v. Huron, 6 S. D. 185, 26 L.R.A. 500, 60 N. W. 803.

175. Mandamus, when issued by a circuit court for the purpose of enforcing a judgment, becomes the proper substitute for an execution to enforce the judgment. *United States ex rel. Riggs v. Johnson County (Riggs v. Johnson County)* 6 Wall. 166, 18: 768

176. Mandamus to compel payment of bonds on which judgment has been recovered against a municipality is in the nature of an execution for the purpose of collecting the judgment. *United States ex rel Harshman v. County Court* (*Harshman v. County Court*) 122 U. S. 306, 7 Sup. Ct. Rep. 1171, 30:1152

Cited in *Stewart v. St. Clair County Justices*, 47 Fed. 483—*Thompson v. Perris Irrig. District*, 116 Fed. 770—*Territory ex rel. Wallace v. Woodbury*, 1 N. D. 87, 44 N. W. 1077—*Joint Free High School District v. Green Grove*, 77 Wis. 537, 46 N. W. 895.

177. When issued by a circuit court to compel officers of a county to levy a tax to pay a judgment, the writ of mandamus is a writ authorized by the judiciary act, § 14, and becomes a substitute for the ordinary process of execution to enforce the judgment. *United States ex rel. Weber v. Lee County* (*Weber v. Lee County*) 6 Wall. 210, 18:781

Cited in *Stewart v. St. Clair County Justices*, 47 Fed. 483—*Ex parte Holman*, 28 Iowa, 104, 4 Am. Rep. 159.

178. A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of execution. The rights of the parties to the judgment, in respect of its subject-matter, were fixed by its being rendered. *Chanute v. Trader*, 132 U. S. 210, 10 Sup. Ct. Rep. 67, 33:345

Cited in *Richardson v. Louisville & N. R. Co.* 169 U. S. 132, 42 L. ed. 688, 18 Sup. Ct. Rep. 268—*Stewart v. St. Clair County Justices*, 47 Fed. 483—*First Nat. Bank v. Society For Savings*, 25 C. C. A. 468, 42 U. S. App. 517, 80 Fed. 582—*Fleming v. Trowsdale*, 29 C. C. A. 106, 54 U. S. App. 474, 85 Fed. 190—*Helena v. United States*, 43 C. C. A. 434, 104 Fed. 117—*Thompson v. Perris Irrig. District*, 116 Fed. 770.

Use of writ as alternative to execution. Mandamus as Substitute for Execution, see *supra*, 174-178.

179. When creditors are unable to obtain payment of their judgments against municipal corporations by execution, they can proceed by mandamus against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the legislature with the taxing power. *Meriwether v. Garrett*, 102 U. S. 472, 26:197

Cited in *Wolff v. New Orleans* (*United States ex rel. Wolff v. New Orleans*) 103 U. S. 369, 26 L. ed. 399—*Amy v. Taxing District*, 114 U. S. 389, 29 L. ed. 173, 5 Sup. Ct. Rep. 893—*Taxing District v. League*, 129 U. S. 496, 32 L. ed. 781, 9 Sup. Ct. Rep. 327—*United States ex rel. Watts v. Lauderdale County Justices*, 10 Fed. 462—*Devereaux v. Brownsville*, 29 Fed. 743—*Marra v. San Jacinto & P. V. Irrig. District*, 131 Fed. 791—*Broadfoot v. Fayetteville*, 124 N. C. 485, 70 Am. St. Rep. 610, 32 S. E. 804.

180. The proper remedy of a judgment creditor to collect a judgment of a Federal circuit court on interest coupons on county bonds in mandamus to compel the proper county officers to levy a tax to pay it, even if the general laws of the state permit the

public property of the county to be levied upon and sold for its ordinary indebtedness, where the bonds were issued under a special act which authorized the commissioners to assess taxes to pay the interest on the coupons. *Knox County v. Aspinwall*, 24 How. 376, 16:735

Cited in *Riggs v. Johnson County* (*United States ex rel. Riggs v. Johnson County*) 6 Wall. 193, 18 L. ed. 775—*Walkley v. Muscatine*, 6 Wall. 483, 18 L. ed. 931—*Washington County v. Durant* (*Washington County v. United States*) 9 Wall. 417, 19 L. ed. 733—*United States v. New Orleans*, 98 U. S. 397, 25 L. ed. 227—*Bayard v. United States*, 127 U. S. 250, 32 L. ed. 118, 8 Sup. Ct. Rep. 1223—*Evans v. Pittsburgh*, Fed. Cas. No. 4,567—*Ex parte Parsons* 1 Hughes, 285, Fed. Cas. No. 10,774—*United States v. Hutton*, 10 Ben. 276, Fed. Cas. No. 15,433—*United States ex rel. Merchants' Nat. Bank v. Jefferson County*, 1 McCrary, 370, Fed. Cas. No. 15,472—*United States ex rel. Ganley v. New Orleans*, 17 Fed. 484—*Re Copenhagen*, 54 Fed. 661—*Walte v. Santa Cruz*, 89 Fed. 624—*Thompson v. Perris Irrig. District*, 116 Fed. 770—*People ex rel. German Ins. Co. v. Getsendaner*, 137 Ill. 280, 34 N. E. 297—*East St. Louis v. Millard*, 14 Ill. App. 488—*Lafayette, M. & B. R. Co. v. Gelger*, 34 Ind. 214—*Leavenworth County v. Miller*, 7 Kan. 508, 12 Am. Rep. 425—*Badger v. New Orleans* (*State ex rel. Badger v. New Orleans*) 49 La. Ann. 840, 37 L.R.A. 554, 21 So. 870—*State ex rel. Polk County v. Demann*, 83 Minn. 336, 86 N. W. 352—*State ex rel. Schackelton v. Guttenberg*, 39 N. J. L. 661—*Thels v. Washita County*, 9 Okla. 653, 60 Pac. 505—*Beaver County v. Armstrong*, 44 Pa. 68—*Wells v. Mason*, 23 W. Va. 464.

Necessity of judgment as foundation for writ.

State Laws Making Judgment Unnecessary; Effect on Federal Jurisdiction, see *Courts*, 1009.

181. Although, in the courts of a state, a judgment may not be necessary to lay the foundation for a writ of mandamus, in courts of the United States such writ can be granted only in aid of an existing jurisdiction, and a judgment at law is necessary to support a writ of mandamus to enforce the levy and collection of taxes to pay bonds. *Chickaming v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. Rep. 620, 27:307

Greene County v. Daniel, 102 U. S. 187, 26:99

Davenport v. Dodge County, 105 U. S. 237, 26:1018

Cited in *Davenport v. Dodge County*, 105 U. S. 242, 26 L. ed. 1021—*Chickaming v. Carpenter*, 106 U. S. 666, 27 L. ed. 308, 1 Sup. Ct. Rep. 620—*Louisiana v. Jumel*, 107 U. S. 727, 27 L. ed. 454, 2 Sup. Ct. Rep. 128—*United States ex rel. Chandler v. Dodge County*, 110 U. S. 162, 28 L. ed. 105, 3 Sup. Ct. Rep. 590—*Rosenbaum v. Bauer*, 120 U. S. 456, 30 L. ed. 745, 7 Sup. Ct. Rep. 633—*Jerome v. Rio Grande County*, 5 McCrary, 641, 18 Fed. 874—*Rosenbaum v. Supervisors*, 28 Fed. 224—*Vincent v. Lincoln County*, 30 Fed. 750—*United States ex rel. Seeger v. Pearson*, 32 Fed. 310—*Fuller v. Aylesworth*, 21 C. C. A. 509, 43 U. S. App. 657, 75 Fed. 699—*King v. Grand County*, 23 C. C. A. 350, 40 U. S. App. 614, 77

Fed. 586—Stryker v. Grand County, 23 C. C. A. 292, 40 U. S. App. 583, 77 Fed. 574—Re Forsyth, 78 Fed. 301—Lake County v. Platt, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 572—Indiana ex rel. Muncie v. Lake Erie & W. R. Co. 85 Fed. 3—Walte v. Santa Cruz, 89 Fed. 623—Shepard v. Tulare Irrig. District, 94 Fed. 3—Herring v. Modesto Irrig. District, 95 Fed. 709—Wyker v. Francis, 120 Ala. 520, 24 So. 895—Grand County v. People, 16 Colo. App. 246, 64 Pac. 675—Rio Grande County v. Burpee, 24 Colo. 59, 48 Pac. 539—People ex rel. German Ins. Co. v. Getzendaner, 137 Ill. 260, 34 N. E. 297—Goldsmith v. Baker City, 31 Or. 255, 49 Pac. 973.

182. A petition for a writ of mandamus commanding the levy of a tax for the payment of a judgment must be dismissed where the judgment itself has been reversed. Currie v. United States ex rel. Jacobs, 129 U. S. 44, 9 Sup. Ct. Rep. 213, 32: 592

Limitations as to scope of writ.

183. Mandamus to aid collection of a judgment against a municipal corporation can be limited in its mandate only by what the judgment itself declares. United States ex rel. Harshman v. County Court (Harshman v. County Court) 122 U. S. 306, 7 Sup. Ct. Rep. 1171, 30: 1152
Cited in First Nat. Bank v. Society for Savings, 25 C. C. A. 468, 42 U. S. App. 517, 80 Fed. 583.

184. A mandamus to collect a tax for the payment of a judgment, or a mandamus to pay a judgment, is process in execution; and the court may control its own final process, and define its extent. An alias writ, including in the list of property to be taxed a class of property that was improperly omitted from the former writ, is not erroneous. Memphis v. Brown, 97 U. S. 300, 24: 924
Cited in McGahey v. Virginia, 135 U. S. 694, 34 L. ed. 314, 10 Sup. Ct. Rep. 972—Apperson v. Memphis, 2 Flipp. 370, Fed. Cas. No. 497—United States ex rel. Gaines v. New Orleans, 17 Fed. 491—Fleming v. Trowsdale, 29 C. C. A. 107, 54 U. S. App. 574, 85 Fed. 190—Hair v. Burnell, 106 Fed. 284.

185. A mandamus cannot be issued to compel a city, by limiting its expenditures for general purposes, to create a surplus for the payment of a judgment recovered against the municipality. East St. Louis v. United States ex rel. Zebbley, 110 U. S. 321, 4 Sup. Ct. Rep. 21, 28: 162
Cited in Ft. Scott v. Hickman, 112 U. S. 165, 28 L. ed. 641, 5 Sup. Ct. Rep. 56—Cleveland v. United States, 49 C. C. A. 391, 111 Fed. 349—Kent v. United States, 51 C. C. A. 194, 113 Fed. 237—State ex rel. Benedict v. New Orleans, 111 La. 376, 35 So. 605—Gibson v. Gray, 17 Tex. Civ. App. 653, 43 S. W. 922.

186. A mandamus cannot be issued to compel the levy of a tax for the payment of a judgment against a municipality, where the proceeds of a maximum levy allowed by law are insufficient to meet the ordinary current expenses of the municipal government. Clay County v. United States

(Clay County v. McAleer) 115 U. S. 616, 6 Sup. Ct. Rep. 199, 29: 482
Cited in Missouri ex rel. Harshman v. Winterbottom, 123 U. S. 222, 31 L. ed. 127, 8 Sup. Ct. Rep. 98—McAleer v. Clay County, 42 Fed. 665—Stryker v. Grand County, 23 C. C. A. 296, 40 U. S. App. 583, 77 Fed. 577—United States ex rel. Dana v. Kent, 107 Fed. 192—Cleveland v. United States, 49 C. C. A. 391, 111 Fed. 348—Kent v. United States, 51 C. C. A. 194, 113 Fed. 237—White v. Decatur, 119 Ala. 481, 23 So. 999—Board of Improvement v. McManus, 54 Ark. 449, 15 S. W. 897—Chicago, R. I. & P. R. Co. v. Stanfield, 7 Kan. App. 275, 53 Pac. 772—Sherman v. Smith, 12 Tex. Civ. App. 583, 35 S. W. 294—Eidemiller v. Tacoma, 14 Wash. 387, 44 Pac. 877—Portland Sav. Bank v. Montesano, 14 Wash. 573, 45 Pac. 158.

187. Mandamus to levy a sufficient tax to satisfy a judgment against a municipality for the cost of a public improvement may properly direct that the tax be paid only in lawful money of the United States, since this does not forbid the city from crediting in payment of the levy whatever property owners have paid under a prior legal assessment, so long as it raises in money a sufficient amount to satisfy the judgment. Memphis v. United States ex rel. Brown, 97 U. S. 293, 24: 920

188. Where the county judge of a county in Kentucky answers to an alternative writ of mandamus commanding him to levy a tax on the property of the county to pay judgments against it on coupons on its bonds, that he has levied such tax and appointed a collector to collect it, and it appears that he has fully discharged his duties in the premises, a peremptory writ of mandamus will not be issued against him to compel him to do more. Bass v. Taft, 137 U. S. 458, 11 Sup. Ct. Rep. 154, 34: 752

Effect of laws abrogating or restricting taxing power.

189. This court has no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. If the municipality has no power, either by express grant or implication, to raise money by taxation to pay bonds on which judgment has been taken, the holder cannot require it. United States ex rel. Huidekoper v. County Court, 99 U. S. 582, 25: 331

Distinguished in State ex rel. Carere v. New Orleans, 36 La. Ann. 689.

Cited in Stryker v. Grand County, 23 C. C. A. 292, 40 U. S. App. 583, 77 Fed. 574—Cleveland v. United States, 49 C. C. A. 385, 111 Fed. 343—Kent v. United States, 51 C. C. A. 191, 113 Fed. 234—United States ex rel. Masslich v. Saunders, 59 C. C. A. 398, 124 Fed. 128—Roberts v. Denver, L. & G. R. Co. 8 Colo. App. 510, 46 Pac. 880—Byrne v. East Carroll, 45 La. Ann. 395, 12 So. 521—Avery v. Job, 25 Or. 523, 36 Pac. 293—Portland Sav. Bank v. Montesano, 14 Wash. 573, 45 Pac. 158—Grand Island & N. W. R.

Co. v. Baker, 6 Wyo. 399, 34 L.R.A. 843, 71 Am. St. Rep. 926, 45 Pac. 494.

190. The courts, treating as void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with it, can compel the exercise of that power, by mandamus, as if no such legislation had ever been attempted. *United States ex rel. Wolff v. New Orleans* (*Wolff v. New Orleans*) 103 U. S. 358,

26: 395

Cited in Deuel County v. First Nat. Bank, 30 C. C. A. 32, 58 U. S. App. 579, 86 Fed. 266—*Tax Assessors v. State*, 44 N. J. L. 421.

191. Laws passed since municipal securities were issued, taking away from the proper authority power to levy taxes necessary to meet their payment, are invalid, and mandamus will issue to require the proper authorities to do all that the law, when the securities were issued, required to raise the means to pay the judgment. *County Court v. United States ex rel. Douglass* (*Ralls County Court v. United States*) 105 U. S. 733,

26: 1220

192. A mandamus cannot be issued to compel the levy of a tax in excess of the amount allowed by statute at the time when the debt was created. *Louisiana ex rel. Stewart v. Jefferson* (*Stewart v. Jefferson*) 116 U. S. 135, 6 Sup. Ct. Rep. 332, 29: 588 *United States ex rel. Huidekoper v. County Court*, 99 U. S. 582,

25: 331

Cited in Clay County v. McAleer (*Clay County v. United States*) 115 U. S. 618, 29 L. ed. 483, 6 Sup. Ct. Rep. 199—*United States ex rel. Hayt v. Independent School District*, 20 Fed. 295—*State ex rel. Parsons v. Winkelman*, 96 Mo. App. 230, 69 S. W. 1068.

Effect of act enlarging taxing power.

193. Where bonds were issued by a municipal corporation under a statute requiring a levy or special tax on real estate for their payment, and the act is subsequently so amended as to require personal property to be included within the levy, a holder of the bonds overdue is entitled, by proper proceedings, to a writ of mandamus directing the levy of the tax on both species of property. *County Court v. United States ex rel. Hill* (*Cape Girardeau County Court v. Hill*) 118 U. S. 68, 6 Sup. Ct. Rep. 951,

30: 73

Cited in Fleming v. Trowsdale, 29 C. C. A. 107, 54 U. S. App. 574, 85 Fed. 190.

Extinction of municipality since contract.

194. The court cannot, by mandamus, compel a new municipal corporation succeeding to the functions of a former municipal corporation, to perform the duties of the extinct corporation in the levy of taxes, especially where its territorial jurisdiction is not the same, and the law has not authorized it to make such levy. *Barkley v. Board of Levee Comrs.* 93 U. S. 258,

23: 893

Cited in United States ex rel. Watson v. Mobile, 4 Woods, 541, 12 Fed. 771—*Vander-*

beck v. Englewood, 39 N. J. L. 347—*State ex rel. Hall v. Howell*, 28 Utah, 59, 72 Pac. 187—*Board of Education v. Board of Education*, 30 W. Va. 430, 4 S. E. 640.

195. If, where a municipal corporation is superseded in functions by other corporations, no provision is made for the continuance or new election of officers, the functions of the existing officers cease when their respective terms expire, and the corporation will be *de facto* extinct. In such case, if there be a judgment against the corporation, mandamus will not lie to enforce the assessment of taxes for its payment, there being no officers to whom the writ can be directed. *Barkley v. Board of Levee Comrs.* 93 U. S. 258,

23: 893

196. County auditors and treasurers, who are the instruments employed by the state legislature to assess and collect taxes, may be compelled by mandamus to levy a tax to pay a judgment on township bonds, although the corporate existence of the township has been abolished by the state Constitution, and its corporate agents removed. *Graham v. Folsom*, 200 U. S. 248, 26 Sup. Ct. Rep. 245,

50: 464

Where municipality without officers.

See also *Judgment*, 1128.

197. Mandamus will not lie to enforce the assessment of taxes for the payment of a judgment against a municipal corporation, where there are no officers to whom the writ can be directed. *Barkley v. Board of Levee Comrs.* 93 U. S. 258,

23: 893

Distinguished in Gibbs v. Green, 54 Miss. 610. *Cited in United States ex rel. Watts v. Lauderdale County Justices*, 10 Fed. 462—*O'Brien v. Wheelock*, 78 Fed. 679—*Bates v. Gregory*, 89 Cal. 395, 26 Pac. 891—*McLean County Precinct v. Deposit Bank*, 81 Ky. 260—*Boody v. Watson*, 64 N. H. 197, 9 Atl. 794.

Right to payment from either general or special fund.

198. Where a county is authorized to subscribe to the stock of a railroad company, and to issue bonds therefor, and to levy a tax to pay the same, not to exceed one twentieth of one per cent upon the assessed value of taxable property for each year, a holder of such bonds, who has recovered a judgment for unpaid interest thereon, is entitled to payment out of the general funds of the county, so far as the special tax of one twentieth of one per cent is insufficient to pay it; and a mandamus will issue against the county to compel such payments. The particular fund is only an additional security for the payment of the debt. *United States ex rel. Johnson v. County Court* (*United States v. Clark County*) 95 U. S. 769,

24: 545

United States ex rel. Huidekoper v. County Court, 99 U. S. 582,

25: 331

Cited in Knox County Court v. United States, 109 U. S. 230, 27 L. ed. 915, 3 Sup. Ct. Rep. 131—*Harshman v. County Court* (*United States ex rel. Harshman v. County Court*) 122 U. S. 314, 30 L. ed. 1154, 7 Sup. Ct. Rep. 1171—*Scotland County Court*

v. United States, 140 U. S. 46, 35 L. ed. 353, 11 Sup. Ct. Rep. 697—United States ex rel. Jones v. Macon County Court, 144 U. S. 568, 36 L. ed. 544, 12 Sup. Ct. Rep. 921—Knox County v. Ninth Nat. Bank, 147 U. S. 94, 37 L. ed. 94, 13 Sup. Ct. Rep. 267—United States ex rel. Douglass v. County Ct. Justices, 5 Dill. 202, Fed. Cas. No. 15,503—Kimball v. Grant County, 21 Fed. 147—Loague v. Taxing District, 36 Fed. 152—United States ex rel. Davis v. Knox County, 51 Fed. 881—Ft. Madison Water Co. v. Ft. Madison, 110 Fed. 906—Weaver v. Ogden City, 111 Fed. 325—Ft. Madison v. Ft. Madison Water Co. 52 C. C. A. 206, 114 Fed. 294—Smith v. Broderick, 107 Cal. 651, 48 Am. St. Rep. 167, 40 Pac. 1033—Grand County v. People, 16 Colo. App. 225, 64 Pac. 675—Raton Waterworks Co. v. Raton, 9 N. M. 89, 49 Pac. 898.

For payment of coupons.

See also *supra*, 180; Taxes, 497.

199. A writ of mandamus is a proper remedy to compel municipal authorities to levy a special tax to pay coupons on outstanding bonds. Louisiana ex rel. Southern v. Pilsbury, 105 U. S. 278, 26: 1090
Cited in Hausmelster v. Porter, 10 Sawy. 282, 21 Fed. 356.

200. Mandamus granted to compel the levy of a tax to pay county bonds. County Court v. United States ex rel. Huidekoper (Macon County Court v. Huidekoper) 134 U. S. 332, 10 Sup. Ct. Rep. 491, 33: 914
Cited in United States ex rel. Morton v. King, 74 Fed. 498—Morton v. Kirk, 79 Fed. 291.

e. To Private Corporations.

Who may Maintain, see *infra*, 212.

Jurisdiction of State Court to Enforce Stockholder's Right to Inspect Books of National Bank, see Courts, 1414.

201. A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty. Northern P. R. Co. v. Washington ex rel. Dustin, 142 U. S. 492, 12 Sup. Ct. Rep. 283, 35: 1092

Cited in Jones v. Newport News & M. Valley Co. 13 C. C. A. 97, 31 U. S. App. 92, 65 Fed. 738—Jack v. Williams, 113 Fed. 829—Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 218, 55 C. C. A. 69, 118 Fed. 119—Page v. Louisville & N. R. Co. 129 Ala. 237, 29 So. 676—Metropolitan R. Co. v. Macfarland, 20 App. D. C. 438—Florida C. & P. R. Co. v. State, 31 Fla. 507, 20 L.R.A. 422, 34 Am. St. Rep. 30, 13 So. 103—State ex rel. Smart v. Kansas City, S. & G. R. Co. 51 La. Ann. 205, 25 So. 126—Cumberland Teleph. & Teleg. Co. v. Texas R. Co. 52 La. Ann. 1854, 28 So. 284—People ex rel. Linton v. Brooklyn Heights R. Co. 69 App. Div. 551, 75 N. Y. Supp. 202—Chaddick v. Lindsay, 5 Okla. 622, 49 Pac. 940—San Antonio Street R. Co. v. State, 90 Tex. 524, 35 L.R.A. 864, 59 Am. St. Rep. 834, 39 S. W. 926—Sherwood v. Atlantic & D. R. Co. 94 Va. 303, 26 S. E. 943.

202. The building of stations by a railroad is a proper subject of legislative action, which is not ordinarily to be enforced by the court by mandamus. Northern P. R. Co. v. Washington ex rel. Dustin, 142 U. S. 492, 12 Sup. Ct. Rep. 283, 35: 1092

Cited in Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 137, 43 U. S. App. 808, 74 Fed. 838—Farmers' Loan & T. Co. v. Northern P. R. Co. 83 Fed. 254—Metropolitan R. Co. v. Macfarland, 20 App. D. C. 436.

203. Mandamus will not lie to require a railroad station to be built or maintained contrary to the public interest. Northern P. R. Co. v. Washington ex rel. Dustin, 142 U. S. 492, 12 Sup. Ct. Rep. 283, 35: 1032

204. Where a drawbridge is required to be constructed across navigable water, as a condition of the right (given by a state statute), of a railroad company originally chartered by another state, to build a bridge across the same, mandamus may be issued by a circuit court, on a petition from the state, to compel a compliance with the condition. New Orleans & M. T. R. Co. v. Mississippi, 112 U. S. 12, 5 Sup. Ct. Rep. 19, 28: 619

Cited in Northern P. R. Co. v. Washington, 142 U. S. 499, 35 L. ed. 1095, 12 Sup. Ct. Rep. 283—Jack v. Williams, 113 Fed. 829—Metropolitan R. Co. v. Macfarland, 20 App. D. C. 438—State ex rel. Smart v. Kansas City, S. & G. R. Co. 51 La. Ann. 206, 25 So. 126.

Editorial notes.

[To compel operation of railroad. 24 L.R.A. 564.

To enforce by-laws. 32 L.R.A. 575.

To enforce right to inspect corporation's books. 45 L.R.A. 457.

Mandamus to compel water company to supply individual applicant with water at reasonable rates. 1 L.R.A.(N.S.) 963.

To compel delivery of market quotations to bucket shop. 3 L.R.A.(N.S.) 153.]

III. Procedure.

a. In General.

Abatement of Action, see Abatement and Revival, 27, 28, 31-34.

Mode of Reviewing Decree, see Appeal and Error, 689-690.

Insufficiency of Judgment, see Appeal and Error, 5177.

Right to Remove Proceeding to Federal Court, see Removal of Causes, 38.

205. A proceeding by a mandamus is an action or suit brought in a court of justice, asserting a right; and is prosecuted according to the forms of judicial proceedings. Kendall v. United States ex rel. Stokes, 12 Pet. 524, 9: 1181

Cited in Holmes v. Jennison, 14 Pet. 366, 10 L. ed. 592—Decatur v. Paulding, 14 Pet. 601 Appx. 10 L. ed. 609 Appx.—Reeside v. Walker, 11 How. 292, 13 L. ed. 701—Ken-

tucky v. Dennison, 24 How. '97, 16 L. ed. 726—*Riggs v. Johnson County* (United States ex rel. *Riggs v. Johnson County*) 6 Wall. 207, 18 L. ed. 780—*Hartman v. Greenbow*, 102 U. S. 673, 26 L. ed. 273—*Louis v. Brown Twp.* 109 U. S. 166, 27 L. ed. 893, 3 Sup. Ct. Rep. 92—*Upshur County v. Rich*, 135 U. S. 474, 34 L. ed. 199, 10 Sup. Ct. Rep. 651—*Clark v. Sohler*, 1 Woodb. & M. 372, Fed. Cas. No. 2,835—*Re Chicago*, 64 Fed. 898—*People ex rel. Central P. R. Co. v. San Francisco*, 27 Cal. 684—*Barnes v. Glide*, 117 Cal. 6, 59 Am. St. Rep. 153, 48 Pac. 804—*Swift v. State*, 7 Houst. (Del.) 336, 40 Am. St. Rep. 127, 32 Atl. 143—*Chance v. Temple*, 1 Iowa, 200—*Ex parte Holman*, 28 Iowa, 155, 4 Am. Rep. 159—*Brown v. Crego*, 29 Iowa, 323—*State ex rel. Craig v. Dougherty*, 45 Mo. 290—*People ex rel. Yates v. Canal Board*, 13 Barb. 439—*Brown v. Turner*, 70 N. C. 105—*Haymore v. Yadkin County*, 85 N. C. 271—*Re Epley*, 10 Okla. 644, 64 Pac. 18—*Lord v. Bates*, 48 S. C. 103, 26 S. E. 213—*Bradley v. McCrabb*, Dallam (Tex.) 506—*Houston, G. & N. R. Co. v. Kuechler*, 36 Tex. 412—*Bledsoe v. International R. Co.* 40 Tex. 575—*Fisher v. Charleston*, 17 W. Va. 605.

206. Relief by mandamus cannot be granted in equity, but only at law. *Smith v. Bourbon County*, 127 U. S. 105, 8 Sup. Ct. Rep. 1043, 32: 73
Cited in First Nat. Bank v. Society for Savings, 25 C. C. A. 468, 42 U. S. App. 517, 80 Fed. 582—*Indiana ex rel. Muncie v. Lake Erie & W. R. Co.* 85 Fed. 3—*Edward C. Jones Co. v. Guttenberg*, 66 N. J. L. 669, 51 Atl. 274.

Rule to show cause.

See also *supra*, 71.

207. No rule to show cause why a mandamus should not issue to a party is necessary, if he waives a formal rule and notice, and states his readiness to show cause. *Life & F. Ins. Co. v. Adams*, 9 Pet. 571, 9: 233

Order for writ.

208. It is no objection to a mandamus that it was issued without an order being entered for it, when the order was actually made, and a note of it entered, and the court subsequently allowed it to be entered *nunc pro tunc*. *Poweshiek County v. United States ex rel. Durant*, 9 Wall. 736, 19: 813
Cited in Rickards v. Ladd, 6 Sawy. 46, Fed. Cas. No. 11,804—*Re McGonigle*, 2 Fed. 769—*Starr v. United States*, 8 App. D. C. 559—*Com. ex rel. Grier v. Cox*, 1 Legal Chronicle, 79.

209. A peremptory writ of mandamus may be ordered in vacation by the judge of the district court of the territory of New Mexico. *Delgado v. Chavez* (Re Delgado) 140 U. S. 586, 11 Sup. Ct. Rep. 874, 35: 578

b. Parties.

1. Persons Entitled to Relief.

Prosecuting officers.

210. A petition for a mandamus is properly presented in the name of a territory at the relation of its prosecuting of-

ficer, to compel the performance of a definite public duty required by law. No demand is necessary before applying for the writ. *Northern P. R. Co. v. Washington ex rel. Dustin*, 142 U. S. 492, 12 Sup. Ct. Rep. 283, 35: 1092

Private persons.

See also *supra*, 100.

211. A writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator, although the nonperformance of the duty will not work him any special injury. *Union P. R. Co. v. Hall*, 91 U. S. 343, 23: 428
Cited in State v. Mobile & M. R. Co. 59 Ala. 325—*Leigh v. State*, 69 Ala. 286—*Eby v. Red Bank School District*, 87 Cal. 176, 25 Pac. 240—*Coleman v. People*, 7 Colo. App. 252, 42 Pac. 1041—*State ex rel. Dakota Hall Asso. v. Carey*, 2 N. D. 41, 49 N. W. 164—*State ex rel. Adkins v. Lien*, 9 S. D. 300, 68 N. W. 748—*Burkhart v. Reed*, 2 Idaho, 519, 22 Pac. 1—*Hall v. Mann*, 96 Ill. App. 662—*State ex rel. Winterburg v. Demaree*, 80 Ind. 523—*Landes v. Walls*, 160 Ind. 221, 66 N. E. 679—*Windsor v. Polk County*, 115 Iowa, 740, 87 N. W. 704—*Vincent v. Ellis*, 116 Iowa, 616, 88 N. W. 836—*State ex rel. Hart v. Burke*, 33 La. Ann. 510—*Pumphrey v. Baltimore*, 47 Md. 154, 28 Am. Rep. 446—*Berube v. Wheeler*, 128 Mich. 35, 87 N. W. 50—*State ex rel. Currie v. Weld*, 39 Minn. 428, 40 N. W. 561—*St. Louis v. St. Louis Gaslight Co.* 70 Mo. 115—*State ex rel. Morris v. Hannibal & St. J. R. Co.* 86 Mo. 17—*State ex rel. Gillman v. Home Street R. Co.* 43 Neb. 838, 62 N. W. 225—*Boody v. Watson*, 64 N. H. 174, 9 Atl. 794—*People ex rel. O'Brien v. Van Wyck*, 27 Misc. 443, 59 N. Y. Supp. 134—*People ex rel. Sherrill v. Guggenheimer*, 28 Misc. 742, 59 N. Y. Supp. 913—*Jackson v. Corporation Commission*, 130 N. C. 418, 42 S. E. 123—*State ex rel. Flowers v. Board of Education*, 35 Ohio St. 384—*State v. Henderson*, 38 Ohio St. 649—*State ex rel. Trauger v. Nash*, 66 Ohio St. 616, 64 N. E. 558—*State ex rel. Durkheimer v. Grace*, 20 Or. 158, 25 Pac. 382—*Kimberly v. Morris*, 87 Tex. 638, 31 S. W. 808—*Lewright v. Love*, 95 Tex. 160, 65 S. W. 1089—*State ex rel. Elmendorf v. San Antonio Street R. Co.* 10 Tex. Civ. App. 14, 30 S. W. 286—*Kimberly v. Morris*, 10 Tex. Civ. App. 600, 31 S. W. 809—*State ex rel. Lloyd v. Elliott*, 13 Utah, 208, 44 Pac. 248—*Richmond R. & Electric Co. v. Brown*, 97 Va. 31, 32 S. E. 775—*State ex rel. Grinsfelder v. Spokane Street R. Co.* 19 Wash. 523, 41 L.R.A. 517, 87 Am. St. Rep. 739, 53 Pac. 719—*State ex rel. Wisconsin Teleph. Co. v. Janesville Street R. Co.* 87 Wis. 79, 22 L.R.A. 765, 41 Am. St. Rep. 23, 57 N. W. 970.

212. A writ of mandamus to compel the performance of its duty, under the acts of Congress, by the Union Pacific Railroad Company, in operating its road over the bridge across the Missouri river, between Omaha and Council Bluffs, may be issued at the instance of a private relator. *Union P. R. Co. v. Hall*, 91 U. S. 343, 23: 428
Distinguished in People v. Rome, W. & O. R. Co. 103 N. Y. 108, 8 N. E. 369—*Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 513, 28 L.R.A. 254, 62 N. W. 417.

Cited in Northern P. R. Co. v. Washington, 142 U. S. 499, 35 L. ed. 1095, 12 Sup. Ct. Rep.

283—Illinois C. R. Co. v. Illinois, 163 U. S. 154, 41 L. ed. 111, 16 Sup. Ct. Rep. 1096—Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co. 4 McCrary, 343, 15 Fed. 655—People ex rel. Van Dyke v. Colorado C. R. Co. 42 Fed. 640—Metropolitan R. Co. v. Macfarland, 20 App. D. C. 438—Ohio & M. R. Co. v. People, 120 Ill. 206, 11 N. E. 347—Chicago & A. R. Co. v. Saffern, 129 Ill. 282, 21 N. E. 824—Illinois C. R. Co. v. People, 143 Ill. 452, 19 L.R.A. 125, 33 N. E. 173—Potwin Place v. Topeka R. Co. 51 Kan. 613, 37 Am. St. Rep. 812, 33 Pac. 309—State ex rel. Little v. Dodge City, M. & T. R. Co. 58 Kan. 335, 24 L.R.A. 568, 36 Pac. 755—State ex rel. Smart v. Kansas City, S. & G. R. Co. 51 La. Ann. 206, 25 So. 126—People v. New York C. & H. R. R. Co. 28 Hun, 552—People v. New York, L. E. & W. R. Co. 40 Hun, 574—People v. New York, L. E. & W. R. Co. 63 How. Pr. 293—People ex rel. Linton v. Brooklyn Heights R. Co. 69 App. Div. 558, 75 N. Y. Supp. 202—Loralne v. Pittsburg, J. E. & E. R. Co. 27 Pa. Co. Ct. 362—McLeod v. Central Normal School Asso. 152 Pa. 586, 25 Atl. 1106—McCann v. South Nashville Street R. Co. 2 Tenn. Ch. 776—State ex rel. Wisconsin Teleph. Co. v. Janesville Street R. Co. 87 Wis. 79, 22 L.R.A. 763, 41 Am. St. Rep. 23, 57 N. W. 970.

213. Any person who will sustain personal injury by an officer's refusal to perform a plain official duty may have a mandamus to compel its performance. Board of Liquidation v. McComb, 92 U. S. 531, 23: 623 Cited in Antoni v. Greenhow, 107 U. S. 809, 27 L. ed. 483, 2 Sup. Ct. Rep. 91—Louisiana State Lottery Co. v. Fitzpatrick, 3 Woods, 260, Fed. Cas. No. 8,541—United States ex rel. Merchants' Nat. Bank v. Jefferson County, 5 Dill. 323, 1 McCrary, 870, Fed. Cas. No. 15,472—Koehler v. Barin, 25 Fed. 166—United States ex rel. Edwards v. Root, 22 App. D. C. 430—State ex rel. McEnery v. Nicholls, 42 La. Ann. 224, 7 So. 738—State ex rel. New Orleans Canal & Bkg. Co. v. Heard, 47 La. Ann. 1695, 47 L.R.A. 523, 18 So. 746—State ex rel. Robert Mitchell Furniture Co. v. Toole, 26 Mont. 28, 55 L.R.A. 647, 91 Am. St. Rep. 386, 66 Pac. 496—State ex rel. Brown v. Boden, 51 N. J. L. 116, 16 Atl. 58—Re Sloan, 5 N. M. 628, 25 Pac. 930—People ex rel. Hammond v. Leonard, 74 N. Y. 445—People ex rel. Broderick v. Morton, 156 N. Y. 152, 41 L.R.A. 237, 66 Am. St. Rep. 547, 60 N. E. 791—State ex rel. Taylor v. Lord, 28 Or. 523, 31 L.R.A. 480, 43 Pac. 471.

Interest in subject-matter.

214. Mandamus to a marshal, to compel him to report a sale, will not be issued at the instance of a party who does not clearly show his interest in the matter. Fleming v. LaCrosse & M. R. Co. (Re Fleming) 2 Wall. 759, 17: 924 Cited in People ex rel. McBride v. Kent County, 38 Mich. 424.

215. The right to enforce redemption of a bond from a fund, by mandamus, or to damages for a refusal to redeem, is an incident of the bond, and can only be established by its holder, and not by the person to whom it was issued and who has parted with it. Memphis v. Brown, 20 Wall. 289.

22: 264

2. Defendants or Respondents.

Writ against Officer as Suit against State, see States, IX. c, 2.
See also supra, 5.

216. A writ of mandamus must issue directly against him whose duty it is to do the thing which it is sought to have done. Re Rowland, 104 U. S. 604, 26: 861 Cited in United States ex rel. Strasburger v. District of Columbia, 5 Mackey, 391.

217. A writ of error does not lie to an order of the court below to stay proceedings finally for the recovery of possession of real property, upon suggestion of the attorney for the United States, in a case to which the United States are not parties: but the court will award a mandamus nisi in the nature of a procedendo. Livingston v. Dorgenois, 7 Cranch, 577, 3: 444

Municipal officers.

218. A peremptory writ of mandamus may be directed to the board of county commissioners, or to the mayor and common council of a city, in their corporate capacity. Leavenworth County v. Sellew, 99 U. S. 624, 25: 333 Leavenworth v. Kinney, 154 U. S. 642, Appx. and 14 Sup. Ct. Rep. 1198,

25: 336 Cited in United States ex rel. Goelet v. Elizabeth, 24 Fed. 851—Norwalk & S. N. Electric Light Co. v. South Norwalk, 71 Conn. 390, 42 Atl. 82—Wren v. Indianapolis, 96 Ind. 214—Boody v. Watson, 64 N. H. 193, 9 Atl. 794—State ex rel. Brown v. Tax Assessors, 53 N. J. L. 158, 20 Atl. 966—Osborne v. Kammer, 96 Va. 229, 31 S. E. 19—Hebb v. County Court, 49 W. Va. 742, 37 S. E. 676.

219. A writ of mandamus directed to the mayor and aldermen of a city is properly directed against the city, where they perform all the duties of the corporation in relation to the matters in controversy. Davenport v. United States (Davenport v. Lord) 9 Wall. 409, 19: 704 Cited in Thompson v. United States, 103 U. S. 484, 26 L. ed. 523—Eufaula v. Hickman, 57 Ala. 341—Cooperrider v. State, 46 Neb. 86, 64 N. W. 372—State ex rel. Sears v. Wright, 10 Nev. 172—State ex rel. Mercer County v. Pennsylvania R. Co. 41 N. J. L. 253—Com. ex rel. Freeman v. Westfield, 11 Pa. Co. Ct. 371—Houston v. Emery, 76 Tex. 323, 13 S. W. 266.

220. A single writ of mandamus is all that is necessary to enforce the assessment and collection of a tax; and there may be joined in it all those whose co-operation is by law required—even although it may be by separate and successive steps—in the performance of those official duties which are necessary to secure that end. Labette County v. United States, 112 U. S. 217, 5 Sup. Ct. Rep. 108, 28: 698 Cited in Hicks v. Cleveland, 45 C. C. A. 432, 106 Fed. 462—Thompson v. Perris Irrig. District, 116 Fed. 770—Guthrie v. Sparks, 65 C. C. A. 435, 131 Fed. 451—People ex rel. German Ins. Co. v. Getzenander, 137 Ill. 263, 34 N. E. 297—State ex rel Sheppard

v. Harbison, 64 Kan. 298, 67 Pac. 844—State ex rel. Livingstone v. Williams, 45 Or. 331, 67 L.R.A. 173, 77 Pac. 965.

221. The circuit court has jurisdiction to issue its mandamus to persons who are not parties to its judgment against a township, but who are officers of the county, and are under a legal duty to take steps necessary to pay the judgment. Labette County v. United States, 112 U. S. 217, 5 Sup. Ct. Rep. 108. 28: 698

Substitution of parties defendant.

Disability of United States Supreme Court to Substitute in Proceedings Removed or Appealed, see Supreme Court of the United States, 2.

222. Although when the order dismissing an appeal was made, the supreme court of a territory consisted of other judges than its present members, yet a mandamus can issue to the court constituted as it now is, to reinstate a case dismissed by their predecessors. Re Parker, 131 U. S. 221, 9 Sup. Ct. Rep. 708, 33: 123
Cited in Murphy v. Utter, 186 U. S. 102, 46 L. ed. 1075, 22 Sup. Ct. Rep. 776.

223. The successor in office of the original respondent in mandamus proceedings cannot be substituted in his place, as the duty sought to be enforced by the writ of mandamus is a personal one, and a distinct demand for its performance is a necessary prerequisite to the application for the writ. United States ex rel. Lewis v. Boutwell, 17 Wall. 604, 21: 721
Distinguished in People ex rel. O'Brien v. Cruger, 12 App. Div. 539, 42 N. Y. Supp. 398.

Cited in Moseley v. Collins, 133 Ala. 329, 32 So. 131—Chumaseo v. Potts, 2 Mont. 293—Boody v. Watson, 64 N. H. 194, 9 Atl. 794.

224. The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent; and, on the death or retirement from office of such person, the writ abates, and his successor cannot be substituted as defendant therein. Cox v. United States ex rel. McGarrahan (The Secretary v. McGarrahan) 9 Wall. 298, 19: 579
United States ex rel. Lewis v. Boutwell, 17 Wall. 604, 21: 721
Limited in Elmore, Logan & Bingham Counties v. Alturas County, 4 Idaho, 155, 95 Am. St. Rep. 53, 37 Pac. 349.

Distinguished in Leavenworth County v. Sel-
lew, 99 U. S. 626, 25 L. ed. 335—Presque Isle County v. Thompson, 10 C. C. A. 165, 22 U. S. App. 418, 61 Fed. 925.

Disapproved in Wood v. State, 155 Ind. 8, 55 N. E. 959.

Cited in United States v. Schurz, 102 U. S. 408, 26 L. ed. 220—Thompson v. United States, 103 U. S. 485, 26 L. ed. 523—Cunningham v. Macon & B. R. Co. 109 U. S. 453, 27 L. ed. 994, 3 Sup. Ct. Rep. 293—United States ex rel. Long v. Lochren, 164 U. S. 701, 41 L. ed. 1181, 17 Sup. Ct. Rep. 1001—Warner Valley Stock Co. v. Smith, 165 U. S. 31, 41 L. ed. 623, 17 Sup. Ct. Rep. 225—United States ex rel. Bernardin v. Butterworth, 169 U. S. 602, 42 L. ed. 873,

18 Sup. Ct. Rep. 441—Murphy v. Utter, 186 U. S. 100, 46 L. ed. 1074, 22 Sup. Ct. Rep. 776—Caledonian Coal Co. v. Baker, 186 U. S. 440, 49 L. ed. 543, 25 Sup. Ct. Rep. 378—Lansing & Co. v. Hesling, 26 C. C. A. 382, 53 U. S. App. 289, 81 Fed. 242—Fox v. Trinidad Waterworks Co. 7 Colo. App. 405, 43 Pac. 1051—Seymour v. United States, 10 App. D. C. 569—Roberts v. United States, 13 App. D. C. 47—Dabney v. Dabney, 20 App. D. C. 451—State ex rel. Matheson v. King, 32 Fla. 420, 13 So. 891—Atty. Gen. v. New Bedford, 128 Mass. 312—State ex rel. School Board v. Guthrie, 17 Neb. 116, 22 N. W. 77—People ex rel. Galge v. Reardon, 49 Hun, 432, 3 N. Y. Supp. 560—People ex rel. Taylor v. Weide, 61 App. Div. 581, 70 N. Y. Supp. 869—People ex rel. Hatch v. Lantry, 88 App. Div. 587, 85 N. Y. Supp. 193—People ex rel. Haverly v. Hanes, 44 Misc. 477, 90 N. Y. Supp. 61—State v. Port Royal & A. R. Co. 45 S. C. 447, 23 S. E. 363—Kuechler v. Wright, 40 Tex. 679—Rains v. Simpson, 50 Tex. 511, 32 Am. Rep. 609—Hebb v. County Court, 49 W. Va. 743, 37 S. E. 676—State ex rel Sloan v. Warner, 55 Wis. 285, 13 N. W. 255.

c. Pleading.

225. A supporting affidavit is necessary to secure the issuance of a mandamus to a judge upon a petition making out a prima facie case of mistake, misconduct, or omission of duty on the part of the court. Postmaster General v. Trigg, 11 Pet. 173, 9: 676

Cited in Gunning v. Sheahan, 78 Ill. App. 127.

d. The Writ and Return.

Validity of Writ in Vacation under Caption of Court, see Courts, 311.

Service.

Waiver of, by Appearance, see Appearance, 17.

226. Service of a copy of a writ of mandamus upon the clerk of the board of commissioners of a county in Kansas is sufficient service on the members of the board. Leavenworth County v. Sellew, 99 U. S. 624, 25: 333

Cited in Knox County v. Harshman, 133 U. S. 156, 33 L. ed. 588, 10 Sup. Ct. Rep. 257—State ex rel. Drury v. Lincoln, 67 Wis. 278, 30 N. W. 360.

Abatement.

See also supra, 223, 224.

227. A writ of mandamus directed to municipal officers in their corporate capacity does not abate on their retirement from office, but is enforceable against their successors. Leavenworth County v. Sellew, 99 U. S. 624, 25: 333

Cited in Thompson v. United States, 103 U. S. 484, 26 L. ed. 523—Warner Valley Stock Co. v. Smith, 165 U. S. 31, 41 L. ed. 623, 17 Sup. Ct. Rep. 225—United States ex rel. Bernardin v. Butterworth, 169 U. S. 604, 42 L. ed. 874, 18 Sup. Ct. Rep. 441—Murphy v. Utter, 186 U. S. 101, 46 L. ed. 1075, 22 Sup. Ct. Rep. 776—United States ex rel. Watts v. Lauderdale County Justices, 10 Fed. 462—Fox v. Trinidad Waterworks Co.

7 Colo. App. 405, 43 Pac. 1051—Dabney v. Dabney, 20 App. D. C. 451—Elmore, Logan & Bingham Counties v. Alturas County, 4 Idaho, 155, 95 Am. St. Rep. 53, 37 Pac. 349—State ex rel. Bauman v. Civil Dist. Judge, 38 La. Ann. 45, 58 Am. Rep. 158—Atty. Gen. v. New Bedford, 128 Mass. 312—Hebb v. County Court, 49 W. Va. 734, 37 S. E. 676—State ex rel. Sloan v. Warner, 55 Wis. 287, 18 N. W. 255.

The return.

See also *infra*, 242.

228. Where a mandamus commanded a municipal corporation to levy a tax on its property sufficient to pay a judgment against it, and collect the tax and pay the judgment, a return to the writ that it did levy a tax for that purpose and other claims is insufficient. *United States ex rel. Benbow v. Iowa City* (Benbow v. Iowa City) 7 Wall. 313, 19: 79

229. A return to a mandamus requiring a supervisor of a town to take the proper steps to levy a tax to pay a judgment against the town, that he had delivered to and filed with the town clerk his resignation of such office of supervisor, did not sufficiently show that the defendant had ceased to be supervisor of the township. The resignation must be accepted. *Edwards v. United States ex rel. Thompson*, 103 U. S. 471, 26: 314
Thompson v. United States ex rel. Cambria Iron Co. 103 U. S. 480, 26: 521
Cited in Thompson v. United States, 103 U. S. 480, 26 L. ed. 522—*People ex rel. German Ins. Co. v. Williams*, 145 Ill. 581, 24 L.R.A. 496, 38 Am. St. Rep. 514, 33 N. E. 849.

230. A judge on whom a rule has been granted to show cause why he should not sign a certain bill of exceptions has a right to show cause on the day of the return, whether the person applying for the rule moves, or not. *Re Bradstreet* (Jackson ex dem. Bradstreet v. Thomas) 4 Pet. 102, 7: 796

231. Upon an application for a mandamus to compel the signing of a bill of exceptions, the return of a district judge to a rule to show cause need not be sworn to by him. *Re Bradstreet* (Jackson ex dem. Bradstreet v. Thomas) 4 Pet. 102, 7: 796

Amendment of return.

232. Where it was not stated in the return to a writ of mandamus that the original writ was exhibited at the time of service, the court may allow the return to be amended to state that fact. *Poweshiek County v. United States ex rel. Durant*, 9 Wall. 736, 19: 813

Issue of new writs.

233. A new writ of mandamus to compel a municipality to levy a tax to satisfy a judgment against it may issue as often as the occasion requires. *Rees v. Watertown*, 19 Wall. 107, 22: 72
Cited in People ex rel. Illinois Midland R. Co. v. Barnett Twp. 100 Ill. 334.

e. Hearing and Determination.

Dismissal of Suit for, see Dismissal and Discontinuance, 16.

Matters Open to Inquiry on Hearing of Application for Writ in Supreme Court, see Supreme Court of the United States, 163.

See also *supra*, 131; *Certiorari*, 56.

234. It is not competent for the superior tribunal, upon the issuance of a writ of mandamus, to re-examine the judgment or decree of the subordinate court, or to interfere in any manner with the judicial discretion and judgment of the subordinate court. *Re Newman*, 14 Wall. 152, 20: 877

235. In a prayer for mandamus that the district court be directed to sell particular property which has been transferred in accordance with statute by the person against whom the process is directed, the Supreme Court cannot determine the construction or obligation of that law, there having been no final judgment thereon. *Life & F. Ins. Co. v. Adams*, 9 Pet. 573, 9: 234

236. Upon application for mandamus to compel the levy of a tax for the payment of a judgment upon county bonds, the original contract cannot be resorted to determine the extent of the remedy, that having been decided by the judgment. *United States ex rel. Harshman v. County Court* (Harshman v. County Court) 122 U. S. 806, 7 Sup. Ct. Rep. 1171, 30: 1152
Cited in Pullman's Palace-Car Co. v. Washburn, 86 Fed. 797—*United States v. King*, 74 Fed. 497.

f. Defenses.

Bar of Prior Judgment, see Judgment, 566, 567.

237. The fact that money which has been lost has once been raised by taxation for the payment of municipal securities is no defense to a proceeding for a mandamus to require the levy of a tax to satisfy a judgment against the municipality, recovered in an action on such securities. *County Court v. United States ex rel. Douglass* (Ralls County Court v. United States) 105 U. S. 733, 26: 1220

238. A city cannot object to a mandamus ordering a tax, at the instance of a creditor, that it owes a large amount of other debts, and that, if these taxes are collected, the other creditors will be entitled to share in the distribution of the proceeds. The diminished resources of the city, and the disproportionate magnitude of its debt, are unimportant considerations. *Galena v. United States ex rel. Amy* (Galena v. Amy) 5 Wall. 705, 18: 560
Cited in Tax Assessors v. State, 44 N. J. L. 419.

239. Under a power to tax, not for the payment of judgments, but for the payment of bonds, when the relator in a

proceeding for mandamus is obliged to go behind his judgments on bonds to obtain the remedy pertaining to the bonds, the validity of the bonds may be brought in question. *Comra. of Taxing District v. League*, 129 U. S. 493, 9 Sup. Ct. Rep. 327, 32: 780

240. The fact that the supervisors of a county have been enjoined by a state court from levying a tax, as prayed, to satisfy a judgment previously rendered by a Federal court, is not a defense against the issuance of a mandamus requiring the supervisors to levy a tax for the payment of the judgment in question. *United States ex rel. Riggs v. Johnson County (Riggs v. Johnson County)* 6 Wall. 166, 18: 768
Cited in Hair v. Burnell, 106 Fed. 283—*Flasher v. Charleston*, 17 W. Va. 612.

241. Mandamus to compel the county authorities through whom taxes are assessed and collected to levy a tax to pay a judgment on township bonds cannot be denied on the theory that, because the legislature might, under S. C. Const. art. 9, § 8, have vested in the township authorities the power to assess and collect taxes for corporate purposes, it could not vest such power in county officers. *Graham v. Folsom*, 200 U. S. 248, 26 Sup. Ct. Rep. 245, 50: 464

242. A fact which has arisen since the return to a mandamus was made is not competent under the issue framed thereon; as a matter of defense, whether in abatement or in bar, it should have been set up by a plea *puis darrein continuance*, or its equivalent. *Thompson v. United States ex rel. Cambria Iron Co.* 103 U. S. 480, 26: 521

243. It is no reason for setting aside a peremptory writ of mandamus to compel the levy of a tax to pay a judgment on interest coupons on county bonds, that a previous alternative writ had not issued, where the court gave the defendants an opportunity to comply with the law, and their excuse for not doing so was equivalent to a refusal. *Knox County v. Aspinwall*, 24 How. 376, 16: 735

Cited in State ex rel. Kelley v. Paterson, 35 N. J. L. 199—*Northern P. R. Co. v. Territory*, 3 Wash. Terr. 314, 13 Pac. 604.

Editorial note.

[Unconstitutionality of statute as defense against mandamus to compel enforcement. 47 L.R.A. 512.]

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- II. For What, 7-56.*
 - a. In General, 7-13.*
 - b. For Repairs, Supplies, etc., 14-49.*
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 - 2. At Home Port, 30-5.*
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 - c. Services and Wages, 50-3.*
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 Marshaling Fund between Lien Holders, see Marshaling Assets, 3.
 Effect of Capture on, see Prize and Capture, 193-197.

I. In General.

1. Maritime liens are *stricti juris* and will not be extended by construction. *Verderwater v. Mills* (Vandewater v. Mills) 19 How. 82. 15: 554

Cited The Ances, 87 Fed. 568—*The Clara A. McIntyre*, 94 Fed. 558—*The Ripon City*, 42 C. C. A. 251, 102 Fed. 180—*Guffey v. Alaska & P. S. S. Co.* 64 C. C. A. 519, 130 Fed. 273—*Birdsall v. Patterson*, 51 N. Y. 47—*Anchutz v. The Seven Sons*, 25 Pittsb. L. J. N. S. 415.

2. A maritime lien attaches when the cargo is delivered to the master of the vessel for shipment. *Bulkley v. Naumkeag Steam Cotton Co.* 24 How. 386. 16: 599
Distinguished in The Guiding Star, 53 Fed. 943.

Cited in The Williams, Brown, Adm. 220, Fed. Cas. No. 17,710—*Blowers v. One Wire Rope Cable*, 19 Fed. 446—*Pearce v. The Thomas Newton*, 41 Fed. 108—*Hayes v. Campbell*, 56 Cal. 425, 36 Am. Rep. 43.

3. Drafts drawn by the master of a vessel on her owners, which express on their face that they are recoverable against the vessel, freight, and cargo, do not themselves create a lien on the vessel, unless the debt for which they were given bound the vessel. *Fechtenburg v. The Woodland* (The Woodland) 104 U. S. 180, 26: 705

Cited in Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 450, 32 L. ed. 795, 9 Sup. Ct. Rep. 469—*The Pride of America*, 19 Fed. 608—*The Scotia*, 35 Fed. 908—*The Lykus*, 36 Fed. 921—*The Serapis*, 37 Fed. 438—*Moore v. The Robilant*, 42 Fed. 165—*Nippert v. The J. B. Williams*, 42 Fed. 540—*The Brooklyn*, 46 Fed. 133—*O'Brien v. 1,614 Bags of Guano*, 48 Fed. 729—*George W. Bush & Sons Co. v. Fitzpatrick*, 73 Fed. 502.

4. The maritime lien for a general average in a case of jettison and the lien for freight depend upon the possession of the goods, and arise from the right to retain them until the amount of the lien is paid. *Sears v. Wills* (Re 4885 Bags of Linseed) 1 Black. 108. 17: 35
Cited in Wellman v. Morse, 22 C. C. A. 320, 33 U. S. App. 610, 76 Fed. 574.

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Maritime liens generally. 2: 636; 4: 609; 6: 531

To what attaches.

5. A maritime lien can exist only upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. *Galena, D. D. & M. Packet Co. v. Rock Island R. Bridge* (The Rock Island Bridge) 6 Wall. 213. 18: 753

Cited in Workman v. New York, 179 U. S. 573, 45 L. ed. 325, 21 Sup. Ct. Rep. 212—*The Ottawa*, Brown Adm. 359, Fed. Cas. No. 10,616—*The W. H. Clark*, 5 Biss. 308, Fed. Cas. No. 17,482—*The Frank G. Fowler*, 8 Fed. 335—*The Mary Stewart*, 5 Hughes, 314, 10 Fed. 138—*The Arkansas*, 5 McCrary, 368, 17 Fed. 386—*The Alabama*, 19 Fed. 546—*The Alabama*, 22 Fed. 450—*The Professor Morse*, 23 Fed. 804—*The City of Pittsburgh*, 45 Fed. 701—*The Major Reybold*, 111 Fed. 416—*Knapp S. & Co. Co. v. McCaffrey*, 178 Ill.

120, 69 Am. St. Rep. 290, 52 N. E. 890—*McCaffrey v. Knapp, S. & Co. Co.* 74 Ill. App. 97.

6. A maritime lien cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. *Galena, D. D. & M. Packet Co. v. Rock Island R. Bridge* (The Rock Island Bridge) 6 Wall. 213, 18: 753
Cited in Hay v. Alexander & W. R. Co. 4 Hughes, 354 Fed. Cas. No. 6,254a—*The Mary Garrett*, 63 Fed. 1013—*Etheridge v. Philadelphia*, 17 W. N. C. 224.

II. For What.**a. In General.**

For General Average, see Average, 49-51.
For Carriage of Goods, see Shipping, IV. c, 5.

Enforcing Lien for Tort as Regulation of Commerce, see Commerce, 364.
See also *supra*, 4.

7. The home port of a vessel, as respects materialmen, is any port in the state to which she belongs. *Rodd v. Heartt* (The Lottawanna) 21 Wall. 558. 22: 654
Cited in The Albany, 4 Dill. 444, Fed. Cas. No. 131—*The Favorite*, 3 Sawy. 411, Fed. Cas. No. 4,699—*The Cumberland*, 30 Fed. 451—*Rees v. General Terry*, 3 Dak. 165, 13 N. W. 533.

8. Items of expense for towage, pilotage, customhouse dues, consular fees, and medical attendance upon the sailors, stand in the same rank with the repairs and supplies to the vessel, and the person advancing funds for their payment is equally entitled to a lien upon the vessel as security. *The Emily B. Souder v. Pritchard* (The Emily Souder) 17 Wall. 666, 21: 683
Cited in The George T. Kemp, 2 Low, Dec. 483, Fed. Cas. No. 5,341—*Porter v. The Sea Witch*, 3 Woods, 76, Fed. Cas. No. 11,289—*Roberts v. The Windermere*, 2 Fed. 727—*The Canada*, 7 Sawy. 178, 7 Fed. 123—*The Guiding Star*, 9 Fed. 525—*The Wivanhoe*, 26 Fed. 928—*The Ellen Holgate*, 30 Fed. 127—*The City of Salem*, 31 Fed. 617—*The Dora*, 34 Fed. 347—*The Gilbert Knapp*, 37 Fed. 213—*The Aina*, 40 Fed. 270—*Nelson v. Yates*, 37 Hun, 54.

9. A fine imposed upon the master of a vessel for carrying too many passengers, by U. S. Rev. Stat. § 4253, is, by § 4270, a lien upon the vessel, recoverable by proceeding *in rem*. *United States v. The Strathairly* (The Strathairly) 124 U. S. 558, 8 Sup. Ct. Rep. 609, 31: 580
Cited in The Bombay, 46 Fed. 666—*Davis v. State*, 119 Ind. 557, 22 N. E. 9.

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[What contracts will support. 70 L.R.A. 353.]

For materials.

Lien for Repairs and Supplies, see *infra*, II. b.

Enforcing Lien as Regulation of Commerce, see Commerce, 365, 366.

10. A contract for building a ship, or for supplying engines, timber, or other materials for her construction, is not a maritime contract, and creates no maritime lien. *Edwards v. Elliott*, 21 Wall. 532, 22: 487 *People's Ferry Co. v. Beers*, 20 How. 393,

15: 961

The Belfast v. Boon (The Belfast) 7 Wall. 624, 19: 266

Cited in *Roach v. Chapman*, 22 How. 132, 16 L. ed. 295—*The Belfast (The Belfast v. Boon)* 7 Wall. 646, 19 L. ed. 272—*New England Mut. M. Ins. Co. v. Dunham*, 11 Wall. 28, 20 L. ed. 98—*Edwards v. Elliott*, 21 Wall. 554, 22 L. ed. 491—*The Lottawanna (Rodd v. Heartt)* 21 Wall. 592, 22 L. ed. 667—*The J. E. Rumbell*, 148 U. S. 11, 37 L. ed. 347, 13 Sup. Ct. Rep. 498—*The Robert W. Parsons (Perry v. Haines)* 191 U. S. 39, 48 L. ed. 82, 24 Sup. Ct. Rep. 8—*Calkin v. United States*, 3 Ct. Cl. 305—*The Albany*, 4 Dill. 443, Fed. Cas. No. 131—*The America*, 1 Low. Dec. 178, Fed. Cas. No. 289—*The Antelope*, 2 Ben. 406, Fed. Cas. No. 482—*The Edith*, 11 Blatchf. 461, Fed. Cas. No. 4,283—*Foster v. Ellis*, 5 Ben. 88, Fed. Cas. No. 4,968—*The General Cass, Brown, Adm.* 341, Fed. Cas. No. 5,307—*Hardy v. The Ruggles*, 2 Hughes, 81, Fed. Cas. No. 6,062—*The Hendrick Hudson*, 3 Ben. 421, Fed. Cas. No. 6,355—*The Illinois*, 2 Flipp. 396, Fed. Cas. No. 7,005—*The Kate Tremaine*, 5 Ben. 66, Fed. Cas. No. 7,622—*McAllister v. The Sam Kirkman*, 1 Bond, 383, Fed. Cas. No. 8,658—*The Revenue Cutter No. 1, Brown, Adm.* 80, Fed. Cas. No. 11,713—*The Richard Busted*, 1 Sprague, 442, Fed. Cas. No. 11,764—*Smith v. The Royal George*, 1 Woods, 292, Fed. Cas. No. 13,102—*The Williams, Brown, Adm.* 223, Fed. Cas. No. 17,710—*Endner v. Greco*, 3 Fed. 413—*The Pacific*, 5 Hughes, 264, 9 Fed. 120—*The Guiding Star*, 9 Fed. 524—*The Count De Lesseps*, 17 Fed. 461—*The Glenmont*, 32 Fed. 704—*The Hiram R. Dixon*, 33 Fed. 299—*The Glenmont*, 34 Fed. 408—*Doolittle v. Knobelock*, 39 Fed. 41—*The J. C. Rich*, 46 Fed. 137—*The Manhattan*, 46 Fed. 798—*The William Windom*, 78 Fed. 498—*The Ella*, 84 Fed. 481—*The Carrie L. Tyler*, 45 C. C. A. 406, 106 Fed. 427—*The Underwriter*, 119 Fed. 745—*Rees v. The General Terry*, 3 Dak. 160, 13 N. W. 538—*Averill v. The Alabama Belle*, 20 La. Ann. 433—*Warren v. Kelley*, 80 Me. 525, 15 Atl. 49—*Atlantic Works v. The Gilde*, 157 Mass. 532, 34 Am. St. Rep. 305, 33 N. E. 163—*Edwards v. Elliot*, 34 N. J. L. 99—*Wilson v. Lawrence*, 18 Hun, 58—*Sheppard v. Steele*, 43 N. Y. 56, 3 Am. Rep. 660—*Brookman v. Hamill*, 43 N. Y. 553, 3 Am. Rep. 731—*Wilson v. Lawrence*, 82 N. Y. 411—*Smith v. Oregon*, S. L. & U. N. R. Co. 24 Or. 131, 32 Pac. 1040—*The M. Tuttle v. Buck*, 23 Ohio St. 567, 13 Am. Rep. 270—*The Petrel v. Dumont*, 28 Ohio St. 617, 22 Am. Rep. 397—*Pollock v. Cleveland Ship Bldg. Co.* 56 Ohio St. 671, 47 N. E. 582—*Morris Co. v. The Count De Lesseps*, 16 Phila. 566—*Balsley v. The Odorilla*, 121 Pa. 237, 1 L.R.A. 506, 15 Atl. 521—*Scully v. Shakespear*, 75 Pa. 304—*Waddell v. The Daisy*, 2 Wash. Terr. 82, 3 Pac. 616.

11. The states can create liens for building or furnishing materials for building a

ship, not amounting to a regulation of commerce, and may enact reasonable rules and regulations prescribing the mode of their enforcement, if not inconsistent with the exclusive jurisdiction of the admiralty courts. *Edwards v. Elliott*, 21 Wall. 532.

22: 487

Cited in *The Robert W. Parsons (Perry v. Haines)* 191 U. S. 25, 48 L. ed. 76, 24 Sup. Ct. Rep. 8—*The Oregon*, 45 Fed. 77—*Balsley v. Odorilla*, 121 Pa. 237, 1 L.R.A. 506, 15 Atl. 521.

For wharfage.

12. A contract for wharfage is a maritime contract, for which a maritime lien arises against a foreign ship or one from another state, cognizable in admiralty, and enforceable by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner. *Re Easton*, 95 U. S. 68, 24: 373 *Cited in* *Ex parte Phenix Ins. Co.* 118 U. S. 625, 30 L. ed. 280, 7 Sup. Ct. Rep. 25—*Clifford v. United States*, 34 Ct. Cl. 231—*Union Wharf & Pier v. The J. H. Starin*, 15 Blatchf. 504, Fed. Cas. No. 7,320—*The John M. Welch*, 9 Ben. 510, Fed. Cas. No. 7,359—*Monongahela Nav. Co. v. The Bob Connell*, 1 Fed. 219—*Murray v. The F. B. Nimick*, 2 Fed. 89—*The John M. Welch*, 18 Blatchf. 63, 2 Fed. 372—*The Vidal Sala*, 12 Fed. 210—*The Hercules*, 28 Fed. 476—*Woodruff v. One Covered Scow*, 30 Fed. 270—*The Dora Mathews*, 31 Fed. 620—*The Gilbert Knapp*, 37 Fed. 210—*The Wm. H. Brinsfield*, 39 Fed. 216—*Wishart v. The Jos. Nixon*, 43 Fed. 927—*The Christobal Colon*, 44 Fed. 804—*The City of Pittsburgh*, 45 Fed. 700—*The Allianca*, 56 Fed. 612—*McRae v. Bowers Dredging Co.* 86 Fed. 348—*The C. Vanderbilt*, 86 Fed. 788—*The Scow No. 15*, 35 C. C. A. 151, 92 Fed. 1010—*The C. W. Moore*, 107 Fed. 957—*The Davidson*, 70 L.R.A. 194, 122 Fed. 1006—*The Surprise*, 64 C. C. A. 319, 129 Fed. 883—*Upper S. B. Co. v. Blake*, 2 App. D. C. 56—*Robertson v. Wilder*, 69 Ga. 344—*Gould v. Jacobson*, 58 Mich. 291, 25 N. W. 194—*International Hide & Skin Co. v. New York Dock Co.* 93 App. Div. 563, 87 N. Y. Supp. 886—*Ryan v. Hook*, 34 Hun, 189—*Walsh v. New York Floating Dry Dock Co.* 77 N. Y. 452—*Flandreau v. Ellsworth*, 151 N. Y. 477, 45 N. E. 853.

For loss of life.

13. A lien or privilege upon a vessel for the loss of life of a passenger is not created by La. Civ. Code, art. 3237, subd. 12, providing a privilege for loss or damage caused to person or property by negligent management of the vessel, as this was not intended to apply to actions for damages resulting in death. *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. Rep. 595, 44: 751 *Cited in* *Workman v. New York*, 179 U. S. 563, 45 L. ed. 321, 21 Sup. Ct. Rep. 212—*The Onoko*, 47 C. C. A. 113, 107 Fed. 987—*The Dauntless*, 64 C. C. A. 245, 129 Fed. 717.

b. For Repairs, Supplies, etc.**1. In General.**

Lien for Materials, see *supra*, 10, 11.

Priority of, see *infra*, 59, 60.

Release from Lien on Giving of Bond, see Admiralty, 415, 415a.

under Bottomry and Respondentia Bond, see Bottomry and Respondentia, IV.

Burden of Proof, see Evidence, 623.

Waiver of Lien for Freight, see Shipping, 292-303.

Owner's Power to Order Supplies on Vessel's Credit, see Shipping, 474.

See also *supra*, 8.

14. Different rules, dependent upon the location of a vessel at her home port or at a foreign port, apply in regard to the existence of a lien for materials or supplies furnished. The General Smith, 4 Wheat. 438, 4: 609

Cited in Hays v. Pacific Mail S. S. Co. 17 How. 599, 15 L. ed. 255—The Chusan, 1 Sprague, 39. Fed. Cas. No. 2,716—The Circassian, 1 Ben. 141. Fed. Cas. No. 2,721—Francis v. The Harrison, 1 Sawy. 373, Fed. Cas. No. 5,038—Hill v. The Golden Gate, Newberry, Adm. 310, Fed. Cas. No. 6,492—Macy v. De Wolf, 3 Woodb. & M. 203, Fed. Cas. No. 8,933—Wick v. The Samuel Strong, Newberry, Adm. 190, Fed. Cas. No. 17,607—The William & Emmeline, Blatchf. & H. 72, Fed. Cas. No. 17,687—Yost v. Lake Erie Transp. Co. 50 C. C. A. 515, 112 Fed. 750.

15. A lien cannot be asserted under the maritime law for the value of coal supplied to a vessel under an order of a charterer by one who has knowledge that under the charter party the charterer is obliged to provide and pay for the coal, even if he furnished it in fact upon the credit both of the charterer and of the vessel. The Kate, 164 U. S. 458, 17 Sup. Ct. Rep. 135, 41: 512 *Distinguished in* Rogers v. A Scow without a Name, 80 Fed. 736.

Cited in Cornell S. B. Co. v. The Ellen J. 84 Fed. 685—The Burton, 84 Fed. 990—The H. C. Grady, 87 Fed. 237—The Sappho, 89 Fed. 373—The Del Norte, 90 Fed. 508—The Mary A. Tryon, 93 Fed. 221—The Iris, 40 C. C. A. 304, 100 Fed. 107—The South Portland, 40 C. C. A. 516, 100 Fed. 496—The Solveig, 43 C. C. A. 252, 103 Fed. 325—The George Farwell, 43 C. C. A. 374, 103 Fed. 883—The C. W. Moore, 107 Fed. 958—The Underwriter, 119 Fed. 755—The Chicklade, 120 Fed. 1006—Post S. B. Co. v. Loughran, 12 App. D. C. 440.

16-17. Debts contracted by the charterer of a vessel, for which a lien is given by N. Y. Laws 1862, p. 956, chap. 482, do not include, by reasonable construction of that statute, a debt for coal furnished on the order of a charterer by one who knows that the charterer does not represent the owners, but has agreed to furnish supplies at his own cost. The Kate, 164 U. S. 458, 17 Sup. Ct. Rep. 135, 41: 512 *Cited in* The Sappho, 86 C. C. A. 401, 94 Fed. 551.

18. Right of a state to create liens upon vessels in favor of materialmen and repairers recognized. The General Smith, 4 Wheat. 438, 4: 609

Cited in Peyroux v. Howard, 7 Pet. 341, 8 L. ed. 706—Waring v. Clarke, 5 How. 491, 12 L. ed. 250—New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 390, 12 L. ed. 485—Maguire v. Card, 21 How. 251, 16 L. ed. 118—Ex parte McNiel, 13 Wall. 243, 20 L. ed. 627—The Lottawanna (Wilson v. Bell)

20 Wall. 217, 22 L. ed. 262—The Robert W. Parsons (Perry v. Haines) 191 U. S. 24, 48 L. ed. 76, 24 Sup. Ct. Rep. 8—The Chusan, 2 Story, 463, Fed. Cas. No. 2,717—Crapo v. Allen, 1 Sprague, 185, Fed. Cas. No. 3,360—Davis v. A. New Brig. Gilpin, 478, Fed. Cas. No. 3,643—The Draco, 2 Sumn. 178, Fed. Cas. No. 4,057—The Infanta, Abb. Adm. 268, Fed. Cas. No. 7,030—The Robert Fulton, 1 Paine, 626, Fed. Cas. No. 11,890—Wick v. The Samuel Strong, 6 McLean, 590, Fed. Cas. No. 17,607—Dumont v. The Petrel No. 2, 1 Cin. Sup. Co. Rep. 30—The E. P. Dorr v. Waldron, 62 Ill. 228, 14 Am. Rep. 86—Re The Circassian, 50 Barb. 491—The E. A. Barnard, 14 Phila. 560—Memphis Dry Dock Co. v. Waggoner, 10 Helsk. 521.

19. A lien on a vessel for repairs or supplies does not depend upon possession or registry. Pendergast v. The Kalorama (The Kalorama) 10 Wall. 204, 19: 941

20. A maritime lien is not created by supplying coal to a vessel on the order of a charterer, without any order or procurement of the master or his expressed consent, where the charterer was required by the charter to provide and pay for the coal, and had an office at the port of supply so that the party providing it could easily have ascertained the ownership of the vessel and the relation of the charterer to it, although he acted in fact on a belief that the vessel was responsible. The Valencia v. Ziegler (The Valencia) 165 U. S. 264, 17 Sup. Ct. Rep. 323, 41: 710 *Distinguished in* The Iris, 88 Fed. 906.

Cited in The Valencia v. Ziegler, 24 C. C. A. 692, 45 U. S. App. 763, 79 Fed. 1005—The Tilhe Ann, 84 Fed. 685—The Burton, 84 Fed. 990—The Algonquin, 88 Fed. 319—The Havana, 35 C. C. A. 148, 63 U. S. App. 650, 92 Fed. 1008—The Iris, 40 C. C. A. 304, 100 Fed. 106—The Roanoke, 101 Fed. 301—The Newport, 107 Fed. 747—Prince v. Ogdenburg Transit Co. 107 Fed. 983—Alaska P. S. S. Co. v. C. W. Chamberlain & Co. 54 C. C. A. 58, 116 Fed. 602—The Underwriter, 119 Fed. 755—The Surprise, 64 C. C. A. 310, 129 Fed. 874—Post S. B. Co. v. Loughran, 12 App. D. C. 440—Atkins v. Lewis, 168 Mass. 536, 47 N. E. 507—Valverde v. Spottswood, 77 Miss. 917, 28 So. 720.

Editorial notes.

For repairs, necessities, and supplies.

4: 609; 11: 239

Necessity for.

At Foreign Port, see *infra*, 45-49.

21. In order to create a maritime lien on a vessel for supplies, a necessity at the time of procuring the supplies for a credit on the vessel must be shown. This proof is as essential as that of the necessity of the articles themselves. Pratt v. Reed, 19 How. 359, 15: 660

Tod v. Pratt, 19 How. 362, 15: 662

Distinguished in the Mary Bell, 1 Sawy. 139, Fed. Cas. No. 9,199.

Cited in The Grapeshot (The Grapeshot v. Walerstein) 9 Wall. 137, 19 L. ed. 654—The Lulu (Hazlehurst v. The Lulu) 10 Wall. 203, 19 L. ed. 909—The A. R. Dunlap, 1 Low. Dec. 355, Fed. Cas. No. 513—Beach v. The Native, Fed. Cas. No. 1,152a—Brown v. The Albany, Fed. Cas. No. 1,987—The Coer-

nine, 21 Month. L. Rep. 344, Fed. Cas. No. 2,044—Cunningham v. Hall, 1 Chff. 50, Fed. Cas. No. 3,481—The Eledona, 2 Ben. 33, Fed. Cas. No. 4,340—Harriman v. Dodge, Fed. Cas. No. 6,104a—The H. B. Foster, 3 Ware, 168, Fed. Cas. No. 6,291—Hill v. The Golden Gate, 6 Am. L. Reg. 274, Fed. Cas. No. 6,491—The Illinois, 2 Flipp. 396, Fed. Cas. No. 7,005—The James Guy, 1 Ben. 115, 5 Blatchf. 497, Fed. Cas. No. 7,195—The Joseph Grant, 1 Biss. 196, Fed. Cas. No. 7,538—The Lady Franklin, 1 Biss. 559, Fed. Cas. No. 7,982—The Lulu, Chase, Dec. 165, 1 Abb. U. S. 194 Fed. Cas. No. 8,604—The Maltland, 2 Biss. 204, Fed. Cas. No. 8,979—The Native, 14 Blatchf. 35, Fed. Cas. No. 10,054—The Neversink, 5 Blatchf. 540, Fed. Cas. No. 10,133—The Regulator, 1 Haskell, 24, Fed. Cas. No. 11,665—The Revenue Cutter No. 1, Brown, Adm. 81, Fed. Cas. No. 11,713—The St. Joseph, Brown, Adm. 205, Fed. Cas. No. 12,229—The Sarah Starr, 1 Sprague, 455, Fed. Cas. No. 12,354—Scott v. The Morning Glory, Fed. Cas. No. 12,542—The Sea Lark, 1 Sprague, 572, Fed. Cas. No. 12,579—The Skylark, 2 Biss. 253, Fed. Cas. No. 12,928—The Tangler, 2 Low. Dec. 9, Fed. Cas. No. 13,744—The Washington Irving, 2 Ben. 319, Fed. Cas. No. 17,244—The Canada, 7 Sawy. 176, 7 Fed. 121—Stephenson v. The Francis, 21 Fed. 720—The Glenmont, 34 Fed. 404—Nippert v. The Williams, 39 Fed. 828—The Templar, 59 Fed. 206—The H. C. Grady, 87 Fed. 235—The Clara A. McIntyre, 94 Fed. 558—The Underwriter, 119 Fed. 750—Holcroft v. Halbert, 16 Ind. 258.

22. A merchant or lender cannot safely make repairs or furnish supplies to a master until he is reasonably satisfied that the vessel needs what the master requests, or that special repairs and supplies are reasonably fit and proper for the ship and the voyage. *The Lulu* (Hazlehurst v. The Lulu) 10 Wall. 192, 19: 906
Cited in *The Raleigh*, 2 Hughes, 55, Fed. Cas. No. 11,539—*The Sullote*, 23 Fed. 922.

23. The repairer or furnisher must prove affirmatively that the ship needed such repairs and supplies furnished, as the authority of the master in such a case is implied from the necessity for the repairs or supplies, the want of funds for that purpose, the inability to procure the same, and the absence of the owner. *Pendergast v. The Kalorama* (The Kalorama) 10 Wall. 204, 19: 941

24. Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship. *The Grapeshot v. Walderstein* (The Grapeshot) 9 Wall. 129, 19: 651
Cited in *Smith v. The Royal George*, 1 Woods, 294, Fed. Cas. No. 13,102—*The Young America*, 30 Fed. 790.

Presence of owner.

See also *infra*, 40.

25. The materialmen have no implied lien for supplies furnished to a ship, where same

were obtained by the owner in person. *The St. Jago de Cuba*, 9 Wheat. 409, 6: 122
Distinguished in *The Alvara*, 63 Fed. 149.

Held obiter in *The George T. Kemp*, 2 Low. Dec. 480, Fed. Cas. No. 5,341—*The Iris*, 88 Fed. 909.

Cited in *Delaware River Storage Co. v. The Thomas*, 7 Am. L. Rev. 382, Fed. Cas. No. 3,769—*The Edith*, 11 Blatchf. 460, Fed. Cas. No. 4,283—*Hill v. The Golden Gate*, Newberry, Adm. 313, Fed. Cas. No. 6,492—*Phelps v. The Camilla*, Taney, 410, Fed. Cas. No. 11,073—*Pickell v. Loper*, Taney, 501, Fed. Cas. No. 11,119—*The Regulator*, 1 Haskell, 20, Fed. Cas. No. 11,665—*The Norman*, 6 Fed. 407—*The Westover*, 76 Fed. 383—*The Havana*, 35 C. C. A. 149, 63 U. S. App. 650, 92 Fed. 1008—*The Iris*, 40 C. C. A. 303, 100 Fed. 106—*The Saratoga*, 100 Fed. 481—*The Roanoke*, 101 Fed. 301—*The C. W. Moore*, 107 Fed. 958—*Prince v. Ogdensburg Transit Co.* 107 Fed. 981—*Cuddy v. Clement*, 51 C. C. A. 296, 113 Fed. 462—*The Underwriter*, 119 Fed. 743—*Post S. B. Co. v. Loughran*, 12 App. D. C. 442—*Boylan v. The Victory*, 40 Mo. 253—*The Norman*, 9 W. N. C. 544—*Storage Co. v. The Thomas*, 9 Phila. 364, 29 Phila. Leg. Int. 116—*Delaware River Iron Ship-building & Engine Works v. The Mary Morgan*, 18 Phila. 577—*Delaware River Iron Ship Building & E. Works v. The Mary Morgan*, 43 Phila. Leg. Int. 308.

26. The owner can order repairs and supplies on the credit of the vessel. *Pendergast v. The Kalorama* (The Kalorama) 10 Wall. 204, 19: 941

27. The owners in person may agree that the advances made for repairs and supplies shall be furnished on the credit of the steamer. *Pendergast v. The General Custer* (The Custer) 10 Wall. 204, 19: 944
Cited in *The Celestine*, 1 Biss. 14, Fed. Cas. No. 2,541—*The Union Express*, Brown, Adm. 539, Fed. Cas. No. 14,364—*Whittaker v. J. A. Travis*, Fed. Cas. No. 17,599.

28. While the presence of the owner defeats the implied authority of the master to procure repairs and supplies on the credit of the vessel, yet the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners, and save the vessel and cargo from the perils of the sea. *Pendergast v. The Kalorama* (The Kalorama) 10 Wall. 204, 19: 941

29. In the absence of an agreement, express or implied, for a lien, a contract for supplies, made directly with the owner in person, is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived. *The Valencia*, 165 U. S. 264, 17 Sup. Ct. Rep. 323, 41: 710
Cited in *The Ella*, 84 Fed. 477—*The H. C. Grady*, 87 Fed. 238—*The Mary A. Tryon*, 93 Fed. 221—*The South Portland*, 40 C. C. A. 516, 100 Fed. 496—*The Solveig*, 43 C. C. A. 253, 103 Fed. 325—*The George Farwell*, 43 C. C. A. 374, 103 Fed. 883—*The Roanoke*, 46 C. C. A. 619, 107 Fed. 743—*The C. W. Moore*, 107 Fed. 958—*Cuddy v. Clement*, 51 C. C. A. 294, 113 Fed. 460—*The Chicklade*, 120 Fed. 1006.

2. At Home Port.

Priority of, see *infra*, 57, 58.

See also *supra*, 7, 14; Liens, 21, 22.

30. A maritime lien does not arise on a contract for repairs and supplies to a vessel in her home port. *Norton v. Switzer*, 93 U. S. 355, 23: 903
Garcia y Leon v. Galceran, 11 Wall. 185, 20: 74

Pendergast v. The Kalorama (The Kalorama) 10 Wall. 204, 19: 941
Held as obiter The Glide, 167 U. S. 618, 42 L. ed. 300, 17 Sup. Ct. Rep. 930.

Cited in The Albany, 4 Dill. 443, Fed. Cas. No. 131—*Circassian*, The, 11 Blatchf. 473, Fed. Cas. No. 2,720a—*The Edith*, 5 Ben. 437, Fed. Cas. No. 4,282—*The Edith*, 11 Blatchf. 466, Fed. Cas. No. 4,283—*The Illinois*, 2 Filpp. 404, Fed. Cas. No. 7,005—*The Gilbert Knapp*, 37 Fed. 214—*The William Windom*, 73 Fed. 498—*Atlantic Works v. The Glide*, 157 Mass. 526, 34 Am. St. Rep. 305, 33 N. E. 163—*The Willapa*, 25 Or. 76, 84 Pac. 689.

31. A maritime lien for repairs or necessities furnished a vessel in her home port is not raised by implication unless such a lien is recognized by the local law. *Peyroux v. Howard*, 7 Pet. 324, 8: 700
Wilson v. Bell (The Lottawanna) 20 Wall. 201, 22: 259

Distinguished in Davis v. Child, 2 Ware, 81 Fed. Cas. No. 3,628.

Cited in The Orleans v. Phoebe, 11 Pet. 184, 9 L. ed. 680—*Waring v. Clarke*, 5 How. 475, 12 L. ed. 242—*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 390, 12 L. ed. 485—*Hays v. Pacific Mail S. S. Co.* 17 How. 599, 13 L. ed. 255—*Maguire v. Card*, 21 How. 251, 16 L. ed. 118—*Roach v. Chapman*, 22 How. 132, 16 L. ed. 295—*The St. Lawrence (Meyer v. Tupper)* 1 Black, 529, 17 L. ed. 184—*Ex parte McNeil*, 13 Wall. 243, 20 L. ed. 627—*The Lottawanna (Rodd v. Heartt)* 21 Wall. 579, 22 L. ed. 663—*The Glide*, 167 U. S. 611, 42 L. ed. 297, 17 Sup. Ct. Rep. 930—*The Roanoke*, 189 U. S. 194, 47 L. ed. 773, 23 Sup. Ct. Rep. 491—*The Robert W. Parsons (Perry v. Haines)* 191 U. S. 24, 48 L. ed. 76, 24 Sup. Ct. Rep. 8—*The Alida*, Abb. Adm. 169, Fed. Cas. No. 199—*The Augusta*, 5 Am. L. Times, 497, Fed. Cas. No. 647—*The Callisto*, 2 Ware, 88, Fed. Cas. No. 2,316—*The Chusan*, 2 Story, 463, Fed. Cas. No. 2,717—*The Circassian*, 12 Am. L. Reg. N. S. 293, Fed. Cas. No. 2,720a—*Crapo v. Allen*, 1 Sprague, 185, Fed. Cas. No. 3,360—*Davis v. Child*, 2 Ware, 81, Fed. Cas. No. 3,628—*Davis v. A New Brig. Gilpin*, 480, Fed. Cas. No. 3,643—*The Draco*, 2 Sumn. 178, Fed. Cas. No. 4,057—*The Edith*, 11 Blatchf. 462, Fed. Cas. No. 4,283—*Francis v. The Harrison*, 1 Sawy. 354, 2 Abb. (U. S.) 75, Fed. Cas. No. 5,038—*The Harvest*, Olcott, 274, Fed. Cas. No. 6,175—*Haslett v. The Enterprise*, Fed. Cas. No. 6,197—*Hill v. The Golden Gate*, 6 Am. L. Reg. 274, Fed. Cas. No. 6,491—*The Hull of a New Ship*, 2 Ware, 205, Fed. Cas. No. 6,859—*The Infanta*, Abb. Adm. 268, Fed. Cas. No. 7,030—*Jackson v. The Kinnie*, 8 Am. L. Reg. N. S. 475, Fed. Cas. No. 7,137—*Jenkins v. Congress*, Fed. Cas. No. 7,264—*The Kate Hinchman*, 6 Bliss, 369, Fed. Cas. No. 7,620—*Ludington v. The Nucleus*, Fed. Cas. No. 8,598—*The Lulu*, 1 Abb. (U. S.) 193, Chase, Dec. 164, Fed. Cas. No. 8,604—*The Marion*, 1 Story, 72, Fed.

Cas. No. 9,087—*Marsh v. The Minnie*, 6 Am. L. Reg. 232, Fed. Cas. No. 9,117—*Read v. The Hull of a New Brig*, 1 Story, 247, Fed. Cas. No. 11,609—*The Robert J. Mercer*, 1 Sprague, 285, Fed. Cas. No. 11,891—*The Richard Busteed*, 1 Sprague, 447, Fed. Cas. No. 11,764—*Schuchardt v. The Angelique*, Fed. Cas. No. 12,483b—*Udell v. The Ohio*, Fed. Cas. No. 14,321a—*The Unadilla*, 8 Ben. 478, Fed. Cas. No. 14,332—*United States v. New Bedford Bridge*, 1 Woodb. & M. 504, Fed. Cas. No. 15,867—*Weaver v. The S. G. Owens*, 1 Wall. Jr. 365, Fed. Cas. No. 17-310—*Whittaker v. The J. A. Travis*, Fed. Cas. No. 17,599—*The William T. Graves*, 8 Ben. 570, Fed. Cas. No. 17,758—*The Young Mechanic*, 2 Curt. C. C. 405, Fed. Cas. No. 18,180—*The E. A. Barnard*, 2 Fed. 721—*Petrie v. The Coal Bluff No. 2*, 3 Fed. 533—*Holmes v. Oregon & C. R. Co.* 6 Sawy. 272, 5 Fed. 83—*The City of Salem*, 7 Sawy. 479, 10 Fed. 845—*The H. E. Willard*, 52 Fed. 389—*The C. Vanderbilt*, 86 Fed. 789—*The Sappho*, 89 Fed. 373—*The Sappho*, 36 C. C. A. 401, 94 Fed. 551—*The Iris*, 40 C. C. A. 303, 100 Fed. 106—*Yost v. Lake Erie Transp. Co.* 50 C. C. A. 515, 112 Fed. 750—*The Underwriter*, 119 Fed. 745—*Fredericks v. James Rees & Sons Co.* 68 C. C. A. 369, 135 Fed. 731—*The Robert Morris v. Williamson*, 6 Ala. 55—*The Belfast v. Boon*, 41 Ala. 63—*Merrick v. Avery*, 14 Ark. 385—*Williamson v. Hogan*, 46 Ill. 578—*Bowen v. Peters*, 71 Me. 465—*Warren v. Kelley*, 80 Me. 524, 15 Atl. 49—*Atlantic Works v. The Glide*, 157 Mass. 526, 34 Am. St. Rep. 305, 33 N. E. 163—*Re The Circassian*, 50 Barb. 491—*Bird v. The Josephine*, 39 N. Y. 26—*Herrington v. The Hugh Chisholm*, 53 N. C. (8 Jones L.) 8—*Dumont v. The Petrel No. 2*, 1 Cin. Sup. Ct. Rep. 30—*The Petrel v. Dumont*, 28 Ohio St. 610, 22 Am. Rep. 397—*Rodd v. Heartt*, 32 Phila. Leg. Int. 210—*Re The E. A. Barnard*, 37 Phila. Leg. Int. 248—*Petrie v. The Coal Bluff No. 2*, 37 Phila. Leg. Int. 416—*Price v. Frankel*, 1 Wash. Terr. 39.

32. Materialmen furnishing repairs and supplies to a vessel in her home port do not acquire thereby any lien upon the vessel by the general maritime law as received in the United States. *Poole v. Tyler (The Edith)* 94 U. S. 518, 24: 167
Rodd v. Heartt (The Lottawanna) 21 Wall. 558, 22: 654
The General Smith, 4 Wheat. 438, 4: 609
Norton v. Switzer, 93 U. S. 355, 23: 903
The Belfast v. Boon (The Belfast) 7 Wall. 624, 19: 266
Questioned in The Red Wing, 5 McCrary, 123, 14 Fed. 870.

Distinguished in Chapman v. The Engines of the Greenpoint, 38 Fed. 672—*The Scow No. 15*, 35 C. C. A. 151, 92 Fed. 1010.

Cited in Ramsay v. Allegre, 12 Wheat. 614, 6 L. ed. 747—*The Belfast (The Belfast v. Boon)* 7 Wall. 646, 19 L. ed. 272—*The Kalorama (Pendergast v. The Kalorama)* 10 Wall. 211, 19 L. ed. 943—*The Lottawanna (Wilson v. Bell)* 20 Wall. 217, 22 L. ed. 262—*The Lottawanna (Rodd v. Heartt)* 21 Wall. 592, 22 L. ed. 667—*Norton v. Switzer*, 93 U. S. 365, 23 L. ed. 907—*Johnson v. Chicago & P. Elevator Co.* 119 U. S. 397, 30 L. ed. 450, 7 Sup. Ct. Rep. 254—*The J. E. Rumbell*, 148 U. S. 12, 37 L. ed. 347, 13 Sup. Ct. Rep. 498—*Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 642, 44 L. ed. 924, 20 Sup. Ct. Rep. 824—*The Roanoke*, 189 U. S. 194, 47 L. ed. 772, 23 Sup. Ct. Rep.

491—The Albany, 4 Dill. 442, Fed. Cas. No. 131—The Alice Getty, 2 Flipp. 19, Fed. Cas. No. 193—The Alida, Abb. Adm. 169, Fed. Cas. No. 199—Baldwin v. The Bradish Johnson, 8 Woods, 585, Fed. Cas. No. 798—The Bradish Johnson, Fed. Cas. No. 1,770—The Circassian, 12 Am. L. Reg. N. S. 292, Fed. Cas. No. 2,720a—The Circassian, 11 Blatchf. 473, Fed. Cas. No. 2,726—The Columbus, 5 Sawy. 489, Fed. Cas. No. 3,044—The Edith, 11 Blatchf. 460, Fed. Cas. No. 4,283—The Eliza Jane, 1 Sprague, 152, Fed. Cas. No. 4,363—Fox v. Holt, 4 Ben. 296, Fed. Cas. No. 5,012—The Harrison, 2 Abb. (U. S.) 75, Fed. Cas. No. 5,038—The George T. Kemp, 2 Low. Dec. 481, Fed. Cas. No. 5,341—The Hilarity, Blatchf. & H. 92, Fed. Cas. No. 6,480—The Illinois, 2 Flipp. 395, Fed. Cas. No. 7,005—Jenkins v. The Congress, Fed. Cas. No. 7,264—The John Farron, 14 Blatchf. 25, Fed. Cas. No. 7,341—The John Richards, 1 Biss. 108, Fed. Cas. No. 7,361—The Kate Hinchman, 6 Biss. 369, Fed. Cas. No. 7,620—The Kate Hinchman, 7 Biss. 239, Fed. Cas. No. 7,621—McCaskey v. Coal Bluff No. 2, Fed. Cas. No. 8,637—The Maitland, 2 Biss. 206, Fed. Cas. No. 8,979—The Mary Bell, 1 Sawy. 137, Fed. Cas. No. 9,199—The Minnie R. Childs, 10 Ben. 556, Fed. Cas. No. 9,640—The Monitor, 40 Ben. 188, Fed. Cas. No. 9,709—The Nestor, 1 Sumn. 74, Fed. Cas. No. 10,126—The N. W. Thomas, 1 Biss. 214, Fed. Cas. No. 10,386—Pickell v. The Loper, Taney, 502, Fed. Cas. No. 11,119—The Plymouth Rock, 18 Blatchf. 508, Fed. Cas. No. 11,237—The Raleigh, 2 Hughes, 48, Fed. Cas. No. 11,539—Raymond v. The Ellen Stewart, 5 McLean, 270, Fed. Cas. No. 11,594—Reeder v. The George's Creek, 3 Hughes, 588, Fed. Cas. No. 11,654—Reyley v. The Carrie Brooks, Fed. Cas. No. 11,718—The Sarah Harris, 13 Blatchf. 504, Fed. Cas. No. 12,347—Udell v. The Ohio, Fed. Cas. No. 14,321a—Underwriters Wrecking Co. v. The Katie, 3 Woods, 186, Fed. Cas. No. 14,342—The Walkyrien, 8 Ben. 395, Fed. Cas. No. 17,091—Whittaker v. The J. A. Travis, Fed. Cas. No. 17,599—The William T. Graves, 8 Ben. 572, Fed. Cas. No. 17,758—The Witch Queen, 3 Sawy. 202, Fed. Cas. No. 17,916—The Young Mechanic, 2 Curt. C. C. 405, Fed. Cas. No. 18,180—Zane v. The President, 4 Wash. C. C. 456, Fed. Cas. No. 18,201—Zollinger v. The Emma, 8 Cent. L. J. 285, Fed. Cas. No. 18,218—Monongahela Nav. Co. v. The Bob Connell, 1 Fed. 219—The E. A. Barnard, 2 Fed. 721—Constantine v. The River Queen, 2 Fed. 731—Endner v. Greco, 3 Fed. 413—Holmes v. Oregon & C. R. Co. 6 Sawy. 272, 5 Fed. 83—The Short Cut, 6 Fed. 631—The City of Salem, 7 Sawy. 479, 10 Fed. 845—The D. S. Newcomb, 12 Fed. 736—The Red Wing, 5 McCrary, 123, 14 Fed. 870—The Canary No. 2, 22 Fed. 534—The Thomas Fletcher, 24 Fed. 377—The Sylvan Stream, 35 Fed. 315—The Wyoming, 35 Fed. 549—Kretzmer v. The William A. Levering, 35 Fed. 784—The Daniel Kalne, 35 Fed. 786—The Menominee, 36 Fed. 198—The Gilbert Knapp, 37 Fed. 214—The Samuel Marshall, 49 Fed. 756—The Samuel Marshall, 4 C. C. A. 388, 6 U. S. App. 389, 54 Fed. 399—Lighters Nos. 27 & 28, 6 C. C. A. 494, 15 U. S. App. 236, 57 Fed. 666—The Alvira, 63 Fed. 147—The Sirius, 65 Fed. 235—The Electron, 21 C. C. A. 16, 45 U. S. App. 16, 74 Fed. 698—The Westover, 76 Fed. 882—The Willamette Valley, 76 Fed. 841—Spedden v. Koenig, 24 C. C. A. 191, 42 U. S. App. 267, 78 Fed. 506—Davidson v. Baldwin, 24 C. C. A. 455, 47 U. S. App.

589, 79 Fed. 97—The C. Vanderbilt, 86 Fed. 788—The Iris, 88 Fed. 906—The Iris, 40 C. C. A. 303, 100 Fed. 106—The John S. Parsons, 110 Fed. 995—The Liberty, 119 Fed. 541—The Underwriter, 119 Fed. 742—Regina v. Dunlop S. S. Co. 128 Fed. 787—Murphey v. Mobile Trade Co. 49 Ala. 438—Buddington v. Stewart, 14 Conn. 408—Fox v. Holt, 36 Conn. 572, Fed. Cas. No. 5,012—Rees v. The General Terry, 3 Dak. 167, 13 N. W. 533—Sinton v. The R. R. Roberts, 46 Ind. 479—Williamson v. Hogan, 46 Ill. 518—The Montauk v. Walker, 47 Ill. 337—Bowen v. Peters, 71 Me. 465—Warren v. Kelley, 80 Me. 525, 15 Atl. 49—Atlantic Works v. The Glide, 157 Mass. 527, 34 Am. St. Rep. 305, 33 N. E. 163—Gould v. Jacobson, 58 Mich. 291, 25 N. W. 194—Burke Mfg. Co. v. The A. Saltzman, 42 Mo. App. 93—Edwards v. Elliott, 34 N. J. L. 99—Herrington v. The Hugh Chisholm, 53 N. C. (8 Jones, L.) 8—The Victorian, 24 Or. 131, 41 Am. St. Rep. 838, 32 Pac. 1040—The Willapa, 25 Or. 73, 34 Pac. 689—The M. Tuttle v. Buck, 23 Ohio St. 567, 13 Am. Rep. 270—The Petrel v. Dumont, 28 Ohio St. 610, 22 Am. Rep. 397—Petrie v. The Coal Bluff No. 2, 37 Phila. Leg. Int. 416—Calhoun v. The Short Cut, 38 Phila. Leg. Int. 150—The D. S. Newcomb, 39 Phila. Leg. Int. 385—Balsley v. The Odorilla, 45 Phila. Leg. Int. 425—The E. A. Barnard, 14 Phila. 561—Weston v. Morse, 40 Wis. 459.

33. A shipmaster, although in the home port of the vessel, may subject her to the implied lien in favor of material men for furnishing repairs and supplies, where the vessel is falsely represented by her owners to be a foreign ship. The *St. Jago de Cuba*, 9 Wheat. 409, 6: 122
Explained in *Ramsey v. Allegre*, 12 Wheat. 632, 6 L. ed. 753—North American Commercial Co. v. United States, 26 C. C. A. 592, 48 U. S. App. 865, 81 Fed. 749.
Cited in *Thomas v. Osborn*, 19 How. 29, 15 L. ed. 587—The *Kalorama* (Pendergast v. The *Kalorama*) 10 Wall. 212, 19 L. ed. 943—The *Patapaco* (The *Patapaco* v. Boyce) 18 Wall. 335, 20 L. ed. 698—The *J. E. Rumbell*, 148 U. S. 9, 37 L. ed. 346, 13 Sup. Ct. Rep. 498—The *Kate*, 164 U. S. 466, 41 L. ed. 516, 17 Sup. Ct. Rep. 135—The *Valencia* (The *Valencia* v. Ziegler) 165 U. S. 268, 41 L. ed. 713, 17 Sup. Ct. Rep. 823—The *Glide*, 167 U. S. 610, 42 L. ed. 297, 17 Sup. Ct. Rep. 930—The *A. D. Patchin*, 1 Blatchf. 418, Fed. Cas. No. 87—The *Alice Tainter*, 14 Blatchf. 42, Fed. Cas. No. 195—Davis v. Child, 2 Ware, 81, Fed. Cas. No. 3,628—Fox v. Holt, 4 Ben. 296, Fed. Cas. No. 5,012—Gager v. The *A. D. Patchin*, Fed. Cas. No. 5,170—The *Hendrick Hudson*, 17 Month. Law Rep. 111, Fed. Cas. No. 6,358—The *Hilarity*, Blatchf. & H. 92, Fed. Cas. No. 6,480—Hill v. The *Golden Gate*, Newberry, Adm. 312, Fed. Cas. No. 6,492—The *Infanta*, Abb. Adm. 267, Fed. Cas. No. 7,030—The *Island City*, 1 Low. Dec. 377, Fed. Cas. No. 7,109—Leland v. The *Medora*, 2 Woodb. & M. 97, Fed. Cas. No. 8,237—Ludington v. The *Nucleus*, Fed. Cas. No. 8,598—Macy v. De Wolf, 3 Woodb. & M. 203, Fed. Cas. No. 8,933—Sarchet v. The *General Isaac Davis*, Crabbe, 201, Fed. Cas. No. 12,357—The *Stephen Allen*, Blatchf. & H. 178, Fed. Cas. No. 13,361—The *Susan G. Owens*, Fed. Cas. No. 13,634—The *Edith*, 11 Blatchf. 460—The *Rapid Transit*, 11 Fed. 329—Blowers v. One Wire Rope Cable, 19 Fed. 448—Stephenson v. The *Francis*, 21

Fed. 717—The Kingston, 23 Fed. 202—The Mary Morgan, 28 Fed. 198—The Norman, 28 Fed. 384—The Cumberland, 30 Fed. 450—The Gilbert Knapp, 37 Fed. 214—McCarthy v. The Richard S. Garrett, 44 Fed. 380—The Willamette Valley, 13 C. C. A. 640, 29 U. S. App. 447, 66 Fed. 570—Spedden v. Koenig, 24 C. C. A. 192, 42 U. S. App. 267, 78 Fed. 507—Re Hydraulic Steam Dredge No. 1, 25 C. C. A. 638, 53 U. S. App. 211, 80 Fed. 555—The Burton, 84 Fed. 1000—The Del Norte, 90 Fed. 509—The John T. Williams, 107 Fed. 751—The Robert Dollar, 115 Fed. 221—The Surprise, 64 C. C. A. 311, 129 Fed. 875—The Alcalde, 132 Fed. 578—Fox v. Holt, 36 Conn. 572—Case v. Woolley, 6 Dana, 27, 32 Am. Dec. 54—The Patapsco, 43 How. Pr. 316—Dumont v. The Petrel No. 2, 1 Cln. Sup. Ct. Rep. 30—Dowell v. The Melnotte, 1 Cln. Sup. Ct. Rep. 62—Nixon v. Bynum, 1 Ball. L. 151—Union P. R. Co. v. United States, 2 Wyo. 186.

Power of state to create liens.

See also *supra*, 18.

34. In respect to contracts for materials and supplies furnished to a vessel in her home port, it is competent for the state to create liens not amounting to a regulation of commerce. The Belfast v. Boon (The Belfast) 7 Wall. 624, 19: 266
 Edwards v. Elliott, 21 Wall. 532, 22: 487
 Rodd v. Heartt (The Lottawanna) 21 Wall. 558, 22: 654
Distinguished in The Maitland, 2 Biss. 206, Fed. Cas. No. 8,979.

Cited in Leon v. Galceran, 11 Wall. 192, 20 L. ed. 77—Norton v. Switzer, 93 U. S. 366, 23 L. ed. 907—Brown v. Houston, 114 U. S. 631, 29 L. ed. 260, 5 Sup. Ct. Rep. 1091—Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 585, 30 L. ed. 254, 1 Inters. Com. Rep. 41, 7 Sup. Ct. Rep. 4—The Albany, 4 Dill. 443, Fed. Cas. No. 131—The Edith, 6 Nat. Bankr. Reg. 454, 5 Ben. 436, Fed. Cas. No. 4,282—Francis v. The Harrison, 1 Sawy. 355, 2 Abb. (U. S.) 76, Fed. Cas. No. 5,038—The Island City, 1 Low. Dec. 377, Fed. Cas. No. 7,109—The Kate Hinchman, 7 Biss. 240, Fed. Cas. No. 7,621—The Mary Bell, 1 Sawy. 137, Fed. Cas. No. 9,199—The Walkyrien, 3 Ben. 395, Fed. Cas. No. 17,091—The General Burnside, 3 Fed. 231—The Comfort, 25 Fed. 158—The City of Norwalk, 55 Fed. 106—Warren v. Kelley, 80 Me. 525, 15 Atl. 49—Stapp v. The Clyde, 43 Minn. 194, 45 N. W. 430—State, Hankins. Prosecutor, v. Cox & Sons' Co. 68 N. J. L. 514, 44 Atl. 206—The Willapa, 25 Or. 76, 34 Pac. 689.

35. Liens granted by the laws of a state in favor of materialmen, for furnishing necessities to a vessel in her home port in said state, are valid, although the contract to furnish the same is a maritime contract, and can only be enforced by proceedings *in rem* in the district court of the United States. Rodd v. Heartt (The Lottawanna) 21 Wall. 558, 22: 654
Cited in The Robert W. Parsons (Perry v. Haines) 191 U. S. 24, 48 L. ed. 76, 24 Sup. Ct. Rep. 8—The Geo. T. Kemp, 2 Low. Dec. 479, Fed. Cas. No. 5,341—The Raleigh, 2 Hughes, 49, Fed. Cas. No. 11,539—Underwriters' Wrecking Co. v. The Katie, 3 Woods, 186, Fed. Cas. No. 14,342—The General Tompkins, 9 Fed. 621—Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 712—The

J. F. Warner, 22 Fed. 245—The Oregon, 45 Fed. 77—The Samuel Marshall, 4 C. C. A. 389, 6 U. S. App. 389, 54 Fed. 400—The Energia, 124 Fed. 846—Fredericks v. James Rees & Sons Co. 68 C. C. A. 369, 135 Fed. 731—Weston v. Morse, 40 Wis. 459.

3. At Foreign Port.

Priority of, see *infra*, 58, 61.

Waiver of, see *infra*, 65.

Conclusiveness of Presumption that Repairs and Supplies Were Made upon Vessel's Credit, see Evidence, 2576.

Making Judgment for Advances Payable in Gold, see Judgment, 98.

Personal Liability of Owners for Repairs, see Shipping, 321.

Master's Power to Bind Owners for Repairs, see Shipping, 448, 460, 464.

See also *supra*, 14.

36. For repairs made on, and supplies furnished to, a foreign ship, the party has a lien on the ship for security; and he may maintain a suit *in rem* in the admiralty to enforce his right. The General Smith, 4 Wheat. 438, 4: 609
 The Virgin v. Vyfhius, 8 Pet. 538, 8: 1036
 Pendergast v. The Kalorama (The Kalorama) 10 Wall. 204, 19: 941
 The Aurora, 1 Wheat. 96, 4: 45
Cited in Waring v. Clarke, 5 How. 459, 12 L. ed. 235—New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 390, 12 L. ed. 485—Thomas v. Osborn, 19 How. 28, 15 L. ed. 537—The Maggie Hammond (The Maggie Hammond v. Morland) 9 Wall. 457, 19 L. ed. 780—The Patapsco (The Patapsco v. Boyce) 13 Wall. 385, 20 L. ed. 698—The Emily Souder (The Emily B. Souder v. Pritchard) 17 Wall. 669, 21 L. ed. 684—Merchants' Mut. Ins. Co. v. Baring, 20 Wall. 163, 22 L. ed. 252—The J. E. Rumbell, 148 U. S. 12, 37 L. ed. 347, 18 Sup. Ct. Rep. 498—The Glide, 167 U. S. 610, 42 L. ed. 297, 17 Sup. Ct. Rep. 930—The Roanoke, 189 U. S. 193, 47 L. ed. 772, 23 Sup. Ct. Rep. 491—The Active, Olcott, 288, Fed. Cas. No. 34—Burke v. The M. P. Rich, 1 Cliff. 314, Fed. Cas. No. 2,161—The Callisto, 2 Ware, 39, Fed. Cas. No. 2,316—The Chusan, 2 Story, 461, Fed. Cas. No. 2,717—Cole v. The Atlantic, Crabbe, 442, Fed. Cas. No. 2,976—Cunningham v. Hall, 1 Cliff. 48, Fed. Cas. No. 3,481—Davis v. Child, 2 Ware, 81, Fed. Cas. No. 8,628—The Harriet, Olcott, 231, Fed. Cas. No. 6,097—The Home, 18 Nat. Bankr. Reg. 558, Fed. Cas. No. 6,657—The Jerusalem, 2 Gall. 349, Fed. Cas. No. 7,294—Joy v. Allen, 2 Woodb. & M. 328, Fed. Cas. No. 7,552—Leland v. The Medora, 2 Woodb. & M. 97, Fed. Cas. No. 8,237—The Lulu, Chase, Dec. 164, 1 Abb. (U. S.) 193, Fed. Cas. No. 8,604—The Metropolis, 8 Ben. 23, Fed. Cas. No. 9,502—The Native, 14 Blatchf. 35, Fed. Cas. No. 10,054—The Nestor, 1 Sumn. 74, Fed. Cas. No. 10,126—Packard v. The Louisa, 2 Woodb. & M. 53, Fed. Cas. No. 10,652—Phillips v. The Thomas Scattergood, Gilpin, 9, Fed. Cas. No. 11,106—Plymouth Rock, 13 Blatchf. 508, Fed. Cas. No. 11,237—The St. Lawrence, 3 Ware, 212, Fed. Cas. No. 12,234—The Sarah Starr, 1 Sprague, 458, Fed. Cas. No. 12,354—Sarchet v. The General Isaac Davis, Crabbe, 201, Fed. Cas. No. 12,357—Selden v. Hendrickson, 1 Brock. 396, Fed. Cas. No. 12,639—

Southern Bank v. The Alexander McNeill, Fed. Cas. No. 13,186—*The Stephen Allen*, Blatchf. & H. 178, Fed. Cas. No. 13,361—*The Susan G. Owens*, Fed. Cas. No. 13,634—*Taylor v. The Commonwealth*, 13 Am. L. Reg. N. S. 504, Fed. Cas. No. 13,788—*Wick v. The Samuel Strong*, 6 McLean, 590, Fed. Cas. No. 17,607—*The William & Emmeline*, Blatchf. & H. 70, Fed. Cas. No. 17,687—*Zane v. The President*, 4 Wash. C. C. 456, Fed. Cas. No. 18,201—*The Scotia*, 35 Fed. 909—*The Manhattan*, 46 Fed. 799—*The Stroma*, 3 C. C. A. 532, 11 U. S. App. 673, 53 Fed. 283—*The Allianca*, 63 Fed. 732—*The Roanoke*, 101 Fed. 300—*Cuddy v. Clement*, 51 C. C. A. 296, 113 Fed. 462—*Alaska & P. S. S. Co. v. C. W. Chamberlain & Co.* 54 C. C. A. 58, 116 Fed. 602—*The Underwriter*, 119 Fed. 715—*United States v. Cincinnati & M. Valley R. Co.* 67 C. C. A. 339, 134 Fed. 357—*Thoms v. Southard*, 2 Dana, 482, 26 Am. Dec. 467—*Case v. Woolley*, 6 Dana, 23, 32 Am. Dec. 54—*Dever v. The Hope*, 42 Miss. 723, 2 Am. Rep. 643—*Hore v. The Belle of Attakapas*, 11 Mo. 108—*Randall v. Roche*, 30 N. J. L. 222, 82 Am. Dec. 233—*Bird v. The Josephine*, 39 N. Y. 26—*The Willapa*, 25 Or. 73, 34 Pac. 689—*Delaware River Iron Ship-building & Engine Works v. The Mary Morgan*, 18 Phila. 579, 43 Phila. Leg. Int. 309.

37. Ports of states other than those of the state where the vessel belongs are considered as foreign ports, within which the master may contract for repairs and supplies on the credit of the vessel or her owners. *The Lulu (Hazlehurst v. The Lulu)* 10 Wall. 192, 19: 906
Pendergast v. The Kalorama (The Kalorama) 10 Wall. 204, 19: 941
Cited in The Albany, 4 Dill. 444, Fed. Cas. No. 131—*The Plymouth Rock*, 13 Blatchf. 507, Fed. Cas. No. 11,237—*The General Burnside*, 3 Fed. 231.

38. Where respondents purchased a vessel without notice of a lien for repairs or supplies in a foreign port, their want of caution in this respect cannot deprive those furnishing materials of a legal right which they have done nothing to forfeit. *Meyer v. Tupper (The St. Lawrence)* 1 Black, 522, 17: 180

39. If the credit for coal furnished a vessel in a foreign port was given to the vessel, there is a lien, and the burden of displacing it is on the claimant. *The Patapsco v. Boyce (The Patapsco)* 13 Wall. 329, 20: 696

Cited in The Emily Souder (The Emily B. Souder v. Pritchard) 17 Wall. 669, 21 L. ed. 684—*Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. 164, 22 L. ed. 252—*The Valencia (The Valencia v. Ziegler)* 165 U. S. 267, 41 L. ed. 712, 17 Sup. Ct. Rep. 323—*The Glilde*, 167 U. S. 610, 42 L. ed. 297, 17 Sup. Ct. Rep. 930—*The Alice Talinter*, 14 Blatchf. 42, Fed. Cas. No. 195—*Harney v. The Sydney L. Wright*, 5 Hughes, 484, Fed. Cas. No. 6,082a—*Re Kirkland*, 12 Am. L. Reg. N. S. 300, Fed. Cas. No. 7,842—*The Metropolis*, 8 Ben. 23, Fed. Cas. No. 9,502—*Taylor v. The Commonwealth*, 13 Am. L. Reg. N. S. 504, Fed. Cas. No. 13,788—*The Walkyrien*, 11 Blatchf. 242, Fed. Cas. No. 17,092—*The Secret*, 15 Fed. 480—*The Gen. Meade*, 20 Fed. 925—*The Ludgate Hill*, 21 Fed. 432—*Stephenson v. The Francis*, 21

Fed. 722—*The Sullote*, 23 Fed. 926—*The Esteban de Antunano*, 31 Fed. 923—*The Dora*, 34 Fed. 347—*Moore v. The Robilant*, 42 Fed. 165—*The Havana*, 54 Fed. 203—*Norwegian S. S. Co. v. Washington*, 6 C. C. A. 315, 13 U. S. App. 459, 57 Fed. 225—*The Vigilancia*, 58 Fed. 700—*The Alvira*, 63 Fed. 154—*The Kate*, 63 Fed. 713—*The Allianca*, 63 Fed. 732—*The George Dumois*, 15 C. C. A. 678, 30 U. S. App. 318, 68 Fed. 929—*The Advance*, 19 C. C. A. 199, 38 U. S. App. 344, 72 Fed. 798—*The Bertha M. Miller*, 24 C. C. A. 643, 50 U. S. App. 18, 79 Fed. 366—*The Iris*, 40 C. C. A. 304, 100 Fed. 107—*Cuddy v. Clement*, 51 C. C. A. 294, 113 Fed. 460—*The Underwriter*, 119 Fed. 750—*The Chicklade*, 120 Fed. 1006—*Young v. The Orpheus*, 119 Mass. 184—*Merchants' Mut. Ins. Co. v. Baring*, 31 Phila. Leg. Int. 262.

40. When the owner is present the implied authority of the master to order necessary repairs and supplies ceases; but, if the owner gives directions to that effect, the master may still order necessary repairs and supplies, and if the ship is, at the time, in a foreign port, those who make the advances will have a maritime lien if they were made on the credit of the vessel. *Pendergast v. The Kalorama (The Kalorama)* 10 Wall. 204, 19: 941
Cited in The Eclipse, 3 Biss. 101, Fed. Cas. No. 4,268—*The George T. Kemp*, 2 Low. Dec. 480, Fed. Cas. No. 5,341—*Harney v. The Sydney L. Wright*, 5 Hughes, 484, Fed. Cas. No. 6,082a—*Metropolis*, The, 8 Ben. 23, Fed. Cas. No. 9,502—*The Robertson*, 8 Biss. 182, Fed. Cas. No. 11,923—*The Union Express*, Brown, Adm. 538, Fed. Cas. No. 14,364—*Stephenson v. The Francis*, 21 Fed. 722—*The Mary Morgan*, 28 Fed. 199—*The Aeronaut*, 36 Fed. 499—*The Kate*, 63 Fed. 713—*The Bertha M. Miller*, 24 C. C. A. 643, 50 U. S. App. 18, 79 Fed. 366—*The Ella*, 84 Fed. 477—*The Marlon S. Harris*, 29 C. C. A. 430, 56 U. S. App. 98, 85 Fed. 800—*The Iris*, 88 Fed. 907—*The Iris*, 40 C. C. A. 303, 100 Fed. 106—*Robinson v. Whitcomb*, 64 C. C. A. 311, 129 Fed. 875.

41. When supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. *The Kate*, 164 U. S. 458, 17 Sup. Ct. Rep. 135, 41: 512

Cited in The Glilde, 167 U. S. 610, 42 L. ed. 297, 17 Sup. Ct. Rep. 930.

42. The presumption of law is that where advances are made to a captain in a foreign port upon his request to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, they are made upon the credit of the vessel as well as upon that of her owners. *The Lulu (Hazlehurst v. The Lulu)* 10 Wall. 192, 19: 906
Cited in The Patapsco (The Patapsco v. Boyce) 13 Wall. 333, 20 L. ed. 698—*The Emily Souder (The Emily B. Souder v. Pritchard)* 17 Wall. 669, 21 L. ed. 685—*Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. 164, 22 L. ed. 252—*The Valencia (The Valencia v. Ziegler)* 165 U. S. 267, 41 L. ed. 712, 17 Sup. Ct. Rep. 323—*The Eclipse*, 3 Biss. 101, Fed. Cas. No. 4,268—*Harney v. The Sydney L. Wright*, 5 Hughes,

485, Fed. Cas. No. 6,082a—The Metropolis, 8 Ben. 23, Fed. Cas. No. 9,502—The Native, 14 Blatchf. 35, Fed. Cas. No. 10,054—The Raleigh, 2 Hughes, 55, Fed. Cas. No. 11,539—The Sarah Harris, 7 Ben. 181, Fed. Cas. No. 12,346—Taylor v. The Commonwealth, 13 Am. L. Reg. N. S. 504, Fed. Cas. No. 13,788—The Walkyrien, 11 Blatchf. 242, Fed. Cas. No. 17,092—The Charlotte Vanderbilt, 19 Fed. 219—The Bertha M. Miller, 24 C. C. A. 643, 50 U. S. App. 18, 79 Fed. 366—McRae v. Bowers Dredging Co. 86 Fed. 349—The Underwriter, 119 Fed. 753—The Chicklade, 120 Fed. 1006—Robinson v. Whitcomb, 64 C. C. A. 313, 129 Fed. 877—Delaware River Iron Ship-building & Engine Works v. The Mary Morgan, 18 Phila. 578.

43. The presumption of law is, in the absence of fraud or collusion, that where advances are made to a captain in a foreign port, upon his request, to pay for the necessary repairs or supplies to enable his vessel to prosecute her voyage, they are made upon the credit of the vessel. Merchant's Mut. Ins. Co. v. Baring, 20 Wall. 159, 22: 250

Cited in The Metropolis, 9 Ben. 88, Fed. Cas. No. 9,503—Taylor v. The Commonwealth, 13 Am. L. Reg. N. S. 504, Fed. Cas. No. 13,788—The Guiding Star, 9 Fed. 525—The Sullote, 28 Fed. 923—Berwind v. Schultz, 25 Fed. 916—The Cumberland, 30 Fed. 450—The Dora, 34 Fed. 349—The Main, 2 C. C. A. 580, 2 U. S. App. 349, 51 Fed. 958—The Underwriter, 119 Fed. 751.

44. The presumption of law is, in the absence of fraud or collusion, that, where advances are made to a captain in a foreign port upon his request, to pay for the necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, and like services rendered to the vessel, they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the hypothecation that there should be any express pledge of the vessel, or any stipulation that the credit should be given on her account. The Emily B. Souder v. Pritchard (The Emily Souder) 17 Wall. 666, 21: 683

Explained in Cuddy v. Clement, 51 C. C. A. 291, 113 Fed. 457.

Cited in The Kate, 164 U. S. 468, 41 L. ed. 517, 17 Sup. Ct. Rep. 135—The Glide, 167 U. S. 610, 42 L. ed. 297, 17 Sup. Ct. Rep. 930—The George T. Kemp, 2 Low. Dec. 484, Fed. Cas. No. 5,341—Harney v. The Sydney L. Wright, 5 Hughes, 485, Fed. Cas. No. 6,082a—The Tangler, 2 Low. Dec. 9, Fed. Cas. No. 13,744—Whittaker v. The J. A. Travis, Fed. Cas. No. 17,599—The Comfort, 25 Fed. 159—The Mary Morgan, 28 Fed. 198—The Willamette Valley, 76 Fed. 849—The Irls, 40 C. C. A. 303, 100 Fed. 106—The Underwriter, 119 Fed. 751—The Surprise, 64 C. C. A. 311, 129 Fed. 875—The Alcalde, 132 Fed. 578—The Worthington, 70 L.R.A. 357, 60 C.C.A. 555, 133 Fed. 725—Delaware River Iron Ship-building & Engine Works v. The Mary Morgan, 18 Phila. 578.

Necessity for.

Burden of Proof, see Evidence, 833.

Sufficiency of Proof, see Evidence, 2577, 2578.

45. Necessary repairs made to a vessel at a foreign port on request of the master of money advanced to him to purchase necessary supplies gives the materialman or lender a lien therefor upon the vessel. The Lulu (Hazlehurst v. The Lulu) 10 Wall. 192, 19: 906

Distinguished in The Eledona, 10 Blatchf. 514, Fed. Cas. No. 4,341.

Cited in The Patasco (The Patasco v. Boyce) 13 Wall. 335, 20 L. ed. 698—The Lottawanna (Wilson v. Bell) 20 Wall. 218, 22 L. ed. 262—The J. E. Rumbell, 148 U. S. 12, 37 L. ed. 347, 13 Sup. Ct. Rep. 498—The Alice Tainter, 14 Blatchf. 42, Fed. Cas. No. 195—Re Kirkland, 12 Am. L. Reg. N. S. 300, Fed. Cas. No. 7,842—The Plymouth Rock, 13 Blatchf. 508, Fed. Cas. No. 11,237—The Union Express, Brown, Adm. 539, Fed. Cas. No. 14,364—The Charlotte Vanderbilt, 19 Fed. 220—The Ellen Holgate, 30 Fed. 127—The Esteban de Antunano, 31 Fed. 923—The Dora, 34 Fed. 347—Moore v. The Robilant, 42 Fed. 165—The Manhattan, 46 Fed. 799—Dixon v. The Bellevue, 47 Fed. 86—The Samuel Marshall, 49 Fed. 761—The Now Then, 50 Fed. 945—The Now Then, 5 C. C. A. 206, 3 U. S. App. 559, 55 Fed. 524—The Kendal, 56 Fed. 240—Norwegian S. S. Co. v. Washington, 6 C. C. A. 315, 13 U. S. App. 459, 57 Fed. 225—The St. John, 21 C. C. A. 144, 41 U. S. App. 62, 74 Fed. 845—The Willamette Valley, 76 Fed. 849—The Marion S. Harris, 29 C. C. A. 430, 56 U. S. App. 98, 85 Fed. 799—The Underwriter, 119 Fed. 751.

46. The necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master and that they were necessary for the ship, unless it is shown that the master had funds, or that the owner had sufficient credit, and that the repairers and lenders of the money knew those facts, or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry. Pendergast v. The Kalorama (The Kalorama) 10 Wall. 204, 19: 941

Cited in The Lottawanna (Rodd v. Heartt) 21 Wall. 589, 22 L. ed. 668—The Valencia (The Valencia v. Ziegler) 165 U. S. 267, 41 L. ed. 712, 17 Sup. Ct. Rep. 323—The Sarah Harris, 7 Ben. 181, Fed. Cas. No. 12,346—The Union Express, Brown, Adm. 539, Fed. Cas. No. 14,364—Berwind v. Schultz, 25 Fed. 917.

47. Reasonable diligence must be exercised by the merchant or lender to ascertain that the repairs and supplies applied for by a master in a foreign port are necessary. The Lulu (Hazlehurst v. The Lulu) 10 Wall. 192, 19: 906

Cited in The Columbus, 5 Sawy. 490, Fed. Cas. No. 3,044—Hamlin v. Pettibone, 10 Nat. Bankr. Reg. 177, Fed. Cas. No. 5,995—Scammon v. Cole, 5 Nat. Bankr. Reg. 265, 3 Chff. 480, Fed. Cas. No. 12,432—The Secret, 15 Fed. 480—Berwind v. Schultz, 25 Fed. 917.

48. The master has no authority to create a lien for repairs or supplies in a

foreign port unless they are necessary, and there is also a necessity for credit. Where freight money earned by the vessel was sufficient to pay for all needful repairs and supplies if it had not been wrongfully diverted, and the persons giving the credit knew this, and aided the master to divert the freight money to other objects, they are not entitled to a lien on the vessel for their advances to pay for repairs and supplies. *Thomas v. Osborn*, 19 How. 22.

15: 534

Explained in The Grapeshot (The Grapeshot v. Wallerstein) 9 Wall. 188, 19 L. ed. 655.

Cited in The Lulu (Hazelhurst v. The Lulu) 10 Wall. 203, 19 L. ed. 909—*The Kalorama* (Pendergast v. The Kalorama) 10 Wall. 209, 19 L. ed. 942—*Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. 164, 22 L. ed. 252—*The Julia Blake* (Bank of St. Thomas v. The Julia Blake) 107 U. S. 428, 27 L. ed. 599, 2 Sup. Ct. Rep. 692—*Burke v. The M. P. Rich*, 1 Cliff. 314, Fed. Cas. No. 2,161—*The Eledona*, 2 Ben. 33, Fed. No. 4,340—*The George T. Kemp*, 2 Low. Dec. 483, Fed. Cas. No. 5,341—*The Joseph Grant*, 1 Biss. 196, Fed. Cas. No. 7,538—*The Mary Bell*, 1 Sawy. 139, Fed. Cas. No. 9,199—*The Never-sink*, 5 Blatchf. 541, Fed. Cas. No. 10,133—*The Sarah J. Weed*, 2 Low. Dec. 557, Fed. Cas. No. 12,350—*The Sarah Starr*, 1 Sprague, 458, Fed. Cas. No. 12,354—*Roberts v. The Windermere*, 2 Fed. 728—*The Vidal Sala*, 12 Fed. 208—*Stephenson v. The Francis*, 21 Fed. 720—*The Sullote*, 23 Fed. 922—*The Mary Morgan*, 28 Fed. 198—*Force v. Providence Washington Ins. Co.* 35 Fed. 776—*The Scotia*, 35 Fed. 911—*Nippert v. The Williams*, 39 Fed. 828—*The Stroma*, 3 C. C. A. 532, 11 U. S. App. 673, 53 Fed. 282—*The Templar*, 59 Fed. 206.

49. An owner *pro hac vice*, such as one who has received the vessel on what is termed a "lay," in command, has the power, in a case of necessity, to bind himself and the owners personally for repairs and supplies. An express hypothecation of the vessel is not necessary. *Thomas v. Osborn*, 19 How. 22,

15: 534

Cited in Thorp v. Hammond, 12 Wall. 416, 20 L. ed. 422—*Flaherty v. Doane*, 1 Low. Dec. 150, Fed. Cas. No. 4,849—*Fox v. Holt*, 4 Ben. 290, Fed. Cas. No. 5,012—*Harney v. The Sydney L. Wright*, 5 Hughes, 483, Fed. Cas. No. 6,082a—*Scarff v. Metcalf*, 107 N. Y. 217, 1 Am. St. Rep. 807, 13 N. E. 796.

o. Services and Wages.

Priority of, see *infra*, 59, 63.

See also *infra*, 55; *Seamen*, 15-18.

50. The lien for seamen's wages will follow the ship and its proceeds into whose hands soever they may come by title or purchase from the owner. *Sheppard v. Taylor*, 5 Pet. 675, 8: 269
Sheppard v. Taylor, 5 Pet. 675. 8: 269
Distinguished in Cutler v. Rae, 7 How. 731, 12 L. ed. 891.

Cited in Oliver v. Alexander, 6 Pet. 144, 8 L. ed. 350—*Cutler v. Rae*, 7 How. 734, 12 L. ed. 892—*The Lottawanna* (Willson v. Bell) 20 Wall. 221, 22 L. ed. 263—*O'Brien v. Miller*, 168 U. S. 305, 42 L. ed. 476, 18 Sup. Ct. Rep. 140—*The John G. Stevens*, 170 U.

S. 119, 42 L. ed. 972, 18 Sup. Ct. Rep. 544—*Ardrey v. Karthaus*, Taney, 385, Fed. Cas. No. 511—*The Bollivar*, Olcott, 477, Fed. Cas. No. 1,609—*The Bollivar*, Olcott, 482, Fed. Cas. No. 1,610—*The Boston*, Blatchf. & H. 329, Fed. Cas. No. 1,669—*Church v. \$1,712*, Fed. Cas. No. 2,713—*The Congress*, 1 Biss. 44, Fed. Cas. No. 3,099—*Dike v. The St. Joseph*, 6 McLean, 575, Fed. Cas. No. 3,908—*Dutlih v. Coursault*, 5 Cranch, C. C. 356, Fed. Cas. No. 4,206—*Fitz v. The Amelle*, 2 Cliff. 448, Fed. Cas. No. 4,838—*Kellum v. Emerson*, 2 Curt. C. C. 83, Fed. Cas. No. 7,669—*Mutual Safety Ins. Co. v. The George*, Olcott, 97, Fed. Cas. No. 9,981—*The Neptune*, Olcott, 490, Fed. Cas. No. 10,120—*The Niphon's Crew*, 13 Month. L. Rep. 286, Fed. Cas. No. 10,277—*Remnants in Court*, Olcott, 387, Fed. Cas. No. 11,697—*Ridgway v. Hays*, 5 Cranch, C. C. 27, Fed. Cas. No. 11,817—*Westmoreland v. Foster*, 60 Ala. 454—*The Rover v. Stiles*, 5 Blackf. 485—*Leonard v. Nye*, 125 Mass. 463—*Hovey v. Elliott*, 118 N. Y. 134, 23 N. E. 475—*China Mut. Ins. Co. v. Force*, 142 N. Y. 99, 40 Am. St. Rep. 576, 36 N. E. 874.

51. In the absence of statute, no maritime lien exists in favor of a master for services. *Norton v. Switzer*, 93 U. S. 355, 23: 903

Cited in The Nebraska, 21 C. C. A. 449, 24 U. S. App. 559, 75 Fed. 599—*The Ripon City*, 42 C. C. A. 251, 102 Fed. 180—*Bruce v. Murray*, 59 C. C. A. 490, 123 Fed. 371.

52. By the maritime law the master has no lien on the ship even for maritime wages. *The Orleans v. Phœbus*, 11 Pet. 175, 9: 677

Cited in Norton v. Switzer, 93 U. S. 365, 23 L. ed. 907—*The William M. Hoag*, 168 U. S. 444, 42 L. ed. 537, 18 Sup. Ct. Rep. 114—*The Dolphin*, 1 Flipp. 584, Fed. Cas. No. 3,973—*The Larch*, 2 Curt. C. C. 428, Fed. Cas. No. 8,085—*Packard v. The Louisa*, 2 Woodb. & M. 55, Fed. Cas. No. 10,652—*The Short Cut*, 6 Fed. 631—*The Imogene M. Terry*, 19 Fed. 463—*The Daniel Kalne*, 35 Fed. 787—*The Nebraska*, 21 C. C. A. 449, 24 U. S. App. 559, 75 Fed. 599—*The Willamette Valley*, 76 Fed. 846—*The Ripon City*, 42 C. C. A. 251, 102 Fed. 180—*Bruce v. Murray*, 59 C. C. A. 499, 123 Fed. 371—*Chauncey v. Jackson*, 9 Ill. 438—*Case v. Woolley*, 6 Dana, 22, 32 Am. Dec. 54—*Calhoun v. Short Cut*, 38 Phila. Leg. Int. 150.

53. Claims for wages due mariners create a lien upon the vessel, under the laws of Louisiana, similar to the lien which arises in such cases under the maritime law. *Garcia y Leon v. Galceran*, 11 Wall. 185,

20: 74

d. Torts.

Priority of, see *infra*, 60, 62.

54. When a maritime lien arises from torts committed at sea, it travels with the thing to which it has attached, wherever that goes and into whosever hands that may pass. *Galena, D. D. & M. Packet Co. v. Rock Island R. Bridge* (The Rock Island Bridge) 6 Wall. 213, 18: 753

Cited in The John G. Stevens, 170 U. S. 117, 42 L. ed. 971, 18 Sup. Ct. Rep. 544—*The Avon*, Brown, Adm. 178, Fed. Cas. No. 680—*Hatch v. The Boston*, 3 Fed. 810—*The Me-*

nominie, 36 Fed. 199—Whitney v. Tibbol, 35 C. C. A. 547, 93 Fed. 688.

55. In maritime law the offending ship herself is considered the wrongdoer, liable for tort, and subject to a maritime lien for wages. The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. Rep. 544, 42: 969 *Distinguished in* Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique, 182 U. S. 413, 45 L. ed. 1160, 21 Sup. Ct. Rep. 831.

Cited in Workman v. New York, 179 U. S. 573, 45 L. ed. 325, 21 Sup. Ct. Rep. 212—Tucker v. Alexandroff, 183 U. S. 438, 46 L. ed. 271, 22 Sup. Ct. Rep. 195—The Anaces, 34 C. C. A. 560, 93 Fed. 242—The William H. Bailey, 103 Fed. 800—The Major Reybold, 111 Fed. 416—Harrison v. Hughes, 60 C. C. A. 451, 125 Fed. 869—The Robert Rickmers, 131 Fed. 642—The Bulley, 138 Fed. 173.

56. A maritime lien attaches at the time of the collision, against the offending vessel, for the damages inflicted which is enforceable in admiralty by proceedings in rem. General Mut. Ins. Co. v. Sherwood, 14 How. 351, 14: 452

Cited in The John G. Stevens, 170 U. S. 117, 42 L. ed. 971, 18 Sup. Ct. Rep. 544—The Frank G. Fowler, 8 Fed. 335.

III. Priority.

Between Bottomry Bond and Other Liens, see Bottomry and Respondentia, 24.

Priority of Lien of Captor, see Prize and Capture, 193-197.

See also Seamen, 15-18.

57. A lien for supplies furnished a vessel in her home port, properly perfected under the state law, is entitled to priority over a mortgage on the vessel, although the mortgage was duly recorded before the supplies were furnished. Rodd v. Heartt (The Lottawanna) 21 Wall. 558, 22: 654 *Distinguished in* The De Smet, 10 Fed. 483.

Cited in The Hiawatha, 5 Sawy. 162, Fed. Cas. No. 6453—The John T. Moore, 3 Woods, 64, Fed. Cas. No. 7430—The Guiding Star, 9 Fed. 524—Britton v. The Venture, 21 Fed. 928—The Venture, 26 Fed. 287—Clyde v. Steam Transp. Co. 1 L.R.A. 794, 36 Fed. 502—The Cara, 4 Woods, 29, 50 Fed. 223—The Cerro Gordo, 54 Fed. 392—The Sleepy Hollow 114 Fed. 368—Norfolk Sand & Cement Co. v. Owen, 58 C. C. A. 99, 115 Fed. 781.

58. The lien created by the statute of a state, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law as adopted in the United States. The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. Rep. 498, 37: 345

Cited in The Kate, 164 U. S. 466, 41 L. ed. 516, 17 Sup. Ct. Rep. 185—The Glide, 167 U. S. 621, 42 L. ed. 301, 17 Sup. Ct. Rep. 930—Workman v. New York, 179 U. S. 562, 45 L. ed. 321, 21 Sup. Ct. Rep. 212—The City of Norwalk, 55 Fed. 106—The Nebraska, 61 Fed. 515—The Advance, 63 Fed. 706—Freights of the Kate, 63 Fed. 715—Bigelow v. Nicker-

son, 30 L.R.A. 340, 17 C. C. A. 7, 34 U. S. App. 261, 70 Fed. 118—The Unadilla, 73 Fed. 351—Davidson v. Baldwin, 24 C. C. A. 455, 47 U. S. App. 589, 79 Fed. 97—The Glendale, 26 C. C. A. 502, 42 U. S. App. 546, 81 Fed. 634—The Ella, 84 Fed. 480—The Sappho, 89 Fed. 373—The Iris, 40 C. C. A. 306, 100 Fed. 109—The St. Johns, 101 Fed. 470—The Energia, 124 Fed. 846—The Sue, 137 Fed. 135.

59. By the admiralty law, maritime liens or privileges for necessary advances made or supplies furnished to keep a vessel fit for sea take precedence of all prior claims upon her, unless for seamen's wages or salvage. The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. Rep. 498, 37: 345

Cited in The Valencia (The Valencia v. Ziegler) 165 U. S. 268, 41 L. ed. 713, 17 Sup. Ct. Rep. 323—The John G. Stevens, 170 U. S. 117, 42 L. ed. 971, 18 Sup. Ct. Rep. 544—Knapp, S. & Co. Co. v. McCaffrey, 177 U. S. 642, 44 L. ed. 924, 20 Sup. Ct. Rep. 824—Workman v. New York, 179 U. S. 566, 45 L. ed. 330, 21 Sup. Ct. Rep. 212—The Templar, 59 Fed. 204—Paxson v. Cunningham, 11 C. C. A. 115, 21 U. S. App. 466, 63 Fed. 137—The Alvira, 63 Fed. 147—The Shrewsbury, 69 Fed. 1019—The Westover, 76 Fed. 363—McRae v. Bowers Dredging Co. 86 Fed. 349—The Sappho, 36 C. C. A. 401, 94 Fed. 551—The John B. Ketcham 2nd. 38 C. C. A. 526, 97 Fed. 880—The Iris, 40 C. C. A. 303, 100 Fed. 106—The John T. Williams, 107 Fed. 751—The Sleepy Hollow, 114 Fed. 368—The Robert Dollar, 115 Fed. 223—The Underwriter, 119 Fed. 745—The Wyandotte, 136 Fed. 473—Globe Iron Works Co. v. The John B. Ketcham, 100 Mich. 589, 43 Am. St. Rep. 464, 59 N. W. 247.

60. A maritime lien upon a vessel for damages caused by her fault to another vessel takes precedence of a maritime lien for supplies previously furnished to the offending vessel. The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. Rep. 544, 42: 969

61. A lien for advances of funds for the necessities of a vessel in a foreign port has priority over existing mortgages to creditors at home. The Emily B. Souder v. Pritchard (The Emily Souder) 17 Wall. 666, 21: 683 *Cited in* The J. E. Rumbell, 148 U. S. 9, 37 L. ed. 348, 13 Sup. Ct. Rep. 498—The Kate Hinchman, 7 Biss. 240, Fed. Cas. No. 7621.

62. A lien upon a tug for damages to her tow by negligent towage, bringing the tow into collision with a third vessel, is to be preferred in admiralty to a statutory lien for supplies furnished to the tug in her home port before the collision. The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. Rep. 544, 42: 969 *Cited in* The Escanaba, 96 Fed. 252—Graham v. Oregon R. & Nav. Co. 134 Fed. 464.

63. Seamen have a lien for their wages prior to that of the holder of a bottomry bond; but the owners are also personally liable for such wages. The Virgin v. Vyfhius, 8 Pet. 538, 8: 1036 *Cited in* The America, 16 Law Rep. 277, Fed. Cas. No. 288—Assign v. The G. B. Lamar, Fed. Cas. No. 593a—Pitman v. Hooper, 3 Sumn. 59, Fed. Cas. No. 11,185—The Dora, 34 Fed. 849.

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IV. Loss or Waiver of Lien.

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Effect of Taking Notes in Payment of Charter Money, see Payment, 53.

Laches as Bar to Relief, see Limitation of Actions, 144, 145.

By Capture as Prize, see Prize and Capture, 193-197.

64. The implied lien given by the general admiralty law may be waived by express contract of the parties or by necessary implication. *Carrington v. The Ann C. Pratt*, 18 How. 63, 15: 267
Cited in *The Underwriter*, 119 Fed. 752—*Welch v. Cabot*, 39 Pa. 353.

65. A lender on a bottomry bond in which fictitious items were fraudulently inserted cannot resort to his general maritime lien for repairs in a foreign port. Such lien is waived by such bond, entered into with an intent to defraud on the part of the lender, although the bond is thereby rendered void. *Carrington v. The Ann C. Pratt*, 18 How. 63, 15: 267

66. An express contract for a stipulated sum is not of itself a waiver of a lien upon a vessel; but to produce that effect, the contract must contain some stipulations inconsistent with the continuance of such lien, or from which a waiver may fairly be inferred. *Peyroux v. Howard*, 7 Pet. 324, 8: 700

Cited in *The Active*, Olcott, 288, Fed. Cas. No. 34—*The Highlander*, 4 Blatchf. 57, Fed. Cas. No. 6,475—*Leland v. The Medora*, 2 Woodb. & M. 98, Fed. Cas. No. 8,237—*Maitland v. The Atlantic*, Newberry, Adm. 519, Fed. Cas. No. 8,980—*Marshall v. Bazin*, 7 N. Y. Legal Obs. 345, Fed. Cas. No. 9,125—*Remnants in Court*, Olcott, 384, Fed. Cas. No. 11,697—*Secor v. The Highlander*, 19 How. Pr. 337, Fed. Cas. No. 12,604—*The Nebraska*, 17 C. C. A. 98, 34 U. S. App. 119, 69 Fed. 1013—*Prince v. Odgensburg Transit Co.* 107 Fed. 981—*Weaver v. Demuth*, 40 N. J. L. 241—*Casey & H. Mfg. Co. v. Weatherly*, 101 Tenn. 324, 47 S. W. 432.

67. A lien on a vessel for supplies or repairs is not waived by the acceptance of promissory notes for the same, unless they were agreed to be received in lieu of the original claim. If the notes have been surrendered, the party has a right to stand upon the original contract, and to seek his remedy as fully as if the notes had never been given. *Meyer v. Tupper (The St. Lawrence)* 1 Black, 522, 17: 180

Cited in *The Bird of Paradise (The Bird of Paradise v. Heyneman)* 5 Wall. 561, 18 L. ed. 666—*The Dubuque*, 2 Abb. (U. S.) 29, Fed. Cas. No. 4,110—*The Eclipse*, 3 Bliss. 102, Fed. Cas. No. 4,268—*The Illinois*, 2 Filpp. 417, Fed. Cas. No. 7,005—*The James Guy*, 1 Ben. 117, Fed. Cas. No. 7,195—*The Maitland*, 2 Bliss. 204, Fed. Cas. No. 8,979—*The Norfolk*, 2 Hughes, 126, Fed. Cas. No. 10,297—

Risher v. The Frolic, 1 Woods, 94, Fed. Cas. No. 11,856—*The Sarah J. Weed*, 2 Low. Dec. 556, Fed. Cas. No. 12,350—*The Theodore Perry*, 8 Cent. L. J. 104, Fed. Cas. No. 13,879—*The Alabama*, 22 Fed. 451—*The Queen of St. Johns*, 31 Fed. 28—*The Nebraska*, 17 C. C. A. 98, 34 U. S. App. 119, 69 Fed. 1013—*Sinton v. The R. R. Roberts*, 46 Ind. 486—*Reany Engineers & Ship Bldg. Work's Estate*, 9 Phila. 622.

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V. Defenses.

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68. Proof of failure to institute inquiries is no defense to a claim for repairs and supplies even if the master had funds, unless that fact was known to the materialman or lender of the money, or such facts and circumstances were known to him as were sufficient to put him upon inquiry. *The Lulu (Hazlehurst v. The Lulu)* 10 Wall. 192, 19: 906
Cited in *Stephenson v. The Francis*, 21 Fed. 726.

69. That the master had funds is not sufficient to defeat the claim of one making repairs or furnishing supplies at the master's request, where he did not know of that fact, or of facts and circumstances sufficient to put him upon inquiry. *The Lulu (Hazlehurst v. The Lulu)* 10 Wall. 192, 19: 906
Cited in *The Kate*, 164 U. S. 467, 41 L. ed. 517, 17 Sup. Ct. Rep. 135—*The Columbus*, 5 Sawy. 490, Fed. Cas. No. 3,044—*Hamlin v. Pettibone*, 6 Bliss. 172, Fed. Cas. No. 5,995—*Scammon v. Cole*, 3 Cliff. 480, Fed. Cas. No. 12,432—*Merchants' Mut. Ins. Co. v. Baring*, 31 Phila. Leg. Int. 262.

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 Validity of License Issued by *De Facto* Deputy, see *Officers*, 79.

1. A marriage in the District of Columbia, if celebrated by a clergyman, would not be invalidated because no marriage license had been obtained. *Blackburn v. Crawford*, 3 Wall. 175, 18: 186
 Cited in *Haggin v. Haggin*, 35 Neb. 379, 58 N. W. 209.

2. Although by the English marriage act, registers of marriages are required to be kept in public books in every parish, and signed by the parties and the minister, and attested by two witnesses, such an entry is not necessary to the validity of the marriage, and an erroneous entry will not necessarily vitiate it. *Bank of United States v. Dandridge*, 12 Wheat. 64, 6: 552
 Cited in *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 120, 52 Atl. 873.

3. The Council of Trent declared null and void every marriage not celebrated before a priest, or by license of the ordinary, and before two or three witnesses. But an ecclesiastical decree could not, *proprio vigore*, affect the status or civil relations of persons, and while this decree was promulgated by Philip II. in his European dominions, it was not extended to the colonies. *Hallett v. Collins*, 10 How. 174, 13: 376

Editorial notes.

What constitutes a valid marriage. 11: 108
 [Antenuptial pregnancy or unchastity as ground of annulment. 18 L.R.A. 375.
 Jurisdiction of chancery to decree nullity or dissolution of marriage. 25 L.R.A. 800.
 Intoxication as affecting marriage. 34 L. R.A. 87.
 Duress to avoid marriage. 43 L.R.A. 814.
 Power of legislature to forbid marriage. 2 L.R.A. (N.S.) 531.]

Common-law marriage.

4. In the absence of any positive statute to the contrary, any marriage regularly made according to the common law is a valid marriage. The statute of Michigan does not deny validity to any marriages which are good at common law. *Meister v. Moore*, 96 U. S. 76, 24: 826. *Limited in Re Wilbur*, 14 Wash. 246, 44 Pac. 262.

Cited in Cheely v. Clayton, 110 U. S. 709, 28 L. ed. 301, 4 Sup. Ct. Rep. 328—*Daniel v. Sams*, 17 Fla. 490—*Teter v. Teter*, 101 Ind. 135, 51 Am. Rep. 742—*State v. Walker*, 36 Kan. 303, 59 Am. Rep. 556, 18 Pac. 279—*Renfrow v. Renfrow*, 60 Kan. 280, 72 Am. St. Rep. 350, 56 Pac. 534—*State v. Zichfeld*, 23 Nev. 308, 34 L.R.A. 785, 62 Am. St. Rep. 800, 46 Pac. 802—*Smith v. Smith*, 52 N. J. L. 214, 19 Atl. 255—*Bieseckers Estate*, 4 Lack. Legal News 5, 7 Pa. Dist. R. 70—*Ingersol v. McWille*, 9 Tex. Civ. App. 554, 30 S. W. 56—*Simon v. State*, 31 Tex. Crim. Rep. 202, 37 Am. St. Rep. 802, 20 S. W. 399—*Holder v. State*, 35 Tex. Crim. Rep. 24, 29 S. W. 793—*Waldrop v. State*, 41 Tex. Crim. Rep. 198, 53 S. W. 130—*Offield v. Davis*, 100 Va. 252, 40 S. E. 910—*Re McLaughlin*, 4 Wash. 573, 16 L.R.A. 700, 30 Pac. 651.

5. Whatever the form of ceremony, or even if all ceremony is dispensed with, if the parties agree presently to take each other for husband and wife, and from that time live together in that relation, proof of these facts is sufficient to constitute proof of a marriage binding on all parties. *Meister v. Moore*, 96 U. S. 76, 24: 826. *Cited in Mathewson v. Phoenix Iron Foundry*, 20 Fed. 284—*Arnold v. Chesebrough*, 7 C. C. A. 512, 20 U. S. App. 87, 58 Fed. 837—*Davis v. Pryor*, 50 C. C. A. 581, 112 Fed. 276—*Haggin v. Haggin*, 35 Neb. 379, 53 N. W. 209.

6. In the absence of statutory regulation, a marriage is a civil contract, and may be made *per verba de presenti*; that is, by words in the present tense, without attending ceremonies, religious or civil; but some public recognition of it is necessary as evidence of its existence. *Maryland use of Markley v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. Rep. 278, 28: 822. *Cited in Adger v. Ackerman*, 52 C. C. A. 570, 115 Fed. 126—*Sharon v. Sharon*, 75 Cal. 26, 16 Pac. 345.

7. This court was equally divided as to the correctness of an instruction given to the jury by the court below, that it amounts to a valid marriage, if, before sexual intercourse, parties, in the presence of friends, agree to marry, and do afterwards live together as man and wife; and also if the contract is made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and is followed by consummation. *Jewell v. Jewell*, 1 How. 219, 11: 108.

Disapproved in Hulett v. Carey, 66 Minn. 337, 34 L.R.A. 387, 61 Am. St. Rep. 419, 69 N. W. 31.

Cited in Holmes v. Holmes, 1 Abb. (U. S.) 525, Fed. Cas. No. 6,338—*Arnold v. Chesebrough*, 7 C. C. A. 515, 20 U. S. App. 87, 58 Fed. 840—*Sharon v. Sharon*, 75 Cal. 18, 16 Pac. 345—*White v. White*, 82 Cal. 450, 7

L.R.A. 808, 23 Pac. 276—*Askew v. Dupree*, 30 Ga. 179—*Redgrave v. Redgrave*, 38 Md. 97—*Jones v. Jones*, 48 Md. 401, 30 Am. Rep. 466—*Richardson v. Smith*, 80 Md. 93, 30 Atl. 568—*George v. George*, 47 N. H. 38—*Duncan v. Duncan*, 10 Ohio St. 186—*Guardians of Poor v. Nathans*, 2 Brewst. (Pa.) 152.

Effect of cohabitation or conduct.

Evidence of Non-Cohabitation, see Evidence, 2126.

8. In the Spanish colonies an actual contract of marriage, made before a civil magistrate, and followed by cohabitation and acknowledgment, was valid. Such was the established principle of civil and canon law antecedent to the Council of Trent. *Hallett v. Collins*, 10 How. 174, 13: 376.

Cited in Mathewson v. Phoenix Iron Foundry, 20 Fed. 284—*Hutchins v. Kimmell*, 81 Mich. 131, 18 Am. Rep. 164—*Lorimer v. Lorimer*, 124 Mich. 634, 83 N. W. 609.

— Editorial note.

[Cohabitation as proof of marriage where unlawfully begun. 14 L.R.A. 364.]

II. Capacity of Parties Who May Marry.

9. A marriage is not invalid by reason of a prior marriage which is void. *Patterson v. Gaines*, 6 How. 550, 12: 553. *Denied in Gaines v. Hennen*, 24 How. 628, 16 L. ed. 795.

Cited in Gaines v. Relf, 12 How. 523, 13 L. ed. 1092—*Harris v. Harris*, 8 Ill. App. 61—*Dare v. Dare*, 52 N. J. Eq. 197, 27 Atl. 654—*People v. Corbett*, 49 App. Div. 517, 63 N. Y. Supp. 460—*Finn v. Finn*, 62 How. Pr. 85—*Williams v. Williams*, 63 Wis. 69, 53 Am. Rep. 253, 23 N. W. 110.

10. If a first marriage is void because of polygamy or any other like impediment, a second is not impaired by it, though there has been no sentence of nullity. *Gaines v. Relf*, 12 How. 472, 13: 1071. *Cited in Dare v. Dare*, 52 N. J. Eq. 197, 27 Atl. 654.

11. A judicial invalidation of marriage at any time, for the bigamy of a party to it, relates back to the time of the marriage, and places the one deceived in a free condition to marry again, or to do any other act as an unmarried woman, without any sentence of the nullity of the marriage. *Gaines v. Hennen*, 24 How. 553, 16: 770.

12. By the laws of Maryland, a *feme covert* who has been abandoned by her husband is not permitted to marry a second time, until her husband shall have been absent seven years, and not heard from during that time. *Rhea v. Rhenner*, 1 Pet. 105, 7: 72. *Cited in Hiram v. Pierce*, 45 Me. 372, 71 Am. Dec. 555.

Editorial notes.

[Effect of right to appeal from divorce decree on party's right to remarry. 17 L.R.A. 573.]

Effect of statutes forbidding remarriage of guilty party after divorce. 24 L.R.A. 831. Marriage of insane person. 40 L.R.A. 737. Insanity as affecting marriage. 40 L.R.A. 737.]

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As Fraud upon Creditors, see Fraudulent Conveyances, 106-110.
Power of Disposal under, see Powers, 9.
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- As Citizens, see Citizens, 21-24.**
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- As Boundary, see Boundaries, 94, 102.**
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MARSHAL.

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Duty as between Federal and State Writs, see Habeas Corpus, 197, 198.
Invalidity of Sale by Marshal not Authorized in Decree, see Judicial Sale, 64.

Definition of the office.

1. Indian policemen are not marshals or deputy marshals within the meaning of U. S. Rev. Stat. § 788. U. S. Comp. Stat. 1901, p. 608, giving such officials in each state the same powers in executing the laws of the United States as sheriffs and their deputies may have by law in executing the laws thereof. *Bad Elk v. United States*, 177 U. S. 529, 20 Sup. Ct. Rep. 729, 44: 874

2. Marshals are the ministerial officers, through whom the commands of the judicial department of the United States must be executed, and they belong to the executive department of the government. *Cunningham v. Neagle (Re Neagle)* 135 U. S. 1, 10 Sup. Ct. Rep. 658, 34: 55
Cited in United States v. Mullin, 71 Fed. 688.

3. The marshal is properly the officer of the law, rather than the agent of the parties, and is bound to fulfil the behests of the

law; and this, too, without special admonition or instruction from any person. *Griffin v. Thompson*, 2 How. 244, 11: 253 *Cited in Kershaw v. Dyer*, 6 Utah, 248, 24 Pac. 621.

Source of authority.

4. Authority from the Attorney General and a district attorney of the United States is sufficient to warrant a marshal in making provisions for the protection and defense of a justice of the Supreme Court while in the discharge of his duty. *Cunningham v. Neagle (Re Neagle)* 135 U. S. 1, 10 Sup. Ct. Rep. 658, 34: 55

Duty to be diligent and prompt.

As to Liability, see *infra*, II. a.

5. The marshal of the District of Columbia is bound to serve a subpoena in chancery as soon as he reasonably can. *Kennedy v. Brent*, 6 Cranch, 187, 3: 194 *Cited in Winter v. Ludlow*, 3 Phila. 483.

6. An indorsement upon a bill by the clerk of court, requiring the marshal to serve notice of attachment, was deemed sufficient to charge him with negligence in failing to perform his duty, in *Kennedy v. Brent*, 6 Cranch, 187, 3: 194 *Cited in Winter v. Ludlow*, 3 Phila. 483, Fed. Cas. No. 17,891—*Comstock v. Rayford*, 1 Smedes & M. 442, 40 Am. Dec. 102.

Power as peace officer.

7. A marshal of the United States has the same power to keep the peace of the United States that a sheriff has to keep the peace of the state, and is authorized to protect a judge from assault and murder. *Cunningham v. Neagle (Re Neagle)* 135 U. S. 1, 10 Sup. Ct. Rep. 658, 34: 55 *Cited in Re Quarles*, 158 U. S. 535, 39 L. ed. 1081, 15 Sup. Ct. Rep. 959—*Re Lee*, 46 Fed. 61—*Ex parte McLeod*, 120 Fed. 143.

Capacity to be commissioner or master.

8. A marshal may be appointed as a commissioner to levy a tax, in satisfaction of a judgment, upon the taxable property of a county, if authorized by state statute. *Lee County v. United States ex rel. Rogers (Lee County v. Rogers)* 7 Wall. 175, 19: 162 *Cited in Rees v. Watertown*, 19 Wall. 117, 22 L. ed. 75—*Barkley v. Levee Comrs.* 93 U. S. 264, 23 L. ed. 896—*Thompson v. Allen County*, 115 U. S. 559, 29 L. ed. 475, 6 Sup. Ct. Rep. 140—*Bloody v. Watson*, 64 N. H. 176, 9 Atl. 794.

Completion of acts after term.

Right to Sue in Federal Courts to Use of Obligor on Attachment Bond, see Courts, 734.

9. If an execution comes into the hands of a sheriff or a marshal to be executed, and his term of office expires before he executes it, he is bound to complete the execution, and it is never completed until the money is paid to the plaintiff, if it be practicable to make it. *McFarland v. Gwin*, 3 How. 717, 11: 799 *Cited in Bagley v. Ward*, 37 Cal. 150, 99 Am. Dec. 256.

10. A sale of land by a marshal on a *venditioni exponas* remaining in his hands

after he is removed from office and a new marshal appointed and qualified is authorized by the provision of the judiciary act of 1789, chap. 20, § 28, which remains in force since the enactment of the act of May 7, 1800, chap. 45 § 3, and such sale, being reported to the court and confirmed by it, and a deed ordered to be made by the new marshal, is valid. *Doolittle v. Bryan*, 14 How. 563, 14: 543 *Cited in Thaw v. Ritchie*, 5 Mackey, 213—*Middleton v. Parke*, 3 App. D. C. 158—*Lord v. Goodall*, N. & P. S. B. Co. 38 Phila. Leg. Int. 197—*Miner v. Cassat*, 2 Ohio St. 203.

De facto marshals and their acts.

11. The acts of the United States marshal in a territory, in matters adjudged to be within his duties by the territorial court, are valid as the acts of an officer *de facto*, although the United States Supreme Court subsequently decides that the acts should be performed by the territorial marshal. *Hussey v. Smith*, 99 U. S. 20, 25: 314 *Cited in Northwestern Mut. L. Ins. Co. v. Seaman*, 80 Fed. 360—*Herkimer v. Keeler*, 109 Iowa, 683, 81 N. W. 178—*Forster v. Forster*, 129 Mass. 565—*Ex parte Haly*, 1 Okla. 15, 25 Pac. 514—*Morford v. Territory*, 10 Okla. 745, 54 L.R.A. 520, 63 Pac. 958—*Lockwitz v. Larson*, 16 Utah, 281, 52 Pac. 279.

12. The appointment and service of a deputy marshal makes him a *de facto* officer, even if the clerk who administered the oath to him was not empowered to do so. *Wright v. United States*, 158 U. S. 232, 13 Sup. Ct. Rep. 819, 39: 963

13. One acting as a *de facto* deputy by the authority of a marshal is a deputy within the meaning of the act of Congress of June 9, 1888, giving jurisdiction to district courts of offenses by Indians against deputy marshals and other officers and agents of the government. *Wright v. United States*, 158 U. S. 232, 15 Sup. Ct. Rep. 819, 39: 963 *Cited in Matthews v. United States*, 32 Ct. Cl. 134—*Goode v. United States*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 136.

II. Rights and Liabilities.

a. In General.

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Liability on Bond, see Bonds, 29a, 63, 73, 82, 111.

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Criminal Liability, see Criminal Law, 31.

Liability to Garnishment, see Garnishment, 4, 5.

Remedy at Law or in Equity to Protect Marshal's Custody, see Equity, 151.

Probative Effect of Treasury Transcript, see Evidence, 2471.

For Accepting other than Legal Tender in Satisfaction of Execution, see Execution, 87-90.

Liability for Interest, see Interest, 30.

Invalidity of Replevin Issuing from Another Court, see Courts, 1476-1479.

Presumption that Escape was due to Negligence of Deputy Marshal, see Evidence, 362.

Right to Reward for Making Arrest, see Reward, 1-3.

Repeal of Statute as to Execution of Process after Expiration of Term, see Statutes, 636.

Right and interest in property held.

14. The marshal or the sheriff, as the case may be, by a levy acquires a special property in the goods, and may maintain an action for them. *Hagan v. Lucas*, 10 Pet. 400, 9: 470

Cited in Welter v. Jacobson, 7 N. D. 36, 66 Am. St. Rep. 632, 73 N. W. 65—*Pitkin v. Burnham*, 62 Neb. 397, 55 L.R.A. 287, 89 Am. St. Rep. 763, 87 N. W. 160—*O'Brien v. Hilburn*, 22 Tex. 625.

Liability generally for nonfeasance or misfeasance.

Nominal Damages for, see Damages, 6, 7.

Effect of Delay and Acquiescence on Right to Cross Return to Execution, see Executions, 54.

Accountability in Coin for Execution Satisfied in Bank Notes, see Payment, 73.

15. Should the marshal fail to obey the writ of the writ without a legal excuse, or should he, in obeying its letter, violate the rights of others, he is liable to an action by the injured party. *Life & Fire Ins. Co. v. Adams*, 9 Pet. 573, 9: 234

16. The "Act Concerning the District of Columbia," passed March 3, 1801, does not require the marshal to apply to the district attorney for executions in all cases of fines levied by the circuit court, or make him liable for neglecting to do so, if no execution is issued. *Levy Court v. Ringgold*, 5 Pet. 451, 8: 188

17, 18. It is the duty of a marshal to execute all process which may be placed in his hands, but he performs this duty at his peril and under the guidance of law. *Life & Fire Ins. Co. v. Adams*, 9 Pet. 573, 9: 234

Cited in The E. W. Gorgas, 10 Ben. 469, Fed. Cas. No. 4,585—*Ex parte Ecuols*, 39 Ala. 700, 88 Am. Dec. 749.

Wrongs by deputy.

Marshal's Liability for Acts of Deputy Directed by Attorney, see Attorneys, 55, 56.

Whether Deputy was Misled by Attorney's Instructions as Question for Jury, see Trial, 288.

19. A marshal is answerable for the misconduct of his deputy. *United States use of Rogers v. Conklin (Rogers v. The Marshal)*, 1 Wall. 644, 17: 714

20. If the deputy marshal who served a writ of replevin and took the statutory bond erased the name of the principal in

the bond, without the direction of someone having authority, he violated a plain duty, and his principal is liable. *United States use of Rogers v. Conklin (Rogers v. The Marshal)*, 1 Wall. 644, 17: 714
Cited in Chandler v. Rutherford, 2 Ind. Terr. 393, 51 S. W. 981.

21. Plaintiffs who direct the deputy marshal to receive certain funds in payment of an execution, if he disobeys their instructions, must look to him, not to the marshal, for any loss they may sustain; although usually the marshal is responsible for the acts of his deputy in the execution of process. *Gwinn v. Buchanan use of Holliday*, 4 How. 1, 11: 849

Executing process void or voidable.

Duty to Surrender Goods taken under Void Levy to Sheriff Making Lawful Writ, see Courts, 1519.

Levying Execution Issued within Period of Stay, see Executions, 48.

Levying Executions Issued more than a Year after Judgment, see Executions, 49.

Liability Generally, for Acts Done under Process or Official Order, see Officers, 68-71.

22. A writ of attachment, though voidable, when it has the seal of the court and everything else on its face to give it apparent validity, is a sufficient protection to an officer who is bound to obey it for making a levy under it. *Marks v. Shoup*, 181 U. S. 562, 21 Sup. Ct. Rep. 724, 45: 1002

23. A writ of attachment valid on its face is sufficient protection to a marshal who executed it, when sued for seizing the property of the defendant therein, although it might have been avoided on a proper proceeding for a defect in the affidavit on which it was issued. *Matthews v. Densmore*, 109 U. S. 216, 3 Sup. Ct. Rep. 126, 27: 912
Cited in Marks v. Shoup, 181 U. S. 564, 45 L. ed. 1003, 21 Sup. Ct. Rep. 724—*Maddux v. Usher*, 2 Haskell, 269, Fed. Cas. No. 8,936—*Ehrstein v. Rothschild*, 22 Fed. 63—*Wise v. Jefferis*, 2 C. C. A. 436, 7 U. S. App. 275, 51 Fed. 645—*Booth v. Denike*, 65 Fed. 46—*Sannoner v. Jacobson*, 47 Ark. 47, 14 S. W. 458—*Huey v. Brimer*, 9 Kan. App. 151, 58 Pac. 485—*Murphy v. Montandon*, 3 Idaho, 328, 35 Am. St. Rep. 279, 29 Pac. 851—*Johnson v. Miller*, 50 Ill. App. 71—*Johnson v. Miller*, 55 Ill. App. 177—*Densmore v. Mathews*, 58 Mich. 622, 26 N. W. 146—*Duxbury v. Dahle*, 78 Minn. 431, 79 Am. St. Rep. 408, 81 N. W. 198—*Westcott v. Sharp*, 50 N. J. L. 394, 13 Atl. 243—*Bank of Colfax v. Richardson*, 34 Or. 531, 75 Am. St. Rep. 664, 54 Pac. 859—*Barelli v. Wagner*, 5 Tex. Civ. App. 449, 27 S. W. 17.

24. A court-martial's sentence of confinement in the penitentiary of the District of Columbia at hard labor, if approved by the Secretary of the Navy and the President, is legal, and a justification to the marshal against an action for false imprisonment. *Dynes v. Hoover*, 20 How. 65, 15: 838
Criticized in Pullan v. Kinsinger, 2 Abb. (U. S.) 104, Fed. Cas. No. 11,463.

Cited in Conner v. Long, 104 U. S. 239, 26 L.

ed. 727—*Delaware R. Co. v. Prettyman*, Fed. Cas. No. 3,787—*United States ex rel. Hendricks v. Harris*, Fed. Cas. No. 15,313—*Re Anderson*, 94 Fed. 495—*McCraw v. Welch*, 2 Colo. 290—*Lampert v. Laclede Gaslight Co.* 14 Mo. App. 387—*Forrist v. Leavitt*, 52 N. H. 487—*Driscoll v. Place*, 44 Vt. 258.

Wrongful levy or levy on wrong goods.

25. Where a marshal is directed to levy upon the property of a person, without describing any specific property, he is liable to any third person whose property he erroneously takes. *Buck v. Colbath*, 3 Wall. 334, 18: 257

Cited in North v. Peters, 138 U. S. 284, 34 L. ed. 940, 11 Sup. Ct. Rep. 346—*United States v. Dantzer*, 3 Woods, 721, Fed. Cas. No. 14,917—*St. Paul, M. & M. R. Co. v. Drake*, 19 C. C. A. 254, 44 U. S. App. 271, 72 Fed. 947—*Re Gutman*, 114 Fed. 1011—*McKnight v. United States*, 65 C. C. A. 44, 130 Fed. 686—*Re Mertens*, 131 Fed. 515—*Sperry v. Ethridge*, 70 Iowa, 30, 30 N. W. 4—*State ex rel. Robertson v. Hope*, 88 Mo. 435—*Phillips v. Spotts*, 14 Neb. 142, 15 N. W. 332—*People v. Hall*, 31 Hun, 409—*Merchants of Memphis v. Memphis*, 9 Baxt. 82.

26. Where the process or order of the court describes the property to be seized, and contains a direct command to the officer to take possession of that particular property, and he has kept himself strictly within the mandatory clause of the process, such writ or process is a protection to him. *Buck v. Colbath*, 3 Wall. 334, 18: 257

Cited in Conner v. Long, 104 U. S. 235, 26 L. ed. 726—*Stutsman County v. Wallace*, 142 U. S. 311, 35 L. ed. 1025, 12 Sup. Ct. Rep. 227—*Re Anderson*, 94 Fed. 496—*Anderson v. Elliott*, 41 C. C. A. 527, 101 Fed. 615—*Bradley v. Frost*, 3 Dill. 459, Fed. Cas. No. 1,780—*Brooks v. Memphis*, 3 Cent. L. J. 357, Fed. Cas. No. 1,954—*Harris v. Glenn*, 56 Ga. 97—*Chipstead v. Porter*, 63 Ga. 222—*Jefferson v. Hartley*, 81 Ga. 718, 9 S. E. 174—*Thompson v. State*, 3 Ind. App. 377, 28 N. E. 996—*State ex rel. Holliday v. King*, 30 Ind. App. 395, 66 N. E. 85.

27. Though a writ be a valid writ, an officer is liable to any third person whom his erroneous action may injure, for the wrongful seizure of property not subject to the writ. *Matthews v. Densmore*, 109 U. S. 216, 3 Sup. Ct. Rep. 126, 27: 912

Lammon v. Feusier, 111 U. S. 17, 4 Sup. Ct. Rep. 286, 28: 337

Buck v. Colbath, 3 Wall. 334, 18: 257
Cited in Sonnentheil v. Christian Moerlein Brewing Co. 172 U. S. 405, 43 L. ed. 494, 19 Sup. Ct. Rep. 233—*Kirk v. United States*, 124 Fed. 341—*Meadow v. Wise*, 41 Ark. 291—*Weber v. Henry*, 16 Mich. 403—*Heyman v. Correll*, 36 Mich. 159.

28. A marshal is liable for the damages, where he refuses to surrender property which he has taken unlawfully. *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. Rep. 379, 31: 374

29. In trespass in a state court against the marshal of the United States for levying on goods which ought not to have been levied on, the marshal's title as marshal is not necessarily drawn in question. He may be

sued, not as marshal, but as trespasser. *Derby v. Gallup* (*Day v. Gallup*) 2 Wall. 97, 17: 855

Cited in Lammon v. Feusier, 111 U. S. 19, 28 L. ed. 337, 4 Sup. Ct. Rep. 286—*Porter v. Davidson*, 62 Fed. 628—*State ex rel. Robertson v. Hope* 88 Mo. 435.

30. Where a marshal who has taken possession of goods on Sunday, under a writ issued on that day, refuses to surrender possession to a sheriff appearing with a lawful writ from a state court, he is liable in damages for the loss caused thereby. *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. Rep. 379, 31: 374

Loss of goods or escape of debtor.

Sufficiency of Plea by Marshal, see Pleading, 751.

See also *supra*, 31, 32.

31. If a marshal has deposited money received, as the proceeds of a confiscation sale, in a bank, pursuant to instructions from the proper authority, he is protected under a mandate subsequently issued ordering restitution. *Re Morris*, 9 Wall. 605, 19: 799

Cited in The Sabine, 4 Woods, 86, 50 Fed. 217—*Baltimore Bldg. & L. Asso. v. Alderson*, 39 C. C. A. 612, 99 Fed. 492—*State v. Jacoba*, 11 Or. 315, 8 Pac. 332.

32. If the marshal has deposited the portion going to the United States in a bank, pursuant to instructions from the proper authority, he is exonerated on the subsequent failure of the bank. *Re Morris*, 9 Wall. 605, 19: 799

33. A United States marshal is not responsible for the escape of the debtor committed to a state jail under process from the United States court. *Randolph v. Donaldson*, 9 Cranch. 76, 3: 662

Cited in United States v. Ewing, 140 U. S. 145, 35 L. ed. 389, 11 Sup. Ct. Rep. 743—*Re Hartwell*, 1 Low. Dec. 537, Fed. Cas. No. 6,172—*Ex parte Paris*, 8 Woodb. & M. 235, Fed. Cas. No. 10,714—*United States v. Ebbs*, 4 Hughes, 482, 10 Fed. 376—*United States v. Harden*, 4 Hughes, 463, 10 Fed. 809—*United States v. Martin*, 9 Sawy. 95, 17 Fed. 154—*Erwin v. United States*, 2 L.R.A. 237, 37 Fed. 485—*Servis v. Marsh*, 38 Fed. 796—*Re Birdsong*, 4 L.R.A. 630, 39 Fed. 600—*United States v. Ebbs*, 49 Fed. 155—*Nail v. State*, 34 Ala. 266—*State ex rel. Savannah v. Dews*, R. M. Charit. (Ga.) 409—*Offutt v. Bowen*, Walk. (Miss.) 546.

Application and disposal of proceeds.

34. [A marshal makes distribution of prize money at his own peril, unless in obedience to orders from the court. *Keane v. The Gloucester* (Fed. Ct. Ap.) 2 Dall. 36, 1: 278]

35. The Comptroller of the Treasury has a right to direct the marshal to whom he shall pay money received upon execution; and a payment according to such directions is good, and he may avail himself of it upon the trial without having submitted it as a claim to the accounting officers of the

Treasury. *United States v. Giles*, 9 Cranch, 212, 3: 708
Cited in Walker v. Chapman, 22 Ala. 128.

36. It is irregular for a marshal to keep the proceeds of a vessel and cargo, or to distribute them among the parties, without any direction of the court. *The Collector*, 6 Wheat. 194, 5: 239
[Keane v. The Gloucester (Fed. Ct. Ap.) 2 Dall. 36, 1: 278]

Representations and warranties.

37-8. If a marshal steps outside of his official duty, and expressly or impliedly warrants the quality of goods offered by him at judicial sale, he is personally responsible. *The Monte Allegre*, 9 Wheat. 616, 6: 174

b. Fees and Compensation.

Effect of Absence of Finding as to, see Appeal and Error, 5171.

For Service at Election, see Elections, 22, a; 22, b.

Right to Set-off Claim for, in Action by Government, see Set-Off and Counterclaim, 79.

By whom payable.

See also **Costs**, 98.

39. The fees and compensation of a marshal for services rendered to the United States in a cause to which the government is a party, whether fixed by some positive statutory rule or depending upon what is reasonable and just under the circumstances, are to be paid out of the Treasury upon a certificate of the amount made by the court or one of the judges, and cannot lawfully constitute any part of the judgment or decree. *The Antelope*, 12 Wheat. 546, 6: 723

Application of local fees.

40. Reference made to the local statutes for the purpose of determining the amount of a marshal's fees, not fixed by Federal statute. *United States v. Ringgold*, 8 Pet. 150, 8: 899
Cited in Jerman v. Stewart, 12 Fed. 274.

Fees accrued to predecessor.

41. A marshal of the United States is entitled to recover pay for the expenses incurred by a deputy of his predecessor in endeavoring to arrest persons for offenses against the United States, where the writs were issued before the plaintiff was qualified for office, but were not returned until after he had qualified, and by an agreement between the outgoing and incoming marshals the latter was to have the fees earned upon all writs in the hands of the deputies of the former at the date the office changed hands, and where the outgoing marshal made no claim to such fees. *United States v. Fletcher*, 147 U. S. 664, 13 Sup. Ct. Rep. 434, 37: 322

"Services."

42. The delivery of warrants of commitment to the warden of a penitentiary by a marshal who has transported a prisoner is

not a "service" for which the marshal is entitled to a fee under U. S. Rev. Stat. § 829, U. S. Comp. Stat. 1901, p. 636, in addition to his other fees. *United States v. McMahon*, 164 U. S. 81, 17 Sup. Ct. Rep. 28, 41: 357
Cited in United States v. Dill, 29 C. C. A. 590, 57 U. S. App. 261, 86 Fed. 84.

43. The delivery of a warrant of commitment to a warden of a penitentiary is in no sense a "service" of a "process, warrant, attachment, or other writ," within the meaning of Rev. Stat. § 829, U. S. Comp. Stat. 1901, p. 636, allowing to United States marshals fees for travel to serve any process, etc. *United States v. Tanner*, 147 U. S. 661, 13 Sup. Ct. Rep. 436, 37: 321

Cited in United States v. McMahon, 164 U. S. 87, 41 L. ed. 380, 17 Sup. Ct. Rep. 28—*Yoes v. United States*, 30 Ct. Cl. 377—*Yoes v. United States*, 31 Ct. Cl. 298—*United States v. McMahon*, 13 C. C. A. 258, 20 U. S. App. 687, 65 Fed. 978.

Arrests and jail costs.

Mileage in Transporting Prisoners, see infra, 49.

Right to Require Items, see infra, 63.
 See also **infra**, 51.

44. The United States is liable to the marshal of the District of Columbia for the amount of his poundage fees on a *ca. ad sat.*, in a suit brought by the United States, when the prisoner is discharged from custody of the marshal by order of the plaintiff. *United States v. Ringgold*, 8 Pet. 150, 8: 899

45. For actual disbursements and services actually rendered in making an arrest, a marshal is entitled to pay. *United States v. Harmon*, 147 U. S. 268, 13 Sup. Ct. Rep. 327, 37: 164
Cited in Hallett v. United States, 63 Fed. 824.

46. A marshal may be allowed for the hire of hacks to transport prisoners to and from court, where this is in accordance with the usual practice, as it must be presumed to have been required by the court in the prompt despatch of business or to prevent the escape of prisoners. *United States v. Harmon*, 147 U. S. 268, 13 Sup. Ct. Rep. 327, 37: 164
Cited in Saunders v. United States, 78 Fed. 784—*Puleston v. United States*, 85 Fed. 573.

47. The expense of transporting a prisoner under a warrant of commitment cannot be allowed a United States marshal, where such prisoner escaped from the custody of his deputy before he could be delivered to the penitentiary, and there is no finding of due diligence on the part of the officer to prevent the escape. *United States v. Nix*, 189 U. S. 199, 23 Sup. Ct. Rep. 495, 47: 775

Mileage and traveling expense.

Costs of Transporting Prisoners, see supra, 46, 47.

Repeal of Statute as to, see Statutes, 642.

48. Full traveling fees may be allowed a marshal on two or more writs in his hands at the same time and served at the same place on different persons. *United States v.*

Harmon, 147 U. S. 268, 13 Sup. Ct. Rep. 327, 37: 164

United States v. Fletcher, 147 U. S. 664, 13 Sup. Ct. Rep. 434, 37: 322

Cited in United States v. Harmon, 147 U. S. 281, 37 L. ed. 169, 13 Sup. Ct. Rep. 327—United States v. Tanner, 147 U. S. 663, 37 L. ed. 322, 13 Sup. Ct. Rep. 436—United States v. Fletcher, 147 U. S. 668, 37 L. ed. 324, 13 Sup. Ct. Rep. 434—United States v. Smith, 158 U. S. 351, 39 L. ed. 1013, 15 Sup. Ct. Rep. 846—Yoes v. United States, 30 Ct. Cl. 373—Campbell v. United States, 13 C. C. A. 133, 27 U. S. App. 666, 65 Fed. 782—Nixon v. United States, 82 Fed. 26—Loving v. United States, 117 Fed. 566—Steenerson v. Polk County, 68 Minn. 513, 71 N. W. 687.

49. A marshal is entitled, under U. S. Rev. Stat. § 829, U. S. Comp. Stat. 1901, p. 636, to fees at the rate of 10 cents per mile, and not merely the actual expenses for transporting a convict to a penitentiary in the same state but outside the district in which he was sentenced, where the court sentences him to that penitentiary under its discretion given by §§ 5541, 5542, U. S. Comp. Stat. 1901, p. 3721, and not under § 5546, U. S. Comp. Stat. 1901, p. 3723, because of the absence of any suitable place of confinement in the district or territory. United States v. McMahon, 164 U. S. 81, 17 Sup. Ct. Rep. 28, 41: 357
Cited in Jacobus v. United States, 87 Fed. 107.

50. Mileage fees for attendance at special terms of court, or for attendance on adjourned days of court, where there are one or more intervening days between the sessions, should be allowed to a marshal. United States v. Harmon, 147 U. S. 268, 13 Sup. Ct. Rep. 327, 37: 164
Cited in United States v. Shields, 153 U. S. 91, 38 L. ed. 647, 14 Sup. Ct. Rep. 735—Dart v. United States, 32 Ct. Cl. 278.

51. A marshal is entitled to pay for travel and other fees in pursuing into other judicial districts and there arresting persons charged with crime in his own district, and bringing the persons so arrested into the latter district, where he or his deputy was deputized by the marshals of the foreign districts to execute the orders of removal to his own district, and they relinquished in his favor all claim against the United States for the mileage and fees so accrued. United States v. Fletcher, 147 U. S. 664, 13 Sup. Ct. Rep. 434, 37: 322

52. A marshal of the United States is not entitled to travel fees in serving warrants of commitment of prisoners to a penitentiary. United States v. Tanner, 147 U. S. 661, 13 Sup. Ct. Rep. 436, 37: 321
Cited in United States v. Baird, 150 U. S. 55, 37 L. ed. 995, 14 Sup. Ct. Rep. 17—Yoes v. United States, 30 Ct. Cl. 373—Campbell v. United States, 13 C. C. A. 132, 27 U. S. App. 666, 65 Fed. 781—Saunders v. United States, 73 Fed. 784—Nixon v. United States, 82 Fed. 31—United States v. Dill, 29 C. C. A. 590, 57 U. S. App. 261, 86 Fed. 84.

53. A United States marshal is not entitled to mileage for the distance traveled

in serving warrants of arrest, in excess of the usually traveled route between the place of receiving the writs and the place of service, however great the necessity of pursuing a circuitous route, in view of U. S. Rev. Stat. § 829 (U. S. Comp. Stat. 1901, p. 636), which directs such mileage to be computed "from the place where the process is returned to the place of service." United States v. Nix, 189 U. S. 199, 23 Sup. Ct. Rep. 495, 47: 775

Commissions on receipt or disbursement of money.

54. A marshal of the United States for a territory is not entitled to commissions upon disbursements for the support of a penitentiary erected by the United States in such territory. United States v. Baird, 150 U. S. 54, 14 Sup. Ct. Rep. 17, 37: 995

Per diem for attendance on courts.

See also *supra*, 50.

55. A marshal attending examinations before two different commissioners on the same day is entitled to his fee of \$2 for attendance before each. United States v. McMahon, 164 U. S. 81, 17 Sup. Ct. Rep. 28, 41: 357
Cited in Nixon v. United States, 82 Fed. 31—Puleston v. United States, 88 Fed. 975—Loving v. United States, 117 Fed. 566.

56. For attending criminal examinations before the same commissioner, in separate and distinct cases, on the same day, a marshal is entitled to a single fee only, under U. S. Rev. Stat. § 829, U. S. Comp. Stat. 1901, p. 636. United States v. McMahon, 164 U. S. 81, 17 Sup. Ct. Rep. 28, 41: 357
Cited in United States v. Saunders, 24 C. C. A. 649, 50 U. S. App. 24 79 Fed. 407.

57. The *per diem* fee for the attendance of a United States marshal at a court which has been opened for business by order of the judge is allowable, although business may not have been transacted in court on such day, and the judge may not have been present. United States v. Nix, 189 U. S. 199, 23 Sup. Ct. Rep. 495, 47: 775
Cited in United States v. McCabe, 64 C. C. A. 237, 129 Fed. 710.

58. A district or circuit court cannot be said to be sitting for the purpose of a marshal's claim to fees, on any day when it is closed for the purposes of business, by its own order, during the whole of that day. McMullen v. United States, 146 U. S. 360, 13 Sup. Ct. Rep. 127, 36: 1007
Cited in United States v. Pittman, 147 U. S. 671, 37 L. ed. 325, 13 Sup. Ct. Rep. 425—Ackiss v. United States, 31 Ct. Cl. 290—Dart v. United States, 32 Ct. Cl. 272—United States v. Hillyer, 7 C. C. A. 429, 15 U. S. App. 269, 58 Fed. 679—Campbell v. United States, 13 C. C. A. 129, 27 U. S. App. 666, 65 Fed. 778.

Reimbursement for expenditures.

59-61. A marshal should be allowed for sums paid by him, upon the requisition of the district attorney approved by the Attorney General, for blank indictments and

informations for the necessary use of the district attorney. *United States v. Harmon*, 147 U. S. 268, 13 Sup. Ct. Rep. 327, 37: 164
Cited in Carroll v. United States, 31 Ct. Cl. 318—*Kinney v. United States*, 60 Fed. 884—*United States v. Denison*, 25 C. C. A. 498, 49 U. S. App. 352, 80 Fed. 372—*Sargent v. La Plata County*, 21 Colo. 171, 40 Pac. 868.

Claims of deputy against marshal.

As Claim against United States, see Claims, 47.

62. The claims of deputy marshals for services, against the marshal, stand upon the same footing as those of an ordinary employee against his employer. *Douglas v. Wallace*, 161 U. S. 346, 16 Sup. Ct. Rep. 485, 40: 727
Cited in Matthews v. United States, 32 Ct. Cl. 133—*Taylor v. Kercheval*, 82 Fed. 502—*Dudley v. James*, 83 Fed. 347—*Mayfield v. Moore*, 139 Ala. 420, 36 So. 21—*Newton v. Luzerne County*, 11 Kulp, 91.

Ascertainment and allowance of fees and costs.

Mode of Reviewing Decision, see Cases Certified, 53.

Necessity of Resorting to Department Before Court of Claims, see Claims, 81, 83.

See also *supra*, 39.

63. The comptroller may lawfully require the items of the expenses incurred in endeavoring to make an arrest, which are allowed to a United States marshal under Rev. Stat. § 829, U. S. Comp. Stat. 1901, p. 636. *United States v. Fletcher*, 147 U. S. 664, 13 Sup. Ct. Rep. 434, 37: 322
Cited in Nixon v. United States, 82 Fed. 25,

64. A marshal has no right to retain out of the public moneys in his hands any sums which may be due him for his services or for advances made by him as such officer, where his claim has never been so submitted to the accounting officers of the treasury that, under the act of March 3, 1797, §§ 3, 4, he might have set off such claim in an action against him for moneys received by him as marshal. *United States v. Giles*, 9 Cranch, 212, 3: 708

65. The allowance by the district judge of the account of a United States marshal is prima facie evidence of the correctness of the mileage items of such account. *United States v. Nix*, 189 U. S. 199, 23 Sup. Ct. Rep. 495, 47: 775

III. Remedies against Marshal.

Amenability of Marshal to Trespass for Wrongful Levy, see *supra*, 29.

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Remedies to recover or require payment over of moneys realized.

Summary Proceedings as Ancillary and not new Suit, see Courts, 1085.

For Share in Prize Money, see Prize and Capture, 225a.

66. [Where a prize has been sold, and the proceeds are in the hands of the marshal, who refuses to pay persons entitled to a share therein, they may either maintain an action for money had and received, or a supplemental libel upon which a decree and order may be obtained, to compel the marshal to pay the money. *Keane v. The Gloucester* (Fed. Ct. Ap.) 2 Dall. 36,

1: 278.

Henderson v. Clarkson (Pa. Sup. Ct.) 2 Dall. 174, 1: 337]

67. A marshal is liable to an attachment compelling him to bring the money collected by him on execution into court; and he is also liable, in Mississippi, to have a judgment entered against himself by motion for failure to pay over money collected on execution. *Gwin v. Breedlove*, 2 How. 29,

11: 167

Penalties.

68. Twenty-five per cent damages cannot be inflicted against the marshal, under a state law, for failure to pay over money collected on execution. *Gwin v. Breedlove*, 2 How. 29,

11: 167

69. The act of Congress of 1828 adopted the statute of Mississippi so far as it authorized summary process against the marshal himself, for payment of debt, interest, and costs, for which his default made him liable, but not as to the penalty imposed nor so far as it permits summary proceedings against the marshal's sureties. *Gwin v. Barton*, 6 How. 7,

12: 321

Cited in Feibelman v. Packard, 109 U. S. 424, 27 L. ed. 985, 3 Sup. Ct. Rep. 289—*Merryfield v. Jones*, 2 Curt. C. C. 307, Fed. Cas. No. 9,486.

Remedy for false return.

70. In cases of false return by a marshal, where the other party is not in fault, relief can be had only in the court where the record was made, or in an action against the marshal. *Walker v. Robbins*, 14 How. 584,

14: 552

Cited in Knox Conty v. Harshman, 133 U. S. 156, 33 L. ed. 588, 10 Sup. Ct. Rep. 257—*Graham v. Loh*, 32 Ind. App. 187, 69 N. E. 474—*Tyler v. Registration Ct. Judges*, 175 Mass. 88, 51 L.R.A. 440, 55 N. E. 812—*Phillips v. Evans*, 64 Mo. 23—*Smoot v. Judd*, 184 Mo. 520, 83 S. W. 481—*Crocker v. Allen*, 34 S. C. 461, 27 Am. St. Rep. 831, 13 S. E. 650—*Masterson v. Ashcom*, 54 Tex. 328—*Randall v. Collins*, 58 Tex. 232—*Preston v.*

Kindrick, 94 Va. 763, 64 Am. St. Rep. 777, 27 S. E. 588—Johnson v. H. P. Gregory & Co. 4 Wash. 111, 31 Am. St. Rep. 907, 29 Pac. 831.

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Right to Interest after Assets are Marshalled, see Interest, 8.
On Foreclosure Sale, see Mortgage, 421, 422. See also Receivers, 11.

1. A court of equity will not entertain the question of marshaling assets unless both funds are within the jurisdiction and control of the court. *Lewis v. United States*, 92 U. S. 618, 23: 513 Cited in *Conrader v. Cohen*, 58 C. C. A. 250, 121 Fed. 802.

2. Where there are in the hands of the court two funds, the principal and the interest of a decree, and one person has a lien on the interest, and the demand of another is payable out of either principal or interest, a court of equity will direct the payment of the lien of the former out of the interest. *Matthews v. Memphis & C. R. Co.* (*Scruggs v. Memphis & C. R. Co.*) 108 U. S. 368, 2 Sup. Ct. Rep. 780, 27: 756

3. The court can marshal the fund arising from the proceeds of a sale of a vessel on a materialman's lien only between lien holders and owners. *Poole v. Tyler* (The Edith) 94 U. S. 518, 24: 167 Cited in *The J. M. Rumbell*, 148 U. S. 12, 37 L. ed. 347, 13 Sup. Ct. Rep. 498—*The Wyoming*, 37 Fed. 543—*The Alice Strong*, 57 Fed. 251—*The Willamette Valley*, 76 Fed. 841.

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a. When Relation Exists.

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1. The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished,—or, in other words, not only what shall be done, but how it shall be done. *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. Rep. 175, 33: 440

2. Where a person, for certain commissions to be paid him, agrees to give his whole time and services to the business of a company in selling its machines, and the company reserves to itself the right of prescribing and regulating, not only what business he shall do, but the manner in which he shall do it, such person is the company's servant, for whose negligence in the course of his employment the company is responsible. *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. Rep. 175, 33: 440

3. A person who hires a public hack, and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence both of the managers of the train and the driver. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29: 652

Cited in Farley v. Wilmington & N. C. Electric R. Co. 3 Penn. (Del.) 586, 52 Atl. 543—*Frank Bird Transfer Co. v. Krug*, 30 Ind. App. 611, 65 N. E. 309—*Zumwalt v. Kansas City Suburban Belt R. Co.* 175 Mo. 312, 74 S. W. 1015—*Duval v. Atlantic Coast Line R. Co.* 134 N. C. 338, 65 L.R.A. 725, 101 Am. St. Rep. 830, 46 S. E. 750—*Shearer v. Buckley*, 31 Wash. 379, 72 Pac. 76.

Editorial notes.

[Which of two is master of another. 37 L.R.A. 33.

Person in charge of a vehicle, under a contract purporting to be a bailment or lease, as a servant of the owner as to third persons injured by the vehicle. 6 L.R.A. (N.S.) 544.

Termination of contracts of employment which contain stipulations permitting rescis-

sion by the employer if the work is not satisfactorily performed. 12 L.R.A. (N.S.) 403.]

b. Hours of Labor.

Equal Protection of Laws as to, see Constitutional Law, 383.

Statutory Interference with Freedom of Contract as to, see Constitutional Law, 607.

Police Power as to, see Constitutional Law, 891-893.

Intentional Violation of Eight Hour Law, see Criminal Law, 36.

See also Statutes, 328.

4. Dredging a channel in Boston harbor is not a public work of the United States, within the meaning of the act of August 1, 1892 (27 Stat. at L. 340, chap. 352. U. S. Comp. Stat. 1901, p. 2521), forbidding a contractor upon any public work of the United States, under penalty of fine or imprisonment, to permit or require employees thereon to work more than eight hours each day. *Ellis v. United States*, 206 U. S. 246, 27 Sup. Ct. Rep. 600, 51: 1047

5. Masters, mates, engineers, firemen, crane men, deck hands, and scow men employed on tugs, dredges, and scows used in dredging a harbor channel are not laborers or mechanics within the meaning of the act of August 1, 1892 (27 Stat. at L. 340, chap. 352, U. S. Comp. Stat. 1901, p. 2521), forbidding contractors upon any public work of the United States or of the District of Columbia, under penalty of fine or imprisonment, to permit or require laborers and mechanics employed thereon to work more than eight hours each day. *Ellis v. United States*, 206 U. S. 246, 27 Sup. Ct. Rep. 600, 51: 1047

6. A delay, not entirely unexpected, in obtaining the timber required for the construction of a pier at the Boston navy yard, does not create an "extraordinary emergency," within the meaning of the exception in the act of August 1, 1892 (27 Stat. at L. 340, chap. 352, U. S. Comp. Stat. 1901, p. 2521), forbidding a contractor upon any public work of the United States, under penalty or fine or imprisonment, to permit or require employees thereon to work more than eight hours each day. *Ellis v. United States*, 206 U. S. 246, 27 Sup. Ct. Rep. 600, 51: 1047

Editorial notes.

Validity of legislation regulating hours of labor. 48: 148

[Limitation of hours of labor. 19 L.R.A. 141, 65 L.R.A. 33.

Validity of limitation of hours of labor on public work. 8 L.R.A. (N.S.) 131.

Constitutionality of legislative limitation of hours of labor. 12 L.R.A. (N.S.) 1130.]

II. Liability of Master to Servant.**a. Nature and Extent.****1. In General.**

Master's Negligence Concurring with Fellow Servant's, see *infra*, II. d, 3.
 Equal Protection of Railroad Companies as to, see Constitutional Law, 286-291.
 Presumption and Burden of Proof as to Master's Negligence, see Evidence, II. h, 3.
 Master's Liability to Parent of Minor Child, see Parent and Child, 1.
 Proximate Cause of Injury to Servant, see Proximate Cause, 9.
 Receiver's Liability for Negligent Death of Employee, see Receivers, 92, 93.
 Construction of Release for Injuries Received, see Release, 12.
 Liability of Vessel for Injury to Seamen, see Shipping, 335, 336.
 Duty of Master of Vessel Towards Injured Seamen, see Shipping, 450-452.
 Sufficiency of Evidence to Go to Jury, see Trial, 138.

7. In dangerous occupations it is incumbent on the promoters, or the employers of others thereon, to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and they may be held responsible for injury to such employees. *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. Rep. 464, 39: 464. *Cited in Simpson's Patent Dry-Dock Co. v. Atlantic & E. S. S. Co.* 47 C. C. A. 444, 108 Fed. 425—*State use of Eckhardt v. Lazaretto Guano Co.* 90 Md. 189, 44 Atl. 1017.

8. The master is under obligation not to expose the servants, when conducting his business, to perils or hazards against which they may be guarded by proper diligence upon his part. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25: 612

Cited in Wabash R. Co. v. McDaniels, 107 U. S. 459, 27 L. ed. 607, 2 Sup. Ct. Rep. 932—*The Serapia*, 2 C. C. A. 107, 8 U. S. App. 49, 51 Fed. 94—*Northern P. R. Co. v. Charles*, 2 C. C. A. 384, 7 U. S. App. 359, 51 Fed. 566—*Pullman's Palace Car Co. v. Harkins*, 5 C. C. A. 337, 17 U. S. App. 22, 55 Fed. 939—*Southern P. Co. v. Lafferty*, 6 C. C. A. 477, 15 U. S. App. 193, 57 Fed. 540—*Texas & P. R. Co. v. Smith*, 31 L.R.A. 325, 14 C. C. A. 513, 30 U. S. App. 176, 67 Fed. 528—*Weiss v. Bethlehem Iron Co.* 31 C. C. A. 371, 59 U. S. App. 627, 88 Fed. 31—*Choctaw, O. & G. R. Co. v. McDade*, 50 C. C. A. 595, 112 Fed. 891—*Staubley v. Potomac Electric Power Co.* 21 App. D. C. 163—*Harvey v. Alturas Gold Min. Co.* 3 Idaho. 522, 31 Pac. 819—*Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 94, 3 N. E. 627—*Powers v. Calcasieu Sugar Co.* 48 La. Ann. 485, 19 So. 455—*Meyers v. Illinois C. R. Co.* 49 La. Ann. 28, 21 So. 120—*Dixon v. Pittsburg & G. Lumber Co.* 52 La. Ann. 1114, 27 So. 654—*State use of Hamelin v. Malster*, 57 Md. 307—*Anderson v. Bennett*, 16 Or. 531, 8 Am. St. Rep. 311, 19 Pac. 765—*Pool v. Southern P. Co.* 20 Utah, 225, 58 Pac. 326—*Konold v. Rio Grande Western R. Co.* 21 Utah, 398, 81 Am. St. Rep. 693, 60 Pac. 1021—*Goodman v. Richmond & D. R. Co.* 81 Va. 385—

Richmond & D. R. Co. v. Risdon, 87 Va. 343, 12 S. E. 786.

9. If employers are not insurers of the lives and limbs of their employees, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so. *Union P. R. Co. v. Fort*, 17 Wall. 553,

21: 739. *Cited in King v. Ohio & M. R. Co.* 11 Blas. 367, 14 Fed. 280—*Wilson v. Willimantic Linen Co.* 50 Conn. 460, 47 Am. Rep. 653—*Indiana Car Co. v. Parker*, 100 Ind. 187—*Powers v. Calcasieu Sugar Co.* 48 La. Ann. 485, 19 So. 455—*Smith v. Peninsular Car Works*, 60 Mich. 505, 1 Am. St. Rep. 542, 27 N. W. 602—*Brennan v. Gordon*, 118 N. Y. 494, 8 L.R.A. 821, 16 Am. St. Rep. 775, 23 N. E. 810—*Norfolk & W. R. Co. v. Nunnally*, 88 Va. 550, 14 S. E. 367—*Riley v. West Virginia C. & P. R. Co.* 27 W. Va. 159

10. Ordinary care implies the exercise of reasonable diligence; as between employer and employee it implies such watchfulness, caution, and foresight as, under all the circumstances of the particular service, ought to be exercised by careful, prudent men. *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 932, 27: 605. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25: 612

Cited in Texas & P. R. Co. v. Behymer, 189 U. S. 470, 47 L. ed. 906, 23 Sup. Ct. Rep. 622—*The Rheola*, 22 Blatchf. 126, 19 Fed. 927—*Bean v. Oceanic Steam Nav. Co.* 24 Fed. 125—*Cincinnati Street R. Co. v. Whitcomb*, 14 C. C. A. 188, 31 U. S. App. 374, 66 Fed. 921—*F. C. Austin Mfg. Co. v. Johnson*, 32 C. C. A. 316, 60 U. S. App. 661, 89 Fed. 683—*Garnett v. Phoenix Bridge Co.* 98 Fed. 195—*The Tresco*, 67 C. C. A. 469, 134 Fed. 823—*Southern P. Co. v. Hetzer*, 1 L.R.A. (N.S.) 206, 68 C. C. A. 38, 135 Fed. 284—*St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 300, 11 L.R.A. 777, 15 S. W. 831—*Wells v. Coe*, 9 Colo. 161, 11 Pac. 50—*Cronk v. Chicago, M. & St. P. R. Co.* 3 S. D. 97, 52 N. W. 420—*Central R. & Bkg. Co. v. Ryles*, 84 Ga. 430, 11 S. E. 499—*Walkowski v. Penokee & G. Consol. Mines*, 115 Mich. 633, 41 L.R.A. 40, 73 N. W. 895—*Henry v. Wabash Western R. Co.* 109 Mo. 493, 19 S. W. 239—*East Tennessee, V. & G. R. Co. v. Alken*, 89 Tenn. 251, 14 S. W. 1082—*International & G. N. R. Co. v. Johnson*, 23 Tex. Civ. App. 188, 55 S. W. 772—*Reddon v. Union P. R. Co.* 5 Utah, 354, 15 Pac. 262—*Downey v. Gemini Min. Co.* 24 Utah, 438, 91 Am. St. Rep. 708, 68 Pac. 414—*Baltimore & O. R. Co. v. McKenzie*, 81 Va. 73—*Goodman v. Richmond & D. R. Co.* 81 Va. 585—*Darracott v. Chesapeake & O. R. Co.* 83 Va. 294, 5 Am. St. Rep. 260, 2 S. E. 511—*South West Improv. Co. v. Smith*, 85 Va. 312, 17 Am. St. Rep. 59, 7 S. E. 365—*Polling v. Ohio River R. Co.* 38 W. Va. 661, 24 L.R.A. 223, 18 S. E. 782.

11. A judgment for defendant on a verdict by direction in an action for death of an employee from negligence,—affirmed by a divided court. *Bauer v. Texas & P. R. Co.* 131 U. S. 430, 9 Sup. Ct. Rep. 795, 33: 209

Editorial notes.

Liability of master for injuries to employees. 33: 651

[Duty to furnish medical aid to servant. 28 L.R.A. 546; 4 L.R.A.(N.S.) 49.]

Injury to employee by electric shock. 32 L.R.A. 351.

Statutes to protect health. 32 L.R.A. 853.

Knowledge as an element of an employer's liability to injured servant. 41 L.R.A. 33.

Duties of master and servant as to rules for safe conduct of business. 43 L.R.A. 305.

Liability to servants of bailee for injuries caused by condition of thing bailed. 46 L.R.A. 104.

Servant's right of action for injuries in obeying a direct command. 48 L.R.A. 753.

Liability for injuries to servant in performance of duties outside of scope of original contract. 48 L.R.A. 796.

Criminal liability for ill-treatment or neglect of servant, causing death. 61 L.R.A. 293.

Duty to furnish protection to servant whose work requires exposure to cold. 70 L.R.A. 924.

Applicability of maxim *Res ipsa loquitur*, as between master and servant. 6 L.R.A.(N.S.) 337.

Employee's right of action for employer's violation of statute not expressly conferring right. 9 L.R.A.(N.S.) 376.

Effect on common-law action of employer's liability act. 12 L.R.A.(N.S.) 1038.]

Duty to warn or instruct.

12. Placing an employee who is ignorant of the danger in a dangerous occupation, without informing him of the dangers, makes the employer liable for injuries resulting. *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. Rep. 464, 39: 464

Cited in *Finlayson v. Utica Min. & Mill. Co.* (Dissenting Opinion) 14 C. C. A. 499, 32 U. S. App. 143, 67 Fed. 514—*Western Coal & Min. Co. v. Ingraham*, 17 C. C. A. 73, 36 U. S. App. 1, 70 Fed. 221—*The Elton*, 81 C. C. A. 499, 42 U. S. App. 666, 83 Fed. 522—*Western Coal & Min. Co. v. Berberich*, 86 C. C. A. 369, 94 Fed. 338—*Grace & H. Co. v. Kennedy*, 40 C. C. A. 71, 99 Fed. 682—*Beattie v. Edge Moor Bridge Works*, 109 Fed. 234—*Nickel v. Columbia Paper Stock Co.* 95 Mo. App. 231, 68 S. W. 955—*Hall v. United States Radiator Co.* 52 App. Div. 94, 64 N. Y. Supp. 1002—*Myrberg v. Baltimore & S. Min. & Reduction Co.* 25 Wash. 371, 65 Pac. 539.

— Editorial notes.

Duty to instruct servant; or to warn of danger. 39: 465

[Master's duty to instruct and warn servants as to perils. 44 L.R.A. 33.]

2. Safety as to Place and Appliances.

a. General Rules.

Assumption of Risk as to, see *infra*, II. b, 3, 4.

Delegation of Duty as to, see *infra*, 122-126.

Prejudicial Error in Instruction as to, see Appeal and Error, 5101, 5102.

Evidence of Precaution After Accident, see Evidence 2127, 2128.

See also *infra*, 57.

13. It is the duty of the master to use ordinary care to provide a reasonably safe place and safe appliances for the use of workmen in his employ. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. Rep. 24, 48: 96

Cited in *Southern P. Co. v. Hetzer*, 1 L.R.A.(N.S.) 295, 68 C. C. A. 35, 135 Fed. 281—*Shandrew v. Chicago, St. P. M. & O. R. Co.* 73 C. C. A. 434, 142 Fed. 324—*Lee v. St. Louis, M. & S. E. R. Co.* 112 Mo. App. 392, 87 S. W. 12.

14. The master owes the duty to his servant to provide him a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. Rep. 843, 40: 994

Texas & P. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. Rep. 777, 42: 1188

Cited in *Patton v. Texas & P. R. Co.* 179 U. S. 664, 45 L. ed. 365, 21 Sup. Ct. Rep. 275—*Grace & H. Co. v. Kennedy*, 40 C. C. A. 71, 99 Fed. 681—*Tennessee Coal, I. & R. Co. v. Currier*, 47 C. C. A. 185, 108 Fed. 23—*Beattie v. Edge Moor Bridge Works*, 109 Fed. 234—*King v. Morgan*, 48 C. C. A. 510, 109 Fed. 449—*Tracy v. Western U. Tele. Co.* 110 Fed. 104—*Swensen v. Bender*, 51 C. C. A. 633, 114 Fed. 7—*Northern P. R. Co. v. Perry*, 54 C. C. A. 68, 116 Fed. 612—*Cecil v. American Sheet Steel Co.* 64 C. C. A. 77, 129 Fed. 547—*McLaine v. Head & D. Co.* 71 N. H. 297, 58 L.R.A. 464, 93 Am. St. Rep. 522, 52 Atl. 545—*McGuire v. Bell Teleph. Co.* 167 N. Y. 221, 52 L.R.A. 442, 60 N. E. 433—*Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 363, 64 L.R.A. 148, 75 Pac. 337—*Tracy v. Western U. Tele. Co.* 32 Pittab. L. J. N. S. 43—*Pool v. Southern P. Co.* 20 Utah, 215, 58 Pac. 326.

15. It is the duty of the master to furnish sufficient and safe materials and machinery, or other means by which the work is to be performed, and to keep them in repair and order. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755

Cited in *Washington & G. R. Co. v. McDade*, 135 U. S. 569, 34 L. ed. 241, 10 Sup. Ct. Rep. 1044—*Texas & P. R. Co. v. Cox*, 145 U. S. 607, 36 L. ed. 834, 12 Sup. Ct. Rep. 905—*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 87, 39 L. ed. 630, 15 Sup. Ct. Rep. 491—*The Maharajah*, 40 Fed. 786—*Northern P. R. Co. v. Charles*, 2 C. C. A. 385, 7 U. S. App. 359, 51 Fed. 566—*Union P. R. Co. v. Jarvi*, 3 C. C. A. 436, 10 U. S. App. 439, 53 Fed. 68—*Pullman's Palace Car Co. v. Harkins*, 5 C. C. A. 337, 17 U. S. App. 22, 55 Fed. 939—*Union P. R. Co. v. James*, 6 C. C. A. 220, 12 U. S. App. 482, 56 Fed. 1004—*Southern P. Co. v. Lafferty*, 6 C. C. A. 480, 15 U. S. App. 193, 57 Fed. 542—*Southern P. Co. v. Burke*, 9 C. C. A. 233, 13 U. S. App. 110, 60 Fed. 708—*Union P. R. Co. v. Novak*, 9 C. C. A. 639, 15 U. S. App. 400, 61 Fed. 584—*Norman v. Wabash R. Co.* 10 C. C. A. 619, 22 U. S. App. 505, 62 Fed. 729—*Texas & P. R. Co. v. Barrett*, 14 C. C. A. 377, 30 U. S. App. 196, 67 Fed. 218—*Atchison, T. & S. F. R. Co. v. Meyers*, 22 C. C. A. 270, 46 U. S. App. 226, 76 Fed. 446—*Alabama G. S. R. Co. v. Car-*

roll, 28 C. C. A. 222, 52 U. S. App. 442, 84 Fed. 786—Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 310, 96 Fed. 716—Cincinnati, N. O. & T. P. R. Co. v. Gray, 50 L.R.A. 53, 41 C. C. A. 541, 101 Fed. 629—Southern P. Co. v. Hetzer, 1 L.R.A. (N.S.) 296, 68 C. C. A. 38, 135 Fed. 284—Trendwell v. Whittier, 80 Cal. 592, 5 L.R.A. 504, 13 Am. St. Rep. 175, 22 Pac. 266—National Syrup Co. v. Carlson, 155 Ill. 215, 40 N. E. 492—Pennsylvania Co. v. Whitcomb, 111 Ind. 216, 12 N. E. 380—Matchett v. Cincinnati, W. & M. R. Co. 132 Ind. 343, 31 N. E. 792—Wabash & W. R. Co. v. Morgan, 132 Ind. 445, 32 N. E. 85—Stucke v. Orleans R. Co. 50 La. Ann. 203, 23 So. 342—Budge v. Morgan's L. & T. R. & S. Co. 108 La. 365, 58 L.R.A. 340, 32 So. 535—Baltimore Boot & Shoe Mfg. Co. v. Jamar, 93 Md. 413, 86 Am. St. Rep. 428, 49 Atl. 847—McDonald v. Michigan C. R. Co. 132 Mich. 379, 102 Am. St. Rep. 426, 93 N. W. 1041—Carroll v. Tidewater Oil Co. 67 N. J. L. 684, 52 Atl. 275—Hudson v. Rome, W. & O. R. Co. 73 Hun. 472, 26 N. Y. Supp. 386—Bolden v. Southern R. Co. 123 N. C. 617, 31 S. E. 851—Konold v. Rio Grande Western R. Co. 21 Utah. 397, 81 Am. St. Rep. 693, 60 Pac. 1021—Hill v. Southern P. Co. 23 Utah, 102, 63 Pac. 814—Darracott v. Chesapeake & O. R. Co. 83 Va. 294, 5 Am. St. Rep. 266, 2 S. E. 511—South West Improv. Co. v. Smith, 85 Va. 316, 17 Am. St. Rep. 59, 7 S. E. 365—Norfolk & W. R. Co. v. Nunnally, 88 Va. 550, 14 S. E. 367—Norfolk & W. R. Co. v. Jackson, 1 Va. Dec. 682, 6 S. E. 220—Beall v. Pittsburgh, C. & St. L. R. Co. 38 W. Va. 530, 18 S. E. 729.

16. The master is bound to furnish such machinery and apparatus as is adequate and suitable, and to keep and maintain them in such condition as to be reasonably safe for use. *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 14 Sup. Ct. Rep. 140, 37: 1107
Cited in *Union P. R. Co. v. O'Brien*, 161 U. S. 457, 40 L. ed. 771, 16 Sup. Ct. Rep. 618—*Anglin v. Texas & P. R. Co.* 9 C. C. A. 131, 23 U. S. App. 62, 60 Fed. 554—*The Elton*, 31 C. C. A. 499, 42 U. S. App. 666, 83 Fed. 522—*Narramore v. Cleveland, C. & St. L. R. Co.* 48 L.R.A. 75, 37 C. C. A. 502, 96 Fed. 302—*Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 310, 96 Fed. 716—*Hodges v. Kimball*, 44 C. C. A. 199, 104 Fed. 752—*Erslew v. New Orleans & N. E. R. Co.* 49 La. Ann. 100, 21 So. 153.

17. As a general rule, in a contract of hiring, there is an implied undertaking by the master to provide safe machinery and appliances for the use of the servant. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25: 612

Distinguished in The Maharajah, 40 Fed. 785.
Cited in *Northern P. R. Co. v. Babcock*, 154 U. S. 200, 38 L. ed. 961, 14 Sup. Ct. Rep. 978—*Central Trust Co. v. Texas & St. L. R. Co.* 32 Fed. 450—*Denver, T. & G. R. Co. v. Simpson*, 16 Colo. 59, 25 Am. St. Rep. 242, 26 Pac. 339—*Chicago & E. R. Co. v. Lee*, 29 Ind. App. 494, 64 N. E. 675—*Rice v. King Philip Mills*, 144 Mass. 237, 59 Am. Rep. 80, 11 N. E. 101—*Joyce v. Rome, W. & O. R. Co.* 92 Hun. 110, 36 N. Y. Supp. 731—*Rettig v. Fifth Ave. Transp. Co.* 6 Misc. 332, 26 N. Y. Supp. 896—*Cowles v. Richmond & D. R. Co.* 84 N. C. 314, 37 Am. Rep. 620—*Gunter v. Graniteville Mfg. Co.* 18 S. C. 273, 44 Am. Rep. 573—*Galveston, H. & S. A. R. Co. v. Sullivan*, 2 Posey, Unrep. Cas. (Tex.) 316—*Wright v. Southern P. Co.* 14 Utah, 393, 46

Pac. 374—*Pool v. Southern P. Co.* 20 Utah, 215, 58 Pac. 326—*Hill v. Southern P. Co.* 23 Utah, 102, 63 Pac. 814—*Norfolk & W. R. Co. v. Nunnally*, 88 Va. 550, 14 S. E. 367—*Michael v. Roanoke Mach. Works*, 90 Va. 496, 44 Am. St. Rep. 927, 19 S. E. 261—*Norfolk & W. R. Co. v. Jackson*, 1 Va. Dec. 682, 6 S. E. 220—*Madden v. Chesapeake & O. R. Co.* 28 W. Va. 617, 57 Am. Rep. 695—*Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 346, 21 N. W. 269.

18. All appliances readily attainable, known to science, for the prevention of accidents, must be used in occupations which are attended with great and unusual danger. *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. Rep. 464, 39: 464

Cited in *Myers v. Chicago*, St. P. M. & O. R. Co. (Dissenting Opinion) 37 C. C. A. 139, 95 Fed. 408—*Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L.R.A. 52, 41 C. C. A. 540, 101 Fed. 628—*Whitney v. New York, N. H. & H. R. Co.* 50 L.R.A. 618, 43 C. C. A. 21, 102 Fed. 852—*Nolk v. B. F. Sturtevant Co.* 43 C. C. A. 528, 104 Fed. 278—*King v. Morgan* (Dissenting Opinion) 48 C. C. A. 513, 109 Fed. 451—*Hyssell v. Swift & Co.* 78 Mo. App. 45—*Kelley v. Fourth of July Mtn. Co.* 16 Mont. 498, 41 Pac. 273.

19. The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. Rep. 433, 28: 440

Distinguished in Beattie v. Edge Moor Bridge Works, 109 Fed. 234—*Sullivan v. Hannibal & St. J. R. Co.* 107 Mo. 77, 28 Am. St. Rep. 388, 17 S. W. 748—*Cadden v. American Steel Barge Co.* 88 Wis. 418, 60 N. W. 800.

Cited in *Mason v. Edison Mach. Works*, 24 Blatchf. 95, 28 Fed. 229—*Heckman v. Mackey*, 35 Fed. 354—*Minneapolis v. Lundin*, 7 C. C. A. 348, 19 U. S. App. 245, 58 Fed. 529—*Relly v. Campbell*, 8 C. C. A. 440, 20 U. S. App. 334, 59 Fed. 991—*Southern P. Co. v. Burke*, 9 C. C. A. 235, 13 U. S. App. 122, 60 Fed. 710—*Texas & P. R. Co. v. Patton*, 9 C. C. A. 496, 23 U. S. App. 319, 61 Fed. 268—*Gulf, C. & S. F. R. Co. v. Jackson*, 12 C. C. A. 509, 27 U. S. App. 519, 65 Fed. 50—*Carolan v. Southern P. Co.* 84 Fed. 87—*Kennedy v. Grace & H. Co.* 92 Fed. 117—*Texas P. R. Co. v. Eason*, 34 C. C. A. 541, 92 Fed. 563—*Baird v. Relly*, 35 C. C. A. 79, 63 U. S. App. 157, 92 Fed. 885—*Stevens v. Chamberlin*, 51 L.R.A. 525, 40 C. C. A. 421, 100 Fed. 381—*Chambers v. American Tin Plate Co.* 64 C. C. A. 130, 129 Fed. 562—*Galow v. Chicago, M. & St. P. R. Co.* 65 C. C. A. 508, 131 Fed. 243—*Hobson v. New Mexico & A. R. Co.* 2 Ariz. 182, 11 Pac. 545—*McGill v. Southern P. Co.* 4 Ariz. 124, 33 Pac. 821—*Richardson v. Anglo-American Provision Co.* 72 Ill. App. 80—*Chicago Edison Co. v. Davis*, 93 Ill. App. 286—*Southern Indiana R. Co. v. Harrell*, 161 Ind. 698, 63 L. R.A. 466, 68 N. E. 262—*Barley v. Southern Indiana R. Co.* 30 Ind. App. 411, 66 N. E. 72—*Baron v. Detroit & C. Steam Nav. Co.* 91 Mich. 587, 52 N. W. 22—*Bowen v. Chicago, B. & K. C. R. Co.* 95 Mo. 277, 8 S. W. 230—*Bradley v. Chicago, M. & St. P. R. Co.* 138 Mo. 302, 39 S. W. 763—*Zellers v. Missouri*

Water & Light Co. 92 Mo. App. 127—Herbert v. Wiggins Ferry Co. 107 Mo. App. 300, 80 S. W. 978—McLaine v. Head & D. Co. 71 N. H. 296, 58 L.R.A. 463, 93 Am. St. Rep. 522, 52 Atl. 545—Ward v. Naughton, 74 App. Div. 70, 77 N. Y. Supp. 344—Spillane v. Eastmans Co. 33 Misc. 465, 67 N. Y. Supp. 867—Perry v. Rogers, 157 N. Y. 256, 51 N. E. 1021—Heald v. Wallace, 109 Tenn. 366, 71 S. W. 80—Texas & P. R. Co. v. Hohn, 1 Tex. Civ. App. 41, 21 S. W. 942—Allen v. Galveston H. & S. A. R. Co. 14 Tex. Civ. App. 346, 37 S. W. 171—Direct Nav. Co. v. Anderson, 29 Tex. Civ. App. 60, 69 S. W. 174—Cully v. Northern P. R. Co. 35 Wash. 247, 77 Pac. 202—Peschel v. Chicago, M. & St. P. R. Co. 62 Wis. 345, 21 N. W. 269—Porter v. Silver Creek & M. Coal Co. 84 Wis. 424, 54 N. W. 1019.

Editorial notes.

Duty of master as to machinery and appliances.

33: 656; 37: 728; 38: 597; 40: 767

Duty to provide safe place to work.

40: 767; 41: 236

[Statutory liability for defects in plant. 57 L.R.A. 817.

Duty to furnish safe appliances as affected by fact that defective appliances are prepared by fellow servant. 4 L.R.A.(N.S.) 220.]

Master not guarantor.

See also *supra*, 9, 18; *infra*, 25.

20. While the employer is bound to use reasonable care in providing a safe place and safe machinery, he need not guarantee that they are absolutely safe. *Patton v. Texas & P. R. Co.* 179 U. S. 658, 21 Sup. Ct. Rep. 275, 45: 361
Cited in *Glenmont Lumber Co. v. Roy*, 61 C. A. 510, 126 Fed. 528—*Illinois C. R. Co. v. Coughlin*, 65 C. C. A. 102, 132 Fed. 802—*Law v. Central District Printing & Teleg. Co.* 140 Fed. 562—*Butler v. Frazee*, 25 App. D. C. 401.

21. A corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all its parts, of the machinery or apparatus which may be provided for the use of employees. *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. Rep. 491, 39: 624

Cited in *Patton v. Texas & P. R. Co.* 179 U. S. 664, 45 L. ed. 365, 21 Sup. Ct. Rep. 275—*Felton v. Bullard*, 37 C. C. A. 5, 94 Fed. 785—*New Orleans & N. E. R. Co. v. Clements*, 40 C. C. A. 473, 100 Fed. 422—*Union Stock Yards Co. v. Goodwin*, 57 Neb. 146, 77 N. W. 357—*McGuire v. Bell Teleph. Co.* 167 N. Y. 221, 52 L.R.A. 442, 60 N. E. 483.

22. A master is not a guarantor of the absolute safety or perfection of the machinery or other apparatus provided for his servants, but he is bound to exercise the care which the exigency reasonably requires, in furnishing such as is adequate and suitable. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25: 612

Cited in *Washington & G. R. Co. v. McDade*, 135 U. S. 569, 34 L. ed. 241, 10 Sup. Ct. Rep. 1044—*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 87, 39 L. ed. 620, 15 Sup. Ct. Rep.

491—*Union P. R. Co. v. O'Brien*, 161 U. S. 457, 40 L. ed. 771, 16 Sup. Ct. Rep. 618—*Patton v. Texas & P. R. Co.* 179 U. S. 664, 45 L. ed. 365, 21 Sup. Ct. Rep. 275—*Choctaw, O. & G. R. Co. v. Tennessee*, 191 U. S. 381, 48 L. ed. 206, 24 Sup. Ct. Rep. 99—*Choctaw, O. & G. R. Co. v. Holloway*, 191 U. S. 338, 48 L. ed. 210, 24 Sup. Ct. Rep. 102—*Rillston v. Mather*, 44 Fed. 744—*Atchison, T. & S. F. R. Co. v. Myers*, 11 C. C. A. 444, 24 U. S. App. 295, 63 Fed. 798—*Texas & P. R. Co. v. Barrett*, 14 C. C. A. 377, 30 U. S. App. 196, 67 Fed. 218—*Lehigh Valley R. Co. v. Kissel*, 25 C. C. A. 569, 51 U. S. App. 265, 80 Fed. 472—*Garnett v. Phoenix Bridge Co.* 98 Fed. 195—*Hodges v. Kimball*, 44 C. C. A. 199, 104 Fed. 752—*The Noranmore*, 113 Fed. 369—*Westinghouse Electric & Mfg. Co. v. Helmlich*, 62 C. C. A. 93, 127 Fed. 93—*The Tresco*, 67 C. C. A. 469, 134 Fed. 823—*St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 300, 11 L.R.A. 777, 15 S. W. 831—*Cameron v. Great Northern R. Co.* 8 N. D. 131, 77 N. W. 1016—*Pullman Palace Car Co. v. Laack*, 143 Ill. 256, 18 L.R.A. 219, 32 N. E. 285—*Indiana Car Co. v. Parker*, 100 Ind. 187—*Lawrence v. Hagemeyer & Co.* 93 Ky. 594, 20 S. W. 704—*Wood v. Helges*, 83 Md. 268, 34 Atl. 872—*Richmond & D. R. Co. v. Norment*, 84 Va. 173, 10 Am. St. Rep. 827, 4 S. E. 211—*Richmond & D. R. Co. v. Burnett*, 88 Va. 544, 14 S. E. 372.

b. Machinery.

Effect of Employee's Contributory Negligence, see *infra*, 88.

Federal Question where Car Inflicting Injury Did not Have Automatic Coupler, see *Appeal and Error*, 1508.

Refusal of Requested Instruction Not Based on Evidence, see *Trial*, 781.

See also *supra*, 16, 17, 20-22; *infra*, 57, 58.

23. Individuals and corporations are bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044, 34: 235

24. If the employer or master fails in the duty of precaution and care, he is responsible for an injury through the defect of machinery which is, or ought to have been, known to him, and is unknown to the employee or servant. *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044, 34: 235

Cited in *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 87, 39 L. ed. 630, 15 Sup. Ct. Rep. 491—*Patton v. Texas & P. R. Co.* 179 U. S. 664, 45 L. ed. 365, 21 Sup. Ct. Rep. 275—*Davidson v. Southern P. Co.* 44 Fed. 479—*The Luckenbach*, 53 Fed. 664—*Atchison, T. & S. F. R. Co. v. Myers*, 11 C. C. A. 444, 24 U. S. App. 295, 63 Fed. 798—*Alaska Treadwell Gold Min. Co. v. Whelan*, 12 C. C. A. 229, 29 U. S. App. 1, 64 Fed. 466—*Patton v. Southern R. Co.* 27 C. C. A. 202, 42 U. S. App. 567, 82 Fed. 984—*New Orleans & N. E. R. Co. v. Clements*, 40 C. C. A. 472, 100 Fed. 422—*Mexican C. R. Co. v. Murray*, 42 C. C. A. 342, 102 Fed. 271—*Hodges v. Kimball*, 44 C. C. A. 199, 104 Fed. 752—*Mexican C. R. Co. v. Jones*, 48 C. C. A. 228, 107 Fed. 65—*Empson Packing Co. v. Vaughn*,

27 Colo. 71, 59 Pac. 749—Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 568, 45 N. E. 108—Anderson v. Illinois C. R. Co. 109 Iowa, 528, 80 N. W. 561—Shadford v. Ann Arbor Street R. Co. 111 Mich. 392, 69 N. W. 661—Shadford v. Ann Arbor Street R. Co. 121 Mich. 225, 80 N. W. 30—Gray v. Commutator Co. 85 Minn. 470, 89 N. W. 322—Thomas v. Missouri P. R. Co. 109 Mo. 214, 18 S. W. 980—Johnson v. Boston & M. Consol. Copper & S. Min. Co. 16 Mont. 178, 40 Pac. 298—Cerrillos Coal R. Co. v. Deserant, 9 N. M. 58, 49 Pac. 807—Fritz v. Salt Lake & O. Gas & Electric Light Co. 18 Utah, 502, 56 Pac. 90—Linden v. Anchor Min. Co. 20 Utah, 148, 58 Pac. 855—Virginia & N. C. Wheel Co. v. Chalkley, 98 Va. 66, 34 S. E. 976.

25. Employers are not bound to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees, or to supply the best and safest and newest of those appliances. *Southern P. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. Rep. 530, 38: 391

Cited in *Western Coal & Min. Co. v. Berberich*, 36 C. C. A. 369, 94 Fed. 334—*Hodges v. Kimball*, 44 C. C. A. 199, 104 Fed. 752—*King v. Morgan*, 48 C. C. A. 511, 109 Fed. 450—*Gilbert v. Burlington, C. R. & N. R. Co.* 63 C. C. A. 29, 128 Fed. 531—*Washington Asphalt Block & Tile Co. v. Mackey*, 15 App. D. C. 426—*Chicago & G. W. R. Co. v. Armstrong*, 62 Ill. App. 234—*O'Neill v. Chicago, R. I. & P. R. Co.* 66 Neb. 648, 60 L.R.A. 447, 92 N. W. 731.

Editorial notes.

[Liability of master for injuries caused by defects in machinery used for purpose not contemplated. 18 L.R.A. 124.

Recovery by servant for injuries from protecting screws in shafts and other moving machinery. 48 L.R.A. 96.]

c. In Mines.

Contributory Negligence of Employee, see *infra*, 90.

Question of Law or Fact as to Explosion, see *Trial*, 394.

Instructions as to Duties with Respect to Ventilation, see *Trial*, 595.

26. The duty of a mine owner as to ventilation of his mine and keeping it clear of standing gas is made imperative by the act of Congress of March 3, 1891; and the consequence of neglecting it cannot be excused because some workmen may disregard instructions. *Deserant v. Cerillos Coal R. Co.* 178 U. S. 409, 20 Sup. Ct. Rep. 967, 44: 1127

Cited in *Sommer v. Carbon Hill Coal Co.* 46 C. C. A. 258, 107 Fed. 233—*Cudahy Packing Co. v. Anthes*, 54 C. C. A. 507, 117 Fed. 121—*Dunworth v. Grand Trunk Western R. Co.* 62 C. C. A. 227, 127 Fed. 309—*Maryland Clay Co. v. Goodnow*, 95 Md. 354, 51 Atl. 292.

27. A mine owner is not absolved from responsibility for his neglect to perform his statutory duty to prevent the accumulation of dangerous gases, which led to an explosion, because there was another efficient cause contributing to the accident for which a recovery could not, under the declaration,

be had. *Wilmington Star Min. Co. v. Fulton*, 205 U. S. 69, 27 Sup. Ct. Rep. 412, 51: 708

Editorial notes.

Statutory duty to ventilate and keep mine clear from gas. 44: 1127

[Statutory regulations for the protection and safety of workmen in mines. 25 L.R.A. 848.]

d. Railroad Cases.

Duty as to Inspection, see *infra*, II. a, 2, e. Contributory Negligence of Employee, see *infra*, II. c, 2.

Duty as to Selection and Retention of Fellow Servants, see *infra*, 58–60.

Assumption of Risk, see *infra*, 66, 67, 69–83.

Question of Law or Fact, see *Trial*, 395–397. Sufficiency of Evidence to Go to Jury, see *Trial*, 137–139.

Directing Verdict for Master, see *Trial*, 542.

28. A railroad company is not liable for injury to an employee by the explosion of a locomotive boiler, unless it resulted from the want of ordinary care, either in selecting the engine or in keeping it in reasonably safe repair. *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. Rep. 707, 41: 1136

29. A railroad company is not required to adopt extraordinary tests for discovering defects in a locomotive boiler or any of its machinery which are not approved, practicable, and customary; but it fulfills its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances. *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. Rep. 707, 41: 1136

30. If a railroad company after purchasing an engine made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests disclosed no defect, it cannot, in an action by an employee of another company, be adjudged guilty of negligence because there was a latent defect which subsequently caused the destruction of the engine and injury to him. *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 13 Sup. Ct. Rep. 837, 37: 728

Cited in *The Olympha*, 9 C. C. A. 400, 22 U. S. App. 69, 61 Fed. 128—*Bragdon v. Perkins-Campbell Co.* 66 L.R.A. 927, 30 C. C. A. 571, 58 U. S. App. 91, 87 L. ed. 112—*Westinghouse Electric & Mfg. Co. v. Helmlich*, 62 C. C. A. 94, 127 Fed. 94—*The Tresco*, 67 C. C. A. 468, 134 Fed. 822—*Kent v. Yazoo & M. Valley R. Co.* 77 Miss. 498, 78 Am. St. Rep. 535, 27 So. 620.

31. The orders of a section foreman to a laborer who is with him on a hand car that he shall not look back to watch for a train, and assurance that the foreman him-

self will watch and give warning of any danger, do not make the master liable for an injury to the laborer resulting from the negligence of the foreman in failing to watch for the train, and thereby failing to see that the laborer had a reasonably safe place to work. *Martin v. Atchison, T. & S. F. R. Co.* 166 U. S. 399, 17 Sup. Ct. Rep. 603, 41: 1051
Cited in McLaine v. Head & D. Co. 71 N. H. 297, 58 L.R.A. 464, 93 Am. St. Rep. 522, 52 Atl. 545.

Editorial note.

[Duty to employees as to railroad fence. 25 L.R.A. 320.]

Track and roadbed.

Discretion as to Reception of Expert Testimony as to Safety of Overhead Structures and Buffers, see Trial, 50.

Sufficiency of Evidence to Go to Jury, see Trial, 137.

Cause of Death a Question for Jury, see Trial, 145.

Instruction as to Unblocked Frogs, see Trial, 619, 656.

32. A railroad company owes to its trainmen the duty to exercise the care which the exigencies reasonably demand in furnishing proper roadbed, track, and other structures, including sufficient culverts for the escape of water collected and accumulated by its embankments and excavations. *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. Rep. 618, 40: 766
Cited in Myers v. Chicago, St. P. M. & O. R. Co. 37 C. C. A. 142, 95 Fed. 411—*Hodges v. Kimball*, 44 C. C. A. 199, 104 Fed. 752—*Choctaw, O. & G. R. Co. v. McDade*, 50 C. C. A. 594, 112 Fed. 891—*Northern P. R. Co. v. Perry*, 54 C. C. A. 68, 116 Fed. 612—*Fisher v. Chesapeake & O. R. Co.* 104 Va. 641, 2 L.R.A.(N.S.) 958, 52 S. E. 373.

33. It is negligence as matter of law for a railroad company to maintain an iron spout so attached to a water tank as to be a constant menace to the lives and limbs of brakemen on its trains, where it might readily have been so constructed and hung as to be safe. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. Rep. 24, 48: 96
Cited in Hawley v. Chicago, B. & Q. R. Co. 66 C. C. A. 217, 133 Fed. 151—*Philadelphia, B. & W. R. Co. v. Devers*, 101 Md. 346, 61 Atl. 418—*Wood v. Southern R. Co.* 104 Va. 655, 52 S. E. 371.

34. A railway company cannot be said, as a matter of law, to have performed its duty to use due care to provide a reasonably safe place for the use of switchmen in its employ when it has located scales where the tracks were only the standard distance apart, leaving a space of less than 2 feet for the movements of a switchman between the side of a freight car and the scale box, when encumbered with a lantern employed for signal purposes,—especially if the necessity of the situation did not require the scales to be constructed in that way. *Texas & P. R. Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. Rep. 164, 49: 382

35. The placing, in a railroad yard, of a ground switch of a form in common use, which could be safely and effectively worked by standing in the middle, opposite the lock, using reasonable care, is not negligence making the railroad corporation liable to the brakeman of a train on one of the tracks, who, while working at the switch, standing at the end of the handle, is struck by an engine on the other track. *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 3 Sup. Ct. Rep. 322, 27: 1003
Cited in Kilpatrick v. Choctaw, O. & G. R. Co. 57 C. C. A. 257, 121 Fed. 13—*Mobile & O. R. Co. v. Healy*, 109 Ill. App. 532—*Coppins v. New York C. & H. R. Co.* 43 Hun, 32.

— Editorial notes.

Duty to block frogs or switches. 41: 236
 [Liability of railroad company to employees for injuries received in line of duty from defective track owned by another. 22 L.R.A. 283.

Liability of employer for injuries to servants from want of blocking at switches. 48 L.R.A. 68.]

Cars.

Burden of Proving Carrier to be within Exception in Automatic Coupler Act, see Evidence, 173.

Strict Construction of Statute Requiring Interstate Carriers to Adopt Automatic Couplers, see Statutes, 490.

36. A shovel car is a "car" within the meaning of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, requiring any car used in moving interstate traffic to be equipped with an automatic coupler. *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 27 Sup. Ct. Rep. 407, 51: 681

37. The equipment of a locomotive and a dining car with automatic couplers, but of such different types as not to couple with each other automatically, does not satisfy the provision of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, prohibiting common carriers from using any car in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. *Johnson v. Southern P. Co.* 196 U. S. 1, 25 Sup. Ct. Rep. 158, 49: 363

Cited in Gillman v. Hinson, 26 App. D. C. 411—*Chicago & A. R. Co. v. Walters*, 120 Ill. App. 155—*State ex rel. Coleman v. Kelly*, 71 Kan. 817, 70 L.R.A. 455, 81 Pac. 450—*Blanchard v. Detroit & M. R. Co.* 139 Mich. 697, 103 N. W. 170—*Southern R. Co. v. Simmons*, 105 Va. 654, 55 S. E. 459.

38. Automatic couplers which will both couple and can be uncoupled without the necessity of men going between the cars are meant by the provision of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, prohibiting common carriers from using any car in moving interstate commerce not equipped with "couplers coupling automatically by

impact, and which can be uncoupled without the necessity of men going between the ends of the cars." *Johnson v. Southern P. Co.* 196 U. S. 1, 25 Sup. Ct. Rep. 158,

49: 363

39. A dining car in constant use is, while waiting for the train to be made up for its next interstate trip, "used in moving interstate traffic" within the meaning of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, requiring common carriers to equip with automatic couplers any car so used. *Johnson v. Southern P. Co.* 196 U. S. 1, 25 Sup. Ct. Rep. 158.

49: 363
Cited in *United States v. Southern R. Co.* 135 Fed. 126—*Rosney v. Erie R. Co.* 68 C. C. A. 160. 135 Fed. 316—*Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 195—*Northern P. R. Co. v. Cumiskey*, 70 C. C. A. 99, 137 Fed. 515—*United States v. Pittsburgh, C. C. & St. L. R. Co.* 143 Fed. 361—*United States v. Northern Pacific Terminal Co.* 144 Fed. 863—*United States v. Great Northern R. Co.* 145 Fed. 439—*Davis v. Cleveland, C. C. & St. L. R. Co.* 146 Fed. 412.

40. Locomotives are embraced by the words "any car" in the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, prohibiting common carriers from using any car in moving interstate commerce not equipped with automatic couplers, although locomotives were, elsewhere in the statute, in terms required to be equipped with power driving-wheel brakes. *Johnson v. Southern P. Co.* 196 U. S. 1, 25 Sup. Ct. Rep. 158,

49: 363
Cited in *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 10, 51 L. ed. 685, 27 Sup. Ct. Rep. 407.

— Editorial notes.

Liability for injuries received while coupling cars. 37: 150; 38: 373

Running of trains.

41. The doctrine as to the duty of the master to furnish a safe place for the servant to work has no application to the failure of a foreman in charge of a hand car to watch for an approaching train, when the car itself is in every way fit for the purpose for which it is used. *Martin v. Atchison, T. & S. F. R. Co.* 166 U. S. 399, 17 Sup. Ct. Rep. 603.

41: 1051
Cited in *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 89, 42 L. ed. 392, 18 Sup. Ct. Rep. 40—*McLaine v. Head & D. Co.* 71 N. H. 299, 58 L.R.A. 464, 93 Am. St. Rep. 522, 52 Atl. 545.

42. A railroad company is liable to an employee for an injury received while riding on a small and overcrowded hand car, caused by its failure to provide the hand car with appliances for removing snow from the rails, and a proper brake and foot rests, and by reason of the negligent construction of the cattle guard, under Iowa Code 1873, § 1307, making railroad companies liable to employees injured in connection with the operation of the railroad. *Chicago, M. & St. P. R. Co. v. Artery*, 137 U. S. 507, 11 Sup. Ct. Rep. 129,

34: 747
Cited in *Larson v. Illinois C. R. Co.* 91 Iowa, U. S. Dig.—249

83, 58 N. W. 1076—*Akeson v. Chicago, B. & Q. R. Co.* 106 Iowa, 60, 75 N. W. 676—*Pearson v. Chicago, M. & St. P. R. Co.* 47 Minn. 11, 49 N. W. 302—*Rice v. Wabash R. Co.* 92 Mo. App. 39.

43. Whether a freight train was handled with ordinary care, and not whether it was handled in the usual and ordinary way, is the test by which to determine the liability of a railroad company for injuries received by a brakeman because of a sudden bump or jerk while he was standing, in obedience to orders, on the icy roof of a car in such train. *Texas & P. R. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. Rep. 622,

47: 905
Cited in *Southern P. Co. v. Hetzer*, 1 L.R.A. (N.S.) 296, 68 C. C. A. 37, 135 Fed. 233—*Shandrew v. Chicago, St. P. M. & O. R. Co.* 73 C. C. A. 435, 142 Fed. 325—*McDermott v. Severe*, 25 App. D. C. 284—*Pittsburgh, C. C. & St. L. R. Co. v. Nicholas*, 165 Ind. 685, 76 N. E. 522.

44. A railroad company is guilty of no negligence in receiving into its yards and passing over its line freight or passenger cars different from those it owns and uses, in that they had deadwoods or bumpers of unusual length, whereby a brakeman in its employ is injured in the act of coupling such cars. *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. Rep. 298,

37: 150
Cited in *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 570, 45 N. E. 108—*Fenton v. Du-luth, S. S. & A. R. Co.* 108 Mich. 286, 66 N. W. 51—*Dooner v. Delaware & H. Canal Co.* 164 Pa. 30, 30 Atl. 269.

45. The promulgation by a train despatcher of special orders, sufficient, if obeyed, to insure the safe operation of two passenger trains approaching each other on the same track, is not a complete discharge of the railway company's duty to furnish safe places and appliances for its employees, if the despatcher afterwards becomes aware of the danger of a collision, growing out of a disobedience of such orders, which he may guard against by issuing new orders. *Santa Fe Pacific R. Co. v. Holmes*, 202 U. S. 438, 26 Sup. Ct. Rep. 676,

50: 1094

46. A railway employee, injured by a head-on collision which would not have occurred if the train having the right of way had not passed a station six minutes ahead of schedule time, as fixed by special orders from the train despatcher, may hold the railway company accountable, where the despatcher failed to issue orders to intercept the train at that point, after being informed that it was two minutes ahead of time in passing a point but a few miles away. *Santa Fe Pacific R. Co. v. Holmes*, 202 U. S. 438, 26 Sup. Ct. Rep. 676,

50: 1094

47. The mere fact that a train is a "wild" train not running on schedule time does not justify an inference that the conductor is relieved from the rules regulating the running of trains, and is under the control of some agent or despatcher of the company. *Northern P. R. Co. v. Poirier*, 167 U. S. 48, 17 Sup. Ct. Rep. 741,

42: 72

48. A rule of a railroad company that, when a train "stops for any cause," danger signals must be given, including the placing of torpedoes on the track at least thirty telegraph poles from the rear of the train, seems intended to apply to trains stopped by accident or obstruction or unexpectedly compelled to stop between stations, and not to be intended to be followed every time a train stops at a station. *Northern P. R. Co. v. Poirier*, 167 U. S. 48, 17 Sup. Ct. Rep. 741, 42: 72

49. In an action against a railroad company for negligence, an instruction to the jury that if the company undertook to run its trains by telegraph it was bound to have suitable telegraph line and operators, and if it did not, and thus occasioned the injury, it would be liable,—is proper. *Grand Trunk R. Co. v. Walker*, 154 U. S. 653, Appx. and 14 Sup. Ct. Rep. 1189, 25: 977

50. A railroad company is not guilty of negligence, as against an employee in slowly moving its cars by a switch engine in its yard, without sending a man in front of the cars to give notice to employees of their approach. *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. Rep. 835, 36: 758

51. The person in charge of a switch engine in a railroad yard, used for the purpose of moving cars, has a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, will take reasonable precaution against their approach; particularly where the cars are moving so slowly that ordinary attention on their part would enable them to avoid them. *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. Rep. 835, 36: 758

Distinguished in New York & N. E. R. Co. v. Hyde, 5 C. C. A. 467, 5 U. S. App. 443, 56 Fed. 194—*Wastl v. Montana Union R. Co.* 24 Mont. 171, 61 Pac. 9.

Cited in Kansas City, Ft. S. & M. R. Co. v. Cook, 28 L.R.A. 186, 13 C. C. A. 370, 31 U. S. App. 277, 66 Fed. 121—*Cahill v. Chicago, M. & St. P. R. Co.* 20 C. C. A. 195, 46 U. S. App. 85, 74 Fed. 296—*Northern P. R. Co. v. Krohne*, 29 C. C. A. 678, 56 U. S. App. 593, 86 Fed. 234—*Grand Trunk R. Co. v. Baird*, 36 C. C. A. 579, 94 Fed. 951—*Chicago & N. W. R. Co. v. Kane*, 50 Ill. App. 101—*Anderberg v. Chicago & N. W. R. Co.* 98 Ill. App. 210—*Keefe v. Chicago & N. W. R. Co.* 92 Iowa, 185, 54 Am. St. Rep. 542, 60 N. W. 503—*Tobey v. Burlington, C. R. & N. R. Co.* 94 Iowa, 271, 33 L.R.A. 501, 62 N. W. 761—*Galvin v. Old Colony R. Co.* 162 Mass. 535, 39 N. E. 186—*Carlson v. Cincinnati, S. & M. R. Co.* 120 Mich. 485, 79 N. W. 688—*Loring v. Kansas City, Ft. S. & M. R. Co.* 128 Mo. 359, 31 S. W. 6—*Smith v. Atlanta & C. Air Line R. Co.* 131 N. C. 618, 42 S. E. 976—*Wabash R. Co. v. Skiles*, 64 Ohio St. 472, 60 N. E. 576—*Chadwick v. Lindsay*, 5 Okla. 623, 49 Pac. 940.

e. Inspection.

Duty as to Testing Locomotives, see *supra*. 29, 30.

Employee Cleaning Engine without Waiting for, see *infra*, 112.

Delegation of Duty as to, see *infra*, 125.

52. A railroad company is under a legal duty not to expose its employees to danger arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted to its train. *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. Rep. 491, 39: 624

Cited in Texas & P. R. Co. v. Archibald, 170 U. S. 669, 42 L. ed. 1190, 18 Sup. Ct. Rep. 777—*Union Stock Yards Co. v. Chicago, B. & Q. R. Co.* 196 U. S. 227, 49 L. ed. 457, 25 Sup. Ct. Rep. 226—*Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 223, 52 U. S. App. 442, 84 Fed. 788—*St. Louis, I. M. & S. R. Co. v. Brown*, 67 Ark. 307, 54 S. W. 865—*Union Stock-Yards Co. v. Goodwin*, 57 Neb. 142, 77 N. W. 357—*Anderson v. Erie R. Co.* 68 N. J. L. 649, 54 Atl. 830—*Eaton v. New York C. & H. R. R. Co.* 163 N. Y. 394, 79 Am. St. Rep. 600, 57 N. E. 609—*Missouri K. & T. R. Co. v. Chambers*, 17 Tex. Civ. App. 491, 43 S. W. 1090—*Wood v. Rio Grande Western R. Co.* 28 Utah, 367, 79 Pac. 182.

53. It is the duty of a railroad company to see to it that the wheels of its cars which are about to be drawn out on its road are in safe and proper condition; and this duty cannot be delegated so as to exonerate the company from liability to its servants for injuries caused by an omission to perform that duty, or by its negligent performance. *Union P. R. Co. v. Snyder (Union P. R. Co. v. Daniels)* 152 U. S. 684, 14 Sup. Ct. Rep. 756, 38: 597

54. The duty of a railway company toward an employee, to inspect cars coming from other roads, is not limited to cars which are to be hauled over its own road, but extends to cars which it switches from another road, to which they are to be returned after loading. *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. Rep. 777, 42: 1188

Cited in Felton v. Bullard, 37 C. C. A. 5, 94 Fed. 785—*Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 310, 96 Fed. 716—*New Orleans & N. E. R. Co. v. Clements*, 40 C. C. A. 473, 100 Fed. 423—*Dawson v. Chicago, R. I. & P. R. Co.* 52 C. C. A. 291, 114 Fed. 875—*Northern P. R. Co. v. Tyman*, 56 C. C. A. 196, 119 Fed. 292—*Missouri K. & T. R. Co. v. Merrill*, 65 Kan. 443, 59 L.R.A. 714, 93 Am. St. Rep. 287, 70 Pac. 358.

55. A railroad company is not excused from its duty to inspect its cars by the sufficiency of the number of its inspectors and their competency. *Union P. R. Co. v. Snyder (Union P. R. Co. v. Daniels)* 152 U. S. 684, 14 Sup. Ct. Rep. 756, 38: 597

Cited in Northern P. R. Co. v. Babcock, 154 U. S. 200, 38 L. ed. 961, 14 Sup. Ct. Rep. 978—*Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 223, 52 U. S. App. 442, 84 Fed. 788—*Hodges v. Kimball*, 44 C. C. A. 199, 104 Fed. 752—*Re California Nav. & Improv. Co.* 110 Fed. 673—*Chicago & N. W. R. Co. v. Gillison*, 72 Ill. App. 213—*Nord Deutscher Lloyd S. S. Co. v. Ingebreghsen*, 57 N. J. L. 402, 51 Am. St. Rep. 604, 31 Atl. 619—*Ryan v. New York*

C. & H. R. R. Co. 88 Hun, 270, 34 N. Y. Supp. 665.

Editorial notes.

[Master's duty of inspection and supervision of appliances. 41 L.R.A. 70, 100.]

Duty to inspect materials upon which servant is to work. 70 L.R.A. 831.

Duty to inspect tools or implements furnished servant. 1 L.R.A.(N.S.) 944.]

3. Selection and Retention of Employees.

See also *infra*, 94.

56. It is the duty of a master to take fair and reasonable precautions to surround his employees with fit and careful co-workers. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, 37: 772 Cited in *Weeks v. Scharer*, 49 C. C. A. 374, 111 Fed. 332—*McCharles v. Horn Silver Min. & Smelting Co.* 10 Utah, 473, 37 Pac. 733—*Stoll v. Daly Min. Co.* 19 Utah, 282, 57 Pac. 295.

57. It is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184,

28: 787

Cited in *Grimsley v. Hankins*, 46 Fed. 401—*Northern P. R. Co. v. Charles*, 2 C. C. A. 385, 7 U. S. App. 359, 51 Fed. 566—*Texas & P. R. Co. v. Barrett*, 14 C. C. A. 377, 30 U. S. App. 196, 67 Fed. 218—*Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L.R.A. 53, 41 C. C. A. 541, 101 Fed. 629—*St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 299, 11 L.R.A. 476, 15 S. W. 831—*Johnson v. Northern P. R. Co.* 1 N. D. 364, 48 N. W. 227—*Pullman Palace Car Co. v. Laack*, 143 Ill. 254, 18 L.R.A. 218, 32 N. E. 285—*Atchison T. & S. F. R. Co. v. Seelye*, 54 Kan. 30, 37 Pac. 104—*Clairain v. Western U. Teleg. Co.* 40 La. Ann. 183, 3 So. 625—*Dobson v. New Orleans & W. R. Co.* 52 La. Ann. 1134, 27 So. 670—*Bowers v. Union P. R. Co.* 4 Utah, 222, 7 Pac. 251—*Norfolk & W. R. Co. v. Jackson*, 1 Va. Dec. 682, 6 S. E. 220—*Turner v. Norfolk & W. R. Co.* 40 W. Va. 690, 22 S. E. 83.

58. It is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. This rule is not changed by the Code of Dakota Territory, §§ 1130, 1131, in respect to the duty of employers. The liability of the employer is the same whether he totally fail to provide persons to perform a duty he owes to his servants, or provide persons who are incompetent and unskilful. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755 Cited in *Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 627, 43 U. S. App. 113, 73 Fed. 638.

59. A railroad company is liable to an em-

ployee for damages caused by the incapacity of another employee,—in this case a telegraph operator,—if his incapacity was known to the company, or could have been learned by ordinary care; that it to say, by such diligence and precaution as was commensurable with the perils or dangers likely to be encountered by him. *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 932, 27: 605

Grand Trunk R. Co. v. Walker, 154 U. S. 653, Appx. 14 Sup. Ct. Rep. 1189, and

25: 977

Cited in *Randall v. Baltimore & O. R. Co.* 109 U. S. 483, 27 L. ed. 1005, 3 Sup. Ct. Rep. 322—*Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 67, 48 L. ed. 100, 24 Sup. Ct. Rep. 24—*Central Trust Co. v. Texas & St. L. R. Co.* 32 Fed. 450—*Rilliston v. Mather*, 44 Fed. 744—*Johnston v. Canadian P. R. Co.* 50 Fed. 887—*Wabash Western R. Co. v. Bron*, 13 C. C. A. 232, 31 U. S. App. 192, 65 Fed. 951—*Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 239, 31 U. S. App. 213, 65 Fed. 958—*Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 627, 43 U. S. App. 113, 73 Fed. 638—*The Anaces*, 34 C. C. A. 565, 93 Fed. 246—*Weeks v. Scharer*, 49 C. C. A. 373, 111 Fed. 331—*The Noranmore*, 113 Fed. 360—*Richmond & D. R. Co. v. Hissong*, 97 Ala. 191, 13 So. 209—*Louisville & N. R. Co. v. Richardson*, 100 Ala. 236, 14 So. 209—*Holston v. New Mexico & A. R. Co.* 2 Ariz. 188, 11 Pac. 545—*Wells v. Coe*, 9 Colo. 161, 11 Pac. 50—*Gerrish v. New Haven Ice Co.* 63 Conn. 17, 27 Atl. 235—*Western Stone Co. v. Whalen*, 151 Ill. 485, 42 Am. St. Rep. 244, 38 N. E. 241—*Indiana Car Co. v. Parker*, 100 Ind. 192—*Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 453, 7 Am. St. Rep. 458, 17 N. E. 101—*Pennsylvania Co. v. McCaffrey*, 139 Ind. 442, 29 L.R.A. 110, 38 N. E. 67—*Indiana, I. & I. R. Co. v. Snyder*, 140 Ind. 659, 39 N. E. 912—*Atchison, T. & S. F. R. Co. v. Kingscott*, 65 Kan. 136, 69 Pac. 184—*Campbell v. Dearborn*, 175 Mass. 185, 55 N. E. 1042—*Smith v. Peninsular Car Works*, 60 Mich. 508, 1 Am. St. Rep. 542, 27 N. W. 662—*Hilton v. Fitchburg R. Co.* 73 N. H. 117, 68 L.R.A. 430, 59 Atl. 625—*Rettig v. Fifth Ave. Transp. Co.* 6 Misc. 332, 26 N. Y. Supp. 896—*Whittaker v. Delaware & H. Canal Co.* 126 N. Y. 549, 27 N. E. 1042—*Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 373, 64 L.R.A. 152, 75 Pac. 537—*McGar v. National & P. Worsted Mills*, 22 R. I. 356, 47 Atl. 1092—*Porter v. Waters-Allen Co.* 94 Tenn. 372, 29 S. W. 227—*Pool v. Southern P. Co.* 20 Utah, 215, 58 Pac. 326—*Baltimore & O. R. Co. v. McKenzie*, 81 Va. 73—*Goodman v. Richmond & D. R. Co.* 81 Va. 586—*Richmond & D. R. Co. v. Norment*, 84 Va. 173, 10 Am. St. Rep. 827, 4 S. E. 211—*South West Improv. Co. v. Smith*, 85 Va. 312, 17 Am. St. Rep. 59, 7 S. E. 365—*Richmond & D. R. Co. v. Burnett*, 88 Va. 544, 14 S. E. 372—*Norfolk & W. R. Co. v. Nunnally*, 88 Va. 550, 14 S. E. 367—*Norfolk & W. R. Co. v. Wade*, 102 Va. 143, 45 S. E. 915—*Norfolk & W. R. Co. v. Jackson*, 1 Va. Dec. 682, 6 S. E. 220—*Carlson v. Wilkeson Coal & Coke Co.* 19 Wash. 476, 53 Pac. 725.

60. Where an employee upon a railroad is injured through the negligence of an engineer, evidence that the latter had frequently shown his recklessness and unfitness, and, notwithstanding complaints against him, was retained by the master, makes a case

for the plaintiff. *Northern P. R. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. Rep. 321, 31: 296

Editorial notes.

Responsibility of master to servant for carefulness and competency of coservants.

27: 605

[Master's duty to know character and capacity of servants. 41 L.R.A. 90.

Duty of master with respect to employment of servants. 48 L.R.A. 368.

Master's liability as affected by restrictions upon his freedom of selection and superintendence of employees. 3 L.R.A.(N.S.) 1105.]

b. Servant's Assumption of Risk.

Refusing Instruction Confusing Doctrines of Assumption of Risk and Contributory Negligence, see Trial, 793a.

Editorial notes.

Servant's assumption of risks. 38: 391
[Assumption by volunteer of the risks of service. 22 L.R.A. 663.

Volenti non fit injuria as defense to action by injured servants. 47 L.R.A. 161.

Effect of an assurance of safety given by master or coservant. 48 L.R.A. 542.

Responsibility of master for appliance constructed by employees as part of the work. 3 L.R.A.(N.S.) 500.

Servant's assumption of risk of master's breach of statutory duty. 6 L.R.A.(N.S.) 981.

Right of one employing child under statutory age to rely on assumption of risk, to defeat liability. 12 L.R.A.(N.S.) 461.]

1. Fellow Servants' Negligence.

Interruption of Statute of Limitations, see Limitation of Actions, 600c.
See also *infra*, 69a, 105.

61. Where fellow servants are engaged in a common employment, each, in undertaking the service, assumes the risk that the others may fail in that care and vigilance which are essential to his safety. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755
Union P. R. Co. v. Fort, 17 Wall. 553, 21: 739

Chicago. M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184, 28: 787
Hough v. Texas & P. R. Co. 100 U. S. 213, 25: 612

Cited in *Northern P. R. Co. v. Herbert*, 116 U. S. 647, 29 L. ed. 758, 6 Sup. Ct. Rep. 590—*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 388, 37 L. ed. 781, 13 Sup. Ct. Rep. 914—*Dalton v. Atlantic, M. & O. R. Co.* 4 Hughes, 188, Fed. Cas. No. 3,550—*The City of Alexandria*, 17 Fed. 392—*The Harold*, 21 Fed. 430—*Quinn v. New Jersey Lighterage Co.* 23 Blatchf. 212, 23 Fed. 365—*Easton v. Houston & T. C. R. Co.* 32 Fed. 895—*The Phoenix*, 34 Fed. 763—*The Queen*, 40 Fed. 698—*Woods v. Lindvall*, 1 C. C. A. 47 4 U. S. App. 49, 48 Fed. 72—*Stockmeyer v. Reed*, 55 Fed. 261—*Texas & P. R. Co. v. Smith*, 31 L. R. A. 324, 14 C. C. A. 511, 30

U. S. App. 176, 67 Fed. 527—*Cross Lake Logging Co. v. Joyce*, 28 C. C. A. 252, 53 U. S. App. 221, 83 Fed. 991—*Olson v. Oregon Coal & Nav. Co.* 96 Fed. 111—*Weeks v. Scharer*, 49 C. C. A. 377, 111 Fed. 335—*St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 294, 11 L.R.A. 775, 15 S. W. 831—*Floyd v. Colorado Fuel & Iron Co.* 18 Colo. App. 156, 70 Pac. 452—*Yates v. McCullough Iron Co.* 60 Md. 384, 16 Atl. 280—*Lyttle v. Chicago & W. M. R. Co.* 84 Mich. 298, 47 N. W. 571—*Schaub v. Hannibal & St. J. R. Co.* 106 Mo. 88, 16 S. W. 924—*Hawk v. McLeod Lumber Co.* 168 Mo. 129, 65 S. W. 1022—*Goodwell v. Montana C. R. Co.* 18 Mont. 298, 45 Pac. 210—*Union P. R. Co. v. Erickson*, 41 Neb. 14, 29 L.R.A. 142, 59 N. W. 347—*Cerrillos Coal R. Co. v. Deserant*, 9 N. M. 59, 49 Pac. 807—*Rettig v. Fifth Ave. Transp. Co.* 6 Misc. 333, 26 N. Y. Supp. 896—*Ches-son v. John L. Roper Lumber Co.* 118 N. C. 67, 23 S. E. 925—*Anderson v. Bennett*, 16 Or. 520, 8 Am. St. Rep. 311, 19 Pac. 765—*Anderson v. Ogden Union R. & Depot Co.* 8 Utah, 133, 30 Pac. 305—*Chapman v. Southern P. Co.* 12 Utah, 40, 41 Pac. 551—*Norfolk & W. R. Co. v. Jackson*, 85 Va. 491, 8 S. E. 370—*Norfolk & W. R. Co. v. Ampey*, 93 Va. 134, 25 S. E. 226—*Northern P. R. Co. v. O'Brien*, 1 Wash. 607, 21 Pac. 32—*Shannon v. Consolidated Tiger & P. Min. Co.* 24 Wash. 132, 64 Pac. 169—*Madden v. Chesapeake & O. R. Co.* 28 W. Va. 619, 57 Am. Rep. 695—*Criswell v. Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 819, 6 S. E. 31—*Skidmore v. West Virginia & P. R. Co.* 41 W. Va. 308, 23 S. E. 713—*Welty v. Lake Superior Terminal & Transfer R. Co.* 100 Wis. 143, 75 N. W. 1022.

62. The employee, in entering the service of the principal, is presumed to take upon himself the incidents to the undertaking, among which is to be counted the negligence of fellow servants. *Union P. R. Co. v. Fort*, 17 Wall. 553, 21: 739

Cited in *Dishon v. Cincinnati, N. O. & T. P. R. Co.* 126 Fed. 197—*St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 296, 11 L.R.A. 775, 15 S. W. 831—*Capper v. Louisville, E. & St. L. R. Co.* 103 Ind. 307, 2 N. E. 740—*Leary v. Boston & A. R. Co.* 139 Mass. 585, 52 Am. Rep. 733, 2 N. E. 115—*Jones v. Florence Min. Co.* 66 Wis. 278, 57 Am. Rep. 269, 28 N. W. 207.

62a. The presumption that an employee assumes the risk of the negligence of coemployees cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. *Union P. R. Co. v. Fort*, 17 Wall. 553, 21: 739

Cited in *Hough v. Texas & P. R. Co.* 100 U. S. 217, 25 L. ed. 615—*Randall v. Baltimore & O. R. Co.* 109 U. S. 483, 27 L. ed. 1005, 3 Sup. Ct. Rep. 322—*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 388, 37 L. ed. 781, 13 Sup. Ct. Rep. 914—*Dillon v. Union P. R. Co.* 3 Dill. 324, Fed. Cas. No. 3,916—*Gilmore v. Northern P. R. Co.* 9 Sawy. 564, 18 Fed. 870—*Northern P. Coal Co. v. Richmond*, 7 C. C. A. 488, 15 U. S. App. 262, 58 Fed. 760—*Stevens v. Chamberlin*, 51 L.R.A. 523, 40 C. C. A. 423, 100 Fed. 380—*McQueen v. Kondelln*, 61 C. C. A. 651, 127 Fed. 77—*McMillan v. Grand Trunk R. Co.* 65 C. C. A. 167, 130 Fed. 829—*Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala. 176, 11 So. 897—*Camp v. Hall*, 39 Fla. 574, 22 So. 792—*Southern Agri. Works v. Franklin*, 111 Ga. 324, 36 So. 693—*Hinckley v. Horazdowski*,

(Ill.) 8 L.R.A. 492, 23 N. E. 338—Pittsburgh, C. & St. L. R. Co. v. Adams, 105 Ind. 187, 5 N. E. 187—Brazil Block Coal Co. v. Gaffney, 119 Ind. 463, 4 L.R.A. 855, 12 Am. St. Rep. 422, 21 N. E. 1102—Cincinnati, H. & I. R. Co. v. Madden 134 Ind. 473, 34 N. E. 227—Wormell v. Maine C. R. Co. 79 Me. 410, 1 Am. St. Rep. 321, 10 Atl. 49—Hanrathy v. Northern C. R. Co. 46 Md. 288—Michael v. Stanley, 75 Md. 474, 23 Atl. 1094—Wood v. Helges, 83 Md. 269 34 Atl. 872—National Enameling & Stamping Co. v. Brady, 93 Md. 650, 49 Atl. 845—Adolf v. Columbia Pretzel & Baking Co. 100 Mo. App. 207, 73 S. W. 321—Maltby v. Belden, 45 App. Div. 303, 60 N. Y. Supp. 824—Coffee v. Phillips, 21 Misc. 665, 47 N. Y. Supp. 1105—Greenville Oil & Cotton Co. v. Harkey, 20 Tex. Civ. App. 280, 48 S. W. 1005—Reddon v. Union P. R. Co. 5 Utah, 353, 15 Pac. 262—Andreson v. Ogden Union R. & Depot Co. 8 Utah, 133, 30 Pac. 305—Hayes v. Colchester Mills, 69 Vt. 7, 60 Am. St. Rep. 915, 37 Atl. 269—Jones v. Old Dominion Cotton Mills, 82 Va. 155, 3 Am. St. Rep. 92—Boyer v. Northern P. Coal Co. 27 Wash. 712, 68 Pac. 348—Turner v. Norfolk & W. R. Co. 40 W. Va. 684, 22 S. E. 83—De Voin v. Michigan Lumber Co. 64 Wis. 620, 54 Am. Rep. 649, 25 N. W. 552—Jones v. Florence Min. Co. 66 Wis. 280, 57 Am. Rep. 269, 28 N. W. 207—Cole v. Chicago & N. W. R. Co. 71 Wis. 124, 5 Am. St. Rep. 201, 37 N. W. 84.

B. Dangers Obvious and Incidental to Work.

Knowledge of Danger, see infra, 76.
Contributory Negligence as to Obvious Dangers, see infra, 89, 95.

63. An employee assumes the risk incident to the employment he enters. Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 7 Sup. Ct. Rep. 1166. 30: 1114
Cited in Kohn v. McNulta, 147 U. S. 241, 37 L. ed. 152, 13 Sup. Ct. Rep. 298—Southern P. R. Co. v. Seley, 152 U. S. 153, 38 L. ed. 395, 14 Sup. Ct. Rep. 530—Carpenter v. Mexican Nat. R. Co. 39 Fed. 317—Townsend v. Langles, 41 Fed. 920—Billston v. Mather, 44 Fed. 745—Union P. R. Co. v. O'Brien, 1 C. C. A. 363, 4 U. S. App. 221, 49 Fed. 547—Oregon Short Line & U. N. R. Co. v. Tracy, 14 C. C. A. 201, 29 U. S. App. 529, 66 Fed. 933—Central Trust Co. v. East Tennessee, V. & G. R. Co. 69 Fed. 356—Southern P. Co. v. Johnson, 16 C. C. A. 331, 44 U. S. App. 1, 69 Fed. 574—Reed v. Stockmeyer, 20 C. C. A. 383, 34 U. S. App. 727, 74 Fed. 189—McPeck v. Central Vermont R. Co. 25 C. C. A. 114, 50 U. S. App. 27, 79 Fed. 594—Pittsburgh & W. R. Co. v. Thompson, 27 C. C. A. 337, 54 U. S. App. 222, 82 Fed. 724—Kansas & T. Coal Co. v. Reid, 29 C. C. A. 479, 57 U. S. App. 464, 85 Fed. 917—Baker v. Barber Asphalt Pav. Co. 92 Fed. 119—Detroit Crude-Oil Co. v. Grable, 36 C. C. A. 97, 94 Fed. 77—Slavens v. Northern P. R. Co. 38 C. C. A. 159, 97 Fed. 263—Bethlehem Iron Co. v. Weiss, 40 C. C. A. 275, 100 Fed. 50—Louisville & N. R. Co. v. Miller, 43 C. C. A. 438, 104 Fed. 126—Volk v. B. F. Sturtevant Co. 43 C. C. A. 528, 104 Fed. 277—Hodges v. Kimball, 44 C. C. A. 200, 104 Fed. 753—Mexican C. R. Co. v. Jones, 48 C. C. A. 228, 107 Fed. 65—King v. Morgan, 48 C. C. A. 509, 109 Fed. 448—Kenney v. Meddaugh, 55 C. C. A. 118, 118 Fed. 212—Texas & P. R.

Co. v. Swearingen, 122 Fed. 197—St. Louis Cordage Co. v. Miller, 63 L.R.A. 559, 61 C. C. A. 487, 126 Fed. 505—Britton v. Central U. Teleg. Co. 65 C. C. A. 598, 131 Fed. 847—Riley v. Louisville & N. R. Co. 66 C. C. A. 600, 133 Fed. 907—The Tresco, 67 C. C. A. 469, 134 Fed. 823—McGill v. Southern P. Co. 4 Ariz. 123, 33 Pac. 821—Washington Asphalt Block & Tile Co. v. Mackay, 15 App. D. C. 425—Pennsylvania Co. v. Finney, 145 Ind. 560, 42 N. E. 816—Dandle v. Southern P. R. Co. 42 La. Ann. 689, 7 So. 792—Coombs v. Fitchburg R. Co. 156 Mass. 202, 30 N. E. 1140—Thain v. Old Colony R. Co. 161 Mass. 854, 37 N. E. 309—Goodes v. Boston & A. R. Co. 162 Mass. 289, 38 N. E. 500—Content v. New York, N. H. & H. R. Co. 165 Mass. 270, 43 N. E. 94—Murch v. Thomas Wilson's Sons & Co. 168 Mass. 411, 47 N. E. 111—Davis v. Forbes, 171 Mass. 555, 47 L.R.A. 177, 51 N. E. 20—Ragon v. Toledo, A. A. & N. M. R. Co. 97 Mich. 275, 37 Am. St. Rep. 336, 56 N. W. 612—Potter v. Detroit, G. H. & M. R. Co. 122 Mich. 197, 81 N. W. 80—Thomas v. Missouri P. R. Co. 109 Mo. 201, 18 S. W. 980—Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 462, 66 Am. St. Rep. 456, 71 N. W. 42—Bancroft v. Boston & M. R. Co. 67 N. H. 468, 30 Atl. 409—Lutz v. Atlantic & P. R. Co. 6 N. M. 518, 16 L.R.A. 830, 30 Pac. 912—Norfolk & W. R. Co. v. Jackson, 85 Va. 494, 8 S. E. 370—Norfolk & W. R. Co. v. McDonald, 88 Va. 855, 13 S. E. 708—McDonald v. Norfolk & W. R. Co. 95 Va. 103, 27 S. E. 821—Knight v. Cooper, 36 W. Va. 234, 14 S. E. 999—Seldomridge v. Chesapeake & O. R. Co. 46 W. Va. 574, 33 S. E. 293.

64. A servant assumes the risk of the dangers which ordinarily attend, or are incident to, the business in which he voluntarily engages for compensation. Hough v. Texas & P. R. Co. 100 U. S. 213,

25: 612
Cited in Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 87, 48 L. ed. 100, 24 Sup. Ct. Rep. 24—Kresanowski v. Northern P. R. Co. 5 McCrary, 531, 18 Fed. 231—Billston v. Mather, 44 Fed. 745—Southern P. Co. v. Burke, 9 C. C. A. 233, 13 U. S. App. 110, 60 Fed. 708—Mason & O. R. Co. v. Yockey, 43 C. C. A. 233, 103 Fed. 260—St. Louis Cordage Co. v. Miller, 63 L.R.A. 554, 61 C. C. A. 480, 126 Fed. 498—Howley v. Chicago, B. & Q. R. Co. 66 C. C. A. 217, 133 Fed. 151—Little Rock, M. R. & T. R. Co. v. Leverett, 48 Ark. 346, 3 Am. St. Rep. 230, 3 S. W. 50—Herbert v. Northern P. R. Co. 3 Dak. 52, 13 N. W. 349—Hughson v. Richmond & D. R. Co. 2 App. D. C. 103—South Florida R. Co. v. Weese, 32 Fla. 234, 13 So. 436—Wells v. O'Hare, 110 Ill. App. 14—Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 573, 2 L.R.A. 525, 9 Am. St. Rep. 883, 19 N. E. 453—Yeaton v. Boston & L. R. Corp. 135 Mass. 418—Smith v. Peninsular Car Works, 80 Mich. 508, 1 Am. St. Rep. 542, 27 N. W. 662—Adolf v. Columbia Pretzel & Baking Co. 100 Mo. App. 207, 73 S. W. 321—Kennedy v. Manhattan R. Co. 33 Hun, 459—Davis v. Central Vermont R. Co. 55 Vt. 93, 45 Am. Rep. 590—McDonald v. Norfolk & W. R. Co. 95 Va. 106, 27 S. E. 821.

65. Where an employee is not placed by the employer in a position of undisclosed danger, and is a mature man, doing the ordinary work which he has engaged to do, and his risks are obvious to anyone, he assumes the risks of the employment, and no negligence can be imputed to the employ-

er for an accident to him therefrom. *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. Rep. 298. 37: 150

Distinguished in Northern P. R. Co. v. Tynan, 56 C. C. A. 196, 119 Fed. 292.

Cited in Southern P. Co. v. Seley, 152 U. S. 155, 38 L. ed. 398, 14 Sup. Ct. Rep. 530—*Northern P. R. Co. v. Blake*, 11 C. C. A. 95, 27 U. S. App. 190, 63 Fed. 47—*Grand Trunk R. Co. v. Tennant*, 14 C. C. A. 193, 21 U. S. App. 682, 66 Fed. 925—*Oregon Short Line & U. N. R. Co. v. Tracy*, 14 C. C. A. 201, 29 U. S. App. 529, 66 Fed. 933—*Mississippi River Logging Co. v. Schneider*, 20 C. C. A. 396, 34 U. S. App. 743, 74 Fed. 201—*Peirce v. Bane*, 27 C. C. A. 362, 53 U. S. App. 297, 80 Fed. 990—*Carolan v. Southern P. Co.* 84 Fed. 86—*Filippin v. Kimball*, 31 C. C. A. 286, 59 U. S. App. 1, 87 Fed. 261—*Baker v. Barber Asphalt Paving Co.* 92 Fed. 120—*Detroit Crude-Oil Co. v. Grable*, 36 C. C. A. 97, 94 Fed. 77—*Louisville & N. R. Co. v. Miller*, 43 C. C. A. 438, 104 Fed. 126—*King v. Morgan*, 48 C. C. A. 512, 109 Fed. 451—*Johnson v. Southern P. Co.* 54 C. C. A. 510, 117 Fed. 464—*Kenney v. Meddaugh*, 55 C. C. A. 118, 118 Fed. 212—*Moffet v. Koch*, 106 La. 379, 31 So. 40—*Cassady v. Boston & A. R. Co.* 164 Mass. 170, 41 N. E. 129—*Ellsbury v. New York, N. H. & H. R. Co.* 172 Mass. 132, 70 Am. St. Rep. 248, 51 N. E. 415—*Oglesby v. Missouri P. R. Co.* 150 Mo. 215, 51 S. W. 758—*McDonald v. Norfolk & W. R. Co.* 95 Va. 105, 27 S. E. 821.

66. A laborer upon a railroad track, either in switching trains or repairing the track, who is constantly exposed to the danger of passing trains and bound to look out for them, assumes the risk of negligence in their management. *Northern P. R. Co. v. Hamby*, 154 U. S. 349, 14 Sup. Ct. Rep. 983. 38: 1009

Cited in Burke v. Anderson, 16 C. C. A. 446, 34 U. S. App. 132, 69 Fed. 819—*Kansas & A. Valley R. Co. v. Dye*, 16 C. C. A. 607, 36 U. S. App. 23, 70 Fed. 27—*Carlson v. United New York Sandy Hook Pilots' Assn.* 93 Fed. 471—*Weeks v. Scharer*, 49 C. C. A. 377, 111 Fed. 335—*Southern P. Co. v. McGill*, 5 Ariz. 41, 44 Pac. 302.

67. A switchman who has been engaged in coupling cars in a railroad company's yard for over two months before the accident, and is familiar with the tracks and the yard and experienced in the business, cannot recover of the receiver of the company by whom he was employed, for an injury to his arm by its being caught between the deadwoods and crushed while coupling cars, although such cars were those of another company and different from those of his own company, where he had before coupled similar cars, and where the deadwood were obvious to anyone attempting to make the coupling, and the danger from them apparent. *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. Rep. 298. 37: 150

Cited in Anglin v. Texas & P. R. Co. 9 C. C. A. 132, 23 U. S. App. 62, 60 Fed. 555—*Southern P. Co. v. Burke*, 9 C. C. A. 243, 23 U. S. App. 1, 60 Fed. 718—*Hodges v. Kimball*, 44 C. C. A. 190, 104 Fed. 751.

68. The owner of a building is not liable for injuries sustained by a carpenter from falling, by reason of the tipping over of a projecting timber of a building, in the

erection of which he is employed. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. Rep. 433. 28: 440

Cited in Finalyson v. Utica Min. & Mill. Co. 14 C. C. A. 494, 32 U. S. App. 143, 67 Fed. 510—*Kansas City Southern R. Co. v. Billingslee*, 54 C. C. A. 114, 116 Fed. 340—*Davis v. Trade Dollar Consol. Min. Co.* 54 C. C. A. 639, 117 Fed. 125—*Highland Boy Gold Min. Co. v. Pouch*, 61 C. C. A. 43, 124 Fed. 151—*Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 266, 40 Pac. 251—*Merchant v. Mickelson*, 101 Ill. App. 404—*Western Wrecking & Lumber Co. v. O'Donnell*, 101 Ill. App. 498—*Ft. Wayne v. Christie*, 136 Ind. 181, 59 N. E. 385—*State use of Eckhardt v. Lazaretto*, *Guano Co.* 90 Md. 192, 44 Atl. 1017—*Burns v. Merchants & P. Oil Co.* 26 Tex. Civ. App. 227, 63 S. W. 1061—*Kath v. Wisconsin C. R. Co.* 121 Wis. 514, 99 N. W. 217.

69. One who enters the service of a railroad corporation, in any work connected with the making up and moving of trains, assumes the risk incident to a yard where trains are made up, and which necessarily has a great number of tracks and switches close to one another, and this rule applies to a brakeman who first enters the yard at night, with a lantern. *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 3 Sup. Ct. Rep. 322. 27: 1003

Cited in Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 194, 30 L. ed. 1116, 7 Sup. Ct. Rep. 1166—*Bunt v. Sierra Butte Gold Min. Co.* 138 U. S. 485, 34 L. ed. 1032, 11 Sup. Ct. Rep. 464—*Southern P. Co. v. Seley*, 152 U. S. 156, 38 L. ed. 398, 14 Sup. Ct. Rep. 530—*Van Avery v. Union P. R. Co.* 35 Fed. 40—*Muhlman v. Union P. R. Co.* 2 L.R.A. 193, 37 Fed. 189—*Rillston v. Mather*, 44 Fed. 745—*Newport News & M. Valley Co. v. Howe*, 3 C. C. A. 122, 6 U. S. App. 172, 52 Fed. 364—*Mase v. Northern P. R. Co.* 57 Fed. 286—*Northern P. R. Co. v. Smith*, 8 C. C. A. 665, 15 U. S. App. 294, 59 Fed. 996—*Thom v. Pittard*, 10 C. C. A. 358, 8 U. S. App. 597, 62 Fed. 238—*Peirce v. Clavin*, 27 C. C. A. 230, 53 U. S. App. 492, 82 Fed. 552—*Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 204, 102 Fed. 112—*Weeks v. Scharer*, 49 C. C. A. 377, 111 Fed. 335—*Kenney v. Meddaugh*, 55 C. C. A. 118, 118 Fed. 212—*Britton v. Central U. Teleg. Co.* 65 C. C. A. 601, 131 Fed. 847—*Hobson v. New Mexico & A. R. Co.* 2 Ariz. 182, 11 Pac. 545—*St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 480, 4 L.R.A. 177, 11 S. W. 699—*St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 296, 11 L.R.A. 775, 15 S. W. 831—*Wheatley v. Philadelphia, W. & B. R. Co.* 1 Marv. (Del.) 313, 30 Atl. 660—*St. Louis Nat. Stock Yards v. Burns*, 97 Ill. App. 178—*Mobile & O. R. Co. v. Healy*, 100 Ill. App. 590—*Coombs v. Fitchburg R. Co.* 156 Mass. 202, 30 N. E. 1140—*Thain v. Old Colony R. Co.* 161 Mass. 354, 37 N. E. 309—*Goodes v. Boston & A. R. Co.* 162 Mass. 289, 38 N. E. 500—*Bence v. New York, N. H. & H. R. Co.* 181 Mass. 226, 63 N. E. 417—*Potter v. Detroit, G. H. & M. R. Co.* 122 Mich. 188, 81 N. W. 80—*Lundquist v. Duluth Street R. Co.* 65 Minn. 389, 67 N. W. 1006—*McMaster v. Illinois C. R. Co.* 65 Miss. 268, 7 Am. St. Rep. 653, 4 So. 59—*Parker v. Hannibal & St. J. R. Co.* 109 Mo. 382, 13 L. R.A. 808, 19 S. W. 1119—*Hastings v. Montana Union R. Co.* 18 Mont. 498, 46 Pac. 264—*Lutz v. Atlantic & P. R. Co.* 6 N. M. 498, 16 L.R.A. 822, 30 Pac. 912—*Power v. New York L. E. & W. R. Co.* 32 Hun, 416—

Coppins v. New York C. & H. R. R. Co. 43 Hun. 32—Hobbs v. Atlantic & N. C. R. Co. 107 N. C. 4, 9 L.R.A. 840, 12 S. E. 124—Chaddick v. Lindsay, 5 Okla. 627, 49 Pac. 940—Miller v. Southern P. Co. 20 Or. 300, 26 Pac. 70—Baltimore & O. R. Co. v. McKenzie, 81 Va. 73—McDonald v. Norfolk & W. R. Co. 95 Va. 105, 27 S. E. 821—Beuhring v. Chesapeake & O. R. Co. 37 W. Va. 503, 16 S. E. 437—Core v. Ohio River R. Co. 38 W. Va. 472, 18 S. E. 596—Turner v. Norfolk & W. R. Co. 40 W. Va. 690, 22 S. E. 83.

3. Defective or Dangerous Appliances, Places, or Methods of Work.

Master's Duty as to Place and Appliances, see *supra*, II. a, 2.

Servant's Knowledge of Danger, see *infra*, II. b, 4.

See also *supra*, 67; *infra*, 103.

69a. The servant does not, by his contract of employment, assume the risks arising from the want of sufficient and skilful co-laborers, or from defective machinery or other instruments with which he has to work. Northern P. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755 Cited in Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 68, 48 L. ed. 100, 24 Sup. Ct. Rep. 24—Northern P. R. Co. v. Dixon, 194 U. S. 353, 48 L. ed. 1013, 24 Sup. Ct. Rep. 683—Floyd v. Colorado Fuel & Iron Co. 18 Colo. App. 156, 70 Pac. 452—Supple v. Agnew, 191 Ill. 447, 61 N. E. 392—Illinois C. R. Co. v. Welland, 67 Ill. App. 339—Wright v. Southern P. R. Co. 14 Utah, 393, 46 Pac. 374—Mangum v. Bullion, B. & C. Min. Co. 15 Utah, 549, 50 Pac. 834—Shannon v. Consolidated Tiger & Poorman Min. Co. 24 Wash. 132, 64 Pac. 169.

70. An employee has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not subjected to the danger of using appliances containing such defects, because of his knowledge of the general methods adopted by the employer in carrying on his business, or because, by ordinary care, he might have known of the methods, and inferred therefrom that danger of insufficient appliances might arise. Texas & P. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. Rep. 777, 42: 1188

Cited in Deserant v. Cerillos Coal R. Co. 178 U. S. 421, 44 L. ed. 1134, 20 Sup. Ct. Rep. 967—New York, N. H. & H. R. Co. v. O'Leary, 35 C. C. A. 566, 93 Fed. 741—Olsen v. North Pacific Lumber Co. 40 C. C. A. 431, 100 Fed. 388—Cincinnati, N. O. & T. P. R. Co. v. Gray, 50 L.R.A. 53, 41 C. C. A. 541, 101 Fed. 629—Mexican C. R. Co. v. Murray, 42 C. C. A. 343, 102 Fed. 272—Swensen v. Bender, 51 C. C. A. 633, 114 Fed. 7—Creswell v. Wilmington & N. R. Co. 2 Penn. (Del.) 215, 43 Atl. 629—Neeley v. Southwestern Cotton Seed Oil Co. 13 Okla. 365, 64 L.R.A. 149, 75 Pac. 537—San Antonio & A. P. R. Co. v. Klaus, 34 Tex. Civ. App. 495, 79 S. W. 58—Missouri, K. & T. R. Co. v. Hoskins, 34 Tex. Civ. App. 629, 79 S. W. 369—Merrill v. Oregon Short Line R. Co. 29 Utah, 283, 110 Am. St. Rep. 695, 81 Pac. 85—Lerch v. Oregon Short Line R. Co. 29 Utah 300, 110 Am. St. Rep. 708, 81 Pac. 90.

71. The risk of injury from a sudden

bump or jerk in the management of a freight train is not, as a matter of law, assumed by a brakeman standing, in obedience to orders, upon the icy roof of a car in such train. Texas & P. R. Co. v. Behmyer, 189 U. S. 468, 23 Sup. Ct. Rep. 622.

47: 905

72. Public policy does not require the courts to restrict the right of a railroad company to make sharp curves in side tracks in freight depots and yards, and brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto, and if they decide to do so, they must be content to assume the risks. Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 7 Sup. Ct. Rep. 1166, 30: 1114

Cited in Twitchell v. Grand Trunk R. Co. 39 Fed. 419—Gowen v. Harley, 6 C. C. A. 198, 12 U. S. App. 574, 56 Fed. 982—Southern P. Co. v. Burke, 9 C. C. A. 240, 23 U. S. App. 1, 60 Fed. 715—Garnett v. Phoenix Bridge Co. 98 Fed. 195—McCormick v. Illinois C. R. Co. 100 Fed. 252—Pennsylvania R. Co. v. Jones, 59 C. C. A. 93, 123 Fed. 759—Bennett v. Northern P. R. Co. 2 N. D. 125, 13 L.R.A. 471, 49 N. W. 408—Chicago & E. I. R. Co. v. Driscoll, 176 Ill. 335, 52 N. E. 921—Mobile & O. R. Co. v. Healy, 100 Ill. App. 590—Terre Haute & I. R. Co. v. Becker, 146 Ind. 218, 45 N. E. 96—Louisville N. A. & C. R. Co. v. Bates, 146 Ind. 572, 45 N. E. 108—Kilpatrick v. Choctaw, O. & G. R. Co. 3 Ind. Terr. 640, 64 S. W. 560—Bryce v. Chicago, M. & St. P. R. Co. 103 Iowa, 667, 72 N. W. 780—Oglesby v. Missouri P. R. Co. 150 Mo. 217, 51 S. W. 758—Ellingson v. Chicago & A. R. Co. 60 Mo. App. 687—Norfolk & W. R. Co. v. Cromer, 101 Va. 671, 44 S. E. 898.

73. The risks assumed by an engineer on a line of road running at the foot of a mountain range do not include unnecessary risks and dangers arising from the failure of the company to construct and maintain its track and roadbed in proper condition. Union P. R. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. Rep. 618, 40: 766 Cited in The Noranmore, 113 Fed. 369—Swensen v. Bender, 51 C. C. A. 633, 114 Fed. 7—Faulkner v. Mammoth Min. Co. 23 Utah, 442, 66 Pac. 799.

74. An engineer on a railroad train cannot be held to knowledge of the danger lurking in a narrow seam in a mountain side, by whose inequalities its sinuosities were hidden, so as to be held to have taken the hazard thereof. Union P. R. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. Rep. 618, 40: 766

4. Knowledge by Servant of Defect or Danger.

Statement in Application for Employment as Evidence of Knowledge, see Evidence, see Evidence, 1400.

See also *supra*, 70, 74; *infra*, 105.

75. An employee assumes the risk of injury from defective appliances furnished by his employer only when the defect is known to, or plainly observable by, the employee.

Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. Rep. 24, 48: 96

Cited in Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 338, 48 L. ed. 210, 24 Sup. Ct. Rep. 102—Texas & P. R. Co. v. Swearingen, 196 U. S. 62, 49 L. ed. 388, 25 Sup. Ct. Rep. 164—Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 16, 51 L. ed. 688, 27 Sup. Ct. Rep. 407—St. Louis Cordage Co. v. Miller, 63 L.R.A. 561, 61 C. C. A. 490, 126 Fed. 508—Glenmont Lumber Co. v. Roy, 61 C. C. A. 510, 126 Fed. 528—Denver & G. R. Co. v. Arrighi, 63 C. C. A. 650, 129 Fed. 348—Chicago, M. & St. P. R. Co. v. Benton, 65 C. C. A. 662, 132 Fed. 462—Riley v. Louisville & N. R. Co. 66 C. C. A. 600, 133 Fed. 907—Chicago, M. & St. P. R. Co. v. Riley, 76 C. C. A. 112, 145 Fed. 142—Choctaw, O. & G. R. Co. v. Jones, 77 Ark. 376, 4 L.R.A. (N. S.) 842, 92 S. W. 244—Halley v. Texas & P. R. Co. 113 La. 539, 37 So. 131—Campbell v. Railway Transfer Co. 95 Minn. 381, 104 N. W. 547—Lee v. St. Louis, M. & S. E. R. Co. 112 Mo. App. 395, 87 S. W. 12—New Omaha Thompson-Houston Electric Light Co. v. Dent, 68 Neb. 680, 103 N. W. 1091—Pressly v. Dover Yarn Mills, 138 N. E. 435, 51 S. E. 60—San Antonio & A. P. R. Co. v. Klaus, 34 Tex. Civ. App. 495, 79 S. W. 58—Missouri, K. & T. R. Co. v. Hoskins, 34 Tex. Civ. App. 629, 79 S. W. 369—Dunn v. Oregon Short Line R. Co. 28 Utah. 489, 80 Pac. 311—Merrill v. Oregon Short Line R. Co. 29 Utah, 283, 110 Am. St. Rep. 695, 81 Pac. 85—Leach v. Oregon Short Line R. Co. 29 Utah, 303, 110 Am. St. Rep. 708, 81 Pac. 90—Tuckett v. American Steam & Hand Laundry, 30 Utah, 289, 4 L.R.A. (N.S.) 997, 84 Pac. 500.

76. A servant entering into employment which is hazardous assumes the usual risk of the service, and when he continues in the service with a knowledge of the dangers to be incurred, he also assumes the hazard incident to the situation. Texas & P. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. Rep. 777, 42: 1188

Cited in Detroit Crude-Oil Co. v. Grable, 36 C. C. A. 98, 94 Fed. 77—Grace & H. Co. v. Kennedy, 40 C. C. A. 72, 99 Fed. 682—Volk v. B. F. Sturtevant Co. 43 C. C. A. 528, 104 Fed. 277—Lindsay v. New York, N. H. & H. R. Co. 50 C. C. A. 299, 112 Fed. 385—Kennedy v. Meddaugh, 55 C. C. A. 120, 118 Fed. 214—Bunker Hill & S. Min. & Concentrating Co. v. Jones, 65 C. C. A. 389, 130 Fed. 810—Butler v. Frazer, 25 App. D. C. 404.

77. Knowledge of the increased hazard resulting from the dangerous proximity to the rails of a railway scale box cannot be imputed to a switchman simply because he was aware of the existence and general location of the box. Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 25 Sup. Ct. Rep. 164, 49: 382

Cited in Choctaw, O. & G. R. Co. v. Jones, 77 Ark. 376, 4 L.R.A. (N.S.) 842, 92 S. W. 244.

78. If an employee knew of the defect from which an injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he assumed the risk of danger from such use. Washington & G. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. Rep. 1044, 34: 235

Cited in Southern P. Co. v. Seley, 152 U. S. 153, 38 L. ed. 395, 14 Sup. Ct. Rep. 530—Texas & P. R. Co. v. Barrett, 166 U. S.

620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 707—Telander v. Sunlin, 44 Fed. 569—Rillston v. Mather, 44 Fed. 744—New Jersey & N. Y. R. Co. v. Young, 1 C. C. A. 430, 1 U. S. App. 96, 49 Fed. 725—Union P. R. Co. v. Jarvi, 3 C. C. A. 437, 10 U. S. App. 439, 53 Fed. 69—Southern P. Co. v. Burke, 9 C. C. A. 234, 13 U. S. App. 110, 60 Fed. 708—McPeck v. Central Vermont R. Co. 25 C. C. A. 116, 50 U. S. App. 27, 79 Fed. 596—Baker v. Barber Asphalt Paving Co. 92 Fed. 121—Detroit Crude-Oil Co. v. Grable, 36 C. C. A. 101, 94 Fed. 80—Volk v. B. F. Sturtevant Co. 43 C. C. A. 528, 104 Fed. 277—King v. Morgan, 48 C. C. A. 511, 109 Fed. 450—Johnson v. Southern P. Co. 54 C. C. A. 510, 117 Fed. 464—Kennedy v. Meddaugh, 55 C. C. A. 120, 118 Fed. 214—Ashland Coal & I. R. Co. v. Wallace, 101 Ky. 640, 42 S. W. 744—Michael v. Stanley, 75 Md. 473, 23 Atl. 1094—Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 751, 76 N. W. 462—Hansen v. Schneider, 58 Hun. 63, 11 N. Y. Supp. 347—McDonald v. Norfolk & W. R. Co. 93 Va. 105, 27 S. E. 821—Johnson v. Chesapeake & O. R. Co. 38 W. Va. 211, 18 S. E. 573.

79. Although a railroad company is guilty of negligence in not providing proper and safe machinery and appliances, in consequence of which neglect an employee is injured, the latter cannot recover if, with knowledge of the defective condition of the machinery and appliances, he exposed himself to injury from them. Northern P. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755

80. A brakeman and conductor of freight trains, whose duty brought him frequently into the yard in question to make up his trains, and who necessarily knew of the form of frog there in use, but who is not shown to have complained to his employers of the character of frogs used by them, must be assumed to have entered and continued in the employ of the defendant with full knowledge of the dangers asserted to arise out of the use of unblocked frogs. Southern P. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. Rep. 530, 38: 397

81. Where the work of construction and repair of a railroad must be done in the intervals between the running of regular trains, and this fact is known to an employee who is employed to do such work, he assumes the risk of doing it at the times at which it has to be done. Coyne v. Union P. R. Co. 133 U. S. 370, 10 Sup. Ct. Rep. 382, 33: 657

Cited in Southern P. Co. v. Burke, 9 C. C. A. 229, 23 U. S. App. 1, 60 Fed. 715—Carolan v. Southern P. Co. 84 Fed. 87—Southern Kansas R. Co. v. Moore, 49 Kan. 627, 31 Pac. 138—Hicks v. Southern P. Co. 27 Utah. 530, 76 Pac. 625.

Continuing in employment after complaint

Contributory Negligence in Continuing Employment, see *infra*, 114.

See also *infra*, 95-97.

82. Where an engineer of a railroad company notified the master mechanic, whose duty it was to make repairs, that the pilot plow of the engine was broken and in a

dangerous condition, and was afterwards required to run the engine without having opportunity to examine whether it had been repaired, he cannot be held by that fact alone to have assumed the risk of defects. *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. Rep. 978, 38: 958

Distinguished in *McPeck v. Central Vermont R. Co.* 25 C. C. A. 113, 50 U. S. App. 27, 79 Fed. 593.

Cited in *Texas & P. R. Co. v. Barrett*, 166 U. S. 620, 41 L. ed. 1189, 17 Sup. Ct. Rep. 707—*Grand Trunk R. Co. v. Tennant*, 14 C. C. A. 192, 21 U. S. App. 682, 68 Fed. 924—*Narramore v. Cleveland, C. C. & St. L. R. Co.* 48 L.R.A. 75, 37 C. C. A. 502, 96 Fed. 301—*Mexican C. R. Co. v. Henderson*, 52 C. C. A. 514, 114 Fed. 894—*Southern P. Co. v. Hetzler*, 1 L.R.A.(N.S.) 296, 68 C. C. A. 38, 135 Fed. 284—*Burnside v. Novelty Mfg. Co.* 121 Mich. 130, 79 N. W. 1108—*Adolf v. Columbia Pretzel & Baking Co.* 100 Mo. App. 207, 73 S. W. 321—*Olney v. Boston & M. R. Co.* 71 N. H. 434, 52 Atl. 1097—*Allcot v. Kirkham*, 101 App. Div. 80, 91 N. Y. Supp. 775—*Mayott v. Norcross Bros.* 24 R. I. 198, 52 Atl. 804—*Gulf, C. & S. F. R. Co. v. Garren*, 96 Tex. 615, 97 Am. St. Rep. 989, 74 S. W. 807—*Chapman v. Southern P. Co.* 12 Utah, 45, 41 Pac. 551—*Virginia & N. C. Wheel Co. v. Chalkley*, 98 Va. 68, 34 S. E. 976—*Green v. Western American Co.* 30 Wash. 109, 70 Pac. 310.

83. A brakeman is not guilty of negligence in staying upon a train after discovering that a step was missing from one of the cars over which he might have to pass, where he has been told by the conductor that the car will be removed when it reaches a coal yard or junction beyond them if he finds on examining his papers that it does not contain perishable freight. *Kane v. Northern C. R. Co.* 128 U. S. 91, 9 Sup. Ct. Rep. 16, 32: 339

Cited in *Washington & G. R. Co. v. McDade*, 135 U. S. 569, 34 L. ed. 241, 10 Sup. Ct. Rep. 1044—*St. Louis Cordage Co. v. Miller*, 63 L.R.A. 562, 61 C. C. A. 492, 126 Fed. 510—*McAndrews v. Montana Union R. Co.* 15 Mont. 299, 39 Pac. 85—*Pool v. Southern P. Co.* 7 Utah, 308, 26 Pac. 654.

— Editorial note.

[Continuing work relying on promise to remove risk. 40 L.R.A. 781.]

5. Compliance with Commands as to Tasks Outside of Duties.

See also *infra*, 104.

84. If an order, which results in an injury, is given to a person of mature years, who has not engaged to do such work, although enjoined to obey the directions of his superior, it may with some plausibility be argued that he should disobey it, as he must know that its execution is attended with danger; or, at any rate, if he chooses to obey, that he takes upon himself the risk incident to the same. *Union P. R. Co. v. Fort*, 17 Wall. 553, 21: 739
Cited in *Ft. Smith Oil Co. v. Slover*, 58 Ark. 176, 24 S. W. 106—*Orman v. Mannix*, 17 Colo. 571, 17 L.R.A. 609, 31 Am. St. Rep. 340, 30 Pac. 1037—*Leary v. Boston & A.*

R. Co. 139 Mass. 585, 52 Am. Rep. 733, 2 N. E. 115—*Smith v. Peninsular Car Works*, 60 Mich. 505, 1 Am. St. Rep. 542, 27 N. W. 682—*Brodeur v. Valley Falls Co.* 16 R. I. 453, 17 Atl. 54.

85. Although it was a wrongful act on the part of a coemployee to order a boy of inexperience to do a thing which, in its nature, was perilous, and not within the duties of such boy, but which was within the duties of the one giving the order, the employer cannot escape responsibility on the plea that the coemployee should not have given the order, having placed the boy under him with directions to obey him. *Union P. R. Co. v. Fort*, 17 Wall. 553, 21: 739

86. Where a boy was injured while employed in a service outside his contract and wholly disconnected from it, by the direction of a coemployee under whose direction he was at the time, the employer is liable for such injury. *Union P. R. Co. v. Fort*, 17 Wall. 553, 21: 739

c. Contributory Negligence of Servant.

1. In General.

Presumptions and Burden of Proof, see Evidence, 387, 388.

Question of Law or Fact, see Trial, 406-411.

Requested Instruction Not Based on Evidence, see Trial, 782.

Refusing Instruction Confusing Doctrine of Assumption of Risk and Contributory Negligence, see Trial, 793a.

87. Those who enter a dangerous employment must exercise all the care and caution that the perils of the business demand. *Southern P. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. Rep. 530, 38: 391
Distinguished in *Oregon Short Line & U. N. R. Co. v. Tracy*, 14 C. C. A. 201, 29 U. S. App. 529, 66 Fed. 933.

Cited in *Texas & P. R. Co. v. Minnick*, 10 C. C. A. 4, 23 U. S. App. 310, 61 Fed. 638—*Reed v. Stockmeyer*, 20 C. C. A. 383, 34 U. S. App. 727, 74 Fed. 189—*Mississippi River Logging Co. v. Schneider*, 20 C. C. A. 396, 34 U. S. App. 743, 74 Fed. 201—*American Dredging Co. v. Walls*, 28 C. C. A. 443, 55 U. S. App. 460, 84 Fed. 429—*Kansas & T. Coal Co. v. Reid*, 29 C. C. A. 479, 57 U. S. App. 464, 85 Fed. 917—*Detroit Crude-Oil Co. v. Grable*, 36 C. C. A. 97, 94 Fed. 77—*Myers v. Chicago, St. P. M. & O. R. Co.* 37 C. C. A. 138, 95 Fed. 407—*Narramore v. Cleveland, C. C. & St. L. R. Co.* 48 L.R.A. 74, 37 C. C. A. 500, 96 Fed. 300—*Slavens v. Northern P. R. Co.* 38 C. C. A. 159, 97 Fed. 263—*Johnson v. Southern P. Co.* 54 C. C. A. 510, 117 Fed. 464—*Kenney v. Meddaugh*, 55 C. C. A. 118, 118 Fed. 212—*St. Louis Cordage Co. v. Miller*, 63 L.R.A. 555, 61 C. C. A. 482, 126 Fed. 500—*Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 381, 64 L.R.A. 155, 75 Pac. 537—*Allen v. Logan City*, 10 Utah, 288, 37 Pac. 496—*Fritz v. Salt Lake & O. Gas & E. L. Co.* 18 Utah, 504, 56 Pac. 90—*McDonald v. Norfolk & W. R. Co.* 95 Va. 105, 27 S. E. 821—*Hennesey v. Chicago & N. W. R. Co.* 90 Wis. 122, 74 N. W. 554.

88. If an employee himself was wanting in reasonable care and prudence, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by a defect of the machinery, through his negligence. *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044.

34: 235

Cited in Chicago G. W. R. Co. v. Price, 38 C. C. A. 247, 97 Fed. 431—*McCauley v. Southern R. Co.* 10 App. D. C. 563.

89. An employee is guilty of contributory negligence which will defeat his right to recover where his injuries result from dangers so obvious and threatening that a reasonably prudent man would have avoided them. *Kane v. Northern C. R. Co.* 128 U. S. 91, 9 Sup. Ct. Rep. 16.

32: 339

Cited in Norman v. Wabash R. Co. 10 C. C. A. 619, 22 U. S. App. 505, 62 Fed. 729—*Atchison, T. & S. F. R. Co. v. Myers*, 11 C. C. A. 444, 24 U. S. App. 295, 63 Fed. 798—*Chicago G. W. R. Co. v. Price*, 38 C. C. A. 247, 97 Fed. 431—*Mason & O. R. Co. v. Yockey*, 43 C. C. A. 232, 103 Fed. 269—*St. Louis Cordage Co. v. Miller*, 63 L.R.A. 554, 61 C. C. A. 480, 126 Fed. 498—*Indiana Natural Gas & Oil Co. v. O'Brien* 160 Ind. 276, 65 N. E. 918—*Ashland Coal & I. R. Co. v. Wallace*, 101 Ky. 639, 42 S. W. 744—*Cerrillos Coal R. Co. v. Deserant*, 9 N. M. 58, 49 Pac. 807—*Hicks v. Naomi Falls Mfg. Co.* 138 N. C. 327, 50 S. E. 703—*Pressly v. Yarn Mills*, 138 N. C. 417, 51 S. E. 69.

90-3. A minor who sat down under a shattered roof, after helping to take out the only post which supported it, is by his negligence responsible for his own death caused by the fall of rock from such roof. *Bunt v. Sierra Butte Gold Min. Co.* 138 U. S. 483, 11 Sup. Ct. Rep. 464.

34: 1031

Cited in Southern P. Co. v. Seley, 152 U. S. 156, 8 L. ed. 396, 14 Sup. Ct. Rep. 530—*Chicago & N. W. R. Co. v. Davis*, 3 C. C. A. 431, 10 U. S. App. 422, 53 Fed. 63—*Union P. R. Co. v. Jarvi*, 3 C. C. A. 436, 10 U. S. App. 439, 53 Fed. 69—*Minneapolis v. Lundin*, 7 C. C. A. 348, 19 U. S. App. 245, 58 Fed. 529—*Louisville & N. R. Co. v. Kelly*, 11 C. C. A. 263, 24 U. S. App. 103, 63 Fed. 410—*Detroit Crude-Oil Co. v. Grable*, 38 C. C. A. 97, 94 Fed. 77—*Davis v. Trade Dollar Consol. Min. Co.* 54 C. C. A. 639, 117 Fed. 125—*Ashland Coal & I. R. Co. v. Wallace*, 101 Ky. 639, 42 S. W. 744—*Fowler v. Pleasant Valley Coal Co.* 16 Utah, 355, 52 Pac. 594.

94. A servant may assume that the master use proper care and diligence in the employment and retention of an engineer. *Northern P. R. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. Rep. 321,

31: 296

95. A laborer is not justified in remaining at work in the face of an obvious risk, where he has merely sent notice of the danger to his employer, and a promise has been made by the latter to obviate or remedy the cause. Notice of such promise must reach the laborer. *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. Rep. 884,

29: 946

Cited in Atchison, T. & S. F. R. Co. v. Midgett, 1 Kan. App. 142, 40 Pac. 995—*Dally v. Flberloid Co.* 186 Mass. 320, 71 N. E. 554.

96. Where a known danger is not such as to make continuance at work negligence *per se*, a laborer is justified in working in its presence for such a space of time as would be reasonable to allow the employer to keep his promise to remedy or obviate it, or for such a period as would not preclude a rational expectation that the promise might be kept. *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. Rep. 884, 29: 946
Cited in Haas v. Balch, 6 C. C. A. 204, 12 U. S. App. 534, 56 Fed. 987—*Detroit Crude-Oil Co. v. Grable*, 38 C. C. A. 100, 94 Fed. 79—*Rocella v. Black Diamond Coal Min. Co.* 57 C. C. A. 575, 121 Fed. 459—*Roux v. Blodgett & D. Lumber Co.* 85 Mich. 526, 13 L.R.A. 731, 24 Am. St. Rep. 102, 48 N. W. 1092.

97. In an action brought against the District of Columbia, by a laborer, to recover damages for an injury caused by the falling of a gravel bank, it was error to instruct the jury that, in determining the question of contributory negligence, they need only inquire whether the plaintiff continued at his work longer than was reasonably sufficient to enable the supervisor to provide someone to watch the bank, as he had promised to do. If he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the District supervisor, be guilty of contributory negligence, such as would defeat his claim for injuries received. *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. Rep. 884,

29: 946

Cited in Kane v. Northern C. R. Co. 128 U. S. 94, 32 L. ed. 341, 9 Sup. Ct. Rep. 16—*Dela-ware, L. & W. R. Co. v. Converse*, 139 U. S. 475, 35 L. ed. 216, 11 Sup. Ct. Rep. 560—*New Jersey & N. Y. R. Co. v. Young*, 1 C. C. A. 430, 1 U. S. App. 96, 49 Fed. 725—*Mason & O. R. Co. v. Yockey*, 43 C. C. A. 233, 103 Fed. 269—*Rocella v. Black Diamond Coal Min. Co.* 57 C. C. A. 568, 121 Fed. 453—*St. Louis Cordage Co. v. Miller*, 63 L.R.A. 554, 61 C. C. A. 480, 126 Fed. 498—*Victor Coal Co. v. Muir*, 20 Colo. 332, 26 L.R.A. 439, 46 Am. St. Rep. 299, 38 Pac. 378—*Davis v. Graham*, 2 Colo. App. 215, 20 Pac. 1007—*Illinois Steel Co. v. Mann*, 170 Ill. 206, 40 L. R. A. 789, 62 Am. St. Rep. 370, 48 N. E. 417—*Rogers v. Leyden*, 127 Ind. 57, 26 N. E. 210—*Walker v. Scott*, 67 Kan. 818, 64 Pac. 615—*Watson v. Kansas & T. Coal Co.* 52 Mo. App. 372—*Lutz v. Atlantic & P. R. Co.* 6 N. M. 505, 16 L.R.A. 826, 30 Pac. 912—*Cerrillos Coal R. Co. v. Deserant*, 9 N. M. 59, 49 Pac. 807—*Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 368, 64 L.R.A. 150, 75 Pac. 537—*Allen v. Logan City*, 10 Utah, 287, 37 Pac. 496—*Gerity v. Haley*, 29 W. Va. 107, 11 S. E. 901—*McKelvey v. Chesapeake & O. R. Co.* 35 W. Va. 513, 14 S. E. 261—*Knight v. Cooper*, 36 W. Va. 234, 14 S. E. 999—*Woodell v. West Virginia Improv. Co.* 38 W. Va. 45, 17 S. E. 386.

98. Judgment in a case involving contributory negligence of plaintiff, an employee, and negligence of a coemployee,—affirmed by equal division of the court. *Chicago & N. W. R. Co. v. McLaughlin*, 119 U. S. 566, 7 Sup. Ct. Rep. 1366,

30: 477

Editorial notes.

Servants' contributory negligence.

33: 656

What acts of an employee amount to contributory negligence precluding a recovery from his employer for injuries caused by electric shock. 50: 564

[Reliance upon orders as affecting contributory negligence of employee. 17 L.R.A. 602.

Disobedience of master's rules as contributory negligence. 24 L.R.A. 657.

Contributory negligence in entering or remaining in employment. 49 L.R.A. 33.

Right of one employing child under statutory age to rely on contributory negligence to defeat liability. 12 L.R.A.(N.S.) 461.]

2. Railroad Cases.

Presumption of Exercise of Due Care, see Evidence, 420.

Sufficiency of Evidence of, see Evidence, 2317.

Question of Law or Fact, see Trial, 406-411.

Instruction as to Fireman's Knowledge as to Absence of Brakes, see Trial, 617.

99. Although a railroad company is guilty of negligence in not providing proper and safe machinery and appliances, in consequence of which neglect an employee is injured, he cannot recover if, with knowledge of the defective condition of the machinery and appliances, he exposed himself to injury from them. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755 *Cited in Kane v. Northern C. R. Co.* 128 U. S. 95, 32 L. ed. 341, 9 Sup. Ct. Rep. 18—*Carpenter v. Mexican Nat. R. Co.* 39 Fed. 317—*Davidson v. Southern P. Co.* 44 Fed. 481—*Southern P. Co. v. Johnson*, 12 C. C. A. 486, 29 U. S. App. 201, 64 Fed. 958—*Overman Wheel Co. v. Griffin*, 14 C. C. A. 612, 33 U. S. App. 147, 67 Fed. 662—*Clyde v. Richmond & D. R. Co.* 18 C. C. A. 469, 25 U. S. App. 642, 72 Fed. 124—*Mason & O. R. Co. v. Yockey*, 43 C. C. A. 233, 103 Fed. 269—*Kansas City S. R. Co. v. Billingslea*, 54 C. C. A. 116, 116 Fed. 342—*St. Louis Cordage Co. v. Miller*, 63 L.R.A. 554, 61 C. C. A. 480, 126 Fed. 498.

Coupling cars.

100. An employee was guilty of negligence in standing to couple cars on the inside of a sharp curve, so that he was crushed by the contact of the cars in consequence of the slipping and passing of the drawbars, when the cars were sufficiently separated on the outside of the curve so that he would not have been injured if he had stood on that side. *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 7 Sup. Ct. Rep. 1166, 30: 1114

Cited in Davidson v. Southern P. Co. 44 Fed. 480—*Memphis & N. Packet Co. v. Hill*, 58 C. C. A. 611, 122 Fed. 247—*St. Louis Cordage Co. v. Miller*, 63 L.R.A. 563, 61 C. C. A. 494, 126 Fed. 512—*Southern P. Co. v. Gloyd*, 70 C. C. A. 530, 138 Fed. 390—*Southern R. Co. v. Logan*, 71 C. C. A. 284, 138 Fed. 728—*Cincinnati, I. St. L. & C. R. Co. v. Long*, 112 Ind. 177, 13 N. E. 659—*Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 593,

23 N. E. 675—*Darracott v. Chesapeake & O. R. Co.* 83 Va. 295, 5 Am. St. Rep. 266, 2 S. E. 511—*Street v. Norfolk & W. R. Co.* 101 Va. 750, 45 S. E. 284.

101. It is not conclusive evidence of contributory negligence, that an employee of a railroad who was injured while coupling cars did not observe the projecting timber on one of the cars which caused his injury, while he was in the discharge of his duty and while his attention was directed to the work in which he was engaged. *Northern P. R. Co. v. Everett*, 152 U. S. 107, 14 Sup. Ct. Rep. 474, 38: 373 *Cited in Linden v. Anchor Min. Co.* 20 Utah, 148, 58 Pac. 355.

102. In an action against a railroad company for damages for injuries received by plaintiff, an employee, while coupling together a box car and a car loaded with bridge timbers, extending so far beyond the end of the car as to leave insufficient space to couple with safety, of which manner of loading he had no notice,—an instruction to the jury that if the car was negligently loaded, with the sticks of timber extending too far beyond the end of the car, and if plaintiff could not, in the exercise of proper diligence, have perceived the projecting timber in time to escape, he was entitled to recover, is not erroneous. *Northern P. R. Co. v. Everett*, 152 U. S. 107, 14 Sup. Ct. Rep. 474, 38: 373 *Cited in Texas & P. R. Co. v. Minnick*, 10 C. C. A. 5, 23 U. S. App. 310, 61 Fed. 639—*Grand Trunk R. Co. v. Tennant*, 14 C. C. A. 181, 21 U. S. App. 682, 66 Fed. 923—*Great Northern R. Co. v. McLaughlin*, 17 C. C. A. 335, 44 U. S. App. 189, 70 Fed. 673—*St. Louis & S. F. R. Co. v. Whittle*, 20 C. C. A. 211, 40 U. S. App. 23, 74 Fed. 311—*Travelers' Ins. Co. v. Randolph*, 24 C. C. A. 311, 47 U. S. App. 260, 78 Fed. 760—*George v. Clark*, 29 C. C. A. 376, 56 U. S. App. 505, 85 Fed. 610—*Mason & O. R. Co. v. Yockey*, 43 C. C. A. 231, 103 Fed. 267—*Kleine v. S. E. Friends Sons Shoe & Clothing Co.* 91 Mo. App. 106—*Thompson v. Bartlett*, 71 N. H. 176, 93 Am. St. Rep. 504, 51 Atl. 633.

103. The possibility that a railway employee, while attempting to make a coupling with a car not equipped with an automatic coupler, as required by the act of March 2, 1893, § 2, might miscalculate the height to which he might safely raise his head, is so inevitably and clearly attached to the risk which, under § 8 of that statute, he does not assume, as to prevent a court from holding, as a matter of law, that he was guilty of contributory negligence which would defeat any recovery in lifting his head a little too high after being warned of the danger. *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 27 Sup. Ct. Rep. 407, 51: 681

Mounting cars to set brakes.

104. An employee in a switchyard of a railroad company has the right to assume, in the absence of notice to the contrary, that it is safe to mount cars for the purpose of setting the brakes, when ordered to do so by the yardmaster. *Northern P. R.*

Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755
Cited in Norfolk & W. R. Co. v. Nunnally, 88 Va. 550, 14 S. E. 867.

Riding an engine.

105. An employee who, equally with the engineer, knew the peril and voluntarily rode with the engineer on the engine, assumed the risk of the engineer's negligence. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, 37: 772

Cited in Gowen v. Harley, 6 C. C. A. 197, 12 U. S. App. 574, 56 Fed. 981—*Thom v. Pittard*, 10 C. C. A. 358, 8 U. S. App. 597, 62 Fed. 238—*Detroit Crude-Oil Co. v. Grable*, 36 C. C. A. 99, 94 Fed. 79—*Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 202, 102 Fed. 111—*Dewey v. Detroit*, G. H. & M. R. Co. 97 Mich. 334, 22 L.R.A. 294, 37 Am. St. Rep. 348, 56 N. W. 756—*Wright v. Southern P. Co.* 14 Utah, 393, 46 Pac. 374—*Faulkner v. Mammoth Mtn. Co.* 23 Utah, 442, 66 Pac. 799—*Cadden v. American Steel Barge Co.* 88 Wis. 420, 60 N. W. 800.

106. An employee of a contractor, engaged in constructing a railroad, is guilty of contributory negligence in riding upon the pilot of an engine, when cars are provided for the employees, and those therein are not injured in the collision. *Griggs v. Houston*, 104 U. S. 553, 26: 840

Cited in Barley v. Southern Indiana R. Co. 30 Ind. App. 410, 66 N. E. 72—*Chaddick v. Lindsay*, 5 Okla. 627, 49 Pac. 940—*Texas & P. R. Co. v. Boyd*, 6 Tex. Civ. App. 212, 24 S. W. 1086.

107. A day laborer on a railroad, employed in constructing and keeping in repair the roadway, who jumps upon the pilot of an engine, after having been warned against riding there, and forbidden to do so, cannot avoid the consequence of his own negligence in taking such risk merely because he was told to hurry and get on anywhere, when there was plenty of room for him in a box car which was provided for carrying the laborers. *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24: 506
Distinguished in *The Manhasset*, 19 Fed. 434—*Missouri P. R. Co. v. McCally*, 41 Kan. 650, 21 Pac. 574.

Cited in Delaware, L. & W. R. Co. v. Converse, 139 U. S. 474, 35 L. ed. 216, 11 Sup. Ct. Rep. 569—*St. Louis & S. F. R. Co. v. Schumacher*, 152 U. S. 81, 38 L. ed. 302, 14 Sup. Ct. Rep. 479—*Northern P. R. Co. v. Egeland*, 163 U. S. 98, 41 L. ed. 86, 16 Sup. Ct. Rep. 975—*Miles v. Atlantic, M. & O. R. Co.* 4 Hughes, 180, Fed. Cas. No. 9, 544—*Ward v. Paducah & M. R. Co.* 4 Fed. 872—*Kresanowski v. Northern P. R. Co.* 5 McCrary, 532, 18 Fed. 232—*Au v. New York, L. E. & W. R. Co.* 29 Fed. 83—*Chicago & N. W. R. Co. v. Davis*, 3 C. C. A. 431, 10 U. S. App. 422, 53 Fed. 63—*Union P. R. Co. v. Jarvi*, 3 C. C. A. 436, 10 U. S. App. 439, 53 Fed. 69—*Whitlock v. Comer*, 57 Fed. 566—*Atchison, T. & S. F. R. Co. v. Reesman*, 23 L.R.A. 773, 9 C. C. A. 28, 19 U. S. App. 596, 60 Fed. 378—*Baltimore & O. R. Co. v. Meyers*, 10 C. C. A. 401, 18 U. S. App. 569, 62 Fed. 374—*MacLeod v. Graven*, 19 C. C. A. 621, 43 U. S. App. 129, 73 Fed. 632—*Chicago, St. P. M. & O. R. Co. v. Myers*, 25 C. C. A.

490, 49 U. S. App. 279, 80 Fed. 364—*Kansas & T. Coal Co. v. Reid*, 29 C. C. A. 479, 57 U. S. App. 464, 85 Fed. 918—*Nelinger v. Cowan*, 42 C. C. A. 24, 101 Fed. 791—*Erie R. Co. v. Moore*, 51 C. C. A. 229, 113 Fed. 272—*Erie R. Co. v. Kane*, 55 C. C. A. 138, 118 Fed. 232—*Gilbert v. Burlington, C. R. & N. R. Co.* 63 C. C. A. 34, 128 Fed. 536—*Lauterer v. Manhattan R. Co.* 63 C. C. A. 42, 128 Fed. 544—*Alabama G. S. R. Co. v. Hawk*, 72 Ala. 116, 47 Am. Rep. 403—*South & North Ala. R. Co. v. Schaeffer*, 75 Ala. 141—*Lilley v. Fletcher*, 81 Ala. 237, 1 So. 273—*Warden v. Louisville & N. R. Co.* 94 Ala. 280, 14 L.R.A. 554, 10 So. 276—*Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 322, 48 Am. Rep. 10—*St. Louis & S. F. R. Co. v. Marker*, 41 Ark. 549—*Bauer v. St. Louis, I. M. & S. R. Co.* 46 Ark. 399—*Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 Ark. 125, 2 S. W. 505—*Colorado C. R. Co. v. Holmes*, 5 Colo. 200—*Colorado C. R. Co. v. Martin*, 7 Colo. 601, 4 Pac. 1118—*Elliott v. Chicago, M. & St. P. R. Co.* 5 Dak. 545, 3 L.R.A. 367, 41 N. W. 758—*Humphreus v. Fremont, E. & M. Valley R. Co.* 8 S. D. 115, 65 N. W. 466—*McGrath v. Pennsylvania Coal Co.* 3 Del. Co. Rep. 241—*Jones v. Baltimore & O. R. Co.* 4 App. D. C. 170—*District of Columbia v. Ashton*, 14 App. D. C. 579—*Sardo v. Moreland*, 17 App. D. C. 226—*Louisville & N. R. Co. v. Ylestra*, 21 Fla. 729—*McCarty v. Boise City Canal Co.* 2 Idaho, 249, 10 Pac. 623—*Knickerbocker Ice Co. v. De Haas*, 37 Ill. App. 197—*Knauss v. Lake Erie & W. R. Co.* 29 Ind. App. 222, 64 N. E. 95—*Barley v. Southern Indiana R. Co.* 30 Ind. App. 410, 66 N. E. 72—*Blake v. Burlington, C. R. & N. R. Co.* 89 Iowa, 12, 21 L.R.A. 560, 56 N. W. 405—*Haynes v. Ft. Dodge & O. R. Co.* 118 Iowa, 396, 92 N. W. 57—*Atchison, T. & S. F. R. Co. v. Lindley*, 42 Kan. 725, 6 L.R.A. 652, 16 Am. St. Rep. 515, 22 Pac. 783—*Tennis v. Interstate Consol. Rapid Transit R. Co.* 45 Kan. 508, 25 Pac. 876—*Atchison, T. & S. F. R. Co. v. O'Melia*, 1 Kan. App. 380, 41 Pac. 437—*Missouri P. R. Co. v. Haynes*, 1 Kan. App. 595, 42 Pac. 259—*St. Louis & S. F. R. Co. v. Stevens*, 3 Kan. App. 189, 43 Pac. 434—*Ashland Coal & I. R. Co. v. Wallace*, 101 Ky. 639, 42 S. W. 744—*Woods v. Jones*, 34 La. Ann. 1088—*Houston v. Vicksburg, S. & P. R. Co.* 39 La. Ann. 799, 2 So. 562—*Weeks v. New Orleans, S. F. & L. R. Co.* 40 La. Ann. 802, 8 Am. St. Rep. 560, 5 So. 72—*Baltimore & O. R. Co. v. State*, 62 Md. 487, 50 Am. Rep. 233—*Glover v. Scotten*, 82 Mich. 374, 46 N. W. 936—*Nieboer v. Detroit Electric R. Co.* 128 Mich. 489, 87 N. W. 626—*Bardwell v. Mobile & O. R. Co.* 63 Miss. 578, 56 Am. Rep. 842—*Francis v. Kansas City, St. J. & C. B. R. Co.* 110 Mo. 398, 19 S. W. 935—*Zuendt v. Missouri P. R. Co.* 124 Mo. 345, 25 S. W. 229—*Aufdenberg v. St. Louis, I. M. & S. R. Co.* 132 Mo. 576, 34 S. W. 485—*Tuley v. Chicago, B. & Q. R. Co.* 41 Mo. App. 436—*Alexander v. Tennessee & L. C. Gold & S. Min. Co.* 3 N. M. 267, 3 Pac. 735—*Candelaria v. Atchison, T. & S. F. R. Co.* 6 N. M. 274, 27 Pac. 497—*Howard v. Southern R. Co.* 132 N. C. 711, 44 S. E. 401—*Radley v. Columbia R. Co.* 44 Or. 344, 75 Pac. 212—*Lehigh Valley R. Co. v. Greiner*, 113 Pa. 608, 6 Atl. 246—*Gunter v. Graniteville Mfg. Co.* 15 S. C. 451—*Renneker v. South Carolina R. Co.* 20 S. C. 221—*Darwin v. Charlotte, C. & A. R. Co.* 23 S. C. 538, 55 Am. Rep. 32—*Houston & T. C. R. Co. v. Clemmons*, 55 Tex. 91, 40 Am. Rep. 799—*Texas & P. R. Co. v. Boyd*.

6 Tex. Civ. App. 213, 24 S. W. 1086—Olsen v. Oregon Short Line & U. N. R. Co. 9 Utah, 139, 33 Pac. 623—Woods v. Southern P. Co. 9 Utah, 151, 33 Pac. 628—Dun v. Seaboard & R. R. Co. 78 Va. 656, 49 Am. Rep. 388—Norfolk & W. R. Co. v. Ferguson, 79 Va. 247—Darracott v. Chesapeake & O. R. Co. 83 Va. 295, 5 Am. St. Rep. 266, 2 S. E. 511—Shenandoah Valley R. Co. v. Lucado, 86 Va. 395, 10 S. E. 422—Richmond & D. R. Co. v. Morris, 31 Gratt. 203—Richmond & D. R. Co. v. Anderson, 31 Gratt. 314, 31 Am. Rep. 750—Norfolk & W. R. Co. v. Jackson, 1 Va. Dec. 686, 5 S. E. 690—Bailey v. Tacoma Traction Co. 16 Wash. 54, 47 Pac. 241—Washington v. Baltimore & O. R. Co. 17 W. Va. 214—Downey v. Chesapeake & O. R. Co. 28 W. Va. 738—Beyel v. Newport News & M. Valley R. Co. 34 W. Va. 544, 12 S. E. 532—Eastburn v. Norfolk & W. R. Co. 34 W. Va. 691, 12 S. E. 819—Carrico v. West Virginia C. & P. R. Co. 39 W. Va. 98, 24 L.R.A. 54, 19 S. E. 571—Fisher v. West Virginia & P. R. Co. 42 W. Va. 201, 33 L.R.A. 76, 24 S. E. 570.

—Editorial note.

[Contributory negligence of railroad employee riding on engine. 14 L.R.A. 552.]

Riding on hand car or flat car.

108. An employee of a railroad company is guilty of the grossest negligence in running a hand car into a deep cut, without preparations to watch for or warn a train known to be due. Goodlett v. Louisville & N. R. Co. 122 U. S. 391, 7 Sup. Ct. Rep. 1254, 30: 1230

Cited in Chicago & N. W. R. Co. v. Davis, 3 C. C. A. 431, 10 U. S. App. 422, 53 Fed. 63—Union P. R. Co. v. Jarvi, 3 C. C. A. 436, 10 U. S. App. 439, 53 Fed. 69—St. Louis Cordage Co. v. Miller, 63 L.R.A. 562, 61 C. C. A. 492, 126 Fed. 510.

109. Where the foreman and the train-master on a railroad had warned the men employed thereon, not to ride on the flat cars, and had provided a caboose in which plaintiff, a laborer on a gravel train, was told it was safer to ride, and he selected a place he knew to be dangerous, when cars were being coupled, sat with his legs hanging over the side of a flat car in a position in which he could be easily jostled off, and paid so little attention to what he knew was going on that he not only did not watch or see the other cars coming down, but failed to hear a warning shout heard by others in the vicinity, at least one of whom was more remote than he,—he cannot recover of the company for being thrown off and injured by the backing down of the train at too great a speed. St. Louis & S. F. R. Co. v. Schumacher, 152 U. S. 77, 14 Sup. Ct. Rep. 479, 38: 361

Cited in Fitchburg R. Co. v. Nichols, 29 C. C. A. 502, 50 U. S. App. 297, 85 Fed. 947—Richmond Locomotive Works v. Ramsey, 65 C. C. A. 506, 131 Fed. 200—Demko v. Carbon Hill Coal Co. 69 C. C. A. 76, 136 Fed. 164—Jones v. Baltimore & O. R. Co. 4 App. D. C. 173—Neeley v. Southwestern Cotton Seed Oil Co. 13 Okla. 370, 64 L.R.A. 151, 75 Pac. 537.

Taking dangerous position in railroad yard.

110. A repairer of tracks employed in a

railroad yard, which were used for the making up of trains, and who was familiar with the manner in which the work was done, and who, knowing that the switch engine was busy moving cars and making up trains, placed himself with his face away from the direction from which cars were to be expected and continued his work without ever looking back, although there was no obstruction to his vision and by ordinary attention he could have observed the approaching cars, and while so employed was struck by the switch engine moving slowly, and was injured, was guilty of contributory negligence which prevents his recovery from the railroad company for his injury. Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. Rep. 835, 36: 758

Cited in Texas & P. R. Co. v. Gentry, 163 U. S. 366, 41 L. ed. 192, 18 Sup. Ct. Rep. 1104—Kenna v. Central P. R. Co. 101 Cal. 30, 35 Pac. 332—Southern Kansas R. Co. v. Moore, 49 Kan. 627, 31 Pac. 138—Davis v. New York, N. H. & H. R. Co. 159 Mass. 535, 34 N. E. 1070.

Going under car.

111. A car repairer by his own inexcusable negligence precludes any recovery for his death, when he goes under a car standing on a track with a train in front of it with the certainty that a caboose is to be attached to the rear, without putting out a flag or other signal to protect himself, and fails to leave the place of danger after hearing the caboose backing down, with ample time to get out, although he relies on another car repairer, who is standing outside, to give warning and prevent the caboose from striking the car under which he is working. Southern P. Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. Rep. 338, 40: 485

Cited in Spiro v. Felton, 73 Fed. 93—Nelson v. New Orleans & N. E. R. Co. 40 C. C. A. 678, 100 Fed. 737—Whitcomb v. McNulty, 45 C. C. A. 94, 105 Fed. 867—Chicago, B. & Q. R. Co. v. McGraw, 22 Colo. 368, 45 Pac. 383—Barksdale v. Charleston & W. C. R. Co. 66 S. C. 211, 44 S. E. 743—Anderson v. Daly Min. Co. 16 Utah. 40, 50 Pac. 815—Pool v. Southern P. Co. 20 Utah, 227, 58 Pac. 326.

Cleaning engine before inspection.

112. A locomotive fireman who, for his own convenience, attempts to discharge his duties of cleaning the engine at the end of his trip, without waiting for it to be inspected and repaired, though knowing that he will have plenty of time to do his work after such inspection, cannot hold the company responsible for a defect on account of which he is injured, which would undoubtedly have been disclosed by the inspection and then repaired. Patton v. Texas & P. R. Co. 179 U. S. 658, 21 Sup. Ct. Rep. 275, 45: 361

Cited in The Santiago, 69 C. C. A. 655, 137 Fed. 325.

Touching uninsulated parts of electric machinery.

113. A street railway pitman, by unnecessarily touching the uninsulated parts in adjusting the leads connecting the motive power of a street car with the overhead cur-

rent, relieves the company from liability for his death from the resulting shock, although the conductor of the car may have been negligent in permitting the trolley pole to come in contact with the trolley wire. *Looney v. Metropolitan R. Co.* 200 U. S. 480, 26 Sup. Ct. Rep. 303, 50: 564

Using defective machinery after promise to repair.

Burden of Proof, see Evidence, 421.

Question of Law or Fact, see Trial, 406.

114. If the servant of a railroad company, who has knowledge of defects in machinery, gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the belief that it will be put in proper condition within a reasonable time, does not make him guilty of contributory negligence. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25: 612

Distinguished in *Hayball v. Detroit, G. H. & M. R. Co.* 114 Mich. 140, 72 N. W. 145.

Cited in *District of Columbia v. McElligott*, 117 U. S. 629, 29 L. ed. 948, 6 Sup. Ct. Rep. 884.—*Young v. New Jersey & N. Y. R. Co.* 46 Fed. 181—*Gowen v. Harley*, 6 C. C. A. 198, 12 U. S. App. 574, 56 Fed. 981—*Homestake Min. Co. v. Fullerton*, 16 C. C. A. 549, 36 U. S. App. 82, 69 Fed. 927—*McPeck v. Central Vermont R. Co.* 25 C. C. A. 113, 50 U. S. App. 27, 79 Fed. 594—*Lehigh Valley Coal Co. v. Warrek*, 28 C. C. A. 542, 55 U. S. App. 437, 84 Fed. 868—*Yager v. Atlantic, M. & O. R. Co.* 88 Fed. 776—*Detroit Crude-Oil Co. v. Grable*, 36 C. C. A. 99, 94 Fed. 78—*Narramore v. Cleveland, C. C. & St. L. R. Co.* 48 L.R.A. 75, 37 C. C. A. 502, 96 Fed. 301—*Choctaw, O. & G. R. Co. v. Holloway*, 52 C. C. A. 268, 114 Fed. 466—*Rocella v. Black Diamond Coal Min. Co.* 57 C. C. A. 575, 121 Fed. 459—*Cudahy Packing Co. v. Skoumal*, 60 C. C. A. 309, 125 Fed. 473—*Musser-Sauntry Land, Logging & Mfg. Co. v. Brown*, 61 C. C. A. 210, 126 Fed. 144—*Eureka Co. v. Bass*, 81 Ala. 214, 60 Am. Rep. 152, 8 So. 216—*Lumber Co. v. Glenwood Lumber Co.* 127 Cal. 602, 49 L.R.A. 39, 60 Pac. 176—*Cheaney v. Ocean S. S. Co.* 92 Ga. 731, 44 Am. St. Rep. 113, 19 S. E. 33—*Missouri Furnace Co. v. Abend*, 107 Ill. 52, 47 Am. Rep. 425—*Weber Wagon Co. v. Kehl*, 40 Ill. App. 587—*Gunning System v. La Pointe*, 113 Ill. App. 412—*Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 33, 5 Am. St. Rep. 578, 14 N. E. 721—*McFarlan Carriage Co. v. Potter*, 153 Ind. 115, 53 N. E. 465—*Romona Oolitic Stone Co. v. Phillips*, 11 Ind. App. 151, 39 N. E. 96—*Valparaiso v. Ramsey*, 11 Ind. App. 217, 38 N. E. 875—*Indianapolis Union R. Co. v. Ott*, 11 Ind. App. 568, 38 N. E. 842—*East Chicago Iron & Steel Co. v. Williams*, 17 Ind. App. 575, 47 N. E. 26—*McFarlan Carriage Co. v. Potter*, 21 Ind. App. 697, 51 N. E. 737—*Daugherty v. Midland Steel Co.* 23 Ind. App. 84, 53 N. E. 844—*Atchison, T. & S. F. R. Co. v. Midgett*, 1 Kan. App. 142, 40 Pac. 905—*Poirier v. Carroll*, 35 La. Ann. 704—*Roux v. Blodgett & D. Lumber Co.* 85 Mich. 525, 13 L.R.A. 731, 24 Am. St. Rep. 102, 48 N. W. 1092—*Mann v. Lake Shore & M. S. R. Co.* 124 Mich. 644, 83 N. W. 596—*Greene v. Minneapolis & St. L. R. Co.* 31 Minn. 250, 47 Am. Rep. 785, 17 N. W. 378—*Hyatt v. Hannibal & St. J. R. Co.* 19 Mo. App. 295—*McAndrews v. Montana Union R. Co.* 15 Mont. 298, 39 Pac. 85—*Kelley v.*

Fourth of July Min. Co. 16 Mont. 501, 41 Pac. 273—*Taylor v. Nevada-California Oregon R. Co.* 26 Nev. 427, 69 Pac. 858—*Belleville Stone Co. v. Mooney*, 60 N. J. L. 330, 38 Atl. 835—*Dowd v. Erie R. Co.* 70 N. J. L. 455, 37 Atl. 248—*Lutz v. Atlantic & P. R. Co.* 6 N. M. 505, 16 L. R.A. 826, 30 Pac. 912—*Rice v. Eureka Paper Co.* 70 App. Div. 354, 75 N. Y. Supp. 49—*Rice v. Eureka Paper Co.* 174 N. Y. 392, 62 L. R. A. 614, 95 Am. St. Rep. 585, 66 N. E. 979—*Union Mfg. Co. v. Morrissey*, 40 Ohio St. 154, 48 Am. Rep. 669—*Louisville & N. R. Co. v. Kenley*, 92 Tenn. 216, 21 S. W. 326—*Texas & P. R. Co. v. Kane*, 2 Tex. App. Civ. Cas. (Willson) § 19—*Texas & N. O. R. Co. v. Bingle*, 9 Tex. Civ. App. 325, 29 S. W. 674—*Virginia & N. C. Wheel Co. v. Chalkley*, 98 Va. 68, 34 S. E. 976—*Crooker v. Pacific Lounge & Mattress Co.* 29 Wash. 39, 69 Pac. 359—*Green v. Western American Co.* 30 Wash. 109, 70 Pac. 310—*Woodell v. West Virginia Improv. Co.* 38 W. Va. 45, 17 S. E. 386—*Stephenson v. Duncan*, 73 Wis. 407, 9 Am. St. Rep. 806, 41 N. W. 337—*Erdman v. Illinois Steel Co.* 95 Wis. 14, 60 Am. St. Rep. 66, 69 N. W. 903

d. Fellow Servants and Their Negligence.

1. In General.

Negligence in Selection and Retention of Fellow Servants, see *supra*, II, a, 3.

Assuming Risk of Obeying Fellow Servant's Orders, see *supra*, II, b, 5.

Federal Question as to, see Appeal and Error, 1797.

State Decisions or Laws as Rules of Decision in Federal Courts, see Courts, 2019, 2022.

See also *supra*, 19, 98.

115. The master is not liable for injuries to a servant, occasioned by the negligence of a coservant. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, 28: 787

Cited in *Missouri P. R. Co. v. Mackey*, 127 U. S. 208, 32 L. ed. 108, 8 Sup. Ct. Rep. 1161—*New England R. Co. v. Conroy*, 175 U. S. 328, 44 L. ed. 184, 20 Sup. Ct. Rep. 85—*The Schem*, 42 Fed. 67—*Kerlin v. Chicago, P. & St. L. R. Co.* 50 Fed. 186—*Gabrielson v. Waydell*, 67 Fed. 343—*Balch v. Haas*, 20 C. C. A. 156, 36 U. S. App. 693, 73 Fed. 979—*Olson v. Oregon Coal & Nav. Co.* 44 C. C. A. 53, 104 Fed. 576—*Louisville & N. R. Co. v. Stuber*, 54 L.R.A. 699, 48 C. C. A. 154, 108 Fed. 939—*Parrish v. Pensacola & A. R. Co.* 28 Fla. 282, 9 So. 696—*Merritt v. Victoria Lumber Co.* 111 La. 164, 35 So. 497—*Stucke v. Orleans R. Co.* 50 La. Ann. 199, 23 So. 342—*McMaster v. Illinois C. R. Co.* 65 Miss. 268, 7 Am. St. Rep. 653, 4 So. 59—*Parker v. Hannibal & St. J. R. Co.* 109 Mo. 384, 18 L.R.A. 808, 19 S. W. 1119—*Hastings v. Montana Union R. Co.* 18 Mont. 498, 46 Pac. 264—*McLaine v. Head & D. Co.* 71 N. H. 301, 58 L.R.A. 466, 93 Am. St. Rep. 522, 52 Atl. 545—*Atchison, T. & S. F. R. Co. v. Martin*, 7 N. M. 168, 34 Pac. 536—*Anderson v. Bennett*, 16 Or. 520, 8 Am. St. Rep. 311, 10 Pac. 765—*Pool v. Southern P. Co.* 7 Utah. 308, 26 Pac. 654—*Webb v. Denver & R. G. W. R. Co.* 7 Utah. 367, 26 Pac. 981—*Jones v. Old Dominion Cotton Mills*, 82 Va. 153, 3 Am. St. Rep. 92—*Norfolk & W. R. Co. v. Jackson*, 85 Va. 491, 8 S. E. 370.

116. The common master is not liable to one servant for injuries caused by the negligence of a fellow servant in the same employment. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25: 612

Cited in Armour v. Hahn, 111 U. S. 319, 28 L. ed. 442, 4 Sup. Ct. Rep. 433—*King v. Ohio & M. R. Co.* 11 Biss. 366, 14 Fed. 280—*Missouri P. R. Co. v. Texas & P. R. Co.* 31 Fed. 527—*Stockmeyer v. Reed*, 55 Fed. 261—*O'Brien v. Chicago & N. W. R. Co.* 116 Fed. 505—*Farrish v. Pensacola & A. R. Co.* 28 Fla. 282, 9 So. 696—*Stucke v. Orleans R. Co.* 50 La. Ann. 203, 23 So. 342—*South West Improv. Co. v. Smith*, 85 Va. 316, 17 Am. St. Rep. 59, 7 S. E. 365.

117. An employer is exempt from liability for injuries to a servant caused by another servant. *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. Rep. 397, 33: 656
Cited in New England R. Co. v. Conroy, 175 U. S. 335, 44 L. ed. 187, 20 Sup. Ct. Rep. 85—*Baltimore & O. R. Co. v. Andrews*, 17 L.R.A. 192, 1 C. C. A. 640, 6 U. S. App. 75, 50 Fed. 732—*The City of Norwalk*, 55 Fed. 102—*The Bolivia*, 59 Fed. 628—*Hermann v. Port Blakely Mill Co.* 71 Fed. 863—*Carlson v. United New York Sandy Hook Pilots' Asso.* 93 Fed. 471—*Olson v. Oregon Coal & Nav. Co.* 44 C. C. A. 53, 104 Fed. 576—*Ell v. Northern P. R. Co.* 1 N. D. 349, 12 L.R.A. 101, 26 Am. St. Rep. 621, 48 N. W. 222—*Parker v. Hannibal & St. J. R. Co.* 109 Mo. 385, 18 L.R.A. 809, 19 S. W. 1119—*Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 406, 48 L.R.A. 408, 77 Am. St. Rep. 721, 55 S. W. 108—*Sofeld v. Guggenheim Smelting Co.* 64 N. J. L. 613, 50 L.R.A. 431, 46 Atl. 711—*Geoghegan v. Atlas S. S. Co.* 3 Misc. 229, 22 N. Y. Supp. 749—*Richmond Locomotive & Mach. Works v. Ford*, 94 Va. 644, 27 S. E. 509.

118. The fellow-servant doctrine applies in case of an injury inflicted on one employee by another in the same common employment, and acting under the same immediate direction. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32: 107
Cited in Dixon v. Chicago & A. R. Co. 109 Mo. 423, 18 L.R.A. 799, 19 S. W. 412—*Relyea v. Kansas City, Ft. S. & G. R. Co.* 112 Mo. 97, 18 L.R.A. 821, 20 S. W. 48v.

118a. Whether the master is responsible for injuries caused by the negligence or misconduct of a fellow servant engaged in the same general business, *quære*. *Northwestern Union Packet Co. v. McCue*, 17 Wall. 508, 21: 705
Cited in Miller v. Baltimore & O. R. Co. Fed. Cas. No. 9,560—*The Clatsop Chief*, 7 Sawy. 278, 8 Fed. 166.

Editorial notes.

Fellow servants and their negligence.
25: 612; 33: 651; 33: 656; 37: 773;
40: 418

[Liability of master for injuries caused to one servant by the incompetency of a fellow servant. 25 L.R.A. 710.]

2. Delegation of Master's Duty.

See also *supra*, 53; *infra*, 128, 133, 160, 166.

119. No duty required of the master for

the safety and protection of his servants can be transferred, so as to exonerate him from liability. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755

120. The master cannot delegate to others the duty required of him for the safety and protection of his servants, so as to exonerate himself from liability for the negligence of persons to whom such duty is delegated. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755

Cited in Union P. R. Co. v. Daniels (Union P. R. Co. v. Snyder) 152 U. S. 688, 38 L. ed. 600, 14 Sup. Ct. Rep. 756—*Northern P. R. Co. v. Hambly*, 154 U. S. 357, 38 L. ed. 1013, 14 Sup. Ct. Rep. 983—*Texas & P. R. Co. v. Barrett*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 707—*New England R. Co. v. Conroy*, 175 U. S. 334, 44 L. ed. 187, 20 Sup. Ct. Rep. 85—*The Noddleburn*, 28 Fed. 858—*Van Avery v. Union P. R. Co.* 35 Fed. 41—*Carpenter v. Mexican Nat. R. Co.* 39 Fed. 317—*Pike v. Chicago & A. R. Co.* 41 Fed. 98—*Baltimore & O. R. Co. v. Andrews*, 17 L.R.A. 192, 1 C. C. A. 639, 6 U. S. App. 75, 50 Fed. 731—*New York & N. E. R. Co. v. Hyde*, 5 C. C. A. 467, 5 U. S. App. 443, 56 Fed. 193—*Little Rock & M. R. Co. v. Moseley*, 6 C. C. A. 228, 12 U. S. App. 574, 56 Fed. 1012—*Northwestern Fuel Co. v. Danielson*, 6 C. C. A. 638, 12 U. S. App. 688, 57 Fed. 918—*Louisville & N. R. Co. v. Ward*, 10 C. C. A. 170, 18 U. S. App. 683, 61 Fed. 930—*Atchison, T. & S. F. R. Co. v. Myers*, 11 C. C. A. 444, 24 U. S. App. 295, 63 Fed. 798—*Alaska Treadwell Gold Min. Co. v. Whelan*, 12 C. C. A. 228, 29 U. S. App. 1, 64 Fed. 465—*Northern P. R. Co. v. Poirier*, 15 C. C. A. 55, 29 U. S. App. 583, 67 Fed. 884—*Frost v. Oregon Short Line & U. N. R. Co.* 69 Fed. 939—*Hermann v. Port Blakely Mill Co.* 71 Fed. 855—*The Pioneer*, 78 Fed. 608—*Sommer v. Carbon Hill Coal Co.* 32 C. C. A. 160, 50 U. S. App. 519, 89 Fed. 58—*F. C. Austin Mfg. Co. v. Johnson*, 32 C. C. A. 315, 60 U. S. App. 661, 89 Fed. 682—*Felton v. Bullard*, 37 C. C. A. 6, 94 Fed. 786—*Port Blakely Mill Co. v. Garrett*, 38 C. C. A. 344, 97 Fed. 539—*New Orleans & N. E. R. Co. v. Clements*, 40 C. C. A. 472, 100 Fed. 422—*Toledo Brewing & Malting Co. v. Bosch*, 41 C. C. A. 485, 101 Fed. 535—*Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 204, 102 Fed. 112—*Stubber v. Louisville & N. R. Co.* 102 Fed. 423—*Swensen v. Bender*, 51 C. C. A. 633, 114 Fed. 7—*Chambers v. American Tin Plate Co.* 64 C. C. A. 132, 129 Fed. 564—*Denver & R. G. R. Co. v. Sipes*, 26 Colo. 24, 55 Pac. 1093—*Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 263, 40 Pac. 251—*Elliot v. Chicago, M. & St. P. R. Co.* 5 Dak. 539, 3 L.R.A. 365, 41 N. W. 758—*Bennett v. Northern P. R. Co.* 2 N. D. 116, 13 L.R.A. 468, 49 N. W. 403—*Cameron v. Great Northern R. Co.* 8 N. D. 131, 77 N. W. 1016—*McDade v. Washington & G. R. Co.* 5 Mackey, 154—*Mackey v. Baltimore & P. R. Co.* 8 Mackey, 293—*Baltimore & P. R. Co. v. Elliot*, 9 App. D. C. 350—*Consolidated Coal Co. v. Wombacher*, 134 Ill. 64, 24 N. E. 627—*Edward Hines Lumber Co. v. Ligas*, 172 Ill. 319, 64 Am. St. Rep. 38, 50 N. E. 225—*Edward Hines Lumber Co. v. Ligas*, 68 Ill. App. 529—*Pennsylvania Co. v. Whitcomb*, 111 Ind. 216, 12 N. E. 380—*Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 444, 10 Am. St. Rep. 67, 20 N. E. 287—*Ohio & M. R. Co. v.*

Pearcy, 128 Ind. 203, 27 N. E. 479—Clarke v. Pennsylvania Co. 132 Ind. 201, 17 L.R.A. 812, 31 N. E. 808—Indiana, I. & I. R. Co. v. Snyder, 140 Ind. 657, 39 N. E. 912—Evansville & T. H. R. Co. v. Holcomb, 9 Ind. App. 207, 36 N. E. 39—Fink v. Des Moines Ice Co. 84 Iowa, 326, 51 N. W. 153—Ashland Coal & I. R. Co. v. Wallace, 101 Ky. 638, 42 S. W. 744—Rogers v. Ludlow Mfg. Co. 144 Mass. 205, 59 Am. Rep. 68, 11 N. E. 77—Moynihan v. Hills Co. 146 Mass. 595, 4 Am. St. Rep. 348, 16 N. E. 574—Van Dusen v. Letellier, 78 Mich. 504, 44 N. W. 572—Morton v. Detroit, B. C. & A. R. Co. 81 Mich. 431, 46 N. W. 111—Sadowski v. Michigan Car Co. 84 Mich. 107, 47 N. W. 598—Roux v. Blodgett & D. Lumber Co. 94 Mich. 615, 54 N. W. 402—Dewey v. Detroit, G. H. & M. R. Co. 97 Mich. 338, 22 L.R.A. 295, 37 Am. St. Rep. 348, 56 N. W. 756—McIntyre v. Detroit Safe Co. 129 Mich. 389, 89 N. W. 39—McDonald v. Michigan C. R. Co. 132 Mich. 377, 102 Am. St. Rep. 426, 93 N. W. 1041—Dixon v. Chicago & A. R. Co. 109 Mo. 421, 18 L.R.A. 799, 19 S. W. 412—Coontz v. Missouri P. R. Co. 121 Mo. 659, 26 S. W. 661—Rodney v. St. Louis S. W. R. Co. 127 Mo. 690, 28 S. W. 887—Bartley v. Trorlicht, 49 Mo. App. 232—Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 402, 51 Am. St. Rep. 604, 31 Atl. 619—Flanigan v. Guggenheim Smelting Co. 63 N. J. L. 664, 44 Atl. 762—Cerrillos Coal R. Co. v. Deserant, 9 N. M. 53, 49 Pac. 807—Eaton v. New York C. & H. R. R. Co. 14 App. Div. 25, 43 N. Y. Supp. 666—Chesson v. John L. Roper Lumber Co. 118 N. C. 67, 23 S. E. 925—Stewart v. Toledo Bridge Co. 15 Ohio C. C. 610—Lake Shore & M. S. R. Co. v. Gilday, 16 Ohio C. C. 658—Neeley v. Southwestern Cotton Seed Oil Co. 13 Okla. 375, 64 L.R.A. 152, 75 Pac. 537—Anderson v. Bennett, 16 Or. 531, 8 Am. St. Rep. 311, 19 Pac. 765—Reddon v. Union P. R. Co. 5 Utah, 353, 15 Pac. 262—Pool v. Southern P. Co. 7 Utah, 308, 26 Pac. 654—Webb v. Denver & R. G. W. R. Co. 7 Utah, 367, 26 Pac. 981—Chapman v. Southern P. Co. 12 Utah, 40, 41 Pac. 551—Richmond & D. R. Co. v. George, 88 Va. 228, 13 S. E. 429—Norfolk & W. R. Co. v. Ampey, 93 Va. 129, 25 S. E. 226—Norfolk & W. R. Co. v. Wade, 102 Va. 143, 45 S. E. 915—Johnson v. Chesapeake & O. R. Co. 38 W. Va. 211, 18 S. E. 573—Cadden v. American Steel Barge Co. 88 Wis. 420, 60 N. W. 800.

121. If, instead of himself performing the positive obligations which he owes to his servants, the master engages another to do them for him, he is liable for the neglect of that other, which is the neglect of the master to do the things which it is his duty to perform. *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. Rep. 843, 40: 994 *Northern P. R. Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. Rep. 848, 40: 999 *Cited in Reed v. Stockmeyer*, 20 C. C. A. 386, 34 U. S. App. 727, 74 Fed. 192—*Oregon Short Line & U. N. R. Co. v. Frost*, 21 C. C. A. 192, 44 U. S. App. 606, 74 Fed. 971—*Bunker Hill & S. Min. & Concentrating Co. v. Schnellling*, 24 C. C. A. 568, 48 U. S. App. 331, 79 Fed. 266—*Pennsylvania R. Co. v. La Rue*, 27 C. C. A. 365, 55 U. S. App. 20, 81 Fed. 150—*Port Blakely Mill Co. v. Garrett*, 38 C. C. A. 345, 97 Fed. 539—*Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 44, 47 C. C. A. 369, 108 Fed. 337—*Weeks v. Scharer*, 49 C. C. A. 377, 111 Fed. 335—*Western U.*

Telegraph Co. v. Tracy, 52 C. C. A. 170, 114 Fed. 284—*Chicago House Wrecking Co. v. Birney*, 54 C. C. A. 462, 117 Fed. 76—*Cumberland Teleph. & Telegr. Co. v. Bills*, 62 C. C. A. 623, 128 Fed. 275—*Chambers v. American Tin Plate Co.* 64 C. C. A. 132, 129 Fed. 564—*Bunker Hill & S. Min. & Concentrating Co. v. Jones*, 65 C. C. A. 370, 130 Fed. 820—*Phoenix Bridge Co. v. Castleberry*, 65 C. C. A. 486, 131 Fed. 180—*Baltimore & O. R. Co. v. Elliott*, 9 App. D. C. 350—*McCauley v. Southern R. Co.* 10 App. D. C. 564—*Foley v. Cudahy Packing Co.* 119 Iowa, 256, 93 N. W. 284—*McGinn v. McCormick*, 109 La. 403, 33 So. 382—*Fogarty v. St. Louis Transfer Co.* 180 Mo. 507, 79 S. W. 664—*Goodwell v. Montana C. R. Co.* 18 Mont. 302, 45 Pac. 210—*Vogel v. American Bridge Co.* 180 N. Y. 382, 70 L.R.A. 730, 73 N. E. 1—*Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 386, 70 Am. St. Rep. 687, 47 S. W. 493—*Jackson v. Norfolk & W. R. Co.* 43 W. Va. 389, 46 L.R.A. 346, 27 S. E. 278.

122. The duty of exercising reasonable care in furnishing suitable and safe machinery and appliances, and keeping them in repair, is a personal obligation which the master cannot rid himself of by delegating it to an agent to perform. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25: 612

Cited in Frost v. Oregon Short Line & U. N. R. Co. 69 Fed. 939—*Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 627, 43 U. S. App. 113, 73 Fed. 638—*The Pioneer*, 78 Fed. 608—*Pennsylvania R. Co. v. La Rue*, 27 C. C. A. 365, 55 U. S. App. 20, 81 Fed. 150—*Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 310, 96 Fed. 716—*Ellis v. Northern P. R. Co.* 103 Fed. 417—*Tracy v. Western U. Telegr. Co.* 110 Fed. 104—*Re California Nav. & Improv. Co.* 110 Fed. 673—*Cumberland Teleph. & Telegr. Co. v. Bills*, 62 C. C. A. 623, 128 Fed. 275—*Chambers v. American Tin Plate Co.* 64 C. C. A. 132, 129 Fed. 564—*Mackey v. Baltimore & P. R. Co.* 8 Mackey, 294—*Indiana, I. & I. R. Co. v. Snyder*, 140 Ind. 659, 39 N. E. 912—*Moynihan v. Hills Co.* 146 Mass. 592, 4 Am. St. Rep. 348, 16 N. E. 574—*Walsh v. New York & N. E. R. Co.* 160 Mass. 572, 39 Am. St. Rep. 514, 36 N. E. 584—*Tracy v. Western U. Telegr. Co.* 32 Pittsb. L. J. N. S. 43—*Cunningham v. Union P. R. Co.* 4 Utah, 213, 7 Pac. 795—*Johnson v. Chesapeake & O. R. Co.* 38 W. Va. 211, 18 S. E. 573.

123. The duty of the master is not performed by the appointment of an agent to supply reasonably and adequately safe instrumentalities for the servant, but he is liable, if the agent fails to do so. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25: 612 *Cited in Northern P. R. Co. v. Herbert*, 116 U. S. 648, 29 L. ed. 758, 6 Sup. Ct. Rep. 590—*Union P. R. Co. v. Daniels* (Union P. R. Co. v. Snyder) 152 U. S. 688, 38 L. ed. 600, 14 Sup. Ct. Rep. 756—*Hermann v. Port Blakely Mill Co.* 71 Fed. 855—*Western U. Telegr. Co. v. Tracy*, 52 C. C. A. 170, 114 Fed. 284—*Wilson v. Willimantic Linen Co.* 50 Conn. 460, 47 Am. Rep. 653—*McElligott v. Randolph*, 61 Conn. 162, 29 Am. St. Rep. 181, 22 Atl. 1094—*Gerrish v. New Haven Ice Co.* 63 Conn. 16, 27 Atl. 235—*McQueeney v. Chicago, M. & St. P. R. Co.* 120 Iowa, 524, 94 N. W. 1124—*Holden v. Fitchburg R. Co.* 129 Mass. 278, 37 Am. Rep. 343—*Flanigan v. Guggenheim Smelting Co.* 63 N. J. L. 664, 44 Atl. 762—*Carroll v.*

Tidewater Oil Co. 67 N. J. L. 684, 52 Atl. 275.

124. The duty of a master to provide reasonably safe tools and machinery and place to work does not go to the extent of a guarantee of safety, but does require that reasonable precautions be taken to secure safety; and this obligation cannot be avoided by delegating it to others. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, 37: 772

Cited in *Union P. R. Co. v. Daniels* (Union P. R. Co. v. Snyder) 152 U. S. 689, 38 L. ed. 600, 14 Sup. Ct. Rep. 756—*Patton v. Texas & P. R. Co.* 179 U. S. 664, 45 L. ed. 365, 21 Sup. Ct. Rep. 275—*Pullman's Palace Car Co. v. Harkins*, 5 C. C. A. 837, 17 U. S. App. 22, 55 Fed. 939—*Union P. R. Co. v. Novak*, 9 C. C. A. 639, 15 U. S. App. 400, 61 Fed. 583—*Southern P. Co. v. Johnson*, 12 C. C. A. 488, 29 U. S. App. 201, 64 Fed. 960—*Texas & P. R. Co. v. Smith*, 31 L.R.A. 325, 14 C. C. A. 513, 30 U. S. App. 176, 87 Fed. 528—*Burke v. Anderson*, 16 C. C. A. 445, 34 U. S. App. 132, 69 Fed. 818—*Frost v. Oregon Short Line & U. N. R. Co.* 69 Fed. 940—*Western Coal & Min. Co. v. Ingraham*, 17 C. C. A. 75, 36 U. S. App. 1, 70 Fed. 223—*Hermann v. Port Blakely Mill Co.* 71 Fed. 855—*Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 630, 43 U. S. App. 113, 78 Fed. 641—*The Pioneer*, 78 Fed. 608—*Boston & M. R. Co. v. McDuffey*, 25 C. C. A. 250, 51 U. S. App. 111, 79 Fed. 987—*Pennsylvania R. Co. v. La Rue*, 27 C. C. A. 365, 55 U. S. App. 20, 81 Fed. 151—*Baker v. Barber Asphalt Pav. Co.* 92 Fed. 120—*New Orleans & N. E. R. Co. v. Clements*, 40 C. C. A. 473, 100 Fed. 423—*Toledo Brewing & Malting Co. v. Bosch*, 41 C. C. A. 486, 101 Fed. 534—*Re California Nav. & Improv. Co.* 110 Fed. 673—*National Steel Co. v. Lowe*, 62 C. C. A. 234, 127 Fed. 316—*Bunker Hill & S. Min. & Concentrating Co. v. Jones*, 65 C. C. A. 368, 130 Fed. 818—*Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 207, 36 N. E. 39—*Treka v. Burlington*, C. R. & N. R. Co. 100 Iowa, 208, 69 N. W. 422—*Atchison, T. & S. F. R. Co. v. Seeley*, 54 Kan. 30, 37 Pac. 104—*Evans v. Louisiana Lumber Co.* 111 La. 543, 35 So. 736—*American Tobacco Co. v. Strickling*, 88 Md. 504, 41 Atl. 1083—*Skinner v. McLaughlin*, 94 Md. 530, 51 Atl. 98—*Maryland Clay Co. v. Goodnow*, 95 Md. 348, 51 Atl. 292—*Anderson v. Michigan C. R. Co.* 107 Mich. 595, 65 N. W. 585—*McLaine v. Head & D. Co.* 71 N. H. 301, 58 L.R.A. 466, 93 Am. St. Rep. 522, 52 Atl. 545—*Flanigan v. Guggenheim Smelting Co.* 63 N. J. L. 664, 44 Atl. 762—*Knutter v. New York & N. J. Teleph. Co.* 67 N. J. L. 652, 58 L.R.A. 810, 52 Atl. 565—*Carroll v. Tidewater Oil Co.* 67 N. J. L. 684, 52 Atl. 275—*Cerrillos Coal R. Co. v. Deserant*, 9 N. M. 57, 49 Pac. 807—*Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 367, 64 L.R.A. 150, 75 Pac. 537—*Lebbering v. Struthers*, 157 Pa. 323, 27 Atl. 720—*Mangum v. Bullion, B. & C. Min. Co.* 15 Utah, 549, 50 Pac. 834—*Pool v. Southern P. Co.* 20 Utah, 216, 58 Pac. 326—*McDonough v. Great Northern R. Co.* 15 Wash. 258, 46 Pac. 334—*Shannon v. Consolidated Tiger & Poorman Min. Co.* 24 Wash. 132, 64 Pac. 169—*Turner v. Norfolk & W. R. Co.* 40 W. Va. 690, 22 S. E. 83.

125. It is the master's duty to exercise reasonable care to furnish suitable machinery
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and appliances, and to repair and inspect the same; and he cannot interpose, as a defense to an action for injury to a servant, the neglect of another servant to perform that duty. *Union P. R. Co. v. Snyder* (Union P. R. Co. v. Daniels) 152 U. S. 684, 14 Sup. Ct. Rep. 756, 38: 597

Cited in *Northern P. R. Co. v. Hambly*, 154 U. S. 357, 38 L. ed. 1013, 14 Sup. Ct. Rep. 983—*Union P. R. Co. v. O'Brien*, 161 U. S. 458, 40 L. ed. 771, 16 Sup. Ct. Rep. 618—*Texas & P. R. Co. v. Barrett*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 707—*Alaska Treadwell Gold Min. Co. v. Whelan*, 12 C. C. A. 228, 29 U. S. App. 1, 64 Fed. 465—*Texas & P. R. Co. v. Barrett*, 14 C. C. A. 377, 30 U. S. App. 196, 67 Fed. 218—*Northern P. R. Co. v. Poirier*, 15 C. C. A. 55, 29 U. S. App. 583, 67 Fed. 884—*Frost v. Oregon Short Line & U. N. R. Co.* 69 Fed. 941—*Great Northern R. Co. v. McLaughlin*, 17 C. C. A. 337, 44 U. S. App. 189, 70 Fed. 675—*Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 627, 43 U. S. App. 113, 73 Fed. 638—*Oregon Short Line & U. N. R. Co. v. Frost*, 21 C. C. A. 194, 44 U. S. App. 606, 74 Fed. 972—*Port Blakely Mill Co. v. Garrett*, 38 C. C. A. 344, 97 Fed. 539—*New Orleans & N. E. R. Co. v. Clements*, 40 C. C. A. 473, 100 Fed. 422—*Rex v. Pullman's Palace Car Co.* 2 Marv. (Del.) 349, 43 Atl. 246—*Morbach v. Home Min. Co.* 53 Kan. 739, 37 Pac. 122—*Atchison, T. & S. F. R. Co. v. Seeley*, 54 Kan. 30, 37 Pac. 104—*Carroll v. Tidewater Oil Co.* 67 N. J. L. 684, 52 Atl. 275—*Joyce v. Rome, W. & O. R. Co.* 92 Hun, 110, 36 N. Y. Supp. 781—*Wright v. Southern R. Co.* 123 N. C. 282, 31 S. E. 652—*Pool v. Southern P. Co.* 20 Utah, 216, 58 Pac. 326—*Faulkner v. Mammoth Min. Co.* 23 Utah, 442, 66 Pac. 799—*McDonald v. Norfolk & W. R. Co.* 95 Va. 105, 27 S. E. 821—*Cadden v. American Steel Barge Co.* 88 Wis. 420, 60 N. W. 800.

126. Where the failure of the master to provide the servant with safe appliances is the cause of the injury, the master cannot escape liability upon the ground that a particular act of negligence was that of a fellow servant. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25: 612

Cited in *McMahon v. Henning*, 1 McCrary, 520, 3 Fed. 355—*The Noddleburn*, 28 Fed. 858—*The Williams F. Babcock*, 31 Fed. 419—*Clyde v. Richmond & D. R. Co.* 59 Fed. 396—*Union P. R. Co. v. Novak*, 9 C. C. A. 639, 15 U. S. App. 400, 61 Fed. 584—*Louisville & N. R. Co. v. Ward*, 10 C. C. A. 170, 18 U. S. App. 683, 61 Fed. 930—*Alaska Treadwell Gold Min. Co. v. Whelan*, 12 C. C. A. 228, 29 U. S. App. 1, 64 Fed. 465—*Port Blakely Mill Co. v. Garrett*, 38 C. C. A. 344, 97 Fed. 539—*Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L.R.A. 52, 41 C. C. A. 540, 101 Fed. 628—*Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 263, 40 Pac. 251—*Zellars v. Missouri Water & Light Co.* 92 Mo. App. 127—*Jacques v. Great Falls Mfg. Co.* 66 N. H. 484, 13 L.R.A. 826, 22 Atl. 552—*Bernardi v. New York C. & H. R. R. Co.* 78 Hun, 456, 29 N. Y. Supp. 230—*Wright v. Southern R. Co.* 123 N. C. 282, 31 S. E. 652—*Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 372, 64 L.R.A. 152, 75 Pac. 537—*Texas Mexican R. Co. v. Whitmore*, 58 Tex. 288—*Galveston, H. & S. A. R. Co. v. Crookell*, 6 Tex. Civ. App. 164, 25 S. W. 486—*Bowers v. Union P. R. Co.* 4 Utah, 223, 7 Pac. 251—*Baltimore & O. R. Co. v. McKenzie*, 81 Va.

73—Ballou v. Chicago, M. & St. P. R. Co. 54 Wis. 276, 41 Am. Rep. 31, 11 N. W. 559—Cadden v. American Steel Barge Co. 88 Wis. 420, 60 N. W. 800.

3. Concurrent Negligence of Master and Fellow Servant.

127. If the negligence of a railroad company contributes to—that is to say, has a share in producing—an injury to an employee, the company is liable, even though the negligence of a fellow servant was also contributory. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493, 27: 266

Cited in Deserant v. Cerillos Coal R. Co. 178 U. S. 421, 44 L. ed. 1133, 20 Sup. Ct. Rep. 967—*The Phoenix*, 84 Fed. 763—*Young v. New Jersey & N. Y. R. Co.* 46 Fed. 161—*New Jersey & N. Y. R. Co. v. Young*, 1 C. C. A. 430, 1 U. S. App. 96, 49 Fed. 725—*Baltimore & O. R. Co. v. Andrews*, 17 L.R.A. 192, 1 C. C. A. 639, 6 U. S. App. 75, 50 Fed. 731—*Northern P. R. Co. v. Charles*, 2 C. C. A. 391, 7 U. S. App. 359, 51 Fed. 572—*Union P. R. Co. v. Callaghan*, 6 C. C. A. 207, 12 U. S. App. 541, 56 Fed. 990—*Cincinnati, N. O. & T. P. R. Co. v. Clark*, 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 128—*Clyde v. Richmond & D. R. Co.* 59 Fed. 397—*Honey v. Chicago, B. & Q. R. Co.* 59 Fed. 425—*Chicago, R. I. & P. R. Co. v. Sutton*, 11 C. C. A. 253, 27 U. S. App. 310, 63 Fed. 395—*Northern P. R. Co. v. Poirier*, 15 C. C. A. 56, 29 U. S. App. 583, 67 Fed. 885—*Chicago, St. P. & K. C. R. Co. v. Chambers*, 15 C. C. A. 333, 32 U. S. App. 253, 68 Fed. 153—*Brown v. Cox Bros. & Co.* 75 Fed. 691—*The Joseph B. Thomas*, 81 Fed. 584—*The Joseph B. Thomas*, 46 L.R.A. 70, 30 C. C. A. 338, 56 U. S. App. 619, 86 Fed. 664—*Maupin v. Texas & P. R. Co.* 40 C. C. A. 236, 99 Fed. 51—*Felton v. Harbeson*, 44 C. C. A. 191, 104 Fed. 740—*Baltimore & O. R. Co. v. Camp*, 44 C. C. A. 455, 105 Fed. 216—*The Anchoria*, 113 Fed. 985—*Choctaw, O. & G. R. Co. v. Holloway*, 52 C. C. A. 264, 114 Fed. 462—*Cudahy Packing Co. v. Anthes*, 54 C. C. A. 506, 117 Fed. 120—*Shugart v. Atlanta, K. & N. R. Co.* 66 C. C. A. 385, 133 Fed. 511—*Georgia P. R. Co. v. Davis*, 82 Ala. 307, 25 Am. St. Rep. 47, 9 So. 252—*Gibson v. Canadian P. Nav. Co.* 1 Alaska, 419—*Denver & R. G. R. Co. v. Sipes*, 26 Colo. 24, 55 Pac. 1093—*Tanner v. Harper*, 32 Colo. 164, 75 Pac. 404—*Farrell v. Eastern Machinery Co.* 77 Conn. 492, 68 L.R.A. 242, 107 Am. St. Rep. 45, 59 Atl. 611—*Creswell v. Wilmington & N. R. Co.* 2 Penn. (Del.) 215, 43 Atl. 629—*Cheaney v. Ocean S. S. Co.* 92 Ga. 732, 44 Am. St. Rep. 113, 19 S. E. 33—*Pennsylvania Co. v. McCaffrey*, 139 Ind. 437, 29 L.R.A. 108, 38 N. E. 67—*Lake Shore & M. S. R. Co. v. Wilson*, 11 Ind. App. 490, 38 N. E. 343—*Barnes v. Marcus*, 96 Iowa, 677, 65 N. W. 984—*Pugh v. Chesapeake & O. R. Co.* 101 Ky. 84, 72 Am. St. Rep. 302, 39 S. W. 695—*Towns v. Vicksburg, S. & P. R. Co.* 37 La. Ann. 632, 55 Am. Rep. 508—*Faren v. Sellers*, 39 La. Ann. 1019, 4 Am. St. Rep. 256, 3 So. 363—*Stucke v. Orleans R. Co.* 50 La. Ann. 197, 23 So. 342—*Dobson v. New Orleans & W. R. Co.* 52 La. Ann. 1133, 27 So. 670—*Griffin v. Boston & A. R. Co.* 148 Mass. 145, 1 L.R.A. 699, 12 Am. St. Rep. 526, 19 N. E. 166—*Huru v. Michigan C. R. Co.* 78 Mich. 525, 7 L.R.A. 506, 44 N. W. 502—*Noble v. Bessemer S. S. Co.* 127 Mich. 113, 54 L.R.A. 460, 89 Am. St. Rep. 461, 86

N. W. 520—*Hayes v. Frederick Stearns & Co.* 130 Mich. 293, 89 N. W. 947—*Matthews v. Clough*, 70 N. H. 601, 49 Atl. 637—*Lutz v. Atlantic & P. R. Co.* 6 N. M. 530, 16 L.R.A. 834, 30 Pac. 912—*Cerillos Coal R. Co. v. Deserant*, 9 N. M. 60, 49 Pac. 807—*Knahtla v. Oregon Short Line & U. N. R. Co.* 21 Or. 149, 27 Pac. 91—*Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 462, 28 Pac. 497—*Gulf, C. & S. F. R. Co. v. Shearer*, 1 Tex. Civ. App. 353, 21 S. W. 133—*Missouri, K. & T. R. Co. v. Hannig*, 20 Tex. Civ. App. 650, 49 S. W. 116—*Gulf, C. & S. F. R. Co. v. Powell*, 25 Tex. Civ. App. 98, 60 S. W. 979—*Wright v. Southern P. Co.* 14 Utah, 398, 46 Pac. 374—*Handley v. Daly Min. Co.* 15 Utah, 186, 62 Am. St. Rep. 916, 49 Pac. 295—*Pool v. Southern P. Co.* 20 Utah, 221, 58 Pac. 326—*Dicks v. Southern P. Co.* 27 Utah, 532, 76 Pac. 625—*Morrissey v. Hughes*, 65 Vt. 559, 27 Atl. 205—*Richmond & D. R. Co. v. George*, 88 Va. 228, 13 S. E. 429—*Norfolk & W. R. Co. v. Thomas*, 90 Va. 209, 17 S. E. 884—*Norfolk & W. R. Co. v. Ampey*, 93 Va. 130, 25 S. E. 226—*Costa v. Pacific Coast Co.* 26 Wash. 142, 66 Pac. 398—*Nelson v. S. Willey S. S. & Nav. Co.* 26 Wash. 554, 67 Pac. 237—*Sroufe v. Morrn Bros. Co.* 28 Wash. 401, 58 L.R.A. 320, 92 Am. St. Rep. 847, 68 Pac. 896—*Howe v. Northern P. R. Co.* 30 Wash. 580, 60 L.R.A. 954, 70 Pac. 1100—*Sherman v. Menominee River Lumber Co.* 72 Wis. 128, 1 L.R.A. 176, 39 N. W. 365—*Cook v. Minneapolis, St. P. & S. Ste. M. R. Co.* 98 Wis. 641, 40 L.R.A. 462, 67 Am. St. Rep. 830, 74 N. W. 561.

128. The employer is liable to the servant for negligence of a fellow servant when the former's own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party, or to his employment in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer. *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. Rep. 397, 33: 656

Editorial note.

[Negligence of fellow servant concurring with failure of the master to establish or enforce proper rules or regulations for conduct of business. 4 L.R.A.(N.S.) 516.]

4. Change of Rule by Statute.

Equal Protection as to, see Constitutional Law. 286-291, 341, 342.

Due Process in, see Constitutional Law, 469, 474.

State Decisions or Laws as Rules of Decision in Federal Courts, see Courts, 2019, 2022.

See also *infra*, 178.

129. A bridge carpenter employed by a railroad company is, at least while engaged in hoisting bridge timbers to load them on cars, exposed to the peculiar hazards incident to the use and operation of railroads, so as to bring him within 1 Kan. Gen. Stat. 1889, p. 415, making a railroad company liable for all damages to an employee from negligence or mismanagement of its agents or other employees. *Chicago,*

K. & W. R. Co. v. Pontius, 157 U. S. 200, 15 Sup. Ct. Rep. 585, 39: 675

130. The neglect, by the foreman of a railway bridge gang, of his special duty to see that the workmen under him performed their duty to leave a clear track for an approaching train, is the neglect of a duty which he owes, not as a fellow servant with such workmen, but as a vice principal of the railroad company, under Sayles's (Tex.) Civ. Stat. 1897, art. 4560g, providing that railroad employees intrusted with the control or command of other employees, or with the authority to direct any other employee in the performance of his duty, are vice principals of the railway company, and not fellow servants with their coemployees. Texas & P. R. Co. v. Carlin, 189 U. S. 354, 23 Sup. Ct. Rep. 585, 47: 849

Editorial notes.

[What constitutes operation of railroad under statutes abrogating fellow-servant rule for railroads. 1 L.R.A.(N.S.) 696.

Is the work of a section gang "connected with the use and operation" of the railroad, within the meaning of fellow-servant statute. 6 L.R.A.(N.S.) 452.

Validity of statute abrogating fellow-servant rule. 12 L.R.A.(N.S.) 1040.]

5. Who are Fellow Servants.

a. In General.

Liability for Fellow Servant's Negligence, see *infra*, II. d, 6.

Question as to, for Court, see Trial, 193.

Editorial notes.

[What servants are in same common employment, apart from statutes, where vice-principalship is not involved. 50 L.R.A. 417.]

Servants in different departments.

131. If the departments in which two servants are employed are so separate from each other that the possibility of coming in contact, and hence of one incurring danger from the negligent performance of the duties of the other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply. Northern P. R. Co. v. Hamby, 154 U. S. 349, 14 Sup. Ct. Rep. 983, 38: 1009

Cited in St. Louis & S. F. R. Co. v. Furry, 52 C. C. A. 524, 114 Fed. 904—Phoenix Bridge Co. v. Castleberry, 65 C. C. A. 486, 131 Fed. 180—Pool v. Southern P. Co. 20 Utah, 225, 58 Pac. 326.

132. An employer is not relieved from liability for injuries to a servant, caused by the negligence of a coservant employed in a different department from that in which the injured servant is engaged, by the provisions of N. D. Civ. Code, § 1130, declaring that an employer is not bound to indemnify his employee for losses suffered by him in consequence of the negligence of another person employed by the same employer in the same general business. North-

ern P. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755

Obtained in Northern P. R. Co. v. Hogan, 11 C. C. A. 55, 27 U. S. App. 184, 63 Fed. 106—Ell v. Northern P. R. Co. 1 N. D. 353, 12 L.R.A. 102, 26 Am. St. Rep. 621, 48 N. W. 222.

133. Agents charged with the master's duty of supplying safe machinery are not fellow servants of those engaged in operating it, as they are employed in distinct and independent departments of service. Hough v. Texas & P. R. Co. 100 U. S. 213, 35: 612

Cited in Randall v. Baltimore & O. R. Co. 109 U. S. 483, 27 L. ed. 1005, 3 Sup. Ct. Rep. 322—Northern P. R. Co. v. Hamby, 154 U. S. 357, 38 L. ed. 1013, 14 Sup. Ct. Rep. 983—Northern P. R. Co. v. Dixon, 194 U. S. 352, 48 L. ed. 1013, 24 Sup. Ct. Rep. 683—Dalton v. Atlantic, M. & O. R. Co. 4 Hughes, 201, Fed. Cas. No. 3,550—Gravelle v. Minneapolis & St. L. R. Co. 3 McCrary, 364, 11 Fed. 573—Buckley v. Gould & C. Silver Min. Co. 8 Sawy. 395, 14 Fed. 834—Craig v. Continental Ins. Co. 26 Fed. 800—Wolcott v. Studebaker, 34 Fed. 10—Little Rock & M. R. Co. v. Moseley, 6 C. C. A. 228, 12 U. S. App. 614, 56 Fed. 1012—Northern P. R. Co. v. Poirier, 15 C. C. A. 55, 29 U. S. App. 583, 67 Fed. 884—Yager v. Atlantic, M. & O. R. Co. 88 Fed. 779—Hobson v. New Mexico & A. R. Co. 2 Ariz. 182, 11 Pac. 545—Brush Electric Light & P. Co. v. Wells, 110 Ga. 197, 35 S. E. 865—Krueger v. Louisville, N. A. & C. R. Co. 111 Ind. 53, 11 N. E. 957—Brewster v. Chicago & N. W. R. Co. 114 Iowa, 145, 89 Am. St. Rep. 348, 86 N. W. 221—Lawless v. Connecticut River R. Co. 136 Mass. 2—Dewey v. Detroit, G. H. & M. R. Co. 97 Mich. 338, 22 L.R.A. 295, 37 Am. St. Rep. 348, 56 N. W. 756—Atchison, T. & S. F. R. Co. v. Martin, 7 N. M. 168, 34 Pac. 536—Borden v. Southern R. Co. 123 N. C. 617, 31 S. E. 851—Reddon v. Union P. R. Co. 5 Utah, 353, 15 Pac. 262—Pool v. Southern P. Co. 7 Utah, 308, 26 Pac. 654—Anderson v. Ogden Union R. & Depot Co. 8 Utah, 133, 30 Pac. 505—Johnson v. Union P. Coal Co. 28 Utah, 64, 67 L.R.A. 514, 76 Pac. 1089—Moon v. Richmond & A. R. Co. 78 Va. 751, 49 Am. Rep. 401.

Porter and carpenter of steamship.

134. The porter and the carpenter of a steamship are fellow servants with the stewardess of the ship. Quebec S. S. Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. Rep. 397, 33: 656

Distinguished in New York & N. E. R. Co. v. Hyde, 5 C. C. A. 467, 5 U. S. App. 443, 56 Fed. 194.

Cited in Baltimore & O. R. Co. v. Baugh, 149 U. S. 389, 37 L. ed. 781, 13 Sup. Ct. Rep. 914—Northern P. R. Co. v. Hamby, 154 U. S. 358, 38 L. ed. 1013, 14 Sup. Ct. Rep. 983—The A. Heaton, 43 Fed. 597—The Frank & Willie, 45 Fed. 495—Grimsley v. Hankins, 46 Fed. 402—Baltimore & O. R. Co. v. Andrews, 17 L.R.A. 192, 1 C. C. A. 640, 6 U. S. App. 75, 50 Fed. 732—St. Louis, I. M. & S. R. Co. v. Needham, 25 L.R.A. 837, 11 C. C. A. 61, 27 U. S. App. 227, 63 Fed. 113—Baltimore & O. R. Co. v. Camp, 13 C. C. A. 245, 31 U. S. App. 213, 65 Fed. 965—Hermann v. Port Blakely Mill, Co. 71 Fed. 859—The Niagara, 77 Fed. 336—The Anaces, 87 Fed. 569—Grady v. Southern R. Co. 34 C. C. A. 496, 92 Fed. 493—Louisville & N. R. Co. v. Stuber, 54 L.R.A. 690, 48 C. C. A. 153, 108 Fed. 938—Ell v. Northern P.

R. Co. 1 N. D. 349, 12 L.R.A. 101, 26 Am. St. Rep. 621, 48 N. W. 222—Brush Electric Light & P. Co. v. Wells, 110 Ga. 202, 35 S. E. 363—Parker v. Hannibal & St. J. R. Co. 109 Mo. 385, 18 L.R.A. 809, 19 S. W. 1119—Spillane v. Eastmans Co. 33 Misc. 465, 67 N. Y. Supp. 867—Norfolk & W. R. Co. v. Lindamood, 1 Va. Dec. 752, 14 S. E. 694.

Mining boss and gang men.

135. A mere foreman or boss of a gang of men working in a mine, being employed in the same department of business, and under a common head, is a fellow servant with them, whether he has or has not authority to engage and discharge the men under him. *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. Rep. 40, 42: 390
Cited in *Gaynon v. Durkee*, 31 C. C. A. 308, 52 U. S. App. 587, 97 Fed. 304—*The Miami*, 87 Fed. 760—*Thomas v. Cincinnati*, N. O. & T. P. R. Co. 97 Fed. 249—*Slavens v. Northern P. R. Co.* 38 C. C. A. 159, 97 Fed. 263—*The Picqua*, 97 Fed. 651—*Brigal v. Southern P. Co.* 39 C. C. A. 368, 98 Fed. 962—*Stevens v. Chamberlin*, 51 L.R.A. 526, 40 C. C. A. 424, 100 Fed. 381—*Lochbaum v. Oregon R. & Nav. Co.* 44 C. C. A. 221, 104 Fed. 854—*McDonald v. Buckley*, 48 C. C. A. 376, 109 Fed. 284—*Alaska United Gold Min. Co. v. Muset*, 52 C. C. A. 18, 114 Fed. 70—*Davis v. Trade Dollar Consol. Min. Co.* 54 C. C. A. 637, 117 Fed. 123—*Memphis & M. Packet Co. v. Hill*, 58 C. C. A. 611, 122 Fed. 247—*Pennsylvania Co. v. Fishack*, 59 C. C. A. 275, 123 Fed. 471—*Fournier v. Pike*, 128 Fed. 994—*Weeks v. Scharer*, 64 C. C. A. 13, 129 Fed. 335—*Phoenix Bridge Co. v. Castleberry*, 65 C. C. A. 486, 131 Fed. 180—*Andre v. Winslow Bros. Elevator Co.* 117 Mich. 563, 76 N. W. 86—*New Omaha Thomson-Houston Electric Light Co. v. Baldwin*, 62 Neb. 189, 87 N. W. 27—*McLaine v. Head & D. Co.* 71 N. H. 308, 58 L.R.A. 460, 93 Am. St. Rep. 522, 52 Atl. 545—*Galvin v. Pierce*, 72 N. H. 83, 54 Atl. 1014—*Deserant v. Cerrillos Coal R. Co.* 9 N. M. 499, 55 Pac. 290—*Vogel v. American Bridge Co.* 180 N. Y. 379, 70 L.R.A. 728, 73 N. E. 1—*Vogel v. American Bridge Co.* 180 N. Y. 382, 70 L.R.A. 730, 73 N. E. 1—*Tennessee Coal, Iron & R. Co. v. Jarrett*, 111 Tenn. 581, 82 S. W. 224—*Sartin v. Oregon Short Line R. Co.* 27 Utah, 452, 76 Pac. 219—*Norfolk & W. R. Co. v. Houchins* (Norfolk & W. R. Co. v. Swaine) 95 Va. 409, 46 L.R.A. 366, 64 Am. St. Rep. 791, 28 S. E. 578—*Jackson v. Norfolk & W. R. Co.* 43 W. Va. 401, 46 L.R.A. 355, 31 S. E. 258—*McVey v. St. Clair Co.* 49 W. Va. 425, 38 S. E. 648—*Wiskie v. Montello Granite Co.* 111 Wis. 451, 87 Am. St. Rep. 885, 87 N. W. 461.

— Editorial note.

[Liability of master for negligence of mine boss outside the scope of his statutory duties. 11 L.R.A. (N.S.) 840.]

Railroad boss or foreman and men.

136. The negligence of a section boss or foreman in running a hand car at too high a rate of speed while carrying his gang of men is not the neglect of any duty which the master is bound to perform, but is that of a fellow servant of the members of his gang. *Northern P. R. Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. Rep. 848, 40: 999

137. The foreman of a drill crew in a

railroad yard, who is a competent part of the crew and an active collaborer in the manual work of switching, with the specific duty assigned to him by the yardmaster of turning the switches, is a fellow servant with other laborers of the crew, so that the railroad company is not liable to one of them for the foreman's negligence in moving detached cars with no one upon them to set the brakes. *Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. Rep. 269.

40: 418

Cited in *Northern P. R. Co. v. Peterson*, 162 U. S. 356, 40 L. ed. 998, 16 Sup. Ct. Rep. 843—*Oakes v. Mase*, 165 U. S. 364, 41 L. ed. 747, 17 Sup. Ct. Rep. 345—*Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 89, 42 L. ed. 392, 18 Sup. Ct. Rep. 40—*New England R. Co. v. Conroy*, 175 U. S. 338, 44 L. ed. 188, 20 Sup. Ct. Rep. 85—*Hermann v. Port Blakely Mill Co.* 71 Fed. 859—*Cleveland C. & St. L. R. Co. v. Brown*, 20 C. C. A. 150, 34 U. S. App. 759, 73 Fed. 973—*Baich v. Haas*, 20 C. C. A. 157, 36 U. S. App. 693, 73 Fed. 980—*Coulson v. Leonard*, 77 Fed. 540—*Pelree v. Van Dusen*, 24 C. C. A. 291, 47 U. S. App. 339, 78 Fed. 705—*Wright v. Southern R. Co.* 80 Fed. 262—*Central R. Co. v. Keegan*, 82 Fed. 174—*Bowes v. Hopkins*, 28 C. C. A. 528, 56 U. S. App. 217, 84 Fed. 769—*The Miami*, 87 Fed. 760—*Grady v. Southern R. Co.* 34 C. C. A. 496, 92 Fed. 493—*Thomas v. Cincinnati*, N. O. & T. P. R. Co. 97 Fed. 249—*Brigal v. Southern P. Co.* 39 C. C. A. 363, 98 Fed. 962—*Stevens v. Chamberlin*, 51 L.R.A. 525, 40 C. C. A. 424, 100 Fed. 381—*Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 204, 102 Fed. 111—*McDonald v. Buckley*, 48 C. C. A. 375, 109 Fed. 292—*Weeks v. Scharer*, 49 C. C. A. 377, 111 Fed. 335—*Chicago House Wrecking Co. v. Birney*, 54 C. C. A. 463, 117 Fed. 77—*Southern Indiana R. Co. v. Martin*, 160 Ind. 286, 66 N. E. 886—*Southern Indiana R. Co. v. Harrell*, 161 Ind. 698, 63 L.R.A. 466, 68 N. E. 262—*American Teleph. & Teleg. Co. v. Bower*, 20 Ind. App. 38, 49 N. E. 182—*Andre v. Winslow Bros. Elevator Co.* 117 Mich. 563, 76 N. W. 86—*Southern R. Co. v. Cheaves*, 84 Miss. 585, 36 So. 691—*Grattis v. Kansas City, P. & G. R. Co.* 158 Mo. 402, 48 L.R.A. 407, 77 Am. St. Rep. 721, 55 S. W. 108—*Goodwell v. Montana C. R. Co.* 18 Mont. 300, 45 Pac. 210—*Richmond Locomotive & Mach. Works v. Ford*, 94 Va. 643, 27 S. E. 509—*Norfolk & W. R. Co. v. Houchins* (Norfolk & W. R. Co. v. Swaine) 95 Va. 409, 46 L.R.A. 366, 64 Am. St. Rep. 791, 28 S. E. 578—*Jackson v. Norfolk & W. R. Co.* 43 W. Va. 387, 46 L.R.A. 344, 27 S. E. 278—*Wiskie v. Montello Granite Co.* 111 Wis. 750, 87 Am. St. Rep. 885, 87 N. W. 461.

Trainmen and common laborer.

138. A common laborer in the employ of a railroad company owning and operating a line of railroad, who at the time he received the injury complained of was working for the company under the direction of a section boss or foreman on a culvert on the line of its road, is a fellow servant with the engineer and conductor operating and conducting a passenger train on the company's road, in such a sense as exempts the company from liability for an injury inflicted upon him by and through the negligence of said conductor and engineer in moving and operating said passenger train. *Northern P.*

R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. Rep. 983, 38: 1009

Cited in Central R. Co. v. Keegan, 160 U. S. 265, 40 L. ed. 421, 16 Sup. Ct. Rep. 269—Northern P. R. Co. v. Peterson, 162 U. S. 356, 40 L. ed. 998, 16 Sup. Ct. Rep. 843—Northern P. R. Co. v. Charless, 162 U. S. 863, 40 L. ed. 1001, 16 Sup. Ct. Rep. 848—Oakes v. Mase, 165 U. S. 364, 41 L. ed. 747, 17 Sup. Ct. Rep. 345—Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 403, 41 L. ed. 1052, 17 Sup. Ct. Rep. 603—New England R. Co. v. Conroy, 175 U. S. 337, 44 L. ed. 188, 20 Sup. Ct. Rep. 85—St. Louis, I. M. & S. R. Co. v. Needham, 25 L.R.A. 838, 11 C. C. A. 62, 27 U. S. App. 227, 63 Fed. 113—Northern P. R. Co. v. Beaton, 12 C. C. A. 305, 29 U. S. App. 88, 64 Fed. 568—Martin v. Chicago & A. R. Co. 65 Fed. 385—Baltimore & O. R. Co. v. Camp, 13 C. C. A. 246, 31 U. S. App. 213, 65 Fed. 965—Kansas & A. Valley R. Co. v. Waters, 16 C. C. A. 609, 36 U. S. App. 31, 70 Fed. 29—Balch v. Haas, 20 C. C. A. 157, 36 U. S. App. 693, 73 Fed. 980—Reed v. Stockmeyer, 20 C. C. A. 387, 34 U. S. App. 727, 74 Fed. 192—Coulson v. Leonard, 77 Fed. 540—McPeck v. Central Vermont R. Co. 25 C. C. A. 113, 50 U. S. App. 27, 70 Fed. 594—Wright v. Southern R. Co. 80 Fed. 263—Pennsylvania R. Co. v. La Rue, 27 C. C. A. 365, 55 U. S. App. 20, 81 Fed. 150—The Job T. Willson, 84 Fed. 208—Bowes v. Hopkins, 28 C. C. A. 526, 56 U. S. App. 217, 84 Fed. 769—Tomlinson v. Chicago, B. & Q. R. Co. 38 C. C. A. 150, 97 Fed. 253—New Orleans & N. E. R. Co. v. Clements, 40 C. C. A. 473, 100 Fed. 422—Missouri, K. & T. R. Co. v. Elliott, 42 C. C. A. 204, 102 Fed. 112—Stuber v. Louisville & N. R. Co. 102 Fed. 423—Louisville & N. R. Co. v. Stuber, 54 L.R.A. 699, 48 C. C. A. 153, 108 Fed. 938—Chicago House Wrecking Co. v. Birney, 54 C. C. A. 462, 117 Fed. 76—Dishon v. Cincinnati, N. O. & T. P. R. Co. 126 Fed. 196—Rosney v. Erie R. Co. 68 C. C. A. 156, 135 Fed. 312—Crosby v. Lehigh Valley R. Co. 70 C. C. A. 201, 137 Fed. 767—Wheatley v. Philadelphia, W. & B. R. Co. 1 Marv. (Del.) 313, 30 Atl. 660—Brush Electric Light & P. Co. v. Wells, 110 Ga. 202, 35 S. E. 365—Donnelly v. Cudahy Packing Co. 68 Kan. 656, 75 Pac. 1017—Gratias v. Kansas City, P. & G. R. Co. 153 Mo. 402, 48 L.R.A. 407, 77 Am. St. Rep. 721, 55 S. W. 103—Schmidt v. Montana C. R. Co. 15 Mont. 113, 38 Pac. 226—Goodwell v. Montana C. R. Co. 18 Mont. 299, 45 Pac. 210—Hastings v. Montana Union R. Co. 18 Mont. 498, 46 Pac. 264—Stephani v. Southern P. Co. 19 Utah, 203, 57 Pac. 34—Martin v. Oregon Short Line R. Co. 27 Utah, 454, 76 Pac. 219—Norfolk & W. R. Co. v. Nuckols, 91 Va. 196, 21 S. E. 342—Norfolk & W. R. Co. v. Houchins (Norfolk & W. R. Co. v. Swaine) 95 Va. 409, 46 L.R.A. 366, 64 Am. St. Rep. 791, 28 S. E. 578—Hughes v. Oregon Improv. Co. 20 Wash. 300, 55 Pac. 119—Peterson v. Seattle Traction Co. 23 Wash. 620, 53 L.R.A. 589, 63 Pac. 539—Jackson & Norfolk v. W. R. Co. 43 W. Va. 387, 46 L.R.A. 344, 27 S. E. 278—Wiskie v. Montello Granite Co. 111 Wis. 450, 87 Am. St. Rep. 885, 87 N. W. 461.

139. The negligence of employees on a train in failing to give a signal of its approach whereby a track laborer on a hand car was injured is the negligence of his co-servants for which the master is not liable. Northern P. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. Rep. 848, 40: 999
Cited in Oakes v. Mase, 165 U. S. 364, 41 L.

ed. 747, 17 Sup. Ct. Rep. 345—Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 403, 41 L. ed. 1052, 17 Sup. Ct. Rep. 603—Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 89, 42 L. ed. 392, 18 Sup. Ct. Rep. 40—Cleveland, C. C. & St. L. R. Co. v. Brown, 20 C. C. A. 150, 34 U. S. App. 759, 73 Fed. 973—Reed v. Stockmeyer, 20 C. C. A. 386, 34 U. S. App. 727, 74 Fed. 192—Chapman v. Reynolds, 23 C. C. A. 168, 33 U. S. App. 686, 77 Fed. 276—Bowes v. Hopkins, 28 C. C. A. 526, 56 U. S. App. 217, 84 Fed. 769—Gaynon v. Durke, 31 C. C. A. 308, 52 U. S. App. 587, 87 Fed. 304—The Miami, 87 Fed. 760—Grady v. Southern R. Co. 34 C. C. A. 496, 92 Fed. 493—Carlson v. United New York Sandy Hook Pilots' Asso. 93 Fed. 471—Tomlinson v. Chicago, B. & Q. R. Co. 38 C. C. A. 150, 97 Fed. 254—Hunt v. Hurd, 39 C. C. A. 231, 98 Fed. 688—Brigial v. Southern P. Co. 39 C. C. A. 363, 98 Fed. 962—Maher v. Union P. D. & G. R. Co. 45 C. C. A. 302, 106 Fed. 310—Dishon v. Cincinnati, N. O. & T. P. R. Co. 126 Fed. 198—Weeks v. Scharer, 64 C. C. A. 13, 129 Fed. 335—O'Neill v. Pittsburg, C. C. & St. L. R. Co. 130 Fed. 207—Hastings v. Montana Union R. Co. 18 Mont. 497, 46 Pac. 264—Miller v. Central R. Co. 69 N. J. L. 416, 55 Atl. 245—Cerrillos Coal R. Co. v. Deserant, 9 N. M. 61, 49 Pac. 807—Gann v. Nashville, C. & St. L. R. Co. 101 Tenn. 386, 70 Am. St. Rep. 687, 47 S. W. 493—Stephani v. Southern P. Co. 19 Utah, 203, 57 Pac. 34—Norfolk & W. R. Co. v. Houchins (Norfolk & W. R. Co. v. Swaine) 95 Va. 409, 46 L.R.A. 366, 64 Am. St. Rep. 791, 28 S. E. 578—Hughes v. Oregon Improv. Co. 20 Wash. 300, 55 Pac. 119—Wiskie v. Montello Granite Co. 111 Wis. 450, 87 Am. St. Rep. 885, 87 N. W. 461.

Trainmen and section foreman.

140. A conductor and hands on a work train, and a section foreman in charge of a hand car, are fellow servants of a laborer on the hand car under the orders of such foreman, when through their negligence he is injured by a collision of the train while running backward, and the hand car. Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 17 Sup. Ct. Rep. 603, 41: 1051
Cited in Grady v. Southern R. Co. 34 C. C. A. 496, 92 Fed. 493—Tomlinson v. Chicago, B. & Q. R. Co. 38 C. C. A. 150, 97 Fed. 254—Slavens v. Northern P. R. Co. 38 C. C. A. 159, 97 Fed. 263—Hunt v. Hurd, 30 C. C. A. 231, 98 Fed. 688—Brigial v. Southern P. Co. 39 C. C. A. 363, 98 Fed. 962—Stevens v. Chamberlin, 51 L.R.A. 528, 40 C. C. A. 424, 100 Fed. 381—McDonald v. Buckley, 48 C. C. A. 376, 109 Fed. 293—Dishon v. Cincinnati, N. O. & T. P. R. Co. 126 Fed. 198—O'Connor v. Atchison, T. & S. F. R. Co. 70 C. C. A. 89, 137 Fed. 505—Miller v. Central R. Co. 69 N. J. L. 416, 55 Atl. 245—Deserant v. Cerrillos Coal R. Co. 9 N. M. 499, 55 Pac. 290—Gann v. Nashville, C. & St. L. R. Co. 101 Tenn. 386, 70 Am. St. Rep. 687, 47 S. W. 493—Stephani v. Southern P. Co. 19 Utah, 204, 57 Pac. 34—Norfolk & W. R. Co. v. Houchins (Norfolk & W. R. Co. v. Swaine) 95 Va. 409, 46 L.R.A. 366, 64 Am. St. Rep. 791, 28 S. E. 578—Wiskie v. Montello Granite Co. 111 Wis. 450, 87 Am. St. Rep. 885, 87 N. W. 461.

Telegraph operator and trainmen.

141. Negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train despatcher the movement of

trains past his station, which causes the death of a fireman on such railway, without any fault or negligence of the train despatcher, is the negligence of a fellow servant of the fireman, the risk of which the latter assumes. *Northern P. R. Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. Rep. 683, 48: 1006
Cited in Santa Fe P. R. Co. v. Holmes, 68 C. C. A. 637, 138 Fed. 69—*Deye v. Lodge & S. Mach. Tool Co.* 70 C. C. A. 67, 137 Fed. 483—*O'Connor v. Atchison, T. & S. F. R. Co.* 70 C. C. A. 89, 137 Fed. 505—*Crosby v. Lehigh Valley R. Co.* 70 C. C. A. 201, 137 Fed. 767—*Florence & C. C. R. Co. v. Whipps*, 70 C. C. A. 447, 138 Fed. 17—*Northern P. R. Co. v. Dixon*, 71 C. C. A. 567, 139 Fed. 739—*Baltimore & O. R. Co. v. Brown*, 76 C. C. A. 487, 146 Fed. 29—*Foster v. New York, N. H. & H. R. Co.* 187 Mass. 24, 72 N. E. 331.

142. A decision that a telegraph operator at a station, by whose negligence an engineer was killed, was a fellow servant, and that therefore his administrator could not recover damages for his death, is affirmed in the Supreme Court of the United States by a divided court. *Price v. Detroit, G. H. & M. R. Co.* 145 U. S. 651, 12 Sup. Ct. Rep. 986, 36: 843

— Editorial notes.

Railway telegraph operators as fellow servants of railway trainmen. 48: 1006

[Train despatcher and telegraph operator as fellow servants of trainmen. 25 L.R.A. 386.]

Trainmen on different trains.

143. An engineer on one train is a fellow servant of a conductor of another train on the same road. *Oakes v. Mase*, 165 U. S. 363, 17 Sup. Ct. Rep. 345, 41: 746
Cited in New England R. Co. v. Conroy, 175 U. S. 340, 44 L. ed. 189, 20 Sup. Ct. Rep. 85—*Bowes v. Hopkins*, 28 C. C. A. 526, 56 U. S. App. 217, 84 Fed. 769—*Thomas v. Cincinnati, N. O. & T. P. R. Co.* 97 Fed. 249—*Tomlinson v. Chicago, B. & Q. R. Co.* 38 C. C. A. 150, 97 Fed. 254—*Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 204, 102 Fed. 111—*St. Louis & S. F. R. Co. v. Furry*, 52 C. C. A. 524, 114 Fed. 904—*Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 402, 48 L.R.A. 407, 77 Am. St. Rep. 721, 55 S. W. 108—*Johnson v. Southern R. Co.* 122 N. C. 958, 29 S. E. 348—*Norfolk & W. R. Co. v. Houchins (Norfolk & W. R. Co. v. Swaine)* 95 Va. 409, 46 L.R.A. 366, 64 Am. St. Rep. 791, 28 S. E. 578—*Jackson v. Norfolk & W. R. Co.* 43 W. Va. 390, 46 L.R.A. 346, 27 S. E. 278.

144. A brakeman on a regular train and a conductor on a wild train are fellow servants, and the railroad company is not liable to the former for injuries caused by the negligence of the latter. *Northern P. R. Co. v. Poirier*, 167 U. S. 48, 17 Sup. Ct. Rep. 741, 42: 72
Cited in New England R. Co. v. Conroy, 175 U. S. 340, 44 L. ed. 189, 20 Sup. Ct. Rep. 85—*Thomas v. Cincinnati, N. O. & T. P. R. Co.* 97 Fed. 249—*Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 204, 102 Fed. 111—*Beaumont v. Northern P. R. Co.* 48 C. C. A. 534, 109 Fed. 537—*Weeks v. Scharer*, 49 C. C. A. 377, 111 Fed. 335.

145. A brakeman working a switch for his

train on one track in a railroad yard is a fellow servant with the engineman of another train of the same corporation, upon an adjacent track; and cannot maintain an action against the corporation for the negligence of the engineman in driving his engine too fast, and not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engineman. *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 3 Sup. Ct. Rep. 322, 27: 1003
Distinguished in Northern P. R. Co. v. Beaton, 12 C. C. A. 305, 29 U. S. App. 88, 64 Fed. 568.

Disapproved in Louisville & N. R. Co. v. Jackson, 106 Tenn. 442, 61 S. W. 771.

Cited in Armour v. Hahn, 111 U. S. 319, 28 L. ed. 442, 4 Sup. Ct. Rep. 433—*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 375, 37 L. ed. 777, 13 Sup. Ct. Rep. 914—*Northern P. R. Co. v. Hambly*, 154 U. S. 356, 38 L. ed. 1012, 14 Sup. Ct. Rep. 983—*New England R. Co. v. Conroy*, 175 U. S. 333, 44 L. ed. 186, 20 Sup. Ct. Rep. 85—*Howard v. Denver & R. G. R. Co.* 28 Fed. 844—*Van Winkle v. Manhattan R. Co.* 23 Blatchf. 423, 32 Fed. 278—*Easton v. Houston & T. C. R. Co.* 32 Fed. 896—*Naylor v. New York C. & H. R. R. Co.* 33 Fed. 803—*Wolcott v. Studebaker*, 34 Fed. 11—*Muhlman v. Union P. R. Co.* 2 L.R.A. 193, 37 Fed. 189—*Howard v. Delaware & H. Canal Co.* 6 L.R.A. 78, 40 Fed. 197—*Pike v. Chicago & A. R. Co.* 41 Fed. 97—*Baltimore & O. R. Co. v. Andrews*, 17 L.R.A. 192, 1 C. C. A. 640, 6 U. S. App. 75, 50 Fed. 732—*Cincinnati, N. O. & T. P. R. Co. v. Needham*, 25 L.R.A. 836, 11 C. C. App. 17, 57 Fed. 131—*St. Louis, I. M. & S. R. Co. v. Needham*, 25 L.R.A. 836, 11 C. C. A. 59, 27 U. S. App. 227, 63 Fed. 110—*Alaska Treadwell Gold Min. Co. v. Whelan*, 12 C. C. A. 229, 29 U. S. App. 1, 64 Fed. 466—*Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 245, 31 U. S. App. 213, 65 Fed. 965—*Northern P. R. Co. v. Poirier*, 15 C. C. A. 55, 29 U. S. App. 58, 67 Fed. 884—*Weeks v. Scharer*, 49 C. C. A. 377, 111 Fed. 335—*Hobson v. New Mexico & A. R. Co.* 2 Ariz. 198, 11 Pac. 545—*McGill v. Southern P. Co.* 4 Ariz. 124, 33 Pac. 821—*Southern P. Co. v. McGill*, 5 Ariz. 41, 44 Pac. 302—*St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 569—*St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 480, 4 L.R.A. 177, 11 S. W. 699—*Ell v. Northern P. R. Co.* 1 N. D. 349, 12 L.R.A. 101, 26 Am. St. Rep. 62, 48 N. W. 222—*Elliott v. Chicago, M. & St. P. R. Co.* 5 Dak. 537, 3 L.R.A. 364, 41 N. W. 758—*Parrish v. Pensacola & A. R. Co.* 28 Fla. 282, 9 So. 696—*Illinois C. R. Co. v. Swisher*, 74 Ill. App. 169—*Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 346, 16 L.R.A. 344, 52 N. W. 942—*McMaster v. Illinois C. R. Co.* 65 Miss. 268, 7 Am. St. Rep. 653, 4 So. 59—*Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 406, 48 L.R.A. 408, 77 Am. St. Rep. 721, 55 S. W. 108—*Hastings v. Montana Union R. Co.* 18 Mont. 496, 46 Pac. 264—*Atchison, T. & S. F. R. Co. v. Martin*, 7 N. M. 168, 34 Pac. 536—*Hallett v. New York C. & H. R. R. Co.* 167 N. Y. 550, 60 N. E. 653—*Hobbs v. Atlantic & N. C. R. Co.* 107 N. C. 4, 9 L.R.A. 840, 12 S. E. 124—*Pleasants v. Raleigh & A. Air Line R. Co.* 121 N. C. 495, 61 Am. St. Rep. 674, 28 S. E. 267—*Stephani v. Southern P. Co.* 19 Utah, 203, 57 Pac. 34—*Norfolk & W. R. Co. v. Lindamood*, 1 Va. Dec. 752, 14 S. E. 694—*Beuh-ring v. Chesapeake & O. R. Co.* 37 W. Va.

504, 16 S. E. 437—Toner v. Chicago. M. & St. P. R. Co. 69 Wis. 198, 33 N. W. 433.

Engineer and fireman.

146. The engineer and fireman of a locomotive running alone and without any train attached are fellow servants of the railroad company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368.

37: 772
Cited in *Northern P. R. Co. v. Hambly*, 154 U. S. 359, 38 L. ed. 1013, 14 Sup. Ct. Rep. 983—*Central R. Co. v. Kegan*, 160 U. S. 263, 40 L. ed. 421, 16 Sup. Ct. Rep. 269—*Northern P. R. Co. v. Charles*, 162 U. S. 365, 40 L. ed. 1002, 16 Sup. Ct. Rep. 848—*Martin v. Atchison, T. & S. F. R. Co.* 166 U. S. 402, 41 L. ed. 1052, 17 Sup. Ct. Rep. 603—*New England R. Co. v. Conroy*, 175 U. S. 327, 44 L. ed. 184, 20 Sup. Ct. Rep. 85—*New York & N. E. R. Co. v. Hyde*, 5 C. C. A. 465, 5 U. S. App. 443, 56 Fed. 192—*Little Rock & M. R. Co. v. Moseley*, 6 C. C. A. 229, 12 U. S. App. 514, 56 Fed. 1012—*Southern P. Co. v. Burke*, 9 C. C. A. 240, 23 U. S. App. 1, 60 Fed. 715—*Texas & P. R. Co. v. Patton*, 9 C. C. A. 406, 23 U. S. App. 319, 61 Fed. 268—*Canadian P. R. Co. v. Johnston*, 25 L.R.A. 475, 9 C. C. A. 592, 26 U. S. App. 85, 61 Fed. 743—*Louisville & N. R. Co. v. Ward*, 10 C. C. A. 169, 18 U. S. App. 683, 61 Fed. 929—*Murray v. Chicago & N. W. R. Co.* 62 Fed. 31—*St. Louis, I. M. & S. R. Co. v. Needham*, 25 L.R.A. 837, 11 C. C. A. 62, 27 U. S. App. 227, 63 Fed. 113—*Killen v. Hyde*, 63 Fed. 176—*Louisville & N. R. Co. v. Kelly*, 11 C. C. A. 264, 24 U. S. App. 103, 63 Fed. 410—*Swift v. Philadelphia & R. R. Co.* 5 Inters. Com. Rep. 123, 64 Fed. 65—*Callaway v. Allen*, 12 C. C. A. 116, 24 U. S. App. 388, 64 Fed. 299—*Northern P. R. Co. v. Beaton*, 12 C. C. A. 305, 29 U. S. App. 88, 64 Fed. 567—*Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 239, 31 U. S. App. 213, 65 Fed. 959—*Atchison, T. & S. F. R. Co. v. Mulligan*, 14 C. C. A. 551, 34 U. S. App. 1, 67 Fed. 573—*Northern P. R. Co. v. Poirier*, 15 C. C. A. 55, 29 U. S. App. 583, 67 Fed. 884—*Oregon Short Line & U. N. R. Co. v. Frost*, 21 C. C. A. 192, 44 U. S. App. 606, 74 Fed. 971—*Coulson v. Leonard*, 77 Fed. 539—*Bowes v. Hopkins*, 28 C. C. A. 526, 56 U. S. App. 217, 84 Fed. 769—*The Miami*, 87 Fed. 760—*F. C. Austin Mfg. Co. v. Johnson*, 32 C. C. A. 317, 60 U. S. App. 661, 89 Fed. 685—*Olson v. Oregon Coal & Nav. Co.* 96 Fed. 111—*Thomas v. Cincinnati, N. O. & T. P. R. Co.* 97 Fed. 249—*Hunt v. Hurd*, 39 C. C. A. 230, 98 Fed. 688—*Brigal v. Southern P. Co.* 39 C. C. A. 363, 98 Fed. 962—*Fenwick v. Illinois C. R. Co.* 40 C. C. A. 370, 100 Fed. 248—*Browne v. King*, 40 C. C. A. 548, 100 Fed. 565—*Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L.R.A. 47, 41 C. C. A. 538, 101 Fed. 626—*Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 202, 102 Fed. 109—*Maher v. Union P. D. & G. R. Co.* 45 C. C. A. 302, 106 Fed. 310—*Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 44, 47 C. C. A. 369, 108 Fed. 337—*Weeks v. Scharer*, 49 C. C. A. 373, 111 Fed. 331—*Alaska United Gold Min. Co. v. Muset*, 52 C. C. A. 17, 114 Fed. 69—*Southern P. Co. v. Schoer*, 57 L.R.A. 708, 52 C. C. A. 271, 114 Fed. 469—*St. Louis & S. F. R. Co. v. Furry*, 52 C. C. A. 524, 114 Fed. 904—*Chicago House Wrecking Co. v. Birney*, 54 C. C. A. 464, 117 Fed. 78—*Hale v. Kansas City Southern R. Co.* 57 C. C. A. 149, 120 Fed. 735—*St. Louis Cordage Co. v. Miller*, 63 L.R.A. 355, 61 C. C. A. 482, 126 Fed.

500—*Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 263, 40 Pac. 251—*Wheatley v. Philadelphia W. & B. R. Co.* 1 Marv. (Del.) 313, 30 Atl. 660—*Creswell v. Wilmington & N. R. Co.* 2 Penn. (Del.) 221, 43 Atl. 629—*Meyer v. Illinois C. R. Co.* 177 Ill. 596, 52 N. E. 848—*Walker v. Gillett*, 59 Kan. 220, 52 Pac. 442—*Stucke v. Orleans R. Co.* 50 La. Ann. 201, 23 So. 342—*Dobson v. New Orleans & W. R. Co.* 52 La. Ann. 1136, 27 So. 670—*Brager v. Austin*, 99 Md. 480, 58 Atl. 432—*Kalleck v. Deering*, 161 Mass. 470, 42 Am. St. Rep. 421, 37 N. E. 450—*Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 334, 22 L.R.A. 294, 37 Am. St. Rep. 348, 56 N. W. 756—*Blomquist v. Chicago, M. & St. P. R. Co.* 60 Minn. 435, 62 N. W. 818—*Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 401, 48 L.R.A. 407, 77 Am. St. Rep. 721, 55 S. W. 108—*Hastings v. Montana Union R. Co.* 18 Mont. 498, 46 Pac. 264—*Missouri P. R. Co. v. Lyons*, 54 Neb. 639, 75 N. W. 13—*Leazotte v. Boston & M. R. Co.* 70 N. H. 6, 45 Atl. 1084—*McLaine v. Head & D. Co.* 71 N. H. 301, 58 L.R.A. 466, 93 Am. St. Rep. 522, 52 Atl. 545—*Knutter v. New York & N. J. Teleph. Co.* 67 N. J. L. 652, 58 L.R.A. 810, 52 Atl. 565—*Atchison, T. & S. F. R. Co. v. Martin*, 7 N. M. 177, 34 Pac. 536—*Mason v. Richmond & D. R. Co.* 114 N. C. 723, 19 S. E. 362—*Lebbering v. Struthers*, 157 Pa. 312, 27 Atl. 720—*Illinois C. R. Co. v. Spence*, 93 Tenn. 173, 42 Am. St. Rep. 907, 23 S. W. 211—*Allen v. Logan City*, 10 Utah, 288, 37 Pac. 496—*Chapman v. Southern P. Co.* 12 Utah, 40, 41 Pac. 551—*Stephani v. Southern P. Co.* 19 Utah, 206, 57 Pac. 34—*Norfolk & W. R. Co. v. Houchins (Norfolk & W. R. Co. v. Swaine)* 95 Va. 409, 46 L.R.A. 366, 64 Am. St. Rep. 791, 28 S. E. 578—*Ilughes v. Oregon Improv. Co.* 20 Wash. 300, 55 Pac. 119—*Jackson v. Norfolk & W. R. Co.* 43 W. Va. 390, 46 L.R.A. 343, 27 S. E. 278—*Hartford v. Northern P. R. Co.* 91 Wis. 380, 64 N. W. 1033—*Wiskie v. Montello Granite Co.* 111 Wis. 450, 87 Am. St. Rep. 885, 87 N. W. 461.

Brakeman and car cleaner.

147. A brakeman is not a fellow servant of the person who is charged with the duty of keeping the cars in order, so as to relieve the railroad company from liability for the latter's negligence. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755

Cited in *Maryland Clay Co. v. Goodnow*, 95 Md. 343, 51 Atl. 292.

b. Vice Principal; Superior Servant.

Liability for Vice Principal's Negligence, see infra, 157-159.

148. Agents of a corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence, and their subordinates or servants engaged in different departments, are not fellow servants. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, 28: 787
Denied in St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 428, 57 Am. Rep. 176, 11 Pac. 408.
Limited in New York & N. E. R. Co. v. Hyde, 5 C. C. A. 467, 5 U. S. App. 443, 56 Fed. 194.

Distinguished in Anderson v. Winston, 31 Fed. 520.

Criticized in *Harley v. Louisville & N. R. Co.* 57 Fed. 146.

Disapproved in *Loughlin v. State*, 105 N. Y. 164, 11 N. E. 371.

Explained in *Northern P. R. Co. v. Peterson*, 2 C. C. A. 161, 4 U. S. App. 574, 51 Fed. 186.

Cited in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 375, 37 L. ed. 777, 10 Sup. Ct. Rep. 914—*Northern P. R. Co. v. Charless*, 162 U. S. 363, 40 L. ed. 1001, 16 Sup. Ct. Rep. 848—*The Titan*, 23 Blatchf. 180, 23 Fed. 416—*Quinn v. New Jersey Lighterage Co.* 23 Blatchf. 210, 23 Fed. 363—*The City of New York*, 25 Fed. 150—*Garraty v. Kansas City, St. J. & C. R. Co.* 25 Fed. 259—*Craig v. Continental Ins. Co.* 26 Fed. 800—*Howard v. Denver & R. G. R. Co.* 26 Fed. 840—*Mason v. Edison Mach. Co.* 24 Blatchf. 95, 28 Fed. 229—*The Noddleburn*, 28 Fed. 858—*Au v. New York, L. E. & W. R. Co.* 29 Fed. 78—*Easton v. Houston & T. C. R. Co.* 32 Fed. 895—*Wolcott v. Studebaker*, 34 Fed. 11—*Van Avery v. Union P. R. Co.* 35 Fed. 41—*The Egyptian Monarch*, 36 Fed. 776—*Howard v. Delaware & H. Canal Co.* 6 L.R.A. 78, 40 Fed. 197—*The Queen*, 40 Fed. 696—*Borgman v. Omaha & St. L. R. Co.* 41 Fed. 668—*McKalg v. Northern P. R. Co.* 42 Fed. 291—*The A. Heaton*, 43 Fed. 595—*Grimsley v. Hankins*, 46 Fed. 402—*Atchison, T. & S. F. R. Co. v. Wilson*, 1 C. C. A. 32, 4 U. S. App. 25, 48 Fed. 61—*Woods v. Lindvall*, 1 C. C. A. 47, 4 U. S. App. 49, 48 Fed. 72—*Newport News & M. Valley Co. v. Howe*, 3 C. C. A. 123, 6 U. S. App. 172, 52 Fed. 364—*Cleveland, C. C. & St. L. R. Co. v. Brown*, 6 C. C. A. 145, 18 U. S. App. 10, 56 Fed. 807—*Northern P. R. Co. v. Beaton*, 12 C. C. A. 303, 29 U. S. App. 88, 64 Fed. 566—*Brigal v. Southern P. Co.* 39 C. C. A. 363, 98 Fed. 902—*Pennsylvania Co. v. Fishback*, 59 C. C. A. 276, 123 Fed. 472—*Hobson v. New Mexico & A. R. Co.* 2 Ariz. 185, 11 Pac. 545—*St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 294, 11 L.R.A. 775, 15 S. W. 831—*Bloyd v. St. Louis & S. F. R. Co.* 58 Ark. 72, 41 Am. St. Rep. 85, 22 S. W. 1089—*Little Rock & M. R. Co. v. Barry*, 58 Ark. 203, 25 L.R.A. 395, 23 S. W. 1097—*Denver, S. P. & P. R. Co. v. Driscoll*, 12 Colo. 524, 13 Am. St. Rep. 243, 21 Pac. 708—*Darrigan v. New York & N. E. R. Co.* 52 Conn. 300, 52 Am. Rep. 590—*Ell v. Northern P. R. Co.* 1 N. D. 348, 12 L.R.A. 101, 26 Am. St. Rep. 621, 48 N. W. 222—*Palmer v. Utah & N. R. Co.* 2 Idaho, 321, 13 Pac. 425—*Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 601, 15 Pac. 484—*Hunn v. Michigan C. R. Co.* 78 Mich. 524, 7 L.R.A. 505, 44 N. W. 502—*Sherrin v. St. Joseph & St. L. R. Co.* 103 Mo. 383, 23 Am. St. Rep. 881, 15 S. W. 442—*Parker v. Hannibal & St. J. R. Co.* 109 Mo. 384, 18 L.R.A. 808, 19 S. W. 1119—*Parker v. Hannibal & St. J. R. Co.* 109 Mo. 410, 18 L.R.A. 811, 19 S. W. 1119—*Chicago, B. & Q. R. Co. v. Sullivan*, 27 Neb. 679, 43 N. W. 415—*Gabrielson v. Waydell*, 135 N. Y. 11, 17 L.R.A. 232, 31 Am. St. Rep. 793, 31 N. E. 960—*Brodeur v. Valley Falls Co.* 16 R. I. 449, 17 Atl. 54—*St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 301, 2 L.R.A. 840, 10 S. W. 529—*Cunningham v. Union P. R. Co.* 4 Utah, 214, 7 Pac. 795—*Reddon v. Union P. R. Co.* 5 Utah, 353, 15 Pac. 262—*Pool v. Southern P. Co.* 7 Utah, 308, 26 Pac. 654—*Webb v. Denver & R. G. W. R. Co.* 7 Utah, 367, 26 Pac. 981—*Andreson v. Ogden Union R. & Depot Co.* 8 Utah, 133, 30 Pac. 305—*Armstrong v. Oregon Short Line & U. N. R. Co.* 8 Utah, 423, 32 Pac. 693—*Richmond & D. R. Co. v. Norment*, 84 Va. 176, 10 Am. St. Rep. 827,

4 S. E. 211—*Sayward v. Carlson*, 1 Wash. 42, 23 Pac. 830—*Daniel v. Chesapeake & O. R. Co.* 36 W. Va. 411, 16 L.R.A. 389, 32 Am. St. Rep. 870, 15 S. E. 162.

Editorial notes.

[Fellow servants, who are; superiors, vice principals. 18 L.R.A. 792, 817, 823, 827.

Vice-principalship determined by rank of negligent servant. 51 L.R.A. 513.

Vice-principalship determined by character of act causing injury. 54 L.R.A. 33.

Statutory liability for negligence of employees exercising superintendence. 58 L.R.A. 33.

Servant charged with duty to warn other servants of danger as a vice principal. 4 L.R.A. (N.S.) 1161.]

Foreman or boss.

Question of Law or Fact, see Trial, 397.

See also *supra*, 130, 135-137, 140.

149. A master is liable to an employee injured by the negligent act of a foreman, who is acting in the performance of an absolute and personal duty imposed upon the master. *Martin v. Atchison, T. & S. F. R. Co.* 166 U. S. 399, 17 Sup. Ct. Rep. 603, 41: 1051 *Cited* in *Pennsylvania Co. v. Fishback*, 59 C. C. A. 273, 123 Fed. 469—*Weeks v. Scharer*, 64 C. C. A. 13, 129 Fed. 335—*Phoenix Bridge Co. v. Castleberry*, 65 C. C. A. 486, 131 Fed. 180—*Sartin v. Oregon Short Line R. Co.* 27 Utah, 454, 76 Pac. 219.

150. The boss of a small gang or ten or fifteen men engaged in making repairs upon a railroad over a distance of three sections, aiding the regular gang upon each section as occasion demands, is a fellow servant of another member of the gang, and not a superintendent of a separate department, or in control of such a distinct branch of the work as will render the master liable for his neglect to a coemployee, even if the boss does not actually handle a shovel or a pick. *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. Rep. 843, 40: 994 *Distinguished* in *Alaska United Gold Min. Co. v. Muset*, 52 C. C. A. 18, 114 Fed. 70.

Cited in *Northern P. R. Co. v. Charless*, 162 U. S. 362, 40 L. ed. 1001, 16 Sup. Ct. Rep. 848—*Oakes v. Mase*, 165 U. S. 364, 41 L. ed. 747, 17 Sup. Ct. Rep. 345—*Martin v. Atchison, T. & S. F. R. Co.* 166 U. S. 403, 41 L. ed. 1052, 17 Sup. Ct. Rep. 603—*Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 89, 42 L. ed. 392, 18 Sup. Ct. Rep. 40—*New England R. Co. v. Conroy*, 175 U. S. 338, 44 L. ed. 188, 20 Sup. Ct. Rep. 85—*Cleveland, C. C. & St. L. R. Co. v. Brown*, 20 C. C. A. 150, 34 U. S. App. 759, 73 Fed. 978—*Oregon Short Line & U. N. R. Co. v. Frost*, 21 C. C. A. 104, 44 U. S. App. 606, 74 Fed. 973—*Chapman v. Reynolds*, 23 C. C. A. 168, 33 U. S. App. 686, 77 Fed. 276—*Coulson v. Leonard*, 77 Fed. 540—*Bosworth v. Rogers*, 27 C. C. A. 387, 53 U. S. App. 620, 82 Fed. 976—*Bowes v. Hopkins*, 28 C. C. A. 526, 56 U. S. App. 217, 84 Fed. 769—*The Miami*, 87 Fed. 760—*Grady v. Southern R. Co.* 34 C. C. A. 496, 92 Fed. 493—*Carlson v. United New York Sandy Hook Pilots' Assn.* 93 Fed. 471—*Thomas v. Cincinnati, N. O. & T. P. R. Co.* 97 Fed. 249—*Tomlinson v. Chicago, B. & Q. R. Co.* 88 C. C. A. 150, 97 Fed. 254—*Hunt v. Hurd*, 89 C. C. A. 231, 98 Fed. 688—*Brigal v. Southern P. Co.* 39 C. C. A.

363, 98 Fed. 962—*Stevens v. Chamberlin*, 51 L.R.A. 525, 40 C. C. A. 424, 100 Fed. 381—*Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L.R.A. 51, 41 C. C. A. 538, 101 Fed. 626—*Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 202, 102 Fed. 109—*Maher v. Union P. D. & G. R. Co.* 45 C. C. A. 302, 106 Fed. 310—*McDonald v. Buckley*, 48 C. C. A. 375, 109 Fed. 293—*St. Louis & S. F. R. Co. v. Furry*, 52 C. C. A. 524, 114 Fed. 904—*Pennsylvania Co. v. Fishack*, 59 C. C. A. 275, 123 Fed. 471—*Dishon v. Cincinnati, N. O. & T. P. R. Co.* 126 Fed. 198—*Fournier v. Pike*, 128 Fed. 996—*Weeks v. Scharer*, 64 C. C. A. 13, 129 Fed. 335—*Phoenix Bridge Co. v. Castleberry*, 65 C. C. A. 486, 131 Fed. 180—*O'Connor v. Atchison, T. & S. F. R. Co.* 70 C. C. A. 89, 137 Fed. 505—*Southern Indiana R. Co. v. Martin*, 160 Ind. 237, 66 N. E. 886—*American Teleph. & Teleg. Co. v. Bower*, 20 Ind. App. 37, 49 N. E. 182—*Geesen v. Saguin*, 115 Iowa, 11, 87 N. W. 745—*Andre v. Winslow Bros. Elevator Co.* 117 Mich. 563, 76 N. W. 86—*Goodwell v. Montana C. R. Co.* 18 Mont. 299, 45 Pac. 210—*Hastings v. Montana Union R. Co.* 18 Mont. 497, 46 Pac. 264—*Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 402, 48 L.R.A. 407, 77 Am. St. Rep. 721, 55 S. W. 108—*Olsen v. Nixon*, 61 N. J. L. 673, 40 Atl. 694—*Louisville & N. R. Co. v. Jackson*, 106 Tenn. 442, 61 S. W. 771—*Sartin v. Oregon Short Line R. Co.* 27 Utah, 453, 76 Pac. 219—*Richmond Locomotive & Mach. Works v. Ford*, 94 Va. 643, 27 S. E. 509—*Norfolk & W. R. Co. v. Houchins (Norfolk & W. R. Co. v. Swaine)* 95 Va. 409, 46 L.R.A. 366, 64 Am. St. Rep. 791, 28 S. E. 578—*Hughes v. Oregon Improv. Co.* 20 Wash. 300, 55 Pac. 119—*Jackson v. Norfolk & W. R. Co.* 43 W. Va. 387, 46 L.R.A. 344, 27 S. E. 273—*Wiskie v. Montello Granite Co.* 111 Wis. 450, 87 Am. St. Rep. 885, 87 N. W. 461.

151. That, after men had lifted a rail which produced an injury to a fellow servant, and had carried it forward to a car, and while there holding it, awaiting the word of command from the boss to lift it further and throw it on the car, the boss failed to give the word of command in such a way as to produce concert of action in the men, but, on the contrary, ordered them to get the rail on the car in any way they could, and that he hurried the men and used oaths, whereby they became confused and failed to act in concert,—do not authorize a recovery from the employer. *Coyne v. Union P. R. Co.* 133 U. S. 370, 10 Sup. Ct. Rep. 382, 33: 651

Conductor of railroad train.

See also *supra*, 138, 140, 143, 144.

152. A conductor having the entire control and management of a railroad train is not a fellow servant with the engineer and other employees of the company on the train. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, 28: 787—*Limited in Kerlin v. Chicago, P. & St. L. R. Co.* 50 Fed. 187.

Noted as Limited in Northern P. R. Co. v. Smith, 8 C. C. A. 666, 15 U. S. App. 294, 59 Fed. 996.

Overruled in Core v. Ohio River R. Co. 38 W. Va. 468, 18 S. E. 596.

Noted in Northern P. R. Co. v. Cavanaugh, 2 C. C. A. 359, 10 U. S. App. 197, 51 Fed. 518—*Northern P. R. Co. v. Charless*, 2 C. C.

A. 397, 7 U. S. App. 359, 51 Fed. 578—*Union P. R. Co. v. Callaghan*, 6 C. C. A. 206, 12 U. S. App. 541, 56 Fed. 990—*Clyde v. Richmond & D. R. Co.* 59 Fed. 398—*Northern P. R. Co. v. Mase*, 11 C. C. A. 64, 27 U. S. App. 238, 69 Fed. 115—*Elliott v. Felton*, 56 C. C. A. 83, 113 Fed. 279—*Georgia P. R. Co. v. Davis*, 92 Ala. 313, 25 Am. St. Rep. 47, 9 So. 252—*McGill v. Southern P. Co.* 4 Ariz. 122, 38 Pac. 821—*Southern P. Co. v. McGill*, 5 Ariz. 43, 44 Pac. 302—*St. Louis, I. M. & S. R. Co. v. Morgart*, 45 Ark. 326—*Fagundes v. Central P. R. Co.* 79 Cal. 102, 3 L.R.A. 826, 21 Pac. 437—*Congrave v. Southern P. R. Co.* 88 Cal. 366, 26 Pac. 175—*Elliott v. Chicago, M. & St. P. R. Co.* 5 Dak. 538, 3 L.R.A. 365, 41 N. W. 758—*Mills v. East Tennessee, V. & G. R. Co.* 87 Ga. 105, 13 S. E. 205—*Chicago & A. R. Co. v. McDonald*, 21 Ill. App. 419—*Illinois C. R. Co. v. Meyer*, 65 Ill. App. 539—*Van Amburg v. Vicksburg, S. & P. R. Co.* 37 La. Ann. 654, 53 Am. Rep. 517—*Towns v. Vicksburg, S. & P. R. Co.* 37 La. Ann. 632, 55 Am. Rep. 508—*McMaster v. Illinois C. R. Co.* 65 Miss. 268, 7 Am. St. Rep. 653, 4 So. 59—*Mason v. Richmond & D. R. Co.* 111 N. C. 495, 18 L.R.A. 848, 32 Am. St. Rep. 814, 16 S. E. 698—*Boatwright v. Northeastern R. Co.* 25 S. C. 134—*East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 78, 6 Am. St. Rep. 816, 5 S. W. 600—*Ayers v. Richmond & D. R. Co.* 84 Va. 684, 5 S. E. 582—*Johnson v. Richmond & D. R. Co.* 84 Va. 716, 5 S. E. 707—*Richmond & D. R. Co. v. Williams*, 86 Va. 168, 19 Am. St. Rep. 876, 9 S. E. 900—*Northern P. R. Co. v. O'Brien*, 1 Wash. 606, 21 Pac. 32—*Madden v. Chesapeake & O. R. Co.* 28 W. Va. 617, 57 Am. Rep. 695—*Madden v. Chesapeake & O. R. Co.* 28 W. Va. 620, 57 Am. Rep. 695—*Haney v. Pittsburgh, C. C. & St. L. R. Co.* 38 W. Va. 579, 18 S. E. 748—*Northern P. R. Co. v. Hambly*, 154 U. S. 358, 38 L. ed. 1013, 14 Sup. Ct. Rep. 983—*Pike v. Chicago & A. R. Co.* 41 Fed. 97—*Ragsdale v. Northern P. R. Co.* 42 Fed. 384—*Baltimore & O. R. Co. v. Andrews*, 17 L.R.A. 191, 1 C. C. A. 638, 6 U. S. App. 75, 50 Fed. 730.

— Editorial notes.

Railroad conductors and engineers as fellow servants with other employees.

38: 1009

[When conductor is deemed coservant of other railway employees. 46 L.R.A. 337.]

153. A conductor having the entire control and management of a railway train is not a fellow servant with the engineer, but stands in the place of, and represents, the corporation; and the railroad company is liable for injuries caused to the engineer by the conductor's negligence. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, 28: 787

Noted in Southern P. Co. v. Schoer, 57 L.R.A. 711, 52 C. C. A. 276, 114 Fed. 474—*Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 371, 49 Am. Rep. 752—*Evansville & T. H. R. Co. v. McKee*, 99 Ind. 522, 50 Am. Rep. 102—*Fleming v. Southern R. Co.* 132 N. C. 719, 44 S. E. 551—*Lawson v. Chicago, St. P. M. & O. R. Co.* 64 Wis. 456, 54 Am. Rep. 634, 24 N. W. 618.

154. A railroad company is responsible to its train servants for injuries received by them in consequence of neglect of duty by a train conductor in charge of the train, with the right to command its movements and

control the persons employed upon it. Chicago. M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184, 28: 787
Overruled in New England R. Co. v. Conroy, 175 U. S. 340, 44 L. ed. 189, 20 Sup. Ct. Rep. 85.

Criticized in Coulson v. Leonard, 77 Fed. 539
 —Grady v. Southern R. Co. 34 C. C. A. 497, 92 Fed. 494—Stuber v. Louisville & N. R. Co. 102 Fed. 422—Louisville & N. R. Co. v. Stuber, 54 L.R.A. 699, 48 C. C. A. 154, 108 Fed. 938—Scott v. Chicago G. W. R. Co. 113 Iowa, 385, 85 N. W. 631—St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 428, 57 Am. Rep. 176, 11 Pac. 408—Grattis v. Kansas City, P. & G. R. Co. 153 Mo. 401, 48 L.R.A. 407, 77 Am. St. Rep. 721, 55 S. W. 108—New Omaha Thomson-Houston Electric Light Co. v. Baldwin, 62 Neb. 189, 87 N. W. 27—Mast v. Kern, 84 Or. 249, 75 Am. St. Rep. 580, 54 Pac. 950—Hanna v. Granger, 18 R. I. 509, 28 Atl. 659—Hicks v. Southern R. Co. 63 S. C. 576, 38 S. E. 725—Norfolk & W. R. Co. v. Houchins (Norfolk & W. R. Co. v. Swaine) 95 Va. 405, 46 L.R.A. 366, 64 Am. St. Rep. 791, 28 S. E. 578—Wisla v. Montello Granite Co. 111 Wis. 450, 87 Am. St. Rep. 885, 87 N. W. 461.

Distinguished in Baltimore & O. R. Co. v. Andrews, 17 L.R.A. 191, 1 C. C. A. 638, 6 U. S. App. 76, 50 Fed. 730—Thom v. Pittard, 10 C. C. A. 358, 8 U. S. App. 597, 62 Fed. 238—Congrave v. Southern P. R. Co. 88 Cal. 366, 26 Pac. 175.

Cited in Howard v. Delaware & H. Canal Co. 6 L.R.A. 78, 40 Fed. 197—The Transfer No. 4, 9 C. C. A. 625, 20 U. S. App. 570, 61 Fed. 368—Canadian P. R. Co. v. Johnston, 25 L. R.A. 475, 9 C. C. A. 592, 26 U. S. App. 85, 61 Fed. 743—Louisville & N. R. Co. v. Ward, 10 C. C. A. 169, 18 U. S. App. 683, 61 Fed. 929—Baltimore & O. R. Co. v. Camp, 13 C. C. A. 240, 31 U. S. App. 213, 65 Fed. 959—Northern P. R. Co. v. Poirier, 15 C. C. A. 55, 29 U. S. App. 583, 67 Fed. 884—Thomas v. Cincinnati, N. O. & T. P. R. Co. 97 Fed. 250—Elliott v. Felton, 56 C. C. A. 82, 119 Fed. 278—St. Louis, I. M. & S. R. Co. v. Morgart, 45 Ark. 326—Fagundes v. Central P. R. Co. 79 Cal. 102, 3 L.R.A. 826, 21 Pac. 437—Colorado Coal & I. Co. v. Lamb, 6 Colo. App. 262, 40 Pac. 251—Denver, S. P. & P. R. Co. v. Driscoll, 12 Colo. 524, 13 Am. St. Rep. 243, 21 Pac. 708—Darrigan v. New York & N. E. R. Co. 52 Conn. 800, 52 Am. Rep. 590—Elliott v. Chicago, M. & St. P. R. Co. 5 Dak. 538, 3 L.R.A. 363, 41 N. W. 758—Parrish v. Pensacola & A. R. Co. 28 Fla. 282, 9 So. 696—Mills v. East Tennessee V. & G. R. Co. 87 Ga. 105, 13 S. E. 205—Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 31, 2 Am. St. Rep. 144, 13 N. E. 122—Louisville & N. R. Co. v. Moore, 83 Ky. 684—Towns v. Vicksburg, S. & P. R. Co. 37 La. Ann. 632, 55 Am. Rep. 508—Van Amburg v. Vicksburg, S. & P. R. Co. 37 La. Ann. 654, 55 Am. Rep. 517—Mattise v. Consumers' Ice Mfg. Co. 46 La. Ann. 1539, 49 Am. St. Rep. 366, 16 So. 400—Blomquist v. Chicago, M. & St. P. R. Co. 60 Minn. 434, 62 N. W. 818—Carlson v. Northwestern Teleph. Exch. Co. 63 Minn. 438, 65 N. W. 914—Smith v. Washash, St. L. & P. R. Co. 92 Mo. 369, 1 Am. St. Rep. 729, 4 S. W. 129—Dixon v. Chicago & A. R. Co. 109 Mo. 421, 18 L.R.A. 799, 19 S. W. 412—Union P. R. Co. v. Doyle, 50 Neb. 561, 70 N. W. 43—O'Brien v. American Dredging Co. 53 N. J. L. 296, 21 Atl. 324—

Mason v. Richmond & D. R. Co. 111 N. C. 495, 18 L.R.A. 848, 32 Am. St. Rep. 814, 16 S. E. 698—Mason v. Richmond & D. R. Co. 114 N. C. 724, 19 S. E. 362—Elmore v. Seaboard Air Line R. Co. 182 N. C. 878, 44 S. E. 620—Anderson v. Bennett, 16 Or. 523, 6 Am. St. Rep. 811, 19 Pac. 765—Brodeur v. Valley Falls Co. 16 R. I. 449, 17 Atl. 54—Boatwright v. Northeastern R. Co. 25 S. C. 134—Illinois C. R. Co. v. Spence, 93 Tenn. 183, 42 Am. St. Rep. 907, 23 S. W. 211—Alabama G. S. R. Co. v. Baldwin, 113 Tenn. 418, 67 L.R.A. 341, 82 S. W. 487—St. Louis, A. & T. R. Co. v. Welch, 72 Tex. 801, 2 L.R.A. 840, 10 S. W. 529—Galveston, H. & S. A. R. Co. v. Smith, 76 Tex. 615, 18 Am. St. Rep. 78, 13 S. W. 562—San Antonio & A. P. R. Co. v. Harding, 11 Tex. Civ. App. 501, 33 S. W. 373—Stephani v. Southern P. Co. 19 Utah, 203, 57 Pac. 34—Baltimore & O. R. Co. v. McKenzie, 81 Va. 74—Ayers v. Richmond & D. R. Co. 84 Va. 684, 5 S. E. 582—Richmond & D. R. Co. v. Norment, 84 Va. 176, 10 Am. St. Rep. 827, 4 S. E. 211—Johnson v. Richmond & D. R. Co. 84 Va. 716, 5 S. E. 707—Richmond & D. R. Co. v. Williams, 86 Va. 168, 19 Am. St. Rep. 876, 9 S. E. 990—Northern P. R. Co. v. O'Brien, 1 Wash. 606, 21 Pac. 32—Sayward v. Carlson, 1 Wash. 42, 23 Pac. 880—McDonough v. Great Northern R. Co. 15 Wash. 256, 46 Pac. 334—Bateman v. Peninsular R. Co. 20 Wash. 138, 54 Pac. 996—Keating v. Pacific Steam Whaling Co. 21 Wash. 422, 58 Pac. 224—Howe v. Northern P. R. Co. 30 Wash. 579, 60 L.R.A. 954, 70 Pac. 1100—Madden v. Chesapeake & O. R. Co. 28 W. Va. 617, 57 Am. Rep. 695—Haney v. Pittsburgh, C. C. & St. L. R. Co. 38 W. Va. 579, 18 S. E. 748—Young v. West Virginia, C. & P. R. Co. 42 W. Va. 124, 24 S. E. 615.

155. The conductor of a freight train is not a vice principal, unless special and unusual powers have been conferred upon him, but is a fellow servant of the engineer and brakemen, within the meaning of the rule which exempts the railroad company, their common employer, from liability to one of them for injuries caused by the negligence of another. *New England R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. Rep. 85, 44: 181
Cited in Northern P. R. Co. v. Dixon, 194 U. S. 843, 48 L. ed. 1009, 24 Sup. Ct. Rep. 683—Briegal v. Southern P. Co. 39 C. C. A. 363, 98 Fed. 962—Stevens v. Chamberlin, 51 L.R.A. 525, 40 C. C. A. 424, 100 Fed. 381—Missouri, K. & T. R. Co. v. Elliott, 42 C. C. A. 202, 102 Fed. 109—Missouri, K. & T. R. Co. v. Elliott, 42 C. C. A. 204, 102 Fed. 111—Stuber v. Louisville & N. R. Co. 102 Fed. 422—Olson v. Oregon Coal & Nav. Co. 44 C. C. A. 53, 104 Fed. 576—Kelly v. Jutte & F. Co. 44 C. C. A. 274, 104 Fed. 956—Louisville & N. R. Co. v. Stuber, 54 L.R.A. 699, 48 C. C. A. 154, 108 Fed. 938—McDonald v. Buckley, 48 C. C. A. 376, 109 Fed. 294—Weeks v. Scherer, 49 C. C. A. 377, 111 Fed. 835—Southern P. Co. v. Schoer, 57 L.R.A. 708, 52 C. C. A. 271, 114 Fed. 469—St. Louis & S. F. R. Co. v. Furry, 52 C. C. A. 524, 114 Fed. 904—Davis v. Trade Dollar Consol. Min. Co. 54 C. C. A. 637, 117 Fed. 123—Elliott v. Felton, 56 C. C. A. 75, 119 Fed. 271—Hale v. Kansas City Southern R. Co. 57 C. C. A. 149, 120 Fed. 735—Fournier v. Pike, 128 Fed. 994—Weeks v. Scherer, 64 C. C. A. 13, 129 Fed. 335—Huntzicker v. Illinois C. R. Co. 64 C. C. A. 79, 129 Fed. 549—Lach v. Burnham, 134 Fed. 689—Rosney v. Erie R. Co. 68 C. C. A.

156. 135 Fed. 312—The Westport, 69 C. C. A. 239, 136 Fed. 395—Crosby v. Lehigh Valley R. Co. 70 C. C. A. 201, 137 Fed. 767—Smith v. Lehigh Valley R. Co. 141 Fed. 194—American Bridge Co. v. Seeds, 75 C. C. A. 410, 144 Fed. 608—American Car & Foundry Co. v. Brinkman, 77 C. C. A. 140, 146 Fed. 714—Baltimore & O. R. Co. v. Brown, 76 C. C. A. 487, 146 Fed. 29—Peterson v. New York, N. H. & H. R. Co. 77 Conn. 385, 59 Atl. 502—Scott v. Chicago G. W. R. Co. 113 Iowa, 385, 85 N. W. 631—Atchison & E. Bridge Co. v. Miller, 71 Kan. 31, 1 L.R.A. (N.S.) 692, 80 Pac. 18—Rounds v. Carter, 94 Me. 540, 48 Atl. 175—Knutter v. New York & N. J. Teleph. Co. 67 N. J. L. 652, 58 L.R.A. 810, 52 Atl. 565—Larsen v. Delaware, L. & W. R. Co. 59 App. Div. 205, 69 N. Y. Supp. 352—Overton v. McCabe, 35 Tex. Civ. App. 135, 79 S. W. 861—Grimm v. Olympia Light & P. Co. 42 Wash. 123, 84 Pac. 635—McVey v. St. Clair Co. 49 W. Va. 425, 38 S. E. 648.

Acting conductor.

156. A rule of a railroad company that where a train or engine is run without a conductor the engineer shall be regarded as the conductor cannot have the effect of making the engineer the representative of the railroad company while performing his duties, and, therefore, to exclude him from the relation of fellow servant to other employees on the train, so as to make the company liable to a fireman for the engineer's negligence. Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. Rep. 914, 37: 772

Cited in Northern P. R. Co. v. Smith, 8 C. C. A. 666, 15 U. S. App. 294, 59 Fed. 996—Kane v. Erie R. Co. 68 L.R.A. 791, 67 C. C. A. 659, 133 Fed. 687.

6. For What Acts of Fellow Servant Master is Liable.

Negligence in Delegated Duty, see *supra*, 121.

See also *supra*, 31, 130.

157. The master is liable to servants for the negligence of superintendents of various departments, who are representatives of the master, charged with the performance of his duties, and, within the limits of their authority, vice principals. Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184, 28: 787

Distinguished in Stevens v. Chamberlin, 51 L. R.A. 530, 40 C. C. A. 426, 100 Fed. 383—Missouri, K. & T. R. Co. v. Elliott, 42 C. C. A. 204, 102 Fed. 111—Walker v. Gillett, 59 Kan. 219, 52 Pac. 442—Loughlin v. State, 105 N. Y. 164, 11 N. E. 371.

Cited in Northern P. R. Co. v. Peterson, 162 U. S. 354, 40 L. ed. 997, 16 Sup. Ct. Rep. 843—Heckman v. Mackey, 35 Fed. 354—Mase v. Northern P. R. Co. 57 Fed. 285—Northern P. R. Co. v. Hogan, 11 C. C. A. 54, 27 U. S. App. 184, 63 Fed. 105—St. Louis, I. M. & S. R. Co. v. Needham, 25 L.R.A. 837, 11 C. C. A. 61, 27 U. S. App. 227, 63 Fed. 112—Killien v. Hyde, 63 Fed. 176—St. Louis & S. F. R. Co. v. Furry, 52 C. C. A. 520, 114 Fed. 900—Chicago House Wrecking Co. v. Birney, 54 C. C. A. 463, 117 Fed. 77—Hobson v. New Mexico & A. R. Co.

2 Ariz. 200, 11 Pac. 545—St. Louis, A. & T. R. Co. v. Triplett, 54 Ark. 204, 11 L. R.A. 777, 15 S. W. 831—Bloyd v. St. Louis & S. F. R. Co. 58 Ark. 72, 41 Am. St. Rep. 85, 22 S. W. 1089—South Florida R. Co. v. Weese, 32 Fla. 230, 18 So. 433—Taylor v. Georgia Marble Co. 99 Ga. 518, 59 Am. St. Rep. 238, 27 S. E. 768—Palmer v. Utah & N. B. Co. 2 Idaho, 321, 13 Pac. 425—Consolidated Coal Co. v. Wombacher, 134 Ill. 64, 24 N. E. 627—Pullman Palace Car Co. v. Laack, 143 Ill. 254, 18 L.R.A. 218, 32 N. E. 285—West Chicago Street R. Co. v. Dwyer, 162 Ill. 493, 44 N. E. 815—Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 31, 2 Am. St. Rep. 144, 13 N. E. 122—Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 571, 16 N. E. 197—Louisville, N. A. & C. R. Co. v. Heck, 151 Ind. 314, 50 N. E. 988—Missouri, K. & T. R. Co. v. Elliott, 2 Ind. Terr. 422, 51 S. W. 1067—Atchison, T. & S. F. R. Co. v. McKee, 37 Kan. 601, 15 Pac. 484—Louisville & N. R. Co. v. Moore, 83 Ky. 684—Faren v. Sellers, 39 La. Ann. 1019, 4 Am. St. Rep. 256, 3 So. 363—Donnelly v. Booth Bros. & H. I. Granite Co. 90 Me. 115, 37 Atl. 874—Kalleck v. Deering, 161 Mass. 472, 42 Am. St. Rep. 421, 37 N. E. 450—Hunn v. Michigan C. R. Co. 78 Mich. 524, 7 L.R.A. 505, 44 N. W. 502—Southern R. Co. v. Cheaves, 84 Miss. 587, 36 So. 691—Dixon v. Chicago & A. R. Co. 109 Mo. 421, 18 L.R.A. 799, 19 S. W. 412—Dayharsh v. Hannibal & St. J. R. Co. 103 Mo. 577, 23 Am. St. Rep. 900, 15 S. W. 554—Sherrin v. St. Joseph & St. L. R. Co. 103 Mo. 383, 23 Am. St. Rep. 881, 15 S. W. 442—Parker v. Hannibal & St. J. R. Co. 109 Mo. 410, 18 L.R.A. 811, 19 S. W. 1119—Clowers v. Wabash, St. L. & P. R. Co. 21 Mo. App. 219—Hutson v. Missouri P. R. Co. 50 Mo. App. 305—Chicago, B. & Q. R. Co. v. Sullivan, 27 Neb. 679, 43 N. W. 415—McLaine v. Head & D. Co. 71 N. H. 301, 58 L.R.A. 466, 93 Am. St. Rep. 522, 52 Atl. 545—Knutter v. New York & N. J. Teleph. Co. 67 N. J. L. 652, 58 L.R.A. 810, 52 Atl. 565—Galveston, H. & S. A. R. Co. v. Smith, 76 Tex. 615, 18 Am. St. Rep. 78, 13 S. W. 562—Cunningham v. Union P. R. Co. 4 Utah, 214, 7 Pac. 795—Bowers v. Union P. R. Co. 4 Utah, 222, 7 Pac. 251—Reddon v. Union P. R. Co. 5 Utah, 353, 15 Pac. 262—Anderson v. Ogden Union R. & Depot Co. 8 Utah, 133, 30 Pac. 305—Armstrong v. Oregon Short Line & U. N. R. Co. 8 Utah, 428, 32 Pac. 693—Baltimore & O. R. Co. v. McKenzie, 81 Va. 74—Jones v. Old Dominion Cotton Mills, 82 Va. 155, 3 Am. St. Rep. 92—Daniel v. Chesapeake & O. R. Co. 36 W. Va. 411, 16 L.R.A. 387, 32 Am. St. Rep. 870, 15 S. E. 162—Jackson v. Norfolk & W. R. Co. 43 W. Va. 385, 46 L.R.A. 355, 27 S. E. 278—Lawson v. Chicago, St. P. M. & O. R. Co. 64 Wis. 456, 54 Am. Rep. 634, 24 N. W. 618.

158. A railroad company is liable when its officers or agents who are invested with a controlling or superior duty in furnishing suitable machinery are, in discharging it, guilty of negligence, from which injury results to a servant of the company. Such officers or agents are not fellow servants with those engaged in operating the railroad. Hough v. Texas & P. R. Co. 100 U. S. 213, 25: 612

Cited in Northern P. R. Co. v. Dixon, 194 U. S. 351, 48 L. ed. 1012, 24 Sup. Ct. Rep. 683—Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. 619—Pike v. Chicago

& A. R. Co. 41 Fed. 98—Baltimore & O. R. Co. v. Andrews, 17 L.R.A. 192, 1 C. C. A. 639, 6 U. S. App. 75, 50 Fed. 731—*Blloyd v. St. Louis & S. F. R. Co.* 58 Ark. 78, 41 Am. St. Rep. 85, 22 S. W. 1089—*Beeson v. Green Mountain Gold Min. Co.* 57 Cal. 37—*Palmer v. Utah & N. R. Co.* 2 Idaho, 320, 18 Pac. 425—*Chicago & N. W. R. Co. v. Gillison*, 72 Ill. App. 218—*Taylor v. Evansville & T. H. R. Co.* 121 Ind. 130, 6 L.R.A. 587, 16 Am. St. Rep. 372, 22 N. E. 876—*Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 599, 3 Pac. 320—*Hall v. Emerson-Stevens Mfg. Co.* 94 Me. 450, 47 Atl. 924—*Willis v. Oregon R. & Nav. Co.* 11 Or. 264, 4 Pac. 121—*Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 553—*Houston & T. C. R. Co. v. Marcelles*, 59 Tex. 338—*Madden v. Chesapeake & O. R. Co.* 28 W. Va. 619, 57 Am. Rep. 695—*Criswell v. Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 819, 6 S. E. 81.

159. An employer is liable for the loss of an arm of a boy helper to a workman at a molding machine, under whose orders he was placed, and by whom he was directed to mount a ladder and adjust a belt among rapidly revolving and dangerous machinery, where the accident happened. *Union P. R. Co. v. Fort*, 17 Wall. 553, 21: 739

Cited in Kitley v. Belcher Silver Min. Co. 3 Sawy. 440, Fed. Cas. No. 7,760—*The Clatsop Chief*, 7 Sawy. 278, 8 Fed. 166—*Gravelle v. Minneapolis & St. L. R. Co.* 3 McCrary, 364, 11 Fed. 573—*Howard v. Denver & R. G. R. Co.* 26 Fed. 840—*Mason v. Edison Mach. Works*, 24 Blatchf. 95, 28 Fed. 229—*Richmond & D. R. Co. v. Finley*, 12 C. C. A. 598, 25 U. S. App. 16, 63 Fed. 231—*Felton v. Girardy*, 43 C. C. A. 442, 104 Fed. 130—*Louisville & N. R. Co. v. Miller*, 43 C. C. A. 439, 104 Fed. 127—*Fones v. Phillips*, 89 Ark. 29, 43 Am. Rep. 264—*Fisk v. Central P. R. Co.* 72 Cal. 44, 1 Am. St. Rep. 22, 18 Pac. 144—*Summerhays v. Kansas P. R. Co.* 2 Colo. 487—*Colorado Midland R. Co. v. O'Brien*, 16 Colo. 225, 27 Pac. 701—*Brazil Block Coal Co. v. Young*, 117 Ind. 523, 20 N. E. 423—*Hanson v. Hammell*, 107 Iowa, 175, 77 N. W. 839—*Dyer v. Rieley*, 28 La. Ann. 9—*Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 213—*Norfolk Beet-Sugar Co. v. Hight*, 56 Neb. 167, 76 N. W. 566—*Stimper v. Fuchs & L. Mfg. Co.* 26 App. Div. 335, 49 N. Y. Sup. 785—*Buckley v. Gutta Percha & Rubber Mfg. Co.* 41 Hun, 450—*Houston & T. C. R. Co. v. Marcelles*, 59 Tex. 337—*Gulf, C. & S. F. R. Co. v. Jones*, 76 Tex. 353, 13 S. W. 374—*Moon v. Richmond & A. R. Co.* 78 Va. 750, 49 Am. Rep. 401—*Michael v. Roanoke Mach. Works*, 90 Va. 496, 44 Am. St. Rep. 927, 19 S. E. 261—*Madden v. Chesapeake & O. R. Co.* 28 W. Va. 619, 57 Am. Rep. 695.

160-1. The question of the master's liability to his servant for the negligent act of a coemployee turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it is not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. *Baltimore & O. R. Co. v.*

Baugh, 149 U. S. 368, 13 Sup. Ct. Rep. 914, 37: 772

Central R. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. Rep. 269, 40: 418

Distinguished in Finley v. Richmond & D. R. Co. 59 Fed. 421—*Terre Haute & I. R. Co. v. Rittenhouse*, 28 Ind. App. 640, 82 N. E. 295.

Cited in What Cheer Coal Co. v. Johnson, 6 C. C. A. 150, 12 U. S. App. 490, 56 Fed. 812—*Harley v. Louisville & N. R. Co.* 57 Fed. 146—*Mase v. Northern P. R. Co.* 57 Fed. 285—*Texas & P. R. Co. v. Rogers*, 6 C. C. A. 406, 18 U. S. App. 547, 57 Fed. 381—*Minneapolis v. Lundin*, 7 C. C. A. 346, 19 U. S. App. 245, 58 Fed. 527—*McGrath v. Texas & P. R. Co.* 9 C. C. A. 134, 23 U. S. App. 86, 60 Fed. 557—*Union P. R. Co. v. Novak*, 9 C. C. A. 648, 15 U. S. App. 400, 61 Fed. 587—*Canadian P. R. Co. v. Johnston*, 25 L.R.A. 475, 9 C. C. A. 592, 26 U. S. App. 85, 61 Fed. 743—*Louisville & N. R. Co. v. Ward*, 10 C. C. A. 169, 18 U. S. App. 683, 61 Fed. 929—*Alaska Treadwell Gold Min. Co. v. Whelan*, 12 C. C. A. 227, 29 U. S. App. 1, 64 Fed. 464—*Northern P. R. Co. v. Beaton*, 12 C. C. A. 305, 29 U. S. App. 88, 64 Fed. 566—*Martin v. Chicago & A. R. Co.* 65 Fed. 385—*Deavers v. Spencer*, 17 C. C. A. 217, 25 U. S. App. 411, 70 Fed. 482—*Kansas & A. Valley R. Co. v. Waters*, 16 C. C. A. 609, 36 U. S. App. 31, 70 Fed. 29—*Hermann v. Port Blakely Mill Co.* 71 Fed. 861—*Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 627, 43 U. S. App. 113, 73 Fed. 638—*Balch v. Haas*, 20 C. C. A. 156, 36 U. S. App. 693, 73 Fed. 979—*Reed v. Stockmeyer*, 20 C. C. A. 386, 34 U. S. App. 727, 74 Fed. 192—*Oregon Short Line & U. N. R. Co. v. Frost*, 21 C. C. A. 192, 44 U. S. App. 606, 74 Fed. 971—*Reed v. Stockmeyer*, 20 C. C. A. 386, 34 U. S. App. 727, 74 Fed. 192—*Grady v. Southern R. Co.* 34 C. C. A. 496, 92 Fed. 493—*Swift & Co. v. Short*, 34 C. C. A. 548, 92 Fed. 570—*Port Blakely Mill Co. v. Garrett*, 38 C. C. A. 344, 97 Fed. 539—*Tomlinson v. Chicago, B. & Q. R. Co.* 88 C. C. A. 150, 97 Fed. 254—*Fenwick v. Illinois C. R. Co.* 40 C. C. A. 370, 100 Fed. 248—*Stevens v. Chamberlin*, 51 L.R.A. 527, 40 C. C. A. 425, 100 Fed. 382—*Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 44, 47 C. C. A. 369, 108 Fed. 337—*Southern P. Co. v. Schoer*, 57 L.R.A. 709, 52 C. C. A. 271, 114 Fed. 469—*Chicago House Wrecking Co. v. Birney*, 54 C. C. A. 462, 117 Fed. 76—*Pennsylvania Co. v. Fishack*, 59 C. C. A. 275, 123 Fed. 471—*National Steel Co. v. Lowe*, 62 C. C. A. 234, 127 Fed. 316—*Kane v. Erie R. Co.* 128 Fed. 475—*Weeks v. Scharer*, 64 C. C. A. 13, 129 Fed. 335—*Bunker Hill & S. Min. & Concentrating Co. v. Jones*, 65 C. C. A. 370, 130 Fed. 820—*Phoenix Bridge Co. v. Castleberry*, 65 C. C. A. 486, 131 Fed. 180—*Crosby v. Lehigh Valley R. Co.* 70 C. C. A. 201, 137 Fed. 767—*Southern P. Co. v. McGill*, 5 Ariz. 41, 44 Pac. 312—*Blloyd v. St. Louis & S. F. R. Co.* 58 Ark. 71, 41 Am. St. Rep. 85, 22 S. W. 1089—*Burns v. Sennett*, 99 Cal. 367, 33 Pac. 916—*Nixon v. Selby Smelting & Lead Co.* 102 Cal. 465, 36 Pac. 803—*McNamara v. MacDonough*, 102 Cal. 582, 36 Pac. 941—*McQueeney v. Chicago, M. & St. P. R. Co.* 120 Iowa, 526, 94 N. W. 1124—*Frye v. Rath Gas & Electric Co.* 94 Me. 23, 46 Atl. 804—*Southern R. Co. v. Cheaves*, 84 Miss. 586, 36 So. 691—*Zellers v. Missouri Water & Light Co.* 92 Mo. App. 126—*Union P. R. Co. v. Doyle*, 50 Neb. 562, 70 N. W. 43—

Mast v. Kern, 34 Or. 249, 75 Am. St. Rep. 580, 54 Pac. 950—*Di Marcho v. Builders Iron Foundry*, 18 R. I. 517, 28 Atl. 661—*Norfolk & W. R. Co. v. Houchins* (Norfolk & W. R. Co. v. Swaine) 95 Va. 409, 46 L.R.A. 366, 64 Am. St. Rep. 791, 28 S. E. 578—*Jackson v. Norfolk & W. R. Co.* 43 W. Va. 385, 46 L.R.A. 343, 27 S. E. 278.

162. A master is responsible for injuries caused by neglect of servants whose duty it is to repair appliances of the business, when those servants know, or ought to know by the exercise of reasonable care, of the defects in the machinery. *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. Rep. 707, 41: 1136
Cited in *New York, N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 568, 93 Fed. 741—*Swensen v. Bender*, 51 C. C. A. 633, 114 Fed. 7.

163. One employed by a railroad company as a laborer or construction hand cannot recover of the company for injuries received by him through the negligence of his fellow servants in allowing a rail to drop, which he and they were loading on a car, whereby his leg and foot were broken and crushed. *Coyne v. Union P. R. Co.* 133 U. S. 370, 10 Sup. Ct. Rep. 382, 33: 651
Cited in *The Frank & Willie*, 45 Fed. 495—*Northern P. R. Co. v. Behling*, 6 C. C. A. 682, 12 U. S. App. 662, 57 Fed. 1038—*Erie R. Co. v. Moore*, 51 C. C. A. 229, 113 Fed. 272.

164. Injury to a member of a railroad gang while riding on a hand car, caused by neglect of a fellow servant, does not make the master liable to him in the absence of any contract to carry him safely on such car, further than it can be inferred from the use of the car in going to and from the place of labor. *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. Rep. 843, 40: 994

165. An injury caused by negligence of a locomotive fireman to a fellow servant is not within W. Va. Stat. 1873, chap. 88, § 31, which provides that a bell or whistle shall be rung or sounded 60 rods from any highway crossing and until the highway is reached, and that "the corporation owning the railroad shall be liable to any person injured for all damages sustained" by reason of neglect so to do, since it does not supersede the general rule which exempts the railroad company from liability to its own servants for the fault of their fellow servants. *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 3 Sup. Ct. Rep. 322, 27: 1003
Cited in *Atlanta & C. Air Line R. Co. v. Gravit*, 93 Ga. 407, 26 L.R.A. 585, 44 Am. St. Rep. 145, 20 S. E. 550—*Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 519, 11 L.R.A. 389, 12 S. E. 553.

166. A master is liable to an employee for injuries sustained by reason of the negligence of a coemployee in the discharge of a positive duty imposed upon the master, and amounting to a personal wrong. *New England R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. Rep. 85, 44: 181
Cited in *Northern P. R. Co. v. Dixon*, 184 U.

S. 349, 48 L. ed. 1011, 24 Sup. Ct. Rep. 688—*Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 44, 47 C. C. A. 369, 108 Fed. 337—*Texas & P. R. Co. v. Carlin*, 60 L.R.A. 464, 49 C. C. A. 608, 111 Fed. 779—*Brush Electric Light & P. Co. v. Wells*, 110 Ga. 202, 35 S. E. 375—*McQueeny v. Chicago, M. & St. P. R. Co.* 120 Iowa, 526, 94 N. W. 1124—*Southern R. Co. v. Cheaves*, 84 Miss. 589, 36 So. 691—*New Omaha Thomson-Houston Electric Light Co. v. Baldwin*, 62 Neb. 189, 87 N. W. 27—*Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 364, 64 L.R.A. 149, 75 Pac. 903—*Louisville & N. R. Co. v. Jackson*, 106 Tenn. 442, 61 S. W. 771—*Sartin v. Oregon Short Line R. Co.* 27 Utah, 454, 76 Pac. 219—*Merrill v. Oregon Short Line R. Co.* 29 Utah, 278, 110 Am. St. Rep. 708, 81 Pac. 85—*Peterson v. Seattle Traction Co.* 23 Wash. 621, 53 L.R.A. 589, 63 Pac. 539—*Shannon v. Consolidated Tiger & Poorman Min. Co.* 24 Wash. 132, 64 Pac. 169—*Mullin v. Northern P. R. Co.* 38 Wash. 553, 80 Pac. 814—*Wiskie v. Montello Granite Co.* 111 Wis. 450, 87 Am. St. Rep. 885, 87 N. W. 461.

167. A decision in favor of an employee in a suit for injury from a falling tub, caused by the separation of a rope, as to negligence of defendant or of fellow servant and as to contributory negligence,—affirmed by divided court. *Cunard S. S. Co. v. Carey*, 119 U. S. 245, 7 Sup. Ct. Rep. 1360, 30: 354
Cited in *Van Avery v. Union P. R. Co.* 35 Fed. 41—*The Anchoria*, 113 Fed. 985—*Northern P. R. Co. v. O'Brien*, 1 Wash. 607, 21 Pac. 82.

III. Liability of Master to Third Person.

a. For Acts of Servant or Agent.

Commander's Liability for Acts of Squadron, see *Army and Navy*, 161, 162.
Responsibility of Carriers, see *Carriers*, 20-23.
Care in Selection of Servants, see *Carriers*, 33.
Liability for Collision Due to Deficiency or Unskillfulness of Crew, see *Collision*, II. 1.
Equal Protection as to, see *Constitutional Law*, 288.
Liability of Corporations, see *Corporations*, VII. b; 217.
State Rules or Decisions as to Liability of Servant's Act as Binding Rules in Federal Courts, see *Courts*, 2020-2022.
Liability of Collector of Customs for Neglect or Unfaithfulness of Subordinates, see *Duties*, 292-295.
Acts and Declarations of Employee as Evidence Against Master, see *Evidence*, X. g.
Corporate Liability for Libelous Publication by Agent, see *Libel and Slander*, 2.
Principal's Liability for Agent's Acts, see *Principal and Agent*, III. i, j.
See also *supra*, 2, 3.

168. A principal or master is liable to

third persons for the acts and negligence of his agent or servant in the course of his employment, although he did not authorize or know of the acts complained of. *New Orleans M. & C. R. Co. v. Hanning*, 15 Wall. 649, 21: 220

Otted in The R. F. Cahill, 9 Ben. 354, Fed. Cas. No. 11,735—*The Colon*, 9 Ben. 354, Fed. Cas. No. 3,023—*Gerrity v. The Kate Cann*, 2 Fed. 244—*Texas & P. R. Co. v. Williams*, 10 C. C. A. 465, 23 U. S. App. 379, 62 Fed. 442—*Louisville & N. R. Co. v. Whitman*, 79 Ala. 330—*Chandler v. Deaton*, 1 Tex. App. Civ. Cas. (W. & W.) § 488.

169. A party is liable for personal injuries from the employment by his servant of unnecessary force and violence in recovering property in the peaceable possession of another, without reference to the question of legal title or right of possession. *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. Rep. 1286, 30: 1146

170. If an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility on him, no responsibility attaches to the employer therefor. *New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. Rep. 109, 35: 919
Cited in Doremus v. Root, 23 Wash. 716, 54 L.R.A. 658, 63 Pac. 572.

Editorial notes.

[Liability of master for assault by servant. 14 L.R.A. 737.

Liability of master for false arrest, imprisonment, or malicious prosecution by servant. 14 L.R.A. 791.

Volunteer; who is. 16 L.R.A. 861.

Master's liability for servant's torts or negligence as to strangers. 27 L.R.A. 161.

Liability for wrongful act of servant in appropriating thing bailed. 29 L.R.A. 92.

Liability for acts of servant sent to commit trespass which the employer claims were in excess of his authority. 70 L.R.A. 731.

Master's liability for injury by automobile when used by servant for his own business or pleasure. 1 L.R.A.(N.S.) 235; 9 L.R.A.(N.S.) 1033.

Duty and liability for conduct of messengers furnished for use of others. 2 L.R.A.(N.S.) 1091.

Liability for malicious act of servant when master owes special duty to party injured. 4 L.R.A.(N.S.) 485.

Liability for injury done by servant to third person in use of dangerous agency placed in his custody. 10 L.R.A.(N.S.) 367.

Parent's liability for tort of minor child where relation of master and servant exists. 10 L.R.A.(N.S.) 938.]

Scope of employment.

Liability for Acts of Agent, see Principal and Agent. 95. 96.

171. Knowingly permitting employees to continue the habit of throwing sticks of wood from a moving repair train for their own use when returning from work, although the act is beyond the scope of their employment and totally disconnected there-

with, renders a railroad company liable for any injury caused by such an act, if such injury might have been reasonably anticipated. *Fletcher v. Baltimore & P. R. Co.* 168 U. S. 135, 18 Sup. Ct. Rep. 35, 42: 411

172. The owner of a vessel is liable for injuries done to third persons or property by the negligence of the master and crew, while in discharge of their duties and acting within the scope of their authority. *Hough v. Western Transp. Co. (The Plymouth)* 3 Wall. 20, 18: 125

Cited in Workman v. New York, 179 U. S. 565, 45 L. ed. 322, 21 Sup. Ct. Rep. 212—*The Major Reybold*, 111 Fed. 416—*Campbell v. H. Hackfield & Co.* 62 C. C. A. 275, 125 Fed. 697.

— Editorial note.

[Liability of master for negligence of mine boss outside the scope of his statutory duties. 11 L.R.A.(N.S.) 840.]

Disobedience of orders.

173. A master is liable for the tortious acts of his servants, done in the course of his employment, although contrary to his orders. *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14: 502

Cited in Slinger Mfg. Co. v. Rahn, 132 U. S. 523, 33 L. ed. 442, 10 Sup. Ct. Rep. 175—*New Jersey S. B. Co. v. Brockett*, 121 U. S. 645, 30 L. ed. 1050, 7 Sup. Ct. Rep. 1030—*Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 109, 37 L. ed. 102, 13 Sup. Ct. Rep. 261—*The E. M. McChesney*, 8 Ben. 150, Fed. Cas. No. 4,463—*Pendleton v. Kingsley*, 3 Cliff. 424, Fed. Cas. No. 10,922—*Heinrich v. Pullman Palace Car Co.* 10 Sawy. 82, 20 Fed. 101—*The General Rucker*, 35 Fed. 157—*Texas & P. R. Co. v. Scoville*, 27 L.R.A. 185, 10 C. C. A. 482, 23 U. S. App. 506, 62 Fed. 733—*Hanover F. Ins. Co. v. Bradford*, 102 Fed. 48—*Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto*, 54 L.R.A. 716, 48 C. C. A. 420, 109 Fed. 376—*Cox v. Keahey*, 36 Ala. 345, 76 Am. Dec. 323—*Duggins v. Watson*, 15 Ark. 127, 60 Am. Dec. 500—*Turner v. North Beach & M. R. Co.* 34 Cal. 599—*Pueblo Electric Street R. Co. v. Sherman*, 25 Colo. 121, 71 Am. St. Rep. 116, 53 Pac. 322—*Florida Southern R. Co. v. Hirst*, 30 Fla. 40, 16 L.R.A. 636, 32 Am. St. Rep. 17, 11 So. 506—*Johnson v. Macon & W. R. Co.* 38 Ga. 422—*Gillenwater v. Madison & I. R. Co.* 5 Ind. 342, 61 Am. Dec. 101—*Jeffersonville R. Co. v. Rogers*, 38 Ind. 126, 10 Am. Rep. 103—*Indianapolis, P. & C. R. Co. v. Anthony*, 43 Ind. 188—*Pittsburgh, C. & St. L. R. Co. v. Kirk*, 102 Ind. 402, 52 Am. Rep. 675, 1 N. E. 849—*Hammond v. New York C. & St. L. R. Co.* 5 Ind. App. 536, 31 N. E. 817—*Shauver v. Phillips*, 7 Ind. App. 16, 32 N. E. 1131—*Spence v. Chicago, R. I. & P. R. Co.* 117 Iowa, 9, 90 N. W. 346—*Robinson v. Webb*, 11 Bush. 482—*Behan v. Bredenburg*, 33 La. Ann. 641—*Goddard v. Grand Trunk R. Co.* 57 Me. 216, 2 Am. Rep. 39—*Southwick v. Estes*, 7 Cush. 386—*New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 120, 12 Am. Rep. 356—*Minter v. Pacific R. Co.* 41 Mo. 508, 97 Am. Dec. 288—*Wickham v. Wolcott*, 1 Neb. (Unof.) 161, 95 N. W. 366—*Porter v. New York C. R. Co.* 34 Barb. 358—*Haack v. Fearling*, 35 How. Pr. 470—*Van Buren v. The E. M. McChesney*, 49 How. Pr. 188—*Fisher v. Metropolitan Elev. R. Co.* 34 Hun. 437—*Tinker v. New York, O.*

& W. R. Co. 71 Hun, 433, 24 N. Y. Supp. 977—Quinn v. Powers, 87 N. Y. Supp. 539, 41 Am. Rep. 392—Franklin F. Ins. Co. v. Bradford, 201 Pa. 36, 55 L.R.A. 409, 88 Am. St. Rep. 770, 50 Atl. 286—Redding v. South Carolina R. Co. 3 S. C. N. S. 7, 16 Am. Rep. 681—De Voss v. Richmond, 18 Gratt. 359, 98 Am. Dec. 646—Palmer v. St. Albans, 60 Vt. 437, 6 Am. St. Rep. 125, 13 Atl. 569—Gregory v. Ohio River R. Co. 37 W. Va. 615, 16 S. E. 819.

174. A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know, of the servant's act or neglect, or even if he disapproved of or forbade it. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. Rep. 175, 33: 440
Cited in Loomis v. Hollister, 75 Conn. 724, 53 Atl. 56—Wilson v. Sioux Consol. Min. Co. 16 Utah, 396, 52 Pac. 626.

b. For Acts of Independent Contractor.

Liability of Contractor, see *infra*, IV.
For Injury Due to Defective Condition of Street, see Highways, 66-69a.
See also *infra*, 180.

175. Where a contractor undertakes, in general terms, to do a piece of work, and the employer reserves the power to direct what shall be done, and how, the latter is the principal or master, and is liable for the negligence of the former while constructing the work by which a third person is injured. New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649, 21: 220
Cited in Singer Mfg. Co. v. Rahn, 132 U. S. 523, 33 L. ed. 442, 10 Sup. Ct. Rep. 175—Atlantic Transport Co. v. Coneys, 28 C. C. A. 389, 51 U. S. App. 570, 82 Fed. 178—Rome & D. R. Co. v. Chasteen, 88 Ala. 594, 7 So. 94—Kelleher v. Schmitt & H. Mfg. Co. 122 Iowa, 638, 98 N. W. 482—Faren v. Sellers, 39 Ia. Ann. 1017, 4 Am. St. Rep. 256, 3 So. 363—Linnehan v. Rollins, 137 Mass. 126, 50 Am. Rep. 287—Thelsen v. Porter, 56 Minn. 558, 58 N. W. 265—Waters v. Greenleaf-Johnson Lumber Co. 115 N. C. 652, 20 S. E. 718—Rogers v. Florence B. Co. 31 S. C. 388, 9 S. E. 1059—Wallace v. Southern Cotton Oil Co. 91 Tex. 21, 40 S. W. 399—Carrico v. West Virginia C. & P. R. Co. 39 W. Va. 93, 24 L.R.A. 52, 19 S. E. 571—Bright v. Barnett & R. Co. 88 Wis. 308, 26 L.R.A. 530, 60 N. W. 418.

176. Where the obstruction or defect which occasioned an injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts, as well as the contractor himself, is liable to the injured party. St. Paul Water Co. v. Ware, 16 Wall. 566, 21: 485

177. Where a contractor, engaged in building a bridge across a river for a railroad company, was discharged in consequence of Liability for acts of independent contract-

the company's abandoning the undertaking, it is the duty of the company, and not the contractor, to take care that all obstructions to navigation should be removed; and it is liable for damages sustained by reason of the obstructions. Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 23 How. 209, 16: 433
Robbins v. Chicago, 4 Wall. 657, 18: 427
Cited in Casement v. Brown, 148 U. S. 623, 37 L. ed. 585, 13 Sup. Ct. Rep. 672—Ware v. St. Paul Water Co. 1 Dill. 466, Fed. Cas. No. 17,172—Sallotte v. King Bridge Co. 65 L.R.A. 631, 58 C. C. A. 468, 122 Fed. 380—Birmingham v. McCary, 84 Ala. 476, 4 So. 630—District of Columbia v. Baltimore & P. R. Co. 1 Mackey, 316—Atlanta & F. R. Co. v. Kimberly, 87 Ga. 166, 27 Am. St. Rep. 231, 13 S. E. 277—Chicago v. Norton Mill. Co. 97 Ill. App. 657—Park v. Adams County, 3 Ind. App. 539, 30 N. E. 147—Atchison County v. Sullivan, 7 Kan. App. 156, 53 Pac. 142—Knoop v. Alter, 47 La. Ann. 574, 17 So. 139—Flynn v. Canton Co. 40 Md. 320, 7 Am. Rep. 603—Wright v. Big Rapids Door & Blind Mfg. Co. 124 Mich. 97, 50 L.R.A. 497, 82 N. W. 829—Palmer v. Lincoln, 5 Neb. 144, 25 Am. Rep. 470—Lincoln v. Walker, 18 Neb. 249, 20 N. W. 113—Omaha v. Jensen, 35 Neb. 72, 37 Am. St. Rep. 432, 52 N. W. 833—Thomas v. Harrington, 72 N. H. 48, 65 L.R.A. 749, 54 Atl. 285—Wilson v. Watertown, 3 Hun, 514—Brusso v. Buffalo, 90 N. Y. 680—Circleville v. Neudling, 41 Ohio St. 469—Southern Ohio R. Co. v. Morey, 47 Ohio St. 217, 7 L.R.A. 704, 24 N. E. 269—Marsh v. Philadelphia, 8 Pa. Dist. R. 341—Smith v. Simmons, 13 W. N. C. 245—Cunningham v. International R. Co. 51 Tex. 510, 32 Am. Rep. 632—Wilson v. Wheeling, 19 W. Va. 337, 42 Am. Rep. 780—Hundhausen v. Bond, 36 Wis. 39—Whitney v. Clifford, 46 Wis. 146, 32 Am. Rep. 703, 19 N. W. 835—Werthelmer v. Saunders, 95 Wis. 580, 37 L.R.A. 149, 70 N. W. 824.

178. The statute of Louisiana of January 21, 1870 (No. 31, page 75, Session Acts), exempting a railroad company from liability for injury to person or property, or loss of life, caused by the act or omission of anyone contracting with it for construction work or materials, or of any of his employees or agents, does not relieve such railroad from responsibility for the negligence of one who contracted with it as its agent or servant, and not as a principal. New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649, 21: 220

Editorial notes.

[Exceptions to rule that employer is not liable for acts of independent contractor. 14 L.R.A. 828.

What persons deemed to be independent contractors. 65 L.R.A. 445.

General rule as to master's liability for torts of independent contractors. 65 L.R.A. 620.

Liability for acts of independent contractor where injury is direct result of work contracted for. 65 L.R.A. 742.

Liability for injuries caused by performance of work by independent contractor which is dangerous unless certain precautions are observed. 65 L.R.A. 833.

or where injuries result from nonperformance of absolute duties of employer. 66 L.R.A. 119.

Liability for injuries occurring in performance of work by independent contractor or where employer's own act is proximate cause of injury. 66 L.R.A. 941.

Liability of employer after assuming control of subject matter of work executed by contractor. 3 L.R.A.(N.S.) 595.]

IV. Liability of Servants or Independent Contractors.

179. Contractors who agree to furnish suitable material and construct certain specified and described piers, subject to the daily approval of the engineers of the companies for whom the piers are to be built, are independent contractors, and liable for injuries to third persons resulting from their own negligence. *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. Rep. 672,

37: 582

Cited in *Atlantic Transport Co. v. Coneys*, 28 C. C. A. 389, 51 U. S. App. 570, 82 Fed. 178—*Toledo Brewing & Malting Co. v. Bosch*, 41 C. C. A. 482, 101 Fed. 532—*Sallotte v. King Bridge Co.* 65 L.R.A. 630, 58 C. C. A. 468, 122 Fed. 380—*Read v. East Providence Fire District*, 20 B. I. 578, 40 Atl. 760—*Carlson v. Stocking*, 91 Wis. 435, 65 N. W. 58.

180. A nuisance necessarily occurring in the ordinary mode of doing a contract job will render the principal liable; but if it arises from the negligence of an independent contractor or his servants, then the independent contractor alone should be responsible. *Chicago v. Robbins*, 2 Black, 418,

17: 298

Cited in *McNamee v. Hunt*, 80 C. C. A. 655, 59 U. S. App. 9, 87 Fed. 300—*Aston v. Nolan*, 63 Cal. 275—*Eyser v. Western U. Teleg. Co.* 2 Colo. 164—*Logansport v. Dick*, 70 Ind. 79, 36 Am. Rep. 166—*Atchison County v. Sullivan*, 7 Kan. App. 156, 53 Pac. 142—*Robinson v. Webb*, 11 Bush, 478—*Matheny v. Wolffs*, 2 Duv. 138—*Wilbur v. White*, 98 Me. 195, 56 Atl. 657—*Palmer v. Lincoln*, 5 Neb. 145, 25 Am. Rep. 470—*Johnston v. Phoenix Bridge Co.* 44 App. Div. 586, 60 N. Y. Supp. 947—*Cunningham v. International R. Co.* 51 Tex. 510, 32 Am. Rep. 632.

Editorial notes.

[Servant's liability to third persons for negligence. 28 L.R.A. 433.

Liability of servant or agent, for conversion, trespass, or other positive act against third person under employer's orders. 50 L.R.A. 644.]

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MECHANICS' LIENS.

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 Lien on Vessel, see Maritime Liens.
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I. Construction of Statutes.

- Liberal Construction, see Statutes, 529.

1. Statutes giving liens to mechanics for their work and labor are to be liberally construed. *Davis v. Alvord*, 94 U. S. 545, 24: 283
Flagstaff Silver Min. Co. v. Cullins, 104 U. S. 176, 26: 704
Cited in Flagstaff Silver Min. Co. v. Cullins, 104 U. S. 177, 26 L. ed. 705—*Springer Land Assn. v. Ford*, 168 U. S. 524, 42 L. ed. 565, 18 Sup. Ct. Rep. 170—*Idaho Min. & Mill. Co. v. Davis*, 59 C. C. A. 202, 123 Fed. 398—*Russell v. Hayner*, 64 C. C. A. 426, 130 Fed. 92—*Pinkerton v. Le Beau*, 3 S. D. 446, 54 N. W. 97—United States use of Vermont Marble Co. v. Burdort, 18 App. D. C. 520—*Monroe v. Hannan* (Citation omitted from official report in 7 Mackey, 197) 3 L.R.A. 553—*Stout v. Sower*, 22 Ill. App. 76—*American Surety Co. v. United States*, 77 Ill. App. 110—*Perrault v. Shaw*, 69 N. H. 181, 76 Am. St. Rep. 160, 38 Atl. 724—*Boyle v. Mountain Key Min. Co.* 9 N. M. 253, 50 Pac. 347—*Virginia Development Co. v. Crozer Iron Co.* 80 Va. 185, 44 Am. St. Rep. 893, 17 S. E. 806.

2. A person for whom work was done on land under a contract may be the "owner" within the Utah mechanics' lien law of March 12, 1890, although without any legal or equitable title until the work was done, if he became the owner when the work was completed by virtue of its performance. *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41: 327
Cited in Chicago Lumber Co. v. Dillon, 13 Colo. App. 204, 56 Pac. 989.

II. The Right; When Lien Exists.

- See also *supra*, 2; Statutes, 323.

3. Contractors are not within the act of March 2, 1833, for the District of Columbia, entitled "An Act to Secure to Mechanics and Others Payment for Labor Done and Materials Found," and bringing within its scope "any brickmaker, bricklayer, stone-cutter, mason, lime merchant, carpenter, painter, and glazier, ironmonger, blacksmith, plasterer, and lumber merchant, or

any other person or persons employed in furnishing materials for, or in erecting and constructing, any building." *Winder v. Caldwell*, 14 How. 434, 14: 487

Cited in *Smith v. Eastern R. Co.* 1 Curt. C. C. 256, Fed. Cas. No. 13,039—*Purinton v. The New Ship*, 2 Curt. C. C. 417, Fed. Cas. No. 11,472—*Jones v. Great Southern Fireproof Hotel Co.* 79 Fed. 482—*Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 121, 58 U. S. App. 397, 86 Fed. 383—*Geiger v. Hussey*, 63 Ala. 343—*Little Rock, H. S. & T. R. Co. v. Spencer*, 65 Ark. 198, 42 L.R.A. 340, 47 S. W. 196—*Monroe v. Hannan*, 7 Mackey, 202, 3 L.R.A. 551—*Weymouth v. Sanborn*, 43 N. H. 174, 80 Am. Dec. 144—*Hale v. Brown*, 59 N. H. 559, 47 Am. Rep. 224—*Lester v. Houston*, 101 N. C. 611, 8 S. E. 366—*Powell v. Nolan*, 27 Wash. 341, 67 Pac. 712—*Mohr v. Clark*, 3 Wash. Terr. 444, 19 Pac. 28.

4. It is not the contract for erecting or repairing the building which creates a mechanic's lien, but it is the use of the materials furnished and the work and labor expended by the contractor that give the materialman and laborer his lien under the statute. *Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 128, 12 Sup. Ct. Rep. 181, 35: 961

Cited in *Central Trust Co. v. Richmond, N. I. & B. R. Co.* 41 L.R.A. 461, 15 C. C. A. 278, 31 U. S. App. 675, 68 Fed. 95—*Jones v. Great Southern Fireproof Hotel Co.* 86 Fed. 384, 30 C. C. A. 122, 58 U. S. App. 397—*Breed v. Glasgow Invest. Co.* 92 Fed. 766—*Withrow Lumber Co. v. Glasgow Invest. Co.* 42 C. C. A. 66, 101 Fed. 868—*First Nat. Bank v. Campbell*, 24 Tex. Civ. App. 163, 58 S. W. 628—*Goodman v. Baerlocher*, 88 Wis. 292, 48 Am. St. Rep. 893, 60 N. W. 415.

4a. The release of real estate security, taken for the price of erecting a building, and the taking of a note in its place, according to the terms of an agreement previously made, which did not contemplate a mechanic's lien as part of the transaction, do not create such a lien. *Grant v. Strong*, 18 Wall. 623, 21: 859

5. The statute of North Carolina of March 28, 1870, giving a lien to mechanics and laborers in certain cases, and the act of March 1, 1873, regulating sales under mortgages given by corporations, do not give to those performing labor and furnishing materials in the construction of railroads a lien upon the property and franchises of the corporation owning and operating such roads. *Buncombe County v. Tommey*, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186, 29: 305

Editorial notes.

[Right of architect to mechanics' lien. 16 L.R.A. 600.

Who are laborers within statute for. 18 L.R.A. 305.]

III. Priorities.

Between Maritime Liens, see Maritime Liens, III.

6. By the law of Montana, liens secured

to mechanics and materialmen have precedence over all other encumbrances put upon the property after the commencement of the building. *Davis v. Bilsland*, 18 Wall. 659, 21: 969

Cited in *Taylor v. Burlington, C. R. & M. R. Co.* 4 Dill. 576, Fed. Cas. No. 13,783—*Re Matthews*, 109 Fed. 610—*Chauncey v. Dyke Bros.* 55 C. C. A. 585, 119 Fed. 7—*Apperson v. Farrell*, 56 Ark. 643, 20 S. W. 514—*Haxtun Steam Heater Co. v. Gordon*, 2 N. D. 252, 33 Am. St. Rep. 776, 50 N. W. 708—*Nelson v. Iowa Eastern R. Co.* 44 Iowa, 77—*Thomas v. Mowers*, 27 Kan. 268—*Kay v. Towsley*, 113 Mich. 283, 71 S. W. 490—*Merrigan v. English*, 9 Mont. 125, 5 L.R.A. 841, 22 Pac. 454—*Murray v. Swanson*, 18 Mont. 534, 46 Pac. 441—*Bassett v. Swarts*, 17 R. I. 218, 21 Atl. 352—*Oriental Hotel Co. v. Griffiths*, 30 L.R.A. 773, 33 S. W. 652.

Editorial note.

[Relation back of subcontractor's lien to the date of that of the original contractor. 16 L.R.A. 335.]

Over mortgage.

Estoppel to Claim Priority, see Estoppel, 309.

Conclusiveness of Judgment as to. see Judgment, 606.

See also *infra*, 38.

7. By the laws of Iowa a mechanics' lien for work done under a contract takes precedence of all encumbrances put on the property, by mortgage or otherwise, after the work is commenced. *Meyer v. Delaware R. Constr. Co. (Removal Cases)* 100 U. S. 457, 25: 593

Cited in *Haxtun Steam Heater Co. v. Gordon*, 2 N. D. 252, 33 Am. St. Rep. 776, 50 N. W. 708—*Thomas v. Mowers*, 27 Kan. 268.

8. In Iowa a mechanics' lien has preference, as to the buildings, erections, and improvements made, over a prior recorded mortgage. It is a lien upon the land paramount to all rights accruing after the commencement of work, and upon what the mechanic puts upon the land, paramount to all other claims, whether created prior or subsequent to that time. *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25: 1057

Distinuated in *Pennsylvania Steel Co. v. J. E. Potts Salt & Lumber Co.* 11 C. C. A. 15, 22 U. S. App. 537, 63 Fed. 15—*Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 636, 41 Am. St. Rep. 741, 57 N. W. 664.

Cited in *Meyer v. Hornby (Meyer v. Egbert)* 101 U. S. 730, 25 L. ed. 1078—*Buncombe County v. Tommey*, 115 U. S. 129, 29 L. ed. 307, 5 Sup. Ct. Rep. 626—*Tommey v. Spartanburg & A. R. Co.* 4 Hughes. 645, 7 Fed. 434—*Gilchrist v. Helena, H. S. & Smelter R. Co.* 58 Fed. 714—*Greenwood, A. & W. R. Co. v. Strang*, 77 Fed. 500—*Ban v. Columbia Southern R. Co.* 54 C. C. A. 422, 117 Fed. 36—*Church v. Smithea*, 4 Colo. App. 177, 35 Pac. 267—*Haxtun Steam Heater Co. v. Gordon*, 2 N. D. 252, 33 Am. St. Rep. 776, 50 N. W. 708—*Atlantic Dynamite Co. v. Ropes Gold & Silver Co.* 119 Mich. 263, 77 N. W. 938—*Hydraulic Press Brick Co. v. Bormans*, 19 Mo. App. 669—*McAdow v. Sturtevant*, 41 Mo. App. 228—*Real Estate*

Invest Co. v. Haseltine, 53 Mo. App. 318—*Hammond v. Darlington*, 109 Mo. App. 343, 84 S. W. 446—*Johnson v. Puritan Min. Co.* 19 Mont. 39, 47 Pac. 337—*Oriental Hotel Co. v. Griffiths*, 88 Tex. 582, 30 L.R.A. 776, 53 Am. St. Rep. 790, 33 S. W. 652—*Smith v. Shell Lake Lumber Co.* 68 Wis. 109, 31 N. W. 694.

9. In Iowa a mechanics' lien has preference over a prior recorded mortgage, as to the building or improvement put upon the land, but not as to the land itself. *Meyer v. Egbert* (*Meyer v. Hornby*) 101 U. S. 728, 25: 1078

10. By the joint resolution of January 21, 1843, the legislature of Pennsylvania intended to give to an unpaid contractor a priority of lien on the property of a railroad company over a mortgage made after the debt to the contractor was incurred. *Fox v. Seal*, 22 Wall. 424, 22: 774
Cited in New Castle Northern R. Co. v. Simpson, 26 Fed. 135—*Shamokin Valley & P. R. Co. v. Malone*, 85 Pa. 35—*Reed's Appeal*, 122 Pa. 577, 16 Atl. 100—*Fidelity Title & T. Co. v. Schenley Park & H. R. Co.* 189 Pa. 368, 69 Am. St. Rep. 819, 42 Atl. 140—*Reed's Appeal*, 46 Phila. Leg. Int. 128—*Fidelity Title & T. Co. v. Schenley Park & H. R. Co.* 29 Pittsb. L. J. N. S. 371, 42 Atl. 140.

10a. A contractor expending money and labor in building a railroad, under an agreement with the company that he shall have the possession of the road until he is fully paid, does not thereby acquire priority over an elder valid mortgage upon "the road built and to be built." *Dunham v. Cincinnati, P. & C. R. Co.* 1 Wall. 254, 17: 584

10b. Unsecured floating debts due contractors and other materialmen, on account of the original construction of a railroad, are not entitled to priority over bonds secured by mortgage representing funds actually expended in the construction of the road and held by bona fide purchasers. *Porter v. Pittsburg Bessemer Steel Co.* 120 U. S. 649, 7 Sup. Ct. Rep. 1206, 30: 830
Cited in Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 300, 33 L. ed. 907, 10 Sup. Ct. Rep. 546—*Coe v. East & West R. Co.* 52 Fed. 556—*St. Louis Trust Co. v. Riley*, 30 L.R.A. 458, 16 C. C. A. 613, 36 U. S. App. 100, 70 Fed. 35—*New York Security & T. Co. v. Capital R. Co.* 77 Fed. 531—*Phoenix Iron-Works Co. v. New York Security & T. Co.* 28 C. C. A. 78, 54 U. S. App. 408, 83 Fed. 759—*Farmers' Loan & T. Co. v. Stuttgart & A. River R. Co.* 92 Fed. 249—*First Nat. Bank v. Ewing*, 43 C. C. A. 169, 103 Fed. 186—*Illinois Trust & Sav. Bank v. Doud*, 52 L.R.A. 490, 44 C. C. A. 404, 105 Fed. 138—*St. Louis Merchants' Bridge Terminal R. Co. v. Continental Trust Co.* 49 C. C. A. 532, 111 Fed. 672—*Niles Tool Works Co. v. Louisville, N. A. & C. R. Co.* 50 C. C. A. 393, 112 Fed. 563—*Ten Eyck v. Pontiac, O. & P. A. R. Co.* 114 Mich. 501, 72 N. W. 362—*Manchester Locomotive Works v. Truesdale*, 44 Minn. 118, 9 L.R.A. 144, 46 N. W. 301—*Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 634, 41 Am. St. Rep. 741, 57 N. W. 664—*McIlhenny v. Binz*, 80 Tex. 17, 26 Am. St. Rep. 705, 13 S. W. 655.

10c. A contractor to build a section of a

railroad, where the work was not done at the request of the mortgagees, but upon a contract with the lessee of the road, which had stipulated as one of the considerations of the lease to construct that part of the line, has not a lien upon the earnings of the section, on the ground that with his money the road over it was constructed, superior to the lien of a prior mortgagee. *Thompson v. White Water Valley R. Co.* 132 U. S. 68, 10 Sup. Ct. Rep. 29, 33: 256

Distinshed in Central Trust Co. v. Arctic Ice Mach. Mfg. Co. 77 Md. 234, 26 Atl. 493
Cited in Fogg v. Blair, 133 U. S. 539, 33 L. ed. 724, 10 Sup. Ct. Rep. 338—*Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 300, 33 L. ed. 907, 10 Sup. Ct. Rep. 546—*Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 86 Fed. 979—*Terre Haute & I. R. Co. v. Harrison*, 32 C. C. A. 139, 60 U. S. App. 265, 88 Fed. 922—*Harris v. Youngstown Bridge Co.* 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 332.

10d. Where a railroad company executed a mortgage on its present and after-acquired property, to secure its bonds, and thereafter a contractor with the company erected a dock for the company on a part of the property covered by the mortgage, and filed a mechanics' lien for his pay, he is not entitled to priority of payment over the mortgage. *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. Rep. 546, 33: 905

Distinshed in Central Trust Co. v. Arctic Ice Mach. Mfg. Co. 77 Md. 234, 26 Atl. 493.

Cited in Wade v. Chicago, S. & St. L. R. Co. 149 U. S. 341, 37 L. ed. 761, 13 Sup. Ct. Rep. 892—*Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 15, 41 L. ed. 333, 17 Sup. Ct. Rep. 7—*Columbia Finance & T. Co. v. Kentucky Union R. Co.* 9 C. C. A. 269, 22 U. S. App. 54, 60 Fed. 798—*Maxwell v. Wilmington Dental Mfg. Co.* 77 Fed. 940—*New York Security & T. Co. v. Capital R. Co.* 77 Fed. 531—*Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 79 Fed. 506—*Phoenix Iron-Works Co. v. New York Security & T. Co.* 28 C. C. A. 78, 54 U. S. App. 408, 83 Fed. 759—*Harris v. Youngstown Bridge Co.* 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328—*Guaranty Trust Co. v. Galveston City R. Co.* 46 C. C. A. 318, 107 Fed. 324—*Tilford v. Atlantic Match Co.* 134 Fed. 926—*Guaranty Trust Co. v. Atlantic Coast Electric R. Co.* 71 C. C. A. 50, 138 Fed. 526—*Brady v. Johnson*, 75 Md. 455, 20 L.R.A. 742, 26 Atl. 49—*Masterson v. Burnett*, 27 Tex. Civ. App. 375, 66 S. W. 90.

11. A mortgage is not a valid encumbrance upon after-acquired land within the meaning of a lien law preserving the priority of valid encumbrances, when the mortgagor's title is acquired with the burden of the lien, which attached simultaneously with the vesting of title in him. *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41: 327
Cited in New York Security & T. Co. v. Capital R. Co. 77 Fed. 531—*Venner v. Farmers' Loan & T. Co.* 33 C. C. A. 102, 62 U. S. App. 141, 90 Fed. 355.

12. The fact that a mortgage including

after-acquired property was on record before any work was done by a contractor who claims a lien on the property does not subordinate his lien to the mortgage, if the mortgagor acquired his title burdened with the lien upon the completion of the work. *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41: 327

13. A lien of a contractor for the construction of a canal on public lands, by the completion of which his employer acquires a right of way under U. S. Rev. Stat. § 2339, U. S. Comp. Stat. 1901, p. 1437, is superior to that of a prior mortgage given by the latter which included after-acquired property. *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41: 327

14. The fiction of the doctrine of relation will not be indulged for the purpose of effecting an injustice to lienors by subjecting the right of way for a canal on public lands to the prior lien of a mortgage including after-acquired property, when the existence of the mortgagor's title to the right of way was made possible only after and by the labor of the lienors. *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41: 327

— Editorial note.

[When superior to earlier mortgages. 14 L.R.A. 305.]

IV. For What Work or Materials.

Common Law Lien for Constructing Canal, see Liens, 20.

15. An overseer and foreman of a body of miners, who performed manual labor upon a mine, is entitled to a lien on the mine for his services, under the law of Utah giving a lien for labor thereon. *Flagstaff Silver Min. Co. v. Cullins*, 104 U. S. 176, 26: 704
Cited in Central Trust Co. v. Richmond, N. I. & B. R. Co. 54 Fed. 728—*Gilchrist v. Helena*, H. S. & Smelter R. Co. 58 Fed. 716—*Re Lawler*, 3 N. B. N. Rep. 975, 110 Fed. 137—*Idaho Min. & Mill. Co. v. Davis*, 59 C. C. A. 202, 123 Fed. 398—*Sutton v. Consolidated Apex Min. Co.* 15 S. D. 414, 89 N. W. 1020—*Lockhart v. Rollins*, 2 Idaho, 543, 21 Pac. 413—*Heckman v. Tammen*, 84 Ill. App. 545—*Pendergast v. Yandes*, 124 Ind. 164, 8 L.R.A. 850, 24 N. E. 724—*Boyle v. Mountain Key Min. Co.* 9 N. M. 243, 50 Pac. 347—*Johnson v. McClure*, 10 N. M. 522, 62 Pac. 983.

16. The Indiana act of 1887 gives a lien to employees of a corporation only for work and labor, and not for the value of materials furnished, or for advances of money made. *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. Rep. 60, 33: 310

17. A contractor with a corporation is not an employee of the corporation, within the meaning of the Indiana act of 1887, § 1 (Ind. Rev. Stat. § 5286), which gives a lien to employees for work and labor done and

performed by them for the corporation. *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. Rep. 60, 33: 310

Cited in Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 505, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405—*Finance Co. v. Charleston*, C. & C. R. Co. 46 Fed. 428—*Tod v. Kentucky Union R. Co.* 18 L.R.A. 312, 3 C. C. A. 68, 6 U. S. App. 186, 52 Fed. 247—*Liberty Perpetual Bldg. & L. Co. v. M. A. Furbush & Son Mach. Co.* 26 C. C. A. 44, 42 U. S. App. 496, 80 Fed. 637—*Postal Teleg. Cable Co. v. Vane*, 26 C. C. A. 349, 53 U. S. App. 319, 80 Fed. 968—*Malcomson v. Wappoo Mills*, 85 Fed. 911—*Frick Co. v. Norfolk & O. V. R. Co.* 32 C. C. A. 43, 57 U. S. App. 236, 86 Fed. 738—*Latta v. Lonsdale*, 52 L.R.A. 480, 47 C. C. A. 2, 107 Fed. 585—*Rogers v. Dexter & P. R. Co.* 85 Me. 374, 21 L.R.A. 529, 27 Atl. 257—*Lewis v. Fisher*, 80 Md. 144, 26 L.R.A. 281, 45 Am. St. Rep. 327, 30 Atl. 608—*Clark v. Renninger*, 89 Md. 71, 44 L.R.A. 414, 42 Atl. 928—*Kansas City use of Mullins v. McDonald*, 80 Mo. App. 448.

Editorial note.

[Mechanic's lien on landlord's interest for labor or materials furnished tenant for the building or improvement removable by tenant. 6 L.R.A. (N.S.) 485.]

V. To What Property Attaches.

See also *infra*, 40, 41.

18. The area of land subject to a lien depends on the character of the improvement for which the lien is claimed. *Springer Land Asso. v. Ford*, 168 U. S. 513, 18 Sup. Ct. Rep. 170, 42: 562

19. An entire railroad is subject to a lien for work done on one part of it, although the road was built in sections. *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25: 1057

Meyer v. Egbert (Meyer v. Hornby) 101 U. S. 728, 25: 1078

Distinguished in Woodworth v. Blair, 112 U. S. 11, 28 L. ed. 616, 5 Sup. Ct. Rep. 6—*District of Columbia v. Metropolitan R. Co.* 8 App. D. C. 351.

Cited in Giant Powder Co. v. Oregon P. R. Co. 8 L.R.A. 706, 14 Sawy. 565, 42 Fed. 474—*National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 45—*Connor v. Tennessee C. R. Co.* 54 L.R.A. 694, 48 C. C. A. 738, 109 Fed. 939—*Pacific Rolling Mill Co. v. Bear Valley Irrig. Co.* 120 Cal. 96, 65 Am. St. Rep. 158, 52 Pac. 136—*Jarvis v. State Bank*, 22 Colo. 315, 55 Am. St. Rep. 129, 45 Pac. 505—*Adams v. Grand Island & W. C. R. Co.* 10 S. D. 248, 72 N. W. 577—*Farmers' Loan & T. Co. v. Canada & St. L. R. Co.* 127 Ind. 262, 11 L.R.A. 745, 26 N. E. 784—*Beach v. Walsefeld*, 107 Iowa, 581, 76 N. W. 688—*Steger v. Arctic Refrigerating Co.* 89 Tenn. 458, 11 L.R.A. 581, 14 S. W. 1087.

20. A lien for an irrigation ditch extends to the tract of land necessary to a convenient use of the improvement for the purposes contemplated in its construction.

Springer Land Asso. v. Ford, 168 U. S. 513, 18 Sup. Ct. Rep. 170, 42: 562

Cited in National Foundry & Pipe Works v. Oconto City Water Supply Co. 51 C. C. A. 473, 113 Fed. 801—Eufaula Water Co. v. Addyston Pipe & Steel Co. 89 Ala. 560, 8 So. 25—McNeal Pipe & Foundry Co. v. Howland, 111 N. C. 632, 20 L.R.A. 750, 16 S. E. 857—Chicago & N. W. R. Co. v. Forest County, 95 Wis. 89, 70 N. W. 77.

21. Ordinary lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which they stand, or a lien upon a lot or farm or other property, for work done thereon or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges, or other property of the railroad company that may be essential in the operation and maintenance of its road for the public purposes for which it was established. Buncombe County v. Tommey, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186, 29: 305

Distinguished in Gian' Powder Co. v. Oregon P. R. Co. 8 L.R.A. 705, 14 Sawy. 565, 42 Fed. 473.

Cited in National Foundry & Pipe Works v. Oconto Water Co. 52 Fed. 46—Industrial & Min. Guaranty Co. v. Electrical Supply Co. 7 C. C. A. 480, 16 U. S. App. 196, 58 Fed. 741—Pennsylvania Steel Co. v. J. E. Potts Salt & Lumber Co. 11 C. C. A. 13, 22 U. S. App. 537, 63 Fed. 13—Farmers' Loan & T. Co. v. Cape Fear & Y. Valley R. Co. 73 Fed. 715—Greenwood, A. & W. R. Co. v. Strang, 77 Fed. 500—Cleveland, C. & S. R. Co. v. Knickerbocker Trust Co. 86 Fed. 74—Huntley Mfg. Co. v. Michigan C. R. Co. 76 Ill. App. 390—People v. Metropolitan Street R. Co. v. State Tax Comrs. 79 App. Div. 203, 80 N. Y. Supp. 85—Yellow River Improv. Co. v. Wood County, 81 Wis. 562, 17 L.R.A. 95, 51 N. W. 1004—Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co. 110 Wis. 641, 84 Am. St. Rep. 948, 86 N. W. 592.

22. Under the lien laws of California, a lien for work upon the upper section of a canal cannot be extended to cover the lower section, where they are distinct and independent works, and the part mortgaged was in use as a canal before the other part, which was merely an extension, was constructed. South Fork Canal Co. v. Gordon, 6 Wall. 561, 18: 894

Cited in Brooks v. Burlington & S. W. R. Co. 101 U. S. 452, 25 L. ed. 1060—Ban v. Columbia Southern R. Co. 54 C. C. A. 423, 117 Fed. 37—Reynolds v. Hosmer, 51 Cal. 208—Pacific Rolling Mill Co. v. Bear Valley Irrig. Co. 120 Cal. 100, 65 Am. St. Rep. 158, 52 Pac. 136—Steger v. Arctic Refrigerating Co. 89 Tenn. 458, 11 L.R.A. 581, 14 S. W. 1087.

23. The term "property" in the statute of North Carolina, giving a lien to mechanics and laborers upon the property of corporations, includes the tangible property, rights, and franchises. Buncombe County v. Tommey, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186, 29: 305

Cited in People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 442, 63 L.R.A. 892, 105 Am. St. Rep. 674, 67 N. E. 691.

24. Mechanics' lien laws have not been extended to railroads in Texas. Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. 459, 20: 199

Editorial note.

[On buildings distinct from the land. 62 L.R.A. 369.]

VI. How Waived or Defeated.

Waiver of Common-Law Lien by Perfecting Claim for, see Liens, 27.

Loss or Waiver of Maritime Liens, see Maritime Liens, IV.

By Repeal of Lien Law, see Statutes, 692.

See also *supra*, 4a.

25. A release obtained by fraud from one who was interested in a share only of the profits of a contract will not invalidate the lien for the work done, so as to affect the interest of another person. South Fork Canal Co. v. Gordon, 6 Wall. 561, 18: 894

26. A contract for the erection of a building, to be paid for in part by the giving of notes to become due after the time within which an action to enforce a mechanics' lien is required to be commenced, does not waive the mechanics' lien, where there is a refusal to give the notes, and the whole amount thereby becomes due before the filing of such lien. Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 128, 12 Sup. Ct. Rep. 181, 35: 961

Cited in Liberty Perpetual Bldg. & Loan Co. v. M. A. Furbush & Son Mach. Co. 26 C. C. A. 44, 42 U. S. App. 496, 80 Fed. 638—Jones v. Great Southern Fireproof Hotel Co. 30 C. C. A. 122, 58 U. S. App. 397, 86 Fed. 384—Harris v. Youngstown Bridge Co. 35 C. C. A. 343, 93 Fed. 357—Baumhoff v. St. Louis & K. R. Co. 171 Mo. 128, 94 Am. St. Rep. 770, 71 S. W. 156.

27. Where one takes real estate security for the price for erecting a building, it is inconsistent with the idea of a mechanics' lien, and no such lien attaches. Grant v. Strong, 18 Wall. 623, 21: 859

Distinguished in Stearns v. Lawrence, 28 C. C. A. 73, 54 U. S. App. 532, 83 Fed. 745.

Cited in McMurray v. Brown, 91 U. S. 286, 23 L. ed. 324—Central Trust Co. v. Richmond, N. I. & B. R. Co. 41 L.R.A. 461, 15 C. C. A. 278, 31 U. S. App. 675, 68 Fed. 94—Ohio Falls Car Mfg. Co. v. Central Trust Co. 18 C. C. A. 390, 37 U. S. App. 523, 71 Fed. 921—Jones v. Great Southern Fireproof Hotel Co. 30 C. C. A. 121, 58 U. S. App. 397, 86 Fed. 383—The Thomas Morgan, 123 Fed. 787—Strong v. Grant, 2 Mackey, 223—Willison v. Douglas, 66 Md. 102, 6 Atl. 530—Howe v. Kindred, 42 Minn. 436, 44 N. W. 311—Baumhoff v. St. Louis & K. R. Co. 171 Mo. 126, 94 Am. St. Rep. 770, 71 S. W. 156—Firth v. Rehfeldt, 30 App. Div. 330, 51 N. Y. Supp. 980—Casey & H. Mfg. Co. v. Weatherly, 101 Tenn. 824, 47 S. W. 432—Pope v. Graham, 44 Tex. 199.

28. A sale under a decree to foreclose a subsequent mortgage does not divest the contractor's lien, and he need not look to

the proceeds of the sale for payment. *Fox v. Seal*, 22 Wall. 424, 22: 774
Cited in Pittsburgh, C. & St. L. R. Co. v. Marshall, 85 Pa. 191—*Pittsburgh, C. & St. L. R. Co. v. Marshall*, 34 Phila. Leg. Int. 419.

29. Where a legislative resolution gave debts due to contractors, laborers, and workmen a lien upon property of a railroad company, superior to any mortgage or conveyance, such lien is not merged in a judgment for such a debt. In whatever shape the debt was, it had the benefit of the statutory privilege; and the expiration of the period for which a judgment would be a lien does not affect it. *Fox v. Seal*, 22 Wall. 424, 22: 774

30. Lien laws do not, in general, create a lien in favor of a materialman or mechanic who has accepted in full a different security at the time the contract or agreement was made; but a mere promise, if subsequently broken, will not impair a right to such a lien. *McMurray v. Brown*, 91 U. S. 257, 23: 321
Cited in Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 550, 48 L. ed. 788, 24 Sup. Ct. Rep. 576—*Central Trust Co. v. Richmond, N. I. & B. R. Co.* 41 L.R.A. 461, 15 C. C. A. 278, 31 U. S. App. 675, 68 Fed. 94—*Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* 34 L.R.A. 628, 15 C. C. A. 293, 31 U. S. App. 704, 68 Fed. 110—*Reynolds v. Manhattan Trust Co.* 27 C. C. A. 629, 55 U. S. App. 96, 83 Fed. 601
Jones v. Great Southern Fireproof Hotel Co. 30 C. C. A. 121, 58 U. S. App. 397, 86 Fed. 383—*The Thomas Morgan*, 123 Fed. 787—*Willson v. Douglas*, 66 Md. 102, 6 Atl. 530—*Henry & C. Co. v. Evans*, 97 Mo. 60, 3 L.R.A. 336, 10 S. W. 868—*Baumbhoff v. St. Louis & K. R. Co.* 171 Mo. 128, 94 Am. St. Rep. 770, 71 S. W. 156—*Firth v. Rehfeldt*, 30 App. Div. 331, 51 N. Y. Supp. 980.

31. A clause in a contract between a construction company and a railroad company, that the money for the work was to be paid from a certain source, does not give the construction company collateral security, and thus under Iowa Case 1873, § 385, vitiate the lien. *Meyer v. Delaware R. Constr. Co.* (Removal Cases) 100 U. S. 457, 25: 593
Cited in Baumbhoff v. St. Louis & K. R. Co. 171 Mo. 128, 94 Am. St. Rep. 770, 71 S. W. 156.

Editorial note.

[Payment to contractors or subcontractors as affecting liens of subordinate claimants. 20 L.R.A. 560.]

VII. Enforcement; Procedure.

Defenses to Lien, see *infra*, 68, 69.

Suit *in Rem* or *in Personam* for, see Admiralty, 387a.

Mode of Reviewing Decree, see Appeal and Error, 675.

Impairment of Contract Obligations by Enlarging Remedy, see Constitutional Law, 1542.

Power of Federal Courts to Enforce in Equity Notwithstanding Legal Remedy under State Laws, see Courts, 1033.

Inefficacy of State Proceeding as against Property already in Federal Custody, see Courts, 1579.

Election of Remedy by Enforcement of, see Election of Remedies, 4.

Institution of Proceedings to Enforce Lien as Election of Remedy, see Election of Remedies, 32.

Estoppel to Object to Enforcement, see Estoppel, 202.

Assignee's Right to Sue in his Own Name, see Parties, 46.

Conclusiveness of Judgment Foreclosing Lien, see Judgment, 643.

Conclusiveness of Judgment Establishing Lien on Trustee under Mortgage, see Judgment, 798.

Enforcement of Maritime Lien, see Maritime Liens, V.

32. The foreclosure of a mechanic's lien is essentially an equitable proceeding. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. Rep. 936, 37: 853
Cited in Hooven, O. & R. Co. v. Featherstone 99 Fed. 181—*Hooven, O. & R. Co. v. John Featherstone's Sons*, 49 C. C. A. 234, 111 Fed. 86—*Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 24, 133 Fed. 272.

33. Proceedings in a state court to enforce a mechanic's lien are substantially proceedings *in rem*, whether there is personal or merely constructive service of process upon the defendant owner. *Heidritter v. Elizabeth Oil Cloth Co.* 112 U. S. 294, 5 Sup. Ct. Rep. 135, 28: 729

Cited in East Tennessee V. & G. R. Co. v. Atlanta & F. R. Co. 15 L.R.A. 110, 49 Fed. 611—*Compton v. Jesup*, 15 C. C. A. 417, 31 U. S. App. 486, 68 Fed. 284—*Rodgers v. Pitt*, 96 Fed. 675—*Colston v. Southern Home Bldg. & L. Asso.* 99 Fed. 312—*Steele v. Walker*, 115 Ala. 495, 67 Am. St. Rep. 62, 21 So. 942—*McCarter v. Nell*, 50 Ark. 191, 6 S. W. 731—*Loaiza v. Superior Court*, 85 Cal. 34, 9 L.R.A. 382, 20 Am. St. Rep. 197, 24 Pac. 707—*Chauncey v. Wass*, 35 Minn. 24, 30 N. W. 826—*Lane v. Innes*, 43 Minn. 141, 45 N. W. 4—*State ex rel. Mathews v. Eddy*, 10 Mont. 318, 25 Pac. 1032—*Re Schuyler's Steam Tow Boat Co.* 136 N. Y. 175, 20 L.R.A. 397, 32 N. E. 623—*Bernhardt v. Brown*, 118 N. C. 706, 36 L.R.A. 405, 24 S. E. 527—*Bragg v. Gaynor*, 85 Wis. 484, 21 L.R.A. 167, 55 N. W. 919.

34-5. The jurisdiction of a court of equity to enforce the lien of a contractor given by statute rests upon the basis of the statute, and can extend no further. *South Fork Canal Co. v. Gordon*, 6 Wall. 561, 18: 894
Distinguished in Gilchrist v. Helena, H. S. & S. R. Co. 58 Fed. 712.

Cited in Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 515, 33 L. ed. 437, 10 Sup. Ct. Rep. 177—*Seventh Nat. Bank v. Shenandoah Iron Co.* 35 Fed. 442—*De La Vergne Refrigerating Mach. Co. v. Montgomery Brew. ing Co.* 46 Fed. 832.

36. An extension of the time to enforce a mechanic's lien, made by a new lien law repealing, but substantially re-enacting, the

former during the progress of the work for which a lien is claimed, does not affect any right or remedy of the lienor, within the meaning of a proviso that the repeal shall not affect any right or remedy under the former law; and therefore the proviso does not prevent him from claiming the benefit of the enlargement of time. *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41: 327

37. A scire facias to enforce a mechanics' lien, under the act of Congress relating to the District of Columbia, states the facts on which it is founded, and requires an answer, and may properly be pleaded to. It is therefore unnecessary for the plaintiff to file a declaration. *Winder v. Caldwell*, 14 How. 434, 14: 487
Cited in United States v. Payne, 147 U. S. 690, 37 L. ed. 333, 13 Sup. Ct. Rep. 442—*Grantland v. Memphis*, 12 Fed. 288—*Kirk v. United States*, 124 Fed. 333—*Kirk v. United States*, 131 Fed. 334—*McRoberts v. Lyon*, 79 Mich. 33, 44 N. W. 160—*Eddy v. Caldwell*, 23 Or. 166, 37 Am. St. Rep. 672, 31 Pac. 475.

38. Mechanics and laborers claiming priority under the statute of Montana for a lien over mortgagees and others must furnish strict proof of the creation of the lien, when the work was commenced, the character of the work, and when it was completed. *Davis v. Alvord*, 94 U. S. 545, 24: 283
Cited in Seventh Nat. Bank v. Shenandoah Iron Co. 35 Fed. 442—*Tod v. Kentucky Union R. Co.* 18 L.R.A. 313, 3 C. C. A. 67, 6 U. S. App. 186, 52 Fed. 248—*Withrow Lumber Co. v. Glasgow Invest. Co.* 42 C. C. A. 65, 101 Fed. 867—*Arkansas River Land, R. & Canal Co. v. Flinn*, 3 Colo. App. 382, 33 Pac. 1006—*Brown v. Waring*, 1 App. D. C. 380—*Minor v. Marshall*, 6 N. M. 197, 27 Pac. 481—*Campbell v. Coon*, 8 Misc. 235, 28 N. Y. Supp. 561—*Alesina v. Stock*, 8 Mont. 418, 20 Pac. 642—*Smith v. Sherman Min. Co.* 12 Mont. 528, 31 Pac. 72—*Johnson v. Puritan Min. Co.* 19 Mont. 41, 47 Pac. 837—*Cushwa v. Improvement, Loan & Bldg. Asso.* 45 W. Va. 502, 32 S. E. 250—*Franklin Street M. E. Church v. Davis*, 85 Va. 195, 7 S. E. 245.

39. A suit to recover judgment for labor performed by the plaintiff upon a quartz mill and mine in Montana territory, and to enforce a mechanics' and laborers' lien upon the defendant's interest in the premises for the payment of the judgment, is a suit in equity requiring specific directions for the sale of the property, as upon the foreclosure of mortgages. *Davis v. Alvord*, 94 U. S. 545, 24: 283

Cited in Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 514, 33 L. ed. 436, 10 Sup. Ct. Rep. 177—*Sheffield Furnace Co. v. Withrow*, 149 U. S. 579, 37 L. ed. 856, 13 Sup. Ct. Rep. 936—*De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co.* 46 Fed. 832—*New England Engineering Co. v. Oakwood Street R. Co.* 75 Fed. 168—*Hooven, O. & R. Co. v. Featherstone*, 99 Fed. 181—*Hooven, O. & R. Co. v. John Featherstone's Sons*, 49 C. C. A. 234, 111 Fed. 86—*Gull River Lumber Co. v. Keefe*, 6 Dak. 164, 41 N. W. 743—*Pinkerton v. Le Beau*, 3 S. D.

446, 54 N. W. 97—*Lockett v. Robinson*, 31 Fla. 137, 20 L.R.A. 68, 12 So. 649—*McConologue v. McCaffrey*, 29 Misc. 141, 60 N. Y. Supp. 279—*Oriental Hotel Co. v. Griffiths (Tex.)* 30 L.R.A. 770, 33 S. W. 652—*Kent v. Muscatine, N. & S. R. Co.* 115 Iowa, 385, 88 N. W. 935.

Editorial note.

[Right to file single mechanics' lien against several buildings. 17 L.R.A. 314.]

Claim; statement.

40. A mechanic's lien for materials for and work upon a row of buildings is not void because of its being claimed on the whole row of buildings, and not on the buildings separately. *Phillips v. Gilbert*, 101 U. S. 721, 25: 833

Cited in Fullerton v. Leonard, 3 S. D. 121, 52 N. W. 325—*Alfred Richards Brick Co. v. Trott*, 23 App. D. C. 293—*Premier Steel Co. v. McElwaine-Richards Co.* 144 Ind. 619, 43 N. E. 876—*Meikell v. Griest*, 1 Kan. App. 148, 40 Pac. 1070—*Maryland Brick Co. v. Spilman*, 76 Md. 342, 17 L.R.A. 601, 35 Am. St. Rep. 431, 25 Atl. 297—*Maynard v. Ivey*, 21 Nev. 246, 29 Pac. 1090—*Willamette Mills Co. v. Shea*, 24 Or. 50, 32 Pac. 759—*Beach v. Stamper*, 44 Or. 7, 102 Am. St. Rep. 597, 74 Pac. 208—*Lyon v. Logan*, 68 Tex. 525, 2 Am. St. Rep. 511, 5 S. W. 72—*Powell v. Nolan*, 27 Wash. 343, 67 Pac. 712—*Seattle Lumber Co. v. Sweeney*, 33 Wash. 696, 74 Pac. 1001.

41. For work done on different parcels of property, the lien claimed on one is to be considered separately from the lien claimed on the other; and notice, so far as each parcel is concerned, must be filed within sixty days; and occasional repairs subsequently made cannot be added to work done months before, so as to render the whole work one continued performance, for which a single lien could be claimed within sixty days after the last repairs. *Davis v. Alvord*, 94 U. S. 545, 24: 283

Cited in Cahoon v. Fortune Min. & Mill. Co. 26 Utah, 95, 72 Pac. 437.

42. Where an undertaking was filed in a suit to release the property from a mechanics' lien, the complainant may take a personal decree only against the defendant, and may bring an action at law against the sureties on the undertaking. *Phillips v. Gilbert*, 101 U. S. 721, 25: 833

Cited in Smith v. Gill, 37 Minn. 456, 35 N. W. 178.

43. The fact that a lien is claimed for a greater sum than is actually owning or is actually covered by the lien does not vitiate the claim when honestly made. *Springer Land Asso. v. Ford*, 168 U. S. 513, 18 Sup. Ct. Rep. 170, 42: 562

44. A claim of lien naming the person by whom the claimant was employed, and stating the names of the owners or reputed owners of the lands, is not insufficient under N. M. Comp. Laws, § 1524, because it does not state the authority of the person who employed him. *Springer Land Asso. v. Ford*, 168 U. S. 513, 18 Sup. Ct. Rep. 170, 42: 562

45. A lien claimant's "statement of his demands after deducting all just credit and offset," as required by N. H. Comp. Laws, § 1524, is sufficiently made by stating the amount of balance due after deducting just credits and offsets, for excavating and embankments made under a specific contract, of which a copy is attached to the claim, although it does not state the details of the transaction, or the payments that have been made, or that there had been an estimate and acceptance by the engineer who was to give certificates of performance. *Springer Land Asso. v. Ford*, 168 U. S. 513, 18 Sup. Ct. Rep. 170, 42: 562

— Editorial note.

[Work done, or material furnished, in perfecting original work, as lienable items to establish period for filing claim. 12 L.R.A. (N.S.) 864.]

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I. In General.

1. The commencement of service in the national militia is determined by actual service, and such service cannot commence until arrival at the place of rendezvous. *Houston v. Moore*, 5 Wheat. 1, 5: 19
Cited in *Luther v. Borden*, 7 How. 60, 12 L. ed. 607—*Antrim's Case*, 5 Phila. 282, Fed. Cas. No. 495—*Ex parte Field*, 5 Blatchf. 79, Fed. Cas. No. 4,761—*Ex parte Henderson*, Fed. Cas. No. 6,349—*McCall's Case*, 5 Phila. 261, Fed. Cas. No. 8,669—*Tyler v. Pomeroy*, 8 Allen, 493—*Howes v. Middleborough*, 108 Mass. 127—*Re Spangler*, 11 Mich. 321—*People ex rel. Gaston v. Campbell*, 40 N. Y. 135—*McCafferty v. Guyer*, 59 Pa. 123—*Ex parte Coupland*, 26 Tex. 429.

II. Control.

2. There is no such connection between those sections of the military Code of Illinois which prohibit any body of men other than the organized state militia and Federal troops from associating as a military company and drilling with arms in any city or town of the state, and those sections which provide for enrolment and organization of the state militia, as to render the former sections invalid because of any repugnancy of the latter sections to the clauses of the Federal Constitution having reference to the militia, or the clause forbidding a state, without the consent of Congress, to keep troops in time of peace.

Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. Rep. 580, 29: 615

3. When any body of militia has been called forth, and has entered the service of the United States, the authority of the general government over such detachment is exclusive. *Houston v. Moore*, 5 Wheat. 1, 5: 19
Cited in *Ex parte Bright*, 1 Utah, 155.

4. There is no repugnancy to the congressional legislation for the organization of the militia, in state legislation prohibiting bodies of men, other than the organized militia of the state and the troops of the United States, from associating as a military company, and drilling with arms in cities or towns. *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 580, 29: 615

Editorial note.

[Governor's power to disband. 23 L.R.A. 510.]

III. Calling Out.

Ratification of, by Act of Congress, see Constitutional Law, 1009.

Province of President Binding on Courts, see Courts, 90.

See also *supra*, 3.

5. The authority to decide whether the exigencies contemplated in the Constitution of the United States, and the act of Congress of 1795, chap. 101, in which the President has the authority to call forth the militia, have arisen, is exclusively vested in the President; and his decision is a judicial act which is conclusive upon all other persons. *Martin v. Mott*, 12 Wheat. 19, 6: 537

Cited in *Luther v. Borden*, 7 How. 61, 12 L. ed. 607—*Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 280, 15 L. ed. 376—*Ex parte Vallandigham*, 1 Wall. 254, 17 L. ed. 594—*Grossmeyer v. United States*, 4 Ct. Cl. 24—*Allen v. Blunt*, 3 Story. 745, Fed. Cas. No. 216—*Ex parte Field*, 5 Blatchf. 77, Fed. Cas. No. 4,761—*McCall v. McDowell*, Deady, 245, 1 Abb. (U. S.) 219, Fed. Cas. 8,673—*United States v. The Tropic Wind*, 2 Havw. & H. 381, Fed. Cas. No. 16,541a—*Re Wilson*, 18 Fed. 36—*Re Day*, 27 Fed. 680—*Hamner v. Mason*, 24 Ala. 485—*Ikelheimer v. Chapman*, 32 Ala. 692—*Grant v. State*, 62 Ala. 236—*Echols v. Tate*, 53 Ark. 16, 13 S. W. 253—*Franklin v. State Examiners*, 23 Cal. 176—*People ex rel. McCullough v. Pacheco*, 27 Cal. 223—*Dauphin v. Key, MacArth. & M.* 227—*United States v. Tropic Wind*, 6 D. C. 356 (Appx.)—*Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 421—*English v. Smock*, 34 Ind. 134, 7 Am. Rep. 215—*Perkins v. Rogers*, 35 Ind. 156, 9 Am. Rep. 639—*Koehler v. Hill*, 60 Iowa. 627, 14 N. W. 738—*People ex rel. Tennant v. Parker*, 3 Neb. 432, 19 Am. Rep. 634—*Harris v. Thompson*, 9 Barb. 363—*Colton v. Beardsley*, 38 Barb. 52—*People ex rel. Gaston v. Campbell*, 40 N. Y. 136—*Kneedler v. Lane*, 45 Pa. 292—*Com. ex rel. Wendt v. Address*, 1 Pearson (Pa.) 227—*Com. ex rel. Wendt v. Address*, 10 Pittsb. L. J. 211, 2

Pittsb. 404—Kneidler v. Lane, 3 Grant, Cas. 519—Chapin v. Ferry, 3 Wash. 396, 15 L. R.A. 120, 28 Pac. 754—Druecker v. Salomon, 21 Wis. 626, 94 Am. Dec. 571.

6. The power to detach and draft the militia, and bring them to the support and defense of the United States, have been considered incident to the President's power of calling forth the militia. *Houston v. Moore*, 5 Wheat. 1, 5: 19
Cited in *Re Griner*, 16 Wis. 439.

7. A state may call out the militia not already in Federal service, to repress insurrection or repel invasion within its own territory, and directed against its own existence or authority. *Per Story*, J. *Houston v. Moore*, 5 Wheat. 1, 5: 19
Cited in *Price v. Poynter*, 1 Bush. 396, 89 Am. Dec. 631—*McCall's Case*, 5 Phila. 261—*Gillman v. Morse*, 12 Vt. 558.

8. In order to perform his duty under the act of February 28, 1795, to call out the militia in case of insurrection against a state, the President, where there are rival governments in a state, both claiming to be lawful, must of necessity determine which of the different bodies claiming to be the legislature of the state is the lawful one, and of rival claimants who is lawful governor. *Luther v. Borden*, 7 How. 1, 12: 581

9. Although the President has no power to initiate or declare a war, either against a foreign nation or a domestic state, he has authority to call out the militia, and use the military and naval force of the United States, in case of invasion by foreign nations, and to suppress insurrections against the government of a state, or of the United States. *Prize Cases*, 2 Black, 635, 17: 459
Cited in *Re Davis*, Chase, Dec. 105, Fed. Cas. No. 3,621a.

10. Requisition treated as an order, where made by the President upon the governor, in calling out the militia. *Houston v. Moore*, 5 Wheat. 1, 5: 19
Cited in *Martin v. Mott*, 12 Wheat. 33, 6 L. ed. 541.

Editorial note.

[Calling out for service. 15 L.R.A. 116.]

Refusal to obey call.

Liability to Court-Martial for, see *Courts-Martial*, 19.

11. Where disobedience by a militiaman to a call to military service is punishable by fine, such fine is deemed an equivalent for his service, and an atonement for his disobedience. *Per Story*, J. *Houston v. Moore*, 5 Wheat. 1, 5: 19
Held *obiter* in *Com. ex rel. Wendt v. Andress*, 2 Pittsb. 403, 10 Pittsb. L. J. 211.
Cited in *McCall's Case*, 5 Phila. 261.

12. The Pennsylvania act of March 28, 1814, providing that the officers and privates of the militia of that state neglecting or refusing to serve when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of Congress of February 28, 1795, or

any penalty which had been, or thereafter should be, prescribed by any law of the United States, and also providing for the trial of such delinquents by a state court-martial, is not repugnant to the Constitution and laws of the United States. *Houston v. Moore*, 5 Wheat. 1, 5: 19

IV. Exemption from Military Duty.

13. A justice of the peace of the District of Columbia is exempt from militia duty, as an officer of the government of the United States. *Wise v. Withers*, 3 Cranch, 331, 2: 457
Distinguished in *Capital Traction Co. v. Hof*, 174 U. S. 17, 43 L. ed. 879, 19 Sup. Ct. Rep. 580.

Cited in *United States ex rel. Brightwood R. Co. v. O'Neal*, 10 App. D. C. 248—*Warner v. Stockwell*, 9 Vt. 17.

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Due Process as to Permits to Sell, see *Constitutional Law*, 590.

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Equal Protection and Privileges in Regulation of, see Constitutional Law, IV. a. 5, b.

Due Process in Condemning Right of Way Across Mining Claim, see Constitutional Law, 445.

Making Mine Owner Liable for Defaults of Mine Managers and Examiners, see Constitutional Law, 474.

Due Process as to Inspection of, see Constitutional Law, 583, 584.

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Loss of Profits as Element of Damages for Breach of Contract for Mining Ores, see Damages, 349.

Dower Rights in Mining Claim, see Dower, 8.

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Master's Liability for Injury to Servant in, see Master and Servant, II. a, 2, c.

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Mine Boss as Fellow Servant, see Master and Servant, 135.

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Power of Land Commissioners to Confirm Mining Claims Derived from Mexican Government, see Private Land Claims, 503.

What Lands are Regarded as Mineral, see Public Lands, 18, 20, 21.

Taxation of Mining Claims and Minerals, see Taxes, 189-191.

1. It is the policy of the government to favor the development of mines of gold and silver and other metals, and every facility is afforded for that purpose; but it exacts a faithful compliance with the conditions required. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32: 571

2-4. The possessory rights of miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims, have been recognized by Congress as valid. *Forbes v. Gracey*, 94 U. S. 762, 24: 313
Cited in *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 240, 50 C. C. A. 92, 112 Fed. 18—*O'Connell v. Pinnacle Gold Mines Co.* 131 Fed. 109—*Blake v. Thorne*, 2 Ariz. 350, 16 Pac. 271.

Cutting timber.

5. The use of timber taken from unsurveyed mineral land in the territory of Arizona in roasting ore at a mine in that territory, whether roasting ore be considered a

part of mining or of smelting, is authorized by the permission given by the act of June 3, 1878 (20 Stat. at L. 88, chap. 150, U. S. Comp. Stat. 1901, p. 1528), § 1, to fell and remove such timber for "building, agricultural, mining, or other domestic purposes," notwithstanding a regulation of the Secretary of the Interior, promulgated under the supposed authority of that statute, that no timber can be used for smelting purposes, since the words of the statute, that the felling and use of the timber shall be "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes," cannot confer upon him the power to take from the industries designated the permission given by Congress. *United States v. United Verde Copper Co.* 196 U. S. 207, 25 Sup. Ct. Rep. 222, 49: 449 *Cited in United States v. Edgar*, 140 Fed. 656.

Ownership of minerals.

Right of United States to Injunction against Waste, see Injunction, 46.

Right of Patentee to Value of Minerals Removed Pending Approval of His Selection, see Public Lands, 902.

6. Mineral ore detached from the soil of public lands becomes the personal property of the man whose labor, capital, and skill have discovered the mine and extracted the ore. *Forbes v. Gracey*, 94 U. S. 762, 24: 313

— Editorial note.

[Right to mineral under surface of street or highway, the fee of which is vested in the public. 8 L.R.A.(N.S.) 422.]

Nature and kind of claims.

7. A mining claim is a parcel of land containing precious metal in its soil or rock. *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26: 875 *Cited in McFeters v. Pierson*, 15 Colo. 203, 22 Am. St. Rep. 388, 24 Pac. 1076—*Salisbury v. Lane*, 7 Idaho, 385, 63 Pac. 383—*Mammoth Min. Co. v. Jaub County*, 10 Utah, 286, 37 Pac. 348.

8. Placer mines, though said by the statute to include all other deposits of mineral matter except veins of quartz or other rock in place, are those in which the mineral is generally found in the softer material which covers the earth's surface, and not in the rocks beneath. *Reynolds v. Iron Silver Min. Co.* 116 U. S. 687, 6 Sup. Ct. Rep. 601.

29: 774
Cited in Iron Silver Min. Co. v. Campbell, 17 Colo. 274, 29 Pac. 513.

9. The term "placer claim," as used in U. S. Rev. Stat. § 2333, U. S. Comp. Stat. 1901, p. 1433, means ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state. By "veins or lodes," as there used, are meant lines or aggregations of metal embedded in quartz or other rock in place. A lode may, and often does, contain more than one vein. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32: 571

10. The amount of land which may be taken up as a placer claim, the amount as a lode claim, and the price per acre to be paid to the government in the two cases when patents are obtained, are different; and the rights conferred by the respective patents, and the conditions upon which they are held, are also different. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32: 571 *Cited in Migeon v. Montana C. R. Co.* 23 C. C. A. 162, 44 U. S. App. 724, 77 Fed. 256—*Brownfield v. Bier*, 15 Mont. 410, 39 Pac. 461—*Butte & B. Min. Co. v. Sloan*, 16 Mont. 101, 40 Pac. 217—*Casey v. Thielege*, 19 Mont. 347, 61 Am. St. Rep. 511, 48 Pac. 394.

11. Discovery and appropriation are the source of title to mining claims, and development by working is the condition of continued possession. *O'Reilly v. Campbell*. 116 U. S. 418, 6 Sup. Ct. Rep. 421, 29: 669 *Cited in Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 196 U. S. 349, 49 L. ed. 509, 25 Sup. Ct. Rep. 266—*Tuolumne Consol. Min. Co. v. Maier*, 134 Cal. 585, 66 Pac. 863—*Honaker v. Martin*, 11 Mont. 96, 27 Pac. 397—*Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co.* 5 Utah, 80, 11 Pac. 515.

12. Mineral locations made prior to the passage of any mineral law by Congress are governed by local rules and customs then in force. *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 8 Sup. Ct. Rep. 1214, 32: 172

Lands open to location.

Right as between Claimant under Wrongful Entry and Junior Claimant after Lands became Subject to Entry, see *infra*, 29.

Veins beyond End Lines of Prior Location, see *infra*, 96.

Exception of Placer Location from Right of Exploration for Lodes, see *infra*, 110.

Unknown Lodes on Placer Location, see *infra*, 153.

As to Lands. Title whereof has Passed to United States, see *infra*, 171.

Exception of Mineral Lands from Railroad Grants, see Public Lands, 228-233.

Reservation of Mineral Lands from School Grant, see Public Lands, 374-377.

Exclusion of Mineral Lands from Preemption or Settlement Generally, see Public Lands, 634-638.

Town Site Including Mineral Lands, see Public Lands, 588.

Effect of Discovery Subsequent to Patent of Land as Non-mineral, see Public Lands, 1108-1110.

13, 14. Valuable mineral deposits in town sites outside of the patent for the town site are open to exploration and purchase. *Davis v. Wiebold*, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35: 232

15. Entry by a mining company, and patent to it from the land office, did not cor-

fer title to a section of land in Michigan, reserved for school purposes under the act admitting the state into the Union. *Cooper v. Roberts*, 18 How. 173, 15: 338
Cited in United States v. Thomas, 151 U. S. 583, 38 L. ed. 278, 14 Sup. Ct. Rep. 426—*Minnesota v. Hitchcock*, 185 U. S. 393, 46 L. ed. 965, 22 Sup. Ct. Rep. 650—*Sprayberry v. State*, 62 Ala. 461—*Waterman v. Smith*, 13 Cal. 413—*Daggett v. Bonewitz*, 107 Ind. 278, 7 N. E. 900—*State v. Stringfellow*, 2 Kan. 309—*Roberts v. Missouri*, K. & T. R. Co. 43 Kan. 107, 22 Pac. 1006—*Bres v. Louviere*, 37 La. Ann. 738—*Minnesota Min. Co. v. National Pining Co.* 11 Mich. 190—*Busch v. Donohue*, 81 Mich. 484—*Ferry v. Street*, 4 Utah, 532, 11 Pac. 571—*Ross v. Outagamie County*, 12 Wis. 43.

16. Land claimed to be within the limits of a Mexican grant is not withdrawn and reserved from entry under the mineral laws of the United States by reason of the mere fact that the claim is before the court of private land claims for adjudication, since there is nothing in the treaty with Mexico to work that result and the provision of the act of 1854 (10 Stat. at L. 308, chap. 103), reserving such land until the final action of Congress on such claims, was repealed by the act of Congress of March 3, 1891 (26 Stat. at L. 854, chap. 539), § 15, establishing the court of private land claims. *Lockhart v. Johnson*, 181 U. S. 516, 21 Sup. Ct. Rep. 665, 45: 979

17. Lands embraced within a town site on the public domain, when unoccupied, are not exempt from location and sale for mining purposes; the exemption is only from settlement and sale under the pre-emption laws. *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 1 Sup. Ct. Rep. 389, 27: 226

Distinguished in Davis v. Wiebold, 139 U. S. 528, 35 L. ed. 246, 11 Sup. Ct. Rep. 628.

Cited in Deffeback v. Hawke, 115 U. S. 406, 29 L. ed. 427, 6 Sup. Ct. Rep. 95—*United States v. White*, 9 Sawy. 129—*Leviston v. Ryan*, 75 Cal. 295, 17 Pac. 239—*Richards v. Dower*, 81 Cal. 52, 22 Pac. 304—*Hawke v. Deffeback*, 4 Dak. 35, 22 N. W. 480—*Silver Bow Min. & Mill. Co. v. Clark*, 5 Mont. 416, 5 Pac. 570.

17a. The existence of a valuable growth of timber on the land does not affect the applicant's claim to a patent for a placer claim. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32: 571

Who may acquire mineral lands.

Who may Question Alien's Right to Locate or Hold Mining Claim, see Aliens, 27, 29.

Effect of Naturalization on Transfer of Claim, see Aliens, 173.

Presumption of Citizenship of Locators, see Evidence, 195.

18. The mineral lands of the United States are open to exploration and purchase only by citizens of the United States, or by those who have declared their intention to

become such. *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. Rep. 421, 29: 669
Distinguished in Billings v. Aspen Min. & Smelting Co. 3 C. C. A. 69, 10 U. S. App. 322, 52 Fed. 250.

Cited in Lohmann v. Helmer, 104 Fed. 181—*Keeler v. Trueman*, 15 Colo. 147, 25 Pac. 311.

18a. A corporation created under the laws of one of the states of the Union, all of whose members are citizens of the United States, is competent to locate or join in the location of a mining claim upon the public lands of the United States, in like manner as individual citizens. *McKinley v. Wheeler*, 130 U. S. 630, 9 Sup. Ct. Rep. 638, 32: 1048

Cited in Dahl v. Montana Copper Co. 132 U. S. 268, 33 L. ed. 326, 10 Sup. Ct. Rep. 97—*United States v. Trinidad Coal & Coking Co.* 137 U. S. 168, 34 L. ed. 643, 11 Sup. Ct. Rep. 57—*Doe v. Waterloo Min. Co.* 17 C. C. A. 197, 44 U. S. App. 204, 70 Fed. 463.

18b. Corporations are associations of persons, within the meaning of and subject to the restrictions as to acquiring vacant coal lands imposed by U. S. Rev. Stat. §§ 2347, 2350, U. S. Comp. Stat. 1901, pp. 1440, 1441. *United States v. Trinidad Coal & Coking Co.* 137 U. S. 161, 11 Sup. Ct. Rep. 57, 34: 640

Cited in Durham v. Richmond & D. R. Co. 108 N. C. 401.

Claim for contribution for labor.

19. The right to give the notice of a claim for contribution for labor on a mining claim is limited under U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, to a co-owner who has performed the labor. *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. Rep. 192, 37: 1189

19a. The lack of an administrator of a deceased co-owner of a mining claim at the time of the publication of the notice provided for by U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, where a co-owner of a mining claim has failed to contribute his share toward the annual labor made necessary by that section, does not render a notice addressed to the deceased owner by name, "his heirs, administrators, and to all whom it may concern," insufficient to work a forfeiture, where, under the local law, an administrator has but a lien on real estate for administrative purposes, the title vesting in the heirs. *Elder v. Horseshoe Min. & Mill. Co.* 194 U. S. 248, 24 Sup. Ct. Rep. 643, 48: 960

Cited in Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. 139 Fed. 842.

19b. The notice by publication provided for by U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, where a co-owner of a mining claim has failed to contribute his share towards the annual labor made necessary by that section, is not insufficient to work a forfeiture because it was addressed to a deceased co-owner by name, and "his heirs, administrators, and to all whom it may concern," without specifically naming the

heirs. *Elder v. Horseshoe Min. & Mill. Co.*
194 U. S. 248, 24 Sup. Ct. Rep. 643,

48: 960

19c. Expenditures of several years for holding a mining claim may be grouped in a single notice by publication, given pursuant to U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, for the purpose of working a forfeiture, where a co-owner of a mining claim has failed to contribute his share toward the annual labor made necessary by that section. *Elder v. Horseshoe Min. & Mill. Co.* 194 U. S. 248, 24 Sup. Ct. Rep. 643,

48: 960

Mortgage, lease, transfer, or sale of claims.

Necessity of Written Conveyance, see Contracts, 134a.

Time as of the Essence in Contract of Sale, see Contracts, 274.

Lease as Disposal of Property, see Contracts, 332.

Time of Performing Contract to Sell Interest, see Contracts, 595.

Finality of Executive Action on Application to Make Mineral Lease in Indian Territory, see Courts, 247a.

Representations of Value as Constituting Fraud, see Fraud and Deceit, 22, 55.

Parties in Action on Application to Lease Indian Lands for Mining Purposes, see Parties, 188.

20. Mining claims on public lands are property, and may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States. *Forbes v. Gracey*, 94 U. S. 762, 24: 313
Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38: 532

Cited in Broder v. Natoma Water & Min. Co. 101 U. S. 276, 25 L. ed. 791—*Belk v. Meagher*, 104 U. S. 283, 26 L. ed. 737—*Black v. Elkhorn Min. Co.* 163 U. S. 449, 41 L. ed. 223, 16 Sup. Ct. Rep. 1101—*Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 62, 43 L. ed. 76, 18 Sup. Ct. Rep. 895—*St. Louis Min. & Mill. Co. v. Montana Min. Co.* 171 U. S. 655, 43 L. ed. 322, 19 Sup. Ct. Rep. 61—*McKinley Creek Min. Co. v. Alaska United Min. Co.* 183 U. S. 572, 46 L. ed. 335, 22 Sup. Ct. Rep. 84—*Manuel v. Wulff*, 152 U. S. 511, 38 L. ed. 534, 14 Sup. Ct. Rep. 651—*Black v. Elkhorn Min. Co.* 49 Fed. 530—*Northern P. R. Co. v. Sanders*, 1 C. C. A. 203, 7 U. S. App. 47, 49 Fed. 135—*Black v. Elkhorn Min. Co.* 3 C. C. A. 314, 7 U. S. App. 393, 52 Fed. 860—*Doe v. Waterloo Min. Co.* 17 C. C. A. 197, 44 U. S. App. 204, 70 Fed. 463—*Bonner v. Melkie*, 82 Fed. 700—*Gillis v. Downey*, 29 C. C. A. 290, 56 U. S. App. 567, 85 Fed. 487—*Lohmann v. Helmer*, 104 Fed. 181—*Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 241, 50 C. C. A. 92, 112 Fed. 16—*O'Connell v. Pinnacle Gold Mines Co.* 131 Fed. 110—*O'Connell v. Pinnacle Gold Mines Co.* 4 L.R.A. (N.S.) 921, 72 C. C. A. 646, 140 Fed. 855—*Tree Consol. Min. Co. v. Lagstedt*, 1 Alaska, 440—*Alexander v. Sherman*, 2 Ariz. 329, 16 Pac. 45—*Ex parte Gaines*, 56 Ark. 230, 19 S. W. 602—*Worthen v. Sidway*, 72 Ark. 225, 79 S. W. 777—*Burns v. Clark*, 133 Cal. 936, 85 Am. St. Rep. 233, 66 Pac. 12—*McFeters v. Pier-*

son, 15 Colo. 204, 22 Am. St. Rep. 388, 24 Pac. 1076—*Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 26 Colo. 62, 50 L.R.A. 296, 77 Am. St. Rep. 245, 56 Pac. 176—*Duggan v. Davey*, 4 Dak. 123, 26 N. W. 837—*Suessenbach v. First Nat. Bank*, 5 Dak. 497, 41 N. W. 662—*Reagan v. McKibben*, 11 S. D. 277, 76 N. W. 943—*Ah Kie v. McLean*, 3 Idaho, 544, 32 Pac. 200—*Hopkins v. Hudson*, 107 Ind. 195, 8 N. E. 91—*Belk v. Meagher*, 3 Mont. 80—*Tibbitts v. Ah Tong*, 4 Mont. 546, 2 Pac. 759—*Siliver Bow Min. & Mill. Co. v. Clark*, 5 Mont. 414, 5 Pac. 570—*Horsky v. Moran*, 21 Mont. 362, 53 Pac. 1064—*State v. Central P. R. Co.* 21 Nev. 256, 30 Pac. 686—*South End Min. Co. v. Tinney*, 22 Nev. 62, 35 Pac. 89—*Topeka Commercial Secur. Co. v. McPherson*, 7 Okla. 345, 54 Pac. 489—*Wilson v. Triumph Consol. Min. Co.* 19 Utah, 73, 75 Am. St. Rep. 718, 56 Pac. 300—*Strickley v. Hill*, 22 Utah, 266, 83 Am. St. Rep. 786, 62 Pac. 893—*Johnston v. Harrington*, 5 Wash. 78, 31 Pac. 316—*Isaacs v. Barber*, 10 Wash. 131, 30 L.R.A. 675, 45 Am. St. Rep. 772, 38 Pac. 871—*Phoenix Min. & Mill. Co. v. Scott*, 20 Wash. 50, 54 Pac. 777—*Sherlock v. Leighton*, 9 Wyo. 309, 63 Pac. 580.

21. Mining claims are property, subject to bargain and sale, and the right to transfer and inherit them is recognized by the courts. *Black v. Elkhorn Min. Co.* 163 U. S. 445, 16 Sup. Ct. Rep. 1101. 41: 221
Cited in Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 62, 43 L. ed. 75, 18 Sup. Ct. Rep. 895—*St. Louis Min. & Mill. Co. v. Montana Min. Co.* 171 U. S. 655, 43 L. ed. 322, 19 Sup. Ct. Rep. 61.

22. The naturalization of an alien, to whom a mining claim is transferred, will remove his disability, if made before a decision against him in favor of another claimant. *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38: 532

23. A contract for purchasing and smelting lead ore, with certain privileges requiring possession of the land, for a payment to be made in lead, is a lease within the meaning of the law. *United States v. Gratiot*, 14 Pet. 526, 10: 573

24. Lessees of a mining claim, who have contracted not to suffer any act or thing whatever to be done whereby the title of the lessor should be encumbered, cannot, after the time given by statute for commencing an adverse suit has expired upon an application by a third person for a patent covering a portion of the leased claim, make a new location, and so secure for themselves the title to the leased claim. *Lowry v. Silver City Gold & S. Min. Co.* 179 U. S. 196, 21 Sup. Ct. Rep. 104, 45: 151
Cited in Stewart v. Westlake, 78 C. C. A. 344, 148 Fed. 352—*Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* 125 Fed. 415.

Leases on Indian lands.

25. The collection of royalties due and owing to the lessors of coal mines in the Choctaw nation for coal mines under valid leases prior to the Curtis act of June 23, 1898, was not prohibited by the provisions of § 16 of that act, making it unlawful for any person after the passage of such act to demand or receive any such royalty, or for

any one to pay any such royalty to any individual. *Southwestern Coal & Improv. Co. v. McBride*, 185 U. S. 499, 22 Sup. Ct. Rep. 763, 46: 1010

b. Requisites and Validity of Locations; Boundaries; Work.

Lands Subject to Location, see *supra*, 13-17.

Joint Entry and Single Patent for Claims, see *infra*, 147, 148.

Whether Discovery must Precede Location in Time, see *infra*, 36.

Application for Placer Patent, see *infra*, 135, 136.

Exploration and Location on Claims already Located, see *infra*, 110-113.

Validity of State Regulations as to Locations, see *Constitutional Law*, 153.

Location Certificate as Evidence, see *Evidence*, 1148.

Mode of Acquiring Mining Grant from Mexican Government, see *Private Land Claims*, 117-124.

As to Time of Making Payment, see *Public Lands*, 708.

26. Location is the act of appropriating a mining claim, according to certain established rules. *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26: 875

27. Miners may, in their respective districts, make rules and regulations not in conflict with the laws of the United States or of the state or territory in which the districts are situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28: 1113

28. Under the acts of July 26, 1866, and May 10, 1872, the location of a mining claim upon a lode or vein of ore should be made along the same, lengthwise of the course of its apex, at or near the surface. *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463, 25: 253

Cited in Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 208, 30 L. ed. 102, 6 Sup. Ct. Rep. 1177—*Elgin Min. & Smelting Co. v. Iron Silver Min. Co.* 4 McCrary, 282, 14 Fed. 379—*Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co.* 66 C. C. A. 399, 131 Fed. 589—*Doe v. Nanger*, 83 Cal. 209, 23 Pac. 365—*Stemwinder Min. Co. v. Emma & L. C. Consol. Min. Co.* 2 Idaho, 462, 21 Pac. 1040—*King v. Amy & S. Consol. Min. Co.* 9 Mont. 564, 24 Pac. 200—*Southern Nevada Gold & S. Min. Co. v. Holmes Min. Co.* 27 Nev. 142, 103 Am. St. Rep. 759, 73 Pac. 759.

29. A party in possession of a mining claim on the withdrawal of a reservation caused by a treaty with the Indians, who failed to comply with the law in making a record of the location certificate of his lode within the time allowed, cannot obtain any advantage from his wrongful entry upon the premises during the existence of the Indian reservation, as against parties who went upon the premises after they had become a U. S. Dig.—252

part of the public domain, and made a proper location certificate and record thereof, and complied in other particulars with the requirements of the law. *Kendall v. San Juan Silver Min. Co.* 144 U. S. 658, 12 Sup. Ct. Rep. 779, 36: 583
Cited in McFadden v. Mountain View Min. & Mill. Co. 38 C. C. A. 358, 97 Fed. 673.

30-33. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel according to certain established rules. It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the boundaries of the parcel, according to the local customs, or, since the statute of 1872 (17 Stat. at L. 91, chap. 152), according to the provisions of that act (Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426). *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26: 875

Editorial notes.

Location of mining claims. [7 L.R.A. (N. S.) 763.] 39: 859; 42: 96

Discovery.

Whether Discovery must Precede Location of Mining Claim in Time, see *infra*, 109.

Right to Collaterally Attack Patent on Ground of Want of Discovery, see *infra*, 150.

Effect of Discovery Subsequent to Patent of Land as Nonmineral, see *Public Lands*, 1108-1110.

34. There must be something beyond a mere guess on the part of the miner, to authorize him to make a location which will exclude others from the ground,—such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28: 1113
Cited in Behrends v. Goldstein, 1 Alaska, 525 —*Doe v. Waterloo Min. Co.* 55 Fed. 13.

35. Even as between rival mineral claimants to petroleum lands, there must have been such a discovery, in order to sustain a location, as would justify a prudent person in the expenditure of money and labor in exploitation for petroleum. *Chrisman v. Miller*, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49: 770

Cited in Cascaden v. Bartolls, 77 C. C. A. 498, 146 Fed. 741—*Steele v. Tanana Mines R. Co.* 78 C. C. A. 414, 148 Fed. 680—*Lange v. Robinson*, 148 Fed. 803.

36. The discovery of the vein or lode before any other steps are taken to perfect the location is not required by the provision of U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," which means nothing more than that no location shall be considered complete until there has been a dis-

covery. Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49: 501

Notice and record of claim.

Notice as a Part of Location or Indicative thereof, see *supra*, 30-32.

Effect to Validate Tunnel Claims not Marked on Surface of Grounds, see *infra*, 46.

Record as Affecting Evidence of Possession to Prove Title, see Evidence, 2235.

Allegations as to Reason for Failure to File Notice, see Pleading, 586.

Sufficiency of Notice as Question of Fact, see Trial, 267.

37. A written notice posted on a stake at the point of discovery of a mineral bearing lode or vein, which declares that the locators claim 1,500 feet on the "lode, vein, or deposit," is, to the extent of 750 feet on the course of the lode or vein in each direction from that point, a sufficient notice of discovery and original location. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28: 1113

Distinguished in Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. 167 U. S. 112, 42 L. ed. 100, 17 Sup. Ct. Rep. 762.

Cited in Doe v. Waterloo Min. Co. 17 C. C. A. 193, 44 U. S. App. 204, 70 Fed. 458—*Perigo v. Erwin*, 85 Fed. 906—*Shoshone Min. Co. v. Rutter*, 31 C. C. A. 229, 59 U. S. App. 538, 87 Fed. 807—*Northmore v. Simmons*, 38 C. C. A. 213, 97 Fed. 388—*Lindsley v. Union Silver Star Min. Co.* 52 C. C. A. 642, 115 Fed. 48—*Loeser v. Gardiner*, 1 Alaska, 646—*McCarthy v. Phelan*, 132 Cal. 406, 64 Pac. 570—*Tuolumne Consol. Min. Co. v. Maier*, 134 Cal. 585, 66 Pac. 863—*Omar v. Soper*, 11 Colo. 386, 7 Am. St. Rep. 246, 18 Pac. 443—*Honaker v. Martin*, 11 Mont. 96, 27 Pac. 397—*Shreve v. Copper Bell Min. Co.* 11 Mont. 341, 28 Pac. 315—*Ormund v. Granite Mountain Min. Co.* 11 Mont. 308, 28 Pac. 289—*Sanders v. Noble*, 22 Mont. 129, 55 Pac. 1037—*Bramlett v. Flick*, 23 Mont. 111, 57 Pac. 869—*Slason v. Sommers*, 24 Nev. 388, 77 Am. St. Rep. 815, 55 Pac. 829—*Lockhart v. Wills*, 9 N. M. 861, 54 Pac. 336—*Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co.* 1 S. D. 360, 47 N. W. 290—*Hayes v. Lavagnino*, 17 Utah, 191, 53 Pac. 1029—*Copper Globe Min. Co. v. Allman*, 23 Utah, 417, 64 Pac. 1019—*Union Min. & Mill. Co. v. Leitch*, 24 Wash. 590, 85 Am. St. Rep. 961, 64 Pac. 829—*Elwood v. Dickinson*, 28 Wash. 640, 67 Pac. 370—*Patterson v. Tarbell*, 26 Or. 37, 37 Pac. 76.

38. Mining locations distinctly marked on the ground so that their boundaries can be readily traced are sufficient under U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, as against subsequent locators, irrespective of the posting of notices. *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 16 Sup. Ct. Rep. 282, 40: 436

Cited in McKinley Creek Min. Co. v. Alaska United Min. Co. 46 L. ed. 334, 22 Sup. Ct. Rep. 84, 183 U. S. 570—*Oregon King Min. Co. v. Brown*, 55 C. C. A. 634, 119 Fed. 56—*Peters v. Tonopah Min. Co.* 120 Fed. 589.

39. A sufficient location of placer min-

ing claims is made by notices upon a stump in a creek, of a claim running 1,500 feet along the creek bottom and extending 300 feet each way from the center of the creek, adding that it is an extension of another claim named, a certain distance from the first falls on said creek. *McKinley Creek Min. Co. v. Alaska United Min. Co.* 183 U. S. 563, 22 Sup. Ct. Rep. 84, 46: 331
Cited in Oregon King Min. Co. v. Brown, 55 C. C. A. 633, 119 Fed. 55—*Smith v. Casca-den*, 78 C. C. A. 463, 148 Fed. 797—*Worthen v. Sldway*, 72 Ark. 223, 79 S. W. 777—*Kern Oil Co. v. Crawford*, 143 Cal. 301, 3 L.R.A. (N.S.) 995, 76 Pac. 1111.

40. Within three months from the discovery, a certificate of the location must be filed for record in the county in which the lode is situated, containing the designation of the lode, the names of the locators, the date of the location, the number of feet claimed on each side of the center of the discovery shaft, the general course of the lode, and such a description of the claim by reference to some natural object or permanent monument, as will identify it with reasonable certainty. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28: 1113
Cited in Northmore v. Simmons, 38 C. C. A. 219, 97 Fed. 393—*Slason v. Sommers*, 24 Nev. 387, 77 Am. St. Rep. 815, 55 Pac. 829—*Farmington Gold Min. Co. v. Rhymney Gold & Copper Co.* 20 Utah, 370, 58 Pac. 832—*Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 196 U. S. 346, 49 L. ed. 507, 25 Sup. Ct. Rep. 266—*Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 207, 30 L. ed. 102, 6 Sup. Ct. Rep. 1177.

41. The recording of notices of location of a mining claim is not required when there is no mining district recorder, and the rules and regulations formerly existing in the district have fallen into disuse and become of no force and effect. *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 16 Sup. Ct. Rep. 282, 40: 436

42. Under Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, the manner of locating mining claims and recording them is subject to the laws of the state or territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States. *Kendall v. San Juan Silver Min. Co.* 144 U. S. 658, 12 Sup. Ct. Rep. 779, 36: 583
Cited in Nevada Sierra Oil Co. v. Home Oil Co. 98 Fed. 678.

43. The requirement of Mont. Ann. Codes. § 3612, that the declaratory statement filed in the office of the clerk of the county in which a mining lode or claim is situated must contain "the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims" and "the location and description of each corner, with the markings thereon," is not invalid as conflicting with congressional legislation prescribing regulations for the location of mining claims. *Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. Rep. 211, 49: 409

Boundaries, marking, and description.

Necessity of Description in Notice or Certificate, see *supra*, 37-43.

Necessity that End Lines be Parallel, see *infra*, 95, 102.

Locations Transverse to Course of Vein, see *infra*, 97, 98, 100.

Necessity that End Lines be Straight, see *infra*, 101.

Overlapping or Bisecting Locations on Cross Veins, see *infra*, 118.

Question of Law or Fact as to, see Trial, 347.

44. A description in the notice of location of a mining claim is sufficient, under U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, which describes the claim as located a certain number of feet from another mine. Such mine will be presumed to be a natural object or permanent monument, within the meaning of the statute, until the contrary appears, where the location is further described by the length of its boundary lines and stakes at the corners. *Hammer v. Garfield Min. & Mill. Co.* 130 U. S. 291, 9 Sup. Ct. Rep. 548, 32: 964

Cited in *Bennett v. Harkrader*, 158 U. S. 444, 39 L. ed. 1047, 15 Sup. Ct. Rep. 863—*Book v. Justice Min. Co.* 58 Fed. 116—*Smith v. Newell*, 86 Fed. 59—*Credo Min. & Smelting Co. v. Highland Min. & Mill. Co.* 95 Fed. 914—*Lindsley v. Union Silver Star Min. Co.* 52 C. C. A. 642, 115 Fed. 48—*Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 537, 91 Am. St. Rep. 87, 69 S. W. 572—*Carter v. Backgalup*, 83 Cal. 191, 23 Pac. 361—*Eaton v. Norris*, 131 Cal. 563, 63 Pac. 856—*McCarthy v. Phelan*, 132 Cal. 406, 64 Pac. 570—*Johnson v. Young*, 18 Colo. 629, 34 Pac. 173—*Duncan v. Fulton*, 15 Colo. App. 151, 61 Pac. 244—*Bramlett v. Filck*, 23 Mont. 102, 57 Pac. 869—*Brady v. Husby*, 21 Nev. 458, 33 Pac. 801—*Hansen v. Fletcher*, 10 Utah, 271, 37 Pac. 480—*Wilson v. Triumph Consol. Min. Co.* 19 Utah, 76, 75 Am. St. Rep. 718, 56 Pac. 300—*McIntosh v. Price*, 58 C. C. A. 140, 121 Fed. 720—*Butler v. Good Enough Min. Co.* 1 Alaska, 251—*Worthen v. Sidway*, 72 Ark. 223, 79 S. W. 777—*Morrison v. Regan*, 8 Idaho, 303, 67 Pac. 955.

45. Subsequent excavations are to be made within sixty days after the discovery; and the location must be distinctly marked on the ground, so that its boundaries can be readily traced. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28: 1113

Cited in *Erwin v. Perego*, 35 C. C. A. 485, 93 Fed. 612—*Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 678—*Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 240, 50 C. C. A. 90, 112 Fed. 15—*Shreve v. Copper Bell Min. Co.* 11 Mont. 336, 28 Pac. 315—*Sanders v. Noble*, 22 Mont. 132, 55 Pac. 1037—*Pacific Land & Improv. Co. v. Elwood Oil Co.* 61 L.R.A. 240, 50 C. C. A. 90, 112 Fed. 15—*Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co.* 57 C. C. A. 206, 119 Fed. 170—*Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* 125 Fed. 395—*Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co.* 66 C. C. A. 310, 131 Fed. 590—*Weed v. Snook*, 144 Cal. 443, 77 Pac. 1023—*Mares v. Dillon*, 30 Mont. 132, 75 Pac. 963—*Butte City Water Co. v. Baker*, 196 U. S. 124, 49 L. ed. 411, 25 Sup. Ct. Rep. 211.

46. The failure to mark on the surface of the ground the point of discovery and the boundaries of a tract claimed will not destroy the right of a tunnel owner to veins which he has discovered in the tunnel, when he posted the proper notices at the mouth of the tunnel, and filed them in the office required by local statute. *Campbell v. Ellet*, 167 U. S. 116, 17 Sup. Ct. Rep. 765, 42: 101
Cited in *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 508, 45 L. ed. 1206, 21 Sup. Ct. Rep. 885—*Brewster v. Shoemaker*, 28 Colo. 181, 53 L.R.A. 799, 89 Am. St. Rep. 188, 63 Pac. 309.

Work, development, and improvement.

As to Claims where Right to Patent is Fully Matured, see *infra*, 78.

Development as Giving Priority to Conflicting Claimant, see *infra*, 108.

Federal Question as to, see Appeal and Error, 1403.

Evidence of Amount Expended in Working, see Evidence, 2234.

Allegations as to, see Pleading, 456.

Publication of Notice of Failure to Contribute Annual Work, see Publication, 6.

See also *supra*, 44; *infra*, 156.

47. U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, requires that some work should be done on every claim to mineral land, in every year, from the date of the discovery until the issue of the patent. *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. Rep. 428, 28: 452
Cited in *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 482, 32 L. ed. 175, 8 Sup. Ct. Rep. 1214—*Book v. Justice Min. Co.* 58 Fed. 117—*Gird v. California Oil Co.* 60 Fed. 541—*Anthony v. Jillson*, 83 Cal. 301, 23 Pac. 419—*Penn v. Oldhauber*, 24 Mont. 290, 61 Pac. 649—*Bishop v. Baisley*, 28 Or. 134, 41 Pac. 936.

48. Work done in June, 1875, on a mining claim was sufficient to give the original locators or those claiming under them an exclusive right to the possession and enjoyment of the property until January 1, 1877, under the act of May 10, 1872, and the acts of 1873 and 1874, amendatory thereof, requiring an annual performance of \$10 worth of work for each 100 feet in length along the vein, until a patent should issue, to prevent the claim from again becoming subject to location. *Belk v. Meagher*, 104 U. S. 279, 26: 735

Cited in *Butte City Water Co. v. Baker*, 196 U. S. 124, 49 L. ed. 411, 25 Sup. Ct. Rep. 211—*Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 196 U. S. 346, 49 L. ed. 507, 25 Sup. Ct. Rep. 266—*Zerres v. Vanina*, 134 Fed. 614—*Jordan v. Duke*, 4 Ariz. 282, 86 Pac. 896—*Worthen v. Sidway*, 72 Ark. 225, 79 S. W. 777—*McGinnis v. Egbert*, 8 Colo. 47, 5 Pac. 652—*Kendall v. San Juan Silver Min. Co.* 9 Colo. 358, 12 Pac. 198—*Fleld v. Tanner*, 32 Colo. 285, 75 Pac. 916—*Lee v. Justice Min. Co.* 2 Colo. App. 125, 29 Pac. 1020—*Burke v. McDonald*, 2 Idaho, 355, 13 Pac. 351—*Lalande v. McDonald*, 2 Idaho, 312, 13 Pac. 347—*Noyes v. Black*, 4 Mont. 534, 2 Pac. 769—*Hamilton v. Huson*, 21 Mont. 11, 53 Pac. 101—*Pur-*

dum v. Laddin, 23 Mont. 389, 59 Pac. 153—*McKay v. McDougall*, 25 Mont. 263, 87 Am. St. Rep. 395, 64 Pac. 669—*Lockhart v. Willis*, 9 N. M. 357, 54 Pac. 336—*Patterson v. Tarbell*, 26 Or. 35, 37 Pac. 76—*Lavagnino v. Uhlig*, 26 Utah, 25, 99 Am. St. Rep. 808, 71 Pac. 1046.

49. Labor and improvements, within the meaning of the statute of 1872, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development; that is, to facilitate the extraction of the metals it may contain; though in fact such labor and improvements may be on ground which originally constituted only one of the locations,—as in sinking a shaft; or may be at a distance from the claim itself,—as where the labor is performed for the turning of a stream or the introduction of water; or where the improvement consists in the construction of a flume to carry off the debris or waste material. *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26: 875 *Cited in Jackson v. Roby*, 109 U. S. 444, 27 L. ed. 992, 3 Sup. Ct. Rep. 301—*Dahl v. Raunheim*, 132 U. S. 261, 33 L. ed. 324, 10 Sup. Ct. Rep. 74—*Book v. Justice Min. Co.* 58 Fed. 117—*Gird v. California Oil Co.* 60 Fed. 542—*Carson City Gold & S. Min. Co. v. North Star Min. Co.* 73 Fed. 600—*Justice Min. Co. v. Barclay*, 82 Fed. 500—*McCulloch v. Murphy*, 125 Fed. 149—*Carney v. Arizona Gold Min. Co.* 65 Cal. 40, 2 Pac. 734—*Malone v. Big Flat Gravel Min. Co.* 76 Cal. 583, 18 Pac. 772—*DeNoon v. Morrison*, 83 Cal. 165, 23 Pac. 374—*Yreka Min. & Mill. Co. v. Knight*, 133 Cal. 548, 65 Pac. 1091—*Sweet v. Webber*, 7 Colo. 447, 4 Pac. 752—*Bryan v. McCalg*, 10 Colo. 315, 15 Pac. 413—*Doherty v. Morris*, 17 Colo. 108, 28 Pac. 85—*Hall v. Kearney*, 18 Colo. 509, 33 Pac. 373—*Taylor v. Parenteau*, 23 Colo. 373, 48 Pac. 505—*Silver Bow & Min. & Mill. Co. v. Clark*, 5 Mont. 422, 5 Pac. 570—*Talbott v. King*, 6 Mont. 105, 9 Pac. 434—*Territory v. Mackey*, 8 Mont. 173, 19 Pac. 395—*McDonald v. Montana Wood Co.* 14 Mont. 92, 43 Am. St. Rep. 616, 35 Pac. 668—*Big Blackfoot Mill Co. v. Blue Bird Min. Co.* 19 Mont. 456, 48 Pac. 778—*Strasburger v. Beecher*, 20 Mont. 151, 49 Pac. 740—*Horsky v. Moran*, 21 Mont. 352, 53 Pac. 1064—*Eberle v. Carmichael*, 8 N. M. 174, 42 Pac. 95—*Deno v. Griffin*, 20 Nev. 252, 20 Pac. 308.

50. The sufficiency of the work performed and improvements made upon each of the claims patented is sufficiently shown by the certificate of the Surveyor General of the United States for the state in which the claim is situated. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32: 571 *Cited in United States v. King*, 27 C. C. A. 511, 48 U. S. App. 542, 83 Fed. 191.

51. A forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law. *Hammer v. Garfield Min. & Mill. Co.* 130 U. S. 291, 9 Sup. Ct. Rep. 548, 32: 964 *Cited in Justice Min. Co. v. Barclay*, 82 Fed. 559—*Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 165, 123 Fed. 219—*McCul-*

loch v. Murphy, 125 Fed. 150—*Willitt v. Baker*, 138 Fed. 946—*Zerres v. Vanina*, 134 Fed. 614—*Loefer v. Gardiner*, 1 Alaska, 648 *Thomson v. Allen*, 1 Alaska, 640—*Providence Gold Min. Co. v. Burke*, 6 Ariz. 332, 57 Pac. 641—*Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 540, 91 Am. St. Rep. 87, 69 S. W. 572—*Quigley v. Gillett*, 101 Cal. 469, 35 Pac. 1040—*Harris v. Kellogg*, 117 Cal. 489, 49 Pac. 708—*Callahan v. James*, 141 Cal. 294, 74 Pac. 853—*Goldberg v. Bruschi*, 146 Cal. 712, 81 Pac. 23—*Johnson v. Young*, 18 Colo. 629, 34 Pac. 173—*Beals v. Cone*, 27 Colo. 301, 83 Am. St. Rep. 92, 62 Pac. 948—*Dibble v. Castle Chief Gold Min. Co.* 9 S. D. 620, 70 N. W. 1055—*Axiom Min. Co. v. White*, 10 S. D. 201, 72 N. W. 482—*Bishop v. Balseley*, 28 Or. 127, 41 Pac. 936—*Crown Point Min. Co. v. Crismon*, 39 Or. 389, 65 Pac. 87—*Power v. Sla*, 24 Mont. 252, 61 Pac. 468.

52. When several claims are held in common and are contiguous, the necessary work to keep them all alive may be done on one of them, but it must equal in value that which would be required on all the claims if they were separate or independent, and must have a tendency to develop each of the claims. *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. Rep. 428, 28: 452 *Cited in Royston v. Miller*, 76 Fed. 52—*Justice Min. Co. v. Barclay*, 82 Fed. 560—*Quigley v. Gillett*, 101 Cal. 471, 35 Pac. 1040—*Taylor v. Parenteau*, 23 Colo. 373, 48 Pac. 505—*Eberle v. Carmichael*, 8 N. M. 174, 42 Pac. 95.

53. The extension of a flume over premises sought to be held as a mining claim, and their use as a place of deposit for the waste material from an adjoining claim, is not such an expenditure upon them as will sustain the claim under the act of 1872, reenacted in the Revised Statutes, requiring a specified annual expenditure for labor or improvements upon mining claims. *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301, 27: 990 *Cited in Butte City Water Co. v. Baker*, 196 U. S. 126, 49 L. ed. 412, 25 Sup. Ct. Rep. 211.

— Editorial notes.

Annual work. 42: 96
[The effect of performance of, or contribution to, assessment work by one not the owner of the legal title, nor his agent, to prevent forfeiture of mining claim. 9 L.R.A. (N.S.) 1136.]

Abandonment, forfeiture, and relocation.

Stipulation in Lease as Disentitling Lessee to Relocate under Adverse Claim to Lessor, see *supra*, 24.

Sufficiency of Development Work to Prevent Forfeiture, see *supra*, 47–53.

Federal Question as to, see *Appeal and Error*, 1402.

Abandonment by Conveyance of Claim, see *Dower*, 8.

Fraudulent Relocator as Constructive Trustee for Original Locator, see *Injunction*, 41.

54–56. An election by the grantee of a patent for a lode mining claim to abandon rights acquired under the act of July 26

1866 (14 Stat. at L. 251, chap. 262), cannot be imputed from the fact that such patent, in addition to granting such rights, also purports to grant all that would have been acquired by a location under the act of May 10, 1872 (17 Stat. at L. 91, chap. 152, § 2, U. S. Rev. Stat. § 2320, U. S. Comp. Stat., 1901, pp. 1424, 1425). *East Central Eureka Min. Co. v. Central Eureka Min. Co.* 204 U. S. 266, 27 Sup. Ct. Rep. 258, 51: 476

57. The validity of a placer mining location is not affected by the lapse of many years since its original location, without the issue of a patent therefor. *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 24 Sup. Ct. Rep. 632, 48: 944

58, 59. Mining claims are not open to relocation until the rights of a former locator have come to an end. The right to the possession comes only from a valid location. If there is no valid location, there can be no possession under it. *Belk v. Meagher*, 104 U. S. 279, 26: 735

Distinguished in *Perigo v. Erwin*, 85 Fed. 906.

Cited in *Noyes v. Mantle*, 127 U. S. 353, 32 L. ed. 170, 8 Sup. Ct. Rep. 1132—*Hammer v. Garfield Min. & Mill. Co.* 130 U. S. 801, 32 L. ed. 968, 9 Sup. Ct. Rep. 548—*Sullivan v. Iron Silver Min. Co.* 143 U. S. 434, 36 L. ed. 215, 12 Sup. Ct. Rep. 555—*Manuel v. Wulff*, 152 U. S. 511, 38 L. ed. 534, 14 Sup. Ct. Rep. 651—*Hawa v. Victoria Copper Min. Co.* 160 U. S. 317, 40 L. ed. 441, 16 Sup. Ct. Rep. 282—*Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 78, 43 L. ed. 82, 18 Sup. Ct. Rep. 895—*Lockhart v. Johnson*, 181 U. S. 527, 45 L. ed. 985, 21 Sup. Ct. Rep. 665—*Aurora Hill Consol. Min. Co. v. 85 Min. Co.* 12 Sawy. 364, 34 Fed. 521—*Franceour v. Newhouse*, 40 Fed. 624—*Montana Co. v. Clark*, 42 Fed. 628—*Book v. Justice Min. Co.* 58 Fed. 128—*Oscamp v. Crystal River Min. Co.* 7 C. C. A. 234, 19 U. S. App. 18, 58 Fed. 295—*Scott v. Lockey Invest. Co.* 60 Fed. 37—*Preston v. Hunter*, 15 C. C. A. 182, 29 U. S. App. 621, 67 Fed. 1000—*Justice Min. Co. v. Barclay*, 82 Fed. 560—*Erwin v. Perego*, 35 C. C. A. 486, 93 Fed. 612—*Northmore v. Simmons*, 38 C. C. A. 218, 97 Fed. 392—*Crown Point Min. Co. v. Buck*, 38 C. C. A. 281, 97 Fed. 465—*Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 680—*Olive Land & Development Co. v. Olmstead*, 103 Fed. 573—*Cosmos Exploration Co. v. Gray Eagle Oil Co.* 104 Fed. 46—*Thallmann v. Thomas*, 49 C. C. A. 319, 111 Fed. 279—*Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 244, 50 C. C. A. 97, 112 Fed. 21—*Teller v. United States*, 51 C. C. A. 238, 113 Fed. 281—*Fee v. Durham*, 57 C. C. A. 585, 121 Fed. 469—*McCulloch v. Murphy*, 125 Fed. 151—*Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co.* 66 C. C. A. 305, 131 Fed. 585—*Porter v. Tonopah North Star Tunnel & Development Co.* 133 Fed. 758—*Willitt v. Baker*, 133 Fed. 946—*Thomson v. Allen*, 1 Alaska, 639—*Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 539, 91 Am. St. Rep. 87, 69 S. W. 572—*Horswell v. Ruiz*, 67 Cal. 112, 7 Pac. 197—*Doe v. Tyler*, 73 Cal. 24, 14 Pac. 375—*Garthe v. Hart*, 73 Cal. 542, 15 Pac. 93—*Goodwin v. McCabe*, 75 Cal. 589, 17 Pac. 705—*Souter v. Maguire*, 78 Cal. 545, 21 Pac. 183—*Miller v. Chrisman*, 140 Cal. 447, 98 Am. St. Rep. 63, 73 Pac. 1083—*Dwinnell v. Dyer*, 145 Cal. 20, 78 Pac. 247—*Sweet v. Webber*, 7 Colo. 450, 4 Pac. 752—*Kendall v. San Juan*

Silver Min. Co. 9 Colo. 358, 12 Pac. 198—*McFeters v. Pierson*, 15 Colo. 204, 22 Am. St. Rep. 388, 24 Pac. 1076—*Johnson v. Young*, 18 Colo. 680, 34 Pac. 173—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 27 Colo. 24, 50 L.R.A. 222, 83 Am. St. Rep. 17, 59 Pac. 607—*Rebecca Gold Min. Co. v. Bryant*, 31 Colo. 123, 102 Am. St. Rep. 17, 71 Pac. 110—*Lee v. Justice Min. Co.* 2 Colo. App. 125, 29 Pac. 1020—*Forbes v. Driscoll*, 4 Dak. 346, 31 N. W. 633—*Burke v. McDonald*, 2 Idaho, 343, 13 Pac. 351—*Lalande v. McDonald*, 2 Idaho, 312, 13 Pac. 347—*Mantle v. Noyes*, 5 Mont. 290, 5 Pac. 865—*Silver Bow Min. & Mill. Co. v. Clark*, 5 Mont. 410, 5 Pac. 570—*Upton v. Larkin*, 5 Mont. 608, 6 Pac. 60—*Garfield Min. & Mill. Co. v. Hammer*, 6 Mont. 59, 8 Pac. 153—*Honaker v. Martin*, 11 Mont. 95, 27 Pac. 397—*Patchen v. Keeley*, 19 Nev. 410, 14 Pac. 347—*Willis v. Blain*, 5 N. M. 246, 20 Pac. 798—*Lockhart v. Leeds*, 10 N. M. 597, 63 Pac. 48—*Adams v. Couch*, 1 Okla. 38, 26 Pac. 1009—*Bishop v. Baisley*, 28 Or. 127, 41 Pac. 936—*Reynolds v. Pascoe*, 24 Utah, 221, 66 Pac. 1064—*Phoenix Min. & Mill. Co. v. Scott*, 20 Wash. 50, 54 Pac. 777—*Caldwell v. Bush*, 6 Wyo. 361, 45 Pac. 488.

60. Where an attempted relocation is invalid, another who takes possession and effects a relocation has secured a better right. *Belk v. Meagher*, 104 U. S. 279, 26: 735

61. An amended relocation of a mining claim, made after the land has reverted to the public domain, cannot cure the defect in the original relocation arising out of the fact that the land was not then subject to entry, where intervening rights in favor of a third person have been created. *Brown v. Gurney*, 201 U. S. 184, 26 Sup. Ct. Rep. 509, 50: 717

62. The area of conflict between two mining locations does not, upon the forfeiture of the senior location, become unoccupied mineral lands of the United States, so as to enable a relocater of the forfeited location to adverse successfully the application for a patent by the junior locator, since the latter's right under U. S. Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, to a patent, which would exist in case of the failure of the owner of a subsisting senior location either to adverse the application or to prosecute such adverse if one was made, must also arise from the forfeiture of the claim of the senior locator before the junior locator's application for a patent was made, and the consequent inability of the senior locator to adverse successfully after the forfeiture is complete. *Lavagnino v. Uhlig*, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49: 1119

63. An election to retain the north end of a lode mining claim, separated from the rest of the claim by a patented placer claim, made after the unsuccessful termination in the Land Department of a contest with the placer claimant, begun after a patent for the entire claim was refused because divided by the placer claim, took effect *eo instanti* as an abandonment of the south end of such claim, which became at once subject to relocation, although the entry as to such tract had not then been formally canceled. *Brown*

v. Gurney, 201 U. S. 184, 26 Sup. Ct. Rep. 509, 50: 717

64. The south end of a lode mining claim, separated from the rest of the claim by a patented placer claim, did not revert to and become part of the public domain, and, as such, subject to relocation, until the claimant elected to retain and patent the north end of the claim, although such election was not made within the sixty days given for that purpose by the Land Department in refusing a patent for the entire claim because divided by the placer claim, but was deferred until after the unsuccessful termination in the Land Department of a contest with the placer claimant, begun after the decision refusing the patent. *Brown v. Gurney*, 201 U. S. 184, 26 Sup. Ct. Rep. 509, 50: 717

— Editorial notes.

Abandonment. 42: 96

[Right of cotenant, agent, or other person standing in fiduciary relation to relocate mining claim for his own exclusive benefit. 50 L.R.A. 184.]

Relocation of mining claim as abandoned or forfeited. 68 L.R.A. 833.]

c. Extent of Claim.

Apex and Extralateral Rights, see *infra*, I. d, 2.

Extent of Patent for Placer Claims, see *infra*, 147, 148.

See also *infra*, 123.

65. A mining claim which includes more than 200 feet, when that is all the locator is entitled to, but which does not affect rights already acquired, is void only as to the excess. *Richmond Min. Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055, 29: 273
Cited in *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 481, 32 L. ed. 174, 8 Sup. Ct. Rep. 1214—*Shoshone Min. Co. v. Rutter*, 177 U. S. 512, 44 L. ed. 887, 20 Sup. Ct. Rep. 720—*Lakin v. Dolly*, 53 Fed. 336—*Doe v. Waterloo Min. Co.* 54 Fed. 941—*McIntosh v. Price*, 58 C. C. A. 139, 121 Fed. 719—*Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 164, 123 Fed. 218—*Price v. McIntosh*, 1 Alaska, 291—*Thompson v. Spray*, 72 Cal. 533, 14 Pac. 182—*Doe v. Tyler*, 73 Cal. 23, 14 Pac. 375—*Sherman v. Wrinkle*, 121 Cal. 509, 53 Pac. 1090—*Stemwinder Min. Co. v. Emma & L. C. Consol. Min. Co.* 2 Idaho, 462, 21 Pac. 1040—*Burke v. McDonald*, 2 Idaho, 683, 33 Pac. 49—*Hoffman v. Beecher*, 12 Mont. 497, 31 Pac. 92—*Stephens v. Wood*, 39 Or. 447, 65 Pac. 602—*Gohres v. Illinois Min. Co.* 40 Or. 519, 67 Pac. 666—*Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co.* 5 Utah, 72, 11 Pac. 515—*Hansen v. Fletcher*, 10 Utah, 272, 37 Pac. 480.

66. The right of a locator to hold more than 200 feet additional, as discoverer, will be sustained after five years, where it was made in good faith, though there was a mistake as to his discovery of a new vein or lode. *Richmond Min. Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055, 29: 273

67. The Colorado territorial act of 1861 limiting the right of a tunnel owner to veins

discovered in the tunnel, to 250 feet on each side, is, if not repealed by the Colorado legislature, superseded by the legislation of Congress in the Revised Statutes. *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 17 Sup. Ct. Rep. 762, 42: 96

68. The location of a claim to a vein discovered in a tunnel may be made on its discovery by taking the full length of 1,500 feet allowed by U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424, on either side of the tunnel, or any such proportion thereof on either side as the locator may desire, and is not limited to 750 feet on each side of the tunnel on account of a failure to indicate, when the tunnel was located, what particular 1,500 feet he would claim. *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 17 Sup. Ct. Rep. 762, 42: 96

69. A tunnel claim 5,000 feet in length and 500 feet in width is valid to the extent of the 3,000 feet allowed by U. S. Rev. Stat. § 2323, U. S. Comp. Stat. 1901, p. 1426. *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 8 Sup. Ct. Rep. 1214, 32: 172

Cited in *Gohres v. Illinois Min. Co.* 40 Or. 519, 67 Pac. 666.

d. Rights Acquired.

1. In General.

Right of Co-owner to Claim Contribution for Labor, see *supra*, 19, 19c.

70. The acts of Congress use the words "vein," "lode," or "ledge" as embracing a more or less continuous body of mineral lying within well-defined boundary of other rock, in the mass within which it is found. *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29: 712
Distinguished in Illinois Silver Min. & Mill. Co. v. Raff, 7 N. M. 342, 34 Pac. 544.

71. A vein is by no means always a straight line, or of uniform dip, thickness, or richness of mineral matter, throughout its course. But if the mineral disappears, or the fissure, with its walls of the same rock, disappears, so that its identity can no longer be traced, the right to pursue it outside of the perpendicular lines of claimants survey is gone. *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29: 712
Cited in *Reynolds v. Iron Silver Min. Co.* 116 U. S. 695, 29 L. ed. 777, 6 Sup. Ct. Rep. 601—*United States v. Iron Silver Min. Co.* 128 U. S. 680, 32 L. ed. 574, 9 Sup. Ct. Rep. 195—*Iron Silver Min. Co. v. Mike & S. Gold & Silver Min. Co.* 143 U. S. 404, 36 L. ed. 204, 12 Sup. Ct. Rep. 543—*Book v. Justice Min. Co.* 58 Fed. 121—*Montana C. R. Co. v. Migeon*, 68 Fed. 816—*Meydenbauer v. Stevens*, 78 Fed. 790—*Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 536, 91 Am. St. Rep. 87, 69 S. W. 572—*Beals v. Cone*, 27 Colo. 486, 83 Am. St. Rep. 92, 62 Pac. 948—*United States v. King*, 9 Mont. 81, 22 Pac. 498—

King v. Amy & S. Consol. Min. Co. 9 Mont. 565, 24 Pac. 200—Shreve v. Copper Bell Min. Co. 11 Mont. 336, 28 Pac. 315—Brownfield v. Bier, 15 Mont. 412, 39 Pac. 461—Jones v. Prospect Mountain Tunnel Co. 21 Nev. 352, 31 Pac. 642—Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 83, 11 Pac. 515—Ralsoeck, v. Anthony, 78 Wis. 586, 41 N. W. 72.

72. Rights in mining property entitled to protection under the act of May 10, 1872 (17 Stat. at L. 91, chap. 152. § 2 U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, pp. 1424, 1425), as previously acquired under existing laws, exist where a lode mining location had been made at the time of the passage of that act, and the proceedings under the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), had then so far advanced as to exclude adverse claims. *East Central Eureka Min. Co. v. Central Eureka Min. Co.* 204 U. S. 266, 27 Sup. Ct. Rep. 258, 51: 476

Editorial note.

[Rights under tunnel-site locations. 53 L.R.A. 793.]

Nature of interest or title.

When Claim Matures into Right, see *supra*, 72.

Settlement of Dispute of Mining Claim in Consideration of Patent, see *infra*, 154.

Validity of Agreement for Interest in Patent, see *infra*, 158.

73. When the right to a patent of public land exists, the full equitable title has passed to the purchaser, with all the benefits, immunities, and burdens of ownership; and no third party can acquire from the government interests as against him. *Benson Min. & Smelting Co. v. Alta Min. & Smelting Co.* 145 U. S. 428, 12 Sup. Ct. Rep. 877, 36: 762

74. The interest in a mining claim prior to payment is nothing more than a right to the exclusive possession of the land, based upon conditions subsequent, a failure to fulfill which forfeits the locator's interest in the claim. *Black v. Elkhorn Min. Co.* 163 U. S. 445, 16 Sup. Ct. Rep. 1101, 41: 221 *Cited in* *Gillis v. Downey*, 29 C. C. A. 292, 56 U. S. App. 567, 85 Fed. 489.

75. When a location of a mining claim is perfected it has the effect of a grant by the United States of the right of present and exclusive possession. *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38: 532 *Cited in* *McCulloch v. Murphy*, 125 Fed. 154—*Worthen v. Sidway*, 72 Ark. 225, 79 S. W. 777—*Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 26 Colo. 59, 50 L.R.A. 294, 77 Am. St. Rep. 245, 56 Pac. 176.

76. A mineral lode or vein whose location is perfected under the law is the property of the locators or their assigns, and not subject to disposal by the government. *Noyes v. Mantle*, 127 U. S. 348, 8 Sup. Ct. Rep. 1132, 32: 168 *Cited in* *Manuel v. Wulff*, 152 U. S. 511, 38 L. ed. 534, 14 Sup. Ct. Rep. 651—*McKinley Creek Min. Co. v. Alaska United Min. Co.* 183

U. S. 572, 46 L. ed. 335, 22 Sup. Ct. Rep. 84—*Migeon v. Montana C. R. Co.* 23 C. C. A. 161, 44 U. S. App. 724, 77 Fed. 254—*Gillis v. Downey*, 29 C. C. A. 290, 56 U. S. App. 567, 85 Fed. 487—*Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 26 Colo. 62, 50 L.R.A. 296, 77 Am. St. Rep. 245, 56 Pac. 176—*Suessenbach v. First Nat. Bank*, 5 Dak. 498, 41 N. W. 662—*South End Min. Co. v. Tinney*, 22 Nev. 33, 35 Pac. 89.

77. Where a person has complied with all the proceedings essential for the issue of a patent for placer mining ground, he is the equitable owner of the mining ground, and the government holds the premises in trust for him, to be delivered upon the payments specified. *Dahl v. Rounheim*, 132 U. S. 260, 10 Sup. Ct. Rep. 74, 33: 324

78. When the price of a mining claim is paid, the right to a patent immediately arises; and a delay in issuing the patent does not make any further annual work necessary, or expose the purchaser to the assaults of third parties, or cast any additional burden on him. *Benson Min. & Smelting Co. v. Alta Min. & Smelting Co.* 145 U. S. 428, 12 Sup. Ct. Rep. 877, 36: 762 *Distinguished in* *South End Min. Co. v. Tinney*, 22 Nev. 27, 35 Pac. 89.

Cited in *Black v. Elkhorn Min. Co.* 163 U. S. 451, 41 L. ed. 223, 16 Sup. Ct. Rep. 1101—*Last Chance Min. Co. v. Tyler Min. Co.* 9 C. C. A. 617, 15 U. S. App. 456, 61 Fed. 562—*Stimson Land Co. v. Rawson*, 62 Fed. 429—*Olive Land & Development Co. v. Olmstead*, 103 Fed. 575—*Teller v. United States*, 51 C. C. A. 237, 118 Fed. 280—*Teller v. United States*, 54 C. C. A. 353, 117 Fed. 581—*Nellson v. Champagne Min. & Mill. Co.* 55 C. C. A. 578, 119 Fed. 125—*Pioneer Land Co. v. Maddux*, 109 Cal. 641, 50 Am. St. Rep. 67, 42 Pac. 295—*Cranes Gulch Min. Co. v. Scherrer*, 134 Cal. 353, 86 Am. St. Rep. 279, 66 Pac. 487—*Horsky v. Moran*, 21 Mont. 361, 58 Pac. 1064—*Murray v. Polglase*, 23 Mont. 421, 59 Pac. 439—*Murray v. Montana Lumber & Mfg. Co.* 25 Mont. 22, 63 Pac. 719—*South End Min. Co. v. Tinney*, 22 Nev. 68, 35 Pac. 89.

79. A certificate of purchase of mineral land, upon an entry of the same by a claimant at the local land office, if no adverse claim is filed, and the entry is not canceled or disaffirmed by the land department, passes the right of the government to him, and, as against the acquisition of title by any other party, is equivalent to a patent. The land thereby ceases to be the subject of sale by the government; which thereafter holds the legal title in trust for the holder of the certificate. *Deffebach v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29: 423

Cited in *Van Brocklin v. Tennessee (Van Brocklin v. Anderson)* 117 U. S. 169, 29 L. ed. 851, 6 Sup. Ct. Rep. 670—*Sullivan v. Iron Silver Min. Co.* 143 U. S. 441, 36 L. ed. 218, 12 Sup. Ct. Rep. 535—*Benson Min. & Smelting Co. v. Alta Min. & Smelting Co.* 145 U. S. 433, 36 L. ed. 764, 12 Sup. Ct. Rep. 877—*Cameron v. United States*, 148 U. S. 308, 37 L. ed. 462, 13 Sup. Ct. Rep. 595—*United States v. Freyberg*, 32 Fed. 197—*Aurora Hill Consol. Min. Co. v. 85 Min. Co.* 12 Sawy. 360, 34 Fed. 518—*United States v. Steenerson*, 1 C. C. A. 552, 4 U. S. App. 332, 50 Fed. 507—*American Mortg. Co. v. Hopper*, 12 C. C.

A. 298, 29 U. S. App. 12, 64 Fed. 558—Olive Land & Development Co. v. Olmstead, 103 Fed. 576—Cosmos Exploration Co. v. Gray Eagle Oil Co. 61 L.R.A. 238, 50 C. C. A. 87, 112 Fed. 11—Teller v. United States, 51 C. C. A. 236, 113 Fed. 279—Teller v. United States, 54 C. C. A. 353, 117 Fed. 581—Nelson v. Champagne Min. & Mill. Co. 55 C. C. A. 578, 119 Fed. 125—Knabe v. Burden, 88 Ala. 438, 7 So. 92—Alta Min. & Smelting Co. v. Benson Min. & Smelting Co. 2 Ariz. 369, 16 Pac. 565—Gilkerson-Sloss Co. v. Forbes, 54 Ark. 149, 26 Am. St. Rep. 29, 15 S. W. 191—Goddling v. Decker, 3 Colo. App. 204, 32 Pac. 832—Murray v. Butte, 7 Mont. 68, 14 Pac. 656—Power v. Sla, 24 Mont. 250, 61 Pac. 468—Deno v. Griffin, 20 Nev. 252, 20 Pac. 308—South End Min. Co. v. Tinney, 22 Nev. 46, 35 Pac. 89—Woodruff v. Wallace, 3 Okla. 375, 41 Pac. 357—Wallowa Nat. Bank v. Riley, 29 Or. 292, 54 Am. St. Rep. 794, 45 Pac. 766—Bash v. Cascade Min. Co. 29 Wash. 53, 69 Pac. 402.

80. A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, will entitle the locator to possession against the United States, as well as against any other defendant. *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, 29: 348

Cited in *Clipper Min. Co. v. Ell Min. & Land Co.* 194 U. S. 226, 48 L. ed. 950, 24 Sup. Ct. Rep. 632—*Allyn v. Schultz*, 5 Ariz. 161, 48 Pac. 960—*Anthony v. Jillson*, 83 Cal. 300, 23 Pac. 419—*Kendall v. San Juan Silver Min. Co.* 9 Colo. 357, 12 Pac. 198—*Seymour v. Fisher*, 16 Colo. 192, 27 Pac. 240—*Lalande v. McDonald*, 2 Idaho, 314, 13 Pac. 347.

81. A mining claim perfected under the law is property. Actual possession is no more necessary for the protection of the title acquired by a valid location than it is for any other grant from the United States. *Belk v. Meagher*, 104 U. S. 279, 26: 735

Cited in *Gwillim v. Donnellan*, 115 U. S. 40, 29 L. ed. 340, 5 Sup. Ct. Rep. 1110—*Black v. Elkhorn Min. Co.* 163 U. S. 449, 41 L. ed. 223, 16 Sup. Ct. Rep. 1101—*McKinley Creek Min. Co. v. Alaska United Min. Co.* 183 U. S. 572, 46 L. ed. 335, 22 Sup. Ct. Rep. 84—*Clipper Min. Co. v. Ell Min. & Land Co.* 194 U. S. 226, 48 L. ed. 950, 24 Sup. Ct. Rep. 632—*Black v. Elkhorn Min. Co.* 49 Fed. 550—*Migeon v. Montana C. R. Co.* 23 C. C. A. 161, 44 U. S. App. 724, 77 Fed. 254—*Gillis v. Downey*, 29 C. C. A. 290, 56 U. S. App. 567, 85 Fed. 487—*Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 244, 50 C. C. A. 97, 112 Fed. 21—*Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 165, 123 Fed. 219—*O'Connell v. Pinnacle Gold Mines Co.* 131 Fed. 110—*Tyee Consol. Min. Co. v. Langstedt*, 1 Alaska, 449—*Worthen v. Sidway*, 72 Ark. 226, 79 S. W. 777—*Quigley v. Gillett*, 101 Cal. 469, 35 Pac. 1040—*Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.* 114 Cal. 103, 45 Pac. 1047—*Harris v. Kellogg*, 117 Cal. 489, 49 Pac. 708—*Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 26 Colo. 59, 50 L.R.A. 294, 77 Am. St. Rep. 245, 56 Pac. 176—*Suessenbach v. First Nat. Bank*, 5 Dak. 498, 41 N. W. 662—*Gorman Min. Co. v. Alexander*, 2 S. D. 564, 51 N. W. 346—*McCarthy v. Speed*, 11 S. D. 370, 50 L.R.A. 189, 77 N. W. 590—*Reagan v. McKibben*, 11 S. D. 277, 76 N. W. 943—*Burke v. McDonald*, 2 Idaho, 343, 13 Pac.

351—*Ah Kle v. McLean*, 3 Idaho, 544, 32 Pac. 200—*Silver Bow Min. & Mill. Co. v. Clark*, 5 Mont. 414, 5 Pac. 570—*Montana Min. Co. v. St. Louis Min. & Mill. Co.* 20 Mont. 405, 51 Pac. 824—*Horsky v. Moran*, 21 Mont. 350, 53 Pac. 1064—*South End Min. Co. v. Tinney*, 22 Nev. 33, 35 Pac. 89—*Lacey v. Woodward*, 5 N. M. 588, 25 Pac. 785—*Sproat v. Durland*, 2 Okla. 57, 35 Pac. 886—*Lily Min. Co. v. Kellogg*, 27 Utah, 123, 74 Pac. 518.

82. A valid and subsisting location of mineral lands has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, 29: 348

Cited in *Manuel v. Wulff*, 152 U. S. 311, 38 L. ed. 534, 14 Sup. Ct. Rep. 651—*McKinley Creek Min. Co. v. Alaska United Min. Co.* 183 U. S. 572, 46 L. ed. 335, 22 Sup. Ct. Rep. 84—*O'Connell v. Pinnacle Gold Mines Co.* 131 Fed. 110—*Worthen v. Sidway*, 72 Ark. 225, 79 S. W. 777—*McFeters v. Piersen*, 15 Colo. 204, 22 Am. St. Rep. 388, 24 Pac. 1076—*Gorman Min. Co. v. Alexander*, 2 S. D. 564, 51 N. W. 346—*South End Min. Co. v. Tinney*, 22 Nev. 33, 35 Pac. 89—*Wills v. Blain*, 5 N. M. 250, 20 Pac. 798—*Duffy v. Mix*, 24 Or. 268, 38 Pac. 807.

83. A patent adds little to the security of a party in the continuous possession of a mine he has discovered or bought. *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 16 Sup. Ct. Rep. 282, 40: 436
Cited in *Mery v. Brodt*, 121 Cal. 836, 53 Pac. 18.

2. Right to Veins Having Apex Within Claim.

84. The location of a mining claim as made and defined must control, not only the rights of the claimant to the vein or lode within its surface lines, but also any lateral rights. *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 14 Sup. Ct. Rep. 510, 38: 419
Cited in *Shoshone Min. Co. v. Rutter*, 31 C. C. A. 229, 59 U. S. App. 538, 87 Fed. 807.

85. A locator working subterraneously into the dip of the vein belonging to another, who is in possession of his location, is a trespasser and liable to an action for taking ore therefrom. *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463, 25: 253

Editorial notes.

[Veins intersecting, crossing, or uniting. 50 L.R.A. 209.]

Lodes or veins within placer claims. 50 L.R.A. 289.]

Right to follow vein.

Lineal and Lateral Extent of Tunnel Claims, see *supra*, 67-69.

Necessity of Parallel End Lines to Support Right, see *infra*, 103.

86. Every vein the top or apex of which lies inside the surface lines of a lode mining claim extended downward vertically belongs to the locator, and may be pursued by him to any depth beyond his vertical side lines, although in doing so he enters beneath the surface of some other proprietor. *Del Monte*

Min. & Mill Co. v. Last Chance Min. & Mill.
Co. 171 U. S. 55, 18 Sup. Ct. Rep. 895,

43: 72

Cited in Walrath v. Champion Min. Co. 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909
—Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 509, 45 L. ed. 1206, 21 Sup. Ct. Rep. 885—Crown Point Min. Co. v. Buck, 38 C. C. A. 281, 97 Fed. 465—Montana Min. Co. v. St. Louis Min. & Mill. Co. 42 C. C. A. 419, 102 Fed. 434—Bunker Hill & S. Min. & Concentrating Co. v. Empire State Idaho Min. & Developing Co. 108 Fed. 194.

87. The right to follow a vein on the dip is limited by the end lines of the claim, in case of a patent under the act of 1866 as well as in case of a location under the act of 1872. *Walrath v. Champion Min. Co.* 171 U. S. 293, 18 Sup. Ct. Rep. 909, 43: 170
Cited in Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. 100 Fed. 915—Cosmopolitan Min. Co. v. Foote, 101 Fed. 521.

88. The right to follow a vein on its dip beyond the vertical side line of the location is not limited to cases in which the apex of the vein crosses both end lines, but extends to a case in which it crosses one end line and one side line. *Clark v. Fitzgerald*, 171 U. S. 92, 18 Sup. Ct. Rep. 941.

43: 87

Cited in St. Louis Min. & Mill. Co. v. Montana Min. Co. 56 L.R.A. 728, 44 C. C. A. 123, 104 Fed. 668—Parrot Silver & Copper Co. v. Heinze, 25 Mont. 144, 53 L.R.A. 497, 87 Am. St. Rep. 386, 64 Pac. 326—State ex rel. Anaconda Copper Min. Co. v. District Court, 25 Mont. 514, 65 Pac. 1020.

89. The conditions upon which extralateral rights may be acquired by locators of mining claims having been prescribed by Congress, a party must bring himself within those conditions, or else be limited to the mineral beneath the surface of his territory. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 18 Sup. Ct. Rep. 895,

43: 72

90. The apex of a vein is not necessarily a point, but often a line of great length. Any portion of the apex on the course or strike of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title. *Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. Rep. 674. 36: 330
Cited in Brewster v. Shoemaker, 28 Colo. 179, 53 L.R.A. 797, 89 Am. St. Rep. 188, 63 Pac. 309—Hayes v. Lavagnino, 17 Utah, 197, 53 Pac. 1029.

91. The top or apex of a vein of ore must be within the boundaries of the claim, in order to entitle the locator to the vein. *Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. Rep. 674, 36: 330

92. Each locator is entitled to follow the dip of the lode or vein to an indefinite depth, though it carries him outside the side lines of the location; but this right is based on the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface; and his right is bounded at each end by the end lines of the location, crossing the lode or vein, and extended perpendicularly downwards, and in-

definitely in their own direction. *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463,

25: 253

Cited in Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 61, 43 L. ed. 75, 18 Sup. Ct. Rep. 895—Doe v. Waterloo Min. Co. 54 Fed. 940—Davis v. Shepherd, 31 Colo. 147, 72 Pac. 57—Stemwinder Min. Co. v. Emma & L. C. Consol. Min. Co. 2 Idaho, 462, 21 Pac. 1040—Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 54, 11 Pac. 515.

93. Under U. S. Rev. Stat. § 2322, U. S. Comp. Stat. 1901, p. 1425, the owner of a mineral vein or lode has the right to follow it when it passes outside of the surface lines, if his claim extends vertically. But this right is dependent, outside of the lateral limits of the claim, upon the vein outside being identical with and a continuation of the one inside those lines. *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29: 712

Distinguished in Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 74, 11 Pac. 515.

Cited in Montana C. R. Co. v. Migeon, 68 Fed. 813—Montana Min. Co. v. St. Louis Min. & Mill. Co. 42 C. C. A. 420, 102 Fed. 435—Butte & B. Min. Co. v. Societe Anonyme, 23 Mont. 192, 75 Am. St. Rep. 505, 58 Pac. 111—Jones v. Prospect Mountain Tunnel Co. 21 Nev. 348, 31 Pac. 642—South End Min. Co. v. Tinney, 22 Nev. 63, 35 Pac. 89—Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 74, 11 Pac. 515—Hayes v. Lavagnino, 17 Utah, 197, 53 Pac. 1029.

94. The right of the owner to pursue a vein apexing within the surface boundaries of his lode mining claim on its dip downward outside the vertical side lines of such claim, which is given by U. S. Rev. Stat. § 2322, U. S. Comp. Stat. 1901, p. 1425, cannot be deemed to include the right to run a horizontal tunnel from his claim into an adjoining patented lode claim, for the purpose of reaching the vein in its descent through such adjoining claim, in view of the provisions of § 2319 (U. S. Comp. Stat. 1901, p. 1424), that all valuable mineral deposits in lands belonging to the United States are open to exploration and purchase, and the lands in which they are found to occupation and purchase, and of § 2325 (U. S. Comp. Stat. 1901, p. 1429), that a patent for any land claimed and located for valuable deposits may be obtained when properly claimed and located. *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 194 U. S. 235, 24 Sup. Ct. Rep. 654, 48: 953

Cited in Creede & C. Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 344, 49 L. ed. 506, 25 Sup. Ct. Rep. 286—Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 306, 131 Fed. 586.

95. The requirement of parallelism of end lines of lode mining locations which is made by the act of May 10, 1872 (17 Stat. at L. 91, chap. 152, § 2, U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, pp. 1424, 1425), cannot be deemed to apply where the location had been made at the time of the passage of that act, and the proceedings un-

der the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), had then so far advanced as to exclude adverse claims, in view of the various provisions of the later act for the protection of all rights previously acquired under existing laws, and of the provision of § 3 of that act, that prior locators shall have "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations." East Central Eureka Min. Co. v. Central Eureka Min. Co. 204 U. S. 266, 27 Sup. Ct. Rep. 258, 51: 476

— Editorial note.

[Following vein or lode on dip beyond surface lines. 53 L.R.A. 491.]

Effect of end or side lines.

Location with Reference to Strike of Vein, see *supra*, 28.

Necessity that End Lines be Parallel, see *supra*, 95.

See also *supra*, 88.

96. While the owner of a vein may follow it in its descent into another's territory beyond his own side lines he cannot beyond his end lines; and the vein beyond those end lines is subject to further discovery and appropriation. Larkin v. Upton, 144 U. S. 19, 12 Sup. Ct. Rep. 674, 36: 330

97. A location laid crosswise of a lode or vein, so that its greatest length crosses the same, instead of following the course thereof, will secure only so much of the vein as it actually crosses at the surface; and its side lines will become its end lines, for the purpose of defining the rights of the owners. Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 463, 25: 253

Limited in Del Monte Min. & Mill. Co. v. New York & L. C. Min. Co. 66 Fed. 214.

Cited in Argentine Min. Co. v. Terrible Min. Co. 122 U. S. 483, 30 L. ed. 1142, 7 Sup. Ct. Rep. 1356—Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 687, 39 L. ed. 861, 15 Sup. Ct. Rep. 733—Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 65, 43 L. ed. 77, 18 Sup. Ct. Rep. 895—Walrath v. Champlon Min. Co. 171 U. S. 302, 43 L. ed. 174, 18 Sup. Ct. Rep. 909—Colorado Cent. Consol. Min. Co. v. Turck, 2 C. C. A. 75, 4 U. S. App. 290, 50 Fed. 896—Tyler Min. Co. v. Sweeney, 4 C. C. A. 339, 7 U. S. App. 463, 54 Fed. 292—Walrath v. Champlon Min. Co. 63 Fed. 556—New Dunderberg Min. Co. v. Old, 25 C. C. A. 124, 49 U. S. App. 201, 79 Fed. 606—Tyler Min. Co. v. Sweeney, 24 C. C. A. 582, 48 U. S. App. 203, 79 Fed. 280—Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. 100 Fed. 913—Cosmopolitan Min. Co. v. Foote, 101 Fed. 521—Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co. 48 C. C. A. 668, 109 Fed. 541—Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 108, 131 Fed. 600

—Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 309, 131 Fed. 588—Tombstone Mill & Min. Co. v. Way Up Min. Co. 1 Ariz. 462, 25 Pac. 794—Watervale Min. Co. v. Leach, 4 Ariz. 61, 38 Pac. 418—Doe v. Sanger, 83 Cal. 209, 23 Pac. 365—Duggan v. Davey, 4 Dak. 143, 26 N. W. 887—Upton v. Larkin, 7 Mont. 462, 17 Pac. 728—Kling v. Amy & S. Consol. Min. Co. 9 Mont. 564, 24 Pac. 200—Fitzgerald v. Clark, 17 Mont. 115, 30 L.R.A. 807, 52 Am. St. Rep. 665, 42 Pac. 273—Parrot Silver & Copper Co. v. Heinze, 25 Mont. 144, 53 L.R.A. 497, 87 Am. St. Rep. 386, 64 Pac. 326—South End Min. Co. v. Tinney, 22 Nev. 62, 35 Pac. 89—Ellers v. Boatman, 3 Utah, 167, 2 Pac. 66—Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 54, 11 Pac. 515.

98. The side lines of a mining location become the end lines, and the end lines the side lines, where the course of the vein is across the claim, instead of in the direction of its length. Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 15 Sup. Ct. Rep. 733, 39: 859

Cited in Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 92, 43 L. ed. 87, 18 Sup. Ct. Rep. 895—Tyler Min. Co. v. Last Chance Min. Co. 71 Fed. 850—Republican Min. Co. v. Tyler Min. Co. 25 C. C. A. 181, 48 U. S. App. 213, 79 Fed. 736—Tyler Min. Co. v. Sweeney, 24 C. C. A. 581, 48 U. S. App. 203, 79 Fed. 280—Bonner v. Melkie, 82 Fed. 705—Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 29 C. C. A. 463, 57 U. S. App. 13, 85 Fed. 868—Empire Mill & Min. Co. v. Tombstone Mill. & Min. Co. 100 Fed. 914—Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 112, 131 Fed. 604—Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 308, 131 Fed. 588—Argonaut Consol. Min. & Mill. Co. v. Turner, 23 Colo. 409, 58 Am. St. Rep. 245, 48 Pac. 685—Catron v. Old, 23 Colo. 437, 58 Am. St. Rep. 256, 48 Pac. 687—Fitzgerald v. Clark, 17 Mont. 114, 30 L.R.A. 805, 52 Am. St. Rep. 665, 42 Pac. 273—Parrot Silver & Copper Co. v. Heinze, 25 Mont. 144, 53 L.R.A. 497, 87 Am. St. Rep. 386, 64 Pac. 326.

99. The end lines of a mining claim under the act of 1866 must be the end lines of all the veins found within the surface boundaries, which are given to the locator by the act of 1872. Wabash v. Champion Min. Co. 171 U. S. 293, 18 Sup. Ct. Rep. 909, 43: 170

Cited in St. Louis Min. & Mill. Co. v. Montana Min. Co. 56 L.R.A. 728, 44 C. C. A. 123, 104 Fed. 667—St. Louis Min. & Mill. Co. v. Montana Min. Co. 56 L.R.A. 727, 44 C. C. A. 123, 104 Fed. 668—Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co. 108 Fed. 194.

100. The only exception to the rule that the end lines of a location as the locator of a lode mining claim places them establish the limits beyond which he may not follow the vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across the course of the vein. In such case what he calls the side lines are to be deemed his end lines, and the so-called end lines are in fact side lines. Del Monte Min. & Mill. Co. v. Last

Chance Min. & Mill. Co. 171 U. S. 55, 18 Sup. Ct. Rep. 895. 43: 72

Cited in Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. 100 Fed. 915—Cosmopolitan Min. Co. v. Foote, 101 Fed. 521—Argonaut Min. & Mill. Co. v. Kennedy Min. & Mill. Co. 131 Cal. 26, 82 Am. St. Rep. 317, 63 Pac. 148—Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 27 Colo. 14, 50 L.R.A. 218, 83 Am. St. Rep. 17, 59 Pac. 607—State ex rel. Anaconda Copper Min. Co. v. District Court, 25 Mont. 514, 65 Pac. 1020—Parrot Silver & Copper Co. v. Heinze, 25 Mont. 145, 53 L.R.A. 498, 87 Am. St. Rep. 386, 64 Pac. 326.

101. The end lines of a lode mining claim under the act of 1866 must be straight, whether they need to be parallel or not. *Walrath v. Champion Min. Co.* 171 U. S. 293, 18 Sup. Ct. Rep. 909, 43: 170
Cited in Argonaut Min. Co. v. Kennedy Min. & Mill. Co. 131 Cal. 26, 82 Am. St. Rep. 317, 63 Pac. 148.

102. Under the act of Congress of 1872 (Rev. Stat. § 2320 et seq.), parallelism of the end lines of a surface location is essential to the existence of any right in the locator or patentee of a surface lode mining claim to follow the vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction; that is, between parallel vertical planes. It can embrace no other portion. *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 6 Sup. Ct. Rep. 1177, 30: 98
Distinguished in Doe v. Sanger, 83 Cal. 211, 23 Pac. 385.

Cited in King v. Amy & S. Consol. Min. Co. 152 U. S. 228, 38 L. ed. 421, 14 Sup. Ct. Rep. 510—Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 87, 43 L. ed. 77, 18 Sup. Ct. Rep. 895—Walrath v. Champion Min. Co. 171 U. S. 304, 43 L. ed. 175, 18 Sup. Ct. Rep. 909—Walrath v. Champion Min. Co. 171 U. S. 308, 43 L. ed. 176, 18 Sup. Ct. Rep. 909—Montana Co. v. Clark, 42 Fed. 628—Blue Bird Min. Co. v. Largey, 49 Fed. 291—Colorado Cent. Consol. Min. Co. v. Turck, 2 C. C. A. 75, 4 U. S. App. 290, 50 Fed. 896—Doe v. Waterloo Min. Co. 54 Fed. 938—Tyler Min. Co. v. Sweeney, 4 C. C. A. 335, 7 U. S. App. 463, 54 Fed. 289—Book v. Justice Min. Co. 58 Fed. 128—Walrath v. Champion Min. Co. 63 Fed. 557—Del. Monte Min. & Mill. Co. v. New York & L. C. Min. Co. 66 Fed. 215—New Dunderberg Min. Co. v. Old, 25 C. C. A. 124, 49 U. S. App. 201, 79 Fed. 606—Republican Min. Co. v. Tyler Min. Co. 25 C. C. A. 181, 48 U. S. App. 213, 79 Fed. 736—Empire Mill. & Min. Co. v. Tombstone Mill & Min. Co. 100 Fed. 913—Cosmopolitan Min. Co. v. Foote, 101 Fed. 522—St. Louis Min. & Mill. Co. v. Montana Min. Co. 56 L.R.A. 727, 44 C. C. A. 122, 104 Fed. 667—Doe v. Sanger, 83 Cal. 211, 23 Pac. 365—Argonaut Min. Co. v. Kennedy Min. & Mill. Co. 131 Cal. 23, 82 Am. St. Rep. 317, 63 Pac. 148—Catron v. Old, 23 Colo. 436, 58 Am. St. Rep. 256, 48 Pac. 687—King v. Amy & S. Consol. Min. Co. 9 Mont. 563, 24 Pac. 200—Fitzgerald v. Clark, 17 Mont. 115, 30 L.R.A. 807, 52 Am. St. Rep. 665, 42 Pac. 278—Sanders v. Noble, 22 Mont. 125, 55 Pac. 1087—Wakeman v. Norton, 24 Colo. 197, 49 Pac. 283—Butte & B. Min. Co.

v. Societe Anonyme, 23 Mont. 193, 75 Am. St. Rep. 505, 58 Pac. 111—Parrot Silver & Copper Co. v. Heinze, 25 Mont. 144, 53 L.R.A. 497, 87 Am. St. Rep. 386, 64 Pac. 326—South End Min. Co. v. Tinney, 22 Nev. 63, 35 Pac. 89—Illinois Silver Min. & Mill. Co. v. Raff, 7 N. M. 344, 84 Pac. 544—Patterson v. Tarbell, 26 Or. 37, 37 Pac. 76—Buillon, B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 77, 11 Pac. 515—Strickley v. Hill, 22 Utah, 268, 83 Am. St. Rep. 786, 62 Pac. 898.

103. The side lines cannot cross the vein and thereby give the right to follow the strike of the vein outside the vertical plane through such lines. *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478, 7 Sup. Ct. Rep. 1356, 30: 1140
Cited in Tyler Min. Co. v. Sweeney, 4 C. C. A. 335, 7 U. S. App. 463, 54 Fed. 289—St. Louis Min. & Mill. Co. v. Montana Min. Co. 56 L.R.A. 727, 44 C. C. A. 123, 104 Fed. 668—King v. Amy & S. Consol. Min. Co. 9 Mont. 564, 24 Pac. 200—Parrot Silver & Copper Co. v. Heinze, 25 Mont. 144, 53 L.R.A. 497, 87 Am. St. Rep. 386, 64 Pac. 326.

104. The end lines of a lode or vein mining claim are those which measure the width of the claim as it crosses the lode. The side lines are those which measure the extent of the claim on each side of the middle of the vein, at the surface. *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478, 7 Sup. Ct. Rep. 1356, 30: 1140
Cited in Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 687, 39 L. ed. 861, 15 Sup. Ct. Rep. 733—Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 86, 43 L. ed. 85, 18 Sup. Ct. Rep. 895—Walrath v. Champion Min. Co. 171 U. S. 304, 43 L. ed. 175, 18 Sup. Ct. Rep. 909—Colorado C. Consol. Min. Co. v. Turck, 2 C. C. A. 75, 4 U. S. App. 290, 50 Fed. 896—Tyler Min. Co. v. Sweeney, 24 C. C. A. 582, 48 U. S. App. 203, 79 Fed. 280—Waterloo Min. Co. v. Doe, 27 C. C. A. 60, 48 U. S. App. 411, 82 Fed. 55—Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. 100 Fed. 914—Cosmopolitan Min. Co. v. Foote, 101 Fed. 521—Bunker Hill & S. Min. & Concentrating Co. v. Empire State Idaho Min. & Developing Co. 48 C. C. A. 668, 109 Fed. 541—Catron v. Old, 23 Colo. 437, 58 Am. St. Rep. 256, 48 Pac. 687—Upton v. Larkin, 7 Mont. 462, 17 Pac. 728—Fitzgerald v. Clark, 17 Mont. 115, 30 L.R.A. 806, 52 Am. St. Rep. 665, 42 Pac. 273.

105. A mining claim has no lateral right by virtue of the extension of a vein through what was called the north side of its claim when that side line so called was in fact one of its end lines. *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 14 Sup. Ct. Rep. 510, 38: 419

Cited in Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 687, 39 L. ed. 861, 15 Sup. Ct. Rep. 733—Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 86, 43 L. ed. 85, 18 Sup. Ct. Rep. 895—Walrath v. Champion Min. Co. 171 U. S. 304, 43 L. ed. 175, 18 Sup. Ct. Rep. 909—Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. 63 Fed. 546—Del Monte Min. & Mill. Co. v. New York & L. C. Min. Co. 66 Fed. 214—New Dunderberg Min. Co. v. Old, 25 C. C. A. 124, 49 U. S. App. 201, 79 Fed. 606—Tyler Min. Co. v. Sweeney, 24 C. C. A. 582, 48 U. S. App. 203, 79 Fed. 280—Bonner v. Melkle, 82 Fed. 705—Montana Ore-Purchas-

ing Co. v. Boston & M. C. C. & S. Min. Co. 29 C. C. A. 463, 57 U. S. App. 13, 85 Fed. 868—Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. 100 Fed. 914—Cosmopolitan Min. Co. v. Foote, 101 Fed. 522—Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co. 48 C. C. A. 668, 109 Fed. 541—Argonaut Consol. Min. & Mill. Co. v. Turner, 23 Colo. 406, 58 Am. St. Rep. 245, 48 Pac. 685—Fitzgerald v. Clark, 17 Mont. 111, 30 L.R.A. 804, 52 Am. St. Rep. 665, 42 Pac. 273—Parrot Silver & Copper Co. v. Heinze, 25 Mont. 144, 53 L.R.A. 497, 87 Am. St. Rep. 386, 64 Pac. 328.

106. The locator of a mining claim must stand upon his own location, and can take only what it will give him under the law. The court cannot relocate his claim and make new side lines or end lines, although it may treat what are called side lines as end lines if they are so in fact. *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 14 Sup. Ct. Rep. 510, 38: 419

107. One of two coterminous mining proprietors is estopped to assert that, because of the nonparallelism of the end lines of the other's claim, it did not carry extralateral rights defined by extending the common end line between the two surface locations, where such common line, described as crossing the lode, was established by the patent surveys as the result of an adverse proceeding in the Land Office, and a compromise agreement with respect thereto entered into by the immediate predecessors in title of such proprietors, who succeeded to the interests of their predecessors with a knowledge of the boundary line so determined. *Kennedy Min. & Mill. Co. v. Argonaut Min. Co.* 189 U. S. 1, 23 Sup. Ct. Rep. 501, 47: 685

e. Priorities.

As between Placer Locations and Lodes Subsequently Discovered therein, see *infra*, 124.

As between Relocated Claims to Forfeited Locations, see *supra*, 62-64.

Federal Question as to, see *Appeal and Error*, 1545.

108. The location of a vein or lode as running in a certain direction, not marked or developed for years, but simply indicated by a notice, is invalid against a claim subsequently located on ground different from that indicated, after the development of the latter claim without objection, though subsequent explorations by the first locators disclose the fact that their vein in its true course covers the subsequent claim. *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. Rep. 421, 29: 663

Cited in Lily Min. Co. v. Kellogg, 27 Utah, 124,

109. An entry of a lode mining claim, sustained by a patent, though conclusive evidence that, at the time of entry, there had been a valid location, does not preclude the owner of a tunnel site located across the lode, who claims that his location was prior

to any discovery in the lode claimed, from showing the order of the steps taken to perfect the lode location, including the date of discovery, notwithstanding the provision of U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," which means nothing more than that no location shall be considered complete until there has been a discovery. *Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49: 501

Cited in East Cent. Eureka Min. Co. v. Central Eureka Min. Co. 204 U. S. 271, 51 L. ed. 481, 27 Sup. Ct. Rep. 258—*Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co.* 73 C. C. A. 37, 141 Fed. 565—*Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co.* 73 C. C. A. 39, 141 Fed. 567.

110. An entry upon a prior valid placer mining location for the purpose of prospecting for unknown lodes, when made against the will of the placer locators, must be deemed a trespass, which can initiate no title to the lode claims thus located within the exterior boundaries of the placer claim. in view of the right of exclusive possession and enjoyment of the surface given to placer locators by U. S. Rev. Stat. §§ 2322, 2329, U. S. Comp. Stat. 1901, pp. 1425, 1432, and of the provision of § 2333 (U. S. Comp. Stat. 1901, p. 1433), that a patent for a placer claim while not including known veins or lodes not specifically applied and paid for, conveys any veins or lodes not known to exist when the patent was issued. *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 24 Sup. Ct. Rep. 632, 48: 944

Cited in Creede & C. Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 342, 49 L. ed. 506, 25 Sup. Ct. Rep. 266—*Lavagnino v. Uhlig*, 198 U. S. 452, 49 L. ed. 1123, 25 Sup. Ct. Rep. 716—*East Cent. Eureka Min. Co. v. Central Eureka Min. Co.* 204 U. S. 271, 51 L. ed. 481, 27 Sup. Ct. Rep. 258—*Traphagen v. Kirk*, 30 Mont. 574, 77 Pac. 58—*Stolp v. Treasury Gold Min. Co.* 38 Wash. 624, 80 Pac. 817.

111. A location of mineral lands, based upon a discovery made within the limits of another existing and valid location, is void. *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, 29: 348

Cited in Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 78, 43 L. ed. 82, 18 Sup. Ct. Rep. 895—*Lowry v. Silver City Gold & Silver Min. Co.* 179 U. S. 198, 45 L. ed. 152, 21 Sup. Ct. Rep. 104—*Inez Min. Co. v. Kinney*, 46 Fed. 835—*Gillis v. Downey*, 29 C. C. A. 286, 290, 56 U. S. App. 567, 85 Fed. 487—*Perigo v. Erwin*, 85 Fed. 906—*Erwin v. Perego*, 35 C. C. A. 486, 93 Fed. 612—*Crown Point Min. Co. v. Buck*, 38 C. C. A. 281, 97 Fed. 465—*Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 48 C. C. A. 672, 109 Fed. 545—*McCulloch v. Murphy*, 125 Fed. 154—*Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* 125 Fed. 414—*Willitt v. Baker*, 133 Fed. 947—*Richards v. Wolfing*, 98 Cal. 198, 32 Pac. 971—*Wilhelm v. Silvester*, 101 Cal. 363, 35 Pac. 997—*Tuolumne Consol. Min. Co. v. Maier*, 134 Cal. 585, 66 Pac.

863—*Lee v. Stahl*, 9 Colo. 211, 11 Pac. 77—*Manning v. Strehlow*, 11 Colo. 454, 18 Pac. 625—*Girard v. Carson*, 22 Colo. 347, 44 Pac. 508—*Mt. Rosa Min. Mill & Land Co. v. Palmer*, 26 Colo. 59, 50 L.R.A. 294, 77 Am. St. Rep. 245, 56 Pac. 176—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 27 Colo. 24, 50 L.R.A. 222, 83 Am. St. Rep. 17, 59 Pac. 607—*Miller v. Hamley*, 31 Colo. 498, 74 Pac. 980—*Rebecca Gold Min. Co. v. Bryant*, 31 Colo. 123, 102 Am. St. Rep. 17, 71 Pac. 1110—*Burke v. McDonald*, 2 Idaho, 343, 13 Pac. 331—*Upton v. Larkin*, 22 Mont. 458, 17 Pac. 728—*Deno v. Griffin*, 20 Nev. 252, 20 Pac. 308—*Silver City Gold & S. Min. Co. v. Lowry*, 19 Utah, 343, 57 Pac. 11.

112. The locator is entitled to protection in the possession of his claim, and cannot be deprived of his inchoate rights by the tortious acts of others; nor can an intruder and trespasser initiate any rights which will defeat those of a prior discoverer. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560. 28: 1113

Cited in Lockhart v. Leeds, 195 U. S. 437, 49 L. ed. 269, 25 Sup. Ct. Rep. 76—*Lockhart v. Leeds*, 10 N. M. 597, 63 Pac. 48.

113. The location of a tunnel site for mining purposes must be made in subordination to prior lode claims, and the tunnel has no right of way through them. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 499, 21 Sup. Ct. Rep. 885, 45: 1200
Cited in Baillie v. Larson, 138 Fed. 178.

114. Blind veins underneath prior lode claims belong to the surface location under U. S. Rev. Stat. § 2322. U. S. Comp. Stat. 1901, p. 1425, and their discovery by running a tunnel, under § 2323, U. S. Comp. Stat. 1901, p. 1426, does not give the owner of the tunnel any right to them. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 499, 21 Sup. Ct. Rep. 885, 45: 1200

115. The right to a vein discovered in a tunnel dates by relation back to the time of the location of the tunnel site. *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 17 Sup. Ct. Rep. 762, 42: 96
Cited in Campbell v. Ellet, 167 U. S. 118, 42 L. ed. 102, 17 Sup. Ct. Rep. 765—*Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 196 U. S. 352, 49 L. ed. 510, 25 Sup. Ct. Rep. 266—*Bonner v. Melkle*, 82 Fed. 699—*Gillis v. Downey*, 29 C. C. A. 292, 56 U. S. App. 567, 85 Fed. 489—*Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co.* 57 C. C. A. 205, 119 Fed. 169—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 27 Colo. 25, 50 L.R.A. 223, 83 Am. St. Rep. 17, 59 Pac. 607.

116. The right of the owner of a tunnel to all veins or lodes not previously known to exist which are within 3,000 feet from its face on the lien thereof, is superior to the right of one who subsequently makes a discovery and location of another claim, if the two conflict. *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 17 Sup. Ct. Rep. 762, 42: 96

117. The servitude imposed upon the senior location of a mining claim by U. S. Rev. Stat. § 2336, U. S. Comp. Stat. 1901, p. 1436, by giving a right of way to the

junior location, whether that extends only through the space of the intersection of the veins or through the space of intersection of the claims, does not otherwise affect the exclusive rights given the senior location, or except therefrom the cross veins apexing therein. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 499, 21 Sup. Ct. Rep. 885, 45: 1200

118. Lines of a junior lode location may be laid within, upon, or across the surface of a valid senior location, for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43: 72

Cited in Ohio Oil Co. v. Indiana, 177 U. S. 202, 44 L. ed. 736, 20 Sup. Ct. Rep. 576—*Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 48 C. C. A. 668, 109 Fed. 540—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 27 Colo. 24, 50 L.R.A. 222, 83 Am. St. Rep. 17, 59 Pac. 607—*Clipper Min. Co. v. Ell Min. & Land Co.* 29 Colo. 394, 64 L.R.A. 214, 93 Am. St. Rep. 80, 68 Pac. 286—*Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 474, 50 L. R.A. 774, 57 N. E. 912.

119. The failure of a tunnel owner to "adverse" the application for a patent for a claim located parallel to his tunnel and about 500 feet distant from it, when he does not know of any vein which will enable him to dispute the right of the other party to a patent, will not defeat his right to a vein subsequently discovered which crosses that claim. *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 17 Sup. Ct. Rep. 762, 42: 96
Cited in Murray v. Polglase, 23 Mont. 417, 59 Pac. 439.

120. Where a patent is issued for 50 acres of placer claim, and a subsequent patent is issued for a lode mining claim within the 50 acres, in any conflict between the titles conferred by the two patents, the holder of the title under the older patent has a right to require that the existence of the lode and his knowledge thereof when he obtained his patent shall be established. *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 10 Sup. Ct. Rep. 765, 34: 155

f. Grants and Patents to Mining Claims.

Delaying Issue of Patent as Affecting Right to Claim, see *supra*, 57.

Nature of Right before Patent, see *supra*, 73-83.

Right to Contest Issue of Patent by Adverse Suit, see *infra*, I. g.

Conclusiveness of Patent on Persons Failing to Interpose Adverse Suit, see *infra*, 159-161.

Collateral Attack on Rulings as to Tract Covered by Lode Claim, see *Public Lands*, 1030.

121. A decision as to conflicting mining

locations,—affirmed by a divided court. *Stemwinder Min. Co. v. Emma & L. C. Consol. Min. Co.* 37: 941

122. The patent of a mining claim carries with it only such rights to the land as the law confers; and those rights cannot be enlarged or diminished by any reservations of the officers of the Land Department. *Davis v. Wiebbold*, 139 U. S. 507, 11 Sup. Ct. Rep. 628. 35: 238

Otted in Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 323, 41 L. ed. 176, 16 Sup. Ct. Rep. 1018—*Johnson v. Drew*, 171 U. S. 100, 43 L. ed. 91, 18 Sup. Ct. Rep. 800—*New Dunderberg Min. Co. v. Old*, 25 C. C. A. 120, 49 U. S. App. 201, 79 Fed. 602—*Garrard v. Silver Peak Mines*, 82 Fed. 584—*King v. McAndrews*, 104 Fed. 432—*King v. McAndrews*, 50 C. C. A. 32, 111 Fed. 863.

123. A patent for a mining location of 600 feet is valid as to its extent, under the act of Congress of May 10, 1872. *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 9 Sup. Ct. Rep. 511, 32: 906
Otted in Lakin v. Dolly, 58 Fed. 338—*Northmore v. Simmons*, 38 C. C. A. 214, 97 Fed. 388.

Exception of lode or vein from placer claim.

Definition of Vein or Lode, see *supra*, 9.
Duty of Junior Lode Claimant to Establish Known Existence of Lode, see *supra*, 120.

Patents Expressly Including Lodes or Veins, see *infra*, 149.

Adverse Suits between Lode and Placer Claimants, see *infra*, 153.

Unknown Lodes Claimed by Subsequent Locator, see *infra*, 153.

Adverse Suits by Conflicting Claimants of Lode and Placer Mines, see *infra*, 155.

Extrinsic Evidence to Show Knowledge of Lode, see *Evidence*, 1752.

Allegations as to, see *Pleading*, 726.

See also *supra*, 110.

124. The statute excepts only veins or lodes "claimed or known to exist" at the time the application is made for the patent, and not at the date of the patent. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32: 571
Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co. 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36: 201
Dahl v. Raunheim, 132 U. S. 260, 10 Sup. Ct. Rep. 74, 33: 324
Otted in Iron Silver Min. Co. v. Mike & S. Gold & Silver Min. Co. 143 U. S. 426, 36 L. ed. 212, 12 Sup. Ct. Rep. 543.

125. A placer patent conveys to the patentee full title to all lodes or veins within the territorial limits. not then known to exist. *Sullivan v. Iron Silver Min. Co.* 143 U. S. 430, 12 Sup. Ct. Rep. 555, 36: 214

126. Under U. S. Rev. Stat. § 2333, U. S. Comp. Stat. 1901, p. 1433, known lodes and veins are not included in a placer claim unless specifically mentioned and claimed in

the contract. *Noyes v. Mantle*, 127 U. S. 348, 8 Sup. Ct. Rep. 1132, 32: 168.
Cited in McCarthy v. Speed, 11 S. D. 368, 50 L.R.A. 188, 77 N. W. 590—*Horsky v. Moran*, 21 Mont. 349, 53 Pac. 1064.

127. Where a vein or lode is known to exist, and is not in claimant's possession, and not mentioned in the claim on which a placer patents issues, the title to it does not pass to the patentee. *Reynolds v. Iron Silver Min. Co.* 116 U. S. 687, 6 Sup. Ct. Rep. 601, 29: 774

Otted in Noyes v. Mantle, 127 U. S. 353, 32 L. ed. 170, 8 Sup. Ct. Rep. 1132—*Dahl v. Raunheim*, 132 U. S. 262, 33 L. ed. 325, 10 Sup. Ct. Rep. 74—*Sullivan v. Iron Silver Min. Co.* 143 U. S. 433, 36 L. ed. 215, 12 Sup. Ct. Rep. 555—*Doe v. Waterloo Min. Co.* 54 Fed. 988—*Standard Quicksilver Co. v. Hablshaw*, 132 Cal. 120, 64 Pac. 113—*Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 28 Colo. 60, 50 L.R.A. 294, 77 Am. St. Rep. 245, 56 Pac. 176.

128. Where no vein or lode is known to exist, the patent for a placer claim carries all veins or lodes within its boundaries which may be afterwards found to exist under its surface. *Reynolds v. Iron Silver Min. Co.* 116 U. S. 687, 6 Sup. Ct. Rep. 601, 29: 774

Otted in Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co. 143 U. S. 418, 36 L. ed. 209, 12 Sup. Ct. Rep. 543—*Lake Superior Ship Canal R. & Iron Co. v. Cunningham*, 155 U. S. 374, 39 L. ed. 190, 15 Sup. Ct. Rep. 103.

129. It cannot be presumed from the issuing of a lode patent, that the lode claim had been discovered, located, and recorded within the boundaries of the land described in a prior placer patent, before the application for the placer patent. *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 10 Sup. Ct. Rep. 765, 34: 155

Otted in Bennett v. Harkrader, 158 U. S. 447, 39 L. ed. 1048, 15 Sup. Ct. Rep. 863—*Last Chance Min. Co. v. Tyler Min. Co.* 9 C. C. A. 622, 15 U. S. App. 456, 61 Fed. 567—*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 13 C. C. A. 400, 32 U. S. App. 75, 66 Fed. 210—*Young v. Goldstein*, 97 Fed. 305—*Unta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co.* 57 C. C. A. 204, 119 Fed. 168—*Horsky v. Moran*, 21 Mont. 349, 53 Pac. 1064—*South End Min. Co. v. Tinney*, 22 Nev. 63, 35 Pac. 89.

130. Where the title to a lode or vein of mineral matter remains in the United States, because known to exist, but not mentioned by the applicant at the time a placer patent is applied for, the patentee and those claiming under him cannot dispossess one who is in peaceful possession of such vein or lode, whether with or without title. *Reynolds v. Iron Silver Min. Co.* 116 U. S. 687, 6 Sup. Ct. Rep. 601, 29: 774

Otted in Johnson v. Drew, 34 Fla. 146, 43 Am. St. Rep. 172, 15 So. 780—*Horsky v. Moran*, 21 Mont. 349, 53 Pac. 1064.

131. It is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver

or other metal, to justify their designation as "known" veins or lodes. To meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account and justify their exploration. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32: 571
Cited in Iron Silver Min. Co. v. Mike & S. Gold & Silver Min. Co. 143 U. S. 402, 36 L. ed. 203, 12 Sup. Ct. Rep. 543—*Sullivan v. Iron Silver Min. Co.* 143 U. S. 441, 36 L. ed. 218, 12 Sup. Ct. Rep. 555—*Wheeler v. Smith*, 5 Wash. 707, 32 Pac. 784.

132. The subsequent discovery of lodes upon the ground and their successful working do not affect the good faith of the application. That must be determined by what was known to exist at the time. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32: 571

133. The term "known vein," as used in U. S. Rev. Stat. § 2333, U. S. Comp. Stat. 1901, p. 1433, is not synonymous with "located claim," but refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location. *Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co.* 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36: 201
Cited in Sullivan v. Iron Silver Min. Co. 143 U. S. 438, 36 L. ed. 215, 12 Sup. Ct. Rep. 555.

134. A known vein or lode, within the intent of the statute, must either have been known to the applicant for a placer patent, or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government. *Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co.* 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36: 201
Cited in Montana C. R. Co. v. Migeon, 68 Fed. 816—*Migeon v. Montana C. R. Co.* 23 C. C. A. 162, 44 U. S. App. 724, 77 Fed. 255—*United States v. Central P. R. Co.* 93 Fed. 878.

135. When a vein or lode is known to exist within the boundaries of the placer claim, the application for a patent which does not include also an application for the vein or lode is to be construed as a conclusive declaration that the claimant has no right of possession to it; but where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable minerals and other deposits subsequently found within the boundaries of the claim. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32: 571

136. If lodes or veins are not taken up and located so as to become the property of others, but are known to exist, the applicant for a patent for a placer claim must include them in his application, or he will be deemed to have declared that he had no right

to them. *Sullivan v. Iron Silver Min. Co.* 143 U. S. 431, 12 Sup. Ct. Rep. 555, 36: 214

137. The amount of the ore, and the facility for reaching and working it as well as the product per ton, are all to be considered in determining whether a vein is one which justifies exploitation and working. *Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co.* 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36: 201

138. Lodes or veins to be excepted from a patent for a placer claim, must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. *Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co.* 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36: 201

Cited in McCarthy v. Speed, 11 S. D. 368, 50 L.R.A. 188, 77 N. W. 590.

139. An applicant for a placer patent is chargeable with notice of the existence of a tunnel thereon, running underneath the surface of the ground, and is also chargeable with notice of whatever a casual inspection of that tunnel would disclose. *Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co.* 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36: 201

Cited in Jones v. Prospect Mountain Tunnel Co. 21 Nev. 348, 31 Pac. 642.

140. A mineral vein or lode is "known to exist," within the meaning of U. S. Rev. Stat. § 2333, U. S. Comp. Stat. 1901, p. 1433, although personal knowledge of the fact may not be possessed by an applicant for a patent for a placer claim, where its location has been made under the law and notice thereof recorded in the usual book of record within the district, and its boundaries have been specifically marked on the surface so as to be readily traced. *Noyes v. Mantle*, 127 U. S. 348, 8 Sup. Ct. Rep. 1132, 32: 168

Cited in Dahl v. Raunhelm, 132 U. S. 262, 33 L. ed. 325, 10 Sup. Ct. Rep. 74—*Iron Silver Min. Co. v. Mike & S. Gold & Silver Min. Co.* 143 U. S. 400, 36 L. ed. 208, 12 Sup. Ct. Rep. 548.

141. Mere belief based, not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which might be merely parts of a single vein of continuous extension through all that territory,—is not the knowledge required by U. S. Rev. Stat. § 2333, U. S. Comp. Stat. 1901, p. 1433, to exclude such vein or lode from a placer patent. *Sullivan v. Iron Silver Min. Co.* 143 U. S. 431, 12 Sup. Ct. Rep. 555, 36: 214

Cited in Migeon v. Montana C. R. Co. 23 C. C. A. 163, 44 U. S. App. 724, 77 Fed. 256—*Olive Land & Development Co. v. Olmstead*, 103 Fed. 578—*Worthen v. Sidway*, 72 Ark. 225, 79 S. W. 777—*Clipper Min. Co. v. Ell Min. & Land Co.* 29 Colo. 391, 64 L.R.A. 213, 93 Am. St. Rep. 89, 68 Pac. 286—*Casey v.*

Thievleze, 19 Mont. 347, 61 Am. St. Rep. 511, 48 Pac. 394—Horsky v. Moran, 21 Mont. 349, 53 Pac. 1064.

142. An instruction that a patent issued upon an application which was made with intent to acquire a title to a lode or vein which may exist in the ground beneath the surface of the placer claim will not convey such lode or vein; and that such intention, formed on investigation and belief in the existence of a valuable lode, amounts to knowledge,—is erroneous. *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 8 Sup. Ct. Rep. 598, 31: 466
Cited in Olive Land & Development Co. v. Oimstead, 103 Fed. 578.

143. The words "vein or lode of quartz . . . known to exist," in U. S. Rev. Stat. § 2333, U. S. Comp. Stat. 1901, p. 1433, excepting it from a patent for a placer claim, refer to knowledge of the existence of the vein or lode within the boundaries of a placer claim; and the belief, after examination, in the existence of a lode, is not knowledge of that fact that will prevent the patent from carrying title to the vein or lode. *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 8 Sup. Ct. Rep. 598, 31: 466
Cited in Noyes v. Mantle, 127 U. S. 352, 32 L. ed. 170, 8 Sup. Ct. Rep. 1132—*Dahl v. Raunheim*, 132 U. S. 262, 33 L. ed. 325, 10 Sup. Ct. Rep. 74—*Iron Silver Min. Co. v. Mike & S. Gold & Silver Min. Co.* 143 U. S. 402, 36 L. ed. 203, 12 Sup. Ct. Rep. 543—*Sullivan v. Iron Silver Min. Co.* 143 U. S. 433, 36 L. ed. 215, 12 Sup. Ct. Rep. 555—*Migeon v. Montana C. R. Co.* 23 C. C. A. 163, 44 U. S. App. 724, 77 Fed. 255—*Ohio Valley Coffin Co. v. Goble*, 28 Ind. App. 367, 62 N. E. 1025—*Casey v. Thievleze*, 19 Mont. 347, 61 Am. St. Rep. 511, 48 Pac. 394.

144. Lodes and veins within the boundaries of placer claims located and in the possession of the locators or their assigns prior to the enactment of U. S. Rev. Stat. § 2333, U. S. Comp. Stat. 1901, p. 1433, are not affected by its provisions. *Noyes v. Mantle*, 127 U. S. 348, 8 Sup. Ct. Rep. 1132. 32: 168
Cited in Sullivan v. Iron Silver Min. Co. 143 U. S. 433, 36 L. ed. 215, 12 Sup. Ct. Rep. 555.

145. Not every crevice in the rocks, nor every out-cropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a "known vein or lode" within the meaning of the U. S. Rev. Stat. § 2333, U. S. Comp. Stat. 1901, p. 1433. *Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co.* 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36: 201
Cited in Montana C. R. Co. v. Migeon, 68 Fed. 815—*United States v. Central P. R. Co.* 84 Fed. 220—*Standard Quicksilver Co. v. Habbshaw*, 132 Cal. 123, 64 Pac. 113—*Cleary v. Skiffich*, 28 Colo. 368, 89 Am. St. Rep. 207, 65 Pac. 59—*Brownfield v. Bier*, 15 Mont. 411, 39 Pac. 461—*Butte & B. Min. Co. v. Sloan*, 16 Mont. 101, 40 Pac. 217—*Casey v. Thievleze*, 19 Mont. 347, 61 Am. St. Rep. 511, 48 Pac. 394—*Horsky v. Moran*, 21 Mont. 349, 53 Pac. 1064—*Jones v. Pros-*

pect Mountain Tunnel Co. 21 Nev. 348, 31 Pac. 642.

Scope and validity of placer patent.

Definition of Placer Mine, see *supra*, 8, 9.
 Distinction between Lode and Placer Mines, see *supra*, 10.

146. The officers of the Land Department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law, and cannot except or reserve buildings or improvements. The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location. *Deffebach v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29: 423
Cited in Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 358, 49 L. ed. 512, 25 Sup. Ct. Rep. 268—*Amador Medean Gold Min. Co. v. South Spring Hill Gold Min. Co.* 36 Fed. 670—*Francoeur v. Newhouse*, 40 Fed. 622—*New Dunderberg Min. Co. v. Old*, 25 C. C. A. 120, 49 U. S. App. 201, 79 Fed. 602—*Frazee v. Spokane County*, 29 Wash. 283, 69 Pac. 779.

147. By a provision of the mining act of 1870 (16 Stat. at L. 217, chap. 235, Rev. Stat. § 2330, U. S. Comp. Stat. 1901, p. 1432), two or more persons or association of persons having contiguous placer claims of any size are allowed to make a joint entry thereof. One individual can hold as many locations as he can purchase, and may obtain a single patent for them all, although the aggregate is more than 160 acres. *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26: 875

Cited in Tucker v. Masser, 113 U. S. 204, 28 L. ed. 980, 5 Sup. Ct. Rep. 420—*Reynolds v. Iron Silver Min. Co.* 116 U. S. 688, 29 L. ed. 775, 6 Sup. Ct. Rep. 601—*Migeon v. Montana C. R. Co.* 23 C. C. A. 162, 44 U. S. App. 724, 77 Fed. 255—*Peabody Gold Min. Co. v. Gold Hill Min. Co.* 97 Fed. 660—*Lockhard v. Asher Lumber Co.* 123 Fed. 437—*Lockhard v. Asher Lumber Co.* 65 C. C. A. 519, 131 Fed. 691—*Price v. McIntosh*, 1 Alaska, 294—*Rosenthal v. Ives*, 2 Idaho, 270, 12 Pac. 904.

148. A patent for a placer mining claim, composed of distinct mining locations, some of which were made after 1870, and together embracing over 160 acres, is valid. *Tucker v. Masser*, 113 U. S. 203, 5 Sup. Ct. Rep. 420, 28: 979
Cited in Carson City Gold & Silver Min. Co. v. North Star Min. Co. 28 C. C. A. 339, 48 U. S. App. 724, 83 Fed. 664—*Peabody Gold Min. Co. v. Gold Hill Min. Co.* 49 C. C. A. 640, 111 Fed. 820.

149. In procuring a patent for a placer mining claim under U. S. Rev. Stat. § 2333, U. S. Comp. Stat. 1901, p. 1433, where the claimant is also in possession of a lode or vein included within the same boundaries, the patent covers both if he makes this known and pays the amount required by law. *Reynolds v. Iron Silver Min. Co.* 116 U. S. 687, 6 Sup. Ct. Rep. 601, 29: 774
Cited in Jones v. Prospect Mountain Tunnel Co. 21 Nev. 348, 31 Pac. 642.

Collateral attack.

Inapplicability of Adverse Suits where Patent has been Issued, see *infra*, 151.

Patent Issued Pending Adverse Suit, see *infra*, 158, 159.

Effect of Failure to Institute Adverse Proceedings, see *infra*, 164-166a.

Individuals Obtaining Patent for Corporation as Fraud in Avoiding Patent, see Public Lands, 1080.

See also *infra*, 157.

150. Patents for lode mining claims cannot be collaterally attacked by evidence that, at the date of the subsequent location of a tunnel site, no ore had been discovered in the lode claims. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 499, 21 Sup. Ct. Rep. 885, 45: 1200

Cited in Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 352, 49 L. ed. 510, 25 Sup. Ct. Rep. 266—*Nelson v. Champagne Min. & Mill. Co.* 35 C. C. A. 578, 119 Fed. 125—*Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co.* 57 C. C. A. 202, 119 Fed. 186—*Peyton v. Desmond*, 63 C. C. A. 659, 129 Fed. 9—*Galbraith v. Shasta Iron Co.* 143 Cal. 99, 76 Pac. 901.

g. Adverse Proceedings; Conflicting Claims.

Federal Question as to, see Appeal and Error, III. d, 9, h, 10, c; 1405;

Courts, 599, 609-611.

Who are Necessary or Nominal Parties, see Courts, 731.

Ejectment for Mining Property, see Ejectment, 44.

Allowance for Improvements, see Ejectment, 99.

Estoppel of Employee to Set up Defense Against Employer, see Estoppel, 313.

Injunction against Further Working of Mine Pending Litigation over Title, see Injunction, 41.

Sufficiency of Description in Judgment, see Judgment, 159.

Conclusiveness of Judgment by Default, see Judgment, 270.

Right to Jury Trial, see Jury, 20.

Laches as Defense to Suit in Equity to Enforce Rights, see Limitation of Actions, I. b, 2, e.

Sufficiency of Allegations, see Pleading, 577.

Sufficiency of Verdict "For Plaintiff," see Trial, 845.

Priorities between Claims, see *supra*, I. e.

Prejudicial Error as to, see Appeal and Error, 4988.

First Raising Objection on Appeal, see Appeal and Error, 4522.

Compromise of Claim, see Compromise and Settlement, 18.

Abandonment of, as Part Performance of Oral Contract, see Contracts, 186.

151. U. S. Rev. Stat. §§ 2325, 2326, U. S. Comp. Stat. 1901, pp. 1429, 1430, concerning adverse mining claims, were not intended to apply to a party who, before the publication first required, had gone through the required proceedings to obtain a patent for mineral land from the United States, had

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established his right to the land, and received his patent. *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 10 Sup. Ct. Rep. 765, 34: 155

Cited in Blackburn v. Portland Gold Min. Co. 175 U. S. 582, 44 L. ed. 281, 20 Sup. Ct. Rep. 222—*Shoshone Min. Co. v. Rutter*, 177 U. S. 513, 44 L. ed. 867, 20 Sup. Ct. Rep. 726—*Behrends v. Goldsteen*, 1 Alaska, 520—*Nome-Sinook Co. v. Simpson*, 1 Alaska, 583—*Lilly Min. Co. v. Kellogg*, 27 Utah, 114, 74 Pac. 518.

152. The judgment rendered in an action brought for special relief in determining adverse mining claims is such as a court exercising jurisdiction in equity alone can render, and the issues can be disposed of without the intervention of a jury. *Hammer v. Garfield Min. & Mill. Co.* 130 U. S. 291, 9 Sup. Ct. Rep. 548, 32: 964

Cited in Rutter v. Shoshone Min. Co. 75 Fed. 39—*Shoshone Min. Co. v. Rutter*, 31 C. C. A. 227, 59 U. S. App. 538, 87 Fed. 805—*Allen v. Myers*, 1 Alaska, 119.

153. An action at law to recover possession when plaintiff is out of possession, or a suit in equity to quiet title when he is in possession, is an appropriate remedy to determine the right of possession of a mining claim under U. S. Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430. *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. Rep. 971, 41: 113

Cited in Black v. Elkhorn Min. Co. 163 U. S. 449, 41 L. ed. 223, 16 Sup. Ct. Rep. 1101—*Shoshone Min. Co. v. Rutter*, 177 U. S. 512, 44 L. ed. 867, 20 Sup. Ct. Rep. 726—*Clipper Min. Co. v. Ell Min. & Land Co.* 194 U. S. 234, 48 L. ed. 953, 24 Sup. Ct. Rep. 632—*Bonner v. Melkie*, 82 Fed. 698—*Gillis v. Downey*, 29 C. C. A. 290, 56 U. S. App. 567, 85 Fed. 487—*Shoshone Min. Co. v. Rutter*, 31 C. C. A. 227, 59 U. S. App. 538, 87 Fed. 805—*Davidson v. Calkins*, 92 Fed. 238—*California Oil & Gas Co. v. Miller*, 96 Fed. 18—*Young v. Goldsteen*, 97 Fed. 309—*Durgan v. Redding*, 103 Fed. 916—*Tomopah Fraction Min. Co. v. Douglass*, 123 Fed. 938—*Allen v. Myers*, 1 Alaska, 119—*Nome-Sinook Co. v. Simpson*, 1 Alaska, 582—*Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 26 Colo. 62, 50 L.R.A. 296, 77 Am. St. Rep. 245, 56 Pac. 176—*Mares v. Dillon*, 30 Mont. 139, 75 Pac. 963—*Deeney v. Mineral Creek Mill. Co.* 11 N. M. 288, 67 Pac. 724—*Kirkman v. Bird*, 22 Utah, 113, 58 L.R.A. 672, 83 Am. St. Rep. 774, 61 Pac. 338—*Lilly Min. Co. v. Kellogg*, 27 Utah, 121, 74 Pac. 518.

154. A compromise of a dispute as to a mining claim, whereby an action to determine the right thereto is dismissed, in consideration of an interest in the ground when thereafter patented by the applicant, is not invalid, in the absence of any statutory prohibition. *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 171 U. S. 650, 19 Sup. Ct. Rep. 61, 43: 320

Who may institute suit.

Ejectment by Cotenant, see Cotenancy, 15, 16.

155. The owner of a prior placer mining location may maintain an adverse suit against an application for a patent for a subsequent lode location within the exterior

boundaries of the placer claim, made by persons entering thereon against the will of the placer locators for the purpose of prospecting for unknown lodes or veins. *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 24 Sup. Ct. Rep. 632, 48: 944

156. An adverse claimant suit, instituted under U. S. Rev. Stat. §§ 2325, 2326, U. S. Comp. Stat. 1901, pp. 1429, 1430, may be brought by one who has given possession to a purchaser under an executory contract for a future conveyance. *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. Rep. 289, 30: 474

157. Whatever may be the effect of Mont. Code Civ. Proc. 354, as to the necessity of possession by a person bringing a suit for the purpose of determining an adverse claim in ordinary actions, it cannot be construed to require actual possession in a court of the territory, by an adverse claimant, of mineral lands, under U. S. Rev. Stat. §§ 2325, 2326. U. S. Comp. Stat. 1901, pp. 1429, 1430, where another person has applied for the patent under those sections. *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. Rep. 289, 30: 474

Cited in Doe v. Waterloo Min. Co. 43 Fed. 221—*Burke v. Bunker Hill & S. Min. & Concentrating Co.* 46 Fed. 647—*Gird v. California Oil Co.* 60 Fed. 533—*Shoshone Min. Co. v. Rutter*, 31 C. C. A. 226, 59 U. S. App. 538, 87 Fed. 804—*Burke v. McDonald*, 2 Idaho, 343, 13 Pac. 351—*Nesbitt v. Delamar's Nevada Gold Min. Co.* 24 Nev. 287, 77 Am. St. Rep. 807, 53 Pac. 178—Iba v. Central Asso. 5 Wyo. 366, 40 Pac. 527.

Editorial notes.

Conflicting locations. 39: 859; 42: 96
[Duty and right of excluded co-owner to file adverse or protest against application for patent to a mining claim. 4 L.R.A. (N.S.) 1126.]

Effect on proceedings in land office.

158. A patent obtained, pending a litigation, by the defendant, for a new claim affecting the subject-matter of the litigation, cannot be set up against the plaintiff. The new claim was initiated *pendente lite*, and must abide the result of the litigation. Any patent issued under this proceeding must relate back to the date of the claim and override the new patent. *Richmond Mining Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055, 29: 273

Cited in Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 693, 39 L. ed. 864, 15 Sup. Ct. Rep. 733—*Witters v. Sowles*, 33 Fed. 541—*Northern P. R. Co. v. Cannon*, 4 C. C. A. 309, 7 U. S. App. 507, 54 Fed. 258.

159. When a contest arises under U. S. Rev. Stat. § 2326, all proceedings are stayed in the Land Department until the controversy is settled by a court of competent jurisdiction, or the adverse claim is waived. Delay in the proceedings in court does not amount to a waiver, and a patent issued pending such proceedings is void as to the adverse party. *Richmond Min. Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055, 29: 273

Cited in McEvoy v. Hyman, 25 Fed. 541—

Last Chance Min. Co. v. Tyler Min. Co. 9 C. C. A. 616, 15 U. S. App. 456, 61 Fed. 561—*Garrard v. Silver Peak Mines*, 82 Fed. 584—*Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 48 C. C. A. 672, 109 Fed. 545—*Mackay v. Fox*, 57 C. C. A. 443, 121 Fed. 491—*Albion Consol. Min. Co. v. Richmond Min. Co.* 19 Nev. 226, 8 Pac. 480.

Answer or disclaimer.

160. Where a petition claims a certain tract and the answer admits that defendants have applied for a patent for the same tract, the conflict as to right of possession sufficiently appears. If defendants do not wish to contest the right of possession to any part of it, they should make a disclaimer. *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. Rep. 289, 30: 474
Cited in Manning v. Strehlow, 11 Colo. 455, 18 Pac. 625—*Burke v. McDonald*, 2 Idaho, 343, 13 Pac. 351—*Perego v. Dodge*, 9 Utah, 7, 33 Pac. 221.

Issues and scope of inquiry.

161. In an action to recover possession of a part of a vein or lode of mineral deposit, the rule which applies to actions of ejectment and to all actions to recover possession of real estate applies; namely, that the plaintiff can only recover on the strength of his own title, and not on the weakness of the defendant's title. *Reynolds v. Iron Silver Min. Co.* 116 U. S. 687, 6 Sup. Ct. Rep. 601, 29: 774

Cited in Mitchell v. Smale, 140 U. S. 146, 35 L. ed. 446, 11 Sup. Ct. Rep. 840—*Montana Co. v. Clark*, 42 Fed. 630—*Lake Superior Ship Canal, B. & Iron Co. v. Cunningham*, 44 Fed. 832.

162. In adverse suits preliminary to a patent of mineral lands, not merely questions of law arising under the statutes of the United States, but questions of fact and questions arising under local rules and customs and state statutes are open for consideration. *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 20 Sup. Ct. Rep. 726, 44: 864
Cited in Nome-Sinook Co. v. Simpson, 1 Alaska, 583.

Judgment.

163. In a suit to determine conflicting mining claims to public lands under Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, if there has been no work done on the premises by either claimant, plaintiff or defendant, the finding should properly be against both. *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301, 27: 990
Distinguished in DeNoon v. Morrison, 83 Cal. 166, 23 Pac. 374—*Conway v. Hart*, 129 Cal. 488, 62 Pac. 44.

Cited in Chambers v. Harrington, 111 U. S. 354, 28 L. ed. 454, 4 Sup. Ct. Rep. 428—*O'Reilly v. Campbell*, 116 U. S. 423, 29 L. ed. 670, 6 Sup. Ct. Rep. 421—*Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 482, 32 L. ed. 175, 8 Sup. Ct. Rep. 1214—*Strasburger v. Beecher*, 44 Fed. 214—*Bay State Silver Min. Co. v. Brown*, 10 Sawy. 246, 21 Fed. 168—*Burke v. Bunker Hill & S. Min. & Concentrating Co.* 46 Fed. 647—*Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co.* 53 Fed. 324—*Book v. Justice Min. Co.* 58 Fed. 117—

Justice Min. Co. v. Barclay, 82 Fed. 560—
 Fee v. Durham, 57 C. C. A. 587, 121 Fed.
 471—Tonopah Fraction Min. Co. v. Douglass,
 123 Fed. 941—Willitt v. Baker, 133 Fed.
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 7 Colo. 447, 4 Pac. 752—Lalande v. Mc-
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 michael, 8 N. M. 174, 42 Pac. 95—Bullion,
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 Utah, 81, 11 Pac. 515—Iba v. Central Asso.
 5 Wyo. 360, 40 Pac. 527.

Effect of failure to "adverse."

Effect of Failure of Tunnel Owner to
 "Adverse" Conflicting Lode Claims,
 see supra, 119.

164. Where plaintiff applied for a patent
 for placer ground, and complied with the
 law, and no adverse claim was filed by de-
 fendant during the period of publication, of
 notice of the application, the latter is pre-
 cluded from questioning plaintiff's right to
 the patent, and from objecting to the loca-
 tion or its character as placer ground. Dahl
 v. Montana Copper Co. 132 U. S. 264, 10
 Sup. Ct. Rep. 97, 33:325
 Dahl v. Raunheim, 132 U. S. 260, 10 Sup.
 Ct. Rep. 74, 33:324
Cited in Golden Reward Min. Co. v. Buxton
 Min. Co. 79 Fed. 874—Gillis v. Downey, 29
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 mer, 26 Colo. 62, 50 L.R.A. 296, 77 Am. St.
 Rep. 245, 56 Pac. 176—Butte & B. Min. Co.
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 v. Montana Lumber & Mfg. Co. 25 Mont. 19,
 63 Pac. 719—Iba v. Central Asso. 5 Wyo.
 366, 40 Pac. 527.

165. The locator of a mining claim, who
 does not interpose an adverse claim in pro-
 ceedings instituted by another to obtain a
 patent for a claim including part of his
 claim, thereby waives his rights and loses
 the benefit of his location. The United
 States may assume that no adverse claim ex-
 ists; and the holder of any such claim will
 be barred, being in law a party to the pro-
 ceeding. Gwillim v. Donnellan, 115 U. S.
 45, 5 Sup. Ct. Rep. 1110, 29:348
Cited in Behrends v. Goldateen, 1 Alaska, 525
 —Nome-Sinook Co. v. Simpson, 1 Alaska,
 583—Miller v. Girard, 3 Colo. App. 279, 33
 Pac. 69—Burke v. McDonald, 2 Idaho, 343,
 13 Pac. 351—Deno v. Griffin, 20 Nev. 252,
 20 Pac. 308—Silver City Gold & S. Min. Co.
 v. Lowry, 19 Utah, 345, 57 Pac. 11.

166. The owner of a tunnel site who sim-
 ply seeks to protect his tunnel, and has as
 yet discovered no lode claim, is not required,
 by U. S. Rev. Stat. §§ 2325, 2326, U. S.
 Comp. Stat. 1901, pp. 1429, 1430, to adverse
 an application for the patent of the lode
 claim through which the tunnel runs, the
 lode of which was discovered on the sur-
 face. Creede & C. C. Min. & Mill. Co. v.

Uinta Tunnel Min. & Transp. Co. 196 U. S.
 337, 25 Sup. Ct. Rep. 266, 49:501

166a. A bill in equity to enforce a claim
 to a mine is not precluded by the failure
 of the owner to set up an adverse claim
 in proceedings by another person for a pat-
 ent. Turner v. Sawyer, 150 U. S. 578, 14
 Sup. Ct. Rep. 192, 37:1189
Offed in McCarthy v. Speed, 11 S. D. 370, 50
 L.R.A. 189, 77 N. W. 590—McCarthy v.
 Speed, 12 S. D. 9, 50 L.R.A. 190, 80 N. W.
 135—Murray v. Montana Lumber & Mfg. Co.
 25 Mont. 19, 63 Pac. 719.

h. Leases by United States.

Right to Possession of Land as Making Ore
 Purchasing Contract a Lease, see supra,
 23.

Finality of Executive Action on Application
 to Make Mineral Lease in Indian Terri-
 tory, see Courts, 247a.

Power of Congress to Authorize Lease, see
 Public Lands, 15.

167. The President has power, under the
 act of Congress of 1807, to lease any lead
 mines in Indiana territory, for a term not
 exceeding five years; and this restriction of
 time does not prevent a renewal of the
 lease. United States v. Gratiot, 14 Pet.
 526, 10:573

168. Congress had power to authorize the
 President to lease any lead mines in the
 Indiana territory, and the state of Illinois,
 upon its subsequent admission to the Union,
 cannot complain of any disposition, made
 under it, of any public lands included in
 that state. United States v. Gratiot, 14
 Pet. 526, 10:573

Cited in United States v. New Bedford Bridge,
 1 Woodb. & M. 503, Fed. Cas. No. 15,867—
 Wood v. Pittman, 113 Ala. 212, 20 So. 972—
 Norris v. Donlpham, 4 Met. (Ky.) 481.

169. The five years' limitation of the lease
 of lead mines by the President is not to be
 construed as a prohibition against renewing
 the leases from time to time. United States
 v. Gratiot, 14 Pet. 526, 10:573

170. The President of the United States
 had the power, under the act of Congress of
 March, 1807, to make a contract which pur-
 ports to be a license for one year for smelt-
 ing lead ore at the lead mines of the United
 States; and it is a lease within the mean-
 ing of the act of Congress. United States v.
 Gratiot, 14 Pet. 526, 10:573
Cited in Lorimier v. Lewis, Morris (Iowa) 255,
 39 Am. Dec. 461.

II. On Private Lands.

a. In General.

Interest of Lessee as Real Property Subject
 to Judicial Sale, see Judicial Sale, 7.

171. Mineral deposits in lands which have
 ceased to be public and have become the

property of private individuals cannot be patented under the laws of Congress. *Davis v. Wiebold*, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35: 238

172. The inability to work mines without loss will not relieve a lessee from a contract to pay royalties of which a minimum amount is stipulated. *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. Rep. 219, 37: 1215

Cited in Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & R. Co. 106 Tenn. 679, 62 S. W. 162.

173. An agreement between two mining companies having mines adjacent to each other, upon a line of division between themselves which should be continued downwards towards the center of the earth, intends that the line shall be extended downwards through the zones of the property in their course towards the center of the earth, although, beneath the surface, it might thereby extend under the surface claim of either party. *Richmond Min. Co. v. Eureka Consol. Min. Co.* 103 U. S. 839, 26: 557

Limited in Butte & B. Min. Co. v. Societe Anonyme, 23 Mont. 203, 75 Am. St. Rep. 505, 58 Pac. 111—*Montana Ore Purchasing Co. v. Roston & M. Consol. Copper & S. Min. Co.* 27 Mont. 320, 70 Pac. 1114.

Cited in Walrath v. Champion Min. Co. 171 U. S. 309, 43 L. ed. 177, 18 Sup. Ct. Rep. 909—*Kennedy Min. & Mill. Co. v. Argonaut Min. Co.* 189 U. S. 7, 47 L. ed. 689, 23 Sup. Ct. Rep. 501—*Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 89 Fed. 532—*Duggan v. Davey*, 4 Dak. 138, 26 N. W. 887.

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b. Oil and Gas.

Restrictions on Waste of, see Constitution-
al Law, 503.

174. Petroleum gas and oil belong to the owner of the land, and are part of it so long as they are on it or in it or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. Rep. 245, 39: 304
Cited in Ohio Oil Co. v. Indiana, 177 U. S. 203, 44 L. ed. 737, 20 Sup. Ct. Rep. 576—*Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 475, 50 L.R.A. 774, 57 N. E. 912—*Andrews v. Andrews*, 31 Ind. App. 191, 67 N. E. 461—*Lanyon Zinc Co. v. Freeman*, 68 Kan. 606, 75 Pac. 995.

175. The doctrine that a landowner, although entitled to bore wells for natural gas and oil, has no title to those substances as owner until they are actually reduced by

him to possession, is settled as a rule of property in the state of Indiana. *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44: 729

Cited in Brewster v. Lanyon Zinc Co. 72 C. C. A. 221, 140 Fed. 809—*Richmond Natural Gas Co. v. Enterprise Natural Gas Co.* 31 Ind. App. 231, 66 N. E. 782—*Lanyon Zinc Co. v. Freeman*, 68 Kan. 606, 75 Pac. 995.

176. A reservation in a lease for oil and gas purposes, of 10 acres described, "upon which no well shall be drilled without consent of the party of the first part," does not reserve the right to gas and oil in the 10 acres, but merely forbids the drilling of wells on that part of the land without consent. *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. Rep. 245, 39: 304
Cited in Carter v. Foster, 145 Mo. 395, 47 S. W. 6.

177. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. Rep. 245, 39: 304
Cited in Simpson v. Pittsburgh Plate Glass Co. 28 Ind. App. 352, 62 N. E. 753.

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1. A mistake of law, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis of relief at law or in equity. *United States v. Hodson*, 10 Wall. 395, 19: 937
Otted in Utermehle v. Norment, 197 U. S. 56, 49 L. ed. 662, 25 Sup. Ct. Rep. 291—*Smith v. United States*, 5 Ariz. 64, 45 Pac. 341.

2. A mistake or ignorance of the law forms no ground of relief from contracts fairly entered into, with a full knowledge of the facts. *Bank of United States v. Daniel*, 12 Pet. 32, 9: 989
Otted in Tloga E. Co. v. Blossburg & C. R. Co., 20 Wall. 150, 22 L. ed. 337—*Upton v. Tribilcock*, 91 U. S. 50, 23 L. ed. 206, 13 Nat. Bankr. Reg. 177—*Utermehle v. Norment*, 197 U. S. 56, 49 L. ed. 662, 25 Sup. Ct. Rep. 291—*Healy v. United States*, 29 Ct. Cl. 140—*Long v. Soule*, Fed. Cas. No. 8,483—*Morton v. Nevada*, 3 C. C. A. 112, 10 U. S. App. 333, 52 Fed. 354—*Paulding v. Lee*, 20 Ala. 766—*Gwynn v. Hamilton*, 29 Ala. 239—*State v. Paup*, 13 Ark. 135, 56 Am. Dec. 303—*Rector v. Collins*, 46 Ark. 178, 55 Am. Rep. 571—*Bartlett v. Gregory*, 60 Ark. 460, 30 S. W. 1043—*Boggs v. Fowler*, 16 Cal. 565, 76 Am. Dec. 561—*Bond v. Coats*, 16 Ind. 203—*Oller v. Gard*, 23 Ind. 219—*Pierson v. Armstrong*, 1 Iowa, 291, 63 Am. Dec. 440—*Stover v. Poole*, 67 Me. 223—*Kearney v. Sascor*, 37 Md. 280—*Felker v. Mowry*, 69 N. H. 166, 38 Atl. 726—*Maxwell Land Grant & R. Co. v. Thompson*, 1 N. M. 606—*Doll v. Earle*, 65 Barb. 302—*Kelly v. Connecticut Mut. L. Ins. Co.* 27 App. Div. 342, 50 N. Y. Supp.

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3. Ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the actions of a party to the contract, is not such a mistake as will authorize equitable relief. *Cleaveland v. Smith* (*Cleaveland v. Richardson*) 132 U. S. 318, 10 Sup. Ct. Rep. 100, 33: 384

4. A clearly established misapprehension of the law by a surety creates a basis for the interference of a court of equity, resting in discretion to be exercised only in a flagrant case, to relieve him from a liability he did not intend to assume. *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. Rep. 972. 999, 35: 678

Cited in Standard Oil Co. v. Hawkins, 38 L.R.A. 741, 20 C. C. A. 471, 46 U. S. App. 115, 74 Fed. 398—*Moffett, H. & C. Co. v. Rochester*, 33 C. C. A. 324, 62 U. S. App. 392, 91 Fed. 33—*Lawrence County Bank v. Arndt*, 69 Ark. 416, 65 S. W. 1052—*Park Bros. v. Blodgett & C. Co.* 64 Conn. 36, 29 Atl. 133—*Miller v. Carpenter*, 79 App. Div. 181, 80 N. Y. Supp. 82—*Miller v. Carpenter*, 68 App. Div. 350, 74 N. Y. Supp. 231—*Kyle v. Fehley*, 81 Wis. 72, 29 Am. St. Rep. 866, 51 N. W. 257.

5. A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must have controlled the conduct of the party, and the party must have availed himself of accessible knowledge. *Grymes v. Sanders*, 93 U. S. 55, 23: 798
Cited in Kinney v. Consolidated Virginia Min. Co. 4 Sawy. 445, Fed. Cas. No. 7,827—*Post v. Beacon Vacuum Pump & Electrical Co.* 28 C. C. A. 483, 50 U. S. App. 271, 84 Fed. 373—*Barth v. Denel*, 11 Colo. 500, 19 Pac. 471—*Floyd v. Atlanta Bkg. Co.* 109 Ga. 786, 35 S. E. 172—*Hoops v. Fitzgerald*, 204 Ill. 330, 68 N. E. 430—*Barker v. Fitzgerald*, 105 Ill. App. 540—*Smith v. Tewalt*, 9 Ind. App. 650, 37 N. E. 294—*Churchill Twp. v. Cummings Twp.* 51 Mich. 451, 16 N. W. 805—*Wood v. Evans*, 43 Mo. App. 233—*Hobart v. Jordan*, 58 N. H. 501—*Whittemore v. Farrington*, 12 Hun. 352—*Persinger v. Chapman*, 93 Va. 353, 25 S. E. 5—*Eldridge v. Young America & C. Consol. Min. Co.* 27 Wash. 307, 67 Pac. 703—*Newman v. Kay*, 57 W. Va. 125, 68 L.R.A. 922, 49 S. E. 926—*Kowalko v. Milwaukee Electric R. & Light Co.* 103 Wis. 478, 74 Am. St. Rep. 877, 79 N. W. 762.

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Legislation.

1. Congress may restrain by suitable enactments the circulation, as money, of any notes not issued under its own authority. *Veazie Bank v. Fenko*, 8 Wall. 533, 19: 482 *Cited in State v. Scogal*, 3 S. D. 63, 15 L. R.A. 482, 44 Am. St. Rep. 756, 51 N. W. 858.

2. Having undertaken to provide a currency for the whole country, Congress may constitutionally secure the benefit of it to the people by appropriate legislation. It may not only deny the quality of legal tender to foreign coins, and provide by law against the imposition of counterfeit and base coin on the community, but may, by suitable enactments, restrain the circulation, as money, of any notes not issued under its own authority. It may, therefore, constitutionally impose a tax upon the circulation of any notes not issued under its authority. *Veazie Bank v. Fenko*, 8 Wall. 533, 19: 482

Cited in Hepburn v. Griswold, 8 Wall. 636, 19 L. ed. 530—*Legal Tender Cases*, 12 Wall. 543, 20 L. ed. 309—*Juilliard v. Greenman*, 110 U. S. 445, 28 L. ed. 213, 4 Sup. Ct. Rep. 122—*Hollister v. Zion's Co-Op. Mercantile Inst.* 111 U. S. 63, 28 L. ed. 353, 4 Sup. Ct. Rep. 263—*Head Money Cases (Edye v. Robertson)* 112 U. S. 596, 28 L. ed. 803, 5 Sup. Ct. Rep. 247—*Hancock v. Yaden*, 121 Ind. 372, 6 L.R.A. 578, 16 Am. St. Rep. 396, 23 N. E. 253—*Breen v. Dewey*, 16 Minn. 140, Gil. 123—*First Nat. Bank v. Garlinghouse*, 22 Ohio St. 504, 10 Am. Rep. 751—*Klauber v. Biggerstaff*, 47 Wis. 560, 32 Am. Rep. 773, 3 N. W. 357.

3. The power of coining money and of regulating its value was delegated to Congress for the purpose of creating and maintaining a pure and uniform metallic standard throughout the Union. *United States v. Marigold*, 9 How. 560, 13: 257

Cited in Moore v. Illinois, 14 How. 20, 14 L. ed. 309—*Scott v. Sandford*, 19 How. 622, 15 L. ed. 791—*Legal Tender Cases*, 12 Wall. 536, 20 L. ed. 307—*Ex parte Carll*, 106 U. S. 523, 27 L. ed. 289, 1 Sup. Ct. Rep. 535—*United States v. Yates*, 6 Fed. 864—*Ex parte Houghton*, 7 Fed. 658—*Ex parte Houghton*, 8 Fed. 897—*United States v. Barnhart*, 10 Sawy. 498, 22 Fed. 290—*Hancock v. Yaden*, 121 Ind. 373, 6 L.R.A. 579, 16 Am. St. Rep. 396, 23 N. E. 253—*Griswold v. Hepburn*, 2 Duv. 38—*Meyer v. Roosevelt*, 25 How. Pr. 119—*Metropolitan Bank v. Van Dyck*, 27 N. Y. 450—*Laughlin v. Harvey*, 52 Pa. 37—*Borle v. Trott*, 5 Phila. 375.

Legal tender acts.

Power to Tax Bank Circulation, see *supra*, 2.

Federal Question as to Legal Tender. see Appeal and Error, 1453, 1454.

Constitutionality of, see Constitutional Law, 1289-1291.

Construing Contract According to Law in Existence When Proposition Was Made, see Contracts, 224a.

Burden of Showing Taxation of Legal Tender Notes, see Evidence, 451.

Debts to which Acts are Applicable, see Payment, 74-79.

Inapplicability to Taxes and Assessments, see Taxes, 592a, 593.

4. Congress has the constitutional power to make the Treasury notes of the United States a legal tender in payment of private debts, in time of peace as well as in time of war. *Juilliard v. Greenman (Legal Tender Cases)* 110 U. S. 421, 4 Sup. Ct. Rep. 122, 28: 204

Cited in Ex parte Prince, 27 Fla. 203, 26 Am. St. Rep. 67, 9 So. 659—*State ex rel. Terre Haute v. Kolsem*, 130 Ind. 442, 14 L.R.A. 570, 29 N. E. 595—*Baldwin v. Baker*, 121 Mich. 260, 80 N. W. 36—*Blanck v. Sadler*, 153 N. Y. 560, 40 L.R.A. 669, 47 N. E. 920—*Com. ex rel. Price v. Dale*, 3 Pa. Co. Ct. 32.

5. Making notes a legal tender is not an appropriate means for the execution of the power to declare and carry on war, or any other power expressly vested in Congress by the Constitution. *Hepburn v. Griswold*, 8 Wall. 603, 19: 513 *Cited in Legal Tender Cases*, 12 Wall. 574, 20 L. ed. 320.

6. Nothing but gold and silver coin can be made a tender in payment of debts. *Sturges v. Crowninshield*, 4 Wheat. 122, 4: 529

Cited in Legal Tender Cases, 12 Wall. 619, 20 L. ed. 334—*Baltimore & O. R. Co. v. State*, 36 Md. 539—*Van Husean v. Kanouse*, 18 Mich. 313.

7. Making bills of credit a legal tender is not consistent with the spirit of, and is prohibited by, the Constitution. *Hepburn v. Griswold*, 8 Wall. 603, 19: 513 *Cited in Legal Tender Cases*, 12 Wall. 616, 20 L. ed. 333—*Norwich & W. R. Co. v. Johnson*, 15 Wall. 196, 21 L. ed. 179—*Juilliard v. Greenman*, 110 U. S. 445, 28 L. ed. 213, 4 Sup. Ct. Rep. 122—*Hancock v. Yaden*, 121 Ind. 373, 6 L.R.A. 578, 16 Am. St. Rep. 396, 23 N. E. 253.

What is legal tender.

8. Under the act of May 31, 1878, chap. 146, which enacts that, when any United States legal tender notes may be redeemed or received into the Treasury, and shall belong to the United States, they shall be reissued and paid out again, and kept in circulation, notes so reissued are a legal tender. *Juilliard v. Greenman (Legal Tender Cases)* 110 U. S. 421, 28: 204

9. A genuine silver coin, worn by natural abrasion only, is a legal tender for its original value so long as it is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint. *Jersey City & B. R. Co. v. Morgan*, 160 U. S. 288, 16 Sup. Ct. Rep. 276, 40: 430

Cancellation and reissue.

Reissued Notes as Legal Tender, see *supra*, 8.

Effect of Attempted Payment in Canceled Notes, see Payment, 80.

10. Canceled Treasury notes in the hands of a collector of customs who received and canceled them, although they may not be money, may possess some value as vouchers,

and as evidence for the Treasury Department that they have been redeemed. *United States v. Morgan*, 11 How. 154, 13: 643

Current money; notes.

Negotiable Instruments as, see Bills and Notes, 34.

Parol Evidence to Explain Term, see Evidence, 1613-1615.

Sufficiency of Payment in, see Payment, II. b, 4.

Computation of Coin Values in Current Money, see Payment, 39.

Computation of Amount of Debt in Current Money, see Payment, 40-42.

Liability of United States for Genuine Notes Unlawfully Issued, see United States, 41.

11. Bank notes constitute a part of the common currency of the country, and ordinarily pass as money. *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6: 334

Cited in Legal Tender Case (Julliard v. Greenman) 110 U. S. 445, 28 L. ed. 213, 4 Sup. Ct. Rep. 122—Woodruff v. Mississippi, 162 U. S. 300, 40 L. ed. 976, 16 Sup. Ct. Rep. 820—People ex rel. Mulford v. Mayhew, 26 Cal. 663—Corbit v. Bank of Smyrna, 2 Harr. (Del.) 252, 30 Am. Dec. 635—Ridenour v. McClurkin, 6 Blackf. 414—Thayer v. Hedges, 23 Ind. 147—Boyd v. Olvey, 82 Ind. 300—First Nat. Bank v. Tappan, 6 Kan. 467, 7 Am. Rep. 568—Doyle v. Baltimore County, 12 Gill & J. 494—Flanagin v. Hambleton, 54 Md. 227—Currie v. White, 45 N. Y. 842—Smith v. Old Dominion Bldg. & L. Asso. 119 N. C. 260, 26 S. E. 40—Crocketer v. Wolford, 5 Phila. 345—Crocketer v. Wolford, 2 Pittsb. 460, 11 Pittsb. L. J. 65—Shollenberger v. Brinton, 52 Pa. 85—State v. Moseley, 10 S. C. N. S. 4—Rodgers v. Bass, 46 Tex. 516—Klauber v. Biggerstaff, 47 Wis. 559, 32 Am. Rep. 773, 3 N. W. 357.

12. United States notes are contracts to pay coined dollars of the United States. *New York ex rel. Bank of New York v. New York County (Bank of New York v. New York County)* 7 Wall. 26, 19: 60
Cited in Legal Tender Cases, 12 Wall. 624, 20 L. ed. 335—*Glover v. Robbins*, 49 Ala. 222, 20 Am. Rep. 272.

Circulating paper.

Right of One Depositing Bank Notes to Recover Gold or Silver, see Banks, 97.

As Money, see Criminal Law, 29.

Federal Taxation of, see Internal Revenue, 87-92.

Inhibition on States, see States, VIII. c.

City Bills and State Notes Issued During Rebellion, see States, 355, 356.

13. A municipal corporation in a state in which it is against public policy, as well as express law, for any person or body corporate to issue small bills to circulate as currency, has no implied power to issue such bills; nor is such power conferred by a clause in the city charter, authorizing the borrowing of money. *Thomas v. Richmond*, 12 Wall. 349, 20: 453
Distinguished in West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 449—*Detroit v. De-*

troit City R. Co. 60 Fed. 103—*Murray v. Chicago & N. W. R. Co.* 62 Fed. 41—*Lindsey v. Rottaken*, 32 Ark. 632—*Dougherty v. Seymour*, 16 Colo. 291, 26 Pac. 823—*Gatton v. Chicago, R. I. & P. R. Co.* 95 Iowa, 142, 28 L.R.A. 566, 63 N. W. 589.

14. Bank notes which form a circulating medium and constitute bills of credit in a limited sense are not legal tender, except where made so by statute. *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9: 709
Cited in Legal Tender Cases, 12 Wall. 620, 20 L. ed. 334.

Confederate money.

Treasury Notes Issued in Aid of Rebellion, see Constitutional Law, 1063.

Impairment of Contract Obligations as to, see Constitutional Law, 1516.

Validity of Contract Based on, see Contracts, 385-390.

Parol Evidence to Show that Confederate Notes Were Meant by Term "Dollars," see Evidence, 1616, 1617.

Parol Evidence of Value, see Evidence, 1663, 1664.

Investment of Ward's Funds in, see Embargo and Nonintercourse, 81; Guardian and Ward, 29.

Provisions in Judgment on Contract Payable in Money, see Judgment, 104.

Executor Investing Proceeds of Mortgage in, see Mortgage, 249.

Allegations of Fraud in Inducing Grantor to Take in Payment, see Pleading, 550.

Agent's Authority to Take in Payment, see Principal and Agent, 81.

City Bills and State Notes Issued During Rebellion, see States, 355, 356.

Right of Trustee to Charge Trust with Losses from Payments in, see Trusts, 134.

15. Confederate notes must be regarded as a currency imposed on the community by irresistible force. Such currency must be considered in courts of law the same as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. *Thorington v. Smith*, 8 Wall. 1, 19: 361

16. The parties entitled to be paid in Confederate dollars can recover judgment for their actual value, at the time and place of the contract, in lawful money of the United States. *Thorington v. Smith*, 8 Wall. 1, 19: 361

Rives v. Duke, 105 U. S. 132, 26: 1031
Bissell v. Heyward, 96 U. S. 580, 24: 678
Distinguished in Bartow County v. Conyers, 108 Ga. 561, 34 S. E. 351.

Foreign money.

Construing Contract as Payable in, see Contracts, 201.

Treasury Proclamation as to Value, see Duties, VIII. d.

Equivalent Values in United States Money of Porto Rican Indebtedness, see Payment, 22.

17. The value of a franc is 19 cents and 3

mills. *Arthur v. Richards* (The Collector v. Richards) 23 Wall. 246, 23: 95

18. Under the act of 1873, the value of foreign coins is measured by the amount of pure metal contained therein. *Arthur v. Richards* (The Collector v. Richards) 23 Wall. 246, 23: 95

MONEYED CORPORATION.

Limitation of Actions against Directors or Stockholders of, see Limitation of Actions, 299-301.

MONEY HAD AND RECEIVED.

See *Assumpsit*, II. b.

MONEY IN COURT.

Appealability of Order Directing Payment into Court, see Appeal and Error, 109, 110.

Directions as to, Pending Appeal, see Appeal and Error, 2823.

Requiring Attorney to Pay into Court, Money on which he has a Lien, see Attorneys, 93.

Fees of Clerk for Custody of, see Clerks, 15-17.

Proceeds of Property Confiscated, see Confiscation and Sequestration, 103.

Paying into Court Money Awarded for Land Condemned, see Eminent Domain, 127.

Payment or Offer to Pay into Court, see Eminent Domain, 138, 142.

Duty of Levying Officer to Bring Money into Court in Case of Execution against it in his Hands, see Execution, 27.

Application of Surplus from Execution Sale to Satisfaction of Judicial Levies, see Execution, 75.

Duty of Levying Officer to Pay into Court, see Execution, 91.

Garnishment of, see Garnishment, 15.

Conclusiveness of Judgment Directing Deposit of, see Judgment, 839.

Mandamus to Compel Authorization of Withdrawal, see Mandamus, 55.

Withdrawal of, to Pay Assignee of Mortgage, see Mortgage, 115.

Effect of Mortgagor's Failure to Unite in Obtaining Order for, see Mortgage, 284.

Permitting Proof of Claim against, after Time Fixed by Foreclosure Decree, see Mortgage, 490.

Whether Deposit by Marshal in Bank Designated as United States Depository is Payment to United States, see Payment, 13.

Duty to Deposit Prize Money in United States Treasury, see Prize and Capture, 213.

Necessity of Bringing Consideration for Contract into Court in Action for Specific Performance, see Specific Performance, 100, 101.

Necessity of Bringing Money Tendered into Court, see Tender, 2.

1. The proceeds of property confiscated and paid into court are under the control of the court until an order for their distribution is made, or until they are paid into the hands of the informer entitled to them, or into the Treasury of the United States. *Osborn v. United States*, 91 U. S. 474, 23: 388

Cited in Kirk v. Lewis, 4 Woods, 101, 9 Fed. 646—*Re Forsythe*, 78 Fed. 304—*Corbitt v. Farmers' Bank*, 114 Fed. 604—*Boggs v. Com.* 76 Va. 1001.

2. Where money belonging to the registry of the court is withdrawn from it without authority of law, the court can, by summary proceedings, compel its restitution; and anyone entitled to the money may apply to the court by petition for its delivery to him. *Osborn v. United States*, 91 U. S. 474, 23: 388

3. Moneys paid into court to the credit of a suit in equity in the same court are to be disposed of in that suit, and no orders relating to such moneys can properly be made in another suit which does not include the same parties as the former. *Gregory v. Boston Safe Deposit & T. Co.* 144 U. S. 665, 12 Sup. Ct. Rep. 783, 36: 585
Cited in Gregory v. Pike, 94 Me. 30, 46 Atl. 793.

4. Payment into court of sums due under a mortgage, pending proceedings under *Porto Rico Code*, §§ 976-980, to have the petitioner declared sole heir *ad intestato* of the mortgagee, discharged the obligation, where made under an order of the court and before any proceedings were begun to establish the rights of an alleged coheir. *Sixto v. Sarria*, 196 U. S. 175, 25 Sup. Ct. Rep. 186, 49: 436

5. One required by a decree of the Supreme Court to restore certain bonds or make good their proceeds, and who has received payment of the bonds pending the suit, will be ordered to pay into court the amount so received by him, for the use of the party entitled thereto. *Texas v. White*, 131 U. S. xcv. Appx., and 19: 532

6. A motion for the issuance of a rule nisi ordering a party who has received payment of bonds in suit, pending the suit, to show cause why he should not pay the amount so received to the clerk, for the adverse party who has been decreed entitled thereto, ought regularly to be accompanied by an affidavit verifying the facts on which they are grounded, but where due notice has been given to the party, and he has appeared and admitted that he has received the amount and stated that he is ready to answer on the merits, the court will grant the rule nisi, giving leave to the parties to file their affidavits on the hearing. *Texas v. White*, 131 U. S. xcv. Appx., and 19: 533

MONEY JUDGMENT.

As Beyond Jurisdiction of Equity, see Equity, 45.
In General, see Judgment, II. a.

MONEY LENT.

Recovery against Guarantor on Count for, see Guaranty, 70.

MONEY ORDER.

Embezzlement of Money Order Funds, see Criminal Law, 51.
Limitation of Time to Prosecute for Embezzlement of, see Limitation of Actions, 556, 557.
Denial of Privilege as to, to Fraudulent Schemes, see Postoffice, 60.

MONEY PAID.

See Assumpsit, II.

MONEY RECEIVED.

In General, see Assumpsit, II. b.
Right of Owner as against Money Received by United States, in Fraud, see United States, 369-371.

MONITION.

In Admiralty, see Admiralty, 327, 372, 430, 436, 473.
Enforcement of Stockholder's Liability by, see Constitutional Law, 1560.

MONOPOLY.

- I. In General; What Constitutes, 1-2.*
II. Combinations in Restraint of Trade, Commerce, or Competition, 3-44.
a. In General, 3-18.
b. Manufacturers of, or Dealers in, Various Products, 19-30.
c. Of Railroad Companies or Carriers, 31-44.

In Intellectual Productions, see Copyright.
In Use of Streets, see Highways, 21.
Granted by Patent, see Patents, 23, 24.
In Use of Trademark, see Trademark.
Federal Question as to, see Appeal and Error, 2148.
Equal Protection of Laws as to, see Constitutional Law, 260, 358.

Impairment of Contract Obligations by Abolishing Monopoly Feature of Corporations, see Constitutional Law, 1329, 1332.

Effect of Provision against Granting Corporate Powers and Privileges, see Corporations, 172.

Right to Revoke Exclusive Features of Franchise, see Corporations, 685.

Counsel Fees in Action against, see Costs, 105.

Liability to Treble Damages for Unlawful Combination, see Damages, 355.

Validity of Joint Bids at Judicial Sales, see Judicial Sale, 16, 17.

Of Telegraph Company in Use of Railroad Right of Way, see Telegraphs, 10, 11.

I. In General; What Constitutes.

Creation of, by Mere Grant of Power by State, see Franchise, 17.

Exclusive Privilege to Furnish Municipality with Water, see Waters, 179-183.

1. A monopoly is an exclusive right, granted to a few, of something which was before of common right. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

9: 773

Cited in Bartholomew v. Austin, 29 C. C. A. 573, 52 U. S. App. 512, 85 Fed. 364—*Memphis v. Memphis Water Co.* 5 Helsk. 529—*Leeper v. State*, 103 Tenn. 514, 48 L.R.A. 170, 53 S. W. 962.

2. A monopoly is an institution or allowance by the King, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade. *United States v. E. C. Knight Co.* 156 U. S. 1, 15 Sup. Ct. Rep. 249, 39: 325
Cited in Wright v. State, 88 Md. 443, 41 Atl. 795.

Editorial notes.

Monopolies. 33: 67; 41: 1008
[Giving monopoly of business. 53 L.R. A. 763.]

II. Combinations in Restraint of Trade, Commerce, or Competition.**a. In General.**

Availability of Unlawfulness as Defense, see Action or Suit, 41.

Constitutionality of Prohibition Against, see Constitutional Law, 494a.

Anti-trust Legislation as Infringement of Freedom of Contract, see Constitutional Law, 598-600.

Due Process in Forfeiting License of Foreign Corporation for Monopolistic Agreement, see Constitutional Law, 512.

Due Process in Prohibiting Combinations of Insurance Companies, see Constitutional Law, 614.

Police Power to Prohibit, see Constitutional Law, 895.

Contracts Between Two Persons in Restraint of Trade, see Contracts, IV. e.

Materiality of Evidence in Action to Enjoin Conspiracy to Suppress Competition, see Evidence, 2252.

Creation of, by State Regulation of Pilots, see Pilots, 10.

Multifariousness of Bill Charging Unlawful Combination, see Pleading, 286.

Sufficiency of Allegations as to, see Pleading, 581, 583.

Right of State to Maintain Suit under Federal Anti-trust Law, see States, 230.

Partial Invalidity of Statute as to, see Statutes, 84.

Retrospective Statute as to, see Statutes, 575.

Privilege of Witnesses in Investigation Before Grand Jury of Violation of Anti-trust Act, see Witnesses, 199-201.

See also Contracts, 494, 497.

3. It was never intended that the power of Congress to regulate commerce should be exercised so as to interfere with private contracts not designed to create impediments to commercial intercourse among the states. *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 584, 22: 173

Cited in Keokuk v. Keokuk Northern Line Packet Co. 45 Iowa, 208—*Norfolk & W. R. Co. v. Com.* 93 Va. 757, 34 L.R.A. 108, 57 Am. St. Rep. 827, 24 S. E. 837.

4. All combinations in restraint of trade or commerce are prohibited by the act of Congress of July 2, 1890, whether they are in the form of trusts or in any other form whatever. *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41: 1007

Cited in Lottery Case (Champion v. Ames) 188 U. S. 359, 47 L. ed. 502, 23 Sup. Ct. Rep. 321—*United States v. Hopkins*, 82 Fed. 537—*United States v. Northern Securities Co.* 120 Fed. 725—*Phillips v. Tola Portland Cement Co.* 61 C. C. A. 21, 125 Fed. 595—*Whitwell v. Continental Tobacco Co.* 64 L. R.A. 694, 60 C. C. A. 204, 125 Fed. 458—*Booth v. Davis*, 127 Fed. 877—*Harding v. American Glucose Co.* 182 Ill. 604, 64 L. R. A. 759, 74 Am. St. Rep. 189, 55 N. E. 577—*Bancroft v. Union Embossing Co.* 72 N. H. 409, 64 L.R.A. 302, 57 Atl. 97—*John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* 175 N. Y. 36, 62 L.R.A. 647, 96 Am. St. Rep. 578, 67 N. E. 136—*Monongahela River Consol. Coal & Coke Co. v. Jutte*, 210 Pa. 308, 105 Am. St. Rep. 812, 59 Atl. 1088—*Slaughter v. Thacker Coal & Coke Co.* 55 W. Va. 646, 65 L.R.A. 345, 104 Am. St. Rep. 1013, 47 S. E. 247.

5. Complete monopoly is not essential to vitiate a contract or combination, if it really tends to that end, and to suppress free competition. *United States v. E. C. Knight Co.* 156 U. S. 1, 15 Sup. Ct. Rep. 249.

39: 325
Cited in United States v. Addyston Pipe & Steel

Co. 46 L.R.A. 137, 29 C. C. A. 162, 54 U. S. App. 723, 85 Fed. 293—*Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 269, 115 Fed. 623—*W. W. Montague & Co. v. Lowry*, 63 L.R.A. 60, 52 C. C. A. 624, 115 Fed. 30—*Chicago, W. & V. Coal Co. v. People*, 114 Ill. App. 114—*Chicago, W. & V. Coal Co. v. People*, 214 Ill. 452, 73 N. E. 770—*State v. Smiley*, 65 Kan. 262, 67 L.R.A. 912, 69 Pac. 199—*Clark v. Needham*, 125 Mich. 88, 51 L.R.A. 787, 84 Am. St. Rep. 559, 83 N. W. 1027—*State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 44, 45 L.R.A. 376, 52 S. W. 595—*State ex rel. Crow v. Armour Packing Co.* 173 Mo. 391, 61 L.R.A. 474, 96 Am. St. Rep. 515, 73 S. W. 645—*Ferd Helm Brewing Co. v. Belinder*, 97 Mo. App. 69, 71 S. W. 691.

6. A combination may illegally restrain trade by preventing competition for contracts and enhancing prices, although it does not prevent the letting of any particular contract. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. Rep. 96, 44: 136

Cited in Union Sewer-Pipe Co. v. Connelly, 99 Fed. 354—*Atlanta v. Chattanooga Foundry & Pipe Co.* 101 Fed. 901—*Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 268, 115 Fed. 622—*Edison Phonograph Co. v. Pike*, 116 Fed. 866—*Phillips v. Tola Portland Cement Co.* 61 C. C. A. 21, 125 Fed. 595—*Camors-McConnell Co. v. McConnell*, 140 Fed. 415—*Brown v. Jacobs' Pharmacy Co.* 115 Ga. 437, 57 L.R.A. 552, 90 Am. St. Rep. 126, 41 S. E. 553—*Chicago, W. & V. Coal Co. v. People*, 114 Ill. App. 114—*Ferd Helm Brewing Co. v. Belinder*, 97 Mo. App. 77, 71 S. W. 691—*John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* 175 N. Y. 36, 62 L.R.A. 647, 96 Am. St. Rep. 578, 67 N. E. 136.

7. The act of Congress of July 2, 1890, to protect trade and commerce from unlawful restraints and monopolies, was intended to prevent combinations, contracts and conspiracies to monopolize or restrain intrastate or international trade and commerce. *United States v. E. C. Knight Co.* 156 U. S. 1, 15 Sup. Ct. Rep. 249, 39: 325

Cited in United States v. Trans-Missouri Freight Assn. 166 U. S. 313, 41 L. ed. 1018, 17 Sup. Ct. Rep. 540—*Hopkins v. United States*, 171 U. S. 594, 43 L. ed. 297, 10 Sup. Ct. Rep. 40—*Addyston Pipe & Steel Co. v. United States*, 175 U. S. 235, 44 L. ed. 145, 20 Sup. Ct. Rep. 96—*Capital City Dairy Co. v. Ohio*, 183 U. S. 245, 46 L. ed. 175, 22 Sup. Ct. Rep. 120—*E. Bement & Sons v. National Harrow Co.* 186 U. S. 92, 46 L. ed. 1069, 22 Sup. Ct. Rep. 747—*United States v. Debs*, 5 Inters. Com. Rep. 208, 64 Fed. 752—*Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 19, 35 U. S. App. 16, 66 Fed. 642—*Merz Capsule Co. v. United States Capsule Co.* 67 Fed. 417—*Lowenstein v. Evans*, 69 Fed. 910—*United States v. Addyston Pipe & Steel Co.* 78 Fed. 721—*United States v. Hopkins*, 82 Fed. 537—*United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 137, 29 C. C. A. 168, 54 U. S. App. 723, 85 Fed. 299—*Gibbs v. McNeeley*, 102 Fed. 597—*Gibbs v. McNeeley*, 107 Fed. 211—*W. W. Montague & Co. v. Lowry*, 63 L.R.A. 60, 52 C. C. A. 624, 115 Fed. 30—*Gibbs v. McNeeley*, 60 L.R.A. 156, 55 C. C. A. 74, 118 Fed. 124—*United States v. Northern Securities Co.* 120 Fed. 728—*Booth v. Davis*, 127 Fed. 877—*Robinson v. Suburban*

Brick Co. 62 C. C. A. 487, 127 Fed. 807—
Davis v. A. Booth & Co. 65 C. C. A. 274, 131
Fed. 36—Ellis v. Inman, P. & Co. 65 C.
C. A. 493, 131 Fed. 187—Getz Bros. & Co.
v. Federal Salt Co. 147 Cal. 119, 109 Am.
St. Rep. 114, 81 Pac. 416—Brown v. Ja-
cob's Pharmacy Co. 115 Ga. 444, 57 L.R.A.
555, 90 Am. St. Rep. 126, 41 S. E. 553—
State v. American Sugar Ref. Co. 108 La.
640, 32 So. 965—Walsh v. Dwight, 40 App.
Div. 518, 58 N. Y. Supp. 91—People v.
Niagara Fruit Co. 75 App. Div. 19, 77 N.
Y. Supp. 805—Slaughter v. Thacker Coal &
Coke Co. 55 W. Va. 647, 65 L.R.A. 345, 104
Am. St. Rep. 1013, 47 S. E. 247.

8. Contracts with telegraph companies by
which the Chicago board of trade limits the
communication of quotations of prices on
sales of grain and provisions for future de-
livery, collected by it, which it might have
refrained from communicating to anyone, do
not effect a monopoly or amount to an at-
tempt at monopoly, and are not contracts
in restraint of trade, either under the act
of July 2, 1890 (26 Stat. at L. 209, chap.
647, U. S. Comp. Stat. 1901, p. 3200), or at
common law. Board of Trade v. Christie
Grain & Stock Co. 198 U. S. 236, 25 Sup.
Ct. Rep. 637, 49: 1031
Cited in Western U. Teleg. Co. v. State, 165
Ind. 511, 3 L.R.A.(N.S.) 162, 78 N. E.
100.

Editorial notes.

Conspiracies against trade. 33: 67
[Illegal trusts under modern anti-trust
laws. 64 L.R.A. 689.

Law as to picketing. 4 L.R.A.(N.S.)
302.

Legality, under modern anti-trust acts, of
combinations or agreements which restrict
the class of persons to whom commodities
shall be sold, or from whom they shall be
bought. 5 L.R.A.(N.S.) 136.

Lawfulness of strike or of threat to cause
strike, when there is no trade dispute be-
tween the strikers and their own employ-
ers. 6 L.R.A.(N.S.) 1067.

Combination of dealers as giving right of
action, where no statutory provision there-
for exists, to merchant who cannot obtain
goods because of such combination. 7 L.R.
A.(N.S.) 976.

Contracts in partial restraint of trade, as
affected by modern anti-trust acts. 9 L.R.
A.(N.S.) 446.

Relation of contract or combination to
interstate commerce which will bring it
within Federal anti-trust act. 10 L.R.A.(N.
S.) 268.

Agreements collateral to contracts form-
ing illegal combinations, and the enforce-
ment thereof by members of such combina-
tions. 11 L.R.A.(N.S.) 368.

Right of labor union to forbid its mem-
bers to handle one's product. 12 L.R.A.(N.
S.) 642.]

Construction of words in statutes.

9. The term "contract in restraint of
trade," as used in the act of Congress of
July 2, 1890, does not refer only to con-
tracts which were invalid at common law,
but includes every contract in restraint of

trade, even if the restraint is reasonable
and valid. United States v. Trans-Missouri
Freight Asso. 166 U. S. 290, 17 Sup. Ct.
Rep. 540, 41: 1007

Cited in United States v. Joint Traffic Asso.
171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct.
Rep. 25—E. Bement & Sons v. National Har-
row Co. 186 U. S. 92, 46 L. ed. 1069, 22
Sup. Ct. Rep. 747—United States v. Addys-
ton Pipe & Steel Co. 85 Fed. 278—Gulf, C.
& S. F. R. Co. v. Miami S. S. Co. 30 C. C.
A. 156, 52 U. S. App. 732, 86 Fed. 421—
The Charles E. Wiswall, 42 L.R.A. 86, 30
C. C. A. 341, 57 U. S. App. 179, 86 Fed.
673—Interstate Commerce Commission v.
Louisville & N. R. Co. 102 Fed. 710—United
States ex rel. Griggs v. Chesapeake & O.
Fuel Co. 105 Fed. 105—Fisheries Co. v. Len-
nen, 116 Fed. 219—United States v. Swift,
122 Fed. 534—Fisheries Co. v. Lennen, 65
C. C. A. 80, 130 Fed. 534—Ellis v. Inman,
65 C. C. A. 494, 131 Fed. 188—Keene v.
Wyatt, 160 Mo. 16, 63 S. W. 116—Stubbs
v. Mulholland, 168 Mo. 73, 67 S. W. 650—
Brett v. Ebel, 29 App. Div. 259, 51 N. Y.
Supp. 573—Re Davies, 168 N. Y. 101, 56
L.R.A. 860, 61 N. E. 118—Lufkin Rule Co.
v. Fringell, 57 Ohio St. 608, 41 L.R.A. 189,
63 Am. St. Rep. 736, 49 N. E. 1030—State
ex rel. Monnett v. Buckeye Pipe Line Co. 61
Ohio St. 548, 56 N. E. 464.

10. The words "unlawful restraints and
monopolies," in the title of the act of Con-
gress of July 2, 1890, do not show that the
purpose of the act was to include only con-
tracts which were unlawful at common law,
and do not restrict the language of the body
of the act declaring what contracts shall be
unlawful. United States v. Trans-Missouri
Freight Asso. 166 U. S. 290, 17 Sup. Ct.
Rep. 540, 41: 1007

Cited in United States v. Coal Dealers Asso.
85 Fed. 261—Lufkin Rule Co. v. Fringell, 57
Ohio St. 608, 41 L.R.A. 189, 63 Am. St.
Rep. 736, 49 N. E. 1030.

11. The word "pool" means an association
of persons engaged in buying or selling a
certain commodity or commodities. Kil-
bourn v. Thompson, 103 U. S. 168, 26: 377
Cited in Mollynaux v. Wittenberg, 39 Neb.
557, 58 N. W. 205.

Combination of commission merchants.

12. A combination of commission mer-
chants at stockyards, by which they refuse
to do business with those who are not mem-
bers of their association, even if it is illegal,
is not subject to the act of Congress of July
2, 1890, to protect trade and commerce,
since their business is not interstate com-
merce. Hopkins v. United States, 171 U. S.
578, 19 Sup. Ct. Rep. 40, 43: 290
Distinguished in W. W. Montague & Co. v. Low-
ry, 63 L.R.A. 61, 52 C. C. A. 624, 115 Fed.
30.

Cited in Hopkins v. United States, 171 U. S.
612, 43 L. ed. 300, 19 Sup. Ct. Rep. 40—
United States v. Joint Traffic Asso. 171 U. S.
568, 43 L. ed. 287, 19 Sup. Ct. Rep. 25—Ad-
dyston Pipe & Steel Co. v. United States, 175
U. S. 243, 44 L. ed. 148, 20 Sup. Ct. Rep.
96—United States v. Northern Securities Co.
120 Fed. 728—Wabash R. Co. v. Hannahan,
121 Fed. 567—Minnesota v. Northern Se-
curities Co. 123 Fed. 700—Whitwell v. Con-
tinental Tobacco Co. 64 L.R.A. 695, 60 C.
C. A. 294, 125 Fed. 458—Phillips v. Iola

Portland Cement Co. 61 C. C. A. 20, 125 Fed. 594—Barber Asphalt Paving Co. v. Field, 188 Mo. 206, 86 S. W. 860—Ferd Helm Brewing Co. v. Belinder, 97 Mo. App. 76, 71 S. W. 691.

13. A rule of a live-stock exchange, that its members shall not recognize any yard trader who is not also a member of the exchange, is not in restraint of, or an attempt to monopolize, trade, where the exchange does not itself do any business, and there is nothing to prevent all yard traders from being members of the exchange, and no one is hindered from access to the yards or having all their facilities, except that of selling to members of the exchange. *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. Rep. 50, 43: 300

Added in Addyston Pipe & Steel Co. v. United States, 175 U. S. 243, 44 L. ed. 148, 20 Sup. Ct. Rep. 96—*Lowry v. Tile, Mantel & Grate Asso.* 98 Fed. 824—*W. W. Montague & Co. v. Lowry*, 68 L.R.A. 61, 52 C. C. A. 624, 115 Fed. 30—*United States v. Northern Securities Co.* 120 Fed. 728—*Minnesota v. Northern Securities Co.* 123 Fed. 700—*Phillips v. Iola Portland Cement Co.* 61 C. C. A. 21, 125 Fed. 595—*Whitwell v. Continental Tobacco Co.* 64 L.R.A. 695, 80 C. C. A. 294, 125 Fed. 458—*Robinson v. Suburban Brick Co.* 62 C. C. A. 487, 127 Fed. 807—*Ellis v. Inman*, 65 C. C. A. 491, 131 Fed. 185—*Ferd Helm Brewing Co. v. Belinder*, 97 Mo. App. 76, 71 S. W. 691—*Bancroft v. Union Embossing Co.* 72 N. H. 410, 64 L.R.A. 302, 57 Atl. 97—*John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 30 Misc. 679, 64 N. Y. Supp. 276—*Reynolds v. Plumbers' Material Protective Asso.* 30 Misc. 717, 63 N. Y. Supp. 303—*John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 54 App. Div. 227, 66 N. Y. Supp. 615—*Straus v. American Publishers' Asso.* 177 N. Y. 489, 64 L.R.A. 716, 101 Am. St. Rep. 819, 69 N. E. 1107.

Requiring particular kind of paving.

14. The specification by a municipal council, in its resolutions and ordinances for street improvements, that Trinidad lake asphalt shall be the material used, does not constitute such a direct interference with interstate commerce as to be repugnant either to the commerce clause of the Federal Constitution or to the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), because this particular kind of asphalt is a product of a foreign country, and there are deposits in several of the United States from which suitable asphalt can be had. *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 24 Sup. Ct. Rep. 784, 48: 1142
Added in Field v. Barber Asphalt Paving Co. 203 U. S. 585, 51 L. ed. 329, 27 Sup. Ct. Rep. 782—*Helmbuecher v. Goff*, 119 Ill. App. 380—*Barber Asphalt Paving Co. v. Field*, 188 Mo. 201, 86 S. W. 860.

Action for threefold damages.

Limitation of Action, see Limitation of Actions, 269, 270.

Right to Set Off Claim for Treble Damages, see Set-Off and Counterclaim, 62.

15. The action for threefold damages for

injury to "business or property" authorized by the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), § 7, in cases of violations of that act, may be maintained by a Georgia municipal corporation against the foreign corporate members of a combination forbidden by that act, where the municipality was led, by reason of the illegal combination, to purchase from an Alabama corporation at an excessive price the iron pipe needed for its waterworks system. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 27 Sup. Ct. Rep. 65, 51: 241

— Editorial note.

[Combination of dealers as giving right of action for damages, under Federal anti-trust law, to merchants thereby restricted in, or prevented from, obtaining goods. 7 L.R.A. (N.S.) 984.]

Right to recover on monopolistic contract.

16. The supplying of illuminating gas is a business of a public nature, to meet a public necessity; and where such business cannot be restrained without prejudice to the public interest, a contract between two gas companies, of the same city, for the abandonment by one of the companies of the discharge of its duties to the public, and for the control of the price of gas to consumers, however partial, will not be enforced or sustained, because in contravention of public policy. *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 9 Sup. Ct. Rep. 553, 32: 979

Added in Fowle v. Park, 131 U. S. 96, 33 L. ed. 74, 9 Sup. Ct. Rep. 658—*United States v. Trans-Missouri Freight Asso.* 166 U. S. 333, 41 L. ed. 1025, 17 Sup. Ct. Rep. 540—*Smythe v. Henry*, 41 Fed. 709—*Oliver v. Gilmore*, 52 Fed. 585—*United States v. Trans-Missouri Freight Asso.* 53 Fed. 449—*United States v. Trans-Missouri Freight Asso.* 24 L.R.A. 83, 4 Inters. Com. Rep. 453, 7 C. C. A. 23, 19 U. S. App. 36, 58 Fed. 67—*Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 4 Inters. Com. Rep. 581, 9 C. C. A. 664, 27 U. S. App. 1, 61 Fed. 997—*Fox Solid Pressed Steel Co. v. Schoen*, 77 Fed. 31—*C. F. Simmons Medicine Co. v. Simmons*, 81 Fed. 165—*Caesar v. Capell*, 83 Fed. 417—*United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 136, 29 C. C. A. 160, 54 U. S. App. 723, 85 Fed. 291—*Metropolitan Trust Co. v. Columbus, S. & H. R. Co.* 95 Fed. 22—*Hanover Nat. Bank v. First Nat. Bank*, 48 C. C. A. 496, 109 Fed. 435—*Love v. Stidham*, 18 App. D. C. 317, 53 L.R.A. 401—*People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 293, 8 L.R.A. 505, 17 Am. St. Rep. 319, 22 N. E. 798—*Lanzit v. J. W. Sefton Mfg. Co.* 83 Ill. App. 179—*Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 362, 9 L.R.A. 761, 22 Am. St. Rep. 387, 26 N. E. 159—*Portland Natural Gas & Oil Co. v. State*, 135 Ind. 56, 21 L.R.A. 640, 34 N. E. 818—*Coy v. Indianapolis Gas Co.* 146 Ind. 661, 36 L.R.A. 536, 46 N. E. 17—*State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 488, 53 L.R.A. 415, 74 Am. St. Rep. 314, 53 N. E. 1089—*Nave v. Wilson*, 12 Ind. App. 43, 38 N. E. 876—*Texas & P. R. Co. v. Southern P. R. Co.* 41 La. Ann. 981, 17 Am. St. Rep. 445, 6 So. 888—*Edison United Mfg. Co. v. Farmington Electric Light &*

P. Co. 82 Me. 471, 19 Atl. 859—Harvey v. Merrill, 150 Mass. 11, 5 L.R.A. 206, 15 Am. St. Rep. 159, 22 N. E. 49—Brightman v. Bates, 175 Mass. 109, 55 N. E. 809—Mal-linckrodt Chemical Works v. Nennlich, 83 Mo. App. 27—Wittenberg v. Mollyneux, 60 Neb. 587, 83 N. W. 842—Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 515, 46 L.R.A. 260, 78 Am. St. Rep. 612, 43 Atl. 723—People v. North River Sugar Ref. Co. 54 Hun, 382, 5 L.R.A. 390, 7 N. Y. Supp. 406—Bath Gaslight Co. v. Claffy, 151 N. Y. 42, 36 L.R.A. 670, 45 N. E. 890—Cowan v. Fairbrother, 118 N. C. 412, 32 L.R.A. 835, 54 Am. St. Rep. 733, 24 S. E. 212—Fox Solid Pressed Steel Co. v. Schoen, 27 Pittsb. L. J. N. S. 200—Queen Ins. Co. v. State, 86 Tex. 266, 22 L.R.A. 492, 24 S. W. 397—Commercial Electric Light & P. Co. v. Tacoma, 17 Wash. 671, 50 Pac. 592—Richards v. American Desk & Seating Co. 87 Wis. 513, 58 N. W. 787.

17. The illegality, at common law, of a combination formed by corporations and persons in restraint of trade, does not preclude it from recovering the purchase price of goods sold in the course of business. Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46: 679

Cited in National Bank & L. Co. v. Petrie, 189 U. S. 425, 47 L. ed. 880, 23 Sup. Ct. Rep. 512—National Cotton Oil Co. v. Texas, 197 U. S. 132, 49 L. ed. 695, 25 Sup. Ct. Rep. 379—Gilbert v. American Surety Co. 61 L.R.A. 257, 57 C. C. A. 623, 121 Fed. 503—Metcalf v. American School Furniture Co. 122 Fed. 121—Atlanta v. Chattanooga Foundry & Pipeworks, 64 L.R.A. 730, 61 C. C. A. 392, 127 Fed. 28—Pennsylvania Co. v. Bay, 138 Fed. 207—Hadley Dean Plate Glass Co. v. Highland Glass Co. 74 C. C. A. 464, 143 Fed. 244—Sellers v. Hayes, 163 Ind. 436, 72 N. E. 119—State v. Hammond Packing Co. 110 La. 187, 98 Am. St. Rep. 459, 34 So. 368—Huguenot Mills v. Jempson, 68 S. C. 366, 102 Am. St. Rep. 673, 47 S. E. 637—Wolf v. Galbraith, 35 Tex. Civ. App. 506, 80 S. W. 648.

18. A violation of the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by the formation of a combination in restraint of trade, by which a penalty is incurred under the statute, does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods. Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46: 679

— Editorial notes.

[Agreements collateral to contracts forming illegal combinations and the enforcement thereof by members of such illegal combinations. 11 L.R.A.(N.S.) 368.

Validity of sale to promote. 12 L.R.A.(N.S.) 600.]

b. Manufacturers of, or Dealers in, Various Products.

See also *supra*, 16.

19. A combination to restrain competition in proposals for contracts for the sale

of certain articles which are to be delivered in the state in which some of the parties to the combination reside and carry on business is not, so far as those members are concerned, in violation of the anti-trust law of Congress, although the contract may be awarded to some party outside the state as the lowest bidder. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. Rep. 96, 44: 136

Cited in Field v. Barber Asphalt Paving Co. 194 U. S. 624, 48 L. ed. 1154, 24 Sup. Ct. Rep. 784—Gibbs v. McNeeley, 107 Fed. 211—Atlanta v. Chattanooga Foundry & Pipe-works, 64 L.R.A. 726, 61 C. C. A. 390, 127 Fed. 26—Robinson v. Suburban Brick Co. 62 C. C. A. 487, 127 Fed. 807—Booth v. Davis, 127 Fed. 879—People ex rel. Akin v. Butler Street Foundry & Iron Co. 201 Ill. 251, 66 N. E. 349—State v. Smiley, 65 Kan. 358, 67 L.R.A. 911, 69 Pac. 199—Martell v. White, 185 Mass. 263, 64 L.R.A. 264, 100 Am. St. Rep. 341, 69 N. E. 1085—Com. v. Strauss, 191 Mass. 555, 78 N. E. 136—Bancroft v. Union Embossing Co. 72 N. H. 410, 64 L.R.A. 302, 57 Atl. 97.

Patented articles.

20. Conditions imposed by the patentee in a license of the right to manufacture or sell the patented article, which keep up the monopoly or fix prices, do not violate the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints or monopolies. E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 22 Sup. Ct. Rep. 747, 46: 1058

21. Reasonable and legal conditions imposed by the patentee in a license of the right to manufacture and sell the patented article, restricting the terms upon which the article manufactured under such license may be used, and the price to be demanded therefor, do not constitute such a restraint on commerce as is forbidden by the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies. E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 22 Sup. Ct. Rep. 747, 46: 1058

Cited in Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 60, 123 Fed. 426—Brodrick Copygraph Co. v. Roper, 124 Fed. 1019—A. B. Dick Co. v. Roper, 126 Fed. 967—United States Consol. Seeded Raisin Co. v. Griffin & S. Co. 61 C. C. A. 338, 126 Fed. 368—National Phonograph Co. v. Schlegel, 64 C. C. A. 596, 128 Fed. 735—Rupp & W. Co. v. Elliott, 65 C. C. A. 545, 131 Fed. 731—Cortelyou v. Charles Eneu Johnson & Co. 138 Fed. 114—Bobbs-Merrill v. Straus, 139 Fed. 179—Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 148 Fed. 23—J. H. Clark Co. v. Rice, 127 Wis. 460, 106 N. W. 231.

22. The agreement of the licensee of a patent for improvements relating to float spring tooth harrows, not to manufacture or sell any other such harrows than those which it had made under its patents before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed

to manufacture and sell by such licensor, is not void as an unlawful restraint on trade or commerce forbidden by the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), since the plain purpose of this provision is to prevent the licensee from infringing on the rights of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 22 Sup. Ct. Rep. 747, 46: 1058

23. An agreement by the licensor of a patent for improvements relating to harrows, not to license any other person than the licensee to manufacture or sell any harrow of the peculiar style and construction then used or sold by such licensee, does not violate the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 22 Sup. Ct. Rep. 747, 46: 1058

Cited in Board of Trade v. Christie Grain & Stock Co. 198 U. S. 252, 49 L. ed. 1040, 25 Sup. Ct. Rep. 637—*Cincinnati, P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 185, 50 L. ed. 433, 26 Sup. Ct. Rep. 208—*Hadley Dean Plate Glass Co. v. Highland Glass Co.* 74 C. C. A. 464, 143 Fed. 244—*Straus v. American Publishers' Assn.* 177 N. Y. 476, 64 L.R. A. 706, 101 Am. St. Rep. 819, 69 N. E. 1107.

— Editorial note.

Restraint of trade in patented articles.

46: 1058

Miscellaneous articles.

24. Contracts and acts creating a monopoly in the manufacture of sugar are not within the prohibition of the act of Congress of July 2, 1890, to protect trade and commerce against monopolies, although trade and commerce may be indirectly affected by such monopoly in the manufacture. *United States v. E. C. Knight Co.* 156 U. S. 1, 15 Sup. Ct. Rep. 249, 39: 325

25. An agreement or combination between corporations engaged in the manufacture, sale, and transportation of iron pipe, under which they enter into public bidding for contracts, not in truth as competitors, but under an arrangement which eliminates all competition between them for the contract, and permits one of their number to make his own bid, while the others are required to bid over him, is in violation of the anti-trust act of Congress, passed July 2, 1890, so far as it applies to sales for delivery beyond the state in which the sale is made. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. Rep. 96, 44: 136

Cited in E. Bement & Sons v. National Harrow Co. 186 U. S. 92, 46 L. ed. 1069, 22 Sup. Ct. Rep. 747—*W. W. Montague & Co. v. Lowry*, 193 U. S. 47, 48 L. ed. 612, 24 Sup. Ct. Rep. 307—*Northern Securities Co. v. United States*, 193 U. S. 329, 48 L. ed. 697, 24 Sup. Ct. Rep. 436—*Swift & Co. v. United States*, 196 U. S. 400, 49 L. ed. 526, 25 Sup. Ct. Rep.

276—*Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 395, 51 L. ed. 244, 27 Sup. Ct. Rep. 65—*Lowry v. Tile, Mantel & Grate Asso.* 106 Fed. 45—*W. W. Montague & Co. v. Lowry*, 63 L.R.A. 80, 52 C. C. A. 623, 115 Fed. 29—*Gibbs v. McNeely*, 60 L.R.A. 155, 55 C. C. A. 73, 118 Fed. 123—*Minnesota v. Northern Securities Co.* 123 Fed. 700—*Whitwell v. Continental Tobacco Co.* 64 L.R.A. 694, 60 C. C. A. 294, 125 Fed. 458—*Atlanta v. Chattanooga Foundry & Pipeworks*, 64 L.R.A. 728, 61 C. C. A. 391, 127 Fed. 27—*Bobbs-Merrill Co. v. Straus*, 139 Fed. 179—*Hadley Dean Plate Glass Co. v. Highland Glass Co.* 74 C. C. A. 464, 143 Fed. 244—*Globe Elevator Co. v. Andrew*, 144 Fed. 882—*Leonard v. Abner-Drury Brewing Co.* 25 App. D. C. 174—*People ex rel. Treat v. Coler*, 166 N. Y. 151, 59 N. E. 776—*Monongahela River Consol. Coal & Coke v. Jutte*, 210 Pa. 295, 105 Am. St. Rep. 812, 59 Atlt. 1088.

26. An association of wholesale dealers in tiles, mantels, and grates in San Francisco and vicinity, and nonresident manufacturers of tiles and fire-place fixtures, in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tile to nonmembers for less than list prices, which are more than 50 per cent higher than prices to members, while the manufacturers agree not to sell their products or wares to nonmembers at any price, under penalty of forfeiture of membership, is an agreement or combination in restraint of trade within the meaning of the anti-trust act of July 2, 1890 (26 Stat. at L. 210, chap. 647, U. S. Comp. Stat. 1901, p. 3202). *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. Rep. 307, 48: 608

Cited in Northern Securities Co. v. United States, 193 U. S. 329, 48 L. ed. 697, 24 Sup. Ct. Rep. 436—*Swift & Co. v. United States*, 196 U. S. 397, 49 L. ed. 523, 25 Sup. Ct. Rep. 276—*Ellis v. Inman, P. & Co.* 65 C. C. A. 492, 131 Fed. 186—*Bobbs-Merrill Co. v. Straus*, 139 Fed. 193—*Hadley Dean Plate Glass Co. v. Highland Glass Co.* 74 C. C. A. 464, 143 Fed. 244—*Continental Wall Paper Co. v. Louis Voigt & Sons Co.* 78 C. C. A. 577, 148 Fed. 948—*Leonard v. Abner-Drury Brewing Co.* 25 App. D. C. 174.

27. A combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to restrict the competition of their respective agents when purchasing stock for them in the stock yards, is an interference with interstate commerce, forbidden by the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies, where such dealers and their slaughtering establishments are largely in different states from those of the stock yards, and the sellers of the cattle largely in different states from either. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. Rep. 276, 49: 518

Cited in National Cotton Oil Co. v. Texas, 197 U. S. 130, 49 L. ed. 694, 25 Sup. Ct. Rep. 379—*Carroll v. Greenwich Ins. Co.* 199 U. S. 409, 50 L. ed. 249, 26 Sup. Ct. Rep. 66—*The Eliza Lines*, 199 U. S. 129, 50 L. ed. 112, 26 Sup. Ct. Rep. 8—*Rearick v. Pennsylv.*

vanla, 203 U. S. 512, 51 L. ed 297, 27 Sup. Ct. Rep. 159—Globe Elevator Co. v. Andrew, 144 Fed. 882—United States v. Milwaukee Refrigerator Transit Co. 145 Fed. 1010—Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 148 Fed. 30—Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 476, 109 Am. St. Rep. 961, 102 N. W. 888.

28. Interstate commerce is unlawfully restrained, in violation of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by a combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to bid up prices for live stock for a few days at a time, in order to induce cattle men in other states to make large shipments to the stock yards, or by a combination for the same purpose to fix the selling price of fresh meat, and to that end to restrict shipments, when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, or by a combination in aid of such purpose to make uniform and improper charges for cartage for the delivery of meat sold to be shipped to dealers and consumers in the several states. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. Rep. 276, 49: 518

29. A combination to secure less than lawful freight rates, entered into by independent meat dealers with the intent to monopolize commerce in fresh meat among the several states, is forbidden by the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. Rep. 276, 49: 518

30. An agreement between rival gas companies to fix the price for gas, in violation of the Illinois anti-trust act of June 11, 1891 (Ill. Laws 1891, p. 206), does not, after they cease to act under it, defeat their right to invoke the due process of law clause of the Federal Constitution to prevent the enforcement of a municipal ordinance which, by establishing unremunerative rates, has the effect of taking private property for public use without just compensation. *Peoria Gas & Electric Co. v. Peoria*, 200 U. S. 48, 26 Sup. Ct. Rep. 214, 50: 365

— Editorial notes.

[Legality, under modern anti-trust acts, of combinations or agreements which restrict the class of persons to whom commodities shall be sold, or from whom they shall be bought. 5 L.R.A.(N.S.) 136.

Validity of contract giving one an exclusive right to handle goods in a given locality. 9 L.R.A.(N.S.) 501.

Power of state to make invalid a provision in a sale of goods for resale, forbidding the purchaser to handle goods of other dealers. 11 L.R.A.(N.S.) 968.

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31. An agreement of railroad companies which directly and effectually stifles competition is in restraint of trade under the act of Congress, notwithstanding the possibility that a restraint of trade might also follow unrestricted competition, which might destroy weaker roads and give the survivor power to raise rates. *United States v. Joint Traffic Assn.* 171 U. S. 505, 19 Sup. Ct. Rep. 25, 43: 259

Cited in East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 39 C. C. A. 422, 99 Fed. 61—*United States ex rel. Griggs v. Chesapeake & O. Fuel Co.* 105 Fed. 105—*Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 696—*Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 265, 115 Fed. 619—*United States v. Northern Securities Co.* 120 Fed. 725—*United States v. Swift*, 122 Fed. 534—*Minnesota v. Northern Securities Co.* 123 Fed. 699—*Whitwell v. Continental Tobacco Co.* 64 L.R.A. 695, 60 C. C. A. 294, 125 Fed. 458—*Phillips v. Iola Portland Cement Co.* 61 C. C. A. 21, 125 Fed. 595—*Bobbs-Merrill Co. v. Straus*, 139 Fed. 179—*Brown v. Jacobs Pharmacy Co.* 115 Ga. 443, 57 L.R.A. 554, 90 Am. St. Rep. 126, 41 S. E. 553—*State v. Smiley*, 65 Kan. 259, 67 L.R.A. 911, 69 Pac. 199—*National Lead Co. v. S. E. Grote Paint Store Co.* 80 Mo. App. 267—*Booth & Co. v. Selbold*, 37 Misc. 103, 74 N. Y. Supp. 776—*Bailey v. Master Plumbers' Assn.* 103 Tenn. 107, 46 L.R.A. 563, 52 S. W. 853.

32. A contract by which a railroad company agreed that an elevator company should, in consideration of the erection of an elevator, have the handling of all through grain brought by the railroad company to a specified point, and receive a specified price therefor, is not repugnant to the act of Congress of June 15, 1866, to facilitate commercial, postal, and military communication among the several states; or the act of July 25, 1866, authorizing the construction of certain bridges, and the establishing of them as post roads, enacted under the power to regulate interstate commerce; or to the public policy as established by such legislation. *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 584, 22: 173

Cited in Bowman v. Chicago & N. W. R. Co. 125 U. S. 484, 31 L. ed. 706, 1 Inters. Com. Rep. 829, 8 Sup. Ct. Rep. 698—*Illinois C. R. Co. v. Illinois*, 163 U. S. 154, 41 L. ed. 111, 16 Sup. Ct. Rep. 1096—*Addyston Pipe & Steel Co. v. United States*, 175 U. S. 227, 44 L. ed. 142, 20 Sup. Ct. Rep. 96—*Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R.A. 326, 2 Inters. Com. Rep. 388, 37 Fed. 629—*United States v. Addyston Pipe & Steel Co.* 78 Fed. 717—*Arkansas v. Kansas & T. Coal Co.* 96 Fed. 366—*Richmond v. Dubuque & S. C. R. Co.* 40 Iowa, 275—*Wiggins Ferry*

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33. An agreement that a company shall have the exclusive right for fifteen years to furnish drawing-room and sleeping cars for the use of a railroad company, and that the latter shall not, during that period, contract for cars of that kind with any other party, is not void as against public policy or as in restraint of trade. Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 11 Sup. Ct. Rep. 490, 35: 97
Cited in United States v. Trans-Missouri Freight Asso. 166 U. S. 374, 41 L. ed. 1039, 17 Sup. Ct. Rep. 540—Northern Securities Co. v. United States, 193 U. S. 353, 48 L. ed. 707, 24 Sup. Ct. Rep. 436—Re Greene, 52 Fed. 118—Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 6 C. C. A. 91, 13 U. S. App. 385, 56 Fed. 706—United States v. Trans-Missouri Freight Asso. 24 L.R.A. 82, 4 Inters. Com. Rep. 452, 7 C. C. A. 73, 19 U. S. App. 36, 58 Fed. 69—United States v. Addyston Pipe & Steel Co. 46 L.R.A. 133, 29 C. C. A. 156, 54 U. S. App. 723, 85 Fed. 287—Kates v. Atlanta Baggage & Cab Co. 107 Ga. 649, 46 L.R.A. 437, 34 S. E. 372—Ferris v. American Brewing Co. 155 Ind. 543, 52 L.R.A. 306, 58 N. E. 701—Wiggins Ferry Co. v. Chicago & A. R. Co. 128 Mo. 246, 27 S. W. 568—State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 457, 51 L.R.A. 166, 81 Am. St. Rep. 368, 60 S. W. 91—Hedding v. Gallagher, 72 N. H. 381, 64 L.R.A. 814, 57 Atl. 225.

34. An agreement that a steamer should not be used in the waters of a state for a fixed period, and thereby be employed in competition with steamers of the vendor, held to be legal. Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22: 315
Cited in Hale v. Finch, 104 U. S. 265, 26 L. ed. 733—Gibbs v. Consolidated Gas Co. 130 U. S. 409, 32 L. ed. 984, 9 Sup. Ct. Rep. 553—Fowle v. Park, 131 U. S. 97, 33 L. ed. 74, 9 Sup. Ct. Rep. 658—Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 89, 35 L. ed. 101, 11 Sup. Ct. Rep. 490—United States v. E. C. Knight Co. 156 U. S. 24, 39 L. ed. 333, 15 Sup. Ct. Rep. 249—United States v. Trans-Missouri Freight Asso. 166 U. S. 350, 41 L. ed. 1030, 17 Sup. Ct. Rep. 540—Carter v. Alling, 43 Fed. 214—Re Greene, 52 Fed. 118—Oliver v. Gilmore, 52 Fed. 567—United States v. Trans-Missouri Freight Asso. 53 Fed. 450—United States v. Trans-Missouri Freight Asso. 24 L.R.A. 84, 4 Inters. Com. Rep. 455, 7 C. C. A. 78, 19 U. S. App. 36, 58 Fed. 74—Duerber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co. 14 C. C. A. 21, 35 U. S. App. 16, 66 Fed. 643—American Strawboard Co. v. Haldeman Paper Co. 27 C. C. A. 639, 54 U. S. App. 416, 83 Fed. 624—Hitchcock v. Anthony, 28 C. C. A. 82, 54 U. S. App. 439, 83 Fed. 781—United States v. Addyston Pipe & Steel Co. 46 L.R.A. 130, 29 C. C. A. 151, 54 U. S. App. 723, 85 Fed. 282—Fisheries Co. v. Lennen,

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35. A purchaser of river craft cannot invoke the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to relieve him from his obligation to pay the purchase price, because of his covenant to maintain the present traffic rates, which is not declared by the contract to enter into the consideration of the sale,—especially where the rates referred to primarily, if not exclusively, relate to domestic, and not to interstate, business. Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 26 Sup. Ct. Rep. 208, 50: 428

36. The interference, if any, with interstate commerce, contemplated by a contract for the sale of certain river craft, which permits a suspension of payment of instalments of the purchase price in case of serious competition in the freight and passenger traffic over a route between two named Ohio ports on the Ohio river, and requires the vendors to withdraw from such competition for five years, is too insignificant to render the contract invalid under the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), as imposing a restraint on interstate commerce. Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 26 Sup. Ct. Rep. 208, 50: 428

Maintenance of rates.

Prohibition of, as Interference with Freedom of Contract, see Constitutional Law, 599a.

37. The right of a railroad company to charge reasonable rates does not include the right to enter into a combination with com-

peting roads to maintain rates. *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41: 1007
Cited in National Cotton Oil Co. v. Texas, 197 U. S. 129, 49 L. ed. 694, 25 Sup. Ct. Rep. 379—*Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 269, 115 Fed. 623—*Interstate Commerce Commission v. Southern P. Co.* 132 Fed. 838—*Rice v. Standard Oil Co.* 134 Fed. 468—*Brown v. Jacobs' Pharmacy Co.* 115 Ga. 443, 57 L.R.A. 554, 90 Am. St. Rep. 126, 41 S. E. 553—*Chicago, W. & V. Coal Co. v. People*, 114 Ill. App. 106—*State v. American Sugar Ref. Co.* 108 La. 642, 32 So. 965—*National Lead Co. v. S. E. Grote Paint Store Co.* 80 Mo. App. 267—*North Carolina Corp. Commission v. Atlantic Coast Line R. Co.* 137 N. C. 17, 49 S. E. 191—*Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 11, 44 S. W. 936.

38. An agreement between railroad companies "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local," is by its necessary effect an agreement to restrain trade or commerce within the meaning of the act of Congress of July 2, 1890, no matter what the intent was on the part of those who signed it. *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41: 1007
Distinguished in Scott v. Wiswall, 42 L.R.A. 86, 30 C. C. A. 341, 57 U. S. App. 179, 86 Fed. 673.

Cited in Northern Securities Co. v. United States, 193 U. S. 329, 48 L. ed. 697, 24 Sup. Ct. Rep. 436—*East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 39 C. C. A. 423, 99 Fed. 61—*Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 696—*Niagara F. Ins. Co. v. Cornell*, 110 Fed. 825—*State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 44, 45 L.R.A. 376, 52 S. W. 595—*State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 460, 51 L.R.A. 168, 81 Am. St. Rep. 368, 60 S. W. 91—*Ferd Helm Brewing Co. Belinder*, 97 Mo. App. 77, 71 S. W. 691—*Bailey v. Master Plumbers' Assn.* 103 Tenn. 107, 46 L.R.A. 563, 52 S. W. 853—*Post v. Southern R. Co.* 103 Tenn. 223, 55 L.R.A. 491, 52 S. W. 301—*State ex rel. Durner v. Hueglin*, 110 Wis. 253, 62 L.R.A. 742, 85 N. W. 1046.

39. A contract or combination between competing railroad companies, to establish and maintain interstate rates and fares for freight and passengers, even though the rates and fares are reasonable, may be made illegal by Congress in the exercise of its right to regulate commerce among the several states. *United States v. Joint Traffic Assn.* 171 U. S. 505, 19 Sup. Ct. Rep. 25, 43: 259

Cited in Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 297, 45 L. ed. 199, 21 Sup. Ct. Rep. 115—*E. Bement & Sons v. National Harrow Co.* 186 U. S. 92, 46 L. ed. 1069, 22 Sup. Ct. Rep. 747—*Lottery Case (Champion v. Ames)* 188 U. S. 359, 47 L. ed. 502, 23 Sup. Ct. Rep. 321—*Western U. Tele. Co. v. Pennsylvania R. Co.* 195 U. S. 578, 49 L. ed. 326, 25 Sup. Ct. Rep. 133—*Pennsylvania R. Co. v. United States*, 35 Ct. Cl. 594—*United States v. Atchison, T. & S. F. R. Co.* 142 Fed. 183—*Re Davies*, 168 N. Y. 101, 56 L.R.A. 860, 61 N. E. 118—*State ex rel. Monnett v. Buckeye Pipe Line Co.* 61 Ohio St. 548, 56 N. E. 464.

40. The right of a railroad company in a

joint traffic association to deviate from the rates prescribed, provided it acts on a resolution of its board of directors and serves a copy thereof on the managers of the association, who, upon its receipt, are required to "act promptly for the protection of the parties hereto," does not relieve the association from condemnation as an illegal restraint of competition, as the privilege of deviating from the rates would be exercised upon pain of war of competition against the whole association. *United States v. Joint Traffic Assn.* 171 U. S. 505, 19 Sup. Ct. Rep. 25, 43: 259
Cited in Northern Securities Co. v. United States, 193 U. S. 329, 48 L. ed. 697, 24 Sup. Ct. Rep. 436—*Post v. Southern R. Co.* 103 Tenn. 223, 55 L.R.A. 491, 52 S. W. 301.

41. A contract between competing railroads relating to traffic rates for the transportation of articles of commerce between the states, the direct effect of which is to produce a restraint of trade or commerce, is within the provision of the act of Congress of July 2, 1890, declaring that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is illegal. *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41: 1007
Cited in Northern Securities Co. v. United States, 193 U. S. 353, 48 L. ed. 707, 24 Sup. Ct. Rep. 436—*United States v. Hopkins*, 82 Fed. 540—*United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 140, 29 C. C. A. 147, 54 U. S. App. 723, 85 Fed. 278—*United States v. Northern Securities Co.* 120 Fed. 727—*Minnesota v. Northern Securities Co.* 123 Fed. 699—*Interstate Commerce Commission v. Southern R. Co.* 137 Fed. 609—*Tift v. Southern R. Co.* 138 Fed. 761—*Bailey v. Master Plumbers' Assn.* 103 Tenn. 107, 46 L.R.A. 563, 52 S. W. 853.

Purchase of competing lines.

Prohibition of, as Interference with Liberty of Contract, see Constitutional Law, 599.

42. A purchase of a railroad at a judicial sale is within a prohibition against the purchase by one railroad company of a parallel and competing line. *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. Rep. 714, 40: 849

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43. A combination by stockholders in two competing interstate railway companies to form a stockholding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, violates the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), which declares illegal every combination or conspiracy in

restraint of interstate commerce, and forbids attempts to monopolize such commerce or any part of it. *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. Rep. 436, 48: 679

Cited in Swift & Co. v. United States, 196 U. S. 400, 49 L. ed. 526, 25 Sup. Ct. Rep. 276—*National Cotton Oil Co. v. Texas*, 197 U. S. 130, 49 L. ed. 694, 25 Sup. Ct. Rep. 379—*Lochner v. New York*, 198 U. S. 75, 49 L. ed. 949, 25 Sup. Ct. Rep. 539—*Carroll v. Greenwich Ins. Co.* 199 U. S. 409, 50 L. ed. 249, 26 Sup. Ct. Rep. 66—*United States v. Northern Securities Co.* 128 Fed. 809—*Ellis v. Inman, P. & Co.* 65 C. C. A. 494, 181 Fed. 188—*Harriman v. Northern Securities Co.* 132 Fed. 465—*Rice v. Standard Oil Co.* 184 Fed. 465—*Tift v. Southern R. Co.* 138 Fed. 762—*Bobbs-Merrill Co. v. Straus*, 139 Fed. 193—*Camors-McConnell Co. v. McConnell*, 140 Fed. 414—*Hartman v. John D. Park & Sons Co.* 145 Fed. 374—*Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.* 148 Fed. 23—*Continental Wall Paper Co. v. Louis Voight & Sons Co.* 78 C. C. A. 574, 148 Fed. 946—*Tyner v. United States*, 23 App. D. C. 362—*Leonard v. Abner-Drury Brewing Co.* 25 App. D. C. 174—*Dunbar v. American Teleph. & Teleg. Co.* 224 Ill. 23, 79 N. E. 423—*Yazoo & M. Valley R. Co. v. Searles*, 85 Miss. 534, 68 L.R.A. 723, 37 So. 939—*Senior v. New York City R. Co.* 111 App. Div. 49, 97 N. Y. Supp. 645—*Riley v. Charleston Union Station Co.* 71 S. C. 491, 110 Am. St. Rep. 579, 51 S. E. 485.

44. Congress did not exceed its power under the commerce clause of the Federal Constitution in enacting the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), declaring illegal every combination or conspiracy in restraint of interstate commerce, and forbidding attempts to monopolize such commerce or any part of it, although such statute is construed to embrace a combination of stockholders of two competing interstate railway companies to form a stockholding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies. *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. Rep. 436, 48: 679

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1. Congress, as the supreme legislature of the territory of Utah, had full power and authority to direct the winding up of the affairs of the Church of Jesus Christ of Latter Day Saints as a defunct corporation, and to order its property to be applied to lawful religious and charitable uses conformable, as near as practicable, to those to which it was originally dedicated. *United States v. Church of Jesus Christ of L. D.* S. 150 U. S. 145, 14 Sup. Ct. Rep. 44, 37: 1033

2. By the resolution of Congress of October 25, 1893, the personal property and money now in the hands of the receiver of the Church of Jesus Christ of Latter Day Saints, not arising from the sale or rents of real estate since March 3, 1887, were restored to said church, to be applied, under the direction and control of the first presidency of said church, to the charitable uses and purposes thereof. *United States v. Church of Jesus Christ of L. D.* S. 150 U. S. 145, 14 Sup. Ct. Rep. 44, 37: 1033

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Agreement for Giving Purchase Money Mortgage, see Contracts, 331.

Rescission of Agreement to Receive Mortgage in Exchange for Other Securities, see Contracts, 639.

Rescission of Contract for Delivery of Mortgaged Property to Mortgagee, see Contracts, 670.

Charge upon all the Testator's Real Estate to Pay, see Contribution, 2.

As to Deeds, see Deeds.

Estoppel of Mortgagee, see Estoppel, 163, 167.

Estoppel to Obtain Deduction for Value of Property Confiscated as Mortgagee's, see Estoppel, 258.

Estoppel of Mortgagor or Mortgagee to Deny Title, see Estoppel, 339.

Parol Evidence to Vary, see Evidence, 1471.

Parol Evidence that Mortgage was Given as Collateral, see Evidence, 1554.

Sufficiency of Evidence to Impeach, see Evidence, 2379.

- Want of Covenant to Repay Purchase Price as Evidence Against Conditional Sale, see Evidence, 2505.
- Garnishment of Proceeds in Hands of Mortgage Trustees, see Garnishment, 8.
- Wife's Legal Mortgage on Husband's Property, see Husband and Wife, 27.
- When Interest on Begins to Run, see Interest, 114.
- Rate of Interest on, see Interest, 138, 139, 144.
- Bringing in Mortgagor by Interpleader, see Interpleader, 3.
- Insurable Interest of Mortgagee and Mortgagor, see Insurance, 67-71.
- On Insured Property, see Insurance, 228-230.
- Mortgagee's Right to Insurance Money, see Insurance, 638-647.
- Subrogation of Insurer to Rights of Mortgagee, see Insurance, 678.
- Conclusiveness on Trustee in, of Judgment Establishing Lien for Labor, see Judgment, 798.
- Conclusiveness of Decree as to Validity of, see Judgment, 1066.
- Tenant as Mortgagee in Possession, see Landlord and Tenant, 42.
- Laches as Bar to Relief, see Limitation of Actions, I. b, 2, f.
- Limitation of Action on, see Limitation of Actions, 309, 310, 345, 346, 505, 507, 663.
- Mortgage Creditors as Necessary Parties to Bill to Set Aside Sale of Insolvent's Property, see Parties, 175.
- Mortgagee as Necessary Party, see Parties, 201.
- Power of Corporation to Make and Formalities of Execution, see Corporations, VI. f.
- Power of Partner to Make, see Partnership, 69-71.
- Validity of Agreement Authorizing Mortgagor to Convey, see Powers, 2.
- Construction of Power to Mortgage, see Powers, 13-15.
- Execution of Power by, see Powers, 38.
- Registry of, see Real Property, 65, 66, 73, 84-86, 103, 107, 108, 112-114, 117-119, 124-126.
- Sufficiency of Record of Mortgage Covering Both Real and Personal Property, see Chattel Mortgage, 28.
- Agent's Liability to Principal for Failure to Record, see Bailment, 14.
- Obligations Assumed by Purchaser where Receiver has been Appointed, see Receivers, 58, 59.
- Compromise of, by Receiver, see Receivers, 200, 201.
- Reformation of, see Reformation of Instruments, 20.
- Right to Set Off Insurance against Liability on Mortgage, see Set-Off and Counterclaim, 57, 58.
- Of Vessel, see Shipping, III.
- As Conveyance, see Statutes, 315.
- Taxation of, see Taxes, 137.
- Double Taxation of Mortgaged Land, see Taxes, 46.
- Situs of, for the Purposes of Taxation, see Taxes, 323-327.
- Mortgagee as Trustee for Creditors of Mortgagors, see Trusts, 28.
- Usury in, see Usury, 44, 48, 101, 105, 112, 139.
- Charge of Mortgage Deed Upon Land Devised, see Wills, 249.
- Competency of Mortgagee as Witness, see Witnesses, 120.

I. Nature, Validity, and Effect.

a. In General.

- Determining Validity of, in Confiscation Proceeding, see Confiscation and Sequestration, 52.
- Validity of Mortgage Given to Pastor, see Contracts, 363.
- Validity of Mortgage by Insolvent Corporation, see Corporations, 722-727.
- Bar of Dower Rights by, see Dower, 11-13.
- Estoppel by, see Estoppel, II.
- Parol Evidence as to Date of Delivery, see Evidence, 1711.
- Weight of Evidence as to Undue Influence, see Evidence, 2309-2311.
- Validity of Mortgage as against Creditors of Mortgagor, see Generally, Fraudulent Conveyances, 51-60.
- Validity of Mortgage by Guardian, see Guardian and Ward, 30.
- Validity of Mortgage on Homestead, see Homestead, 10.
- Validity of Mortgage of Married Woman on Her Separate Estate, see Husband and Wife, 53-56.
- Discharge of Surety by Taking Mortgage from Principal as Collateral Security, see Principal and Surety, 45.
- Mortgage of Railroad Land Grant as Pay for Making "Disposal" of the Lands, see Public Lands, 268.
- Taking Mortgage as Waiver of Vendor's Lien, see Vendor and Purchaser, 211.
- See also *infra*, 208.

1. A mortgage is a lien; and, more, it is a transfer of the property itself as security for the debt. *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 7: 189
Cited in Alexander v. Mortg. Co. 47 Fed. 135
 —Colby v. Cato, 47 Ala. 253—*Everett v. Buchanan*, 2 Dak. 263, 8 N. W. 31—*Adams v. Holden*, 111 Iowa, 60, 82 N. W. 468—*Louisville Bkg. Co. v. Leonard*, 90 Ky. 111, 13 S. W. 521—*Chaffe v. Heyner*, 31 La. Ann. 612—*Mundy v. Monroe*, 1 Mich. 72—*Tannahill v. Tuttle*, 3 Mich. 113, 61 Am. Dec. 480—*Madigan v. Mead*, 31 Minn. 98, 18 N. W. 539—*Jefferson College v. Dickson*, *Freem. Ch. (Miss.)* 483—*Dunlap v. Burnett*, 5 Smedes & M. 710, 45 Am. Dec. 268—*Pickett v. Buckner*, 45 Miss. 244—*Bonner v. Minner*, 13 Mont. 287, 40 Am. St. Rep. 441, 34 Pac. 30—*White v. Cole*, 24 Wend. 129—*Rogers v. Traders Ins. Co.* 6 Paige, 587—*Bank of Muskingum v. Carpenter*, 7 Ohio, pt. 1, p. 70, 28 Am. Dec. 616—*Holmes v. Gardner*, 50 Ohio St. 176, 20 L.R.A. 332, 33 N. E. 644—*Presbyterian Corporation v. Wal-*

lace, 3 Rawle, 158—Gordon v. Deery, 1 Coldw. 270—Graham v. McCampbell, Meigs, 56, 33 Am. Dec. 126—Jordan v. Peak, 38 Tex. 442—Jones v. Taylor, 30 Vt. 46—Gordon v. Rixey, 76 Va. 698—Rogers v. Bradford, 1 Pinney (Wis.) 434.

2. A mortgage, as between the parties to it or their privies, is a grant which transmits the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. *Doe ex dem. Brobst v. Roe* (Brobst v. Brock) 10 Wall. 519, 19: 1002
Cited in *Waterman v. Mackenzie*, 138 U. S. 259, 34 L. ed. 927, 11 Sup. Ct. Rep. 334—*Mutual L. Ins. Co. v. Doherty*, 75 Fed. 952—*Mutual L. Ins. Co. v. Doherty*, 27 Pittsb. L. J. N. S. 66—*Brewer v. Nash*, 16 R. I. 462, 27 Am. St. Rep. 749, 17 Atl. 857—*Fulton v. Johnson*, 24 W. Va. 115.

3. A mortgage, as between the mortgagor and all persons other than the mortgagee, is a lien, and not an estate. *Doe ex dem. Brobst v. Roe* (Brobst v. Brock) 10 Wall. 519, 19: 1002

4. The defeasance in a mortgage that the mortgagor should pay the debt according to the conditions of a bond recited in the deed, by which it was payable on a day already past at the time of the execution of the deed, did not avoid the mortgage deed in equity when it was intended as a security merely, and to be treated in the same manner as an ordinary mortgage. *Hughes v. Edwards*, 9 Wheat. 489, 6: 142
Cited in *Ward v. Hood*, 124 Ala. 572, 82 Am. St. Rep. 205, 27 So. 245—*Porter v. Pillsbury*, 36 Me. 284—*Neale v. Hagthorpe*, 3 Bland, Ch. 582—*Racine County Bank v. Ayers*, 12 Wis. 518.

5. Where a mortgage is executed on the same day that the mortgagor receives his title, and contains a reference to the deed to the mortgagor, both deeds may be considered parts of one transaction, and be construed together. *Foxcraft v. Mallett*, 4 How. 353, 11: 1008
Cited in *Hogg v. Emerson*, 6 How. 482, 12 L. ed. 524—*Clark v. Manufacturers' Ins. Co.* 8 How. 246, 12 L. ed. 1065, 2 Woodb. & M. 481—*Clark v. Manufacturers' Ins. Co.* 2 Woodb. & M. 481, Fed. Cas. No. 2,829.

6. In the execution of a mortgage by a party purporting to act as agent of a corporation which, by reason of the invalidity of the act of incorporation, has no existence, all those parts of the instrument which refer to the corporation, including the corporate seal, being merely descriptive, may be regarded as surplusage, where sufficient remains to sustain the mortgage as a partnership conveyance on the part of the incorporators. *Anthony v. Butler*, 13 Pet. 423, 10: 229

7. The consideration of a mortgage need not be proved, where, on its face, it recites one, and the mortgage is not void though without valuable consideration, unless shown to be given through mistake, deception, incapacity, or fraud. *Jackson v. Ashton*, 11 Pet. 229, 9: 698

8. Representations contained in circulars

issued by a railroad company, to advertise a new issue of bonds for the construction of a branch line, are superseded by a mortgage given by the company to secure the bonds, in so far as the representations differed from the terms of that instrument. *Van Weel v. Winston*, 115 U. S. 228, 6 Sup. Ct. Rep. 22, 29: 384

9. A railroad mortgage foreclosure is not affected by the fact that some of the bonds may have been invalid. *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 6 Sup. Ct. Rep. 1009, 30: 196
Cited in *Drake v. New York Suburban Water Co.* 36 App. Div. 278, 55 N. Y. Supp. 225.

10-11. A mortgage given by two upon property jointly owned by them, with no words to show an intent to mortgage the undivided halves separately, to secure a joint note signed by them, although each was liable on the note for his share only, is a mortgage of the whole property for the whole debt, under La. Civ. Code, art. 3282, declaring that a mortgage is in its nature indivisible. *Groves v. Sentell*, 153 U. S. 465, 14 Sup. Ct. Rep. 898, 38: 785
Cited in *Groves v. Sentell*, 13 C. C. A. 387, 30 U. S. App. 119, 66 Fed. 180—*Groves v. Sentell*, 16 C. C. A. 219, 30 U. S. App. 382, 69 Fed. 225—*Randolph v. Stark*, 51 La. Ann. 1124, 26 So. 59.

12. The law in force at the time a mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of the mortgage. *East Tennessee, V. & G. R. Co. v. Frazier*, 139 U. S. 288, 11 Sup. Ct. Rep. 517, 35: 196

13. The chattel-mortgage statute of Illinois is inapplicable to mortgages given by a railroad corporation in connection with its real estate and franchises, upon its personal property used and appropriated for railroad purposes. *Hammock v. Farmer's Loan & T. Co.* 105 U. S. 77, 26: 1111
Distinguished in *Radebaugh v. Tacoma & P. R. Co.* 8 Wash. 574, 36 Pac. 460.

Cited in *Farmers' Loan & T. Co. v. Detroit, B. C. & A. R. Co.* 71 Fed. 34—*Illinois Trust & Sav. Bank v. Seattle Electric R. & P. Co.* 27 C. C. A. 272, 48 U. S. App. 744, 82 Fed. 941—*State Trust Co. v. Kansas City, P. & G. R. Co.* 120 Fed. 404.

14. A mortgage executed by a railroad company upon its road, works and franchises is valid in Texas. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20: 199

15. Under legislative authority to mortgage separately any particular division of a railway for the purpose of raising money, the company may assign certain rolling stock to one division, and other rolling stock to other divisions, when the road is divided for mortgage purposes. *Milwaukee & M. R. Co. v. Soutter* (Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.) 2 Wall. 609, 17: 233

16. Where some of the bonds secured by a mortgage executed by railroad companies

are valid, the mortgage is valid as to them, though there may be some invalid bonds included in the mortgage. *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 6 Sup. Ct. Rep. 1009, 30: 196

Editorial note.

Mortgage defined; nature of. 27: 910

b. What Constitutes.

1. In General.

Nature of Mortgage, see *supra*, 1-3.

Distinction Between Mortgage and Assignment for Creditors, see Assignment for Creditors, I.

What Constitutes a Deed, see Deeds, 5-7.

Parol Evidence to Show Whether Contract was Mortgage or Conditional Sale, see Evidence, 1557, 1558.

Rights of Mortgagee, see Subrogation, III.

See also *infra*, 36; Ejectment, 70.

17. Although no precise form of words is necessary to constitute a mortgage, yet there must be a present purpose of the mortgagor to pledge his land for the payment of a sum of money or the performance of some other act. *New Orleans Nat. Bkg. Asso. v. Adams*, 109 U. S. 211, 3 Sup. Ct. Rep. 161, 27: 910
Cited in *Lillenthal v. McCormick*, 54 C. C. A. 484, 117 Fed. 98.

18. An instrument in the form of a mortgage, conveying real and personal property, executed as security for the payment of a note given for the purchase price of stock, concluding with the condition that it will become void upon the payment of the note according to its tenor and effect, and acknowledged and recorded in the registry of mortgages,—is a mortgage, in which the mortgagor has an equity of redemption which can only be extinguished by some legal method. *Dean v. Nelson*, 10 Wall. 158, 19: 926

19. A conveyance of property to be administered and sold by the grantee, in consideration of which the grantee agrees to pay certain specified debts of the grantor, and if, after payment of the debts, there is a residue resulting from the sale of the property, to pay the grantor one half of such residue, is not a mortgage. *Flagg v. Walker*, 113 U. S. 659, 5 Sup. Ct. Rep. 697, 28: 1072
Cited in *Ladd v. Johnson*, 32 Or. 202, 49 Pac. 758.

20. A court of equity treats an agreement for a mortgage or pledge as binding, and will give it effect according to the intention of the parties. *White Water Valley Canal Co. v. Vallette*, 21 How. 414, 16: 154
Cited in *Calhoun v. Memphis & P. R. Co.* 2 Filpp. 442, Fed. Cas. No. 2,309—*Spence v. Mobile & M. R. Co.* 79 Ala. 586—*Howard v. Iron & Land Co.* 62 Minn. 301, 64 N. W. 896—*Hamilton Trust Co. v. Clemes*, 163 N. Y. 429, 57 N. E. 614—*Jarrigan v. Gilchrist*, 121 Wis. 361, 99 N. W. 909.

21. A conveyance of property to secure

debts therein named, reserving a right of redemption to the grantors and authorizing the trustee to sell only in case of failure to pay such debts, contains the elements of a valid mortgage. *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 10 Sup. Ct. Rep. 1013, 34: 341
Cited in *Splint v. Sullivan*, 58 Mo. App. 585—*Marshall v. Livingston Nat. Bank*, 11 Mont. 360, 28 Pac. 312.

22. A sale of land in Louisiana is not a mortgage when possession is delivered with the instrument of conveyance. *Livingston v. Story*, 11 Pet. 351, 9: 746

Inadequacy of price in conditional sales.

23. Mere inadequacy of price will not convert a conditional sale into a mortgage, although gross inadequacy may be ground for suspicion. *Conway v. Alexander*, 7 Cranch, 218, 3: 321
Distinguished in *Lane v. Dickerson*, 10 Yerg. 374.

Cited in *Livingston v. Story*, 11 Pet. 405, 9 L. ed. 768—*Russell v. Southard*, 12 How. 148, 12 L. ed. 931—*Bentley v. Phelps*, 2 Woodb. & M. 443, Fed. Cas. No. 1,331—*Flagg v. Mann*, 2 Sumn. 534, Fed. Cas. No. 4,547—*Jewett v. Cunard*, 3 Woodb. & M. 295, Fed. Cas. No. 7,310—*Husheon v. Husheon*, 71 Cal. 412, 12 Pac. 410—*Voss v. Eller*, 109 Ind. 264, 10 N. E. 74—*Willson v. Patrick*, 34 Iowa, 370—*Holmes v. Fresh*, 9 Mo. 211—*Scott v. Britton*, 2 Yerg. 224—*Hubby v. Harris*, 68 Tex. 94, 3 S. W. 558—*Rockwell v. Humphrey*, 57 Wis. 416, 15 N. W. 394.

Depositing title deeds.

24. In England deposit of title deeds as security for a debt creates a lien which will be recognized as an equitable mortgage. Per *Story, J. Mandeville v. Welch*, 5 Wheat. 277, 5: 87
Cited in *United States v. Cutts*, 1 Sumn. 141, Fed. Cas. No. 14,912—*Wellborn v. Williams*, 9 Ga. 92, 52 Am. Dec. 427—*Bloomfield State Bank v. Miller*, 55 Neb. 253, 44 L.R.A. 391, 70 Am. St. Rep. 381, 75 N. W. 569.

— Editorial note.

Equitable mortgage by deposit of title deeds. 25: 271

Deed in escrow.

25-6. Where a deed remains an escrow until the first payment is made, and is then delivered as the deed of the parties, it is equivalent to a mortgage to secure the first payment. *Brown v. Gilman*, 4 Wheat. 255, 4: 564

— Editorial note.

[Effect of deed delivered in escrow as further security for a mortgage debt. 2 L.R.A.(N.S.) 628.]

Agreement accompanying deed.

See also Chattel Mortgage, 49.

27. An agreement accompanying a deed, whereby the grantor has the option to claim a reconveyance by making payments largely in excess of the consideration paid by the grantee, there being no extraneous facts to show that the transaction was anything but a sale, as imported by the instruments,

—is only an independent contract, by the vendee, to reconvey the lands to the vendor on certain conditions, and does not make the deed a mortgage. *Horbach v. Hill*, 112 U. S. 144, 5 Sup. Ct. Rep. 81, 28: 670 Cited in *Wallace v. Johnstone*, 129 U. S. 64, 32 L. ed. 621, 9 Sup. Ct. Rep. 243—*Barnes v. Van Keuren*, 31 Neb. 168, 47 N. W. 848.

2. Deed Absolute on Face.

Deed in Escrow, see *supra*, 25.

Mortgagee's Remedy on, see *infra*, 271.

Right of Grantee to Resort to Federal Courts on Ground of Diverse Citizenship, see *Courts*, 710.

State Construction as Binding in Federal Courts, see *Courts*, 1951.

Jurisdiction of Equity to Enforce Parol Agreement for Defeasance, see *Equity*, 123.

Parol Evidence to Establish Defeasibility, see *Evidence*, VI. g.

Presumption as to, see *Evidence*, 673.

Conversion of Deed into Mortgage by Accompanying Agreement, see *supra*, 27.

See also *infra*, 106.

28. The policy of the law does not favor a mortgage being considered as a sale. *Conway v. Alexander*, 7 Cranch, 218, 3: 321 Cited in *Russell v. Southard*, 12 How. 147, 13 L. ed. 930—*Babcock v. Wyman*, 19 How. 299, 15 L. ed. 648—*Amory v. Lawrence*, 3 Cliff. 530, Fed. Cas. No. 336—*Wyman v. Babcock*, 2 Curt. C. C. 398, Fed. Cas. No. 18,113—*Lewis v. Wells*, 85 Fed. 899—*Walker v. Farmers' Bank*, 8 Houst. (Del.) 261, 10 Atl. 94—*Walker v. Farmers' Bank*, 6 Del. Ch. 91, 10 Atl. 94—*Baughner v. Merryman*, 32 Md. 192.

29. As lenders of money are less under the pressure of circumstances which control the perfect and free exercise of judgment than are borrowers, the leaning of the courts has been against them, in that a contract for the purchase of lands defeasible by the payment of money at a future date will, in case of doubt, be held to be a mortgage, rather than a conditional sale. *Conway v. Alexander*, 7 Cranch, 218, 3: 321

Cited in *De Laigle v. Denham*, 65 Ga. 491—*Cully v. Bloomingdale*, 68 Ga. 759—*Keithley v. Wood*, 151 Ill. 574, 42 Am. St. Rep. 265, 38 N. E. 149—*Rubo v. Bennett*, 85 Ill. App. 487—*Davis v. Stonestreet*, 4 Ind. 105—*Plummer v. Shirley*, 16 Ind. 382—*Hughes v. Sheaff*, 19 Iowa, 343—*Reed v. Reed*, 75 Me. 271—*Parks v. Hall*, 2 Pick. 211—*Stoeve v. Stoeve*, 9 Serg. & R. 447—*Allegheny R. & Coal Co. v. Casey*, 79 Pa. 97—*Stamper v. Johnson*, 3 Tex. 4—*Ruffer v. Womack*, 30 Tex. 341—*Alstin v. Cundiff*, 52 Tex. 462—*De Bruhl v. Maas*, 54 Tex. 472—*Davis v. Demming*, 12 W. Va. 282—*Hoffman v. Ryan*, 21 W. Va. 429—*Vangilder v. Hoffman*, 22 W. Va. 16.

30. In considering the question whether an instrument in the form of a deed is not actually a mortgage, it is important to inquire whether the consideration was ade-

quate to induce a sale. *Russell v. Southard*, 12 How. 139, 13: 927

Cited in *Morgan v. Shinn* (McLellan v. Shinn) 15 Wall. 110, 21 L. ed. 89—*Howland v. Blake*, 97 U. S. 627, 24 L. ed. 1029—*Coyle v. Davis*, 116 U. S. 112, 29 L. ed. 584, 6 Sup. Ct. Rep. 314—*Lewis v. Wells*, 85 Fed. 901—*Husheon v. Husheon*, 71 Cal. 412, 12 Pac. 410—*DeLaigle v. Denham*, 65 Ga. 491—*Whitcomb v. Sutherland*, 18 Ill. 579—*Brueggstradt v. Ludwig*, 184 Ill. 40, 56 N. E. 419—*Grueggstradt v. Ludwig*, 82 Ill. App. 450—*Willson v. Patrick*, 34 Iowa, 370—*Bridges v. Linder*, 60 Iowa, 195, 14 N. W. 217—*Caldwell v. Tow*, 93 Iowa, 735, 61 N. W. 1090—*Freeman v. Wilson*, 51 Miss. 334—*McHall v. Hall*, 41 S. C. 169, 19 S. E. 307—*Rockwell v. Humphrey*, 57 Wis. 417, 15 N. W. 394.

Editorial note.

[Does a deed absolute on its face, but intended as a mortgage, convey the legal title. 11 L.R.A.(N.S.) 209.]

As security for loan generally.

Parol Evidence, see *Evidence*, 1573.

Sufficiency of Evidence to Establish, see *Evidence*, 2395-2397.

See also *supra*, 18.

31. Equity looks to the substantial object of a conveyance, and will treat a deed absolute in form as a mortgage, when executed as security for a loan of money. *Peugh v. Davis*, 96 U. S. 332, 24: 775
Shillaber v. Robinson, 97 U. S. 68, 24: 967
Hughes v. Edwards, 9 Wheat. 489, 6: 142
Distinguished in Duke v. Story, 116 Ga. 389, 42 S. E. 722—*Bridges v. Linder*, 60 Iowa, 195, 14 N. W. 217.

Cited in *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 776—*Brick v. Brick*, 98 U. S. 516, 25 L. ed. 257—*Jackson v. Lawrence*, 117 U. S. 681, 29 L. ed. 1025, 6 Sup. Ct. Rep. 915—*Cleveland v. La Crosse & M. R. Co.* 7 Am. L. Reg. 548, Fed. Cas. No. 2,887—*The Ellen Holgate*, 30 Fed. 127—*De Martin v. Phelan*, 47 Fed. 764—*Ray v. Tatum*, 18 C. C. A. 466, 30 U. S. App. 635, 72 Fed. 114—*United States v. Devereux*, 32 C. C. A. 570, 61 U. S. App. 548, 90 Fed. 188—*Hudson v. Isbell*, 5 Stew. & P. (Ala.) 77—*Mobile Bldg. & L. Asso. v. Robertson*, 65 Ala. 388—*Narman v. May*, 40 Ark. 149—*Lee v. Evans*, 8 Cal. 430—*Sears v. Dixon*, 33 Cal. 333—*Hall v. Livingston*, 3 Del. Ch. 374—*Hayward v. Mayse*, 1 App. D. C. 138—*Tobriner v. White*, 19 App. D. C. 173—*First Nat. Bank v. Ashmead*, 23 Fla. 389, 2 So. 657—*Gibson v. Hough*, 60 Ga. 590—*Kelly v. Leachman*, 3 Idaho, 673, 34 Pac. 813—*Keithley v. Wood*, 151 Ill. 574, 42 Am. St. Rep. 265, 38 N. E. 149—*Voss v. Eller*, 109 Ind. 263, 10 N. E. 74—*Caldwell v. Meltveldt*, 93 Iowa, 735, 61 N. W. 1090—*Baxter v. Child*, 39 Me. 112—*Linnell v. Lyford*, 72 Me. 284—*Decrow v. Moody*, 73 Me. 103—*Hinckley v. Hinckley*, 79 Me. 324, 9 Atl. 897—*Campbell v. Dearborn*, 109 Mass. 139, 12 Am. Rep. 671—*Ladue v. Detroit & M. R. Co.* 13 Mich. 396, 87 Am. Dec. 759—*Huxley v. Rice*, 40 Mich. 83—*McMillan v. Bissell*, 63 Mich. 69, 29 N. W. 737—*Bourgeois v. Gopen*, 58 Neb. 371, 78 N. W. 639—*Hughes v. Harlam*, 166 N. Y. 432, 60 N. E. 22—*Welseham v. Hocker*, 7 Okla. 253, 54 Pac. 464—*Adair v. Adair*, 22 Or. 131, 29 Pac. 193—*Marx v. La Roque*, 27 Or. 48, 39 Pac. 401—*Stephens v. Sherrod*, 6 Tex. 298, 55 Am. Dec. 776—*Baxter v.*

Wiley, 9 Vt. 280, 31 Am. Dec. 623—Balch v. Arnold, 9 Wyo. 37, 59 Pac. 434.

32. Equity looks to the substantial object of a conveyance, and will treat a deed absolute in form as a mortgage when executed as security for a loan of money. In doubtful cases the court leans to the conclusion that the instrument was intended as a mortgage rather than a sale. *Russell v. Southard*, 12 How. 139, 13: 927

Cited in *Cleveland v. La Crosse & M. R. Co.* 7 Am. L. Reg. 548, Fed. Cas. No. 2,887—*Holbrook v. American Ins. Co.* 1 Curt. C. C. 197, Fed. Cas. No. 6,589—*Demond v. Crary*, 9 Fed. 752—*The Ellen Holgate*, 30 Fed. 127—*Watts v. Kellar*, 5 C. C. A. 396, 12 U. S. App. 274, 56 Fed. 3—*Crimp v. McCormick Constr. Co.* 18 C. C. A. 76, 34 U. S. App. 479, 71 Fed. 362—*Ray v. Tatum*, 18 C. C. A. 468, 30 U. S. App. 635, 72 Fed. 114—*United States v. Devereux*, 32 C. C. 9, 570, 61 U. S. App. 548, 90 Fed. 188—*Jarvis v. Woodruff*, 22 Conn. 551—*French v. Burns*, 35 Conn. 363—*Kelley v. Leachman*, 3 Idaho, 397, 29 Pac. 849—*Kelthley v. Wood*, 47 Ill. App. 104—*North Chicago Street R. Co. v. Le Grand Co.* 95 Ill. App. 461—*Church v. Cole*, 36 Ind. 50—*Booth v. Robinson*, 55 Md. 451—*Campbell v. Dearborn*, 109 Mass. 139, 12 Am. Rep. 671—*Hack v. Norris*, 46 Mich. 594, 10 N. W. 104—*Carveth v. Winegar*, 133 Mich. 38, 94 N. W. 381—*Klein v. McNamara*, 54 Miss. 100—*Newton v. Taylor*, 32 Ohio St. 410—*Maffitt v. Rynd*, 69 Pa. 387—*Snarely v. Pickle*, 29 Gratt. 34—*Nease v. Capehart*, 8 W. Va. 128—*Vangilder v. Hoffman*, 22 W. Va. 21—*Rogan v. Walker*, 1 Wis. 572—*Musgat v. Pumpelly*, 46 Wis. 666, 1 N. W. 410.

33. An absolute deed, intended by the parties as security for a debt, is in equity a mortgage. *Jackson v. Lawrence*, 117 U. S. 679, 6 Sup. Ct. Rep. 915, 29: 1024

34. A deed, absolute on its face, made by nephews and nieces with their mother to an uncle, a debt from them to the uncle being secured, at the time, by a mortgage on part of the premises, will be held to be a mortgage. *Alexander v. Rodriguez (Villa v. Rodriguez)* 12 Wall. 323, 20: 406
Distinguished in *Bridges v. Linder*, 60 Iowa, 195, 14 N. W. 217.

Cited in *De Martin v. Phelan*, 47 Fed. 764—*Carveth v. Winegar*, 133 Mich. 38, 94 N. W. 381—*Morrow v. Jones*, 41 Neb. 877, 60 N. W. 369—*Macauley v. Smith*, 132 N. Y. 531, 30 N. E. 997—*Brownlee v. Martin*, 21 S. C. 400—*Rockwell v. Humphrey*, 57 Wis. 417, 15 N. W. 394.

35. If a deed, absolute on its face, is given to a lender to secure a loan, where the parties originally met on the footing of borrowing and lending, it will be considered in the nature of a mortgage to secure the loan, unless proved that the parties afterwards bargained for the property independently of the loan. *Morris v. Nixon*, 1 How. 118, 11: 69
Cited in *Villa v. Rodriguez (Alexander v. Rodriguez)* 12 Wall. 339, 20 L. ed. 411—*Jackson v. Lawrence*, 117 U. S. 681, 29 L. ed. 1025, 6 Sup. Ct. Rep. 915—*Bentley v. Phelps*, 2 Woodb. & M. 443, Fed. Cas. No. 1,331—*Husheon v. Husheon*, 71 Cal. 412, 12 Pac. 410—*Taussig v. Reid*, 145 Ill. 497, 36 Am. St. Rep. 504, 32 N. E. 918—*Rubo v. Bennett*, 85 Ill. App. 487—*Campbell v. Dearborn*, 109

Mass. 139, 12 Am. Rep. 671—*Cook v. Eaton*, 16 Barb. 452—*Macauley v. Smith*, 132 N. Y. 531, 30 N. E. 997.

36. A deed absolute in form, with general warranty of title, and an agreement to reconvey to the vendor or a third person, upon payment of a fixed sum within a specified time, do not of themselves constitute a mortgage, unless shown by parol evidence or by attendant circumstances—such as the condition and relation of the parties or gross inadequacy of price—to have been intended as security for a loan or an existing debt. *Wallace v. Johnstone*, 129 U. S. 58, 9 Sup. Ct. Rep. 243, 32: 619

Cited in *Bogk v. Gassert*, 149 U. S. 27, 37 L. ed. 636, 13 Sup. Ct. Rep. 738—*Peninsular Trading & Fishing Co. v. Pacific Steam Whaling Co.* 123 Cal. 695, 56 Pac. 604—*Devore v. Woodruff*, 1 N. D. 149, 45 N. W. 701—*Morris v. Nyswanger*, 5 S. D. 315, 58 N. W. 800—*Northern C. R. Co. v. Hering*, 93 Md. 174, 48 Atl. 461—*Spalding v. Brown*, 36 Or. 167, 59 Pac. 185—*Tripler v. Campbell*, 22 R. I. 266, 47 Atl. 385.

37. A deed executed as security for promissory notes, which was absolute in form, and a defeasance, are to be taken as one instrument, and constitute a mortgage. *Lanahan v. Sears*, 102 U. S. 318, 26: 180
Cited in *Security Trust Co. v. Loewenberg*, 38 Or. 169, 62 Pac. 647.

38. A deed of land with a power of sale, to secure the payment of a debt, is, in equity, a mortgage, if there is left a right to redeem on payment of such debt. *Shillaber v. Robinson*, 97 U. S. 68, 24: 967
Cited in *Hunt v. Springfield F. & M. Ins. Co.* 106 U. S. 49, 49 L. ed. 382, 25 Sup. Ct. Rep. 179—*Cornell v. Conine-Eaton Lumber Co.* 9 Colo. App. 231, 47 Pac. 912—*Turpie v. Lowe*, 114 Ind. 50, 15 N. E. 834—*Rogers v. Shewmaker*, 27 Ind. App. 634, 87 Am. St. Rep. 274, 60 N. E. 462—*Stephens v. Allen*, 11 Or. 194, 3 Pac. 168.

Agreement to reconvey.

Question of Law or Fact, see *Trial*, 310.

39. A deed absolute upon its face, but intended as a security for the payment of money, is a mortgage, even at law, if accompanied by a separate contemporaneous agreement in writing to reconvey upon the payment of the debt. *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. Rep. 420, 28: 415
Cited in *Jackson v. Lawrence*, 117 U. S. 681, 29 L. ed. 1025, 6 Sup. Ct. Rep. 915—*Simpson v. Ferguson*, 112 Cal. 185, 53 Am. St. Rep. 201, 44 Pac. 484—*Tilden v. Greenwood*, 149 Mass. 569, 22 N. E. 43—*Berdell v. Berdell*, 33 Hun. 537—*Weissham v. Hocker*, 7 Okla. 253, 54 Pac. 464—*Marshall v. Williams*, 21 Or. 270, 28 Pac. 137—*Security Trust Co. v. Loewenberg*, 38 Or. 169, 62 Pac. 647.

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Conveyance to trustees.

40. That a conveyance is made to trustees is not a circumstance of much weight in determining whether such transfer constitutes a sale or a mortgage. *Conway v. Alexander*, 7 Cranch, 218, 3: 321

41. A conveyance of land for a valuable consideration to a trustee in trust, to be by the latter conveyed to a third person on default in payment of a specified sum, may be regarded, if such is the clear intent, as a conditional sale, which becomes absolute on default in payment of that sum and conveyance by the trustee. *Conway v. Alexander*, 7 Cranch, 218, 3: 321
Distinguished in Scott v. Henry, 13 Ark. 127—*Floyd v. Harrison*, 2 Rob. (Va.) 181—*Rogan v. Walker*, 1 Wis. 570—*Plato v. Roe*, 14 Wis. 457.

Cited in Livingston v. Story, 11 Pet. 405, 9 L. ed. 768—*Hatfield v. Montgomery*, 2 Port. (Ala.) 69—*Hudson v. Isbell*, 5 Stew. & P. (Ala.) 80—*Sewall v. Henry*, 9 Ala. 33—*Robinson v. Farrelly*, 16 Ala. 478—*Murphy v. Barfield*, 27 Ala. 639—*Byrne v. Marshall*, 44 Ala. 357—*Douglas v. Moody*, 80 Ala. 69—*Porter v. Clements*, 8 Ark. 384—*Johnson v. Clark*, 5 Ark. 338—*Devore v. Woodruff*, 1 N. D. 148, 45 N. W. 701—*Winters v. Swift*, 2 Idaho, 69, 3 Pac. 15—*Hays v. Carr*, 83 Ind. 283—*Bridges v. Linder*, 60 Iowa, 192, 14 N. W. 217—*Hicks v. Hicks*, 5 Gill & J. 83—*Dougherty v. McColgan*, 6 Gill & J. 281—*Hopper v. Smyser*, 90 Md. 382, 45 Atl. 206—*Reed v. Bond*, 96 Mich. 140, 55 N. W. 619—*Hoopes v. Bailey*, 28 Miss. 339—*Page v. Foster*, 7 N. H. 394—*Matthews v. Sheehan*, 69 N. Y. 591—*Spalding v. Brown*, 36 Or. 167, 59 Pac. 185—*Lowry v. McGhee*, 8 Yerg. 248—*Kroesen v. Severs*, 5 Leigh, 441—*Reed v. Parker*, 33 Wash. 117, 74 Pac. 61—*Smith v. Crosby*, 47 Wis. 166, 2 N. W. 104—*Schriber v. Le Clair*, 66 Wis. 599, 29 N. W. 889.

Absence of personal security.

42-3. That no personal security was taken is not conclusive against treating an instrument in the form of a deed as a mortgage. The absence of a personal obligation by the grantor to repay the money furnishes no conclusive test to determine whether the conveyance was a mortgage or a conditional sale. *Russell v. Southard*, 12 How. 139, 13: 927

8. Equitable Mortgages.

Vendor Under Contract of Sale of Land as Equitable Mortgagor, see Vendor and Purchaser, 46d.

See also *supra*, 24.

44. Where a person entered into possession of real property, and expended large sums in repairs and improvements under a parol agreement with his wife's father, who owned it, that if he would do so it should be conveyed to his wife; and the father-in-law was then possessed of a large estate and good credit, but afterwards died insolvent, without ever making a conveyance, it was held that the expenditure for repairs and improvements created an equitable mortgage. *King v. Thompson*, 9 Pet. 204, 9: 102
Cited in Thompson v. King, 5 Cranch, C. C. 94, Fed. Cas. No. 13,963—*Tufts v. Tufts*, 3 Woodb. & M. 512, Fed. Cas. No. 14,233—*Stramann v. Scheeren*, 7 Colo. App. 15, 42 Pac. 191—*McCormick v. Hammersley*, 1 App. D. C. 320—*Woodbury v. Gardner*, 77 Me. 71—*Donnell v. Wylie*, 85 Me. 146, 26 Atl. 1092—*Haines v. Haines*, 6 Md. 439—*Green*

v. Drummond, 31 Md. 86, 1 Am. Rep. 14—*Duckett v. Duckett*, 71 Md. 360, 18 Atl. 535—*Kilm v. Sachs*, 102 App. Div. 46, 92 N. Y. Supp. 107—*Freeman v. Freeman*, 51 Barb. 310—*Price v. Palmer*, 23 Hun, 506—*Smith v. Smith*, 51 Hun, 167, 4 N. Y. Supp. 669—*Gilbert v. Peteler*, 38 N. Y. 170, 97 Am. Dec. 785—*Smith v. Smith*, 125 N. Y. 229, 26 N. E. 259—*Preston v. Brown*, 35 Ohio St. 29—*Ridley v. McNairy*, 2 Humph. 177—*Metcalf v. Hart*, 3 Wyo. 556, 27 Pac. 900.

45. The acceptance of a deed containing a reservation of a lien for payment of the purchase price creates an equitable mortgage, as the acceptance amounts to an express agreement that the land should be held as security for payment of the balance due on the purchase price. *Ober v. Gallagher*, 93 U. S. 199, 23: 829

Cited in Converse v. Michigan Dairy Co. 45 Fed. 21—*White v. Ewing*, 16 C. C. A. 299, 37 U. S. App. 365, 69 Fed. 454—*Kyle v. Bellenger*, 79 Ala. 521—*Talleferro v. Barnett*, 37 Ark. 517—*Dowdy v. Blake*, 50 Ark. 210, 7 Am. St. Rep. 88, 6 S. W. 897.

46. Parties can contract to extend the area of property to be covered by a lien. Such a stipulation is tantamount to an equitable mortgage. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. Rep. 936, 37: 853

47. The Missouri statute of 1865, under which St. Louis county issued bonds as a loan to the Pacific Railroad Company, constituted such bonds, when accepted, an equitable lien or charge, in favor of the county, upon the earnings of the railroad, to the extent necessary to meet the interest upon the bonds; and this lien or charge is enforceable, not only against the funds in the hands of the receiver, but against a purchaser upon foreclosure of a subsequent mortgage, and against whomsoever may hold the property or have custody of its earnings. *Ketchum v. St. Louis*, 101 U. S. 306, 25: 999
Distinguished in Tompkins v. Little Rock & Ft. S. R. Co. 125 U. S. 122, 31 L. ed. 622, 8 Sup. Ct. Rep. 762—*Tompkins v. Little Rock & Ft. S. R. Co.* 5 McCrary, 612, 18 Fed. 353—*Brown v. Chesapeake & O. Canal Co.* 73 Md. 594.

Cited in Sheffield Furnace Co. v. Witherow, 149 U. S. 578, 37 L. ed. 855, 13 Sup. Ct. Rep. 936—*Fourth Street Nat. Bank v. Yardley*, 165 U. S. 644, 41 L. ed. 862, 17 Sup. Ct. Rep. 439—*Walker v. Brown*, 165 U. S. 664, 41 L. ed. 871, 17 Sup. Ct. Rep. 453—*Tompkins v. Little Rock & Ft. S. R. Co.* 15 Fed. 12—*Tompkins v. Little Rock & Ft. S. R. Co.* 21 Fed. 372—*Bridgeport Electric & Ice Co. v. Meader*, 18 C. C. A. 455, 30 U. S. App. 580, 72 Fed. 118—*Fidelity Ins. Trust & S. D. Co. v. Norfolk & W. R. Co.* 72 Fed. 706—*Mercantile Trust Co. v. Baltimore & O. R. Co.* 82 Fed. 369—*Newton v. Eagle & P. Mfg. Co.* 101 Fed. 154—*Farmers' Loan & T. Co. v. Penn. Plate Glass Co.* 56 L.R.A. 716, 43 C. C. A. 134, 103 Fed. 152—*Howard v. Delgado*, 57 C. C. A. 274, 121 Fed. 30—*Fortier v. Delgado*, 122 Fed. 608—*Booz v. Philadelphia & L. Transp. Co.* 124 Fed. 435—*Roberts v. Central Trust Co.* 63 C. C. A. 222, 128 Fed. 884—*Hume v. Riggs*, 12 App. D. C. 364—*Johnson v. Gordon*, 102 Ga. 364, 30 S. E. 507—*First Nat. Bank v. Adam*, 34 Ill. App. 166—*Tinsley v. Durfey*, 99 Ill.

App. 243—*Elmore v. Symonds*, 183 Mass. 323, 67 N. E. 314—*Belden v. Burke*, 72 Hun, 79, 25 N. Y. Supp. 601.

48. The guaranty of the Arkansas Central Railway Company of the payment of the state bonds delivered to it, indorsed on the bonds, only made each holder of bonds a general creditor of the company, and gave no lien for their payment upon its property, and did not prevent the company from giving a mortgage on its property to secure bonds issued by it, a sale on the foreclosure of which gave title to the property. *McKittick v. Arkansas C. R. Co.* 152 U. S. 473, 14 Sup. Ct. Rep. 661, 38: 518
Cited in *Mercantile Trust Co. v. Baltimore & O. R. Co.* 82 Fed. 372—*Rothchild v. Memphis & C. R. Co.* 51 C. C. A. 315, 113 Fed. 481.

c. Debt Secured.

1. In General.

Parol Evidence to Show Whether Mortgage Executed by Officer was to Secure Corporate or Individual Debt, see Evidence, 1679.

49. It is not necessary to the validity of a mortgage that it should truly state the transaction and debt it is intended to secure; but if the transaction is a fair one, it may stand as a security for the actual equitable claims of the mortgagees, whether they existed at the date of the mortgage, or arose afterwards upon the faith of the mortgage before notice of the equity of any third person. *Shirras v. Caig*, 7 Cranch, 34, 3: 260

Cited in *Lawrence v. Tucker*, 23 How. 27, 16 L. ed. 478—*Jones v. New York Guaranty & I. Co.* 101 U. S. 631, 25 L. ed. 1036—*Wood v. Welmar*, 104 U. S. 793, 26 L. ed. 781—*Baldwin v. Rapple*, 4 Ben. 442, Fed. Cas. No. 801—*Ripley v. Harris*, 3 Blas. 201, Fed. Cas. No. 11,853—*Pascault v. Cochran*, 34 Fed. 683—*Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.* 41 C. C. A. 619, 3 N. B. B. Rep. 409, 101 Fed. 705—*Stover v. Herrington*, 7 Ala. 150, 41 Am. Dec. 86—*Lawson v. Alabama Warehouse Co.* 80 Ala. 343—*Dickson v. McLarney*, 97 Ala. 390, 12 So. 398—*Bell v. Radcliff*, 32 Ark. 664—*Hubbard v. Savage*, 8 Conn. 220—*Cady v. Gay*, 31 Conn. 394—*Droop v. Ridenour*, 11 App. D. C. 238—*Collins v. Carille*, 13 Ill. 259—*Christie v. Hale*, 46 Ill. 120—*Commercial Bank v. Cunningham*, 24 Pick. 274, 35 Am. Dec. 322—*Hall v. Tay*, 131 Mass. 193—*Johnson v. Bratton*, 112 Mich. 323, 70 N. W. 1021—*Harrington v. Samples*, 36 Minn. 202, 30 N. W. 671—*Stevens v. Hampton*, 46 Mo. 410—*Smith v. Montoya*, 3 N. M. 24, 1 Pac. 175—*Holt v. Creamer*, 34 N. J. Eq. 189—*Bank of Utica v. Finch*, 3 Barb. Ch. 303, 49 Am. Dec. 175—*Truscott v. King*, 6 Barb. 348—*Youngs v. Wilson*, 24 Barb. 512—*Walker v. Snediker*, Hoffm. Ch. 146—*Bainbridge v. Richmond*, 17 Hun, 393—*Craig v. Tappin*, 2 Sandf. Ch. 83—*Robinson v. Williams*, 22 N. Y. 385—*McKinstler v. Babcock*, 26 N. Y. 381—*Youngs v. Wilson*, 27 N. Y. 356—*Hendrix v. Gore*, 8 Or. 409—*Moroney's Appeal*, 24 Pa. 375—*Blackmar v. Sharp*, 23 R. I. 424, 50 Atl. 852—*Keyes v. Bump*, 59 Vt. 398, 9 Atl. 598—*Alexander Sav. Inst. v. Thomas*, 29 Gratt. 492—*McCarty v. Chalfant*, 14 W. Va.

546—*Tingle v. Fisher*, 20 W. Va. 504—*Riggs v. Armstrong*, 23 W. Va. 771—*Fisher v. Otis*, 3 Pinney (Wis.) 91.

50. [A simple-contract debt cannot be tacked to a mortgage. *Dorow v. Kelly* (Ct. Com. Pl. Phila.) 1 Dall. 142, 1: 73]

51. Where a mortgage provides for indemnifying the trustee against all costs, charges, and expenses, it may cover an allowance for counsel fees and costs in a suit. *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482, 30: 595
Cited in *Read v. Memphis Gaslight Co.* 107 Tenn. 439, 64 S. W. 769.

2. Future Advances.

Chattel Mortgage to Secure, see Chattel Mortgage, 5.

Given by Firm, Effect of Admitting New Partners, see Partnership, 159.
See also *infra*, 174.

52. A mortgage may be given as security for future advances. *Shirras v. Caig*, 7 Cranch, 34, 3: 260

Cited in *Lawrence v. Tucker*, 23 How. 27, 16 L. ed. 479—*Davis v. Schwartz*, 155 U. S. 645, 39 L. ed. 296, 15 Sup. Ct. Rep. 237—*Turnbull v. Thomas*, 1 Hughes, 176, Fed. Cas. No. 14,243—*United States v. Lenox*, 2 Paine, 183, Fed. Cas. No. 15,592—*Edwards v. Dwight*, 68 Ala. 391—*Hendon v. Morris*, 116 Ala. 114, 20 So. 27—*Tully v. Barloe*, 35 Cal. 309, 85 Am. Dec. 102—*Crane v. Deming*, 7 Conn. 397—*Boswell v. Goodwin*, 31 Conn. 81, 81 Am. Dec. 169—*Speer v. Skinner*, 35 Ill. 202—*Louisville Bkg. Co. v. Leonard*, 90 Ky. 111, 13 S. W. 521—*Wilson v. Russell*, 13 Md. 535, 71 Am. Dec. 645—*Summers v. Roos*, 42 Miss. 779, 2 Am. Rep. 633—*Foster v. Reynolds*, 38 Mo. 557—*Bell v. Fleming*, 12 N. J. Eq. 16—*Ely v. Parkhurst*, 25 N. J. L. 192—*Coon v. Bosque Bonita Land & Cattle Co.* 8 N. M. 131, 42 Pac. 77—*James v. Morey*, 2 Cow. 292, 14 Am. Dec. 475—*Bank of Albion v. Burns*, 2 Lans. 57—*Truscott v. King*, 6 N. Y. 159—*Mead v. York*, 6 N. Y. 451, 57 Am. Dec. 467—*Ackerman v. Hunsicker*, 85 N. Y. 47, 39 Am. Rep. 621—*Friedley v. Hamilton*, 17 Serg. & R. 73, 17 Am. Dec. 638—*Gordon v. Deery*, 1 Coldw. 270—*McDaniels v. Colvin*, 16 Vt. 305, 42 Am. Dec. 512—*Didler v. Patterson*, 93 Va. 537, 25 S. E. 661—*Home Sav. & L. Asso. v. Burton*, 20 Wash. 699, 56 Pac. 940.

53-4. Mortgages may be given to secure future advances and contingent debts, as well as those which are certain and due. *United States v. Hooe*, 3 Cranch, 73, 2: 370
Conard v. Atlantic Ins. Co. 1 Pet. 386, 7: 189

Lawrence v. Tucker, 23 How. 14, 16: 474
Cited in *Lawrence v. Tucker*, 23 How. 27, 16 L. ed. 479—*Jones v. New York Guaranty & Indemnity Co.* 101 U. S. 626, 25 L. ed. 1034—*Leeds v. Cameron*, 3 Sumn. 492, Fed. Cas. No. 8,206—*Ripley v. Harris*, 3 Blas. 201, Fed. Cas. No. 11,853—*Re York*, 3 Nat. Bankr. Reg. 664, Fed. Cas. No. 18,138—*Schuelenburg v. Martin*, 1 McCrary, 350, 2 Fed. 749—*Re First Nat. Bank*, 41 C. C. A. 619, 3 N. B. N. Rep. 409, 101 Fed. 705—*Mobile & C. P. R. Co. Talman*, 15 Ala. 490—*Wells v. Thompson*, 50 Ala. 85—*Bell v. Radcliff*, 32 Ark. 664—*Lanier v. Union Mortg. Bkg. &*

T. Co. 64 Ark. 52, 40 S. W. 468—Hubbard v. Savage, 8 Conn. 221—Booth v. Barnum, 9 Conn. 290, 23 Am. Dec. 330—Calkins v. Lockwood, 16 Conn. 288, 41 Am. Dec. 143—Boswell v. Goodwin, 31 Conn. 81, 81 Am. Dec. 169—Speer v. Skinner, 35 Ill. 293—Schmidt v. Zahndt, 148 Ind. 453, 47 N. E. 335—Hall v. Tay, 131 Mass. 193—Arthur v. Commercial & R. Bank, 9 Smedes & M. 432, 48 Am. Dec. 719—Williams v. Alnutt, 72 Mo. App. 65—Smith v. Montoya, 3 N. M. 45, 1 Pac. 175—Coon v. Bosque Bonita Land & Cattle Co. 8 N. M. 131, 42 Pac. 77—Truscott v. King, 6 Barb. 347—Robinson v. Williams, 22 N. Y. 383—Ackerman v. Hunsicker, 85 N. Y. 47, 39 Am. Rep. 621—Moroney's Appeal, 24 Pa. 375—McDaniels v. Colvin, 16 Vt. 305, 42 Am. Dec. 512—Keyes v. Bump, 59 Vt. 398, 9 Atl. 598—Alexandria Sav. Inst. v. Thomas, 29 Gratt. 488—Didler v. Patterson, 93 Va. 537, 25 S. E. 661—McCarty v. Chalfant, 14 W. Va. 547.

55. In Connecticut a mortgage must truly describe the debt intended to be secured. A mortgage reciting a specific indebtedness, but given in fact to secure advances or indorsements thereafter to be made, is not a valid security. *Townsend v. Todd*, 91 U. S. 452, 23: 413

56. A mortgage to cover future advances, under the Code of Louisiana, is valid. *New Orleans Nat. Bkg. Asso. v. Le Breton*, 120 U. S. 765, 7 Sup. Ct. Rep. 772, 30: 821

57. A deed of trust given in good faith to secure one as surety upon a bond, and also upon existing and future indorsements, is valid. *United States v. Hooe*, 3 Cranch, 73, 2: 370

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d. Property Subject to, and Covered by; Description of Property.

1. In General.

Description in Notice of Sale, see *infra*, 410.
Chattel Mortgage, see *Chattel Mortgage*, II. b.

Description of Property in Deed, see *Deeds*, III. b.

Excessiveness of Security; Whether Badge of Fraud as against Creditors, see *Fraudulent Conveyances*, 58.

On Homestead, see *Homestead*, 10.

Mining Claims, see *Mines*, 20, 21.

Rights under Private Land Grants from Former Government, see *Private Land Claims*, 271, 272.

Lots in Town Site Entries on Public Lands, see *Public Lands*, 596.

Mortgage on Entryman's Rights in Public Lands, see *Public Lands*, 865, 866.
See also *supra*, 15; *infra*, 368.

58. A mortgage covering the whole interest in land is valid, although it is given on the purchase of an undivided fourth part of the property. *Orvis v. Powell*, 98 U. S. 176, 25: 238

59. A mortgage by the owner of half of a tract of land, which falsely recites a

power from the owner of the remainder, affects only his own share. *Shirras v. Caig*, 7 Cranch, 34, 3: 260

60. The words "all other property" in a mortgage executed by a railroad company in favor of the state, to secure it for a loan of its credit due the company, and which enumerates with great particularity its land grant from Congress, its telegraph lines and offices, its machine shops and its coal mines, do not operate to include within the mortgage all of the lands belonging to the company not specifically described. *Alabama v. Montague*, 117 U. S. 602, 6 Sup. Ct. Rep. 911, 29: 1000

Cited in *District of Columbia v. Reuter*, 15 App. D. C. 240—*Tishomingo Sav. Inst. v. Allen*, 76 Miss. 132, 23 So. 958—*Wilson v. Beckwith*, 117 Mo. 78, 22 S. W. 639—*Belden v. Burke*, 72 Hun, 83, 25 N. Y. Supp. 601.

61. The clear purpose of the parties to two separate mortgages of railway property covering respectively the eastern and western divisions of the road to make the mortgages distinct and different as to everything else covered by them requires doubtful language in reference to the rolling stock to be construed as intended to include in each mortgage only such rolling stock as was properly appurtenant to the particular division mortgaged. *Milwaukee & M. R. Co. v. Soutter* (*Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.*) 2 Wall. 609, 17: 886

62. By a mortgage executed by one party to a traffic contract on all its property, to secure its bonds, to a trust company as trustee, the title to the property passed to the trust company, without having attached to it the lien of the contract for the traffic arrangement. *Des Moines & Ft. D. R. Co. v. Wabash, St. L. & P. R. Co.* 135 U. S. 576, 10 Sup. Ct. Rep. 753, 34: 243

63. Property omitted by accident from a trust deed, when both parties supposed the deed covered it, may be reached and sold in a foreclosure suit. *Shepherd v. Pepper*, 133 U. S. 626, 10 Sup. Ct. Rep. 438, 33: 706

64. Real property only temporarily used for railroad purposes, having been acquired by a railroad company with the intention of subdividing such portions as should not be needed for railroad purposes into lots to be sold to its employees, is not covered by a mortgage of all the property of such company "used for and pertaining to the operation of said railroad." *Pardee v. Aldridge*, 189 U. S. 429, 23 Sup. Ct. Rep. 514, 47: 883
Cited in *Central Trust Co. v. Washington County R. Co.* 124 Fed. 817.

65. The owner of real estate can create a trust in rents and profits, separate and apart from the title; but where the object is security and the title is conveyed, the lien is on the land. The mere direction to appropriate the rents and profits to the payment of the debt will not relieve the realty from the burden of the lien. *Gisborn v. Charter Oak L. Ins. Co.* 142 U. S. 326, 12 Sup. Ct. Rep. 277, 35: 1029

66. A railroad mortgage, conveying the road, franchises, and endowments, does not cover or convey a contract with the United States for carrying the mails. *St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 5 Sup. Ct. Rep. 366, 28: 861
Cited in Moran v. Pittsburgh, C. & St. L. R. Co. 32 Fed. 887.

67. A purchase-money mortgage of a parcel of land sold to a railroad company for its use covers only the tract of land specifically mentioned therein, and does not affect the title of the corporation in other lands, and in so much of its road as is not laid over the land mortgaged. *Woodworth v. Blair*, 112 U. S. 8, 5 Sup. Ct. Rep. 6, 28: 615

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Of railroad property. 33: 256
 [On buildings upon leased premises. 21 L. R.A. 347.]

Appurtenances and easements.

See also *infra*, 86, 97.

68. Under the term "appurtenances," as used in a mortgage made by a railroad company upon its railroad, only such property passes as is indispensable to the use and enjoyment of the franchises of the company. *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779, 35: 473

69. An elevator is not a common appurtenance to the railroads of several companies owning the stock of the elevator company, within the meaning of a mortgage upon the railroad and its appurtenances. *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779, 35: 473

70. Although a railroad company possesses a separate legal interest in an elevator, it is not appurtenant to its railroad within the meaning of a mortgage upon the railroad and its appurtenances, where the building is situated more than half a mile from the railroad and is erected on land not belonging to the company. *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779, 35: 473

71. The fact that there was no building upon the property when a deed of trust was executed conveying the described property "with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in any wise appertaining" does not prevent an easement on the adjacent property of the grantor, made necessary to the use and enjoyment of an apartment house built flush upon the line of the property described, from passing under the deed, where it was within the knowledge and purpose of the parties that a building should be constructed which would be the principal security for a loan. *Warner v. Grayson*, 200 U. S. 257, 26 Sup. Ct. Rep. 240, 50: 470

Franchises.

See also *supra*, 66.

72. The franchise of a railroad corporation, of the right to occupy streets and public grounds with railroad tracks, may be in-

cluded in a mortgage of the railroad. in Louisiana. *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. Rep. 1009, 29: 244

73. The franchise of being a corporation is not one which passes by a mortgage of the property and franchises, except by positive provisions of law. *Memphis & L. R. R. Co. v. Railroad Comrs.* (*Memphis & L. R. R. Co. v. Berry*) 112 U. S. 609, 5 Sup. Ct. Rep. 299, 28: 837
Cited in New Orleans, S. F. & L. R. Co. v.

Delamore, 114 U. S. 510, 29 L. ed. 247, 5 Sup. Ct. Rep. 1009—*Dow v. Beldelman*, 125 U. S. 689, 31 L. ed. 843, 2 Inters. Com. Rep. 58, 8 Sup. Ct. Rep. 1028—*Ohio C. R. Co. v. Central Trust Co.* 133 U. S. 92, 33 L. ed. 564, 10 Sup. Ct. Rep. 235—*Mercantile Bank v. Tennessee*, 161 U. S. 171, 40 L. ed. 659, 16 Sup. Ct. Rep. 461—*New Orleans Debenture Redemption Co. v. Louisiana*, 180 U. S. 329, 45 L. ed. 558, 21 Sup. Ct. Rep. 378—*Southern P. R. Co. v. Orton*, 32 Fed. 473—*National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 57—*Detroit v. Detroit City R. Co.* 56 Fed. 882—*Andrews Bros. Co. v. Youngstown Coke Co.* 30 C. C. A. 298, 58 U. S. App. 444, 86 Fed. 590—*Central Trust Co. v. Western North Carolina R. Co.* 89 Fed. 31—*Union Bank v. Oxford*, 90 Fed. 12—*Central Trust Co. v. Western North Carolina R. Co.* 112 Fed. 472—*Julian v. Central Trust Co.* 53 C. C. A. 441, 115 Fed. 959—*Dow v. Beldelman*, 49 Ark. 335, 5 S. W. 297—*People ex rel. Adams v. Oakland*, 92 Cal. 614, 28 Pac. 807—*Snell v. Chicago*, 133 Ill. 430, 8 L.R.A. 860, 24 N. E. 532—*State ex rel. Godard v. Topeka Water Co.* 61 Kan. 560, 60 Pac. 337—*Chadwick v. Old Colony R. Co.* 171 Mass. 242, 50 N. E. 629—*State ex rel. Kansas City v. East Fifth Street R. Co.* 140 Mo. 548, 38 L.R.A. 220, 62 Am. St. Rep. 742, 41 S. W. 955—*People ex rel. Schurs v. Cook*, 110 N. Y. 450, 18 N. Y. S. 100, 18 N. E. 113—*People v. O'Brien*, 111 N. Y. 44, 2 L.R.A. 262, 7 Am. St. Rep. 684, 18 N. E. 692—*State v. Butler*, 15 Lea, 113—*Pumphrey v. Threadgill*, 9 Tex. Civ. App. 192, 28 S. W. 450—*Denison & S. R. Co. v. St. Louis Southwestern R. Co.* 30 Tex. Civ. App. 481, 72 S. W. 201—*Pennison v. Chicago, M. & St. P. R. Co.* 93 Wis. 347, 67 N. W. 702.

74. Where a mortgage executed by a railroad company mortgages "all its present and future-to-be-acquired property,—that is to say," and then enumerates its road, right of way, and other property,—Held, that county bonds belonging to the company, not enumerated in the mortgage, are not embraced in and do not pass by it. *Smith v. McCullough*, 104 U. S. 25, 26: 637

75. The rights, privileges and franchises mortgaged were only such as had direct connection with the management and operation of the road. *Smith v. McCullough*, 104 U. S. 25, 26: 637
Cited in New Orleans P. R. Co. v. Parker, 143 U. S. 55, 36 L. ed. 70, 12 Sup. Ct. Rep. 364—

Moran v. Pittsburgh, C. & St. L. R. Co. 32 Fed. 887—*Parker v. New Orleans, B. R. & V. R. Co.* 33 Fed. 697—*Wheeling Bridge & Terminal R. Co. v. Cochran*, 15 C. C. A. 323, 25 U. S. App. 306, 68 Fed. 145—*Central Trust Co. v. Worcester Cycle Mfg. Co.* 114 Fed. 662—*Mallory v. Maryland Glass Co.* 131 Fed. 114—*Gaffey v. O'Relley*, 88 Mo. 423, 57 Am. Rep. 424—*General Electric Co. v.*

Wightman, 3 App. Div. 127, 39 N. Y. Supp. 420—Ellis v. Cochran, 8 Tex. Civ. App. 512, 28 S. W. 243—Murray v. Farmville & P. R. Co. 101 Va. 272, 43 S. E. 553—Lawrence v. Times Printing Co. 22 Wash. 492, 61 Pac. 166.

—Editorial note.

[On right to use street for quasi public purposes. 47 L.R.A. 87.]

Timber.

76. Timber growing upon land mortgaged is a portion of the realty, and is embraced in the mortgage as security. Mortgagors have no right to cut it after default upon the mortgage, and may be restrained therefrom by a court of equity. *Hutchins v. King*, 1 Wall. 53, 17: 544

2. After-Acquired Property.

a. In General.

Priority between Mortgages, see *infra*, 182.
Validity as against Mortgagor's Creditors, see *Fraudulent Conveyances*, 57.
Priority of Mechanics' Lien Over Mortgage, see *Mechanics' Liens*, 11-14.

77. Whenever a party undertakes to mortgage or grant property, real or personal, *in presentis*, which does not belong to him or has no existence, the deed or mortgage is inoperative and void, either in law or equity. *Pennock v. Coe*, 23 How. 117, 16: 436
Cited in *Barnard v. Norwich & W. R. Co.* 4 Cliff. 360, Fed. Cas. No. 1,007—*Brett v. Carter*, 2 Low. Dec. 463, Fed. Cas. No. 1,844—*Calhoun v. Memphis & P. R. Co.* 2 Filpp. 447, Fed. Cas. No. 2,309—*Ellett v. Butt*, 1 Woods. 218, Fed. Cas. No. 4,384—*Harris v. Youngstown Bridge Co.* 90 Fed. 328—*Paden v. Belenger*, 87 Ala. 576, 6 So. 351—*McClure v. McDearmon*, 26 Ark. 73—*Apperson v. Moore*, 30 Ark. 60, 21 Am. Rep. 170—*Stephens v. Tucker*, 55 Ga. 544—*Kimball v. Gafford*, 78 Iowa. 69, 4 L.R.A. 400, 42 N. W. 583—*Campbell v. Quinton*, 4 Kan. App. 327, 45 Pac. 914—*Dodge v. Smith*, 5 Kan. App. 745, 46 Pac. 990—*Chaffe v. Heyner*, 31 La. Ann. 611—*Bell v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 791—*Emerson v. European & N. A. R. Co.* 67 Me. 391, 42 Am. Rep. 39—*Wilson v. Wilson*, 37 Md. 11, 11 Am. Rep. 518—*Sliters v. Lester*, 48 Miss. 524—*New England Nat. Bank v. Northwestern Nat. Bank*, 171 Mo. 329, 60 L.R.A. 265, 71 S. W. 191—*Williams v. Briggs*, 11 R. I. 478, 23 Am. Rep. 518—*Cook v. Corthell*, 11 R. I. 488, 23 Am. Rep. 518—*Dupree v. McClanahan*, 1 Tex. App. Civ. Cas. (White & W.) § 595—*Hale v. Holton*, 14 Tex. Civ. App. 108, 35 S. W. 843—*Murray v. Farmville & P. R. Co.* 101 Va. 269, 43 S. E. 553—*Balch v. Arnold*, 9 Wyo. 32, 59 Pac. 434.

78. Courts of equity will give effect to a mortgage of after-acquired property, where no rule of law is infringed, and rights of third persons are not prejudiced. *Beall v. White*, 94 U. S. 382, 24: 173
Cited in *Calhoun v. Memphis & P. R. Co.* 2 Filpp. 447, Fed. Cas. No. 2,309—*The Kate*, 63 Fed. 714—*Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co.* 6 Dak. 366, 43 N. W. 806—*Hughes v. Wheeler*, 66 Iowa, 643, 24 N. W. 251—*Bell v. Chicago, St. L.*

& N. O. R. Co. 34 La. Ann. 791—*Brown v. Phillips*, 40 Mich. 271—*Aldine Mfg. Co. v. Phillips*, 118 Mich. 167, 42 L.R.A. 534, 74 Am. St. Rep. 380, 76 N. W. 371—*Perry v. White*, 111 N. C. 200, 16 S. E. 172—*Flanagan Bank v. Graham*, 42 Or. 418, 71 Pac. 137—*Brockenbrough v. Brockenbrough*, 31 Gratt. 592—*First Nat. Bank v. Turnbull*, 32 Gratt. 704, 34 Am. Rep. 791.

79. The after-acquired property of a company, described in its mortgage given to secure its bonds becomes subject to such mortgage as fast as it is acquired. *United Lines Teleg. Co. v. Boston Safe Deposit & T. Co.* 147 U. S. 431, 13 Sup. Ct. Rep. 396, 37: 231

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The lien of a mortgage on after-acquired property. 16: 437
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b. Property Covered by Railroad Mortgages.

Priority of Mortgage, see *infra*, 169, 170, 201-203.
Priority between Mortgages, see *infra*, 183-188.
As against Conditional Seller, see *Sale*, 84.

80. A railroad company authorized to borrow money and issue its bonds, to enable it to finish and stock the road, may mortgage as security not only the then-acquired property, but such as may be acquired in future. *Pennock v. Coe*, 23 How. 117, 16: 436
Cited in *Dunham v. Cincinnati, P. & C. R. Co.* 1 Wall. 267, 17 L. ed. 588—*Shaw v. Bill*, 95 U. S. 16, 24 L. ed. 335—*Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 300, 33 L. ed. 907, 10 Sup. Ct. Rep. 546—*Ruggles v. Southern Minnesota R. Co.* Fed. Cas. No. 12,121—*Compton v. Jesup*, 15 C. C. A. 420, 31 U. S. App. 486, 68 Fed. 286—*New England R. Co. v. Carnegie Steel Co.* 21 C. C. A. 222, 33 U. S. App. 491, 75 Fed. 56—*Conklin v. United States Shipbuilding Co.* 123 Fed. 921—*Central Trust Co. v. Washington County R. Co.* 124 Fed. 817—*Dunham v. Isett*, 15 Iowa, 293—*Beach v. Wakefield*, 107 Iowa, 583, 76 N. W. 688—*Bell v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 792—*Butler v. Rahm*, 46 Md. 548—*Omaha & St. L. R. Co. v. Wabash, St. L. & P. R. Co.* 108 Mo. 301, 18 S. W. 1101—*St. Joseph, St. L. & S. F. R. Co. v. Smith*, 170 Mo. 331, 70 S. W. 790—*Williamson v. New Jersey Southern R. Co.* 26 N. J. Eq. 403—*Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 322, 13 Am. Rep. 505—*Perry v. White*, 111 N. C. 200, 16 S. E. 172—*Hand v. Savannah & C. R. Co.* 12 S. C. 364—*Hand v. Savannah & C. R. Co.* 17 S. C. 277—*Phelps v. Murray*, 2 Tenn. Ch. 753—*Richardson v. Washington*, 88 Tex. 346, 31 S. W. 614—*Miller v. Rutland & W. R. Co.* 36 Vt. 497.

81. A clause in a mortgage which subjects subsequently acquired property to the lien thereof is valid. *Bear Lake & River Water Works & Irrig. Co. v. Garland*, 164, U. S. 1, 17 Sup. Ct. Rep. 7, 41: 327
Cited in *Harris v. Youngstown Bridge Co.* 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328.

82. A mortgage of after-acquired property creates a valid equitable lien, which will

attach to the property as soon as it is acquired. *New Orleans & O. R. Co. v. Mellen* (United States v. *New Orleans & O. R. Co.*) 12 Wall. 362, 20: 434

Cited in *Beall v. White*, 94 U. S. 387, 24 L. ed. 175—*Barnard v. Norwich & W. R. Co.* 4 Cliff. 365, 14 Nat. Bankr. Reg. 476, Fed. Cas. No. 1,007—*Harris v. Youngstown Bridge Co.* 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328—*Williamson v. New Jersey Southern R. Co.* 26 N. J. Eq. 403—*Williams v. Briggs*, 11 R. I. 478, 23 Am. Rep. 518—*Phelps v. Murray*, 2 Tenn. Ch. 753—*Judge v. Jones*, 99 Tenn. 22, 42 S. W. 4—*First Nat. Bank v. Turnbull*, 32 Gratt. 704, 34 Am. Rep. 791—*Horne-Gaylord Co. v. Fawcett*, 50 W. Va. 403, 57 L.R.A. 869, 40 S. E. 564.

83. Mortgages of railroad property and deeds of trust of the same, which in terms cover after-acquired property, are valid, and estop the company and all persons claiming under it and in privity with it from asserting that they do not cover all the property and rights which they profess to cover. *Thompson v. White Water Valley R. Co.* 132 U. S. 68, 10 Sup. Ct. Rep. 29, 33: 256
Cited in *Central Trust Co. v. Kneeland*, 138 U. S. 414, 34 L. ed. 1016, 11 Sup. Ct. Rep. 357—*New Mexico v. United States Trust Co.* 172 U. S. 185, 43 L. ed. 412, 19 Sup. Ct. Rep. 128—*New York Security & T. Co. v. Capital R. Co.* 77 Fed. 531—*Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 79 Fed. 507—*Harris v. Youngstown Bridge Co.* 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328—*International Trust Co. v. T. B. Townsend Brick & Contracting Co.* 37 C. C. A. 409, 95 Fed. 863—*Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 645, 41 Am. St. Rep. 741, 57 N. W. 664—*General Electric Co. v. Transit Equipment Co.* 57 N. J. Eq. 474, 42 Atl. 101—*Platt v. New York & S. B. R. Co.* 17 Misc. 23, 39 N. Y. Supp. 871.

84. A mortgage executed by a railroad company upon its present and after-acquired property covers not only property then owned by it, but becomes a lien upon all property subsequently acquired by it, coming within the description in the mortgage, to which it acquires either the legal or equitable title. *Central Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. Rep. 357, 34: 1014

Cited in *Wade v. Chicago, S. & St. L. R. Co.* 149 U. S. 342, 37 L. ed. 761, 13 Sup. Ct. Rep. 892—*Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 15, 41 L. ed. 333, 17 Sup. Ct. Rep. 7—*Augusta, T. & G. R. Co. v. Kittel*, 2 C. C. A. 623, 2 U. S. App. 409, 52 Fed. 71—*Columbia Finance & T. Co. v. Kentucky Union R. Co.* 9 C. C. A. 269, 22 U. S. App. 54, 60 Fed. 798—*Bridgens v. Dollar Sav. Bank*, 66 Fed. 12—*New England R. Co. v. Carnegie Steel Co.* 21 C. C. A. 222, 33 U. S. App. 491, 75 Fed. 56—*New York Security & T. Co. v. Capital R. Co.* 77 Fed. 531—*St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co.* 32 C. C. A. 290, 60 U. S. App. 675, 89 Fed. 654—*Harris v. Youngstown Bridge Co.* 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328—*Wood v. Holly Mfg. Co.* 100 Ala. 352, 46 Am. St. Rep. 56, 13 So. 948—*State v. Morgan's L. & T. R. & S. S. Co.* 106 La. 526, 31 So. 115—*Brady v. Johnson*, 75 Md. 455, 20 L.R.A. 742, 26 Atl. 49—*Omaha & St. L. R. Co. v. Wabash, St. L. & P. R. Co.* 108 Mo. 301, 18 S. W. 1101—*Platt v. New York & S. B. R. Co.* 9 App. Div. 80, 41 N. Y. Supp.

42—*Platt v. New York & S. B. R. Co.* 17 Misc. 23, 39 N. Y. Supp. 871.

85. The after-acquired property clause in the mortgage of a railroad company covers all acquisitions made to that property by either the construction company which has agreed to construct the road, or others acquiring rights under it. *Wade v. Chicago, S. & St. L. R.* 149 U. S. 327, 13 Sup. Ct. Rep. 892, 37: 755

Cited in *Harris v. Youngstown Bridge Co.* 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328.

86. A mortgage of a railroad to be built, together with its superstructure, appurtenances, fixtures and rolling-stock, covered these several items of property as they came into existence as property of the mortgagor. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20: 199

Cited in *United States v. New Orleans & O. R. Co.* (New Orleans & O. R. Co. v. *Mellen*) 12 Wall. 365, 20 L. ed. 436—*Thompson v. White Water Valley R. Co.* 132 U. S. 74, 33 L. ed. 260, 10 Sup. Ct. Rep. 29—*Central Trust Co. v. Kneeland*, 138 U. S. 419, 34 L. ed. 1016, 11 Sup. Ct. Rep. 357—*United Lines Teleg. Co. v. Boston Safe Deposit & T. Co.* 147 U. S. 448, 37 L. ed. 237, 13 Sup. Ct. Rep. 306—*Wade v. Chicago, S. & St. L. R. Co.* 149 U. S. 341, 37 L. ed. 761, 13 Sup. Ct. Rep. 892—*Bear Lake & River Waterworks Irrig. Co. v. Garland*, 164 U. S. 15, 41 L. ed. 333, 17 Sup. Ct. Rep. 7—*New Mexico v. United States Trust Co.* 172 U. S. 185, 43 L. ed. 412, 19 Sup. Ct. Rep. 128—*Dillon v. Barnard, Holmes*, 394, Fed. Cas. No. 3,015—*Scott v. Clinton & S. R. Co.* 6 Biss. 535, Fed. Cas. No. 12,527—*Boston Safe-Deposit & T. Co. v. Bankers' & M. Teleg. Co.* 36 Fed. 298—*Manhattan Trust Co. v. Sioux City & N. R. Co.* 68 Fed. 73—*Compton v. Jesup*, 15 C. C. A. 421, 31 U. S. App. 486, 68 Fed. 288—*New York Secur. & T. Co. v. Capital R. Co.* 77 Fed. 531—*Harris v. Youngstown Bridge Co.* 33 C. C. A. 74, 62 U. S. App. 112, 90 Fed. 328—*Morgan v. Donovan*, 58 Ala. 263—*Meyer v. Johnston*, 53 Ala. 320—*Colt v. Barnes*, 64 Ala. 122—*Drennen & Co. v. Mercantile Trust & D. Co.* 115 Ala. 634, 39 L. R.A. 635, 67 Am. St. Rep. 72, 23 So. 164—*Holland v. State*, 15 Fla. 518—*Farmers Loan & T. Co. v. Canada & St. L. R. Co.* 127 Ind. 269, 11 L. R.A. 747, 26 N. E. 784—*Watkins v. Houck*, 44 Kan. 512, 24 Pac. 361—*Campbell v. Quinton*, 4 Kan. App. 329, 45 Pac. 914—*Dodge v. Smith*, 5 Kan. App. 745, 46 Pac. 990—*Bell v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 791—*Hamlin v. Jerrard*, 72 Me. 75—*Thompson v. Foerstel*, 10 Mo. App. 299—*Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 644, 41 Am. St. Rep. 741, 57 N. W. 664—*Williamson v. New Jersey Southern R. Co.* 26 N. J. Eq. 403—*Randolph v. Wilmington & R. R. Co.* 11 Phila. 506—*Williams v. Briggs*, 11 R. I. 478, 23 Am. Rep. 518—*Zorn v. Savannah & C. R. Co.* 5 S. C. N. S. 95—*Hand v. Savannah & C. R. Co.* 12 S. C. 364—*Phelps v. Murray*, 2 Tenn. Ch. 753—*Houston & T. C. R. Co. v. Shirley*, 54 Tex. 139—*Masterson v. Burnett*, 27 Tex. Civ. App. 375, 66 S. W. 90—*Horne-Gaylord Co. v. Fawcett*, 50 W. Va. 493, 57 L.R.A. 871, 40 S. E. 564—*Balch v. Arnold*, 9 Wyo. 32, 59 Pac. 434.

87. A mortgage by a railroad, covering after-acquired property, and naming engines, cars, and machinery, covers engines, cars, and machinery added after the mortgage was

given and in existence at the time of foreclosure. *Shaw v. Bill*, 95 U. S. 10, 24: 333
Cited in *Calhoun v. Memphis & P. R. Co.* 2
 Filipp. 447, Fed. Cas. No. 2,309—*Moran v.*
Pittsburgh, C. & St. L. R. Co. 32 Fed. 887—
Parker v. New Orleans, B. R. & V. R. Co.
 33 Fed. 696—*Buck v. Seymour*, 46 Conn. 170
 —*Quincy v. Chicago, B. & Q. R. Co.* 94 Ill.
 542—*Bell v. Chicago, St. L. & N. O. R. Co.*
 34 La. Ann. 791—*Hamlin v. Jerrard*, 72
 Me. 75.

88. A mortgage by a railway company to a trustee for the benefit of the bondholders holds "the road built and to be built," together with all the other matters and things specifically enumerated in the mortgage. *Dunham v. Cincinnati, P. & C. R. Co.* 1 Wall. 254. 17: 584

Distinguished in *General Electric Co. v. Transit Equipment Co.* 57 N. J. Eq. 474, 42 Atl. 101—*Hand v. Savannah & C. R. Co.* 12 S. C. 364—*Hand v. Savannah & C. R. Co.* 17 S. C. 277.

Cited in *Beall v. White*, 94 U. S. 387, 24 L. ed. 175—*Porter v. Pittsburgh Bessemer Steel Co.* 122 U. S. 283, 30 L. ed. 1211, 7 Sup. Ct. Rep. 120—*Fogg v. Blair*, 133 U. S. 540, 33 L. ed. 724, 10 Sup. Ct. Rep. 338—*Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 299, 33 L. ed. 907, 10 Sup. Ct. Rep. 546—*Central Trust Co. v. Kneeland*, 138 U. S. 419, 34 L. ed. 1016, 11 Sup. Ct. Rep. 357—*United Lines Teleg. Co. v. Boston Safe Deposit & T. Co.* 147 U. S. 448, 37 L. ed. 237, 13 Sup. Ct. Rep. 396—*Wade v. Chicago, S. & St. L. R. Co.* 149 U. S. 341, 37 L. ed. 761, 13 Sup. Ct. Rep. 892—*Barnard v. Norwich & W. R. Co.* 4 Cliff. 365, Fed. Cas. No. 1,007—*Calhoun v. Memphis & P. R. Co.* 2 Filipp. 447, Fed. Cas. No. 2,309—*Dillon v. Barnard, Holmes*, 394, Fed. Cas. No. 3,915—*Scott v. Clinton & S. R. Co.* 6 Biss. 534, Fed. Cas. No. 12,527—*Parker v. New Orleans, B. R. & O. R. Co.* 33 Fed. 696—*Boston Safe Deposit & T. Co. v. Bankers' & M. Teleg. Co.* 36 Fed. 298—*Finance Co. v. Charleston, C. & C. R. Co.* 52 Fed. 680—*Farmers' Loan & T. Co. v. Cape Fear & Y. Valley R. Co.* 73 Fed. 715—*New York Secur. & T. Co. v. Capital R. Co.* 77 Fed. 531—*Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 79 Fed. 509—*Phoenix Iron Works Co. v. New York Secur. & T. Co.* 28 C. A. 78, 54 U. S. App. 408, 83 Fed. 759—*Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 86 Fed. 980—*Harris v. Youngstown Bridge Co.* 33 C. C. A. 74, 62 U. S. App. 112, 90 Fed. 328—*First Nat. Bank v. Ewing*, 43 C. C. A. 169, 103 Fed. 186—*Illinois Trust & Sav. Bank v. Doud*, 52 L.R.A. 480, 44 C. C. A. 402, 105 Fed. 136—*Farmers' Loan & T. Co. v. American Waterworks Co.* 107 Fed. 29—*Drennen & Co. v. Mercantile Trust & D. Co.* 115 Ala. 634, 39 L.R.A. 635, 67 Am. St. Rep. 72, 23 So. 164—*Binkley v. Forkner*, 117 Ind. 186, 3 L.R.A. 36, 19 N. E. 753—*Farmers Loan & T. Co. v. Canada & St. L. R. Co.* 127 Ind. 269, 11 L.R.A. 747, 26 N. E. 784—*Chaffee v. Heyner*, 31 La. Ann. 611—*Bell v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 791—*Hamlin v. Jerrard*, 72 Me. 75—*Edwards v. Peterson*, 80 Me. 371, 6 Am. St. Rep. 207, 14 Atl. 936—*Omaha & St. L. R. Co. v. Wabash, St. L. & P. R. Co.* 108 Mo. 301, 18 S. W. 1101—*St. Joseph, St. L. & S. F. R. Co. v. Smith*, 170 Mo. 331, 70 S. W. 700—*Williamson v. New Jersey Southern R. Co.* 20 N. J. Eq. 317—*Hollister v. Stewart*, 111 N. Y. 462, 19 N. E. 782—*Cotten v. Willoughby*, 83 N. C. 79, 35 Am. Rep. 564—*Phelps v. Mur-*
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ray, 2 Tenn. Ch. 753—*First Nat. Bank v. Turnbull*, 32 Gratt. 705, 34 Am. Rep. 791—*Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 493, 57 L.R.A. 871, 40 S. E. 564.

Rolling stock.

Priority of Mortgage, see *infra*, 203.

See also *supra*, 86, 87.

89. After-acquired rolling-stock of a railroad company attaches in equity to a mortgage, if within the description, from the time it is placed there, so as to protect it against the judgment creditors of the railroad company. There is no rule of law or principle of equity that denies effect to such an agreement. *Pennock v. Coe*, 23 How. 117, 16: 436

Dunham v. Cincinnati, P. & C. R. Co. 1 Wall. 254, 17: 584

Cited in *Beall v. White*, 94 U. S. 387, 24 L. ed. 175—*Central Trust Co. v. Kneeland*, 138 U. S. 419, 34 L. ed. 1016, 11 Sup. Ct. Rep. 357—*Barnard v. Norwich & W. R. Co.* 4 Cliff. 364, Fed. Cas. No. 1,007—*Dillon v. Barnard, Holmes*, 394, Fed. Cas. No. 3,915—*Pullan v. Cincinnati & C. Air-Line R. Co.* 5 Biss. 248, Fed. Cas. No. 11,462—*Scott v. Clinton & S. R. Co.* 6 Biss. 534, Fed. Cas. No. 12,527—*Hodder v. Kentucky & G. E. R. Co.* 7 Fed. 799—*Parker v. New Orleans B. & V. R. Co.* 33 Fed. 696—*Boston Safe-Deposit & T. Co. v. Bankers & M. Teleg. Co.* 36 Fed. 298—*Manhattan Trust Co. v. Sioux City & N. R. Co.* 68 Fed. 74—*Burdon Cent. Sugar Ref. Co. v. Ferris Sugar Mfg. Co.* 78 Fed. 420—*Cox v. Birmingham Dry Goods Co.* 125 Ala. 324, 82 Am. St. Rep. 238, 28 So. 456—*Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co.* 6 Dak. 366, 43 N. W. 806—*Roy v. Golings*, 6 Ill. App. 164—*Nellson v. Iowa Eastern R. Co.* 51 Iowa, 188, 33 Am. Rep. 124, 1 N. W. 434—*Hamlin v. Jerrard*, 72 Me. 75—*Edwards v. Peterson*, 80 Me. 372, 6 Am. St. Rep. 207, 14 Atl. 936—*Williamson v. New Jersey Southern R. Co.* 20 N. J. Eq. 320—*Bement v. Plattsburgh & M. R. Co.* 47 Barb. 110—*Platt v. New York & S. B. R. Co.* 17 Misc. 23, 39 N. Y. Supp. 871—*Cotten v. Willoughby*, 83 N. C. 79, 35 Am. Rep. 564—*Groton Mfg. Co. v. Gardiner*, 11 B. I. 628—*Zorn v. Savannah & C. R. Co.* 5 S. C. N. S. 95—*McGraw v. Memphis & O. R. Co.* 5 Coldw. 444—*Louisville & N. R. Co. v. State*, 8 Helsk. 802—*Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 493, 57 L.R.A. 871, 40 S. E. 564.

90. Contracts for the leasing of rolling-stock to a railroad being in effect sales with retention of title as security for purchase money, made by a syndicate composed mostly of those interested in the organization of the road, and the raising of money by car trust certificates issued to themselves or those in confidential relations with them, are a constructive fraud upon a prior mortgagee whose mortgage covers future-acquired property; and such leases, so far as they are a security at all, must be treated as mortgages. *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 13 Sup. Ct. Rep. 170, 36: 1079

91. A mortgage upon the present and future-acquired property of a railroad, including cars, cannot hold cars which have been subsequently leased to the company with the option of purchase, although, under the laws of the state, rolling-stock and personal prop-

erty are deemed part of the road for purposes of a mortgage. *Meyer v. Western Car Co.* 102 U. S. 1, 26: 59
Cited in Harris v. Youngstown Bridge Co. 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328
 —Contracting & Bldg. Co. v. Continental Trust Co. 47 C. C. A. 145, 108 Fed. 4.

92. Where cars were sold and delivered to a railroad company on time, and the title of the cars was to remain in the vendor until they were paid for, the contract was valid; and the cars are not subject to a prior mortgage given on the present and future-acquired property of the company; and the seller may reclaim them. *Fosdick v. Schall*, 99 U. S. 235, 25: 339
Fosdick v. Southwestern Car Co. 99 U. S. 256, 25: 344

Huidekoper v. Hinckley Locomotive Works, 99 U. S. 258, 25: 344
Cited in Fosdick v. Southwestern Car Co. 99 U. S. 256, 25 L. ed. 344—*Sage v. Central R. Co.* 99 U. S. 345, 25 L. ed. 398—*Hale v. Frost*, 99 U. S. 392, 25 L. ed. 419—*Myer v. Western Car Co.* 102 U. S. 9, 26 L. ed. 59—*Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 283, 30 L. ed. 1211, 7 Sup. Ct. Rep. 1206—*McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 551, 36 L. ed. 1085, 13 Sup. Ct. Rep. 170—*Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 16, 41 L. ed. 333, 17 Sup. Ct. Rep. 7—*Re Binford*, 3 Hughes, 299, Fed. Cas. No. 1,411—*Hart v. Barney & S. Mfg. Co.* 7 Fed. 552—*Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 3 McCrary, 140, 11 Fed. 7—*Hardesty v. Pyle*, 15 Fed. 779—*Loomis v. Davenport & St. P. R. Co.* 3 McCrary, 495, 17 Fed. 305—*Farmers' Loan & T. Co. v. Missouri, I. & W. R. Co.* 21 Fed. 267—*Frank v. Denver & R. G. R. Co.* 23 Fed. 126—*Mercantile Trust Co. v. Kanawha & O. R. Co.* 7 C. C. A. 11, 16 U. S. App. 37, 58 Fed. 14—*Farmers' Loan & T. Co. v. Cape Fear & Y. Valley R. Co.* 73 Fed. 715—*Manhattan Trust Co. v. Sioux City Cable R. Co.* 76 Fed. 661—*New York Secur. & T. Co. v. Capital R. Co.* 77 Fed. 531—*Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 79 Fed. 509—*Phoenix Iron Works Co. v. New York Secur. & T. Co.* 28 C. C. A. 78, 54 U. S. App. 408, 83 Fed. 759—*Harris v. Youngstown Bridge Co.* 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328—*Evans v. Klister*, 35 C. C. A. 37, 92 Fed. 836—*Bench's Appeal*, 58 Conn. 473, 20 Atl. 475—*Hall v. Larey*, 73 Ga. 699—*National Bank v. Good-year*, 90 Ga. 728, 16 S. E. 962—*Binkley v. Forkner*, 117 Ind. 185, 3 L.R.A. 36, 19 N. E. 753—*Missouri P. R. Co. v. Bradbury*, 106 Mo. App. 458, 79 S. W. 966—*Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 645, 41 Am. St. Rep. 741, 57 N. W. 664—*Campbell v. Roddy*, 44 N. J. Eq. 252, 6 Am. St. Rep. 889, 14 Atl. 279—*General Electric Co. v. Transit Equipment Co.* 57 N. J. Eq. 474, 42 Atl. 101—*Redewill v. Gillen*, 4 N. M. 79, 12 Pac. 872—*Westinghouse Electric & Mfg. Co. v. New Paltz & P. Traction Co.* 32 Misc. 133, 65 N. Y. Supp. 644—*Call v. Seymour*, 40 Ohio St. 673.

93. If rolling-stock, though nominally leased by a railway company, was acquired under an arrangement which amounted in law to a purchase by it, a mortgagee of the company or a purchaser at foreclosure sale may insist that the railway thereby acquired the title to the property, under a clause as to after-acquired property, and

that it had become subject to the lien of the mortgage. *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 13 Sup. Ct. Rep. 170, 36: 1079

Fixtures.

Priority over Other Liens, see *infra*, 193.
 Rolling Stock Passing by Judicial Sale, see *Judicial Sale*, 102.

See also *supra*, 86.

94. Where one furnishes iron to be used in the construction of a railroad, and allows it to go into and become a part of the road, it is covered by a mortgage executed by the railroad company upon its property, and he has no lien which can displace it. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20: 199

95. Rails put down upon a railroad, and permanent fixtures which are essential to its successful operation, become a part of the property of the company covered by a mortgage, as much as though they had existed when the mortgage was executed. *Thompson v. White Water Valley R. Co.* 182 U. S. 68, 10 Sup. Ct. Rep. 29, 33: 256

96. Rails and other property, which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against a contract between the furnisher of the property and the railroad company which provided that the title thereto should remain in the former until the contract price is paid. This rule applied to bridges and bridge materials. *Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 267, 7 Sup. Ct. Rep. 1206, 30: 1210

Cited in Harris v. Youngstown Bridge Co. 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328.

Land grant.

Mortgage of Railroad Land Grant as Pay for Making "Disposal" of the Lands, see *Public Lands*, 268.

Land Grants Subsequently Forfeited, see *Public Lands*, 287.

97. A land grant is not necessary to the operation of a railroad, or appurtenant to the road, within the meaning of a clause of a mortgage on the railroad which covers after-acquired property which shall be appurtenant to or necessary for the operation of the railroad. *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364, 36: 66

Cited in Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 614, 36 L. ed. 253, 12 Sup. Ct. Rep. 479.

Road purchased.

98. A mortgage by a railroad company upon all its railroad and property, acquired or to be acquired, covers a road purchased, where it was one which might have been built under its charter. *Branch v. Jesup*, 106 U. S. 468, 1 Sup. Ct. Rep. 495, 27: 279

Cited in Columbia Finance & T. Co. v. Kentucky Union R. Co. 9 C. C. A. 269, 22 U. S.

App. 54, 60 Fed. 798—Central Trust Co. v. Washington County R. Co. 124 Fed. 817.

Right of way and track.

See also *supra*, 95, 96.

99. The charter of a railroad company which authorizes the company to mortgage real estate applies to any real estate which the company may acquire in any way and includes the right of way and track. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20: 199

3. Future Earnings.

Rights of Parties as to Earnings, see *infra*, 150-155.

Priority of Mortgage Lien on, see *infra*, 169.

100. A mortgage, by a railroad company, of its road and income, does not transfer the income until possession is taken, where by the mortgage the company holds possession and receives the earnings until the mortgagee take possession or the proper judicial authority interposes. Until then the whole fund belonged to the company, and was subject to its control and was liable to the creditors of the company as if the mortgage did not exist. *Eyster v. Gaff*, 91 U. S. 521, 23: 403

Gilman v. Illinois & M. Teleg. Co. 91 U. S. 603, 23: 405

101. Even though a railroad mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. *Fosdick v. Schall*, 99 U. S. 235, 25: 339

Cited in White v. Pulley, 27 Fed. 441—*Thomas v. Peoria & R. I. R. Co.* 36 Fed. 818—*Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. 184—*Lehman Bros. v. Tallassee Mfg. Co.* 64 Ala. 597—*Roberts v. Denver, L. & G. R. Co.* 8 Colo. App. 510, 46 Pac. 880—*Cook v. Cole*, 55 Iowa, 73, 7 N. W. 419.

102. Mortgages executed by a railroad upon its future earnings, to secure municipal bonds issued in aid of its construction pursuant to statute, are so construed, in equity, as to give effect to the intention of the parties. *Ketchum v. St. Louis*, 101 U. S. 306, 25: 999

Cited in French v. Gapen, 105 U. S. 523, 26 L. ed. 956—*Tompkins v. Little Rock & Ft. S. R. Co.* 15 Fed. 12.

103. The lien of the United States bonds issued as a subsidy to the Kansas Pacific Railway Company applies to the net earnings from the first 393 15-16 miles east of the 100th meridian, which was all that the company was originally authorized to construct. *United States v. Kansas P. R. Co.* 99 U. S. 455, 25: 289

Cited in United States v. Denver P. R. Co. 99 U. S. 460, 25 L. ed. 291—*United States v. Central P. R. Co.* 118 U. S. 239, 30 L. ed. 175, 6 Sup. Ct. Rep. 1038—*United States v. Alabama G. S. R. Co.* 142 U. S. 622, 35 L. ed. 1136, 12 Sup. Ct. Rep. 306—*Union P. R.*

Co. v. United States, 16 Ct. Cl. 358—*Central P. R. Co. v. United States*, 21 Ct. Cl. 182—*Alabama G. S. R. Co. v. United States*, 25 Ct. Cl. 42—*Mackintosh v. Flint & P. M. R. Co.* 34 Fed. 609—*Rosenberg v. Frank*, 58 Cal. 405.

e. Merger.

Supersedure of Prior Representations by Mortgage, see *supra*, 8.

Merger of Previous Negotiations into Mortgage, see *Contracts*, 354.

See also *infra*, 424.

104. Where an encumbrancer, by mortgage or otherwise, becomes the owner of the legal title or of the equity of redemption, the merger of the encumbrance will not be held to take place if it be apparent that it was not the intention of the owner, or if, in the absence of any intention, such merger was against his manifest interest. *Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 4 Sup. Ct. Rep. 679, 28: 582

Cited in Jackson v. Relf, 26 Fla. 468, 8 So. 184—*Keith v. Wheeler*, 159 Mass. 163, 34 N. E. 174—*Brendt v. Brendt*, 25 Misc. 360, 53 N. Y. Supp. 1026—*Agnew v. Charlotte, C. & A. R. Co.* 24 S. C. 23, 58 Am. Rep. 237—*Glenn v. Rudd*, 68 S. C. 105, 102 Am. St. Rep. 659, 46 S. E. 555—*Irvine v. Shram*, 97 Tenn. 259, 36 S. W. 1089.

105. A mortgage, which, in Louisiana, a wife has by statute on her husband's real estate for her money which came to his hands, though not registered, is not merged in a simulated and fraudulent title conveyed by her husband as *dation en paiement*. *Bradley v. Claffin*, 132 U. S. 379, 10 Sup. Ct. Rep. 125, 33: 367

Cited in McDaniel v. Stroud, 45 C. C. A. 450, 106 Fed. 490.

II. Rights and Liabilities of Parties Generally.

a. In General.

Rights of Mortgagee as to Enforcement Generally, see *infra*, 268-277.

Mortgagor's Right to have Receiver Discharged, see *infra*, 278.

Right of Mortgagee to Purchase on Foreclosure, see *infra*, 449-451.

Liability of Equity of Redemption to Attachment, see *Attachment*, 35. 36.

Abriding Privileges of Holder of Mortgage, see *Constitutional Law*, 298.

Denial of Equal Protection to Nonresident Owners, see *Constitutional Law*, 232, 233.

Due Process of Law as to, see *Constitutional Law*, 452-455.

Corporate Liability on Mortgage Executed by President, see *Corporations*, 271.

Rights of Claimant's Heirs as against Holder of Mortgage Given before Confirmation of Claim, see *Descent and Distribution*, 34.

Liability of Heir on Mortgage Given by Ancestor, see *Descent and Distribution*, 38.

Dower Rights of Purchaser's Wife where Purchase Money Mortgage Given, see Dower, 6.

Declarations of Mortgagor as Evidence, see Evidence, 1951.

Right of Mortgagee to be Paid out of Legal Assets of Decedent Debtor's Estate, see Executors and Administrators, 140-142.

Accountability to Codistributees of One Who Takes Assignment of Mortgage as His Share, see Executors and Administrators, 209.

Mortgagee's Right to Interest After Default, see Interest, 101.

Rights of Innocent Mortgagee as Against Condemnation for Illicit Distilling, see Internal Revenue, 309-311.

Conclusiveness of Judgment as to, see Judgment, 524.

Mortgagee's Right to Plead Statute of Limitations, see Limitation of Actions, 233, 234.

See also *infra*, 167, 168, 181.

106. A person holding the strict legal title, with no other right than a lien for a given sum, who sells the land to innocent purchasers, must account to the owners of the equity of redemption for all he receives beyond that sum. *Shillaber v. Robinson*, 97 U. S. 68, 24: 967

107. A power to sell the premises on default in payment of the debt which is included in a deed of trust in the nature of a mortgage does not violate Mont. Rev. Stat. § 371, which provides that a mortgage shall not be deemed a conveyance so as to give the mortgagee a right to possession without foreclosure and sale. *Bell Silver & Copper Min. Co. v. First Nat. Bank*, 156 U. S. 470, 15 Sup. Ct. Rep. 440, 39: 497

Cited in Largey v. Chapman, 18 Mont. 567, 46 Pac. 808.

108. That a mortgagor had only the equitable title to the land does not change the rights of the mortgagee under a mortgage with words of general description, conveying land held by a full equitable, as well as that held by a legal, title. *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. Rep. 546, 33: 905
Cited in Augusta, T. & G. R. Co. v. Kittel, 2 C. C. A. 623, 2 U. S. App. 409, 52 Fed. 71.

109. The debtor, under the Louisiana law of antichresis or mortgage, cannot, before the full payment of the debt, claim the enjoyment of the immovables; but the creditor who wishes to free himself from the obligation under the antichresis may always, unless he has renounced this right, compel the debtor to retake the enjoyment of his immovables. *Livingston v. Story*, 11 Pet. 351, 9: 746

110. The legal title under a mortgage or trust deed vests, under the common law, in the mortgagee or trustee, the grantor having but an equity of redemption in the case of the mortgage, and but a right to the surplus after sale under the trust deed.

Bank of the Metropolis v. Guttschlick, 14 Pet. 19, 10: 335

Cited in Morsell v. First Nat. Bank, 91 U. S. 361, 23 L. ed. 438—*Shea v. Dulin*, 3 MacArthur 344—*Beyer v. LeFevre*, 17 App. D. C. 249—*Wilkes v. Wilkes*, 18 App. D. C. 97—*Rogers v. Shewmaker*, 27 Ind. App. 636, 87 Am. St. Rep. 274, 60 N. E. 462—*Lowe v. Grinnan*, 19 Iowa, 197.

111. The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 605, 25: 757

Cited in Credit Co. v. Arkansas C. R. Co. 5 McCrary, 27, 15 Fed. 50—*Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 68 Fed. 624—*Central Trust Co. v. Marietta & N. G. R. Co.* 21 C. C. A. 302, 41 U. S. App. 339, 75 Fed. 203—*Cutter v. Iowa Water Co.* 128 Fed. 508—*Pueblo Traction & Electric Co. v. Allison*, 30 Colo. 342, 70 Pac. 424.

112. Under the *Little Rock & Ft. Smith Railway mortgage* of December 19, 1874, providing for the payment of interest coupons from the sales of lands so far as the earnings of the road are insufficient therefor, the fact that an extension of time for the payment of such coupons has been obtained, although they are still held as collateral security, does not release the trustees from the duty to pay them from the sales of lands. The trustees should apply the proceeds of such sales in payment of the indebtedness of the corporation, first on its coupons and then upon its bonds so long as they can be bought at a premium not exceeding 10 per cent, to which the mortgage restricts them. *Little Rock & Ft. S. R. Co. v. Huntington*, 120 U. S. 160, 7 Sup. Ct. Rep. 517, 30: 591

113. Land in the possession of the true owners, as established by their successful prosecution of ejectment actions, which were pending when the defendant executed a deed of trust of the property, duly recorded, to secure a loan of money to be used in erecting improvements thereon, cannot be subjected, at the suit of the mortgagee, to an equitable lien for the value of such improvements, on the theory that such owners were charged with the duty of active investigation to discover from what source the money used in the improvements was obtained and on what security, where the mortgagee, even if unaware of the pendency of the ejectment actions, had knowledge that a suit in equity, raising the question of the mortgagor's title to the premises, had been begun, and dismissed for want of prosecution, without prejudice. *Armstrong v. Ashley*, 204 U. S. 272, 27 Sup. Ct. Rep. 270, 51: 482

114. Payments by a mortgagor to the person who has been decreed the heir *ab intestato* of the mortgagee in proceedings under the *Porto Rico Code*, §§ 976-980, are not made at the risk of being required to respond to others who may subsequently be found to be coheirs because the

decree expressly reserved the rights of third parties. *Sixto v. Sarria*, 196 U. S. 175, 25 Sup. Ct. Rep. 186, 49: 436

115. After a judgment of an appellate court reinstating an order of the court below by which instalments due under a mortgage had been directed to be paid into court, pending the determination of the rights of a party claiming to be an heir of the mortgagee, who had died intestate, the mortgagor, acting with full knowledge of this decision of the higher court, cannot discharge his liability by obtaining an order from the lower court permitting the withdrawal of his deposit to pay an assignee of the mortgage, and by paying such assignee pursuant to a decree in a suit to which the alleged heir was not a party. *Sixto v. Sarria*, 196 U. S. 175, 25 Sup. Ct. Rep. 186, 49: 436

Editorial notes.

Right to keep on foot to protect title.

8: 199

[Extension of lien of, by renewal of secured debt. 55 L.R.A. 673.]

Does power of sale in, confer an interest which prevents its revocation by death of mortgagor. 70 L.R.A. 185.

Effect upon mortgagor's obligation of modification between mortgagee and subsequent grantee. 4 L.R.A.(N.S.) 666.]

As to timber.

See also *supra*, 76; *infra*, 144.

116. Timber growing upon land mortgaged is a portion of the realty embraced in the mortgage, and the cutting and sale of it after default by the mortgagor, without license, does not divest the lien of the assignee of the mortgage, the purchaser taking subject to their rights. *Hutchins v. King*, 1 Wall. 53, 17: 544

117. Timber growing upon land mortgaged is a portion of the realty, and is embraced in the mortgage as security. Mortgagors have no right to cut it after default upon the mortgage, and may be restrained therefrom by a court of equity. *Hutchins v. King*, 1 Wall. 53, 17: 544
Cited in *Owens v. Lewis*, 46 Ind. 509, 15 Am. Rep. 295—*Howe v. Batchelder*, 49 N. H. 208—*Knox v. Haralson*, 2 Tenn. Ch. 237—*Hanly v. Watterson*, 39 W. Va. 224, 19 S. E. 536.

118. The mortgagees or their assignees can follow timber wrongfully cut on the land after default, and take possession of it, and hold it until the amounts due at the time are paid; when these are paid, their right over it ceases, and the vendee of the mortgagors is invested with a complete title. *Hutchins v. King*, 1 Wall. 53, 17: 544

Distinguished in *Berthold v. Holman*, 12 Minn. 345, 93 Am. Dec. 233, 611. 221.

Cited in *Morgan v. Gilbert*, 2 Filpp. 647, 2 Fed. 838—*Steed v. Knowles*, 79 Ala. 448—*Hamlin v. Parsons*, 12 Minn. 111, 90 Am. Dec. 284, 611. 59—*Whitney v. Huntington*, 34 Minn. 463, 26 N. W. 631—*Verner v. Betz*, 46 N. J. Eq. 267, 7 L.R.A. 633, 19 Am.

St. Rep. 387, 19 Atl. 203—*Missouri, K. & T. R. Co. v. Starr*, 2 Tex. Civ. App. 357, 55 S. W. 393—*Goff v. McLain*, 48 W. Va. 448, 86 Am. St. Rep. 64, 37 S. E. 503.

119. Action for conversion will lie against the assignee of a mortgage of land in New Hampshire, who, rightfully taking possession of timber wrongfully cut and sold by the mortgagor after default, sold it subsequent to the payment of all sums due upon the mortgage. *Hutchins v. King*, 1 Wall. 53, 17: 544

Cited in *Griswold v. Morse*, 59 N. H. 215—*Carey v. Starr*, 93 Tex. 515, 56 S. W. 324.

As to possession.

120. A mortgagee is entitled to the possession of the property covered by the instrument, in the absence of stipulation to the contrary. *Hodgson v. Butts*, 3 Cranch, 140, 2: 391

Cited in *The Bramen, Brown, Adm.* 162, Fed. Cas. No. 1,805—*Wolf v. O'Farrel*, 1 Treadway, Const. 154.

121. A mortgage conveys the title to the property covered, to the mortgagee, although the mortgagor remains in possession. *United States v. Hooe*, 3 Cranch, 73, 2: 370

Cited in *Conard v. Atlantic Ins. Co.* 1 Pet. 441, 7 L. ed. 213—*Savings & L. Soc. v. Multnomah County*, 169 U. S. 428, 42 L. ed. 805, 18 Sup. Ct. Rep. 392.

122. If a mortgagee or his assignee is lawfully in possession of the premises after condition broken, he will not be turned out until his debt is paid. *Russell v. Ely*, 2 Black, 575, 17: 258

Cited in *Edwards v. Wray*, 11 Biss. 253, 12 Fed. 44—*Johnson v. Cornett*, 29 Ind. 68—*Boggs v. Douglass*, 105 Iowa, 347, 75 N. W. 185—*Madison Ave. Baptist Church v. Baptist Church*, 19 Abb. Pr. 109—*Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 94.

123. If a mortgagee obtain possession of the mortgaged premises by an arrangement with a tenant of the mortgagor, after the tenant's lease has expired, and without the mortgagor's consent, he is not lawfully in possession. *Russell v. Ely*, 2 Black, 575, 17: 258

Cited in *Stouffer v. Harlan*, 68 Kan. 138, 64 L.R.A. 322, 104 Am. St. Rep. 396, 74 Pac. 610—*Davis v. Flagg*, 44 N. J. Eq. 112, 13 Atl. 257—*Barson v. Mulligan*, 66 App. Div. 495, 73 N. Y. Supp. 265—*Bennett v. Austin*, 81 N. Y. 316.

124. Where the owner of the equity of redemption never sought to regain possession of mortgaged premises upon which the mortgagee had made entry, it is presumed that the possession remained in the mortgagee so long as his rights under the mortgage continued. *Doe ex dem. Brobst v. Roe* (*Brobst v. Brock*) 10 Wall. 519, 19: 1002

125. A mortgagee of land entitled to possession after condition broken cannot maintain summary proceedings, under D. C. Rev. Stat. § 634, to recover possession from the mortgagor, where there has been neither forcible entry nor detainer by force. *Willis*

v. Eastern Trust & Bkg. Co. 169 U. S. 295, 18 Sup. Ct. Rep. 347, 42: 752
Offered in Eastern Trust & Bkg. Co. v. American Ice Co. 14 App. D. C. 326.

As to taxes and tax titles.

Liability of Purchaser on Foreclosure for Taxes, see *infra*, 452, 453.

Taking Amount Necessary to Pay, out of Proceeds, see *infra*, 493.

See also *infra*, 277, 491.

126. Upon the foreclosure of a deed of trust which provided for the payment out of the proceeds of all moneys advanced for taxes, the mortgagee is entitled to be paid the sums paid by him to extinguish tax titles, and is not obliged to contest them, where it was obligatory on the mortgagor to pay the taxes. *Windett v. Union Mut. L. Ins. Co.* 144 U. S. 581, 12 Sup. Ct. Rep. 751, 36: 551

Cited in Weinreich v. Hensley, 121 Cal. 657, 54 Pac. 254—*Worcester v. Boston*, 179 Mass. 51, 60 N. E. 410—*Rowse v. Johnson*, 66 Mo App. 62.

127. A Federal tax upon a railroad mortgage held by a city having been exacted from the company under color of law, the company, having notified the city of the demand of the United States, was justified in paying it, and recovering it of the city, and cannot be required, on its own behalf, to test the ruling of the revenue officers. *Baltimore v. Baltimore & O. R. Co.* 10 Wall. 543, 19: 1043

Cited in United States v. Hodson, Fed. Cas. No. 15,376—*United States v. Myers*, 3 Hughes, 245, Fed. Cas. No. 15,846.

128. Under a clause in a mortgage made by a railway company, that the company shall pay the principal and interest without any deduction for any taxes or assessment whatsoever, the company is authorized to deduct or withhold the amount of such tax, when paid by it, from the coupons or interest due by it on such mortgage and the accompanying bonds. *Haight v. Pittsburg, Ft. W. & C. R. Co.* 6 Wall. 15, 18: 818

Offered in Barnes v. Philadelphia & R. R. Co. 17 Wall. 319, 21 L. ed. 551—*United States v. Baltimore & O. R. Co.* 17 Wall. 325, 21 L. ed. 599—*United States v. Erie R. Co.* 106 U. S. 332, 27 L. ed. 154, 1 Sup. Ct. Rep. 223—*United States v. Baltimore & O. R. Co.* Fed. Cas. No. 14,511—*United States v. Louisville & N. R. Co.* 33 Fed. 831—*Minneapolis & N. Elevator Co. v. Trall County*, 9 N. D. 221, 50 L.R.A. 271, 82 N. W. 727—*New Jersey West Line R. Co. v. Beardsley*, 35 N. J. L. 481—*Territory v. Co-operative Bldg. & L. Asso.* 10 N. M. 347, 62 Pac. 1097—*South Nashville Street R. Co. v. Morrow*, 87 Tenn. 426, 2 L.R.A. 860, 11 S. W. 348.

— Editorial note.

[Right of mortgagee, who has paid taxes, to maintain independent action against mortgagor for reimbursement before or after foreclosure of mortgage. 10 L.R.A. (N.S.) 679.]

As to insurance moneys.

Mortgagee's Rights in Insurance Money, see Insurance, 638-647, 681, 682.

Subrogation of Insurer to Rights of Mortgagee, see Insurance, 678.
 See also *infra*, 354.

129. Where, by agreement between the mortgagee and life tenant, the insurance money, after destruction of the mortgaged building by fire, has been deposited in a bank, to be used in rebuilding, the sum must be considered, as to the remaindermen, who executed the mortgage jointly with the life tenant, as a payment *pro tanto*, extinguishing their liability upon the mortgage to that extent; and the mortgagee is at liberty to use the money towards restoring the building, is bound to see that it is so applied, and takes the risk of diversion, where he intrusts the amount to the life tenant. *Connecticut Mut. L. Ins. Co. v. Scammon*, 117 U. S. 634, 6 Sup. Ct. Rep. 889, 29: 1007

Default of mortgagor.

130. The mortgagee, after breach of the condition, may enter or maintain ejectment for the land. And, having entered, he cannot be dispossessed by the mortgagor, so long as the mortgage continues in force. *Doe ex dem. Brobst v. Roe* (*Brobst v. Brock*) 10 Wall. 519, 19: 1002

131. In equity the mortgagee's legal title, upon failure by the mortgagor to comply with the conditions of the mortgage, is regarded as a trust estate, to secure the payment of the money; and therefore, where the debt is discharged, there is a resulting trust for the mortgagor. *Bronson v. Kinzie*, 1 How. 311, 11: 143
Cited in Upham v. Brooks, 2 Woodb. & M. 413, Fed. Cas. No. 16,797—*Mundy v. Monroe*, 1 Mich. 72—*Rogers v. Bradford*, 1 Pinney (Wis.) 434.

132. In Wisconsin, the fee of the mortgaged premises does not vest, upon default of the mortgagor, in the mortgagee or his assignee; the fee vests only upon sale and foreclosure. *Russell v. Ely*, 2 Black, 575, 17: 258

Offered in Swain v. Seamens, 9 Wall. 270, 19 L. ed. 559—*Howard v. La Crosse & M. R. Co.* Woolw. 57, Fed. Cas. No. 6,760—*Witherell v. Wiberger*, 4 Sawy. 235, Fed. Cas. No. 17,917.

— Editorial note.

[Stipulation that mortgagor shall, on default, become a tenant. 49 L.R.A. 435.]

Discharge of debt.

133. A mortgagee does not have a lien, but a qualified estate and security; and, when the debt is discharged, there is a resulting trust for the mortgagor. *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 7: 189

Cited in Bronson v. Kinzie, 1 How. 318, 11 L. ed. 146—*Massingill v. Downs*, 7 How. 767, 12 L. ed. 906—*Gibson v. Stevens*, 8 How. 400, 12 L. ed. 1130—*United States v. Stowell*, 133 U. S. 19, 33 L. ed. 560, 10 Sup. Ct. Rep. 244—*Bingham v. Frost*, 6 Nat. Bankr. Reg. 131, Fed. Cas. No. 1,413—*Cleveland v. La Crosse & M. R. Co.* 7 Am. L. Reg. 548, Fed. Cas. No. 2,887—*Upham v. Brooks*, 2 Woodb. & M. 413, Fed. Cas. No. 16,797—*Webb v. Anderson*, Taney, 513, Fed. Cas. No. 17,318—*Ringo v. Woodruff*, 43 Ark. 489—*Whittington*

v. Flint, 43 Ark. 519, 51 Am. Rep. 572—
Green v. Turner, 38 Iowa, 118—Kennebec &
P. R. Co. v. Portland & K. R. Co. 59 Me. 75
—Charter v. Stevens, 3 Denio, 35, 45 Am.
Dec. 444.

Sale by mortgagor to mortgagee.

134. To give validity to a sale by a mortgagor to a mortgagee, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid what the property was worth, every doubt being resolved against him. *Alexander v. Rodriguez* (Villa v. Rodriguez) 12 Wall. 323. 20: 406

Cited in Savings & L. Soc. v. Davidson, 38 C. C. A. 386, 97 Fed. 717—*Bradbury v. Davenport*, 114 Cal. 600, 55 Am. St. Rep. 92, 46 Pac. 1062—*Clarke v. East*, 128 Cal. 428, 61 Pac. 72—*Walker v. Farmers' Bank*, 8 Houst. (Del.) 264, 14 Atl. 519—*Walker v. Farmers' Bank*, 6 Del. Ch. 94, 10 Atl. 94—*Peugh v. Davis*, 2 MacArth. 21—*Jones v. Franks*, 33 Kan. 502, 6 Pac. 789—*Niggeler v. Maurin*, 34 Minn. 125, 24 N. W. 369—*McLeod v. Bullard*, 86 N. C. 215—*Shaw v. Walbridge*, 33 Ohio St. 6—*Tant v. Guess*, 37 S. C. 510, 16 S. E. 472—*Treggle v. Berkeley*, 101 Va. 95, 42 S. E. 199—*Vangilder v. Hoffman*, 22 W. Va. 33.

135. He must take no advantage of the fears or poverty of the other party. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence, if there is vice in the transaction. *Alexander v. Rodriguez* (Villa v. Rodriguez) 12 Wall. 323. 20: 406

136. Where the mortgagee assured the mortgagors, before and after the "conveyance" to him, that if he could sell so as to repay them the money secured by the mortgage, he would return the surplus money, or if he could sell a portion sufficient to reimburse him, he would return the unsold portion, he cannot repudiate such assurances upon which his grantors were drawn in to convey. *Alexander v. Rodriguez* (Villa v. Rodriguez) 12 Wall. 323, 20: 406

Release of equity of redemption.

137. A subsequent release of the equity of redemption must be a transfer in writing of the mortgagor's interest, or such facts must be shown as will estop him from asserting any interest in the premises. *Peugh v. Davis*, 96 U. S. 332. 24: 775

Cited in Oliver v. Cunningham, 7 Fed. 694—*Bazemore v. Mullins*, 52 Ark. 212, 12 S. W. 474—*Bradbury v. Davenport*, 114 Cal. 599, 55 Am. St. Rep. 92, 46 Pac. 1062—*Niggeler v. Maurin*, 34 Minn. 124, 24 N. W. 369—*Nebraska Loan & T. Co. v. Hamer*, 40 Neb. 287, 58 N. W. 695—*Marshall v. Williams*, 21 Or. 270, 28 Pac. 137—*Tuggle v. Berkeley*, 101 Va. 97, 43 S. E. 199.

138. The release must also be for an adequate consideration; any marked undervaluation of the property in the price paid will vitiate the proceeding. *Peugh v. Davis*, 96 U. S. 332. 24: 775

Cited in Savings & L. Soc. v. Davidson, 38 C. C. A. 386, 97 Fed. 717—*McMillan v. Jewett*, 85 Ala. 479, 5 So. 145—*Goree v. Clements*, 94 Ala. 340, 10 So. 906—*Clarke v. East*, 128 Cal. 428, 61 Pac. 72—*DeFalgie v. Denham*, 65 Ga. 491.

Conversion of land into money.

139. Where mortgaged property has been converted into money, the lien of the mortgage follows the fund into the hands of an assignee in bankruptcy and binds it there. *Gibson v. Warden*, 14 Wall. 244, 20: 797

Remedy against person of debtors.

140. It is a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of a debtor. *Conway v. Alexander*, 7 Cranch, 218, 3: 321
Denied in Kerr v. Gilmore, 6 Watts, 410.

Cited in Bentley v. Phelps, 2 Woodb. & M. 443, Fed. Cas. No. 1,331—*Flagg v. Mann*, 2 Sumn. 534, Fed. Cas. No. 4,847—*Demond v. Crary*, 9 Fed. 752—*McKinstry v. Conly*, 12 Ala. 681—*West v. Hendrix*, 28 Ala. 234—*Haynie v. Robertson*, 58 Ala. 40—*Galt v. Jackson*, 9 Ga. 156—*Winter v. Swift*, 2 Idaho, 66, 3 Pac. 15—*Voss v. Eller*, 109 Ind. 264, 10 N. E. 74—*Northern C. R. Co. v. Hering*, 93 Md. 175, 48 Atl. 461—*Pace v. Bartles*, 47 N. J. Eq. 176, 20 Atl. 352—*Robinson v. Cropsey*, 2 Edw. Ch. 144—*Slutz v. Desenberg*, 28 Ohio St. 377—*Calhoun v. Lumpkin*, 60 Tex. 189—*Sadler v. Taylor*, 49 W. Va. 119, 38 S. E. 583—*Musgat v. Pumpelly*, 46 Wis. 666, 1 N. W. 410.

b. Rents and Profits.

Taking into Account in Determining Amount Payable on Redemption, see *infra*, 525, 534, 539.

See also *supra*, 65.

141. In the case of a mortgage of land the rents and profits are not pledged. They belong to the tenant in possession, whether the mortgagor or a third person claiming under him. *Omaha Hotel Co. v. Kountze* (*Kountze v. Omaha Hotel Co.*) 107 U. S. 378, 2 Sup. Ct. Rep. 911, 27: 609

Cited in H. B. Claflin Co. v. Furtick, 119 Fed. 431—*Bank of Woodland v. Heron*, 120 Cal. 618, 52 Pac. 1006—*Keyser v. Hitz*, 4 Mackey, 183—*Chelton v. Green*, 65 Md. 277, 4 Atl. 271—*Heller v. National Marine Bank*, 89 Md. 622, 45 L.R.A. 445, 73 Am. St. Rep. 212, 43 Atl. 800—*Huston v. Canfield*, 57 Neb. 348, 77 N. W. 763.

142. A mortgagor is not liable for rent and profits received during the continuance of his possession, even though the land, when sold, is insufficient to pay the debt. *Per Washington, J. Hughes v. Edwards*, 9 Wheat. 489. 6: 142

Cited in Teal v. Walker, 111 U. S. 250, 28 L. ed. 418, 4 Sup. Ct. Rep. 420—*Willis v. Eastern Trust & Bkg. Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 347—*Dow v. Memphis & L. R. Co.* 20 Fed. 770—*Eastern Trust & Bkg. Co. v. American Ice Co.* 14 App. D. C. 328.

142a. A mortgagee in possession is accountable for the net rents and profits. *Mathews v. Memphis & C. R. Co.* (*Scruggs v. Memphis & C. R. Co.*) 108 U. S. 368, 2 Sup. Ct. Rep. 780, 27: 756

Cited in Waterman v. Mackenzie, 138 U. S. 259, 34 L. ed. 927, 11 Sup. Ct. Rep. 334—*Emil Kiewert Co. v. Juneau*, 24 C. C. A. 297, 47 U. S. App. 394, 78 Fed. 711—*Murdock v. Clarke*, 90 Cal. 440, 27 Pac. 275—*Froud v. Merritt Bros.* 99 Iowa, 418, 68 N. W. 728—

Franklin Land, Mill. & W. Co. v. Card, 84 Me. 534, 24 Atl. 960.

143. An express stipulation for payment of rents and profits to the mortgagee even while the mortgagor remains in possession will be enforced. *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 8 Sup. Ct. Rep. 1250. 32: 163

Cited in O'Hara v. Moble & O. R. Co. 75 Fed. 133.

144. A person in possession of land claiming the whole title may be compelled to account to the mortgagee of an undivided three fourths of the land on foreclosure, for three fourths of the timber cut and removed. *McGahan v. National Bank of Rondout (McGahan v. Bank of Rondout)* 156 U. S. 218, 15 Sup. Ct. Rep. 347, 39: 403

Editorial note.

Right of mortgagor to income and products of mortgaged premises. 23: 405

When right to accrues, in general.

145. An ordinary mortgagee of real estate, who has not taken possession under his mortgage, is not entitled to the rents and profits as against the mortgagor or his attaching creditors. *Brown v. Maryland (Macalester v. Maryland)* 114 U. S. 598, 5 Sup. Ct. Rep. 1065, 29: 233

Cited in Hook v. Bosworth, 12 C. C. A. 214, 24 U. S. App. 341, 64 Fed. 448—*Mercantile Trust Co. v. Baltimore & O. R. Co.* 82 Fed. 366.

146. Under a mortgage including rents, issues, and profits, until the mortgagee takes possession they belong to the mortgagor, and are subject to claims of the mortgagor's creditors. *American Bridge Co. v. Heidelbach*, 94 U. S. 798, 24: 144

Gilman v. Illinois & M. Teleg. Co. 91 U. S. 603, 23: 405

Distinguished in Sunflower Oil Co. v. Wilson, 142 U. S. 325, 35 L. ed. 1029, 12 Sup. Ct. Rep. 235.

Cited in American Bridge Co. v. Heidelbach, 94 U. S. 800, 24 L. ed. 144—*Fosdick v. Schall*, 99 U. S. 253, 25 L. ed. 343—*Teal v. Walker*, 111 U. S. 251, 28 L. ed. 418, 4 Sup. Ct. Rep. 420—*Macalester v. Maryland (Brown v. Maryland)* 114 U. S. 605, 29 L. ed. 235, 5 Sup. Ct. Rep. 1065—*Sage v. Memphis & L. R. R. Co.* 125 U. S. 378, 31 L. ed. 698, 8 Sup. Ct. Rep. 887—*Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 500, 32 L. ed. 168, 8 Sup. Ct. Rep. 1250—*Sunflower Oil Co. v. Wilson*, 142 U. S. 325, 35 L. ed. 1029, 12 Sup. Ct. Rep. 235—*United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 307, 37 L. ed. 1091, 14 Sup. Ct. Rep. 86—*Allen v. Dallas & W. R. Co.* 3 Woods, 328, Fed. Cas. No. 221—*Hay v. Alexandria & W. R. Co.* 4 Hughes, 373, Fed. Cas. No. 6,254a—*Strang v. Montgomery & E. R. Co.* 3 Woods, 616, Fed. Cas. No. 13,523—*Union Trust Co. v. St. Louis, I. M. & S. R. Co.* 4 Dill. 118, Fed. Cas. No. 14,402—*Young v. Northern Illinois Coal & I. Co.* 9 Biss. 305, 13 Fed. 809—*Dow v. Memphis & L. R. R. Co.* 20 Fed. 770—*Farmers' Loan & T. Co. v. Missouri, I. & N. R. Co.* 21 Fed. 271—*White v. Pulley*, 27 Fed. 441—*Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 1 L.R.A. 400, 36 Fed. 226—*Thomas v. Peoria & R. I. R. Co.* 36 Fed. 818—*Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. 184—*The Kate*, 63 Fed. 717—

Hook v. Bosworth, 12 C. C. A. 214, 24 U. S. App. 341, 64 Fed. 448—*Farmers' Loan & T. Co. v. Detroit, B. C. & A. R. Co.* 71 Fed. 35—*Linder v. Hartwell R. Co.* 73 Fed. 324—*Farmers' Loan & T. Co. v. Cape Fear & Y. Valley R. Co.* 73 Fed. 714—*Downs v. Farmers' Loan & T. Co.* 24 C. C. A. 505, 52 U. S. App. 79, 79 Fed. 221—*Veatch v. American Loan & T. Co.* 28 C. C. A. 386, 55 U. S. App. 191, 84 Fed. 276—*American Waterworks & Guarantee Co. v. Home Water Co.* 115 Fed. 175—*Atlantic Trust Co. v. Dana*, 62 C. C. A. 667, 128 Fed. 217—*Lehman v. Tallahassee Mfg. Co.* 64 Ala. 597—*Scott v. Ware*, 65 Ala. 184—*Johnston v. Riddle*, 70 Ala. 226—*Falkner v. Campbell Printing Press & Mfg. Co.* 74 Ala. 384—*Perkerson v. Snodgrass*, 85 Ala. 141, 4 So. 752—*Drennen & Co. v. Mercantile Trust & D. Co.* 115 Ala. 608, 39 L.R.A. 626, 67 Am. St. Rep. 72, 23 So. 164—*Sacramento P. R. Co. v. Superior Court*, 55 Cal. 458—*McLane v. Placerville & S. Valley R. Co.* 66 Cal. 615, 6 Pac. 748—*Simpson v. Ferguson*, 112 Cal. 186, 53 Am. St. Rep. 201, 44 Pac. 484—*Roberts v. Denver, L. & G. R. Co.* 8 Colo. App. 510, 46 Pac. 880—*Green v. Coast Line R. Co.* 97 Ga. 22, 33 L.R.A. 809, 54 Am. St. Rep. 379, 24 S. E. 814—*Mississippi Valley & W. R. Co. v. United States Exp. Co.* 81 Ill. 537—*Bagley v. Illinois Trust & Sav. Bank*, 199 Ill. 79, 64 N. E. 1083—*Silverman v. Northwestern Mut. L. Ins. Co.* 5 Ill. App. 130—*Des Moines Gas Co. v. West*, 50 Iowa, 29—*Emerson v. European & N. A. R. Co.* 67 Me. 394, 24 Am. Rep. 39—*Brown v. Chesapeake & O. Canal Co.* 73 Md. 583—*Heller v. National Marine Bank*, 89 Md. 623, 45 L.R.A. 445, 73 Am. St. Rep. 212, 43 Atl. 800—*Smith v. Eastern R. Co.* 124 Mass. 157—*De Graff v. Thompson*, 24 Minn. 457—*Re Life Assn. of America*, 96 Mo. 636, 10 S. W. 69—*St. Louis Nat. Bank v. Field*, 156 Mo. 312, 56 S. W. 1095—*White v. Wear*, 4 Mo. App. 347—*Huston v. Canfield*, 57 Neb. 348, 77 N. W. 763—*Platt v. New York & S. B. R. Co.* 63 App. Div. 407, 71 N. Y. Supp. 813—*New York Security & T. Co. v. Saratoga Gas & Electric Light Co.* 159 N. Y. 144, 45 L.R.A. 135, 53 N. E. 758—*Merchants Bank v. Petersburg R. Co.* 12 Phila. 483—*Merchants' Bank v. Petersburg R. Co.* 4 W. N. C. 264—*Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 165, 12 S. W. 537—*McIlhenny v. Bink*, 80 Tex. 17, 26 Am. St. Rep. 705, 13 S. W. 655—*Giles v. Stanton*, 86 Tex. 627, 26 S. W. 615—*Gilbert v. Washington City, V. M. & G. S. R. Co.* 83 Gratt. 649—*Frayser v. Richmond & A. R. Co.* 81 Va. 391—*Childs v. Hurd*, 32 W. Va. 87, 9 S. E. 362.

147. A mortgagee is not entitled to demand, of the owner of the equity of redemption, the rents and profits of the mortgaged premises until he takes actual possession, although the mortgagee may have the right to take possession upon condition broken, and the condition has been broken. *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. Rep. 420, 28: 415

148. Where a mortgage does not provide for the payment of rents to the mortgagee during the mortgagor's possession, even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon nonperformance of the conditions of the mortgage, the former is not entitled to rents until he takes actual possession, or possession is taken in his behalf. *Freedman's Sav.*

& T. Co. v. Shepherd, 127 U. S. 494, 8 Sup. Ct. Rep. 1250, 32: 163

Cited in United States Trust Co. v. Wabash Western R. Co. 150 U. S. 308, 37 L. ed. 1091, 14 Sup. Ct. Rep. 86—Willis v. Eastern Trust & Bkg. Co. 169 U. S. 310, 32 L. ed. 759, 18 Sup. Ct. Rep. 347—Lopez v. United States, 2 L.R.A. 575, 24 Ct. Cl. 84—Thomas v. Peoria & R. I. R. Co. 36 Fed. 818—American Waterworks & Guarantee Co. v. Home Water Co. 115 Fed. 176—North American Trust Co. v. Burrow, 68 Ark. 586, 60 S. W. 950—Eastern Trust & Bkg. Co. v. American Ice Co. 14 App. D. C. 329—Barron v. Whiteside, 89 Md. 461, 43 Atl. 825—Heller, H. & Co. v. National Marine Bank, 89 Md. 622, 45 L.R.A. 445, 73 Am. St. Rep. 212, 43 Atl. 800—New York Security & T. Co. v. Saratoga Gas & Electric Light Co. 159 N. Y. 144, 45 L.R.A. 135, 53 N. E. 758—Killebrew v. Hines, 104 N. C. 191, 17 Am. St. Rep. 672, 10 S. E. 159.

149. A statute of a state, that "a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law," establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure. *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. Rep. 420 28: 415

Right to earnings.

150. The mortgagor of a railroad, even though the mortgage covers the income, need not account for earnings while the property is in his possession, until a demand has been made therefor or for the surrender of the possession under the mortgage. *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 8 Sup. Ct. Rep. 887, 31: 694
Dow v. Memphis & L. R. Co. 124 U. S. 652, 8 Sup. Ct. Rep. 673, 31: 565

Cited in *Sage v. Memphis & L. R. R. Co.* 125 U. S. 377, 31 L. ed. 698, 8 Sup. Ct. Rep. 887—Union Trust Co. v. Morrison, 125 U. S. 612, 31 L. ed. 831, 8 Sup. Ct. Rep. 1004—St. Louis A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co. 125 U. S. 673, 31 L. ed. 837, 8 Sup. Ct. Rep. 1011—Freedman's Sav. & T. Co. v. Shepherd, 127 U. S. 503, 32 L. ed. 167, 8 Sup. Ct. Rep. 1250—United States Trust Co. v. Wabash Western R. Co. 150 U. S. 308, 37 L. ed. 1091, 14 Sup. Ct. Rep. 86—Southern R. Co. v. Carnegie Steel Co. 176 U. S. 295, 44 L. ed. 474, 20 Sup. Ct. Rep. 347—Mercantile Trust Co. v. Missouri, K. & T. R. Co. 1 L.R.A. 400, 36 Fed. 226—Thomas v. Peoria & R. I. R. Co. 36 Fed. 818—Central Trust Co. v. Wabash, St. L. & P. R. Co. 46 Fed. 34—Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co. 53 Fed. 184—Hook v. Bosworth, 12 C. C. A. 214, 24 U. S. App. 341, 64 Fed. 449—Farmers' Loan & T. Co. v. Detroit, B. C. & A. R. Co. 71 Fed. 37—Jones v. Central Trust Co. 19 C. C. A. 574, 4 U. S. App. 224, 78 Fed. 573—Whiteley v. Central Trust Co. 34 L.R.A. 305, 22 C. C. A. 70, 43 U. S. App. 643, 76 Fed. 77—Southern R. Co. v. Carnegie Steel Co. 22 C. C. A. 294, 42 U. S. App. 145, 76 Fed. 498—Downs v. Farmers' Loan & T. Co. 24 C. C. A. 505, 52 U. S. App. 79, 79 Fed. 220—Veatch v. American Loan & T. Co.

28 C. C. A. 386, 55 U. S. App. 191, 84 Fed. 276—Appleton Waterworks Co. v. Central Trust Co. 35 C. C. A. 308, 93 Fed. 290—Illinois Trust & Sav. Bank v. Doud, 52 L.R.A. 488, 44 C. C. A. 400, 105 Fed. 135—Farmers' Loan & T. Co. v. American Water Works Co. 107 Fed. 25—Gregg v. Mercantile Trust Co. 48 C. C. A. 326, 109 Fed. 228—Eau Claire v. Payson, 48 C. C. A. 610, 109 Fed. 678—American Waterworks & Guarantee Co. v. Home Water Co. 115 Fed. 176—New York Security & T. Co. v. Saratoga Gas & Electric Light Co. 159 N. Y. 144, 45 L.R.A. 135, 53 N. E. 758.

151. Demand for possession may be made by bringing suit for that purpose, and thereafter the mortgagor must account for the earnings: and it is of no consequence that a receiver was not appointed until subsequently. *Dow v. Memphis & L. R. Co.* 124 U. S. 652, 8 Sup. Ct. Rep. 673, 31: 565
Cited in Central Trust Co. v. Wabash, St. L. & P. R. Co. 46 Fed. 33—Hook v. Bosworth, 12 C. C. A. 214, 24 U. S. App. 341, 64 Fed. 448—Downs v. Farmers' Loan & T. Co. 24 C. C. A. 505, 52 U. S. App. 79, 79 Fed. 220—Central Trust Co. v. Worcester Cycle Mfg. Co. 86 Fed. 38—Eau Claire v. Payson, 48 C. C. A. 610, 109 Fed. 678—American Waterworks & G. Co. v. Home Water Co. 115 Fed. 175—Barron v. Whiteside, 89 Md. 461, 43 Atl. 825—New York Security & T. Co. v. Saratoga Gas & Electric Light Co. 159 N. Y. 144, 45 L.R.A. 135, 53 N. E. 758.

152. Until the mortgagee of a railroad asserts his rights under the mortgage to the possession of the road by filing a bill of foreclosure, or, if the road be in the hands of a third party, by demanding possession of such party, he has no right to its earnings and profits. *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 14 Sup. Ct. Rep. 86, 37: 1085
Cited in *Seney v. Wabash Western R. Co.* 150 U. S. 310, 37 L. ed. 1093, 14 Sup. Ct. Rep. 94—The Kate, 63 Fed. 717—Central Trust Co. v. Charlotte, C. & A. R. Co. 65 Fed. 270—New England R. Co. v. Carnegie Steel Co. 21 C. C. A. 222, 33 U. S. App. 491, 75 Fed. 57—Central Trust Co. v. East Tennessee, V. & G. R. Co. 26 C. C. A. 35, 47 U. S. App. 663, 80 Fed. 629—Central Trust Co. v. Chattanooga, R. & C. R. Co. 89 Fed. 391—American Waterworks & Guarantee Co. v. Home Water Co. 115 Fed. 176—Atlantic Trust Co. v. Dana, 62 C. C. A. 667, 128 Fed. 219—Cox v. Terre Haute & I. R. Co. 66 C. C. A. 438, 133 Fed. 376—New York Security & T. Co. v. Saratoga Gas & Electric Light Co. 159 N. Y. 144, 45 L.R.A. 135, 53 N. E. 758.

153. The right of a second mortgagee to all the income of a receivership created under a bill in foreclosure filed by him is limited to cases in which the first mortgagee is not a party. *Miltenerberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 1 Sup. Ct. Rep. 140, 27: 117

154. The act of July 2, 1864, authorized the payment of the interest accruing on the first-mortgage bonds out of the net earnings of the road, in preference to the 5 per

cent payable to the government. *Union P. R. Co. v. United States*, 99 U. S. 402,

25: 274

United States v. Sioux City & Pac. R. R. Co. 99 U. S. 491,

25: 232

United States v. Central P. R. Co. 99 U. S. 449,

25: 287

155. Under the statutes of Maryland the tolls and revenues of the Chesapeake & Ohio Canal Company are mortgaged to the state to secure the repayment of money lent by the state to the company, and the payment of dividends and interest on the stock subscribed for by the state, subject to the payment of necessary expenses, and to a mortgage to trustees to secure the payment of certain bonds of the company. At the suit in equity of the state and of such trustees, even before the state has taken possession under its mortgages, a general creditor of the company, who, at the time of contracting his debt, had notice of the provisions of the statutes and of the mortgages, will be restrained from levying on money deposited by the company in a bank, and needed to meet such necessary expenses. *Brown v. Maryland (Macalester v. Maryland)* 114 U. S. 598, 5 Sup. Ct. Rep. 1065, 29: 233
Cited in Roberts v. Denver L. & G. R. Co. 8 Colo. App. 510, 46 Pac. 880—*Brady v. Johnson*, 75 Md. 453, 20 L.R.A. 741, 26 Atl. 49.

c. Trustees and Bondholders.

Constructive Notice to Trustee of Prior Lien, see *infra*, 175.

Right of Trustees to Purchase at Sale, see *infra*, 444, 445.

Priority of Bondholder, see *infra*, 188, 197-201.

Right of Bondholders to Foreclose, see *infra*, 297-299.

Right of Bondholders to Purchase on Foreclosure, see *infra*, 447, 448.

Right of Bondholders to Object to Confirmation of Foreclosure Sale, see *infra*, 466.

Bondholder's Right to have Foreclosure Sale Set Aside, see *infra*, 475, 478-480.

Bondholders Bound by Release of Errors Executed by Trustee, see *Appeal and Error*, 2435.

Agreement by First Mortgage Bondholders to Give Second Bondholders a Share in Reorganization, see *Contracts*, 75, 77.

Rights of Bondholder on Bill of Review, see *Review*, 60.

See also *Bonds*, 137, 139.

156. Where the same person is trustee in two mortgages on a railroad, a foreclosure of the first by him is not inconsistent with his position as trustee in the second mortgage. *Robinson v. Iron R. Co.* 135 U. S. 522, 10 Sup. Ct. Rep. 907, 34: 276
Cited in Compton v. Jesup, 167 U. S. 29, 42 L. ed. 66, 17 Sup. Ct. Rep. 795.

157. The bare fact that some of the trustees of a railroad mortgage are holders of bonds secured by their trust is not sufficient of itself to make them incompetent to consent to a decree of foreclosure embodying a

plan for reorganization. *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 605, 25: 757

Power of trustee to bind bondholders.

Conclusiveness against Bondholders of Judgment in Suit to which Trustees are Parties, see *Judgment*, 808-810.
 See also *infra*, 295.

158. A trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties; and whatever binds him, if he acts in good faith, binds them. *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 605, 25: 757
Distinguished in Ex parte Clyde, 14 S. C. 394.

Cited in First Nat. Bank v. Shedd, 121 U. S. 86, 30 L. ed. 882, 7 Sup. Ct. Rep. 807—*Richter v. Jerome*, 123 U. S. 246, 31 L. ed. 137, 8 Sup. Ct. Rep. 106—*Beals v. Illinois, M. & T. R. Co.* 133 U. S. 295, 33 L. ed. 611, 10 Sup. Ct. Rep. 314—*Elwell v. Foadick*, 134 U. S. 513, 33 L. ed. 1002, 10 Sup. Ct. Rep. 598—*Kent v. Lake Superior Ship Canal, R. & Iron Co.* 144 U. S. 90, 36 L. ed. 358, 12 Sup. Ct. Rep. 650—*Credit Co. v. Arkansas C. R. Co.* 5 McCrary, 30, 15 Fed. 52—*Huntington v. Little Rock & Ft. S. R. Co.* 3 McCrary, 585, 16 Fed. 909—*Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. 185—*Pollitz v. Farmers' Loan & T. Co.* 53 Fed. 211—*Phinlay v. Augusta & K. R. Co.* 56 Fed. 277—*Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 171—*Woods v. Woodson*, 40 C. C. A. 529, 100 Fed. 519—*Fletcher v. Ann Arbor R. Co.* 53 C. C. A. 649, 116 Fed. 481—*Atlantic Trust Co. v. Dana*, 62 C. C. A. 673, 128 Fed. 225—*Bowling Green Trust Co. v. Virginia Pass. & P. Co.* 132 Fed. 924—*Selbert v. Minneapolis & St. L. R. Co.* 52 Minn. 155, 20 L.R.A. 540, 38 Am. St. Rep. 530, 53 N. W. 1134—*Grant v. Winona & S. W. R. Co.* 85 Minn. 430, 89 N. W. 60—*F. G. Oxley Stave Co. v. Butler County*, 121 Mo. 637, 26 S. W. 367—*Atkins v. Judson*, 33 App. Div. 47, 53 N. Y. Supp. 504—*Atlantic Trust Co. v. Crystal Water Co.* 72 App. Div. 541, 76 N. Y. Supp. 647—*White v. Wood*, 129 N. Y. 536, 29 N. E. 835—*Meyer v. Utah & P. Valley R. Co.* 3 Utah, 291, 3 Pac. 393.

159. A trustee for bondholders who brings a suit to foreclose a trust deed can bind the bondholders by recognizing in his complaint the paramount lien upon the property of receivers' certificates issued by order of the court in another suit, and asking that they be paid. *Kent v. Lake Superior Ship Canal R. & Iron Co.* 144 U. S. 75, 12 Sup. Ct. Rep. 650, 36: 352
Cited in Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 68 Fed. 626—*Pueblo Traction & Electric Co. v. Allison*, 30 Colo. 341, 70 Pac. 424.

160. Where, by the provisions of a mortgage to a trustee, he could proceed to collect the mortgage debt, by litigation or otherwise, only at the request of the holders of a majority of the bonds, and the majority of such holders desired litigation to cease, the trustee was authorized to put an end to it; and his waiver of an appeal binds all who act in his name as trustee. *Elwell v. Foadick*, 134 U. S. 500, 10 Sup. Ct. Rep. 598, 33: 998

Cited in Farmers' Loan & T. Co. v. Kansas

City, W. & N. W. R. Co. 53 Fed. 185—Pollitz v. Farmers' Loan & T. Co. 53 Fed. 212—Rumsey v. People's R. Co. 154 Mo. 246, 55 S. W. 615.

161. A clause in a mortgage that the trustees, "upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed and collect, etc.," gives the trustees no power to act without such written request. (Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. Rep. 10.

27: 47
Cited in Credit Co. v. Arkansas C. R. Co. 5 McCrary, 30, 15 Fed. 52—Dow v. Memphis & L. R. Co. 20 Fed. 265—Farmers' Loan & T. Co. v. Chicago & A. R. Co. 27 Fed. 153—Mercantile Trust Co. v. Chicago, P. & St. L. R. Co. 61 Fed. 375—Farmers' Loan & T. Co. v. Chicago & N. P. R. Co. 61 Fed. 546—Grape Creek Coal Co. v. Farmers' Loan & T. Co. 12 C. C. A. 354, 24 U. S. App. 38, 63 Fed. 895—Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 179—Alabama & G. Mfg. Co. v. Robinson, 19 C. C. A. 157, 30 U. S. App. 683, 72 Fed. 712—New York Secur. & T. Co. v. Lincoln Street R. Co. 77 Fed. 527—General Electric Co. v. La Grande Edison Electric Co. 79 Fed. 25—Peoria, D. & E. R. Co. v. Central Trust Co. 83 Fed. 912—Low v. Blackford, 31 C. C. A. 18, 58 U. S. App. 737, 87 Fed. 396—Deck v. Whitman, 96 Fed. 879—Farmers' Loan & T. Co. v. Penn Plate-Glass Co. 43 C. C. A. 116, 103 Fed. 133—Guardian Trust Co. v. White Cliffs Portland Cement & Chalk Co. 109 Fed. 530—Union Cent. L. Ins. Co. v. Caldwell, 68 Ark. 525, 58 S. W. 355—Boley v. Lake Street Elev. R. Co. 64 Ill. App. 313—Selbert v. Minneapolis & St. L. R. Co. 52 Minn. 155, 20 L.R.A. 540, 38 Am. St. Rep. 530, 53 N. W. 1134—Central Trust Co. v. New York City & N. R. Co. 38 Hun, 518—Union Trust Co. v. Chattanooga Electric R. Co. 101 Tenn. 300, 47 S. W. 422.

162. Where an agreement was made between a person claiming a lien on property in foreclosure and a trust company who represented the bondholders, for the surrender by the former of rights given him by a decree of the state court in consideration of the receiver's certificate for the amount of his claim, the bondholders are bound by what their representatives did, and cannot, after they purchase the property under a decree of sale, raise any question as to the validity of such certificate. Central Trust Co. v. Seasongood, 130 U. S. 482, 9 Sup. Ct. Rep. 575, 32: 985

Rights of majority and minority.

See also *infra*, 380, 388.

163. In the absence of statutory authority, or some provision in the instrument which establishes the trust, nothing can be done by a majority, however large, of the holders of bonds issued by a corporation and secured by mortgages to trustees, which will bind a minority without their consent. Canada Southern R. Co. v. Gebhardt, 109 U. S. 527, 3 Sup. Ct. Rep. 363, 27: 1020 Distinguished in Hollister v. Stewart, 111 N. Y. 660, 19 N. E. 782.

164. Where differences of opinion exist among the bondholders as to what their interests require, the trustee should act with-

in the provisions of his trust in accord with the wishes of the majority, acting in good faith and without collusion. First Nat. Bank v. Shedd, 121 U. S. 74, 7 Sup. Ct. Rep. 807, 30: 877

Cited in Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 180—Farmers' Loan & T. Co. v. Cape Fear & Y. Valley R. Co. 71 Fed. 89.

165. A small minority of bondholders, in the absence of fraud or unfairness, cannot be allowed to defeat the wishes of an overwhelming majority of those associated with them in the benefits of their common security, in respect to the legal proceedings to be taken in relation to it. Shaw v. Little Rock & Ft. S. R. Co. 100 U. S. 605, 25: 757

Cited in Symmes v. Union Trust Co. 60 Fed. 871—Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 180—Lyman v. Kansas City & A. R. Co. 101 Fed. 642—Gates v. Boston & N. Y. Air Line R. Co. 53 Conn. 346, 5 Atl. 695—Waldoborough v. Knox & L. R. Co. 84 Me. 471, 24 Atl. 942—State v. Brown, 73 Md. 516, 21 Atl. 374—Brown v. Chesapeake & O. Canal Co. 73 Md. 582 Appx.—Selbert v. Minneapolis & St. L. R. Co. 52 Minn. 155, 20 L.R.A. 540, 38 Am. St. Rep. 530, 53 N. W. 1134—Industrial & General Trust v. Tod, 180 N. Y. 226, 73 N. E. 7.

166. A bondholder of a class covered by a mortgage to secure the class of bonds issued in case of insolvency of the obligors cannot, by getting a judgment at law, be permitted to sell a portion of the property devoted to the common security, as this would disturb the *pro rata* distribution among the bondholders, to which they are equitably entitled. Pennock v. Coe, 23 How. 117, 16: 436

Cited in Milwaukee & M. R. Co. v. James, 6 Wall. 752, 18 L. ed. 856—New Orleans P. R. Co. v. Parker, 143 U. S. 59, 36 L. ed. 71, 12 Sup. Ct. Rep. 364—La Mothe v. Fink, 8 Bliss. 498, Fed. Cas. No. 8,032—Hacketts-town Nat. Bank v. Yuengling Brewing Co. 20 C. C. A. 332, 38 U. S. App. 681, 74 Fed. 114—Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co. 79 Fed. 848—Kimber v. Gunnell Gold Min. & Mill. Co. 61 C. C. A. 206, 126 Fed. 140—Chicago & N. W. R. Co. v. Ellson, 113 Mich. 37, 71 N. W. 324—Guilford v. Minneapolis, S. Ste. M. & A. R. Co. 48 Minn. 575, 31 Am. St. Rep. 694, 51 N. W. 658—Fish v. New York Water Proof Paper Co. 29 N. J. Eq. 21—Comm. ex rel. Atty. Gen. v. Susquehanna & D. River R. Co. 122 Pa. 321, 1 L.R.A. 228, 15 Atl. 448.

III. Priorities.

a. In General.

Abandonment of Mortgaged Property by Assignee in Bankruptcy, see Bankruptcy, 253.

Preservation in Bankruptcy, see Bankruptcy, 273, 298, 300.

Avoidance of Preferential Mortgage by Bankruptcy, see Bankruptcy, 196, 198, 199. Of Chattel Mortgages, see Chattel Mortgage, IV.

Due Process as to, see Constitutional Law, 454.

Distributing Vested Priorities, see Constitutional Law, 1462.

Priority Over Deed Delivered After Registration of Mortgage, see Deeds, 28.

Estoppel to Deny Priority of Contractor's Lien, see Estoppel, 309.

Priority of Mortgage over United States, see United States, 222, 223.

See also *infra*, 225, 349.

167. Mortgagors, or their assignee in bankruptcy, cannot object to the priority of liens on the mortgaged property decreed by the court. *Jerome v. McCarter*, 94 U. S. 734, 24: 136

Cited in *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 68 Fed. 625—*Re Byrne*, 2 N. B. N. Rep. 248, 97 Fed. 764—*McLane v. Placerville & S. Valley R. Co.* 66 Cal. 629, 6 Pac. 748—*Martin v. Bowen*, 51 N. J. Eq. 458, 26 Atl. 823—*Young v. Cardwell*, 6 Lea, 172.

168. Dealings of the mortgagor with a third person, subsequent to the execution of the mortgage, cannot affect prejudicially the rights of the mortgagee. *Bronson v. La Crosse & M. R. Co.* 2 Wall. 283, 17: 725

169. A railway mortgage upon the present and future-acquired property of a railway company and its incomes and profits is a prior lien only upon the net earnings of the road, after the payment of all the operating expenses, while the road is in the possession of the company. *Hale v. Frost*, 99 U. S. 389, 25: 419

170. A mortgage by a railroad company on all future-acquired property is subject to any liens under which it comes into the company's possession, and is not preferred to a mortgage for the purchase money of locomotives and cars purchased by the company. *New Orleans & O. R. Co. v. Mellen* (United States v. New Orleans & O. R. Co.) 12 Wall. 362, 20: 434

Cited in *Fosdick v. Schall*, 99 U. S. 251, 25 L. ed. 342—*McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 551, 36 L. ed. 1085, 18 Sup. Ct. Rep. 184—*Taylor v. Burlington, C. R. & M. E. Co.* 4 Dill. 588, Fed. Cas. No. 18,783—*Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 3 McCrary, 140, 11 Fed. 7—*Hardesty v. Pyle*, 15 Fed. 779—*Loomis v. Davenport & St. P. R. Co.* 3 McCrary, 495, 17 Fed. 305—*Frank v. Denver & R. G. R. Co.* 23 Fed. 126—*Central Trust Co. v. Marletta & N. G. R. Co.* 1 C. C. A. 184, 2 U. S. App. 95, 48 Fed. 870—*Holly Mfg. Co. v. New Chester Water Co.* 48 Fed. 888—*New Chester Water Co. v. Holly Mfg. Co.* 3 C. C. A. 410, 3 U. S. App. 264, 53 Fed. 30—*Fidelity Ins. Trust & S. D. Co. v. Norfolk & W. R. Co.* 72 Fed. 706—*New York Security & T. Co. v. Capital R. Co.* 77 Fed. 531—*St. Joseph Union Depot Co. v. Chicago, B. I. & P. R. Co.* 32 C. C. A. 290, 60 U. S. App. 675, 89 Fed. 654—*Farmers' Loan & T. Co. v. Denver, L. & G. R. Co.* 60 C. C. A. 591, 126 Fed. 49—*St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co.* 131 Mo. 310, 31 S. W. 908—*Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 644, 41 Am. St. Rep. 741, 57 N. W. 664—*Williamson v. New Jersey Southern R. Co.* 28 N. J. Eq. 298—

Williamson v. New Jersey Southern R. Co. 29 N. J. Eq. 317—*United New Jersey R. & Canal Co. v. Long Dock Co.* 42 N. J. Eq. 551, 9 Atl. 586—*Campbell v. Roddy*, 44 N. J. Eq. 252, 6 Am. St. Rep. 889, 14 Atl. 279—*United States Trust Co. v. Atlantic & P. R. Co.* 8 N. M. 689, 47 Pac. 725—*Westinghouse Electric & Mfg. Co. v. New Patls. & P. Traction Co.* 32 Misc. 183, 65 N. Y. Supp. 644.

171. The provision of N. C. act of 1873, § 3 (Battle's Revisal, chap. 26, § 48), that all debts and contracts of any corporation prior to or at the time of the execution of any mortgage or deed of trust by such corporation shall have a first lien upon the property rights and franchises of such corporation, and shall be paid off or secured before such mortgage or deed of trust shall be registered," has reference to the debts and contracts of private corporations formed under the act of February 12, 1872, and not those of railroad corporations organized for public use under the act of February 8, 1872. *Buncombe County v. Tommey*, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186, 29: 305

172. If current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use. *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29: 963

Cited in *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 865, 42 L. ed. 1072, 18 Sup. Ct. Rep. 657—*Wood v. New York & N. E. R. Co.* 70 Fed. 743—*International Trust Co. v. T. B. Townsend Brick & Contracting Co.* 37 C. C. A. 407, 95 Fed. 861—*Illinois Trust & Sav. Bank v. Doud*, 52 L.R.A. 486, 44 C. C. A. 398, 105 Fed. 132.

Editorial notes.

Priority of mortgage for future advances. 16: 474

[For loans; how far regarded as for purchase money. 14 L.R.A. 55.]

Priority of notes falling due at different times secured by same mortgage. 24 L.R.A. 800.]

Notice.

173. A mortgagee with notice of the fraudulent discharge of a prior mortgage is not a bona fide purchaser. *Connecticut General L. Ins. Co. v. Burnstine*, 131 U. S. Appx. ciii. and 24: 706

174. A mortgage for future advances secures priority only to such future advances as were made or incurred prior to receipt of actual notice of intervening rights. *Shirras v. Craig*, 7 Cranch, 34, 3: 260
Cited in *Re Haake*, 2 Sawy. 241, 7 Nat. Bankr. Reg. 71, Fed. Cas. No. 5,883—*M'Lean v. Lafayette Bank*, 3 McLean, 604, Fed. Cas. No. 8,888—*M'Lean v. Lafayette Bank*, 4 McLean, 436, Fed. Cas. No. 8,889—*Doe ex dem. Duval v. McLoskey*, 1 Ala. 736—*Tapia v. Demartini*, 77 Cal. 387, 11 Am. St. Rep. 288, 19 Pac. 641—*Boswell v. Goodwin*, 31 Conn. 94, 81 Am. Dec. 169—*Richards v. Waldron*, 9 Mackey, 588—*Holbrook v. Betton*, 5 Fla. 107—*Schmidt v. Zahndt*, 148 Ind. 453, 47 N. E. 335—*Ward v. Cooke*, 17 N. J.

Eq. 100—*Wilder v. Butterfield*, 50 How. Pr. 396—*Ackerman v. Hunsicker*, 21 Hun, 56—*Willoughby v. Fredonia Nat. Bank*, 68 Hun, 279, 23 N. Y. Supp. 46—*Miller v. Lockwood*, 32 N. Y. 299—*Ter-Hoven v. Kerns*, 2 Pa. St. 98—*National Bank v. Gunhouse*, 17 S. C. 494—*Seymour v. Darrow*, 31 Vt. 134—*Alexandria Sav. Inst. v. Thomas*, 29 Gratt. 489—*Home Sav. & L. Asso. v. Burton*, 20 Wash. 700, 56 Pac. 940.

175—7. A trustee to whom lands are conveyed to secure a debt is, like a mortgagee, regarded as a purchaser, and is not charged with constructive notice of any prior lien. *Kesner v. Trigg*, 98 U. S. 50, 25: 83 Cited in *Peters v. Bain*, 133 U. S. 696, 33 L. ed. 705, 10 Sup. Ct. Rep. 354—*Robinson v. Owens*, 103 Tenn. 97, 52 S. W. 870.

b. As to Other Mortgages or Trust Deeds.

Discrimination between Nonresident and Resident Mortgage Creditors, see Corporations, 722.

Priority Between Coupons Attached to Bonds Secured by Mortgage, see Coupons, 17, 18.

Repeal of Statute as to, see Statutes, 637. See also *supra*, 173; *infra*, 353, 388.

178. The earlier of two mortgages upon the same property is entitled to precedence if properly recorded. *Beals v. Hale*, 4 How. 37, 11: 865

179. A junior mortgage taken without notice, actual or constructive, of a prior mortgage, and first recorded, is to be preferred in its lien to a mortgage prior in execution, but subsequently recorded. *Neslin v. Wells, F. & Co.* 104 U. S. 428, 26: 802 *National Bank of Genesee v. Whitney*, 103 U. S. 99, 26: 443, 561

Cited in *Blennerhassett v. Sherman*, 105 U. S. 121, 26 L. ed. 1087—*Fechheimer v. Baum*, 43 Fed. 727—*Bacon v. Harris*, 62 Fed. 104—*Cady v. Purser*, 131 Cal. 556, 82 Am. St. Rep. 391, 63 Pac. 844—*Montgomery v. Phillips*, 53 N. J. Eq. 220, 31 Atl. 622—*Drake v. Reggel*, 10 Utah, 385, 37 Pac. 583—*Preston v. Nash*, 76 Va. 11—*Marrow v. Brinkley*, 85 Va. 62, 6 S. E. 605—*Slater v. Moore*, 86 Va. 32, 9 S. E. 419.

180. Where a sale was made under a deed of trust to one of the grantors therein, for a sum sufficient to pay the debt and leave a surplus, and the purchaser gave a new deed of trust on the same property to secure the original debt and an additional advancement, and also another deed of trust, as a second lien, to the cotenant for her share of the surplus, but the latter never accepted the deed or recorded it, it was held, after a sale ordered in subsequent litigation to which all were parties, at which the original creditor bought the property for a sum less than the amount secured by her second deed of trust, that said second deed was a lien prior to that of the original cotenant. *Mellen v. Wallach*, 112 U. S. 41, 5 Sup. Ct. Rep. 15, 28: 633

181. One who lends money in good faith, on the security of a trust deed of lands

shown to him to be unencumbered on the records, has the legal title, and is entitled to priority of payment as against the indorsee of a promissory note secured by a previous trust deed of said lands, which had been released by the trustees, although in violation of their trust. *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. Rep. 814, 27: 529 *Distinguished in Baxter v. First Nat. Bank*, 85 Tenn. 45, 1 S. W. 501.

Cited in *Townsend v. Little*, 109 U. S. 512, 27 L. ed. 1015, 3 Sup. Ct. Rep. 357—*Weldon v. Tollman*, 15 C. C. A. 142, 32 U. S. App. 265, 67 Fed. 989—*Henniges v. Paschke*, 9 N. D. 497, 81 Am. St. Rep. 588, 84 N. W. 350—*Pickford v. Peebles*, 7 S. D. 172, 63 N. W. 779—*Pierce v. Jacobs*, 7 Mackey, 499—*Frey v. Allen*, 9 App. D. C. 405—*Crandall v. Lynch*, 20 App. D. C. 79—*Chesapeake Beach R. Co. v. Washington, P. & C. R. Co.* 23 App. D. C. 599—*Mann v. Jummel*, 183 Ill. 530, 56 N. E. 161—*Reed v. Jennings*, 196 Ill. 479, 63 N. E. 1005—*Havighorst v. Bowen*, 214 Ill. 96, 73 N. E. 402—*Jummel v. Mann*, 80 Ill. App. 298—*Havighorst v. Bowen*, 116 Ill. App. 235—*Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 382, 3 Am. Rep. 655, 14 N. E. 586—*Livermore v. Maxwell*, 87 Iowa, 714, 55 N. W. 37—*Day v. Brenton*, 102 Iowa, 487, 63 Am. St. Rep. 460, 71 N. W. 538—*Swasey v. Emerson*, 168 Mass. 121, 60 Am. St. Rep. 368, 46 N. E. 426—*Evans Bros. v. Roanoke Sav. Bank*, 95 Va. 300, 28 S. E. 323.

Mortgages on after-acquired property generally.

182. Where one telegraph company agreed with another that the latter should construct and deliver to the former a telegraph line between two certain points, for which the former agreed to issue and deliver to the latter its first mortgage bonds secured by mortgage on its franchises and property then owned or afterwards to be acquired by it, including such line to be constructed, such telegraph line, upon being built, becomes the property of the former company and is subject to such mortgage before then executed: and the lien of such mortgage is superior to that of a mortgage subsequently executed thereon. *United Lines Teleg. Co. v. Boston Safe Deposit & T. Co.* 147 U. S. 431, 13 Sup. Ct. Rep. 396, 37: 231

Cited in *Boston Safe-Deposit & T. Co. v. American Rapid Teleg. Co.* 67 Fed. 167.

Railroad mortgages.

Leviability of Personal Property of Mortgaged Railroad, see Execution, 23.

Priority of Mechanics' Lien to Railroad Mortgage, see Mechanics' Liens, 10-10d.

As between United States and Mortgagee of Lands Granted to Railroad, see Public Lands, 333.

See also *supra*, 170; *infra*, 352, 427.

183. A railroad mortgage duly recorded, given on its present and after-acquired property, has priority over a subsequent mortgage executed by a subsequent grantee, on the same property. *Wade v. Chicago, S. & St. L. R. Co.* 149 U. S. 327, 13 Sup. Ct. Rep. 892, 37: 755 Cited in *New York Security & T. Co. v. Capital*

R. Co. 77 Fed. 531—*Harris v. Youngstown Bridge Co.* 33 C. C. A. 76, 82 U. S. App. 112, 90 Fed. 330.

184. If a railroad company give a mortgage for the purchase money of property, such mortgage, whether registered or not, has precedence over a general mortgage covering the future-acquired property, except when the property is annexed to a subject already covered by the general mortgage, and becomes a part thereof, as rails laid down. *United States v. New Orleans & O. R. Co.* (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362. 20: 434
Cited in Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 283, 30 L. ed. 1211, 7 Sup. Ct. Rep. 1206.

185. A recorded mortgage given by a railroad company on its roadbed and other property creates a lien whose priority cannot be displaced thereafter directly by a mortgage given by the company, or indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction. *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. Rep. 546, 33: 905
Cited in California Safe Deposit & T. Co. v. Yakima Invest. Co. 82 Fed. 544—*Crowther v. Fidelity Ins. T. & S. D. Co.* 29 C. C. A. 4, 42 U. S. App. 701, 85 Fed. 44—*Maryland Steel Co. v. Gettysburg Electric R. Co.* 99 Fed. 151—*Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 630, 41 Am. St. Rep. 741, 57 N. W. 664.

186. The fact that part of a road was entirely built by money raised on a subsequent mortgage does not give it priority over prior mortgages which lawfully cover the whole road. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20: 199

187. A mortgage given by a company incorporated to construct a railroad between two cities, upon its line of railroad constructed or to be constructed between the named termini, together with all the stations, depot grounds, engine-houses, machine-shops, buildings, erections in any way now or hereafter appertaining unto said described line of railroad, creates a lien upon its terminal facilities in those cities superior to a subsequent mortgage specifically executed thereon. *Central Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. Rep. 357, 34: 1014

Distinguished in Central Trust Co. v. Arctic Ice Mach. Mfg. Co. 77 Md. 234, 26 Atl. 493.

Cited in Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 283, 30 L. ed. 1211, 7 Sup. Ct. Rep. 1206—*Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 300, 33 L. ed. 907, 10 Sup. Ct. Rep. 546—*Barnard v. Norwich & W. R. Co.* 4 Clif. 355, Fed. Cas. No. 1,007—*Dillon v. Barnard, Holmes*, 394, Fed. Cas. No. 3,915—*Duncan v. Mobile & O. R. Co.* 2 Woods, 546, Fed. Cas. No. 4,137—*Hook v. Bosworth*, 12 C. C. A. 214, 24 U. S. App. 341, 64 Fed. 448—*Lackawanna Iron & Coal Co. v. Farmers' Loan & T. Co.* 24 C. C. A. 494, 52 U. S. App. 91, 79 Fed. 210—*Phoenix Iron-Works Co. v. New York Secur. & T. Co.* 28 C. C. A. 78, 54 U. S. App. 408, 83 Fed. 759—*Veatch v. American Loan & T. Co.* 28 C. C. A. 386, 55 U. S. App. 191, 84 Fed. 276—*Evans v. Klister*, 35 C. C. A. 37, 92 Fed. 836—*Inter-*

national Trust Co. v. T. B. Townsend Brick & Contracting Co. 37 C. C. A. 409, 95 Fed. 863—*First Nat. Bank v. Ewing*, 43 C. C. A. 169, 103 Fed. 186—*Doud v. Illinois Trust & Sav. Bank*, 52 L.R.A. 489, 44 C. C. A. 403, 105 Fed. 137—*Illinois Trust & Sav. Bank v. Doud*, 52 L.R.A. 496, 44 C. C. A. 415, 105 Fed. 149—*Binkley v. Forkner*, 117 Ind. 186, 3 L.R.A. 36, 19 N. E. 753—*Edwards v. Peterson*, 80 Me. 371, 6 Am. St. Rep. 207, 14 Atl. 936—*Manchester Locomotive Works v. Truesdale*, 44 Minn. 118, 9 L. R.A. 143, 46 N. W. 301—*Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 317—*Roddy v. Brick*, 42 N. J. Eq. 225, 6 Atl. 806—*Daly v. New York & G. L. R. Co.* 55 N. J. Eq. 603, 38 Atl. 202—*General Electric Co. v. Transit Equipment Co.* 57 N. J. Eq. 474, 42 Atl. 101.

188-92. Where a third mortgage on a railroad, and the bonds issued under it, were made in express terms subject to the payment of the bonds issued under the second mortgage, all persons taking the third-mortgage bonds took them subject to such prior lien and indebtedness. *Bronson v. La Crosse & M. R. Co.* 2 Wall. 283, 17: 725
Cited in Jerome v. McCarter, 94 U. S. 736, 24 L. ed. 137—*Buckman v. Dunn*, 2 Haskell, 219, Fed. Cas. No. 2,006—*Pullan v. Cincinnati & C. Air-Line R. Co.* 4 Biss. 45, Fed. Cas. No. 11,461—*Coe v. East & West R. Co.* 52 Fed. 534—*Farmers' Loan & T. Co. v. Penn Plate-Glass Co.* 43 C. C. A. 119, 103 Fed. 136—*Columbus, S. & H. R. Co.'s Appeal*, 48 C. C. A. 311, 109 Fed. 213—*Pratt v. Nixon*, 91 Ala. 197, 8 So. 751.

c. Judgments and Other Liens and Equities.

Right of Purchaser on Foreclosure to Litigate other Liens, see *infra*, 456.
 Federal Question as to, see *Appeal and Error*, 1704.

Sale in Bankruptcy, Notice to Mortgagees, see *Bankruptcy*, 318.

Priority of Marriage Settlement over Mortgage, see *Husband and Wife*, 117.

Conclusiveness of Judgment as to, see *Judgment*, 606, 607.

Priority of Mechanics' Lien, see *Mechanics' Liens*, 7-14, 38.

See also *infra*, 424; *Constitutional Law*, 945; *Lis Pendens*, 6.

193. Rails and other property which become affixed to and part of a railroad covered by a prior mortgage will be held by the lien in such mortgage in favor of bona fide creditors, as against a contract with the furnisher of the property and the railroad company, providing that the title shall not pass until the price is paid. The rule applies to bridges and bridge materials. *Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 267, 7 Sup. Ct. Rep. 1206, 30: 1210
Distinguished in Holly Mfg. Co. v. New Chester Water Co. 48 Fed. 888—*J. L. Mott Iron Works v. Middle States Loan, Bldg. & Constr. Co.* 17 App. D. C. 599—*General Electric Co. v. Transit Equipment Co.* 57 N. J. Eq. 474, 42 Atl. 101.

Cited in Thompson v. White Water Valley R. Co. 132 U. S. 74, 33 L. ed. 260, 10 Sup. Ct. Rep. 29—*Toledo, D. & B. R. Co. v. Ham-*

ilton, 134 U. S. 300, 33 L. ed. 907, 10 Sup. Ct. Rep. 546—Wade v. Chicago, S. & St. L. R. Co. 149 U. S. 341, 37 L. ed. 761, 13 Sup. Ct. Rep. 892—New Mexico v. United States Trust Co. 172 U. S. 185, 43 L. ed. 412, 19 Sup. Ct. Rep. 128—New York Security & T. Co. v. Capital R. Co. 77 Fed. 531—Phoenix Iron-Works Co. v. New York Security & T. Co. 28 C. C. A. 78, 54 U. S. App. 408, 83 Fed. 759—Cleveland, C. & S. R. Co. v. Knickerbocker Trust Co. 86 Fed. 74—Evans v. Kister, 35 C. C. A. 37, 92 Fed. 836—Guaranty Trust Co. v. Galveston City R. Co. 46 C. C. A. 318, 107 Fed. 324—Fisk v. People's Nat. Bank, 14 Colo. App. 27, 59 Pac. 63—Binkley v. Forkner, 117 Ind. 186, 3 L.R.A. 36, 19 N. E. 753—Wickes Bros. v. Hill, 115 Mich. 339, 73 N. W. 375—Woodland Co. v. Mendenhall, 82 Minn. 491, 83 Am. St. Rep. 445, 85 N. W. 164—Missouri P. R. Co. v. Bradbury, 106 Mo. App. 458, 79 S. W. 966—General Electric Co. v. Transit Equipment Co. 57 N. J. Eq. 474, 42 Atl. 101—United States Trust Co. v. Atlantic & P. R. Co. 8 N. M. 688, 47 Pac. 725—McMillan v. Leaman, 101 App. Div. 441, 91 N. Y. Supp. 1055—Fuller-Warren Co. v. Harter, 110 Wis. 91, 53 L.R.A. 609, 84 Am. St. Rep. 867, 85 N. W. 698.

194. A law of a state having made water rents a charge on land, with a lien prior to all other encumbrances, in the same manner as taxes and assessments, a mortgage on the land is subject to this condition and charge, whether the water was introduced on to the lot mortgaged before or after the giving of the mortgage. *Provident Inst. for Savings v. Jersey City*, 113 U. S. 506, 5 Sup. Ct. Rep. 612, 28: 1102

195. Whether a debt of a railroad company was contracted upon the personal credit of the company, without reference to its receipts, so as to deprive it of the right to priority over a mortgage debt is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction. *Southern R. Co. v. Carnegie Steel Co.* 176 U. S. 257, 20 Sup. Ct. Rep. 458, 44: 458

Cited in *Southern R. Co. v. Ensign Mfg. Co.* 54 C. C. A. 595, 117 Fed. 421.

196. Under a mortgage executed on railroad property, the mortgagee takes only such rights as the mortgagor has or subsequently obtains, as against the vendors in a part of the line covered by the mortgage, but which the mortgagor occupied under a conditional sale, and whose rights therein had become forfeited under the terms of the sale, especially where the mortgagee did not take steps to set aside the forfeiture within a reasonable time. *Wright v. Kentucky & G. E. R. Co.* 117 U. S. 72, 6 Sup. Ct. Rep. 697, 29: 821

Editorial notes.

Priority between mortgage and mechanics' lien. 25: 1057

[Pre-existing debt] as consideration as against other creditors or equities. 33 L. R.A. 305.

Waiver of junior lien by failure to assert it in foreclosure proceedings. 68 L.R.A. 323.]

Lien of bondholders.

197. A decree of a circuit court which gives precedence to the past-due coupons over the principal of the bonds is erroneous, where the terms of the mortgage are that, in case of default in payment of interest or principal, and a sale to coerce the same, all bonds and the interest accrued thereon shall be equally due and payable. *Dunham v. Cincinnati, P. & C. R. Co.* 1 Wall. 254, 17: 584
Distinguished in *Stevens v. New York & O. M. R. Co.* 13 Blatchf. 417, Fed. Cas. No. 18,406.

Cited in *Ketchum v. Duncan*, 96 U. S. 671, 24 L. ed. 873—*Duncan v. Mobile & O. R. Co.* 3 Woods, 580, Fed. Cas. No. 4,138—*Memphis v. Brown*, 1 Filpp. 217, Fed. Cas. No. 9,415—*Wilmer v. Atlanta & R. Air-Line R. Co.* 2 Woods, 453, Fed. Cas. No. 17,776—*Low v. Blackford*, 31 C. C. A. 19, 58 U. S. App. 737, 87 Fed. 396—*Callanan v. Brown*, 31 Iowa, 337—*Leavitt v. Felton*, 11 W. N. C. 75—*State v. Spartanburg & U. R. Co.* 8 S. C. N. S. 155.

198. A bank lending money which is put into the general funds of a railway company, expecting to be paid out of the proceeds of the sales of bonds, and not from the earnings, and relying on the indorsers of the note taken and the bonds given as collateral, is not entitled to payment out of the proceeds of the sale of the mortgaged property in preference to bondholders. It occupies the position of a general creditor only. *Penn v. Calhoun*, 121 U. S. 251, 7 Sup. Ct. Rep. 906, 30: 915

Cited in *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 199, 34 L. ed. 635, 11 Sup. Ct. Rep. 61—*Farmers' Loan & T. Co. v. Northern P. R. Co.* 68 Fed. 38—*St. Louis Trust Co. v. Riley*, 30 L.R.A. 458, 16 C. C. A. 613, 36 U. S. App. 100, 70 Fed. 35—*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 93 Fed. 532—*First Nat. Bank v. Ewing*, 43 C. C. A. 169, 103 Fed. 186—*Illinois Trust & Sav. Bank v. Doud*, 52 L.R.A. 494, 44 C. C. A. 389, 105 Fed. 145—*Farmers' Loan & T. Co. v. Bankers & M. Teleg. Co.* 148 N. Y. 324, 31 L.R.A. 406, 51 Am. St. Rep. 690, 42 N. E. 707.

199. Holders of obligations of a railroad company, conferring upon them a lien upon the earnings of a section of the road for its construction by them, have a lien inferior in priority to that of bondholders secured by an earlier mortgage on the road, and to that of purchasers under a foreclosure sale on the mortgage. *Thompson v. White Water Valley R. Co.* 132 U. S. 68, 10 Sup. Ct. Rep. 29, 33: 256

Cited in *Lackawanna Iron & Coal Co. v. Farmers' Loan & T. Co.* 24 C. C. A. 495, 52 U. S. App. 91, 79 Fed. 210—*Phoenix Iron Works Co. v. New York Security & T. Co.* 28 C. C. A. 78, 54 U. S. App. 408, 83 Fed. 750—*Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 86 Fed. 981—*Illinois Trust & Sav. Bank v. Doud*, 52 L.R.A. 490, 44 C. C. A. 405, 105 Fed. 139.

200. Where a railroad company issued certain of its bonds under an agreement with the person to whom they were issued that it would issue no more of its bonds, the holder of such bonds has a right of

priority in payment from the proceeds of a foreclosure sale of the railroad under the mortgage securing the bonds, over those holders only of other subsequently issued bonds of the company secured by the same mortgage, who took their bonds with actual notice of the agreement. *McMurray v. Moran*, 134 U. S. 150, 10 Sup. Ct. Rep. 427, 33: 814

Cited in Moran v. Hagerman, 12 C. C. A. 241, 29 U. S. App. 71, 64 Fed. 501—*Low v. Blackford*, 31 C. C. A. 18, 58 U. S. App. 737, 87 Fed. 395.

201. Where a lien upon property, evidenced by leases, was acquired after the purchase of the property by a railway, and the property to which it was to attach was not designated until after it had passed into the possession of the company, and after the lien of the future-acquired-property clause of a mortgage had attached to it, such lien will be postponed to that of the bondholders. *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 13 Sup. Ct. Rep. 170, 36: 1079

Liens on after-acquired property.

See also *supra*, 201.

202. A mortgage by a railroad company on all future-acquired property is subject to any liens under which it comes into the company's possession. *New Orleans & O. R. Co. v. Mellen (United States v. New Orleans & O. R. Co.)* 12 Wall. 362. 20: 434
Cited in Bear Lake & River Waterworks & Irrig. Co. v. Garland, 184 U. S. 16, 41 L. ed. 333, 17 Sup. Ct. Rep. 7—*New Mexico v. United States Trust Co.* 172 U. S. 185, 43 L. ed. 412, 19 Sup. Ct. Rep. 128—*Boston Safe Deposit & T. Co. v. Bankers' & M. Teleg. Co.* 36 Fed. 297—*Phoenix Iron Works Co. v. New York Security & T. Co.* 28 C. C. A. 78, 54 U. S. App. 408, 83 Fed. 759—*Evans v. Kister*, 35 C. C. A. 34, 92 Fed. 834—*Contracting & Bldg. Co. v. Continental Trust Co.* 47 C. C. A. 145, 108 Fed. 4—*Wood v. Holly Mfg. Co.* 100 Ala. 351, 46 Am. St. Rep. 56, 13 So. 948—*Warren v. Liddell*, 110 Ala. 247, 20 So. 89—*Jarvis v. State Bank*, 22 Colo. 318, 55 Am. St. Rep. 129, 45 Pac. 505—*J. L. Mott Iron Works v. Middle States Loan Bldg. & Constr. Co.* 17 App. D. C. 598—*National Bank v. Good-year*, 90 Ga. 728, 16 S. E. 982—*Binkley v. Forkner*, 117 Ind. 185, 3 L.R.A. 36, 19 N. E. 753—*Hamlin v. Jerrard*, 72 Me. 75—*Edwards v. Peterson*, 80 Me. 371, 6 Am. St. Rep. 207, 14 Atl. 936—*Brown v. Phillips*, 40 Mich. 270—*Hammel v. First Nat. Bank*, 129 Mich. 177, 95 Am. St. Rep. 431, 88 N. W. 397—*Woodland Co. v. Mendenhall*, 82 Minn. 491, 83 Am. St. Rep. 445, 85 N. W. 164—*Russell v. Grant*, 122 Mo. 178, 43 Am. St. Rep. 563, 26 S. W. 958—*General Electric Co. v. Transit Equipment Co.* 57 N. J. Eq. 474, 42 Atl. 101—*Zorn v. Savannah & C. R. Co.* 5 S. C. N. S. 95.

203. The future-acquired-property clause of a railway mortgage attaches only to such property as the company owns or may thereafter acquire, subject to any liens under which it comes into the possession of the company, and cannot defeat the rights of one who in good faith leases rolling-stock to the company. *McGourkey v. To-*

ledo & O. C. R. Co. 146 U. S. 536, 13 Sup. Ct. Rep. 170, 36: 1079
Cited in New York Security & T. Co. v. Capital R. Co. 77 Fed. 531—*Harris v. Youngstown Bridge Co.* 33 C. C. A. 75, 62 U. S. App. 112, 90 Fed. 328.

Tax liens.

204. Priority of tax liens over senior mortgage claims, recognized. *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29: 963
Cited in Central Trust Co. v. New York City & N. R. Co. 110 N. Y. 258, 1 L.R.A. 264, 18 N. E. 92—*Wise v. L. & C. Wise Co.* 153 N. Y. 510, 47 N. E. 788.

Judgments.

Effect of Judicial Sale as to Mortgages, see *Judicial Sale*, 55, 57, 59, 60.

See also *infra*, 432; *Judgment*, 886.

205. The lien acquired by a creditor without notice, by the judgment and levy of execution, is superior to that of an unrecorded mortgage; and a purchaser under the execution, with notice, is entitled to all the rights of the creditor. *Stevenson v. Texas & P. R. Co.* 105 U. S. 703, 26: 1215
Cited in Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 755, 31 L. ed. 312, 8 Sup. Ct. Rep. 337—*Commercial Bank v. Sandford*, 99 Fed. 157—*Manogue v. Bryant*, 15 App. D. C. 260—*McFadden v. Blocker*, 2 Ind. Terr. 295, 58 L.R.A. 892, 48 S. W. 1043.

206. Judgments against a water company in actions to recover the value of property alleged to have been destroyed by fire, as a result of the failure of the company to exercise reasonable care to furnish an adequate supply of water, are judgments for torts, within the meaning of N. C. Code, 1883, § 1255, subordinating the lien of corporate mortgages to judgments for torts committed by the corporation. *Guardian Trust & D. Co. v. Fisher*, 200 U. S. 57, 26 Sup. Ct. Rep. 186, 50: 367
Cited in Knuth v. Butte Electric R. Co. 148 Fed. 75.

207. A judgment in tort, recovered against the corporate purchaser of a water-works system encumbered with a mortgage executed by the original corporate owner, is entitled to priority over the lien of such mortgage, under N. C. Code, 1883, § 1255, subordinating the lien of corporate mortgages to judgments for torts committed by the corporation, since to hold that only the interest in the property acquired by the purchasing corporation was responsible for damages caused by its negligence would defeat the purpose of the statute to make corporate property security against torts committed by the owner. *Guardian Trust & D. Co. v. Fisher*, 200 U. S. 57, 26 Sup. Ct. Rep. 186, 50: 367

IV. Vendee of Mortgagor; Assumption of Debt.

Sale by Mortgagor to Mortgagee, see *supra*, 134-136.

Title Acquired Through Sale in Bankruptcy of Mortgagor, see Bankruptcy, 322.

Grantee's Right to Set up Statute of Limitations, see Limitation of Actions, 235.

Right of Vendee to Set up Statute of Limitations, see Limitation of Actions, 506.

Relation of Principal and Surety Between Vendee and Mortgagor, see Principal and Surety, 2.

Right of Purchaser of Equity of Redemption to Set Up Usury as Defense, see Usury, 139.

Rights of Bona Fide Purchaser with Actual or Constructive Notice of Mortgage, see Vendor and Purchaser, 177.

208. A mortgage, in a majority of the states of the Union, is a mere security, and the equity of redemption is the real and beneficial estate in the land, and may be sold and conveyed in any of the ordinary modes of transfer, subject only to the lien of the mortgage. *Hutchins v. King*, 1 Wall. 53, 17: 544

Cited in *Teal v. Walker*, 111 U. S. 250, 28 L. ed. 418, 4 Sup. Ct. Rep. 420—*Waterman v. Mackenzie*, 138 U. S. 259, 34 L. ed. 927, 11 Sup. Ct. Rep. 334—*Scott v. Neely*, 140 U. S. 113, 35 L. ed. 361, 11 Sup. Ct. Rep. 712—*Savings & Loan Soc. v. Multnomah County*, 160 U. S. 428, 42 L. ed. 805, 18 Sup. Ct. Rep. 392—*Allen v. National State Bank*, 92 Md. 516, 52 L.R.A. 764, 84 Am. St. Rep. 517, 48 Atl. 78—*Strickland v. Kirk*, 51 Miss. 799—*Fair v. Howard*, 6 Nev. 319—*Dekum v. Multnomah County*, 38 Or. 260, 63 Pac. 406—*Hale v. Horne*, 21 Gratt. 122.

209. Actual knowledge, by a purchaser, of an existing mortgage, is equivalent to a notice resulting from registry. *Patheron v. De la Ronde*, 8 Wall. 292, 19: 415
Cited in *Ridings v. Johnson*, 128 U. S. 221, 32 L. ed. 404, 9 Sup. Ct. Rep. 72—*The John T. Moore*, 3 Woods. 68, Fed. Cas. No. 7,430—*Levy v. Mentz*, 23 La. Ann. 262.

210. The failure to make the mortgagor a party to a mortgagee's bill in equity against a grantee assuming payment of encumbrances, to which no objection was taken at the hearing, is no ground for refusing relief, where the omission to make him a party cannot prejudice any interest of his, or any right of either party to the suit. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. Rep. 494, 33: 667
Cited in *McGahan v. National Bank*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 347.

211. One who purchases mortgaged property from the mortgagor is not bound to see that the proceeds are appropriated according to an agreement between the mortgagor and the mortgagee, giving the former full right and permission to sell the property and make titles thereto, the proceeds of sale to go to the credit of the mortgagee. *Woodward v. Jewell*, 140 U. S. 247, 11 Sup. Ct. Rep. 784, 35: 478

212. Purchasers of the equity of redemption from the grantor in a deed of trust, with knowledge that such deed covered the described property "with all and singular the improvements, ways, easements, rights, U. S. Dig.—256

privileges, and appurtenances to the same belonging or in anywise appertaining," and that the grantor had so erected a building thereon that an easement upon adjacent property owned by him was necessary to its use and enjoyment, and that he had attempted to obtain this easement by release from another deed of trust covering such adjacent property,—have no better standing than their grantor to claim that such easement did not pass under the deed. *Warner v. Grayson*, 200 U. S. 257, 26 Sup. Ct. Rep. 240, 50: 470

Editorial note.

Bona fide purchaser from grantee of deed absolute on its face, but in reality a mortgage. 3: 321

Relation of parties generally.

213. The release from a mortgage of certain portions of the mortgaged premises after their sale on the receipt and application, to the mortgage, of the proceeds of a sale thereof at a fair price, does not release the vendor who gave the mortgage and holds the relation of a surety. *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. Rep. 67, 35: 843

Cited in *Prairie State Nat. Bank v. United States*, 164 U. S. 238, 41 L. ed. 418, 17 Sup. Ct. Rep. 742—*Zeigler v. Hallahan*, 66 C. C. A. 4, 131 Fed. 208—*Gulford Granite Co. v. Harrison Granite Co.* 23 App. D. C. 23—*Hinton v. Greenleaf*, 113 N. C. 7, 18 S. E. 56.

214. In the absence of the mutual agreement of the grantor, grantee, and holder of the encumbrance, to that effect, the relation of principal and surety does not exist between the grantee and grantor; and the latter is not discharged from his liability by an agreement between the other parties to extend the time of payment. *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. Rep. 119, 29: 456

Cited in *Keller v. Ashford*, 133 U. S. 625, 33 L. ed. 674, 10 Sup. Ct. Rep. 494—*Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 190, 36 L. ed. 120, 12 Sup. Ct. Rep. 437—*Willard v. Wood*, 164 U. S. 520, 41 L. ed. 539, 17 Sup. Ct. Rep. 176—*Johns v. Wilson*, 180 U. S. 448, 45 L. ed. 617, 21 Sup. Ct. Rep. 445—*Winters v. Hub Min. Co.* 57 Fed. 289—*Compton v. Jesup*, 15 C. C. A. 452, 31 U. S. App. 486, 68 Fed. 318—*Campbell v. Clay*, 4 Colo. App. 553, 36 Pac. 909—*Granger v. Roll*, 6 S. D. 619, 62 N. W. 970—*Dorsey v. Manning*, 15 App. D. C. 396—*Fish v. Glover*, 154 Ill. 92, 39 N. E. 1081—*Fish v. Glover*, 51 Ill. App. 570—*Mulvane v. Sedgley*, 63 Kan. 121, 55 L.R.A. 537, 64 Pac. 1038—*Chilton v. Brooks*, 72 Md. 558, 20 Atl. 125—*Washington Slate Co. v. Burdick*, 60 Minn. 271, 62 N. W. 285—*Pratt v. Conway*, 148 Mo. 295, 71 Am. St. Rep. 602, 49 S. W. 1028—*Pendleton v. Cowling*, 11 Mont. 50, 27 Pac. 386—*Lavelle v. Gordon*, 15 Mont. 519, 39 Pac. 740—*Poe v. Dixon*, 60 Ohio St. 130, 71 Am. St. Rep. 713, 54 N. E. 86—*A. F. Shapleigh Hardware Co. v. Wells*, 90 Tex. 112, 59 Am. St. Rep. 783, 37 S. W. 411—*Hall v. Johnston*, 6 Tex. Civ. App. 118, 24 S. W. 861—*Michigan Sav. & L. Asso. v. Atteberry*, 16 Tex. Civ. App. 226, 42 S. W. 569—*Mallory v. Kessler*, 18 Utah, 15, 54 Pac. 892.

Effect of condition in grant.

215. Where lands subject to a condition in the original grant that a certain number of settlers shall be placed upon the tract by the grantee are mortgaged by a subsequent grantee, no part of the security provided by the mortgage is withdrawn by appropriating the requisite number of lots to settlers. *Foxcroft v. Mallett*, 4 How. 353, 11: 1008

216. A settlor who has located land according to law has a title paramount to one who purchased the premises upon the foreclosure of a mortgage executed upon the property to a college to which the land had originally been granted by the state, subject to the condition that "they shall give security that they will place a certain number of settlers on the land," where the grantee of the college conveyed a portion of the land subject to the condition that his grantee should perform his part of the settling duties, and the latter gave the mortgage foreclosed, since by reason of the unperformed condition no title passed either by the deeds or mortgage. *Foxcroft v. Mallett*, 4 How. 353, 11: 1008

Purchase subject to mortgage.

217. The purchase of land, subject to a mortgage, does not make the debt personal; but it is a charge upon the land, even where additional security has been given. *M'Learn v. Wallace*, 10 Pet. 625, 9: 559
Cited in *Colquitt v. Thomas*, 8 Ga. 263—*Manly v. Slason*, 21 Vt. 279, 52 Am. Dec. 60.

218. An agreement merely to take land subject to a specified encumbrance is not an agreement to assume and pay the encumbrance. *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. Rep. 119, 29: 456

219. An agreement merely to take land subject to a specified encumbrance is not an agreement to assume and pay off the encumbrance. The grantee, without words in the grant importing in some form that he assumes the payment of the mortgage, does not bind himself personally. *Elliott v. Sackett*, 108 U. S. 132, 2 Sup. Ct. Rep. 375, 27: 678

Cited in *Shepherd v. May*, 115 U. S. 510, 29 L. ed. 457, 6 Sup. Ct. Rep. 119—*Metropolitan Nat. Bank v. St. Louis Dispatch Co.* 149 U. S. 447, 37 L. ed. 803, 13 Sup. Ct. Rep. 944—*Jones v. Lamar*, 34 Fed. 469—*Re Rhoe-smith*, 68 C. C. A. 325, 135 Fed. 687—*Granger v. Roll*, 6 S. D. 625, 62 N. W. 970—*Giesy v. Truman*, 17 App. D. C. 452—*Chilton v. Brooks*, 72 Md. 559, 20 Atl. 125—*Pendleton v. Cowling*, 11 Mont. 50, 27 Pac. 386—*Lavelle v. Gordon*, 15 Mont. 519, 39 Pac. 740—*Marshall v. Homler*, 13 Okla. 276, 74 Pac. 308.

220. The mere purchase of premises subject to a mortgage does not render the purchaser personally liable to the mortgagee as having assumed to pay it, nor does the mere payment of interest in itself impose that liability. *Metropolitan Nat. Bank v. St. Louis Dispatch Co.* 149 U. S. 436, 13 Sup. Ct. Rep. 944, 37: 799

221. No obligation to insure for the bene-

fit of the mortgagee rests upon the purchaser of property subject to a mortgage which provides that the sale of the mortgaged premises shall operate as a satisfaction of the mortgage indebtedness and all the covenants therein contained, even though an obligation to effect such insurance was imposed upon the mortgagor by the terms of the mortgage, and under the state law a purchaser of property subject to a mortgage impliedly agrees to indemnify the mortgagor against his liability on the mortgage. *Farmers' Loan & T. Co. v. Penn Plate Glass Co.* 186 U. S. 434, 22 Sup. Ct. Rep. 842, 46: 1234
Cited in *American Ice Co. v. Eastern Trust & Bkg. Co.* 188 U. S. 629, 47 L. ed. 25, 23 Sup. Ct. Rep. 432.

— Editorial note.

[Purchase subject to mortgage as giving right of action to third party. 25 L.R.A. 257.]

Assumption of mortgage debt in general.

What Law Determines Proper Remedy, see *Conflict of Laws*, 197.

Remedy at Law or in Equity in Federal Courts, see *Equity*, 183.

Estoppel to Deny Assumption, see *Estoppel*, 260.

Limitation of Action on Covenant to Assume Debt, see *Limitation of Actions*, 42.

Assumption of Debt as Payment, see *Payment*, 55.

Grantee's Right of Set-Off, see *Set-Off and Counterclaim*, 40.

See also *supra*, 217-220; *infra*, 237.

222. The clause in a deed of land "subject, however, to certain encumbrances now resting thereon, payment of which is assumed by said party of the second part," designates and comprehends all mortgages and taxes which are encumbrances, as if particularly described. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. Rep. 494, 33: 667

223. Where, in a recorded deed of land subject to a mortgage, an agreement of the grantee to assume and pay it is inserted by mistake of the scrivener and against the intention of the parties, and, on the discovery of the mistake, the grantor releases the grantee from all liability under the agreement, a court of equity will not enforce the agreement at the suit of one who, in ignorance of the agreement, and before the execution of the release, purchased the notes secured by the mortgage, although the grantee, after the deed of conveyance to him, paid interest accruing on the notes. *Drury v. Hayden*, 111 U. S. 223, 4 Sup. Ct. Rep. 405, 28: 408

Cited in *Keller v. Ashford*, 133 U. S. 625, 33 L. ed. 673, 10 Sup. Ct. Rep. 494—*Metropolitan Nat. Bank v. St. Louis Dispatch Co.* 149 U. S. 447, 37 L. ed. 803, 13 Sup. Ct. Rep. 944—*Willard v. Wood*, 164 U. S. 520, 41 L. ed. 538, 17 Sup. Ct. Rep. 176—*Starbird v. Cranston*, 24 Colo. 29, 48 Pac. 652—*Giesy v. Truman*, 17 App. D. C. 452—*American Nat. Bank v. Klock*, 58 Mo. App. 343.

224. On a substantial exchange of real estate, in which, with the full assent of both parties, one of them had the property which he obtained conveyed to his wife, with an agreement that she should assume the mortgage thereon while he gave a bond to indemnify the other party to the amount of the mortgage which the latter assumed, the former cannot be held liable for the whole mortgage debt on the property conveyed to his wife, although it was done without authority and without making her liable for the mortgage. *Episcopal City Mission v. Brown*, 158 U. S. 222, 15 Sup. Ct. Rep. 833, 39: 960

225. Where a grantee in a deed assumes to pay a mortgage, he cannot avoid payment on the ground that the mortgage has lost its priority because registry laws have not been complied with. *Patterson v. De la Ronde*, 8 Wall. 292, 19: 415

— Editorial notes.

Assumption of mortgage by purchaser.

27: 678

Effect of assumption of payment in deed.

33: 667

Relation of parties in assumption of debt.

226. As between a grantor and a grantee who assumes a mortgage, the grantee is the principal and the grantor the surety. *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. Rep. 437, 36: 118
Cited in Lazelle v. Miller, 40 Or. 552, 67 Pac. 307—*Sully v. Childress*, 106 Tenn. 112, 82 Am. St. Rep. 875, 60 S. W. 499.

227. An agreement by a grantee assuming a mortgage does not, without the mortgagee's assent, put the grantee and mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. Rep. 494, 33: 667
Cited in Williams v. Naftzger, 103 Cal. 440, 37 Pac. 411—*Willard v. Wood*, 1 App. D. C. 60—*Chilton v. Brooks*, 72 Md. 558, 20 Atl. 125—*Travers v. Dorr*, 60 Minn. 177, 62 N. W. 269—*Pratt v. Conway*, 148 Mo. 296, 71 Am. St. Rep. 602, 49 S. W. 1028—*Huffman v. Western Mortg. & Invest. Co.* 13 Tex. Civ. App. 172, 36 S. W. 306.

228. A debtor whose obligation is secured by mortgage is not converted into a surety by his creditor's acceptance of an additional promise from a third person, to whom the mortgaged premises are conveyed, to pay the debt due him by his debtor. *Cucullu v. Hernandez*, 103 U. S. 105, 26: 322
Cited in Shepherd v. May, 115 U. S. 511, 29 L. ed. 457, 6 Sup. Ct. Rep. 119—*Mulvane v. Sedgley*, 63 Kan. 121, 55 L.R.A. 557, 64 Pac. 1038—*Pratt v. Conway*, 148 Mo. 296, 71 Am. St. Rep. 602, 49 S. W. 1028.

229. In Illinois a grantee, as soon as the mortgagee knows of an arrangement whereby he has assumed the payment of the mortgage, becomes directly and primarily liable to the mortgagee for the debt for which the mortgagor was already liable to the latter, and the relation of the grantee and the

grantor, towards the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt. *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. Rep. 437, 36: 118
Cited in Willard v. Wood, 164 U. S. 525, 41 L. ed. 540, 17 Sup. Ct. Rep. 176—*Adams v. Shirk*, 44 C. C. A. 657, 105 Fed. 663—*Adams v. Shirk*, 55 C. C. A. 30, 117 Fed. 806—*Webster v. Fleming*, 178 Ill. 146, 52 N. E. 975—*Wyatt v. Dufrene*, 106 Ill. App. 217.

Extending time of payment.

See also *supra*, 214.

230. In Illinois any subsequent agreement of the mortgagee with a grantee who has assumed to pay the mortgage, extending the time of payment of the mortgage debt, without the assent of the grantor, discharges the grantor from all personal liability for that debt. *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. Rep. 437, 36: 118
Cited in Herd v. Tuohy, 133 Cal. 62, 65 Pac. 139—*Miller v. Kennedy*, 12 S. D. 482, 81 N. W. 906—*Wayman v. Jones*, 58 Mo. App. 319—*Hall v. Johnston*, 6 Tex. Civ. App. 114, 24 S. W. 861—*Schroeder v. Kinney*, 15 Utah. 467, 49 Pac. 894.

Right of mortgagee to sue grantee.

Laches as Bar to Relief and Covenant Assuming Debt, see *Limitation of Actions*, 154.

When Right Barred by Limitation, see *Limitation of Actions*, 461, 462.

Limitation of Action on Right to Sue, see *Limitation of Actions*, 612, 630.

231. A mortgagee may avail himself of an agreement in a deed of conveyance from the mortgagor by which the grantee promises to pay the mortgage, but has no greater right than the mortgagor has against the grantee. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. Rep. 494, 33: 667
Cited in Episcopal City Mission v. Brown, 158 U. S. 227, 39 L. ed. 961, 15 Sup. Ct. Rep. 833—*New York Security & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 232—*Tulare County Bank v. Madden*, 109 Cal. 314, 41 Pac. 1092—*Ward v. De Ora*, 120 Cal. 105, 52 Pac. 130—*Hawkins v. Central R. Co.* 119 Ga. 165, 46 S. E. 82—*James v. Western North Carolina R. Co.* 121 N. C. 527, 46 L.R.A. 310, 28 S. E. 537—*Young Men's Christian Asso. v. Croft*, 34 Or. 111, 75 Am. St. Rep. 568, 55 Pac. 439—*Clark v. Fisk*, 9 Utah, 99, 33 Pac. 248—*McKay v. Ward*, 20 Utah, 185, 46 L.R.A. 638, 57 Pac. 1024.

231a. A grantee's covenant with his grantor to assume a mortgage may be enforced in equity by the mortgagee. *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. Rep. 176, 41: 531
Cited in Green v. Turner, 80 Fed. 42—*Green v. Turner*, 30 C. C. A. 428, 59 U. S. App. 252, 86 Fed. 838.

232. The contract of a purchaser to pay a mortgage, contained in the mortgagor's deed to him, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee.

The mortgagee cannot sue at law; but in equity he may avail himself of the right of the mortgagor against the purchaser. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. Rep. 494, 33: 667

Cited in Willard v. Wood, 135 U. S. 314, 34 L. ed. 213, 10 Sup. Ct. Rep. 831—*Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 190, 36 L. ed. 120, 12 Sup. Ct. Rep. 437—*Constable v. National S. S. Co.* 154 U. S. 73, 38 L. ed. 914, 14 Sup. Ct. Rep. 1062—*McKee v. Lamon*, 159 U. S. 322, 40 L. ed. 187, 16 Sup. Ct. Rep. 11—*Willard v. Wood*, 164 U. S. 519, 41 L. ed. 538, 17 Sup. Ct. Rep. 170—*Johns v. Wilson*, 180 U. S. 447, 45 L. ed. 617, 21 Sup. Ct. Rep. 445—*Jesup v. Illinois C. R. Co.* 43 Fed. 493—*Episcopal City Mission v. Brown*, 43 Fed. 837—*Orman v. North Alabama Development Co.* 53 Fed. 470—*Winters v. Hub Min. Co.* 57 Fed. 289—*Green v. Turner*, 80 Fed. 42—*Knapp v. Connecticut Mut. L. Ins. Co.* 40 L.R.A. 863, 29 C. C. A. 174, 56 U. S. App. 452, 85 Fed. 331—*Green v. Turner*, 30 C. C. A. 428, 59 U. S. App. 252, 86 Fed. 838—*Everett v. Independent School District*, 109 Fed. 701—*Fairfield v. Rural Independent School District*, 111 Fed. 110—*Goodyear Shoe Machinery Co. v. Dancel*, 56 C. C. A. 303, 119 Fed. 695—*Hudson v. Wood*, 119 Fed. 769—*Central Electric Co. v. Sprague Electric Co.* 57 C. C. A. 198, 120 Fed. 926—*Wood v. Adler Goldman Commission Co.* 59 Ark. 276, 27 S. W. 490—*Savings Bank v. Thornton*, 112 Cal. 260, 44 Pac. 466—*Anglo-American Sav. & L. Asso. v. Campbell*, 13 App. D. C. 599, 43 L.R.A. 627—*Gleay v. Gregory*, 15 App. D. C. 52—*Dorsey v. Manning*, 15 App. D. C. 393—*Gleay v. Truman*, 17 App. D. C. 452—*Walker v. Washington Title Ins. Co.* 19 App. D. C. 584—*Morris v. Mix*, 4 Kan. App. 661, 46 Pac. 58—*Hand v. Evans Marble Co.* 88 Md. 230, 40 Atl. 899—*Bain v. Atkins*, 181 Mass. 245, 57 L.R.A. 793, 92 Am. St. Rep. 411, 63 N. E. 414—*Commercial Bank v. Wood*, 56 Mo. App. 219—*American Nat. Bank v. Klock*, 58 Mo. App. 345—*De Grauw v. Mechan.* 48 N. J. Eq. 224, 21 Atl. 193—*Green v. Stone*, 54 N. J. Eq. 390, 55 Am. St. Rep. 577, 34 Atl. 1099—*Beacon Lamp Co. v. Travellers Ins. Co.* 61 N. J. Eq. 62, 47 Atl. 579—*Woodcock v. Bostic*, 118 N. C. 828, 24 S. E. 362—*Tatum v. Ballard*, 94 Va. 374, 26 S. E. 871—*Solicitors Loan & T. Co. v. Robins*, 14 Wash. 508, 45 Pac. 39—*Ople v. Pacific Invest. Co.* 26 Wash. 513, 56 L.R.A. 782, 67 Pac. 231.

233. By the law of New York, Illinois, and some other states, the mortgagee may sue at law a grantee who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt. *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. Rep. 437, 36: 118
Cited in Central Trust Co. v. Berwind-White Coal Co. 95 Fed. 394.

234. By the law of the District of Columbia, an agreement of the grantee, in his deed, to assume and pay a mortgage, is one made with the grantor only, and the mortgagee cannot sue there upon it at law, but his only remedy against the grantee is by suit in equity, although in New York he can maintain such suit either in equity or at law. *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 831, 34: 210

Liability of grantee for deficiency.

235. A grantee whose deed contains a

stipulation that he will assume and pay off a mortgage on the land is personally and primarily liable for any deficiency remaining after the proceeds of the land have been applied to the debt in a direct action brought by the mortgagee in his own name. *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. Rep. 445, 45: 613
Cited in Re Dresser, 68 C. C. A. 210, 135 Fed. 498.

V. Assignment.

Rights of Assignee in Timber, see also supra, 116, 118.

Payment to Assignee Pending the Termination of Rights of Alleged Heir of Mortgagee, see supra, 115.

Compelling Assignee to Surrender Title on Discharge of Debt, see infra, 256.

Consideration for Assignment, see Contracts, 65.

Rights as Mortgagee Passing by Deed, see Deeds, 55.

Estoppel of Mortgagor to Deny Validity of Mortgage as Against Assignee, see Estoppel, 128.

Burden of Proof as to Execution, see Evidence, 688.

Accountability to Codistributees of One Who Takes Assignment of Mortgage as His Share, see Executors and Administrators, 209.

Conclusiveness against Assignor of Judgment against Assignee, see Judgment, 804.

Rights of Bank Creditor in Mortgage Turned over to him by Receiver, see Receivers, 57.

See also infra, 248.

236. A mortgagee is not bound to accept a tender by a stranger of the amount due on account of the mortgage, and make an assignment thereof. *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. Rep. 129, 29: 440

237. That one who has agreed to pay a mortgage indebtedness upon the property of another does so by a purchase of the mortgage lien does not deprive him of the benefit of the security, where it was agreed that he should be reimbursed for his advances. *Flagg v. Walker*, 113 U. S. 659, 5 Sup. Ct. Rep. 697, 28: 1072

238. An assignment of a mortgage properly executed and for a valuable consideration passes the title and interest, although the motive of the transfer might have been to give jurisdiction of an action upon it to a circuit court. *Smith v. Kernochen*, 7 How. 198, 12: 666

Cited in Deshler v. Dodge, 16 How. 631, 14 L. ed. 1088—*Barney v. Baltimore*, 6 Wall. 288, 18 L. ed. 827—*Marine & River Phosphate & Mfg. Co. v. Bradley*, 105 U. S. 180, 26 L. ed. 1036—*Farmington v. Pillsbury*, 114 U. S. 143, 29 L. ed. 116, 5 Sup. Ct. Rep. 807—*Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 333, 40 L. ed. 447, 16 Sup. Ct. Rep. 307—*Lake County v. Dudley*, 173 U.

S. 251, 43 L. ed. 688, 10 Sup. Ct. Rep. 398—*Dickerman v. Northern Trust Co.* 176 U. S. 192, 44 L. ed. 430, 20 Sup. Ct. Rep. 311—*South Dakota v. North Carolina*, 192 U. S. 311, 48 L. ed. 458, 24 Sup. Ct. Rep. 269—*Barney v. Baltimore*, 1 Hughes, 122, Fed. Cas. No. 1,029—*Blackburn v. Selma, M. & M. R. Co.* 2 Flipp. 538, Fed. Cas. No. 1,467—*Clarke v. Janesville*, 1 Biss. 101, Fed. Cas. No. 2,854—*Hawley v. Kepp*, 2 Flipp. 178, Fed. Cas. No. 6,249—*Hill v. Winne*, 1 Biss. 277, Fed. Cas. No. 6,503—*Osborne v. Brooklyn City R. Co.* 5 Blatchf. 368, Fed. Cas. No. 10,597—*Perrine v. Thompson*, 17 Blatchf. 20, Fed. Cas. No. 10,997—*United States v. The Fidelity*, Fed. Cas. No. 15,088—*Marion v. Ellis*, 10 Fed. 412—*Whiting v. Wellington*, 10 Fed. 813—*Lehigh Min. & Mfg. Co. v. Kelly*, 64 Fed. 403.

239. The assignee of a bond and mortgage, though the assignment be expressly stated to be as collateral security, acquires thereby the entire legal interest. *Chew v. Brumagen*, 13 Wall. 497, 20: 663

Assignment of mortgage debt.

See also *infra*, 334.

240. The assignment of a debt carries with it an assignment of the judgment or mortgage by which it is secured. If a part only of the debt is assigned, a *pro tanto* portion of the security follows it. *Batesville Institute v. Kauffman*, 18 Wall. 151, 21: 775

Ober v. Gallagher, 93 U. S. 199, 23: 829
Cited in *Ober v. Gallagher*, 93 U. S. 207, 23 L. ed. 831—*Wall v. Bissell*, 125 U. S. 392, 31 L. ed. 777, 8 Sup. Ct. Rep. 979—*Mercantile Trust Co. v. St. Louis & S. F. R. Co.* 69 Fed. 196—*Rufe v. Commercial Bank*, 40 C. C. A. 31, 99 Fed. 654—*Kirkpatrick v. Eastern Mill. & Export Co.* 135 Fed. 149—*Com. v. Reading Sav. Bank*, 137 Mass. 443—*Barnes v. Boardman*, 149 Mass. 114, 3 L.R.A. 788, 21 N. E. 308—*Smith v. Lang*, 2 Tex. Civ. App. 680, 22 S. W. 197—*Scott v. Ludington*, 14 W. Va. 393.

241. Where a note which is secured by a deed of trust is transferred, the right to the benefit of the security, whether it is delivered with the note or not, passes with the transfer of the note. *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25: 188

242. The transfer of notes secured by a deed of trust gives to the transferees the benefit of the security with the same protection as bona fide purchasers with respect to the security as with respect to the notes. *New Orleans Canal & Bkg. Co. v. Montgomery*, 95 U. S. 16, 24: 346

Cited in *Drury v. Hayden*, 111 U. S. 227, 28 L. ed. 410, 4 Sup. Ct. Rep. 405—*Hayden v. Snow*, 9 Biss. 518, 14 Fed. 76—*O'Rourke v. Wahl*, 48 C. C. A. 361, 109 Fed. 277—*Swift v. Bank of Washington*, 52 C. C. A. 341, 114 Fed. 645—*Kirkpatrick v. Eastern Mill. & Export Co.* 135 Fed. 149—*Monague v. Bryant*, 15 App. D. C. 258—*Belden v. Burke*, 72 Hun 74, 25 N. Y. Supp. 601—*Singer Mfg. Co. v. Chalmers*, 2 Utah, 546.

243. Where notes are secured by a deed of trust, the trustee is a purchaser in good faith for a valuable consideration. Both trustees and *cestuis que trust* occupy the same ground with respect to notice, actual

and constructive. *New Orleans Canal & Bkg. Co. v. Montgomery*, 95 U. S. 16, 24: 346

Cited in *Schepp v. Smith*, 35 La. Ann. 6—*Robinson v. Owens*, 103 Tenn. 97, 52 S. W. 870.

244. The bona fide purchaser for value before maturity, without notice, of a negotiable note and a mortgage given to secure it, takes the mortgage, as well as the note, free from the objections to which it was liable in the hands of the mortgagee. The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. *Carpenter v. Longan*, 16 Wall. 271, 21: 313

Distinguished in Southern Commercial Sav. Bank v. Slaterry, 106 Mo. 637, 66 S. W. 1066.

Cited in *Porter v. King*, 1 Fed. 760—*Swett v. Stark*, 31 Fed. 860—*Converse v. Michigan Dairy Co.* 45 Fed. 21—*The D. B. Steelman*, 5 Hughes, 212, 48 Fed. 581—*Myers v. Hazard*, 4 McCrary, 107, 50 Fed. 158—*Thomson-Houston Electric Co. v. Capitol Electric Co.* 56 Fed. 854—*Press Co. v. City Bank*, 7 C. C. A. 249, 17 U. S. App. 213, 58 Fed. 322—*The W. B. Cole*, 8 C. C. A. 83, 16 U. S. App. 334, 59 Fed. 187—*Black v. Reno*, 59 Fed. 919—*New York Security & T. Co. v. Lombard Invest. Co.* 65 Fed. 274—*Thomson-Houston Electric Co. v. Capitol Electric Co.* 12 C. C. A. 648, 22 U. S. App. 669, 65 Fed. 346—*Hamilton v. Fowler*, 40 C. C. A. 52, 99 Fed. 24—*Gilman v. New Orleans & S. R. Co.* 72 Ala. 584—*Spence v. Mobile & M. R. Co.* 79 Ala. 587—*Trader v. Childester*, 41 Ark. 248, 48 Am. Rep. 38—*Pullen v. Ward*, 60 Ark. 92, 28 S. W. 1084—*Frost v. Fisher*, 13 Colo. App. 333, 58 Pac. 872—*Himrod v. Bolton*, 44 Ill. App. 522—*McCormick v. Buehler*, 67 Ill. App. 70—*Reeves v. Hayes*, 95 Ind. 525—*Burbans v. Hutchinson*, 25 Kan. 630, 37 Am. Rep. 274—*Lewis v. Kirk*, 28 Kan. 501, 42 Am. Rep. 173—*Barnes v. Boardman*, 149 Mass. 114, 3 L.R.A. 788, 21 N. E. 308—*Watson v. Wyman*, 101 Mass. 99, 36 N. E. 692—*Com. v. Globe Invest. Co.* 108 Mass. 81, 40 N. E. 410—*Blumenthal v. Jassoy*, 29 Minn. 178, 12 N. W. 517—*Pickett v. Jones*, 63 Mo. 198—*Mayer v. Robinson*, 93 Mo. 123, 5 S. W. 611—*Bartlett v. Eddy*, 49 Mo. App. 50—*Dodd v. Lee*, 57 Mo. App. 172—*Moses v. Comstock*, 4 Neb. 520—*Gould v. Marsh*, 1 Hun, 509—*Union College v. Wheeler*, 61 N. Y. 107—*Jenkins v. Wilkinson*, 113 N. C. 536, 18 S. E. 696—*First Nat. Bank v. National Live Stock Bank*, 13 Okla. 723, 76 Pac. 130—*Nashville Trust Co. v. Smythe*, 94 Tenn. 520, 27 L.R.A. 666—*Stimpson v. Bishop*, 82 Va. 200—*Tidoute Sav. Bank v. Libbey*, 101 Wis. 196, 70 Am. St. Rep. 907, 77 N. W. 182—*Graham v. Blinn*, 3 Wyo. 750, 30 Pac. 446.

245. One who takes a note before maturity, without notice of any defense, pays a portion of a mortgage in money, and cancels a valid debt against the mortgagee for the residue, is a bona fide holder of the note and mortgage. *Sawyer v. Prickett*, 19 Wall. 146, 22: 105

Cited in *Beals v. Neddo*, 1 McCrary, 209, 2 Fed. 44—*Swett v. Stark*, 31 Fed. 859—*The W. B. Cole*, 8 C. C. A. 85, 16 U. S. App. 334, 59 Fed. 190—*Black v. Reno*, 59 Fed. 919—

O'Rourke v. Wahl, 48 C. C. A. 361, 109 Fed. 277—Swift v. Bank of Washington, 52 C. C. A. 340, 114 Fed. 644—Cudahy Packing Co. v. State Nat. Bank, 67 C. C. A. 670, 134 Fed. 546—Lewis v. Kirk, 28 Kan. 501, 42 Am. Rep. 173—Schepp v. Smith, 35 La. Ann. 6—State Nat. Bank v. Flathers, 45 La. Ann. 79, 40 Am. St. Rep. 216, 12 So. 243.

ed. 87, 11 Sup. Ct. Rep. 465—Case v. Fant, 3 C. C. A. 421, 10 U. S. App. 415, 53 Fed. 44—Kimberly's Appeal, 3 Sadler (Pa.) 534, 7 Atl. 75.

247. The erasure and cancelation of mortgages may be made in Louisiana by the judgment of a court of competent jurisdiction, where it has the effect of a *res judicata*. Adams v. Preston, 22 How. 473, 16: 273

VI. Satisfaction; Discharge; Release; Cancelation.

Release of Equity of Redemption, see *supra*, 137, 138.

Notice of Fraudulent Discharge of Prior Mortgage, see *supra*, 173.

Release of Purchaser Assuming Debt, see *supra*, 223.

Vacation of Satisfaction on Setting Aside Foreclosure Sale, see *infra*, 482.

Application of Proceeds of Sale to Satisfaction of Mortgage, see *infra*, 483.

Federal Question as to Extinguishment of Lien by Sale in Bankruptcy, see Appeal and Error, 1943.

Effect of Confiscation to Destroy Lien of Mortgage, see Confiscation and Sequestration, 3, 8, 52, 53, 84.

Effect of Paying Mortgage with Proceeds of Sale in Confiscation Proceedings, see Confiscation and Sequestration, 86.

Jurisdiction to Cancel, Pending Insolvency of Mortgagee, see Courts, 1605-1607.

Right of Defendant in Ejectment to Set up Payment of Mortgage as Defense, see Ejectment, 70.

Preservation of Security for Amount Actually Due, see Equity, 305.

Necessity of Doing Equity by Tendering Amount Due, see Equity, 305.

Presumption of Payment, see Evidence, 818.

Application of Payments on Mortgage, see Interest, 166.

Conclusiveness of Finding that Mortgage was Satisfied, see Judgment, 620.

Laches as Bar to Object to Medium of Payment, see Limitation of Actions, 158.

Payment into Court of Sums Due Deceased Mortgagee's Estate, as Discharge, see Money in Court, 4.

By Sale of Mortgaged Property for Bond which is not Paid, see Novation, 2.

Medium of Payment of Mortgage Stipulating for Gold or Silver Coin, see Payment, 76.

Rights of Junior Mortgagee Paying Senior Mortgage, see Subrogation, 13-16.

Validity of Payment to Heir When Question for Jury, see Trial, 420.

Mortgagee as Trustee for Mortgagor When Condition is Fulfilled, see Trusts, 29.

See also *supra*, 114, 115, 131; *infra*, 341, 351.

246. If a note secured by a mortgage be renewed or otherwise changed, the lien of the mortgage continues until the debt is paid. Jones v. New York Guaranty & I. Co. 101 U. S. 622, 25: 1030
Disapproved in Stone v. Billings, 63 Ill. App. 374.

Cited in King v. Doane, 139 U. S. 172, 35 L.

248. Neither the reinscription of a canceled mortgage nor its assignment can have the effect to give any claim upon property of an insolvent which has been sold under the judgment of a court having jurisdiction in insolvency. Adams v. Preston, 22 How. 473, 16: 273

249. Where an executor in the Confederate states during the Rebellion sold his testator's lands, receiving as part of the purchase price the purchaser's bonds secured by a mortgage on the lands, and the latter, on selling the lands, paid the bonds in Confederate treasury notes, and the executor discharged the mortgage and invested the notes in Confederate bonds, which became worthless, upon application by the devisees residing in the northern states the mortgage will be decreed a valid lien on the lands, on the ground that its discharge was procured by fraud. McBurney v. Carson, 99 U. S. 567, 25: 378
Cited in Carson v. Hyatt, 118 U. S. 281, 30 L. ed. 168, 6 Sup. Ct. Rep. 1050—Carson v. Dunham, 121 U. S. 424, 30 L. ed. 993, 7 Sup. Ct. Rep. 1030—Tayloe v. Dugger, 66 Ala. 450—Carson v. Dunham, 149 Mass. 55, 3 L.R.A. 205, 14 Am. St. Rep. 397, 20 N. E. 312—Hyatt v. McBurney, 15 S. C. 395—Hyatt v. McBurney, 18 S. C. 205.

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[Release of mortgagor as surety by mortgagee's dealing with vendee who has assumed mortgage. 16 L.R.A. 85.]

Effect of payment of debt by volunteer. 23 L.R.A. 120.

Effect of unaccepted tender on lien. 33 L.R.A. 231.

Waiver of lien of, by attachment or execution. 50 L.R.A. 714.

Reinstatement of, when discharged by mistake. 58 L.R.A. 788.]

Release of mortgage.

Burden of Proof, see Evidence, 637.

Validity of Release by Executor before Letters Granted, see Executors and Administrators, 40-43.

Conclusiveness of Judgment as to, see Judgment, 591.

Imputing Agent's Notice of Fraud in, to Principal, see Notice, 21, 42.

Effect on Surety of Release of Part of Premises, see Principal and Surety, 25.

See also *supra*, 213.

250. The release of a mortgage is not fully executed when some of the creditors of the mortgagor, to whom a deed in trust for them

was to be given in consideration thereof, refuse to sign. *Dick v. Balch*, 8 Pet. 30,

8: 856

251. Delivery of a release from a mortgage is not conclusively proved by the fact that it was left in the possession of the debtor, when the testimony shows that it was placed in his hands to obtain the signatures of his creditors. *Dick v. Balch*, 8 Pet. 30, 8: 856

252. The trustee cannot fraudulently release the deed of trust, without payment of the note secured thereby, to one who has actual or constructive notice that the note was not paid. *Swift v. Smith*, 102 U. S. 442, 26: 193

Connecticut General L. Ins. Co. v. Eldredge, 102 U. S. 545, 26: 245
Cited in *Waterman v. Webster*, 108 N. Y. 165, 15 N. E. 380.

253. A purchaser who has knowledge of such unauthorized release takes the property subject to the equitable rights of a holder of the notes. *Connecticut General L. Ins. Co. v. Eldredge*, 102 U. S. 545, 26: 245

— Editorial note.

[Tender to divest lien of mortgage. 33 L.R.A. 231.]

Release or discharge of debt. *

Right of Mortgagee to be Paid out of Legal Assets of Decedent Debtor's Estate, see *Executors and Administrators*, 140-142.

Question of Law or Fact as to Extension of Time for, see *Trial*, 309.

See also *supra*, 133; *Bankruptcy*, 402.

254. Where a mortgagee, who held the mortgage as security for an indorsement by him, upon default of payment by the mortgagor pays the note which he had indorsed, enters a charge therefor upon his books in general account against the mortgagor, and afterwards assigns the mortgage, the assignee is entitled to enforce the suit. The entry of the money on the books of account does not merge or extinguish the mortgage, or the personal liability of the mortgagor. *Bendey v. Townsend*, 109 U. S. 665, 3 Sup. Ct. Rep. 482, 27: 1065

255. On a reciprocal extinguishment of debts which by agreement compensate each other, an agreement that a mortgage securing one of them shall be kept alive for the benefit of the mortgagor's wife, in consideration of the release of her paraphernal claims against her husband, is ineffectual, as the mortgage falls with the extinguishment of the debt which it secured. *Nalle v. Young*, 160 U. S. 624, 16 Sup. Ct. Rep. 420, 40: 560

256. After a mortgage debt is discharged, the mortgagor or his assignee may compel the mortgagee or his assignee to surrender the legal title. *Smith v. Orton*, 21 How. 241, 16: 104
Cited in *Gray v. Jones*, 4 McCrary. 522, 14 Fed. 87.

257. The release of a debtor by the creditor satisfies the debt, and discharges the

lien of the mortgage; while a discharge in bankruptcy releases the debtor from personal liability, but does not discharge such lien. *Bush v. Person*, 18 How. 82, 15: 273

258. Where the maker of a note agreed with a third person that he should take up the note when due, and hold it until he was paid, a payment by the latter of the amount of the note to the holder, who surrendered it uncanceled, is not a payment of the note, but a sale and transfer of the note to such person, and does not release or postpone a deed of trust given as security for the note. *Carter v. Burr*, 113 U. S. 737, 5 Sup. Ct. Rep. 713, 28: 1147

Cited in *Peake v. New Orleans*, 139 U. S. 375, 35 L. ed. 143, 11 Sup. Ct. Rep. 541—*McDaniel v. Stroud*, 45 C. C. A. 449, 3 N. B. N. Rep. 505, 106 Fed. 490—*Cussen v. Brandt*, 97 Va. 8, 75 Am. St. Rep. 762, 32 S. E. 791.

VII. Enforcement.

a. Generally.

Revival of Suit against Heirs, see *Abatement and Revival*, 73.

Right of Alien Mortgagee to Enforce, see *Aliens*, 25.

Reviewability of Judgment, see *Appeal and Error*, I. d, 16.

Federal Question as to, see *Appeal and Error*, 1209.

Jurisdictional Amount on Appeal, see *Appeal and Error*, 490, 563-566.

Amount of Security Required on Appeal, see *Appeal and Error*, 2896, 2897.

Filing Bill to Foreclose without Leave, see *Appeal and Error*, 4523.

First Raising Objection to Jurisdiction on Appeal, see *Appeal and Error*, 4557.

Extent of Liability on Appeal Bond, see *Appeal and Error*, 5697, 5698, 5700.

Appearance as Waiver of Failure to Give Notice of Pendency, see *Appearance*, 20.

Enforcement as Incident to Bankruptcy, see *Bankruptcy*, 23.

Foreclosure after Adjudication in Bankruptcy, see *Bankruptcy*, 58.

Enforcement of Chattel Mortgage, see *Chattel Mortgage*, V.

Impairment of Obligations of Contract by Provisions as to Enforcement, see *Constitutional Law*, IV. g. 4, i (9).

Appointment of Receiver During Enforcement as Deprivation of Property, see *Constitutional Law*, 507.

Set-off in Foreclosure Suit, see *Set-Off and Counterclaim*, 34.

Contract to Foreclose for Excessive Amount, see *Contracts*, 411.

Jurisdiction to Foreclose, see *Courts*, 343.

Power of Courts as to Lands Beyond Territorial Jurisdiction, see *Courts*, 63.

Jurisdiction as to Railroad Lying in Two States, see *Courts*, 59.

Diversity of Citizenship Requisite to Suit in Federal Courts, see *Courts*, 729.

Foreclosure in Louisiana as "Suit" within Federal Jurisdiction, see Courts, 464.

Citizenship of Trustee as Affecting Jurisdiction of Federal Courts over Foreclosure Suit, see Courts, 743, 744.

Foreclosure Suit as Distinct from Action upon Debt for Purpose of Suit by Assignee in Federal Court, see Courts, 828, 829.

Jurisdiction over Bill as Ancillary to Foreclosure Bill, see Courts, 1047.

Exclusiveness of Jurisdiction First Attached, see Courts, 1589, 1590.

Jurisdiction to Enforce, Pending Insolvency of Mortgagor or Administration of His Estate, see Courts, 1608-1610.

Effect of Pendency of Action For, on Necessity of Reducing Claim to Judgment Before Bringing Creditors' Bill, see Creditors' Bill, 21.

Right to Bring Ejectment and Foreclosure Suit at Same Time, see Ejectment, 2.

Jurisdiction to Retain Foreclosure Suit until Confirmation of Sale, see Equity, 23.

Judicial Notice of Effect of Foreclosure of Railroad Mortgage, see Evidence, 128.

Injunction against Enforcement upon Wife's Property, see Evidence, 709.

Mortgage Notes as Evidence of Amount of Indebtedness, see Evidence, 1438.

Effect of, to Cut off Lien of Judgment, see Judgment, 896, 897.

Notice of Pendency of Suit, see *Lis Pendens*, 6, 35.

Foreclosure of Mechanics' Lien, see Mechanics' Liens, VII.

Bill in Name of District Attorney as Suit by United States, see Parties, 49.

Admissions Rendering Proof Unnecessary, see Pleading, 162.

Foreclosure of Statutory Lien of Bondholders, see Railroads, 142, 146.

Appointment of Receiver Pending Foreclosure, see Receivers, 4-8, 13.

Powers, Duties and Liability of Receiver Appointed in Foreclosure Proceedings, see Receivers, 28, 33, 70, 71.

Claims against Receiver Appointed in Foreclosure Suit, see Receivers, 94, 95.

Discharge of Receiver Appointed in Foreclosure Proceedings, see Receivers, 203.

Application for Instructions by Receiver Appointed in Foreclosure Proceedings, see Receivers, 177.

Removal of Cause to Federal Court, see Removal of Causes, 11, 86, 169.

Where State is Necessary Party, see States, 242.

Service by Publication During War, see Writ and Process, 92.

See also *supra*, 47.

259-260. On a suit for foreclosure of a second mortgage on a railroad, where a receiver is asked, and the first mortgagee is a party, the *res* in the hands of the court and subject to sale is the entire mortgaged property, and not merely the equity of redemption. *Miltenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 1 Sup. Ct. Rep. 140, 27: 117

261. An outstanding equity cannot be adjusted in a foreclosure suit, and share in the proceeds of the sale. *Vose v. Bronson*, 6 Wall. 452, 18: 846

262. Proceedings for foreclosure of a railroad mortgage may be maintained to a decree of foreclosure and sale before finally determining the validity or ownership of the mortgage bonds, or the number held bona fide by present holders. Such questions may be determined upon proper notice upon final hearing after decree. *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 11 Sup. Ct. Rep. 512, 35: 116
Cited in Dickerman v. Northern Trust Co. 176 U. S. 194, 44 L. ed. 431, 20 Sup. Ct. Rep. 311—*Farmers' Loan & T. Co. v. Winona & S. W. R. Co.* 59 Fed. 959—*Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 181—*Dickerman v. Northern Trust Co.* 25 C. C. A. 554, 53 U. S. App. 270, 80 Fed. 455—*Central Trust Co. v. California & N. R. Co.* 110 Fed. 76—*Green v. Equitable Mut. L. & Endowment Assn.* 105 Iowa, 632, 75 N. W. 635—*Re Anson*, 85 Me. 89, 26 Atl. 996—*Farmers' Loan & T. Co. v. New York & N. R. Co.* 78 Hun, 217, 28 N. Y. Supp. 933—*M. T. Jones Lumber Co. v. Rhoades*, 17 Tex. Civ. App. 674, 41 S. W. 102.

263. A sale of mortgaged premises, upon a judgment recovered at law on a part of the notes secured by the mortgage, does not preclude the holder of other notes secured by the same mortgage from proceedings to foreclose it. *Pugh v. Fairmont Gold & Silver Min. Co.* 112 U. S. 238, 5 Sup. Ct. Rep. 131, 28: 684
Cited in Sheffield & B. Coal, Iron & R. Co. v. Newman, 23 C. C. A. 465, 41 U. S. App. 766, 77 Fed. 794.

264. A judgment against a corporation is not collusive in the legal sense, so as to prevent its nonpayment from constituting a default for which a mortgage debt may be declared due under a provision of the mortgage, merely because the action was undertaken for the purpose of creating such default, if it was brought for a debt that was due, and was properly conducted. *Dickerman v. Northern Trust Co.* 176 U. S. 181, 20 Sup. Ct. Rep. 311, 44: 423

265. Bonds need not be produced in evidence prior to a decree of foreclosure and sale in a suit by trustees under a mortgage securing the bonds, where the evidence is sufficient to prove that the bonds were valid and were outstanding obligations. *Dickerman v. Northern Trust Co.* 176 U. S. 181, 20 Sup. Ct. Rep. 311, 44: 423

266. A cumulative security can be no waiver of the right to foreclose. A surety who holds several securities for his indemnity cannot be prevented from using one of them, because he has another to which he might resort. *Muller v. Dows*, 94 U. S. 444, 24: 207

267. The fact of the voluntary partition of the property covered by an indivisible mortgage does not operate to prevent the

mortgage creditor from enforcing his mortgage against either party thereof. *Grover v. Sentell*, 153 U. S. 465, 14 Sup. Ct. Rep. 898, 38: 785

Rights of mortgagee.

268. The right of the mortgagee to extinguish the mortgagor's equitable title is a contract right, and it is the duty of the court to enforce it without unreasonable delay. *Bronson v. Kinzie*, 1 How. 311, 11: 143

Distinguished in *Merritt v. Gibson*, 129 Ind. 178, 15 L.R.A. 285, 27 N. E. 136—*Bradley v. Chester Valley R. Co.* 36 Pa. 148, 149—*Shelor v. Mason*, 2 S. C. N. S. 234.

269. When not prohibited by statute, a mortgagee may sue on the obligation, bring an action of ejectment, and may file a bill for foreclosure and sale. *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603, 23: 405
Cited in *Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 23, 133 Fed. 271—*Connecticut Mut. L. Ins. Co. v. Jones*, 1 McCrary, 392, 8 Fed. 306—*Smith Charities v. Connolly*, 157 Mass. 276, 31 N. E. 1058.

270. The holder of a note secured by mortgage need not exhaust his remedies at law after suit begun on the note, before he can go into equity to enforce his mortgage. *Ober v. Gallagher*, 93 U. S. 199, 23: 829

271. In the case of a deed absolute in form given as a mortgage, as well as in the case of a mortgage, the mortgagee may pursue his legal remedy by ejectment, and, at the same time, file his bill to foreclose the equity of redemption. *Hughes v. Edwards*, 9 Wheat. 489, 6: 142
Cited in *Dorsey v. Hammond*, 1 Bland, Ch. 472—*Mundy v. Monroe*, 1 Mich. 71—*Jefferson College v. Dickson*, *Freem. Ch. (Miss.)* 482—*Harris v. Vaughn*, 2 Tenn. Ch. 485—*McClaskey v. O'Brien*, 16 W. Va. 848.

272. The right of a mortgagee to have foreclosure and sale of all the mortgaged property is not affected by any relative rights of contribution which the various purchasers of the mortgaged property may have, as between themselves. *Hughes v. Edwards*, 9 Wheat. 489, 6: 142
Cited in *Schmucker v. Silbert*, 18 Kan. 110, 26 Am. Rep. 765—*Moreton v. Harrison*, 1 Bland, Ch. 494—*Gibson v. McCormick*, 10 Gill & J. 105.

273. A conditional surrender of notes secured by a mortgage does not cut off the right to foreclose the mortgage for their satisfaction, if the condition is not fulfilled. *Pugh v. Fairmount Gold & Silver Min. Co.* 112 U. S. 238, 5 Sup. Ct. Rep. 131, 28: 684

274. Under an act containing the *pact de non alienando*, the mortgagee can proceed against the mortgagor, after the latter's expropriation through confiscation proceedings, as though he had never been divested of title. *Shields v. Schiff*, 124 U. S. 351, 8 Sup. Ct. Rep. 510, 31: 445

275. In a suit in equity to foreclose a mortgage from a railroad corporation, of its whole railroad, franchise, lands, and property, which have since been put in the possession

of a receiver, an intervening prior mortgagee of part of the lands is not entitled to have the amount of his mortgage paid out of the funds in the hands of the receiver, or out of the proceeds of a sale made pursuant to the decree of foreclosure subject to his mortgage. *Woodworth v. Blair*, 112 U. S. 8, 5 Sup. Ct. Rep. 6, 28: 615
Cited in *Shepherd v. Pepper*, 133 U. S. 651, 33 L. ed. 716, 10 Sup. Ct. Rep. 438—*Finance Co. v. Charleston, C. & C. E. Co.* 46 Fed. 428—*Compton v. Jesup*, 15 C. C. A. 445, 31 U. S. App. 486, 68 Fed. 311—*Tome v. King*, 64 Md. 183, 21 Atl. 279.

276. The security of subsequent mortgagees in Louisiana, whose mortgages are foreclosed in a suit to which they are not parties, is transferred to the proceeds of the sale; and their protection consists in the requirement that no sale shall take place for less than two thirds of the value of the mortgaged property, as appraised for that purpose. *Carite v. Trotot*, 105 U. S. 751, 26: 1223

277. Where a mortgagor who has agreed not to sell or encumber the property to the prejudice of the mortgage has fraudulently combined with his brother to defeat the mortgage lien by means of a sale for taxes due from the mortgagor, at which sale the brother was to bid in the property, in his own name, for the benefit of the mortgagor, it is not necessary that the mortgagee, in order to maintain a suit to enforce his lien, should tender the amount of the taxes, with interest thereon, the nonpayment of which by the mortgagor had caused the sale to the prejudice of the mortgagee. The Louisiana constitutional provision that "no sale of property for taxes shall be annulled for any informality in the proceedings until the price paid, with 10 per cent interest, be tendered to the purchaser," has no application to such a case. *Mendenhall v. Hall*, 134 U. S. 559, 10 Sup. Ct. Rep. 616, 33: 1012

— Editorial note.

[Set-off on foreclosure. 21 L.R.A. 321.]

Rights of mortgagor.

278. Where the amount of the mortgage debt is definitely fixed by the court, a defendant in foreclosure proceedings in which a receiver has been appointed has a right to pay the sum due, and have the receiver discharged and the property restored. *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. 510, 17: 900

Demand of payment.

279. Where a mortgagor is insolvent, and has no funds at place of payment, demand there, prior to foreclosure, is unnecessary. *Shaw v. Bill*, 95 U. S. 10, 24: 333
Distinguished in *Potomac Mfg. Co. v. Evans*, 84 Va. 721, 6 S. E. 2.

Provisions restricting foreclosure.

280. Provisions in mortgages delaying or impeding the right to foreclose on default are to be strictly construed. *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 11 Sup. Ct. Rep. 512, 35: 116

Cited in *Farmers' Loan & T. Co. v. Chicago &*

N. P. R. Co. 61 Fed. 546—*Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 179—*Central Trust Co. v. Worcester Cycle Mfg. Co.* 35 C. C. A. 554, 93 Fed. 718—*Turner v. Southern Home Bldg. & L. Asso.* 41 C. C. A. 385, 101 Fed. 314—*Farmers' Loan & T. Co. v. Penn Plate-Glass Co.* 43 C. C. A. 116, 103 Fed. 133—*Boley v. Lake Street Elev. R. Co.* 64 Ill. App. 313.

b. On Default of Interest, Instalment, etc.

Distribution of Proceeds in Case of Sale on Default, see *infra*, 496.

Provision in Bond for Maturity on Failure to Pay Instalment of Interest, see *Bonds*, 292.

Provision in Municipal Bond as to, see *Bonds*, 546.

See also *supra*, 107, 264, 280; *infra*, 296.

281-2. A mortgage which provides that the whole debt may become due upon any default in payment of either the principal, interest, or taxes, at the option of the mortgagee, may be foreclosed upon any such default on giving notice of the mortgagee's election. *Noonan v. Braley* (*Noonan v. Lee*) 2 Black, 499, 17: 278

Cited in Olcott v. Bynum, 17 Wall. 62, 21 L. ed. 575—*Chicago D. & V. R. Co. v. Fosdick*, 106 U. S. 77, 27 L. ed. 58, 1 Sup. Ct. Rep. 10—*Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* 3 L.R.A. 92, 37 Fed. 280—*Rumsey v. Peeples R. Co.* 154 Mo. 247, 55 S. W. 615.

283. A mortgage authorizing the sale in event of default of the entire property mortgaged, which also provides that if there is a sale the amount "then due," with costs and charges, shall be retained, and the overplus, if any, paid over "into the party of the first part, his heirs, administrators, or assigns,"—does not make the entire debt due and collectible on the first default. *Olcott v. Bynum*, 17 Wall. 44, 21: 570
Cited in Grape Creek Coal Co. v. Farmers' Loan & T. Co. 12 C. C. A. 354, 24 U. S. App. 38, 63 Fed. 805.

284. The failure of the mortgagor to signify a readiness to pay and to unite with the mortgagee in obtaining an order to pay the money into court, where the condition of the mortgage requires it, will allow the mortgagee to foreclose. *Crescent Min. Co. v. Wasatch Min. Co.* 151 U. S. 317, 14 Sup. Ct. Rep. 348, 38: 177

285. Where mortgages are given by co-sureties each to the other, to indemnify for an overpayment, unless one of them has been compelled to pay and has in fact paid, an excess beyond his agreed share of the debt, there is no breach of the conditions of the mortgage, and consequently no right to a foreclosure and sale of the mortgaged premises. *Hampton v. Phipps*, 108 U. S. 260, 2 Sup. Ct. Rep. 622, 27: 719

Instalments.

See also *infra*, 351, 376.

286. Stipulation in a mortgage providing that, upon default in the payment, when

due, of a part of the amount secured, the whole shall become due and may be collected, is valid and may be enforced. *Olcott v. Bynum*, 17 Wall. 44, 21: 570
Cited in Union Mut. L. Ins. Co. v. Union Mills Plaster Co. 3 L.R.A. 92, 37 Fed. 280—*McFadden v. Mays Landing & E. H. City R. Co.* 49 N. J. Eq. 187, 22 Atl. 932.

287. A condition in a mortgage that if, at the expiration of the time limited for the payment of the instalments, there should remain due on the mortgage a named sum, the mortgagor might have the privilege of paying the amount due by giving his note therefor, secured by mortgage on other real estate, does not prevent the instalments from falling due at the time stipulated, or prevent a sale under the mortgage to satisfy them when due; but the mortgagor may, in such case, stop the sale by insisting on the terms of the stipulation in the mortgage and complying with the terms thereof. *Bacon v. Northwestern Mut. L. Ins. Co.* 131 U. S. 258, 9 Sup. Ct. Rep. 787, 33: 128

— Editorial notes.

Effect of agreement that the whole shall become due on failure to pay any part. 27: 47

[Foreclosure for part. 37 L.R.A. 737.]

Interest.

Distribution of Proceeds in Case of Sale, see *infra*, 496.

Allegations of Default, see *Pleading*, 433.

See also *supra*, 281; *infra*, 378, 538; *Limitation of Actions*, 336.

288. The parties to an instrument may agree to a foreclosure for nonpayment of interest. *Richards v. Holmes*, 18 How. 143, 15: 304
Cited in Pope v. Durant, 26 Iowa, 240.

289. Failure to pay the first year's interest, in accordance with the terms of a written instrument, is a default in the condition which will justify foreclosure. *Richards v. Holmes*, 18 How. 143, 15: 304
Cited in Black v. Reno, 59 Fed. 921—*Kimball v. Cotton*, 58 N. H. 516—*Scheibe v. Kennedy*, 64 Wis. 587, 25 N. W. 646.

290. Where, by the terms of the mortgage, the entire debt does not become absolutely due on the default to pay interest, except at the election of the trustees as declared and notified by them to the mortgagor, the right to foreclose for the whole debt must be established by such declaration and notice; the default to pay interest alone is not sufficient. *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10, 27: 47

Cited in Beekman v. Hudson River W. S. R. Co. 35 Fed. 11—*Gunnison v. Chicago, M. & St. P. R. Co.* 117 Fed. 646—*Central Trust Co. v. New York City & N. R. Co.* 33 Hun. 518.

291. Where a mortgage debt is not absolutely due on default of interest, but only at the election of the mortgagee duly declared, in the absence of his declaration the right to redeem and prevent the sale, on

payment of the interest in arrears, is not destroyed by a stipulation in the mortgage authorizing a sale of the property as an entirety, and the payment of the whole debt, in case of sale for any default, even though the whole debt should not be due. *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10, 27: 47

292. A railroad company authorized to issue bonds could mortgage its property for payment of instalments of interest as well as principal, and provide in the mortgage that it might be foreclosed if these instalments were not paid as they fell due. *Howell v. McAden (Howell v. Western R. Co.)* 94 U. S. 463, 24: 254

293. A mortgage may be foreclosed for default in payment of interest under such a provision in the mortgage, although the bonds which it is given to secure cannot lawfully be made payable within less than thirty years. *Howell v. McAden (Howell v. Western R. Co.)* 94 U. S. 463, 24: 254

294. Where, by the terms of a railroad mortgage, a mortgagor's right of possession terminates upon default of payment of interest on any of the bonds, the trustees, or, on their failure to do so, any bondholder, may file a bill to foreclose; but, unless the mortgage expressly stipulates that the whole debt shall be due in such a contingency, the decree must be *nisi*, and, on payment of the sum then due, no further proceedings can be had until another default. *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10, 27: 47
Distinguished in General Electric Co. v. La Grande Edison Electric Co. 31 C. C. A. 120, 59 U. S. App. 473, 87 Fed. 503—*Com. ex rel. Atty. Gen. v. Susquehanna & D. R. Co.* 122 Pa. 322, 1 L.R.A. 228, 15 Atl. 448.

Cited in Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 192, 34 L. ed. 632, 11 Sup. Ct. Rep. 61—*Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 141, 35 L. ed. 118, 11 Sup. Ct. Rep. 512—*Jackson & S. Co. v. Burlington & L. R. Co.* 29 Fed. 475—*Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.* 56 Fed. 166—*Kimber v. Gunnell Gold Min. & Mill. Co.* 61 C. C. A. 206, 126 Fed. 140—*Citizens' Bank v. Los Angeles Iron & Steel Co.* 131 Cal. 191, 82 Am. St. Rep. 341, 63 Pac. 462—*Selbert v. Minneapolis & St. L. R. Co.* 52 Minn. 155, 20 L.R.A. 540, 38 Am. St. Rep. 530, 53 N. W. 1134—*McFadden v. Mays Landing & E. H. City R. Co.* 49 N. J. Eq. 184, 22 Atl. 932—*Schultze v. Van Doren*, 64 N. J. Eq. 469, 53 Atl. 815.

c. What may Foreclose; Parties.

1. In General.

Bona Fide Holder of County Bonds, see **Bonds**, 558.

295. The trustee of a railroad mortgage, as a rule, represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not actual parties. *First Nat. Bank v. Shedd*, 121 U. S. 74, 7 Sup. Ct. Rep. 807, 30: 877
Cited in Elwell v. Fosdick, 134 U. S. 513, 33

L. ed. 1002, 10 Sup. Ct. Rep. 598—*Pollitz v. Farmers' Loan & T. Co.* 53 Fed. 212.

296. Where a mortgage of a railroad provides that, when the interest on the bonds secured thereby shall remain unpaid for sixty days after a demand, the trustee in the mortgage shall, upon request of the holders of the outstanding bonds, take possession of and operate the railroad, and shall, upon like request, foreclose the mortgage, this does not limit the power of the trustee to foreclose the mortgage in equity without such request; especially where the mortgage contains the clause that nothing contained in it shall prevent a foreclosure by any court of competent jurisdiction. *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 171, 11 Sup. Ct. Rep. 61, 34: 625

Cited in Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 142, 35 L. ed. 118, 11 Sup. Ct. Rep. 512—*Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 61 Fed. 546—*The Alliance*, 65 Fed. 247—*Central Trust Co. v. Charlotte, C. & A. R. Co.* 65 Fed. 269—*Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 179—*General Electric Co. v. La Grande Edison Electric Co.* 79 Fed. 25—*Low v. Blackford*, 31 C. C. A. 22, 58 U. S. App. 737, 87 Fed. 399—*Turner v. Southern Home Bldg. & L. Asso.* 41 C. C. A. 385, 101 Fed. 314—*Farmers' Loan & T. Co. v. Penn. Plate-Glass Co.* 43 C. C. A. 116, 103 Fed. 133—*Guardian Trust Co. v. White Cliffs Portland Cement & Chalk Co.* 109 Fed. 530—*Boley v. Lake Street Elev. R. Co.* 64 Ill. App. 313—*McFadden v. Mays Landing & E. H. City R. Co.* 49 N. J. Eq. 188, 22 Atl. 932—*Farmers Loan & T. Co. v. New York & N. R. Co.* 78 Hun. 217, 28 N. Y. Supp. 933—*Real Estate, Title Ins. & T. Co. v. Mahoning Rolling Mill Co.* 14 Lanc. L. Rev. 381, 6 Pa. Dist. R. 410.

297. Where the trustees of a railroad mortgage or deed of trust are dead, a bill of foreclosure and sale may be filed against the company by one or more of the bondholders on behalf of themselves and all other bondholders secured by the same mortgage; or, if there be several successive mortgages, the trustees of which are dead, and the complainants hold bonds secured by each mortgage, the bill may be filed on behalf of themselves and all of the other bondholders under each mortgage. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20: 199
Cited in Sutherland v. Lake Superior Ship Canal, R. & Iron Co. 9 Nat. Bankr. Reg. 303, Fed. Cas. No. 13,643—*Chester v. Life Asso. of America*, 4 Fed. 492—*Reinach v. Atlantic & G. W. R. Co.* 58 Fed. 38—*Henry v. Travelers' Ins. Co.* 16 Colo. 186, 26 Pac. 318—*Stevens v. Union Trust Co.* 57 Hun. 511, 11 N. Y. Supp. 268—*Stretch v. Stretch*, 2 Tenn. Ch. 142—*Galveston, H. & S. A. R. Co. v. Butler*, 56 Tex. 512—*Hammond v. Tarver*, 89 Tex. 294, 34 S. W. 729.

298. Some of the holders of corporate bonds may, on refusal of the trustee, to whom the deed of trust executed by the corporation was given, to institute an action to foreclose it, bring a suit for such purpose, making defendants therein trustees and other bondholders who refuse to join. *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 24: 917
Cited in Stevens v. Smith, 61 C. C. A. 630, 126 Fed. 712.

299. A single bondholder has no right to a decree for his exclusive benefit on the foreclosure of a mortgage on a railroad, but is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene, but also to see that their rights are protected in the final decree. *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364, 36: 66

300. In Louisiana, where a mortgage contains the *pact de non alienando*, the mortgagee may enforce his mortgage by proceeding against the mortgagor alone, notwithstanding the alienation of the property or its sale under confiscation proceedings; and all those claiming under the mortgagor, whether directly or remotely, will be bound, although not made parties. *Avegno v. Schmidt*, 113 U. S. 293, 5 Sup. Ct. Rep. 487, 28: 976

Cited in Chase v. New Orleans Gaslight Co. 45 La. Ann. 307, 12 So. 308.

301-2. A bill to foreclose a mortgage is properly filed in the name of the two executors under the will of the mortgagee, to whom letters testamentary have issued. *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. Rep. 449, 34: 1078

Editorial note.

[Foreclosure of, by unauthorized foreign corporation. 24 L.R.A. 315.]

2. Parties.

Effect of Failure to Make Tenant a Party, see *infra*, 504.

Effect of Bankruptcy of Mortgagor, see Bankruptcy, 129.

Stockholder's Right to Defend Foreclosure Suit Against Corporation, see Corporations, 546, 547.

Conclusiveness of Judgment as, see Judgment, III. k, 9.

Who is Necessary Party for Purpose of Determining Right to Remove Cause, see Removal of Causes, 71, 169.

Reversal of Decree for Non-Joiner of Parties, see Review, 13.

303. A bill to enforce a mortgage will not be dismissed because certain persons, who might otherwise have been made parties, were beyond the jurisdiction of the court, it appearing that they had no beneficial interest in the mortgaged property. *Union Bank v. Stafford*, 12 How. 327, 13: 1008
New Orleans Canal & Bkg. Co. v. Stafford, 12 How. 343, 13: 1015

Cited in Shalnwald v. Davids, 69 Fed. 700—*Byrd v. McDaniel*, 33 Ala. 27—*Smith v. Ford*, 48 Wis. 141, 2 N. W. 134.

304. In a suit to enforce upon certain lands a judgment operating as a judicial mortgage, one is not a necessary party who has no interest in the lands, and who has no right to contest the judgment under which the mortgage is alleged to arise. *McCoy v. Rhodes*, 11 How. 131, 13: 634

305. Jurisdiction to decree foreclosure and sale under a mortgage and to enter a de-

ficiency judgment is not defeated because of the inability to join all the parties and to sell all the land due to a conveyance of a part of the mortgaged property to the territory of Hawaii, which insists upon its immunity from suit. *Kawananakoa v. Polyblank*, 205 U. S. 349, 27 Sup. Ct. Rep. 526, 51: 834

Cited in Kansas v. Colorado, 206 U. S. 83, 31 L. ed. 969, 27 Sup. Ct. Rep. 635.

306. Where a bill charges fraud and conspiracy in a sale by executors, and that the purchaser was a party to them, and seeks to enforce the mortgage given on the purchase, the purchaser is a necessary party, although he has parted with his interest without warranty. *Robertson v. Carson*, 19 Wall. 94, 22: 178

Cited in McBurney v. Carson, 99 U. S. 567, 25 L. ed. 380—*Carson v. Hyatt*, 118 U. S. 281, 30 L. ed. 168, 6 Sup. Ct. Rep. 1050—*Alexander v. Horner*, 1 McCrary, 642, Fed. Cas. No. 169—*Sloan v. Sloan*, 21 Fla. 598—*McPike v. Wells*, 54 Miss. 154—*Hyatt v. McBurney*, 18 S. C. 207.

307. The husband of one in possession of land in Florida claiming title is a necessary party, with his wife, to an action to foreclose a mortgage thereon. *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. Rep. 449, 34: 1078

Prior encumbrancers.

308. In a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessary parties. *Jerome v. McCarter*, 94 U. S. 734, 24: 136

Cited in Woodworth v. Blair, 112 U. S. 11, 28 L. ed. 616, 5 Sup. Ct. Rep. 6—*Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 754, 31 L. ed. 312, 8 Sup. Ct. Rep. 337—*Wabash, St. L. & P. R. Co. v. Central Trust Co.* 22 Fed. 144—*Pennsylvania R. Co. v. Allegheny Valley R. Co.* 48 Fed. 144—*Bound v. South Carolina R. Co.* 59 Fed. 512—*Compton v. Jeausp*, 15 C. C. A. 445, 81 U. S. App. 486, 68 Fed. 311—*Hanna v. State Trust Co.* 30 L.R.A. 204, 16 C. C. A. 590, 30 U. S. App. 61, 70 Fed. 7—*McClure v. Adams*, 76 Fed. 901—*Tug River Coal & Salt Co. v. Brigel*, 30 C. C. A. 419, 58 U. S. App. 320, 86 Fed. 822—*Boatmen's Bank v. Fritzlen*, 68 C. C. A. 297, 135 Fed. 659—*Bryan v. May*, 9 App. D. C. 390—*Globe Loan & T. Co. v. Eller*, 61 Neb. 228, 85 N. W. 48—*Woods v. Pittsburgh, C. & St. L. R. Co.* 99 Pa. 108—*Hays v. Cornelius*, 3 Tenn. Ch. 463—*Gilbert v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 603.

309. On a suit for foreclosure of a second mortgage on a railroad, where a receiver is asked, the first mortgagee is a proper party, and in such case the *res* in the hands of the court and subject to sale is the entire mortgaged property, and not merely the equity of redemption. *Miltenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 1 Sup. Ct. Rep. 140, 27: 117

Cited in Tome v. King, 64 Md. 182, 21 Atl. 279.

310. A prior encumbrancer holding legal title, whose debt is payable, is a necessary party to the foreclosure of a junior mort-

gage. when the property is sought to be sold free from prior encumbrances. *Hagan v. Walker*, 14 How. 29, 14: 312
Cited in Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 754, 31 L. ed. 312, 8 Sup. Ct. Rep. 337—*Shepherd v. Pepper*, 183 U. S. 651, 33 L. ed. 716, 10 Sup. Ct. Rep. 438—*Sutherland v. Lake Superior Ship Canal. R. & Iron Co.* 9 Nat. Bankr. Reg. 309, Fed. Cas. No. 13,643—*Converse v. Michigan Dairy Co.* 45 Fed. 19—*Masters v. Templeton*, 92 Ind. 452—*Randall v. Lower*, 98 Ind. 262.

311. Prior incumbrancers are not bound by a decree in a suit to which they are not made parties; and purchasers under the sale take subject to the prior liens. *Dupasseur v. Rochereau*, 21 Wall. 130,

22: 588

Cited in Rldings v. Johnson, 128 U. S. 225, 32 L. ed. 405, 9 Sup. Ct. Rep. 72—*Nalle v. Young*, 160 U. S. 643, 40 L. ed. 566, 16 Sup. Ct. Rep. 420—*Sheffield & B. Coal. Iron & R. Co. v. Newman*, 23 C. C. A. 465, 41 U. S. App. 766, 77 Fed. 793—*James v. Central Trust Co.* 39 C. C. A. 181, 98 Fed. 493—*Hyatt v. McBurney*, 18 S. C. 210.

312. In mortgage foreclosure, the presence of a prior mortgagee or party having a prior lien, may be dispensed with when the validity of the prior encumbrance is not disputed, and where the prior encumbrancer is incapable of being sued, or not subject to the jurisdiction of court. *Hagan v. Walker*, 14 How. 29,

14: 312

Cited in Jerome v. McCarter, 94 U. S. 736, 24 L. ed. 137—*Carey v. Houston & T. C. R. Co.* 161 U. S. 132, 40 L. ed. 644, 16 Sup. Ct. Rep. 537—*Kelly v. Alabama & C. R. Co.* 58 Ala. 499—*Gilman v. New Orleans & S. R. Co.* 72 Ala. 586.

313. The petition of a prior mortgagee of a specific portion of a railroad company's property, for intervention in a suit to foreclose a mortgage of the whole railroad, franchise, and property of the mortgagor, will be dismissed without prejudice, as the prior mortgagee is not a necessary party in such suit by the junior mortgagee. *Woodworth v. Blair*, 112 U. S. 8, 5 Sup. Ct. Rep. 6,

23: 615

Cited in Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 754, 31 L. ed. 312, 8 Sup. Ct. Rep. 337—*Central Trust Co. v. Worcester Cycle Mfg. Co.* 86 Fed. 36—*Boatmen's Bank v. Fritzen*, 68 C. C. A. 298, 135 Fed. 660.

314. Where a sale of the entire property and estate, and not merely the equity of redemption, is desired upon the foreclosure of a junior mortgage, prior encumbrancers are necessary parties to ascertain the amount of debts and protect the title of the purchaser. *Jerome v. McCarter*, 94 U. S. 734,

24: 136

Cited in Shepherd v. Pepper, 183 U. S. 651, 33 L. ed. 716, 10 Sup. Ct. Rep. 438.

315. A prior mortgagee is not a necessary party in Louisiana upon the foreclosure of a subsequent mortgage, and purchasers take subject to the prior lien. *Nalle v. Young*, 160 U. S. 624, 16 Sup. Ct. Rep. 420.

40: 560

Subsequent encumbrancers.

See also *infra*, 390.

316. It is not necessary that parties who acquired liens subsequent to the mortgage in question should be made parties. *Brewster v. Wakefield*, 22 How. 118,

16: 301

Cited in Mercantile Trust Co. v. Kanawha & O. R. Co. 7 C. C. A. 9, 16 U. S. App. 37, 58 Fed. 12—*Louisville, N. A. & C. R. Co. v. Pope*, 20 C. C. A. 257, 46 U. S. App. 25, 74 Fed. 5.

317. A decree of sale in foreclosure is not void because a second encumbrancer is not made a party to the proceeding; and his lien remains in full force, notwithstanding a decree of sale entered pursuant to such a proceeding. *Howard v. Milwaukee & St. P. R. Co.* 101 U. S. 837,

25: 1081

Cited in Tug River Coal & Salt Co. v. Brigel, 30 C. C. A. 419, 58 U. S. App. 320, 86 Fed. 822.

318. A subsequent mortgagee need not be made a party on the foreclosure of a prior mortgage containing the *pact de non alienando*, but must take note of the proceedings at his peril. *Nalle v. Young*, 160 U. S. 624, 16 Sup. Ct. Rep. 420,

40: 560

319. A holder of a first mortgage in Louisiana, duly executed before a notary, with *pact de non alienando*, is not bound to give notice to any person but the debtor in possession; the fact that others had a junior mortgage by virtue of the same instrument makes no difference. *New Orleans Nat. Bkg. Asso. v. Le Breton*, 120 U. S. 765, 7 Sup. Ct. Rep. 772,

30: 821

Mortgagors; adverse claimants.

Mortgagor as Necessary Party for Purpose of Determining Right to Remove Cause, see *Removal of Causes*, 69, 70.

320. The mortgagor is an indispensable party to a suit against his grantee to foreclose the mortgage, under the Connecticut practice, whereby the mortgagor's liability for the mortgage debt is to be saved, and the value of the mortgaged property applied in payment to be conclusively settled against him. *Coney v. Winchell*, 116 U. S. 227, 6 Sup. Ct. Rep. 366,

29: 610

Cited in Hicklin v. Marco, 6 C. C. A. 17, 15 U. S. App. 55, 56 Fed. 556.

321. In a suit to establish a mortgage, and for a sale thereunder, it is competent to unite as defendants both the mortgagor and a party claiming the property adversely to the lien of the mortgage by virtue of proceedings for a sale for taxes had subsequently to its execution. *Mendenhall v. Hall*, 134 U. S. 559, 10 Sup. Ct. Rep. 616,

33: 1012

Cited in Cohen v. Solomon, 66 Fed. 412—*Allison v. Corson*, 32 C. C. A. 16, 60 U. S. App. 387, 88 Fed. 585—*Appleton Waterworks Co. v. Central Trust Co.* 35 C. C. A. 306, 93 Fed. 290—*Kirlicks v. Interstate Bldg. & L. Asso.* 51 C. C. A. 318, 113 Fed. 290—*Williams v. Cooper*, 124 Cal. 669, 57 Pac. 577.

322. In a foreclosure, the complainant cannot make a person who claims adversely to both the mortgagor and mortgagee a party,

and litigate and settle his rights in that case. *Dial v. Reynolds*, 96 U. S. 340,

24: 644

Cited in Peters v. Bowman, 98 U. S. 60, 25 L. ed. 92—*Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 752, 31 L. ed. 311, 8 Sup. Ct. Rep. 337—*Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 413, 32 L. ed. 471, 9 Sup. Ct. Rep. 127—*Chapin v. Walker*, 2 McCrary, 177, 6 Fed. 796—*Farmers' Loan & T. Co. v. San Diego Street-Car Co.* 40 Fed. 110—*Converse v. Michigan Dairy Co.* 45 Fed. 19—*James v. Central Trust Co.* 39 C. C. A. 131, 98 Fed. 494—*Savings & T. Co. v. Bear Valley Irrig. Co.* 112 Fed. 703—*Randle v. Boyd*, 73 Ala. 286—*Hillens v. Brinsfield*, 108 Ala. 614, 18 So. 604—*Adams v. Edgerton*, 48 Ark. 423, 3 S. W. 628—*Wells v. Francis*, 7 Colo. 415, 4 Pac. 49—*Gage v. Perry*, 93 Ill. 179—*Bell v. Pate*, 47 Mich. 469, 11 N. W. 275—*Dickerson v. Uhl*, 71 Mich. 406, 39 N. W. 472—*Faublon v. Rogers*, 66 Tex. 475, 1 S. W. 166—*Wolf v. Harris*, 20 Tex. Civ. App. 101, 48 S. W. 529—*Washington City Sav. Bank v. Thornton*, 83 Va. 166, 2 S. E. 193—*California Safe Deposit & T. Co. v. Cheney Electric Light, Teleph. & P. Co.* 12 Wash. 139, 40 Pac. 732—*St. Lawrence Boom & Mfg. Co. v. Holt*, 51 W. Va. 379, 41 S. E. 351.

Mortgage of other portion of railroad.

323-4. The mortgagees in a mortgage covering one portion of a railroad are not necessary parties in an action to foreclose a mortgage on a different and distinct portion of the same road. *Bronson v. La Crosse & M. R. Co.* 2 Black, 524, 17: 347

Bondholders.

Trustee's Power to Bind Bondholders, see *supra*, 158-162.

Right of Part of Bondholders to Sue in Federal Courts by Omitting Dissenting Bondholders, see *Courts*, 754.

Right of State Holding Lien, to Sue in Supreme Court, see *Supreme Court of the United States*, 108.

See also *supra*, 298.

325. All bondholders are necessary parties to an action to foreclose a railroad mortgage. *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364, 36: 66 *Cited in Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 466, 41 U. S. App. 766, 77 Fed. 794.

326. In a foreclosure suit the bondholders are not necessary parties; they are represented by their trustee. *Richter v. Jerome*, 123 U. S. 233, 8 Sup. Ct. Rep. 106,

31: 132

Distinguished in Chaffin v. Hull, 49 Fed. 526. *Cited in Clyde v. Richmond & D. R. Co.* 55 Fed. 448—*Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 172—*Watkins v. Bryant*, 91 Cal. 504, 27 Pac. 776.

327. Bondholders need not be made parties in a suit to foreclose a railroad mortgage given to a trustee to secure the bonds. *Vose v. Bronson*, 6 Wall. 452, 18: 846

328. Where the mortgage of a railroad company is made directly to the persons holding bonds of a county, secured by the mortgage, who are named, and their several

interests described, all the bondholders should be parties to a suit for its foreclosure, especially where the adequacy of the security to pay all the bonds is doubtful. *Nashville & D. R. Co. v. Orr*, 18 Wall. 471, 21: 810

Cited in New Orleans P. R. Co. v. Parker, 143 U. S. 59, 36 L. ed. 71, 12 Sup. Ct. Rep. 364—*United States v. Central P. R. Co.* 8 Sawy. 93, Fed. Cas. No. 12,319—*United States v. Central P. R. Co.* 8 Sawy. 93, 11 Fed. 458—*Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.* 56 Fed. 166—*Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 465, 41 U. S. App. 766, 77 Fed. 794—*Swenney v. Hill*, 65 Kan. 829, 70 Pac. 868—*McPike v. Wells*, 54 Miss. 146—*Babbitt v. Gibbs*, 51 App. Div. 390, 64 N. Y. Supp. 609—*Galveston, H. & S. A. R. Co. v. Butler*, 56 Tex. 511—*Preston v. Aston*, 85 Va. 113, 7 S. E. 344.

329. All the holders of bonds secured by a railroad mortgage are necessary parties to an action to foreclose it, and those who are not made parties by proper notice are not bound by the foreclosure sale. *Jackson v. Ludeling*, 21 Wall. 616, 22: 492 *Cited in Ridings v. Johnson*, 128 U. S. 225, 32 L. ed. 405, 9 Sup. Ct. Rep. 72—*Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 466, 41 U. S. App. 766, 77 Fed. 794—*Byers v. Rollins*, 13 Colo. 27, 21 Pac. 894.

— Editorial note.

[Right of bondholder to sue for enforcement of trust deed. 20 L.R.A. 535.]

Beneficiaries.

330. On the foreclosure of a mortgage given by one who was merely a trustee, the beneficiaries who are known to be such should be made parties. *Oliver v. Piatt*, 3 How. 333, 11: 622 *Cited in Johnson v. Robertson*, 31 Md. 491.

331. Beneficiaries under a subsequent trust deed should be made parties to a foreclosure of a mortgage. *Clark v. Reyburn*, 8 Wall. 318, 19: 354 *Cited in Sears v. Hardy*, 120 Mass. 530—*Jones v. McKenna*, 4 Lea, 686.

Assignees and assignors.

Right of Indorsee to Sue in Federal Court by Reason of Citizenship, see *Courts*, 778, 779.

332. Assignees of a note secured by a judgment foreclosing a builder's lien, and also by a deed of trust, are not necessary parties to an action to enforce the lien of the deed of trust. *Batesville Institute v. Kauffman*, 18 Wall. 151, 21: 775

333. The proceedings in a foreclosure suit after the appointment of an assignee in bankruptcy are not void because he was not made a defendant. *Eyster v. Gaff*, 91 U. S. 521, 23: 403

334. The assignee of a bond and mortgage, taken as collateral security for a debt due him from the assignor, became the holder of the legal right, under an express trust, to hold the beneficial interest or money collected primarily for himself and secondarily for his assignor. In *New York*

he is not required to make the assignor or his representative a party to the foreclosure of the mortgage. *Chew v. Brumagen*, 13 Wall. 497, 20: 663

Cotenants.

335. On foreclosure of a deed of trust given by one cotenant, the other cotenants are not necessary parties. *Stephen v. Beall*, 22 Wall. 329, 22: 786
Distinguished in Detweiler v. Holderbaum, 42 Fed. 340.

Owner at date of foreclosure.

336. The owner of property mortgaged at the time of the foreclosure of the mortgage, whether he be the original mortgagor or his successor in interest, is an indispensable party to the foreclosure suit. A decree without his being made a party will not bind him or parties claiming under him, although the latter may have acquired their interests after the suit was commenced. *Terrell v. Allison*, 21 Wall. 289, 22: 634

337. Where the title to land was in the mortgagor at the date of the mortgage, and a tax title was subsequent in time, although paramount in right, to the title acquired under the mortgage foreclosure, upon foreclosure of the mortgage in equity the court could determine the validity of the tax title; and the owner of such title was a proper, if not a necessary, party to foreclosure. *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 8 Sup. Ct. Rep. 337, 31: 309
Distinguished in Appleton Waterworks Co. v. Central Trust Co. 35 C. C. A. 305, 93 Fed. 289.

Cited in Shepherd v. Pepper, 133 U. S. 651, 33 L. ed. 716, 10 Sup. Ct. Rep. 438—*Hussman v. Durham*, 165 U. S. 148, 41 L. ed. 665, 17 Sup. Ct. Rep. 253—*Cohen v. Solomon*, 66 Fed. 412—*Commercial Bank v. Sandford*, 99 Fed. 157.

State and United States.

338. In a foreclosure suit, a state which has the possession and legal title to the property involved is an indispensable party; and the United States circuit court has no jurisdiction, although the suit is nominally against the governor and treasurer of the state. *Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 3 Sup. Ct. Rep. 292, 609, 27: 992

339. In an action by an heir to establish title to real estate, he cannot object that the United States was not made a party to a suit to foreclose a mortgage given by his ancestor upon the property, which had been sold by the United States under the confiscation act of July 17, 1862. The estate of the government in the property having determined at the death of the mortgagor, the title to the property is not affected by the question whether the government was represented in the foreclosure suit or not. *Avegno v. Schmidt*, 113 U. S. 293, 5 Sup. Ct. Rep. 487, 28: 976

3. Intervention.

See also *supra*, 313; Parties, 288.

339a. In a suit to foreclose a mortgage on

a railroad, a holder of first-mortgage bonds on the road, who is also trustee of a second mortgage, and another bondholder under both mortgages, both claiming to be interested in an agreement for purchasing the property on foreclosure, may intervene and contest the allowance to the trustee for his compensation, and appeal from the decree making his allowance. *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. Rep. 638, 28: 559
Cited in Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 172—*Farmers' Loan & T. Co. v. Detroit, B. C. & A. R. Co.* 71 Fed. 39—*Southern P. Co. v. Railroad Comrs.* 71 Fed. 440—*General Electric Co. v. West Asheville Improv. Co.* 73 Fed. 389—*Central Trust Co. v. Carter*, 24 C. C. A. 82, 41 U. S. App. 663, 78 Fed. 233—*Rice v. Durham Water Co.* 91 Fed. 434—*Central Trust Co. v. California & N. R. Co.* 110 Fed. 72—*Re Michigan C. R. Co.* 59 C. C. A. 646, 124 Fed. 730—*United States v. Northern Securities Co.* 128 Fed. 812—*Bromley Carpet Co. v. Field*, 88 Ill. App. 229.

339b. The right of bondholders and others having claims against the mortgagor to intervene in foreclosure proceedings, to contest the validity of certain bonds, not controverted. *Washburn v. Green (Richardson v. Green)* 133 U. S. 30, 10 Sup. Ct. Rep. 280, 33: 516
Cited in Farmers' Loan & T. Co. v. San Diego Street-Car Co. 45 Fed. 520—*Central Trust Co. v. California & N. R. Co.* 110 Fed. 72.

339c. General creditors of a mortgagor, having no specific lien, have no right to intervene on *ex parte* affidavits, on appeal from a decree foreclosing the mortgage, to prevent a modification of the decree so as to provide for payment in full of the bonds secured by the mortgage. *Bronson v. La Crosse & M. R. Co.* 2 Black. 524, 17: 347, 353

Cited in Gest v. Packwood, 39 Fed. 536—*Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 28 C. C. A. 204, 56 U. S. App. 208, 84 Fed. 541—*Farmers' Loan & T. Co. v. Louisville, N. A. & C. R. Co.* 103 Fed. 118—*Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 142, 49 N. W. 1100—*Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 370, 12 N. E. 763.

339d. The failure of an unsecured creditor to intervene at the first instant on a bill for the foreclosure of a railroad mortgage filed in the avowed interest of all creditors, without taking any action to notify them or bring them into court, will not be a fatal delay or neglect which will prevent relief against a foreclosure by collusion to cut off unsecured creditors. *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 174 U. S. 674, 19 Sup. Ct. Rep. 827, 43: 1130
Cited in State Trust Co. v. Kansas City, P. & G. R. Co. 110 Fed. 17.

339e. A simple contract creditor whose claim has not been reduced to judgment can intervene in a foreclosure suit to secure his rights, but he cannot maintain an independent suit to have the property applied in satisfaction of his claim, although it is brought in the court in which the foreclosure suit is pending. *Hollins v. Brierfield*

Coal & I. Co. 150 U. S. 371, 14 Sup. Ct. Rep. 127. 37: 1113

Cited in Foster v. Bank of Abingdon, 68 Fed. 724—Park v. New York, L. E. & W. R. Co. 70 Fed. 642—Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co. 72 Fed. 959—Lombard Invest. Co. v. Seaboard Mfg. Co. 74 Fed. 326—Mercantile Trust Co. v. Southern States Land & Timber Co. 30 C. C. A. 359, 52 U. S. App. 675, 86 Fed. 721—Savings & T. Co. v. Bear Valley Irrig. Co. 93 Fed. 340—Harrison v. Farmers' Loan & T. Co. 36 C. C. A. 443, 94 Fed. 729—Strang v. Richmond, P. & C. R. Co. 41 C. C. A. 480, 101 Fed. 516—Enos v. New York & O. R. Co. 103 Fed. 47—Farmers' Loan & T. Co. v. Louisville, N. A. & C. R. Co. 103 Fed. 115—Kessler & Co. v. Ensley Co. 129 Fed. 409—O'Beare Jewelry Co. v. Volfer, 106 Ala. 223, 28 L.R.A. 713, 54 Am. St. Rep. 31, 17 So. 525—Wehn v. Fall, 55 Neb. 553, 70 Am. St. Rep. 397, 76 N. W. 13—Flournoy v. Bullock (Flournoy v. Champion) 11 N. M. 104, 55 L.R.A. 750, 66 Pac. 547—Flournoy v. Champion (N. M.) 55 L. R.A. 758, 66 Pac. 547.

d. Defenses.

Title by Adverse Possession, see Adverse Possession, 45.

First Raising on Appeal, see Appeal and Error, 4564.

Illegality of Purpose for which Mortgagor Incorporated, see Corporations, 52.

Identity of Corporate Officers of Mortgagor and Mortgagee, see Corporations, 265.

Ultra Vires, see Corporations, 359.

Estoppel to Set up, see Estoppel, 15, 16, 242.

Conclusiveness of Judgment as to, see Judgment, 849.

Judgment on Note Secured as Bar to Enforcement of Deed of Trust, see Judgment, 1113, 1114.

Laches as Defense, see Limitation of Actions, 37, 159-166.

Limitation of Action, see Limitation of Actions, 234, 235, 309, 310, 505-507, 610.

Estoppel to Set up by Admissions of Answer, see Pleading, 127.

Necessity of Pleading Prescription as Defense, see Pleading, 704.

Sufficiency as Allegations as to, see Pleading, 727.

Usury, see Usury, 112, 139.

340. No other or further defenses are allowed in an action to foreclose a mortgage given to secure bonds given by a county to aid in the construction of a railroad through it, brought by a bona fide holder for value, than would be allowed in an action on the bonds themselves. Kenicott v. Wayne County, 16 Wall. 452, 21: 319
Carpenter v. Longan, 16 Wall. 271, 21: 313

Distinguished in Doll v. Hollenbeck, 19 Neb. 643, 28 N. W. 286—Dearman v. Trimmer, 26 S. C. 513, 2 S. E. 501.

Cited in Kenicott v. Wayne County, 16 Wall. 460, 21 L. ed. 321—Sawyer v. Prickett, 19 Wall. 166, 22 L. ed. 109—Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 283, 34 L. ed. 353, 10 Sup. Ct. Rep. 999—Patapsco Guano Co. v. Morrison, 2 Woods,

404, Fed. Cas. No. 10,792—Beals v. Neddo, 1 McCrary, 209, 2 Fed. 44—Hayden v. Drury, 3 Fed. 788—Hayden v. Snow, 9 Bliss 518, 14 Fed. 75—Windle v. Bonebrake, 23 Fed. 166—Swett v. Stark, 31 Fed. 859—Converse v. Michigan Dairy Co. 45 Fed. 21—Myers v. Hazzard, 4 McCrary, 98, 50 Fed. 158—The W. B. Cole, 8 C. C. A. 85, 16 U. S. App. 334, 59 Fed. 190—Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 22 C. C. A. 403, 43 U. S. App. 550, 75 Fed. 453—Hamilton v. Fowler, 40 C. C. A. 52, 99 Fed. 24—O'Rourke v. Wahl, 48 C. C. A. 361, 109 Fed. 277—Swift v. Bank of Washington, 52 C. C. A. 340, 114 Fed. 644—Cudahy Packing Co. v. State Nat. Bank, 67 C. C. A. 670, 134 Fed. 546—Spence v. Mobile & M. R. Co. 79 Ala. 587—Wildsmith v. Tracy, 80 Ala. 263—Frost v. Fisher, 13 Colo. App. 333, 58 Pac. 872—McGovney v. Gwillim, 16 Colo. App. 292, 65 Pac. 346—Cowing v. Cloud, 16 Colo. App. 331, 65 Pac. 417—First Nat. Bank v. Flath, 10 N. D. 286, 86 N. W. 867—United States Exp. Co. v. Smith, 35 Ill. App. 96—Gabbert v. Schwartz, 69 Ind. 432—Preston v. Morris, 42 Iowa, 551—Farmers' Nat. Bank v. Fletcher, 44 Iowa, 257—Berry v. Berry, 57 Kan. 693, 57 Am. St. Rep. 351, 47 Pac. 837—Schepp v. Smith, 35 La. Ann. 6—State Nat. Bank v. Flatbush, 45 La. Ann. 79, 40 Am. St. Rep. 216, 12 So. 243—Gamble v. Gibson, 10 Mo. App. 335—Merchants' Nat. Bank v. Abernathy, 32 Mo. App. 222—Logan v. Smith, 62 Mo. 459—Hagerman v. Sutton, 91 Mo. 532, 4 S. W. 73—Hostetter v. Alexander, 22 Minn. 561—Olson v. Northwestern Guaranty Loan Co. 65 Minn. 479, 68 N. W. 100—Cheney v. Cooper, 14 Neb. 417, 16 N. W. 471—Woodruff v. Morristown Inst. for Savings, 34 N. J. Eq. 179—Paige v. Chapman, 58 N. H. 334—Union College v. Wheeler, 61 N. Y. 107—Belden v. Burke, 72 Hun. 74, 25 N. Y. Supp. 601—Atlantic Trust Co. v. Crystal Water Co. 72 App. Div. 540, 56 N. Y. Supp. 647—Atlantic Trust Co. v. Crystal Water Co. 72 App. Div. 540, 76 N. Y. Supp. 547—Bamberger v. Geiser, 24 Or. 207, 33 Pac. 609—Dearman v. Trimmer, 26 S. C. 513, 2 S. E. 501—Patterson v. Rabb, 38 S. C. 152, 19 L.R.A. 836, 17 S. E. 463—Bailey v. Seymour, 42 S. C. 325, 20 S. E. 62—Nashville Trust Co. v. Smythe, 94 Tenn. 520, 27 L.R.A. 666, 45 Am. St. Rep. 748, 29 S. W. 903—Douglass v. Blount, 22 Tex. Civ. App. 496, 55 S. W. 526.

341. In an action to foreclose a mortgage it is a good defense to show that the mortgagee had made an agreement, not inequitable in its terms, and for a valuable consideration, to accept, in satisfaction of the mortgage, certain specific goods, and that there were no laches on the part of the mortgagor. Under such circumstances the court of equity may decree a performance of the contract. Very v. Levy, 13 How. 345, 14: 173

342. It is no defense to a mortgage that the consideration was bills of a bank whose charter was illegal, and the bills were finally worthless, where the mortgagor used the bills in payment of his debts while they were current, and he has not taken them back, nor has he been subjected to the repayment of the debts he discharged by the

use of them. *Orchard v. Hughes*, 1 Wall. 73, 17: 560
Distinguished in Thornburg v. Harris, 3 Coldw. 163.

Cited in Scheible v. Bacho, 41 Ala. 438—*Wells v. American Mortg. Co.* 123 Ala. 422, 26 So. 301—*Miller v. Gould*, 38 Ga. 472—*Sherfy v. Argenbright*, 1 Helsk. 142, 2 Am. Rep. 690—*Story v. Dobson*, 2 Helsk. 30—*Gowen v. Shute*, 4 Baxt. 60—*Washington v. Burnett*, 4 W. Va. 89.

343. It is not a defense to the foreclosure of a mortgage in the hands of a bona fide holder for value without notice, that in a writing, reciting the execution of the note and mortgage and its receipt in payment of a stock subscription, it was stipulated that the company would not demand interest, but would save the mortgagor harmless therefrom; when in the same paper the mortgagor agreed to pay the principal upon maturity, in any event, and that the provision in relation to interest should not be a defense to the payment of interest, if the note or mortgage should be in the hands of a third party, either as security or otherwise. *Sawyer v. Prickett*, 19 Wall. 146, 22: 105

344. To make a misrepresentation as to an existing fact a defense to a mortgage executed as security to a note given for a subscription to the stock of a railroad, it must be made to appear that the misrepresentation was actually made, that it was made by an agent of the company by whose acts or declarations it would be bound, and that the subscriber relied upon the statement as an inducement to subscribe. *Sawyer v. Prickett*, 19 Wall. 146, 22: 105

345. A mortgagor cannot defeat the foreclosure of a mortgage by the defense that the deed executed to him which was the consideration of the mortgage did not contain all the land to which he was entitled, where he has elected to pursue another remedy by bringing an action to reform the deed, in which a reformation of the deed so as to include all the land he purchased has been decreed. *Crescent Min. Co. v. Wasatch Min. Co.* 151 U. S. 317, 14 Sup. Ct. Rep. 348, 38: 177

346. It is a good defense to a suit in foreclosure that the plaintiff took the notes which the mortgage was to secure as agent to raise or advance money on them to the maker, and failed to do so, but retained them tortiously and without the assent of the maker. *Weaver v. Field*, 114 U. S. 244, 5 Sup. Ct. Rep. 844, 29: 143

347. A mortgage executed by husband and wife, of her land, for the accommodation of a partnership of which the husband is a member, and as security for a promissory note made by the husband and his partner for the same purpose, and to which note the partner adds the wife's name as a maker, without the consent or knowledge of herself or her husband, is not thereby avoided as against one who, in ignorance of the note having been so altered, subsequently U. S. Dig.—257

lends money to the partnership upon the security of the note and mortgage. *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. Rep. 65, 28: 641

Cited in United States Glass Co. v. West Virginia Flint Bottle Co. 81 Fed. 995—*First Nat. Bank v. Weidenbeck*, 87 Fed. 274—*United States Glass Co. v. Mathews*, 32 C. C. A. 367, 61 U. S. App. 542, 89 Fed. 830—*First Nat. Bank v. Weidenbeck*, 38 C. C. A. 133, 97 Fed. 898—*First Nat. Bank v. Ashmead*, 23 Fla. 389, 2 So. 657—*Taylor v. Acom*, 1 Ind. Terr. 441, 45 S. W. 130—*Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 590, 58 N. E. 162—*Farmers' Bank v. Myers*, 50 Mo. App. 162—*Standard Underground Cable Co. v. Stone*, 35 App. Div. 65, 54 N. Y. Supp. 383.

348. Foreclosure of a mortgage, as against defendants within the Confederate lines, who could not lawfully cross those lines, is void. *Dean v. Nelson*, 10 Wall. 158, 19: 926

Cited in Ludlow v. Ramsey, 11 Wall. 586, 20 L. ed. 219—*Lasere v. Rochereau*, 17 Wall. 437, 21 L. ed. 695—*Burbank v. Conrad*, 96 U. S. 305, 24 L. ed. 728—*Kimball v. Taylor*, 2 Woods, 41, Fed. Cas. No. 7,775—*Seymour v. Bailey*, 66 Ill. 295—*Foreman v. Carter*, 9 Kan. 679—*Newcomb v. Newcomb*, 13 Bush, 570, 26 Am. Rep. 222—*Ogden v. Leland University*, 49 La. Ann. 192, 21 So. 685—*Dorsey v. Thompson*, 37 Md. 44—*De Jarnette v. De Giverville*, 56 Mo. 447—*Pennywit v. Foote*, 27 Ohio St. 626, 22 Am. Rep. 340—*McVeigh v. Bank of Old Dominion*, 26 Gratt. 840—*Walker v. Beauchler*, 27 Gratt. 521—*Fairfax v. Alexandria*, 28 Gratt. 37—*Dorr v. Rohr*, 82 Va. 362, 3 Am. St. Rep. 106—*Dryden v. Stephens*, 19 W. Va. 13—*Grinnan v. Edwards*, 21 W. Va. 362—*Haymond v. Camden*, 22 W. Va. 193—*Sturm v. Fleming*, 22 W. Va. 420—*Hall v. Hall*, 30 W. Va. 789, 5 S. E. 260.

e. Relief; Decree and Orders; Effect on Fund.

Appellate Jurisdiction over, see Appeal and Error, 1121.

Bondholder's Right to Appeal in Suit by Trustee, see Appeal and Error, 2404, 2415.

Receiver's Right to Appeal, see Appeal and Error, 2408.

State Laws as Decisive on Right to Fees in Federal Proceedings, see Courts, 2125.

Specific Performance in Action to Foreclose, see Specific Performance, 21.

See also *supra*, 129.

349. A court of equity in a suit for the foreclosure of a mortgage has cognizance of all questions relating to priority of lien on the property in litigation, as between the parties to the suit and those whom they represent. *New Orleans & O. R. Co. v. Mellen (New Orleans & O. R. Co. v. United States)* 12 Wall. 362, 20: 434

350. Where a decree upon foreclosure of a mortgage cuts off all right of redemption, an action to reverse so much of the decree as forecloses the statutory right to redeem cannot be maintained after the time to redeem has passed, if complainant has made

no offer to redeem. *Burley v. Flint*, 105 U. S. 247, 26: 986

Cited in Andrews v. National Foundry & Pipe Works, 36 L.R.A. 154, 23 C. C. A. 456, 46 U. S. App. 619, 77 Fed. 776—*National Nickel Co. v. Nevada Nickel Syndicate*, 50 C. C. A. 117, 112 Fed. 48—*Hyman v. Bogue*, 135 Ill. 16, 26 N. E. 40.

351. A clause in a mortgage, payable in instalments, which authorized the mortgagee at public auction to sell the entire property in the event of any default, does not have the effect of making the entire debt due and collectible upon the first default, when it expressly provided that, if there should be a sale, the amount "then due," with costs and charges, should be retained, and the overplus, if any, paid over to the mortgagor, his heirs or assigns. But when property incapable of division has been sold on the first default, and has yielded a fund sufficient to extinguish the whole mortgage debt, it is proper to extinguish the entire debt, as the lien of the mortgage continued upon the fund, and equity would have so applied it. *Olcott v. Bynum*, 17 Wall. 44, 21: 570

352. When the road was divided for the purpose of making mortgages, the order that the master ascertain the whole amount of the rolling-stock on the road, and that he specify the quantity thereof that is covered by the first and second mortgages respectively, required the master to ascertain what rolling stock was covered by each mortgage, not to settle the priority between the mortgages. *Milwaukee & M. R. Co. v. Soutter (Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.)* 2 Wall. 609, 17: 886

Cited in Fechet v. Drake, 2 Ariz. 244, 12 Pac. 694—*Meek v. Parker*, 63 Ark. 372, 58 Am. St. Rep. 119, 38 S. W. 900—*Neilson v. Iowa Eastern R. Co.* 51 Iowa, 188, 33 Am. Rep. 124, 1 N. W. 434—*Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 30, 4 L.R.A. 287, 16 Am. St. Rep. 471, 21 Pac. 809—*Williamson v. New Jersey Southern R. Co.* 28 N. J. Eq. 283—*Hoyle v. Plattsburgh & M. R. Co.* 51 Barb. 61.

Relief generally.

Relief Granted under Pleading, see Pleading, 116.

See also Contracts, 673.

353. On default of payment within a reasonable time given after default in payment of an instalment, a foreclosure of all rights subordinate to the mortgage will be decreed, and the proceeds will be paid into court. *Howell v. McAden (Howell v. Western R. Co.)* 94 U. S. 463, 24: 254

Cited in Toler v. East Tennessee, V. & G. R. Co. 87 Fed. 181—*New York Security & T. Co. v. Lincoln Street R. Co.* 74 Fed. 68—*Gunnison v. Chicago, M. & St. P. R. Co.* 117 Fed. 646—*McFadden v. Mays Landing & E. H. City R. Co.* 40 N. J. Eq. 186, 22 Atl. 932—*Central Trust Co. v. New York City & N. R. Co.* 33 Hun, 519—*Capehart v. Detrick*, 91 N. C. 348.

354. Sums paid by the mortgagee for insurance on the mortgaged premises are recoverable by him on foreclosure, where the

deed of trust requires the mortgagor to keep the property insured for the benefit of the mortgagee. *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24: 858

The decree.

On Foreclosure for Default in Interest, see *supra*, 294.

Permitting Proof of Claim against Proceeds after Time Fixed by Decree, see *infra*, 490.

Reviewability of Decree, see Appeal and Error, I. d, 16.

Mode of Reviewing Decree, see Appeal and Error, 679-680.

Who may Appeal from Foreclosure Decree, Generally, see Appeal and Error, 2414-2417, 2449-2451.

Stockholder's Right to Appeal from Decree against Corporation, see Appeal and Error, 2403.

Intervener's Right to Appeal from Decree, see Appeal and Error 2414-2417, 2449.

Trustee's Right to Appeal from Decree, see Appeal and Error, 2421.

Loss of Right to Appeal from Decree, see Appeal and Error, 2430.

Effect of Appeal from Foreclosure Decree, see Appeal and Error, 2787-2791.

Effect as Binding, *Pendente Lite* Assignee in Bankruptcy, see Bankruptcy, 298.

Estoppel by Acquiescing in Decree, see Estoppel, 202.

Conclusiveness of, see Judgment, III. j. 4, c; III. k, 4, 9; 320, 606, 774, 779.

Confession of Judgment, see Judgment, 30, 56.

In Suit Commenced after Plaintiff's Death, see Judgment, 145.

Collateral Attack on, see Judgment, 461.

Setting Aside Decree, see Judgment, 1195.

Limitation of Time to Review Decree, see Limitation of Actions, 433.

Reversal of Decree for Non-joinder of Parties, see Review, 13.

Ground for Granting Bill of Review, see Review, 27.

Running of Limitations against Bill of Review, see Review, 31.

See also *supra*, 305; *infra*, 380, 506.

355. Although, in a suit to foreclose a mortgage, the specific relief sought is a strict foreclosure, a decree for a sale of the property and for the enforcement of the agreement contained in the mortgage is, under a prayer for general relief, appropriate. *Sage v. Central R. Co.* 99 U. S. 334, 25: 394
Cited in London & S. F. Bank v. Dexter Horton & Co. 61 C. C. A. 528, 126 Fed. 606.

356. It was not error in the decree to require any other person than the trustee under the first mortgage, if he became the purchaser at the sale, to pay at once in cash a part of his bid, as earnest-money. *Sage v. Central R. Co.* 99 U. S. 334, 25: 394
Cited in Donahue v. Parkman, 161 Mass. 413, 42 Am. St. Rep. 415, 37 N. E. 205.

357. It was proper to make a decree of sale subject to the rights and equities of parties to the suit under liens or judgments claimed by them, and to reserve such rights for further adjudication. *Sage v. Central R. Co.* 99 U. S. 334, 25: 394
Cited in Langdon v. Vermont & C. R. Co. 54 Vt. 610.

358. A decree nisi in foreclosure must find the amount due, for nonpayment of which, according to the terms of the decree, the property must be sold; and a substantial error in this will vitiate subsequent proceedings. *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10, 27: 47
Howell v. McAden (*Howell v. Western R. Co.*) 94 U. S. 463, 24: 254
Cited in Chicago & V. R. Co. v. Fosdick, 106 U. S. 68, 27 L. ed. 53, 1 Sup. Ct. Rep. 10
 —*Columbia Finance & T. Co. v. Kentucky Union R. Co.* 9 C. C. A. 269, 22 U. S. App. 54, 60 Fed. 790—*Seattle, L. S. & E. R. Co. v. Union Trust Co.* 24 C. C. A. 519, 48 U. S. App. 253, 79 Fed. 185—*Central Trust Co. v. California & N. R. Co.* 110 Fed. 71—*Wells v. Northern Trust Co.* 195 Ill. 297, 63 N. E. 136—*Chicago & S. S. Rapid Transit R. Co. v. Northern Trust Co.* 90 Ill. App. 489—*Rumsey v. People's R. Co.* 144 Mo. 190, 46 S. W. 144—*Hays v. Cornelius*, 8 Tenn. Ch. 464.

359. An agreement by a company to pay in coin its first-mortgage bonds, which were payable in lawful money, cannot, on foreclosure of the first mortgage, be complained of by a second-mortgage bondholder, where the agreement affects only the company itself, and cannot be enforced against the common fund to his prejudice. *Wallace v. Loomis*, 97 U. S. 146, 24: 895

360. A decree of strict foreclosure which does not find the amount due, and gives no time for the redemption of the estate, can not be sustained. *Clark v. Reyburn*, 8 Wall. 318, 19: 354
Cited in Brine v. Hartford F. Ins. Co. 96 U. S. 638, 24 L. ed. 862—*Chicago & V. R. Co. v. Fosdick*, 106 U. S. 71, 27 L. ed. 56, 1 Sup. Ct. Rep. 10—*Parker v. Dacres*, 130 U. S. 47, 32 L. ed. 850, 9 Sup. Ct. Rep. 433
 —*American Loan & T. Co. v. Atlanta Electric R. Co.* 99 Fed. 318—*Taylor v. Girard L. Ins. Annuity & T. Co.* 1 D. C. App. 214
 —*Barr v. Vanaistine*, 120 Ind. 594, 22 N. E. 965—*Blandin v. Wade*, 20 Kan. 254—*Watkins v. Glenn*, 55 Kan. 431, 31 L.R.A. 84, 40 Pac. 816—*Phinney v. Phinney*, 81 Me. 464, 4 L.R.A. 351, 10 Am. St. Rep. 266, 17 Atl. 405—*State ex rel. Thomas Cruse Sav. Bank v. Gilliam*, 18 Mont. 99, 31 L. R.A. 723, 44 Pac. 394—*Murphy v. New Hampshire Sav. Bank*, 63 N. H. 363—*Moulton v. Cornish*, 61 Hun. 442, 16 N. Y. Supp. 267—*Mebane v. Mebane*, 80 N. C. 87—*Long v. Weller*, 29 Gratt. 355.

361. A decree for the sale of property under a deed of trust given by an infant and afterwards disaffirmed, when the money obtained thereon has been used to pay off prior liens and make improvements, should be so framed as to place the borrower, so far as it can be done, in the position occupied at the time the deed of trust was given. *MacGreal*

v. Taylor, 167 U. S. 688, 17 Sup. Ct. Rep. 961, 42: 326

362. On the foreclosure of a mortgage given to secure a negotiable note assigned before maturity to a bona fide holder for value without notice, a decree that the face of the note and interest be paid or the mortgaged premises sold must be rendered, as that amount could be recovered in an action at law. *Carpenter v. Longan*, 16 Wall. 271, 21: 313

363. An express order cutting off the equity of redemption of a junior mortgagee who is a party to the suit is not necessary in a decree of foreclosure, where the bill prays that the junior mortgagee be decreed to redeem, and the priority of the plaintiff's mortgage is established, and the debtor's right to redeem declared to be forever barred. *Simmons v. Burlington, C. R. & N. R. Co.* 159 U. S. 278, 16 Sup. Ct. Rep. 1, 40: 150

364. The court may properly refuse to delay a decree in foreclosure, to enable the right to the equity of redemption under the trust deed to be settled as between parties other than the complainant, where the latter had no interest in the controversy. *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24: 858

365. Where the decree of the supreme court in a foreclosure case provided that the court below ascertain the moneys in the hands of the receiver of the mortgaged property, and apply the same to the discharge of interest, the court below need not wait till the close of a litigation over the receiver's accounts before making the application of payment, where there is acknowledged to be enough in his hands to pay such interest. *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. 510, 17: 900

Effect of foreclosure.

366. A mortgage foreclosure does not cut off the rights of persons and parties under a prior mortgage, where those rights are reserved by the decree. *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779, 35: 473

f. Strict Foreclosure.

Decree of, see *supra*, 355, 360.

367. When the property is of less value than the debt for which it is mortgaged, and the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of the debt, the court is justified in decreeing a strict foreclosure, unless there are other encumbrances, purchasers of the equity of redemption, or creditors, to object. *Flagg v. Walker*, 113 U. S. 659, 5 Sup. Ct. Rep. 697, 28: 1072

Editorial notes.

Strict foreclosure of mortgage. 19: 354
 [Right to strict foreclosure. 20 L.R.A. 370.]

g. Sale.**1. In General.**

Jurisdiction as to Railroad Lying in Two States, see Courts, 59.
 Power of Courts as to Lands Beyond Territorial Jurisdiction, see Courts, 63.
 Effect of Sale on Dower Rights, see Dower, 11.
 Estoppel to Set up Irregularity in Sale, see Estoppel, 179.
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 Right of Minority Bondholders to Sell Portion of Property, see Mortgage, 166.
 Effect of Sale on Judgment on Part of Notes Secured, see Mortgage, 263.
 Sale for Bond which is not Paid as Novation, see Novation, 2.
 Trustee as Necessary Party to Suit to Prevent Sale, see Parties, 225.
 Usury in Sale, see Usury, 69.
 See also *supra*, 276.

368. Mere general words of description in a mortgage of railroad property are not sufficient to extend a sale beyond the subject-matter of the lien, as defined by the statute. *Wilson v. Gaines*, 103 U. S. 417, 26: 401 *Distinguished in Buchanan v. Knoxville & O. R. Co.* 18 C. C. A. 135, 37 U. S. App. 499, 71 Fed. 338.
Cited in United States v. Flournoy Live Stock & Real Estate Co. 71 Fed. 578.

369. A law subjecting the road and chartered rights of all railroad companies to sale for their debts enures to the benefit of prior as well as subsequent mortgagees. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20: 199

370. The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale, and to transfer them, with the corporeal property of the company, to the purchaser. *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. Rep. 1009, 29: 244
Cited in Julian v. Central Trust Co. 193 U. S. 106, 48 L. ed. 636, 24 Sup. Ct. Rep. 399—*Africa v. Knoxville*, 70 Fed. 738—*New Orleans, S. F. & L. R. Co. v. New Orleans*, 52 La. Ann. 1838, 28 So. 311—*Chadwick v. Old Colony R. Co.* 171 Mass. 243, 50 N. E. 629.

371. Sales of mortgaged premises in foreclosure are made by the marshal of the district where the decree was entered, or by a master appointed by the court. *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18: 43
Cited in Blackburn v. Selma R. Co. 3 Fed. 695—*Knox v. Spratt*, 19 Fla. 833—*Rumsey v. Peoples R. Co.* 154 Mo. 252, 55 S. W. 615—*Meyer v. Bishop*, 27 N. J. Eq. 145.

372. An objection to the validity of a mortgage sale of public land, on the ground of a combination to prevent competition in

bidding, can only be taken by the government itself. *Easley v. Kellom*, 14 Wall. 279, 20: 890

373. The right of a lien claimant reserved in a foreclosure decree which provides that if his lien is established he shall be paid a certain sum, in default of which the court shall resume possession of the property affected by his lien, and enforce the decree rendered in his favor "by a resale of such property, or otherwise, as this court may direct,"—includes the right to a resale of the property, and is not limited to a redemption thereof. *Compton v. Jesup*, 167 U. S. 1, 17 Sup. Ct. Rep. 795, 42: 55
Cited in Central Trust Co. v. Georgia P. R. Co. 30 C. C. A. 652, 58 U. S. App. 120, 87 Fed. 293—*The New York*, 51 C. C. A. 483, 113 Fed. 811.

374. No sale of mortgaged property under a junior encumbrance can be made, under La. Code, arts. 679, 683, 684, unless the price bid is sufficient to discharge the prior lien if that was conventional or special; but if the prior mortgage was legal or judicial this requirement does not apply. *Nalle v. Young*, 160 U. S. 624, 16 Sup. Ct. Rep. 420, 40: 560

375. The acknowledgment, by a mortgagor in Louisiana, of the amount due for advances made under the mortgage, being all that was needed to make the mortgage exigible, the fact that he also made a confession of judgment did not make invalid a sale of the property by executory process. *New Orleans Nat. Bkg. Asso. v. Le Breton*, 120 U. S. 765, 7 Sup. Ct. Rep. 772, 30: 821

376. Where a decree in foreclosure directs that an order for the sale of the mortgaged premises may be made on default of any future instalment of interest, subsequent orders of sale on default of payment of such instalments are valid. *Fleming v. Soutter*, 6 Wall. 747, 18: 847

377. A plantation and the personal property belonging thereto may be sold under a mortgage including both, in a lump; and the sale may be at the seat of justice, unless the debtor seasonably requires the sale to be on the plantation. *Stockmeyer v. Tobin*, 139 U. S. 176, 11 Sup. Ct. Rep. 504, 35: 123

378-9. A condition in a trust deed of railroad property, that on default in the payment of interest or principal for the time stated the trustees shall, on the written request of 60 per cent of the bondholders, take possession of the property and sell the same in a place named, does not apply to foreclosure proceedings begun in a court of competent jurisdiction to obtain a judicial sale of the property. *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 11 Sup. Ct. Rep. 512, 35: 116

380. Where a mortgage of a railroad contained a covenant that the trustee named therein should, at the request of a majority of the bondholders, purchase the premises at

sale thereunder, for the benefit of the bondholders, and organize a new company, it was not error to decree, on a foreclosure of the mortgage, that the trustee should be authorized and directed to bid at the sale, as trustee for the first mortgaged bondholders, at least the amount of the principal and interest of the first mortgage bonds. Under the prayer for general relief, the court could direct the trustee, if he became the purchaser, to convey the property to a new corporation organized by and for the benefit of the bondholders according to the priority of their interests, giving the controlling interest and power of management to the first-mortgage bondholders. *Sage v. Central R. Co.* 99 U. S. 334, 25: 394

Cited in *Elwell v. Fosdick*, 134 U. S. 512, 33 L. ed. 1002, 10 Sup. Ct. Rep. 598—*Mackintosh v. Flint & P. M. R. Co.* 34 Fed. 591—*Hackettstown Nat. Bank v. Yuengling Brewing Co.* 20 C. C. A. 331, 38 U. S. App. 681, 74 Fed. 118—*Fidelity Ins. & S. D. Co. v. Roanoke Street R. Co.* 98 Fed. 479—*Pennsylvania Transp. Co.'s Appeal*, 40 Phila. Leg. Int. 425.

Editorial note.

Order of sale of mortgaged premises.

25: 238

Notice of sale.

Of Sale under Power, see *infra*, 410-413.

See also *infra*, 394, 437, 471.

381. Where a notice of sale is ordered to be made in a certain newspaper, a change in the name, while the identity of the paper remains, will not vitiate the notice. *Sage v. Central R. Co.* 99 U. S. 334, 25: 394
Cited in *Perkins v. Keller*, 43 Mich. 57, 4 N. W. 559.

382. [The sheriff's omission to post notices of a sale, as required by the Pennsylvania act of 1790 for the sale of land, under a mortgage to the general loan office, ought not to affect the title of a bona fide purchaser, if the sale was a fair one. *Weitzell v. Fry* (Pa. Sup. Ct.) 4 Dall. 218, 1: 807]

Franchises and corporate rights.

See also *supra*, 369; *infra*, 425, 432.

383. The franchise of a railroad company may be sold upon foreclosure of a mortgage upon the railroad. *Jackson v. Ludeling*, 21 Wall. 616, 22: 492
Cited in *Chadwick v. Old Colony R. Co.* 171 Mass. 243, 50 N. E. 629—*Yellow River Improv. Co. v. Wood County*, 81 Wis. 562, 17 L.R.A. 95, 51 N. W. 1004.

384. Where a company is authorized to mortgage its franchises and rights, these may be sold and the purchaser acquire title thereto at foreclosure sale, although the corporate right to exist may not be sold. *Julian v. Central Trust Co.* 193 U. S. 93, 24 Sup. Ct. Rep. 399, 48: 629
Cited in *Vicksburg v. Vicksburg Waterworks Co.* 202 U. S. 464, 50 L. ed. 1109, 26 Sup. Ct. Rep. 660—*Omaha Water Co. v. Omaha*, 77 C. C. A. 281, 147 Fed. 15.

Death of party.

385. The death of a party after a decree

in foreclosure was rendered, and before the sale, does not invalidate the title of the purchaser, although the decree was not revived against the heirs. *Whiting v. Bank of United States*, 13 Pet. 6, 10: 33
Cited in *Schley v. Baltimore*, 29 Md. 47.

Adjournment; postponement.

Of Sale under Power, see *infra*, 409.

386. Every officer authorized to sell property under a decree in foreclosure possesses the powers, for good cause shown, to adjourn the sale; and, if the interest of the parties require it, he is bound to exercise a sound discretion upon the subject. *Blossom v. Milwaukee & C. R. Co.* 1 Wall. 655, 17: 673

387. An adjournment of a foreclosure sale is proper, where granted at the request of the parties, to enable the respondents to negotiate an arrangement to pay the mortgage debt. *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18: 43

388. In a proceeding to foreclose two railroad mortgages and determine the amount due on the first, and the extent of priority of its lien, a sale need not be postponed until all the disputed questions as to distribution are settled, against the wishes of the trustees and a large majority of the bondholders, merely because interveners representing a minority object. *First Nat. Bank v. Shedd*, 121 U. S. 74, 7 Sup. Ct. Rep. 807, 30: 877
Cited in *Compton v. Jesup*, 15 C. C. A. 423, 31 U. S. App. 486, 68 Fed. 289—*Alabama & G. Mfg. Co. v. Robinson*, 19 C. C. A. 157, 80 U. S. App. 683, 72 Fed. 712—*Olmstead v. Distilling & Cattle-Feeding Co.* 73 Fed. 49—*Kirby v. Runals*, 37 Ill. App. 192—*Smith v. Burton*, 67 Vt. 518, 32 Atl. 467.

Improper practices at auction.

389. Improper practices at an auction, to enhance the price of the property sold, cannot be complained of by a subsequent encumbrancer, since it is for his interest that the property should bring the highest price obtainable. *Richards v. Holmes*, 18 How. 143, 15: 304
Cited in *Etna Coal & I. Co. v. Marting Iron & Steel Co.* 61 C. C. A. 403, 127 Fed. 39.

Seizure and appraisalment.

390. By the Civil Code of Louisiana the seizure and sale, by virtue of executory process under a mortgage, are not affected by the existence of subsequent mortgages, the owners of which are not made parties to the proceeding. *Carite v. Trotot*, 105 U. S. 751, 26: 1223
Cited in *New Orleans Nat. Bkg. Asso. v. Le Breton*, 120 U. S. 770, 30 L. ed. 823, 7 Sup. Ct. Rep. 772—*Nalle v. Young*, 160 U. S. 643, 40 L. ed. 566, 16 Sup. Ct. Rep. 420.

391. The law of Louisiana requires an actual seizure of land on foreclosure, in all the parishes of the state except Orleans and Jefferson; and a sale without a valid seizure conveys no title. *Watson v. Bondurant*, 21 Wall. 123, 22: 509
Distinguished in *Pike v. Evans*, 94 U. S. 10, 24 L. ed. 41.

392. In Louisiana a sale under a mortgage is not illegal for want of an appraisalment,

where appraisement is dispensed with by the mortgage. *Stockmeyer v. Tobin*, 139 U. S. 176, 11 Sup. Ct. Rep. 504, 35: 123

Waiver; cure of defects.

See also *infra*, 420.

393. Where the mortgagor makes no objection to the sale as made, this would cure the defect, if it were defective, and give it validity. *Markey v. Langley*, 92 U. S. 142, 23: 701

394. Although the marshal could not give the notice of seizure and sale required by law, to the executor against whom the petition was filed, yet if the executor was served with process on the spot where the property was situated and where the advertisements were posted up, was present at the sale and named one of the appraisers, and requested that the property should be sold together, he cannot afterwards impeach the sale because formal steps were not strictly complied with, nor can the curator who subsequently represented the same estate. *Erwin v. Lowry*, 7 How. 172, 12: 655

395. Where a petition for the seizure and sale of the mortgaged property of a deceased person was filed in the circuit court of the United States for Louisiana, against the executor of that deceased person, which petition alleged the plaintiff to be a citizen of Tennessee and the defendant to be a citizen of Louisiana, and the proceedings went on to a sale without any objection to the jurisdiction of the court being made by the executor on the ground of residence of parties, it is too late for a curator appointed in the place of the executor to raise the objection in a state court against a purchaser at the sale, and attempt to prove that the circuit court had no jurisdiction over the case because the executor was not a citizen of Louisiana. Evidence *dehors* the record cannot be introduced to disprove it. *Erwin v. Lowry*, 7 How. 172, 12: 655

2. Under Power.

Right of Bona Fide Purchaser, see *infra*, 526a.

Effect of Recital of Foreclosure on Title Conveyed by Trustee's Deed, see *Deeds*, 57.

Injunction against Sale for Usurious Loan as Requiring Offer to Pay Principal and Legal Interest, see *Injunction*, 9.

396. That the price which property brought at a trustee's sale was grossly inadequate does not alone invalidate the sale, unless the inadequacy was such as to shock the conscience or raise a presumption of fraud or unfairness. *Clark v. Eaton* (Clark v. Freedman's Sav. & T. Co.) 100 U. S. 149, 25: 573
Cited in *Hunt v. Fisher*, 29 Fed. 809—*Sharp v. Greene*, 22 Wash. 693, 62 Pac. 147.

397. A sale under a deed of trust will not be declared invalid because the trustee's deed to the purchaser is defective. The execution of a new deed will be ordered, if necessary.

Clark v. Eaton (Clark v. Freedman's Sav. & T. Co.) 100 U. S. 149, 25: 573

398. A sale of mortgaged premises upon the premises themselves is proper, under a power of sale to the mortgagee, when the place of sale was not prescribed in the mortgage. *Olcott v. Bynum*, 17 Wall. 44, 21: 570

399. In case of a deed of trust executed to secure a debt, unless in case of some extrinsic matter of equity, a court of equity never interferes to delay or prevent a sale according to the terms of the trust; and the only right of the grantor in the deed is the right to any surplus which may remain of the money for which the property is sold. *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19, 10: 335

400. If a mortgagee in selling keeps within his authority, equity will not hold him responsible for mere errors of judgment, or for results which he could not reasonably have anticipated. *Markey v. Langley*, 92 U. S. 142, 23: 701
Cited in *Tate v. Norton*, 94 U. S. 750, 24 L. ed. 223—*Mellen v. Wallach*, 112 U. S. 50, 28 L. ed. 636, 5 Sup. Ct. Rep. 15—*Newburn v. Bass*, 82 Ala. 625, 2 So. 520.

401. That the trustee, at the date of the deed to him, and when the sale was made, was actuary of the trust company whose debt it was given to secure, does not invalidate a sale made under it to the company, which was in conformity to the deed and free from fraud. *Clark v. Eaton* (Clark v. Freedman's Sav. & T. Co.) 100 U. S. 149, 25: 573
Cited in *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 497, 32 L. ed. 165, 8 Sup. Ct. Rep. 1250—*Gray v. Quicksilver Min. Co.* 68 Fed. 682—*Monroe Bros. v. Fuchtlar*, 121 N. C. 104, 28 S. E. 63.

402. An auctioneer at a sale under a power in a deed of trust may bid for the mortgagee a specified sum, without invalidating the sale. *Richards v. Holmes*, 18 How. 143, 15: 304
Cited in *Felton v. Le Breton*, 92 Cal. 467, 28 Pac. 490—*Thornton v. Irwin*, 43 Mo. 165—*Hull v. Voorhis*, 45 Mo. 559.

403. That the purchaser of land at a trustee's sale, at the time he took the deed from the trustees, settled with one of them on the basis of a purchase for cash, although the terms of sale provided for a credit, and, as holder of the note secured, credited on it the amount of the net proceeds of sale, leaving a sum still due on the note, does not violate any right of the former owner of the land. *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. Rep. 50, 29: 398

404. Where a creditor becomes the purchaser at a sale under a deed of trust made to a third person as trustee, and credits the debtor on the overdue obligation with the amount of the purchase money, it can not be said that such sale is one in form only as no money passed, as it is in fact and law a payment to the use and benefit of the

debtor. *Easton v. German-American Bank*, 127 U. S. 532, 8 Sup. Ct. Rep. 1297,

32: 210

405. A condition in a deed of trust, that the premises mortgaged shall not be sold under proceedings either at law or in equity, but that the model of sale provided by the mortgage shall be exclusive of all others, is invalid so far as it attempts to oust the jurisdiction of the courts. *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 11 Sup. Ct. Rep. 512,

35: 116

Cited in *Mercantile Trust Co. v. Chicago, P. & St. L. R. Co.* 61 Fed. 375—*Low v. Blackford*, 31 C. C. A. 22, 58 U. S. App. 737, 87 Fed. 399—*Mitchell v. Dougherty*, 33 C. C. A. 211, 62 U. S. App. 443, 90 Fed. 645—*Guardian Trust Co. v. White Cliffs Portland Cement & Chalk Co.* 109 Fed. 529—*Land Title & T. Co. v. Asphalt Co.* 121 Fed. 193—*Downes v. Long*, 79 Md. 390, 29 Atl. 827—*McFadden v. Mays Landing & E. H. City R. Co.* 49 N. J. Eq. 188, 22 Atl. 932—*Greve v. Aetna Live Stock Ins. Co.* 81 Ill. 30, 30 N. Y. Supp. 668—*Real Estate, Title Ins. & T. Co. v. Mahoning Rolling Mill Co.* 14 Lanc. L. Rev. 381, 6 Pa. Dist. R. 410.

405a. Neither error in mere recitals in a trustee's deed, nor its silence as to the hour of the day when the sale occurred, makes the deed void or ineffectual as a conveyance of the title by a trustee invested with power to sell and to convey the title. *Mansfield v. Excelsior Ref. Co.* 135 U. S. 326, 10 Sup. Ct. Rep. 825,

34: 162

Public and private sale.

406. Where the power of sale in an instrument authorizes a private, as well as a public, sale of the encumbered property, the advertisement should so state. *Richards v. Holmes*, 18 How. 143,

15: 304

407. Where, by the terms of a deed of trust, the trustee is directed to sell the property conveyed, at public auction, it is not competent for him to establish the value of it in any other way, although he might thereby promote the interest of those for whom he acted. *Greenleaf v. Queen*, 1 Pet. 138,

7: 85

Cited in *Foster v. Goree*, 5 Ala. 428—*Beebe v. DeBaun*, 8 Ark. 507.

408. The absence of one of the trustees from the sale is not a sufficient reason, of itself, for setting aside a sale held under a deed of trust covering land in the District of Columbia, made by a debtor to two grantees, their heirs and assigns, to secure the payment of a promissory note, with power on default to sell the land at public auction "on such terms and conditions, and at such time and place, and after such previous public advertisement" as they should deem advantageous and proper, and convey the same in fee simple to the purchaser; where the sale was had by public auction in pursuance of a notice of sale signed by both of the trustees, and duly published in the newspaper. *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. Rep. 50,

29: 398

Cited in *Crutchfield v. Hewett*, 2 App. D. C.

387—*Loveland v. Clark*, 11 Colo. 270, 18 Pac. 544—*Thaw v. Ritchie*, 5 Mackey, 214.

409. A power given in a deed of trust to sell at public auction includes power to adjourn the sale. *Richards v. Holmes*, 18 How. 143,

15: 304

Cited in *Gager v. Henry*, 5 Sawy. 248, Fed. Cas. No. 5,172—*Re Mott*, 6 Fed. C90—*Simmons v. Baynard*, 30 Fed. 536—*Crutchfield v. Hewett*, 2 App. D. C. 386—*Fowler v. Taylor*, 8 Mackey, 468—*Thornton v. Boyden*, 31 Ill. 207—*Patten v. Stewart*, 26 Ind. 397—*Carlton v. Davis*, 8 Allen, 99—*Dexter v. Shepard*, 117 Mass. 485—*Judge v. Booge*, 47 Mo. 551—*Noland v. Barrett*, 122 Mo. 193, 43 Am. St. Rep. 572, 26 S. W. 692—*Reynolds v. Hoxsle*, 6 R. I. 468—*Morris v. Virginia State Ins. Co.* 90 Va. 379, 18 S. E. 843.

Notice.

See also Appeal and Error, 209.

410. No particular form of notice of sale of real property under deed of trust is prescribed by law; it is sufficient if the description of the land is reasonably certain, so as to inform the public of the property to be sold. *Newman v. Jackson*, 12 Wheat. 570,

6: 732

Cited in *Loveland v. Clark*, 11 Colo. 272, 18 Pac. 544.

411. Where a deed of trust or mortgage of real estate stipulates that, in case of a sale, the trustee should give sixty days' notice in newspapers in Richmond and in the city of New York, a sale without such notice conveys no title, but is void. *Bigler v. Waller*, 14 Wall. 297,

20: 891

Distinguished in *Stephens v. Clay*, 17 Colo. 494, 31 Am. St. Rep. 328, 30 Pac. 43—*Ingle v. Culbertson*, 43 Iowa, 273.

Cited in *Shillaber v. Robinson*, 97 U. S. 77, 24 L. ed. 969—*Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 71, 27 L. ed. 56, 1 Sup. Ct. Rep. 10—*Romig v. Gillett*, 187 U. S. 117, 47 L. ed. 100, 23 Sup. Ct. Rep. 40—*Berman v. Wolf*, 40 Ark. 258—*Moore v. Dick*, 187 Mass. 211, 72 N. E. 967.

412. A requirement in a deed of trust, that notice of a sale under a power contained therein shall be published in a newspaper, is intended for the grantor's benefit, by giving notoriety and publicity as to the sale, and not for the purpose of appraising him of the sale, so as to make unlawful a sale at a time when such notice could not reach him because of his residence in an insurrectionary state. *Washington University v. Finch*, 18 Wall. 106,

21: 818

413. Sales under a power in a mortgage must be in strict conformity to the prescribed directions. Therefore, a sale on a notice of six weeks, instead of twelve, as required by the mortgage and the statute of the state, is absolutely void. *Shillaber v. Robinson*, 97 U. S. 68,

24: 967

Distinguished in *Stephens v. Clay*, 17 Colo. 494, 31 Am. St. Rep. 328, 30 Pac. 43.

Cited in *Ray v. Tatum*, 18 C. C. A. 466, 30 U. S. App. 635, 72 Fed. 114—*Woodruff v. Berry*, 40 Ark. 258—*Moore v. Dick*, 187 Mass. 211, 72 N. E. 967—*First Nat. Bank v. Bell Silver & Copper Min. Co.* 8 Mont. 54, 19 Pac.

403—Van Schaack v. Saunders, 32 Hun, 518
—Dupee v. Rose, 10 Utah, 310, 37 Pac. 567,

3. Quantity Sold; Selling in Parcels.

Federal Question as to, see Appeal and Error, 1630.

State Rule as to Selling an Inverse Order as Rule Binding Federal Court, see Courts, 1957.

Res Judicata as to, see Judgment, 641.

Propriety of Selling Railroad Property in Parcels, see Judicial Sale, 32, 33.

Selling Land for Taxes in Parcels, see Taxes, 662-668.

See also *supra*, 377; *infra*, 488, 514.

414. Railroad property covered in part by mortgages cannot advantageously be sold thereunder, otherwise than as an entirety. First Nat. Bank v. Shedd, 121 U. S. 74, 7 Sup. Ct. Rep. 807, 30: 877
Cited in Compton v. Jesup, 15 C. C. A. 460, 31 U. S. App. 486, 68 Fed. 327—Low v. Blackford, 31 C. C. A. 23, 58 U. S. App. 737, 87 Fed. 400.

415. Sale of the entire property is proper in the case of deeds of trust, where all the encumbrances are due, and where the plaintiff has a first lien on some of the property sought to be sold and a second lien on the other property, and where all the encumbrancers are parties to the suit. Shepherd v. Pepper, 133 U. S. 626, 10 Sup. Ct. Rep. 438, 33: 706
Cited in Philadelphia Mortg. & T. Co. v. Needham, 71 Fed. 600.

416. A court of equity, on the application of a junior encumbrancer, will provide for the sale of the entire encumbered property, if the circumstances of the case show that the interests of the mortgagor and of the encumbrancers require the sale. Shepherd v. Pepper, 133 U. S. 626, 10 Sup. Ct. Rep. 438, 33: 706
Cited in Converse v. Michigan Dairy Co. 45 Fed. 20.

417. Where the realty, water power, and machinery constitute a paper-mill, which cannot be disintegrated and sold separately without large depreciation and a diminished amount in the aggregate, they should be sold together. Hill v. Farmers' & M. Nat. Bank, 97 U. S. 450, 24: 1051
Cited in Shepherd v. Pepper, 133 U. S. 651, 33 L. ed. 716, 10 Sup. Ct. Rep. 438—Re Goldville Mfg. Co. 118 Fed. 898—William Flirth Co. v. South Carolina Loan & T. Co. 122 Fed. 578—Pfueger v. Lewis Foundry & Mach. Co. 67 C. C. A. 105, 134 Fed. 31—Thompson v. Browne, 10 S. D. 348, 73 N. W. 194—Fisfield v. Farmers' Nat. Bank, 148 Ill. 172, 39 Am. St. Rep. 166, 35 N. E. 802—Calumet Iron & Steel Co. v. Lathrop, 30 Ill. App. 260—Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 522, 6 L.R.A. 261, 15 Am. St. Rep. 235, 23 N. E. 327.

418. A sale in entirety of two parcels of land covered by separate trust deeds should not be ordered unless the interests of the holders of the equity of redemption and of the encumbrancers require it. Warner v

Grayson, 200 U. S. 257, 26 Sup. Ct. Rep. 240, 50: 470

419. If enough of the premises to satisfy the amount due can be segregated and sold without injury to the residue, it is the duty of the mortgagees so to sell; otherwise a sale of the whole is necessary. Olcott v. Bynum, 17 Wall. 44, 21: 570
Cited in Hill v. Farmers & M. Nat. Bank, 97 U. S. 453, 24 L. ed. 1053—Springer v. United States, 102 U. S. 594, 26 L. ed. 257—Wilmer v. Atlanta & R. Air-Line R. Co. 2 Woods, 453, Fed. Cas. No. 17,776—Black v. Reno, 59 Fed. 921—Fitzgerald v. Blocher, 32 Ark. 746, 29 Am. Rep. 3.

420. Under the laws of Pennsylvania, upon a sale under foreclosure proceedings, the judgment debtor is a party and is bound by the confirmation as by a judicial decree; and the acknowledgment of the sheriff's deed cures all defects, except want of power in the officer to sell, or fraud in making it. An objection to the validity of the sale on the ground that more property was sold than was necessary cannot be made subsequent to such acknowledgment. Gibson v. Lyon, 115 U. S. 439, 6 Sup. Ct. Rep. 129, 29: 440

421. In Illinois the rule has been established that the parcels first sold should be last subjected to the satisfaction of the mortgage. Orvis v. Powell, 98 U. S. 176, 25: 238
Cited in Diamond Flint Glass Co. v. Boyd, 30 Ind. App. 487, 66 N. E. 479.

422. Where real estate bound by a judgment or a mortgage has been aliened in separate parcels to various persons at different times, the prevailing doctrine in courts of equity is that such parcels should be subjected to the satisfaction of the lien in the inverse order of their alienation. National Sav. Bank v. Creswell, 100 U. S. 630, 25: 713
Cited in Quinpiac Brewing Co. v. Fitzgerald, 73 Conn. 196, 47 Atl. 128—Aurora Nat. Bank v. Black, 129 Ind. 599, 29 N. E. 306—Diamond Flint Glass Co. v. Boyd, 30 Ind. App. 487, 66 N. E. 479—Hopper v. Smyser, 90 Md. 379, 45 Atl. 206—Stanton v. Catron, 8 N. M. 367, 45 Pac. 884—James v. Markham, 128 N. C. 386, 38 S. E. 917—Warren v. Raymond, 17 S. C. 206—Watson v. Neal, 38 S. C. 99, 16 S. E. 833—Steinmeyer v. Steinmeyer, 55 S. C. 307, 33 S. E. 15.

4. Purchasers and Their Rights, Liabilities, Title, etc.

On Setting Aside of Sale for Fraud, see *infra*, 484, 485.

Purchaser's Right to Appeal, see Appeal and Error, 2398, 2406.

Bidder's Right to Appeal, see Appeal and Error, 2405.

Right to Writ of Assistance, see Assistance, 1, 2.

Attorney's Authority to Purchase in Client's Name, see Attorneys, 67.

Requirement that Deed be Given within Specified Time as Denial of Due Process, see Constitutional Law, 674.

Impairment of Contract Obligations as to, see Constitutional Law, 1396, 1541.

Liability of Purchaser of Railway for Old Company's Debts, see Corporations, 152, 154.

Right of Officer to Bid on Sale of Corporate Property, see Corporations, 257.

State Decision as to Title of Purchaser under Federal Decree, as Precedent in Federal Court, see Courts, 1956.

Ejectment against Purchaser on Irregular Foreclosure, see Ejectment, 55, 56.

Purchaser's Right to Award in Condemnation Proceedings, see Eminent Domain, 154.

Inadequacy of Price as Evidence of Fraud, see Evidence, 281.

Slander of Title by Secret Purchaser as Evidence of Fraud, see Evidence, 283.

Estoppel of Purchaser, see Estoppel, 2, 3, 26.

Right to Interest on Outlay, see Interest, 6.

Right to Intervene in Action Affecting Different Portions of Mortgaged Road, see Parties, 307.

Necessity of Recording Judgment to Bind Purchasers, see Real Property, 84.

Rights of Purchaser to Earnings of Railroad while in Receiver's Hands, see Receivers, 55.

Title of Purchaser at Tax Sale, see Taxes, III. i, 4.

Right of Purchaser to Continuance of Exemption, see Taxes, 443-449.

Fraudulent Purchasers as Trustees for Creditor, see Trusts, 47.

See also *supra*, 311, 315, 385; *infra*, 481, 513, 526a; *Lis Pendens*, 6.

423. The purchaser at foreclosure sale takes the title of the mortgagor as it stood at the date of the execution of the mortgage. *Osterberg v. Union Trust Co.* 93 U. S. 424,

23: 964

Cited in *Goodenough v. Warren*, 5 Sawy. 498, Fed. Cas. No. 5,534—*Shanklin v. Franklin L. Ins. Co.* 77 Ind. 272—*Belloq v. New Orleans*, 31 La. Ann. 473—*Ruggles v. First Nat. Bank*, 43 Mich. 198, 5 N. W. 257.

424. A purchaser of premises at a mortgage foreclosure sale cannot, by agreement, keep alive and in force such mortgage, after it has been foreclosed, as security for the purchase money; such agreement is not a mortgage. *New Orleans Nat. Bkg. Asso. v. Adams*, 109 U. S. 211, 3 Sup. Ct. Rep. 161,

27: 910

425. The contract rights under a municipal ordinance, which were the property of a waterworks company, authorized by Miss. Laws 1882, p. 50, to borrow money and secure its payment by mortgage or deed of trust upon its property and franchises, passed by foreclosure and a subsequent quitclaim deed of the property covered by a mortgage of all its property and franchises, privileges and rights. *Vicksburg v. Vicksburg Waterworks Co.* 202 U. S. 453, 26 Sup. Ct. Rep. 660,

50: 1102

426. Purchasers of a road under a judgment are not liable to account for the tolls and income received by them from the road

before they were notified to pay them over, although the tolls and income were covered by prior mortgages, where the mortgagees had the right to take possession of the road upon default. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459,

20: 199

Cited in *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 617, 23 L. ed. 410—*American Bridge Co. v. Heldelbach*, 94 U. S. 800, 24 L. ed. 144—*Fosdick v. Schall*, 99 U. S. 253, 25 L. ed. 343—*Macalester v. Maryland* (Brown v. Maryland) 114 U. S. 605, 29 L. ed. 235, 5 Sup. Ct. Rep. 1065—*Dow v. Memphis & L. R. R. Co.* 124 U. S. 654, 31 L. ed. 566, 8 Sup. Ct. Rep. 673—*Sage v. Memphis & L. R. R. Co.* 125 U. S. 378, 31 L. ed. 698, 8 Sup. Ct. Rep. 887—*Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 501, 32 L. ed. 166, 8 Sup. Ct. Rep. 1250—*United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 306, 37 L. ed. 1091, 14 Sup. Ct. Rep. 86—*Gilman v. Illinois & M. Teleg. Co.* 1 McCrary, 173, Fed. Cas. No. 5,443—*Hay v. Alexandria & W. R. Co.* 4 Hughes, 374, Fed. Cas. No. 6,254a—*Young v. Northern Illinois Coal & I. Co.* 9 Biss. 305, 13 Fed. 809—*Dow v. Memphis & L. R. R. Co.* 20 Fed. 770—*Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 1 L.R.A. 400, 36 Fed. 225—*Thomas v. Peoria & R. I. R. Co.* 36 Fed. 818—*Illinois Trust & Sav. Bank v. Doud*, 52 L.R.A. 488, 44 C. C. A. 400, 105 Fed. 135—*Farmers' Loan & T. Co. v. American Waterworks Co.* 107 Fed. 25—*Atlantic Trust Co. v. Dana*, 62 C. C. A. 667, 128 Fed. 219—*Hall v. Mobile & M. R. Co.* 58 Ala. 24—*Lehman Bros. v. Tallassee Mfg. Co.* 64 Ala. 597—*Johnston v. Riddle*, 70 Ala. 226—*Drennen & Co. v. Mercantile Trust & D. Co.* 115 Ala. 608, 39 L.R.A. 626, 67 Am. St. Rep. 72, 23 So. 164—*Green v. Coast Line R. Co.* 97 Ga. 22, 33 L.R.A. 809, 54 Am. St. Rep. 379, 24 S. E. 814—*Mississippi Valley & W. R. Co. v. United States Exp. Co.* 81 Ill. 538—*Des Moines Gas Co. v. West*, 50 Iowa, 29—*Emerson v. European & N. A. R. Co.* 67 Me. 394, 24 Am. Rep. 39—*De Graff v. Thompson*, 24 Minn. 457—*Re Life Asso. of America*, 96 Mo. 636, 10 S. W. 69—*White v. Wear*, 4 Mo. App. 347—*McFadden v. Mays Landing & E. H. City R. Co.* 49 N. J. Eq. 185, 22 Atl. 932—*New York Security & T. Co. v. Saratoga Gas & Electric Light Co.* 159 N. Y. 144, 45 L.R.A. 135, 53 N. E. 758—*Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 166, 12 S. W. 537—*McIlhenny v. Binz*, 80 Tex. 13, 26 Am. St. Rep. 705, 13 S. W. 655—*Giles v. Stanton*, 86 Tex. 627, 26 S. W. 615—*Gibert v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 649—*Childs v. Hurd*, 32 W. Va. 89, 9 S. E. 362.

427. By the foreclosure of a mortgage on one division of a railroad, which is prior to any liens on other divisions, an interest in any right to use rolling-stock bought out of common funds of the company, placed and used upon the entire line for the common benefit, and of which no division has ever been made, will pass to the purchaser of that division. *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* 6 Wall. 742,

18: 856

Cited in *Keyes v. Milwaukee & St. P. R. Co.* 25 Wis. 694.

428. The title of a purchaser on a sale under a judgment of foreclosure cannot be attacked collaterally on the ground of the

insanity of the mortgagor. *Luhrs v. Hancock*, 181 U. S. 567, 21 Sup. Ct. Rep. 726. 45: 1005

429. A clause in a trust deed, prescribing that the terms of sale should be the amount due on the note, and the expenses of sale, in cash, does not estop the creditor who purchased the property from denying payment in full where he purchased for less than the amount due. *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. Rep. 119, 29: 456

430. A condition in a deed of trust, that its enforcement shall be had only in the mode thereby provided and that the property shall not be sold in proceedings either at law or in equity, even if effective at all, can be set up only by the grantor and his assigns, and not by purchasers at a judicial sale. *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 11 Sup. Ct. Rep. 512, 35: 116

431. An agreement resting wholly in contract cannot be enforced against a new corporation which has purchased the property of a former one upon foreclosure sale. *Sullivan v. Portland & K. R. Co.* 94 U. S. 806, 24: 324

Cited in *Behlmer v. Louisville & N. R. Co.* 71 Fed. 836—*Interstate Commerce Commission v. Western New York & P. R. Co.* 82 Fed. 104—*Woods v. Ayres*, 39 Mich. 351, 33 Am. Rep. 396.

432. Property purchased at a sale under a decree foreclosing a mortgage of all a railway company's franchises and property is not rendered liable to sale for the satisfaction of a judgment recovered on a tort alleged to have been committed by the mortgagor after the sale, because of N. C. Code, § 1255, making liens for judgments for torts superior to mortgages of incorporated companies. *Julian v. Central Trust Co.* 193 U. S. 93, 24 Sup. Ct. Rep. 399, 48: 629

433. Equities which form part of the security which was enforced in a foreclosure suit, if not excepted from the sale, pass by it. *Richter v. Jerome*, 123 U. S. 233, 8 Sup. Ct. Rep. 106, 31: 132

434. Where a purchase of a railroad upon foreclosure sale took the property subject to liens established or which might, pending reference be established, the court, by requiring the parties to litigate claims then pending on references in a new suit between themselves, did not invalidate the lien of those established in an independent suit brought in conformity with its orders. *Swann v. Clark*, 110 U. S. 602, 4 Sup. Ct. Rep. 241, 28: 256

Cited in *Compton v. Jesup*, 15 C. C. A. 439, 31 U. S. App. 486, 68 Fed. 305—*Denison & N. R. Co. v. Raney-Alton Mercantile Co.* 3 Ind. Terr. 145, 53 S. W. 496.

435. A purchaser of a railroad on foreclosure under a decree reserving the rights of a lien claimant holds a trust relation which involves an accounting until the lien is disposed of. *Compton v. Jesup*, 167 U. S. 1, 17 Sup. Ct. Rep. 795, 42: 55

436. A sale under a statutory mortgage conveyed a title which was superior to a title by deed of the railroad company given after the passage of the act creating the mortgage. *Wilson v. Boyce*, 92 U. S. 320, 23: 608

Distinguished in *Wilson v. Beckwith*, 117 Mo. 75, 22 S. W. 639.

Cited in *Miller v. Swan* (*Miller v. Anderson*) 150 U. S. 135, 37 L. ed. 1029, 14 Sup. Ct. Rep. 52—*Miller v. Swann*, 89 Ala. 636, 7 So. 771—*Longworth v. Aslin*, 106 Mo. 160, 17 S. W. 294.

Editorial note.

Does assignee of mortgage as collateral security, who forecloses the same and purchases the property, hold the title subject to a trust in favor of the assignor. 7 L.R.A. (N.S.) 1094.

Notice.

437. Defects in a notice of mortgage sale, not sufficient to deceive anyone, will not defeat the title acquired at the sale. *Bacon v. Northwestern Mut. L. Ins. Co.* 131 U. S. 258, 9 Sup. Ct. Rep. 787, 33: 128
Cited in *Yellowly v. Beardsley*, 76 Miss. 619, 71 Am. St. Rep. 536, 24 So. 973.

Void and irregular sale; resale.

Efficiency to Pass Mortgagee's Right to Purchaser, see *Judicial Sale*, 113.

See also *supra*, 373, 382, 435.

438. A purchaser at a void sale under a deed of trust, who entered in pursuance of his purchase, claiming title in himself by virtue thereof, is chargeable as a trustee; but a claim of title thereunder without actual occupation is not sufficient to charge him as such. *Bigler v. Waller*, 14 Wall. 297, 20: 891

438a. A purchaser at a void sale under a deed of trust who did not take actual possession is not responsible for the waste and destruction committed upon the land by the Confederate military forces in his absence, without his knowledge. *Bigler v. Waller*, 14 Wall. 297, 20: 891
Cited in *Sloan v. Frothingham*, 72 Ala. 606—*Van Duyne v. Shann*, 41 N. J. Eq. 314, 7 Atl. 429.

439. The rights of the mortgagee as such pass to the purchaser at an irregular judicial sale made at the suit of the mortgagee, which does not bar the equity of redemption. *Bryan v. Brasius*, 162 U. S. 415, 16 Sup. Ct. Rep. 803, 40: 1022

Cited in *Romig v. Gillett*, 187 U. S. 117, 47 L. ed. 100, 23 Sup. Ct. Rep. 40—*Deck v. Whitman*, 96 Fed. 886—*Walker v. Warner*, 179 Ill. 24, 70 Am. St. Rep. 85, 53 N. E. 594—*Jennings v. Parr*, 51 S. C. 212, 28 S. E. 82.

440. The rule of compensation to the purchaser of a railroad on foreclosure, when a resale is ordered after repairs have been made, is to allow credit to the possessors for the value of the materials of such improvements as are yet in existence, and the cost of the labor bestowed thereon, not to exceed their value when delivered up; but not for the improvements which were con-

sumed in the use. *Jackson v. Vicksburg, S. & T. R. Co.* (*Jackson v. Ludeling*) 99 U. S. 513, 25: 460

Distinguished in *Loos v. Wilkinson*, 113 N. Y. 495, 4 L.R.A. 357, 10 Am. St. Rep. 495, 21 N. E. 392.

Cited in *Doe ex dem. Myrick v. Roe*, 31 Fed. 99—*Hopkins v. Grimshaw*, 17 App. D. C. 12—*Dean v. Feely*, 69 Ga. 821—*Wood v. Nichols*, 33 La. Ann. 751—*Chadwick v. Old Colony R. Co.* 171 Mass. 243, 50 N. E. 629—*Loos v. Wilkinson*, 51 Hun, 85, 5 N. Y. Supp. 410—*Morenus v. Crawford*, 51 Hun, 89, 5 N. Y. Supp. 453.

441. In Louisiana, where a railroad in a state of dilapidation was sold under a mortgage, under circumstances which induced the court to set aside the sale and order a resale, the purchasers are entitled to compensation for reconstructing and repairing the road and putting it in working order. *Jackson v. Vicksburg, S. & T. R. Co.* (*Jackson v. Ludeling*) 99 U. S. 513, 25: 460

442. A purchaser on a foreclosure sale cannot object to the terms of a decree of sale which provided for a resale on certain conditions. *Compton v. Jesup*, 167 U. S. 1, 17 Sup. Ct. Rep. 795, 42: 55

Rights of bidder.

443. A bidder at a foreclosure sale thereby makes himself a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions thereafter arising, expressly reserved to him, or not concluded by the terms of the decree of sale. *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 10 Sup. Ct. Rep. 950, 34: 379
Cited in *Davis v. Mercantile Trust Co.* 152 U. S. 594, 38 L. ed. 565, 14 Sup. Ct. Rep. 693—*Grape Creek Coal Co. v. Farmers' Loan & T. Co.* 25 C. C. A. 378, 53 U. S. App. 99, 80 Fed. 201—*Tennessee v. Quintard*, 28 C. C. A. 171, 47 U. S. App. 621, 80 Fed. 835—*Baltimore Trust & Guarantee Co. v. Hofstetter*, 29 C. C. A. 38, 56 U. S. App. 122, 85 Fed. 78—*Montgomery v. Charleston*, 48 L.R.A. 509, 40 C. C. A. 115, 99 Fed. 832—*Mercantile Trust & D. Co. v. Roanoke & S. R. Co.* 109 Fed. 8—*Horse Springs Cattle Co. v. Schofield*, 9 N. M. 142, 49 Pac. 954.

Rights of bondholders.

Right to Object to Confirmation, see *infra*, 466.

See also *infra*, 455.

444. A purchase of a railroad upon foreclosure by a trustee at his own sale without payment of his bid in money, for the purpose of organizing a new company, cannot operate as a foreclosure of the mortgage, except with the consent of the bondholders. *Barnes v. Chicago, M. & St. P. R. Co.* 122 U. S. 1, 7 Sup. Ct. Rep. 1043, 30: 1128

445. Where the trustee in a mortgage purchased the railroad on foreclosure without a payment of his bid in money, for the purpose of organizing a new company, the silence of bondholders, during litigation by the new company in their behalf, was held equivalent to their actual consent to such

sale. *Barnes v. Chicago, M. & St. P. R. Co.* 122 U. S. 1, 7 Sup. Ct. Rep. 1043, 30: 1128

446. Upon the foreclosure of a mortgage by a trust company, all its interest in the land as trustee for bondholders passes to the purchaser at the sale, and the sale binds bondholders who receive a share of the proceeds without objection. *Richter v. Jerome*, 123 U. S. 233, 8 Sup. Ct. Rep. 106, 31: 132

447. Permission to bondholders under the mortgage foreclosed to purchase at a sale of the mortgaged property, and to pay by their bonds, is not only usual, but it is highly advantageous to all persons who have an interest. *Ketchum v. Duncan*, 96 U. S. 659, 24: 868

448. A person owning part of the bonds against a railroad, secured by a mortgage, has no right so to use them as to become the owner of the property mortgaged at the lowest possible price, leaving the bonds held by his associate holders unpaid. He has no right to enter into an agreement to purchase the railroad and mortgaged property at the lowest possible price, for the exclusive benefit of the parties to the agreement with no reference to the other bondholders; and a sale in pursuance of such an agreement will be set aside. *Jackson v. Ludeling*, 21 Wall. 616, 22: 492

Cited in *Booker v. Crocker*, 65 C. C. A. 630, 132 Fed. 10—*Reed v. Schmidt*, 115 Ky. 82, 61 L.R.A. 273, 72 S. W. 367.

Right of creditor to buy.

Validity of Purchase by Creditor and Transfer to Widow or Children of Debtor, see *Fraudulent Conveyances*, 15, 16.

449. The creditor for the satisfaction of whose debt a sale is made under a deed of trust has a right to compete fairly at the sale, and may become the purchaser. *Richards v. Holmes*, 18 How. 143, 15: 304
Smith v. Black, 115 U. S. 308, 6 Sup. Ct. Rep. 50, 29: 398

Cited in *Smith v. Black*, 115 U. S. 315, 29 L. ed. 401, 6 Sup. Ct. Rep. 50—*Pewabic Min. Co. v. Mason*, 145 U. S. 362, 36 L. ed. 736, 12 Sup. Ct. Rep. 887—*Black v. Caldwell*, 83 Fed. 884—*Deck v. Whitman*, 96 Fed. 879—*Stocks v. Young*, 67 Ala. 345—*McMillan v. Harris*, 110 Ga. 83, 48 L.R.A. 350, 78 Am. St. Rep. 93, 35 S. E. 334—*Lee v. Fox*, 113 Ind. 105, 14 N. E. 880—*Hyde v. Warren*, 46 Miss. 28—*Very v. Russell*, 65 N. H. 649, 23 Atl. 522—*Edmiston v. Brucker*, 40 Hun. 257—*Ellott v. Wood*, 45 N. Y. 79—*Monroe Bros. v. Fuchter*, 121 N. C. 104, 28 S. E. 63.

450. A creditor secured by a deed of trust to a stranger as trustee may become a purchaser at a sale by the trustee. But he cannot become such a purchaser where real estate is conveyed by the debtor directly to him as security for his debt, with power of sale in case of default. *Easton v. German-American Bank*, 127 U. S. 532, 8 Sup. Ct. Rep. 1297, 32: 210

Right of mortgagee to buy.

See also *supra*, 449, 450.

451. The mortgagee had a right to have the property sold, and become the purchaser at two thirds of its appraised value, and convey it to the mortgagor's wife. The security of the subsequent encumbrancers is transferred from the property to the proceeds of the sale; and their protection consists in the requirement that no sale shall take place for less than two thirds of the appraised value. *Carite v. Trotot*, 105 U. S. 751, 26: 1223

Taxes and other liens and demands.

452. The grantees of the purchasers of property at a sale under foreclosure cannot claim that they were misled in any way as to their liability for unpaid taxes where, by the terms of the decree, the sale was to be made subject to any indebtedness that might subsequently be charged against the property prior in lien to that of the mortgages foreclosed, and on the confirmation of the sale, and before they took title from the purchasers at such sale, the order specifically included within the obligations which must be assumed any taxes which might "finally be adjudged to be a lien on the property." *United States Trust Co. v. New Mexico*, 183 U. S. 535, 22 Sup. Ct. Rep. 172, 46: 315

453. A purchaser at a mortgage sale cannot withhold from the mortgagee any of the purchase money, to pay taxes then a lien on the property, unless authorized by the terms of sale. *Osterberg v. Union Trust Co. of New York*, 93 U. S. 424, 23: 964

454. Where trustees who have the right to sell initiate proceedings and do sell the property by virtue of their authority, and by virtue of the joint lien of all the bonds, and the purchaser takes a clear title, except a vendor's lien for the unpaid part of the purchase price, the original lien of the bonds is consummated and merged in the title of the purchaser, and cannot be set up without repudiating the sale. *Florida v. Anderson*, 91 U. S. 667, 23: 290

455. Bondholders purchasing a railroad on foreclosure sale, subject to the lien of all claims then pending against it, are bound to take notice of the claim of a surety on an injunction bond given to protect the rolling stock from execution for indemnity, and the property in their hands is subject to it. *Union Trust Co. of New York v. Morrison*, 125 U. S. 591, 8 Sup. Ct. Rep. 1004, 31: 825

456. Where a purchaser of a railroad upon a mortgage foreclosure sale, by the express terms of the decree of sale, took the property subject to the liens already established, or which might, on pending references, be established, as prior and superior to the liens of the first-mortgage bondholders, he cannot, so long as he keeps the property, relitigate the liens expressly subject to which he bought and took the title, nor be relieved from his obligation to comply with

the terms of the purchase. *Swann v. Fabryan (Swann v. Wright)* 110 U. S. 590, 4 Sup. Ct. Rep. 235, 28: 252

457. The successor to the Union Pacific Railroad Company by purchase under a foreclosure sale of a first mortgage of the railway property did not take the property free from the obligation, under the act of February 24, 1871 (16 Stat. at L. 430, chap. 67), enacted subsequent to the execution of the mortgage, in the exercise by Congress of its reserved right to alter, amend, or repeal the act incorporating the railroad company, to permit the joint use, by the trains of all railroads terminating at Omaha, of the bridge whose construction at that point by the Union Pacific Railroad Company was authorized by that statute. *Union P. R. Co. v. Mason City & Ft. D. R. Co.* 199 U. S. 160, 26 Sup. Ct. Rep. 19, 50: 134
Cited in Omaha Water Co. v. Omaha, 77 C. C. A. 281, 147 Fed. 15.

458. Where the decree of sale of mortgaged property provides for the payment of demands by the purchaser, and that demands which are not presented within six months after the confirmation of the sale shall be barred, and the decree of confirmation contains no such limitation as to time, a claimant may present his demands after the lapse of more than six months. *Olcott v. Headrick*, 141 U. S. 543, 12 Sup. Ct. Rep. 81, 35: 851

Cited in Anderson v. Condlet, 35 C. C. A. 338, 93 Fed. 352—*Houston & T. C. R. Co. v. Crawford*, 88 Tex. 277, 28 L.R.A. 764, 53 Am. St. Rep. 752, 31 S. W. 176—*Houston & T. C. R. Co. v. Bath*, 17 Tex. Civ. App. 707, 44 S. W. 595.

459. A purchaser of property at a foreclosure sale under a decree which makes him liable for claims against the receiver which shall be presented within six months after the confirmation of the sale is liable for such a claim presented after said six months, where the decree of confirmation of the sale makes such purchaser liable for all claims against the receiver, without any limitation as to the time of their presentation. *Olcott v. Headrick*, 141 U. S. 543, 12 Sup. Ct. Rep. 81, 35: 851

460. Purchasers of a railroad at foreclosure sale are not obliged to perform the obligations or pay the debts of the company defendant. *Hoard v. Chesapeake & O. R. Co.* 123 U. S. 222, 8 Sup. Ct. Rep. 74, 31: 130
Cited in Behlmer v. Louisville & N. R. Co. 71 Fed. 836—*Western New York & P. R. Co. v. Penn Ref. Co.* 70 C. C. A. 39, 137 Fed. 359—*Hawkins v. Central R. Co.* 119 Ga. 105, 46 S. E. 82—*Midland R. Co. v. Fisher*, 125 Ind. 21, 8 L.R.A. 605, 21 Am. St. Rep. 189, 24 N. E. 756—*Atchison, T. & S. F. R. Co. v. Young*, 3 Ind. Terr. 63, 53 S. W. 481—*Wallace v. Ann Arbor & Y. Electric R. Co.* 121 Mich. 590, 80 N. W. 572—*Burge v. St. Louis, M. & E. R. Co.* 100 Mo. App. 465, 74 S. W. 456—*Dickey v. Kansas City & I. Rapid Transit R. Co.* 122 Mo. 230, 26 S. W. 685—*Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 217, 25 N. E. 332—*Sherwood v. Atlantic & D. R. Co.* 94 Va. 297, 26 S. E. 948—*Pennison v. Chicago, M. & St. P. R.*

Co. 98 Wis. 847, 87 N. W. 702—National Foundry & Pipe Works v. Oconto City Water Supply Co. 105 Wis. 58, 81 N. W. 125.

461. Corporate property of a North Carolina railway company covered by a legally authorized mortgage of all its franchises and property does not continue liable for the debts of such company accruing after the sale in foreclosure proceedings to a non-resident railway company authorized by its charter to make the purchase, because of the failure of the latter to exercise the privilege conferred by N. C. Code, §§ 697, 698, 1936, 2005, of organizing a domestic corporation to operate the purchased property. *Julian v. Central Trust Co.* 193 U. S. 93, 24 Sup. Ct. Rep. 399, 48: 629

462. Where one of the purchasers of property at a foreclosure sale which is subject to a charge thereon for the fees of the attorneys of an assignee in bankruptcy, has agreed to pay such fees out of a certain fund expected to be realized from a sale of the property, if that fund fails to be realized the property is not relieved from such charge, although the decree of sale was, by reason of such agreement, entered without any provision for the payment of such fees. *Meddaugh v. Wilson*, 151 U. S. 333, 14 Sup. Ct. Rep. 356, 38: 183

463. Where not concluded by the terms of the decree, a purchaser on foreclosure has a right to be heard in the trial court, as to the amount of intervening claims to be subsequently allowed, where the matter affects his interests as a bondholder and trustee of the other bondholders. *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 10 Sup. Ct. Rep. 950, 34: 379

464. Where a sale of a railroad on a mortgage foreclosure is made "subject to all liens established or which shall be established on references heretofore had and now pending," the court, by requiring the parties to litigate claims then pending on references in a new suit between themselves, did not invalidate the lien of those established in an independent suit brought in conformity with its orders. *Swann v. Clark*, 110 U. S. 602, 4 Sup. Ct. Rep. 241, 28: 256

Interest.

465. A law changing the rate of interest on bids at mortgage sale applies to all sales made thereafter; but the purchaser is entitled to the rate prescribed by law when he purchased. *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. Rep. 236, 27: 649

Distinguished in *Watkins v. Glenn*, 55 Kan. 431, 31 L.R.A. 84, 40 Pac. 316.

Overruled in *Barnits v. Beverly*, 163 U. S. 128, 41 L. ed. 100, 16 Sup. Ct. Rep. 1042—*Hooker v. Burr*, 194 U. S. 420, 48 L. ed. 1050, 24 Sup. Ct. Rep. 706—*Bradley v. Lightcap*, 195 U. S. 21, 49 L. ed. 74, 24 Sup. Ct. Rep. 748—*Rosenplanter v. Provident Sav. Life Assur. Soc.* 46 L.R.A. 476, 37 C. C. A. 572, 96 Fed. 727—*Watkins v. Glenn*, 55 Kan. 444, 40 Pac. 316—*Beverly v. Barnits*, 55

Kan. 470, 31 L.R.A. 76, 49 Am. St. Rep. 257, 42 Pac. 725.

5. Confirmation of Sale.

Right to Appeal before, see Appeal and Error, 204.

Appealability of Decree of, see Appeal and Error, 212.

Necessity of Conformity in Federal Courts, see Courts, 1210, 1212.

Jurisdiction to Retain Foreclosure Suit until Confirmation, see Equity, 23.

See also *supra*, 458, 459.

466-7. Where bondholders under a railroad mortgage surrender their bonds to the trustees, and take stock and bonds, in pursuance of a plan for foreclosure and sale, in order to form a new company, they cannot be heard to interpose any objection to the confirmation of the sale under the mortgage, and especially where the confirmation is made subject to payment of their bonds with interest. *Crawshaw v. Souter*, 6 Wall. 739, 18: 845
Cited in *Columbus, S. & H. R. Co.'s Appeal*, 48 C. C. A. 310, 109 Fed. 212—*Guarantee Co. of N. A. v. Phenix Ins. Co.* 59 C. C. A. 378, 124 Fed. 172.

6. Setting Aside.

Setting Aside Tax Sale, see Taxes, III. 1.5.
Appealability of Decree for, see Appeal and Error, 213.

Construction of Decree setting Aside, see Judgment, 131.

Laches as Bar, see Limitation of Actions, 160-166, 201.

Necessary Parties in Action for, see Parties, 236.

See also Judgment, 772.

468. In Louisiana the covenant known as the *pact de non alienando*, although making it unnecessary to make a subsequent purchaser from the mortgagor a party, does not relieve the plaintiff from the necessity of pursuing forms of law in making the sale, or prevent such purchaser from setting the sale aside, if it does not conform to law. *Watson v. Bondurant*, 21 Wall. 123, 22: 509

Grounds for.

For Setting Aside Tax Sale, see Taxes, 703, 705.

See also *supra*, 408; Review, 19.

469. A foreclosure sale of mortgaged property may be set aside before confirmation upon the single ground of inadequacy of price, if such price is grossly disproportionate to the value of the property. *Balentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. Rep. 527, 51: 803

470. If a sale on foreclosure was in fraud of bondholders' rights, their remedy is to set it aside and to proceed anew with another foreclosure. *Richter v. Jerome*, 123 U. S. 233, 8 Sup. Ct. Rep. 106, 31: 182

471. In a sale under a railroad mortgage,

where the amount of bonds in the hands of bona fide holders was less than \$200,000, and the notice of sale set forth that the mortgage debt was \$2,000,000, and that \$70,000 of interest was due, the sale was void for fraud, and must be set aside. *James v. Milwaukee & M. R. Co.* 6 Wall. 752, 18: 885 Cited in *Howard v. Milwaukee & St. P. R. Co.* 101 U. S. 848, 25 L. ed. 1084—*Barnes v. Chicago, M. & St. P. R. Co.* 122 U. S. 14, 30 L. ed. 1132, 7 Sup. Ct. Rep. 1043—*Barnes v. Chicago, M. & St. P. R. Co.* 8 Bliss. 517, Fed. Cas. No. 1,016—*First Nat. Bank v. Ridenour*, 46 Kan. 722, 26 Am. St. Rep. 167, 27 Pac. 150—*Santa Fe Electric Co. v. Hitchcock*, 9 N. M. 165, 50 Pac. 332—*Merrill v. Farmers' Loan & T. Co.* 24 Hun, 303—*Hope v. Valley City Salt Co.* 25 W. Va. 804—*Sweeney v. Wheeling Grape Sugar & Ref. Co.* 30 W. Va. 454, 8 Am. St. Rep. 88, 4 S. E. 431.

472. The fact of depreciation in real-estate values is no ground, of itself, for not upholding a sale under a trust deed. *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. Rep. 50, 29: 398

473. The facts that some of the trustees in a deed of trust or mortgage given by a railroad company were directors or stockholders in a railroad company which procured the foreclosure of the mortgage, and that one person was the president of both companies, and that a majority of the directors of both companies were the same persons, and that a majority of the stock of the mortgagor company was in the hands of the president of the other company, and that the attorney who appeared for the mortgagor company had previously been employed by the other company, and the attorneys who brought the foreclosure suit were afterwards attorneys of the latter company, and one of the attorneys of that company in the foreclosure suit was a director in the mortgagor company,—are not sufficient, in the absence of actual fraud, to render the foreclosure void. *Leavenworth County v. Chicago, R. I. & P. R. Co.* 134 U. S. 688, 10 Sup. Ct. Rep. 708, 33: 1064

474. Foreclosure of a railroad mortgage by collusion between bondholders and stockholders for the purpose of destroying the interests of unsecured creditors may be set aside on their application as a fraud. *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 174 U. S. 674, 19 Sup. Ct. Rep. 827, 43: 1130

Cited in *Fidelity Ins. & S. D. Co. v. Roanoke Street R. Co.* 98 Fed. 478—*St. Louis Trust Co. v. Des Moines, N. & W. R. Co.* 101 Fed. 635—*Farmers' Loan & T. Co. v. Louisville, N. A. & C. R. Co.* 103 Fed. 111—*Wenger v. Chicago & E. R. Co.* 51 C. C. A. 662, 114 Fed. 36—*Central R. & Bkg. Co. v. Farmers' Loan & T. Co.* 52 C. C. A. 151, 114 Fed. 265—*Land Title & T. Co. v. Asphalt Co.* 114 Fed. 485.

To whom remedy available.

475. One of the second mortgage or income bondholders of a railroad, in behalf of the others, cannot maintain a suit in equity to set aside a foreclosure sale of the railroad

on the first mortgage to a committee of the first mortgage bondholders, or declare the sale to be in trust for both classes of bondholders, on the ground of a breach of an agreement, made without consideration or mutuality, between committees of both classes of bondholders, that the second mortgage bondholders should participate in the reorganization of the company after the sale, and rank therein as they ranked previously, where there is no charge of fraud and no offer by the latter to redeem from the sale. *Robinson v. Iron R. Co.* 135 U. S. 522, 10 Sup. Ct. Rep. 907, 34: 276

476. Parties cannot complain that there was collusion in bringing and conducting a suit to foreclose mortgages given upon the property of a railroad corporation, where they were permitted to come in as parties defendant, and have had full opportunity to assert their equities. *Muller v. Dows*, 94 U. S. 444, 24: 207

477 A mortgagee cannot object that a prior mortgagee allowed the property on foreclosure to be bid in by heirs of the debtor without payment, where no fraud is shown. *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. Rep. 1109, 30: 1105

478. After the sale of a railroad on foreclosure, one who subsequently became the equitable owner of some of the bonds secured by the mortgage that was foreclosed cannot interfere to set aside the sale. *Fleming v. La Crosse & M. R. Co. (Re Fleming)* 2 Wall. 759, 17: 924

479. Holders of second-mortgage bonds cannot avoid a sale under the first mortgage on the ground of the incapacity of the state as trustee in that mortgage to purchase at the sale, without tendering reimbursement of the amount of the first mortgage. *Cunningham v. Macon & B. R. Co.* 156 U. S. 400, 15 Sup. Ct. Rep. 361, 39: 471

480. Holders of second-mortgage bonds cannot avoid a sale under the first mortgage on the ground that it was announced improperly that bonds of a certain issue would be received in payment, where they did not bid at the sale or in any way manifest a willingness to free the property from the first-mortgage debt. *Cunningham v. Macon & B. R. Co.* 156 U. S. 400, 15 Sup. Ct. Rep. 361, 39: 471

481. The grantee of a purchaser at a foreclosure sale cannot, because of the insufficiency of the affidavit for service by publication, be dispossessed or the judgment set aside by a court of equity at the instance of one claiming under the mortgagor by a deed subsequent to the mortgage, which remains unpaid; but the latter is only entitled to be let in to make any equitable defense which he may have. *Romig v. Gillett*, 187 U. S. 111, 23 Sup. Ct. Rep. 40, 47: 97 Cited in *Stouffer v. Harlan*, 68 Kan. 140, 64 L.R.A. 320, 104 Am. St. Rep. 396, 74 Pac. 610.

Effect of setting aside.

Dissolution of New Corporation by, see Corporations, 677.

See also Limitation of Actions, 586.

482. The satisfaction of a mortgage debt, brought about by the sale of the lands mortgaged, is vacated when the sale is set aside. *Fort v. Roush*, 104 U. S. 142, 26: 664
Cited in *Taylor v. Girard L. Ins. Annuity & T. Co.* 1 App. D. C. 217—*Lindgren v. Lindgren*, 73 Minn. 99, 75 N. W. 1034.

483. Where the mortgagee purchased the property on the mortgage sale, the amount found due from him for use, rents, and damages for waste, after the sale is set aside, should be first applied to the satisfaction of his decree of foreclosure, and personal judgment should be rendered against him only for the balance after such application. *Fort v. Roush*, 104 U. S. 142, 26: 664

484. Where the sale of a railroad on foreclosure is set aside for fraud, the fraudulent purchasers cannot recover the amount of an incumbrance which they had paid off while in possession. *Milwaukee & M. R. Co. v. Soutter*, 13 Wall. 517, 20: 543

485. Where the sale of a railroad upon foreclosure was set aside for fraud, it was adjudged that the mortgage should remain as security for bonds in the hands of *bona fide* holders for value who were not implicated in the fraud. *James v. Milwaukee & M. R. Co.* 6 Wall. 752, 18: 885
Cited in *First Nat. Bank v. Knowles*, 67 Wis. 391, 28 N. W. 225.

486. Setting aside a sale for irregularity, in Louisiana, does not affect an order of seizure and sale, but a new writ may issue upon it. *Gordon v. Gilfoil*, 99 U. S. 168, 25: 383

h. Surplus; Proceeds.

Right of Outstanding Equity to Share in Proceeds, see *supra*, 261.

Appealability of Decree for Distributing Proceeds, see Appeal and Error, 215-217.

Dismissal of Appeal as to, on Reversal of Foreclosure Decree, see Appeal and Error, 3911, 3912.

Attorney's Rights to Accounting as to, see Attorneys, 95.

Fees of Attorney Payable from, see Costs and Fees, 46, 108.

Rights in, for Improvements of Subsequent Purchaser with Notice of Mortgage, see Improvements, 11.

Proceeds on Foreclosure of Deed of Trust Disaffirmed by Infant, see Infants, 24.

Right of one holding Balance of Proceeds to Bring in Mortgagor by Interpleader, see Interpleader, 3.

Rights of Life Tenant, see Life Tenants, 3.

Mechanics' Lienor Looking to, for Payment, see Mechanics' Liens, 28.

See also *supra*, 110, 126, 136, 180, 276, 351, 353, 446, 458, 463.

487. If the surplus money arising from a foreclosure sale is still undisposed of, then

the whole case is under the control of the court, and no supplemental bill is needed to prevent a perversion of the decree and the consummation of a wrong under it. *Randall v. Howard*, 2 Black, 585, 17: 269

488. Upon mortgage foreclosure, where the property is incapable of division without injury, and is sold together and yields a fund sufficient to pay the whole debt, it is proper at once to pay the whole, whether all is due or not. *Olcott v. Bynum*, 17 Wall. 44, 21: 570

Cited in *Markey v. Langley*, 92 U. S. 150, 23 L. ed. 704—*Chicago & V. R. Co. v. Fosdick*, 106 U. S. 68, 27 L. ed. 55, 1 Sup. Ct. Rep. 10—*Mellen v. Wallach*, 112 U. S. 50, 28 L. ed. 636, 5 Sup. Ct. Rep. 15—*Simmons v. Baynard*, 30 Fed. 537—*Fryar v. Fryar*, 62 Miss. 208.

489. The lien of the mortgage continues upon the fund as it subsisted upon the premises before they were sold. *Olcott v. Bynum*, 17 Wall. 44, 21: 570

Limited in *Cone v. Ivins*, 4 Wyo. 254, 35 Pac. 933.

Cited in *Markey v. Langley*, 92 U. S. 155, 23 L. ed. 705—*Kesner v. Trigg*, 98 U. S. 54, 25 L. ed. 84—*Jeffrey v. Moran*, 101 U. S. 288, 25 L. ed. 786—*Lewis v. Dillard*, 22 C. C. A. 490, 40 U. S. App. 404, 76 Fed. 690—*Rumsey v. Peoples R. Co.* 154 Mo. 247, 55 S. W. 615—*Dahoney v. Allison*, 1 Posey Unrep. Cas. (Tex.) 115.

490. Where a fund arising from a sale of property is in court, the court may abrogate the limitation of six months provided by the decree of sale for the presentation of claims, and permit a creditor to prove his debt after the expiration of said six months. *Olcott v. Headrick*, 141 U. S. 543, 12 Sup. Ct. Rep. 81, 35: 581

491. The expenditures of the purchaser at a bankruptcy sale, in payment of taxes and prior liens, and in improvements necessary to the prevention of loss and deterioration in the property, required for the benefit of all the lienholders, should be first paid out of the proceeds of a subsequent sale, under a mortgage, the holder of which was not bound by the bankruptcy sale, because not a party to the proceedings; and he should account for rents and profits, if there were any. *Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 4 Sup. Ct. Rep. 679, 28: 582

492. In Louisiana the holder of one or more of a series of notes secured by a concurrent mortgage is entitled to a *pro rata* share of the net proceeds of the sale of the mortgaged property at the suit of a holder of any of the other notes, and in hypothecary action lies to enforce such claim. *Lovell v. Cragin*, 136 U. S. 130, 10 Sup. Ct. Rep. 1024, 34: 372
Cited in *Baltimore & O. R. Co. v. Pittsburgh, C. & St. L. R. Co.* 55 Fed. 703.

493. Upon a sale under a trust deed containing a covenant on the part of the makers of the deed to pay all taxes and assessments on the property, the amount necessary to pay off the taxes, if not advanced before

the sale, can be properly taken out of the proceeds. *Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. Rep. 453, 34: 1086

494. Liens upon mortgaged property attach to the proceeds of the sale in the same order and with the same effect as they bound the premises before the sale. *Markey v. Langley*, 92 U. S. 142, 23: 701
Cited in Lewis v. Dillard, 22 C. C. A. 490, 40 U. S. App. 404, 76 Fed. 690—*Jones v. Arkansas Mechanical & Agri. Co.* 38 Ark. 27—*Goldsmith v. Rome R. Co.* 62 Ga. 483—*Dahoney v. Allison, Posey Unrep. Cas. (Tex.)* 115.

Railroad mortgages.

Lien of Judgment on Proceeds, see Judgment, 885.

Payment of Claims against Receiver from, see Receivers, III. c.

Claim for Payment of Taxes from, see Receivers, 97.

Priority of Claims Payable from, see Receivers, 152.

495. On foreclosure of a railroad mortgage, whatever interest remains after the lien of the mortgages is discharged belongs to the corporation, and becomes a fund in trust for the benefit of its creditors. *Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. 392, 19: 117

Cited in Bradley v. Converse, 4 Cliff. 379, Fed. Cas. No. 1,776—*Foreman v. Bigelow*, 4 Cliff. 546, Fed. Cas. No. 4,934—*Union Nat. Bank v. Douglass*, 1 McCrary, 92, Fed. Cas. No. 14,375—*Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A. 128, 31 U. S. App. 432, 66 Fed. 822—*Wenger v. Chicago & E. R. Co.* 105 Fed. 797—*Anderson v. War Eagle Consol. Min. Co.* 8 Idaho, 801, 72 Pac. 671—*Chicago & A. Bridge Co. v. Fowler*, 55 Kan. 32, 39 Pac. 727—*Pennsylvania Transp. Co. v. Pittsburgh, T. & B. R. Co.* 11 W. N. C. 89.

496. A provision in a railroad mortgage that in no case shall the principal of any bond secured by it be considered due until twenty years after its date does not conflict with a provision therein that all bonds of the same class, and the accrued interest, shall be entitled to a *pro rata* dividend of the proceeds after sale on default of interest or principal. *Dunham v. Cincinnati, P. & C. R. Co.* 1 Wall. 254, 17: 584

497. In case the proceedings result in a sale of the mortgaged premises, the sale is made free from the equity of redemption of the mortgagor, and all holders of junior incumbrances, if made parties to the suit; it conveys a clear and absolute title as against all parties to the suit, or their privies, and the proceeds of the sale are distributed after payment of the amount due, for nonpayment of which the sale was ordered, in satisfaction of the unpaid debt remaining, whether due or not. *Chicago, D. & V. R. Co. v. Fossick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10, 27: 47

Cited in Parker v. Dacres, 130 U. S. 48, 32 L. ed. 850, 9 Sup. Ct. Rep. 433—*Ohio C. R. Co. v. Central Trust Co.* 133 U. S. 90, 33 L. ed. 563, 10 Sup. Ct. Rep. 235—*Simmons v. Burlington, C. R. & N. R. Co.* 159 U. S. 289, 40 L. ed. 153, 16 Sup. Ct. Rep.

1—*Farmers' Loan & T. Co. v. Oregon & C. R. Co.* 24 Fed. 411—*Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 1 L.R.A. 399, 36 Fed. 223—*Alabama & G. Mfg. Co. v. Robinson*, 6 C. C. A. 83, 13 U. S. App. 359, 56 Fed. 693—*Black v. Reno*, 59 Fed. 921—*Rumsey v. Peoples R. Co.* 154 Mo. 247, 55 S. W. 615—*Com. v. Susquehanna & D. River R. Co.* 45 Phila. Leg. Int. 387.

498. In a suit to foreclose a second mortgage upon a railroad, a court has power to order the receiver, before paying the first mortgage, to pay certain claims, payment of which is indispensable to the business of the road, including claims for materials, repairs, and ticket and freight balances, some of which claims are yet to be created, and others were contracted even more than ninety days before the receiver's appointment. *Miltenerberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 1 Sup. Ct. Rep. 140, 27: 117

Distinguished in Hanna v. State Trust Co. 30 L.R.A. 204, 16 C. C. A. 590, 36 U. S. App. 61, 70 Fed. 6—*Farmers' Loan & T. Co. v. American Waterworks Co.* 107 Fed. 26—*Baht v. Attrill*, 106 N. Y. 436, 60 Am. Rep. 456, 13 N. E. 282.

Cited in Union Trust Co. v. Souther, 107 U. S. 594, 27 L. ed. 489, 2 Sup. Ct. Rep. 293—*Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 456, 29 L. ed. 971, 6 Sup. Ct. Rep. 809—*Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 754, 31 L. ed. 312, 8 Sup. Ct. Rep. 337—*Union Trust Co. v. Morrison*, 125 U. S. 612, 31 L. ed. 831, 8 Sup. Ct. Rep. 1004—*St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 673, 31 L. ed. 837, 8 Sup. Ct. Rep. 1011—*Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.* 137 U. S. 197, 34 L. ed. 634, 11 Sup. Ct. Rep. 61—*Joy v. St. Louis*, 138 U. S. 47, 34 L. ed. 858, 11 Sup. Ct. Rep. 243—*Kneeland v. Luce*, 141 U. S. 508, 35 L. ed. 836, 12 Sup. Ct. Rep. 32—*Thomas v. Western Car Co.* 149 U. S. 110, 37 L. ed. 669, 13 Sup. Ct. Rep. 824—*Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 365, 42 L. ed. 1072, 18 Sup. Ct. Rep. 657—*Gregg v. Metropolitan Trust Co.* 197 U. S. 187, 49 L. ed. 718, 25 Sup. Ct. Rep. 415—*Blair v. St. Louis, H. & K. R. Co.* 19 Fed. 862—*Dow v. Memphis & L. R. Co.* 20 Fed. 267—*Central Trust Co. v. Texas & St. L. R.* 22 Fed. 136—*Blair v. St. Louis, H. & K. R. Co.* 22 Fed. 473—*Farmers' Loan & T. Co. v. Vicksburg & M. R. Co.* 33 Fed. 783—*Easton v. Houston & T. C. R. Co.* 38 Fed. 15—*Central Trust Co. v. Wabash, St. L. & P. R. Co.* 46 Fed. 35—*American Loan & T. Co. v. East & West R. Co.* 46 Fed. 103—*Bound v. South Carolina R. Co.* 47 Fed. 31—*Farmers' Loan & T. Co. v. Grape Creek Coal Co.* 16 L.R.A. 604, 50 Fed. 482—*Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. 189—*Park v. New York, L. E. & W. R. Co.* 57 Fed. 803—*Finance Co. v. Charleston, C. & C. R. Co.* 10 C. C. A. 326, 8 U. S. App. 547, 62 Fed. 208—*The Alliance*, 65 Fed. 246—*Central Trust Co. v. Charlotte, C. & A. R. Co.* 65 Fed. 270—*Lloyde v. Chesapeake, O. & S. W. R. Co.* 65 Fed. 359—*Compton v. Jesup*, 15 C. C. A. 442, 31 U. S. App. 486, 68 Fed. 309—*Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 68 Fed. 624—*St. Louis Trust Co. v. Riley*, 30 L.R.A. 458, 16 C. C. A. 612, 36 U. S. App. 100, 70 Fed. 34—*Mercantile Trust Co. v. Atlantic & P. R. Co.* 70 Fed. 524—*Wood v. New York & N. E. R. Co.* 70 Fed. 743—*Jones v. Central Trust Co.* 19 C. C.

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 Co. 34 L.R.A. 305, 22 C. C. A. 70, 43 U. S.
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 nessee, V. & G. R. Co. 26 C. C. A. 33, 47
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 tracting Co. 37 C. C. A. 404, 95 Fed. 858—
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 R. Co. 90 Fed. 151—New York Secur. & T.
 Co. v. Louisville, E. & St. L. Consol. R. Co.
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 Traction Co. 105 Fed. 408—Farmers' Loan &
 T. Co. v. Stuttgart & A. R. Co. 106 Fed.
 567—Gregg v. Mercantile Trust Co. 48 C.
 C. A. 326, 109 Fed. 228—Blubber-White Co.
 v. White River Valley Electric R. Co. 53 C.
 C. A. 286, 115 Fed. 790—Bank of Commerce
 v. Central Coal & Coke Co. 53 C. C. A. 336,
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 Co. 54 C. C. A. 595, 117 Fed. 421—Louisville
 & N. R. Co. v. Memphis Gaslight Co. 60 C.
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 Wire Co. 60 C. C. A. 510, 125 Fed. 742—
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 115 Ala. 606, 39 L.R.A. 625, 67 Am. St.
 Rep. 72, 23 So. 164—International Trust Co.
 v. United Coal Co. 27 Colo. 254, 83 Am. St.
 Rep. 59, 60 Pac. 621—Pueblo Traction &
 Electric Co. v. Allison, 30 Colo. 342, 70
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 County Nat. Bank, 177 Ill. 40, 52 N. E. 322
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 557—Manchester Locomotive Works v. Trues-
 dale, 44 Minn. 118, 9 L.R.A. 144, 46 N. W.
 301—Van Frank v. St. Louis, C. G. & Ft.
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 600, 62 S. W. 1027—Litzenberger v. Jarvis-
 Conklin Trust Co. 8 Utah, 18, 28 Pac. 871
 —Salt Lake Lithographing Co. v. Ibox Mine
 & Smelting Co. 15 Utah, 449, 49 Pac. 832—
 Bellingham Bay Improv. Co. v. Fairhaven &
 N. W. R. Co. 17 Wash. 378, 49 Pac. 514—
 Fidelity Ins. Trust & S. D. Co. v. Shenan-
 doah Valley R. Co. 33 W. Va. 788, 11 S. E.
 58—Anderson v. Matthews, 8 Wyo. 522, 58
 Pac. 898.

499 Where cars purchased on time, with
 title to remain in the seller until they were
 paid for, were sold as part of the railroad on
 the foreclosure of a prior mortgage, an or-
 der to pay, from the fund in court arising
 from such sale, the price of said cars, to
 the seller thereof, was proper. Fosdick v.
 Southwestern Car Co. 99 U. S. 256, 25: 344
Cited in St. Louis Trust Co. v. Riley, 30 L.R.A.
 458, 16 C. C. A. 612, 36 U. S. App. 100, 70
 Fed. 34.

500. The net earnings of the road, while
 in the possession of the court and operated
 by its receiver, are not necessarily the prop-
 erty of the mortgagees, but are subject to
 the disposal of the chancellor in the pay-
 ment of claims which have superior equities.
 Hale v. Frost, 99 U. S. 389, 25: 419
Cited in Re Dexterville Mfg. & Boom Co. 4 Fed.
 874—Stewart v. Potomac Ferry Co. 5 Hughes,
 383, 12 Fed. 305—Hiles v. Case, 9 Biss. 550,
 14 Fed. 142—American Loan & T. Co. v.
 East & West R. Co. 46 Fed. 103—American
 Trust & Sav. Bank v. McGettigan, 152 Ind.
 587, 71 Am. St. Rep. 345, 52 N. E. 793—
 Lock v. Franklin & H. Turnp. Co. 100 Tenn.
 173, 47 S. W. 133—Texas R. Co. v. John-
 son, 76 Tex. 431, 18 Am. St. Rep. 60, 13
 S. W. 463—Giles v. Stanton, 86 Tex. 628,
 26 S. W. 615.

501-2. The amount due for the use and
 injured condition, when returned, of cars
 bought on time, with the title to remain in
 the vendor until paid for, is only a general
 debt of the company, with no special equi-
 ties in its favor; and it is not entitled to be
 paid from the proceeds, in the hands of a re-
 ceiver, of the sale on a prior mortgage, as
 against the claims of the bondholders.
 Huidekoper v. Hinckley Locomotive Works,
 99 U. S. 258, 25: 344

i. Deficiency and Judgment Therefor.

Liability of Grantee Assuming Mortgage, see
supra, 235.

Rights of Intervening Prior Mortgagee to
 Payment from, see *supra*, 275.

Reversal of Deficiency Judgment on Appeal,
 see Appeal and Error, 5255.

Restriction of Claim in Bankruptcy to, see
 Bankruptcy, 375.

Waiver of Right to Deficiency by Proving in
 Full in Bankruptcy, see Bankruptcy,
 377.

Vacation of Judgment, see Judgment, 1230.
 Jurisdiction to Render Deficiency Judgment,
 see *supra*, 305.

Deficiency Decree under Prayer for General
 Relief, see Pleading, 117.

503. In the absence of a rule of the su-

preme court authorizing it to be done, a Federal court cannot make a decree that the mortgagor pay the balance which may remain unsatisfied after exhausting the proceeds of the mortgaged premises. *Noonan v. Braley* (*Noonan v. Lee*) 2 Black, 499.

17: 278

Orchard v. Hughes, 1 Wall. 73, 17: 560
Cited in Orchard v. Hughes, 1 Wall. 77, 17 L. ed. 561—*Noonan v. Bradley*, 9 Wall. 408, 19 L. ed. 762—*Noonan v. Bradley*, 12 Wall. 125, 20 Fed. 280—*Hornbuckle v. Toombs*, 18 Wall. 652, 21 L. ed. 967—*Betts v. Drew*, Fed. Cas. No. 1,372—*Phelps v. Loyhed*, 1 Dill. 513, Fed. Cas. No. 11,077—*Seckel v. Backhaus*, 7 Biss. 356, Fed. Cas. No. 12,599—*Sharpleigh v. Surdam*, 1 Filipp. 475, Fed. Cas. No. 12,711—*Sweeney v. Coffin*, 3 West. Jur. 337, Fed. Cas. No. 13,686—*White v. Ewing*, 16 C. C. A. 299, 37 U. S. App. 365, 69 Fed. 454—*Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 24, 133 Fed. 272—*Winston v. Browning*, 61 Ala. 84—*Sayre v. Elyton Land Co.* 73 Ala. 104—*Palmer v. Cowdrey*, 2 Colo. 2—*Freedman's Sav. & T. Co. v. Dodge*, 3 MacArth. 533—*Webber v. Blanc*, 39 Fla. 227, 22 So. 655—*Ford v. Springer Land Asso.* 8 N. M. 65, 41 Pac. 541—*Frank v. Davis*, 135 N. Y. 278, 17 L.R.A. 307, 31 N. E. 1100—*Nolen v. Woods*, 12 Lea, 616.

504. The failure to make a tenant a party to a foreclosure suit will not relieve persons who are personally liable for the mortgage debt, if they are not prejudiced by his omission. *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. Rep. 445, 45: 613

505. If the seizure and sale of mortgaged property in Louisiana does not result in full satisfaction of the debt, suit may be brought on the primary security in order to recover the balance. *Gordon v. Gilfoil*, 99 U. S. 168, 25: 383

506. A decree in foreclosure which directs execution for the balance of the debt, after applying the proceeds of the property, is erroneous under equity practice in the United States courts. The same rule was applied and such a decree held erroneous in a case decided in a territorial court of Nebraska [Justices Nelson, Swayne, and Field, dissenting on this point.] *Orchard v. Hughes*, 1 Wall. 73, 17: 560
Overruled in Hornbuckle v. Toombs, 18 Wall. 652, 21 L. ed. 967.

Denied in Palmer v. Cowdrey, 2 Colo. 2.

Distinguished in Nickels v. Griffin, 1 Wash. Terr. 387.

Cited in Clinton v. Englebrecht, 13 Wall. 448, 20 L. ed. 663—*Re Osterhaus*, 6 Am. L. T. 521, Fed. Cas. No. 10,609—*Creighton v. Hershfield*, 2 Mont. 388—*Houtz v. Gilsborn*, 1 Utah, 175.

507. On a suit in foreclosure in the District of Columbia, a personal judgment against the debtor defendant may be given for any deficiency after application of the proceeds of the sale of the lands. *Dodge v. Freedmans' Sav. & T. Co.* 106 U. S. 445, 1 Sup. Ct. Rep. 335, 27: 206
Cited in Shepherd v. Pepper, 133 U. S. 632, 33 L. ed. 716, 10 Sup. Ct. Rep. 438—*Ford v. Springer Land Asso.* 8 N. M. 38, 41 Pac. 541.

508. U. S. Rev. Stat. § 808. U. S. Comp. Stat. 1901, p. 626, relating to the District of Columbia, authorizes a decree in *personam* against a debtor for the balance remaining due after the proceeds of the sale of lands covered by the mortgage or a deed of trust in the nature thereof have been applied to the satisfaction of the debt. *Shepherd v. Pepper*, 133 U. S. 626, 10 Sup. Ct. Rep. 438, 33: 708

j. Subsequent Suit.

Prosecution in Circuit Court of Suit for Death Pending Foreclosure Suit in State Court, see Abatement and Revival, 49.

509. A second foreclosure of a mortgage may be had for the purpose of terminating the rights of a vendee under a conveyance fraudulently made and withheld from record, and of which the mortgagee had no knowledge and no means of knowledge at the time of bringing the first suit. *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. Rep. 445, 45: 613

Cited in Hudson v. Wood, 119 Fed. 771—*London & S. F. Bank v. Dexter Horton & Co.* 61 C. C. A. 529, 126 Fed. 607.

510. The failure to file an amended bill in a foreclosure suit on learning of a secret conveyance to a stranger to the suit will not preclude the plaintiff from having a second foreclosure, if his failure does not prejudice any of the defendants; nor will it deprive him of his rights, except to the costs of the first suit. *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. Rep. 445, 45: 613

VIII. Redemption.

a. In General.

Appealability of Decree for, see Appeal and Error, 214.

Remanding Case to Trial Court where Property has Changed Hands, see Appeal and Error, 5390.

Impairment of Contract Obligations by Redemption Statute, see Constitutional Law, IV. g, 4, i, (12).

State Laws and Decisions as Binding on Federal Courts, see Courts, 1958-1964.
 Mode of Procedure in Federal Courts, see Courts, 1209.

Lessee as Bona Fide Purchaser as Against One Claiming Right to Redeem, see Vendor and Purchaser, 144.

Redemption from Judicial Sale Generally, see Judicial Sale, VIII.

Redemption from Tax Sale, see Taxes, III. j. See also supra, 350, 373.

511. The only remedy for a mortgagor or his assignee, after payment of the debt, if the mortgagee, having entered for condition broken, refuses to relinquish possession of the mortgaged premises, is by bill in equity. *Doe ex dem. Brobst v. Roe* (*Brobst v. Brock*) 10 Wall. 519, 19: 702
Cited in Bryan v. Braslus, 162 U. S. 4 40

L. ed. 1023, 16 Sup. Ct. Rep. 803—Savings & L. Soc. v. Multnomah County, 169 U. S. 430, 42 L. ed. 808, 18 Sup. Ct. Rep. 392—Semple v. Bank of British Columbia, Fed. Cas. No. 12,659—Moulton v. Leighton, 33 Fed. 144—Compton v. Jesup, 15 C. C. A. 439, 31 U. S. App. 486, 68 Fed. 305—Wilkes v. Wilkes, 18 App. D. C. 97.

512. To redeem property from a mortgage after a foreclosure sale insufficient to bar the right of him who offers to redeem, the whole mortgage debt must be tendered or paid into court, and not merely the amount for which it was sold. *Collins v. Riggs*, 14 Wall. 491, 20: 723

Cited in Jones v. Van Doren, 130 U. S. 692, 32 L. ed. 1080, 9 Sup. Ct. Rep. 685—*Cunningham v. Macon & B. R. Co.* 156 U. S. 425, 39 L. ed. 478, 15 Sup. Ct. Rep. 361—*Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 466, 41 U. S. App. 766, 77 Fed. 794—*American Loan & T. Co. v. Atlanta Electric R. Co.* 99 Fed. 316—*McGough v. Sweetzer*, 97 Ala. 365, 19 L.R.A. 472, 12 So. 162—*First Nat. Bank v. Elliott*, 125 Ala. 663, 47 L.R.A. 747, 82 Am. St. Rep. 268, 27 So. 7—*German Nat. Bank v. Barham*, 57 Ark. 536, 22 S. W. 95—*Fields v. Danenhower*, 65 Ark. 399, 43 L.R.A. 522, 46 S. W. 938—*Evans v. Kahr*, 60 Kan. 722, 57 Pac. 950—*Martin v. Fridley*, 23 Minn. 16—*Sellwood v. Gray*, 11 Or. 540, 5 Pac. 196.

513. After redemption from a mortgage subsequent to a foreclosure sale insufficient to bar the right of him who redeems, the money will be subject to distribution between the mortgagee and the purchaser at the mortgage sale, in equitable proportions, so as to reimburse the latter his purchase money, and pay the former the balance of his debt. *Collins v. Riggs*, 14 Wall. 491, 20: 723

514. The owner of the equity of redemption cannot redeem from a mortgage sale on the ground that the whole premises were sold when only part of the debt was due, under a power authorizing sale of the whole by the mortgagee for the part then due, upon any default, and payment of the overplus to the mortgagor; when, after the sale was advertised, he procured an extension of time to pay, with knowledge that the premises were to be sold *en masse*, and made no objection, nor set up any claim to the property until he filed his bill seven years later. *Olcott v. Bynum*, 17 Wall. 44, 21: 570
Cited in Chicago & V. R. Co. v. Fosdick, 106 U. S. 75, 27 L. ed. 57, 1 Sup. Ct. Rep. 10—*Lunsford v. Speaks*, 112 N. C. 614, 17 S. E. 430.

515. If the initiation of foreclosure proceedings operated to acknowledge an outstanding right of redemption at that time, their culmination and the deed of the sheriff must be recognized as evidence of the assertion of an extinguishment of such equity. *Harter v. Twohig*, 158 U. S. 448, 15 Sup. Ct. Rep. 883, 39: 1049
Cited in Walker v. Warner, 179 Ill. 28, 70 Am. St. Rep. 85, 53 N. E. 594.

b. Right to Redeem.

Right to Appeal from Wrongful Denial, see Appeal and Error, 2383.

Impairment of Contract Obligations by Statute Permitting, see Constitutional Law, IV. g, 4, i (12).

Liability of Equity of Redemption to Execution Sale, see Execution, 10, 11.

Effect of Judgment on Right, see Judgment, 851.

Right of State Holding Lien to Redeem Notwithstanding Foreclosure and Sale, see States, 249.

See also *supra*, 363; Guardian and Ward, 30.

516. The right to redeem is a favorite equity, and will not be taken away except upon a strict compliance with the steps necessary to divest it. *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10, 27: 47

Bigler v. Waller, 14 Wall. 297, 20: 891
Shillaber v. Robinson, 97 U. S. 68, 24: 967
Cited in Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 71, 27 L. ed. 56, 1 Sup. Ct. Rep. 10—*Romig v. Gillett*, 187 U. S. 117, 47 L. ed. 100, 23 Sup. Ct. Rep. 40—*Taylor v. Girard L. Ins. Annuity & T. Co.* 1 App. D. C. 214—*Wells v. Northern Trust Co.* 195 Ill. 297, 63 N. E. 136—*Chicago & S. S. Rapid Transit R. Co. v. Northern Trust Co.* 90 Ill. App. 489.

517. Where a bill in equity is filed for the settlement of a trust, and the redemption of real estate in the hands of the trustee from liens for money advanced by him for the purposes of the trust, the plaintiffs are not entitled, as matter of equity and right, to have a sale of the premises,—especially where the prayer of the bill is not for a sale, but for the redemption of the property. *Flagg v. Walker*, 113 U. S. 659, 5 Sup. Ct. Rep. 697, 28: 1072

Cited in Deck v. Whitman, 96 Fed. 885.

518. The right of redemption from a decree of foreclosure does not exist in Louisiana. *Nalle v. Young*, 160 U. S. 624, 16 Sup. Ct. Rep. 420, 40: 560

519. The civil practice act of Washington territory of 1873 authorizes the mortgagor, before the sale occurs, to satisfy the judgment by paying the debt with interest and costs. The right to redeem, after sale, wherever it exists, is statutory. *Parker v. Dacres*, 130 U. S. 43, 9 Sup. Ct. Rep. 433, 32: 848

Cited in Anderson v. Anderson, 129 Ind. 576, 28 Am. St. Rep. 211, 29 N. E. 35.

520. The legislation of Illinois giving the right to redeem mortgaged lands sold under decree does not embrace the real estate of a railroad corporation mortgaged in connection with its franchises and personal property. Its real estate, personalty, and franchises so mortgaged should be sold as an entirety, and without the right of redemption given by statute. *Hammock v. Farmers' Loan & T. Co.* 105 U. S. 77, 26: 1111
Distinguished in Loyce Coal Mines v. Chicago

W. & V. Coal Co. 131 Ill. 10, 8 L.R.A. 601, 22 N. E. 503.

Cited in Parker v. Dacres, 130 U. S. 48, 32 L. ed. 850, 9 Sup. Ct. Rep. 433—Benedict v. St. Joseph & W. R. Co. 19 Fed. 175—Simmons v. Taylor, 38 Fed. 694—Columbia Finance & T. Co. v. Kentucky Union R. Co. 9 C. C. A. 270, 22 U. S. App. 54, 60 Fed. 799—Farmers' Loan & T. Co. v. Detroit, B. C. & A. R. Co. 71 Fed. 37—Andrews v. National Foundry & Pipe Works, 36 L.R.A. 154, 23 C. C. A. 456, 46 U. S. App. 619, 77 Fed. 776—Maxwell v. Wilmington Dental Mfg. Co. 77 Fed. 940—Farmers' Loan & T. Co. v. Iowa Water Co. 78 Fed. 889—American Loan & T. Co. v. Union Depot Co. 80 Fed. 40—Sloux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. 27 C. C. A. 86, 49 U. S. App. 523, 82 Fed. 137—Locey Coal Mines v. Chicago, W. & V. Coal Co. 28 Ill. App. 488—Ten Eyck v. Pontiac, O. & P. R. Co. 114 Mich. 500, 72 N. W. 362—Selbert v. Minneapolis & St. L. R. Co. 58 Minn. 67, 59 N. W. 826—State ex rel. Milwaukee Street R. Co. v. Anderson, 90 Wis. 563, 63 N. W. 746.

521. The law upon the subject of the right to redeem by the mortgagor who has conveyed to the mortgagee the equity of redemption is like that which governs a sale by the *cestui que trust* to his trustee. *Alexander v. Rodriguez* (Villa v. Rodriguez) 12 Wall. 323, 20: 406
Cited in Romig v. Gillett, 187 U. S. 117, 47 L. ed. 100, 23 Sup. Ct. Rep. 40—Partee v. Thomas, 11 Fed. 773—Peugh v. Davis, 2 MacArth. 21.

Surrender of right.

522. The surrender of the right to redeem, by a mortgagor to a mortgagee in possession, will be closely scrutinized by a court of equity; and where it was obtained by such mortgagee denying the right to redeem, for no consideration, or as a condition to the correction of a mistake which in equity he was bound to correct, the surrender will be set aside. *Russell v. Southard*, 12 How. 139, 13: 927

Cited in Villa v. Rodriguez (Alexander v. Rodriguez) 12 Wall. 339, 20 L. ed. 411—Peugh v. Davis, 96 U. S. 337, 24 L. ed. 776—Romig v. Gillett, 187 U. S. 117, 47 L. ed. 100, 23 Sup. Ct. Rep. 40—Wyman v. Babcock, 2 Curt. C. C. 393, Fed. Cas. No. 18,113—Oliver v. Cunningham, 7 Fed. 694—Savings & Loan Soc. v. Davidson, 38 C. C. A. 386, 97 Fed. 717—Stoutz v. Rouse, 84 Ala. 311, 4 So. 170—Bradbury v. Davenport, 114 Cal. 601, 55 Am. St. Rep. 92, 46 Pac. 1062—Walker v. Farmers' Bank, 6 Del. Ch. 94, 10 Atl. 94—Walker v. Farmers' Bank, 8 Houst. (Del.) 264, 10 Atl. 94—Peugh v. Davis, 2 MacArth. 22—Martin v. New Rochelle Water Co. 11 App. Div. 179, 42 N. Y. Supp. 893—Tant v. Guess, 37 S. C. 510, 16 S. E. 472—Hall v. Hall, 41 S. C. 167, 44 Am. St. Rep. 696, 19 S. E. 305—Knowlton v. Walker, 13 Wis. 274.

When barred.

Laches as Bar, see Limitation of Actions, 167.

523. A judicial sale under decree of mortgage foreclosure, if the court has power to make the decree, effectually bars the mortgagor's right of redemption. and the purchaser will hold it free from the equity of

redemption. *Simmons v. Burlington, C. R. & N. R. Co.* 159 U. S. 278, 16 Sup. Ct. Rep. 1, 40: 150
Cited in Deck v. Whitman, 96 Fed. 881—Julian v. Central Trust Co. 53 C. C. A. 443, 115 Fed. 961.

Waiver.

Estoppel to Claim Right, see Estoppel, 192.

524. The right of a borrower to redeem by payment cannot be waived or abandoned by any stipulation of the parties made at the time of the loan, even if embodied in the mortgage. *Peugh v. Davis*, 96 U. S. 332, 24: 775

Distinguished in First Nat. Bank v. Bell Silver & Copper Min. Co. 8 Mont. 55, 19 Pac. 403.
Cited in Fields v. Helms, 82 Ala. 451, 3 So. 106—Nelson v. Kelly, 91 Ala. 575, 8 So. 690—Turple v. Lowe, 114 Ind. 51, 15 N. E. 834—Martin v. New Rochelle Water Co. 11 App. Div. 179, 42 N. Y. Supp. 893—Vickers v. Battershall, 84 Hun, 490, 32 N. Y. Supp. 314—Mooney v. Byrne, 163 N. Y. 92, 57 N. E. 163—Dennis v. Moses, 18 Wash. 579, 40 L.R.A. 313, 52 Pac. 333.

c. Who May Redeem.

Waiver or Abandonment of Right to Redeem, see supra, 524.

Impairment of Contract Obligations as to, see Constitutional Law, 1555.

State Rules as to Order in which Parties may Redeem, as Binding on Federal Courts, see Courts, 1961, 1962.

Effect of Judgment, see Judgment, 851.

Who may Redeem from Tax Sale, see Taxes, 710-712.

525. One who holds a portion of the title by deed from a part of the mortgagors is clothed with their rights, and is entitled to redeem such portion upon paying a proper proportion of the mortgage debt and interest, taking into account the rents, issues, profits, and improvements made upon the premises. *Alexander v. Rodriguez* (Villa v. Rodriguez) 12 Wall. 323, 20: 406

526. Where real estate is sold on execution, and is afterwards sold on foreclosure of a prior mortgage, the purchaser at the execution sale, if not made a party to the foreclosure proceedings, may redeem and treat the deed made on foreclosure as a mortgage, and the purchaser on foreclosure sale as a mortgagee in possession. *Insley v. United States*, 150 U. S. 512, 14 Sup. Ct. Rep. 158, 37: 1163

526a. Where a debtor executed a deed absolute in terms to his creditor, with the verbal agreement that it was to secure a note, and that, if the note was not paid at maturity, the creditor should be authorized to sell the land, a bona fide purchaser of the land on a sale by the creditor after default, who paid just the amount due on the note, takes the land free from all rights of creditors of the first grantor who levied an attachment on the land prior to the sale. Such attaching creditors have no right of re-

demption. *Jackson v. Lawrence*, 117 U. S. 679, 6 Sup. Ct. Rep. 915. 29: 1024
Cited in Martin v. Pond, 30 Fed. 17—*Welseham v. Hocker*, 7 Okla. 254, 54 Pac. 464.

527. Parties not notified of proceedings to foreclose, taken during war, while they were within the lines of the enemy, will be allowed to redeem on condition of the payment of principal and interest in full. *Dean v. Nelson*, 10 Wall. 158, 19: 94; 19: 926
Cited in Dorr v. Gibboney, 3 Hughes, 389, Fed. Cas. No. 4,006—*Green v. Alexander*, 7 D. C. 154—*Johnson v. Robertson*, 34 Md. 174—*De Jarnette v. De Gwerville*, 56 Mo. 460.

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Who may redeem from the lien of a mortgage. 24: 909

[Inchoate right of dower as basis of right to redeem. 3 L.R.A.(N.S.) 1068.

Right of wife during husband's lifetime to redeem. 3 L.R.A.(N.S.) 1068.

Dower right as basis of redemption from mortgage after husband's death. 4 L.R.A.(N.S.) 1039.]

d. Time.

Impairment of Contract Obligations as to, see Constitutional Law, 1541.

Time to Redeem from Tax Sale, see Taxes, 713, 714.

See also supra, 360; Appeal and Error, 4991a; Limitation of Actions, 346.

528-9. The party seeking to redeem must make the offer within the time prescribed by the statute. *Burley v. Flint*, 105 U. S. 247, 26: 986
Cited in Mason v. Northwestern Mut. L. Ins. Co., 106 U. S. 164, 27 L. ed. 130, 1 Sup. Ct. Rep. 765.

530. A mortgagor cannot redeem after the lapse of twenty years after forfeiture and possession by the mortgagee, no interest having been paid in the meantime, and no circumstances appearing to account for the neglect. *Hughes v. Edwards*, 9 Wheat. 489, 6: 142

Slicer v. Bank of Pittsburg, 16 How. 571, 14: 1063

Doe ex dem. Brobst v. Roe (Brobst v. Brock), 10 Wall. 519, 19: 1002

Cited in Willison v. Watkins, 3 Pet. 52, 7 L. ed. 600—*Slicer v. Bank of Pittsburg*, 16 How. 580, 14 L. ed. 1066—*Smith v. Gale*, 144 U. S. 526, 36 L. ed. 527, 12 Sup. Ct. Rep. 674—*Bryan v. Kales*, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 802—*Gibson v. Lyon*, 115 U. S. 447, 29 L. ed. 442, 6 Sup. Ct. Rep. 120—*Amory v. Lawrence*, 3 Cliff. 533, Fed. Cas. No. 336—*Re May*, Fed. Cas. No. 9,326—*Platt v. Vattler*, 1 McLean, 162, Fed. Cas. No. 11,117—*Semple v. Bank of British Columbia*, 5 Sawy. 101, Fed. Cas. No. 12,659—*Chase v. Driver*, 34 C. C. A. 673, 92 Fed. 786—*Huguley Mfg. Co. v. Galetton Cotton Mills*, 36 C. C. A. 238, 94 Fed. 270.

531. Though a mortgage has been irregularly foreclosed, an adverse possession for a period of thirty years, under a title derived at the foreclosure sale, will bar re-

demption. *Slicer v. Bank of Pittsburg*, 16 How. 571, 14: 1063
Cited in Byed v. McDaniel, 33 Ala. 27.

532. A court of equity should refuse aid to a party asserting, under the statute of Washington territory, a right of redemption, who has neglected, without sufficient cause, before the expiration of six months from the confirmation of the sale, to invoke the authority of the proper court or judge to compel the recognition of such right by the officer whose duty it was, under the statute, to accept a tender made in conformity with the law. *Parker v. Dacres*, 130 U. S. 43, 9 Sup. Ct. Rep. 433, 32: 848
Cited in Chezum v. McBride, 21 Wash. 564, 58 Pac. 1067.

e. Amount Payable and Allowable on Redemption.

Due Process as to, see Constitutional Law, 1540.

See also supra, 525, 527.

533. In an action to redeem from an alleged mortgage which the defendant claimed was a sale, the defendant is not chargeable with money received by him from an insurance company on account of the destruction of the house on the premises while he was in possession under a claim of absolute ownership, and on which he had paid the premium. If there were any equities arising out of the receipt of this money, they would be in favor of the underwriters, and not of the mortgagor. *Russell v. Southard*, 12 How. 139, 13: 927

534. An account of rents and profits is not an inseparable incident to a decree for redemption against a mortgagee in possession; and where the case showed long delay, and acquiescence in the claim of the mortgagee to absolute ownership, it was decreed that the account of the interest due on the loan, and of the rents and profits of the land, commence at the date of the filing of the bill. *Russell v. Southard*, 12 How. 139, 13: 927
Cited in Compton v. Jesup, 15 C. C. A. 441, 31 U. S. App. 486, 68 Fed. 308—*Booth v. Baltimore Steam Packet Co.*, 63 Md. 44—*Howard v. Clark*, 72 Vt. 432, 48 Atl. 636.

535. A mortgagee who has paid a prior mortgage or other encumbrance is entitled to be repaid when the mortgagor, or his vendee, or a subsequent mortgagee, comes to redeem. *McCormick v. Knox*, 105 U. S. 122, 26: 940

Cited in American Loan & T. Co. v. Atlanta Electric R. Co., 99 Fed. 318—*Van Dwyne v. Shann*, 39 N. J. Eq. 11.

536. The existing laws with reference to which the mortgagor and mortgagee must be assumed to have contracted are those only which, in their direct or necessary legal operation, controlled or affected the obligation of their contract, and do not include laws changing the rate of interest on bids to be paid, upon redemption, to the purchaser at foreclosure sale. *Connecticut Mut. L.*

Ins. Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. Rep. 236, 27: 648

537. The purchaser at decretal sale is entitled, upon redemption of the property, to interest at the rate prescribed by statute when he purchased. Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. Rep. 236, 27: 648

Cited in Currier v. Elliott, 141 Ind. 407, 39 N. E. 554—Jurgens v. Hauser, 19 Mont. 186, 47 Pac. 809.

538. The right of the mortgagee to redeem, and thus prevent a sale on default of payment of interest, where such default does not make the entire debt due, is preserved on payment, not of the unmatured principal sum of the debt, but merely of the interest then actually due and in arrears. Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. Rep. 10, 27: 47

539. In an action to redeem property by the payment of a loan secured by a conveyance in the nature of a mortgage, and to compel a reconveyance, where the property was open, uninclosed, and without buildings, and defendant's possession was merely constructive, he should not be charged anything for its use. A sum equal to the interest on the money borrowed should not, in such case, be allowed as rent, where the possession was worth nothing; nor should damages be awarded for a depreciation in value of the property. Peugh v. Davis, 113 U. S. 542, 5 Sup. Ct. Rep. 622, 28: 1127

MORTMAIN.

Statute of, see Charities, I. a.
Violation of Statutes of, see Perpetuities.

MOTIONS AND ORDERS.

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As Basis for Certifiable Question, see Cases Certified, 22-25.

Fees of Commissioner for Hearing and Deciding, see Commissioners, 26.

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Presumption as to Validity of Order to Show Cause, see Evidence, 544.

Effect of Entry Into Consent Rule in Ejectment, see Evidence, 757.

As Method of Controlling Execution, see Executions, 68.

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In Supreme Court; Necessity for Verification, see Supreme Court of the United States, 157.

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Disputed Facts on Motion Determined by Court, see Trial, 82.

Motion for Nonsuit, see Trial, 484-487.

Rule to Show Cause as Process, see Writ and Process, 6.

1. The effect of a division of opinion in a court upon a motion is that the motion is lost. Davis v. Braden, 10 Pet. 286, 9: 427
Cited in United States v. Rider, 163 U. S. 136, 41 L. ed. 103, 16 Sup. Ct. Rep. 983—Bagg v. Detroit, 5 Mich. 69.

2. A motion to confirm a master's sale where speedy relief is necessary may be determined on *ex parte* affidavits. Savery v. Sypher, 6 Wall. 157, 18: 822
Cited in Blackburn v. Selma R. Co. 3 Fed. 696—Robertson v. Smith, 94 Va. 252, 64 Am. St. Rep. 723, 26 S. E. 579.

3. In cases of original jurisdiction in the Supreme Court in equity, a motion by complainant for leave to file a bill will be heard on the regular motion day, and only on the part of the complainant, and ten printed copies of the bill must be filed with the clerk before the hearing. Georgia v. Grant, 6 Wall. 241, 18: 848
Cited in California v. Southern P. Co. 157 U. S. 249, 39 L. ed. 690, 15 Sup. Ct. Rep. 591—Washington v. Northern Securities Co. 185 U. S. 255, 46 L. ed. 897, 22 Sup. Ct. Rep. 623.

4. While proceedings are still *in fieri* it is proper for the court, on motion, to quash them for any irregularity. Such irregularities as could formerly be corrected by writ of error *coram vobis* or *audita querela* may now be corrected by motion. Harris v. Hardeman, 14 How. 334, 14: 444

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Of Commander in Punishing Marine, see Army and Navy, 164-167.

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Of Plaintiff in Divorce Suit Changing Residence, see Divorce and Separation, 4.
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 In Joining Parties, Effect on Right to Remove Cause, see Removal of Causes, 95.
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b. Charter, 20.

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g. Property and Revenues, 131-42.

h. Liability for Damages, 145-62.

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Estoppel to Deny Validity of Bonds, see Bonds, V. i.

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Impairment of Contract Obligations by, see Constitutional Law, IV. g.

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Effect of Legislative Control on Impairment of Contract Obligations, see Constitutional Law, IV. g. 4, g, 1.

Due Process in Disposal of Garbage, see Constitutional Law, 520, 521.

Due Process in Abrogating Right of, to Set Off Unpaid Taxes, see Constitutional Law, 695.

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Increasing Number of Railroad Directors Which Municipality May Elect, see Constitutional Law, 1399.

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State Decisions on Validity of Organization and Boundaries as Binding on Federal Courts, see Courts, 1735, 1737.

Editorial note.

[Physical characteristics necessary to municipal organization. 25 L.R.A. 755.]

Nature and purpose of corporation.

Of District of Columbia, see District of Columbia, 1-5.

1. A municipal corporation is established for the general purposes of government, as a part of the government of the country. *Fowle v. Alexandria*, 3 Pet. 398, 7:719
Cited in Symonds v. Clay County, 71 Ill. 357—
 State ex rel. *Pearson v. Hayes*, 61 N. H. 332—*Wooster v. Plymouth*, 62 N. H. 209.

2. A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the state. *Maxwell v. District of Columbia*, 91 U. S. 557, 23:445
Dant v. District of Columbia, 91 U. S. 557, 23:446

Barnes v. District of Columbia, 91 U. S. 540, 23:440

Distinguished in Johnston v. District of Columbia, 118 U. S. 21, 30 L. ed. 70, 6 Sup.

Ct. Rep. 923—*Bradley v. Galt*, 5 Mackey, 388.

Criticized in Young v. Charleston, 20 S. C. 120, 47 Am. Rep. 827.

Cited in Brown v. District of Columbia, 127 U. S. 380, 32 L. ed. 264, 8 Sup. Ct. Rep. 1314—*Cleveland v. King*, 132 U. S. 303, 33 L. ed. 338, 10 Sup. Ct. Rep. 90—*Detroit v. Osborne*, 135 U. S. 408, 34 L. ed. 262, 10 Sup. Ct. Rep. 1012—*District of Columbia v. Woodbury*, 136 U. S. 451, 34 L. ed. 472, 10 Sup. Ct. Rep. 990—*Workman v. New York*, 179 U. S. 574, 45 L. ed. 325, 21 Sup. Ct. Rep. 212—*Ericsson v. Manchester*, 3 Hughes, 196, Fed. Cas. No. 4,511—*The F. C. Latrobe*, 28 Fed. 379—*Osborne v. Detroit*, 32 Fed. 42—*Boston v. Crowley*, 38 Fed. 204—*Barney Dumping-Boat Co. v. New York*, 40 Fed. 51—*Rollins Invest. Co. v. George*, 48 Fed. 777—*Greenwood v. Westport*, 63 Conn. 591, 60 Fed. 569—*Madden v. Lancaster County*, 12 C. C. A. 569, 27 U. S. App. 528, 65 Fed. 191—*Jacksonville v. Smith*, 24 C. C. A. 100, 41 U. S. App. 657, 78 Fed. 295—*Webster v. Beaver Dam*, 84 Fed. 282—*Mahoney v. Helena*, 96 Fed. 791—*Chope v. Eureka*, 78 Cal. 592, 4 L.R.A. 328, 12 Am. St. Rep. 113, 21 Pac. 364—*People ex rel. Bryant v. Holladay*, 93 Cal. 248, 27 Am. St. Rep. 186, 29 Pac. 54—*Denver v. Dunsmore*, 7 Colo. 338, 3 Pac. 705—*Denver v. Peterson*, 5 Colo. App. 44, 36 Pac. 1111—*Johnson v. People*, 6 Colo. App. 168, 40 Pac. 576—*Ludlow v. Fargo*, 3 N. D. 492, 57 N. W. 506—*Vall v. Amenla*, 4 N. D. 246, 59 N. W. 1092—*Bailey v. Lawrence County*, 5 S. D. 397, 49 Am. St. Rep. 881, 59 N. W. 219—*Roth v. District of Columbia*, 16 App. D. C. 333—*Strong v. District of Columbia*, 1 Mackey, 268—*Clark v. District of Columbia*, 3 Mackey, 88—*District of Columbia v. Washington Gaslight Co.* 3 Mackey, 348—*McGill v. District of Columbia*, 4 Mackey, 78, 54 Am. Rep. 256—*District of Columbia v. Washington & G. R. Co.* 4 Mackey, 228—*Glick v. Baltimore & O. R. Co.* 8 Mackey, 424—*Terre Haute v. Hudnut*, 112 Ind. 547, 13 N. E. 686—*Freel v. Crawfordsville*, 142 Ind. 29, 37 L.R.A. 304, 41 N. E. 312—*Jasper County v. Allman*, 142 Ind. 576, 39 L.R.A. 61, 42 N. E. 206—*Hill v. Boston*, 122 Mass. 372, 23 Am. Rep. 332—*Burridge v. Detroit*, 117 Mich. 559, 42 L.R.A. 686, 72 Am. St. Rep. 582, 76 N. W. 84—*Sullivan v. Helena*, 10 Mont. 143, 25 Pac. 94—*State ex rel. Pearson v. Hayes*, 61 N. H. 332—*Wooster v. Plymouth*, 62 N. H. 209—*Barry v. Port Jervis*, 64 App. Div. 280, 72 N. Y. Supp. 104—*Ehrgott v. New York*, 96 N. Y. 271, 48 Am. Rep. 622—*Walsh v. New York & B. Bridge*, 96 N. Y. 437—*Pettengill v. Yonkers*, 116 N. Y. 565, 15 Am. St. Rep. 442, 22 N. E. 1095—*Wilson v. Troy*, 135 N. Y. 102, 18 L.R.A. 455, 31 Am. St. Rep. 817, 32 N. E. 44—*People ex rel. Reynolds v. Buffalo*, 140 N. Y. 307, 37 Am. St. Rep. 563, 35 N. E. 485—*Moffitt v. Asheville*, 103 N. C. 254, 14 Am. St. Rep. 810, 9 S. E. 695—*Robinson v. Greenville*, 42 Ohio St. 630, 51 Am. Rep. 857—*Johns v. Cincinnati*, 45 Ohio St. 283, 12 N. E. 801—*Guthrie v. T. W. Harvey Lumber Co.* 5 Okla. 783, 60 Pac. 84—*Templeton v. Linn County*, 22 Or. 315, 15 L.R.A. 732, 29 Pac. 795—*Esberg-Gunst Cigar Co. v. Portland*, 34 Or. 296, 43 L.R.A. 442, 75 Am. St. Rep. 651, 55 Pac. 961—*State v. Wilson*, 12 Lea, 257—*Navasota v. Pearce*, 46 Tex. 533, 26 Am. Rep. 279—*Galveston v. Posnalsky*, 62 Tex. 129, 50 Am. Rep. 517—*Lenzen v. New Braunfels*, 13 Tex. Civ. App. 339, 35 S. W. 341—*Levy v. Salt Lake City*, 3 Utah, 69, 1 Pac. 160—*Noble v. Richmond*, 31 Gratt.

281, 31 Am. Rep. 726—Orme v. Richmond, 79 Va. 89—Gordon v. Richmond, 83 Va. 440, 2 S. E. 727—Moore v. Richmond, 85 Va. 542, 8 S. E. 387—Winchester v. Carroll, 99 Va. 739, 40 S. E. 37—Sutton v. Snohomish, 11 Wash. 28, 48 Am. St. Rep. 847, 39 Pac. 273—Saylor v. Montesano, 11 Wash. 330, 39 Pac. 653—Hutchinson v. Olympia, 2 Wash. Terr. 320, 5 Pac. 606—Gibson v. Huntington, 38 W. Va. 178, 22 L.R.A. 563, 45 Am. St. Rep. 853, 18 S. E. 447—Charleston v. Beller, 45 W. Va. 48, 30 S. E. 152.

3. Municipal corporations are instrumentalities of the state, for the convenient administration of government within their limits. Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 3 Sup. Ct. Rep. 211, 27: 936

Cited in Chicago League Ball Club v. Chicago, 77 Ill. App. 139.

4. A municipal corporation, so far as it is invested with subordinate legislative powers for local purposes, is a mere instrumentality of the state for the convenient administration of government. Broughton v. Pensacola, 93 U. S. 266, 23: 896
Cited in Mt. Pleasant v. Beckwith, 100 U. S. 529, 25 L. ed. 702—*Mobile v. Watson*, 116 U. S. 305, 29 L. ed. 628, 6 Sup. Ct. Rep. 398—*St. Louis v. St. Louis Gaslight Co.* 5 Mo. App. 513.

5. Municipal corporations are public corporations, and parts of the machinery employed in carrying on the affairs of the state. Laramie County v. Albany County, 92 U. S. 307, 23: 552
Cited in Hughes v. Ewing, 93 Cal. 418, 28 Pac. 1067—*Hill v. Boston*, 122 Mass. 380, 23 Am. Rep. 332—*Stafford County v. Luck*, 80 Va. 226.

6. A municipal corporation is a subordinate branch of the domestic government of a state. Nashville v. Ray, 19 Wall. 468, 22: 164

Cited in Scott v. Laporte, 102 Ind. 43, 68 N. E. 278—*Vaughtman v. Waterloo*, 14 Ind. App. 651, 43 N. E. 476—*Fischer Land & Improv. Co. v. Bordelon*, 52 La. Ann. 436, 27 So. 59—*Kansas City v. Vineyard*, 128 Mo. 81, 30 S. W. 326—*Kansas City v. Smart*, 128 Mo. 291, 30 S. W. 773—*State v. Butler*, 178 Mo. 312, 77 S. W. 560—*State ex rel. Patterson v. Douglas County*, 47 Neb. 453, 66 N. W. 434—*Territory ex rel. Jones v. Hopkins*, 9 Okla. 147, 59 Pac. 976.

Legislative power over.

Control over Power of Municipality, see *infra*, 23, 24, 26-30.

Executive Functions of Legislature and Judiciary, see *Courts*, 168-171.

Legislative Grant to Corporations of Exclusive Privilege to Furnish City with Water, see *Waters*, 179.

Wharfage, see *Wharves*, 24.

See also *infra*, 17, 157.

7. The legislature, as guardian of the public interests, has the exclusive and unrestrained control over public corporations, such as cities and towns; and, as it may create, so it may modify or destroy, as public exigency requires or recommends. Unit-

ed States v. Baltimore & O. R. Co. 17 Wall. 322, 21: 597
Limited in Lexington v. Thompson, 113 Ky. 545, 57 L.R.A. 776, 101 Am. St. Rep. 361, 68 S. W. 477.

Cited in Meriwether v. Garrett, 102 U. S. 510, 26 L. ed. 204—*Williamson v. New Jersey*, 130 U. S. 200, 32 L. ed. 919, 9 Sup. Ct. Rep. 483—*Rogers Locomotive Mach. Works v. American Emigrant Co.* 164 U. S. 576, 41 L. ed. 559, 17 Sup. Ct. Rep. 188—*Atlantic Trust Co. v. Darlington*, 63 Fed. 81—*Ex parte Wells*, 21 Fla. 310—*Adams v. Rome*, 59 Ga. 772—*State ex rel. Jameson v. Denny*, 118 Ind. 419, 4 L.R.A. 91, 21 N. E. 252—*Linn County v. Snyder*, 45 Kan. 638, 23 Am. St. Rep. 742, 28 Pac. 21—*Fuller v. Morrison County*, 36 Minn. 311, 30 N. W. 824—*Wooster v. Plymouth*, 62 N. H. 215.

8. Where no constitutional restriction is imposed the corporate existence and powers of municipalities are subject to the legislative control of the state creating them. *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25: 699

Cited in Mobile v. Watson, 116 U. S. 305, 29 L. ed. 628, 6 Sup. Ct. Rep. 398—*Atkin v. Kansas*, 191 U. S. 221, 48 L. ed. 157, 24 Sup. Ct. Rep. 124—*Worcester v. Worcester Consol. Street R. Co.* 196 U. S. 550, 49 L. ed. 596, 25 Sup. Ct. Rep. 327—*Sinton v. Carter County*, 23 Fed. 537—*Pepin Twp. v. Sage*, 64 C. C. A. 171, 129 Fed. 659—*Ex parte Folsom*, 131 Fed. 504—*Chicago v. Cicero*, 210 Ill. 294, 71 N. E. 356—*Woolverton v. Albany*, 152 Ind. 79, 52 N. E. 453—*State ex rel. White v. Barber*, 116 Iowa, 103, 57 L.R.A. 249, 93 Am. St. Rep. 222, 89 N. W. 204—*Mt. Hope Cemetery v. Boston*, 158 Mass. 512, 35 Am. St. Rep. 515, 33 N. E. 695—*Wooster v. Plymouth*, 62 N. H. 212—*Henderson v. New York*, 65 App. Div. 182, 72 N. Y. Supp. 609—*Dare County v. Currituck County*, 95 N. C. 102—*State ex rel. Richards v. Cincinnati*, 52 Ohio St. 457, 27 L.R.A. 750, 40 N. E. 508—*Morris v. State*, 62 Tex. 743—*Barre v. School Dist. No. 13*, 67 Vt. 113, 30 Atl. 807—*Board of Education v. Board of Education*, 30 W. Va. 430, 4 S. E. 640—*Richland County v. Richland Center*, 59 Wis. 599, 18 N. W. 497—*Forest County v. Langlade County*, 76 Wis. 610, 45 N. W. 598—*State ex rel. Joint School Dist. No. 2 v. Sweeney*, 103 Wis. 406, 79 N. W. 420.

9. The legislature may, under proper limitations, change, modify, enlarge, or restrain public corporations, such as counties, cities, etc. *Terrett v. Taylor*, 9 Cranch. 43, 3: 650

Cited in Stoutenburgh v. Frazier, 16 App. D. C. 240, 48 L.R.A. 224—*State v. Savannah, R. M. Charlt. (Ga.)* 256—*Savannah v. Steamboat Co. R. M. Charlt. (Ga.)* 346—*Lucas v. Tippecanoe County*, 44 Ind. 540—*Louisville v. University of Louisville*, 15 B. Mon. 673—*New Orleans, M. & C. R. Co. v. New Orleans*, 26 La. Ann. 482—*State use of Washington County v. Baltimore & O. R. Co.* 12 Gill & J. 440, 38 Am. Dec. 317—*Baltimore v. Howard*, 15 Md. 490—*People ex rel. Trombley v. Humphrey*, 23 Mich. 483, 9 Am. Rep. 94—*St. Louis v. Russell*, 9 Mo. 511—*Wooster v. Plymouth*, 62 N. H. 210—*Webb v. New York*, 64 How. Pr. 17—*People ex rel. Rodgers v. Coler*, 166 N. Y. 32, 52 L.R.A. 827, 82 Am. St. Rep. 605, 59 N. E. 716—*Knoup v. Plqua Branch of State Bank*, 1 Ohio St.

623—*Re Malone*, 21 S. C. 449—*Prince William School Board v. Stuart*, 80 Va. 79.

10. Subject to constitutional limitations, the power of the legislature over municipal corporations is supreme and transcendent, and it may erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require. *Covington v. Kentucky*, 173 U. S. 231, 19 Sup. Ct. Rep. 383, 43: 679

Cited in Johnson v. Rock Hill, 57 S. C. 379, 35 S. E. 568.

11. The power of the legislature over all local municipal corporations is unlimited save by the restrictions of the state and Federal Constitutions. *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. Rep. 617, 42: 1047

Cited in Norwood v. Baker, 172 U. S. 278, 43 L. ed. 447, 19 Sup. Ct. Rep. 187—*French v. Barber Asphalt Paving Co.* 181 U. S. 351, 45 L. ed. 892, 21 Sup. Ct. Rep. 625—*Goodrich v. Detroit*, 184 U. S. 439, 46 L. ed. 631, 22 Sup. Ct. Rep. 397—*Crane v. Siloam Springs*, 67 Ark. 36, 55 S. W. 955—*Matthews v. Kimball*, 70 Ark. 463, 66 S. W. 651—*Webster v. Fargo*, 9 N. D. 210, 56 L.R.A. 157, 82 N. W. 732—*District of Columbia v. Wormley*, 15 App. D. C. 67—*Adams v. Shelbyville*, 154 Ind. 471, 49 L.R.A. 800, 77 Am. St. Rep. 484, 37 N. E. 114—*Browne v. Turner*, 176 Mass. 13, 56 N. E. 969—*Heman v. Allen*, 156 Mo. 551, 37 S. W. 550—*Barber Asphalt Paving Co. v. French*, 158 Mo. 546, 54 L.R.A. 498, 58 S. W. 934—*King v. Portland*, 38 Or. 416, 55 L.R.A. 817, 63 Pac. 2.

12. A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature. *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. Rep. 617, 42: 1047

Cited in People ex rel. Rodgers v. Coler, 166 N. Y. 31, 52 L.R.A. 827, 82 Am. St. Rep. 605, 59 N. E. 716—*Town School District v. School Dist. No. 2*, 72 Vt. 455, 48 Atl. 697.

— Editorial notes.

[Authority of legislature to remove from trusteeship. 16 L.R.A. 695.

Power of legislature to impose burdens upon, and to control their local administration and property. 48 L.R.A. 465.

Right of local self-government; legislative regulation of municipal officers. 1 L.R.A. (N.S.) 512.]

Recognition.

13. When a legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes a *de jure*, out of what before was only a *de facto*, corporation. *Comanche County v. Lewis*, 133 U. S. 198, 10 Sup. Ct. Rep. 286, 36: 604

Cited in Street v. United States, 133 U. S. 307, 33 L. ed. 635, 10 Sup. Ct. Rep. 309—*State ex rel. Sanche v. Webb*, 110 Ala. 222, 20 So. 462—*Merchants Nat. Bank v. McKinney*, 2 S. D. 117, 48 N. W. 841.

14. A corporation was in fact created by

the Kentucky act of 1869 granting authority to a defined portion of Shelby county to subscribe stock and vote bonds to a railroad; and such corporation, by virtue of the subscription and issue of the bonds, became the owner of the stock, with the right to vote the same. *Hancock v. Louisville & N. R. Co.* 145 U. S. 409, 12 Sup. Ct. Rep. 969, 36: 755

Cited in Breckinridge County v. McCracken, 9 C. C. A. 445, 22 U. S. App. 115, 61 Fed. 194—*Savannah, F. & W. R. Co. v. Bundick*, 94 Ga. 778, 5 Inters. Com. Rep. 293, 21 S. E. 995—*Gross v. Kentucky Bd. of Managers*, 103 Ky. 844, 43 L.R.A. 704, 49 S. W. 458—*Southern R. Co. v. Wilcox*, 99 Va. 408, 39 S. E. 144.

De facto existence.

Recognition as Converting *De Facto* into *De Jure* Corporations, see *supra*, 13.

As to *De Facto* Distinction of Corporation, see *infra*, 163.

15. A *de facto* corporation was constituted by a bona fide attempt to organize an irrigation district under the California irrigation act of March 7, 1887 (providing for the creation of such districts as public municipal corporations), accompanied by an actual user of the corporate franchise. *Tulare Irrig. District v. Shepard*, 185 U. S. 1, 22 Sup. Ct. Rep. 531, 46: 773

Cited in W. L. Wells Co. v. Avon Mills, 118 Fed. 193—*California ex rel. Brady v. Brown's Valley Irrig. District*, 119 Fed. 538.

Collateral attack.

16. The state, as creator of municipal corporations, is the proper party to impeach the validity of their creation; and if it acquiesces, the corporate existence thereof cannot be attacked collaterally. *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. Rep. 957, 42: 310

Cited in Tulare Irrig. District v. Shepard, 185 U. S. 1, 46 L. ed. 780, 22 Sup. Ct. Rep. 531—*Gastonia Cotton Mfg. Co. v. W. L. Wells Co.* 63 C. C. A. 116, 128 Fed. 374—*Readsboro v. Woodford*, 76 Vt. 378, 57 Atl. 962.

Dissolution, succession, and substitution.

Liability of Successor for Debts, see *infra*, 99–102.

Succession of Incumbent of Newly Created Office to Powers of Predecessors, see *infra*, 169, 170.

Power of State to Alter or Destroy Municipalities, see *Constitutional Law*, 1029.

Dissolution without Provision for Payment of Debts, as Presenting Federal Question, see *Courts*, 504.

Compelling New Corporation to Perform Duty of Former One, see *Mandamus*, 194, 195.

17. A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature. *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14: 977
Cited in Von Hoffman v. Quincy (United States ex rel. *Von Hoffman v. Quincy*) 4 Wall. 554,

18 L. ed. 410—*Williamson v. New Jersey*, 130 U. S. 200, 32 L. ed. 919, 9 Sup. Ct. Rep. 453—*Atkin v. Kansas*, 191 U. S. 221, 48 L. ed. 157, 24 Sup. Ct. Rep. 124—*Jones v. Pensacola*, Fed. Cas. No. 7,488—*Ex parte Tate*, 39 Ala. 261—*Wells v. Cole*, 27 Ark. 614—*English v. Oliver*, 28 Ark. 334—*Chicago City R. Co. v. People*, 73 Ill. 552—*New Orleans v. Orleans R. Co.* 42 La. Ann. 5, 21 Am. St. Rep. 365, 7 So. 59—*Colt v. Grand Rapids*, 115 Mich. 496, 73 N. W. 811—*Jenkins v. Charleston*, 5 S. C. N. S. 398, 23 Am. Rep. 14—*South Morgantown v. Morgantown*, 49 W. Va. 731, 40 S. E. 15.

18. A corporation created for municipal purposes, being superseded by new and different corporations created for accomplishing the same purposes, ceases to exist, except so far as its existence is expressly continued for special objects, such as settling up its indebtedness and the like. *Barkley v. Board of Levee Comrs.* 93 U. S. 258, 23: 893

Territory and boundaries.

Certiorari to Review Decision as to Validity of Annexation, see *Certiorari*, 45.

Discrimination as to Annexation of Agricultural Lands, see *Constitutional Law*, 195b.

Due Process in Taxing Farm Lands Brought within City Limits, see *Constitutional Law*, 526.

Impairing Contract Obligations as to, see *Constitutional Law*, 1102.

As Legislative or Judicial Province, see *Courts*, 168, 171.

Who may Attack Validity of Statute Providing for Annexation, see *Statutes*, 53.

19. The eastern boundary of St. Louis is the eastern boundary of the state of Missouri, in the middle of the Mississippi river. *Jones v. Soulard*, 24 How. 41, 16: 604

St. Louis Public Schools v. Risley, 10 Wall. 91, 19: 850

Cited in St. Louis Public Schools v. Risley, 10 Wall. 115, 19 L. ed. 857—*St. Clair County v. Livingston*, 23 Wall. 64, 23 L. ed. 62—*St. Louis v. Ruts*, 138 U. S. 249, 34 L. ed. 950, 11 Sup. Ct. Rep. 337—*St. Joseph & G. I. R. Co. v. Devereux*, 41 Fed. 16—*Ft. Smith & V. B. Bridge Co. v. Hawkins*, 54 Ark. 516, 12 L.R.A. 491, 16 S. W. 565—*Keokuk & H. Bridge Co. v. People*, 145 Ill. 604, 34 N. E. 842—*St. Louis Public Schools v. Risley*, 40 Mo. 371—*Myers v. St. Louis*, 82 Mo. 374—*Cooley v. Golden*, 52 Mo. App. 232.

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Annexation of rural lands to municipalities. 44: 392

[*Boundary of, on navigable waters.* 23 L.R.A. 520.

Legislative power to annex territory to. 27 L.R.A. 737.]

b. Charter.

Power to Change Without Impairing Contract Obligations, see *Constitutional Law*, 1081.

Impairment of Contract Obligations by Change in, see *Constitutional Law*, 1317.

Removal to Federal Court of Suit Involving, see *Removal of Causes*, 229.

Retrospective Effect of Revision of, see *Statutes*, 569.

Repeal of General Statute by, see *Statutes*, 630.

Limitation in, on Amount of Taxes Leviable, see *Taxes*, 495.

20. A municipal charter prepared and adopted in pursuance of authority given by the state Constitution is an organic act, and the powers granted by it, so far as they are in harmony with the Constitution and laws of the state, and have not been set aside by any act of the general assembly, are the powers vested in the city. *St. Louis v. Western U. Teleg. Co.* 149 U. S. 465, 13 Sup. Ct. Rep. 990, 37: 810
Offd in State ex rel. Ryan v. District Court, 87 Minn. 151, 91 N. W. 300—*State ex rel. Fawcett v. Superior Court (Fawcett v. Pritchard)* 14 Wash. 617, 33 L.R.A. 678, 45 Pac. 23.

II. Powers, Duties, and Liabilities.

a. In General.

Power of Legislature to Alter or Extend Powers, see *supra*, 8, 9.

Power of Legislation to Enlarge Debt Limit Fixed by Previous Statute, see *infra*, 116.

Power to Take and Hold Property, see *infra*, 131.

Power to Take Away Liability for Damage by Mob, see *infra*, 157.

Authority to Subscribe for Stock of Railroad Company, see *Bonds, V.; Railroads*, III.

Power to Issue Bonds, see *Bonds, V. b.*

Power to Control Bridge, see *Bridges*, 1.

Power to Hold Property on Trust, see *Charities*, 70-75, 95a, 95b.

Who may Question Power of Municipality to Hold Property upon Trust, see *Charities*, 85.

Impairment of Contract Obligations by Restricting Taxing Power of Municipality, see *Constitutional Law*, IV. g, 4, i (14).

Retroactive Effect of Change in State Constitution on Powers of Municipality, see *Constitutional Law*, 65-68.

Retrospective Operation of New Constitution on Municipal Right to Become Corporate Stockholders, see *Constitutional Law*, 998.

Right to Claim Protection of Contract Clause of Federal Constitution, see *Constitutional Law*, 1040.

Due Process in Acts of Municipality, see *Constitutional Law*, 412.

Power to Subscribe for Stock in Public Improvement, see *Counties*, 15.

Superiority to Review by Courts, see *Courts*, 248-250.

Exclusiveness of State Control Over Police Regulations, see *Courts*, 1373.

State Decisions as to Validity and Extent of Powers, as Binding on Federal Courts, see *Courts*, 1738-1740.

Powers and Duties as to Land Dedicated as Street, see Dedication.

Evidence of Fraud or Abuse of Power by Municipality in Ordering Public Improvements, see Evidence, 2305.

Rights and Powers as to Highways Generally, see Highways.

Duty to Repair Highway, see Highways, III. Authority and Duty as to Opening Streets, see Highways, 1, 4.

Propriety of Injunctive Relief against Acts of Municipality, see Injunction, 122-132.

Power to Specify Materials for Street Improvement, see Monopoly and Combinations, 14.

Power to Abate Nuisance, see Nuisances, 31.

Power as to Public Improvements, see Public Improvements.

Power of Taxation Generally, see Taxes, I.

Power to Collect Taxes on Interstate Bridge, see Taxes, 344, 347.

Power to Deprive Legislature of Power to Tax Street Railway, see Taxes, 418.

Power to Raise Money by Taxation to Aid Manufacturers, see Taxes, 483.

Power to Sell Land for Taxes, see Taxes, 626.

Effect of Legislation Restricting Taxing Power, see Mandamus, 190, 191.

Liability to Federal Taxation, see Internal Revenue, 49, 65a, 66-70, 73.

Power of Territorial Legislature to Require Municipality to Pay Claims, see Territories, 35.

Lease of Water Front by Officers Appointed During Military Occupation, see War, 47.

Riparian Rights of, see Waters, 156.

See also *supra*, 20.

21. Municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given, or implied because essential to carry into effect such as are expressly granted. *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. Rep. 819, 36: 652 *Cited in West Plains Twp. v. Sage*, 16 C. C. A. 563, 32 U. S. App. 725, 69 Fed. 952.

22. Municipal corporations have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. They can bind the people and property only to the extent of their powers. *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. Rep. 361, 27: 669

Cited in West Plains Twp. v. Sage, 16 C. C. A. 563, 32 U. S. App. 725, 69 Fed. 952—*Re Munro*, 1 Alaska, 280—*Croft v. Danbury*, 65 Conn. 300, 32 Atl. 365—*Manning v. Devils Lake* (N. D.), 65 L.R.A. 190, 99 N. W. 51—*Van Antwerp v. Dell Rapids Twp.* 3 S. D. 308, 53 N. W. 82—*Shreveport v. Prescott*, 51 La. Ann. 1923, 46 L.R.A. 212, 26 So. 664—*Moreland v. Millen*, 126 Mich. 397, 85 N. W. 882—*Knapp v. Kansas City*, 48 Mo. App. 492—*Hurley v. Trenton*, 66 N. J. L. 539, 49 Atl. 518.

23. Their powers, as originally conferred, may be enlarged or diminished, and are at all times subject to modification or repeal. *Rogers v. Burlington*, 3 Wall. 654, 18: 79 *Cited in Atkin v. Kansas*, 191 U. S. 221, 48 L. ed. 157, 24 Sup. Ct. Rep. 124—*Atlantic Trust Co. v. Darlington*, 63 Fed. 81—*State ex rel. Jameson v. Denny*, 118 Ind. 417, 4 L.R.A. 90, 21 N. E. 252.

24. Municipal corporations are created by the legislature, and they derive all their power from the source of their creation. *Rogers v. Burlington*, 3 Wall. 654, 18: 79 *Cited in People's Pass. R. Co. v. Memphis City R. Co.* 10 Wall. 52, 19 L. ed. 849—*Hitchcock v. Galveston*, 2 Woods, 280, Fed. Cas. No. 6532—*German Ins. Co. v. Manning*, 78 Fed. 903—*Palmer v. Cowdrey*, 2 Colo. 7—*Perry v. House of Refuge*, 63 Md. 23, 52 Am. Rep. 495—*Virginia Exch. Bank v. Lewis County*, 28 W. Va. 287.

25. Municipal corporations are established for purposes of local government, and, in the absence of specific delegation of power, cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. Rep. 562, 33: 887 *Cited in Kirsch v. Braun*, 153 Ind. 257, 53 N. E. 1082—*Wilkes County v. Call*, 122 N. C. 312, 44 L.R.A. 253, 31 S. E. 481—*Bardsley v. Sternberg*, 17 Wash. 249, 49 Pac. 499.

26. Municipal corporations are mere instrumentalities of the state, for the more convenient administration of local government, and their powers are such as the legislature may confer; and these may be enlarged, abridged, or entirely withdrawn at its pleasure. *Meriwether v. Garrett*, 102 U. S. 472, 26: 197

Distinguished in Tax Assessors v. State, 44 N. J. L. 421.

Cited in Amy v. Watertown, 130 U. S. 319, 32 L. ed. 952, 9 Sup. Ct. Rep. 530—*Travelers' Ins. Co. v. Oswego Twp.* 7 C. C. A. 678, 19 U. S. App. 321, 59 Fed. 67—*Forsyth v. Hammond*, 18 C. C. A. 179, 34 U. S. App. 552, 71 Fed. 446—*Peplin Twp. v. Sage*, 64 C. C. A. 172, 129 Fed. 660—*Hare v. Kennerly*, 83 Ala. 611, 3 So. 683—*Ex parte Wells*, 21 Fla. 319—*State ex rel. Hays v. Steunenberg*, 5 Idaho, 4, 45 Pac. 462—*State ex rel. Jameson v. Denny*, 118 Ind. 419, 4 L.R.A. 91, 21 N. E. 252—*State ex rel. Terre Haute v. Kolsem*, 130 Ind. 437, 14 L.R.A. 569, 20 N. E. 595—*State ex rel. White v. Barker*, 116 Iowa, 102, 57 L.R.A. 249, 93 Am. St. Rep. 222, 89 N. W. 204—*Lovejoy v. Foxcroft*, 91 Me. 371, 40 Atl. 141—*Reynolds v. Waterville*, 92 Me. 320, 42 Atl. 553—*Mt. Hope Cemetery v. Boston*, 158 Mass. 511, 35 Am. St. Rep. 515, 33 N. E. 695—*Ward v. Elizabeth City*, 121 N. C. 3, 27 S. E. 993—*Brockenbrough v. Water Comrs.* 134 N. C. 19, 46 S. E. 28—*State ex rel. Richards v. Cincinnati*, 52 Ohio St. 457, 27 L.R.A. 750, 40 N. E. 508—*Smith v. Westcott*, 17 R. I. 369, 13 L.R.A. 219, 22 Atl. 280—*Olliver v. Houston*, 93 Tex. 207, 22 Tex. Civ. App. 57, 54 S. W. 940—*Stafford County v. Luck*, 80 Va. 227—*Hornbrook v. Elm Grove*, 40 W. Va. 550, 28 L.R.A. 420, 21 S. E. 851—*South Morgantown v. Morgantown*, 49 W. Va. 731, 40 S. E. 15—*Richland County v. Richland Center*, 59 Wis. 599, 18 N. W. 497.

27. A municipal corporation, in the exer-

rise of all its duties, is but a department of the state, and its powers may be great or small, according as the legislature shall extend or contract the sphere of its action. *Barnes v. District of Columbia*, 91 U. S. 540. 23: 440

Cited in Kennedy v. Pawtucket, 24 R. I. 469, 53 Atl. 317.

28. A city is a political subdivision of the state, created for the convenient administration of the government, with powers more or less enlarged according to the requirements of the public, which may be increased or repealed at the will of the legislature. *Jefferson City Gaslight Co. v. Clark* (*New Orleans v. Clark*) 95 U. S. 644, 24: 521

Cited in Worcester v. Worcester Consol. Street R. Co. 196 U. S. 549, 49 L. ed. 595, 25 Sup. Ct. Rep. 327—*Brewis v. Duluth*, 3 McCrary, 224, 13 Fed. 335—*Marion County v. Coler*, 14 C. C. A. 306, 23 U. S. App. 699, 67 Fed. 64—*Huron v. Second Ward Sav. Bank*, 49 L.R.A. 541, 30 C. C. A. 46, 57 U. S. App. 593, 86 Fed. 280—*Johnson v. San Diego*, 109 Cal. 474, 30 L.R.A. 180, 42 Pac. 249—*State ex rel. Atty. Gen. v. Shawnee County*, 28 Kan. 435—*Agawam v. Hampden County*, 130 Mass. 530—*Wester v. Plymouth*, 62 N. H. 208—*McCully v. Board of Education*, 63 N. J. L. 20, 42 Atl. 776—*Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 85, 70 N. W. 77—*Adams v. Beloit*, 105 Wis. 381, 47 L.R.A. 448, 81 N. W. 869.

29. So far as municipal corporations are invested with subordinate legislative powers for local purposes, they are the mere instrumentalities of the state, for the convenient administration of their affairs, and are subject to legislative control. *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. Rep. 398. 29: 620

Cited in State ex rel. Jameson v. Denny, 118 Ind. 419, 4 L.R.A. 91, 21 N. E. 252.

30. The legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including that of taxation, provided its action does not impair the obligation of contracts of the corporation, by abrogating or lessening the means of their enforcement. *United States ex rel. Wolff v. New Orleans* (*Wolff v. New Orleans*) 103 U. S. 358, 26: 395
Cited in Edwards v. Williamson, 70 Ala. 152—*Rousseau v. New Orleans*, 35 La. Ann. 558—*State ex rel. Munday v. Assessors*, 43 N. J. L. 341—*State ex rel. Thompson v. Willey*, 46 N. J. L. 478.

Editorial notes.

[Powers and liabilities in epidemics. 26 L.R.A. 727.

Right of taxpayer to inspect books of municipality. 64 L.R.A. 418.

Power of municipality to limit its control or authority over street or other public ground as an incident of its acquisition of title or right therein. 9 L.R.A. (N. S.) 1045.]

Effect of change of class of city.

31. The corporate powers lawfully conferred upon the board of education of the city of Atchison, Kansas, when said city was a city of the second class, were not lost or destroyed by reason of the transition of

the city from a city of such class to a city of the first class. *Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. Rep. 706, 37: 573

Public and private phases of power.

32. While towns, cities, parishes, and counties are, in many respects, public corporations, they also involve some private interests. Per Story, J., in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4: 629
Cited in Whitfield v. Carrollton, 50 Mo. App. 102—*Bullmaster v. St. Joseph*, 70 Mo. App. 66—*Wooster v. Plymouth*, 62 N. H. 225—*Robinson v. New York & E. R. Co.* 27 Barb. 520—*Gooch v. Gregory*, 65 N. C. 144.

Delegation by municipality.

Delegation of Power to Municipality, see Constitutional Law, 156-158.

To Mayor, Reviewability of Question as to, see Appeal and Error, 2106.

33. A municipal corporation can delegate its ministerial work to agents. *Hitchcock v. Galveston*, 96 U. S. 341, 24: 659

Cited in Cass County v. Gibson, 46 C. C. A. 347, 107 Fed. 369—*United States ex rel. Kerr v. Ross*, 5 App. D. C. 253—*Jacksonville v. Ledwith*, 26 Fla. 163, 9 L.R.A. 77, 23 Am. St. Rep. 558, 7 So. 88—*Jacksonville v. Ledwith*, 26 Fla. 201, 9 L.R.A. 77, 23 Am. St. Rep. 558, 7 So. 885—*Schweiker v. Hussler*, 146 Ill. 432, 34 N. E. 1022—*Newcomb v. Indianapolis*, 141 Ind. 462, 28 L.R.A. 736, 40 N. E. 919—*Burge v. Rockwell City*, 120 Iowa, 496, 94 N. W. 1103—*Frantz v. Jacob*, 88 Ky. 534, 11 S. W. 654—*State ex rel. Pearson v. Hayes*, 61 N. H. 324—*Harcourt v. Asbury Park*, 62 N. J. L. 160, 40 Atl. 690—*Ecroyd v. Coggeshall*, 21 R. I. 7, 79 Am. St. Rep. 741, 41 Atl. 200—*Green v. Ward*, 82 Va. 329—*McCrowell v. Bristol*, 89 Va. 670, 20 L.R.A. 661, 16 S. E. 867—*Harrisonburg v. Roller*, 97 Va. 586, 34 S. E. 523.

— Editorial notes.

[Delegation by city council of power to determine width, grade, material, etc., of streets, etc. 20 L.R.A. 653.

Delegation of municipal powers as to license, franchise, and buildings. 20 L.R.A. 721.]

Exercise of powers.

34. A municipal corporation can execute its laws only by its agents. *Clark v. Washington*, 12 Wheat. 40, 6: 544

Cited in People v. Hoge, 55 Cal. 623—*State ex rel. Pearson v. Hayes*, 61 N. H. 324.

35. A municipal corporation can exercise powers conferred upon it by the legislature, through its agents, without the formality of a resolution or ordinance by its council. *Fanning v. Gregoire*, 16 How. 524, 14: 1043
Cited in Gottfried v. Miller, 104 U. S. 527, 26 L. ed. 853—*Baltimore v. Weatherby*, 52 Md. 451—*Long v. Duluth*, 49 Minn. 288, 32 Am. St. Rep. 547, 51 N. W. 918.

36. A municipal corporation must conform to the enabling act in executing a power which is expressly conferred by the legislature and is not incidental to its existence. *Fowle v. Alexandria*, 3 Pet. 398, 7: 719
Cited in Kyle v. Matin, 8 Ind. 38—*Nicholson v. Detroit*, 129 Mich. 249, 56 L.R.A. 602, 88 N. W. 695—*Caledonia County Grammar School v. Burt*, 11 Vt. 642.

Legislative ratification of irregular action.

37. Laws to obviate mistakes and irregularities in the proceedings of municipal corporations, when they do not impair any contract or injuriously affect the rights of third persons, are within the legislative authority. *Bissell v. Jeffersonville*, 24 How. 287,

16: 664

Cited in Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 668, 22 L. ed. 462—*Jones v. Pensacola*, Fed. Cas. No. 7,488—*Sweatt v. Boston H. & E. R. Co.* 5 Nat. Bankr. Reg. 241, 3 Cliff. 345, Fed. Cas. No. 13,684.

38. Ratification by a legislature of the loan of the credit of a city is equivalent to original authority. *Lee County v. Rogers*, 7 Wall. 181,

19: 160

b. Legislative Functions; Ordinances.

Disability to Limit Power by Contracts, see *infra*, 53.

Federal Question as to Construction of, see Appeal and Error, III. d. 9, *h* (1) (c).

Reviewability of State Decision Construing, see Appeal and Error, III. d. 9, *j*. (2) (b).

Reviewability of Question as to Power to Adopt, see Appeal and Error, 2107.

Reviewability of Question as to Violation, see Appeal and Error, 2108.

Federal Question as to, see Appeal and Error, 1583, 2146.

Discrimination against Chinese in Enforcement of Ordinance against Gambling, see Appeal and Error, 3405.

As State Statute, see Appeal and Error, 1655.

Invalid Ordinance Reducing Water Rates, as Cloud on Title, see Cloud on Title, 21.

Delegation to Municipality of Power to Enact Ordinances, see Constitutional Law, 156b.

Propriety of Injunctive Relief against Acts of Municipality, see Injunction, 122-132.

Disability of Courts to Restrain Enactment of Ordinances, see Injunction, 126.

Ordinance for License, see License, II.

Municipal Power to Declare Structure a Nuisance, see Nuisances, 8, 9.

Power to Abate Nuisance, see Nuisances, 31.

Ordinance for Construction of Railroad Fence, see Railroads, 14.

Ordinance Granting or Regulating Street Railway Franchise, see Street Railways, I.

Summary Proceeding for Breach of Ordinance, see Summary Proceedings.

Validity generally.

Federal Question as to Invalidity under State Constitution, see Appeal and Error, 2159.

Validity of Bonds Issued under Ordinance not Properly Published or Recorded, see Bonds, 343.

Denial of Equal Protection and Privileges by, see Constitutional Law, IV. a.

Violation of Constitutional Provision as to Due Process of Law, see Constitutional Law, IV. b.

Due Process in Limiting Height of Buildings, see Constitutional Law, 681.

Police Power as to. see Constitutional Law, 859, 866, 884, 889, 898.

Ordinances Impairing Obligation of Contract, see Constitutional Law, IV. g. 4.

Ordinance as a Law Within Prohibition Against Impairing Contract Obligation, see Constitutional Law, 1031a-1031c.

Ordinance as Contract Within Prohibition Against Impairment, see Constitutional Law, 1074.

Ordinance as to Sale of Liquor, see Constitutional Law, 351.

Estoppel of Municipality to Deny, see Estoppel, 108.

Injunction against Prosecution under Void Ordinance, see Injunction, 83.

Ordinances Regulating Liquor Traffic, see Intoxicating Liquors, 4.

Laches in Attacking Validity, see Limitations of Actions, 88.

Necessity of Having Interested Parties Present in Proceeding to have Ordinance Declared Void, see Parties, 128.

39. Courts cannot inquire into the motives which prompted a municipal ordinance, except as they may be disclosed on its face or inferable from its operation. *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28: 1145

Cited in New Orleans v. Warner, 175 U. S. 146, 44 L. ed. 109, 20 Sup. Ct. Rep. 44—*Farmers' Loan & T. Co. v. Chicago*, P. & S. R. Co. 39 Fed. 155—*Donald v. Scott*, 74 Fed. 861—*Dobbins v. Los Angeles*, 139 Cal. 184, 96 Am. St. Rep. 95, 72 Pac. 970—*Liggett v. Klowa County*, 6 Colo. App. 274, 40 Pac. 475—*State v. Blake*, 69 Conn. 75, 36 Atl. 1019—*Morse v. Westport*, 136 Mo. 292, 37 S. W. 932—*People v. Arensburg*, 103 N. Y. 401, 57 Am. Rep. 741, 8 N. E. 736—*Hutton v. Webb*, 124 N. C. 758, 59 L.R.A. 44, 33 S. E. 169—*Philadelphia v. Brabender*, 201 Pa. 578, 58 L.R.A. 221, 51 Atl. 374—*State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 35, 17 L.R.A. 864, 25 Atl. 246—*Tilly v. Mitchell & L. Co.* 121 Wis. 11, 105 Am. St. Rep. 1007, 98 N. W. 969.

—Editorial notes.

Validity of ordinances. 41: 519
[Discrimination by municipality between its own residents and other residents of same state. 16 L.R.A. 49.]

Vote of common council or similar body, as affected by personal interest of members. 18 L.R.A. 367.

Validity of ordinance as to street parades. 19 L.R.A. 858.]

Force and effect.

State Construction of Ordinances as Binding on Federal Courts, see Courts, 1832, 1833.

Construction of Ordinance Granting Street Railway Franchise, see Street Railways, 2.

40. When city ordinances are passed under the supposed authority of a legislative act, their provisions become the law of the state. *Murray v. Charleston*, 96 U. S. 432, 24: 760

Cited in *Antoni v. Greenhow*, 107 U. S. 795, 27 L. ed. 478, 2 Sup. Ct. Rep. 91—*Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 266, 38 L. ed. 967, 13 Sup. Ct. Rep. 90—*Iron Mountain R. Co. v. Memphis*, 37 C. C. A. 424, 96 Fed. 126—*Mercantile Trust & D. Co. v. Collins Park & Belt R. Co.* 99 Fed. 815—*Badger v. New Orleans* (State ex rel. *Badger v. New Orleans*) 49 La. Ann. 843, 37 L.R.A. 555, 21 So. 870—*Canal Co.'s Case*, 83 Md. 630, 35 Atl. 354.

Exercise by resolution or ordinance.

Resolutions or Ordinances as Proper Mode of Assenting to Contract, see *infra*, 73.

41. Where the charter of a city commits the decision of a matter to the council, and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by an ordinance. *Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. Rep. 706, 37: 573

Cited in *Swan v. Arkansas City*, 61 Fed. 481—*Illinois Trust & Sav. Bank v. Arkansas City*, 34 L.R.A. 527, 22 C. C. A. 185, 40 U. S. App. 257, 76 Fed. 286—*Ogden City v. Weaver*, 47 C. C. A. 490, 108 Fed. 569—*Morristown v. East Tennessee Teleph. Co.* 53 C. C. A. 135, 115 Fed. 307—*Holst v. Savannah Electric Co.* 131 Fed. 942—*Pollok v. San Diego*, 118 Cal. 596, 50 Pac. 769—*Denver v. Webber*, 15 Colo. App. 517, 63 Pac. 804—*People ex rel. Conlon v. Mount*, 186 Ill. 573, 58 N. E. 360—*Smith v. State*, 64 Kan. 733, 68 Pac. 641—*McGavock v. Omaha*, 40 Neb. 82, 58 N. W. 543—*Noel v. San Antonio*, 11 Tex. Civ. App. 585, 33 S. W. 263.

c. Particular Subjects of Municipal Concern.

42. That the council of a city has legislative powers in regard to police of the city is admitted. *Fanning v. Gregoire*, 16 How. 524, 14: 1043
Cited in *State ex rel. Pearson v. Hayes*, 61 N. H. 332.

Editorial notes.

Municipal drainage of surface water.

41: 837

[Power to prescribe fire limits. 12 L.R.A. 150.]

For what purposes appropriations may be made by. 14 L. R. A. 474.

Power as to nuisance. 36 L.R.A. 593.

As to buildings as nuisances. 38 L.R.A. 161.

As to nuisance affecting health and safety. 38 L.R.A. 305.

As to nuisances affecting trade or business. 38 L.R.A. 640.

As to nuisance affecting morals and decency. 39 L.R.A. 520.

As to smoke nuisance. 39 L. R.A. 551.

As to nuisances of street railway or electrical company on street. 39 L.R.A. 609.

As to nuisances affecting highways or waters. 39 L.R.A. 649.

Right of municipality to require theater

to pay for services of firemen performed at the theater or place of exhibition. 11 L.R.A. (N.S.) 700.]

Streets and servitudes or franchises therein.

Use of Streets by Hackmen, see *Carrriers*, 212, 213.

Presumption of License to Leave Area Open and Unguarded, see *Evidence*, 238.

Power of Municipality Superior to Injunction, see *Injunction*, 127.

Power to Establish Streets in Town Sites on Public Lands, see *Public Lands*, 595.

Right to Charge Telegraph Company for Use of Streets, see *Telegraphs*, 9.

43. It is within the discretion of the common council to determine whether the public exigencies require that the grade of a street be so changed as to cross a railroad at a level. *Wabash R. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. Rep. 748, 42: 87
Cited in *Field v. Barber Asphalt Paving Co.* 194 U. S. 625, 48 L. ed. 1155, 24 Sup. Ct. Rep. 784.

44. A city has a right to charge a telegraph company for the use of its streets and public places for telegraph poles erected therein. *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 13 Sup. Ct. Rep. 485, 37: 380
Cited in *Postal Teleg. Cable Co. v. Baltimore*, 156 U. S. 210, 39 L. ed. 401, 15 Sup. Ct. Rep. 356—*Missouri ex rel. Laclede Gaslight Co. v. Murphy*, 170 U. S. 99, 42 L. ed. 964, 18 Sup. Ct. Rep. 505—*Hopkins v. United States*, 171 U. S. 594, 43 L. ed. 297, 10 Sup. Ct. Rep. 40—*Walla Walla v. Walla Walla Water Co.* 172 U. S. 17, 43 L. ed. 348, 19 Sup. Ct. Rep. 77—*United States v. Hopkins*, 82 Fed. 540—*Richmond v. Southern Bell Teleph. & Teleg. Co.* 28 C. C. A. 665, 42 U. S. App. 686, 85 Fed. 25—*Toledo v. Western U. Teleg. Co.* 52 L.R.A. 733, 46 C. C. A. 115, 107 Fed. 14—*Western U. Teleg. Co. v. Pennsylvania R. Co.* 120 Fed. 366—*Postal Teleg. Cable Co. v. Baltimore*, 79 Md. 512, 24 L.R.A. 167, 29 Atl. 819—*State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 571, 42 L.R.A. 127, 46 S. W. 981—*Plattsburg v. Peoples' Teleph. Co.* 88 Mo. App. 313—*Newport Illuminating Co. v. Tax Assessors*, 19 R. I. 640, 36 L.R.A. 269, 36 Atl. 426.

45. The court cannot assume that a charge of \$5 per pole made to a telegraph company for the use of the streets of a city for its poles is excessive, so as to make the ordinance of the city imposing the charge unreasonable and void. *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 13 Sup. Ct. Rep. 485, 37: 380

46. The power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. Rep. 493, 45: 679

Danville Water Co. v. Danville, 180 U. S. 619, 21 Sup. Ct. Rep. 505, 45: 696

Cited in *Owensboro v. Owensboro Waterworks*

Co. 191 U. S. 371, 48 L. ed. 224, 24 Sup. Ct. Rep. 82—*Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 208, 48 L. ed. 411, 24 Sup. Ct. Rep. 241.

47. The power to control streets and highways, conferred upon the board of trustees for the town of Lake View, in Cook county, by Ill. act of March 5, 1867, § 7, includes the right to authorize the use of such streets and highways for street railway purposes. *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. Rep. 427, 50: 801

— Editorial notes.

[Power to make use of property for particular purpose or in a particular manner, conditional upon consent of neighbors. 8 L.R.A.(N.S.) 978.

Power of municipality to limit its control or authority over street or other public ground as an incident of its acquisition of title or right therein. 9 L.R.A.(N.S.) 1045.]

Railroads.

See also *supra*, 43.

48. Although an ordinance prescribes that a fence along a railroad right of way, over public grounds, is to be of such a height as the common council may direct, the failure of the common council to direct its height does not excuse the railroad company from the duty of its construction. *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 4 Sup. Ct. Rep. 369, 28: 410

49. An ordinance of a city granting to a railroad company the right of way over public grounds for tracks, providing the company shall erect fences to secure persons and property from danger, is not merely a contract, but is also a municipal regulation, and, if duly authorized by the legislature, has the force of law within the limits of the city. *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 4 Sup. Ct. Rep. 369, 28: 410

Otted in Doran v. Flood, 47 Fed. 544—*Chicago General R. Co. v. Chicago City R. Co.* 62 Ill. App. 522—*Shelbyville v. Cleveland, C. C. & St. L. R. Co.* 146 Ind. 72, 44 N. E. 920—*State ex rel. New Orleans v. New Orleans & C. R. Co.* 37 La. Ann. 592—*Badger v. New Orleans (State ex rel. Badger v. New Orleans)* 49 La. Ann. 847, 37 L.R.A. 557, 21 So. 870—*Bott v. Pratt*, 33 Minn. 326, 53 Am. Rep. 47, 23 N. W. 237—*Fath v. Tower Grove & L. R. Co.* 105 Mo. 548, 13 L.R.A. 78, 16 S. W. 913—*Jackson v. Kansas City Ft. S. & M. R. Co.* 157 Mo. 640, 80 Am. St. Rep. 650, 58 S. W. 32—*Jelly v. Pieper*, 44 Mo. App. 385—*Mitchell v. Raleigh Electric Co.* 129 N. C. 170, 55 L.R.A. 400, 85 Am. St. Rep. 735, 39 S. E. 801—*Schmalzried v. White*, 97 Tenn. 37, 32 L.R.A. 784, 36 S. W. 393—*State ex rel. Rose v. Superior Court*, 105 Wis. 674, 48 L.R.A. 828, 81 N. W. 1046.

50. Under a law of a state conferring power upon a city council to require railroad companies to provide protection against injury to persons and property in the use of such railroads, an ordinance of the city requiring the erection of a fence or other barrier between the railroad tracks and the public highways and parks of the city is a reasonable provision, clearly within the

limits of such authority. *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 4 Sup. Ct. Rep. 369, 28: 410

Cited in Joy v. St. Louis, 138 U. S. 34, 34 L. ed. 853, 11 Sup. Ct. Rep. 243—*Deserant v. Cerillos Coal R. Co.* 178 U. S. 420, 44 L. ed. 1133, 20 Sup. Ct. Rep. 967—*Pittsburg, C. & St. L. R. Co. v. Hood*, 30 C. C. A. 427, 94 Fed. 624—*Wadsworth v. Union P. R. Co.* 18 Colo. 611, 23 L.R.A. 817, 36 Am. St. Rep. 309, 33 Pac. 515—*Rosse v. St. Paul & D. R. Co.* 68 Minn. 219, 37 L.R.A. 592, 64 Am. St. Rep. 472, 71 N. W. 20—*Fath v. Tower Grove & L. R. Co.* 105 Mo. 548, 13 L.R.A. 74, 16 S. W. 913—*Barney v. Hannibal & St. J. R. Co.* 126 Mo. 388, 26 L.R.A. 852, 28 S. W. 1069.

— Editorial notes.

[Compelling railroads to light tracks. 41 L.R.A. 422.

Compelling change of grade of railway. 70 L.R.A. 850.]

Street railways.

Street Railway Tunnels Beneath Navigable Rivers, see *infra*, 57.

Equity Jurisdiction to Restrain Enforcement of Ordinance Fixing Street Railway Rates, see *Equity*, 84.

51. A reservation, in an ordinance granting a street railway franchise, of the right from time to time to make such further rules, orders, or regulations as to the common council may seem proper, does not include the right on the part of the city at its own pleasure to reduce the rates of fare agreed upon in such ordinance. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 22 Sup. Ct. Rep. 410, 46: 592

52. An ordinance renewing, upon additional conditions, the consent of a municipality to the construction and operation of a street railway through the city streets, is not invalid because by such ordinance the term of consent is extended beyond the then limit of the corporate life of such company. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 22 Sup. Ct. Rep. 410, 46: 592

53. A municipal contract which secures to the public for a term of years the benefit of a single fare of not more than 5 cents for a continuous passage over the whole length, or any portion of consolidated and extended street railway lines does not violate the provision of *Bates's (Ohio) Anno. Stat. 1897, § 2502*, that a municipal corporation shall not, during the term of a street railway grant, or renewal thereof, release the grantee from any obligation or liability thereby imposed, because such contract deprives the municipality of the right to regulate fares over a portion of the consolidated lines, reserved in an ordinance adopted before the consolidation, granting a renewal franchise to the corporation which then owned such portion of the lines. *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 24 Sup. Ct. Rep. 756, 48: 1102

54. The right to renew street railway grants, conferred upon municipal councils by *Bates's (Ohio) Anno. Stat. 1897, § 2401*, may be exercised prior to the expiration of

the original grant, although the language of such section is that "the council may renew any such grant at its expiration." *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 24 Sup. Ct. Rep. 756, 48: 1102

55. The acceptance of a bid already made when the successful bidder defaults is necessitated by the provision of Cal. act March 11, 1901, § 5 for the granting of a street railway franchise by a municipality to the "next highest bidder" therefore in case the successful bidder fails to make the requisite deposit of the amount of his bid within twenty-four hours after the sale. *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 24 Sup. Ct. Rep. 586, 48: 896

— Editorial notes.

[Validity of ordinance requiring conductor on street car. 15 L.R.A. 604.

Regulation of the carriage of passengers by street railroads. 19 L.R.A. 570.

Imposing conditions of assent to. 36 L. R.A. 33.]

Power over street railways. 43: 67

Harbors and wharves.

Tonnage Tax, see Commerce, 555, 566-570.

Wharfage, see Wharves, 20, 24.

56. A city ordinance may prescribe at what wharf a vessel may lie and for how long; when she may load and unload; where she may anchor in the harbor and for what time; and what light she may display at night, where the regulations do not conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States. *The James Gray v. The John Fraser* (Cushing v. The John Fraser) 21 How. 184, 16: 106

Cited in Chicago & N. W. R. Co. v. Fuller, 17 Wall. 568, 21 L. ed. 714—*Gulf, C. & S. F. R. Co. v. Hefey*, 158 U. S. 104, 39 L. ed. 912, 15 Sup. Ct. Rep. 802—*Hennington v. Georgia*, 183 U. S. 311, 41 L. ed. 171, 16 Sup. Ct. Rep. 1086—*United States v. St. Louis & M. Valley Transp. Co.* 184 U. S. 255, 46 L. ed. 527, 22 Sup. Ct. Rep. 350—*The E. A. Packer*, 10 Ben. 531, Fed. Cas. No. 4,241—*The Lady Franklin*, 2 Low. Dec. 223, Fed. Cas. No. 7,984—*United States v. The Ohio*, 9 Phila. 461, Fed. Cas. No. 15,015—*Green v. The Helen*, 5 Hughes, 122, 1 Fed. 922—*Ralli v. Troop*, 37 Fed. 891—*The Nettle Sundberg*, 100 Fed. 888—*Clement v. Metropolitan West Side Elev. R. Co.* 59 C. C. A. 291, 123 Fed. 273—*Sherlock v. Alling*, 44 Ind. 196—*State ex rel. Belden v. Fagan*, 22 La. Ann. 556—*State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 539, 2 Inters. Com. Rep. 65, 14 Atl. 604—*Roosevelt v. Godard*, 52 Barb. 552.

57. The city of Chicago was empowered, without the approval of the Secretary of War, to require the lowering of a street railway tunnel under the Chicago river to give a clear depth of 21 feet of water above it, or, in the alternative, to compel its removal, by the declaration in the river and harbor act of March 3, 1899 (30 Stat. at L. 1156, chap. 425), that all the work of removing and reconstructing bridges and piers

and lowering tunnels, necessary to permit a practicable channel with the prescribed "project" depth of 21 feet in the Chicago river, should be done by the city without expense to the United States. *West Chicago Street R. Co. v. Illinois*, 201 U. S. 506, 26 Sup. Ct. Rep. 518, 50: 845
Cited in Fair Haven & W. R. Co. v. New Haven, 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. Rep. 74—*Union Bridge Co. v. United States*, 204 U. S. 398, 51 L. ed. 538, 27 Sup. Ct. Rep. 367.

Markets.

58. By the law of Louisiana, the regulation and control of markets are matters of municipal police, and may be entrusted by the legislature to a city council, to be exercised as the public health and convenience may require. *Natal v. Louisiana*, 139 U. S. 621, 11 Sup. Ct. Rep. 636, 35: 288
Cited in New Orleans v. Faber, 105 La. 211, 53 L.R.A. 166, 83 Am. St. Rep. 232, 29 So. 507.

59. The ordinance of the city of New Orleans prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of fine and imprisonment, is within the authority constitutionally conferred upon the city council by the legislature of the state. *Natal v. Louisiana*, 139 U. S. 621, 11 Sup. Ct. Rep. 636, 35: 288

60. The power to establish rules and regulations with respect to the Washington Market Company, incorporated by the act of Congress of May 20, 1870, is given by § 16 to the city government, and not to the market company. *Washington Market Co. v. District of Columbia*, 172 U. S. 361, 19 Sup. Ct. Rep. 218, 43: 478

— Editorial note.

[Power to regulate market. 24 L.R.A. 584.]

Regulation of occupations.

Licenses Generally, see License, II.

Municipal License as Affecting Commerce, see Commerce, 264, 265, 281, 285-287, 301-302.

Municipal Taxation of Interstate Bridge, as Affecting Commerce, see Commerce, 308.

Municipal Wharfage Charges as Regulation of Commerce, see Commerce, 347, 349-351.

61-2. The ordinance of the city and county of San Francisco prohibiting the carrying on of public laundries and wash houses, within certain prescribed limits of the city and county, from 10 o'clock at night until 6 o'clock in the morning, is purely a police regulation, within the competency of any municipality possessed of the ordinary powers to make. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28: 923
Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28: 1145
Cited in Charlotte, C. & A. R. Co. v. Gibbs, 142 U. S. 394, 35 L. ed. 1055, 12 Sup. Ct.

Rep. 255—*Lawton v. Steele*, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499—*Holden v. Hardy*, 169 U. S. 383, 42 L. ed. 788, 18 Sup. Ct. Rep. 383—*Austin v. Tennessee*, 179 U. S. 349, 45 L. ed. 229, 21 Sup. Ct. Rep. 132—*Fischer v. St. Louis*, 194 U. S. 371, 48 L. ed. 1024, 24 Sup. Ct. Rep. 673—*Electric Improv. Co. v. San Francisco*, 13 L.R.A. 134, 45 Fed. 595—*Jew Ho v. Williamson*, 103 Fed. 24—*McDonald v. State*, 81 Ala. 284, 60 Am. Rep. 158, 2 So. 829—*Youngblood v. Birmingham Trust & Sav. Co.* 95 Ala. 526, 20 L.R.A. 61, 36 Am. St. Rep. 245, 12 So. 579—*Hawkins v. Roberts & Son*, 122 Ala. 142, 27 So. 327—*Ex parte Mount*, 66 Cal. 450, 6 Pac. 78—*Ex parte White*, 67 Cal. 103, 7 Pac. 186—*Re Yick Wo*, 68 Cal. 305, 58 Am. Rep. 12, 9 Pac. 139—*Re Hang Kie*, 69 Cal. 152, 10 Pac. 327—*Ex parte Flske*, 72 Cal. 128, 13 Pac. 310—*McCloskey v. Kreling*, 76 Cal. 512, 18 Pac. 433—*Ex parte Sing Lee*, 96 Cal. 357, 24 L.R.A. 196, 31 Am. St. Rep. 218, 31 Pac. 245—*Dobbins v. Los Angeles*, 139 Cal. 186, 96 Am. St. Rep. 95, 72 Pac. 970—*Chicago v. Gunning System*, 114 Ill. App. 385—*Eastman v. State*, 109 Ind. 279, 58 Am. Rep. 400, 10 N. E. 97—*State ex rel. Clark v. Haworth*, 122 Ind. 506, 7 L.R.A. 254, 23 N. E. 946—*Jay County v. Taylor*, 123 Ind. 152, 7 L.R.A. 161, 23 N. E. 752—*Parks v. State*, 159 Ind. 225, 59 L.R.A. 196, 64 N. E. 362—*Missouri P. R. Co. v. Merrill*, 40 Kan. 409, 19 Pac. 793—*Schoolcraft v. Louisville & N. R. Co.* (Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.) 92 Ky. 241, 14 L.R.A. 587, 17 S. W. 567—*Singer v. State*, 72 Md. 465, 8 L.R.A. 551, 19 Atl. 1044—*State v. Boehm*, 92 Minn. 378, 100 N. W. 95—*Knapp, Stout & Co. Co. v. St. Louis*, 156 Mo. 356, 56 S. W. 1102—*Wenham v. State*, 65 Neb. 406, 58 L.R.A. 825, 91 N. W. 421—*State v. Pennoyer*, 65 N. H. 116, 5 L.R.A. 711, 18 Atl. 878—*Sturtevant v. Armsby Co.* 66 N. H. 559, 49 Am. St. Rep. 627, 23 Atl. 368—*Grossman v. Caminez*, 79 App. Div. 20, 79 N. Y. Supp. 900—*People v. Clipperly*, 37 Hun. 328—*State v. Ray*, 131 N. C. 822, 60 L.R.A. 636, 92 Am. St. Rep. 795, 42 S. E. 960—*State v. Gardner*, 58 Ohio St. 609, 41 L.R.A. 691, 65 Am. St. Rep. 785, 51 N. E. 136—*Com. v. Gillespie*, 8 Lanc. L. Rev. 70—*South Bethlehem v. Hackett*, 12 Lanc. L. Rev. 199—*Wormser v. Easton*, 6 Northampton Co. Rep. 131—*Wilkes-Barre v. Garabed*, 11 Pa. Super. Ct. 376—*Com. v. Powell*, 1 Pa. Co. Ct. 104—*Powell v. Com.* 114 Pa. 277, 60 Am. Rep. 350, 7 Atl. 913—*Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 12, 44 S. W. 936—*Ex parte Kennedy*, 42 Tex. Crim. Rep. 148, 51 L.R.A. 271, 58 S. W. 129—*Isaacs v. Richmond*, 90 Va. 32, 17 S. E. 760—*Norfolk & W. R. Co. v. Com.* 93 Va. 762, 34 L.R.A. 109, 24 S. E. 837.

— Editorial notes.

[Regulating junk dealers, etc. 32 L.R.A. 116.

Power of municipal corporation to make right to transact certain business dependent upon consent of municipal authorities. 9 L.R.A.(N.S.) 659.]

d. Contracts Generally.

Power of Officers Respecting Contract, see *infra*, 165-168.

Power to Purchase Back its Bonds, see *Bonds*, 170.

Ratification by Municipality of Bonds Issued, see *Bonds*, 456-460.

Prohibition Against Impairing Obligation of, see *Constitutional Law*, IV. g.

Between City and Railroad Company as to Issuance of City Bonds, see *Contracts*, 289.

Contracts for Erection of City Building, see *Contracts*, 680, 681.

Meeting of Minds on Contract, see *Contracts*, 682, 683.

Mistake in Proposals by Bidders, see *Contracts*, 685.

Power of Courts to Set Aside, see *Courts*, 250.

Contracts of District of Columbia, see *District of Columbia*, VII.

Conclusiveness of Judgment as to Validity of, see *Judgment*, 485.

Allegations in Action on Contract, see *Pleading*, 437.

Contracts for Public Improvements, see *Public Improvements*.

Liability of Municipality on Contract, see *Public Improvements*, 5.

Ratification of Contract by Town, see *Towns*, 5.

See also *Contracts*, 693, 694.

63. A municipal corporation cannot abridge its own legislative power by contract. *Goszler v. Georgetown*, 6 Wheat. 593, 5: 339

Distinguished in Armstrong v. St. Louis, 3 Mo. App. 158.

Cited in Baltimore Trust & G. Co. v. Baltimore, 64 Fed. 163—*Daly v. Harris*, 33 Ga. Supp. 50—*Snouffer v. Cedar Rapids & M. C. R. Co.* 118 Iowa, 307, 92 N. W. 79—*State ex rel. McClellan v. Graves*, 19 Md. 378, 81 Am. Dec. 639—*Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 275, 20 L.R.A. 132, 26 Atl. 510—*State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 575, 56 Am. St. Rep. 515—*State ex rel. Pearson v. Hayes*, 61 N. H. 332—*Dow v. Northern R. Co.* 67 N. H. 47, 36 Atl. 510—*Corning v. Greene*, 23 Barb. 58—*Britton v. New York*, 21 How. Pr. 257—*Gatlin v. Walton*, 60 N. C. (1 Winst. L.) 340—*Grant v. Hyde Park*, 67 Ohio St. 175, 65 N. E. 891—*Burroughs v. Peyton*, 16 Gratt. 489—*State ex rel. Ginn v. Wilson*, 121 Wis. 525, 99 N. W. 336.

64. A contract to pave streets for a municipality, for which bonds were to be given, and taxes to be collected and paid over upon them, will not be rescinded for failure to pay over such taxes. More appropriate relief is to provide for payment out of future collections of taxes. *Loudon v. Taxing Dist. of Shelby County*, 104 U. S. 771, 26: 923

Editorial notes.

[Municipal contracts for work or articles which embody a patented invention. 18 L. R.A. 45.

Limitation of the doctrine of ultra vires. 19 L.R.A. 619.

Rights of lowest bidder on contracts of. 26 L.R.A. 707.

Statutes legalizing contracts of. 27 L.R.A. 696.]

Contracts within power.

What Constitutes Borrowing Money, see *infra*, 78.

Estoppel to Deny Power to Make, see Estoppel, 248.

65. A mere municipal corporation has no power to make commercial paper of any kind, unless such power is expressly conferred by law or clearly implied from some power expressly given which cannot fairly be exercised without it. *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937, 30: 885

Cited in *Brenham v. German American Bank*, 144 U. S. 185, 36 L. ed. 395, 12 Sup. Ct. Rep. 559—*Francis v. Howard County*, 50 Fed. 58—*West Plains Twp. v. Sage*, 16 C. C. A. 563, 32 U. S. App. 725, 69 Fed. 952—*Lehman v. San Diego*, 27 C. C. A. 670, 48 U. S. App. 681, 83 Fed. 671—*Watson v. Huron*, 38 C. C. A. 266, 97 Fed. 450—*Wilkes County v. Call*, 123 N. C. 312, 44 L.R.A. 253, 31 S. E. 481.

66. No implication of such power arises from authority to appropriate and raise by taxation money to aid in the construction of a railroad. *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937, 30: 885

67. An agreement by commissioners of a sinking fund who form a corporation distinct from the city and the city attorney with certain banks, to the effect that a dispute between them as to which no litigation is yet pending concerning liability for taxes shall abide the result of a pending litigation with another bank, is not binding either upon the commissioners or the city, in the absence of any grant authority to the commissioners or the city attorney to make such contract. *Stone v. Bank of Commerce*, 174 U. S. 412, 19 Sup. Ct. Rep. 747, 43: 1028

Cited in *Fidelity Trust & Safety Vault Co. v. Louisville*, 174 U. S. 431, 43 L. ed. 1035, 19 Sup. Ct. Rep. 875—*Louisville v. Bank of Louisville*, 174 U. S. 442, 43 L. ed. 1040, 19 Sup. Ct. Rep. 753—*Smith v. Epping*, 69 N. H. 560, 45 Atl. 415.

68. Authority of the city of New Orleans to issue warrants in settlement of the damages claimed by a ship canal company will be deemed to have been conferred by La. act February 24, 1876, empowering the city to "transact and contract" for the purchase and settlement of any rights, franchises, and privileges of such company and to purchase its dredging plant, in view of the long acquiescence of the city in this construction of that act, and of the impossibility of distinguishing between these warrants and such as were issued in payment of the plant. *New Orleans v. Warner*, 180 U. S. 199, 21 Sup. Ct. Rep. 353, 45: 493

69. The issue of warrants by the city of New Orleans, as a compromise of drainage taxes collected by the city and misappropriated, was authorized by La. act February 24, 1876, providing for the purchase and settlement by the city of all or any rights arising in favor of the Mississippi & Mexico Gulf Ship Canal Company, and by an ordinance providing for "the full settlement of all claims for damages and to secure the absolute sale, relinquishment, and transfer to

the city of New Orleans of all rights" arising in favor of the canal company. *New Orleans v. Warner*, 180 U. S. 199, 21 Sup. Ct. Rep. 353, 45: 493

Contracts creating debt.

Revisory Power of Courts, see Courts, 249.

70. The validity of a contract of a municipal corporation, which can only be fulfilled by resort to taxation, depends on the power to levy the tax for that purpose. *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22: 455

Cited in *Farmer's Loan & T. Co. v. Sioux Falls*, 131 Fed. 903—*Eufaula v. McNab*, 67 Ala. 591, 42 Am. Rep. 118—*Manning v. Devils Lake (N. D.)* 65 L.R.A. 189, 99 N. W. 51—*State ex rel. Griffith v. Osawkee Twp.* 14 Kan. 420—*Hope v. Board of Liquidation*, 43 La. Ann. 780, 9 So. 754—*Hammond v. Place*, 116 Mich. 631, 72 Am. St. Rep. 543, 74 N. W. 1002—*Raton Waterworks Co. v. Raton*, 9 N. M. 88, 49 Pac. 898—*Gould v. Paris*, 68 Tex. 516, 4 S. W. 650.

Subcontracts.

Right of Subcontractor for Gas Works to Enjoin Municipality from Enforcing Ordinance Declaring their Erection to be Illegal, see Injunction, 6.

See also *infra*, 77.

71. It is against public policy to permit municipal corporations, in the administration of their affairs relating to the construction of public works, to be embarrassed by subcontracts between their contractors and third persons, to which they have never assented. *Delaware County v. Diebold Safe & Lock Co.* 133 U. S. 473, 10 Sup. Ct. Rep. 399, 33: 674

Requisites and form.

Presumption of Assent of Electors, see Evidence, 482.

Contract by Town, see Towns, 4.

72. If a city has power to bind itself by substituting a new liability for a canceled one, it may do so by any instrument which affords evidence of the debt. *Little Rock v. Merchants' Nat. Bank*, 98 U. S. 308, 25: 108

Cited in *Lovejoy v. Foxcroft*, 91 Me. 377, 40 Atl. 141—*Lee v. Jefferson County*, 62 How. Pr. 207.

73. The authorized body of a municipal corporation may bind it by an ordinance in favor of private persons interested therein, which may, if so intended, operate as a contract; or they may bind it by a resolution, or by a vote clothe its officers with power to act for it. *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631, 23: 631

Cited in *Bates County v. Winters*, 97 U. S. 89, 24 L. ed. 934—*Cass County v. Gillett*, 100 U. S. 594, 25 L. ed. 587—*Wade v. Walnut*, 105 U. S. 3, 26 L. ed. 1028—*Bates County v. Winters*, 112 U. S. 327, 28 L. ed. 745, 5 Sup. Ct. Rep. 157.

74. The City of Boston was bound by a contract made by its water board, without

first advertising for proposals by bidders as required by an ordinance of the city, where it was made by special authority of the city council and mayor. *Worthington v. Boston*, 152 U. S. 695, 14 Sup. Ct. Rep. 757, 38: 603

Modification and discharge.

Right to Rescind Contract for Failure of Municipality to Apply Taxes as Agreed, see *supra*, 64.

Of District of Columbia, see *District of Columbia*, VII.

75. Where a contract is made by a municipality in the mode specifically provided by local law, by advertising for proposals, etc. it cannot be substantially modified by the officers of the municipality without its assent to the change. *Memphis v. Brown*, 20 Wall. 289, 22: 264

76. A city cannot claim that a bidder who has made a mistake in his proposals did not intend to give the executive board of the city an opportunity to correct the mistake, where, before the time expressed in the resolutions of the board for the bidder to appear and execute a contract, or be regarded as abandoning any intention to do so, the bidder filed a bill in a court of equity to determine the rights of the parties, and the city made a reformation of the proposals impossible by letting the contract to another party. *Moffett H. & C. Co. v. Rochester*, 178 U. S. 373, 20 Sup. Ct. Rep. 957, 44: 1108

77. Abandonment by a municipality, with the consent of its contractor, of the work contracted to be done, does not make the city liable for the debts of the contractor. *Peake v. New Orleans*, 139 U. S. 342, 11 Sup. Ct. Rep. 541, 35: 131

e. Borrowing Money; Lending Credit; Indebtedness.

1. In General.

Power of Debt-making as Limited by Power of Taxation, see *supra*, 70.

Application of Revenue as between Creditors, see *infra*, 139-143.

Municipal Bonds, see *Bonds*, V.

Impairment of Contract Obligations as to Indebtedness, see *Constitutional Law*, 65-67a. 1316-1318 1518, 1547.

City's Right to Set Off Taxes Against Claim of Water Works Company, see *Constitutional Law*, 1519.

Indebtedness of County, see *Counties*, 20-22.

Conclusiveness of Judgment on Question of Indebtedness, see *Judgment*, 557.

Interruption of Limitations against Indebtedness, see *Limitation of Actions*, 620.

Mandamus to Enforce Collection of Municipal Obligations, see *Mandamus*, II. d, 6.

Municipal Authority to Borrow Money to Pay Subscription to Stock of Railroad Company, see *Railroads*, III.

Statute Creating Special Tribunal for Claims, see *Statutes*, 119.

Special Legislation Refunding Indebtedness, see *Statutes*, 121.

Taxation for Purpose of Paying Indebtedness, see *Taxes*.

Duty to Levy Tax to Pay Judgment, see *Taxes*, 491, 496, 503, 504.

78. A contract whereby the plaintiffs agreed to pay the interest for the city upon the debts of the city already created, and the city agreed to refund the amount so paid, is neither within the terms nor the spirit of the provisions of the charter forbidding it to borrow money. *Gelpcke v. Dubuque*, 1 Wall. 221, 17: 519

Cited in Richmond v. McGirr, 78 Ind. 196—*Austin v. District Township*, 51 Iowa, 105.

Editorial note.

[Implied power of municipality to construct improvements on credit. 4 L.R.A.(N. S.) 746.]

Power and mode of borrowing.

Retroactive Effect of Constitutional Provision as to, see *Constitutional Law*, 65, 66.

Presumption of Assent of Electors, see *Evidence*, 482.

Repeal of Statute as to, see *Statutes*, 632.

See also *Bonds*, 172, 191, 213, 289.

79. On the question whether municipal corporations have power without legislative authority to borrow money or to issue notes, bills, or other securities of a commercial character free from equitable defenses in the hands of bona fide holders the court was equally divided. *Nashville v. Lindsey*, 19 Wall. 485, note 22: 180

80. An act which confers upon the mayor and aldermen of a city power to obtain money on loan, on the faith and credit of the city, for the purpose of contributing to works of internal improvement, authorizes them to obtain money upon a guaranty, by the city, of bonds of a railroad company. *Savannah v. Kelly*, 108 U. S. 184, 2 Sup. Ct. Rep. 468, 27: 696

Cited in Merrill v. Monticello, 22 Fed. 595.

81-2. A statute providing that municipalities may issue registered bonds in place of old ones does not take away the power which the city formerly had to borrow money for such purposes. *Louisiana v. Wood*, 102 U. S. 294, 26: 153

Cited in Portland Sav. Bank v. Evansville, 23 Fed. 391.

83. The borrowing of money by a city for the development of its natural resources for manufacturing purposes is within the provision of the Illinois Constitution, that corporate authorities may be empowered "to assess and collect taxes for corporate purposes," as interpreted by the supreme court of the state. *Hackett v. Ottawa*, 99 U. S. 86, 25: 363

Cited in Weightman v. Clark, 103 U. S. 260, 26 L. ed. 394—*Cary v. Ottawa*, 8 Fed. 201

—Wetherell v. Devine, 116 Ill. 635, 6 N. E. 24.

Issuing at a discount.

84. Where officers of a municipality are forbidden to part with its securities to a creditor at less than par. they cannot accomplish that result indirectly by allowing a bill to be made out and certified to, at rates which will produce an aggregate the amount of which in depreciated securities is equal to the true amount of the bill in cash. Shipman v. District of Columbia, 119 U. S. 148, 7 Sup. Ct. Rep. 134, 30: 337

85. Where such certificates are received for the whole of the fictitious amount of the bill, they must be taken to be a cash payment to the full amount. Shipman v. District of Columbia, 119 U. S. 148, 7 Sup. Ct. Rep. 134, 30: 337

Bills of credit.

Ultra Vires as Defense to Action on, see Bills and Notes, 346.

Bills of Credit by State, see States, VIII. c.

86. Issuing bills as a currency, by a municipal corporation, contrary to the law of the state, is *ultra vires*, and no recovery can be had against the city on the bills themselves or for the money paid therefor. Thomas v. Richmond, 12 Wall. 349, 20: 453

Loans of credit; stock subscriptions.

Ratification as Equivalent to Original Authority, see *supra*. 38.

Necessity of Legislation to Impower Municipality to Loan Credit, see Constitutional Law, 58.

Retrospective Effect of Constitution as to, see Constitutional Law, 66-68a.

Self-Executing Constitutional Provision as to, see Constitutional Law, 97.

Loan of Credit by County, see Counties, 19.

See also States, 216.

87. The Tennessee act of Jan. 23, 1871, does not confer any authority for the giving or loaning of credit upon any municipality, or confer the right upon any municipality to become a stockholder with others in any corporation. Kelley v. Milan, 127 U. S. 139, 8 Sup. Ct. Rep. 1101, 32: 77

Cited in Norton v. Taxing District, 129 U. S. 492, 32 L. ed. 779, 9 Sup. Ct. Rep. 322—Fidelity Trust & Safety-Vault Co. v. Lawrence County, 34 C. C. A. 556, 92 Fed. 578.

87a. Missouri act of Feb. 16, 1872, inhibiting municipal officers from loaning the credit of the municipality without the prescribed consent of others, is merely prohibitory, and does not authorize such loan when such assent is given. Jarrolt v. Moberly, 103 U. S. 580, 26: 492

Cited in Morton v. Taxing District, 129 U. S. 491, 32 L. ed. 779, 9 Sup. Ct. Rep. 332—Norton v. Nevada, 41 Fed. 584—Garland v. Montgomery County, 87 Ala. 226, 6 So. 402—Wilkes County v. Call, 123 N. C. 318, 44 L.R.A. 255, 31 S. E. 481.

88. Where the charter of a city authorizes it "to take stock in any chartered company

for making a road or roads to the said city," a subscription to a road in extension of one leading into the city is within the power granted. Von Hostrup v. Madison, 1 Wall. 291, 17: 538

Distinguished in Lewis v. Shreveport, 3 Woods, 213, Fed. Cas. No. 8,331.

Cited in Moulton v. Evansville, 25 Fed. 385—Washington County v. Williams, 49 C. C. A. 629, 111 Fed. 809—Parker v. Smith, 3 Ill. App. 363—Atchison, T. & S. F. R. Co. v. Fletcher, 35 Kan. 248, 10 Pac. 596—State ex rel. Minnesota R. Constr. Co. v. Hastings, 24 Minn. 85—Washington County v. David, 2 Neb. (Unof.) 654, 89 N. W. 737.

89. A private corporation may be aided by a city, unless some constitutional or legislative provision stands in the way, in the construction of gas works needed by its citizens, although such works may be used by the corporation for its own gain, and bonds issued for such a purpose, if for a valuable consideration, are valid. Jefferson City Gas Light Co. v. Clark (New Orleans v. Clark) 95 U. S. 644, 24: 521
Cited in New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 659, 29 L. ed. 520, 6 Sup. Ct. Rep. 252—Newport v. Newport Light Co. 84 Ky. 177.

Refunding or discharge of debt.

90. The relator obtained in 1882 a judgment against the city of New Orleans, founded on contracts made from 1871 to 1877. In 1884 he made a compromise with the city, by which it was in part provided that the balance of the judgment, not otherwise provided for, should be funded under the provisions of the act of 1884. The petition alleged that the city made no objection to the performance of the contract, but that the board of liquidation refused to issue the bonds. Held, on a review of the constitutional and legislative provisions, that the relator was entitled to a mandamus compelling the issue of the bonds. Board of Liquidation v. United States ex rel. Hart (New Orleans Board of Liquidation v. Hart) 118 U. S. 136, 6 Sup. Ct. Rep. 995, 30: 65

Warrants and certificates.

Power to Issue in Settlement of Compromised Claim, see *supra*, 68, 69.

As Commercial Paper, see Bills and Notes, 4-5.

City's Agreement as to Collection and Application of Fund to Pay Warrants, see Contracts, 524.

County Warrants, see Constitutional Law, 1315; Counties, 20, 22-26.

Rights of Assignee to Sue in Federal Courts by Reason of Citizenship, / see Courts, 812-816.

Estoppel to Deny Liability on, see Estoppel, 117.

Effect of Judgment Dismissing Suit on, see Judgment, 321.

Conclusiveness of Judgment on, see Judgment, 744.

Limitation of Action on, see Limitation of Actions, 319, 344.

Sufficiency of Payment to Indorsee, see Payment, 3.

Allegations in Action on Order, see Pleading, 436.

Certificates for Street Improvement, see Public Improvements, 6, 7.

Specific Performance of Contract under which Warrant Given, see Specific Performance, 13.

Municipality as Trustee of Drainage Assessments for Holder of Warrant, see Trusts, 82.

91. Though certificates of indebtedness issued by a municipal corporation are negotiable instruments, they belong to a peculiar class of such instruments, and are not valid in the hands of bona fide purchasers when issued for a fraudulent purpose. *District of Columbia v. Cornell*, 130 U. S. 655, 9 Sup. Ct. Rep. 694. 32: 1041

Cited in *Aylesworth v. Gratiot County*, 43 Fed. 355—*Raymond v. People*, 2 Colo. App. 339, 30 Pac. 504—*Pugh v. Moore*, 44 La. Ann. 218, 10 So. 710—*Salley v. Terrill*, 95 Me. 556, 55 L.R.A. 731, 85 Am. St. Rep. 433, 50 Atl. 896—*Bardsley v. Sternberg*, 17 Wash. 249, 49 Pac. 499—*Fidelity Trust Co. v. Palmer*, 22 Wash. 475, 79 Am. St. Rep. 953, 61 Pac. 158.

92. Certificates of indebtedness, city warrants, orders, checks, drafts, used for giving to the public creditors evidence of the amount of their claims against the city, are not commercial paper. The holder takes them subject to all defenses. *Nashville v. Ray*, 19 Wall. 468. 22: 164

Cited in *Wall v. Monroe County*, 103 U. S. 78, 26 L. ed. 432—*Merchants' Exch. Nat. Bank v. Bergen County*, 115 U. S. 391, 29 L. ed. 432, 6 Sup. Ct. Rep. 88—*Kinsey v. Little River County*, 4 Cent. L. J. 247, Fed. Cas. No. 7,829—*Shirk v. Pulaski County*, 4 Dill. 213, Fed. Cas. No. 12,794—*Adams v. Republic County*, 23 Fed. 213—*Aylesworth v. Gratiot County*, 43 Fed. 355—*Thompson v. Searcy County*, 6 C. C. A. 679, 12 U. S. App. 618, 57 Fed. 1036—*Hamilton County v. Sherwood*, 11 C. C. A. 511, 27 U. S. App. 458, 64 Fed. 107—*Watson v. Huron*, 38 C. C. A. 266, 97 Fed. 451—*Allen v. Lafayette*, 89 Ala. 645, 9 L.R.A. 498, 8 So. 30—*Goodwin v. East Hartford*, 70 Conn. 42, 38 Atl. 876—*Goose River Bank v. Willow Lake School Twp.* 1 N. D. 27, 26 Am. St. Rep. 605, 44 N. W. 1002—*People ex rel. Hurd v. Johnson*, 100 Ill. 548, 39 Am. Rep. 63—*Morrison v. Austin State Bank*, 213 Ill. 484, 104 Am. St. Rep. 225, 72 N. E. 1109—*Johnson v. People*, 8 Ill. App. 397—*State ex rel. Cohen v. Hawes*, 112 Ind. 327, 14 N. E. 87—*McPherson v. Foster Bros.* 43 Iowa, 67, 22 Am. Rep. 215—*Garfield Twp. v. Crocker*, 63 Kan. 273, 65 Pac. 273—*First Nat. Bank v. Gates*, 66 Kan. 507, 97 Am. St. Rep. 383, 72 Pac. 207—*Newgass v. New Orleans*, 42 La. Ann. 167, 21 Am. St. Rep. 368, 7 So. 565—*Johnson v. New Orleans*, 46 La. Ann. 715, 15 So. 100—*Ramsey County v. Nelson*, 51 Minn. 86, 38 Am. St. Rep. 492, 52 N. W. 991—*Isom v. First Nat. Bank*, 52 Miss. 919—*Heidelberg v. St. Francois County*, 100 Mo. 75, 12 S. W. 914—*Knapp v. Hoboken*, 39 N. J. L. 398—*Magie v. Union Twp.* 40 N. J. L. 455—*United States ex rel. McAllister v. Fidelity & D. Co.* 86 App. Div. 479, 83 N. Y. Supp. 752—*Fritsca v. Salt Lake County*, 15 Utah, 96, 47 Pac. 1026—*Gloucester County v. Catlett*, 86 Va. 163, 9 S. E. 999—*Soule v. Seattle*, 6 Wash. 323, 33 Pac.

384—*Bardsley v. Sternberg*, 17 Wash. 249, 49 Pac. 499.

93. Municipal warrants are merely prima facie evidence of indebtedness. *Wall v. Monroe County*, 103 U. S. 74. 26: 430
Distinguished in *Apache County v. Barth*, 177 U. S. 546, 44 L. ed. 881, 20 Sup. Ct. Rep. 718.

Cited in *Dorian v. Shreveport*, 28 Fed. 292—*Aylesworth v. Gratiot County*, 43 Fed. 355—*Dodge v. Memphis*, 51 Fed. 167—*Hamilton County v. Sherwood*, 11 C. C. A. 511, 27 U. S. App. 458, 64 Fed. 107—*Speer v. Kearney County*, 32 C. C. A. 108, 60 U. S. App. 38, 88 Fed. 756—*Seward County v. Aetna L. Ins. Co.* 32 C. C. A. 589, 61 U. S. App. 41, 90 Fed. 226—*First Nat. Bank v. Gates*, 66 Kan. 507, 97 Am. St. Rep. 383, 72 Pac. 207.

Remedy for collection.

Jurisdiction at Law or in Equity for Enforcement of Judgment against Municipality, see Equity, 264-272.

Liability of Public Property to Levy of Execution, see Execution, 30-34.

Injunction against Judicial Sale of Exempt City Property, see Injunction, 115.

Mandamus and not Injunction as Remedy to Compel Levy of Tax, see Injunction, 180.

94. A debt against a municipality cannot be collected by a remedy which is in direct violation of a statute in existence and known to the creditor when the debt was incurred. *Rees v. Watertown*, 19 Wall. 107. 22: 72

Liability of successor for debts.

Impairment of Contract Obligations as to, see Constitutional Law, 1318.

Liability of District of Columbia, see District of Columbia, 4.

Mandamus to Compel Successor to Levy Tax, see Mandamus, 194, 195.

Sufficiency of Title of Statute as to, see Statutes, 104.

Collection and Application to Debts of Taxes Levied before Dissolution, see Taxes, 621.

Liability of New Township, see Towns, 1.

95. Where a new municipality is formed from portions of an old one, the old corporation owns all the public property within her new limits, and is responsible for all the debts of the corporation contracted before the act of separation was passed, unless the legislature otherwise provides. The new municipality owns the public property which falls within her boundaries. *Mt. Pleasant v. Beckwith*, 100 U. S. 514. 25: 699

Laramie County v. Albany County, 92 U. S. 307. 23: 552

Cited in *Mt. Pleasant v. Beckwith*, 100 U. S. 526, 25 L. ed. 701—*Beckwith v. Racine*, 7 Biss. 153, Fed. Cas. No. 1,213—*Brewis v. Duluth*, 3 McCrary, 224, 13 Fed. 335—*Savings & L. Assn. v. Alturas County*, 65 Fed. 681—*Taylor v. Pine Grove Twp.* 132 Fed. 567—*Planters' & Sav. Bank v. Hulet Twp.* 132 Fed. 628—*Perry County v. Conway*

County, 52 Ark. 432, 6 L.R.A. 666, 12 S. W. 877—Los Angeles County v. Orange County, 97 Cal. 331, 32 Pac. 316—Riverside County v. San Bernardino County, 134 Cal. 521, 66 Pac. 788—Washington County v. Weld County, 12 Colo. 154, 20 Pac. 273—Cheyenne County v. Bent County, 15 Colo. 326, 25 Pac. 508—Lawrence County v. Meade County, 6 S. D. 333, 62 N. W. 131—Livingston v. School Dist. No. 7, 9 S. D. 106, 68 N. W. 167—Stuart v. Kirley, 12 S. D. 255, 81 N. W. 147—People ex rel. Richberg v. School Trustees, 86 Ill. 616—Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 505, 3 L.R.A. 438, 20 N. E. 432—Wellington v. Wellington Twp. 46 Kan. 221, 26 Pac. 415—Fitzpatrick v. Trustees of Mt. Sterling Public Graded Schools, 87 Ky. 188, 7 S. W. 896—State ex rel. Minnesota Railway Constr. Co. v. Lake City, 25 Minn. 416—Winona v. School Dist. No. 82, 40 Minn. 19, 3 L.R.A. 49, 12 Am. St. Rep. 687, 41 N. W. 539—Chickasaw County v. Sumner County, 58 Miss. 622—Territory ex rel. Choteau County v. Cascade County, 8 Mont. 406, 7 L.R.A. 107, 20 Pac. 809—Bloomfield Twp. v. Glen Ridge, 54 N. J. Eq. 280, 33 Atl. 925—Bloomfield Twp. v. Glen Ridge, 55 N. J. Eq. 507, 37 Atl. 63—Lodi v. Hackensack Improv. Commission, 60 N. J. Eq. 230, 46 Atl. 782—McCully v. Board of Education, 63 N. J. L. 21, 42 Atl. 776—McCully v. Tracy, 66 N. J. L. 490, 49 Atl. 436—Re Vacheron, 51 App. Div. 186, 64 N. Y. Supp. 508—People ex rel. McKenzie v. Ulster County, 94 N. Y. 267—Gilliam County v. Wasco County, 14 Or. 525, 13 Pac. 824—Winters v. George, 21 Or. 259, 27 Pac. 1041—Templeton v. Linn County, 22 Or. 316, 15 L.R.A. 732, 29 Pac. 795—Re College Avenue Bridge, 9 Pa. Dist. R. 17—Prescott v. Lennox, 100 Tenn. 592, 47 S. W. 181—De Mattos v. New Whatcom, 4 Wash. 130, 29 Pac. 933—Crook County v. Rollins Invest. Co. 3 Wyo. 475, 27 Pac. 683—Powder River Cattle Co. v. Johnson County, 3 Wyo. 608, 29 Pac. 361—Re Fremont & B. H. Counties, 8 Wyo. 22, 54 Pac. 1073.

96. A change in the charter of a municipal corporation by an amendment, or the substitution of a new charter, embracing substantially the same corporators and the same territory, will not affect the identity of the corporation, or relieve it from previous liabilities, although different powers are possessed and different officers administer the affairs. *Broughton v. Pensacola*, 93 U. S. 266. 23: 896

Distinguished in Amy v. Watertown, 130 U. S. 319, 32 L. ed. 952, 9 Sup. Ct. Rep. 530.

Cited in New Orleans v. Clark (Jefferson City Gaslight Co. v. Clark) 95 U. S. 654, 24 L. ed. 522—*Meriwether v. Garrett*, 102 U. S. 512, 26 L. ed. 204—*Mobile v. Watson*, 116 U. S. 301, 29 L. ed. 624, 6 Sup. Ct. Rep. 398—*Comanche County v. Lewis*, 133 U. S. 205, 33 L. ed. 607, 10 Sup. Ct. Rep. 286—*New Orleans v. Benjamin*, 153 U. S. 428, 38 L. ed. 770, 14 Sup. Ct. Rep. 905—*Shapleigh v. San Angelo*, 167 U. S. 652, 42 L. ed. 313, 17 Sup. Ct. Rep. 957—*Garrett v. Memphis*, 5 Fed. 868—*Brewis v. Duluth*, 3 McCrary, 223, 13 Fed. 334—*Laird v. De Soto*, 22 Fed. 422—*Bate Refrigerating Co. v. Gillett*, 30 Fed. 688—*Hill v. Kahoka*, 35 Fed. 33—*Benjamin v. New Orleans*, 71 Fed. 760—*Pacific Improv. Co. v. Clarksdale*, 20 C. C. A. 640, 41 U. S. App. 68, 74 Fed. 533—*Emsheimer v. New Orleans*, 116 Fed. 895—*Peplin Twp. v. Sage*, 64 C. C. A. 172, 129 Fed. 660—*Folsom v. Greenwood County*, 130 Fed.

733—*Ex parte Folsom*, 131 Fed. 504—*University of Alabama v. Moody*, 62 Ala. 395—*McKemie v. Gorman*, 68 Ala. 447—*Nelson v. Hubbard*, 96 Ala. 244, 17 L.R.A. 377, 11 So. 428—*Mobile Transp. Co. v. Mobile*, 128 Ala. 350, 64 L.R.A. 343, 86 Am. St. Rep. 143, 30 So. 645—*Bates v. Gregory*, 89 Cal. 395, 26 Pac. 891—*Gaither v. Green*, 40 La. Ann. 366, 4 So. 210—*Day v. Worcester*, N. & R. Co. 151 Mass. 308, 23 N. E. 824—*Higginson v. Turner*, 171 Mass. 592, 51 N. E. 172—*Ross v. Wimberly*, 60 Miss. 348—*School Dist. No. 3 v. Greenfield*, 64 N. H. 85, 6 Atl. 484—*Opinion of the Justices*, 66 N. H. 639, 33 Atl. 1076—*Vanderbeck v. Englewood*, 39 N. J. L. 347—*Broadfoot v. Fayetteville*, 124 N. C. 486, 70 Am. St. Rep. 610, 32 S. E. 804—*Andres v. Morgan*, 62 Ohio St. 245, 78 Am. St. Rep. 712, 56 N. E. 875—*Guthrie v. Territory*, 1 Okla. 202, 21 L.R.A. 847, 31 Pac. 190—*Blackburn v. Oklahoma City*, 1 Okla. 295, 31 Pac. 782—*Guthrie v. Wylie*, 6 Okla. 66, 55 Pac. 103—*School Dist. No. 76 v. Capitol Nat. Bank*, 7 Okla. 50, 54 Pac. 309—*Greer County v. Clarke & Courts*, 12 Okla. 209, 70 Pac. 206—*O'Connor v. Memphis*, 6 Lea, 735—*Ranken v. McCallum*, 25 Tex. Civ. App. 86, 60 S. W. 975.

97. Disincorporation of a municipality by legal proceedings does not avoid its legally subsisting contracts, but on the reincorporation of the same inhabitants, and of a territory including street improvements for which bonds were given, the obligation to pay them devolves upon the new corporation. *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. Rep. 957, 42: 310

Cited in Oquawka v. Graves, 27 C. C. A. 332, 53 U. S. App. 452, 82 Fed. 573—*Lampasas v. Talcott*, 36 C. C. A. 328, 94 Fed. 467—*Herring v. Modesto Irrig. District*, 95 Fed. 719—*Miller v. Perris Irrig. District*, 99 Fed. 150—*Higginson v. Turner*, 171 Mass. 592, 51 N. E. 172—*Ranken v. McCallum*, 25 Tex. Civ. App. 87, 60 S. W. 975—*Gilkey v. How*, 105 Wis. 47, 49 L.R.A. 485, 81 N. W. 120.

98. Where a municipal corporation is dissolved and a new corporation is created, composed of substantially the same community, including substantially the same taxable property within reduced territorial limits, organized for the same general purposes and holding by transfer, without consideration, the public property of the former, it is the successor of the old corporation, and is liable for its debts. *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. Rep. 398, 29: 620

Cited in Shapleigh v. San Angelo, 167 U. S. 653, 42 L. ed. 313, 17 Sup. Ct. Rep. 957—*Devereaux v. Brownsville*, 29 Fed. 744—*Hill v. Kahoka*, 35 Fed. 33—*Pacific Improv. Co. v. Clarksdale*, 20 C. C. A. 640, 41 U. S. App. 68, 74 Fed. 533—*Robertson v. Blaine County*, 47 L.R.A. 465, 32 C. C. A. 520, 61 U. S. App. 242, 90 Fed. 70—*Herring v. Modesto Irrig. District*, 95 Fed. 724—*D'Estier v. New York*, 44 C. C. A. 81, 104 Fed. 611—*Peplin Twp. v. Sage*, 64 C. C. A. 172, 129 Fed. 660—*Folsom v. Greenwood County*, 130 Fed. 733—*Ex parte Folsom*, 131 Fed. 506—*Taylor v. Pine Grove Twp.* 132 Fed. 566—*Susong v. Cokesbury Twp.* 132 Fed. 568—*Planters' & Sav. Bank v. Huilett Twp.* 132 Fed. 628—*Hare v. Kennedy*, 83 Ala. 612, 3 So. 683—*Mobile Transp. Co. v. Mobile*, 128 Ala. 350, 64 L.R.A. 343, 86 Am. St. Rep. 143, 30 So. 645—*Bates v. Gregory*, 89

Cal. 396, 26 Pac. 891—*Vandriess v. Hill*, 58 Kan. 613, 50 Pac. 872—*Phinney v. Phinney*, 81 Me. 464, 4 L.R.A. 351, 10 Am. St. Rep. 266, 17 Atl. 405—*Bronx Gas & Electric Co. v. New York*, 17 Misc. 434, 41 N. Y. Supp. 358—*Broadfoot v. Fayetteville*, 124 N. C. 485, 70 Am. St. Rep. 610, 32 S. E. 804—*Guthrie v. Territory*, 1 Okla. 202, 21 L.R.A. 847, 31 Pac. 190—*Blackburn v. Oklahoma City*, 1 Okla. 205, 31 Pac. 782—*Guthrie v. Wylie*, 6 Okla. 66, 55 Pac. 103—*School Dist. No. 76 v. Capitol Nat. Bank*, 7 Okla. 50, 54 Pac. 309—*Greer County v. Clarke & Courts*, 12 Okla. 212, 70 Pac. 206—*Ranken v. McCullum*, 25 Tex. Civ. App. 86, 60 S. W. 975—*South Morgantown v. Morgantown*, 49 W. Va. 780, 40 S. E. 15.

99. Irregularity in the formation of a municipal corporation which is organized under a general statute does not prevent its authorities from making a valid contract for municipal purposes, which will be continued against its successor, lawfully incorporated, after the former corporation is abolished. *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. Rep. 957, 42: 310

100. The outstanding obligations of a municipal corporation which is abolished by decree cannot be enforced against its successor before their maturity, on the theory that the liability of the latter is of an equitable character, but they can be enforced only as existing legal obligations in manner and form as they would have been enforceable had there been no change of organization. *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. Rep. 957, 42: 310
Cited in Greer County v. Clarke & Courts, 12 Okla. 219, 70 Pac. 206—*Peninsular Lead & Color Works v. Union Oil & Paint Co.* 100 Wis. 495, 42 L.R.A. 333, 69 Am. St. Rep. 934, 76 N. W. 559.

101. Under the Louisiana act of 1852, which consolidated the three previously existing municipalities within the limits of New Orleans into one, and added to it the adjacent city of Lafayette, when the creditors surrendered their debts against the former municipalities, and, in consideration of the surrender, the city gave them its bonds, which carried the pledge of an annual tax of a specified amount for the payment of the interest on them, and, ultimately, payment of the principal, the transaction thus consummated amounted to a contract between the city and the parties taking the bonds; and the pledge to levy the annual tax formed part of the contract. *Louisiana ex rel. Southern Bank v. Pillsbury*, 105 U. S. 278, 26: 1090

102. The remedy of the creditors of a municipal corporation legislated out of existence is, in equity, against the corporations succeeding to its property and powers. *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25: 699

Cited in D'Esterre v. New York, 44 C. C. A. 78, 104 Fed. 607—*Towle v. Brown*, 110 Ind. 68, 10 N. E. 626—*Swann v. Summers*, 19 W. Va. 132.

Liability of private property.

Due Process as to, see Constitutional Law, 647.

See also Execution, 32.

103. The private property of individuals within the limits of the territory of a municipal corporation cannot be taken to pay the debts of the municipality, or subjected to the payment of such debts, except through taxation. *Meriwether v. Garrett*, 102 U. S. 472, 26: 197

Cited in Eames v. Savage, 77 Me. 223, 52 Am. Rep. 751—*Lee v. Jefferson County*, 62 How. Pr. 210.

104. The Supreme Court recognized the existence in the New England states of a system which permits the seizure of the property of the inhabitants of a municipality on judgment against the municipality. *Barkley v. Board of Levee Comrs.* 93 U. S. 258, 23: 893

Cited in Eames v. Savage, 52 Am. Rep. 751, 77 Me. 224.

Apportionment on change of territory taxed.

As Impairment of Contract Obligations, see Constitutional Law, 1314.

105. Where a contract was made to pave streets in a city, and subsequently two new wards were added to the city, and thereafter a statute was enacted which provided that the new wards should not be taxed to pay any part of the prior debt of the city, a mandamus commanding the city to levy a tax to pay a judgment rendered for paving such streets properly excluded from the tax such new wards. *United States ex rel. Brown v. Memphis*, 97 U. S. 284, 24: 937
Distinguished in Daly v. Morgan, 69 Md. 486, 1 L.R.A. 765, 16 Atl. 287.

Cited in Donahue v. Morgan, 24 Colo. 397, 50 Pac. 1038—*Madry v. Cox*, 73 Tex. 541, 11 S. W. 541.

106. Where a city was created out of a portion of a town, under a law providing that the new city should pay its proper share of the existing debts, as if remaining unseparated, a bill in equity may be brought against both city and town to recover a debt existing at the time of separation. *Beloit v. Morgan*, 7 Wall. 619, 19: 205
Cited in Johnson v. San Diego, 109 Cal. 475, 30 L.R.A. 180, 42 Pac. 249.

2. Limitation on Amount.

Purposes for which Money may be Borrowed, see *supra*, 81-83.

Issuance of Bonds in Excess of Debt Limit, see Bonds, 184, 185.

Estoppel to Assert that Debt Limit was Exceeded, see Bonds, 399, 400, 406, 428, 437.

Ratification of Bonds Issued in Excess of Constitutional Limit, see Bonds, 461-463.

Duty of Purchaser of Municipal Bond to Take Notice as to, see Bonds, 501-503.

Rights of Bona Fide Holders of Bonds Issued in Excess of Limit, see Bonds, 512, 532.

Limitation of County, see Counties, 20-22.
Indebtedness of School District, see Schools, 3.

Limitation on Amount Raised by Taxation, see Taxes, 32-34.

No Resulting Trust in Favor of Holder of Bonds Issued in Excess of Constitutional Limit, see Trusts, 78.

107. Under power conferred upon a city by a general provision "to borrow money for any purpose within its discretion," without reference to any limit in amount, it cannot borrow for a schoolhouse more than a certain sum named as the limit in a statute specially conferring power to borrow for that purpose. *Read v. Plattsmouth*, 107 U. S. 568, 2 Sup. Ct. Rep. 208, 27: 414

108. A constitutional amendment adopted, pending the execution of a contract for the construction of a drainage system for a city, prohibiting "increase" of city's debt, which expressly provides that it shall not be construed so as to prevent the issue of drainage warrants to the transferee of the drainage contract, payable only from drainage taxes, should receive a construction commensurate with the object intended to be accomplished, and will authorize the issue of warrants in payment for the contractor's plant in case the city decides to do the work itself, where the debt created by the drainage assessments had already been incurred and put in judgment. *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44: 96

Cited in United States ex rel. Kilpatrick v. Capdevielle, 55 C. C. A. 425, 118 Fed. 813—*Jewell v. Superior*, 67 C. C. A. 626, 135 Fed. 22—*State ex rel. Perkins v. Recorder of Mortgages*, 111 La. 239, 35 So. 534.

109. A charter which prohibits the city council from borrowing for general purposes more than \$50,000 does not prevent a contract for the improvement of its sidewalks involving a larger expenditure. *Hitchcock v. Galveston*, 96 U. S. 341, 24: 659

Cited in Logan County Nat. Bank v. Townsend, 139 U. S. 72, 35 L. ed. 110, 11 Sup. Ct. Rep. 496—*Memphis & L. R. Co. v. Dow*, 22 Blatchf. 55, 19 Fed. 393—*Detroit v. Detroit City R. Co.* 56 Fed. 903—*Denny v. Spokane*, 25 C. C. A. 170, 48 U. S. App. 282, 79 Fed. 725—*Coles County v. Goehring*, 209 Ill. 156, 70 N. E. 610—*Valparaiso v. Valparaiso City Water Co.* 30 Ind. App. 323, 65 N. E. 1063—*Corvinton v. Nadaud*, 103 Ky. 461, 45 S. W. 498—*Reuting v. Titusville*, 175 Pa. 520, 34 Atl. 916—*Mauldin v. Greenville*, 33 S. C. 22, 8 L.R.A. 295, 11 S. E. 434—*Galveston v. Loonie*, 54 Tex. 525—*Baker v. Seattle*, 2 Wash. 583, 27 Pac. 462.

110. Where the Constitution of a state provides that no city, etc., "shall be allowed to become indebted in any manner or for any purpose" beyond a certain per centum of its taxable property, the prohibition is as effectual against an implied as an express promise, and is as binding in equity as

at law. *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820, 29: 132

Distinguished in Geer v. School Dist. No. 11, 49 C. C. A. 544, 111 Fed. 686.

Cited in Aetna L. Ins. Co. v. Middleport, 124 U. S. 547, 31 L. ed. 541, 8 Sup. Ct. Rep. 265—*Doon v. Cummins*, 142 U. S. 374, 35 L. ed. 1047, 12 Sup. Ct. Rep. 220—*Hedges v. Dixon County*, 150 U. S. 191, 37 L. ed. 1048, 14 Sup. Ct. Rep. 71—*Morton v. Nevada*, 41 Fed. 586—*Weber v. Spokane Nat. Bank*, 50 Fed. 737—*Aetna L. Ins. Co. v. Lyon County*, 82 Fed. 930—*Gillette-Herzog Mfg. Co. v. Canyon County*, 85 Fed. 398—*Game-well Fire-Alarm Teleg. Co. v. Laporte*, 96 Fed. 666—*Gamewell Fire-Alarm Teleg. Co. v. Laporte*, 42 C. C. A. 407, 102 Fed. 419—*City Water Supply Co. v. Ottumwa*, 120 Fed. 315—*Buck v. Eureka*, 119 Cal. 45, 50 Pac. 1065—*Goose River Bank v. Willow Lake School Twp.* 1 N. D. 29, 26 Am. St. Rep. 605, 44 N. W. 1002—*Engstad v. Dinnie*, 8 N. D. 12, 76 N. W. 292—*Prince v. Quincy*, 128 Ill. 458, 21 N. E. 768—*Prince v. Quincy*, 28 Ill. App. 505—*Laporte v. Gamewell Fire-Alarm Teleg. Co.* 146 Ind. 469, 35 L.R.A. 688, 58 Am. St. Rep. 359, 45 N. E. 588—*Thomas v. Burlington*, 69 Iowa, 143, 28 N. W. 480—*Windsor v. Des Moines*, 110 Iowa, 187, 80 Am. St. Rep. 280, 81 N. W. 476—*Hall v. Cedar Rapids*, 115 Iowa, 204, 88 N. W. 448—*Reynolds v. Lyon County*, 121 Iowa, 736, 96 N. W. 1096—*Lovejoy v. Foxcroft*, 91 Me. 383, 40 Atl. 141—*Ironwood Waterworks Co. v. Treblcock*, 99 Mich. 459, 58 N. W. 371—*State ex rel. Helena Waterworks Co. v. Helena*, 24 Mont. 531, 55 L.R.A. 341, 81 Am. St. Rep. 453, 63 Pac. 99—*Raton Waterworks Co. v. Raton*, 9 N. M. 87, 49 Pac. 808—*Re Rapid Transit Comms.* 23 App. Div. 475, 49 N. Y. Supp. 60—*Guthrie v. New Vienna Bank*, 4 Okla. 211, 38 Pac. 4—*Martin v. Territory*, 5 Okla. 194, 48 Pac. 106—*D. County v. Gillette*, 9 Okla. 598, 60 Pac. 277—*Andrews Bros. Co. v. Youngstown Coke Co.* 7 Pa. Co. Ct. 68—*McAleer v. Angell*, 19 R. I. 694, 36 Atl. 588—*Davis v. Wayne County Court*, 38 W. Va. 109, 18 S. E. 373—*Earles v. Wells*, 94 Wis. 296, 59 Am. St. Rep. 885, 68 N. W. 964—*Crogher v. Bayfield County*, 99 Wis. 15, 74 N. W. 635.

111. A provision in a state Constitution, that a municipal corporation shall not become indebted to an amount exceeding a certain per cent of its taxable property, forbids implied as well as express liability on bonds issued contrary to such provision. *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. Rep. 71, 37: 1044

Distinguished in Everett v. Independent School District, 109 Fed. 702.

Cited in Prickett v. Marcelline, 65 Fed. 474—*Dudley v. Lake County (Dissenting Opinion)* 26 C. C. A. 91, 49 U. S. App. 336, 80 Fed. 680—*Earles v. Wells*, 94 Wis. 296, 59 Am. St. Rep. 885, 68 N. W. 964.

112. A constitutional prohibition against the contraction by a municipality of indebtedness in excess of a certain amount applies to the construction and maintenance of a system of waterworks, although bonds are issued therefor, payable in the future. *Buchanan v. Litchfield*, 102 U. S. 278, 26: 138
Cited in Walla Walla v. Walla Walla Water Co. 172 U. S. 19, 43 L. ed. 349, 19 Sup. Ct. Rep. 77—*State ex rel. Helena Waterworks Co. v. Helena*, 24 Mont. 531, 55 L.R.A. 341, 81 Am. St. Rep. 453, 63 Pac. 99.

113. A limitation of municipal indebtedness is not violated by a contract for a supply of water or gas at an annual rental, merely because the aggregate of the rentals during the life of the contract may exceed the limit of indebtedness. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 19 Sup. Ct. Rep. 77., 43: 341
Disapproved in Dawson v. Dawson Waterworks Co. 106 Ga. 714, 32 S. E. 907.

Cited in Helena v. Mills, 36 C. C. A. 5. 94 Fed. 919—*Riverside & A. R. Co. v. Riverside*, 118 Fed. 741—*Brown v. Schleier*, 55 C. C. A. 479. 118 Fed. 985—*Denver v. Hubbard*, 17 Colo. App. 352, 68 Pac. 993—*Roberts v. Fargo*, 10 N. D. 243, 86 N. W. 726—*Windsor v. Des Moines*, 110 Iowa, 193, 80 Am. St. Rep. 280. 81 N. W. 476—*State ex rel. Helena Waterworks Co. v. Helena*, 24 Mont. 534, 55 L.R.A. 342, 81 Am. St. Rep. 453, 63 Pac. 99—*Dallas Electric Co. v. Dallas*, 23 Tex. Civ. App. 327, 58 S. W. 153—*Herman v. Oconto*, 110 Wis. 673, 86 N. W. 681.

114. Interest not regarded as part of the bonded indebtedness of a city, for the purpose of determining whether such indebtedness was within the constitutional limit. *Sutliff v. Lake County*, 147 U. S. 230, 13 Sup. Ct. Rep. 318, 37: 145
Cited in Kelly v. Cole, 63 Kan. 393, 65 Pac. 672.

115. In determining whether the Constitutional limit of indebtedness has been exceeded by a municipal corporation, the inquiry as to the amount of taxable property within its boundaries should be solved, not by information derived from individual officers of the municipality, but only in the mode prescribed in the Constitution; that is, by reference to the last assessment for state and county taxes for the year preceding the issuing of the bonds. *Buchanan v. Litchfield*, 102 U. S. 278, 26: 138
Cited in Bates v. Independent School District, 25 Fed. 195—*Lake County v. Standley*, 24 Colo. 14, 49 Pac. 23—*Board of Education v. Bitting*, 9 N. M. 596, 58 Pac. 395.

Editorial notes.

[What constitutes indebtedness restricted. 23 L.R.A. 402.

Effect of limitation of indebtedness upon acquisition of water supply or sewer system. 59 L.R.A. 604.

Mortgage debt upon property purchased by municipality without assuming payment, as part of municipal indebtedness. 3 L.R.A. (N.S.) 684.

Right of municipal corporation to secure public utilities by piecemeal to avoid constitutional debt limit. 12 L.R.A. (N.S.) 433.]

Power of legislature.

116. A statute restricting the amount of indebtedness of a municipal corporation does not deplete the legislature of the power to increase the amount by excepting certain bonds from the limitation. *Amey v. Allegany City*, 24 How. 364, 16: 614
Cited in State ex rel. Moore v. New Orleans, 32 La. Ann. 740.

116a. No legislation can confer upon a

municipal corporation authority to contract indebtedness which the Constitution expressly declares it shall not be allowed to incur. *Doon Dist. Twp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. Rep. 220, 35: 1044
Buchanan v. Litchfield, 102 U. S. 278, 26: 138

Cited in Kiehl v. South Bend, 36 L.R.A. 231, 22 C. C. A. 620, 44 U. S. App. 687, 76 Fed. 923—*State v. Bradford*, 12 S. D. 215, 80 N. W. 143—*Ada County v. Bullen Bridge Co.* 5 Idaho, 92, 86 L.R.A. 372, 47 Pac. 818—*Lovejoy v. Foxcroft*, 91 Me. 383, 40 Atl. 141—*State ex rel. Hill v. Wabash R. Co.* 169 Mo. 575, 70 S. W. 132—*Gibson v. Knapp*, 47 N. Y. Supp. 446, 21 Misc. 502—*Guthrie v. New Vienna Bank*, 4 Okla. 211, 38 Pac. 4—*Martin v. Territory*, 5 Okla. 194, 48 Pac. 106—*D. County v. Gillett*, 9 Okla. 598, 60 Pac. 277—*Eaton v. Mimnaugh*, 43 Or. 474, 73 Pac. 754—*State ex rel. Winston v. Rogers*, 21 Wash. 209, 57 Pac. 801—*Earles v. Wells*, 94 Wis. 296, 59 Am. St. Rep. 885, 68 N. W. 964—*Croger v. Bayfield County*, 99 Wis. 11, 74 N. W. 635.

f. Lights, Water Supply, and other Public Service.

Municipal Wharfage Charges as Regulation of Commerce, see Commerce, 347, 349-351.

Impairing Contract Obligations as to, see Constitutional Law, 1102.

Recovery for Extra Work in Construction of Waterworks, see Contracts, 687-690.

Validity of Agreement between Gas Companies to Abandon Duties to Public, see Corporations, 341.

Injunction against Exercise by, of Discontinued Ferry Franchise, see Ferries, 12.

Right of Subcontractor for Gas Works to Enjoin Municipality from Enforcing Ordinance Declaring their Erection to be Illegal, see Injunction, 6.

Effect of Combination to Fix Gas Rates on Right to Relief against Municipal Establishment of Confiscatory Rates, see Monopoly and Combinations, 30.

Power to Fix Water Rates, see Waters, III. b.

Wharves and Docks, see Waters, 95, 102.

Exclusive Privilege to Supply Water, see Waters, 179-183.

Editorial notes.

[Water supply, statutory protection of. 41 L.R.A. 177.

Power as to establishment and operation of ferries. 59 L.R.A. 513.

Duty and liability of municipality with respect to drainage. 61 L.R.A. 673.]

Public ownership.

Impairment of Contract Obligations by Municipality Establishing Independent System, see Constitutional Law, 1424, 1425.

Impairment of Contract Obligations in Statute Authorizing City to Sell, see Constitutional Law, 1547.

Injunction against Sale by Junior Bondholders where Security of First Mortgagees is Insufficient, see Injunction, 114.

Injunction against Acts of Municipality Impairing Water Franchise or Contract, see Injunction, 123-125.

117. A grant under legislative authority, by a city, of an exclusive privilege for a term of years of supplying the city and its people with gas, does not prevent the city from erecting its own gas works, under a state law giving it power to do so. *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 13 Sup. Ct. Rep. 90, 36: 963
Cited in *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 696, 41 L. ed. 1169, 17 Sup. Ct. Rep. 718—*Shaw v. Covington*, 194 U. S. 596, 48 L. ed. 1132, 24 Sup. Ct. Rep. 754—*Helena Waterworks Co. v. Helena*, 195 U. S. 392, 49 L. ed. 250, 25 Sup. Ct. Rep. 40—*Superior v. Norton*, 12 C. C. A. 472, 24 U. S. App. 59, 63 Fed. 359—*Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. 158.

118. A municipal grant of a waterworks franchise is not to be construed by implication to divest the municipality of its power to construct an independent waterworks system of its own. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. Rep. 224, 50: 353

119. A grant of a franchise, which is not exclusive, to construct a system of waterworks in a city, does not preclude the city from afterwards erecting such works and supplying its inhabitants. *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 20 Sup. Ct. Rep. 40, 44: 92

Cited in *Bienville Water Supply Co. v. Mobile*, 186 U. S. 215, 46 L. ed. 1133, 22 Sup. Ct. Rep. 820—*Joplin v. Southwest Missouri Light Co.* 191 U. S. 158, 48 L. ed. 130, 24 Sup. Ct. Rep. 43—*Cunningham v. Cleveland*, 39 C. C. A. 217, 98 Fed. 662—*Austin v. Bartholomew*, 46 C. C. A. 330, 107 Fed. 352—*Helena v. Helena Waterworks Co.* 58 C. C. A. 394, 122 Fed. 14—*Sioux Falls v. Farmers' Loan & T. Co.* 69 C. C. A. 380, 136 Fed. 728—*Tillamook Water Co. v. Tillamook City*, 139 Fed. 406—*Farmers' Loan & T. Co. v. Meridian Waterworks Co.* 139 Fed. 674—*Omaha Water Co. v. Omaha*, 77 C. C. A. 274, 147 Fed. 8.

— Editorial notes.

[Power to own and operate electric light plants. 14 L.R.A. 268.]

Establishment and regulation of municipal waterworks. 61 L.R.A. 33.]

Contract against public establishment.

Impairment of Obligation of Contract, see Constitutional Law. 1213.

Allegations as to, see Pleading, 447.

120. A municipality, in exercising the authority conferred by its charter to provide for the erection and maintenance of a system of waterworks to supply the city with water, and, to that end, to contract with a party or parties who shall build and operate waterworks, may exclude itself from constructing and operating waterworks of its own for the term covered by

such contract. *Vicksburg v. Vicksburg Waterworks Co.* 202 U. S. 453, 26 Sup. Ct. Rep. 660, 50: 1102

121. A municipality excludes itself from competition during the period named with the grantee in an ordinance of the exclusive right to erect, maintain, and operate waterworks for a definite term, to supply water for public and private use. *Vicksburg v. Vicksburg Waterworks Co.* 202 U. S. 453, 26 Sup. Ct. Rep. 660, 50: 1102

122. A city does not impliedly contract not to construct its own waterworks system by requiring a waterworks company, as a condition of its franchise, to provide all the inhabitants of the city with a water supply on the terms and conditions therein expressed, when read in connection with a previous provision requiring the company to furnish water to those desiring to purchase it,—at least after the five years have expired during which the company was bound by such franchise to furnish water to the city at a definite price, for which an appropriation was therein made. *Helena Waterworks Co. v. Helena*, 195 U. S. 383, 25 Sup. Ct. Rep. 40, 49: 245

Cited in *Knoxville Water Co. v. Knoxville*, 200 U. S. 37, 50 L. ed. 361, 26 Sup. Ct. Rep. 224—*Sioux Falls v. Farmers' Loan & T. Co.* 69 C. C. A. 380, 136 Fed. 728—*Tillamook Water Co. v. Tillamook City*, 139 Fed. 407—*Farmers' Loan & T. Co. v. Meridian*, 139 Fed. 675—*Meridian v. Farmers' Loan & T. Co.* 74 C. C. A. 225, 143 Fed. 71—*Omaha Water Co. v. Omaha*, 77 C. C. A. 275, 147 Fed. 9.

123. An implied contract that a village will not construct its own waterworks, or provide itself therewith otherwise than by purchase or condemnation of the works of an incorporated water company, after the expiration of a contract for the supply of water by such company for a term of years, does not arise from the consent of the village to the incorporation of the company and its construction of waterworks under a franchise that is not exclusive and which does not require the village to take water of that company, where the statutes give the village merely the right, without imposing upon it any express liability, to condemn such waterworks, and also preclude the village from making an express contract for a water supply for more than five years without a vote of the electors. *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 22 Sup. Ct. Rep. 400, 46: 585

Cited in *Joplin v. Southwest Missouri Light Co.* 191 U. S. 157, 48 L. ed. 130, 24 Sup. Ct. Rep. 43—*Helena Waterworks Co. v. Helena*, 195 U. S. 388, 49 L. ed. 248, 25 Sup. Ct. Rep. 40—*Farmers' Loan & T. Co. v. Sioux Falls*, 199 U. S. 601, 50 L. ed. 328, 26 Sup. Ct. Rep. 748—*Knoxville Water Co. v. Knoxville*, 200 U. S. 37, 50 L. ed. 360, 26 Sup. Ct. Rep. 224—*Helena v. Helena Waterworks Co.* 58 C. C. A. 395, 122 Fed. 15—*Farmers' Loan & T. Co. v. Sioux Falls*, 131 Fed. 899—*Sioux Falls v. Farmers' Loan & T. Co.* 69 C. C. A. 380, 136 Fed. 728—*Tillamook Water Co. v. Tillamook City*, 139 Fed. 406—*Farmers' Loan & T. Co. v. Meridian Waterworks Co.* 139 Fed. 674—*Tampa v. Tampa*

Waterworks Co. 45 Fla. 627, 34 So. 631—
Electric City R. Co. v. Niagara Falls, 48
Misc. 93, 95 N. Y. Supp. 73.

124. The inadequacy of the supply of water which renders a contract by a city with a water company voidable, does not justify the city in erecting waterworks of its own in violation of the express terms of the contract, without first having the contract annulled. Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 19 Sup. Ct. Rep. 77, 43: 341

Cited in Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 362, 46 L. ed. 590, 22 Sup. Ct. Rep. 400—Blenville Water Supply Co. v. Moblle, 95 Fed. 543—Los Angeles City Water Co. v. Los Angeles, 103 Fed. 734—Austin v. Bartholemew, 46 C. C. A. 330, 107 Fed. 352—Southwest Missouri Light Co. v. Joplin, 113 Fed. 822—American Waterworks & Guarantee Co. v. Home Water Co. 115 Fed. 179.

Water supply contracts.

Power to make Contract as Affected by Limitation of Indebtedness, see *supra*, 112, 113.

Breach of Contract as Absolving City from Agreeing not to Build Public Plant, see *supra*, 124.

Impairment of Obligations of Contract, see Constitutional Law, 1212, 1217—1219, 1424—1426, 1519.

125. A municipality has power to make a contract for a water supply with a water company for a term of years. Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. Rep. 585, 46: 808
Cited in Westminster Water Co. v. Westminster, 98 Md. 556, 64 L.R.A. 633, 103 Am. St. Rep. 424, 56 Atl. 990.

126. A city's resolutions of acceptance of waterworks is not a guaranty to bondholders that the water company would thereafter perform its contract for furnishing water in the quantity and of the quality called for by the ordinance. Farmers' Loan & T. Co. v. Galesburg, 133 U. S. 156, 10 Sup. Ct. Rep. 316, 33: 573

127. Although purchasers of the bonds of a water company were influenced to purchase them by the resolution of a city to accept the waterworks, and by letters from officers and citizens of the city, yet the city was not thereby estopped, on failure of the company to fulfill its contract, from refusing to pay rental for the hydrants, which, by the terms of the mortgage given by the company to secure the bondholders, was to be applied to pay interest on the bonds, or from having the contract canceled. Farmers' Loan & T. Co. v. Galesburg, 133 U. S. 156, 10 Sup. Ct. Rep. 316, 33: 573

128. Where water furnished by a water company for a city was unfit for use and inadequate for protection from fire, the city had a right, after the company had had reasonable time to comply with its contract to supply pure and sufficient water, to treat the contract as terminated, and to invoke the aid of a court of equity to enforce its

rescission. Farmers' Loan & T. Co. v. Galesburg, 133 U. S. 156, 10 Sup. Ct. Rep. 316, 33: 573

Distinguished in Winfield v. Winfield Water Co. 51 Kan. 84, 32 Pac. 663.

Cited in Ferris v. Hoglan, 121 Ala. 244, 25 So. 834—Grand Haven v. Grand Haven Waterworks, 99 Mich. 112, 57 N. W. 1075—Light, Heat & Water Co. v. Jackson, 73 Miss. 646, 19 So. 771—Palestine Water & P. Co. v. Palestine, 91 Tex. 548, 40 L.R.A. 207, 44 S. W. 814—Kaukauna Electric Light Co. v. Kaukauna, 114 Wis. 341, 89 N. W. 542.

129. Where a city has contracted to sell the old water mains to a water company to be used in supplying water, the city has the right, upon the failure of the company to comply with the contract, after ample time given, to retake possession of such mains for the use of the city, to protect the city from fire. Farmers' Loan & T. Co. v. Galesburg, 133 U. S. 156, 10 Sup. Ct. Rep. 316, 33: 573

Scavenger service.

130. The adoption of ordinances granting an exclusive privilege for fifty years to dispose of garbage and refuse matter by cremation or reduction, and requiring the delivery of all such material at the crematory or reduction plant, there to be destroyed at the expense of the person, company, or corporation conveying the same, was within the authority of the board of supervisors of the city and county of San Francisco—under Cal. Const. 1879, art. 11, § 11, Cal. Stat. 1863, p. 540, Cal. Stat. 1893, p. 288—to make and enforce, within the city and county, all such reasonable sanitary and other regulations as are not in conflict with any general statute or with the Constitution, and which have for their object the preservation of the public health. California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 26 Sup. Ct. Rep. 100, 50: 204

Cited in Gardner v. Michigan, 199 U. S. 331, 50 L. ed. 216, 26 Sup. Ct. Rep. 106—New York ex rel. Lieberman v. Van De Carr, 199 U. S. 558, 50 L. ed. 309, 26 Sup. Ct. Rep. 144—Water, Light & Gas Co. v. Hutchinson, 144 Fed. 285—Re Scow No. 36, 75 C. C. A. 573, 144 Fed. 933—Logan v. Childs, 51 Fla. 237, 41 So. 197.

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Monopoly in contract or ordinance for removal of garbage. 50: 204

g. Property and Revenues.

Validity of Devise to Municipality for Charity; What Law Governs, see Conflict of Laws, 186.

Impairment of Contract Obligations as to, see Constitutional Law, 1042.

Liability of Public Property to Levy of Execution, see Execution, 30—34.

Injunction against Judicial Sale of Exempt City Property, see Injunction, 115.

Liability to Sale under Execution, see Judicial Sale, 12.

Pueblo Lands Held under Mexican or Spanish Government Generally, see Pueblo Lands.

Power to Tax, see Taxes, I.

Power to take, hold, or convey.

Railroad Stock for which Municipality was Authorized to Subscribe, see *supra*, 14.

For Charitable Purposes, see *Charities* 70-75, 95a, 95b.

Inalienability of Lands Granted by United States for Schools, see *Public Lands*, 349, 350.

131. The corporation of Philadelphia has power under its charter to take real and personal estate by deed and also by devise. *Vidal v. Philadelphia (Vidal v. Girard)* 2 How. 127, 11: 205
Cited in Re Girard College Grounds, 10 Phila. 152.

132. A general power of alienation conferred upon a city by its charter extends to the alienation of property owned by it and devoted to burial purposes. *Wright v. Morgan*, 191 U. S. 55, 24 Sup. Ct. Rep. 6.

48: 89

133. The act of assembly of Maryland, which authorized the commissioners of the city of Washington to resell lots for default of payment by the first purchaser, contemplates a single resale only. *Oneale v. Thornton*, 6 Cranch, 53, 3: 150

— Editorial note.

[Part owners of property. 35 L.R.A. 737.]

Conveyances.

134. The informality in a sale of real property by a municipality, arising from the execution of the deed by the mayor rather than by a special commissioner, will not sustain ejectment by the municipality to recover back the land after the purchase price has been received by the city, and the land occupied by the purchaser for nearly twenty years. *Wright v. Morgan*, 191 U. S. 55, 24 Sup. Ct. Rep. 6, 48: 89

135. A deed from a municipality to a person incorrectly described as the bishop of Colorado, habendum to him, his heirs, and assigns, is within the authority conferred by a resolution of the common council, granting the petition of the grantee, who was the Roman Catholic bishop of Denver, for a conveyance to him and his successors in office. *Wright v. Morgan*, 191 U. S. 55, 24 Sup. Ct. Rep. 6, 48: 89

Estate in the public.

136. Under the repeal of the charter of a city, property held by the city for public uses passes under the immediate control of the State. *Meriwether v. Garrett*, 102 U. S. 472, 26: 197

Cited in Greer County v. Texas, 187 U. S. 243, 49 L. ed. 739, 25 Sup. Ct. Rep. 437—*Grantland v. Memphis*, 12 Fed. 290—*Monte-erey v. Jacks*, 139 Cal. 558, 73 Pac. 436—*State ex rel. Pearson v. Hayes*, 61 N. H. 332.

137. Property donated for the site of a city is subject to alterations for municipal

purposes, such as the widening of streets or variation of established uses, or even disposition for the public benefit. *Van Ness v. Washington*, 4 Pet. 232, 7: 842
Cited in Markham v. Atlanta, 23 Ga. 406—*New Orleans M. & C. R. Co. v. New Orleans*, 26 La. Ann. 491.

138. A municipality, like an individual, is not bound by acts affecting its property rights, where such acts are performed in ignorance of its rights. *New Orleans v. United States*, 10 Pet. 662, 9: 573
Cited in Lewis v. San Antonio, 7 Tex. 318.

Application of revenues.

Prohibition of Loans of Public Credit, see *supra*, 87.

139. Property of a municipal corporation undoubtedly may be appropriated, and special taxes pledged, to meet future debts created for public purposes; but the legislature of Louisiana cannot, under the Code of that state, authorize a municipality to appropriate its entire property and revenues, except what might be required for the support of its government, to a class of existing demands, over others equally entitled to payment. *Board of Liquidation v. United States ex rel. Hart (New Orleans Board of Liquidation v. Hart)* 118 U. S. 136, 6 Sup. Ct. Rep. 995, 30: 65

140. La. act of 1877, providing that a municipality shall apply its revenues for each year to the expenditures of that year, but providing that any surplus may be applied to pay indebtedness of former years, does not give a creditor who obtains judgment on a claim accruing in a certain year a right to payment out of surplus revenues of any subsequent year, which will control the discretion of the municipality as to the use of such surplus. *United States ex rel. Siegel v. Thoman*, 156 U. S. 353, 15 Sup. Ct. Rep. 378, 39: 450

Cited in United States ex rel. Siegel v. Board of Liquidation, 73 Fed. 770—*United States ex rel. Siegel v. Board of Liquidation*, 20 C. C. A. 624, 41 U. S. App. 414, 74 Fed. 492—*Siegel v. New Orleans*, 26 C. C. A. 493, 52 U. S. App. 228, 81 Fed. 523—*Kent v. United States*, 51 C. C. A. 194, 113 Fed. 237—*United States v. Cornell S. B. Co.* 69 C. C. A. 607, 137 Fed. 459—*Fernandez v. New Orleans*, 50 La. Ann. 487, 23 So. 611.

141. Article 254 of the Louisiana Constitution of 1879, providing for the liquidation of the indebtedness of the city of New Orleans, and the application of its assets to the satisfaction thereof, forbids preference as to indebtedness in existence at the time of the adoption of that Constitution. *Board of Liquidation v. United States ex rel. Hart (New Orleans Board of Liquidation v. Hart)* 118 U. S. 136, 6 Sup. Ct. Rep. 995, 30: 65

142. Holders of the floating debt of New Orleans, existing at the time of the passage of the act of 1880, who have established its validity by judicial proceedings, cannot be excluded from sharing in the proceeds of property and funds which are, by the act, appropriated to purchase and retire her bonds, notwithstanding the provision except-

ing from its benefits the floating indebtedness. *Board of Liquidation v. United States ex rel. Hart* (New Orleans Board of Liquidation v. Hart) 118 U. S. 136, 6 Sup. Ct. Rep. 995, 30: 65

143. Where the indebtedness of a city is conclusively established by judgments recovered against it, the payment of the judgments is not restricted to any species of property or revenues, or subject to any conditions. *United States ex rel. Ranger v. New Orleans*, 98 U. S. 381, 25: 225
United States ex rel. Wolff v. New Orleans (Wolff v. New Orleans) 103 U. S. 358, 26: 395

Cited in New Orleans v. Warner, 175 U. S. 141, 44 L. ed. 107, 20 Sup. Ct. Rep. 44—*United States v. Mobile*, 4 Woods, 538, 12 Fed. 769—*United States v. Board of Auditors*, 28 Fed. 409—*New Orleans v. United States*, 1 C. C. A. 149, 2 U. S. App. 125, 49 Fed. 41—*Jefferson v. United States*, 8 C. C. A. 610, 23 U. S. App. 10, 60 Fed. 252—*Lake County v. Platt*, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 572—*Fleming v. Trowsdale*, 29 C. C. A. 107, 54 U. S. App. 574, 85 Fed. 190—*Smith v. Broderick*, 107 Cal. 651, 48 Am. St. Rep. 167, 40 Pac. 1033—*Rio Grande County v. Burpee*, 24 Colo. 59, 48 Pac. 539—*People ex rel. Rollins v. Rio Grande County*, 7 Colo. App. 237, 42 Pac. 1032—*Grand County v. People*, 16 Colo. App. 246, 64 Pac. 675—*Howard v. Huron*, 5 S. D. 547, 26 L.R.A. 498, 59 N. W. 833—*State ex rel. Wilson v. Rainey*, 74 Mo. 234—*State ex rel. Munday v. Assessors*, 43 N. J. L. 342—*State Assessors v. State*, 44 N. J. L. 417—*Harkness v. Hutcherson*, 90 Tex. 386, 38 S. W. 1120—*Sherman v. Langham*, 92 Tex. 18, 39 L.R.A. 260, 42 S. W. 961—*State ex rel. Ledger Pub. Co. v. Gloyd*, 14 Wash. 7, 44 Pac. 103—*Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 394, 34 L.R.A. 841, 71 Am. St. Rep. 926, 45 Pac. 494.

144. Where a city owes a drainage fund a debt, and puts into that fund more than the amount of the debt, it cannot be charged as debtor to that fund because when it puts its moneys into the fund it did not declare that they were put in to discharge its indebtedness. *Peake v. New Orleans*, 139 U. S. 342, 11 Sup. Ct. Rep. 541, 35: 131
Cited in Cicero v. People, 105 Ill. App. 408.

h. Liability for Damages.

For Injury by Defective Bridge, see Bridges, 5.

Municipal Responsibility for Defective Bridge as Question for Jury, see Trial, 190.

Federal Courts Following State Laws and Decisions as to Tort Liability, see Courts, 2015-2017.

Liability of District of Columbia, see District of Columbia, V.

Variance Between Allegations and Proof, see Evidence, 2770.

Due to Defects in Street, see Highways, IV. a.

Effect of Failure to File Claim for Damages from Change of Street Grade, see Highways, 45.

Liability for Interest, see Interest, I. b, 5.
 Right to Jury Trial, see Jury, 19.

Liability for Failure to Collect Assessment, see Public Improvements, 5, 25.

Creditor's Bill against City for Claims Payable out of School Taxes, see Schools, 4.

Liability of Village, see Village.

145. A legislative corporation established as a part of the government of the country is not liable for losses sustained by a non-feasance by an omission of the corporate body to observe a law of its own in which no penalty is provided. *Fowle v. Alexandria*, 3 Pet. 398, 7: 719
Distinguished in Tallahassee v. Fortune, 3 Fla. 22, 52 Am. Dec. 358.

Cited in Trescott v. Waterloo, 26 Fed. 594—*Barbour County v. Horn*, 48 Ala. 575—*Sherbourne v. Yuba County*, 21 Cal. 115, 81 Am. Dec. 151—*Vall v. Amenla*, 4 N. D. 243, 59 N. W. 1092—*Vlgo Twp. v. Knox County*, 111 Ind. 175, 12 N. E. 305—*McGary v. Lafayette*, 4 La. Ann. 440—*Hill v. Boston*, 122 Mass. 369, 23 Am. Rep. 332—*Lyon v. Cambridge*, 136 Mass. 420—*Detroit v. Blackeby*, 21 Mich. 114, 4 Am. Rep. 450—*Reock v. Newark*, 33 N. J. L. 133—*New York v. Ballew*, 2 Denio, 448—*Hamilton County v. Mighels*, 7 Ohio St. 124—*Hand v. Philadelphia*, 8 Pa. Co. Ct. 215—*Elliott v. Philadelphia*, 7 Phila. 132—*White v. Charleston*, 2 Hill, L. 575—*Main v. North Eastern R. Co.* 12 Rich. L. 85, 75 Am. Dec. 725—*Coleman v. Chester*, 14 S. C. 291—*Black v. Columbia*, 19 S. C. 421, 45 Am. Rep. 785—*Young v. Charleston*, 20 S. C. 118, 47 Am. Rep. 827—*Memphis v. Lasser*, 9 Humph. 760—*Richmond v. Long*, 17 Gratt. 381, 94 Am. Dec. 461—*Petersburg v. Applegarth*, 28 Gratt. 344, 26 Am. Rep. 357—*Mendel v. Wheeling*, 28 W. Va. 257, 67 Am. Rep. 664.

146. Where municipal corporations are invested with certain powers which are discretionary, an action will not lie against the corporations, at the suit of an individual, for the failure on their part to perform the duty of carrying them out. *Weightman v. Washington*, 1 Black, 39, 17: 52
Cited in Workman v. New York, 179 U. S. 574, 45 L. ed. 325, 21 Sup. Ct. Rep. 212—*Hart v. Bridgeport*, 13 Blatchf. 292, Fed. Cas. No. 6,149—*Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 378, 25 U. S. App. 166, 66 Fed. 144—*New York v. Workman*, 14 C. C. A. 532, 35 U. S. App. 201, 67 Fed. 349—*Greenwood v. Louisville*, 13 Bush, 229, 26 Am. Rep. 263—*Baltimore v. O'Neill*, 63 Md. 345—*Fisher v. Boston*, 104 Mass. 94, 6 Am. Rep. 196—*Welsh v. Rutland*, 56 Vt. 236, 48 Am. Rep. 762—*Mendel v. Wheeling*, 28 W. Va. 241, 57 Am. Rep. 664.

147. A municipal corporation is liable for injuries to persons or property arising from the neglect to perform, or from negligence and unskillfulness in the performance of, a specific duty enjoined upon the municipality in consideration of the privileges which the act of incorporation confers, where the means to perform the duty are at the disposal of the corporation or within its control. *Weightman v. Washington*, 1 Black, 39, 17: 52

Cited in Nebraska City v. Campbell, 2 Black, 592, 17 L. ed. 272—*St. Paul Water Co. v. Ware*, 16 Wall. 574, 21 L. ed. 487—*Barnes*

v. District of Columbia, 91 U. S. 551, 23 L. ed. 443—*Johnston v. District of Columbia*, 118 U. S. 21, 30 L. ed. 77, 6 Sup. Ct. Rep. 923—*Ericsson v. Manchester*, 3 Hughes, 196. Fed. Cas. No. 4,511—*The F. C. Latrobe*, 28 Fed. 379—*Boston v. Crowley*, 38 Fed. 204—*Webster v. Beaver Dam*, 84 Fed. 282—*Campbell v. Montgomery*, 53 Ala. 529, 25 Am. Rep. 656—*Woodruff v. Stewart*, 63 Ala. 212—*Denver v. Dunsmore*, 7 Colo. 337, 3 Pac. 705—*Greenwood v. Westport*, 63 Conn. 591, 60 Fed. 569—*Ludlow v. Fargo*, 3 N. D. 492, 57 N. W. 506—*Gagg v. Vetter*, 41 Ind. 237, 18 Am. Rep. 322—*McCullom v. Black Hawk County*, 21 Iowa, 414—*Collins v. Council Bluffs*, 32 Iowa, 328, 7 Am. Rep. 200—*Jansen v. Atchison*, 16 Kan. 382—*Oliver v. Worcester*, 102 Mass. 500, 3 Am. Rep. 485—*Hill v. Boston*, 122 Mass. 370, 23 Am. Rep. 332—*Detroit v. Blackeby*, 21 Mich. 122, 4 Am. Rep. 450—*Shurtle v. Minneapolis*, 17 Minn. 314, Gil. 284—*Heller v. Sedalia*, 53 Mo. 161, 14 Am. Rep. 444—*Tritz v. Kansas City*, 84 Mo. 641—*Jordan v. Hannibal*, 87 Mo. 677—*Sullivan v. Helena*, 10 Mont. 144, 25 Pac. 94—*Snook v. Anaconda*, 26 Mont. 135, 66 Pac. 756—*Omaha v. Olmstead*, 5 Neb. 452—*Barry v. Port Jervis*, 64 App. Div. 280, 72 N. Y. Supp. 104—*Moffitt v. Asheville*, 103 N. C. 254, 14 Am. St. Rep. 810, 9 S. E. 695—*Guthrie v. Swan*, 5 Okla. 783, 51 Pac. 562—*Multnomah County v. Knott*, 6 Or. 279—*Aldrich v. Tripp*, 11 R. I. 145, 23 Am. Rep. 434—*Galveston v. Posnalnsky*, 62 Tex. 129, 50 Am. Rep. 517—*Lenzen v. New Braunfels*, 13 Tex. Civ. App. 351, 35 S. W. 341—*Levy v. Salt Lake City*, 3 Utah, 68, 1 Pac. 160—*Noble v. Richmond*, 31 Gratt. 281, 31 Am. Rep. 726—*Moore v. Richmond*, 85 Va. 542, 8 S. E. 387—*Sutton v. Snohomish*, 11 Wash. 28, 48 Am. St. Rep. 847, 39 Pac. 273—*Wilson v. Wheeling*, 19 W. Va. 331, 42 Am. Rep. 780—*Watkins v. County Court*, 30 W. Va. 662, 5 S. E. 654—*Hughes v. Fond du Lac*, 73 Wis. 384, 41 N. W. 407.

148. A city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the legislature. *Northern Transp. Co. v. Chicago*, 99 U. S. 635.

25: 336

Cited in *Montgomery v. Maddox*, 89 Ala. 183, 7 So. 433—*Denver v. Bayer*, 7 Colo. 120, 2 Pac. 6—*Selden v. Jacksonville*, 28 Fla. 588, 14 L.R.A. 379, 29 Am. St. Rep. 278, 10 So. 457—*Long v. Elberton*, 109 Ga. 31, 46 L.R.A. 430, 77 Am. St. Rep. 363, 34 S. E. 333—*O'Brien v. Baltimore Belt R. Co.* 74 Md. 372, 13 L.R.A. 129, 22 Atl. 141—*Burford v. Grand Rapids*, 53 Mich. 100, 51 Am. Rep. 105, 18 N. W. 571—*Vanderlip v. Grand Rapids*, 73 Mich. 536, 3 L.R.A. 253, 16 Am. St. Rep. 597, 41 N. W. 677—*Genols v. St. Paul*, 35 Minn. 331, 29 N. W. 129—*Willis v. Winona*, 59 Minn. 34, 28 L.R.A. 144, 60 N. W. 814—*Van De Vere v. Kansas City*, 107 Mo. 88, 28 Am. St. Rep. 396, 17 N. W. 695—*Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 319, 25 L.R.A. 169, 24 S. W. 591—*State ex rel. Kansas City v. East Fifth Street R. Co.* 140 Mo. 550, 38 L.R.A. 221, 62 Am. St. Rep. 742, 41 S. W. 953—*Clark v. Elizabeth*, 61 N. J. L. 590, 40 Atl. 737—*Story v. New York Elev. R. Co.* 90 N. Y. 154, 43 Am. Rep. 146—*Talbot v. New York & H. R. Co.* 151 N. Y. 162, 45 N. E. 382—*Uppington v. New York*, 165 N. Y. 229, 53 L.R.A. 553, 59 N. E. 91—*Cohen v. Cleve-*

land, 43 Ohio St. 193, 1 N. E. 589—*South Bound R. Co. v. Burton*, 67 S. C. 521, 46 S. E. 340—*Kehrer v. Richmond*, 81 Va. 748—*Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 420—*Colclough v. Milwaukee*, 92 Wis. 186, 65 N. W. 1039.

Editorial notes.

[Distinction between public and private functions of, in respect to liability for negligence, 19 L.R.A. 452.

Liability for permitting animals in streets, 27 L.R.A. 728.

For negligent operation of electric light plant. 5 L.R.A. (N.S.) 536.]

Acts of officers and agents.

Liability of District of Columbia, see District of Columbia, 35-37.

149. Municipal corporations acting within the limits of the powers conferred upon them by the legislature, in the exercise of a special franchise granted to them, are responsible for the acts and contracts of their agents duly appointed and authorized, within the scope of the authority of such agents, in the same manner as other corporations or individuals are responsible on their promises. *Clark v. Washington*, 12 Wheat. 40, 6: 544

Cited in *United States v. Robertson*, 5 Pet. 665, 8 L. ed. 266—*East Hartford v. Hartford Bridge Co.* 10 How. 535, 13 L. ed. 528—*Bacon v. Robertson*, 18 How. 486, 15 L. ed. 502—*Boone County v. Burlington & M. River R. Co.* 139 U. S. 693, 35 L. ed. 323, 11 Sup. Ct. Rep. 687—*Coburn v. San Mateo County*, 75 Fed. 540—*San Francisco Gas Co. v. San Francisco*, 9 Cal. 472—*United States ex rel. Kerr v. Ross*, 5 App. D. C. 253—*Thorn v. West Chicago Park*, 130 Ill. 607, 22 N. E. 520—*Decorah v. Dunstan Bros.* 38 Iowa, 99—*Anne Arundel County v. Duckett*, 20 Md. 481, 83 Am. Dec. 557—*Thayer v. Boston*, 19 Pick. 516, 31 Am. Dec. 157—*Com. v. Smith*, 141 Mass. 140, 6 N. E. 89—*Sheldon v. Kalamazoo*, 24 Mich. 387—*Maxwell v. Bay City Bridge Co.* 41 Mich. 465, 2 N. W. 639—*Leggett v. New Jersey Mfg. & Bkg. Co.* 1 N. J. Eq. 553, 23 Am. Dec. 728—*Hickok v. Plattsburgh*, 15 Barb. 440—*Robinson v. New York & E. R. Co.* 27 Barb. 520—*New York v. Bailey*, 2 Denio, 447—*Bailey v. New York*, 3 Hill, 540, 38 Am. Dec. 669—*Maxmillian v. New York*, 62 N. Y. 164, 20 Am. Rep. 468—*Oklahoma City v. Hill Bros.* 6 Okla. 139, 50 Pac. 242—*Hackney v. Alleghany County Mut. Ins. Co.* 4 Pa. 187—*Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 30, 53 Am. Dec. 742—*Lufkin v. Galveston*, 56 Tex. 533—*De Voss v. Richmond*, 18 Gratt. 346, 98 Am. Dec. 646—*Commercial Electric Light & P. Co. v. Tacoma*, 20 Wash. 291, 72 Am. St. Rep. 103, 55 Pac. 219.

150. While it is true that the rule rendering corporations liable for the torts of their officers and agents requires a more careful scrutiny in its application to municipal corporations than to corporations for pecuniary profit, the former are not wholly exempt from liability for such wrongful acts. *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. Rep. 1055. 30: 176

Cited in *South Carolina v. United States*, 39 Ct. Cl. 290.

151. Although the officer of a city upon

whom process is to be served may have resigned from an improper motive, and although the creditors of the city are prejudiced by his action, it is *damnum absque injuria*. *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. Rep. 530, 32: 946

— Editorial notes.

Liability for acts of fireman. [15 L.R.A. 781] 45: 314

[Liability for acts of policeman, 15 L.R.A. 783.

Liability for false imprisonment and unlawful arrest. 44 L.R.A. 795.

Liability for arrest and imprisonment under invalid ordinance. 47 L.R.A. 593.

Municipal liability for acts or negligence of members of fire department. 4 L.R.A. (N.S.) 629.]

Acts of independent contractors.

152. Where a company contracted with a city to lay water pipes, and to keep the work properly guarded, and to be responsible for damages which might occur by the neglect of its employees, a party injured through the negligence of one contracting with such company to do the work, or of his employees, may, at his election, sue the company or the municipality for the injury. *St. Paul Water Co. v. Ware*, 16 Wall. 566, 21: 485

Cited in Texas & P. R. Co. v. Juneman, 18 C. C. A. 397, 30 U. S. App. 541, 71 Fed. 943—*McNamee v. Hunt*, 30 C. C. A. 655, 59 U. S. App. 9, 87 Fed. 300—*Toledo Brewing & Malting Co. v. Bosch*, 41 C. C. A. 484, 101 Fed. 532—*Birmingham v. McCrary*, 84 Ala. 472, 4 So. 630—*Colgrove v. Smith*, (citation omitted from official report in 102 Cal. 220) 27 L.R.A. 591—*Atlanta & F. R. Co. v. Kimberly*, 87 Ga. 167, 27 Am. St. Rep. 231, 13 S. E. 277—*Chicago Bridge & Iron Co. v. La Mantia*, 112 Ill. App. 47—*Logansport v. Dick*, 70 Ind. 79, 36 Am. Rep. 166—*Stalder v. Huntington*, 153 Ind. 363, 55 N. E. 88—*Anderson v. Fleming*, 160 Ind. 600, 66 L.R.A. 125, 67 N. E. 443—*Park v. Adams County*, 3 Ind. App. 539, 30 N. E. 147—*Cloud County v. Vickers*, 62 Kan. 20, 61 Pac. 391—*Atchison County v. Sullivan*, 7 Kan. App. 156, 53 Pac. 142—*Davie v. Levy*, 39 La. Ann. 555, 4 Am. St. Rep. 225, 2 So. 395—*Knoop v. Alter*, 47 La. Ann. 574, 17 So. 139—*Woodman v. Metropolitan R. Co.* 149 Mass. 340, 4 L.R.A. 215, 14 Am. St. Rep. 427, 21 N. E. 482—*Samuelson v. Cleveland Iron Min. Co.* 49 Mich. 172, 43 Am. Rep. 456, 13 N. W. 499—*Crisler v. Olt*, 72 Miss. 169, 16 So. 416—*Benjamin v. Metropolitan Street R. Co.* 133 Mo. 285, 34 S. W. 590—*Independence v. Slack*, 134 Mo. 76, 34 S. W. 1094—*Thomas v. Harrington*, 72 N. H. 48, 65 L.R.A. 750, 54 Atl. 285—*Downey v. Low*, 22 App. Div. 461, 48 N. Y. Supp. 207—*Johnston v. Phoenix Bridge Co.* 44 App. Div. 585, 60 N. Y. Supp. 947—*Barry v. Port Jervis*, 64 App. Div. 279, 72 N. Y. Supp. 104—*Dressell v. Kingston*, 32 Hun. 535—*French v. Vix*, 2 Misc. 318, 21 N. Y. Supp. 1010—*McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 183, 19 Am. Rep. 267—*Brusso v. Buffalo*, 90 N. Y. 680—*Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 224, 76 Am. St. Rep. 375, 55 N. E. 618—*McAllister v. Albany*, 18 Or. 430, 23 Pac. 845—*Marsh v. Philadelphia*, 8 Pa. Dist. R. 341—*Williams v. Tripp*, 11 R.

I. 455—*Sanford v. Pawtucket Street R. Co.* 19 R. I. 540, 33 L.R.A. 565, 35 Atl. 67—*Houston & G. N. R. Co. v. Meador*, 50 Tex. 87—*Dallas & G. R. Co. v. Able*, 72 Tex. 159, 9 S. W. 871—*Taylor v. Dunn*, 80 Tex. 673, 16 S. W. 732—*Werthelmer v. Saunders*, 95 Wis. 580, 37 L.R.A. 148, 70 N. W. 824.

Negligent or wrongful licensing.

153. A municipal corporation is not liable for failure to take a bond from a licensee, where its governing body is not required or enabled by law to take the same. *Fowle v. Alexandria*, 3 Pet. 398.

7: 719

Cited in Fifield v. Phoenix, 4 Ariz. 287, 24 L. R.A. 431, 36 Pac. 916—*St. James v. Hingtgen*, 47 Minn. 524, 50 N. W. 700.

154. A municipal corporation is not liable for losses sustained in consequence of the insolvency of an auctioneer acting under a license which the municipality had no authority to give, and which had been granted without taking the security required by a statute no longer in force. *Fowle v. Alexandria*, 3 Pet. 398, 7: 719

Destruction of property for public safety.

Right to Take Water Mains for Fire Protection, see *supra*, 129.

State Decisions as to Liability, as Binding Federal Courts, see *Courts*, 1740.

155. At common law there was no responsibility, on the part of one destroying buildings to prevent the spread of fire, for such destruction, and no remedy for the owner. One suing to recover compensation for such destruction must show not only a statute giving him the right to recover, but also that the provisions of the statute had been substantially complied with. *Bowditch v. Boston*, 101 U. S. 16, 25: 980
Cited in Rall v. Troop, 157 U. S. 405, 39 L. ed. 751, 15 Sup. Ct. Rep. 657—*Sentell v. New Orleans & C. R. Co.* 166 U. S. 705, 41 L. ed. 1172, 17 Sup. Ct. Rep. 693—*Workman v. New York*, 179 U. S. 584, 45 L. ed. 329, 21 Sup. Ct. Rep. 212—*Phoenix Assur. Co. v. Fire Department*, 117 Ala. 649, 42 L. R.A. 472, 23 So. 843—*Edgerly v. Concord*, 62 N. H. 20, 13 Am. St. Rep. 533—*Wallace v. Richmond*, 94 Va. 223, 26 S. E. 586.

156. Under the statutes of Massachusetts and the ordinances of Boston in order that a person may recover for a building blown up in that city, to prevent the spread of fire, at least three engineers of the fire department, the chief engineer being one, if present, must have consulted together concerning the blowing up of that particular building. *Bowditch v. Boston*, 101 U. S. 16, 25: 980

— Editorial note.

Liability for damages for destruction of building to prevent spread of fire. 25: 980

Damage by mobs.

Judgment for, as Contract Protected from Impairment, see *Constitutional Law*, 1259.

157. The right to reimbursement from a

city for damages caused by a mob is not founded upon contract, but is created by statute, and can be withdrawn or limited, either in the extent of the liability or in the means of its enforcement. *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 3 Sup. Ct. Rep. 211, 27: 936
Cited as obiter in Pennsylvania Co. v. Chicago, 81 Fed. 318.

Cited in Wilson v. Head, 184 Mass. 519, 69 N. E. 317—*Livingston v. Livingston*, 173 N. Y. 388, 61 L.R.A. 805, 93 Am. St. Rep. 600, 66 N. E. 123—*Byers v. Pennsylvania R. Co.* 18 Pa. Co. Ct. 191—*Parsons v. Ft. Worth*, 26 Tex. Civ. App. 275, 63 S. W. 889.

— Editorial notes.

[Liability for property destroyed by mob. 24 L.R.A. 592. 27: 936]

What is a mob or riot for the act of which a municipality is responsible. 10 L.R.A.(N.S.) 925.]

Drains, sewers, and waters.

Evidence of Negligent Construction, see Evidence, 2120.

158. A municipality which constructs a drain in such a manner that its discharge becomes a nuisance is liable to anyone injured thereby. *Richardson v. Boston*, 19 How. 263, 15: 639
Cited in Shively v. Bowlby, 152 U. S. 19, 38 L. ed. 338, 14 Sup. Ct. Rep. 548—*Carmichael v. Texarkana*, 94 Fed. 572—*Peck v. Michigan City*, 149 Ind. 673, 49 N. E. 800—*Boston v. Richardson*, 13 Allen, 152—*Boston v. Richardson*, 105 Mass. 365—*Haskell v. New Bedford*, 108 Mass. 215—*Brayton v. Fall River*, 113 Mass. 227, 18 Am. Rep. 470—*Hill v. Boston*, 122 Mass. 370, 23 Am. Rep. 332—*Backus v. Detroit*, 49 Mich. 116, 43 Am. Rep. 447, 13 N. W. 380—*Sayre v. Newark*, 60 N. J. Eq. 379, 48 L.R.A. 729, 83 Am. St. Rep. 629, 45 Atl. 985—*Sleight v. Kingston*, 11 Hun, 597—*Clark v. Peckham*, 9 R. I. 469.

159. The city of Boston owns such portions of the territory occupied by it as have not been disposed of. Such city has the right, on its own lands, to extend sewers for drainage to low-water mark, discharging them into the sea. Such erections are not a public nuisance, the subjects of actions for private damage, although the land on which they are extended has long been used as a dock for plaintiff's wharf. *Boston v. Lecraw*, 17 How. 426, 15: 118
Cited in Richardson v. Boston, 19 How. 271, 15 L. ed. 642—*Shively v. Bowlby*, 152 U. S. 19, 38 L. ed. 338, 14 Sup. Ct. Rep. 548—*Potomac S. B. Co. v. Upper S. B. Co. MacArth. & M.* 294.

160. The acts of municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers according to the general plan so adopted are simply ministerial duties, for negligence in U. S. Dig.—260

which the municipality may be sued by a person whose property is thereby injured. *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. Rep. 923, 30: 75
Cited in McCord v. Pueblo, 5 Colo. App. 54, 36 Pac. 1109—*Hesslon v. Wilmington*, 1 Marv. (Del.) 135, 40 Atl. 749—*District of Columbia v. Metropolitan R. Co.* 8 App. D. C. 359—*Chicago v. Seben*, 165 Ill. 379, 56 Am. St. Rep. 245, 46 N. E. 244—*Springer v. Walters*, 37 Ill. App. 332—*Knostrman & P. Furniture Co. v. Davenport*, 99 Iowa, 594, 68 N. W. 887—*Philadelphia, W. & B. R. Co. v. Davis*, 68 Md. 291, 6 Am. St. Rep. 440, 11 Atl. 822—*Sentman v. Baltimore & O. R. Co.* 78 Md. 230, 27 Atl. 1074—*Buckley v. New Bedford*, 155 Mass. 67, 29 N. E. 201—*Donahoe v. Kansas City*, 136 Mo. 666, 38 S. W. 571—*Bullmaster v. St. Joseph*, 70 Mo. App. 65—*Sayre v. Newark*, 60 N. J. Eq. 382, 48 L.R.A. 731, 83 Am. St. Rep. 629, 45 Atl. 985—*San Antonio v. San Antonio Street R. Co.* 15 Tex. Civ. App. 7, 39 S. W. 136—*Dallas v. Webb*, 22 Tex. Civ. App. 51, 54 S. W. 398—*Willett v. St. Albans*, 69 Vt. 335, 38 Atl. 72.

— Editorial notes.

[Liability for damming back waters of stream. 59 L.R.A. 853.]

Duty and liability with respect to drainage. 61 L.R.A. 673.

Rights and duties as to surface waters. 65 L.R.A. 250.

Liability of municipality for changing course of surface drainage. 5 L.R.A.(N.S.) 831.]

Maritime Liabilities.

161. The exemption of a fire-boat belonging to a city from seizure *in rem*, if such exemption exists, will not relieve the city from liability to an action *in personam* under the maritime law, for injuries to another vessel, caused by negligence of those in charge of the fire-boat. *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. Rep. 212, 45: 314
Cited in Tucker v. Alexandroff, 183 U. S. 438, 46 L. ed. 270, 22 Sup. Ct. Rep. 195.

162. A city is liable by maritime law for the negligence of its servants in charge of a fire-boat while hastening to put out a fire raging at the head of a dock, in consequence of which the boat collides with and injures another vessel. *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. Rep. 212, 45: 314
Cited in The Major Reybold, 111 Fed. 415—*United States v. Portland*, 147 Fed. 867—*South Carolina v. United States*, 199 U. S. 472, 50 L. ed. 274, 26 Sup. Ct. Rep. 110.

III. Officers and Agents.

Action through Agents Generally, see *supra*, 33-35.

Powers as to Police, see *supra*, 42.

Power to Issue Securities below Par, see *supra*, 84, 85.

Mode of Executing Conveyance from Municipality, see *supra*, 134, 135.

Authority of City Attorney, see Attorneys, 59.

What Officers must Act in Issuing Bonds, see Bonds, V. f.

Power to Vary Time Limited for Redeeming Bonds, see Bonds, 275.

Exclusiveness of State Jurisdiction to Prevent Removal from Office, see Courts, 1374.

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Propriety of Injunctive Relief against Acts of Municipality, see Injunction, 122-132.

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Conclusiveness against Officer of Judgment against Municipality, see Judgment, 837.

Mandamus to, see Mandamus, II. d.

To What Officers Mandamus Directed, see Mandamus, 218-221.

As to Appointment Generally, see Officers, 7.

Personal Liability of Officers Disobeying Mandamus to Compel Tax Levy, see Officers, 64.

Officers of Township, see Towns, 9, 10.

Service of Process on Municipal Officers, see Writ and Process, 35-42.

163. If no provision is made for the continuance or new election of the officers of a municipal corporation, the functions of the existing officers will cease when their respective terms expire, and the corporation will be *de facto* extinct. *Barkley v. Board of Levee Comrs.* 93 U. S. 258, 23: 893

164. The city council, and not the voters, are the corporate authorities of a city, under the Illinois Constitution of 1848. *Quincy v. Cooke*, 107 U. S. 549, 2 Sup. Ct. Rep. 614, 27: 549

Editorial notes.

[City officers, who are. 14 L.R.A. 646.

By-law to compel acceptance of office. 24 L.R.A. 492.

Power of, to remove officer in absence of statutory authority. 9 L.R.A.(N.S.) 572.]

Power as to contracts.

As to Modification of Contracts, see *supra*, 75.

Presumption of Assent of Electors, see Evidence, 482.

See also *supra*, 67.

165. A city attorney has no power to bind the city by a contract that a controversy, as to which no litigation is pending, shall abide the result of a pending litigation, under Ky. Rev. Stat. § 2909, making it his duty to give opinions, prosecute and defend suits, and attend to other legal business prescribed by the council. *Stone v. Bank of Commerce*, 174 U. S. 412, 19 Sup. Ct. Rep. 747, 43: 1028

Cited in Brown v. Arnold, 127 Fed. 592—*Brown v. Arnold*, 67 C. C. A. 127, 131 Fed. 725—*Louisville v. Louisville R. Co.* 111 Ky.

21, 63 S. W. 14—*Bush v. O'Brien*, 164 N. Y. 212, 58 N. E. 106.

166. The officers of a municipal corporation have only such powers as are specifically granted, and cannot bind it under powers that have been taken away, by simply antedating their contracts. *Coler v. Cleburne*, 131 U. S. 162, 9 Sup. Ct. Rep. 720, 33: 146

Cited in West Plains Twp. v. Sage, 16 C. C. A. 563, 32 U. S. App. 725, 69 Fed. 952—*Goodwin v. East Hartford*, 70 Conn. 40, 38 Atl. 876—*Raton Waterworks Co. v. Raton*, 9 N. M. 92, 49 Pac. 898.

167. Under La. Acts of 1882, Nos. 20, 58, and 81, the city council of New Orleans had express authority to bind the city by a compromise of a pending suit with a railroad company, respecting its rights to use *batture* property of the city; and such compromise was not subject to the control of the board of liquidation of the city, under inconsistent power granted to it by La. act of 1880, No. 133. *Board of Liquidation v. Louisville & N. R. Co.* 109 U. S. 221, 3 Sup. Ct. Rep. 144, 27: 916
Cited in Dakota County v. Glidden, 113 U. S. 226, 28 L. ed. 982, 5 Sup. Ct. Rep. 428—*New Orleans v. Louisiana Constr. Co.* 140 U. S. 662, 35 L. ed. 559, 11 Sup. Ct. Rep. 968—*Kelly v. Milan*, 21 Fed. 864—*State ex rel. Leese v. Wilkinson*, 20 Neb. 619, 31 N. W. 376.

168. Where a person contracted to construct two wells under supervision of the city engineer, the city cannot complain that work was done as he directed, although variant from the contract. *Omaha v. Hammond*, 94 U. S. 98, 24: 70

Cited in Hitchcock v. Galveston, 3 Woods, 298, Fed. Cas. No. 6,534—*Fitzgerald v. Walker*, 55 Ark. 155, 17 S. W. 702—*McGuire v. Rapid City*, 6 Dak. 356, 5 L.R.A. 756, 48 N. W. 706—*Norcross v. Wyman*, 187 Mass. 28, 72 N. E. 347—*Noble County v. Hunt*, 33 Ohio St. 178—*Boettler v. Tendick*, 73 Tex. 494, 5 L.R.A. 270, 11 S. W. 497.

Transfer of and succession to powers.

169. Special powers conferred upon the mayor, aldermen, and commonalty of a municipality are not incidentally transferred by an amendatory act which makes the common council the corporate body. *Fowle v. Alexandria*, 3 Pet. 398, 7: 719

170. Upon the reorganization of a municipal corporation in pursuance of an amendment of its charter whereby a common council is provided for, in place of aldermen an existing ordinance authorizing the mayor and commonalty to take bonds payable to themselves from those licensed as auctioneers, cannot be carried into effect by the common council in the absence of an enabling act. *Fowle v. Alexandria*, 3 Pet. 398, 7: 719

Cited in Savannah v. Steam Boat Co. R. M. Charl. 348.

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1. The law knows but one Christian name, and the omission or insertion of the middle name, or of the initial letter of the middle name, is immaterial. It is competent for a party to show that he is known as well without, as with, a middle name, *Games v. Stiles ex dem. Dunn*, 14 Pet. 322, 10: 476.

Cited in Dunlap v. Green, 8 C. C. A. 604, 23 U. S. App. 154, 60 Fed. 247—*Cox v. Durham*, 63 C. C. A. 342, 128 Fed. 874—*Fincher v. Hanegan*, 59 Ark. 159, 24 L.R.A. 547, 26 S. W. 821—*Banks v. Lee*, 73 Ga. 27—*Schofield v. Jennings*, 68 Ind. 235—*Johnson v. Hess*, 126 Ind. 312, 9 L.R.A. 476, 25 N. E. 445—*Dutton v. Simmons*, 65 Me. 584, 20 Am. Rep. 729—*Gillespie v. Rogers*, 146 Mass. 611, 16 N. E. 711—*Gues v. Dupuis*, 152 Mass. 457, 25 N. E. 740—*Wiebold v. Hermann*, 2 Mont. 610—*Page v. Arnim*, 29 Tex. 73.

2. Initials are no part of a name. *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 13 Sup. Ct. Rep. 217, 37: 72.

3. The name "Ida J. Hawthorn" is not equivalent to "Ida J. Hanthorn." *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. Rep. 508, 37: 410.

Cited in Castillo v. McConnico, 168 U. S. 684, 42 L. ed. 626, 18 Sup. Ct. Rep. 220—*Meyer v. Kuhn*, 13 C. C. A. 305, 25 U. S. App. 174, 65 Fed. 713.

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Variance between Allegations and Findings in Action for Negligent Communication of Infectious Disease, see Trial, 939-941.

1. Even an expert may be guilty of negligence in doing what, at the time, his judgment approves. *Oceanic Steam Nav. Co. v. Aitken (The Germanic)* 196 U. S. 589, 25 Sup. Ct. Rep. 317, 49: 610

2. When one of two innocent persons must suffer, he to whom is imputable negligence, or want of the employment of all the means within his reach to guard against the injury, must bear the loss. *The Monte Allegre*, 9 Wheat. 616 6: 174
Cited in *American Press Asso. v. Dally Story* Pub. Co. 66 L.R.A. 452, 57 C. C. A. 74, 120 Fed. 770.

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In sale of food or drug. 21 L.R.A. 139.

In failing to take precautions required by statute. 21 L.R.A. 723.

Wrongdoer's right under statute as to action for negligent injuries. 28 L.R.A. 749.

Spreading of weeds to adjoining premises. 52 L.R.A. 293.

Care due to sick, infirm, and other helpless persons with whom no contract relation is sustained. 69 L.R.A. 513.

In leaving horse unhitched in highway. 10 L.R.A.(N.S.) 845.]

What constitutes generally.

Evidence of Generally, see Evidence, XI. h.

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3. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what such a person, under the existing circumstances, would not have done. The duty is dictated and measured by the exigencies of the occasion. *Baltimore & P. R. R. Co. v. Jones*, 95 U. S. 439, 24: 506

Cited in *Saldana v. Galveston, H. & S. A. R. Co.* 43 Fed. 863—*Southwestern Tele. & Teleph. Co. v. Robinson*, 16 L.R.A. 546, 1 C. C. A. 686, 2 U. S. App. 205, 50 Fed. 812

—*Southern P. Co. v. Burke*, 9 C. C. A. 243, 23 U. S. App. 1, 60 Fed. 717—*Anderson v. Berlin Mills Co.* 32 C. C. A. 144, 50 U. S. App. 413, 88 Fed. 946—*State v. Newton*, 33 Ark. 281—*Buckl v. Cone*, 25 Fla. 23, 6 So. 160—*Morris v. Florida C. & P. R. Co.* 43 Fla. 25, 29 So. 541—*Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 522—*Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 187—*Peoria v. Adams*, 72 Ill. App. 669—*Harker v. Burlington, C. R. & N. R. Co.* 88 Iowa, 413, 45 Am. St. Rep. 242, 55 N. W. 316—*Cleghorn v. Thompson*, 62 Kan. 731, 54 L.R.A. 404, 64 Pac. 605—*Levy v. Carondelet Canal & Nav. Co.* 34 La. Ann. 181—*New Orleans & N. E. R. Co. v. McEwen*, 49 La. Ann. 1197, 38 L.R.A. 140, 22 So. 675—*Blair v. Grand Rapids & I. R. Co.* 60 Mich. 132, 26 N. W. 855—*Kearney Electric Co. v. Laughlin*, 45 Neb. 405, 63 N. W. 941—*Dalley v. Burlington & M. River R. Co.* 58 Neb. 400, 78 N. W. 722—*Lane v. Hancock*, 142 N. Y. 516, 37 N. E. 473—*Bradley v. Ohio River & C. R. Co.* 126 N. C. 741, 36 S. E. 181—*Turrentine v. Wellington*, 136 N. C. 312, 48 S. E. 739—*McCloskey v. Chautauqua Lake Ice Co.* 174 Pa. 37, 34 Atl. 287—*Texas & P. R. Co. v. Curlin*, 13 Tex. Civ. App. 507, 36 S. W. 1003—*Saunders v. Southern P. Co.* 13 Utah, 291, 44 Pac. 932—*Klenk v. Oregon Short Line R. Co.* 27 Utah, 431, 76 Pac. 214—*Bryant v. Central Vermont R. Co.* 56 Vt. 713—*Danville R. & Electric Co. v. Hodnett*, 101 Va. 365, 43 S. E. 606—*Goff v. Chippewa River & M. R. Co.* 86 Wis. 245, 56 N. W. 465.

4. Negligence is the omission to do something that a reasonable, prudent man, guided by those considerations that ordinarily regulate the conduct of human affairs, would do, or doing something that a prudent or reasonable man would not do under all the circumstances of the particular transaction. *Union P. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619, 38: 434
Cited in *Stowell v. Erle R. Co.* 39 C. C. A. 148, 98 Fed. 523—*District of Columbia v. Moulton*, 15 App. D. C. 375—*Conroy v. Chicago, St. P. M. & O. R. Co.* 96 Wis. 256, 38 L.R.A. 423, 70 N. W. 486.

5. Negligence, to be actionable, must occur in breach of a legal duty arising out of contract, or otherwise owing to the person sustaining the loss. *National Sav. Bank v. Ward*, 100 U. S. 195, 25: 621
Distinguished in Allen v. Hopkins, 62 Kan. 183, 61 Pac. 750.

Cited in *Missouri ex rel. Harshman v. Winterbottom*, 123 U. S. 222, 31 L. ed. 127, 8 Sup. Ct. Rep. 98—*Goodlander Mill Co. v. Standard Oil Co.* 27 L.R.A. 585, 11 C. C. A. 255, 24 U. S. App. 7, 63 Fed. 402—*McCornick v. Western U. Tele. Co.* 38 L.R.A. 686, 25 C. C. A. 39, 49 U. S. App. 116, 79 Fed. 452—*Cleveland, C. C. & St. L. R. Co. v. Bahlentine*, 28 C. C. A. 574, 56 U. S. App. 266, 84 Fed. 937—*Bragdon v. Perkins-Campbell Co.* 66 L.R.A. 927, 30 C. C. A. 570, 58 U. S. App. 91, 87 Fed. 112—*Singleton v. Felton*, 42 C. C. A. 60, 101 Fed. 528—*Standard Oil Co. v. Murray*, 57 C. C. A. 3, 119 Fed. 575—*Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 306, 57 C. C. A. 240, 120 Fed. 868—*Marquardt v. Ball Engine Co.* 58 C. C. A. 464, 122 Fed. 376—*Galbraith v. Illinois Steel Co.* 2 L.R.A.(N.S.) 801, 66 C. C. A. 361, 133 Fed. 487—*Talpey v. Wright*, 61 Ark. 280, 54 Am. St. Rep. 206, 32 S. W.

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6. Negligence has always relation to the circumstances in which one is placed and what an ordinarily prudent man would do or omit in such circumstances. Charnock v. Texas & P. R. Co. 194 U. S. 432, 24 Sup. Ct. Rep. 671.

Cited in Southern P. Co. v. Hetzer, 1 L.R.A. (N. S.) 295, 68 C. C. A. 35, 135 Fed. 281—Shandrew v. Chicago, St. P. M. & O. R. Co. 73 C. C. A. 434, 142 Fed. 324—Shellabarger v. Fisher, 5 L.R.A. (N.S.) 261, 75 C. C. A. 13, 143 Fed. 941.

Gross negligence.

7. Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "ordinary negligence," but, after all, it means the absence of the care that is necessary under the circumstances. Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 23: 374

Cited in Albion Lumber Co. v. DeNobra, 19 C. C. A. 171, 44 U. S. App. 347, 72 Fed. 741—Purple v. Union P. R. Co. 57 L.R.A. 705, 51 C. C. A. 571, 114 Fed. 130—Davenport v. Southern R. Co. 124 Fed. 984—Kelly v. Malott, 67 C. C. A. 550, 135 Fed. 76—Davenport v. Southern R. Co. 68 C. C. A. 451, 135 Fed. 967—Atchison v. Wills, 21 App. D. C. 562—Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 539, 1 L.R.A. (N.S.) 681, 106 Am. St. Rep. 187, 74 N. E. 705—White v. Dresser, 135 Mass. 152, 46 Am. Rep. 454—Reed v. Western U. Teleg. Co. 135 Mo. 672, 34 L.R.A. 496, 58 Am. St. Rep. 600, 37 S. W. 904—Rieser v. Metropolitan Exp. Co. 45 Misc. 633, 91 N. Y. Supp. 170—Hansley v. Jamesville & W. R. Co. 115 N. C. 606, 32 L.R.A. 546, 44 Am. St. Rep. 474, 20 S. E. 528—Atchison, T. & S. F. R. Co. v. Chamberlain, 4 Okla. 547, 46 Pac. 490—Hand v.

Central Pennsylvania Teleph. & Supply Co. 1 Lack. Legal News 357—Lockwood v. Belle City Street R. Co. 92 Wis. 112, 65 N. W. 866.

Degree of care required.

8. By ordinary care is meant such as a prudent man would use under the same circumstances; it must be measured by the character and risks of the business. Texas & P. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. Rep. 707. 41: 1136
Cited in Simpson's Patent Dry-Dock Co. v. Atlantic & E. S. S. Co. 47 C. C. A. 444, 108 Fed. 425.

b. Dangerous Agencies.

9. The measure of care against accidents which a carrier must take to avoid responsibility for injuries to property adjoining its own is that which a person of ordinary prudence and caution would use if his own interest were to be affected, and the whole risk were his own. Parrott v. Wells (Nitro-glycerine Case) 15 Wall. 524, 21: 206

Cited in Crandall v. Goodrich Transp. Co. 11 Bias. 520, 16 Fed. 79—Northwest Transp. Co. v. Boston M. Ins. Co. 41 Fed. 799—Smith v. Whittier, 95 Cal. 291, 30 Pac. 529—Central R. & Bkg. Co. v. Ryles, 84 Ga. 430, 11 S. E. 499—Kennon v. Glimer, 5 Mont. 272, 51 Am. Rep. 45, 5 Pac. 847—Foxworthy v. Hastings, 23 Neb. 777, 37 N. W. 657—Johnson v. Union Pacific Coal Co. 28 Utah, 51, 67 L.R.A. 509, 76 Pac. 1089.

10. Where there is nothing to excite the suspicion of a common carrier as to the contents of a package carried by him, it is not negligence on his part to introduce the package, when appearing to be damaged, into his place of business for examination, and to handle it in the same manner as other packages of similar outward appearance are usually introduced for examination and handled. Parrott v. Wells (Nitro-glycerine Case) 15 Wall. 524, 21: 206

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[In respect to guns and similar dangerous agencies. 14 L.R.A. 675.

Liability of manufacturer of dangerous article. 15 L.R.A. 818.

In use of fire. 21 L.R.A. 255.

Liability of manufacturer to person injured by article dangerous to life, in the absence of any privity of contract. 1 L.R.A. (N.S.) 1178.

Liability of manufacturer for defective tool. 2 L.R.A. (N.S.) 303.

Liability of manufacturer of dangerously defective machine. 5 L.R.A. (N.S.) 1103.]

c. Dangerous Places and Premises.

1. In General.

11. Contractors who have contracted to furnish the material and do the entire work of constructing piers in a river, and to keep buoys over them while submerged to warn boats of danger, and who have omitted to replace a buoy after it has been carried away by high water, after ample time to do so and knowledge of its necessity, or other-

wise to warn of the danger, are guilty of negligence and responsible for all injuries resulting therefrom. *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. Rep. 672,

37: 532

Cited in Vessel Owners' Towing Co. v. Wilson, 11 C. C. A. 368, 24 U. S. App. 49, 63 Fed. 629—*Harrison v. Hughes*, 60 C. C. A. 450, 125 Fed. 868.

12. One who abandons the work of constructing a bridge, and discharges the contractors engaged in the undertaking, is liable for an injury to a steamer caused by a sight pile driven into the channel of the river by the contractors and left there by them. *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co.* 23 How. 209, 16: 433

Distinguished in The Ottawa, Brown, Adm. 360, Fed. Cas. No. 10,616.

Cited in Smith v. Burnett, 173 U. S. 433, 43 L. ed. 758, 19 Sup. Ct. Rep. 442—*The Blackheath (United States v. Evans)* 195 U. S. 365, 49 L. ed. 237, 25 Sup. Ct. Rep. 46—*Sawyer v. Oakman*, 7 Blatchf. 293, Fed. Cas. No. 12,402—*The Alabama*, 18 Fed. 832—*Ball v. Berwind*, 29 Fed. 541—*Vessel Owners' Towing Co. v. Wilson*, 11 C. C. A. 368, 24 U. S. App. 49, 63 Fed. 628—*Hartford & N. Y. Transp. Co. v. Hughes*, 125 Fed. 982—*Etheridge v. City of Philadelphia*, 18 Phila. 539.

13. A judgment for damages for personal injuries sustained by plaintiff by the falling of a piazza of a building alleged to be a hotel,—affirmed by a divided court. *Continental S. B. Co. v. Burke*, 37: 939

Editorial note.

[As to dangerous premises beside road. 26 L.R.A. 686.]

2. Liability to Licensees or Trespassers.

a. In General.

Trespasser on Wharf, see Wharves, 6.

14. When one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit. *Bennett v. Louisville & N. R. Co.* 102 U. S. 577,

26: 235

Distinguished in Cahill v. Layton, 57 Wis. 606, 46 Am. Rep. 46, 16 N. W. 1.

Cited in Gleeson v. Virginia Midland R. Co. 140 U. S. 443, 35 L. ed. 463, 11 Sup. Ct. Rep. 859—*Pearce v. Humphreys*, 34 Fed. 284—*Foster v. Portland Gold Min. Co.* 52 C. C. A. 395, 114 Fed. 615—*Washington Market Co. v. Clagett*, 19 App. D. C. 26—*John Spry Lumber Co. v. Duggan*, 182 Ill. 223, 54 N. E. 1002—*John Spry Lumber Co. v. Duggan*, 80 Ill. App. 398—*Nave v. Flack*, 90 Ind. 209, 46 Am. Rep. 205—*Cleveland, C. C. & St. L. R. Co. v. Martin*, 13 Ind. App. 495, 41 N. E. 1051—*Kann v. Meyer*, 88 Md. 550, 41 Atl. 1065—*Powers v. Harlow*, 53 Mich. 514, 51 Am. Rep. 154, 19 N. W. 257—*Moore v. Wabash*, St. L. & P. R.

Co. 84 Mo. 487—*True v. Meredith Creamery*, 72 N. H. 156, 55 Atl. 893—*Sunderlin v. Hollister*, 4 App. Div. 484, 38 N. Y. Supp. 682—*George v. Cypress Hills Cemetery*, 32 App. Div. 287, 52 N. Y. Supp. 1097—*Swinarton v. Le Boutillier*, 7 Misc. 641, 28 N. Y. Supp. 53—*Cogdell v. Wilmington & W. R. Co.* 124 N. C. 306, 32 S. E. 706—*Mayne v. Chicago, R. I. & P. R. Co.* 12 Okla. 18, 69 Pac. 983—*Matthews v. Seaboard Air Line R. Co.* 67 S. C. 511, 65 L.R.A. 292, 46 S. E. 835—*Clark v. Northern P. R. Co.* 29 Wash. 147, 59 L.R.A. 512, 69 Pac. 636—*Dowd v. Chicago, M. & St. P. R. Co.* 84 Wis. 113, 20 L.R.A. 530, 36 Am. St. Rep. 917, 54 N. W. 24—*Hupfer v. National Distilling Co.* 114 Wis. 291, 90 N. W. 191.

15. The principle, in determining whether the use of the premises of another is by invitation or license, appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them. *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26: 235

16. The owner or occupant of land who induces or leads others to come upon it for a lawful purpose is liable in damages to them, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if known to him and not to them, and he negligently suffered it to exist, without giving timely notice thereof to them or the public. *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26: 235
Distinguished in Beehler v. Daniels, 18 R. I. 566, 27 L.R.A. 514, 49 Am. St. Rep. 790, 29 Atl. 6—*Beehler v. Daniels*, 19 R. I. 52, 31 Atl. 582—*Zieman v. Kleckhefer Elevator Mfg. Co.* 90 Wis. 502, 63 N. W. 1021—*Conroy v. Chicago, St. P. M. & O. R. Co.* 96 Wis. 255, 38 L.R.A. 423, 70 N. W. 486.

Cited in Union P. R. Co. v. McDonald, 152 U. S. 269, 38 L. ed. 438, 14 Sup. Ct. Rep. 619—*McDonald v. Union P. R. Co.* 42 Fed. 583—*Crane Elevator Co. v. Lippert*, 11 C. C. A. 525, 24 U. S. App. 176, 63 Fed. 946—*Felton v. Aubrey*, 20 C. C. A. 444, 43 U. S. App. 278, 74 Fed. 358—*Illinois C. R. Co. v. Griffin*, 25 C. C. A. 416, 53 U. S. App. 22, 80 Fed. 281—*Adams v. Southern R. Co.* 28 C. C. A. 498, 52 U. S. App. 433, 84 Fed. 600—*Ellsworth v. Metheney*, 51 L.R.A. 392, 44 C. C. A. 487, 104 Fed. 122—*Texas & St. L. R. Co. v. Orr*, 46 Ark. 202—*Schmidt v. Bauer*, 80 Cal. 567, 5 L.R.A. 582, 22 Pac. 256—*Pomponio v. New York, N. H. & H. R. Co.* 66 Conn. 537, 32 L.R.A. 533, 50 Am. St. Rep. 124, 34 Atl. 491—*Stewart v. Washington & G. F. Electric R. Co.* 22 App. D. C. 511—*Savannah, F. & W. R. Co. v. Booth*, 98 Ga. 23, 25 S. E. 928—*Fisher v. Jansen*, 30 Ill. App. 93—*Chapin v. Walsh*, 37 Ill. App. 529—*Louisville, N. A. & C. R. Co. v. Phillips*, 112 Ind. 67, 2 Am. St. Rep. 155, 13 N. E. 132—*Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 408, 16 N. E. 121—*Farris v. Hoberg*, 134 Ind. 280, 39 Am. St. Rep. 261, 33 N. E. 1028—*Cleveland, C. C. & St. L. R. Co. v. Adair*, 12 Ind. App. 581, 39 N. E. 672—*Chicago, I. & L. R. Co. v. Martin*, 31 Ind. App. 318, 65 N. E. 591—*Missouri P. R. Co. v. Nelswanger*, 41 Kan. 626, 13 Am. St. Rep. 304, 21 Pac. 582—*Moore v. Stetson*, 96 Me. 203, 52 Atl. 767—*Smith v. Benick*, 87 Md. 614, 42 L. R.A. 278, 41 Atl. 56—*Powers v. Harlow*, 53 Mich. 514, 51 Am. Rep. 154, 19 N. W. 257—

Donaldson v. Wilson, 60 Mich. 90, 1 Am. St. Rep. 487, 26 N. E. 842—Johnson v. Spear, 76 Mich. 144, 15 Am. St. Rep. 298, 42 N. E. 1092—Brezee v. Powers, 80 Mich. 177, 45 N. W. 130—Ella v. Boyce, 112 Mich. 558, 70 N. W. 1106—Archer v. Union P. R. Co. 110 Mo. App. 353, 85 S. W. 934—Phillips v. Library Co. 55 N. J. L. 313, 27 Atl. 478—Speckman v. Boehm, 38 App. Div. 264, 56 N. Y. Supp. 753—Larkin v. O'Neill, 119 N. Y. 225, 23 N. E. 563—Emry v. Roanoke Nav. & Water Power Co. 111 N. C. 99, 17 L.R.A. 701, 16 S. E. 18—Kelley v. Columbus, 41 Ohio St. 268—Curtis v. De Coursey, 176 Pa. 450, 35 Atl. 183—Rosenbaum v. Shoffner, 98 Tenn. 634, 40 S. W. 1086—Smith v. Texas & P. R. Co. 2 Posey Unrep. Cas. (Tex.) 331—Galveston Oil Co. v. Morton, 70 Tex. 404, 8 Am. St. Rep. 611, 7 S. W. 756—Simonton v. Citizens Electric Light & P. Co. 28 Tex. Civ. App. 377, 67 S. W. 530—Lowe v. Salt Lake City, 13 Utah, 97, 57 Am. St. Rep. 708, 44 Pac. 1050—Herrman v. Great Northern R. Co. 27 Wash. 484, 57 L.R.A. 395, 68 Pac. 82—Sealer v. Rolfe Coal & Coke Co. 51 W. Va. 322, 41 S. E. 216—Bright v. Barnett & R. Co. 88 Wis. 308, 26 L.R.A. 530, 60 N. W. 418—Huper v. National Distilling Co. 114 Wis. 284, 90 N. W. 191.

Editorial notes.

[Of contractor to third persons after acceptance of work. 26 L.R.A. 504.]

Doctrine of, as applied to injury from hot water or ashes. 3 L.R.A. (N.S.) 149.]

b. Injuries to Children.

17. If, from the evidence given, it might justly be inferred by the jury that a railroad company, in the construction, location, management, or condition of its turntable, had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury may find in favor of an infant injured thereby. *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21: 745
Cited in *Nugent v. Wann*, 1 McCrary, 443—*Carey v. Kansas City*, 187 Mo. 732, 70 L.R.A. 69, 86 S. W. 438—*Chicago, B. & Q. R. Co. v. Kraysenbuhl*, 65 Neb. 900, 59 L.R.A. 923, 91 N. W. 880.

18. That a turntable was a dangerous machine may be inferred from the injury which actually occurred to the plaintiff, who was a boy six years old, and who got his foot caught in it and badly crushed while playing with other children. *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21: 745
Distinguished in *McAlpin v. Powell*, 70 N. Y. 134, 26 Am. Rep. 555.

Disapproved in *Frost v. Eastern R. Co.* 64 N. H. 222, 10 Am. St. Rep. 396, 9 Atl. 790.

Cited in *Union P. R. Co. v. McDonald*, 152 U. S. 272, 38 L. ed. 439, 14 Sup. Ct. Rep. 619—*McDonald v. Union P. R. Co.* 35 Fed. 39—*Jefferson v. Birmingham R. & Electric Co.* 116 Ala. 300, 38 L.R.A. 459, 17 Am. St. Rep. 116, 22 So. 546—*Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 465, 38 Am. St. Rep. 251, 21 S. W. 1062—*Hansen v. Southern P. Co.* 105 Cal. 386, 38 Pac. 937—*Crogan v. Schiele*, 53 Conn. 206, 55 Am. Rep. 88, 1 Atl. 899—*Smith v. Davis*, 22 App. D. C. 315—*Moore v. Metropolitan R. Co.* 2 Mackey, 447—*York v. Pacific & N. E. Co.* 8 Idaho, 585, 69 Pac.

1042—*Indianapolis, P. & C. E. Co. v. Pitzer*, 109 Ind. 183, 58 Am. Rep. 387, 6 N. E. 310—*Kentucky C. R. Co. v. Gastineau*, 83 Ky. 127—*Reary v. Louisville, N. O. & T. R. Co.* 40 La. Ann. 35, 8 Am. St. Rep. 497, 3 So. 390—*O'Connor v. Illinois C. R. Co.* 44 La. Ann. 346, 10 So. 678—*Daniels v. New York & N. E. R. Co.* 154 Mass. 351, 13 L.R.A. 249, 26 Am. St. Rep. 253, 28 N. E. 283—*Powers v. Harlow*, 53 Mich. 515, 51 Am. Rep. 154, 19 N. W. 257—*Fuchs v. St. Louis*, 133 Mo. 199, 34 L.R.A. 125, 34 S. W. 508—*Lincoln v. Walker*, 18 Neb. 275, 25 N. W. 66—*Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 29, 4 Am. St. Rep. 507, 12 N. E. 451—*Lake Shore & M. S. R. Co. v. Lüdtkke*, 69 Ohio St. 399, 69 N. E. 653—*Bishop v. Union R. Co.* 14 R. I. 319, 51 Am. Rep. 386—*Robinson v. Oregon Short Line & U. N. R. Co.* 7 Utah, 496, 13 L.R.A. 767, 27 Pac. 689—*Clark v. Richmond*, 83 Va. 359, 5 Am. St. Rep. 281, 5 S. W. 369—*Ilwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 452, 22 Am. St. Rep. 169, 25 Pac. 335—*Klix v. Nieman*, 68 Wis. 276, 60 Am. Rep. 854, 32 N. W. 223.

19. The nonperformance by a railroad company of the duty imposed by a statute of putting a fence around its slack pit in which coal slack was burning under ashes, was a breach of its duty to the public, and therefore evidence of negligence, for which it was liable to a child who fell into it and was injured, if the injuries in question were, in a substantial sense, the result of such violation of duty. *Union P. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619, 38: 434

Distinguished in *Smith v. Jacob Dold Packing Co.* 82 Mo. App. 18.

Cited in *McDonald v. Toledo Consol. Street R. Co.* 20 C. C. A. 326, 48 U. S. App. 79, 74 Fed. 108—*McCabe v. American Woolen Co.* 124 Fed. 285—*Smith v. Davis*, 22 App. D. C. 315—*Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 421, 57 L.R.A. 568, 90 N. W. 95—*Lopes v. Sa-huque*, 114 La. 1012, 38 So. 810—*Chicago, B. & Q. R. Co. v. Kraysenbuhl*, 65 Neb. 900, 59 L.R.A. 923, 91 N. W. 880—*Cerrillos Coal R. Co. v. Deserant*, 9 N. M. 65, 49 Pac. 807—*Mitchell v. Raleigh Electric Co.* 129 N. C. 170, 55 L.R.A. 400, 85 Am. St. Rep. 735, 39 S. E. 801—*Ann Arbor R. Co. v. Kins*, 68 Ohio St. 226, 67 N. E. 479—*Lake Shore & M. S. R. Co. v. Lüdtkke*, 69 Ohio St. 398, 69 N. E. 653—*Matthews v. Seaboard Air Line R. Co.* 67 S. C. 511, 65 L.R.A. 292, 46 S. E. 335—*International & G. N. R. Co. v. Richmond*, 28 Tex. Civ. App. 524, 67 S. W. 1029—*Norfolk R. & Light Co. v. Corletto*, 100 Va. 339, 41 S. E. 740—*Klatt v. N. C. Foster Lumber Co.* 97 Wis. 647, 73 N. W. 563.

20. Where a railroad company left its slack pit without a fence around it, or anything to give warning of its really dangerous condition, and knew or had reason to believe that it was in a place where it would attract the interest or curiosity of passersby, a boy of tender years cannot be regarded as a mere trespasser, for whose safety and protection while on the premises in question the railroad company was under no duty or obligation whatever to make provision. *Union P. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619, 38: 434

Editorial note.

[Liability of railroad company for injury to children playing on turntable. 4 L.R.A. (N.S.) 80.]

II. Contributory.

a. Generally.

Injury Avoidable Notwithstanding Contributory Negligence, see *infra*, II. d.

Presumptions and Burden of Proof, see Evidence, II. h, 5.

Opinion Evidence, see Evidence, 1812.

Sufficiency of Evidence of, see Evidence, 2316, 2317.

In Using Defective Sidewalk, see Highways, IV. c.

Of Passengers, see Carriers, II. a, 4, b.

Of Employee, see Master and Servant, II. c.

On Railroad Track, see Railroads, 155.

At Railroad Crossing, see Railroads, 162-167.

Of Tow, see Towage, 18, 19.

Questions of Law or Fact, see Trial, VI. c, 21, c.

Requested Instruction, see Trial, 795a, 816, 817.

21. That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29: 652
Cited in *Missouri, K. & T. R. Co. v. Turley*, 29 C. C. A. 197, 56 U. S. App. 1, 85 Fed. 370—*Moakler v. Willamette Valley R. Co.* 18 Or. 192, 6 L.R.A. 658, 17 Am. St. Rep. 717, 22 Pac. 948.

22. Mere error of judgment on the part of a pilot is not negligence contributing to the injury of a vessel run upon an obstruction in a river, when he pursued the proper and customary course in the channel. *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. Rep. 672, 37: 582
Cited in *Harrison v. Hughes*, 110 Fed. 555.

23. Errors of judgment of the pilots in charge of a steamboat, and their dependence on the appearance of the river, and their reliance upon the duty of contractors who were constructing a pier to place a suitable buoy on it or give other warning, are not such contributory negligence as relieves such contractors from liability for injury resulting from negligence in omitting to place such buoy or other warning. *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. Rep. 672, 37: 582

Editorial notes.

Generally. 10: 115; 33: 656; 35: 734
[Drunkenness as affecting, 40 L.R.A. 131.]

Voluntarily incurring danger to save life of another person as contributory negligence. 49 L.R.A. 715.]

Acting in emergency.

In Case of Collision, see Collision, III. b.

24. Persons in sudden emergencies and called to act under peculiar circumstances are not held to the exercise of the same degree of caution as in other cases. *Union P. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619, 38: 434
Cited in *St. Louis & M. Valley Transp. Co. v. United States*, 33 Ct. Cl. 286—*Grand Trunk R. Co. v. Baird*, 36 C. C. A. 578, 94 Fed. 950—*Marande v. Texas & P. R. Co.* 42 C. C. A. 320, 102 Fed. 249—*Dashiell v. Washington Market Co.* 10 App. D. C. 96—*McCinn v. McCormick*, 109 La. 401, 33 So. 382—*Kilpatrick v. Grand Trunk R. Co.* 74 Vt. 305, 93 Am. St. Rep. 887, 52 Atl. 531.

b. Of Persons Under Disability.

1. In General.

See also *infra*, 30.

25. In determining the existence of contributory negligence the plaintiff is not to be held liable for faults which arise from inherent physical or mental defects or want of capacity to appreciate what is and what is not negligence, but is only to be held to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger. *Baltimore & P. R. Co. v. Cumberland*, 176 U. S. 232, 20 Sup. Ct. Rep. 380, 44: 447

2. Of Children.

Requested Instructions Ignoring or Excluding Evidence, see Trial, 789a, 789b.

26. The rule of law in regard to the negligence of an adult, and that in regard to an infant of tender years, are quite different. *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401, 21: 114
Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21: 745
Cited in *Kansas P. R. Co. Whipple*, 39 Kan. 540, 18 Pac. 730—*Murray v. Richmond & D. R. Co.* 93 N. C. 95—*Reed v. Madison*, 83 Wis. 176, 17 L.R.A. 736, 53 N. W. 547.

27. The law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition. *Union P. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619, 38: 434
Cited in *Baltimore & P. R. Co. v. Cumberland*, 176 U. S. 239, 44 L. ed. 451, 20 Sup. Ct. Rep. 380—*Newark Electric Light & P. Co. v. Garden*, 37 L.R.A. 731, 23 C. C. A. 657, 39 U. S. App. 416, 78 Fed. 82—*Smith v. Pittsburgh & W. R. Co.* 90 Fed. 790—*Illinois C. R. Co. v. Jones*, 37 C. C. A. 118, 95 Fed. 380—*McQueen v. Kondelin*, 61 C. C. A. 651, 127 Fed. 77—*Kopplekom v. Colorado Cement Pipe Co.* 16 Colo. App. 277, 54 L.R.A. 285, 64 Pac. 1047—*Tully v. Philadelphia, W. & B. R. Co.* 2 Penn. (Del.) 541, 82 Am. St. Rep. 425, 47 Atl. 1019—*Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 421, 57 L.R.A. 566, 90 N. W. 95—*Ryan v. Towar*,

128 Mich. 484, 55 L.R.A. 318, 92 Am. St. Rep. 481, 87 N. W. 644—Rosse v. St. Paul & D. R. Co. 68 Minn. 216, 37 L.R.A. 592, 64 Am. St. Rep. 472, 71 N. W. 20—Chicago, B. & Q. R. Co. v. Kreyenbuhl, 65 Neb. 900, 59 L.R.A. 923, 91 N. W. 880—Paolino v. McKendall, 24 R. I. 437, 60 L.R.A. 135, 96 Am. St. Rep. 736, 53 Atl. 268.

28. The care and caution required of a child is according to his maturity and capacity and this is to be determined in each case by the circumstances thereof. Washington & G. R. Co. v. Gladmon, 15 Wall. 401, 21: 114

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21: 745

Cited in Sioux City & P. R. Co. v. Stout, 17 Wall. 660, 21 L. ed. 748—Baltimore & P. R. Co. v. Cumberland, 176 U. S. 239, 44 L. ed. 451, 20 Sup. Ct. Rep. 380—Miles v. Atlantic, M. & O. R. Co. 4 Hughes, 179, Fed. Cas. No. 9,544—Crane Elevator Co. v. Lippert, 11 C. C. A. 527, 24 U. S. App. 176, 63 Fed. 948—Felton v. Aubrey, 20 C. C. A. 438, 43 U. S. App. 278, 74 Fed. 353—Illinois C. R. Co. v. Jones, 37 C. C. A. 117, 95 Fed. 380—Government Street R. Co. v. Hanlon, 53 Ala. 80—Western R. Co. v. Mutch, 97 Ala. 198, 21 L.R.A. 318, 38 Am. St. Rep. 179, 11 So. 894—Little Rock & Ft. S. R. Co. v. Barker, 33 Ark. 372, 34 Am. Rep. 44—Pueblo Electric Street R. Co. v. Sherman, 25 Colo. 119, 71 Am. St. Rep. 116, 53 Pac. 322—Moore v. Metropolitan R. Co. 2 Mackey, 449—Metropolitan R. Co. v. Falvey, 5 App. D. C. 182—Baltimore & P. R. Co. v. Webster, 6 App. D. C. 199—District of Columbia v. Boswell, 6 App. D. C. 420—Reiners v. Washington & G. R. Co. 9 App. D. C. 25—Baltimore & P. R. Co. v. Cumberland, 12 App. D. C. 607—Western & A. R. Co. v. Young, 81 Ga. 416, 12 Am. St. Rep. 320, 7 S. E. 912—Chicago & A. R. Co. v. Murray, 71 Ill. 607—St. Louis & S. E. R. Co. v. Vallrins, 56 Ind. 520—Citizens Street R. Co. v. Hamer, 29 Ind. App. 434, 62 N. E. 658—Merryman v. Chicago, R. I. & P. R. Co. 85 Iowa, 638, 52 N. W. 545—Bess v. Atchison T. & S. F. R. Co. 62 Kan. 302, 62 Pac. 996—Westerfield v. Lewis, 43 La. Ann. 69, 9 So. 52—Elkins v. Boston & A. R. Co. 115 Mass. 200—Wright v. Detroit, G. H. & M. R. Co. 77 Mich. 127, 43 N. W. 765—Twist v. Winona & St. P. R. Co. 39 Minn. 169, 12 Am. St. Rep. 626, 39 N. W. 402—Mackey v. Vicksburg, 64 Miss. 783, 2 So. 178—Westbrook v. Mobile & O. R. Co. 66 Miss. 568, 14 Am. St. Rep. 587, 6 So. 321—Dowling v. Allen, 88 Mo. 299—Ridenhour v. Kansas City Cable R. Co. 102 Mo. 287, 14 S. W. 760—Donoho v. Vulcan Iron Works, 7 Mo. App. 450—Atchison v. United Traction Co. 90 App. Div. 575, 86 N. Y. Supp. 176—Meagher v. Cooperstown & C. Valley R. Co. 75 Hun, 459, 27 N. Y. Supp. 504—Elze v. Baumann, 2 Misc. 70, 21 N. Y. Supp. 782—Thurber v. Harlem Bridge, M. & F. R. Co. 60 N. Y. 335—Manly v. Wilmington & W. R. Co. 74 N. C. 660—Bottoms v. Seaboard & R. R. Co. 114 N. C. 712, 25 L.R.A. 792, 41 Am. St. Rep. 799, 19 S. E. 730—Lake Erie & W. R. Co. v. Mackey, 53 Ohio St. 384, 29 L.R.A. 760, 53 Am. St. Rep. 640, 41 N. E. 980—Wallace v. City & Suburban R. Co. 26 Or. 180, 25 L.R.A. 667, 37 Pac. 477—Dubliver v. City & Suburban R. Co. 44 Or. 236, 74 Pac. 915—Houston & G. N. R. Co. v. Miller, 51 Tex. 275—Young v. Clark, 16 Utah, 51, 50 Pac. 832.

29. While it is the general rule in regard

to an adult, that, to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case. Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21: 745

Distinguished in Koons v. St. Louis & I. M. R. Co. 65 Mo. 595.

Cited in Baltimore & P. R. Co. v. Cumberland, 176 U. S. 239, 44 L. ed. 451, 20 Sup. Ct. Rep. 380—Miles v. Atlantic, M. & O. R. Co. 4 Hughes, 179, Fed. Cas. No. 9,544—Felton v. Aubrey, 20 C. C. A. 438, 43 U. S. App. 278, 74 Fed. 353—Smith v. Pittsburgh & W. R. Co. 90 Fed. 789—Government Street R. Co. v. Hanlon, 53 Ala. 81—Little Rock & Ft. S. R. Co. v. Barker, 33 Ark. 372, 34 Am. Rep. 44—Brinkley Car Co. v. Cooper, 60 Ark. 549, 46 Am. St. Rep. 216, 31 S. W. 154—Barrett v. Southern P. Co. 91 Cal. 303, 25 Am. St. Rep. 186, 27 Pac. 666—Kopplekom v. Colorado Cement Pipe Co. 16 Colo. App. 279, 54 L.R.A. 286, 64 Pac. 1047—Rohloff v. Fair Haven & W. R. Co. 76 Conn. 693, 58 Atl. 5—Weldon v. Philadelphia, W. & B. R. Co. 2 Penn. (Del.) 14, 43 N. W. 156—Baltimore & P. R. Co. v. Webster, 6 App. D. C. 199—Baltimore & P. R. Co. v. Cumberland, 12 App. D. C. 607—Moore v. Metropolitan R. Co. 2 Mackey, 447—Western & A. R. Co. v. Young, 81 Ga. 416, 12 Am. St. Rep. 320, 7 S. E. 912—Krenzer v. Pittsburg, C. C. & St. L. R. Co. 151 Ind. 600, 68 Am. St. Rep. 252, 52 N. E. 220—Louisville, N. A. & C. R. Co. v. Sears, 11 Ind. App. 666, 38 N. E. 837—Elwood Electric Street R. Co. v. Ross, 26 Ind. App. 263, 58 N. E. 535—Chicago, B. I. & P. R. Co. v. Kennedy, 2 Kan. App. 702, 43 Pac. 802—Bransom v. Labrot, 81 Ky. 644, 50 Am. Rep. 193—Westerfield v. Lewis, 43 La. Ann. 69, 9 So. 52—Gay v. Essex Electric Street R. Co. 159 Mass. 242, 21 L.R.A. 449, 38 Am. St. Rep. 415, 34 N. E. 186—Battishill v. Humphreys, 64 Mich. 511, 31 N. W. 894—Wright v. Detroit, G. H. & M. R. Co. 77 Mich. 127, 43 N. W. 765—Twist v. Winona & St. P. R. Co. 39 Minn. 166, 12 Am. St. Rep. 626, 39 N. W. 402—Mackey v. Vicksburg, 64 Miss. 783, 2 So. 178—Westbrook v. Mobile & O. R. Co. 66 Miss. 568, 14 Am. St. Rep. 587, 6 So. 321—Dowling v. Allen, 88 Mo. 299—Donoho v. Vulcan Iron Works, 7 Mo. App. 450—Chicago, B. & Q. R. Co. v. Grabin, 38 Neb. 100, 56 N. W. 796—McAlpin v. Powell, 55 How. Pr. 173—Meagher v. Cooperstown & C. V. R. Co. 75 Hun, 459, 27 N. Y. Supp. 504—Thurber v. Harlem Bridge, M. & F. R. Co. 60 N. Y. 335—Kuns v. Troy, 104 N. Y. 352, 10 N. E. 442—Murray v. Richmond & D. R. Co. 93 N. C. 95—Cleveland Rolling Mill. Co. v. Corrigan, 46 Ohio St. 289, 3 L.R.A. 388, 15 Am. St. Rep. 596, 20 N. E. 466—Dubliver v. City & Suburban R. Co. 44 Or. 236, 74 Pac. 915—Paolino v. McKendall, 24 R. I. 437, 60 L.R.A. 135, 96 Am. St. Rep. 736, 53 Atl. 268—Houston & T. C. R. Co. v. Booser, 2 Posey Unrep. Cas. (Tex.) 455—Houston & T. C. R. Co. v. Simpson, 60 Tex. 106—Norfolk & W. R. Co. v. Groseclose, 88 Va. 270, 29 Am. St. Rep. 718, 13 S. E. 454—Townley v. Chicago M. & St. P. R. Co. 53 Wis. 636, 11 N. W. 55.

30. A boy, particularly if he be of limited intelligence, is not to be held to the same

standard in respect to contributory negligence as if he were an adult. *Baltimore & P. R. Co. v. Cumberland*, 176 U. S. 232, 20 Sup. Ct. Rep. 380, 44: 447
Cited in *Tucker v. Draper*, 62 Neb. 71, 54 L.R.A. 325, 86 N. W. 917.

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c. Imputed.

31. A person who hires a public hack, and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering from a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and the driver. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29: 652
Cited in *Missouri P. R. Co. v. Texas P. R. Co.*

41 Fed. 317—*Union P. R. Co. v. Lapsley*, 16 L.R.A. 802, 2 C. C. A. 152, 4 U. S. App. 542, 51 Fed. 178—*Honey v. Chicago, B. & Q. R. Co.* 59 Fed. 425—*Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co.* 9 C. C. A. 315, 22 U. S. App. 102, 60 Fed. 994—*Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L.R.A. 698, 9 C. C. A. 672, 22 U. S. App. 220, 61 Fed. 610—*Robinson v. Detroit & C. Steam Nav. Co.* 20 C. C. A. 97, 43 U. S. App. 190, 73 Fed. 894—*Pyle v. Clark*, 75 Fed. 647—*Hardy v. Shedden Co.* 37 L.R.A. 39, 24 C. C. A. 265, 47 U. S. App. 362, 78 Fed. 613—*Evans v. Lake Erie & W. R. Co.* 78 Fed. 783—*Pyle v. Clark*, 25 C. C. A. 193, 49 U. S. App. 260, 79 Fed. 748—*Kowalski v. Chicago G. W. R. Co.* 84 Fed. 588—*Smith v. Day*, 49 L.R.A. 110, 40 C. C. A. 368, 100 Fed. 246—*Delaware, L. & W. R. Co. v. Devore*, 52 C. C. A. 82, 114 Fed. 160—*Elyton Land Co. v. Mingea*, 89 Ala. 527, 7 So. 666—*Scarborough v. Alabama M. R. Co.* 94 Ala. 500, 10 So. 316—*Birmingham R. & Electric Co. v. Baker*, 132 Ala. 516, 31 So. 618—*Bartram v. Sharon*, 71 Conn. 688, 46 L.R.A. 146, 71 Am. St. Rep. 225, 43 Atl. 143—*Baltimore & O. R. Co. v. Adams*, 10 App. D. C. 104—*East Tennessee, V. & G. R. Co. v. Markens*, 88 Ga. 62, 14 L.R.A. 282, 13 S. E. 855—*Chicago City R. Co. v. Wilcox*, 33 Ill. App. 452—*Knightstown v. Musgrove*, 116 Ind. 123, 9 Am. St. Rep. 827, 18 N. E. 452—*Nesbit v. Garner*, 75 Iowa, 319, 1 L.R.A. 154, 9 Am. St. Rep. 486, 39 N. W. 516—*Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 166, 59 Am. St. Rep. 159, 7 Atl. 105—*Randolph v. O'Riordan*, 155 Mass. 337, 29 N. E. 583—*Murray v. Boston Ice Co.* 180 Mass. 168, 61 N. E. 1001—*State v. Boston & M. R. Co.* 80 Me. 446, 15 Atl. 36—*Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 166, 59 Am. Rep. 159, 7 Atl. 105—*Randolph v. O'Riordan*, 155 Mass. 337, 29 N. E. 583—*Driscoll v. Towle*, 181 Mass. 420, 63 N. E. 922—*Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 417, 49 N. W. 670—*Mullem v. Owosso*, 100 Mich. 107, 23 L.R.A. 694, 43 Am. St. Rep. 436, 58 N. W. 663—*Follman v. Mankato*, 35 Minn. 527, 59 Am. St. Rep. 340, 29 N. W. 317—*Illinois C. R. Co. v. McKay*, 69 Miss. 143, 12 So. 447—*Becke v. Missouri P. R. Co.* 102 Mo. 549, 9 L.R.A. 162, 13 S. W. 1053—*Kuttner v. Lindell R. Co.* 29 Mo. App. 508—*Munger v. Sedalla*, 66 Mo. App. 632—*Noyes v. Bosca-*

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d. Injury Avoidable, Notwithstanding Contributory Negligence.

32. Contributory negligence of a party injured will not defeat his action, if the defendant might by reasonable care and prudence have avoided the consequences of the injured party's negligence. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679, 36: 485

Inland & S. Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. Rep. 653, 35: 270
Cited in *Grand Trunk R. Co. v. Ives*, 144 U. S. 429, 36 L. ed. 493, 12 Sup. Ct. Rep. 679—*Washington & G. R. Co. v. Harmon* (Washington & G. R. Co. v. Tobriner) 147 U. S. 583, 37 L. ed. 289, 13 Sup. Ct. Rep. 557—*St. Louis & M. Valley Transp. Co. v. United States*, 33 Ct. Cl. 266—*Newport News & M. Valley Co. v. Howe*, 3 C. C. A. 127, 6 U. S. App. 172, 52 Fed. 369—*Reed v. Pennsylvania R. Co.* 56 Fed. 183—*Louisville & N. E. Co. v. East Tennessee, V. & G. R. Co.* 9 C. C. A. 318, 22 U. S. App. 102, 60 Fed. 997—*Mitchell v. Marker*, 25 L.R.A. 36, 10 C. C. A. 309, 22 U. S. App. 325, 62 Fed. 142—*Texas & P. R. Co. v. Nolan*, 11 C. C. A. 205, 23 U. S. App. 443, 62 Fed. 555—*Cincinnati Street R. Co. v. Whitcomb*, 14 C. C. A. 189, 31 U. S. App. 374, 66 Fed. 921—*Mobile & O. B. Co. v. Wilson*, 22 C. C. A. 103, 46 U. S. App. 214, 76 Fed. 129—*McPeck v. Central Vermont R. Co.* 25 C. C. A. 115, 50 U. S. App. 27, 79 Fed. 596—*Boston & M. R. Co. v. McDuffey*, 25 C. C. A. 255, 51 U. S. App. 111, 79 Fed. 942—*Northern P. R. Co. v. Freeman*, 27 C. C. A. 459, 48 U. S. App. 757, 83 Fed. 84—*Baltimore & O. R. Co. v. Hellenenthal*, 31 C. C. A. 417, 60 U. S. App. 156, 88 Fed. 120—*Neln v. La Crosse City R. Co.* 34 C. C. A. 227, 92 Fed. 88—*Gli-*

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Liability of Neutral Property Generally to Capture, see Prize and Capture, I. g, 4.

Employment of Civil Officers to Make Seizures under Neutrality Act, see Prize and Capture, 5.

Validity of Capture within Neutral Waters, see Prize and Capture, 52.

Right to Salvage on Capture or Recapture of Neutral Vessel, see Salvage, 34-40.

Effect of Saving Clause in Repeal of Neutrality, see Statutes, 683.

I. Status of Neutrals.

1-2. [When war exists between two nations, only the concurrence of both belligerents will establish peace, so as to make one neutral as to the other and a third nation: *Miller v. The Resolution* (Fed. Ct. Ap.) 2 Dall. 19, 1: 271]

3. A neutral domiciled in a belligerent country at the commencement of a war throws off his hostile character immediately upon sailing from the hostile port, and becomes entitled to all the rights of a neutral *United States v. Guillem*, 11 How. 47, 13: 599

II. Rights of.

Rights as to Blockade, see Blockade, 64.

Right to Make Capture, see Prize and Capture, 29.

Right to Recover Property Legally Captured, see Prize and Capture, 238.

Right of Neutrals to Freight, see Shipping, 181-183.

See also *infra*, 13.

4-6. A neutral cannot justify the use of force or fraud to escape a search, but he has a right to escape it if he can by means lawful in themselves, such as placing his goods on board an armed belligerent. *The Nereide*, 9 Cranch, 388, 3: 769

III. What Property is Neutral.

Proof of Neutral Ownership, see Evidence, XII. o.

7. Neutral goods in an enemy's vessel do not lose their neutral character by the armament or by the resistance made by such vessel, provided the neutral does not aid in such armament or resistance, although he chartered the whole vessel, and is on board at the time of the resistance. *The Nereide*, 9 Cranch, 388, 3: 769
Cited in The Atalanta, 3 Wheat. 419, 4 L. ed. 424.

IV. Violation of Neutrality and Its Effect.**a. Statutes and Rules Generally.**

Admiralty Jurisdiction over Captures for Violations, see Admiralty, 209a-213.

Validity of Contract in Violation of Neutrality, see Contracts, 391-393.
 Enforcement of Contract in Violation of Neutrality, see Contracts, 470, 471.
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 Seizure for Violation of Neutrality Act, see Prize and Capture.
 Restoration of Captured Property where Neutrality had been Violated, see Prize and Capture, 246-256.

8. [A neutral power cannot, by treaty, afford a succor or privilege to either belligerent, not previously stipulated for. *Vasse v. Ball* (Pa. Sup. Ct.) 2 Dall. 270, 1: 377]

9. The act of 1817, chap. 58, adapts the previous neutrality laws to the actual situation of the world, by adding to the words, "of any foreign prince or state," the words, "or of any colony, district, or people." The Gran Para, 7 Wheat. 471, 5: 501
Cited in The Three Friends (United States v. The Three Friends) 166 U. S. 56, 41 L. ed. 916, 17 Sup. Ct. Rep. 495.

10. The word "people," used in an act of neutrality, is one of the denominations applied to a foreign power. *United States v. Quincy*, 6 Pet. 445, 8: 458
Cited in The Three Friends (United States v. The Three Friends) 166 U. S. 51, 41 L. ed. 917, 17 Sup. Ct. Rep. 495—*The Three Friends*, 78 Fed. 178—*Wyntt v. Larimer & W. Irrig. Co.* 1 Colo. App. 495, 20 Pac. 906.

b. What are Violations Generally.

Burden of Proof, see Evidence, 839-842.

11. [Under the act of Congress, converting a merchant ship into a vessel of war is to be deemed an original outfit; and if for use against a nation at peace with us, it violates neutrality. *United States v. Guinet* (C. Ct.) 2 Dall. 321, 1: 398]

12. A vessel built and equipped with partial reference to use as a lawful privateer in case of then anticipated war may be sold to a foreign belligerent without violating neutrality. *Moodie v. The Alfred*, 3 Dall. 307, 1: 614
Cited in The Meteor, Fed. Cas. No. 9,498.

13. Under article 19 of the treaty with France, French vessels, public or private, had the right, on urgent necessity, to enter our ports and be supplied with all necessary repairs. Where such repairs were made to a French privateer, the mere replacement of her guns, which had been taken out for the purpose of repairing her, was not such an illegal fitting out or augmentation of force as to constitute a violation of neutrality. *Moodie v. The Phoebe Anne*, 3 Dall. 319, 1: 618

Geyer v. Michel, 3 Dall. 285, 1: 605
Cited in Moodie v. The Phoebe Anne, 3 Dall. 319, 1 L. ed. 619.

14. The neutrality of the United States is violated by increasing the force of a bel-

ligerent vessel within the United States, whether the persons enlisted were native American citizens or foreigners domiciled within the United States, since neither the law of nations nor the act of June, 1794, recognizes any distinction except in respect to subjects of the state in whose service they are so enlisted, transiently within the United States. *The Alerta v. Moran*, 9 Cranch, 359, 3: 758

15. Under the act of June, 1794, fitting out or arming any ship or vessel with intent that it shall be employed, in the service of any foreign prince or state, to cruise against a nation with whom the United States is at peace, is a penal offense and a violation of the neutral obligations of the United States. *The Gran Para*, 7 Wheat. 471, 5: 501

Cited in The Gran Para, 10 Wheat. 498, 6 L. ed. 375—*The Meteor*, 1 Am. L. Rev. 403, Fed. Cas. No. 9,498.

16. To an indictment under the act of 1818, § 3, for the punishment of crimes against neutrality, it is not necessary that the vessel be fitted out and armed in the United States so far as to be prepared for war. *United States v. Quincy*, 6 Pet. 445, 8: 458

17. To bring a defendant within the words of the act of 1818, § 3, for the punishment of crimes against neutrality, it is not necessary to charge him with being concerned in fitting out and arming the vessel; either will constitute the offense. *United States v. Quincy*, 6 Pet. 445, 8: 458
Cited in United States v. O'Sullivan, 9 N. Y. Legal Obs. 261, Fed. Cas. No. 15,974.

18. It is not necessary that the design or intention to arm or equip a vessel in violation of the neutrality laws should be carried into execution, in order to constitute the offense. But it is necessary that the intention should be a fixed one, not contingent on future arrangements. *United States v. Quincy*, 6 Pet. 445, 8: 458
Cited in The Meteor, Fed. Cas. No. 9,498—*United States v. The Mary N. Hogan*, 18 Fed. 538—*The City of Mexico*, 24 Fed. 33—*The City of Mexico*, 28 Fed. 151—*The Conserva*, 38 Fed. 436, 439—*United States v. Trumbull*, 48 Fed. 105—*The Itata*, 5 C. C. A. 615, 15 U. S. App. 1, 56 Fed. 512

19. The law does not prohibit armed vessels belong to citizens of the United States from sailing out of our ports. It only requires the owners to give security that the vessels shall not be employed against nations at peace with the United States. *United States v. Quincy*, 6 Pet. 445, 8: 458

20. International law allows both free sale and free conveyance by neutrals to belligerents, if no blockade be violated, of all sorts of goods except contraband. *Haigh v. United States* (The Bermuda) 3 Wall. 514, 18: 200

The Peterhoff v. United States (The Peterhoff) 5 Wall. 28, 18: 564
Distinguished in The Peterhoff (The Peter-

hoff v. United States) 5 Wall. 54, 18 L. ed. 570.

Cited in *La Plante v. United States*, 6 Ct. Cl. 319—*The Adula*, 89 Fed. 358—*Pearson v. Parson*, 108 Fed. 463.

Military expeditions.

Validity of Contract to Furnish Supplies for, see *Contracts*, 391.

21. Mates of the vessel who proceeded on the voyage under the captain's orders are not guilty of assisting a military expedition by reason of the fact that the vessel carried the persons engaged in such expedition, in the absence of proof of guilty knowledge of or participation in such expedition before they left port. *Wiborg v. United States*, 163 U. S. 632, 16 Sup. Ct. Rep. 1127, 1197, 41: 289

22. A military expedition or enterprise prohibited by U. S. Rev. Stat. § 5286. U. S. Comp. Stat. 1901, p. 3601, is entered upon when men combined and organized in this country are taken with arms and ammunition under their control by a tug thirty or forty miles out to sea to a steamer on which they embark and drill and by which they are taken to Cuba, where they disembark to effect an armed landing on the coast with intent to make war against the government. *Wiborg v. United States*, 163 U. S. 632, 16 Sup. Ct. Rep. 1127, 1197, 41: 289
Disapproved in Hart v. United States, 28 C. C. A. 620, 55 U. S. App. 479, 84 Fed. 807.

Cited in *The Three Friends (United States v. The Three Friends)* 166 U. S. 51, 41 L. ed. 914, 17 Sup. Ct. Rep. 495—*United States v. O'Brien*, 75 Fed. 904—*The Three Friends*, 78 Fed. 180—*United States v. Nunez*, 82 Fed. 601—*Hart v. United States*, 28 C. C. A. 613, 55 U. S. App. 479, 84 Fed. 800—*The Laura-da*, 85 Fed. 767.

Foreign prince or state.

Forfeiture of Vessel Fitted out to Commit Hostilities against, see *Prize and Capture*, 11.

23. Any insurgent or insurrectionary body of people acting together, undertaking and conducting hostilities, although its belligerency has not been recognized, is included in the terms "colony, district, or people" as used in U. S. Rev. Stat. § 5283, U. S. Comp. Stat. 1901, p. 3599, making it an offense to fit out a vessel to be employed "in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace." *United States v. The Three Friends (The Three Friends)* 166 U. S. 1, 17 Sup. Ct. Rep. 495, 41: 897

24. A new government not recognized by the United States nor by the government to which it belonged is not "a foreign prince or state" within the meaning of the neutrality act of 1794, so that fitting out and arming a vessel to be employed in its service can be punished under that act. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381
Cited in *The Three Friends (United States v. U. S. Dig.—261*

The Three Friends) 166 U. S. 57, 41 L. ed. 916, 17 Sup. Ct. Rep. 495.

c. Contraband Trade.

Exception from Insurance Policy of Vessels Sailing with Contraband Articles on Board, see *Insurance*, 472, 475, 476.

Liability of Contraband Property to Capture, see *Prize and Capture*, I. g. 6.

Liability to Capture for Engaging in, see *Prize and Capture*, I. g. 6.

Right of Neutral to Freight for Carrying Contraband, see *Shipping*, 181, 182.

See also *supra*, 20.

25. The sending of armed vessels and munitions of war to a belligerent port is unlawful only as it subjects the property to confiscation by the other belligerent. *The Santissima Trinidad*, 7 Wheat. 283, 5: 454

What are contraband goods.

26. Articles for immediate military use in battle, such as cannon and other guns, pistols, swords, cartridges, and gunpowder; also printing presses and materials, paper and Confederate States postage stamps, for the immediate civil service of the Confederate government, and belonging to it, are contraband. *The Peterhoff v. United States (The Peterhoff)* 5 Wall. 28, 18: 564
Haigh v. United States (The Bermuda) 3 Wall. 514, 18: 200

27. Articles exclusively used for peaceful purposes are not contraband, though liable to seizure and condemnation for violation of blockade or siege. *The Peterhoff v. United States (The Peterhoff)* 5 Wall. 28, 18: 564

28. Articles manufactured and ordinarily and primarily used for military purposes in time of war, destined to a belligerent country or places occupied by a belligerent army or navy, are always contraband. *The Peterhoff v. United States (The Peterhoff)* 5 Wall. 28, 18: 564

Cited in *The Carlos F. Roses*, 177 U. S. 875, 44 L. ed. 937, 20 Sup. Ct. Rep. 803—*Carlisle v. United States*, 6 Ct. Cl. 405—*Hooper v. United States*, 22 Ct. Cl. 449—*The Juno*, 38 Ct. Cl. 476—*The Atlantic*, 39 Ct. Cl. 195—*Lawson v. Miller*, 44 Ala. 626, 4 Am. Rep. 147—*Cantu v. Bennett*, 39 Tex. 308.

29. Artillery harness, men's army bluchers, artillery boots, government regulation gray blankets, come fairly under the description of goods primarily and ordinarily used for military purposes in time of war, and are always contraband. *The Peterhoff v. United States (The Peterhoff)* 5 Wall. 28, 18: 564

30. Provisions are not contraband when they are the growth of a neutral exporting country; but if they are the growth of the enemy's country, they are contraband. *The Commercen*, 1 Wheat. 382, 4: 116
Cited in *The Juno*, 38 Ct. Cl. 470.

31. Provisions which are neutral property, but the growth of the enemy's country, and destined for the supply of the enemy's military or naval forces, are contraband; but if destined for the ordinary use of human life in the enemy's country, they are

not contraband. *The Commercen*, 1 Wheat. 382, 4: 116

Cited in The Peterhoff (The Peterhoff v. United States) 5 Wall. 58, 18 L. ed. 571—*The Benito Estenger*, 176 U. S. 573, 44 L. ed. 594, 20 Sup. Ct. Rep. 489—*Hooper v. United States*, 22 Ct. Cl. 451—*The Peterhoff*, Blatchf. Prize Cas. 506, Fed. Cas. No. 11,024—*The Stephen Hart*, Blatchf. Prize Cas. 406, Fed. Cas. No. 13,363—*The City of Mexico*, 24 Fed. 40—*New York Firemen Ins. Co. v. De Wolf*, 2 Cow. 64.

Unlawful trading in contraband goods.

32. Contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade; but if destined to the hostile country, or for the use of the enemy, it is liable to capture. *The Peterhoff v. United States* (The Peterhoff) 5 Wall. 28, 18: 564

33. Neutrals may convey in neutral ships, from one neutral port to another, any goods whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port. *Haigh v. United States* (The Bermuda) 3 Wall. 514, 18: 200

34. A neutral ship cannot take on a contraband cargo, ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure and confiscation of the cargo. *Haigh v. United States* (The Bermuda) 3 Wall. 514, 18: 200
The Springbok v. United States (The Springbok) 5 Wall. 1, 18: 480
The Peterhoff v. United States (The Peterhoff) 5 Wall. 28, 18: 564
Cited in The Carondelet, 37 Fed. 802—*The Itata*, 5 C. C. A. 629, 15 U. S. App. 1, 56 Fed. 509.

35. The conveyance of contraband articles to belligerents by neutrals is always unlawful; and such articles may always be seized during transit by sea, though primarily destined to a neutral port. *The Peterhoff v. United States* (The Peterhoff) 5 Wall. 28, 18: 564

Duty of government as to.

36. No neutral state is bound to prohibit the export of contraband articles. *The Santissima Trinidad*, 7 Wheat. 283, 5: 454

37. There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. *The Santissima Trinidad*, 7 Wheat. 283, 5: 454
Cited in Ford v. Surget, 97 U. S. 611, 24 L. ed. 1023—*Northern P. R. Co. v. American Trading Co.* 195 U. S. 465, 49 L. ed. 281, 25 Sup. Ct. Rep. 84—*The Meteor*, 1 Am. L. Rev. 402, Fed. Cas. No. 9,498—*The City of Mexico*, 24 Fed. 41—*The Carondelet*, 37 Fed. 802—*The Itata*, 5 C. C. A. 629, 15 U. S. App. 1, 56 Fed. 509—*Hart v. United States*, 28 C. C. A. 618, 55 U. S. App. 479, 84 Fed. 805—*The Laurada*, 85 Fed. 769—*Pearson v. Parson*, 108 Fed. 403.

V. Duty of Government to Prevent Violation of Neutrality.

Duty of Government to Prevent Contraband Trade, see *supra*, 36, 37.

38. The collectors are not authorized to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances shall render it probable that such vessels are intended to be employed by the owners to commit hostilities against some foreign power at peace with the United States. *United States v. Quincy*, 6 Pet. 445, 8: 458

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 Removal of Cause after Granting of, see Removal of Causes, 398.
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I. In General.

1. [New trials will be granted for actual and manifest injustice done, or because the jury have proceeded on manifest mistake, or contrary to evidence, or have grossly misbehaved, or for extravagant damages. *Cowperthwaite v. Jones* (Ct. Com. Pl. Phila.) 2 Dall. 55, 1: 287]

2. Where the verdict is substantially right, and justice has been done, a new trial will not be granted, although there may have been mistakes committed on the trial. It is different in the case of a writ of error. *M'Lanahan v. Universal Ins. Co.* 1 Pet. 170, 7: 98
Cited in Allen v. Blunt, 2 Woodb. & M. 154, Fed. Cas. No. 217—*Fearing v. De Wolf*, 3 Woodb. & M. 189, Fed. Cas. No. 4,711—*Norman v. Manciette*, 1 Sawy. 488, Fed. Cas. No. 10,300—*United States v. Martin*, 1 Haskell, 172, Fed. Cas. No. 15,729—*United States v. Moore*, 11 Fed. 249—*United States v. Jones*, 32 Fed. 570—*Fuller v. Fletcher*, 44 Fed. 38—*Stanley v. Brunswick Tontine Hotel Corp.* 13 Me. 59, 29 Am. Dec. 485—*Hamblett v. Hamblett*, 6 N. H. 342—*Colburn v. Groton*, 66 N. H. 154, 22 L.R.A. 765, 28 Atl. 95—*Coleman v. Bell*, 4 N. M. 28, 12 Pac. 657—*Kline v. Wynne*, 10 Ohio St. 230—*Kearney v. Snodgrass*, 12 Or. 313, 7 Pac. 809.

3. Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, where it appears that the complaining party made no effort at the trial to have the point explained. *Flanders v. Tweed* (Tweed's Case) 16 Wall. 504, 21: 389
Cited in Baltimore & P. R. Co. v. Mackey, 157 U. S. 87, 39 L. ed. 629, 15 Sup. Ct. Rep. 491—*Eastern Oregon Land Co. v. Cole*, 35 C. C. A. 104, 92 Fed. 953.

4. In an action to recover an alleged excess of customs duties, a new trial will be granted where the verdict as directed, and the judgment thereon, are wrong as to a part of the goods. *Miller v. Vietor* (Arthur v. Vietor) 127 U. S. 572, 8 Sup. Ct. Rep. 1225, 32: 201

5. Tex. Rev. Stat. art. 1373, as to new trials, applies only to cases in which judg-

ment has been rendered upon service of process by publication. *Société Foncière et Agricole des États Unis v. Milliken*, 135 U. S. 304, 10 Sup. Ct. Rep. 823, 34: 208

6. The supreme court of the District of Columbia has power to prescribe the rule that when the judge is unable to settle the bill of exceptions, and counsel cannot settle it by agreement, a new trial must be granted. *Hume v. Bowie*, 148 U. S. 245, 13 Sup. Ct. Rep. 582, 37: 438

Cited in Morse v. Anderson, 150 U. S. 158, 37 L. ed. 1037, 14 Sup. Ct. Rep. 43—*Missouri, K. & T. R. Co. v. Russell*, 9 C. C. A. 110, 19 U. S. App. 641, 60 Fed. 503—*New York & N. E. R. Co. v. Hyde*, 5 C. C. A. 404, 5 U. S. App. 443, 56 Fed. 191—*Spinney v. Halliday*, 115 Iowa, 423, 88 N. W. 939.

7. A *venire de novo* was awarded in *Thornton v. Wynn*, 12 Wheat. 183, 6: 595
Cited in Garr v. Stokes, 16 N. J. L. 408.

Editorial note.

[Right to, after satisfaction of judgment. 68 L.R.A. 126.]

• Second new trial.

Rule as to Ejectment in Federal Court, see Courts, 1187.

Conformity of Federal Court in Ejectment Cases to State Statute, see Courts, 1344.

In Ejectment Generally, see Ejectment, IX.

8. Courts will rarely grant a new trial after two verdicts upon the facts in favor of the same party, except for error of law. *Louisville & N. R. Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. Rep. 628, 33: 1032
Cited in East Tennessee, V. & G. R. Co. v. Mahoney, 89 Tenn. 326, 15 S. W. 652.

9. The Tennessee statute forbidding the granting of more than two new trials in the same cause on the facts applies to a case where, in the opinion of the judge, the verdict was not supported by sufficient evidence, but not to a case where there is no evidence at all. *Louisville & N. R. Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. Rep. 628, 33: 1032

Cited in Mt. Adams & E. P. Inclined R. Co. v. Lowery, 20 C. C. A. 609, 43 U. S. App. 408, 74 Fed. 475—*Re Hoover*, 8 Mackey, 510—*State v. Welch*, 22 Mont. 99, 55 Pac. 927.

II. For Errors of the Court.

See also *supra*, 3.

10. [Where parol evidence of the contents of a deed and of a will was allowed without notice having been given to the other party to produce them, and the jury had listened to evidence out of court, a new trial was granted. *Bradley v. Bradley* (Pa. Sup. Ct.) 4 Dall. 112, 1: 763]

11. If the court is satisfied that if, on the trial of an issue ordered out of chancery, evidence improperly received had been rejected, or the evidence improperly rejected

had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds, but only upon review of the whole case as submitted to the jury. *Watt v. Starke*, 101 U. S. 247, 25: 826

Cited in Hammer v. Garfield Min. & Mill. Co. 130 U. S. 301, 32 L. ed. 968, 9 Sup. Ct. Rep. 548.

III. For Matters Pertaining to Jury or Verdict.

Conclusiveness of Verdict in Equity Case, see Trial, 885.

See also *supra*, 1, 2, 4.

12. If the jury fails to observe the instructions of the court, or finds excessive damages, the defendant's remedy is by motion for a new trial. *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. 541, 9: 222

13. A judge should set aside the verdict and grant a new trial, if the jury disregard *prima facie* evidence, where there is no rebutting evidence. *Kelly v. Jackson ex dem. Morris*, 6 Pet. 622, 8: 523

Editorial note.

[Inadequacy of, as ground for setting aside verdict. 47 L.R.A. 33.]

Erroneous verdict.

14. If a verdict has been given against a party on insufficient evidence, his remedy is by motion for a new trial. *Gardner v. Babcock* (Providence v. Babcock) 3 Wall. 240, 18: 31

Cited in Preble v. Bates, 37 Fed. 773—*Dupuis v. Thompson*, 16 Fla. 71.

15. [A new trial will be granted where the verdict was against the strength of the evidence. *Steinmetz v. Currey* (Pa. Sup. Ct.) 1 Dall. 234, 1: 115]

16. If a verdict is against the evidence, the only remedy is a new trial, to be granted by the court in which the verdict was found. *Maryland Ins. Co. v. Ruden*, 6 Cranch, 338, 3: 242

Schuchardt v. Allen, 1 Wall. 359, 17: 642
Cited in Home Ins. Co. v. Barton, 13 Wall. 604.

20 L. ed. 709—*Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 301, 23 L. ed. 901—*Pittsburgh, C. & St. L. R. Co. v. Heck*, 102 U. S. 120, 26 L. ed. 59—*The Connemara* (*Sinclair v. Cooper*) 108 U. S. 360, 27 L. ed. 754, 2 Sup. Ct. Rep. 754—*Louisville & N. R. Co. v. Woodson*, 134 U. S. 621, 33 L. ed. 1035, 10 Sup. Ct. Rep. 628—*Texas & P. R. Co. v. Nelson*, 1 C. C. A. 691, 2 U. S. App. 213, 50 Fed. 816—*Postal Teleg. Cable Co. v. Zopf*, 19 C. C. A. 606, 43 U. S. App. 141, 73 Fed. 610—*Kelley v. Cunard S. S. Co.* 120 Fed. 542—*Welch v. County Court*, 29 W. Va. 68, 1 S. E. 337.

Qualifications of jurors.

17. [Previous declarations of a juror showing bias are sufficient ground for a new trial. *United States v. Fries* (C. Ct.) 3 Dall. 515, 1: 701]

— Editorial note.

[Disqualification of juror as ground for 18 L.R.A. 473.]

IV. New Evidence; Surprise.

Failure to Obtain New Trial as Insufficient Ground for Injunction against Judgment, see Injunction, 89.

New Evidence as Ground for Bill of Review, see Review, II. b.

18. A new trial may be granted for newly discovered evidence in an action at law, by the United States court in the Indian territory, after a final decision of the case in the Supreme Court of the United States, under the authority of the Arkansas statute (Mans. Dig. chap. 119, § 5155), which is made applicable to the United States court of the Indian territory by the act of Congress of May 2, 1890, since that section relates to new trials for grounds disclosed after the term, and requires the grounds to be set forth in the petition which shall issue against the adverse party, and makes a proceeding under that section in form a new and independent suit. *Re Fuller* (Fuller v. United States) 182 U. S. 562, 21 Sup. Ct. Rep. 871, 45: 1230
Cited in *Chambliss v. Hass*, 125 Iowa, 488, 68 L.R.A. 130, 101 N. W. 153.

19. If a party has been taken by surprise by the introduction of evidence, his only remedy is by a motion for a new trial. *Mulhall v. Keenan*, 18 Wall. 342, 21: 808
Cited in *Colorado Midland R. Co. v. Bowles*, 14 Colo. 89, 23 Pac. 467.

Editorial note.

[Cumulative evidence as ground for. 14 L. R.A. 609.]

V. Practice.**a. In General.**

Conformity as Between Federal and State Practice, see Courts, V. e, 7.

20. A district judge may grant a new trial in a cause pending in his court, although the judgment therein was rendered by his predecessor. *Life & F. Ins. Co. v. Wilson*, 8 Pet. 291, 8: 949
Cited in *Hume v. Bowle*, 148 U. S. 253, 37 L. ed. 440, 13 Sup. Ct. Rep. 582—*People ex rel. Hambel v. McConnell*, 153 Ill. 201, 40 N. E. 608—*Wamesit Power Co. v. Lowell & A. R. Co.* 130 Mass. 457.

21. The verdict in an equity case can be set aside only on a motion for a new trial, based not merely on errors of the judge, but upon review of the whole case as submitted to the jury. *Watt v. Starke*, 101 U. S. 247, 25: 826

22. Misdirection of the judge in an equity case submitted to the jury, is a circumstance

to be taken into consideration, on motion for a new trial, but the evidence may be so preponderating as to sustain the verdict, notwithstanding the instructions. *Watt v. Starke*, 101 U. S. 247, 25: 826

23. A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial. On such motion for a new trial, the evidence, or the substance of it, should be stated and made part of the record. The court cannot decide the case upon exceptions without the evidence. *Watt v. Starke*, 101 U. S. 247, 25: 826

Johnson v. Harmon, 94 U. S. 371, 24: 271
Cited in *Watt v. Starke*, 101 U. S. 250, 25 L. ed. 827—*Wilson v. Riddle*, 123 U. S. 615, 31 L. ed. 283, 8 Sup. Ct. Rep. 255—*Brown v. Cranberry Iron & Coal Co.* 13 C. C. A. 68, 25 U. S. App. 107, 65 Fed. 638—*Brown v. Cranberry Iron & Coal Co.* 18 C. C. A. 447, 25 U. S. App. 679, 72 Fed. 99—*Brinkley v. Louisville & N. R. Co.* 95 Fed. 351—*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 178—*Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 330—*Fanning v. Russell*, 94 Ill. 391—*Dorr v. Tremont Nat. Bank*, 128 Mass. 354—*American Dock & Improv. Co. v. Public Schools*, 37 N. J. Eq. 269.

24. The operation of a judgment will not be suspended in any case beyond a period of forty-two days, to allow an application for a new trial. *Cambuston v. United States*, 95 U. S. 285, 24: 448

25. Where damages for a tort have been assessed by a jury at an entire sum, the court, upon a motion for a new trial, cannot, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, enter an absolute judgment for any other sum than that assessed by the jury. *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. Rep. 696, 33: 110

26. The territorial district court, upon a motion for a new trial, has power to make additional findings in support of its judgment when it considers that material findings have been omitted or imperfectly stated. *North v. Peters*, 138 U. S. 271, 11 Sup. Ct. Rep. 346, 34: 936
Cited in *Thompson v. Connecticut Mut. L. Ins. Co.* 139 Ind. 352, 38 N. E. 796—*Estill v. Irvine*, 10 Mont. 513, 26 Pac. 1005—*Wachsmuth v. Orient Ins. Co.* 49 Neb. 596, 68 N. W. 935.

Time.

In Court of Claims, see Court of Claims, 29.

27. [No motion for a new trial shall be made after motion in arrest of judgment. *Republica v. Lacaze* (Pa. Sup. Ct.) 2 Dall. 118, 1: 313]

28. Where a new and different judgment was directed to be entered in the trial court by the appellate court's mandate, the period limited by statute in which to pay costs and apply for a new trial was regarded as running from the time when such judgment

was entered. *Smale v. Mitchell*, 143 U. S. 99, 12 Sup. Ct. Rep. 353, 36: 90
Cited in Iron Silver Min. Co. v. Mike & S. Gold & Silver Min. Co. 6 C. C. A. 182, 12 U. S. App. 497, 56 Fed. 957.

29. A motion for a new trial is to be deemed to be overruled at the end of the term, although continued to another term by an order in chambers made by the judge who tried the cause, because of his inability to attend, by virtue of *Ariz. Rev. Stat. 1887, § 837*, requiring motions for new trials to be "determined at the term of the court at which the motion shall be made,"—especially when considered in connection with § 842, as amended by Acts 1891, No. 49, providing for a review by the territorial supreme court of a denial of a motion for a new trial, and enacting that "in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then said motion shall be denied." *James v. Appel*, 192 U. S. 129, 24 Sup. Ct. Rep. 222, 48: 377

b. Testimony or Affidavits of Jurors.

See also Judgment, 1193.

30. On a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations is inadmissible either to impeach or to support the verdict. But a juror may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. Rep. 50, 36: 917

Cited in Haws v. Victoria Copper Min. Co. 160 U. S. 313, 40 L. ed. 439, 16 Sup. Ct. Rep. 282—*Pelzer Mfg. Co. v. Hamburg-Bremen F. Ins. Co.* 71 Fed. 830—*Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co.* 22 C. C. A. 286, 42 U. S. App. 123, 76 Fed. 482—*Felton v. Spiro*, 24 C. C. A. 327, 47 U. S. App. 402, 78 Fed. 583—*United States v. Ogden*, 105 Fed. 374—*Ogden v. United States*, 50 C. C. A. 382, 112 Fed. 526—*State v. Riggs*, 110 La. 516, 34 So. 655—*Territory v. Edie*, 7 N. M. 184, 34 Pac. 46—*United States v. Swan*, 7 N. M. 315, 34 Pac. 538—*United States v. Blena*, 8 N. M. 102, 42 Pac. 70—*United States v. Spencer*, 8 N. M. 670, 47 Pac. 715—*People v. Ritchie*, 12 Utah, 194, 42 Pac. 209—*Hempton v. State*, 11 Wis. 145, 86 N. W. 596—*Wolfgram v. Schoepke*, 123 Wis. 25, 100 N. W. 1054.

31. Voluntary affidavits of two jurors, stating that, while impaneled to try a criminal cause, they read a newspaper report of the trial, but that it had no influence upon their verdict, are, even if admissible, no ground for a new trial. *United States v. Reid*, 12 How. 361, 13: 1023

Cited in Mattox v. United States, 146 U. S. 147, 36 L. ed. 920, 13 Sup. Ct. Rep. 50—*Rumford Chemical Works v. Finnie*, 2 Flipp. 460, Fed. Cas. No. 12,130—*Fuller v. Fletcher*, 44 Fed. 39—*Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co.* 22 C. C. A. 286, 42 U. S. App. 123, 76 Fed. 482—*Morse v. Montana Ore Purchasing Co.* 105 Fed. 346—*Territory*

v. Taylor, 1 Dak. 488 Appx.—*Kelly v. Moore*, 22 App. D. C. 29—*Perry v. Bailey*, 12 Kan. 543—*Browne v. Browne*, 22 Md. 114—*Woodward v. Leavitt*, 107 Mass. 463, 9 Am. Rep. 49—*Knowlton v. McMahon*, 13 Minn. 388, 52 Am. Dec. 849, Gil. 358—*Copeland v. Wabash R. Co.* 175 Mo. 683, 75 S. W. 106—*Harris v. State*, 24 Neb. 810, 40 N. W. 817—*Knight v. Epsom*, 62 N. H. 360—*State v. Cucuel*, 31 N. J. L. 263—*United States v. Spencer*, 8 N. M. 670, 47 Pac. 715—*Com. v. Johnson*, 5 Pa. Co. Ct. 238—*Williams v. State*, 33 Tex. Crim. Rep. 136, 47 Am. St. Rep. 21, 25 S. W. 629—*State v. Robinson*, 20 W. Va. 757, 43 Am. Rep. 799.

c. Remittitur.

Remittitur on Appeal, see *Appeal and Error*, 5271-5279.

As Denial of Right to Jury Trial, see *Jury*, 68.

See also *supra*, 25.

32-3. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the damages awarded him by the verdict of the jury, is within the discretion of the trial court. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29: 755

Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. Rep. 453, 32: 854

Cited in Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 73, 32 L. ed. 855, 9 Sup. Ct. Rep. 458—*Koenigsberger v. Richmond Silver Min. Co.* 158 U. S. 53, 39 L. ed. 893, 15 Sup. Ct. Rep. 751—*Scaife v. Western North Carolina Land Co.* 30 C. C. A. 664, 59 U. S. App. 28, 87 Fed. 311—*Smith v. Pittsburgh & W. R. Co.* 90 Fed. 787—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* 53 C. C. A. 521, 116 Fed. 7—*Missouri K. & T. R. Co. v. Turley*, 1 In4. Terr. 284, 37 S. W. 52—*Southern P. Co. v. Tomlinson*, 4 Ariz. 132, 33 Pac. 710—*Nelson v. Crescent City R. Co.* 49 La. Ann. 501, 21 So. 635—*Stucke v. Orleans R. Co.* 50 La. Ann. 205, 23 So. 342—*Creve Coeur Lake Ice Co. v. Tamm*, 90 Mo. App. 201—*Chicago Title & T. Co. v. O'Marr*, 25 Mont. 247, 64 Pac. 506—*Schofield v. Territory*, 9 N. M. 544, 56 Pac. 306—*Smith v. Times Pub. Co.* 178 Pa. 512, 35 L.R.A. 835, 39 W. N. C. 341, 36 Atl. 296—*Texas & N. O. R. Co. v. Syfan*, 91 Tex. 567, 44 S. W. 1064—*Winter v. Shoudy*, 9 Wash. 53, 36 Pac. 1049—*Ohio River R. Co. v. Blake*, 38 W. Va. 724, 18 S. E. 957.

34. On a new trial granted after the remission, by plaintiff, of part of his judgment, he will not be bound by such remission. *Planters' Bank v. Union Bank*, 16 Wall. 483, 21: 473

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1. Prior to the act of February 26, 1881 (21 Stat. at L. 352; chap. 82, U. S. Comp. Stat. 1901, p. 3499), notaries public in the several states had no authority to administer to officers of national banking associations the oath required by U. S. Rev. Stat. § 5211, U. S. Comp. Stat. 1901, p. 3498, in verifying returns to the Comptroller of the Currency. The act of 1881 gave power to administer such oaths. *United States v. Curtis*, 107 U. S. 671, 2 Sup. Ct. Rep. 501, 27: 534

Cited in United States v. Madison, 10 Sawy. 220, 21 Fed. 628.

2. A notary public has no authority to administer an oath to a deputy surveyor of the United States in reference to the manner in which he had discharged his duties as deputy surveyor, under the contract which is made part of the indictment in this case. *United States v. Hall*, 131 U. S. 50, 9 Sup. Ct. Rep. 663, 33: 97
Cited in United States v. Reilly, 131 U. S. 59, 83 L. ed. 75, 9 Sup. Ct. Rep. 664.

3. A notary public, or other officer designated by Congress to take depositions in case of a contested election of a member of the House of Representatives of the United States, performs this function under the authority of Congress, and not under that of the state. *Thomas v. Loney (Re Loney)* 134 U. S. 372, 10 Sup. Ct. Rep. 584, 33: 949

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I. In General.

1. One acquiring a legal title is not affected by notice of any claim of another, unless that is at least valid in equity. *Wilson v. Mason*, 1 Cranch, 45, 2: 29
Cited in *Jones v. Van Zandt*, 5 How. 225, 12 L. ed. 127—*Byers v. Fowler*, 12 Ark. 286, 54 Am. Dec. 271—*Kerr v. Mack*, 1 Ohio, 166—*McArthur v. Phoebus*, 2 Ohio, 420—*Smith v. Fultz*, 4 Serg. & R. 479.

2. The legal rights of one holding a prior lien or encumbrance on property cannot be affected by a sale or disposal thereof unless he had notice and an opportunity to come in and claim his rights. *Wiswall v. Sampson*, 14 How. 52, 14: 322
Cited in *Williams v. Gibbs*, 17 How. 255, 15 L. ed. 141—*Johnson v. Culbertson*, 79 Fed. 5—*Continental Nat. Bank v. Hellman*, 81 Fed. 42.

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Of Powers of Officers to Bind United States by Contract, see United States, 126a.

To Purchaser of Land, see Vendor and Purchaser, IV. b, 3.

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3. Constructive notice is, in its nature, no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. Rep. 357, 27: 1012
Distinguished in *Baltimore v. Whittington*, 78 Md. 238, 27 Atl. 984.
Cited in *Adams-Booth Co. v. Reid*, 112 Fed.

112—*Hayward v. Mayse*, 1 App. D. C. 140—*Thomas v. Flint*, 123 Mich. 35, 47 L.R.A. 509, 81 N. W. 936.

4. Constructive notice of a contract cannot be implied from the fact of its record in the office of the clerk of the county, where there is no statute providing for such record, although the party sought to be charged has seen fit to record a similar contract in the same office. *Burck v. Taylor*, 152 U. S. 634, 14 Sup. Ct. Rep. 696, 38: 578

5. If a state, by a public act of its legislature, impose restrictions upon the alienation of its property, every person who takes a transfer of such property must be held affected by notice of them. *Texas v. White*, 7 Wall. 700, 19: 227

6. The trustees of a newspaper corporation, in whom is lodged the power to manage its affairs, are charged with the knowledge of the extent of the power usually exercised by the managing editor in the collection of news, and must be held to have acquiesced in the possession by him of such authority, even though they had not expressly delegated it to him. *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240, 46: 366

7. A principal reposing confidence in an agent, and therefore neglecting some source of knowledge which he might have sought, is not chargeable with what he might have found out upon inquiry aroused by suspicion. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. Rep. 594, 32: 1005

Sufficiency of notice.

To Purchaser of Trust Estate, see Trusts, V. a.

8. Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry may lead. *Shauer v. Alerton*, 151 U. S. 607, 14 Sup. Ct. Rep. 442, 38: 286

Cited in *Columbus, S. & H. R. Co.'s Appeal*, 48 C. C. A. 304, 109 Fed. 206—*Southern Bldg. & L. Asso. v. Miller*, 49 C. C. A. 25, 110 Fed. 39—*Kansas Moline Plow Co. v. Sherman*, 3 Okla. 214, 32 L.R.A. 60, 41 Pac. 623.

9. One is bound by actual knowledge, or actual notice of such facts and circumstances as by the exercise of due diligence would lead to knowledge, of another's title to land; or where his ignorance is the result of gross and culpable negligence he is equally bound. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239, 35: 1063

Cited in *Church of Jesus Christ of L. D. S. v. Church of Christ*, 60 Fed. 946.

10. A notice by one purchasing a mill, to one who has made it, that, if the latter does not put the mill in repair so that it will do good work, the former will do so and charge the expense to the latter, is sufficient to cover the necessary alterations to accom-

plish that end. *Stillwell & B. Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. Rep. 601, 32: 1035

Reference in one writing to another.

11. A reference in a deed to a contract under which it is given constitutes notice, not only of that contract, but also of another which is referred to therein. *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243, 34: 843

12. A paper which expressly refers to another paper within power of the party gives notice of the contents of that other paper. *Livingston v. Maryland Ins. Co.* 7 Cranch, 506, 3: 421

Notice of covenants.

13-15. Whether covenants be, or be not, strictly such as run with the land, when they are contained in an instrument which constitutes a link in a chain of title, all persons holding thereunder must be held to have notice of them. *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243, 34: 843
Cited in Wade v. Chicago, S. & St. L. R. Co. 149 U. S. 341, 37 L. ed. 761, 13 Sup. Ct. Rep. 892.

II. Imputed.

a. In General.

16. Knowledge of an employee of another employee's default, not communicated to the employer, is not, in the absence of an express agreement, imputable to such employer so as to relieve the surety on a bond given to the employer conditioned for the faithful performance by the employee of his duties. *Fidelity & D. Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. Rep. 833, 46: 1193
Cited in American Bonding Co. v. Spokane Bldg. & L. Soc. 65 C. C. A. 124, 130 Fed. 740—*Ætna Indemnity Co. v. Schroeder*, 12 N. D. 117, 95 N. W. 436.

17. Where two of several joint purchasers of the assets of a business had knowledge of the incorrectness of one of the items on the list of assets, their knowledge extends to the others. *Lyman v. Bank of United States*, 12 How. 225, 13: 965
Cited in Proctor v. Baldwin, 82 Ind. 374—*Merchants' Bank v. Rudolf*, 5 Neb. 541—*Seale v. Baker*, 70 Tex. 292, 8 Am. St. Rep. 592, 7 S. W. 742—*Ayott v. Smith*, 40 Vt. 537, 94 Am. Dec. 429.

18. A notice of a blockade to the charterer of a vessel, who is on board with power to name the port which she is to visit, but with no right to interfere with the navigation of the ship, is a notice to the vessel. *The Adula*, 176 U. S. 361, 20 Sup. Ct. Rep. 432, 44: 505

b. By Knowledge of Agent or Representative.

Notice to Draftsman Employed by Grantor Not Notice to Grantee, see Vendor and Purchaser, 172.
 See also *supra*, 7; Limitation of Actions, 219.

19. The general principle is, that notice to the agent is notice to the principal. *Brooks v. Marbury*, 11 Wheat. 78, 6: 423
Mechanics Bank v. Seton, 1 Pet. 299, 7: 152
Cited in Platt v. Oliver, 2 McLean, 316, Fed. Cas. No. 11,115—*Blerce v. Red Bluff Hotel Co.* 31 Cal. 165—*Greer v. Higgins*, 8 Kan. 522—*Bank of United States v. Davis*, 2 Hill 461.

20. Notice of a prior encumbrance to an agent is notice to the principal. *Astor v. Wells*, 4 Wheat. 466, 4: 616
Cited in Pine Mountain Iron & Coal Co. v. Bailey, 36 C. C. A. 231, 94 Fed. 260—*Blerce v. Red Bluff Hotel Co.* 31 Cal. 165—*Mounce v. Byars*, 11 Ga. 195—*Page v. Brant*, 18 Ill. 39—*Brannon v. May*, 42 Ind. 101—*De Louis v. Meek*, 2 G. Greene, 70, 50 Am. Dec. 491—*Greer v. Higgins*, 8 Kan. 522.

21. Notice to an agent of fraud in the release of a prior mortgage is notice to the principal. *Connecticut General L. Ins. Co. v. Burnstine*, 131 U. S. cliii. Appx., and 24: 706

22. A principal in a transaction is chargeable with notice of matters affecting its validity, coming to the knowledge of his agent pending the proceedings. *Johnston v. Laffin*, 103 U. S. 800, 26: 532
Connecticut General L. Ins. Co. v. Burnstine, 131 U. S. cliii. Appx., and 24: 706
Cited in Columbian Bank's Estate, 147 Pa. 435, 23 Atl. 626.

23. If an agent, at the time of effecting a purchase, has previous knowledge of any prior lien, trust, or fraud affecting the property, his principal is affected thereby, unless the knowledge of the agent was acquired by confidential communications, or in some way such that it is not his duty to communicate it. *Harrington v. United States (The Distilled Spirits)* 11 Wall. 356, 20: 167
Cited in Beecher v. Gillespie, 6 Ben. 366, Fed. Cas. No. 1,224—*Goodenough v. Warren*, 5 Sawy, 502, Fed. Cas. No. 5,534—*Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 92—*Robinson v. Pebworth*, 71 Ala. 246—*Christie v. Sherwood*, 113 Cal. 530, 45 Pac. 820—*Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.* 11 Colo. 240, 7 Am. St. Rep. 226, 17 Pac. 760—*Campbell v. First Nat. Bank*, 22 Colo. 189, 43 Pac. 1007—*Zang v. Adams*, 23 Colo. 410, 58 Am. St. Rep. 249, 48 Pac. 500—*Schollay v. McMillan*, West Drug Co. 17 Colo. App. 134, 67 Pac. 182—*Fishel v. Bennett*, 56 Conn. 44, 12 Atl. 102—*Red River Valley Land & Invest. Co. v. Smith*, 7 N. D. 245, 74 N. W. 194—*Enos v. St. Paul F. & M. Ins. Co.* 4 S. D. 652, 46 Am. St. Rep. 796, 57 N. W. 919—*Mack v. McIntosh*, 181 Ill. 644, 54 N. E. 1019—*Yerger v. Barz*, 56 Iowa, 82, 8 N. W. 769—*Hummel v. Bank of Monroe* 75 Iowa, 691, 37 N. W. 954—*Hardten v. State*, 32 Kan. 639, 5 Pac. 212—*Fairfield Sav. Bank v. Chase*, 72 Me. 230, 39 Am. Rep. 319—*Suit v. Woodhall*,

113 Mass. 395—Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 326, 13 N. W. 145—Equitable Securities Co. v. Sheppard, 78 Miss. 234, 28 So. 842—Union Trust Co. v. Provident Washington Ins. Co. 79 Mo. App. 369—Fowler v. Randall, 99 Mo. App. 412, 73 S. W. 931—Clark v. Marshall, 62 N. H. 500—Sooy v. State, 41 N. J. L. 400—Dupree v. Virginia Home Ins. Co. 93 N. C. 240—Bangor & P. R. Co. v. American Bangor Slate Co. 203 Pa. 12, 52 Atl. 40—Norris v. Hartford F. Ins. Co. 57 S. C. 365, 35 S. E. 572—Societe Des Mines D'Argentat Fonderies De Bingham v. Mackintosh, 5 Utah, 578, 18 Pac. 363—Easley v. Barksdale, 75 Va. 284—Dormitzer v. German Sav. & L. Soc. 23 Wash. 218, 62 Pac. 862.

24. If the facts of a vessel's navigating under a license from the enemy, or trading with the enemy, come to the knowledge of an agent, it will affect the principal who is the owner of a cargo on board the vessel, though he may be ignorant of the same. *The Hiram*, 1 Wheat. 440, 4: 131

25. The subsequent filling up of the blank power of attorney indorsed on a certificate of bank stock, with another name, does not so connect the vendor with the party named as to charge him with the latter's knowledge, and thus affect the previous transaction. *Johnston v. Laffin*, 103 U. S. 800, 26: 532

26. Notice to the trustees is notice to the beneficiaries in a deed of trust. *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. Rep. 354, 33: 696
Cited in *National Waterworks Co. v. Kansas City*, 78 Fed. 432.

27. A creditor is liable to the assignee for the amount of a debt secured, within four months before bankruptcy proceedings, by his agent with knowledge of the debtor's insolvency. *West Philadelphia Bank v. Dixon*, 95 U. S. 180, 24: 407
Cited in *Lindsey v. Lambert Bldg. & L. Asso.* 4 Fed. 53—*Lindsey v. Lambert Bldg. & L. Asso.* 37 Phila. Leg. Int. 427.

Editorial note.

[Effect of notice to a subagent. 21 L.R.A. 340.]

To attorney.

For Purchaser of Land, see Vendor and Purchaser, 171.
See also *infra*, 45.

28. Information to an attorney is information to his client, and the latter is affected with notice of all facts, notice of which can be charged upon his attorney. *Smith v. Ayer*, 101 U. S. 320, 25: 955
Rogers v. Palmer, 102 U. S. 263, 26: 164
May v. Le Claire, 11 Wall. 217, 20: 50
Distinguished in *Wiegmann v. Morimura*, 12 Misc. 39, 33 N. Y. Supp. 39.
Cited in *Goodenough v. Warren*, 5 Sawy. 502, Fed. Cas. No. 5,554—*Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. 16—*Chicago, St. P. M. & O. R. Co. v. Belliwith*, 28 C. C. A. 361, 55 U. S. App. 113, 83 Fed. 440—*Denver v. Sherret*, 31 C. C. A. 508, 60 U. S. App. 104, 88 Fed. 234—*Re Dunavant*, 96 Fed. 549—*Barstow v. Beckett*, 122 Fed. 147—*Re Pease*, 129 Fed. 455—*Walker v.*

Schreiber, 47 Iowa, 533—*Ross v. Chicago, R. I. & P. R. Co.* 55 Iowa, 696, 8 N. W. 644—*Presstman v. Mason*, 68 Md. 92, 11 Atl. 764—*Baltimore v. Whittington*, 78 Md. 238, 27 Atl. 984—*Hardten v. State*, 32 Kan. 639, 5 Pac. 212—*Schwind v. Boyce*, 94 Md. 518, 51 Atl. 45—*Edwards v. Carson Water Co.* 21 Nev. 506, 34 Pac. 381—*Wiegmann v. Morimura*, 12 Misc. 39, 33 N. Y. Supp. 39—*Pacific Mfg. Co. v. Brown*, 8 Wash. 352, 36 Pac. 273.

29. An attorney employed by a collection agent, being the agent of the collection agent, and not of the creditor, such attorney's knowledge of the bankrupt condition of the debtor is not chargeable to the creditor. *Hoover v. Wise*, 91 U. S. 308, 23: 392
Distinguished in *First Nat. Bank v. Reno County Bank*, 1 McCrary, 496, 3 Fed. 261—*Re Flick*, 105 Fed. 506.

Cited in *Rogers v. Palmer*, 102 U. S. 268, 26 L. ed. 165—*First Nat. Bank v. Reno County Bank*, 1 McCrary, 496, 3 Fed. 261—*Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 22 C. C. A. 414, 43 U. S. App. 550, 75 Fed. 469—*Fairfield Sav. Bank v. Chase*, 72 Me. 228, 39 Am. Rep. 319—*Mathews v. Riggs*, 80 Me. 110, 13 Atl. 48—*Woodward v. Republic F. Ins. Co.* 32 Hun, 371—*Poucher v. Blanchard*, 86 N. Y. 262—*Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 657—*Bangor & P. R. Co. v. American Bangor Slate Co.* 203 Pa. 12, 52 Atl. 40—*Bates v. American Mortg. Co.* 37 S. C. 101, 21 L.R.A. 346, 16 S. E. 883.

30. The knowledge of plaintiff's attorney is the knowledge of the plaintiff, where the question is whether the plaintiff in a judgment on which goods were taken in execution knew of the defendant's insolvency and attempt to evade the bankrupt law. *Rogers v. Palmer*, 102 U. S. 263, 26: 164
Cited in *Brown v. Jefferson County Nat. Bank*, 10 Blatchf. 333, 9 Fed. 272—*Re Pease*, 129 Fed. 455—*Blake v. Clary*, 83 Me. 157, 21 Atl. 841—*Sartwell v. North*, 144 Mass. 194, 10 N. E. 824—*Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 275, 9 Am. St. Rep. 698, 17 N. E. 496—*Babbitt v. Kelley*, 96 Mo. App. 534, 70 S. W. 384—*Hyman v. Barmon*, 6 Wash. 520, 33 Pac. 1076.

31. When it is not the agent's duty to communicate his knowledge to his principal, —as when it has been acquired confidentially as attorney,—the principal is not bound by it. *Harrington v. United States (The Distilled Spirits)* 11 Wall. 356, 20: 167

32. Where the attorney of a creditor knew of the insolvency of his debtor, and both co-operated to have the debtor's property seized on execution before the bankrupt law could be enforced, with intent to defeat its operation, and the debtor contributed actively to that end, this is a fraud upon the bankrupt law. The client is charged with his attorney's knowledge. *Rogers v. Palmer*, 102 U. S. 263, 26: 164

33. The acts of an attorney, and his knowledge obtained in the course of his employment, are the acts and knowledge of his principal. *Rogers v. Palmer*, 102 U. S. 263, 26: 164
Cited in *Pochin v. Knoebel*, 63 Neb. 774, 89 N. W. 264—*Poucher v. Blanchard*, 86 N. Y. 262.

To corporate agent or officers.

See also *infra*, 45.

34. Knowledge of the cashier of matter relating to the special deposit of securities in a bank is knowledge of the bank. *Manhattan Bank v. Walker*, 130 U. S. 267, 9 Sup. Ct. Rep. 519, 32: 959
Cited in St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 576, 33 L. ed. 686, 10 Sup. Ct. Rep. 390—*Wasson v. Hawkins*, 59 Fed. 234—*Fisher v. United States Nat. Bank*, 12 C. C. A. 415, 26 U. S. App. 448, 64 Fed. 711—*Hunter v. Robbins*, 117 Fed. 923.

35. Notice of a trust communicated to the cashier of a bank when he received the stock on which money was loaned is binding upon the bank. *Duncan v. Jaudon*, 15 Wall. 165, 21: 142

36. A subsequent board of directors of a bank is to be considered as knowing all the circumstances communicated or known to a previous board, as that a certain person in whose name stock of the bank stands holds it as trustee. *Mechanics Bank v. Seton*, 1 Pet. 299, 7: 152
Cited in Lawrence v. Dana, 4 Cliff. 69, Fed. Cas. No. 8,136—*Dock v. Elizabethtown Steam Mfg. Co.* 34 N. J. L. 317.

37. Knowledge or actual notice of all the corporators and the president of the company associated together to carry forward a common enterprise is the knowledge or notice of the company; and where constructive notice binds them, it binds the company. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239, 35: 1063
Cited in Southern Bldg. & L. Assn. v. Miller, 49 C. C. A. 25, 110 Fed. 39—*Vercruyase v. Williams*, 50 C. C. A. 491, 112 Fed. 211.

38. The knowledge of the vice president and of one or more of the directors of a bank, but less than a majority of the board, of a default by the president, is not rendered imputable to the bank, so as to relieve a surety on his bond from liability thereon, by the provision therein that the employer shall exercise due and customary supervision, and will not condone a default of the bonded employee, or continue him in his employment after the commission of a default, as such provision relates to the bank, and not to a minority of the board of directors, or its subordinate officers or agents. *Fidelity & D. Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. Rep. 833, 46: 1193

39. A bank cannot be deemed to have had constructive notice that its president gave a certificate to enable its cashier to procure a bond insuring his fidelity, where it was not the duty or business of the president, and there was no usage of the bank allowing him to give the certificate. *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. Rep. 552, 42: 977
Cited in Fidelity & D. Co. v. Courtney, 186 U. S. 350, 46 L. ed. 1197, 22 Sup. Ct. Rep. 833—*Fidelity & D. Co. v. Courtney*, 43 C. C. A. 336, 103 Fed. 604—*United States Fidelity & G. Co. v. Muir*, 53 C. C. A. 58, 115 Fed. 266.

Of agents own wrong.

40. The presumption that an agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations, not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends, or to commit some fraud against the principal. *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. Rep. 552, 42: 977

Cited in American Surety Co. v. Pauly, 170 U. S. 162, 42 L. ed. 989, 18 Sup. Ct. Rep. 563—*Hadden v. Dooley*, 34 C. C. A. 343, 63 U. S. App. 173, 92 Fed. 279—*Pine Mountain Iron & Coal Co. v. Bailey*, 36 C. C. A. 232, 94 Fed. 261—*Yelser v. United States Board & Paper Co.* 52 L.R.A. 728, 46 C. C. A. 572, 107 Fed. 345—*Central Coal & Coke Co. v. George S. Good & Co.* 57 C. C. A. 166, 120 Fed. 798—*American Bonding Co. v. Spokane Bldg. & L. Soc.* 65 C. C. A. 125, 130 Fed. 741—*City Electric Street R. Co. v. First Nat. Bank*, 65 Ark. 546, 47 S. W. 855—*Shideler v. Fisher*, 13 Colo App. 114, 57 Pac. 864—*Ætna Indemnity Co. v. Schroeder*, 12 N. D. 116, 95 N. W. 436—*Warren Deposit Bank v. Fidelity & D. Co.* 116 Ky. 50, 74 S. W. 1111—*Butler v. Montgomery Grain Co.* 85 Mo. App. 56—*Wells, F. & Co's Express v. Walker*, 9 N. M. 466, 54 Pac. 875—*Pacific Nat. Bank v. Ætna Indemnity Co.* 33 Wash. 436, 74 Pac. 590.

41. The fraud of an agent cannot alter the legal effect of his knowledge with respect to his principal in regard to third parties who had no connection whatever with such agent in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated. *Armstrong v. Ashley*, 204 U. S. 272, 27 Sup. Ct. Rep. 270, 51: 182

42. Where an agent, in receiving a release of mortgage, had knowledge of a fraud in giving the release, his principal is affected with notice of the fraud. *Connecticut General L. Ins. Co. v. Burnstine*, 131 U. S. ciii. Appx. and, 24: 706

When knowledge acquired.

43. The general rule is that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is notice to the principal. *Harrington v. United States (Distilled Spirits)* 11 Wall. 356, 20: 167

Cited in Hoover v. Wise, 91 U. S. 310, 23 L. ed. 393—*Peters v. Bain*, 133 U. S. 697, 33 L. ed. 706, 10 Sup. Ct. Rep. 354—*Beecher v. Gillespie*, 6 Ben. 366, Fed. Cas. No. 1,224—*Goodenough v. Warren*, 5 Sawy. 502, Fed. Cas. No. 5,534—*Brown v. Jefferson County Nat. Bank*, 19 Blatchf. 336, 9 Fed. 274—*Re Douglas*, 11 Fed. 405—*Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.* 22 Blatchf. 224, 20 Fed. 701—*Satterfield v. Malone*, 1 L.R.A. 39, 35 Fed. 453—*Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. 16—*Ætna Indemnity Co. v. Ladd*, 68 C. C. A. 285, 135 Fed. 647—*Watson v. Sutro*, 86 Cal. 517, 24 Pac. 172—*Armstrong v. Abbott*, 11 Colo. 223, 17 Pac. 517—*Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.* 11 Colo. 240,

7 Am. St. Rep. 226, 17 Pac. 760—First Nat. Bank v. Campbell, 2 Colo. App. 285, 30 Pac. 357—Hummel v. First Nat. Bank, 2 Colo. App. 579, 32 Pac. 72—Fishel v. Bennett, 56 Conn. 44, 12 Atl. 102—McGurk v. Metropolitan L. Ins. Co. 56 Conn. 589, 1 L.R.A. 567, 16 Atl. 263—Snyder v. Partridge, 138 Ill. 185, 32 Am. St. Rep. 180, 29 N. E. 851—Mathews v. Riggs, 80 Me. 110, 13 Atl. 48—Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 276, 9 Am. St. Rep. 698, 17 N. E. 406—Allen v. South Boston R. Co. 150 Mass. 206, 5 L.R.A. 719, 15 Am. St. Rep. 185, 22 N. E. 917—Bank for Savings v. Frank, 36 How. Pr. 414—Kendall v. Niebuhr, 58 How. Pr. 164—Woodward v. Republic F. Ins. Co. 32 Hun, 372—Bennett v. Buchan, 76 N. Y. 390—Constant v. University of Rochester, 111 N. Y. 609, 2 L.R.A. 737, 7 Am. St. Rep. 769, 19 N. E. 631—Cox v. Pearce, 112 N. Y. 641, 3 L.R.A. 564, 20 N. E. 566—Akers v. Bowan, 33 S. C. 472, 10 L.R.A. 715, 12 S. E. 165—Riordan v. Britton, 69 Tex. 204, 5 Am. St. Rep. 37, 7 S. W. 50—Brothers v. Bank of Kaukauna, 84 Wis. 395, 36 Am. St. Rep. 932, 54 N. W. 786.

44. The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind at the time he is acting as such agent; provided it be of such a character that he may communicate it to his principal without breach of professional confidence. *Harrington v. United States (The Distilled Spirits)* 11 Wall. 256, 20: 167
Cited in McIntire v. Pryor, 173 U. S. 52, 43 L. ed. 611, 19 Sup. Ct. Rep. 352—*Fidelity & D. Co. v. Courtney*, 186 U. S. 362, 46 L. ed. 1202, 22 Sup. Ct. Rep. 833—*Potter v. Phenix Ins. Co.* 63 Fed. 888—*Western Mortg. & Invest. Co. v. Ganzer*, 11 C. C. A. 374, 23 U. S. App. 608, 63 Fed. 650—*Thomson-Houston Electric Co. v. Capitol Electric Co.* 12 C. C. A. 645, 22 U. S. App. 669, 65 Fed. 343—*Starr & Co. v. Galgate Ship Co.* 15 C. C. A. 375, 29 U. S. App. 599, 68 Fed. 243—*Brown v. Cranberry Iron & Coal Co.* 18 C. C. A. 449, 25 U. S. App. 679, 72 Fed. 101—*American Surety Co. v. Pauly*, 18 C. C. A. 655, 38 U. S. App. 254, 72 Fed. 481—*Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 22 C. C. A. 414, 43 U. S. App. 550, 75 Fed. 469—*Denver v. Sherret*, 31 C. C. A. 508, 60 U. S. App. 104, 88 Fed. 234—*Bank of Overton v. Thompson*, 56 C. C. A. 557, 118 Fed. 801—*Re Pease*, 129 Fed. 455—*American Bonding Co. v. Spokane Bldg. & L. Soc.* 65 C. C. A. 125, 130 Fed. 741—*City Nat. Bank v. Jeffries*, 73 Ala. 195—*Phoenix Ins. Co. v. Flemming*, 65 Ark. 63, 39 L.R.A. 793, 67 Am. St. Rep. 900, 44 S. W. 464—*Donald v. Beals*, 57 Cal. 405—*Wittenbrock v. Parker*, 102 Cal. 101, 24 L.R.A. 199, 41 Am. St. Rep. 172, 36 Pac. 374—*McClelland v. Saul*, 113 Iowa, 210, 36 Am. St. Rep. 370, 84 N. W. 1034—*Schwind v. Boyce*, 94 Md. 518, 51 Atl. 45—*State v. Sittlington*, 51 Mo. App. 258—*Haragadine McKetrick Dry Goods Co. v. Krug*, 2 Neb. (Unof.) 54, 96 N. W. 286—*Henry v. Allen*, 151 N. Y. 9, 36 L.R.A. 662, 45 N. E. 355—*Benedict v. Arnoux*, 154 N. Y. 729, 49 N. E. 326—*Arrington v. Arrington*, 114 N. C. 172, 19 S. E. 351—*Pennoyer v. Willis*, 26 Or. 12, 46 Am. St. Rep. 594, 36 Pac. 568—*Dight v. Chapman*, 44 Or. 278, 65 L.R.A. 799, 75 Pac. 585—*Knobelock v. Germania Sav. Bank*, 50 S. C. 289, 27 S. E. 962—*George v. Butler*, 19

Utah, 116, 50 Pac. 1032—*Morrison v. Bausemer*, 32 Gratt. 232—*Deering v. Holcomb*, 26 Wash. 597, 67 Pac. 240—*Melms v. Pabst Brewing Co.* 93 Wis. 167, 57 Am. St. Rep. 899, 66 N. W. 518.

45. Knowledge of the local attorney and president of the local board of directors of a foreign building and loan association in regard to a matter coming within the sphere of their duty, and acquired while acting with reference thereto, and before sending to the company at its home office the report which it was their duty to make, must be imputed to the company. *Armstrong v. Ashley*, 204 U. S. 272, 27 Sup. Ct. Rep. 270, 51: 482

III. By Possession.

See also Limitation of Actions, 114.

46. Possession and cultivation of land is constructive notice of rights in land. *Lea v. Polk County Copper Co.* 21 How. 493, 16: 203
Herbach v. Potter, 154 U. S. 549, 14 Sup. Ct. Rep. 1164, Appx. and 18: 30
Bowman v. Wathen, 1 How. 189, 11: 97
Hughes v. United States, 4 Wall. 232, 18: 303
Cited in McLean v. Clapp, 141 U. S. 436, 35 L. ed. 807, 12 Sup. Ct. Rep. 29—*Kirby v. Tallmadge*, 160 U. S. 384, 40 L. ed. 466, 16 Sup. Ct. Rep. 349—*Van Gunden v. Virginia Coal & I. Co.* 3 C. C. A. 305, 8 U. S. App. 229, 52 Fed. 850—*Fuller v. Montague*, 8 C. C. A. 108, 16 U. S. App. 591, 59 Fed. 220—*United States v. Winona & St. P. R. Co.* 15 C. C. A. 119, 32 U. S. App. 306, 67 Fed. 971—*Woods v. Montevallo Coal & Transp. Co.* 84 Ala. 563, 5 Am. St. Rep. 393, 3 So. 475—*Packard v. Moss*, 68 Cal. 128, 8 Pac. 818—*Humphries v. Huffman*, 33 Ohio St. 403.

47. Where plaintiff's deed was duly recorded before the purchase of the defendants, and those deriving title under this deed were in possession, claiming title, at the time of their purchase, this operated as notice to the subsequent purchasers. *Crews v. Burcham*, 1 Black, 352, 17: 91
Cited in Errett v. Crane, Fed. Cas. No. 4,523.

Must be open, notorious and unequivocal.

47a. One is not an innocent purchaser of land, as against another who is and has for a long time been in the open, notorious, and unequivocal adverse possession thereof, claiming title. *Long v. Thayer*, 150 U. S. 520, 14 Sup. Ct. Rep. 189, 37: 1167
McLean v. Clapp, 142 U. S. 429, 12 Sup. Ct. Rep. 29, 35: 804
Cited in Simmons Creek Coal Co. v. Doran, 142 U. S. 442, 35 L. ed. 1073, 12 Sup. Ct. Rep. 239—*Kirby v. Tallmadge*, 160 U. S. 384, 40 L. ed. 466, 16 Sup. Ct. Rep. 349.

48. Actual and unequivocal possession is notice, because it is incumbent on one who is about to purchase real estate to ascertain by whom and in what right it is held or occupied; and the neglect of his duty is one

of the defaults which, unexplained, is equivalent to notice. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239, 35: 1063

Cited in Rich v. Braxton, 158 U. S. 384, 39 L. ed. 1025, 15 Sup. Ct. Rep. 1006—*Mackay v. Gabel*, 117 Fed. 877—*Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co.* 58 C. C. A. 315, 121 Fed. 977—*Jerome v. Carbonate Nat. Bank*, 22 Colo. 42, 43 Pac. 215—*Security Invest. Co. v. Garrett*, 3 App. D. C. 78—*Sharp v. Shenandoah Furnace Co.* 100 Va. 35, 40 S. E. 103—*Leenig's Ex'rs. v. White*, 1 Va. Dec. 893.

49. Where possession is relied on as giving constructive notice, it must be open and sufficiently distinct and unequivocal to put the purchaser on his guard. *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. Rep. 357, 27: 1012

Cited in Kirby v. Tallmadge, 160 U. S. 384, 40 L. ed. 466, 16 Sup. Ct. Rep. 349—*National Waterworks Co. v. Kansas City* 78 Fed. 435—*Atlanta Nat. Bldg. & L. Assn. v. Gilmer*, 128 Fed. 295—*United States v. Detroit Timber & Lumber Co.* 67 C. C. A. 8, 131 Fed. 675—*Munn v. Achey*, 110 Ala. 631, 18 So. 299—*Red River Valley Land & Invest. Co. v. Smith*, 7 N. D. 241, 74 N. W. 194—*Elliot v. Lane*, 82 Iowa, 486, 31 Am. St. Rep. 504, 48 N. W. 720.

50. Where one holds a contract for lands, and is in the open, visible, and exclusive possession of the same, this is constructive notice, to creditors and subsequent purchasers, of his rights therein. *Noyes v. Hall*, 97 U. S. 34, 24: 909

Cited in McLean v. Clapp, 141 U. S. 436, 35 L. ed. 807, 12 Sup. Ct. Rep. 29—*Kirby v. Tallmadge*, 160 U. S. 384, 40 L. ed. 466, 16 Sup. Ct. Rep. 349—*United States v. Winona & St. P. R. Co.* 15 C. C. A. 117, 32 U. S. App. 306, 67 Fed. 971—*Manogue v. Bryant*, 15 App. D. C. 260—*Tate v. Pensacola, Gulf, Land & Development Co.* 37 Fla. 452, 53 Am. St. Rep. 251, 20 So. 542—*Jeffersonville, M. & I. R. Co. v. Oyler*, 82 Ind. 404—*Kirkham v. Moore*, 30 Ind. App. 553, 65 N. E. 1042—*Renney v. Hardy*, 43 Ohio St. 160, 1 N. E. 523—*Dennits v. Northern P. R. Co.* 20 Wash. 380, 55 Pac. 210—*Bartz v. Paff*, 95 Wis. 107, 37 L.R.A. 852, 69 N. W. 297.

51. Where one is in notorious possession of land, no other person can lay any new location upon it, without being charged with full knowledge of the claim of ownership of the possessor. *Miller v. Texas & P. R. Co.* 132 U. S. 662, 10 Sup. Ct. Rep. 206, 33: 487

52. Open and notorious adverse possession of land by the parties claiming it is evidence of notice, not only of the adverse holding, but of the title under which the possession is held. *Landes v. Brant*, 10 How. 348, 13: 449

Cited in Marsh v. Brooks, 14 How. 524, 14 L. ed. 526—*Lea v. Polk County Copper Co.* 21 How. 498, 16 L. ed. 205—*McLean v. Clapp*, 141 U. S. 436, 35 L. ed. 807, 12 Sup. Ct. Rep. 29—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 442, 35 L. ed. 1074, 12 Sup. Ct. Rep. 239—*Kirby v. Tallmadge*, 160 U. S. 384, 40 L. ed. 465, 16 Sup. Ct. Rep. 349—*Lash v. Hardick*, 5 Rep. 554, Fed. Cas. No.

8,097—*Lonsdale Co. v. Moles*, 21 Month. L. Rep. 661, Fed. Cas. No. 8,496—*Lord v. Doyle*, 1 Cliff. 458, Fed. Cas. No. 8,505—*Brooks v. McComb*, 38 Fed. 319—*Van Gunden v. Virginia Coal & I. Co.* 3 C. C. A. 305, 8 U. S. App. 229, 52 Fed. 850—*Fuller v. Montague*, 8 C. C. A. 108, 16 U. S. App. 391, 59 Fed. 220—*Gale v. Shillock*, 4 Dak. 196, 29 N. W. 661—*Rupert v. Mark*, 15 Ill. 542—*Jeffersonville, M. & I. R. Co. v. Oyler*, 60 Ind. 394—*Hammond v. Johnston*, 93 Mo. 211, 6 S. W. 83—*Block v. Morrison*, 112 Mo. 354, 20 S. W. 340—*Story v. Black*, 5 Mont. 52, 51 Am. Rep. 37, 1 Pac. 1—*Patten v. Moore*, 32 N. H. 385—*Janvrin v. Janvrin*, 60 N. H. 172—*Galley v. Ward*, 60 N. H. 332—*Lamont v. Cheshire*, 65 N. Y. 42.

53. Open, notorious, and exclusive possession of premises by parties claiming them is sufficient to put others upon inquiry as to the legal or equitable interests of the former therein; and if inquiry is neglected, the latter are not entitled to any greater consideration than though they had made it and ascertained the actual facts of the case. *Hughes v. United States*, 4 Wall. 232, 18: 303

Cited in Van Gunden v. Virginia Coal & I. Co. 3 C. C. A. 305, 8 U. S. App. 229, 52 Fed. 850—*Betts v. Letcher*, 1 S. D. 194, 46 N. W. 193—*Hayward v. Mayne*, 1 App. D. C. 138—*McDaniel v. Peabody*, 54 Iowa. 311, 6 N. W. 538—*Fearn v. Atchison, T. & S. F. R. Co.* 33 Kan. 281, 6 Pac. 237—*Story v. Black*, 5 Mont. 52, 51 Am. Rep. 37, 1 Pac. 1—*Galley v. Ward*, 60 N. H. 333.

Possession of wharf.

54. In an action for obstructing a wharf, possession of the defendant under color and with claim of title is sufficient to put the plaintiff upon proof of a better title. *Linthicum v. Ray*, 9 Wall. 241, 19: 657
Cited in Winchester v. Stevens Point, 58 Wis. 360, 17 N. W. 547.

Possession of husband and wife.

55. Where land is occupied by two persons, as, for instance, by husband and wife, and there is a recorded title in one of them, such joint occupation is not notice of an unrecorded title in the other. *Kirby v. Tallmadge*, 160 U. S. 379, 16 Sup. Ct. Rep. 349, 40: 463

Cited in National Waterworks Co. v. Kansas City, 78 Fed. 435—*Schumacher v. Truman*, 134 Cal. 432, 66 Pac. 591—*Hamilton v. Rathbone*, 9 App. D. C. 59—*Ellison v. Torpin*, 44 W. Va. 426, 30 S. E. 183.

56. The joint occupation by husband and wife as a home of premises owned by her under an unrecorded deed, but of which neither had a record title, is notice of the wife's title to a purchaser from a third person holding the record title. *Kirby v. Tallmadge*, 160 U. S. 379, 16 Sup. Ct. Rep. 349, 40: 463

Cited in Columbus, S. & H. R. Co's Appeal, 48 C. C. A. 304, 109 Fed. 206—*Marden v. Dorothy*, 160 N. Y. 52, 46 L.R.A. 699, 54 N. E. 726.

57. A polygamous wife occupying premises with her so-called husband, the apparent owner, does not have such possession of the property as to give constructive notice to a

bona fide purchaser of any claim she may have thereto by virtue of a secret agreement with the owner. *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. Rep. 357, 27: 1012. *Cited in Elliot v. Lane*, 82 Iowa, 486, 31 Am. St. Rep. 504, 48 N. W. 720—*Rankin v. Coar*, 46 N. J. Eq. 573, 11 L.R.A. 663, 22 Atl. 177.

NOVATION.

1. A novation will, if it be absolute and unconditional, amount to the direct extinguishment of the original debt, but no extinguishment is wrought if the arrangement is conditional and the conditions are not fully complied with. *Hyde v. Booraem*, 16 Pet. 169, 10: 925.

2. A sale of mortgaged property under the Louisiana practice, for a twelve months' bond, did not, the bond never having been paid, operate as a novation or extinguishment of the original mortgage. *Union Bank v. Stafford*, 12 How. 327, 13: 1008. *Cited in Sharp v. Fly*, 9 Baxt. 10.

NOVEL QUESTIONS.

Duty of Courts to Decide, see Courts, 1621.

NOVELTY.

In Patented Article, see Estoppel, 274.
Of Invention, see Patents, V. d.

NUISANCES.

- I. What Are; Power to Declare and Abate, 1-14a.**
II. Remedies, 15-34.
 a. In General, 15-23.
 b. Who Liable, 24.
 c. Abatement, 25-31b.
 d. Defenses, 31c-4.

Judicial Notice of Offensive Business, see Evidence, 125.

Nuisances Extending Across State Line, see Injunction, 38.

Conclusiveness of Judgment as to, see Judgment, 579, 580.

Limitation of Action Based on, see Limitation of Actions, 481.

- I. What Are; Power to Declare and Abate.**

Power of Legislature to Declare Property a Nuisance, see *infra*, 25, 30.

Power of Village to Abate Nuisance, see *infra*, 31.

Obstructions in Highway as, see Highways, 7.

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Fences on Public Lands, see Public Lands, 53.

Importation of Armed Men into County where Strike Exists, as, see Removal of Causes, 201.

1. That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27: 739.

2. That which the law authorizes cannot be a public nuisance. *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25: 336. *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 15: 435. *Cited in Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L.R.A. 548, 42 Fed. 279—*Mills v. United States*, 12 L.R.A. 677, 46 Fed. 740—*Stein v. Lafayette*, 6 Ind. App. 418, 33 N. E. 912—*Richmond v. Test*, 18 Ind. App. 497, 48 N. E. 610—*Com. v. Packard*, 185 Mass. 66, 69 N. E. 1067—*Omaha v. Flood*, 57 Neb. 129, 77 N. W. 379—*Atwater v. Canandaigua*, 56 Hun. 297, 9 N. Y. Supp. 557—*Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 26, 9 L.R.A. 717, 25 N. E. 246—*Fisher v. Seaboard Air Line R. Co.* 102 Va. 369, 46 S. E. 381.

Editorial notes.

[Bees as. 62 L.R.A. 133.

Surface water as; liability of city for. 65 L.R.A. 280.]

Sewers.

3. A city has the right, on its own lands, to extend sewers for drainage to low-water mark, discharging them into the sea. Such erections are not a public nuisance, the subjects of actions for private damage, although the land on which they are extended has long been used as a dock for plaintiff's wharf. *Boston v. Leeraw*, 17 How. 426, 15: 118.

Chimneys.

4. It is an actionable nuisance to build one's chimney so low as to cause the smoke to enter his neighbor's house. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27: 739.

Machine shop.

5. The erection and maintenance of an engine house and machine shop immediately adjoining a church edifice, and its use in such a way as to disturb the congregation assembled in the church and to interfere with religious exercises therein, and break up its Sunday school by reason of the noise, smoke, and cinders, dust and offensive odors, constitute an actionable nuisance. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27: 739.

Distinguished in Farrell v. New York Steam Co. 23 Misc. 727, 53 N. Y. Supp. 55.

Cited in New York L. Ins. Co. v. Savage, 7 C. C. A. 263, 19 U. S. App. 197, 58 Fed. 341—*Stanford v. San Francisco*, 111 Cal. 204, 43 Pac. 605—*Nolan v. New Britain*, 69 Conn. 678, 38 Atl. 703—*Moses v. United States*, 16 App. D. C. 437, 50 L.R.A. 536—*Georgia R. & Bkg. Co. v. Maddox*, 116 Ga. 78, 42 S. E. 315—*Kuhn v.*

Illinois C. R. Co. 111 Ill. App. 327—Cleveland, C. C. & St. L. R. Co. v. King, 23 Ind. App. 581, 55 N. E. 875—Adams Hotel Co. v. Cobb, 3 Ind. Terr. 58, 53 S. W. 478—Bennett v. Marlon, 119 Iowa, 477, 93 N. W. 558—Selfert v. Brooklyn, 101 N. Y. 142, 54 Am. Rep. 684, 4 N. E. 321—Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 25, 57 Am. Rep. 701, 8 N. E. 537—Bates v. Holbrook, 171 N. Y. 470, 64 N. E. 181—Smith v. East End Street R. Co. 87 Tenn. 636, 11 S. W. 709—Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 173, 9 L.R.A. 300, 22 Am. St. Rep. 42, 14 S. W. 259—Powell v. Bentley & G. Furniture Co. 34 W. Va. 812, 12 L.R.A. 56, 12 S. E. 1085—McCann v. Strang, 97 Wis. 554, 72 N. W. 1117—Dolan v. Chicago, M. & St. P. R. Co. 118 Wis. 366, 95 N. W. 385.

Open areas in streets.

6. If an area dug in a city street is left open, it is dangerous, and is a nuisance which can be abated. *Chicago v. Robbins*, 2 Black, 418, 17: 298

Obstruction to navigation.

Right of Action for, see *infra*, 20.

Fishing Nets as, see *infra*, 30.

Abatement of, see *infra*, 30, 31a, 31b.

Defenses in Action for Maintaining, see *infra*, 31c-31f.

Bridge over Navigable Stream, see Commerce, 119.

Relative Power of Courts and Legislature to Regulate Bridges, see Courts, 180.

As a Crime Indictable in Federal Courts, see Courts, 879.

Question as to as One of Fact, see Trial, 199.

Rights of Navigation Generally, see Waters, I. d. 3.

7. Any obstruction in navigable waters is a public nuisance. *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 9: 1012

Cited in United States v. Hall, 11 C. C. A. 295, 21 U. S. App. 402, 63 Fed. 473—*United States v. Debs*, 5 Inters. Com. Rep. 192, 64 Fed. 742—*American Colonization Soc. v. Gartrell*, 23 Ga. 458—*Moor v. Veazie*, 32 Me. 360, 52 Am. Dec. 655—*State v. Patterson*, 14 Tex. Civ. App. 469, 37 S. W. 478.

8. A municipal corporation cannot, by its mere declaration that a structure is a nuisance, subject it to removal. *Yates v. Milwaukee*, 10 Wall. 497, 19: 984
Distinguished in Nazworthy v. Sullivan, 55 Ill. App. 52.

Cited in Hennessy v. St. Paul, 37 Fed. 567—*Denver v. Mullen*, 7 Colo. 357, 3 Pac. 693—*Harlan & H. Co. v. Paschall*, 5 Del. Ch. 456—*Dana v. Rock Creek R. Co.* 7 App. D. C. 496—*Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 44—*First Nat. Bank v. Sarlls*, 129 Ind. 207, 13 L.R.A. 484, 28 Am. St. Rep. 185, 28 N. E. 434—*Evansville v. Miller*, 146 Ind. 618, 38 L.R.A. 171, 45 N. E. 1054—*Crawford v. Topeka*, 51 Kan. 762, 20 L.R.A. 694, 37 Am. St. Rep. 323, 33 Pac. 476—*Crowley v. West*, 52 Ia. Ann. 532, 47 L.R.A. 655, 78 Am. St. Rep. 355, 27 So. 53—*New Windsor v. Stocksdales*, 95 Md. 215, 52 Atl. 596—*St. Louis v. Edward Heltzeberg Packing & Provision Co.* 141 Mo. 384, 39 L.R.A. 558, 64 Am. St. Rep. 516, 42 S. W. 954—*People ex rel. Copcutt v. Board of Health*, 140 N. Y. 9, 23 L.R.A. 484, 37 Am. St. Rep. 522, 35 N. E. 320—*Tate v. Greensboro*, 114 N. C. 404, 24 L.R.A.

675, 19 S. E. 767—*Darlington v. Ward*, 48 S. C. 579, 38 L.R.A. 338, 26 S. E. 906—*Matheny v. Alken*, 68 S. C. 177, 47 S. E. 56—*Bristol Door & Lumber Co. v. Bristol*, 97 Va. 307, 75 Am. St. Rep. 783, 33 S. E. 588—*Ravenswood v. Fleming*, 22 W. Va. 69, 46 Am. Rep. 485—*Teass v. St. Albans*, 38 W. Va. 19, 19 L.R.A. 809, 17 S. E. 400—*Diedrich v. Northwestern Union R. Co.* 42 Wis. 271, 24 Am. Rep. 399.

9. A municipal corporation cannot arbitrarily declare by special ordinance a private wharf to be an obstruction of navigation and a nuisance. *Yates v. Milwaukee*, 10 Wall. 497, 19: 984

Cited in Stockton Laundry Case, 26 Fed. 612—*Re Sam Kee*, 31 Fed. 681—*Ward v. Little Rock*, 41 Ark. 530, 48 Am. Rep. 46—*Ex parte Foote*, 70 Ark. 14, 91 Am. St. Rep. 63, 65 S. W. 706—*Denver v. Mullen*, 7 Colo. 357, 3 Pac. 693—*Moses v. United States*, 16 App. D. C. 433, 50 L.R.A. 535—*Orlando v. Pragg*, 31 Fla. 124, 19 L.R.A. 201, 34 Am. St. Rep. 17, 12 So. 368—*Western & A. R. Co. v. Atlanta*, 113 Ga. 544, 54 L.R.A. 299, 38 S. E. 996—*Poyer v. Des Plaines*, 18 Ill. App. 231—*Munsell v. Carthage*, 105 Ill. App. 122—*First Nat. Bank v. Sarlls*, 129 Ind. 207, 13 L.R.A. 484, 28 Am. St. Rep. 185, 28 N. E. 434—*Everett v. Council Bluffs*, 46 Iowa, 67—*Cole v. Kegler*, 64 Iowa, 62, 19 N. W. 843—*Crawford v. Topeka*, 51 Kan. 762, 20 L. R. A. 694, 37 Am. St. Rep. 323, 33 Pac. 476—*Knauer v. Louisville*, 20 Ky. L. Rep. 195, 41 L.R.A. 221, 45 S. W. 510—*Crowley v. West*, 52 La. Ann. 532, 47 L.R.A. 655, 78 Am. St. Rep. 355, 27 So. 53—*Frostburg v. Wineland*, 98 Md. 244, 64 L.R.A. 629, 103 Am. St. Rep. 399, 56 Atl. 811—*St. Louis v. Schnuckelberg*, 7 Mo. App. 541—*People ex rel. Copcutt v. Board of Health*, 140 N. Y. 9, 23 L.R.A. 484, 37 Am. St. Rep. 522, 35 N. E. 320—*State v. Austin*, 114 N. C. 865, 23 L.R.A. 286, 41 Am. St. Rep. 817, 19 S. E. 919—*Grossman v. Oakland*, 30 Or. 483, 36 L.R.A. 618, 60 Am. St. Rep. 832, 41 Pac. 5—*Thellan v. Porter*, 14 Lea. 628, 52 Am. Rep. 173—*Pye v. Peterson*, 45 Tex. 313, 23 Am. Rep. 608—*Manchester Cotton Mills v. Manchester*, 25 Gratt. 833—*Roanoke v. Bolling*, 101 Va. 187, 48 S. E. 343—*Davis v. Davis*, 40 W. Va. 470, 21 S. E. 906—*Wisconsin River Improv. Co. v. Lyons*, 30 Wis. 66.

10. Wharves and permanent piers constructed by the riparian proprietor on the shores of navigable rivers, bays, and arms of the sea, or on the lakes, where they do not extend below low-water mark, are not a nuisance, unless they are an obstruction to navigation. *Dutton v. Strong*, 1 Black, 1, 17: 29

Cited in Harlan & H. Co. v. Paschall, 5 Del. Ch. 455—*Delaware & H. Canal Co. v. Lawrence*, 2 Hun, 178.

11. If an erection by which navigation is affected is for a public purpose, and produces a public benefit, and is in a reasonable situation, and a reasonable space is left for the passage of vessels, then it is not an unreasonable obstruction. The obstruction to navigation must be plainly a nuisance before it can be removed by decree. *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14: 249
Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17: 311
Cited in Mississippi & M. R. Co. v. Ward, 2 Black, 496, 17 L. ed. 815—*Sherlock v. Ailing*,

93 U. S. 102, 23 L. ed. 820—Newport & C. Bridge Co. v. United States, 105 U. S. 480, 26 L. ed. 1147—Cardwell v. American River Bridge Co. 113 U. S. 208, 28 L. ed. 960, 5 Sup. Ct. Rep. 423—St. Louis v. Knapp, S. & Co. Co. 2 McCrary, 519, 6 Fed. 224—Hatch v. Wallamet Iron Bridge Co. 7 Sawy. 134, 6 Fed. 833—Canada Southern R. Co. v. International Bridge Co. 8 Fed. 192—Ruts v. St. Louis, 8 McCrary, 265, 10 Fed. 341—Doboy & U. I. Teleg. Co. v. De Magathias, 25 Fed. 698—Kentucky v. Louisville Bridge Co. 42 Fed. 245—Ehea v. Newport News & M. Valley R. Co. 50 Fed. 19—Columbus Ins. Co. v. Curtenius, 6 McLean, 219, Fed. Cas. No. 3,045—Silliman v. Hudson River Bridge Co. 4 Blatchf. 409, Fed. Cas. No. 12,852—Silliman v. Troy & W. T. Bridge Co. 11 Blatchf. 285, Fed. Cas. No. 12,853—Perry v. New Orleans, M. & C. R. Co. 55 Ala. 419, 28 Am. Rep. 740—Harlan & H. Co. v. Paschall, 5 Del. Ch. 454—St. Joseph County v. Pidge, 5 Ind. 17—State v. Portland & K. R. Co. 57 Me. 404—Adams v. Ulmer, 91 Me. 58, 39 Atl. 347—Macomber v. Nichols, 34 Mich. 218, 22 Am. Rep. 522—Crookston Waterworks P. & L. Co. v. Sprague, 91 Minn. 468, 64 L.R.A. 989, 103 Am. St. Rep. 525, 98 N. W. 347—Kansas City, M. & B. R. Co. v. Wiygul, 82 Miss. 231, 61 L.R.A. 582, 33 So. 965—Dela-ware & H. Canal Co. v. Lawrence, 2 Hun, 176—Blanchard v. Western U. Teleg. Co. 60 N. Y. 514—People ex rel. Murphy v. Kelly, 76 N. Y. 482—Sweeney v. Chicago, M. & St. P. R. Co. 60 Wis. 68, 18 N. W. 756.

12. Not every bridge over a river is necessarily a nuisance. (Circuit court decision affirmed on equal division.) Milnor v. New Jersey R. & Transp. Co. (Passaic Bridges) 3 Wall. 782, Appx. and 16: 799 Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17: 311

12a. The erection of an unauthorized bridge across a navigable stream is an obstruction punishable by law. M'Lean, J., in Charles River v. Warren Bridge, 11 Pet. 420, 9: 773

Cited in Harris v. Thompson, 9 Barb. 364.

12b. The implied power of railroad companies to construct bridges across navigable streams is subject to the condition that they shall be so constructed as not unnecessarily to interfere with the navigation of the stream. Hamilton v. Vicksburg, S. & P. R. Co. 119 U. S. 280, 7 Sup. Ct. Rep. 206, 30: 393

Cited in Southern R. Co. v. Ferguson, 105 Tenn. 558, 80 Am. St. Rep. 908, 59 S. W. 343—Milwaukee Street R. Co. v. Adlam, 85 Wis. 150, 55 N. W. 181.

13. A bridge shown, by measurements of its height and of the height of the water and of the chimneys of steamboats, to be an obstruction, is a nuisance. The record of the commissioner appointed by the court to ascertain these facts is equivalent to the verdict of a jury. Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14: 249 Cited in Phoenix Mut. L. Ins. Co. v. Grant, 3 MacArth 49.

14. A bridge across the Mississippi river at Rock island is not necessarily a clear nuisance to either Iowa or Illinois to the extent of half its length, and a Federal

court cannot decree the removal of that part which is within its territorial jurisdiction. Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17: 311

14a. The rights of a street railway company in a tunnel under a navigable river, arising from its ownership of the fee of the land on either side of the river or in its bed, are subject to the paramount right of navigation over the waters of such river. West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 26 Sup. Ct. Rep. 518, 50: 845

— Editorial note.

[Obstruction of navigable waters as. 59 L.R.A. 90.]

II. Remedies.

a. In General.

Relative Functions of Courts and Legislature as to Removal of Obstructions in Navigable Streams, see Courts, 179.

Jurisdiction of Federal Equity Courts, see Courts, 879.

Amount in Controversy for Purpose of Federal Jurisdiction, see Courts, 921.

Injunction as Remedy, see Injunction, I. d. Right of State to Relief from Nuisance Committed in another State but Extending its Effects beyond State Line, see Injunction, 38.

Venue of Action for, see Venue, 4.

15. The police power of the state is adequate to give an effectual remedy against nuisances. Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24: 1036 Distinguished in Re Morgan, 26 Colo. 427, 47 L.R.A. 58, 77 Am. St. Rep. 269, 58 Pac. 1071.

Cited in Lelsy v. Hardin, 135 U. S. 128, 34 L. ed. 139, 3 Inters. Com. Rep. 48, 10 Sup. Ct. Rep. 681—Crutcher v. Kentucky, 141 U. S. 61, 35 L. ed. 653, 11 Sup. Ct. Rep. 851—L' Hote v. New Orleans, 177 U. S. 597, 44 L. ed. 903, 20 Sup. Ct. Rep. 788—Dobbins v. Los Angeles, 195 U. S. 239, 49 L. ed. 176, 25 Sup. Ct. Rep. 18—Dobbins v. Los Angeles, 139 Cal. 185, 96 Am. St. Rep. 95, 72 Pac. 970—Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 235, 73 Pac. 987—Hurlbut v. McKone, 55 Conn. 44, 3 Am. St. Rep. 17, 10 Atl. 164—Chicago & N. W. R. Co. v. Chicago, 140 Ill. 318, 29 N. E. 1109—Baumgartner v. Hasty, 100 Ind. 580, 50 Am. Rep. 830—Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 566, 12 L.R.A. 656, 3 Inters. Com. Rep. 617, 28 N. E. 76—Kaufman v. Stein, 138 Ind. 55, 46 Am. St. Rep. 368, 37 N. E. 333—Snouffer v. Cedar Rapids & M. C. R. Co. 118 Iowa, 301, 92 N. W. 79—Com. v. Pear, 183 Mass. 245, 67 L.R.A. 938, 66 N. E. 719—Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 147, 5 N. W. 275—State v. Tower, 185 Mo. 93, 68 L.R.A. 407, 84 S. W. 10—Bullard v. Northern P. R. Co. 10 Mont. 184, 11 L.R.A. 251, 3 Inters. Com. Rep. 541, 25 Pac. 120—Ex parte Boyce, 27 Nev. 364, 65 L.R.A. 69, 75 Pac. 1—Brooklyn v. Nassau Electric R. Co. 20 App. Div. 33, 46 N. Y. Supp. 651—Kelley v. New York, 89 Hun, 252, 35 N. Y. Supp. 1109—Kelley v. New York, 6

Misc. 522, 27 N. Y. Supp. 164—Rudderow v. Philadelphia, 166 Pa. 247, 31 Atl. 53.

16. A court of equity may take jurisdiction in cases of a public nuisance by an information filed by the Attorney General. *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 9: 1012

Cited in Metropolitan City R. Co. v. Chicago, 96 Ill. 627—*Muncie Natural Gas Co. v. Muncie*, 160 Ind. 106, 60 L.R.A. 828, 66 N. E. 436—*Com. v. Croushore*, 145 Pa. 159, 22 Atl. 807—*Philadelphia v. Manayunk Bridge Co.* 6 Phila. 524—*Weakley v. Page*, 102 Tenn. 202, 46 L.R.A. 558, 53 S. W. 551.

17. The concurrent jurisdiction of courts of equity in cases of private nuisance is now established, but is not without limitation, there being many instances where an action at law could be maintained which would not justify relief in equity. *Parker v. Winnipiseogee Lake Cotton & Woollen Co.* 2 Black, 545, 17: 333

18. A court of equity may take jurisdiction in cases of public nuisance; yet it ought not to exercise it except where there is imminent danger of irreparable mischief before the tardiness of the law could reach it. *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 9: 1012

Parker v. Winnipiseogee Lake Cotton & Woollen Co. 2 Black, 545, 17: 333

Cited in Re Debs, 158 U. S. 587, 39 L. ed. 1103, 15 Sup. Ct. Rep. 900—*Pierpont v. Fowle*, 2 Woodb. & M. 37, Fed. Cas. No. 11,152—*North Bloomfield Gravel Min. Co. v. United States*, 32 C. C. A. 99, 59 U. S. App. 377, 88 Fed. 679—*Hagge v. Kansas City S. R. Co.* 104 Fed. 394—*Lux v. Haggin*, 69 Cal. 280, 10 Pac. 674—*Frink v. Lawrence*, 20 Conn. 121, 50 Am. Dec. 274—*District of Columbia v. Washington Market Co.* 3 MacArth. 573—*United States v. Cole*, 7 Mackey, 522—*Johnson v. Baltimore & P. R. Co.* 4 App. D. C. 503—*Dewey Hotel Co. v. United States Electric Lighting Co.* 17 App. D. C. 367—*Alden v. Pinney*, 12 Fla. 392—*Valparaiso v. Bozarth*, 153 Ind. 539, 47 L.R.A. 488, 55 N. E. 439—*Ewell v. Greenwood*, 26 Iowa, 380—*Musser v. Hershey*, 42 Iowa, 365—*O'Brien v. Baltimore Belt R. Co.* 74 Md. 374, 13 L.R.A. 130, 22 Atl. 141—*Bembe v. Anne Arundel County*, 94 Md. 329, 57 L.R.A. 281, 51 Atl. 179—*Glasgow v. St. Louis*, 15 Mo. App. 124—*Chessman v. Hale*, 31 Mont. 589, 68 L.R.A. 415, 79 Pac. 254—*Carpenter v. Gold*, 88 Va. 553, 14 S. E. 329.

Who may have.

Right of State to Maintain Bill for Abatement of Nuisance, see Injunction, 33a-38.

Municipality as Proper Party to Sue for Abatement, see Parties, 75.

Religious Corporation, see Religious Societies, 4.

See also *supra*, 3.

19. Wherever a public nuisance is productive of a specific injury to an individual, he may make it the foundation of an action at law; and, if the injury would be irreparable, a court of equity will interpose by injunction. *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 9: 1012
Gilman v. Philadelphia, 3 Wall. 713, 18: 96

Cited in Irwin v. Dixon, 9 How. 28, 13 L. ed. 33—*Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 568, 14 L. ed. 269—*Atlee v. Northwestern Packet Co.* 21 Wall. 392, 22 L. ed. 620—*New Orleans, M. & T. R. Co. v. Elberman*, 105 U. S. 174, 26 L. ed. 1018—*Miller v. New York*, 109 U. S. 396, 27 L. ed. 975, 3 Sup. Ct. Rep. 228—*Potomac S. B. Co. v. Upper Potomac S. B. Co.* 109 U. S. 675, 27 L. ed. 1071, 3 Sup. Ct. Rep. 445—*Coosaw Min. Co. v. South Carolina*, 144 U. S. 563, 36 L. ed. 543, 12 Sup. Ct. Rep. 689—*North-eastern P. R. Co. v. Whalen*, 149 U. S. 162, 37 L. ed. 688, 13 Sup. Ct. Rep. 822—*Adams v. Douglas County*, 1 Kan. Dassel's ed. 249 Appx., Fed. Cas. No. 52—*Illinois & St. L. R. & Canal Co. v. St. Louis*, 2 Dill. 90, Fed. Cas. No. 7,007—*Parker v. Winnipiseogee Lake Cotton & Woollen Mfg. Co.* 1 Cliff. 251, Fed. Cas. No. 10,752—*Spooner v. McConnell*, 1 McLean, 359, Fed. Cas. No. 13,245—*United States v. Bain*, 3 Hughes, 608, Fed. Cas. No. 14,496—*United States v. Mississippi & R. River Boom Co.* 1 McCrary, 605, 3 Fed. 552—*Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L.R.A. 549, 42 Fed. 282—*Detroit v. Detroit City R. Co.* 56 Fed. 906—*New York, N. H. & H. R. Co. v. Piscataqua Nav. Co.* 47 C. C. A. 228, 108 Fed. 95—*Columbus v. Rodgers*, 10 Ala. 47—*United States v. Cooper*, 9 Mackey, 120—*Schnecker v. Milwaukee & P. du Ch. R. Co.* 21 Iowa, 517—*Hamilton v. Whitridge*, 11 Md. 148, 69 Am. Dec. 184—*Whitfield v. Rogers*, 26 Miss. 87, 59 Am. Dec. 244—*Coulson v. Harris*, 43 Miss. 750—*State ex rel Circuit Attorney v. County Court*, 51 Mo. 381, 11 Am. Rep. 454—*Delaware & H. Canal Co. v. Lawrence*, 2 Hun, 168—*Anderson v. Doty*, 33 Hun, 164—*Doolittle v. Broome County*, 16 How. Pr. 518—*People v. New York*, 27 How. Pr. 36—*Doolittle v. Broome County*, 18 N. Y. 160—*People v. Ingersoll*, 58 N. Y. 29, 17 Am. Rep. 178—*Parrish v. Stephens*, 1 Or. 75—*Moyamensing Twp. v. Long*, 1 Pars. Sel. Eq. Cas. 148—*Smith v. Cummings*, 2 Pars. Sel. Eq. Cas. 98—*Savage v. Philadelphia*, 16 Phila. 177—*Philadelphia v. Carmany*, 18 W. N. C. 153—*Richi v. Chattanooga Brewing Co.* 105 Tenn. 653, 58 S. W. 646—*Jones v. St. Paul, M. & M. R. Co.* 16 Wash. 29, 47 Pac. 226—*Atty Gen. v. Chicago & N. W. R. Co.* 35 Wis. 538—*State v. Carpenter*, 68 Wis. 173, 60 Am. Rep. 848, 31 N. W. 730—*State ex rel Hartung v. Milwaukee*, 102 Wis. 512, 78 N. W. 756.

20. A private person has no right of action for mere inconvenience occasioned by the obstruction to navigation by a bridge erected under lawful authority. *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280, 7 Sup. Ct. Rep. 206, 30: 393

Cited in Central Trust Co. v. Wabash, St. L. & P. R. Co. 32 Fed. 568—*Green & B. River Nav. Co. v. Chesapeake O. & S. W. R. Co.* 88 Ky. 8, 2 L.R.A. 543, 2 Inters. Com. Rep. 317, 10 S. W. 6—*Frost v. Washington County R. Co.* 96 Me. 87, 59 L.R.A. 87, 51 Atl. 806—*Carvalho v. Brooklyn & J. B. Turnp. Co.* 58 App. Div. 524, 67 N. Y. Supp. 539.

21. A bill in equity to abate a public nuisance may be filed by one who has sustained special damages. *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17: 311

22. Unless one shows that he has sustained and is still sustaining individual damage from a public nuisance he cannot

maintain a bill in equity for its abatement. *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17: 311

Cited in Illinois & St. L. R. & Canal Co. v. St. Louis, 2 Dill. 90, Fed. Cas. No. 7,007—*St. Louis v. Knapp, S. & Co. Co. 2 McCrary*, 518, 6 Fed. 223—*Mining Debris Case*, 8 Sawy. 639, 16 Fed. 35—*Mining Debris Case*, 9 Sawy. 516, 18 Fed. 789—*Tuttle v. Church*, 53 Fed. 427—*Hart v. Buckner*, 5 C. C. A. 7, 2 U. S. App. 488, 54 Fed. 931—*Indianapolis Water Co. v. American Strawboard Co.* 57 Fed. 1003—*The Brinton*, 13 C. C. A. 333, 26 U. S. App. 486, 66 Fed. 73—*American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 613—*Lake Erie & W. R. Co. v. Fremont*, 34 C. C. A. 635, 92 Fed. 731—*Carmichael v. Texarkana*, 94 Fed. 573—*Ward v. Little Rock*, 41 Ark. 531, 48 Am. Rep. 46—*Arkansas River Packet Co. v. Sorrels*, 50 Ark. 474, 8 S. W. 683—*Johnson v. Baltimore & P. R. Co.* 4 App. D. C. 502—*Dewey Hotel Co. v. United States Electric Lighting Co.* 17 App. D. C. 367—*Powell v. Foster*, 59 Ga. 791—*Musser v. Hershey*, 42 Iowa, 365—*Douglass v. Leavenworth*, 6 Kan. App. 99, 49 Pac. 676—*Holke v. Herman*, 87 Mo. App. 139—*Campbell's Appeal*, 22 W. N. C. 82—*State v. Goodnight*, 70 Tex. 686, 11 S. W. 119—*Mahler v. Brumder*, 92 Wis. 486, 31 L.R.A. 698, 66 N. W. 502.

23. Wash. Terr. Code, §1247, defining and providing for the abatement of nuisances, is aimed at nuisances which affect the public morals or the public peace, and affords no countenance for a private action unless by an owner of property the use or enjoyment of which is specifically affected by the existence of such a nuisance in its immediate neighborhood. *Northern P. R. Co. v. Whalen*, 149 U. S. 157, 13 Sup. Ct. Rep. 822,

37: 686

— Editorial notes.

Who may maintain action for public nuisance 9: 1012

[How far property right necessary to sustain action for private nuisance. 15 L.R.A. 689.

Power of board of health as to nuisance. 36 L.R.A. 603.]

b. Who Liable.

Carrier Issuing Bill of Lading for Goods so Stored by Another as to Constitute Nuisance, see Carriers, 90.

24. A corporation which could be individually indicted for creating a public nuisance may be individually prosecuted in chancery for its abatement. *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17: 311

Editorial notes.

[Liability of landlord to tenant of part of premises. 23 L.R.A. 158.

Liability of landlord to third persons for. 26 L.R.A. 197.]

c. Abatement

To Whom Available, see supra, 21–23.

By Summary Destruction of Fishing Nets, see Constitutional Law, 476.

Exemption from, by Charter Provisions, see Constitutional Law, 1072.

Due Process in, see Constitutional Law, 661.

Venue of Federal Suit for Abatement of Bridge as Nuisance, see Courts, 974, 975.

Effect of Reasonable Doubt, see Evidence, 2535a.

Municipal Liability for Failure to Abate Nuisance in Street, see Highways, 59.

Abatement of Liquor Nuisance, see Intoxicating Liquors, 16, 17.

Joinder of Plaintiffs, see Parties, 86a.

Right to Remove Proceeding for to Federal Court, see Removal of Causes, 40.

Obstruction of River as Nuisance Violating Virginia Compact, see States, 172.

Interest of State to Bring Suit for Abatement of Obstruction to Navigation, see States, 231.

See also supra, 6, 11, 24; Commerce, 402.

25. Where property is of little value, and its use for an illegal purpose is clear, the legislature may declare it to be a nuisance and subject to summary abatement. *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38: 385

26–7. Equity will entertain jurisdiction of an action to abate a nuisance only where there appears to be a necessity for its interference. *Re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39: 1092

Cited in Robinson v. Baltimore & O. R. Co. 64 C. C. A. 284, 129 Fed. 756—*State v. Paxson*, 119 Ga. 734, 46 S. E. 872—*Doane v. Lake Street Elev. R. Co.* 165 Ill. 519, 36 L.R.A. 103, 56 Am. St. Rep. 265, 46 N. E. 520—*Muncie Natural Gas Co. v. Muncie*, 160 Ind. 106, 60 L.R.A. 828, 66 N. E. 436—*State ex rel. Jump v. Louisiana*, B. G. & A. Gravel Road Co. 116 Mo. App. 199, 92 S. W. 153—*Reaves v. Territory*, 13 Okla. 403, 74 Pac. 951.

28. For any annoyance and discomfort caused to a person in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him, courts of law will afford redress by giving damages against the wrongdoer; and when the cause of the annoyance and discomfort are continuous, equity will interfere and restrain it. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27: 739

Distinguished in Romer v. St. Paul City R. Co. 75 Minn. 219, 74 Am. St. Rep. 455, 77 N. W. 825.

Cited in Baltimore & P. R. Co. v. Fitzgerald, 2 App. D. C. 516—*Johnson v. Baltimore & P. R. Co.* 4 App. D. C. 502—*Vegelahm v. Guntner*, 167 Mass. 99, 35 L.R.A. 724, 57 Am. St. Rep. 443, 44 N. E. 1077—*Anderson v. Doty*, 33 Hun, 164.

29. In a proceeding by indictment, if the jury doubt whether or not an obstruction is a nuisance, they are bound to acquit; and the same rule applies in chancery, where the court determines the question. *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17: 311

30. If nets are being used in fishing in a manner detrimental to the interests of the

public, it is within the power of the legislature to declare them to be nuisances, and to authorize the officers of the state to abate them. *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38: 385

31. A village incorporated by a charter authorizing it to abate nuisance may, by an ordinance, abate a nuisance, consisting of the transportation of offensive matter through the streets, and carrying on an unwholesome business in the manufacture of fertilizer. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24: 1036

Distinguished in New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 666, 29 L. ed. 522, 6 Sup. Ct. Rep. 252.

Cited in Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 74, 42 L. ed. 954, 18 Sup. Ct. Rep. 513—*Walla Walla v. Walla Walla Water Co.* 172 U. S. 15, 43 L. ed. 348, 19 Sup. Ct. Rep. 77—*New Orleans Waterworks Co. v. St. Tammany Waterworks Co.* 4 Woods, 142, 14 Fed. 199—*Michigan Teleph. Co. v. Charlotte*, 93 Fed. 15—*Westport v. Mulholland*, 159 Mo. 95, 53 L.R.A. 444, 60 S. W. 77—*Melner v. Racine*, 68 Wis. 246, 32 N. W. 139.

31a. The Supreme Court may make an order directing the defendant so to change the construction of its bridge over the Ohio river, according to certain detailed plans and specifications therein set forth, as not to obstruct the navigation of the river. *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14: 249

Cited in Zanesville v. Zanesville Teleg. & Teleph. Co. 64 Ohio St. 89, 52 L.R.A. 157, 83 Am. St. Rep. 725, 59 N. E. 781.

31b. A railroad company chartered in another state may be obliged, by the condition of a state statute, which recognizes it as a corporation of that state, to construct and maintain a drawbridge in the channel of a river which is crossed by the company's road, on the line between two states. *New Orleans, M. & T. R. Co. v. Mississippi*, 112 U. S. 12, 5 Sup. Ct. Rep. 19, 28: 619

Editorial note.

[Compensation for property destroyed in abating. 19 L.R.A. 196.]

d. Defenses.

Evidence to Show Public Property Benefitted by Encroachment, see Evidence, 2246.

31c. The public benefit derived from the construction of a railroad bridge over a navigable river will not justify an obstruction of navigation by which the injury cannot be balanced against the benefits secured. *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14: 249

Cited in Beebe v. State, 6 Ind. 546, 63 Am. Dec. 301—*Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 386, 13 L.R.A. 834, 21 Atl. 1090.

31d. It is the duty of a railroad company, upon abandoning the work of constructing a bridge, to take care that all obstructions which had been placed in the channel by its orders should be removed. It is no excuse that the contractors were directed to remove

the obstructions by the engineers, who were the servants of the company. *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co.* 23 How. 209, 16: 433

31e. The failure of an order by police jury for the construction of a dam, to say anything about the subject of health, does not preclude the defense against an indictment for obstructing a navigable stream, that it was done in order to promote the health of the community. *Leovy v. United States*, 177 U. S. 621, 20 Sup. Ct. Rep. 797, 44: 914

Legislative authority.

31f. A riparian owner on a navigable stream cannot maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction. *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25: 336

Cited in Monongahela Nav. Co. v. United States, 148 U. S. 333, 37 L. ed. 470, 13 Sup. Ct. Rep. 622—*Rutz v. St. Louis*, 2 McCrary, 346, 7 Fed. 439—*Rutz v. St. Louis*, 3 McCrary, 265, 10 Fed. 341—*Huse v. Glover*, 11 Biss. 556, 15 Fed. 296—*Hughes v. Northern P. R. Co.* 9 Sawy. 328, 18 Fed. 117—*Holyoke Water Power Co. v. Connecticut River Co.* 23 Blatchf. 144, 52 Conn. 575, 20 Fed. 79—*Rhea v. Newport News & M. Valley R. Co.* 50 Fed. 20—*Sallotte v. King Bridge Co.* 65 L.R.A. 636, 58 C. C. A. 470, 122 Fed. 382—*Holyoke Water Power Co. v. Connecticut River Co.* 52 Conn. 575—*Lane v. New Haven Harbor*, 70 Conn. 695, 40 Atl. 1058—*Green & B. River Nav. Co. v. Chesapeake, O. & S. W. R. Co.* 88 Ky. 8, 2 L.R.A. 543, 2 Inters. Com. Rep. 517, 10 S. W. 6—*Kansas City, M. & B. R. Co. v. Wiygul*, 82 Miss. 231, 61 L.R.A. 582, 33 So. 965—*Atwater v. Canandaigua*, 56 Hun, 297, 9 N. Y. Supp. 557—*Black River Improv. Co. v. La Crosse Booming & Transp. Co.* 54 Wis. 681, 41 Am. Rep. 66, 11 N. W. 443—*Smith v. Gould*, 59 Wis. 642, 18 N. W. 457.

32. The grant of powers and privileges by the legislature to do certain things—as to a railroad company to bring its tracks and construct its works within a city—does not carry with it immunity from damages for private nuisances resulting directly from the exercise of those powers and privileges. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27: 739

Cited in Northern P. R. Co. v. United States, 59 L.R.A. 87, 44 C. C. A. 137, 104 Fed. 693—*Swift v. Broyles*, 115 Ga. 887, 58 L.R.A. 391, 42 S. E. 277—*Haggart v. Stehlin*, 137 Ind. 55, 22 L.R.A. 588, 35 N. E. 997—*Weston Paper Co. v. Pope*, 155 Ind. 401, 56 L.R.A. 902, 57 N. E. 719—*Adams v. Chicago B. & N. R. Co.* 39 Minn. 292, 1 L.R.A. 495, 12 Am. St. Rep. 644, 39 N. W. 629—*Church of Holy Apostles v. New York Elev. R. Co.* 21 App. Div. 50, 47 N. Y. Supp. 418—*Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 27, 9 L.R.A. 718, 25 N. E. 246—*Root v. Butte, A. & P. R. Co.* 20 Mont. 358, 51 Pac. 155—*Frost v. Berkeley Phosphate Co.* 42 S. C. 413, 26 L.R.A. 697, 46 Am. St. Rep. 736, 20 S. E. 280—

Stadler v. Grieben, 61 Wis. 504, 21 N. W. 629.

33. The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claims of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large. Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27: 739 *Distinguished in* Illinois C. R. Co. v. Anderson, 73 Ill. App. 626.

Cited in Northern P. R. Co. v. United States, 59 L.R.A. 87, 44 C. C. A. 137, 104 Fed. 693—Baltimore & P. R. Co. v. Taylor, 6 App. D. C. 271—Dana v. Rock Creek R. Co. 7 App. D. C. 491—Austin v. Augusta Terminal R. Co. 108 Ga. 686, 47 L.R.A. 762, 34 S. E. 852—Mordhurst v. Ft. Wayne & S. W. Traction Co. 163 Ind. 281, 66 L.R.A. 117, 106 Am. St. Rep. 222, 71 N. E. 642—Churchill v. Burlington Water Co. 94 Iowa, 92, 62 N. W. 646—Douglass v. Leavenworth, 6 Kan. App. 99, 49 Pac. 676—Louisville R. Co. v. Foster, 108 Ky. 749, 50 L.R.A. 815, 57 S. W. 480—Mathews v. St. Louis & S. F. R. Co. 121 Mo. 319, 25 L.R.A. 169, 24 S. W. 591—Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 330, 56 Am. Rep. 1, 17 Atl. 432—Methodist Episcopal Church v. Pennsylvania R. Co. 48 N. J. Eq. 455, 22 Atl. 183—Ridge v. Pennsylvania R. Co. 58 N. J. Eq. 176, 43 Atl. 275—Garvey v. Long Island R. Co. 9 App. Div. 255, 41 N. Y. Supp. 397—Syracuse Solar Salt Co. v. Rome, W. & O. R. Co. 43 App. Div. 209, 80 N. Y. Supp. 40—Bates v. Holbrook. 67 App. Div. 32, 73 N. Y. Supp. 417—Briesen v. Long Island R. Co. 81 Hun, 113—Garvey v. Long Island R. Co. 159 N. Y. 331, 70 Am. St. Rep. 550, 54 N. E. 57—Grand Lodge A. O. U. W. v. Bollman, 22 Tex. Civ. App. 111, 53 S. W. 829.

— Editorial notes.

[Statutory authority to commit, not presumed. 70 L.R.A. 579.

Effect of legislative authority on liability for. 1 L.R.A. (N.S.) 49.]

Prescription.

34. Lapse of time, whatever its length,

cannot justify a nuisance to health arising from the manufacture of animal matter into a fertilizer, as every day's continuance is a new offense. Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24: 1036

— Editorial note.

[Prescriptive right to maintain. 53 L. R.A. 891.]

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 Of Witnesses whose Depositions are Taken, see Depositions, 19, 25, 27, 51.
 Estoppel to Deny Authority to Administer, see Estoppel, 279.
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 Of Owner Seeking to Redeem from Federal Tax Sale, see Internal Revenue, 288.
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 To Return to Mandamus, see Mandamus, 231.
 Authority of Notary to Administer, see Notary.
 Of Inventor in Support of Patent, see Patents, 427.
 Of Appraisers for Establishment of Park, see Parks and Squares, 4.
 False Oath, see Perjury.
 Of Pre-emptor, before Whom Taken, see Public Lands, 778.
 To Petition for Removal of Cause, see Removal of Causes, 276.
 Of Tax Officer, see Taxes, 566, 567.

In proceedings under the landlord and tenant act of the District of Columbia, oath to the complaint before a notary public in the state of New York is sufficient, as such act only requires a written complaint on oath of the person entitled to the premises. *Harris v. Barber*, 129 U. S. 366, 9 Sup. Ct. Rep. 314, 32: 697
Cited in Hutchins v. Maneely, 11 App. D. C. 91—*Howard v. Citizens Bank & T. Co.* 12 App. D. C. 234—*Duggan v. Washougal Land & Logging Co.* 10 Wash. 85, 38 Pac. 856.

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Under Law of Nations, see International Law, III.

An offense, in its legal signification, means the transgression of law. *Moore v. Illinois*, 14 How. 13, 14: 306
Cited in United States v. Cashel, 1 Hughes, 353, Fed. Cas. No. 14,744—*Cruthers v. State*, 161 Ind. 147, 67 N. E. 930—*State v. Oleson*, 26 Minn. 517, 5 N. E. 959.

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I. Nature of Office; Who are Officers.

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Relations between Departmental Heads and Subordinates in National Government, see Executive Department, 5.

Nature of Office of Governor, see Governor. Requisition Agent as State and not Federal Officer, see Habeas Corpus, 25.

Officer of Irrigation District as a Public Officer, see Irrigation Districts, 2.

Presidential Electors as State Officers, see Presidential Electors, 1.

Officers and Employees of United States Generally, see United States, III. b.

1. An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. *United States v. Hartwell*, 6 Wall. 385, 18: 830

Cited in Franklin v. United States, 29 Ct. Cl. 9—*United States v. Bowerman*, Fed. Cas. No. 14,630—*Myers v. Hettlinger*, 37 C. C. A. 371, 94 Fed. 372—*McDonald v. Nebraska*, 41 C. C. A. 280, 101 Fed. 173—*McGregor v. United States*, 134 Fed. 196—*Oldham v. Birmingham*, 102 Ala. 366, 14 So. 793—*Vincen-heller v. Reagan*, 69 Ark. 474, 64 S. W. 278—*Ptacek v. People*, 94 Ill. App. 578—*State v. Spaulding*, 102 Iowa, 644, 72 N. W. 288—*Ricker's Petition*, 66 N. H. 231, 24 L.R.A. 751, 29 Atl. 559—*Oliver v. Jersey City*, 63 N. J. L. 102, 42 Atl. 782—*State ex rel. Barnhill v. Thompson*, 122 N. C. 496, 29 S. E. 720—*State v. Brennan*, 49 Ohio St. 38, 29 N. E. 593—*Guthrie Daily Leader v. Cameron*, 3 Okla. 682, 41 Pac. 635—*Com. v. Frank*, 4 Pa. Co. Ct. 623—*Re Factory Inspector's Lawyer*, 28 Pa. Co. Ct. 371—*Kendall v. Ray-bauld*, 13 Utah, 234, 44 Pac. 1034—*Hartigan v. West Virginia University*, 49 W. Va. 20, 38 S. E. 698.

2. The holding of an office is not a contract, nor is it a vested right. *Blake v. United States*, 103 U. S. 227, 26: 462
Cited in Crenshaw v. United States, 134 U. S. 107, 33 L. ed. 828, 10 Sup. Ct. Rep. 431—*Taylor v. Beckham*, 178 U. S. 577, 44 L. ed. 1200, 20 Sup. Ct. Rep. 890—*Taylor v. Vana*, 127 N. C. 249, 37 S. E. 263—*Mial v. Ellington*, 134 N. C. 165, 65 L.R.A. 710, 46 S. E. 961.

3. Whatever the form of the statute, an officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one legislature cannot deprive its successor of the power of revocation. *Crenshaw v. United States*, 134 U. S. 99, 10 Sup. Ct. Rep. 431, 33: 825

Editorial note.

[Who are public officers. 17 L.R.A. 243.]

Officer or employee.

4. A "commissioner" performing services for the state under a contract of employment made with the governor, pursuant to statute, is not a public officer whose office the legislature may abolish at pleasure. *Hall v. Wisconsin*, 103 U. S. 5, 26: 302
Cited in Aufmordt v. Hedden, 137 U. S. 327,

34 L. ed. 680, 11 Sup. Ct. Rep. 103—Glavey v. United States, 35 Ct. Cl. 260—People v. Rathbone, 11 Misc. 98, 32 N. Y. Supp. 108—Com. v. Frank, 4 Pa. Co. Ct. 623—Snyder v. Emerson, 19 Utah, 326, 57 Pac. 800.

II. Appointment and Tenure.

De Facto Officers, see *infra*, VII.

Appointment of Successor as Tantamount to Acceptance of Resignation, see *infra*, 17.

Officer in Army or Navy, see Army and Navy, 31, 32.

Of Pay Master or Navy Agent, see Army and Navy, 178, 179.

Preference of Soldiers and Sailors, see Civil Service, 1.

Appointment of Clerk, see Clerks, 1, 3, 76, 78.

Contracts as to, Protected from Impairment, see Constitutional Law, IV. g. 2, c. (5).

Appointment by Congress, see Constitutional Law, 138.

Of Consular Officer, see Diplomatic and Consular Officers, IV.

Clerks of Collector of Customs, see Duties, 275.

General Jurisdiction of Equity, see Equity, 190.

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Presumption and Burden of Proof as to Appointment, see Evidence, 434-436, 488.

Recital in Official Bond as Evidence of Appointment, see Evidence, 2423.

Eligibility of Judges, see Judges, III.

Appointment of Deputy Postmaster, see Postoffice, 21.

Mode of Appointing Presidential Electors, see Presidential Electors, 2-4.

Quo Warranto to Determine Regularity of Appointment, see Quo Warranto, 3.

Directory Provisions as to Giving Bond before Commencing Duties, see Statutes, 430.

Repeal of Statute Prescribing Qualifications for Appointment, see Statutes, 656.

Effect of Tax Officer's Delay in Filing Oath, see Taxes, 567.

Election of Auditor for Territory of Utah, see Territories, 45.

Of Officers of the United States Generally, see United States, 60-70.

Editorial notes.

[Election distinguished from appointment. 15 L.R.A. 106.

Compelling citizen to accept office. 24 L.R.A. 492.

Right of woman to hold office. 38 L.R.A. 208.

Re-election of public officer after ouster for misconduct. 6 L.R.A.(N.S.) 843.

Right of person to hold two judicial positions at the same time. 8 L.R.A.(N.S.) 1107.]

Requisites and sufficiency of appointment.

Revocability of Appointment, see *infra*, 15.

Commission as Conclusive Evidence of Appointment, see Evidence, 2464.

5. Where an appointment is evidenced by no other act than the commissioning of the officer, the commission and appointment are inseparable, though the commission, while conclusive evidence of it, is not the appointment. *Marbury v. Madison*, 1 Cranch, 137, 2: 60

Cited in Collins v. United States, 15 Ct. Cl. 31—*Kilburn v. United States*, 15 Ct. Cl. 47—*Young v. United States*, 19 Ct. Cl. 153—*Bennett v. United States*, 19 Ct. Cl. 385—*State ex rel. Watson v. Cobb*, 2 Kan. 47—*Com. v. Waller*, 145 Pa. 242, 23 Atl. 382.

6. An appointment not evidenced by a commission is complete upon the performance of an open, unequivocal act, witnessing the decision of the appointing officer. *Marbury v. Madison*, 1 Cranch, 137, 2: 60
Cited in Hoke v. Field, 10 Bush, 146, 19 Am. Rep. 58—*State v. Gatewood*, 7 Rich. L. 227.

7. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind a municipality. *Bernards Twp. v. Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333, 33: 726
Cited in Flagg v. School Dist. No. 70, 4 N. D. 42, 25 L.R.A. 369, 58 N. W. 499.

8. Under the joint resolution of February 28, 1867, allowing additional pay to persons in the civil service, neither a commission nor a warrant of appointment is necessary to entitle an employee to its benefit, provided he was an employee in the executive mansion, or in any of the departments, or in a bureau or division thereof. *United States v. Fitzpatrick (Twenty Per Cent Cases)* 13 Wall. 568, 20: 707
Twenty Per Cent Cases, 20 Wall. 179, 22: 339

United States v. Miller (Twenty Per Cent Cases) 13 Wall. 577, 20: 705

United States v. Manning (Twenty Per Cent Cases) 13 Wall. 578, 20: 706

Cited in Twenty Per Cent Cases, 20 Wall. 184, 22 L. ed. 341—*United States v. Allison*, 91 U. S. 807, 23 L. ed. 373—*Pearson v. United States*, 9 Ct. Cl. 153—*Wilson v. United States*, 11 Ct. Cl. 568—*Schaeffer v. United States*, 11 Ct. Cl. 732—*Phillips v. United States*, 11 Ct. Cl. 573—*Plummer v. United States*, 24 Ct. Cl. 519—*United States v. McDonald*, 21 C. C. A. 351, 44 U. S. App. 461, 72 Fed. 902—*State v. Loechner*, 65 Neb. 818, 59 L.R.A. 917, 91 N. W. 874.

Delivery of commission and acceptance.

Mandamus to Compel, see Mandamus, 122.

Record of Commission, see Records, 1.
Replevin as Remedy for Obtaining Commission, see Replevin, 4.

See also *United States*, 63, 64.

9. Acceptance of an office is not essential to the validity of an appointment. *Marbury v. Madison*, 1 Cranch, 137, 2: 60
Cited in Johnson v. United States, 5 Mason, 438, Fed. Cas. No. 7419—*State ex rel. Williams v. Fitts*, 49 Ala. 402—*Atty. Gen. ex*

rel. *Haight v. Love*, 39 N. J. L. 479, 23 Am. Rep. 234—*Booker v. Young*, 12 Gratt. 309.

Incompatible offices.

As to Double Salaries, see *infra*, 26, 27.

10. [The recorder of the city of Philadelphia is not a judge within the meaning of the Constitution of the state of Pennsylvania, art. 2, § 8, making incompatible the office of United States attorney. *Commonwealth v. Dallas* (Pa. Sup. Ct.) 4 Dall. 229, 1: 812]

Term and tenure.

When Resignation is Effective, see *infra*, 18, 19.

Cessation of Power on Cessation of Official Relation, see *infra*, 39.

Officer in Navy, see *Army and Navy*, 30. Judicial Notice of, see *Evidence*, 46, 47, 76.

Capacity of Marshal to Complete Acts after Expiration of Term, see *Marshal*, 9, 10.

Effect of Lack of Statutory Provision for Continuance in Office or New Election, see *Municipal Corporations*, 163.

Recess Appointment of Federal Officers, see *United States*, 71, 72.

11. The tenure of ancient common-law officers, and the rules and principles by which they are governed, have no application to the office of the clerk of a district court of the United States. In the United States there is no ancient usage which can apply to and govern the tenure of offices created by the Constitution and laws. *Re Hennen*, 13 Pet. 230, 10: 138

12. Where the mayor of a city, whose charter contains a provision that the mayor shall hold over until his successor is elected, is declared by the judges of election to be re-elected, but the rival candidate is declared by the joint convention of the councils of the city to be elected, and is sworn into office; and the former succeeds, in a proceeding by quo warranto, in ousting the latter, he becomes thereupon entitled to the office, either by virtue of the declaration of the judges who returned him elected, or by virtue of that provision of the charter which enacts that the mayor shall hold over until his successor is elected. *United States ex rel. Crawford v. Addison*, 6 Wall. 291, 18: 919

13. It is a general rule that an office is held at the will of either party, unless a different tenure is expressed in the appointment, or is implied by the nature of the office, or results from ancient usage. *Re Hennen*, 13 Pet. 230, 10: 138

14. A charter of a city which provides that its officers shall hold their office until their successors are elected and qualified does not apply in case of resignation, especially where the law applicable to the city provides for their resignation. *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. Rep. 530, 32: 946

— Editorial notes.

[Vacancy by death of officer elect. 14 L.R.A. 858.

Vacancy by delay in filing bond. 16 L.R.A. 140.

Power to extend term, by postponing time for election. 3 L.R.A.(N.S.) 887.]

III. Resignation or Deprivation.

Power of Legislature to Defeat Right to Office, see *supra*, 4.

As to Tenure, see *supra*, 13.

Appellate Jurisdiction of Judgment for Restoration of Office, see *Appeal and Error*, 1069.

Measure of Damages for Excluding from Office, see *Damages*, 115.

Mandamus to Compel Reinstatement of Clerk, see *Mandamus*, II. c. 4.

Salary of Postmaster during Suspension, see *Postoffice*, 17.

Vacation of Office of Township Treasurer, see *Towns*, 9.

Impeachment of Federal Officers, see *United States*, 77.

Revocation of appointment.

Revocation of Commission, see *Bonds*, 53.

15. An appointment once made of an officer not removable at will is irrevocable. *Marbury v. Madison*, 1 Cranch, 137, 2: 60 *Distinguished in Parsons v. United States*, 167 U. S. 335, 42 L. ed. 189, 17 Sup. Ct. Rep. 680 —*State ex rel. Atty. Gen. v. Porter*, 1 Ala. 704—*State ex rel. Lindley v. Clark*, 61 Mo. 268.

Cited in McAllister v. United States, 141 U. S. 188, 35 L. ed. 698, 11 Sup. Ct. Rep. 949—*Miller v. United States*, 19 Ct. Cl. 351—*People ex rel. Finlay v. Jewett*, 6 Cal. 292—*Territory ex rel. French v. Cox*, 6 Dak. 505—*State ex rel. Holmes v. Finnerud*, 7 S. D. 246, 64 N. W. 121—*Atty. Gen. ex rel. Dust v. Oakman*, 126 Mich. 721, 86 Am. St. Rep. 574, 86 N. W. 151—*Brady v. Howe*, 50 Miss. 621—*Myers v. Chalmers*, 60 Miss. 789—*Speed v. Detroit*, 97 Mich. 207, 56 N. W. 570—*State ex rel. Haight v. Love*, 39 N. J. L. 21—*State ex rel. Whitney v. Van Buakirk*, 40 N. J. L. 470—*Re Fitzgerald*, 88 App. Div. 441, 82 N. Y. Supp. 811—*Ewing v. Thompson*, 43 Pa. 375—*Com. v. Troxel*, 4 Pa. Co. Ct. 453—*McDougal v. Guigon*, 27 Gratt. 136.

Resignation.

Holding Over till Election of Successor, see *supra*, 14.

Abatement of Action on, see *Abatement and Revival*, II. d.

Officer in Army, see *Army and Navy*, 35. Judicial Notice of, see *Evidence*, 76.

Presumption as to Continuance of Common Law Rule, see *Evidence*, 155.

See also *Towns*, 10.

16. A public office was, under the common law, considered a burden which the appointee was bound to bear, and could resign

only when the appointing power consented. *Edwards v. United States*, 103 U. S. 471, 26: 314

Cited in United States v. Dietrich, 126 Fed. 681—*State ex rel. Kirtley v. Augustine*, 113 Mo. 25, 35 Am. St. Rep. 696, 20 S. W. 651—*Atty. Gen. v. Taggart*, 66 N. H. 372, 29 Atl. 1027—*State v. Chadwick*, 10 Or. 469—*Keen v. Featherston*, 29 Tex. Civ. App. 565, 69 S. W. 983—*Evans v. Johnson*, 39 W. Va. 307, 23 L.R.A. 743, 45 Am. St. Rep. 912, 19 S. E. 623.

17. The acceptance of the resignation of a public officer may be shown by a formal declaration or by the appointment of a successor. *Edwards v. United States*, 103 U. S. 471, 26: 314
Cited in Johnson v. Griswold, 177 Mass. 36, 58 N. E. 157.

18. Legislation intended to prevent an hiatus in public office does not abrogate the common-law rule making a resignation thereof effective only upon its acceptance. *Edwards v. United States*, 103 U. S. 471, 26: 314

19. In Illinois a resignation of a supervisor or town clerk does not take effect until a successor is appointed. *Badger v. United States ex rel. Bolles*, 93 U. S. 599, 23: 991
Cited in Amy v. Watertown, 180 U. S. 315, 32 L. ed. 951, 9 Sup. Ct. Rep. 530—*United States ex rel. Watts v. Lauderdale County Justices*, 10 Fed. 467—*United States v. Green*, 53 Fed. 771—*People ex rel. Illinois Midland R. Co. v. Barnett Twp.* 100 Ill. 336—*Colorado Debuture Corp. v. Lombard Invest. Co.* 66 Kan. 255, 97 Am. St. Rep. 373, 71 Pac. 584—*State ex rel. Brown v. Tax Assessors*, 53 N. J. L. 160, 20 Atl. 966—*Tomilat v. J. S. Held Co.* 17 Misc. 538, 40 N. Y. Supp. 692—*Eddy v. Kincaid*, 28 Or. 560, 41 Pac. 156—*Baker City v. Murphy*, 30 Or. 416, 35 L.R.A. 95, 42 Pac. 133—*Jones v. Jefferson*, 66 Tex. 580, 1 S. W. 903—*McGhee v. Dickey*, 4 Tex. Civ. App. 105, 23 S. W. 404—*Keen v. Featherston*, 29 Tex. Civ. App. 565, 69 S. W. 983—*Coleman v. Sands*, 87 Va. 704, 13 S. E. 148—*State ex rel. Meredith v. Tallman*, 24 Wash. 431, 64 Pac. 759—*State ex rel. Wheeler v. Nobles*, 109 Wis. 205, 85 N. W. 367—*State ex rel. Richardson v. Henderson*, 4 Wyo. 542, 22 L.R.A. 753, 35 Pac. 517.

— Editorial notes.

[Necessity of an acceptance to complete resignation. 23 L.R.A. 681; 12 L.R.A. (N.S.) 1010.]

Removal.

Cessation of Duty upon Removal, see *infra*, 49.

Appellate Jurisdiction over Judgment of Ouster, see *Appeal and Error*, 1070.

Under Civil Service Laws, see *Civil Service*, 2.

Jury Trial as Essential to Due Process, see *Constitutional Law*, 659.

Power of Courts to Review, see *Courts*, 235.

Due Process in Removal, see *Constitutional Law*, 663-666.

Power of President to Remove Territorial Judge, see *Courts*, 364.

Concurrent or Exclusive Jurisdiction in Case of Wrongful Removal, see *Courts*, 1374.

State Decision as to Validity of Removal, as Binding on Federal Courts, see *Courts*, 1734.

President's Power to Remove District Attorney, see *District Attorney*, 2.

Right to Injunction against Removal, see *Injunction*, 60.

Suspension of Federal Judge, see *Judges*, 3, 4.

Right to Remove Proceeding for, to Federal Court, see *Removal of Causes*, 37.

Officer of Army or Navy, see *Army and Navy*, 36-44.

Of Assignee in Bankruptcy, see *Bankruptcy*, 99.

Of Commissioners, see *Commissioners*, III.

Of Collector of Customs, see *Duties*, 278, 316.

Of Customs Officers, see *Duties*, 334.

Of Police Officers, see *Police*, 1.

20. The power of removal is incidental to the power of appointment, unless the legislature has decreed differently. *Blake v. United States*, 103 U. S. 227, 26: 462

Cited in United States v. Allred, 155 U. S. 594, 39 L. ed. 274, 15 Sup. Ct. Rep. 231—*Shurtleff v. United States*, 189 U. S. 315, 47 L. ed. 831, 23 Sup. Ct. Rep. 535—*Hartigan v. United States*, 196 U. S. 174, 49 L. ed. 436, 25 Sup. Ct. Rep. 204—*Perkins v. United States*, 20 Ct. Cl. 443—*Street v. United States*, 24 Ct. Cl. 248—*Leadville v. Bishop*, 14 Colo. App. 521, 61 Pac. 58—*State ex rel. Reiley v. Chatfield*, 71 Conn. 112, 40 Atl. 922—*United States ex rel. Brown v. Root*, 18 App. D. C. 242—*People ex rel. Cline v. Robb*, 126 N. Y. 182, 27 N. E. 287—*Winslow v. Morton*, 118 N. C. 490, 24 S. E. 417.

21. The power of removal is usually incident to the power of appointment, unless restricted by law, constitutional or otherwise; and the appointment of a successor *per se* effects the removal. *Re Hennen*, 13 Pet. 230, 10: 138

Distinguished in Hallgren v. Campbell, 82 Mich. 261, 9 L.R.A. 410, 21 Am. St. Rep. 557, 46 N. W. 381.

Cited in Ware v. United States, 4 Wall. 632, 18 L. ed. 393—*Ex parte Siebold*, 100 U. S. 398, 25 L. ed. 726—*Blake v. United States*, 103 U. S. 231, 26 L. ed. 463—*Todd v. United States*, 158 U. S. 282, 39 L. ed. 983, 15 Sup. Ct. Rep. 889—*Parsons v. United States*, 167 U. S. 331, 42 L. ed. 187, 17 Sup. Ct. Rep. 880—*Keim v. United States*, 177 U. S. 294, 44 L. ed. 776, 20 Sup. Ct. Rep. 574—*Reagan v. United States*, 182 U. S. 424, 45 L. ed. 1164, 21 Sup. Ct. Rep. 842—*Shurtleff v. United States*, 189 U. S. 315, 47 L. ed. 831, 23 Sup. Ct. Rep. 535—*Hartigan v. United States*, 196 U. S. 174, 49 L. ed. 436, 25 Sup. Ct. Rep. 204—*McElrath v. United States*, 12 Ct. Cl. 213—*Collins v. United States*, 14 Ct. Cl. 574—*Thwing v. United States*, 16 Ct. Cl. 18—*Perkins v. United States*, 20 Ct. Cl. 443—*Parsons v. United States*, 30 Ct. Cl. 248—*Keim v. United States*, 33 Ct. Cl. 186—*Dearie v. United States*, 36 Ct. Cl. 12—*Shurtleff v. United States*, 36 Ct. Cl. 43—*Peck v. United States*, 39 Ct. Cl. 135—*District Attorney's Case*,

7 Am. L. Reg. N. S. 800, Fed. Cas. No. 3,924—Ex parte Schaumburg, Fed. Cas. No. 12,441—United States ex rel. Bigler v. Avery, Deady, 215, Fed. Cas. No. 14,481—United States v. Bank of Arkansas, Hempst. 462, Fed. Cas. No. 14,515—Re Marshalship, 20 Fed. 382—Re Eaves, 30 Fed. 23—Re Circuit Court Comrs. 65 Fed. 318—Nixon v. United States, 82 Fed. 28—Taylor v. Kercheval, 82 Fed. 499—Butler v. White, 83 Fed. 582—Morgan v. Nunn, 84 Fed. 552—Cole v. Territory, 5 Ariz. 141, 48 Pac. 217—Patton v. Vaughan, 39 Ark. 215—People ex rel. Travers v. Freese, 76 Cal. 639, 18 Pac. 812—People ex rel. Travers v. Freese, 83 Cal. 456, 23 Pac. 378—People ex rel. Menzies v. Gunst, 110 Cal. 451, 42 Pac. 963—Leadville v. Bishop, 14 Colo. App. 521, 61 Pac. 58—Norwalk Street R. Co.'s Appeal, 69 Conn. 596, 39 L.R.A. 800, 37 Atl. 1080—State ex rel. Reiley v. Chatfield, 71 Conn. 112, 40 Atl. 922—State ex rel. Moore v. Archibald, 5 N. D. 377, 66 N. W. 234—Field v. People, 3 Ill. 130—Jelley v. Roberts, 50 Ind. 7—Roth v. State, 158 Ind. 258, 63 N. E. 460—State ex rel. Little v. Mitchell, 50 Kan. 295, 20 L.R.A. 307, 33 Pac. 104—Jacques v. Little, 51 Kan. 303, 20 L.R.A. 306, 33 Pac. 106—Todd v. Dunlap, 99 Ky. 461, 36 S. W. 541—Johnson v. Ginn, 105 Ky. 682, 49 S. W. 470—Nicholson v. Thompson, 5 Rob. (La.) 402—Peters v. Bell, 51 La. Ann. 1628, 26 So. 442—Townsend v. Kurtz, 83 Md. 350, 34 Atl. 1123—Stubbs v. St. John's Church, 96 Md. 277, 53 Atl. 917—Freeman v. Bourne, 170 Mass. 293, 39 L.R.A. 512, 49 N. E. 435—Speed v. Detroit, 97 Mich. 210, 56 N. W. 570—Newsom v. Cocke, 44 Miss. 359, 7 Am. Rep. 686—State ex rel. Denison v. St. Louis, 90 Mo. 22, 1 S. W. 757—State ex rel. Withers v. Stonestreet, 99 Mo. 376, 12 S. W. 895—State ex rel. Rife v. Hawes, 177 Mo. 378, 76 S. W. 653—Horstman v. Adamson, 101 Mo. App. 125, 74 S. W. 398—State ex rel. Carter v. Public Lands & Buildings, 7 Neb. 48—Sterling v. Warden, 51 N. H. 241, 12 Am. Rep. 80—State, Livingston, Prosecutor, v. Trinity Church, 45 N. J. L. 239—Territory ex rel. Wade v. Ashenfelter, 4 N. M. 139, 12 Pac. 879—People ex rel. Ward v. Drake, 43 App. Div. 329, 60 N. Y. Supp. 309—People ex rel. Whiting v. Carrique, 2 Hill, 98—People ex rel. McCullough v. Cram, 15 Misc. 13, 36 N. Y. Supp. 1117—Holley v. New York, 59 N. Y. 170—People ex rel. Royal v. New York Fire Comrs. 73 N. Y. 441—People ex rel. Gilmour v. Hyde, 89 N. Y. 20—People ex rel. Cline v. Robb, 126 N. Y. 182, 27 N. E. 267—Mial v. Ellington, 134 N. C. 142, 65 L.R.A. 701, 46 S. E. 961—Cameron v. Parker, 2 Okla. 343, 38 Pac. 14—Territory Bd. of Edu. v. Territory, 12 Okla. 301, 70 Pac. 792—Christy v. Kingfisher, 13 Okla. 593, 76 Pac. 135—Com. ex rel. Bowman v. Slifer, 25 Pa. 29, 64 Am. Dec. 680—Field v. Com. 32 Pa. 481—Com. ex rel. Haymaker v. Black, 201 Pa. 436, 50 Atl. 1008—Caulfield v. State, 1 S. C. N. S. 465—Williams v. Boughner, 6 Coldw. 490—Keenan v. Perry, 24 Tex. 263—Honey v. Graham, 39 Tex. 12—People ex rel. Murphy v. McAllister, 10 Utah, 368, 37 Pac. 578—McDougal v. Gulgon, 27 Gratt. 136—Lewis v. Whittle, 77 Va. 423—Davis v. Filler, 47 W. Va. 415, 35 S. E. 6—Gillan v. Normal Schools, 88 Wis. 13, 24 L.R.A. 338, 58 N. W. 1042.

22. The grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice. *Eckloff v. District*

of Columbia, 135 U. S. 240, 10 Sup. Ct. Rep. 752, 34: 120
Cited in *Hutton v. District of Columbia*, 9 Mackey, 59—*Townsend v. Kurtz*, 83 Md. 350, 34 Atl. 1123—*State ex rel. Hastings v. Smith*, 35 Neb. 29, 16 L.R.A. 796, 52 N. W. 700—*Gillan v. Normal Schools*, 88 Wis. 14, 24 L.R.A. 338, 58 N. W. 1042.

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[Right to remove summarily. 15 L.R.A. 95.]

Power of town or municipality to remove officer in absence of statutory authority. 9 L.R.A. (N.S.) 572.]

IV. Compensation and Fees.

Officers of Army and Navy, see *Army and Navy*, VI. b.

Of Pay Masters, Purser, and Disbursing Officers, see *Army and Navy*, 180–190.

Of Clerk of United States Court, see *Clerks*, I. b.

Of Commissioners, see *Commissioners*, V.

Of Coroner, see *Coroner*.

Of District Attorney, see *District Attorneys*, II.

Of Consul, see *Diplomatic and Consular Officers*, III.

Of Customs Officers, see *Duties*, VI. d.

Of Election Officers, see *Elections*, IV. a.

Of Internal Revenue Officers, see *Internal Revenue*, 58–65.

Of Judges Generally, see *Judges*, IV.

Of Judge after Suspension, see *Judges*, 4.

Of Marshal, see *Marshal*, II. b.

Of Postmaster, see *Postoffice*, 6, 8–17.

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Of Letter Carriers, see *Postoffice*, 24–27.

Attachment to Enforce Payment, see *Attachment*, 12.

Under Civil Service Laws, see *Civil Service*, 2, 3.

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Claims against United States, see *Claims*, 113–116.

Contracts as to, Protected from Impairment, see *Constitutional Law*, IV. g, 2, c (5).

Review of Accounts and Allowances by Courts, see *Courts*, 236–242.

Custom or Usage as to, see *Custom and Usage*, 45, 46.

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Federal Taxation of Salary of State Officer, see *Internal Revenue*, 71.

Compelling Payment of, after Removal, see *Mandamus*, 107.

Mandamus to Compel Payment, see *Mandamus*, 148.

Fees for Attendance in Two Examinations on the Same Day, see *Marshal*, 56.

Application of Fund Retained from Pay of Police Officers, see *Police*, 2.

Right to Offset Claim for, in Action by Government, see *Set-Off and Counterclaim*, IV.

Set-Off in Action for, see Set-Off and Counterclaim, 69, 72, 74, 75.
Special Legislation as to, see Statutes, 118.
Construction of Statute as to Per Diem Fees, see Statutes, 255.
Strict Construction of Statute as to, see Statutes, 535.
Repeal of Statute as to, see Statutes, 647.

23. The legislature may pass an act reducing the compensation of canal commissioners during their term of office. *Butler v. Pennsylvania*, 10 How. 402, 13: 472
Cited in Newton v. Mahoning County, 100 U. S. 559, 25 L. ed. 711—*United States v. Fisher*, 109 U. S. 145, 27 L. ed. 886, 3 Sup. Ct. Rep. 154—*Fisk v. Police Jury*, 116 U. S. 134, 29 L. ed. 588, 6 Sup. Ct. Rep. 329—*Maynard v. Hill*, 125 U. S. 210, 31 L. ed. 659, 8 Sup. Ct. Rep. 723—*Crenshaw v. United States*, 134 U. S. 104, 33 L. ed. 827, 10 Sup. Ct. Rep. 431—*Taylor v. Beckham*, 178 U. S. 576, 44 L. ed. 1200, 20 Sup. Ct. Rep. 890—*Shrewsbury v. United States*, 9 Ct. Cl. 266—*Fisher v. United States*, 15 Ct. Cl. 329—*Re Hobbs*, 1 Woods, 540, Fed. Cas. No. 6,550—*Keene v. Wheatley*, 9 Am. L. Reg. 73, Fed. Cas. No. 7,644—*Osborn v. Nicholson*, 1 Dill. 234, Fed. Cas. No. 10,505—*Tinker v. Van Dyke*, 1 Flipp. 527, Fed. Cas. No. 14,058—*Perkins v. Corbin*, 45 Ala. 119, 6 Am. Rep. 698—*Lane v. Kolb*, 92 Ala. 641, 9 So. 873—*Morrow v. Earle*, 122 Ala. 146, 27 So. 327—*Cohen v. Wright*, 22 Cal. 319—*State ex rel. Rylands v. Pinkerman*, 63 Conn. 196, 22 L.R.A. 662, 28 Atl. 110—*State ex rel. Lavin v. Bacon*, 14 S. D. 408, 85 N. W. 605—*Augusta v. Sweeney*, 44 Ga. 465, 9 Am. Rep. 172—*State ex rel. Wessolowski v. Gilbert*, 51 Ga. 227—*Collins v. Russell*, 107 Ga. 426, 33 S. E. 444—*People ex rel. Murphy v. Lippincott*, 67 Ill. 337—*Allen County v. Chapman*, 22 Ind. App. 63, 53 N. E. 187—*Gibbons v. Young*, 2 Duv. 471—*State ex rel. Newgass v. New Orleans*, 38 La. Ann. 121, 58 Am. Rep. 168—*Knappen v. Barry County*, 46 Mich. 24, 8 N. W. 579—*People ex rel. Robertson v. Van Gaskin*, 5 Mont. 366, 6 Pac. 30—*Re Dewar*, 10 Mont. 440, 25 Pac. 1026—*Lloyd v. Silver Bow County*, 11 Mont. 411, 28 Pac. 453—*State v. Glover*, 41 Mo. 381—*State ex rel. Atty. Gen. v. Davis*, 44 Mo. 131—*Douglas County v. Timme*, 32 Neb. 275, 49 N. W. 266—*Truesdale v. Rochester*, 33 Hun, 576—*People v. Wilmerding*, 62 Hun, 396, 17 N. Y. Supp. 102—*Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 668—*People ex rel. Cunningham v. Roper*, 35 N. Y. 639—*McVeany v. New York*, 80 N. Y. 190, 36 Am. Rep. 600—*Gatlin v. Walton*, 60 N. C. (Winst. L.) 411—*Lowe v. Harris*, 112 N. C. 480, 22 L.R.A. 382, 17 S. E. 539—*State ex rel. Abbott v. Beddingfield*, 125 N. C. 277, 34 S. E. 412—*Bank of Toledo v. Toledo*, 1 Ohio St. 656—*Matheny v. Golden*, 5 Ohio St. 392—*Baker County v. Benson*, 40 Or. 212, 66 Pac. 815—*Keene v. Wheatley*, 5 Clark (Pa.) 540, Fed. Cas. No. 7,644—*Duff's Appeal*, 56 Pa. 440—*McCormick v. Fayette County*, 150 Pa. 193, 30 W. N. C. 400, 24 Atl. 667—*Coogan v. State*, 1 S. C. N. S. 472—*Alexander v. McKenzie*, 2 S. C. N. S. 90—*McFall v. Austin*, 1 Tex. App. Civ. Cas. (White & W.) § 451—*Grayson County v. May*, 4 Tex. Civ. App. Cas. (Willson) 310—*Maynard v. Vanentine*, 2 Wash. Terr. 16, 3 Pac. 195—*Maynard v. Hill*, 2 Wash. Terr. 327, 5 Pac. 717—*Richland County v. Richland Center*, 59 Wis. 590, 18 N. W. 497—

Lee v. Uinta County, 3 Wyo. 54, 31 Pac. 1045.

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Fees and compensation of. 37: 325
 [Constitutional prohibition against change of salary during term, as affecting fees. 23 L.R.A. 609.]

Computation of salary.

24. The salary of a public officer runs from the time of his appointment, and not from the date of the transmission or acceptance of his commission. *Marbury v. Madison*, 1 Cranch, 137, 2: 60
Cited in Andrews v. Saucier, 13 La. Ann. 303—*Thomas v. Owens*, 4 Md. 220—*Burks v. Hinton*, 77 Va. 37.

25. When any person takes an office with an annual salary in an intermediate time between one quarter and another, the practice is to pay him a proportion of the quarter's salary accordingly; and, if he leaves office before the end of his official year, to pay him for the like proportion of the last quarter. *United States v. Dickson*, 15 Pet. 141, 10: 689

Double salaries.

By Collector of Customs, see Duties 309, 310.

26. A person holding two distinct offices under the government, each with its own duties and compensation, is entitled to the salary in compensation of both, when the services required or which might be required in one capacity had no connection with those of the other. *Converse v. United States*, 21 How. 463, 16: 192
Distinguished in Talbot v. United States, 10 Ct. Cl. 427.

Cited in Collins v. United States, 15 Ct. Cl. 38—*Melgs v. United States*, 19 Ct. Cl. 503—*United States v. Shoemaker*, 7 Wall. 342, 19 L. ed. 81—*Hall v. United States*, 91 U. S. 565, 23 L. ed. 448—*Gausson v. United States*, 97 U. S. 592, 24 L. ed. 1010—*United States v. Brindle*, 110 U. S. 694, 28 L. ed. 288, 4 Sup. Ct. Rep. 180—*United States v. Saunders*, 120 U. S. 130, 30 L. ed. 595, 7 Sup. Ct. Rep. 467—*Badeau v. United States*, 130 U. S. 451, 32 L. ed. 1001, 9 Sup. Ct. Rep. 579—*United States v. King*, 147 U. S. 680, 37 L. ed. 329, 13 Sup. Ct. Rep. 439—*Mullett v. United States*, 150 U. S. 570, 37 L. ed. 1186, 14 Sup. Ct. Rep. 190—*Donovan v. United States*, 21 Ct. Cl. 122—*Saunders v. United States*, 21 Ct. Cl. 410—*Hartson v. United States*, 21 Ct. Cl. 453—*Goode v. United States*, 25 Ct. Cl. 267—*The Anna, Blatchf. Prize Cas.* 340, Fed. Cas. No. 402—*United States v. Austin*, 2 Cliff, 334, Fed. Cas. No. 14,480—*United States v. Gausson*, 2 Woods, 99, Fed. Cas. No. 15,192—*Well v. Calhoun*, 25 Fed. 875—*Erwin v. United States*, 2 L.R.A. 234, 37 Fed. 479—*United States v. Harsha*, 6 C. C. A. 180, 16 U. S. App. 13, 56 Fed. 955—*Weed v. United States*, 65 Fed. 402—*McDonald v. United States*, 66 Fed. 259—*Weed v. United States*, 82 Fed. 422—*United States v. Evans*, 4 Mackey, 283—*Detroit v. Redfield*, 19 Mich. 383—*White v. East Saginaw*, 43 Mich. 569, 6 N. W. 86—*Warner v. Auditor General*, 129 Mich. 654, 89 N. W. 591—*Merzbach v. New York*, 163 N. Y. 22, 57 N. E. 96—*Finley v. Territory*, 12 Okla. 644, 73 Pac. 273.

27. A person holding two offices or employments under the government, when the services rendered or which might be required under them are not incompatible, is not precluded from receiving the salary or compensation of both. *Badeau v. United States*, 130 U. S. 439, 9 Sup. Ct. Rep. 579, 32: 997
Cited in Bartlett v. United States, 25 Ct. Cl. 400—*United States v. King*, 147 U. S. 680, 37 L. ed. 329, 13 Sup. Ct. Rep. 439—*Germania Iron Co. v. United States*, 165 U. S. 384, 41 L. ed. 756, 17 Sup. Ct. Rep. 337—*Palmer v. Polk County*, 81 Iowa, 245, 25 Am. St. Rep. 489, 47 N. W. 65—*People v. Duane*, 55 Hun, 321, 8 N. Y. Supp. 439—*Crosthwaite v. United States*, 30 Ct. Cl. 309—*Webster v. United States*, 28 Ct. Cl. 30—*Winchell v. United States*, 28 Ct. Cl. 39—*Geddes v. United States*, 38 Ct. Cl. 446—*Ada County v. Gess*, 4 Idaho, 616, 43 Pac. 71—*Geddes v. United States*, 38 Ct. Cl. 449—*Re Winthrop*, 31 Ct. Cl. 44—*State v. rel. Chatterton v. Grant*, 12 Wyo. 12, 73 Pac. 470.

Extra services and additional compensation.

Officers of Army and Navy, see Army and Navy, VI. b, 3.

Disbursing Officer of Army, see Army and Navy, 180, 184, 187-190.

Special Compensation for District Attorneys, see District Attorneys, 5, 8-10.

Customs Officers, see Duties, 306-308.

Estoppel to Claim, see Estoppel, 75.

As to Mileage on Two Writs Served at the Same Time, see Marshal, 48.

Extra Compensation of Letter Carriers, see Postoffice, 25-27.

Unauthorized Services as Set-Off, see Claims, 31.

Set-Off by United States in Action for, see Set-Off and Counterclaim, 74.

See also *supra*, 8.

28. For extra services cast upon an officer of the government by reason of his official position he cannot recover compensation, where there is no express provision of law authorizing it. *Mullett v. United States*, 150 U. S. 566, 14 Sup. Ct. Rep. 190, 37: 1184

Cited in United States v. Garlinger, 169 U. S. 321, 42 L. ed. 763, 18 Sup. Ct. Rep. 364—*King v. United States*, 32 Ct. Cl. 243—*Young v. Millelt*, 19 Wash. 490, 53 Pac. 823.

29. A department of the government charged with the execution of a particular authority, business, or duty, requiring service to be performed not strictly appertaining to any particular officers, incidentally possesses the right to employ the proper persons to perform the same, and also the right, when the service is an extra service, to allow the persons so employed a suitable compensation. *Gratnot v. United States*, 15 Pet. 336, 10: 759

Distinguished in Gratnot v. United States, 4 How. 115, 11 L. ed. 800.

Cited in Minis v. United States, 15 Pet. 445, 10 L. ed. 799—*Acosta v. The Halcyon*, Fed. Cas. No. 32—*Andrews v. United States*, 2 Story, 208, Fed. Cas. No. 381—*United States v. Hall*, 2 Dill. 427, Fed. Cas. No. 15,284—*United States v. Smith*, 1 Woodb. & M. 194, Fed. Cas. No. 16,346—*Poinier v. United*

States, 40 Fed. 141—*Swigett v. United States*, 78 Fed. 459—*United States v. Schlierholz*, 133 Fed. 335—*Mexico v. De Arrangois*, 11 How. Pr. 9.

30. The ordinary rule, in the absence of legislation, is, that if the statute increases the duties of an officer by the addition of other duties germane to his office, he must perform them without extra compensation; but if he is employed to render services in an independent employment, not incidental to his official duties, he may recover for such services. *United States v. King*, 147 U. S. 676, 13 Sup. Ct. Rep. 439, 37: 328

Cited in United States v. McCandless, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 465—*Mullett v. United States*, 150 U. S. 571, 37 L. ed. 1186, 14 Sup. Ct. Rep. 190—*United States v. Garlinger*, 169 U. S. 321, 42 L. ed. 763, 18 Sup. Ct. Rep. 364—*Lemly v. United States*, 28 Ct. Cl. 477—*Garner v. United States*, 31 Ct. Cl. 348—*Milchrist v. United States*, 31 Ct. Cl. 413—*Fuller v. United States*, 58 Fed. 331—*Van Dusee v. United States*, 73 Fed. 796.

31. That a clerk did work during office hours (outside his ordinary duties) is no objection to his obtaining compensation therefor. *United States v. Macdaniel*, 7 Pet. 1, 8: 587

32. A receiver of public moneys is entitled to commissions on sales of Indian trust lands in addition to his compensation as such receiver of public moneys, when appointed special receiver to assist in selling such trust lands. *United States v. Brindle*, 110 U. S. 688, 4 Sup. Ct. Rep. 180, 28: 286

Cited in United States v. Saunders, 120 U. S. 130, 30 L. ed. 595, 7 Sup. Ct. Rep. 467—*Badeau v. United States*, 130 U. S. 451, 32 L. ed. 1001, 9 Sup. Ct. Rep. 579—*United States v. King*, 147 U. S. 680, 37 L. ed. 329, 13 Sup. Ct. Rep. 439—*Mullett v. United States*, 150 U. S. 571, 37 L. ed. 1186, 14 Sup. Ct. Rep. 190—*Melgs v. United States*, 19 Ct. Cl. 503—*Donovan v. United States*, 21 Ct. Cl. 122—*Saunders v. United States*, 21 Ct. Cl. 412—*Hartson v. United States*, 21 Ct. Cl. 453—*Goode v. United States*, 23 Ct. Cl. 267—*Yates v. United States*, 25 Ct. Cl. 300—*Graham v. United States*, 29 Ct. Cl. 413—*Geddes v. United States*, 38 Ct. Cl. 446—*Stewart v. United States*, 39 Ct. Cl. 337—*Erwin v. United States*, 2 L.R.A. 234, 37 Fed. 474—*Weed v. United States*, 82 Fed. 422—*Tippecanoe County v. Mitchell*, 131 Ind. 372, 15 L.R.A. 523, 30 N. E. 409—*Finley v. Territory*, 12 Okla. 643, 73 Pac. 273—*Kollock v. Dodge*, 105 Wis. 198, 80 N. W. 603—*Baker v. Crook County*, 9 Wyo. 57, 59 Pac. 797.

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V. Rights and Powers.

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Reviewableness of Official Acts or Decisions Generally, see Courts, 77, 78.

Power of District Attorney, see District Attorneys, III.

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 Effect of Legislative Confirmation of Report of Commissioners of Land Claims, see Private Land Claims, 678.
 Right to Reward for Making Arrest, see Reward, 1-3.
 Of Sheriff, see Sheriff.
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Amendment of officer's return. 23: 901
 [Place at which officer may act. 33 L.R. A. 85.]

Right to the office.

When Right Complete under Federal Appointment, see United States, 60-64.

As a Judicial Question, see Courts, 199.

33. The value of a public office being incapable of ascertainment, an appointee is entitled to the office itself, and cannot be relegated to an action at law for damage sustained by being prevented from exercising its functions. *Marbury v. Madison*, 1 Cranch, 137, 2: 60
Cited in State ex rel. Savannah v. Dewa, R. M. Charit. (Ga.) 425.

Powers.

Authority to Take Acknowledgment, see Acknowledgment, I.

Power of Army and Naval Officer, see Army and Navy, VI. c.

Of County Court or Commissioners, see Counties, 38-40.

Independence of Judicial Control, see Courts, I. e, 4-7.

Customs Officers, see Duties, VI. b.

Seizure by Customs Officers for Violation of Customs Laws, see Duties, XII. c.

Presumption of Official Authority, see Evidence, 437-442.

Regulations of Commissioner of Internal Revenue, see Internal Revenue, 44, 45.

Of Patent Officer after Expiration of Term, see Patents, 429, 430.

Land Patent as Binding only within Lawful Authority, see Public Lands, 1089-1110.

Transfer and Succession of Powers on Change of Official Organization, see Municipal Corporations, 169, 170.

Power to Submit State to Suit and Waive Immunity, see States, 271.

34. Public functionaries have the right to exercise the powers indispensable to the attainment of the ends for which they were placed in office. *Anderson v. Dunn*, 6 Wheat. 204, 5: 242

Distinguished in Kilbourn v. Thompson, 103 U. S. 196, 28 L. ed. 389.

Cited in Interstate Commerce Commission v. Brimson, 154 U. S. 485, 38 L. ed. 1080, 4 Inters. Com. Rep. 558, 14 Sup. Ct. Rep. 1125

—*Latham v. United States*, 1 Ct. Cl. 160—U. S. Dig.—263

Re Barry, 42 Fed. 121—*Ex parte McCarthy*, 29 Cal. 405—*Ex parte Henderson*, 6 Fla. 204—*Hooker v. Johnson*, 8 Fla. 512—*Smith v. Myers*, 109 Ind. 7, 58 Am. Rep. 375, 9 N. E. 692—*Re Gunn*, 50 Kan. 211, 19 L.R.A. 535, 32 Pac. 470—*Re Davis*, 58 Kan. 379, 49 Pac. 160—*Griswold v. Hepburn*, 2 Durv. 61—*Filnt & F. Pl. Road Co. v. Woodhull*, 25 Mich. 104, 12 Am. Rep. 233—*People ex rel. McDonald v. Keeler*, 32 Hun. 567—*Ex parte Dalton*, 44 Ohio St. 150, 58 Am. Rep. 800, 5 N. E. 138—*Borle v. Trott*, 5 Phila. 380, 21 Leg. Int. 68.

35. An officer can bind the government only by the acts which come within the just exercise of his official powers. *Hunter v. United States*, 5 Pet. 173, 8: 86
Cited in Wisconsin C. R. Co. v. United States, 164 U. S. 205, 41 L. ed. 404, 17 Sup. Ct. Rep. 45—*Ellis v. State Auditors*, 107 Mich. 537, 65 N. W. 577.

36. The power of public officers is defined and limited by law and their acts in excess of such authority are void and do not bind or estop the government. *Pierce v. United States (The Floyd Acceptances)* 7 Wall. 666, 19: 169
Distinguished in John Shillito Co. v. McClung, 2 C. C. A. 532, 6 U. S. App. 128, 51 Fed. 875.

Cited in Humboldt Twp. v. Long, 92 U. S. 648, 23 L. ed. 755—*United States v. Alexander*, 110 U. S. 329, 28 L. ed. 168, 4 Sup. Ct. Rep. 99—*United States v. San Jacinto Tin Co.* 125 U. S. 307, 31 L. ed. 759, 8 Sup. Ct. Rep. 850—*Pine River Logging & Improv. Co. v. United States*, 186 U. S. 291, 46 L. ed. 1170, 22 Sup. Ct. Rep. 920—*Salomon v. United States*, 7 Ct. Cl. 494—*DeCells v. United States*, 13 Ct. Cl. 134—*Leonard v. United States*, 18 Ct. Cl. 384—*Connecticut Mut. L. Ins. Co. v. United States*, 21 Ct. Cl. 200—*Smoot v. United States*, 38 Ct. Cl. 424—*Chisholm v. Montgomery*, 2 Woods, 595, Fed. Cas. No. 2,688—*Smith v. Ontario*, 15 Blatchf. 269, Fed. Cas. No. 13,085—*Lewis v. Barbour County*, 1 McCrary, 465, 3 Fed. 196—*Worthington v. Boston*, 41 Fed. 27—*United States v. Pine River Logging & Improv. Co.* 32 C. C. A. 412, 61 U. S. App. 69, 89 Fed. 913—*Potter v. United States*, 58 C. C. A. 286, 122 Fed. 54—*State v. Brewer*, 64 Ala. 298—*Sanford Cattle Co. v. Williams*, 18 Colo. App. 382, 71 Pac. 889—*New York Iron Mine v. First Nat. Bank*, 39 Mich. 651—*State v. Bank of Missouri*, 45 Mo. 540—*State ex rel. Clark v. Gates*, 67 Mo. 143—*Edwards v. Carson Water Co.* 21 Nev. 486, 34 Pac. 381—*State v. Edgefield & K. R. Co.* 6 Lea. 362—*Walker v. Rogan*, 93 Tex. 255, 54 S. W. 1018—*State v. Chilton*, 49 W. Va. 457, 39 S. E. 612.

37. Individuals must take notice of the extent of the authority of an officer. The government is not bound by an act of its agent, unless within the scope of his authority, or he had been held out as having authority to do the act. *Hawkins v. United States*, 96 U. S. 689, 24: 607
Whiteside v. United States, 93 U. S. 247, 23: 882

Filor v. United States, 9 Wall. 45, 19: 549
Cited in Hawkins v. United States, 96 U. S. 691, 24 L. ed. 608—*Camp v. United States*, 113 U. S. 653, 28 L. ed. 1083, 5 Sup. Ct. Rep. 687—*Robertson v. Sichel*, 127 U. S. 515, 32 L. ed. 206, 8 Sup. Ct. Rep. 1286

—Hume v. United States, 132 U. S. 414, 33 L. ed. 397, 10 Sup. Ct. Rep. 134—Wisconsin C. R. Co. v. United States, 164 U. S. 210, 41 L. ed. 406, 17 Sup. Ct. Rep. 45—Pine River Logging & Improv. Co. v. United States, 186 U. S. 291, 46 L. ed. 1170, 22 Sup. Ct. Rep. 920—Kirwan v. Murphy, 189 U. S. 54, 47 L. ed. 705, 23 Sup. Ct. Rep. 599—Salomon v. United States, 7 Ct. Cl. 494—Bradley v. United States, 13 Ct. Cl. 179—Cohen v. United States, 15 Ct. Cl. 259—Camp v. United States, 15 Ct. Cl. 486—McCollum v. United States, 17 Ct. Cl. 103—Connecticut Mut. L. Ins. Co. v. United States, 21 Ct. Cl. 200—Barnes v. District of Columbia, 22 Ct. Cl. 393—Allen v. United States, 28 Ct. Cl. 146—Ferris v. United States, 28 Ct. Cl. 340—Baxter v. United States, 32 Ct. Cl. 81—Choctaw & C. Nations v. United States, 34 Ct. Cl. 167—Maine v. United States, 36 Ct. Cl. 559—Bancroft v. Thayer, 5 Sawy. 509, Fed. Cas. No. 835—United States v. Murphy, 32 Fed. 383—Austin v. Felton, 41 Fed. 162—Bowe v. United States, 42 Fed. 778—United States v. Pine River Logging & Improv. Co. 32 C. C. A. 412, 61 U. S. App. 69, 89 Fed. 913—Churchyard v. United States, 100 Fed. 921—Potter v. United States, 58 C. C. A. 236, 122 Fed. 54—Woodruff v. Berry, 40 Ark. 256—Munlix v. Mutual Ben. L. Ins. Co. 23 Colo. 75, 33 L.R.A. 830, 46 Pac. 123—Brown v. Bon Homme County, 1 S. D. 227, 46 N. W. 173—Dartmouth Sav. Bank v. Minnehaha County School Dists. No. 6 & 31, 6 Dak. 344, 43 N. W. 822—Bouton v. McDonough County, 84 Ill. 395—State v. Portsmouth Sav. Bank, 106 Ind. 451, 7 N. E. 379—Peck-Williamson Heating & Ventilating Co. v. Steen School Twp. 30 Ind. App. 640, 66 N. E. 909—Murdock v. Chaffe, 67 Miss. 753, 7 So. 519—Hudson v. Miles, 185 Mass. 585, 102 Am. St. Rep. 370, 71 N. E. 63—Rogers v. Westchester County, 77 App. Div. 503, 78 N. Y. Supp. 1081—People v. Denison, 19 Hun, 150—Ollifers v. Belmont, 12 Misc. 165, 33 N. Y. Supp. 275—Dickinson v. Poughkeepsie, 75 N. Y. 84—Young v. State, 19 Wash. 636, 54 Pac. 36.

38. A public agent cannot bind his principal under powers that have been taken away, by simply antedating his contracts. Under such circumstances a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. Coler v. Cleburne, 131 U. S. 162, 9 Sup. Ct. Rep. 720, 33: 146
Distinguished in State ex rel. Hoffman v. Moore, 46 Neb. 592, 50 Am. St. Rep. 626, 65 N. W. 193.

Cited in Lehman v. San Diego, 27 C. C. A. 674, 48 U. S. App. 681, 83 Fed. 675.

38a. The rule that, if one about to lend money on real estate applies to a prior mortgagee to ascertain whether he holds any encumbrance upon it, he will be preferred over such mortgagee, should the latter deny the existence of the mortgage, or assert that it is satisfied, does not extend to similar mistakes made by public officers, so as to affect the government, unless the officer manifestly was acting within the scope of his authority, and was empowered, in his official capacity, to make the dec-

laration or representations relied upon as the ground of relief. Lee v. Munroe, 7 Cranch, 366, 3: 373

39. At common law, the power to perform official duties ceases with the expiration of the official relation. Badger v. United States ex rel. Bolles, 93 U. S. 599, 23: 991

Cited in State ex rel. Wood v. Sheldon, 8 S. D. 527, 67 N. W. 613—State ex rel. Lavin v. Bacon, 14 S. D. 291, 85 N. W. 225—State ex rel. Cosgrove v. Perkins, 139 Mo. 114, 40 S. W. 650—State ex rel. Crow v. Lund, 167 Mo. 234, 66 S. W. 1062—Reiter v. State, 51 Ohio St. 78, 23 L.R.A. 683, 36 N. E. 943—Com. v. Waller, 145 Pa. 250, 23 Atl. 382.

40. State legislatures have power to enlarge, repeal, and limit the authority of public officers in their official capacity, in all cases where the Constitutions of the respective states do not prohibit them, for the reason, among others, that there is no express or implied contract that they shall always, during their continuance in office, exercise such authority; they are to exercise it only during the pleasure of the legislature. Per Story, J., in Dartmouth College v. Woodward, 4 Wheat. 518, 4: 629
Cited in Pyle v. Hand County, 1 S. D. 387, 47 S. W. 401—State v. Wilmington, 3 Harr. (Del.) 299—State v. Savannah, R. M. Charl. (Ga.) 256—Iowa City v. Foster, 10 Iowa. 192—Donahue v. Will County, 100 Ill. 106—People ex rel. Akin v. Loeffler, 173 Ill. 609, 51 N. E. 785—State v. Smedes, 26 Miss. 50—Swann v. Buck, 40 Miss. 300—Baltimore v. Howard, 15 Md. 491—Beasley v. Ridout, 94 Md. 656, 52 At. 61—Marden v. Portsmouth, 59 N. H. 20—State's Prison v. Day, 124 N. C. 388, 46 L.R.A. 304, 32 S. E. 748—Hoboken v. Gear, 27 N. J. L. 278—People v. Pinckney, 32 N. Y. 395—People ex rel. Bradley v. Stevens, 51 How. Pr. 152—Smith v. New York, 37 N. Y. 520—State ex rel. Abbott v. Beddingfield, 125 N. C. 279, 34 S. E. 412—White v. Ayer, 126 N. C. 611, 36 S. E. 132—Mial v. Ellington, 134 N. C. 140, 65 L.R.A. 700, 46 S. E. 961—Alexander v. McKenzie, 2 S. C. N. S. 91—Hall v. State, 39 Wis. 84.

—Editorial notes.
[Power to contract with the public or municipality represented. 15 L.R.A. 520.
Power to make contracts binding on successors. 16 L.R.A. 257.]

Deputies.

Liability of Principal for Acts of Subordinate, see *infra*, 75.

Person Acting in Office as *De Facto* Deputy Clerk, see *infra*, 79.

Power of Departmental Heads to Act through Subordinates, see Executive Departments, 11, 12.

De Facto Deputy, see Marshal, 12, 13.

Claims of Deputy against Marshal, see Marshal, 62.

Validity of Survey by Deputy Surveyor General, see Private Land Claims, 539; Public Lands, 1321, 1325.

41. In general, a deputy of a ministerial officer can do every act which his principal

might do. *United States v. Clarke* (Confiscation Cases) 20 Wall. 92, 22: 320
Cited in Ex parte Burdell, 32 Fed. 681—
National Accl. Soc. v. Spiro, 37 C. C. A. 389, 94 Fed. 751—*Small v. Field*, 102 Mo. 119, 14 S. W. 815—*Harden v. Roberts*, 9 Pa. Co. Ct. 161—*Deputy Secretary's Office*, 28 Pa. Co. Ct. 220—*Appointment of Deputy Secretary*, 29 Pa. Co. Ct. 221—*Steinke v. Graves*, 16 Utah, 299, 52 Pac. 386.

— Editorial note.

[In whose name acts by deputy should be performed. 19 L.R.A. 177.]

Judicial and administrative powers.

Power to Revise or Reconsider their own Proceedings, see Executive Departments, 13-15.

Amenability of Executive Heads to Judicial Supervision in Ministerial Duties, see Executive Departments, 17, 18.

Disqualification of Land Commissioners by Reason of Privy and Interest with Claimant, see Private Land Claims, 497.

42. The subjection of an act to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinate, takes from it the quality of a judicial act and makes it administrative. *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25, 28: 656
Cited in United States v. Loeb, 99 Fed. 733—
Pierce v. France, 2 Wash. 100, 26 Pac. 807.

Conclusiveness and effect of official decisions.

43. When power or jurisdiction over a subject-matter is delegated to any public officer or tribunal, and its exercise is confided to his or their discretion, the acts so done are in general binding and valid as to the subject-matter. The only questions which can arise between an individual and the public, or any person denying their validity, are power in the officer and fraud in the party. *Belcher v. Linn*, 24 How. 508, 16: 754
Cited in United States v. Leng, 18 Fed. 20—
United States v. McDowell, 21 Fed. 564—
Bonbright v. Schoettler, 1 L.R.A. (N.S.) 1094, 64 C. C. A. 215, 127 Fed. 323.

44. When jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. *United States v. California & O. Land Co.* 148 U. S. 31, 13 Sup. Ct. Rep. 458, 37: 354
Cited in School Dist. No. 2 v. Lambert, 28 Or. 223, 42 Pac. 221.

45. Where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding as to the subject-matter; and individual rights will not be disturbed collaterally for anything done, in the exercise of that discretion, within the authority and power conferred. The only question which can arise between an individual claiming a right under the acts done, and the public or any person denying its validity, are power in the officer and fraud in the

party. *United States v. De la Maza Arredondo*, 6 Pet. 691, 8: 547
Cited in Voorhees v. Jackson, 10 Pet. 478, 9 L. ed. 502—*Holmes v. Jennison*, 1

Appx. 10 L. ed. 627 Appx.—*Cocke v. Halsey*, 16 Pet. 87, 10 L. ed. 897—*Grignon v. Astor*, 2 How. 340, 11 L. ed. 292—*United States v. King*, 7 How. 883, 12 L. ed. 955—
Bartlett v. Kane, 16 How. 272, 14 L. ed. 935—
Belcher v. Linn, 24 How. 522, 16 L. ed. 757—*Thompson v. Whitman*, 18 Wall. 467, 21 L. ed. 901—*United States v. California & O. Land Co.* 148 U. S. 43, 37 L. ed. 380, 13 Sup. Ct. Rep. 458—*Atkinson v. Philadelphia & T. R. Co.* Fed. Cas. No. 615—*Barling v. Erdman*, Fed. Cas. No. 981—*Bonaparte v. Camden & A. R. Co.* Baldw. 219, Fed. Cas. No. 1,617—
Cervantes v. United States, 3 Am. L. Reg. 750, Fed. Cas. No. 2,560—*Delaware R. Co. v. Prettyman*, Fed. Cas. No. 3,767—*Re McKibben*, 12 Nat. Bankr. Reg. 101, Fed. Cas. No. 8,859—*Starr v. Stark*, 2 Sawy. 621, Fed. Cas. No. 13,317—*Daily v. Doe*, 3 Fed. 914—
Adams v. Terrell, 4 Woods, 341, 4 Fed. 800—
United States v. Earnshaw, 12 Fed. 285—
United States v. Leng, 18 Fed. 20—*United States v. Maxwell Land Grant Co.* 21 Fed. 22—
United States v. McDowell, 21 Fed. 564—
Buchanan v. Knoxville & O. R. Co. 18 C. C. A. 129, 37 U. S. App. 499, 71 Fed. 331—
Bonbright v. Schoettler, 64 C. C. A. 215, 127 Fed. 323—*Wright v. Nagle*, 48 Ga. 391—
Clay County v. Markle, 46 Ind. 113—*Coolman v. Fleming*, 82 Ind. 123—*Tiffany v. Glover*, 3 G. Greene, 402—*Cavender v. Smith*, 1 Iowa, 347—*Cooper v. Sunderland*, 3 Iowa, 133, 66 Am. Dec. 52—*Hampson v. Wear*, 4 Iowa, 16, 66 Am. Dec. 116—*Denegre v. Haun*, 14 Iowa, 248, 81 Am. Dec. 480—*Lownsberry v. Rakestraw*, 14 Kan. 157—*Rathbone v. Sterling*, 25 Kan. 447—*Farrelly v. Cole*, 60 Kan. 378, 44 L.R.A. 472, 56 Pac. 492—
Scuddy v. Shaffer, 10 La. Ann. 136—*Dover v. Portsmouth Bridge*, 17 N. H. 227—*Pennywit v. Foote*, 27 Ohio St. 618, 22 Am. Rep. 340—*Saunders v. Niswanger*, 11 Ohio St. 303—*Miltimore v. Miltimore*, 40 Pa. 153—
Thompson v. Whitman, 31 Phila. Leg. Int. 157—*Re Legislative Adjournment*, 18 R. I. 831, 22 L. R. A. 720, 27 Atl. 324—*Yates v. Houston*, 3 Tex. 447—*Hancock v. McKinney*, 7 Tex. 440—*O'Docherty v. Archer*, 9 Tex. 296—*Jenkins v. Chambers*, 9 Tex. 230—*Lancaster v. Wilson*, 27 Gratt. 630—*Bellingham Bay Land Co. v. Dibble*, 4 Wash. 770, 31 Pac. 30—*Jackson ex dem. Grignon v. Astor*, 1 Pinney (Wis.) 161, 39 Am. Dec. 281.

46. An officer given discretionary powers by statute is the sole judge of the right to exercise such powers, and acts done under his authority are presumed to be legal. *Martin v. Mott*, 12 Wheat. 19, 6: 537
Cited in Luther v. Borden, 7 How. 44, 12 L. ed. 600—*Wilkes v. Dinsman*, 7 How. 130, 12 L. ed. 637—*United States v. Speed*, 8 Wall. 83, 19 L. ed. 451—*Mullan v. United States*, 140 U. S. 245, 35 L. ed. 491, 11 Sup. Ct. Rep. 788—*Nishimura Ektu v. United States*, 142 U. S. 680, 35 L. ed. 1149, 12 Sup. Ct. Rep. 336—*Lem Moon Sing v. United States*, 158 U. S. 544, 39 L. ed. 1084, 15 Sup. Ct. Rep. 967—*The Japanese Immigrant Case (Yamataya v. Fisher)* 189 U. S. 98, 47 L. ed. 724, 23 Sup. Ct. Rep. 611—*Grossmeyer v. United States*, 4 Ct. Cl. 21—*Gould v. Hammond*, McAll. 237, Fed. Cas. No. 5,638—*United States ex rel. Stokes v. Kendall*, 5 Cranch, C. C. 276, Fed. Cas. No. 15,517—*Re Tom Yum*, 64 Fed. 487—*McTyler v. McDowell*, 36 Ala. 46—
Porter v. Haight, 45 Cal. 639—*New York & N. E. R. Co's Appeal*, 62 Conn. 540, 26

Atl. 122—*Green v. Savannah*, 6 Ga. 11—*Koehler v. Hill*, 60 Iowa, 566, 14 N. W. 738—*Corbin v. Marsh*, 2 Duv. 231—*School Dist. No. 6 v. Aetna Ins. Co.* 54 Me. 513—*People ex rel. Horn v. Wayne Circuit Judge*, 39 Mich. 20—*Reed v. Conway*, 20 Mo. 47—*Schoettgen v. Wilson*, 48 Mo. 257—*State ex rel. Lindley v. Clark*, 61 Mo. 269—*Waldron v. Berry*, 51 N. H. 142—*Hart v. Albany*, 9 Wend. 594, 24 Am. Dec. 165—*People ex rel. Case v. Collins*, 19 Wend. 61—*Re Legislative Adjournment*, 18 R. I. 834, 22 L.R.A. 721, 27 Atl. 324.

VI. Duties and Liabilities.

a. In General.

Of Assessors, Federal Question as to, see Appeal and Error, 1933.
Of Customs Officers, see Duties, VI. b.
Of Election Officer, see Elections, IV. b.
Of Internal Revenue Officers, see Internal Revenue, 46-57.
Of Postmaster, see Postoffice, 18-20.
Of Sheriff, see Sheriff.
Of Tax Officers, see Taxes, III. d.
Duties of Army and Naval Officers, see Army and Navy, VI. c.
Duties of District Attorney, see District Attorneys, III.
Duties of Judges, see Judges, VI.
Liability of Army and Naval Officers, see Army and Navy, VI. d.
Liability of Collector of Customs to Suit for Recovery of Duties Illegally Exacted, see Duties, XI.
Liability of Judges, see Judges, V.
Liability of Government Officers for Infringement of Patent, see Patents, 1122, 1123.
Liability of State Officers to Suit Generally, see States, IX. c. 1.
As to Captured and Abandoned Property, see Abandoned and Captured Property, II.
Liability on Bond, see Bonds, II.
Unauthorized Services as Set-Off, see Claims, 31.
What Constitutes Contempt by, see Contempt, 13, 17, 21, 23, 25.
Liability for Costs, see Costs and Fees, 32-35.
Reviewableness of Official Acts or Decisions Generally, see Courts, 77, 78.
Conclusiveness of Finding of Court-Martial on Trespass Against Officer for Collecting Fine Imposed, see Courts-Martial, 39.
Measure of Damages Against Officers, see Damages, VI. g.
Liability to Exemplary Damages, see Damages, 26, 27.
Liability for Seizure and Detention under Nonintercourse Acts, see Embargo and Nonintercourse, VIII.
Presumption as to Performance of Duty, see Evidence, II. i.
Judicial Notice of Duties of Purser, see Evidence, 48.
Admissibility of Private Books to Contradict Official Adjustment of Accounts, see Evidence, 1723.

Accounts of Revenue Officer as Evidence Against Him and His Sureties, see Evidence, 2020.

Predecessor's Duties not Provable by Testimony of Later Incumbent, see Evidence, 2139.

Admissibility of Evidence of Special Damage in Action Against Patent Commissioner without Allegation of Special Damage, see Evidence, 2661.

Impropriety of Injunction to Control Transfer to other Duties, see Injunction, 118.

Void Judgment as Justification to Officer Acting under Same, see Judgment, 138.

Limitation of Action to Enforce Liability, see Limitation of Actions, 547, 548.

Mandamus to Compel Performance of Duty, see Mandamus, II. d.

Question of Law or Fact, see Trial, 445, 446.

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Liability for neglect or refusal to perform judicial or ministerial duty. 11: 506

[Liability for defects in abstracts of title. 22 L.R.A. 99.]

Care required in selecting bank for deposit of public funds. 7 L.R.A. (N.S.) 1084.]

Mandatory or discretionary duty.

Liability for Errors of Judgment, see *infra*, 72-74.

Supervision by Courts, see Courts, 222-229.

Presumption as to Proper Exercise of Discretion, see Evidence, 428, 448.

Cancellation of Entry under Direction of Secretary of Interior, see Injunction, 121.

47. Where power is given to public officers, whenever public or individual right calls for its exercise, the language used, though permissive in form, is in fact peremptory. In all such cases it is held that the intent of the legislature was not to devolve a mere discretion, but to impose a positive and absolute duty. *Rock Island County v. United States ex rel. State Bank*, 4 Wall. 435, 18: 419

Cited in United States ex rel. Siegel v. Thoman, 156 U. S. 359, 39 L. ed. 452, 15 Sup. Ct. Rep. 378—*Henderson v. United States*, 4 Ct. Cl. 83—*Thayer v. United States*, 4 Ct. Cl. 100—*Gregg v. United States*, 4 Ct. Cl. 109—*The California*, 1 Sawy. 600, Fed. Cas. No. 2313—*Sibley v. Mobile*, 3 Woods. 540, Fed. Cas. No. 12,829—*United States v. Dustin*, Fed. Cas. No. 15,012—*United States v. Sterling*, 2 Biss. 411, Fed. Cas. No. 16,388—*Woolridge v. McKenna*, 8 Fed. 662—*United States v. De Visser*, 10 Fed. 645—*Ralston v. Crittenden*, 3 McCrary, 349, 13 Fed. 512—*New Orleans Nat. Bank v. Merchant*, 18 Fed. 848—*National Bank v. St. Joseph*, 31 Fed. 217—*Provisional Municipality v. Lehman*, 6 C. C. A. 357, 13 U. S. App. 411, 57 Fed. 332—*Little Rock v. United States*, 43 C. C. A. 267, 103 Fed. 424—*Board of Liquidation v. United States*, 47 C. C. A. 590, 108 Fed. 692—*Kent v. United States*, 51 C. C. A. 104, 113 Fed. 237—*Ex parte Chase*, 43 Ala. 312—*Hayes v. Los Angeles County*, 99 Cal. 80, 33 Pac. 766—*Erskine v. Nelson County*, 4 N. D. 75, 27 L.R.A. 704, 58 N. W. 348—*State v. Kent*, 4 N. D. 591, 27 L.R.A. 692, 62 N. W.

631—Swenehart v. Strathman, 12 S. D. 316, 81 N. W. 505—Indianapolis v. McAvoy, 86 Ind. 590—Rowell v. Williams, 29 Iowa, 215—Baldwin v. Letson, 6 Kan. App. 19, 49 Pac. 619—Douglass v. Cline, 12 Bush, 651—Mullins v. McKeel, 109 Ky. 544, 59 S. W. 849—Sifford v. Morrison, 63 Md. 18—Bowen v. Minneapolis, 47 Minn. 117, 28 Am. St. Rep. 333, 49 N. W. 683—State ex rel. Clark v. Buffalo County, 6 Neb. 462—State ex rel. Munday v. Assessors, 43 N. J. L. 342—Atlantic City Waterworks Co. v. Read, 50 N. J. L. 671, 15 Atl. 10—Clark v. Elizabeth, 61 N. J. L. 582, 40 Atl. 616—People ex rel. Central Bank v. Otsego County, 53 Barb. 567—People ex rel. Central Bank v. Otsego County, 36 How. Pr. 4—Gilmore v. Utica, 55 Hun, 519, 9 N. Y. Supp. 912—People ex rel. Otsego County Bank v. Otsego County, 51 N. Y. 406—Battery Park Bank v. Madison County, 135 N. C. 240, 47 S. E. 1016—Jordan v. Davis, 10 Okla. 332, 61 Pac. 1063—King Real Estate Assn. v. Portland, 23 Or. 201, 31 Pac. 482—Bell v. Caldwell, 42 Phila. Leg. Int. 217—Russell v. Williamsport, 9 Pa. Co. Ct. 132—Dunbar v. Williamsport, 9 Pa. Co. Ct. 453—Smith's Petition, 5 Pa. Dist. R. 465—Com. ex rel. District Attorney v. Marshall, 3 W. N. C. 186—Ex parte Lowrie, 4 Utah, 179, 7 Pac. 493—Leighton v. Maury, 76 Va. 870—Turner v. Smith, 18 Gratt. 338—Leighton v. Com. 1 Va. Dec. 417—Dillon v. Whatcom County, 12 Wash. 404, 41 Pac. 174—Vermont Loan & T. Co. v. Greer, 19 Wash. 613, 53 Pac. 1303—Territory v. Nelson, 2 Wyo. 860.

— Editorial note.

[Character and extent of relief against an officer vested with discretion, who has rendered a decision upon a ground not within his discretion. 7 L.R.A.(N.S.) 525.]

Enforceability of duty.

Jurisdiction of Courts as Limited by Relation to Other Departments, see Courts, I. e.

Power of Courts over their own Officers, see Courts, 48, 49.

Control of Courts as to Duty Extraneous to Functions as Court Officers, see Courts, 48a.

Propriety of Injunctive Remedy against Officers, see Injunction, 116-121.

Judicial Enforcement of Ministerial Duties, see also States, 278.

See also Evidence, 427.

48. It is a maxim of the law, admitting few if any exceptions, that every duty laid upon a public officer for the benefit of a private person is enforceable by judicial process. *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25. 28: 656

Cessation of duty.

49. The duties of an officer cease upon his removal from office. *Sthresley v. United States*, 4 Cranch, 169, 2: 584
Cited in *Cutts v. United States*, 1 Gall. 74, Fed. Cas. No. 3,522.

b. On Contracts.

Instrument Signed by Officer as Individual Act or Act of State, see States, 160.

50. Public agents are not usually liable

on mere contracts or promises made in behalf of their principals. *Garland v. Davis*, 4 How. 131, 11: 907
Cited in *United States v. Buchanan*, 8 How. 105, 12 L. ed. 1006.

51. A public agent is not personally liable on his contracts, made in the line of his duty and by legal authority, although under his seal. *Hodgson v. Dexter*, 1 Cranch, 345, 2: 130

Distinguished in *Whiteside v. Jennings*, 19 Ala. 789—*Wilson v. Fridenberg*, 22 Fla. 151—*Bank of Kentucky v. Sanders*, 3 A. K. Marsh. 185, 13 Am. Dec. 149—*McCleinticks v. Bryant*, 1 Mo. 600, 14 Am. Dec. 310.

Cited in *Sheets v. Selden*, 2 Wall. 187, 17 L. ed. 826—*Garland v. Davis*, 4 How. 148, 11 L. ed. 915—*District of Columbia v. Camden Iron Works*, 181 U. S. 460, 45 L. ed. 933, 21 Sup. Ct. Rep. 680—*Belknap v. Schild*, 161 U. S. 17, 40 L. ed. 601, 16 Sup. Ct. Rep. 443—*Averill v. Tucker*, 2 Cranch, C. C. 545, Fed. Cas. No. 670—*Dwinell v. Henriquez*, 1 Cal. 392—*Adams v. Whittlessey*, 3 Conn. 560—*Perry v. Hyde*, 10 Conn. 338—*Sterling v. Peet*, 14 Conn. 252—*Ogden v. Raymond*, 22 Conn. 385, 58 Am. Dec. 429—*Yulee v. Canova*, 11 Fla. 47—*Ghent v. Adams*, 2 Ga. 218—*Aven v. Beckom*, 11 Ga. 6—*Perrin v. Lyman*, 32 Ind. 18—*Newman v. Sylvester*, 42 Ind. 113—*de Beblan v. Gola*, 64 Md. 273, 21 Atl. 275—*Dewey v. Garvey*, 130 Mass. 87—*Bradford v. Rowe*, 3 Pick. 18—*Freeman v. Otis*, 9 Mass. 276, 6 Am. Dec. 66—*Sarborn v. Neal*, 4 Minn. 139, 77 Am. Dec. 502, Gll. 83—*Copes v. Matthews*, 10 Smedes & M. 402—*Tutt v. Hobbs*, 17 Mo. 489—*Reed v. Conway*, 26 Mo. 24—*Hanover v. Eaton*, 3 N. H. 39—*Brown v. Rundlett*, 15 N. H. 360—*Stephenson v. Weeks*, 22 N. H. 263—*Knight v. Clark*, 48 N. J. L. 24, 57 Am. Rep. 534, 2 Atl. 780—*Holmes v. Brown*, 13 Barb. 601—*Nichols v. Moody*, 22 Barb. 615—*Walker v. Swartwout*, 12 Johns. 448—*Griffith v. Ketchum*, 12 Johns. 388—*Olney v. Wicks*, 18 Johns. 126—*Belknap v. Reinhart*, 2 Wend. 377, 20 Am. Dec. 621—*Dameron v. Irwin*, 30 N. C. (8 Ired. L.) 423—*Hite v. Goodman*, 21 N. C. (1 Dev. & B. Eq.) 365—*Hite v. Goodman*, 21 N. C. (1 Dev. & B. Eq.) 365—*Providence v. Miller*, 11 R. I. 278, 23 Am. Rep. 453—*McKagen v. Windham*, 59 S. C. 430, 38 S. E. 2—*Miller v. Ford*, 4 Rich. L. 385, 55 Am. Dec. 687—*Gibson v. Musey*, 11 Vt. 213—*Ives v. Hulet*, 12 Vt. 319—*Walker v. Christian*, 21 Gratt. 298—*Graves v. McWilliams*, 1 Pinney (Wis.) 493.

52. A public agent is not responsible on any contract made by him in that capacity; and wherever his contract or engagement is connected with a subject fairly within the scope of his authority, it shall be intended to have been made officially, unless the contrary clearly appears. *Parks v. Ross*, 11 How. 362, 13: 730

Cited in *Crowell v. United States*, 2 Ct. Cl. 507—*New York & C. S. S. Co. v. Harrison*, 16 Fed. 690—*Yulee v. Canova*, 11 Fla. 47—*Mann v. Richardson*, 66 Ill. 485—*Broadwell v. Chapin*, 2 Ill. App. 515—*Barlow v. Congregational Soc.* 8 Allen, 463—*Balcombe v. Northrup*, 9 Minn. 176, Gll. 149—*Newman v. Davenport*, 9 Baxt. 540.

53. A bill of exchange drawn on public funds by a public officer does not bind him personally. *Jones v. Le Tombe*, 3 Dall. 384, 1: 647
Cited in *Yulee v. Canova*, 11 Fla. 47—*Aven v*

Beckom, 11 Ga. 6—Comparet v. Burr, 5 Blackf. 420—Carter v. Edwards, 16 Ind. 241—McMillen v. County Judge, 6 Iowa, 394—St. Paul Div. No. 1 v. Brown, 9 Minn. 163, Gil. 144—Balcombe v. Northrup, 9 Minn. 177, Gil. 159—Underhill v. Gibson, 2 N. H. 356, 9 Am. Dec. 82—Brown v. Rundlett, 15 N. H. 364—Seldel v. Peschkaw, 27 N. J. L. 430—Nichols v. Moody, 22 Barb 615—Passmore v. Mott, 2 Binn. 202.

54. A contract signed by "Samuel Dexter, Secretary of War," was deemed a contract in behalf of the government, and not binding upon the party signing, where it appeared from the context of the agreement that the government was the sole party interested. *Hodgson v. Dexter*, 1 Cranch, 345, 2: 130

Cited in Hovey v. Magill, 2 Conn. 693—*Ohio & M. R. Co. v. Middleton*, 20 Ill. 686—*Barlow v. Congregational Soc.* 8 Allen, 463—*Stinchfield v. Little*, 1 Me. 234, 10 Am. Dec. 65—*Sumner v. Williams*, 8 Mass. 186, 5 Am. Dec. 83—*Devendorf v. West Virginia Oil & Oil Land Co.* 17 W. Va. 158.

Editorial note.

[Liability on contracts made for the public. 15 L.R.A. 509.]

c. Payment or Delivery over of Money or Property.

Review of Accounts and Allowances by Courts, see Courts, 236-242.

Presumption of Payment, see Evidence, 815, 816.

Admissibility of Evidence under Pleading not Describing Receiver of Public Monies in Official Capacity, see Evidence, 2629.

Admissibility of Treasury Transcript under Declaration upon Settled Account, see Evidence, 2647.

Evidence of Receipt of Public Stock under Count for Money Had and Received, see Evidence, 2653.

Proof of Extra Services Under Plea of Set-Off, see Evidence, 2723.

Liability for Interest, see Interest, 30, 31.

Liability of Collector of Internal Revenue for Taxes Illegally Exactd, see Internal Revenue, VII.

Liability of Marshal as to Proceeds of Confiscation Deposited in Bank, see Marshal, 31, 32.

Of Officers of the United States, see United States, 133-136.

55. A receiver of public moneys in a public capacity is individually liable therefor. *Walton v. United States*, 9 Wheat. 651, 6: 182

Cited in United States v. Wade, 75 Fed. 266.

56. The law will not imply a promise by a public officer to pay money twice, or to pay it to a private party, where the law requires him to pay it into the public treasury and he has done so. *Brainard v. Hubbard (The Collector v. Hubbard)* 12 Wall. 1, 20: 272

Property turned over to enemy.

See also Postoffice, 2.

57. An officer of the government cannot

turn over its money or property to an insurrectionary government which exercises no force or threat of personal violence. *United States v. Keebler*, 9 Wall. 83, 19: 574

Cited in Rogers v. Parker, 1 Hughes, 158, Fed. Cas. No. 12,018.

d. Torts.

Liability to Action on the Case, see Case, 5. Conversion by Collector of Customs, see Duties, 285-287.

Presumption that Prisoner Escaped through Negligence of Deputy Marshal, see Evidence, 362.

Immunity of Executive Heads from Civil Liability, see Executive Departments, 16.

Immunity of Postmaster General from Liability for Injury Resulting from Official Circular, see Executive Departments, 53.

Propriety of Injunctive Remedy against Officers, see Injunction, 116-121.

Remedy for Wrongs of Land Officers, see Public Lands, 1054.

Liability of State for Wrong Done by Officer, see States, VI.

Amenability of Officer to Suit for Wrongs by Him, see States, 278.

Liability of United States, see United States, 49-58.

Editorial note.

Liability for tort or breach of trust.

11: 506

Personal liability in general.

58. A public officer may be held responsible to an injured party where he refuses to do a ministerial act over which he can exercise no discretion or where he does an act which is clearly not within his jurisdiction, or where he acts wilfully, maliciously, and unjustly, in a case within his jurisdiction. *Kendall v. Stokes*, 3 How. 789, Appx. 11: 633

Cited in McKennan v. Bodine, 6 Phila. 584, 25 Phila. Leg. Int. 109.

59. Congress may impose upon any executive officer any duty it may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. This is emphatically the case where the duty enjoined is merely of a ministerial character. *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 9: 1181

Cited in Kellogg v. United States, 1 Ct. Cl. 314—*Reeside v. United States*, 2 Ct. Cl. 55—*Chorpenning v. United States*, 11 Ct. Cl. 634—*United States v. Greiner*, 4 Phila. 400.

60. A ministerial officer is liable for an injury done, where his acts are clearly against law. *Tracy v. Swartwout*, 10 Pet. 80, 9: 354

Cited in Kendall v. Stokes, 3 How. 796, 11 L. ed. 836—*Garland v. Davis*, 4 How. 149, 11 L. ed. 915—*Teal v. Felton*, 12 How. 292,

13 L. ed. 993—*Larned v. Briscoe*, 62 Mich. 401, 29 N. W. 22—*Tremain v. Cohoes Co.* 2 N. Y. 165, 51 Am. Dec. 284.

— Editorial note.

[Personal liability for judicial acts. 14 L.R.A. 138.]

Nonfeasant wrongs.

Of Sheriff, see Sheriff, 5, 6.

61-2 Where the law requires a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he is liable in damages to the party injured. Mistake or honest intentions will not excuse him. *Amy v. Barkholder* (*Amy v. The Supervisors*) 11 Wall. 136, 20: 101 *South v. Maryland*, 18 How. 396, 15: 433 *Cited in Talcott v. Pine Grove Twp.* 1 Filipp. 131, Fed. Cas. No. 13,735—*Stephenson v. Monmouth Min. & Mfg. Co.* 28 C. C. A. 293, 54 U. S. App. 499, 84 Fed. 115—*People v. Smith*, 123 Cal. 74, 55 Pac. 765—*Mock v. Santa Rosa*, 126 Cal. 344, 58 Pac. 826—*Sinton v. The R. R. Roberts*, 46 Ind. 479—*Muscatine Western R. Co. v. Horton*, 38 Iowa, 47—*Raynsford v. Phelps*, 43 Mich. 345, 38 Am. Rep. 189, 5 N. W. 403—*Knox County v. Hunolt*, 110 Mo. 75, 19 S. W. 628—*St. Joseph School Board ex rel. Donovan v. Hull*, 72 Mo. App. 407—*Merritt v. McNally*, 14 Mont. 238, 36 Pa. 44—*School Dist. No. 80 v. Burress*, 2 Neb. (Unof.) 557, 89 N. W. 609—*Beardslee v. Dolge*, 143 N. Y. 165, 42 Am. St. Rep. 707, 38 N. E. 205—*Mattson v. Astoria*, 39 Or. 579, 87 Am. St. Rep. 687, 65 Pac. 1066—*Com. ex rel. Atty-Gen. v. State Treasurer*, 29 Pa. Co. Ct. 560—*Louisville & N. E. Co. v. State*, 8 Heisk. 788.

63. Where an officer is required by law to give copies of papers in his office upon payment of fees, for refusal to do so upon demand, and tender of the fees, an action will lie against him; and a verdict for nominal damages should be rendered unless special damages is alleged and proved. *Boyden v. Burke*, 14 How. 575, 14: 548

64. A suit will lie personally against members of a city council for their refusal to obey a writ of mandamus from the United States circuit court, commanding them to levy a tax to pay judgments in that court against the city. *Farr v. Thompson*, 11 Wall. 139, 20: 102

Acts under authority or color of law.

Seizure and Detention of Vessel on Invalid Claim for Duties, see Duties, 289.

Nonliability to Injunction for Infringement of Patent in Interest of Government, see Injunction, 193.

Burden of Proof, see Evidence, 440.

Liability of Internal Revenue Officers, see Internal Revenue, 46-57.

Liability to Trespass, see Trespass, 4-7.

Liability of Military Officer for Arrest, see War, 85.

65. A ministerial officer, in a case in which it is his duty to act, cannot upon any principle of law be made a trespasser. *Harding v. Woodcock*, 137 U. S. 43, 11 Sup. Ct. Rep. 6, 34: 580

66-7. An officer cannot be said to have acted under color of a law which gave neither him nor any other person authority to do the act in question. *Flanders v. Tweed* (*Tweed's Case*) 16 Wall. 504, 21: 389

Acts done in executing judgment or process.

Evidence in Mitigation of Damages in Action Against Officers Making Seizure, see Evidence, 2240.

Liability of Marshal for Wrongful or Negligent Execution of Process, see Marshal, II. a.

Liability of Marshal Executing Void or Voidable Writ, see Marshal, 22-24.

Nullity of Confederate Courts, see States, 341.

Protection Afforded by Unconstitutional Act, see Statutes, 32.

Officer as Trespasser, see Trespass, 2, 4, 5.

68. An order or process issued by an officer or tribunal having jurisdiction over the subject-matter upon which judgment is passed, and with power to issue the same, if regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, will give full and entire protection to a ministerial officer in its regular enforcement, against any prosecution which the party aggrieved thereby may institute against him. *Erskine v. Hohnbach*, 14 Wall. 613, 20: 745 *Distinguished in Philadelphia & R. B. Co. v. Kenney*, 9 Phila. 405, Fed. Cas. No. 11,088—*Shepard v. Birth*, 53 Ind. 108.

Cited in Dixwell v. Jones, 2 Dill. 185, Fed. Cas. No. 3,937—*Milan Distilling Co. v. Tillson*, Fed. Cas. No. 9,539—*Mehlin v. Ice*, 5 C. C. A. 406, 12 U. S. App. 305, 56 Fed. 16—*Re Anderson*, 94 Fed. 495—*Anderson v. Elliott*, 41 C. C. A. 527, 101 Fed. 615—*McCraw v. Welch*, 2 Colo. 290—*Leachman v. Dougherty*, 81 Ill. 328—*State ex rel. Holliday v. King*, 30 Ind. App. 395, 66 N. E. 85—*Holdredge v. McCombs*, 8 Kan. App. 667, 56 Pac. 536—*Nowell v. Tripp*, 61 Me. 430, 14 Am. Rep. 572—*Winchester v. Everett*, 80 Me. 538, 1 L.R.A. 426, 6 Am. St. Rep. 228, 15 Atl. 596—*Bird v. Perkins*, 33 Mich. 32—*Mathews v. Denamore*, 43 Mich. 463, 5 N. W. 669—*Moss v. Cummings*, 44 Mich. 362, 6 N. W. 843—*Atwood v. Atwater*, 43 Neb. 156, 61 N. W. 574—*Henline v. Reese*, 54 Ohio St. 605, 56 Am. St. Rep. 736, 44 N. E. 269—*Barr v. Combs*, 29 Or. 401, 45 Pac. 776—*Philadelphia & R. R. Co. v. Kenney*, 9 Phila. 405—*Marks v. Sullivan*, 9 Utah, 18, 20 L.R.A. 593, 33 Pac. 224.

69. Ministerial officers acting in obedience to process regular on its face, and issued by an officer or tribunal having jurisdiction of the subject-matter and power to issue the process, are not liable for its regular enforcement, although errors may have been committed by the officer or tribunal which issued it. *Stutsman County v. Wallace*, 142 U. S. 293, 12 Sup. Ct. Rep. 227, 35: 1018 *Cited in Re Tyler*, 149 U. S. 187, 37 L. ed. 697, 13 Sup. Ct. Rep. 785—*Anderson v. Elliott*, 41 C. C. A. 527, 101 Fed. 615.

70. An officer is not justified in obeying the order of a judge or court having no jurisdiction in the matter; and this rule ap-

plies in an especial manner, as between the state and Federal courts, where the judges of the one cannot control the process of the other. *Duncan v. Darst*, 1 How. 301,

11: 139

Cited in *McNutt v. Bland*, 2 How. 13, 11 L. ed. 160—*Riggs v. Johnson County (United States ex rel. Riggs v. Johnson County)* 6 Wall. 195, 18 L. ed. 776—*United States ex rel. Moses v. Keokuk*, 6 Wall. 517, 18 L. ed. 934—*Re Brinkman*, 7 Nat. Bankr. Reg. 426, Fed. Cas. No. 1,884—*Re Metzger*, 5 N. Y. Legal Obs. 89, Fed. Cas. No. 9,511—*Reinach v. Atlantic & G. W. R. Co.* 58 Fed. 44—*Opellka v. Daniel*, 59 Ala. 215—*Freeman v. Timanus*, 12 Fla. 410—*Childs v. Tuttle*, 54 Hun, 59, 7 N. Y. Supp. 59.

71. The decision of a court-martial in a case clearly without its jurisdiction affords no protection to an officer who executes it. *Wise v. Withers*, 3 Cranch, 331, 2: 457 *Distinguished in* *Delaware R. Co. v. Prettyman*, Fed. Cas. No. 3,767.

Cited in *Williams v. United States*, 24 Ct. Cl. 313—*Greene v. Briggs*, 1 Curt. C. C. 333, Fed. Cas. No. 5,764—*Deming v. McClaughry* 51 C. C. A. 360, 113 Fed. 650—*Nooe v. Bradley*, 3 Blackf. 160.

— Editorial note.

Ministerial officer protected in the execution of regular process. 20: 745

Errors of judgment.

72. An honest opinion, though not founded upon reasonable grounds, protects a public officer in the performance of the duties of his position. *Crowell v. McFadon*, 8 Cranch, 94, 3: 499

Distinguished in *Campbell v. Thompson*, 16 Me. 120.

Cited in *Otis v. Watkins*, 9 Cranch, 356, 3 L. ed. 757—*Bailey v. Berkey*, 81 Fed. 741.

73. An officer whose duty is mainly judicial is no more liable personally for a mistaken construction of an act of Congress than he would be for mistaking the common law or a state statute. *Williams v. Weaver*, 100 U. S. 547, 25: 708

Cited in *Tyler v. Cass County*, 142 U. S. 291, 35 L. ed. 1018, 12 Sup. Ct. Rep. 225—*Boody v. Watson*, 64 N. H. 165, 9 Atl. 794—*Worden v. Oneida County*, 35 App. Div. 210, 54 N. Y. Supp. 952.

74. A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake. *Kendall v. Stokes*, 3 How. 87, 11: 506

Cited in *Garland v. Davis*, 4 How. 149, 11 L. ed. 915—*Teal v. Felton*, 12 How. 291, 13 L. ed. 993—*Noble v. Union River Logging R. Co.* 147 U. S. 171, 37 L. ed. 125, 13 Sup. Ct. Rep. 271—*Brown v. United States*, 6 Ct. Cl. 182—*Gould v. Hammond*, McAll. 237, Fed. Cas. No. 5,638—*Register & Receiver*, Woolw. 308, Fed. Cas. No. 8,388—*New Orleans Nat. Bank v. Merchant*, 18 Fed. 851—*Stephenson v. Monmouth Min. & Mfg. Co.* 28 C. C. A. 294, 54 U. S. App. 499, 84 Fed. 116—*Brewer v. Watson*, 65 Ala. 96—*Porter v. Haight*, 45 Cal. 639—*Ballerino v.*

Mason, 83 Cal. 449, 23 Pac. 530—*Gilbert v. Bone*, 64 Ill. 524—*Robertson v. State*, 109 Ind. 100, 10 N. E. 582—*State ex rel. Wall v. Fleming*, 124 Ind. 99, 24 N. E. 664—*Cronan v. Peters*, 9 La. Ann. 475—*State use of Cocking v. Wade*, 87 Md. 541, 40 L. R.A. 630, 40 Atl. 104—*Sherburne v. Flske*, 8 Cush. 266, 54 Am. Dec. 753—*Reed v. Conway*, 20 Mo. 49—*Waldron v. Berry*, 51 N. H. 142—*New York v. Bailey*, 2 Denio, 448—*Morris v. People*, 3 Denio, 391—*Hannon v. Grizzard*, 99 N. C. 164, 6 S. E. 93—*State v. Chadwick*, 10 Or. 471—*McKenna v. Bodine*, 6 Phila. 583, 25 Phila. Leg. Int. 109—*Goodwin v. Guild*, 94 Tenn. 490, 27 L.R.A. 661, 45 Am. St. Rep. 743, 29 S. W. 721—*Taylor v. Robertson*, 16 Utah, 336, 52 Pac. 1—*Lander v. Seaver*, 32 Vt. 122, 76 Am. Dec. 156—*Allen v. Com.* 83 Va. 97, 1 S. E. 607—*Henderson v. Smith*, 26 W. Va. 836, 53 Am. Rep. 139.

— Editorial note.

When liable for error in judgment.

11: 506

Wrongs by subordinates.

Evidence of Neglect of Assistant Not Admissible on Issue of Postmaster's Neglect, see Evidence, 2769.

Liability of Marshal for Deputy's Acts, see Marshal, 19-21.

See also Duties, 292-295.

75. A public officer is not liable for the misfeasance or negligence of his subordinates. *Robertson v. Sichel*, 127 U. S. 507, 8 Sup. Ct. Rep. 1286, 32: 203

Cited in *Rubens v. Robertson*, 38 Fed. 89—*Mister v. Brown*, 59 Fed. 912—*Riggin v. Brown*, 59 Fed. 1006—*United States v. Zabriskie*, 87 Fed. 717—*Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. S. M. R. Co.* 65 L.R.A. 405, 54 C. C. A. 614, 117 Fed. 440—*Hawkins v. Thomas*, 3 Ind. App. 410, 29 N. E. 157—*Boston Ins. Co. v. Chicago R. I. & P. R. Co.* 118 Iowa, 433, 59 L.R.A. 801, 92 N. W. 88—*Brown v. Weaver*, 76 Miss. 21, 42 L.R.A. 427, 71 Am. St. Rep. 512, 23 So. 388—*People ex rel. Tate v. Dalton*, 41 App. Div. 460, 58 N. Y. Supp. 929.

e. Crimes.

Limitation of Time to Prosecute for, see Limitation of Actions, 555.

Privilege from Arrest, see Writ and Process, 97.

76. For a breach of public duty an officer is punishable by indictment. *South v. Maryland*, 18 How. 396, 15: 433

Distinguished in *Tennessee use of United States v. Hill*, 24 L.R.A. 173, 9 C. C. A. 330, 22 U. S. App. 1, 60 Fed. 1009.

Cited in *Scougale v. Sweet*, 124 Mich. 321, 82 N. W. 1061.

VII. Officers De Facto.

Clerk of Court, see Clerks, 77.

Court Commissioner as, see Commissioners, 7.

De Facto Judge, see Constitutional Law, 816; Judges, 2, 8.

De Facto Marshals, see Marshal, 11-13.

Compelling Obedience to, see *Mandamus*, 131.

Effect of Ratification, see *United States*, 125.

77. Where an act attempting to create the office of commissioner never became a law, the office never came into existence; and there can be no officer, either *de jure* or *de facto*, if there be no office to fill. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. There cannot be a *de facto* office under a constitutional government; and the acts of the incumbent of such a nonexistent office are not entitled to consideration as valid acts of a *de facto* officer. Where an office exists under law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises the power and functions. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30: 178

Cited in Re Manning (Manning v. Weeks) 139 U. S. 507, 35 L. ed. 265, 11 Sup. Ct. Rep. 624—*Ball v. United States*, 140 U. S. 129, 35 L. ed. 382, 11 Sup. Ct. Rep. 761—*Lyons v. Woods*, 153 U. S. 669, 38 L. ed. 861, 14 Sup. Ct. Rep. 959—*Wright v. United States*, 158 U. S. 239, 39 L. ed. 965, 15 Sup. Ct. Rep. 819—*McDowell v. United States*, 159 U. S. 601, 40 L. ed. 278, 16 Sup. Ct. Rep. 111—*Shapleigh v. San Angelo*, 167 U. S. 658, 42 L. ed. 314, 17 Sup. Ct. Rep. 957—*Ex parte Ward*, 173 U. S. 456, 43 L. ed. 766, 19 Sup. Ct. Rep. 459—*Tulare Irrig. District v. Shepard*, 185 U. S. 14, 46 L. ed. 780, 22 Sup. Ct. Rep. 531—*McClaughray v. Deming*, 186 U. S. 64, 46 L. ed. 1056, 22 Sup. Ct. Rep. 786—*Ashley v. Presque Isle County*, 8 C. C. A. 464, 16 U. S. App. 656, 60 Fed. 64—*McDowell v. United States*, 20 C. C. A. 479, 42 U. S. App. 1, 74 Fed. 406—*Miller v. Perris Irrig. District*, 85 Fed. 609—*Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed. 173—*Speer v. Kearney County*, 32 C. C. A. 117, 60 U. S. App. 38, 88 Fed. 764—*Miller v. Perris Irrig. District*, 92 Fed. 265—*Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 167, 95 Fed. 509—*Herring v. Modesto Irrig. District*, 95 Fed. 713—*Western U. Tele. Co. v. Myatt*, 98 Fed. 355—*Baltimore Bldg. & L. Assn. v. Alderson*, 39 C. C. A. 614, 99 Fed. 494—*Butler v. Walker*, 98 Ala. 363, 39 Am. St. Rep. 61, 13 So. 261—*Re Allison*, 13 Colo. 530, 10 L.R.A. 793, 16 Am. St. Rep. 224, 22 Pac. 820—*Gorman v. People*, 17 Colo. 597, 31 Am. St. Rep. 350, 31 Pac. 335—*Farrington v. New England Invest. Co.* 1 N. D. 113, 45 N. W. 101—*Merchants Nat. Bank v. McKinney*, 2 S. D. 120, 48 N. W. 841—*Lee v. Wilmington*, 1 Marv. (Del.) 70, 40 Atl. 663—*Crutchfield v. Hewett*, 2 App. D. C. 385—*Georgia Southern & F. R. Co. v. Mercantile Trust & D. Co.* (McTighe v. Macon Constr. Co.) 94 Ga. 315, 32 L.R.A. 211, 47 Am. St. Rep. 153, 21 S. E. 701—*Herrington v. State*, 103 Ga. 319, 68 Am. St. Rep. 95, 29 S. E. 931—*Leach v. People*, 122 Ill. 439, 12 N. E. 726—*Ward v. Cook*, 78 Ill. App. 117—*Re Norton*, 64 Kan. 846, 91 Am. St. Rep. 255, 68 Pac. 639—*Warren v. Kelley*, 80 Me. 532, 15 Atl. 49—*Izer v. State*, 77 Md. 115, 26 Atl. 282—*Auditor General v. Menominee County*, 89 Mich. 626, 51 N. W. 483—*State*

v. Miller, 111 Mo. 549, 20 S. W. 243—*Magneau v. Fremont*, 30 Neb. 847, 9 L.R.A. 790, 27 Am. St. Rep. 436, 47 N. W. 280—*Walcott v. Wells*, 21 Nev. 56, 9 L.R.A. 63, 37 Am. St. Rep. 478, 24 Pac. 367—*State, Flancher, Prosecutor, v. Camden*, 56 N. J. L. 247, 28 Atl. 82—*Brinkerhoff v. Jersey City*, 64 N. J. L. 229, 46 Atl. 170—*Allen v. Sisson*, 66 Hun. 145, 20 N. Y. Supp. 971—*Melody v. Goodrich*, 35 Misc. 140, 70 N. Y. Supp. 568—*Re Brenner*, 35 Misc. 215, 70 N. Y. Supp. 744—*Knowles v. New York*, 37 Misc. 202, 75 N. Y. Supp. 189—*Demarest v. New York*, 147 N. Y. 209, 41 N. E. 405—*Wilkes County v. Call*, 123 N. C. 310, 44 L. R.A. 253, 31 S. E. 481—*State v. Godwin*, 123 N. C. 702, 31 S. E. 22—*State v. Shuford*, 128 N. C. 591, 38 S. E. 808—*Debnam v. Chitty*, 131 N. C. 678, 43 S. E. 3—*Lewis v. Symmes*, 61 Ohio St. 487, 76 Am. St. Rep. 428, 56 N. E. 194—*State v. Gardner*, 54 Ohio St. 30, 31 L.R.A. 661, 42 N. E. 999—*Guthrie v. Territory*, 1 Okla. 193, 21 L. R.A. 845, 31 Pac. 190—*Morford v. Territory*, 10 Okla. 745, 54 L.R.A. 520, 63 Pac. 958—*Whitney v. Pittsburgh*, 138 Pa. 410, 21 Atl. 757—*Bradford City v. Pennsylvania & N. Y. Tele. & Teleph. Co.* 26 Pa. Co. Ct. 337—*Collier v. Montgomery County*, 103 Tenn. 716, 54 S. W. 989—*Daniel v. Hutcheson*, 4 Tex. Civ. App. 246, 22 S. W. 278—*Snyder v. Emerson*, 19 Utah, 326, 57 Pac. 300—*Fancher v. Stearns*, 61 Vt. 618, 18 Atl. 455—*Roche v. Jones*, 87 Va. 486, 12 S. E. 965—*Ex parte Bassitt*, 90 Va. 680, 19 S. E. 453—*Denver v. Spokane Falls*, 7 Wash. 233, 34 Pac. 926—*State v. Cross*, 44 W. Va. 330, 29 S. E. 527—*Rasmussen v. Carbon County*, 8 Wyo. 292, 45 L.R.A. 299, 56 Pac. 1098.

78. By the laws of Wisconsin, the official acts of an officer *de facto*, until he is ousted from his office, are valid. *Manning v. Weeks (Re Manning)* 139 U. S. 504, 11 Sup. Ct. Rep. 624, 35: 264

79. The signature of a marriage license in the name of a clerk by another person who was not a deputy, but who was in sole charge of the office, transacting the business, with the recognition of the clerk and the deputy, is that of an officer *de facto*. *Nofire v. United States*, 164 U. S. 657, 17 Sup. Ct. Rep. 212, 41: 588

80. Acts of officers *de facto*, who come into their office under color of title, are valid as to the public or third persons who have an interest in the acts done. *Cooke use of Commercial Bank v. Halsey*, 16 Pet. 71, 10: 891

Cited in Ex parte Ward, 173 U. S. 456, 43 L. ed. 766, 19 Sup. Ct. Rep. 459—*Northwestern Mut. L. Ins. Co. v. Seaman*, 80 Fed. 360—*Trinity College v. Hartford*, 32 Conn. 480—*State v. Carroll*, 38 Conn. 466, 9 Am. Rep. 409—*Hinton v. Lindsay*, 20 Ga. 749—*State v. Sadler*, 51 La. Ann. 1403, 26 So. 390—*Sheehan's Case*, 122 Mass. 447, 23 Am. Rep. 374—*Board of Auditors v. Benoit*, 20 Mich. 188, 4 Am. Rep. 382—*McNutt v. Lancaster*, 9 Smedes & M. 588—*Powers v. State*, 83 Miss. 703, 36 So. 6—*Harbaugh v. Winsor*, 38 Mo. 331—*Missouri P. R. Co. v. Bradley*, 51 Neb. 606, 71 N. W. 283—*People ex rel. Hodgkinson v. Stevens*, 5 Hill, 630—*Hawver v. Seldenridge*, 2 W. Va. 277, 94 Am. Dec. 532—*Burkhart v. Jennings*, 2 W. Va. 248.

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Prohibition in against Slavery, see Slaves, 45.

Superseded by Admission of States, see States, 373-378.

Power of Territorial Legislature under, to Create Corporation, see Territories, 30.

1. The ordinance of 1787 was adopted by a Congress representing the authority of several and separate sovereignties, and acting under their authority and command (but not from any authority derived from the Articles of Confederation). *Scott v. Sandford*, 19 How. 393, 15: 691

2. Under the ordinance of 1787, made applicable to Indiana by the act of Congress of May 7, 1800, establishing that territory, the territorial government of Indiana had power to pass an act incorporating a university with all the functions necessary to effectuate its objects. *Vincennes University v. Indiana*, 14 How. 268, 14: 416

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1. Subsequent ratification by Congress is a sufficient answer to the contention that the title of the United States to the Isthmian or Panama Canal Zone was not acquired as provided in the act of June 28, 1902 (32 Stat. at L. 481, chap. 1302, U. S. Comp. Stat. Supp. 1905, p. 707), by treaty with the Republic of Columbia. *Wilson v. Shaw*, 204 U. S. 24, 27 Sup. Ct. Rep. 233, 51: 351

2. The title of the United States to the Isthmian or Panama Canal Zone under the treaty of November 18, 1903 (33 Stat. at L. 2234), with the Republic of Panama, is no less perfect because of the omission from that treaty of some of the technical terms used in ordinary conveyances of real

estate. *Wilson v. Shaw*, 204 U. S. 24, 27 Sup. Ct. Rep. 233, 51: 351

3. Failure to define the exact boundary of the Isthmian or Panama Canal Zone in the treaty of November 18, 1903 (33 Stat. at L. 2234), with the Republic of Panama, does not affect the title of the United States, where the description is sufficient for identification, and the boundaries have been practically identified by the concurrent action of the two nations alone interested. *Wilson v. Shaw*, 204 U. S. 24, 27 Sup. Ct. Rep. 233, 51: 351

4. Congress has power to construct the Panama canal in the territory acquired by the treaty of November 18, 1903 (33 Stat. at L. 2234), with the Republic of Panama. *Wilson v. Shaw*, 204 U. S. 24, 27 Sup. Ct. Rep. 233, 51: 351

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- II. Power of Congress as to, 3.
- III. Acceptance and Rejection of, 4-6.
- IV. Conditional and Unconditional Pardon, 7-13.
- V. Effect of Pardon, 14-40.
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 - b. As to Abandoned and Captured Property, 24-31.

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- c. As to Confiscation, 32-39.
- d. As to Embargo and Nonintercourse, 40.
- e. As to Liability for Running Blockade, 41.

Due Process as to Reprieve, see Constitutional Law, 817, 819.
Interference with Pardoning Power by Indeterminate Sentence Act, see Constitutional Law, 821.
To Person Turning State's Evidence, see Criminal Law, 59-61; District Attorneys, 20.
Judicial Notice of, see Evidence, 67, 69, 70.
Sufficiency of Plea of Amnesty, see Pleading, 730.
See also Estoppel, 54.

I. Nature of; Definition.

See also infra, 5.

1. A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. Per Marshall, Ch. J. *United States v. Wilson*, 7 Pet. 150,

8: 640

Re Wells, 18 How. 307, 15: 421
Distinguished in *People v. Bowen*, 43 Cal. 442, 13 Am. Rep. 148.

Cited in *Boyd v. United States*, 142 U. S. 454, 35 L. ed. 1078, 12 Sup. Ct. Rep. 292—*United States v. Thomas*, 151 U. S. 581, 38 L. ed. 278, 14 Sup. Ct. Rep. 426—*Pargoud v. United States*, 4 Ct. Cl. 346—*Collie v. United States*, 9 Ct. Cl. 450—*United States v. Culbertson*, 8 Bliss. 171, Fed. Cas. No. 14,899—*United States v. James*, 26 L.R.A. 422, 5 Inters. Com. Rep. 588, 60 Fed. 265—*People v. Defoor*, 100 Cal. 156, 34 Pac. 642—*State ex rel. Witter v. Forkner*, 94 Iowa, 18, 28 L.R.A. 212, 62 N. W. 772—*Woodward v. Murdock*, 124 Ind. 443, 24 N. E. 1047—*George v. Lillard*, 106 Ky. 823, 51 S. W. 798—*People v. Cummings*, 88 Mich. 265, 14 L.R.A. 292, 50 N. W. 310—*Rich v. Chamberlain*, 104 Mich. 441, 27 L.R.A. 575, 62 N. W. 584—*Roberts v. State*, 30 App. Div. 107, 51 N. Y. Supp. 691—*Ex parte Lockhart*, 1 Disney (Ohio) 107—*Territory v. Richardson*, 9 Okla. 584, 49 L.R.A. 442, 60 Pac. 244—*State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 650, 4 N. E. 81—*Territory v. Richardson*, 9 Okla. 584, 49 L.R.A. 442, 60 Pac. 244—*Com. v. House*, 10 Pa. Super. Ct. 265—*Easterwood v. State*, 34 Tex. Crim. Rep. 409, 31 S. W. 294—*Anglea v. Com.* 10 Gratt. 703—*Edwards v. Com.* 78 Va. 42, 49 Am. Rep. 377.

2. The term "pardon" has the same meaning as prevailed in England and the colonies when the Constitution was adopted. Re Wells, 18 How. 307, 15: 421
Cited in *Ex parte Law*, 35 Ga. 205 Appx. Fed. Cas. No. 8,126—*Pollock v. The Laura*, 5 Fed. 136—*Ex parte Browne*, 2 Colo. 558—*Ex parte Law*, 35 Ga. 295—*United States v. Athens Armory*, 35 Ga. 363—*People ex rel.*

Forsyth v. Court of Sessions, 141 N. Y. 295,
23 L.R.A. 858, 36 N. E. 386.

II. Power of Congress as to.

Effect of Pardon by Congress, see *infra*, 22,
23.

3. The vesting of pardoning power in the President by the Constitution does not take from Congress the power to pass acts of general amnesty, such as the provision in the act of Congress of February 11, 1893, that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may give evidence before the Interstate Commerce Commission or in obedience to its subpoena. *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. Rep. 644, 40: 819

III. Acceptance and Rejection of.

4. The acceptance of a pardon or reprieve by one legally imprisoned cannot be avoided as made under duress *per minas*. *Re Wells*, 18 How. 307, 15: 421
Cited in Re Greathouse, 4 Sawy. 490, 2 Abb. (U. S.) 385, Fed. Cas. No. 5,741—*Lafayette & I. R. Co. v. Pattison*, 41 Ind. 321.

5. A pardon is a deed, to the validity of which delivery is essential; and delivery is not complete without acceptance. *United States v. Wilson*, 7 Pet. 150, 8: 640
Cited in Re Callicot, 8 Blatchf. 96, Fed. Cas. No. 2,323—*Re De Puy*, 3 Ben. 316, Fed. Cas. No. 3,814—*Saunders v. United States*, 73 Fed. 784—*Ex parte Powell*, 73 Ala. 519, 49 Am. Rep. 71—*Redd v. State*, 65 Ark. 485, 47 S. W. 119—*Grubb v. Bullock*, 44 Ga. 381—*Com. v. Shisler*, 2 Phila. 258, 14 Phila. Leg. Int. 93—*Re Convicts*, 73 Vt. 423, 56 L.R.A. 660, 51 Atl. 10.

6. If a pardon be rejected by the person to whom it is rendered, the court has no power to force it on him. *United States v. Wilson*, 7 Pet. 150, 8: 640

IV. Conditional and Unconditional Pardon.

Effect of Unconditional Pardon, see *infra*, V.
See also Criminal Law, 182, 183.

7. A pardon may be conditional. *Per Marshall, Ch. J. United States v. Wilson*, 7 Pet. 150, 8: 640
Cited in Ex parte Wells, 18 How. 314, 15 L. ed. 425—*United States v. Harris*, 1 Abb. (U. S.) 114, Fed. Cas. No. 15,312—*Ex parte Hawkins*, 61 Ark. 324, 30 L.R.A. 736, 54 Am. St. Rep. 209, 33 S. W. 106—*Arthur v. Craig*, 48 Iowa, 267, 30 Am. Rep. 395—*Com. v. Haggerty*, 4 Brewst. (Pa.) 330—*Lee v. Murphy*, 22 Gratt. 792, 12 Am. Rep. 563.

8. The President may grant a conditional pardon under the constitutional power given

to grant pardons "for offenses against the United States, except in cases of impeachment." *Re Wells*, 18 How. 307, 15: 421
United States v. Padelford, 9 Wall. 531, 19: 788

United States v. Klein, 13 Wall. 128, 20: 519

Cited in Re Ruhl, 5 Sawy. 187, Fed. Cas. No. 12,124—*United States v. Athens Armory*, 2 Abb. (U. S.) 150, Fed. Cas. No. 14,473—*United States v. Harris*, 1 Abb. (U. S.) 114, Fed. Cas. No. 15,312—*Fuller v. State*, 122 Ala. 37, 45 L.R.A. 502, 82 Am. St. Rep. 17, 26 So. 146—*Ex parte Hawkins*, 61 Ark. 324, 30 L.R.A. 736, 54 Am. St. Rep. 209, 33 S. W. 106—*People v. Bowen*, 43 Cal. 442, 13 Am. Rep. 148—*Ex parte Marks*, 64 Cal. 31, 49 Am. Rep. 684, 28 Pac. 109—*Dominick v. Bowdoin*, 44 Ga. 361—*Arthur v. Craig*, 48 Iowa, 267, 30 Am. Rep. 395—*State v. Page*, 60 Kan. 670, 57 Pac. 514—*Rich v. Chamberlain*, 104 Mich. 441, 27 L.R.A. 575, 62 N. W. 584—*Jones v. Board of Registrars*, 56 Miss. 768, 31 Am. Rep. 385—*People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 295, 23 L.R.A. 858, 36 N. E. 386—*Com. v. Haggerty*, 4 Brewst. (Pa.) 330—*Re Convicts*, 73 Vt. 420, 56 L.R.A. 659, 51 Atl. 10—*Lee v. Murphy*, 22 Gratt. 794, 12 Am. Rep. 563—*Re Convicts*, 73 Vt. 427, 56 L.R.A. 662, 51 Atl. 10.

9. The President could annex to his offer of pardon of December 8, 1863, any conditions he should see fit; but after those conditions had been satisfied, the pardon and its connected promises took full effect. *United States v. Klein*, 13 Wall. 128, 20: 519

10. A condition in a pardon, forbidding a claim to any property, or the proceeds of any property, sold under the confiscation laws, does not preclude application to the court for the proceeds of a money bond secured by a confiscated mortgage. It was only intended to protect purchasers at the confiscation sale. *Osborn v. United States*, 91 U. S. 474, 23: 388

11. A conditional pardon is not absolute on the ground that the condition is void. *Re Wells*, 18 How. 307, 15: 421

12. One convicted by a consular court having jurisdiction, and sentenced to death for murder, but accepting a pardon granted on condition that he be imprisoned for life in a penitentiary, is bound by the condition. *Ross v. McIntyre (Re Ross)* 140 U. S. 453, 11 Sup. Ct. Rep. 897, 35: 581
Cited in Re Convicts, 73 Vt. 423, 56 L.R.A. 661, 51 Atl. 10.

13. The recital in a pardon, that it was requested by the district attorney in order to restore the competency of the person pardoned as a witness in a murder trial, does not alter the fact that the pardon was, as stated by its terms, full and unconditional. *Boyd v. United States*, 142 U. S. 450, 12 Sup. Ct. Rep. 292, 35: 1077

Editorial note.

Conditional pardons.

15: 421

V. Effect of Pardon.**a. In General.**

Effect of, on Competency as Witness, see Witnesses, 13, 16, 17.
See also *supra*, 1.

14. The principles governing the pardoning power, as exercised from time immemorial by the King of England, will determine the operation and effect of a pardon in American law. Per Marshall, Ch. J. *United States v. Wilson*, 7 Pet. 150, 8: 640
Cited in *Ex parte Wells*, 18 How. 310, 15 L. ed. 424—*The Laura* (Pollock v. Bridgeport S. B. Co.) 114 U. S. 416, 29 L. ed. 149, 5 Sup. Ct. Rep. 881—*Knote v. United States*, 10 Ct. Cl. 398—*United States v. Harris*, 1 Abb. (U. S.) 115, Fed. Cas. No. 15,312—*Singleton v. State*, 38 Fla. 300, 34 L.R.A. 253, 56 Am. St. Rep. 177, 21 So. 21—*State ex rel. Morris v. Wrightson*, 56 N. J. L. 209, 22 L.R.A. 559, 28 Atl. 56.

15. A pardon restores to its recipient all rights of property lost by the offense pardoned, unless the property has, by judicial process, become vested in other persons. *Re Garland*, 4 Wall. 333, 18: 366
Osborn v. United States, 91 U. S. 474, 23: 388

Carlisle v. United States, 16 Wall. 147, 21: 426

Distinguished in *United States v. Thomasson*, 4 Biss. 340, Fed. Cas. No. 16,479—*The Laura*, 19 Blatchf. 568, 8 Fed. 616—*Ex parte Browne*, 2 Colo. 559.

Cited in *United States v. Padelford*, 9 Wall. 542, 19 L. ed. 792—*Knote v. United States*, 95 U. S. 153, 24 L. ed. 443—*Hart v. United States*, 118 U. S. 67, 30 L. ed. 97, 6 Sup. Ct. Rep. 961—*Illinois C. R. Co. v. Bosworth*, 133 U. S. 103, 33 L. ed. 554, 10 Sup. Ct. Rep. 231—*Boyd v. United States*, 142 U. S. 454, 35 L. ed. 1078, 12 Sup. Ct. Rep. 292—*Austin v. United States*, 155 U. S. 428, 39 L. ed. 210, 15 Sup. Ct. Rep. 167—*Pargoud v. United States*, 4 Ct. Cl. 340—*Pargoud v. United States*, 4 Ct. Cl. 347—*Backer v. United States*, 7 Ct. Cl. 553—*Collie v. United States*, 9 Ct. Cl. 450—*Collie v. United States*, 12 Ct. Cl. 685—*Vanderslice v. United States*, 19 Ct. Cl. 488—*Austin v. United States*, 25 Ct. Cl. 449—*Brown v. United States*, Woolw. 201, Fed. Cas. No. 2,032—*Re Spenser*, 5 Sawy. 199, Fed. Cas. No. 13,234—*United States v. Athens Armory*, 2 Abb. (U. S.) 150, Fed. Cas. No. 14,473—*United States v. Cullerton*, 8 Biss. 171, Fed. Cas. No. 14,899—*Ex parte Welmer*, 8 Biss. 324, Fed. Cas. No. 17,362—*United States v. Griswold*, 24 Fed. 365—*State v. Carson*, 27 Ark. 471—*Re Executive Communication*, 14 Fla. 319—*United States v. Athens Armory*, 35 Ga. 363—*Dade Coal Co. v. Haslett*, 83 Ga. 551, 10 S. E. 435—*State ex rel. Witter v. Forkner*, 94 Iowa, 18, 28 L.R.A. 212, 62 N. W. 772—*State v. Page*, 60 Kan. 670, 57 Pac. 514—*Cowan v. Prowse*, 93 Ky. 172, 19 S. W. 407—*Jones v. Board of Registrars*, 56 Miss. 768, 31 Am. Rep. 385—*Roberts v. State*, 30 App. Div. 108, 51 N. Y. Supp. 691—*People v. Price*, 53 Hun, 188, 6 N. Y. Supp. 833—*People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 295, 23 L.R.A. 858, 36 N. E. 386—*Knapp v. Thomas*, 39 Ohio St. 381, 48 Am. Rep. 462—*U. S. Dig.*—264

—*State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 650, 4 N. E. 81—*State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 122, 5 N. E. 228—*Wood v. Fitzgerald*, 3 Or. 576—*Com. v. Haggerty*, 4 Brewst. (Pa.) 329—*Com. v. House*, 10 Pa. Super. Ct. 264—*Diehl v. Rodgers*, 169 Pa. 322, 36 W. N. C. 449, 47 Am. St. Rep. 908, 32 Atl. 424—*Scott v. State*, 6 Tex. Civ. App. 348, 25 S. W. 337—*Hunnicut v. State*, 18 Tex. App. 519, 51 Am. Rep. 330—*Carr v. State*, 19 Tex. App. 660, 53 Am. Rep. 395—*Easterwood v. State*, 34 Tex. Crim. Rep. 409, 31 S. W. 294—*Portner v. Cazenove*, 18 Gratt. 119—*Edwards v. Com.* 78 Va. 43, 49 Am. Rep. 377—*State v. Duket*, 90 Wis. 282, 31 L.R.A. 522, 48 Am. St. Rep. 928, 63 N. W. 83.

Editorial note.

Effect of pardon.

18: 882

Pardon by President.

16. A full pardon by the President to every person who participated in the late Rebellion, with the restoration of all rights, blots out the offense. *Armstrong v. United States*, 13 Wall. 154, 20: 614
United States v. Padelford, 9 Wall. 531, 19: 788

Knote v. United States, 95 U. S. 149, 24: 442

Cited in *Knote v. United States*, 95 U. S. 153, 24 L. ed. 443—*Brown v. Walker*, 161 U. S. 601, 40 L. ed. 822, 18 Sup. Ct. Rep. 644—*Reilly v. United States*, 7 Ct. Cl. 507—*Hardee v. United States*, 8 Ct. Cl. 319—*Collie v. United States*, 12 Ct. Cl. 685—*White v. United States*, 19 Ct. Cl. 438—*Field Officers v. United States*, 20 Ct. Cl. 21—*Newman v. United States*, 21 Ct. Cl. 210—*Austin v. United States*, 25 Ct. Cl. 451—*State v. Page*, 60 Kan. 670, 57 Pac. 514—*Cowan v. Prowse*, 93 Ky. 172, 19 S. W. 407—*Jones v. Board of Registrars*, 56 Miss. 768, 31 Am. Rep. 385—*People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 295, 23 L.R.A. 858, 36 N. E. 386—*Re Briggs*, 135 N. C. 124, 47 S. E. 403—*Knapp v. Thomas*, 39 Ohio St. 381, 45 Am. Rep. 462—*Scott v. State*, 6 Tex. Civ. App. 348, 25 S. W. 337—*Carr v. State*, 19 Tex. App. 661, 53 Am. Rep. 395—*Easterwood v. State*, 34 Tex. Crim. Rep. 409, 31 S. W. 294.

17. A full pardon does not affect any rights vested in others directly by the execution of the judgment for the offense, or acquired by others while that judgment was in force. *Knote v. United States*, 95 U. S. 149, 24: 442

Cited in *Illinois C. R. Co. v. Bosworth*, 133 U. S. 104, 33 L. ed. 554, 10 Sup. Ct. Rep. 231—*Austin v. United States*, 155 U. S. 428, 39 L. ed. 210, 15 Sup. Ct. Rep. 167—*Vanderslice v. United States*, 19 Ct. Cl. 488—*Austin v. United States*, 25 Ct. Cl. 451—*Ex parte Welmer*, 8 Biss. 325, Fed. Cas. No. 17,362—*Fischel v. Mills*, 55 Ark. 346, 15 L.R.A. 397, 18 S. W. 237—*Roberts v. State*, 30 App. Div. 109, 51 N. Y. Supp. 691—*United States v. Bassett*, 5 Utah, 133, 13 Pac. 237—*Peerce v. Kitzmiller*, 19 W. Va. 577.

18. The pardon of the President for all offenses arising from the participation, direct or implied, in the Rebellion, relieves the petitioner from the necessity of taking the oath required by the act of January 24, 1865, denying that he has ever borne arms against

the government, as a condition of admission to practise as an attorney in the courts of the United States. *Re Garland*, 4 Wall. 333.

18: 366

Cited in Brown v. Walker, 161 U. S. 638, 40 L. ed. 835, 5 Inters. Com. Rep. 381, 16 Sup. Ct. Rep. 644—*Haym v. United States*, 26 Ct. Cl. 171—*United States v. Thomasson*, 4 Biss. 340, Fed. Cas. No. 16,479—*Ex parte Welmer*, 8 Biss. 325, Fed. Cas. No. 17,362—*State v. Nichols*, 26 Ark. 90, 7 Am. Rep. 600—*Singleton v. State*, 38 Fla. 302, 34 L.R.A. 254, 56 Am. St. Rep. 177, 21 So. 21—*Dom'nick v. Bowdoin*, 44 Ga. 361—*State ex r. Daniel v. Rose*, 29 Ia. Ann. 760—*Com. v. Lockwood*, 109 Mass. 340, 12 Am. Rep. 699—*Rich v. Chamberlain*, 104 Mich. 441, 27 L.R.A. 575, 62 N. W. 584—*People v. Marsh*, 125 Mich. 414, 51 L.R.A. 402, 84 Am. St. Rep. 584, 84 N. W. 472—*Territory v. Richardson*, 9 Okla. 586, 49 L.R.A. 442, 60 Pac. 244.

19. The proclamation of the President of the United States, dated December 25, 1868, granting "unconditionally and without reservation to all and to every person who directly or indirectly participated in the late Rebellion a full pardon for the offense of treason against the United States, with restoration of all rights," includes aliens domiciled in the country, who gave aid and comfort to the Rebellion. *Carlisle v. United States*, 16 Wall. 147, 21: 426

Cited in Sprott v. United States, 20 Wall. 468, 22 L. ed. 373—*Osborn v. United States*, 91 U. S. 478, 23 L. ed. 390—*Knote v. United States*, 95 U. S. 153, 24 L. ed. 443—*Hart v. United States*, 118 U. S. 67, 30 L. ed. 98, 6 Sup. Ct. Rep. 961—*Jenkins v. Collard*, 145 U. S. 556, 36 L. ed. 815, 12 Sup. Ct. Rep. 868—*Austin v. United States*, 155 U. S. 425, 39 L. ed. 209, 15 Sup. Ct. Rep. 167—*Collie v. United States*, 9 Ct. Cl. 451—*Collie v. United States*, 12 Ct. Cl. 685—*Austin v. United States*, 25 Ct. Cl. 451—*State v. Page*, 60 Kan. 670, 57 Pac. 514—*Cowan v. Prowse*, 93 Ky. 172, 19 S. W. 407—*State ex rel. Collins v. Lewis*, 111 La. 696, 35 So. 816—*Jones v. Board of Registrars*, 56 Miss. 768, 31 Am. Rep. 385—*People v. Price*, 53 Hun, 188, 6 N. Y. Supp. 833—*Knapp v. Thomas*, 39 Ohio St. 381, 48 Am. Rep. 462—*Easterwood v. State*, 34 Tex. Crim. Rep. 409, 31 S. W. 294—*Edwards v. Com.* 78 Va. 43, 49 Am. Rep. 377.

20. The amnesty proclamation gave back no property sold, or interest in it. *Wallach v. Van Riswick*, 92 U. S. 202, 23: 473
Chaffraix v. Shift, 92 U. S. 214, 23: 478
Cited in Illinois C. R. Co. v. Bosworth, 133 U. S. 100, 33 L. ed. 553, 10 Sup. Ct. Rep. 231—*Menger v. Carruthers*, 3 Kan. App. 83, 44 Pac. 1096—*Shields v. Shift*, 36 La. Ann. 650—*Beard v. Lufriu*, 40 La. Ann. 879, 15 So. 207—*Ledoux v. Lavedan*, 52 La. Ann. 323, 27 So. 196.

21. A pardon to one who promoted the late Rebellion, "for all offenses committed by him arising from participation, direct or implied, in the Rebellion," granted by the President prior to the passage of Rev. Stat. § 3480, U. S. Comp. Stat. 1901, p. 2322, which prohibits payment to persons, not known to have been loyal during the war, of claims that accrued prior to April 13, 1861, did not authorize the payment of a claim to such person, which

originated prior to April 13, 1861, and was forbidden by such section to be paid; and where such claim was referred by the Secretary of War to the court of claims, that court properly decided that it had no jurisdiction further than to find the facts. *Hart v. United States*, 118 U. S. 62, 6 Sup. Ct. Rep. 961, 30: 96

Cited in Austin v. United States, 155 U. S. 429, 39 L. ed. 211, 15 Sup. Ct. Rep. 167.

Legislative pardon.

22. A court must *ex officio* take notice of a pardon by legislative act since it is considered a public law having the same effect as if the general law punishing the offense had been repealed or annulled. *Per Marshall*, *Ch. J. United States v. Wilson*, 7 Pet. 150, 8: 640

Cited in State v. Nichols, 26 Ark. 89, 7 Am. Rep. 600—*Re Briggs*, 135 N. C. 123, 47 S. E. 403—*United States v. Hall* 23 Pittsb. L. J. N. S. 246.

23. The constitutional effect to amnesty is not denied by Congress in making proof of loyalty a condition precedent to the jurisdiction of the court of claims on removing the bar of the statute of limitations against a claim. *Austin v. United States*, 155 U. S. 417, 15 Sup. Ct. Rep. 167, 39: 206

b. As to Abandoned and Captured Property.

24. The pardon and amnesty granted by the President's proclamation of December 25, 1868, relieved claimants prosecuting in the court of claims for the proceeds of captured and abandoned property, under the act of Congress of March 12, 1863, from the consequences of participation in the Rebellion, and the necessity of establishing their loyalty in order to prosecute their claims. *Carlisle v. United States*, 16 Wall. 147, 21: 426
United States v. Padelford, 9 Wall. 531, 19: 788

Cited in United States v. Klein, 13 Wall. 142, 20 L. ed. 524—*Carlisle v. United States*, 16 Wall. 151, 21 L. ed. 428—*Knote v. United States*, 95 U. S. 153, 24 L. ed. 443—*Young v. United States*, 97 U. S. 58, 24 L. ed. 997—*Kirk v. Lynd*, 106 U. S. 318, 27 L. ed. 194, 1 Sup. Ct. Rep. 296—*Hart v. United States*, 118 U. S. 67, 30 L. ed. 98, 6 Sup. Ct. Rep. 961—*Austin v. United States*, 155 U. S. 422, 39 L. ed. 208, 15 Sup. Ct. Rep. 167—*Mills v. United States*, 6 Ct. Cl. 204—*Witkowski v. United States*, 7 Ct. Cl. 399—*Martin v. United States*, 7 Ct. Cl. 450—*Backer v. United States*, 7 Ct. Cl. 553—*Carroll v. United States*, 7 Ct. Cl. 593—*Meldrum v. United States*, 7 Ct. Cl. 597—*Hardee v. United States*, 8 Ct. Cl. 319—*Green v. United States*, 8 Ct. Cl. 420—*Goodman v. United States*, 14 Ct. Cl. 568—*Gooch v. United States*, 15 Ct. Cl. 287—*South Carolina Troops v. United States*, 20 Ct. Cl. 21—*Austin v. United States*, 25 Ct. Cl. 451—*Hayn v. United States*, 26 Ct. Cl. 163—*Garrison v. United States*, 30 Ct. Cl. 287—*State v. Nichols*, 26 Ark. 80, 7 Am. Rep. 600—*State v. Page*, 60 Kan. 670, 57 Pac. 514—*Cowan v. Prowse*, 93 Ky. 172, 19 S. W. 171—*Jones v. Board of Registrars*, 56 Miss. 768, 31 Am. Rep. 385—*People v. Price*, 53 Hun, 188, 6 N. Y. Supp. 833—*Hamilton v.*

Kennedy, 3 Baxt. 483—Easterwood v. State, 34 Tex. Crim. Rep. 409, 31 S. W. 294.

25. The restoration of the proceeds of property under the abandoned and captured property act became the absolute right of persons pardoned by the President, on application within two years from the close of the war. *United States v. Klein*, 13 Wall. 128, 20: 519

Pargoud v. United States, 13 Wall. 156, 20: 646

Armstrong v. United States, 13 Wall. 154, 20: 614

Cited in Armstrong v. United States, 13 Wall. 155, 20 L. ed. 615—*Carlisle v. United States*, 16 Wall. 152, 21 L. ed. 428—*Sprott v. United States*, 20 Wall. 470, 22 L. ed. 374—*Haycraft v. United States*, 22 Wall. 94, 22 L. ed. 741—*Lamar v. Browne*, 92 U. S. 194, 23 L. ed. 653—*Knote v. United States*, 95 U. S. 153, 24 L. ed. 443—*Hart v. United States*, 118 U. S. 66, 30 L. ed. 97, 6 Sup. Ct. Rep. 961—*Great Falls Mfg. Co. v. Atty. Gen. (Great Falls Mfg. Co. v. Garland)* 124 U. S. 599, 31 L. ed. 533, 8 Sup. Ct. Rep. 631—*Austin v. United States*, 155 U. S. 425, 39 L. ed. 209, 15 Sup. Ct. Rep. 167—*Witkowski v. United States*, 7 Ct. Cl. 397—*Waring v. United States*, 7 Ct. Cl. 504—*Backer v. United States*, 7 Ct. Cl. 554—*Reilly v. United States*, 7 Ct. Cl. 507—*Austell v. United States*, 7 Ct. Cl. 603—*Hardee v. United States*, 8 Ct. Cl. 319—*Green v. United States*, 8 Ct. Cl. 420—*Haycraft v. United States*, 8 Ct. Cl. 484—*Moore v. United States*, 10 Ct. Cl. 383—*Collie v. United States*, 12 Ct. Cl. 701—*Winchester v. United States*, 14 Ct. Cl. 43—*Hart v. United States*, 16 Ct. Cl. 483—*Field Officers v. United States*, 20 Ct. Cl. 21—*Meigs v. United States*, 20 Ct. Cl. 185—*Webb v. United States*, 20 Ct. Cl. 498—*Newman v. United States*, 21 Ct. Cl. 210—*Haym v. United States*, 26 Ct. Cl. 169—*Stovall v. United States*, 26 Ct. Cl. 234—*Western Cherokee Indians v. United States*, 27 Ct. Cl. 36—*The Laura*, 19 Blatchf. 568, 8 Fed. 616—*Wallach v. Van Riewick*, 1 MacArth. 77.

26. The President's pardon of December 25, 1868, relieved claimants under the abandoned and captured property act from proof of adhesion to the United States during the late Civil War. *Pargoud v. United States*, 13 Wall. 156, 20: 646

Cited in Carlisle v. United States, 16 Wall. 152, 21 L. ed. 429—*Knote v. United States*, 95 U. S. 153, 24 L. ed. 443—*Austin v. United States*, 155 U. S. 425, 39 L. ed. 209, 15 Sup. Ct. Rep. 167—*Hardee v. United States*, 8 Ct. Cl. 319—*Sierra v. United States*, 9 Ct. Cl. 233—*Collie v. United States*, 9 Ct. Cl. 452—*Collie v. United States*, 12 Ct. Cl. 685—*White v. United States*, 19 Ct. Cl. 438—*Austin v. United States*, 25 Ct. Cl. 451.

27. The President's proclamation of pardon relieved claimants prosecuting in the court of claims for the proceeds of captured and abandoned property, under the act of Congress, from the consequences of participation in the Rebellion, and from the necessity of establishing their loyalty in order to prosecute their claims. *Young v. United States*, 97 U. S. 39, 24: 992
Cited in Campbell v. United States, 28 Ct. Cl. 516.

28. The proviso in the general appropri-

ation act of 1870, which assumes to annul the effect of the President's pardon in claims in the court of claims, can have no such effect. *United States v. Klein*, 13 Wall. 128, 20: 519

Cited in Nimmack v. United States, 10 Ct. Cl. 598—*Field Officers v. United States*, 20 Ct. Cl. 21—*Austin v. United States*, 25 Ct. Cl. 449—*Re Monroe*, 46 Fed. 57—*State v. Prouty*, 115 Iowa, 666, 84 N. W. 670—*People ex rel. Hillel Lodge No. 72, I. O. B. B. v. Rose*, 207 Ill. 361, 69 N. E. 762—*Knapp v. Thomas*, 39 Ohio St. 391, 45 Am. Rep. 462—*Mitchell v. State*, 42 Ohio St. 400—*Arnold v. Kelley*, 5 W. Va. 447.

29. The right to sue for the proceeds of property sold under the abandoned and captured property act is given to the subjects of Great Britain, excepting those who gave aid and comfort to the enemy; and the President's proclamation of pardon and amnesty of Dec. 25, 1868, did not restore the rights of the latter to sue for such property. *Young v. United States*, 97 U. S. 39, 24: 992
Cited in Austin v. United States, 25 Ct. Cl. 455—*Haym v. United States*, 26 Ct. Cl. 169.

Limitations.

30. One who gave aid and comfort to the late Rebellion cannot, more than two years after its suppression, maintain an action in the court of claims to recover money in the Treasury arising from the sale of his cotton, taken possession of by the United States and sold under the abandoned and captured property act. The unconditional pardon granted by the President's proclamation of Dec. 25, 1868, does not operate to extend the period for bringing such suits. *Haycraft v. United States*, 22 Wall. 81, 22: 738

Cited in Austin v. United States, 155 U. S. 426, 39 L. ed. 209, 15 Sup. Ct. Rep. 167—*Mount v. United States*, 11 Ct. Cl. 512—*Hamner v. United States*, 13 Ct. Cl. 14—*Ford v. United States*, 19 Ct. Cl. 525—*McDonald v. United States*, 21 Ct. Cl. 321—*Rice v. United States*, 21 Ct. Cl. 416—*Austin v. United States*, 25 Ct. Cl. 457.

Aliens.

31. A nonresident alien owes no allegiance to the government, and cannot be guilty of treason or of any criminal offense against it by reason of trading with the enemy. Consequently he is not a subject of pardon by the President. But if his property be captured while engaged in such trade, he cannot recover for it. The abandoned and captured property act gave the privilege of suing only to those who could show they had not given aid or comfort to the enemy; and the President's proclamation of Dec. 25, 1868, giving pardon for the offense of treason or of adhering to the enemy, with restoration of all rights, etc., could not apply to those who, in the eye of the law, had been guilty of no offense. *Young v. United States*, 97 U. S. 39, 24: 992
Cited in Haym v. United States, 26 Ct. Cl. 169.

c. As to Confiscation.

See also *supra*, 10; Confiscation and Sequestration, 45.

32. A full pardon does not affect any

rights vested in others directly by the execution of the judgment for the offense, or acquired by others while that judgment was in force. *United States v. Clarke* (Confiscation Cases) 20 Wall. 92, 22: 320

Chaffraix v. Shift, 92 U. S. 214, 23: 478

Gay v. United States (Gay's Gold) 13 Wall. 358, 20: 606

Wallach v. Van Riswick, 92 U. S. 202, 23: 473

Semmes v. United States, 91 U. S. 21, 23: 193

Cited in Semmes v. United States, 91 U. S. 27, 23 L. ed. 195—*Wallach v. Van Riswick*, 92 U. S. 214, 23 L. ed. 478—*Burbank v. Semmes*, 99 U. S. 140, 25 L. ed. 316—*Illinois C. R. Co. v. Bosworth*, 133 U. S. 100, 33 L. ed. 553, 10 Sup. Ct. Rep. 231—*Jenkins v. Collard*, 145 U. S. 555, 36 L. ed. 815, 12 Sup. Ct. Rep. 868—*Winchester v. United States*, 14 Ct. Cl. 44—*Newby v. Brownlee*, 23 Fed. 321—*Beard v. Lufriu*, 46 La. Ann. 882, 15 So. 207.

33. Where land of one who bore arms in the Confederate army against the United States in the late war was, under the confiscation act, condemned and sold, he was restored by the proclamation of pardon and amnesty, made by the President, to the control and power of disposition over the naked residuary ownership of the property, subject to the usufruct of the purchaser under the confiscation proceedings. *Jenkins v. Collard*, 145 U. S. 546, 12 Sup. Ct. Rep. 868, 36: 812

Illinois C. R. Co. v. Bosworth, 133 U. S. 92, 10 Sup. Ct. Rep. 231, 33: 550

Cited in Jenkins v. Collard, 145 U. S. 556, 36 L. ed. 816, 12 Sup. Ct. Rep. 868—*Fischel v. Mills*, 55 Ark. 348, 15 L.R.A. 397, 18 S. W. 237—*Menger v. Carruthers*, 3 Kan. App. 82, 44 Pac. 1096—*Ledoux v. Lavedan*, 52 La. Ann. 328, 27 So. 196.

34. On being restored to all the rights by pardon, one who bore arms in the Confederate army against the United States was restored to the residuary ownership of the land, subject to the usufruct of the purchaser under the confiscation proceedings, and a subsequent conveyance, by him and his wife, of all their right and title in and to said land, transferred the land as against his heirs. *Illinois C. R. Co. v. Bosworth*, 133 U. S. 92, 10 Sup. Ct. Rep. 231, 33: 550

Cited in Beard v. Lufriu, 46 La. Ann. 881, 15 So. 207.

35. The acceptance of amnesty and compliance with its conditions, under the proclamation of the President, of December 1863, relieved a person whose property had become liable to forfeiture under the confiscation act of 1861, from so much of the penalty at least as accrued to the United States. *Armstrong's Foundry v. United States* (Armstrong's Foundry) 6 Wall. 766, 18: 882

Cited in United States v. Padelford, 9 Wall. 542, 19 L. ed. 792—*Knote v. United States*, 95 U. S. 153, 24 L. ed. 443—*Kirk v. Lynd*, 108 U. S. 318, 27 L. ed. 194, 1 Sup. Ct. Rep. 296—*Hart v. United States*, 118 U. S. 67, 30 L. ed. 98, 6 Sup. Ct. Rep. 961—*Illinois C. R. Co. v. Bosworth*, 133 U. S. 105, 33 L. ed. 555, 10 Sup. Ct. Rep. 231—*Pargoud v. United*

States, 4 Ct. Cl. 344—*Backer v. United States*, 7 Ct. Cl. 553—*Austin v. United States*, 25 Ct. Cl. 451—*Griswold v. Connolly*, 1 Woods, 194, Fed. Cas. No. 5,833—*United States v. Stevenson*, 1 Abb. (U. S.) 502, Fed. Cas. No. 16,395—*United States v. Thomasson*, 4 Bias. 343, Fed. Cas. No. 16,479—*Ex parte Welmer*, 8 Bias. 325, Fed. Cas. No. 17,362—*Kirk v. Lewis*, 4 Woods, 102, 9 Fed. 646.

36. Legal proceedings against property under the confiscation act were not dismissed by the amnesty proclamation of 1867. *Semmes v. United States*, 91 U. S. 21, 23: 193

37. The proclamation of amnesty in 1868 did not effect a repeal of the confiscation act; nor can an amnesty proclamation divest vested rights. *United States v. Clarke*, (Confiscation Cases) 20 Wall. 92, 22: 320

38. A claimant of property seized under the act of August 6, 1861, is entitled to the benefit of the amnesty proclamation of December 8, 1863, to the same extent as, under like pleading and proof, he would be entitled to pardon. *St. Louis Street Foundry v. United States* (St. Louis Street Foundry) 6 Wall. 770, 18: 884

Cited in Pargoud v. United States, 4 Ct. Cl. 344—*Griswold v. Connolly*, 1 Woods, 194, Fed. Cas. No. 5,833.

39. The general pardon and amnesty granted by the proclamation of December 25, 1868, do not entitle one receiving their benefits to the proceeds of his property previously condemned and sold under the confiscation act of 1862, after such proceeds have been paid into the Treasury of the United States. *Knote v. United States*, 95 U. S. 149, 24: 442

d. As to Embargo and Nonintercourse.

See also *supra*, 31.

40. The amnesty proclamation of December 25, 1868, was limited to persons who participated in the Rebellion, and did not restore property forfeited under the nonintercourse laws to a person who did not participate in the Rebellion, although the property remained in court in proceedings not concluded when the proclamation was issued. *Gay v. United States* (Gay's Gold) 13 Wall. 358, 20: 606

Cited in Scott v. United States, 8 Ct. Cl. 460.

e. As to Liability for Running Blockade.

41. The amnesty proclamation of December 8, 1863, cannot be held to extinguish the liability of a vessel and cargo running the blockade and seized *in flagrante delicto*, and the restitution of the property cannot be compelled by the subsequent oath of the claimant to establish his innocence. *The Grey Jacket v. United States* (The Grey Jacket) 5 Wall. 370, 18: 646

PARENT AND CHILD.

Right of Minor Children of Domiciled Chinese to enter Country, see Aliens, 141.

Citizenship of Child of Alien, see Citizens, III. b.

Citizenship of Parent, see Citizens, 3.

Presumption as to Parentage, see Evidence, 211.

Presumption as to Validity of Deed from Child to Parent, see Evidence, 303.

Mother's Liability for Interest, see Interest, 35.

Establishment, by Laches, of Deed to Parent, see Limitation of Actions, 110.

1. A master is liable to a parent whose minor child, while in the master's employ, was injured in attempting in obedience to his superior's orders to adjust a belt while standing on a ladder among rapidly revolving and dangerous machinery. *Union P. R. Co. v. Fort*, 17 Wall. 553, 21: 739. Cited in *Sullivan v. Union P. R. Co.* 3 Dill. 337, Fed. Cas. No. 13,599—*Wyman v. Leavitt*, 71 Me. 281, 36 Am. Rep. 303—*Gulf, C. & S. F. E. Co. v. Redeker*, 67 Tex. 191, 60 Am. Rep. 20, 2 S. W. 527.

2. The plenary power conferred upon the father by La. Civ. Code 1870, arts. 221, 223, 226, to administer, during marriage, the estate of his minor children, is wholly distinct from tutorship, and is not modified or controlled by the provision of art. 3350, that an inventory must be made and recorded before fathers and mothers who, by law, are entitled to the usufruct of property belonging to their minor children, shall be allowed to take possession of such property, and enjoy the fruits and revenue thereof. *Darlington v. Turner*, 202 U. S. 195, 26 Sup. Ct. Rep. 630, 50: 992.

Editorial notes.

[Legal status of adopted child. 17 L.R.A. 435.

Recovery by parent from carrier for loss of personal effects of infant that pays no fare. 1 L.R.A.(N.S.) 353.

Right of one who employs minor without parent's consent to allowance on account of expenditures for necessities. 9 L.R.A.(N.S.) 411.

Liability for torts of minor child. 10 L.R.A.(N.S.) 933.

Adoption of adult under statute providing for adoption of "child." 12 L.R.A.(N.S.) 884.]

Legitimation.

Right of Illegitimate Children to Inherit, see Descent and Distribution, I. b.

Presumption and Burden of Proof, see Evidence, 207, 208, 210.

Evidence to Disprove Legitimacy, see Evidence, 2366.

Illegitimate Children as "Kindred," see Kindred.

3. On a question as to the legitimacy of a child, good faith is first to be presumed;

and as to what constitutes good faith, it is adjudged in Louisiana that to marry a second time, supposing the previous marriage invalid, is one of the cases of good faith. *Gaines v. New Orleans*, 6 Wall. 642.

18: 950

4. Marriage and subsequent recognition by parents of children born prior to the marriage will make them legitimate in Maryland for the purpose of inheritance. *Blackburn v. Crawford*, 3 Wall. 175, 18: 186

5. When the legislature speaks in general terms of illegitimate children, it is supposed to mean the whole class, including those of an incestuous connection. *Brewer v. Blougher*, 14 Pet. 178, 10: 408

Cited in *Blythe v. Ayres*, 96 Cal. 559, 19 L.R.A. 41, 31 Pac. 915—*Robinson v. Ruprecht*, 191 Ill. 434, 61 N. E. 631—*McCarthy v. Marsh*, 5 N. Y. 275—*McGunnigle v. McKee*, 32 Phila. Leg. Int. 127—*Opdyke's Appeal*, 49 Pa. 379—*Bennett v. Toler*, 15 Gratt. 632, 78 Am. Dec. 638.

6. The provisions of the Louisiana Code, arts. 217, 222, 1475, forbidding natural parents to legitimate or acknowledge their adulterine children, or to dispose of property to them, does not apply to a claimant under a will of a male testator who contracted marriage in good faith with a woman, married, but believing herself free. *Gaines v. Hennen*, 24 How. 553, 16: 770

7. Although the Virginia act of 1785, which declares that "where a man having by a woman one or more children shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereafter legitimated," applies to bastards in esse at the time the law came into operation, as well as to such as might thereafter be born, it is not retrospective as to the recognition of the child by the father, but must be so construed as to enable the father to perceive all the consequences of his recognition at the time it is made. *Stevenson v. Sullivan*, 5 Wheat. 207, 5: 70. Cited in *Hartinger v. Ferring*, 24 Fed. 17—*Alston v. Alston*, 114 Iowa. 33, 86 N. W. 55—*Pettus v. Dawson*, 82 Tex. 20, 17 S. W. 714.

PARI DELICTO.

Refusal to Aid Either Party, see Contracts, 463, 474, 482, 494, 497, 506, 516.

PARISH.

Impairing Obligation of Contract of, see Constitutional Law, 1510.

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PARKS AND SQUARES.

Liability for Injury by Wild Animal in, see Animals, 2, 3.
 Due Process in Assessment for, see Constitutional Law, 563.
 Enforceability of Railroad Company's Contract with Park Commissioners, see Contracts, 510.
 Condemnation of Land for, see Eminent Domain, 46, 47.
 Measure of Recovery on Condemnation of Land for, see Damages, 233g.
 Allowance for Prospective Gold Mine in Assessing Damages for Taking Land for, see Damages, 227.

1. There is no solid ground of distinction between a public park and highways or other works of public improvement as proper subjects for the application of the rule of assessment for special benefits. *Wilson v. Lambert*, 168 U. S. 611, 18 Sup. Ct. Rep. 217, 42: 599
Cited in Matthews v. Kimball, 70 Ark. 455, 66 S. W. 651.

2. The act of Congress of Sept. 27, 1890, to establish a public park in the District of Columbia, is not invalid because the President has the appointment of park commissioners and the approval of the value or price of lands to be taken. *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. Rep. 361, 37: 170

3. Congress in providing for the cost of a park in the District of Columbia may assess a proportionate part of the cost upon property specially benefited. *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. Rep. 361, 37: 170
Cited in Bauman v. Ross, 167 U. S. 589, 42 L. ed. 288, 17 Sup. Ct. Rep. 966—*Wilson v. Lambert*, 168 U. S. 613, 42 L. ed. 600, 18 Sup. Ct. Rep. 217—*Parsons v. District of Columbia*, 170 U. S. 56, 42 L. ed. 947, 18 Sup. Ct. Rep. 521—*French v. Barber Asphalt Paving Co.* 181 U. S. 342, 45 L. ed. 889, 21 Sup. Ct. Rep. 625—*Wright v. Davidson*, 181 U. S. 379, 45 L. ed. 904, 21 Sup. Ct. Rep. 616—*Rolph v. Fargo*, 7 N. D. 668, 42 L.R.A. 657, 76 N. W. 242—*Webster v. Fargo*, 9 N. D. 211, 56 L.R.A. 158, 82 N. W. 732—*Re Clinton Ave.* 57 App. Div. 172, 68 N. Y. Supp. 196.

4. As the act to establish a public park in the District of Columbia did not prescribe the form for the oath of the appraisers, the court has the right to prescribe its form. *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. Rep. 361, 37: 170

5. The two squares, "Alta plaza" and "Hamilton square," San Francisco, designated in the report of the commissioners approved by the supervisors in 1856, were dedicated to public use as squares. *Clark v. San Francisco (Hoadley v. San Francisco)* 124 U. S. 639, 8 Sup. Ct. Rep. 659, 31: 553
Cited in Rhodes v. Brightwood, 145 Ind. 32, 43 N. E. 942.

6. Lands dedicated as squares could not lawfully be conveyed by the city to private

parties, and therefore a conveyance to the city by act of Congress did not enure to the benefit of a prior grantee of the city. *Clark v. San Francisco (Hoadley v. San Francisco)* 124 U. S. 639, 8 Sup. Ct. Rep. 659, 31: 553
Cited in Pacific Gas Improv. Co. v. Ellert, 64 Fed. 435—*La Societa Italiana Di Mutua Beneficenza v. San Francisco*, 131 Cal. 174, 53 L.R.A. 384, 63 Pac. 174.

PARLIAMENT.

Proof of Acts of, see Evidence, 1060.

PARLIAMENTARY LAW.

Preservation of Original Title to Bill, see Statutes, 96.

1. When a quorum or majority of the House is present, the act of a majority of the quorum is the act of the body; and a law passed by a majority of the quorum is valid. *United States v. Ballin*, 144 U. S. 1, 12 Sup. Ct. Rep. 507, 36: 321
Cited in Zeller v. Central R. Co. 84 Md. 322, 34 L.R.A. 470, 35 Atl. 932—*State ex rel. Young v. Yates*, 19 Mont. 243, 37 L.R.A. 207, 47 Pac. 1004—*Rathbone v. Wirth*, 6 App. Div. 312, 34 L.R.A. 414, 40 N. Y. Supp. 535—*Rathbone v. Wirth*, 150 N. Y. 474, 34 L. R.A. 414, 45 N. E. 15.

2. Rule 15 of the House of Representatives, providing that names of members sufficient to make a quorum, in the hall of the House, who do not vote, shall be noted by the clerk and recorded in the journal and counted in determining the presence of a quorum, is valid. *United States v. Ballin*, 144 U. S. 1, 12 Sup. Ct. Rep. 507, 36: 321

Cited in Re Gunn, 50 Kan. 233 (Dissenting opinion) 19 L.R.A. 524, 32 Pac. 470—*North Platte v. North Platte Waterworks Co.* 56 Neb. 411, 76 N. W. 906—*Re Beck*, 7 Pa. Dist. R. 633—*Re DoYLES*, 1 Dauphin Co. Rep. 350, 7 Pa. Dist. R. 635, 24 Pa. Co. Ct. 30—*Com. ex rel. Curren v. Schubmehl*, 3 Lack. Legal News, 188, 13 Mont. Co. L. Rep. 159, 19 Pa. Co. Ct. 480—*Mercantile Library Hall Co. v. Pittsburgh Library Assn.* 25 Pittsb. L. J. N. S. 347—*State ex rel. Stanford v. Ellington*, 117 N. C. 160, 30 L.R.A. 533, 53 Am. St. Rep. 580, 23 S. E. 250.

3. The House of Representatives has power to do business when a majority of its members is present, and may prescribe any method which is reasonably certain to determine the presence of a majority. *United States v. Ballin*, 144 U. S. 1, 12 Sup. Ct. Rep. 507, 36: 321

4. The minority of a committee to which a corporate power has been delegated cannot bind the majority, or do any valid act, in the absence of any special provision otherwise. *Brown v. District of Columbia*, 127 U. S. 579, 8 Sup. Ct. Rep. 1314, 32: 262

Cited in United States v. Ballin, 144 U. S. 1.

36 L. ed. 325, 12 Sup. Ct. Rep. 507—*Re Gunn*, 50 Kan. 182, 19 L.R.A. 525, 32 Pac. 470—*Rathbone v. Wirth*, 6 App. Div. 312, 40 N. Y. Supp. 535.

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Casting vote by presiding officer in deciding tie on election. 47 L.R.A. 561.]

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Partner, see Witnesses, 76.

1. [*A cestui que trust* may maintain ejectment in his own name. *Kennedy v. Fury* (Pa. Sup. Ct.) 1 Dall. 72, 1: 42]

2. Where an act uniting two colleges was valid, and the two original corporations become merged in one, neither of them can thereafter sue for any cause of action. *Jefferson College v. Washington & J. College* (Pennsylvania College Cases) 13 Wall. 190, 20: 550
Cited in Kansas, O. & T. R. Co. v. Smith, 40 Kan. 193, 19 Pac. 636.

3. The carrier may sue in his own name, at common law or in admiralty, for a trespass upon or injury to the property carried. *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. Rep. 860, 39: 993
Cited in The New York, 93 Fed. 499—*Chicago v. Pennsylvania Co.* 57 C. C. A. 516, 119 Fed. 504.

4. An action to recover damages against a railroad company for breach of a contract for the transportation of cattle is properly brought by the owner of the cattle, although another person has an interest in the profits. *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24: 693

5. The general owners of property entrusted to expressmen may maintain an action for its loss against a common carrier employed by the expressmen to transfer it. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12: 465
Cited in Bacon v. Robertson, 18 How. 486, 13 L. ed. 502—*St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.* 117 U. S. 18, 29 L. ed. 799, 6 Sup. Ct. Rep. 542—*Sonamith v. The J. P. Donaldson*, 21 Fed. 681—*Southern Exp. Co. v. Urquhart*, 52 Ga. 144—*Maghee v. Camden & A. R. Transp. Co.* 45 N. Y. 321, 6 Am. Rep. 124—*Wilson v. Harry*, 32 Pa. 272.

6. Where the covenant of a sealed contract sued on is with "the party of the first part," and only one party of the first part affixed his seal, an action of covenant should be brought by the party sealing alone, although in the premises of the deed two parties are named of the first part. *Philadelphia W. & B. R. Co. v. Howard*, 13 How. 307, 14: 157
Cited in Seymour v. Western R. Co. 106 U. S. 321, 27 L. ed. 103, 1 Sup. Ct. Rep. 123—*Northwestern Distilling Co. v. Brant*, 69 Ill. 661, 18 Am. Rep. 631.

7-8. An action by a private person against a sheriff to compel him to release from custody another person whom he al-

leges to be held in forcible custody in violation of the constitutional rights of the prisoner cannot be maintained because of any friendship or sympathy that the plaintiff may have for the prisoner, or any concern he may feel as to the enforcement of unconstitutional laws. *Gusman v. Marrero*, 180 U. S. 81, 21 Sup. Ct. Rep. 293, 45: 436

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Interest necessary to support suit.

Right to Maintain Adverse Suit for Mining Claim, see Mines, 155-157.

Suit by United States, see United States, 138-147.

9. No one need be made a party complainant in whom there exists no interest, and no one party defendant from whom nothing is demanded. *Kerr v. Watts*, 6 Wheat. 550, 5: 328

Cited in Bonaparte v. Camden & A. R. Co. Baldwin, 217, Fed. Cas. No. 1,617—*Society for Propagation of Gospel v. Hartland*, 2 *Palne*, 541, Fed. Cas. No. 13,155—*Hickox v. Elliott*, 10 *Sawyer*, 427, 22 Fed. 21—*New Chester Water Co. v. Holly Mfg. Co.* 3 C. C. A. 406, 3 U. S. App. 264, 53 Fed. 26—*Sanche v. Electrolibration Co.* 4 App. D. C. 462—*Elliott v. Armstrong*, 2 *Blackf.* 207—*Haggerty v. Wagner*, 148 Ind. 639, 39 L.R.A. 389, 48 N. E. 366—*Ridgely v. Wilmer*, 97 Md. 730, 55 Atl. 488—*Bourne v. Hall*, 10 R. I. 152—*Burrill v. Garst*, 19 R. I. 39, 31 Atl. 486.

10. The bringing of a suit by a plaintiff who shows no interest of any kind in the suit is a fatal objection, if taken by demurrer or answer. *House v. Mullen*, 22 Wall. 42, 22: 838

Cited in Boyle v. Farmers' Loan & T. Co. 41 C. C. A. 298, 101 Fed. 186.

11-12. A mere stranger to a title cannot ask a court to decree in favor of such title for the benefit of whom it may concern. Parties prosecuting a title must show some real interest to be protected. *McMicken v. United States*, 97 U. S. 204, 24: 947

13-14. An action for an account and distribution of the profits of a national savings bank cannot be maintained by a corporation, where there is no pecuniary interest in the corporations, nor any duty due to them from the corporation, and the profits belong to the depositors. *Huntington v. National Sav. Bank*, 96 U. S. 388, 24: 777

Cited in Hall v. Paris, 59 N. H. 74—*Gilbert v. Finch*, 72 App. Div. 42, 76 N. Y. Supp. 143—*Rutland Sav. Bank v. Rutland*, 52 Vt. 467.

Editorial note.

[Who is real party in interest within meaning of statutes defining parties by whom action must be brought. 64 L.R.A. 581.]

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Preferential Payment of Transfers in Bankruptcy, see Bankruptcy, 233, 234.

In Action on Insurance Policy, see Insurance, 696-699.

On Foreclosure of Mortgage, see Mortgage, VII. c.

15. An action of covenant cannot be brought by one of several lessors who were the joint owners of real property, on a covenant by the lessee to keep the premises in repair, although the interests of the lessors were separately set out in the lease, and the rent was reserved to them severally in proportion thereto. *Calvert v. Bradley*, 16 How. 580, 14: 1066

Third persons.

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Principal's Right to Sue on Factor's Contract, see Factors, 9.

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Trust Created for Third Person, see Trusts, 14.

16. A party may maintain assumpsit on a promise, not under seal, made to another for his benefit. *Hendrick v. Lindsay*, 93 U. S. 143, 23: 855

Distinguished in Keller v. Ashford, 133 U. S. 621, 33 L. ed. 672, 10 Sup. Ct. Rep. 494.

Cited in Willard v. Wood, 135 U. S. 313, 34 L. ed. 213, 10 Sup. Ct. Rep. 831—*Constable v. National S. S. Co.* 154 U. S. 73, 38 L. ed. 914, 14 Sup. Ct. Rep. 1062—*Austin v. Seligman*, 21 *Blatchf.* 508, 18 Fed. 521—*Timayenis v. Union Mut. L. Ins. Co.* 22 *Blatchf.* 408, 21 Fed. 226—*Central Trust Co. v. Cincinnati, J. & M. R. Co.* 58 Fed. 505—*Jackson Iron Co. v. Negaunee Concentrating Co.* 12 C. C. A. 641, 31 U. S. App. 1, 65 Fed. 303—*American Exch. Nat. Bank v. Northern P. R. Co.* 76 Fed. 130—*Central Trust Co. v. Berwind-White Coal Co.* 95 Fed. 393—*Barker v. Pullman's Palace Car Co.* 124 Fed. 567—*Re Dresser*, 68 C. C. A. 210, 135 Fed. 498—*Lehow v. Simonton*, 3 Colo. 348—*Willard v. Wood*, 4 *Mackey*, 555—*Smith v. Herrell*, 11 App. D. C. 434—*Hunter v. Wilson*, 21 Fla. 252—*Webster v. Fleming*, 178 Ill. 150, 52 N. E. 975—*Hall v. Alford*, 105 Ky. 666, 49 S. W. 444—*Kilbourne v. Wiley*, 124 Mich. 375, 83 N. W. 99—*Lee v. Newman*, 55 Miss. 375—*Millani v. Tognini*, 19 Nev. 135, 7 Pac. 279—*Blordan v. First Presb. Church*, 6 Misc. 85, 26 N. Y. Supp. 38—*Todd v. Weber*, 95 N. Y. 195, 47 Am. Rep. 20—*Parker v. Jeffery*, 26 Or. 189, 37 Pac. 712—*Lancaster City v. Frescoln*, 22 Pa. Co. Ct. 230, 16 Lanc. L. Rev. 77—*Thompson v. Cheesman*, 15 Utah, 49, 48 Pac. 477—*Montgomery v. Rief*, 15 Utah, 500, 50 Pac. 623.

17. Where a debt already exists from one person to another, and a promise is made by a third person to the debtor to pay such debt (there being no novation), he has a right of action against the promisor for his own indemnity. The original creditor can-

not sue on the promise. *Second Nat. Bank v. Grand Lodge, F. & A. M.* 98 U. S. 123, 25: 75

Cited in *Cragin v. Lovell*, 109 U. S. 199, 27 L. ed. 905, 3 Sup. Ct. Rep. 132—*Sousteby v. Keeley*, 2 McCrary, 106, 7 Fed. 449—*Austin v. Seligman*, 21 Blatchf. 508, 18 Fed. 521—*Anderson v. Fitzgerald*, 21 Fed. 298—*Good-year Shoe Machinery Co. v. Dancel*, 56 C. C. A. 303, 119 Fed. 695—*Barker v. Pullman's Palace Car Co.* 124 Fed. 566—*Hawkins v. Central R. Co.* 119 Ga. 165, 46 S. E. 82—*Whicker v. Hushaw*, 159 Ind. 3, 64 N. E. 460—*Hall v. Alford*, 105 Ky. 666, 49 S. W. 444—*Austin v. Seligman*, 66 How. Pr. 91—*Adams v. Kuehn*, 45 Phila. Leg. Int. 175.

18-19. A person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain suit in equity to have it paid directly to himself. *Russell v. Clark*, 7 Cranch, 69, 3: 271

Cited in *Re Baldwin*, 8 Cent. L. J. 187, Fed. Cas. No. 796—*Sedam v. Williams*, 4 McLean, 54, Fed. Cas. No. 12,609—*Trecothick v. Austin*, 4 Mason, 36, Fed. Cas. No. 14,164—*Wood v. Dummer*, 3 Mason, 313, Fed. Cas. No. 17,944—*Homer v. Savings Bank*, 7 Conn. 484—*Rodney v. Shankland*, 1 Del. Ch. 47, 12 Am. Dec. 70—*Fusze v. Stern*, 17 Ill. App. 433—*Turner Bros. v. Alabama Min. & Mfg. Co.* 25 Ill. App. 153—*First Nat. Bank v. Ridenour*, 46 Kan. 713, 27 Pac. 150—*Batchelder v. Atheimer*, 10 Mo. App. 185—*Keene Five Cents Sav. Bank v. Herrick*, 62 N. H. 176—*Meyers v. Campbell*, 59 N. J. L. 379, 35 Atl. 788—*Cumberland v. Codrington*, 3 Johns. Ch. 261, 8 Am. Dec. 492—*Breedlove v. Stump*, 3 Yerg. 263.

20. A stipulation in a contract for the collection of a claim for an Indian nation, that the attorney out of the agreed compensation will adjust the claims of all parties who have rendered services theretofore in the prosecution of the claim, can be enforced by the beneficiaries in a suit in equity, if not at law, notwithstanding their names are not stated in the agreement. *McKee v. Lamon*, 159 U. S. 317, 16 Sup. Ct. Rep. 11, 40: 165

Cited in *Coler v. Stanley County*, 89 Fed. 260.

21. Where the manager of a lottery, drawn in pursuance of an ordinance of the corporation of the city of Washington, gave a bond to the corporation conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance," the person entitled to a prize ticket had no right to bring a suit for the prize against the manager, upon his bond, in the name of the corporation, without its consent. *Washington use of McCue v. Young*, 10 Wheat. 406, 6: 352

22. Where two titles to a tract of land were both derived from the same person, an agreement by the holder of the senior title with the original grantor, to confirm the sale by the latter to the holder of the junior title on receiving the purchase money, created a privity of contract between the holder of the senior title and a purchaser from the holder of the junior title; and the latter could enforce said agreement for the con-

fimation of his title. *Buchannon v. Upshaw*, 1 How. 56, 11: 46

23. A proprietor of lands crossed by a canal which the state has contracted with the Federal government to maintain cannot take advantage of a default of the state in this particular, when he was not a party to the contract. *Walsh v. Columbus, H. Valley & A. R. Co.* 176 U. S. 469, 20 Sup. Ct. Rep. 393, 44: 548

24. A consignee of goods cannot enforce an agreement of the carrier with the collector of customs to pay the consignee the value of goods stolen, lost, or burned, made as a condition to the collector's permit for the goods to remain upon the wharf for forty-eight hours. *Constable v. National S. Co.* 154 U. S. 51, 14 Sup. Ct. Rep. 1062, 38: 903

Cited in *Anglo-American Sav. & L. Asso. v. Campbell*, 13 App. D. C. 599, 43 L.R.A. 627—*Brower & T. Lumber Co. v. Miller*, 28 Or. 570, 52 Am. St. Rep. 807, 43 Pac. 659—*Montgomery v. Rief*, 15 Utah, 502, 50 Pac. 623.

25. By the acts of the legislature of North Carolina, in force in Tennessee, the indorser of a promissory note is entitled to sue in his own name, as on inland bills of exchange in England. *Kirkman v. Hamilton*. 6 Pet. 20, 8: 305

26. A bank may sue upon a note made payable to its agent. *Lyman v. Bank of United States*, 12 How. 225, 13: 965

Cited in *Barlow v. Congregational Soc.* 8 Allen, 462.

27. The contract of the agent is the contract of the principal; and the principal may maintain a suit on the contract, though his name be not disclosed. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12: 465

Cited in *Ford v. Williams*, 21 How. 290, 16 L. ed. 38—*Baldwin v. Bank of Newbury*, 1 Wall. 241, 17 L. ed. 536—*Nash v. Towne*, 5 Wall. 704, 18 L. ed. 530—*The D. R. Martin*, 11 Blatchf. 235, Fed. Cas. No. 1,030—*Camblos v. Philadelphia & R. R. Co.* 4 Brewst. 627, Fed. Cas. No. 2,331—*The Clematis*, Brown Adm. 435, Fed. Cas. No. 2,875—*St. Louis Ins. Co. v. St. Louis, V. & T. H. R. Co.* 6 Rep. 231, Fed. Cas. No. 12,239—*The T. A. Goddard*, 12 Fed. 181—*Prichard v. Budd*, 22 C. C. A. 507, 42 U. S. App. 186, 76 Fed. 713—*Morris v. Chesapeake & O. S. S. Co.* 125 Fed. 66—*Re Weisenberg*, 131 Fed. 521—*Atlanta & W. P. R. Co. v. Texas Grate Co.* 81 Ga. 606, 9 S. E. 600—*Lake Shore & M. S. R. Co. v. Hochstim*, 67 Ill. App. 517—*Second Nat. Bank v. Midland Steel Co.* 155 Ind. 590, 52 L.R.A. 311, 70 N. E. 833—*York v. Stein*, 24 Md. 464—*American Transp. Co. v. Moore*, 5 Mich. 392—*Southern Exp. Co. v. Thornton*, 41 Miss. 224—*Lowenburg v. Jones*, 36 Miss. 692, 31 Am. Rep. 379—*Elkins v. Boston & M. R. Co.* 19 N. H. 342, 51 Am. Dec. 184—*Barter v. Wheeler*, 49 N. H. 28, 6 Am. Rep. 434—*Chandler v. Coe*, 54 N. H. 568—*Kuapp v. United States & C. Exp. Co.* 55 N. H. 353—*Smith v. Felter*, 63 N. J. L. 32, 42 Atl. 1053—*Green v. Clarke*, 12 N. Y. 350—*First Nat. Bank v. Marietta & C. R. Co.* 20 Ohio St. 276, 5 Am. Rep. 655—*Barbre v. Goodale*, 28

Or. 472, 43 Pac. 378—Camblos v. Philadelphia & R. R. Co. 30 Phila. Leg. Int. 149, 9 Phila. 445—Butler v. Western U. Teleg. Co. 62 S. C. 231, 89 Am. St. Rep. 893, 40 S. E. 162—Sires v. Newton, 1 Wash. Terr. 860.

3. Effect of Assignment.

Intervention by Assignee, see *infra*, 290.
Of Bill of Lading, see Admiralty, 340; Bills of Lading, 9.
Suit by Indorsee of Non-negotiable Bill of Exchange, see Bills and Notes, 40.
Right of Assignee of Bond to Sue, see Bonds, 23a.
Right of Partial Assignee to Sue Separately in Federal Courts, see Courts, 1285.
Inability to Sue in Assignee's Name as Ground for Equity Jurisdiction, see Equity, 106, 107.
Assignee of Life Insurance Policy, see Insurance, 695.
Right of Licensee of Patent to Sue for Infringement, see Patents, 1107, 1113, 1115-1118.
Suit by Assignee of Patent for Infringement, see Patents, 1109-1114b.
Jurisdictional Averments in Suit by Assignee, see Pleading, 329, 330, 351.
Suits in Name of Original Private Land Claimant or his Assignee for Confirmation of Claim, see Private Land Claims, 441-443.
See also Assignment, 50; Champerty and Maintenance, 8-11.

Chose in action generally.

Rights of Assignor to Interfere in Suit by Assignee, see Assignment, 68, 69.
What Law Governs as to who must Sue, see Conflict of Laws, 195.
Disability of Creditors after Vesting of Title in Insolvency, see Insolvency, 37.

28. An assignee of a chose in action, on which a complete and adequate remedy exists at law, cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of the demand. *New York Guaranty & I. Co. v. Memphis Water Co.* 107 U. S. 205, 2 Sup. Ct. Rep. 279, 27: 484
Cited in *Smith v. Bourbon County*, 127 U. S. 112, 32 L. ed. 77, 8 Sup. Ct. Rep. 1043.

29. In the District of Columbia a chose in action is not assignable so as to authorize the assignee to sue at law in his own name. This is the rule of the common law. *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. Rep. 914, 36: 790
Cited in *Furnald v. Glenn*, 56 Fed. 373—*Manhattan L. Ins. Co. v. P. J. Willis & Bro.* 8 C. C. A. 506, 23 U. S. App. 103, 60 Fed. 239—*Edmunds v. Illinois C. R. Co.* 80 Fed. 78—*Hale v. Hardon*, 37 C. C. A. 284, 95 Fed. 790—*Hale v. Coffin*, 114 Fed. 570—*American Bonding & T. Co. v. Baltimore & O. S. W. R. Co.* 60 C. C. A. 57, 124 Fed. 871—*Great Western Mtn. & Mfg. Co. v. Harris*, 63 C. C. A. 51, 128 Fed. 327—*Glenn v. Sothoron*, 4 App. D. C. 130—*National Exp. & T. Co. v. Burdette*, 7 App. D. C. 560—

Gordon v. Frazer, 13 App. D. C. 336—*W. G. Armstrong Whitworth & Co. v. Norton*, 15 App. D. C. 229—*Commercial Nat. Bank v. Consumers' Brewing Co.* 16 App. D. C. 198—*Karrick v. Wetmore*, 22 App. D. C. 494—*Wisener v. Myers*, 25 Pittsb. L. J. N. S. 167, 3 Pa. Dist. R. 688—*Osborn v. First Nat. Bank*, 175 Pa. 497, 38 W. N. C. 342, 34 Atl. 858.

Simple-contract debt.

30. [In Pennsylvania, an action cannot be maintained by the assignee of a simple-contract debt, in his own name. *Guthrie v. White* (Pa. Sup. Ct.) 1 Dall. 268, 1: 131]

Promissory notes.

Right of United States to Sue on Indorsement of its Treasurer, see United States, 139.

See also *supra*, 25; Bills and Notes, 270, 271, 310.

31. [The mere sale and delivery of a promissory note payable to order, without any indorsement or other written assignment, does not give the holder a right of action in his own name. *Waters v. Millar* (Ct. Com. Pl. Phila.) 1 Dall. 369, 1: 180]

32. By the law of Mississippi, where the executor, having proved the will of his testator in Kentucky, has assigned a promissory note due from a citizen of Mississippi, the assignee could bring suit without any probate of the will in Mississippi. *Harper v. Butler*, 2 Pet. 239, 7: 410

33. Where the property of the late Bank of the United States had been assigned, a suit in equity might be maintained by the assignees of certain promissory notes, the property of the bank. *Lenox v. Roberts*, 2 Wheat. 373, 4: 264

Cited in *Curran v. Arkansas*, 15 How. 311, 14 L. ed. 709—*Hayward v. Andrews*, 106 U. S. 678, 27 L. ed. 273, 1 Sup. Ct. Rep. 544—*Ontario Bank v. Mumford*, 2 Barb. Ch. 615—*De Ruyter v. St. Peter's Church*, 3 Barb. Ch. 124—*Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 530—*Bacon v. Cohea*, 12 Smedes & M. 526—*Taylor v. Reese*, 44 Miss. 93—*Bank of United States v. Biddle*, 2 Pars. Sel. Eq. Cas. 48.

34. A promissory note made payable to the order of several persons, and indorsed by the real owners, will sustain an action in the name of the indorsee, although it lacks the indorsement of one of those named as payees, who had refused to be considered a party, and was not considered a party by the other payees, in the delivery and negotiation of the note, under 3 and 4 Anne, chap. 9, providing that any person to whom a promissory note that is payable to any person or his order is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain an action for such sum of money, either against the person signing such note or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange. *Pease v. Dwight*, 6 How. 190, 12: 399
Distinguished in *Price v. Brown*, 98 N. Y. 384.
Cited in *Mann v. Second Nat. Bank*, 34 Kan.

750, 10 Pac. 150—Lumberman's Bank v. Pratt, 51 Me. 565—Rogers v. Ware, 2 Neb. 47—Greenville v. Ormand, 51 S. C. 72, 30 L.R.A. 854, 64 Am. St. Rep. 663, 28 S. E. 50.

Accounts.

35. Where an open account has been assigned, with the assent of the debtor, the assignor may maintain a suit thereon in his own name for the use of the assignee; but the debtor may set off his claims against the latter. Winchester v. Hackley, 2 Cranch, 342, 2: 299
Cited in Suydam v. Ewing, 2 Blatchf. 361, Fed. Cas. No. 13,655—Reed v. Bainbridge, 4 N. J. L. 356—Sloan v. Sommers, 14 N. J. L. 512—Wartman v. Yost, 22 Gratt. 606.

36. In Louisiana the equitable owner of an account can sustain an action for it in his own name, and assignments to prove his title may be received in evidence. Martin v. Ihmsen, 21 How. 394, 16: 134

Stock contracts.

Disregard in Equity of Parties Standing as Transferees for Sole Purpose of Speculating in Litigation, see Equity, 297.

See also Bills and Notes, 37.

37. [A contract to buy certain stocks from J. B., or order, is negotiable, on which an assignee can sue in his own name. Reed v. Ingraham (Pa. Sup. Ct.) 3 Dall. 505, 1: 697
 Reed v. Ingraham (Pa. Sup. Ct.) 4 Dall. 169, 1: 786]

38-41. [The assignee of a stock contract, payable "to B or order," may recover thereon in his own name. Reed v. Ingraham (Pa. Sup. Ct.) 3 Dall. 505, 4 Dall. 169, 1: 697, 786]

Fee farm rent.

42. The assignee of a fee farm rent, being an estate of inheritance, is, upon the principle of the common law, entitled to sue therefor in his own name in an action of covenant, although there are no words in the indenture of assignment, assigning the rights, powers, and remedies of distress and re-entry, or the residuary interest in the premises resulting from re-entry, which were given by the original indenture. Scott v. Lunt, 7 Pet. 596, 8: 797

Cited in Northern P. R. Co. v. McClure, 9 N. D. 78, 47 L.R.A. 151, 81 N. W. 52—Wine- man v. Hughson, 44 Ill. App. 25—Demars v. Koehler, 60 N. J. L. 317, 38 Atl. 808—Van Rensselaer v. Hays, 19 N. Y. 98, 75 Am. Dec. 278—Van Rensselaer v. Read, 26 N. Y. 568—Fisher v. Lewis, 1 Clark (Pa.) 428—Robb v. Beaver, 8 Watts & S. 112—Gardiner v. Painter, 3 Phila. 366, 16 Phila. Leg. Int. 141—Juvenal v. Patterson, 10 Pa. 284—Hartung v. Witte, 59 Wis. 294, 18 N. W. 175.

Pre-emption warrant.

43. An assignment of a pre-emption warrant, absolute on its face, does not give to a third person, claiming to be the beneficial owner, a right to sue in his own name. Wilson v. Speed, 3 Cranch, 283, 2: 441

Claim against United States.

See also Embargo and Nonintercourse, 90.

44. Suit maintained by assignee of claim against United States in his own name. United States v. Jones, 131 U. S. 1. 9 Sup. Ct. Rep. 669, 33: 90
Cited in Emmons v. United States, 48 Fed. 45.

45. Claims against the United States cannot be assigned so as to enable the assignee to bring suit in his own name in the court of claims. United States v. Gillis, 95 U. S. 407, 24: 503

Mechanics' Lien.

46. The claim of a mechanic for a statutory lien may be enforced by an assignee by a suit in his own name, under the Montana civil practice act, § 4, providing that actions shall be prosecuted in the name of the real party in interest. Davis v. Bilsland, 18 Wall. 659, 21: 969
Cited in Duncan v. Hawn, 104 Cal. 14, 37 Pac. 626—Midland R. Co. v. Wilcox, 122 Ind. 93, 23 N. E. 506—Merchants v. Ottumwa Water Power Co. 54 Iowa, 454, 6 N. W. 709—Kent v. Muscatine, N. & S. R. Co. 115 Iowa, 386, 88 N. W. 935—Brown v. School Dist. No. 84, 48 Kan. 712, 29 Pac. 1069—Murphy v. Adams, 71 Me. 118, 36 Am. Rep. 290—Wiley v. Connelly, 179 Mass. 364, 60 N. E. 784—Sibley v. Pine County, 31 Minn. 202, 17 N. W. 337—O'Connor v. Current River R. Co. 111 Mo. 193, 20 S. W. 16—Brown v. Chicago, S. F. & C. R. Co. 38 Mo. App. 461—Sutton v. The Victorian, 26 Or. 198, 41 Pac. 1103—McDonald v. Kelly, 14 R. I. 338.

Award.

47. The assignee of an award against a city for land condemned for a street, who is also the purchaser of the land on foreclosure, may maintain an action against the city for the money. Chicago v. Tebbetts, 104 U. S. 120, 26: 655

4. On Matters of Public Right.

Attorney General as Party to File Bill for Enforcement of Charity, see Equity, 173.

Suits to Enforce Forfeiture of Railroad Land Grant, see Public Lands, 295.

United States as Proper Complainant in Suit to Cancel Land Patent, see Public Lands, 1155, 1156.

48. Practice of instituting proceedings in behalf of the public in the name of the Attorney General recognized. Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. Rep. 689, 36: 537
Cited in Muncie Natural Gas Co. v. Muncie, 160 Ind. 106, 60 L.R.A. 828, 66 N. E. 436—State ex rel. Taylor v. Lord, 28 Or. 529, 31 L.R.A. 481, 43 Pac. 471.

49. The United States may be considered the real party in interest, for the purpose of sustaining a bill for the foreclosure of a mortgage, filed in the name of a district attorney, on behalf of the United States, although it is desirable, in all suits in which the United States is plaintiff, that the pro-

ceedings should be in its name unless it is otherwise ordered by Congress. *Benton v. Woolsey*, 12 Pet. 27, 9: 987
Cited in Florida v. Georgia, 17 How. 500, 15 L. ed. 197—*Jecker v. Montgomery*, 18 How. 125, 15 L. ed. 317—*Atty. Gen. v. Rumford Chemical Works*, 2 Bann. & Ard. 314, 32 Fed. 623, Fed. Cas. No. 638a—*Ward v. Hubbard*, 62 Tex. 563.

Editorial notes.

Who may maintain action for public nuisance. 9: 1012
 [Right of municipal corporation to sue to abate nuisance. 51 L.R.A. 657.]

5. In Representative Capacity.

In Admiralty, see Admiralty, 348-353.

Suit by Master of Vessel for Destruction of Cargo, see Bailment, 2.

Suit by Stockholder in Bank, see Banks, 37.
 Impairing Contract Obligations as to, see Constitutional Law, 1513.

Right of Stockholder to Sue in Behalf of Corporation, see Corporations, IX. d, 2.

By one Creditor to Enforce Stockholder's Liability, see Corporations, 691, 692.

Suit by Taxpayer to Prevent Illegal Disposition of County Funds, see Counties, 32.

Diversity of Citizenship as Dependent on Character of Parties, see Courts, V. c, 3, b, 4.

Right of Agent to Sue in His Own Name in Federal Courts, see Courts, 1280.

Taxpayer's Suit to Restrain Issue of Municipal Bonds, see Injunction, 130, 131.

Bill by Bank against Taxation of Shares, see Injunction, 201.

See also supra, 3.

50. A bank required by statute to report, for purpose of taxation, the names of its stockholders and the amounts held by them, and authorized to pay the tax assessed on their shares, and deduct the same from dividends, is entitled to maintain an action to enjoin the collection of a tax alleged to have been wrongfully assessed against the shares of its stockholders. *Cummings v. Merchants Nat. Bank*, 101 U. S. 153, 25: 903
Distinguished in Sloux Falls Nat. Bank v. Swenson, 48 Fed. 623—*People's Nat. Bank v. Marye*, 107 Fed. 577.

Cited in Hills v. National Albany Exch. Bank, 105 U. S. 319, 28 L. ed. 1052—*Hills v. National Albany Exch. Bank*, 12 Fed. 94—*Whitney Nat. Bank v. Parker*, 41 Fed. 403—*Brown v. French*, 80 Fed. 169—*Northwestern Loan & Bkg. Co. v. Muggill*, 7 S. D. 529, 64 N. W. 1122—*Northwestern Loan & Bkg. Co. v. Muggill*, 8 S. D. 161, 65 N. W. 442—*Mercantile Nat. Bank v. New York*, 172 N. Y. 44, 64 N. E. 756—*Mercantile Nat. Bank v. New York*, 27 Misc. 42, 57 N. Y. Supp. 254—*People ex rel. Merchants' Nat. Bank v. Coleman*, 41 Hun. 344.

51. Suit upon a promissory note payable to the president of a company is properly brought in his name, though given in a firm

transaction. *Van Ness v. Forrest*, 8 Cranch, 30, 3: 478

Cited in Bank of United States v. Lyman, 1 Blatchf. 308, Fed. Cas. No. 924—*Pacific Guano Co. v. Holleman*, 4 Woods, 464, 12 Fed. 62—*Pacific Guano Co. v. Holleman*, 4 Woods, 464, 12 Fed. 62—*Hymer v. Ijams*, 56 Md. 473—*Haynes v. Covington*, 13 Smedes & M. 412—*Underhill v. Gibson*, 2 N. H. 357, 9 Am. Dec. 82—*Blanchard v. Ely*, 21 Wend. 345, 34 Am. Dec. 250—*Hunt v. Van Alstyne*, 25 Wend. 612, 25 Am. Dec. 545—*Bank of United States v. Lyman*, 20 Vt. 675—*Collamer v. Foster*, 26 Vt. 759.

52. That advances were made and business done by plaintiffs as agents of others does not defeat their right to recover, where their principals reside out of the state, and plaintiffs are interested to the extent of their commissions. *McCullough v. Roots*, 19 How. 349, 15: 681

53. Under the New York Code of Civil Procedure, one who enters into a contract in his own name, but describes himself as agent for a third party, may maintain an action thereon in his own name. *Albany & R. Iron & Steel Co. v. Lundberg*, 121 U. S. 451, 7 Sup. Ct. Rep. 958, 30: 982
Distinguished in American Exch. Nat. Bank v. Northern P. R. Co. 76 Fed. 130.

Cited in Arkansas Valley Smelting Co. v. Belden Mtn. Co. 127 U. S. 387, 32 L. ed. 248, 8 Sup. Ct. Rep. 1308—*Braithwaite v. Aikins*, 1 N. D. 466, 48 N. W. 354—*Harrigan v. Welch*, 49 Mo. App. 505—*Pelton v. Baker*, 158 Mass. 351, 33 N. E. 394—*Melcher v. Kreiser*, 28 App. Div. 364, 51 N. Y. Supp. 249—*Schipper v. Milton*, 51 App. Div. 524, 64 N. Y. Supp. 687.

54. When a promissory note was given by one member of a company to another member for the use of the company, the promisee can maintain action in his own name against the maker for the use of the company. *Van Ness v. Forrest*, 8 Cranch, 30, 3: 478

55. A municipal corporation cannot maintain an action as a representative of the individual interests of its citizens for injunctive relief against a public nuisance. *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 9: 1012

Editorial note.

[Agent's right of action on contract in his own name for principal. 1 L.R.A.(N.S.) 303.]

Suits by trustees generally.

Suit by *Cestui Que Trust*, see supra, 1, 18, 20.

Bill to Reach Unlawful Preference, see Bankruptcy, 241.

Authority of Assignee in Bankruptcy, see Bankruptcy, 307, 308.

United States as Trustee of Indians, Enjoining Illegal Taxation of their Property, see Injunction, 203.

Suits on Injunction Bond, see Injunction, 249.

Trustee in Mortgage Representing Bondholders, see Mortgage, 158-162.

56. A trustee, having the entire legal

estate in himself, sues in his own right. *Bank of United States v. Deveaux*, 5 Cranch, 61, 3: 38
Cited in *Mead v. Walker*, 15 Wis. 503.

57. Where the legal title to the land was conveyed to plaintiff in trust for himself and others, the suit was necessarily brought in his name. Such a transaction has none of the characteristics of champerty. *Lewis v. Bell*, 17 How. 616, 15: 203

58. When an action is, in its origin, instituted in the name of A for the use of B, the *cestui que use* is, by the law of Maryland, regarded as the real party to the suit. *Gaither v. Farmers & M. Bank*, 1 Pet. 37, 7: 43

Cited in *Stewart v. Baltimore & O. R. Co.* 168 U. S. 449, 42 L. ed. 539, 18 Sup. Ct. Rep. 105.

59. A corporation is the real plaintiff in a suit brought in its name for the use of others on a bond given to it. *Washington use of M'Cue v. Young*, 10 Wheat. 406, 6: 352

Cited in *East St. Louis v. Renshaw*, 153 Ill. 498, 38 N. E. 1048.

60. The cashier of an unincorporated banking association may sue in his own name upon a check held by him, for the use of the bank. *O'Brien v. Smith*, 1 Black. 99, 17: 64

Cited in *Central Trust Co. v. Indiana & L. M. R. Co.* 39 C. C. A. 223, 98 Fed. 669—*Kent v. Dana*, 40 C. C. A. 288, 100 Fed. 64—*Salmon v. Rural Independent School District*, 125 Fed. 241.

61. A second-mortgage trustee was permitted to maintain an action for the purpose of determining the validity of rates established by the state board of railway commissioners. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 420, 14 Sup. Ct. Rep. 1047, 1062, 38: 1014, 1031

Cited in *Southern P. Co. v. Railroad Comrs.* 71 Fed. 439.

Suits in name of state or United States.
Federal Question as to, see Appeal and Error, 2216.

Disability of State to Lend Its Name for Purpose of Suit, see States, 232.

See also *supra*, 48, 49; Interstate Commerce Commission, 5 a; Quo Warranto, 4.

62-3. Where the trustee is dead, having given a bond with sureties to the state for the performance of his duties, a suit at law in the name of the state, for the use of the parties in interest, may be brought against the sureties. *Brent v. Maryland use of Warfield*, 18 Wall. 430, 21: 777

64. An action is maintainable in the name of the United States for the use of an administrator and distributees, to recover a debt due a deceased Indian. *United States use of Mackey v. Cox*, 18 How. 100, 15: 299

Cited in *United States v. Ritchie*, 3 Mackey, 163.

65-6. A private suitor has the right, with-

out express statutory authority, to sue in the name of the United States for his benefit on the bond of a clerk of a circuit court of the United States, given to the United States in compliance with U. S. Rev. Stat. § 795, U. S. Comp. Stat. 1901, p. 619, as amended by act of February 22, 1875, to insure the faithful discharge of his duties and the seasonable record of the decrees, judgments, and determinations of the court, since the court, which by the terms of the statute retains custody of the bond, is to be regarded as the trustee for any party injured by a breach of its conditions. *Howard v. United States use of Stewart*, 184 U. S. 676, 22 Sup. Ct. Rep. 543, 46: 754

Suits in name of Governor.

67. Where the state is a party, it is represented by the governor; and the suit may be in form by him as governor in behalf of the state, where the state is plaintiff; and he must be summoned or notified as the officer representing the state, where the state is defendant. *Kentucky v. Dennison*, 24 How. 66, 16: 717

Cited in *Re Ayers*, 123 U. S. 489, 31 L. ed. 224, 8 Sup. Ct. Rep. 164—*State ex rel. Fleming v. Crawford*, 28 Fla. 509, 14 L.R.A. 263, 10 So. 118—*Ward v. Hubbard*, 62 Tex. 563.

68-9. Suit on a sheriff's bond cannot be controlled by the governor though taken in his name. The real and only plaintiffs are the plaintiffs in execution, who have a legal right to make the bond available for their indemnity. *McNutt use of Leggett v. Bland*, 2 How. 9, 11: 159

Cited in *United States v. Neene*, 127 U. S. 345, 32 L. ed. 124, 8 Sup. Ct. Rep. 1083—*Arkansas v. Ball*, Hempst. 545, Fed. Cas. No. 530—*Heckscher v. Blinney*, 3 Woodb. & M. 338, Fed. Cas. No. 6316—*Harper v. Norfolk & W. R. Co.* 36 Fed. 104—*Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 517, 17 N. W. 31—*Hickman v. Missouri, K. & T. R. Co.* 151 Mo. 656, 52 S. W. 351—*Robb v. Parker*, 3 S. C. N. S. 70.

Suits by receivers.

Suits by Receivers Generally, see Receivers, IV. a.

70. Stockholders of a national bank cannot object that an action by the receiver to enforce their personal liability is not brought by the attorney of the United States, as directed by the act of June 3, 1864, § 56, but by his own attorney. *Kennedy v. Gibson*, 8 Wall. 498, 19: 476

71. A delinquent debtor to a bank, the charter of which has been taken away, cannot show in an action on his promissory note brought by a receiver in the name of the trustee of the bank, that the nominal plaintiff is no longer the real party in interest. The receiver having the beneficial interest in the notes, has the right to use the name of the trustee to compel payment. *Lum v. Robertson use of Ferguson*, 6 Wall. 277, 18: 743

— Editorial note.

Suits by receivers.

35: 797

Administrators.

By Executor of Assignee in Bankruptcy, see Bankruptcy 303, 309, 310.

What Suable as Representative and what as Individual, see Executors and Administrators, 162, 163.

72. An administrator is the representative of creditors authorized to maintain an action to reach property fraudulently transferred, when the assets are insufficient to pay the debts. *Hagan v. Walker*, 14 How. 29, 14: 312

Cited in Central Nat. Bank v. Hume, 3 Mackey, 362, 51 Am. Rep. 780—*Cole v. Terrell*, 71 Tex. 553, 9 S. W. 668.

— Editorial note.

What demands executors and administrators can sue for in individual names.

11: 261

Suits by personal representative or heir.

By Executor of Assignee in Bankruptcy, see Bankruptcy, 303, 309, 310.
See also *infra*, 240.

73. The personal representative of one deceased, and not his heirs-at-law, is the proper complainant in a suit to enforce a trust as to personal property. *Ware v. Galveston City Co.* 111 U. S. 170, 4 Sup. Ct. Rep. 337, 28: 393

74. A bill cannot be brought by heirs of a deceased person to enforce a contract made by him in his lifetime with a railroad company for the construction of its railway and telegraph. The contract formed part of his personal estate, and belonged to his personal representative, and can be enforced only by him. *Crane v. Kansas P. R. Co.* 131 U. S. clxviii. Appx. and, 25: 782

Part suing for all.

Foreclosure Suit by one or more Bondholders, see Mortgage, 297-299.

See also Mortgage, 297.

75. There are cases in which it is competent for persons to come into a court of equity as plaintiffs for themselves and others having similar interests; but the plaintiffs who bring the suit have an interest in the subject-matter, and the others are treated as a kind of coplaintiffs, although they themselves are not named. The rule does not apply to the case of a municipal corporation suing for its citizens to abate a public nuisance. *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 9: 1012
Cited in Piscataqua Nav. Co. v. New York, N. H. & H. R. Co. 89 Fed. 363.

76. A citizen whose property imported is seized by officials under an unconstitutional statute cannot proceed for an injunction on behalf of other persons who may make similar importations. *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. Rep. 262, 41: 648
Cited in Pillsbury-Washburn Flour Mills Co. v. Eagle, 41 L.R.A. 174, 30 C. C. A. 408, 58 U. S. App. 490, 86 Fed. 629—*Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed.

167—*Turner v. Mobile*, 135 Ala. 123, 33 So. 132.

77. A committee of a religious association may maintain a suit for a perpetual injunction against the heirs of the donor of land consecrated for religious purposes and a burying ground, who seek to disturb this possession. *Beatty v. Kurtz*, 2 Pet. 566, 7: 521

78. Persons belonging to a voluntary association, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society, for purposes common to all and beneficial to all. *Beatty v. Kurtz*, 2 Pet. 566, 7: 521

Cited in Callsen v. Hope, 75 Fed. 760—*American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 606—*Ebbinghaus v. Killian*, 1 Mackey, 255—*Whitney v. Mayo*, 15 Ill. 255—*Gullfoll v. Arthur*, 158 Ill. 605, 41 N. E. 1009—*Bingle v. State*, 161 Ind. 370, 68 N. E. 645—*Cahill v. Bigger*, 8 B. Mon. 213—*Bennett v. Morgan*, 112 Ky. 523, 66 S. W. 287—*Mears v. Moulton*, 30 Md. 146—*Associate Reformed Church v. Theological Seminary*, 4 N. J. Eq. 100—*Mannix v. Purcell*, 46 Ohio St. 141, 2 L.R.A. 702, 19 N. E. 572—*Nance v. Busby*, 91 Tenn. 315, 15 L.R.A. 804, 18 S. W. 874.

79. A suit in equity may be brought by part of the stockholders of a dissolved corporation in behalf of all, to establish their title to, and obtain distribution of, the surplus of its assets after its debts have been paid, the number of the parties making it impracticable to bring them all before the court. *Bacon v. Robertson*, 18 How. 480, 15: 499

80-81. A part of the stockholders interested in a trust fund, the names of the others being unknown, may maintain a bill in equity to call the trustee to account, and for a collection and disposal of the property, under the authority of a court of chancery. *Bacon v. Robertson*, 18 How. 480, 15: 499
Cited in Wood v. Draper, 24 Barb. 196.

82. A lessor of cars under an agreement that the lessee shall be responsible for damages thereto while in the latter's possession may bring an action for their loss, for the joint benefit of itself and an insurance company whose policy on the cars provided for subrogation of the company, upon payment of a loss, to the lessor's right to recover against any other person or corporation. *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 11 Sup. Ct. Rep. 490, 35: 97

83. In all cases where a few parties are permitted to sue and defend on behalf of many, care must be taken that parties fairly representing the interest or right involved are brought into the record, so that it may be fully and honestly tried. *Smith v. Swormstedt*, 16 How. 288, 14: 942
Cited in Ayres v. Carver, 17 How. 504, 15 L. ed. 180—*Bacon v. Robertson*, 18 How. 480, 15 L. ed. 504—*United States v. Old*

Settlers, 148 U. S. 480, 37 L. ed. 529, 13 Sup. Ct. Rep. 650—Wallace v. Adams, 204 U. S. 425, 51 L. ed. 552, 27 Sup. Ct. Rep. 363—Northern P. R. Co. v. Slaght, 205 U. S. 133, 51 L. ed. 742, 27 Sup. Ct. Rep. 442—Pond v. Vermont Valley R. Co. 12 Blatchf. 287, Fed. Cas. No. 11,265—Adams v. Douglass County, Fed. Cas. No. 52, 1 Kan. Dassler's ed. 255, Appx.—Terry v. Bank of Cape Fear, 20 Fed. 781—Gamble v. San Diego, 79 Fed. 500—American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union Nos. 1 & 3, 90 Fed. 606—McIntosh v. Pittsburg, 112 Fed. 707—Floyd v. Glibreath, 27 Ark. 703—Wheelock v. First Presby. Church, 119 Cal. 481, 51 Pac. 841—Bates v. Houston, 66 Ga. 202—Macon & B. R. Co. v. Gibson, 85 Ga. 24, 21 Am. St. Rep. 135, 11 S. E. 442—Harmon v. Auditor, 123 Ill. 132, 5 Am. St. Rep. 502, 13 N. E. 161—Mason v. York & C. R. Co. 52 Me. 109—Wood v. Draper, 24 Barb. 196—McIntosh v. Pittsburg, 32 Pittsb. L. J. N. S. 214—Methodist Episcopal Church South v. Clifton, 34 Tex. Civ. App. 253, 78 S. W. 732—Grafton v. Holt, 58 W. Va. 186, 52 S. E. 21—Hammond v. Tarver, 89 Tex. 204, 32 S. W. 511, 34 S. W. 729.

84. Under the rule that where parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others, and a bill may also be maintained against a portion of a numerous body of defendants representing a common interest, certain members of the Methodist Episcopal Church South, which was one of the divisions of the church after the separation, who were some of them supernumerary, and some superannuated, preachers belonging to the traveling connection of that church, and as such had a personal interest in the property, real and personal, belonging to the Book Concern, could properly maintain a bill against members of the Methodist Episcopal Church North, which was the other division of the church, who had the custody and control of the fund in question. *Smith v. Swormstedt*, 16 How. 288, 14: 942
Cited in *Ayres v. Carver*, 17 How. 594, 15 L. ed. 180—*Bacon v. Robertson*, 18 How. 489, 15 L. ed. 504—*United States v. Old Settlers*, 148 U. S. 480, 37 L. ed. 529, 13 Sup. Ct. Rep. 650—*Adams v. Douglass County*, 1 Kan. Dassler's ed. 255 Appx., Fed. Cas. No. 52—*Terry v. Bank of Cape Fear*, 20 Fed. 781—*Gamble v. San Diego*, 79 Fed. 500—*American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 606—*McIntosh v. Pittsburg*, 112 Fed. 707—*Wheelock v. First Presby. Church*, 119 Cal. 481, 51 Pac. 841—*Bates v. Houston*, 66 Ga. 202—*Macon & B. R. Co. v. Gibson*, 85 Ga. 24, 21 Am. St. Rep. 135, 11 S. E. 442—*Harmon v. Auditor*, 123 Ill. 132, 5 Am. St. Rep. 502, 13 N. E. 161—*Wood v. Draper*, 24 Barb. 196—*Hammond v. Tarver*, 89 Tex. 204, 34 S. W. 729.

85. Where the cargo of a boat was partially insured, but not the boat, and both were destroyed in a collision, the owners of the boat may file a libel for the benefit of themselves and of the insurers, who have paid the insurance on the cargo. *Fretz v. Bull*, 12 How. 466, 13: 1068
Cited in *The Commander-in-Chief (La Tour-*

ette v. Burton) 1 Wall. 53, 17 L. ed. 612—*The Potomac (The Potomac v. Cannon)* 105 U. S. 634, 26 L. ed. 1195—*Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 321, 29 L. ed. 878, 6 Sup. Ct. Rep. 750—*Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 88, 35 L. ed. 101, 11 Sup. Ct. Rep. 490—*Burke v. The M. P. Rich.* 1 Cliff. 312, Fed. Cas. No. 2,161—*The Richard Doane*, 2 Ben. 113, Fed. Cas. No. 11,765—*The Sarah J. Weed*, 2 Low. Dec. 558, Fed. Cas. No. 12,350—*Minturn v. Alexandre*, 5 Fed. 119—*The Frank G. Fowler*, 8 Fed. 384—*The Anchoria*, 9 Fed. 841—*The Grand Republic*, 10 Fed. 400—*The Sydney*, 27 Fed. 122—*Merrick v. Brainard*, 38 Barb. 590.

— Editorial notes.

Action in equity by one for benefit of others interested. 14: 942; 15: 499
[Plaintiff's control of suit brought for all similarly situated. 46 L.R.A. 839.]

b. Joinder.

Joinder of Causes of Action, see Action or Suit, 60-66.

Right of Parties to Several Contract to Sue Separately, see Action or Suit, 55.

In Admiralty, see Admiralty, 354-357.

Of Appellants or Plaintiffs in Error, see Appeal and Error, IV. b, 2, a.

First Objecting on Appeal to Unnecessary Joinder, see Appeal and Error, 4659.

In Confiscation Proceedings, see Confiscation and Sequestration, 77.

Necessity for Total Diversity to Support Federal Jurisdiction, see Courts, 678-687.

Who are Proper and Who Necessary with Respect to Federal Jurisdiction, see Courts, 765-769.

Rules for Joinder in Federal Courts, see Courts, 1283-1285.

Joint Action by Husband and Wife, see Husband and Wife, 128, 129.

Multifariousness or Misjoinder in Pleading Generally, see Pleading, I. t.

Who Must Unite in Petition for Removal of Cause, see Removal of Causes, 270-272.

In Bill of Review, see Review, 37.

86. As a general rule, both at law and in equity, a suit upon a written instrument must be brought in the name of all who are formal parties to it, and who retain an interest in it. *Nashville & D. R. Co. v. Orr*, 18 Wall. 471, 21: 810

86a. Complainant in a bill in equity to abate a public nuisance, filed by one who has sustained special damage, need not join his partners in the prosecution, or any other person who has sustained injury. *Mississippi & M. R. Co. v. Ward*, 2 Black. 485, 17: 311
Cited in *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 87—*New York, N. H. & H. R. Co. v. Piscataqua Nav. Co.* 47 C. C. A. 227, 103 Fed. 95—*Jackson v. State Belt Electric Street R. Co.* 7 Northampton Co. Rep. 289.

87. The general owner of property, and a sheriff who had it in possession by attachment, may be joined as plaintiffs in an ac-

tion of conversion. *Geekie v. Kirby Carpenter Co.* 106 U. S. 379, 1 Sup. Ct. Rep. 315, 27: 157
Cited in First Nat. Bank v. Knoll, 7 Kan. App. 356, 52 Pac. 619.

88. Every seaman has a right to sue severally for his own wages in the courts of common law; and a joint action cannot be maintained in such courts by any number of seamen for wages accruing under the same shipping articles for the same voyage. *Oliver v. Alexander*, 6 Pet. 143, 8: 349

89. Plaintiffs severally claiming the return of money paid by them on distinct promissory notes given to the defendants cannot join their claims in the same bill. *Yeaton v. Lenox*, 8 Pet. 123, 8: 889
Cited in Baker v. Portland, 5 Sawy. 571, Fed. Cas. No. 777—*The Merchant, Abb. Adm.* 9, Fed. Cas. No. 9,434—*Bestor v. Barker*, 106 Ala. 253, 17 So. 389—*Youngblood v. Sexton*, 32 Mich. 411, 20 Am. Rep. 654—*Winslow v. Jenness*, 64 Mich. 90, 30 N. W. 905—*Brown v. Bedford City Land & Improv. Co.* 91 Va. 39, 20 S. E. 968—*Baker v. Rinehard*, 11 W. Va. 249—*Williams v. County Court*, 26 W. Va. 499, 53 Am. Rep. 94—*Day v. National Mut. Bldg. & L. Assn.* 53 W. Va. 553, 44 S. E. 779.

90. Where the receiver of a fund brings suit to compel payment of the amount of certain bonds by the purchaser of a railroad, the holders of the bonds cannot be joined with him. *Doggett v. Florida R. Co.* 99 U. S. 72, 25: 301
Cited in Southern Exp. Co. v. Western North Carolina R. Co. 99 U. S. 199, 25 L. ed. 320—*Atlantic Trust Co. v. Dana*, 62 C. C. A. 670, 128 Fed. 222.

91. The joinder by amendment of the assignee of a policy of insurance as a party plaintiff in a suit in Porto Rico by a mortgage creditor of the assured to enforce his rights under the mortgage to the avails of the insurance cannot be deemed a clear abuse of the trial court's discretion, where the assignee's rights are alleged to be subordinate to those of the mortgage creditor, in view of the provision of the Law of Civil Procedure for Cuba and Porto Rico, art. 156, that "causes of action against several persons, or by several persons against one, arising from the same source of title, or based upon the same cause of action, may be joined and brought in one action." *Royal Ins. Co. v. Miller*, 199 U. S. 353, 26 Sup. Ct. Rep. 46, 50: 226

Joint obligees.

See also *infra*, 100.

92. All the plaintiffs in a suit must be competent to sue, or the action cannot be maintained. *Marsteller v. McClean*, 7 Cranch, 156, 3: 300
Cited in Griffith v. Huston, 7 J. J. Marsh. 390—*Pringle v. Gaw*, 5 Serg. & R. 537.

93. One of several joint obligees cannot alone bring suit upon the obligation. *Calvert v. Bradley*, 16 How. 580, 14: 1066
Farni v. Tesson, 1 Black, 309, 17: 67
Cited in United States use of McCarthy v. O'Leary, 8 Mackey, 125—*Cleaves v. Lord*, U. S. Dig.—265

3 Gray, 68—*Franklin v. National Ins. Co.* 43 Mo. 495—*Peerce v. Athey*, 4 W. Va. 26.

94. Where a contract is joint and not several, all the joint obligees who are alive must be joined as plaintiffs. *Farni v. Tesson*, 1 Black, 309, 17: 67
Cited in Dana v. Parker, 27 Fed. 264.

95. If plaintiffs are jointly interested in the subject of the action, it is quite immaterial in what proportions they may be concerned. *Lyon v. Bertram*, 20 How. 149, 15: 847

96. Where a lease was made by several owners, reserving rent to each in proportion to his interest, and the lessee covenanted to keep the premises in good repair, and to surrender them in like repair, this covenant was joint as respected the lessors; and one of them cannot maintain an action for its breach without joining the other lessors. *Calvert v. Bradley*, 16 How. 580, 14: 1066

Creditors in Attachment.

97. Several creditors may not unite in a suit to attach the effects of an absent debtor, but they may file their separate claims, and be allowed payment out of the same fund. *Yeaton v. Lenox*, 8 Pet. 123, 8: 889
Cited in Corrothers v. Sargent, 20 W. Va. 359.

Creditors' bill.

Bill to Reach Unlawful Preference, see Bankruptcy, 241.

98. Two mercantile firms may unite as complainants in equity in a creditors' bill. *Nelson v. Hill*, 5 How. 127, 12: 81
Cited in Brown v. Buckner, 86 Va. 616, 10 S. E. 882.

— Editorial note.

Judgment creditors may unite in a creditors' bill. 18: 604

Covenant.

See also *supra*, 96; Contracts, 15.

99. Where there are several covenants,—as, for instance, to pay to A \$100, and B \$200,—each may sue alone on his several covenant. *Farni v. Tesson*, 1 Black, 309, 17: 67

100. An action of covenant cannot be brought by one of several lessors who were joint owners of real property, on a covenant by the lessee to keep the premises in repair, although the interests of the lessors were separately set out in the lease, and the rent was reserved to them severally in proportion thereto. *Calvert v. Bradley*, 16 How. 580, 14: 1066

Ejectment.

101. All those against whom a joint judgment in ejectment has been rendered may unite in a bill in equity to enjoin the judgment and assert their claims under either or both of two separate titles, where some of the complainants held under both titles. *Stephens v. McCargo*, 9 Wheat. 502, 6: 145

102. Tenants in common in Tennessee may declare in ejectment on a joint demise. *Poole v. Fleeger*, 11 Pet. 185, 9: 680

103. In Vermont, devisees of a tract of

land, to be equally divided between them, may maintain a joint action of ejectment. *Hicks v. Rogers*, 4 Cranch, 165, 2: 583
Cited in Lytle v. State, 17 Ark. 650—*Kellogg v. Kellogg*, 6 Barb. 132—*McFarland v. Stone*, 17 Vt. 175, 44 Am. Dec. 325.

II. Defendants.

a. Proper and Necessary Parties.

1. In General.

Rule in Equity to Look to Real Parties rather than Nominal, see Equity, 296.
 Parties in Injunction Proceedings, see Injunction, 198-208.
 Dismissal for Lack of, see Dismissal and Discontinuance, 33-39.
 Conclusiveness of Decree of Dismissal for Lack of, see Judgment 313, 314.
 Dismissal Without Prejudice for Lack of, see Judgment, 72.
 Effect of Lack of, on Validity of Judgment, see Judgment, 140.
 Arrest of Judgment for Lack of, see Judgment, 1178.
 In Mandamus Proceeding, see Mandamus, III. b, 2.
 Waiver of Lack of, see Pleading, 32, 35, 49, 61.
 Proper Mode of Raising Objection of Lack of, see Pleading, 601.
 Mode of Raising Objection to Non-Joinder, see Pleading, 847.
 General Demurrer for Failure to Join Joint Debtor, see Pleading, 857.
 Defect of Parties as Ground for Review, see Review, 12, 13.
 Retrospective Statute as to, see Statutes, 572.

104. In all cases where jurisdiction depends on the party, it is the party named in the record. *Osborn v. Bank of United States*, 9 Wheat. 738. 6: 204
Limited in Re Ayers, 123 U. S. 487, 31 L. ed. 223, 8 Sup. Ct. Rep. 164.

Distinguished in Dodge v. Woolsey, 18 How. 845, 15 L. ed. 408.

Cited in McNutt v. Bland, 2 How. 22, 11 L. ed. 164—*Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 178, 20 L. ed. 180—*Rice v. Houston*, 13 Wall. 67, 20 L. ed. 484—*Minnesota v. Northern Securities Co.* 184 U. S. 237, 46 L. ed. 516, 22 Sup. Ct. Rep. 308—*Lee v. Kaufman*, 3 Hughes, 124, Fed. Cas. No. 8,191—*United States v. Rhodes*, 1 Abb. (U. S.) 33, Fed. Cas. No. 16,151—*Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 747, 2 Inters. Com. Rep. 328, 35 Fed. 869—*Harper v. Norfolk & W. R. Co.* 36 Fed. 104—*Reinach v. Atlantic & G. W. R. Co.* 58 Fed. 38—*Re Stutsman County*, 88 Fed. 342—*Sharps' Rifle Mfg. Co. v. Rowan*, 34 Conn. 332, 91 Am. Dec. 728—*Robb v. Parker*, 3 S. C. N. S. 71.

105. There are three classes of parties to suits in equity: There is a class whose relations to the suit are such that the court will take no account of the omission to make them parties; there is another class whose

relations are such that the court, before deciding the case, will require them to be brought in, if possible, and if not, will administer such relief as it may between the parties before it; and there is a third class, whose interests in the subject-matter of the suit are so bound up with those of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. *Barney v. Baltimore*, 6 Wall. 280, 18: 825

Cited in Traders' Nat. Bank v. Campbell, 14 Wall. 94, 20 L. ed. 833, 6 Nat. Bankr. Reg. 355—*Horn v. Lockhart*, 17 Wall. 579, 21 L. ed. 660—*Ober v. Gallagher*, 93 U. S. 205, 23 L. ed. 831—*Kendig v. Dean*, 97 U. S. 425, 27 L. ed. 1062—*Cunningham v. Macon & B. R. Co.* 109 U. S. 456, 27 L. ed. 996, 3 Sup. Ct. Rep. 292—*Swan Land & Cattle Co. v. Frank*, 148 U. S. 611, 37 L. ed. 580, 13 Sup. Ct. Rep. 691—*Cole Silver Min. Co. v. Virginia & G. H. Water Co.* 1 Sawy. 687, Fed. Cas. No. 2,990—*Litchfield v. Register*, Woolw. 306, Fed. Cas. No. 8,388—*Myers v. Dorr*, 13 Blatchf. 28, Fed. Cas. No. 9,088—*First Nat. Bank v. Smith*, 6 Fed. 210—*United States v. Central P. R. Co.* 8 Sawy. 93, 11 Fed. 458—*United States v. Central P. R. Co.* 8 Sawy. 93, 11 Fed. 458—*Bell v. Donohoe*, 8 Sawy. 437, 17 Fed. 711—*Hazard v. Durant*, 19 Fed. 476—*Goldsmith v. Gilliland*, 10 Sawy. 619, 24 Fed. 157—*Goldsmith v. Gilliland*, 10 Sawy. 618, 24 Fed. 157—*Bland v. Fleeman*, 29 Fed. 672—*Froment v. Duclos*, 30 Fed. 386—*Jessup v. Illinois C. R. Co.* 36 Fed. 734—*Gross v. George W. Scott Mfg. Co.* 48 Fed. 40—*Consolidated Water Co. v. San Diego*, 35 C. A. 634, 93 Fed. 851—*West v. East Coast Cedar Co.* 41 C. C. A. 530, 101 Fed. 618—*Ban v. Columbia Southern R. Co.* 54 C. C. A. 413, 117 Fed. 27—*Mackay v. Gabel*, 117 Fed. 877—*Weightman v. Washington Cmtic Co.* 4 App. D. C. 154—*Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 43 S. C. 166, 20 S. E. 1002—*Smith v. Ford*, 48 Wis. 145, 2 N. W. 134.

106. In equity there are three classes of parties: 1. Formal parties. 2. Persons having an interest in the controversy, commonly called necessary parties. 3. Persons with such an interest in the controversy that a final decree would affect the same, or be inequitable or unconscionable. *California v. Southern P. Co.* 157 U. S. 229, 15 Sup. Ct. Rep. 591, 39: 683

Cited in South Dakota v. North Carolina, 192 U. S. 352, 48 L. ed. 475, 24 Sup. Ct. Rep. 260—*Roberts v. Bradfield*, 12 App. D. C. 459—*State ex rel. King v. Hall*, 47 Neb. 583, 66 N. W. 642—*Stallcup v. Tacoma*, 13 Wash. 153, 52 Am. St. Rep. 25, 42 Pac. 541—*Moore v. Jennings*, 47 W. Va. 189, 34 S. E. 793—*Castle v. Madison*, 113 Wis. 354, 80 N. W. 156.

107. The lack of essential parties precludes a court of equity from proceeding to make a decree with reference to the parties before it. *Russell v. Clark*, 7 Cranch. 69, 3: 271
Cited in Shields v. Barrow, 17 How. 139, 15 L. ed. 160—*Florida v. Georgia*, 17 How. 508, 15 L. ed. 200—*Ribon v. Chicago*, R. I. & P. R. Co. 16 Wall. 451, 21 L. ed. 369—*Christian v. Atlantic & N. C. R. Co.* 133 U. S. 241, 33 L. ed. 592, 10 Sup. Ct. Rep. 260—*California v. Southern P. Co.* 157 U. S. 249, 39 L. ed. 691, 15 Sup. Ct. Rep. 591.

—Gray v. Larrimore, 4 Sawy. 650, Fed. Cas. No. 5,721—Poole v. Nixon, 9 Pet. 775 Appx., Fed. Cas. No. 11,270—Plquet v. Swan, 5 Mason, 571, Fed. Cas. No. 11,135—Reese v. Bradford, 13 Ala. 844—Porter v. Clements, 3 Ark. 382—Eyster v. Gaff, 2 Colo. 241—Hightower v. Mustain, 8 Ga. 511—Griffin v. Lovell, 42 Misc. 404—Dinsmore v. Atlantic & P. R. Co. 46 How. Pr. 203—Steinbach v. Prudential Ins. Co. 62 App. Div. 143, 70 N. Y. Supp. 809—Mahr v. Norwich Union F. Ins. Soc. 127 N. Y. 461, 28 N. E. 391—Lynch v. United States, 13 Okla. 158, 73 Pac. 1095—Beasley v. Shively, 20 Or. 510, 26 Pac. 846.

108. So long as a board of supervisors defends a suit to have water rates fixed by them declared void for unreasonableness, there is a sufficient party respondent to enable the court to consider the merits of the controversy, notwithstanding the default of those who set in motion the proceedings before the board. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. Rep. 571, 47: 892
Cited in *Spring Valley Waterworks v. San Francisco*, 124 Fed. 602.

109. A Federal circuit court was given no power either by the act of February 28, 1839, or by the 47th rule for the equity practice of these courts, to make a decree in equity in the absence of an indispensable party, whose rights must necessarily be affected by such decree. *Shields v. Barrow*, 17 How. 130, 15: 158
Cited in *Colton v. Millaudon*, 19 How. 115,

15 L. ed. 576—*Christmas v. Russell* (*Christmas v. Gaines*) 14 Wall. 80, 20 L. ed. 763—*Ober v. Gallagher*, 93 U. S. 204, 23 L. ed. 831—*Kendig v. Dean*, 97 U. S. 425, 24 L. ed. 1062—*California v. Southern P. Co.* 157 U. S. 249, 39 L. ed. 691, 15 Sup. Ct. Rep. 591—*Abbot v. American Hard Rubber Co.* 4 Blatchf. 491, Fed. Cas. No. 9—*Alexander v. Horner*, 1 McCrary, 644, Fed. Cas. No. 169—*Barney v. Baltimore*, 1 Hughes, 121, Fed. Cas. No. 1,029—*Cole Silver Min. Co. v. Virginia & G. H. Water Co.* 1 Sawy. 476, Fed. Cas. No. 2,989—*Cookingham v. Ferguson*, 8 Blatchf. 495, 4 Nat. Bankr. Reg. 642, Fed. Cas. No. 3,182—*Cross v. De Valle*, Fed. Cas. No. 3,431, 21 Month L. Rep. 737—*Drake v. Goodridge*, 6 Blatchf. 152, Fed. Cas. No. 4,062—*Florence Sewing Mach. Co. v. Singer Mfg. Co.* 8 Blatchf. 128, 4 Fisher, Pat. Cas. 345, Fed. Cas. No. 4,884—*Re Frazer*, 18 Alb. L. J. 353, Fed. Cas. No. 5,068—*Goodyear v. Bourn*, 3 Blatchf. 268, Fed. Cas. No. 5,561—*Greene v. Sisson*, 2 Curt. C. C. 177, Fed. Cas. No. 5,768—*Kellum v. Emerson*, 2 Curt. C. C. 84, Fed. Cas. No. 7,669—*Myers v. Dorr*, 13 Blatchf. 28, Fed. Cas. No. 9,988—*Stenchfield v. Robinson*, 2 Haskell, 386, Fed. Cas. No. 13,359a—*Taylor v. Rockefeller*, 18 Am. L. Reg. N. S. 305, Fed. Cas. No. 13,802—*Tobin v. Walkinshaw*, McAll. 30, Fed. Cas. No. 14,068—*Tuckerman v. Bigelow*, 21 Month. L. Rep. 209, Fed. Cas. No. 14,228—*Winter v. Ludlow*, 3 Phila. 465, Fed. Cas. No. 17,891—*First Nat. Bank v. Smith*, 6 Fed. 216—*United States v. Central P. R. Co.* 8 Sawy. 92, 11 Fed. 458—*Judson v. Courier Co.* 15 Fed. 545—*Santa Clara Min. Asso. v. Quicksilver Min. Co.* 8 Sawy. 334, 17 Fed. 659—*New Jersey Zinc & Iron Co. v. Trotter*, 18 Fed. 339—*Oberlin College v. Blair*, 70 Fed. 420—*Consolidated Water Co. v. Babcock*,

76 Fed. 248—*Donovan v. Camplon*, 29 C. C. A. 32, 56 U. S. App. 388, 85 Fed. 72—*Woodward v. McConaughy*, 45 C. C. A. 604, 106 Fed. 760—*Watson v. Bonfile*, 53 C. C. A. 547, 116 Fed. 167—*Ban v. Columbia Southern R. Co.* 54 C. C. A. 413, 117 Fed. 27—*Einstein v. Georgia S. & F. R. Co.* 120 Fed. 1010—*United States v. Northern P. R. Co.* 67 C. C. A. 273, 134 Fed. 719—*London, P. & A. Bank v. Smith*, 101 Cal. 421, 35 Pac. 1027—*Treadway v. Schnauber*, 1 Dak. 284, 46 N. W. 464—*First Nat. Bank v. Henry*, 156 Ind. 8, 58 N. E. 1057—*Tod v. Crisman*, 123 Iowa, 699, 99 N. W. 686—*Stafford v. Twitchell*, 33 La. Ann. 524—*Union Trust Co. v. Detroit & River St. C. R. Co.* 127 Mich. 268, 86 N. W. 788—*McPike v. Wells*, 54 Miss. 155—*Moore v. Summerville*, 80 Miss. 339, 32 So. 204—*Hiles v. Rule*, 121 Mo. 256, 25 S. W. 959—*Lilly v. Menke*, 126 Mo. 215, 28 S. W. 643—*Aull v. Day*, 133 Mo. 347, 34 S. W. 578—*Johnson v. Johnson*, 170 Mo. 57, 50 L.R.A. 755, 70 S. W. 241—*Rusling v. Brodhead*, 55 N. J. Eq. 204, 35 Atl. 841—*Winter v. Ludlow*, 16 Phila. Leg. Int. 332, 3 Phila. 465—*Taylor v. Rockefeller*, 6 W. N. C. 286—*Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 7 Pa. Dist. R. 289—*Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 43 S. C. 166, 20 S. E. 1002—*Stallcup v. Tacoma*, 13 Wash. 153, 52 Am. St. Rep. 25, 42 Pac. 541.

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2. Who are Proper and Necessary Parties.

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See also supra, 9.

110. Who shall be made parties is a matter more or less discretionary. *Elmendorf v. Taylor*, 10 Wheat. 152, 6: 289

Cited in *Suburban R. Co. v. Chicago*, 204 Ill. 319, 68 N. E. 422—*Demarest v. Holdeman*,

157 Ind. 474, 62 N. E. 17—*Colt v. Lasnier*, 9 Cow. 330—*Hughes v. Brown*, 88 Tenn. 590, 8 L.R.A. 483, 13 S. W. 286.

111. Who shall be made parties to the matter is more or less discretionary; no one need be made a party against whom, if the case is brought to a hearing, the plaintiff can have no decree. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7: 152

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Necessary parties to suit for specific performance. 4: 242

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Parties materially interested in general.

Necessity of Original Parties in Bill to Enjoin a Judgment, see Injunction, 199.

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Right of Interested and Necessary Parties to Removal of Cause, see Removal of Causes, 69-76, 163-169.

See also *supra*, 84.

112. A court of equity will not make a decree which is to operate directly upon the parties in interest, without affording them an opportunity to be heard. *Marshall v. Beverley*, 5 Wheat. 313, 5: 97

Cited in Ribon v. Chicago. R. I. & P. R. Co. 16 Wall. 451, 21 L. ed. 369—*Phillips v. Mariner*, 5 Biss. 28. Fed. Cas. No. 11,105—*Wilson v. Castro*, 31 Cal. 427—*Bryant v. Russell*, 23 Pick. 523—*Hannegan v. Roth*, 12 Wash. 697, 44 Pac. 256.

113. A court of chancery will not make a decree unless all those who are substantially interested and can be joined are made parties to the suit. *Osborn v. Bank of United States*, 9 Wheat. 738, 6: 204

Cited in Vattier v. Hinde, 7 Pet. 263, 8 L. ed. 679—*Shields v. Barrow*, 17 How. 140, 15 L. ed. 161—*Barney v. Baltimore*, 6 Wall. 285, 18 L. ed. 826—*United States v. Parrott*, McAll. 281, Fed. Cas. No. 15,998—*Conolly v. Wells*, 33 Fed. 208—*Montgomery v. Charleston*, 48 L.R.A. 509, 40 C. C. A. 115, 99 Fed. 833—*Mackay v. Gabel*, 117 Fed. 878.

114. No court can adjudicate directly upon a person's rights without the party being directly or constructively before the court. *Mallow v. Hinde*, 12 Wheat. 193, 6: 599

Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. Rep. 422, 33: 792

Cited in Shields v. Barrow, 17 How. 141, 15 L. ed. 161—*Barney v. Baltimore*, 6 Wall. 285, 18 L. ed. 826—*Minnesota v. Northern Securities Co.* 184 U. S. 237, 46 L. ed. 516, 22 Sup. Ct. Rep. 308—*Society for Propagation of Gospel v. Hartland*, 2 Palme. 543, Fed. Cas. No. 13,155—*Stenchfield v. Robinson*, 2 Haskell, 386, Fed. Cas. No. 13,359a—*Tobin v. Walkinshaw*, McAll. 29, Fed. Cas. No. 14,068—*United States v. Parrott*, McAll. 281, Fed. Cas. No. 15,998—*Detweiler v. Holdersbaum*, 42 Fed. 338—*Chadbourne v. Coe*, 45 Fed. 826—*Mangels v. Donau Brewing Co.* 53 Fed. 514—*Davis v. Davis*, 89 Fed. 538—*Taylor v. Southern P. Co.* 122 Fed. 153—*State v. Anderson*, 5 Kan. 116—*Walker v. Cambern*, 5 Kan. App. 548, 47 Pac. 980—*Adler v. Wolf*, 36 La. Ann. 175—*Greiner v.*

Klein, 28 Mich. 18—*McPike v. Wells*, 54 Miss. 155—*Stallcup v. Tacoma*, 13 Wash. 153, 52 Am. St. Rep. 25, 42 Pac. 541—*Moore v. Jennings*, 47 W. Va. 188, 34 S. E. 793.

115. A final decree in equity, or an interlocutory decree which, in a great measure, decides the merits of the cause, cannot be pronounced until all the parties to the bill and all the parties in interest are before the court. *Dandridge v. Washington*, 2 Pet. 370, 7: 454

Cited in Cross v. De Valle, 21 Month. L. Rep. 737, Fed. Cas. No. 3,431.

116. An interlocutory decree in equity, which in a great measure decides the merits of the cause, cannot be pronounced until all the parties are before the court. *Conn v. Penn*, 5 Wheat. 424, 5: 125

Cited in Badger v. Badger, 1 Cliff. 244, Fed. Cas. No. 717—*Wilson v. Castro*, 31 Cal. 427—*Lynch v. United States*, 13 Okla. 153, 73 Pac. 1095—*Moore v. Jennings*, 47 W. Va. 190, 34 S. E. 793.

117. The rule that no court can adjudicate directly upon the rights of one who is neither actually nor constructively before it, applies to all courts of equity, Federal as well as state, notwithstanding the limited jurisdiction of the Federal courts. *Mallow v. Hinde*, 12 Wheat. 193, 6: 599

118. In equity, all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all. *Gregory v. Stetson*, 133 U. S. 579, 10 Sup. Ct. Rep. 422, 33: 792

Christian v. Atlantic & N. C. R. Co. 133 U. S. 233, 10 Sup. Ct. Rep. 260, 33: 589

Cited in Golden v. Bruning, 72 Fed. 4—*Consolidated Water Co. v. Babcock*, 76 Fed. 249—*Consolidated Water Co. v. San Diego*, 35 C. C. A. 634, 93 Fed. 851—*American Surety Co. v. Lawrenceville Cement Co.* 96 Fed. 31—*Western U. Tele. Co. v. Pennsylvania R. Co.* 120 Fed. 383—*Walte v. Larocque*, 12 App. D. C. 418—*Robinson v. Howe*, 35 Fla. 81, 17 So. 368—*Gregory v. Merchants' Nat. Bank*, 171 Mass. 70, 50 N. E. 520.

119. In chancery proceedings all persons materially interested in a suit ought to be parties, that a complete decree may be made, except when a decree in relation to the subject-matter in litigation can be made without a person who has an interest having his interest in any way concluded by the decree. *Story v. Livingston*, 13 Pet. 359, 10: 200

Cited in Chicago. R. I. & P. R. Co. v. Howard, 7 Wall. 415, 19 L. ed. 122—*Ribon v. Chicago. R. I. & P. R. Co.* 16 Wall. 451, 21 L. ed. 369—*Nashville & D. R. Co. v. Orr*, 18 Wall. 474, 21 L. ed. 811—*Carey v. Brown*, 92 U. S. 172, 23 L. ed. 470—*Vetterlein v. Barnes*, 124 U. S. 172, 31 L. ed. 401, 8 Sup. Ct. Rep. 441—*Florence Sewing Mach. Co. v. Singer Mfg. Co.* 8 Blatchf. 127, 4 Fisher. Pat. Cas. 344, Fed. Cas. No. 4,884—*Marsh v. Whitmore*, 1 Haskell, 405, Fed. Cas. No. 9,122—*Myers v. Dorr*, 13 Blatchf. 28, Fed. Cas. No. 9,988—*The Hudson*, 15 Fed. 171—*Golden v. Bruning*, 72 Fed. 4—*Godchaux v. Morris*, 57 C. C. A. 436, 121 Fed. 494—

Weightman v. Washington Critic Co. 4 App. D. C. 154—*Moore v. Jennings*, 47 W. Va. 190, 34 S. E. 793—*Smith v. Ford*, 48 Wis. 145, 2 N. W. 134.

120. All persons materially interested in the subject of a suit in chancery ought to be made parties, either plaintiffs or defendants; but this is a rule established for the convenient administration of justice, and is more or less within the discretion of the court, and it should be restricted to parties whose interests are in the issue and to be affected by the decree. The relief granted will always be so modified as not to affect the interests of others. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7: 152

Cited in Harrison v. Urann, 1 Story, 66, Fed. Cas. No. 6,146—*Society for Propagation of Gospel v. Hartland*, 2 Paine, 542, Fed. Cas. No. 13,155—*Godchaux v. Morris*, 57 C. C. A. 436, 121 Fed. 484—*Lucas v. Bank of Darien*, 2 Stew. (Ala.) 326—*Wilson v. Castro*, 31 Cal. 427—*Treadway v. Schnauber*, 1 Dak. 284, 46 N. W. 404—*Weightman v. Washington Critic Co.* 4 App. D. C. 154—*State ex rel. Hart v. Burke*, 33 La. Ann. 505—*Walsh v. Smyth*, 3 Bland. Ch. 26—*Burrill v. Garst*, 19 R. I. 39, 31 Atl. 436—*Smith v. Ford*, 48 Wis. 145, 2 N. W. 134.

121. All persons interested in a suit in equity, and whose rights will be directly affected by the decree, must be made parties to the suit, unless they are too numerous, or some of them are out of the jurisdiction, or not in being; and in every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all. *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. Rep. 652, 28: 1015

Williams v. Bankhead, 19 Wall. 563, 22: 184

Cited in Christian v. Atlantic & N. C. R. Co. 133 U. S. 241, 33 L. ed. 592, 10 Sup. Ct. Rep. 260—*Land Co. v. Elkins*, 22 Blatchf. 204, 20 Fed. 546—*Goldsmith v. Gilliland*, 10 Sawy. 618, 24 Fed. 157—*Harrison & H. Iron Co. v. Council Bluffs City Waterworks Co.* 25 Fed. 172—*Bland v. Fleeman*, 29 Fed. 672—*Hays v. Humphreys*, 37 Fed. 284—*Van Bibber v. Williamson*, 37 Fed. 750—*McClaskey v. Barr*, 42 Fed. 614—*Central Trust Co. v. Florida R. & Nav. Co.* 43 Fed. 758—*Chadbourn v. Coe*, 45 Fed. 827—*Chaffin v. Hull*, 49 Fed. 526—*Chadbourn v. Coe*, 2 C. C. A. 329, 10 U. S. App. 78, 51 Fed. 481—*Gray v. Havemeyer*, 3 C. C. A. 505, 10 U. S. App. 456, 53 Fed. 178—*Franklin Sav. Bank v. Taylor*, 4 C. C. A. 67, 9 U. S. App. 406, 53 Fed. 867—*Marco v. Hicklin*, 6 C. C. A. 14, 15 U. S. App. 56, 56 Fed. 553—*Columbia Finance & T. Co. v. Kentucky Union R. Co.* 9 C. C. A. 267, 22 U. S. App. 54, 60 Fed. 796—*Union Mill & Mln. Co. v. Dangberg*, 81 Fed. 90—*Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 75, 49 U. S. App. 523, 82 Fed. 126—*Donovan v. Camplon*, 29 C. C. A. 32, 56 U. S. App. 388, 85 Fed. 72—*Lawrence v. Times Printing Co.* 90 Fed. 28—*American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 606—*Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 596, 105 Fed. 825—*Woodward v. McConaughy*, 45 C. C. A. 604, 106 Fed. 760—*Ban v. Columbia Southern R. Co.* 54 C. C. A. 413, 117 Fed. 27—*Mackay v. Gabel*, 117 Fed. 878—*Western U. Teleg. Co. v. Pennsylvania R. Co.* 120

Fed. 383—*Stevens v. Smith*, 61 C. C. A. 629, 126 Fed. 711—*Allen v. Tritch*, 5 Colo. 227—*Pollard v. Lathrop*, 12 Colo. 176, 20 Pac. 251—*Weightman v. Washington Critic Co.* 4 App. D. C. 154—*Sanche v. Electro-llibration Co.* 4 App. D. C. 462—*Masters v. Templeton*, 92 Ind. 452—*Hale v. Hale*, 146 Ill. 260, 20 L.R.A. 257, 33 N. E. 858—*Demarest v. Holdeman*, 157 Ind. 474, 62 N. E. 17—*State ex rel. Hart v. Burke*, 33 La. Ann. 505—*Wilhelm v. Byles*, 60 Mich. 575, 29 N. W. 113—*Gregory v. Merchants' Nat. Bank*, 171 Mass. 69, 50 N. E. 520—*Fox v. Fee*, 24 App. Div. 322, 49 N. Y. Supp. 292—*Standart v. Burtis*, 46 Hun. 86—*Bradley v. Bradley*, 165 N. Y. 187, 58 N. E. 887—*Lynch v. United States*, 13 Okla. 158, 73 Pac. 1095—*Branson v. Oregonian R. Co.* 11 Or. 167, 2 Pac. 86—*Wheeler v. Lack*, 37 Or. 246, 61 Pac. 849—*Western U. Teleg. Co. v. Pennsylvania R. Co.* 33 Pitts. L. J. N. S. 249—*Stevens v. South Ogden Land, Bldg. & Improv. Co.* 14 Utah, 241, 47 Pac. 81—*Moore v. Jennings*, 47 W. Va. 189, 34 S. E. 793—*Sadler v. Taylor*, 49 W. Va. 115, 38 S. E. 583—*Cresap v. Cresap*, 54 W. Va. 590, 46 S. E. 582—*Douglas County v. Walbridge*, 38 Wis. 188—*Re Luscombe*, 109 Wis. 201, 85 N. W. 341—*Williams v. Smith*, 117 Wis. 150, 93 N. W. 464.

122. Where a person's interests are involved in a suit, he should be made a party. *Dandridge v. Washington*, 2 Pet. 370, 7: 454

Williams v. Bankhead, 19 Wall. 563, 22: 184

Traders' Nat. Bank of Chicago v. Campbell, 14 Wall. 87, 20: 832

Cited in Bonaparte v. Camden & A. R. Co. Baldw. 217, Fed. Cas. No. 1,617—*Labitut v. Prewitt*, 1 Woods, 147, Fed. Cas. No. 7,962—*Walsh v. Smyth*, 3 Bland. Ch. 25, 28: 1015

123. The rule in equity as to parties defendant is that all those whose interests will be affected by the decree sought to be obtained must be before the court; and if any such persons cannot be reached by process the bill must be dismissed. *Ribon v. Chicago, R. I. & P. R. Co.* 16 Wall. 446, 21: 367

Cited in Nashville & D. R. Co. v. Orr, 18 Wall. 475, 21 L. ed. 812—*Thayer v. Life Asso. of America*, 112 U. S. 720, 28 L. ed. 866, 5 Sup. Ct. Rep. 355—*Christian v. Atlantic & N. C. R. Co.* 133 U. S. 241, 33 L. ed. 592, 10 Sup. Ct. Rep. 260—*Alexander v. Horner*, 1 McCrary, 644, Fed. Cas. No. 169—*Evans v. Faxon*, 11 Bliss, 178, 10 Fed. 314—*United States v. Central P. R. Co.* 8 Sawy. 93, 11 Fed. 458—*Mitchell v. Tillotson*, 11 Bliss, 327, 12 Fed. 738—*Price v. Foreman*, 12 Fed. 803—*Judson v. Courier Co.* 15 Fed. 545—*Bell v. Donohue*, 8 Sawy. 437, 17 Fed. 711—*New Jersey Zinc & I. Co. v. Trotter*, 18 Fed. 339—*Ervin v. Oregon R. & Nav. Co.* 22 Blatchf. 193, 20 Fed. 582—*Goldsmith v. Gilliland*, 10 Sawy. 618, 24 Fed. 157—*Terbell v. Lee*, 40 Fed. 43—*Detweiler v. Holderbaum*, 42 Fed. 338—*Chadbourn v. Coe*, 45 Fed. 827—*Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 420—*Chadbourn v. Coe*, 2 C. C. A. 329, 10 U. S. App. 78, 51 Fed. 481—*Gray v. Havemeyer*, 3 C. C. A. 505, 10 U. S. App. 456, 53 Fed. 178—*Marco v. Hicklin*, 6 C. C. A. 14, 15 U. S. App. 55, 56 Fed. 553—*Averill v. Southern R. Co.* 75 Fed. 730—*Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 75, 49 U. S. App. 523, 82 Fed. 126—*Donovan v. Camplon*, 29 C.

C. A. 32, 56 U. S. App. 888, 85 Fed. 72—Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 30 C. C. A. 635, 58 U. S. App. 83, 87 Fed. 254—Lawrence v. Times Printing Co. 90 Fed. 28—Woodward v. McConnaughey, 45 C. C. A. 604, 106 Fed. 760—Ban v. Columbia Southern R. Co. 54 C. C. A. 413, 117 Fed. 27—Weidenfeld v. Northern P. R. Co. 63 C. C. A. 543, 129 Fed. 311—United States v. Northern P. R. Co. 67 C. C. A. 274, 134 Fed. 720—Waite v. Larocque, 12 App. D. C. 418—Lynch v. United States, 13 Okla. 158, 73 Pac. 1095—Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 7 Pa. Dist. R. 289.

124. If the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that final decision cannot be made without affecting the rights of absent parties, such parties cannot be dispensed with. Mallow v. Hinde, 12 Wheat. 193, 6: 599

Cited in Findlay v. Hinde, 1 Pet. 246, 7 L. ed. 130—Shields v. Barrow, 17 How. 140, 15 L. ed. 160—California v. Southern P. Co. 157 U. S. 249, 39 L. ed. 690, 15 Sup. Ct. Rep. 591—Cookingham v. Ferguson, 8 Blatchf. 495, 4 Nat. Bankr. Reg. 642, Fed. Cas. No. 3-182—Florence Sewing Mach. Co. v. Singer Mfg. Co. 8 Blatchf. 127, 4 Fisher, Pat. Cas. 344, Fed. Cas. No. 4,884—Gray v. Larimore, 4 Sawy. 650, 2 Abb. (U. S.) 554, Fed. Cas. No. 5,721—Litchfield v. The Register, Woolw. 308, Fed. Cas. No. 3,888—Smith v. Shane, 1 McLean, 32, Fed. Cas. No. 13,105—Robin v. Walkinshaw, McAll. 37, Fed. Cas. No. 14,068—Winter v. Ludlow, 3 Phila. 466, Fed. Cas. No. 17,891—Chester v. Chester, 7 Fed. 4—Crane v. Chicago & N. W. R. Co. 20 Fed. 405—Land Co. v. Elkins, 22 Blatchf. 204, 20 Fed. 546—Goldsmith v. Gilliland, 10 Sawy. 619, 24 Fed. 157—Conolly v. Wells, 33 Fed. 208—Miller v. Merline, 43 Fed. 269—Consolidated Water Co. v. San Diego, 35 C. C. A. 635, 93 Fed. 852—Eldred v. American Palace Car Co. 44 C. C. A. 558, 105 Fed. 459—Shingleur v. Jenkins, 11 Fed. 453—Marr v. Southwick, 2 Port. (Ala.) 370—Lucas v. Bank of Darien, 2 Stew. (Ala.) 291—Holman v. Bank of Norfolk, 12 Ala. 423—Porter v. Clements, 3 Ark. 382—New London Bank v. Lee, 11 Conn. 120, 27 Am. Dec. 713—Weightman v. Washington Critic Co. 4 App. D. C. 154—Spear v. Campbell, 5 Ill. 427—First Nat. Bank v. Henry, 156 Ind. 7, 58 N. E. 1057—Thomas v. Kennedy, 24 Iowa, 403, 95 Am. Dec. 740—Lawrence v. Rokes, 53 Me. 116—Florence Sewing Mach. Co. v. Grover & B. Sewing Mach. Co. 110 Mass. 9—Griffin v. Lovell, 42 Miss. 404—Hallett v. Hallett, 2 Paige, Ch. 19—Dinsmore v. Atlantic & P. R. Co. 40 How. Pr. 203—Lynch v. United States, 13 Okla. 158, 73 Pac. 1095—Winter v. Ludlow, 3 Phila. 466, 16 Phila. Leg. Int. 332—State ex rel. Puget Sound Nat. Bank v. Superior Court, 14 Wash. 695, 43 Pac. 670—Smith v. Ford, 48 Wis. 145, 2 N. W. 134.

125. Persons made parties defendant, who disclaim all interest in the suit and against whom no relief is sought, are unnecessary parties. Delaware County v. Diebold Safe & Lock Co. 133 U. S. 473, 10 Sup. Ct. Rep. 399, 33: 674

126. Upon a prayer for relief against specific property purchased by a trustee with trust funds, under circumstances amounting to a breach of trust, the court will not de-

cre a sale of such property for the benefit of the *cestui que trust*, where all the parties interested in such property are not before the court. Caldwell v. Taggart, 4 Pet. 190, 7: 828

Cited in Story v. Livingston, 13 Pet. 375, 10 L. ed. 208—Ribbon v. Chicago, R. I. & P. R. Co. 16 Wall. 451, 21 L. ed. 369—Hay v. Alexandria & W. R. Co. 4 Hughes, 375—Baker v. Biddle, Baldw. 416, Fed. Cas. No. 764—Bonaparte v. Camden & A. R. Co. Baldw. 217, Fed. Cas. No. 1,617—Platt v. Oliver, 2 McLean, 306, Fed. Cas. No. 11,115—The Hudson, 15 Fed. 170—Bland v. Fleeman, 29 Fed. 672—Willson v. Castro, 31 Cal. 427—Kenan v. Miller, 2 Ga. 329—Elce v. Tarver, 4 Ga. 588—Carey v. Hoxey, 11 Ga. 648—Sears v. Hardy, 120 Mass. 530—Cutler v. Tuttle, 19 N. J. Eq. 556—Bender v. Terwilliger, 48 App. Div. 374, 63 N. Y. Supp. 269—Townsend v. Bogert, 126 N. Y. 574, 22 Am. St. Rep. 835, 27 N. E. 555—Lynch v. United States, 13 Okla. 158, 73 Pac. 1095—Morris v. Bean, 17 W. Va. 661.

127. A bill filed against the executors of an estate and all those who purchased from them, calling for an account of rents and profits from them, should not make parties defendant persons who have no interest under the will. Gains v. Chew, 2 How. 619, 11: 402

128. A decree declaring ordinances granting franchises or privileges to be null and void will not be made if none of the persons for whose benefit the ordinances were passed are made parties. New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 17 Sup. Ct. Rep. 161, 41: 518
Cited in Consolidated Water Co. v. San Diego, 35 C. C. A. 634, 93 Fed. 852—City Water Supply Co. v. Ottumwa, 120 Fed. 311—Taylor v. Southern P. Co. 122 Fed. 152—Weidenfeld v. Northern P. R. Co. 63 C. C. A. 543, 129 Fed. 311—Roberts v. Bradfield, 12 App. D. C. 459—Moore v. Jennings, 47 W. Va. 190, 34 S. E. 793.

129. The question of whether an Associated Press membership will pass under a mortgage of a newspaper plant, franchises, etc., cannot be determined in the absence of the association as a party. Metropolitan Nat. Bank v. St. Louis Despatch Co. 149 U. S. 436, 13 Sup. Ct. Rep. 944, 37: 799
Cited in Lawrence v. Times Printing Co. 90 Fed. 28.

130. On a proceeding *in rem* to sell the estate of a deceased intestate in payment of debts, there are no adversary parties, the administrator merely representing the land. Grignon v. Astor, 2 How. 319, 11: 283
Distinguished in Fiske v. Kellogg, 3 Or. 504—Fraser v. Prather, 1 MacArth. 214.

Cited in Apel v. Kelsey, 47 Ark. 419, 2 S. W. 102—Lorch v. Aultman, 75 Ind. 166.

131. Individual parishioners are not necessary parties to a bill praying a sale of the glebe. They are represented by the vestry of the parish. Mason v. Muncester, 9 Wheat. 445, 6: 131

132. The right of a board of railroad commissioners, in a suit brought to enjoin action by them, to interpose an answer on behalf of all parties interested, recognized.

Stone v. New Orleans & N. E. R. Co. 116 U. S. 352, 6 Sup. Ct. Rep. 349, 391, 29: 651

Cited in San Diego Land & Town Co. v. Jasper, 110 Fed. 713.

133. To a bill by third parties to vacate a decree for fraud, the plaintiff in such decree is a necessary party defendant. The want of him as a party is a fatal defect. Harwood v. Cincinnati & C. Air Line R. Co. 17 Wall. 78, 21: 558

Distinguished in Ralston v. Sharon, 51 Fed. 712.

Cited in Johnson v. Hunter, 127 Fed. 221—Whitney v. Kelley, 94 Cal. 154, 15 L.R.A. 817, 28 Am. St. Rep. 106, 29 Pac. 624—State ex rel. Hart v. Burke, 33 La. Ann. 585—Harrison v. Walton (Harrison v. Turnbull) 95 Va. 727, 41 L.R.A. 707, 64 Am. St. Rep. 830, 30 S. E. 372.

134. Those whose interests are separable from those before the court are not indispensable parties. Shields v. Barrow, 17 How. 130, 15: 158

Cited in Barney v. Baltimore, 6 Wall. 284, 18 L. ed. 826—Nashville & D. R. Co. v. Orr, 18 Wall. 475, 21 L. ed. 812—Cunningham v. Macon & B. R. Co. 109 U. S. 457, 27 L. ed. 996, 3 Sup. Ct. Rep. 293—Vetterlein v. Barnes, 124 U. S. 172, 31 L. ed. 401, 8 Sup. Ct. Rep. 441—Christian v. Atlantic & N. C. R. Co. 133 U. S. 241, 33 L. ed. 592, 10 Sup. Ct. Rep. 260—Gregory v. Stetson, 133 U. S. 587, 33 L. ed. 704, 10 Sup. Ct. Rep. 422—Swan Land & Cattle Co. v. Frank, 148 U. S. 611, 37 L. ed. 580, 13 Sup. Ct. Rep. 691—Cole Silver Min. Co. v. Virginia & G. H. Water Co. 1 Sawy. 686, Fed. Cas. No. 2,990—Litchfield v. Register, Woolw. 306, Fed. Cas. No. 8,388—Scudder v. Calais S. B. Co. 20 Month. L. Rep. 500, Fed. Cas. No. 12,566—Tobin v. Walkinshaw, McAll. 46, Fed. Cas. No. 14,068—Bell v. Donohoe, 8 Sawy. 437, 17 Fed. 711—Conolly v. Wells, 33 Fed. 207—Jessup v. Illinois C. R. Co. 36 Fed. 730—Gregory v. Swift, 39 Fed. 712—D'Auxy v. Porter, 41 Fed. 69—Chadbourne v. Coe, 2 C. C. A. 329, 10 U. S. App. 78, 51 Fed. 481—Golden v. Bruning, 72 Fed. 4—Greer, M. & Co. v. Stoller, 77 Fed. 5—Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 30 C. C. A. 635, 58 U. S. App. 83, 87 Fed. 254—Lawrence v. Times Printing Co. 90 Fed. 28—Consolidated Water Co. v. San Diego, 35 C. C. A. 634, 93 Fed. 851—Old Colony Trust Co. v. Atlanta R. Co. 100 Fed. 799—Watson v. Bonfils, 53 C. C. A. 538, 116 Fed. 169—Mackay v. Gabel, 117 Fed. 877—Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co. 119 Fed. 940—Weldenfeld v. Northern P. R. Co. 63 C. C. A. 543, 129 Fed. 311—Backus Portable Steam Heater Co. v. Simonds, 2 App. D. C. 294—Weightman v. Washington Critic Co. 4 App. D. C. 154—Bryan v. May, 9 App. D. C. 388—Waite v. Larocque, 12 App. D. C. 418—Estes v. Nell, 108 Mo. 177, 18 S. W. 1006—James v. Thurston, 6 R. I. 432—Garland v. McMartin, 8 Utah, 156, 30 Pac. 385.

135. Parties defendants are as necessary to cross bills as to original bills, and their appearance in both cases is enforced by process in the same manner. Texas v. Chiles (Texas v. White) 10 Wall. 127, 19: 971

Formal parties.

Effect of Joinder on Right to Remove Cause, see Removal of Causes, 66-68.

136. The incapacity of a Federal circuit court to proceed against any person residing within the United States, but not within the district for which the court is held, justifies it in dispensing with parties merely formal. Russell v. Clark, 7 Cranch, 69, 3: 271

Cited in West v. Smith, 8 How. 410, 12 L. ed. 1134—Shields v. Barrow, 17 How. 140, 15 L. ed. 160—Wood v. Davis, 18 How. 460, 15 L. ed. 461—Abbot v. American Hard Rubber Co. 4 Blatchf. 492, Fed. Cas. No. 9—Pond v. Vermont Valley R. Co. 12 Blatchf. 291, Fed. Cas. No. 11,265—Tobin v. Walkinshaw, McAll. 29, Fed. Cas. No. 14,068—West v. Randall, 2 Mason, 196, Fed. Cas. No. 17,424—Trecotick v. Austin, 4 Mason, 41, Fed. Cas. No. 14,164—Harrison v. Urann, 1 Story, 68, Fed. Cas. No. 6,146—Heriot v. Davis, 2 Woodb. & M. 233, Fed. Cas. No. 6,404—Romaine v. Union Ins. Co. 28 Fed. 630—Hamilton v. Savannah, F. & W. R. Co. 49 Fed. 418—United States v. American Lumber Co. 80 Fed. 311—Howard v. Cannon, 11 Rich. Eq. 26, 75 Am. Dec. 736.

137. This court will not suffer its jurisdiction in an equity cause to be ousted by the circumstance of the joinder or non-joinder of merely formal parties who are not entitled to sue or liable to be sued in the United States courts. Wormley v. Wormley, 8 Wheat. 421, 5: 651
Cited in Bunnell v. Stoddard, Fed. Cas. No. 2,135—Gordon v. Clarke, 10 Fla. 196—James v. Thurston, 6 R. I. 431.

Numerous, unknown, or absent parties.

See also supra, 121.

138. Where parties are very numerous or unknown, and the purposes of justice would be impeded or defeated by bringing in all the parties before the court, equity may dispense with such a proceeding. Mandeville v. Riggs, 2 Pet. 482, 7: 493
Cited in Bryan v. Stevens, Fed. Cas. No. 2,066a—American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, 90 Fed. 606—Carey v. Hoxey, 11 Ga. 651—Durburow v. Niehoff, 37 Ill. App. 417—Petibone v. McGraw, 6 Mich. 445.

139. Wherever a case may be completely decided as between the litigant parties, an interest existing in some other person whom the process of the court cannot reach will not prevent a decree upon the merits. Elmendorf v. Taylor, 10 Wheat. 152, 6: 289

Mallow v. Hinde, 12 Wheat. 193, 6: 599
Distinguished in Alexander v. Horner, 1 McCrary, 645, Fed. Cas. No. 169.

Cited in Mallow v. Hinde, 12 Wheat. 197, 8 L. ed. 600—West v. Smith, 8 How. 410, 12 L. ed. 1134—Shields v. Barrow, 17 How. 142, 15 L. ed. 161—California v. Southern P. Co. 157 U. S. 251, 39 L. ed. 691, 15 Sup. Ct. Rep. 591—Barney v. Baltimore, 8 Hughes, 121, Fed. Cas. No. 1,020—Bryan v. Stevens, Fed. Cas. No. 2,066a—Cookingham v. Ferguson, 8 Blatchf. 493, 4 Nat. Bankr. Reg. 642, Fed. Cas. No. 3,182—Florence Sewing Mach. Co. v. Singer Mfg. Co. 8 Blatchf. 127,

Fed. Cas. No. 4,884—Harrison v. Urann, 1 Story, 66, Fed. Cas. No. 6,146—Rateau v. Bernard, 3 Blatchf. 248, Fed. Cas. No. 11,579—Society for Propagation of Gospel v. Hartland, 2 Paine, 542, Fed. Cas. No. 13,155—Suydam v. Truesdale, 6 McLean, 463, Fed. Cas. No. 13,656—Trecothick v. Austin, 4 Mason, 37, Fed. Cas. No. 14,164—Goldsmith v. Gilliland, 10 Sawy. 619, 24 Fed. 157—Conolly v. Wells, 33 Fed. 208—Gregory v. Swift, 39 Fed. 711—Chadbourne v. Coe, 45 Fed. 826—Hamilton v. Savannah, F. & W. R. Co. 49 Fed. 418—Cook v. Lasher, 19 C. C. A. 658, 42 U. S. App. 42, 73 Fed. 704—Union Mill & Min. Co. v. Dangberg, 81 Fed. 90—Davis v. Davis, 89 Fed. 538—Williams v. Crabb, 59 L.R.A. 434, 54 C. C. A. 225, 117 Fed. 205—Lucas v. Bank of Darien, 2 Stew. (Ala.) 291—Marr v. Southwick, 2 Port. (Ala.) 370—Holman v. Bank of Norfolk, 12 Ala. 423—New London Bank v. Lee, 11 Conn. 120, 27 Am. Dec. 713—Rankin v. Beard, Breeze (Ill.) 124—Gebhard v. Sattler, 40 Iowa, 157—Lawrence v. Rokes, 53 Me. 117—Florence Sewing-Mach. Co. v. Grover & B. Sewing Mach. Co. 110 Mass. 8—Northwestern Cement & Concrete Pav. Co. v. Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 43 Minn. 453, 45 N. W. 868—McPike v. Wells, 54 Miss. 145—Erickson v. Nesmith, 46 N. H. 375—Spivey v. Jenkins, 36 N. C. (1 Ired. Eq.) 128—Stimson v. Lewis, 36 Vt. 93—Smith v. Ford, 48 Wis. 141, 2 N. W. 134—Story v. Livingston, 13 Pet. 375, 10 L. ed. 208—Harrison v. Urann, 1 Story, 66, Fed. Cas. No. 6,146—Gregory v. Swift, 39 Fed. 711—Union Mill & Min. Co. v. Dangberg, 81 Fed. 90—Einstein v. Georgia S. & F. R. Co. 120 Fed. 1010—Erickson v. Nesmith, 46 N. H. 375—Iowa County v. Mineral Point R. Co. 24 Wis. 134.

140. Judgment will be decreed without all parties being present if the court is able to proceed to a decree and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit. *Payne v. Hook*, 7 Wall. 425, 19: 260
Distinguished in *Blake v. Alabama & C. R. Co.* 6 Nat. Bankr. Rep. 335, Fed. Cas. No. 1,493—*Carrau v. O'Calligan*, 60 C. C. A. 361, 125 Fed. 671.

Cited in *Amory v. Amory*, 12 Am. L. Reg. N. S. 589, Fed. Cas. No. 333—*Bourne v. Maybin*, 3 Woods, 731, Fed. Cas. No. 1,700—*Brigham v. Luddington*, 12 Blatchf. 243, Fed. Cas. No. 1,874—*Florence Sewing Mach. Co. v. Singer Mfg. Co.* 8 Blatchf. 128, Fed. Cas. No. 4,884—*Haines v. Carpenter*, 1 Woods, 269, Fed. Cas. No. 5,905—*National Bank v. Sebastian County*, 5 Dill. 417, Fed. Cas. No. 10,040—*Phelps v. O'Brien County*, 2 Dill. 519, Fed. Cas. No. 11,078—*Van Bokkelen v. Cook*, 5 Sawy. 594, Fed. Cas. No. 16,831—*Union Mill & Min. Co. v. Dangberg*, 81 Fed. 89—*Martin v. Fort*, 27 C. C. A. 430, 54 U. S. App. 316, 83 Fed. 22—*American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 606—*United States v. Eisenbels*, 50 C. C. A. 186, 112 Fed. 197—*Williams v. Crabb*, 59 L.R.A. 434, 54 C. C. A. 225, 117 Fed. 205—*Thiel Detective Service Co. v. McClure*, 130 Fed. 58—*Slater v. McAvoy*, 123 Cal. 439, 56 Pac. 49—*Pace v. Pace*, 19 Fla. 454.

141. The absence of parties whose rights would be in effect determined, even though they might not be technically bound, in

subsequent litigation in some other tribunal, is sufficient to prevent the Supreme Court of the United States from proceeding to dispose of the case in the exercise of its original jurisdiction. *California v. Southern P. Co.* 157 U. S. 229, 15 Sup. Ct. Rep. 591, 39: 683

Cited in *Minnesota v. Northern Securities Co.* 184 U. S. 237, 46 L. ed. 516, 22 Sup. Ct. Rep. 308—*Consolidated Water Co. v. San Diego*, 35 C. C. A. 635, 93 Fed. 852—*American Surety Co. v. Lawrenceville Cement Co.* 96 Fed. 31—*Yarnell v. Felton*, 102 Fed. 370—*Yarnell v. Felton*, 104 Fed. 162—*Eldred v. American Palace-Car Co.* 44 C. C. A. 556, 105 Fed. 459—*Percy Summer Club v. Astle*, 110 Fed. 488—*Shingleur v. Jenkins*, 111 Fed. 453.

Parties beyond jurisdiction.

See also *supra*, 121; *infra*, 200, 280.

142. The want of proper parties is not a good plea, if the bill suggests, as a reason, that such parties are out of the jurisdiction of the court. *Milligan v. Milledge*, 3 Cranch, 220, 2: 417

Cited in *Harrison v. Urann*, 1 Story, 66, Fed. Cas. No. 6,146—*West v. Randall*, 2 Mason, 106, Fed. Cas. No. 17,424—*Trecothick v. Austin*, 4 Mason, 41, Fed. Cas. No. 14,164—*London, P. & A. Bank v. Smith*, 101 Cal. 423, 35 Pac. 1027.

143. A party who is alleged, in a bill in the circuit court, to reside permanently beyond the jurisdiction of the court, said allegation not being contested by plea or by objection against proceeding to final decree for want of parties,—is not a necessary party under rules 47 and 48 of chancery rules of 1842. *McCoy v. Rhodes*, 11 How. 131, 13: 634

144. Where the case can be completely decided between the parties, the fact that an interest exists in another whom the court cannot reach by process will not prevent a decree. *Shields v. Barrow*, 17 How. 130, 15: 158

Cited in *Horn v. Lockhart*, 17 Wall. 579, 21 L. ed. 660—*Cole Silver Min. Co. v. Virginia & G. H. Water Co.* 1 Sawy. 473, Fed. Cas. No. 2,980—*Florence Sewing-Mach. Co. v. Singer Mfg. Co.* 8 Blatchf. 129, 4 Fisher. Pat. Cas. 345, Fed. Cas. No. 4,884—*Hazard v. Durant*, 19 Fed. 470—*Wall v. Thomas*, 41 Fed. 622—*Detweiler v. Holderbaum*, 42 Fed. 338—*Chadbourne v. Coe*, 45 Fed. 827—*Gross v. George W. Scott Mfg. Co.* 48 Fed. 40—*Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 417—*Hicklin v. Marco*, 6 C. C. A. 14, 15 U. S. App. 55, 56 Fed. 552—*Union Mill & Min. Co. v. Dangberg*, 81 Fed. 90—*Sloux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 75, 49 U. S. App. 523, 82 Fed. 126—*Davis v. Davis*, 89 Fed. 538—*Shingleur v. Jenkins*, 111 Fed. 453—*Edwards v. Mercantile Trust Co.* 124 Fed. 389—*Sloan v. Sloan*, 21 Fla. 598—*Cassidy v. Shlimmin*, 122 Mass. 410—*Reformed Presby. Church v. Nelson*, 35 Ohio St. 643.

Parties interested in contract generally.

145. No final decree can be rendered affecting the parties to a contract sued on, without making them all parties to the suit.

Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. Rep. 422, 33: 792
Cited in Gray v. Havemeyer, 8 C. C. A. 505, 10 U. S. App. 456, 53 Fed. 178.

146. There is no necessity to make one a party who made the contract on which the bill is based jointly with another, but relinquished his right before the work contemplated by the contract was commenced. *Fitch v. Creighton*, 24 How. 159, 16: 596
South Fork Canal Co. v. Gordon, 6 Wall. 561, 18: 894

147. On a bill to rescind a contract, all interested in the contract should be made parties, unless the interests are separable. *Shields v. Barrow*, 17 How. 130, 15: 158
Cited in Klug v. Commissioners Court, 10 Tex. Civ. App. 116, 30 S. W. 257.

148. The owners of partial interests in contracts for land, acquired subsequently to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern. *Willard v. Tayloe*, 8 Wall. 557, 19: 501
Cited in Pullman Palace Car Co. v. Texas & P. R. Co. 4 Woods, 323, 11 Fed. 629—*Moulton v. Chafee*, 22 Fed. 27—*Ashley v. Little Rock*, 56 Ark. 397, 19 S. W. 1058—*Calanchini v. Branstetter*, 96 Cal. 616, 31 Pac. 575—*Washburn & M. Mfg. Co. v. Chicago Galvanized Wire Fence Co.* 109 Ill. 85—*Bragg v. Olson*, 128 Ill. 544, 21 N. E. 519—*Smith v. Ingram*, 130 N. C. 113, 61 L.R.A. 884, 40 S. E. 984—*Hoskins v. Dougherty*, 29 Tex. Civ. App. 322, 69 S. W. 103—*Hagar v. Buck*, 44 Vt. 290, 8 Am. Rep. 368.

149. A release obtained by fraud from one who was interested only in a share of the profits of a contract so far severs the interests that the party releasing is not a necessary party to the suit to enforce the contract. *South Fork Canal Co. v. Gordon*, 6 Wall. 561, 18: 894

Parties claiming interest in real estate generally.

Creditors' Suits to Subject Land to Payment of Debts, see Executors and Administrators, 173, 176.

Adverse Claimants to Pre-emptive Right in Bill to Enjoin Land Officers in Receiving Applications, see Injunction, 119.

In Foreclosure Suit, see Mortgage, 307.

Necessity of Impleading Adverse Claimants to Private Land Claim Suits, see Private Land Claims, 444.

150. Claimants who have only an equitable title ought to make those whose title they assert, and those from whom they claim a conveyance, parties to the suit. *Simms v. Guthrie*, 9 Cranch, 19, 3: 642
Distinguished in Thomas v. Kennedy, 24 Iowa, 403, 95 Am. Dec. 740.

Held obiter in Kerr v. Watts, 6 Wheat. 559, 5 L. ed. 330.

Cited in Findlay v. Hinde, 1 Pet. 245, 7 L. ed. 130—*Smith v. Shane*, 1 McLean, 32, Fed. Cas. No. 13,105—*Tilghman v. Tilghman*, Baldw. 491, Fed. Cas. No. 14,045—*State ex rel. Hart v. Burke*, 33 Ia. Ann. 505.

151. In New York, under N. Y. Code Civ. Proc. § 1502, one who claims the right to occupy submerged land for the cultivation of oysters, and exercises acts of ownership thereupon, and claims an interest therein is a proper defendant in an action for the possession of the premises. *Lowndes v. Huntington*, 153 U. S. 1, 14 Sup. Ct. Rep. 758, 38: 615

152-3. Where a bill is filed claiming the equitable title to lands, and praying that defendant, who is alleged to have fraudulently obtained a decree from the holders of the legal title, be now decreed to convey to the complainant, the persons under whom both parties claim the title are not necessary parties. *Boon v. Chiles*, 8 Pet. 532, 8: 1034
Cited in Boone v. Chiles, 10 Pet. 219, 9 L. ed. 403—*Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. 415, 19 L. ed. 122—*Harrison v. Urann*, 1 Story, 66, Fed. Cas. No. 6,146—*Rateau v. Bernard*, 3 Blatchf. 248, Fed. Cas. No. 11,579—*Smith v. Rines*, 2 Sumn. 350, Fed. Cas. No. 13,100—*Lynchburg Iron Co. v. Tayloe*, 79 Va. 674—*Smith v. Ford*, 48 Wis. 137, 2 N. W. 134.

154. A purchaser of land subsequent to the commencement of a suit to enforce a prior vendors' lien is not a necessary, although a proper, party to the suit. *Fisher v. Shropshire*, 147 U. S. 133, 13 Sup. Ct. Rep. 201, 37: 109

155. In a suit to quiet title, the party who gave a receipt for the purchase money, binding himself to convey the estate, should be made a party, although he had subsequently conveyed the title to another. *Findlay v. Hinde*, 1 Pet. 241, 7: 128

156. A person was a necessary party to an action in a Federal court wherein a decree was made disposing of a specific fund in which, by the decree of a state court, such person was interested, and directing the sale of a plantation in possession of that person's tenants, the rents and profits of which were to be received by her until her claim to such fund was satisfied. *Williams v. Bankhead*, 19 Wall. 563, 22: 184

157. The Code of Virginia allows the action of ejectment to be brought against persons claiming title or interests in the property, although out of possession. *Harvey v. Tyler*, 2 Wall. 328, 17: 871
Cited in Ozark Land Co. v. Leonard, 20 Fed. 882—*Heinmiller v. Hatheway*, 60 Mich. 396, 27 N. H. 558—*Stearns v. Harman*, 80 Va. 56—*Postlewaite v. Wise*, 17 W. Va. 14—*Beckwith v. Thompson*, 18 W. Va. 135—*Moore v. McNutt*, 41 W. Va. 699, 24 S. E. 682.

Persons inhabiting disputed territory.

158. People inhabiting the disputed territory need not be made parties to a suit in the Supreme Court of the United States to settle the boundaries between states. *Rhode Island v. Massachusetts*, 12 Pet. 657, 9: 1233

Parties liable to contribution.

159. Parties who are liable to contribution should be brought before the court, ex-

cept where a decree of contribution would be useless, or where the proceeding would defeat the jurisdiction of the court, and the parties are not indispensable to the decree. *Mandeville v. Riggs*, 2 Pet. 482, 7: 493

Parties participating in fraud.

160. Persons for whose benefit an alleged fraud was committed, and who were its principal instigators, and whose actions were essential to its success, should be made parties to a suit in chancery in which damages are sought to be recovered. *Nougue v. Clapp*, 101 U. S. 551, 25: 1026

161. In an action brought by an assignee in bankruptcy to recover the proceeds from an illegal sale under a void judgment by confession, parties who also had fraudulent judgments are not necessary parties. *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20: 832

Cited in Fisher v. Shropshire, 147 U. S. 146, 37 L. ed. 116, 13 Sup. Ct. Rep. 201—*Penn v. Edwards*, 50 Ala. 64—*State ex rel. Hart v. Burke*, 33 La. Ann. 505—*McPike v. Wells*, 54 Miss. 156.

United States.

In Case of Infringement of Patent Preventing Injunction against it, see Injunction, 192, 193.

In Foreclosure Suit, see Mortgage, 339.

162. The United States cannot be regarded as a necessary party to a suit brought under the act of August 15, 1894 (28 Stat. at L. 286, 305, chap. 290), prior to the amendatory act of February 6, 1901 (31 Stat. at L. 760, chap. 217), to determine the respective rights of two Indians, each claiming under the allotment act of March 3, 1885, in view of the provision of the act under which the action was brought, that the judgment or decree of the court in favor of any claimant to an allotment, upon being properly certified to the Secretary of the Interior, shall have the same effect as if the allotment had been allowed and approved by the Secretary. *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U. S. 401, 24 Sup. Ct. Rep. 676, 48: 1039

Cited in McKay v. Kalyton, 204 U. S. 468, 51 L. ed. 571, 27 Sup. Ct. Rep. 346—*Kalyton v. Kalyton*, 45 Or. 130, 78 Pac. 332.

State, county, and city.

Territory as Party in Foreclosure Suit, see Mortgage, 305.

State as Party in Foreclosure Suit, see Mortgage, 338.

Removal to Federal Court of Suit against State, see Removal of Causes, 76-80.

Jurisdiction as Dependent on Reality or Necessity of State as Party, see States, IX. b.

163. Dividends due to a state cannot be seized upon and appropriated to the payment of its bonds, nor can stock held and owned by the state be so sold and transferred, through the medium of a suit in equity, without making the state a party to the suit. *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 10 Sup. Ct. Rep. 260, 33: 559

164. Inability to make a state a party is a sufficient reason for not doing so in a suit in a Federal court to enjoin a state officer from executing a state law in conflict with the Federal Constitution or laws, and the court may proceed to make a decree against the officer in all respects as if the state were a party to the record. *Davis v. Gray*, 16 Wall. 203, 21: 447

Distinguished in United States v. Lee, 106 U. S. 215, 27 L. ed. 180, 1 Sup. Ct. Rep. 240. *Cited in Hagood v. Southern*, 117 U. S. 69, 29 L. ed. 811, 6 Sup. Ct. Rep. 608—*McCauley v. Kellogg*, 2 Woods, 21, Fed. Cas. No. 8,683—*Head v. Porter*, 48 Fed. 483.

165. Where bonds purport to be issued by a board of county commissioners on behalf of a precinct, and are executed by the proper county officers, and with the county seal, although the precinct is the promisor, a suit to recover on such coupons is properly brought against the county. *Blair v. Cumming County*, 111 U. S. 363, 4 Sup. Ct. Rep. 449, 28: 457

Davenport v. Dodge County, 105 U. S. 237, 26: 1018

Distinguished in Meath v. Phillips County, 108 U. S. 555, 27 L. ed. 820, 2 Sup. Ct. Rep. 869.

Cited in Blair v. Cumming County, 111 U. S. 367, 28 L. ed. 459, 4 Sup. Ct. Rep. 449—*Nemaha County v. Frank*, 120 U. S. 46, 30 L. ed. 586, 7 Sup. Ct. Rep. 395—*Kimball v. Grant County*, 21 Fed. 147—*Liebman v. San Francisco*, 24 Fed. 721—*Aylesworth v. Gratiot County*, 43 Fed. 353—*Breckinridge County v. McCracken*, 9 C. C. A. 450, 22 U. S. App. 115, 61 Fed. 199—*Fuller v. Aylesworth*, 21 C. C. A. 511, 43 U. S. App. 657, 75 Fed. 701—*Clapp v. Otoe County*, 45 C. C. A. 585, 104 Fed. 479—*Mather v. San Francisco*, 52 C. C. A. 633, 115 Fed. 39—*Folsom v. Greenwood County*, 130 Fed. 732—*Neale v. County Court*, 43 W. Va. 98, 27 S. E. 370.

166. A suit by the state of California against a railroad company to obtain a decree that the state is the owner of the bed of the bay of San Francisco and the harbor of the city of Oakland will not be entertained by the Supreme Court of the United States in the exercise of its original jurisdiction, in the absence of the city of Oakland, which claimed that a grant of the water front had been made by the state, and of the Oakland Water Front Company, which had succeeded to the rights of the city and from which the railroad company had derived its rights. *California v. Southern P. Co.* 157 U. S. 229, 15 Sup. Ct. Rep. 591, 39: 683

Officers.

Secretary of Navy in Writ of Prohibition to Court-Martial, see Prohibition, 37.

See also *supra*, 67.

167. In a suit to restrain the collection of taxes already levied to pay interest on county bonds, and any further levies by the county judge, in which a decree is asked adjudging the invalidity of the bonds, the sheriff who was about to enforce the collection, and the county judge, were necessary

parties, as were the bondholders. *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. Rep. 308, 34: 987

168. To a suit brought by the taxpayers of a township in Iowa to invalidate a tax voted in aid of a railroad, the railroad company, the township trustees, and the county treasurer are necessary parties. *Sully v. Drennan*, 113 U. S. 287, 5 Sup. Ct. Rep. 453, 28: 1007

169. The practice of bringing an action against a state board of railroad commissioners to test the validity of rates fixed by them recognized. *Reagan v. Farmer's Loan & T. Co.* 154 U. S. 362, 420, 14 Sup. Ct. Rep. 1047, 1062, 38: 1014, 1031
Cited in *San Diego Land & Town Co. v. Jasper*, 110 Fed. 713.

Arbitrators.

170. Arbitrators are not necessary parties to an action upon an award unless fraud and misconduct are charged. *Veazie v. Williams*, 8 How. 134, 12: 1018
Cited in *Knowlton v. Mickles*, 29 Barb. 470.

Debtors.

171. The judgment debtor and creditor are necessary parties to a suit by purchasers from the judgment debtor to set aside a sale on execution issued on the judgment, which is alleged to have been discharged by payment before the execution issued. *Field v. Holland*, 6 Cranch, 8, 3: 136

172. Upon a bill filed by the United States, proceeding as ordinary creditors against the debtor of their debtor, for an account, the original debtor should be made a party, and an account taken between him and his debtor. *United States v. Howland*, 4 Wheat. 108, 4: 526
Cited in *Colt v. Lasnier*, 9 Cow. 334, 5 Am. Dec. 200.

173-4. Where a creditors' bill is filed against a corporation and certain of the corporation debtors, the debtors who are made defendants cannot object that other debtors of the corporation are not also made parties. *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16: 349
Cited in *Hatch v. Dana*, 101 U. S. 211, 25 L. ed. 886—*Swan Land & Cattle Co. v. Frank*, 148 U. S. 611, 37 L. ed. 580, 13 Sup. Ct. Rep. 691—*Marsh v. Burroughs*, 1 Woods, 467, Fed. Cas. No. 9,112—*Upton v. Hansbrough*, 3 Bliss, 426, Fed. Cas. No. 16,801—*First Nat. Bank v. Smith*, 6 Fed. 216—*Holmes v. Sherwood*, 3 McCrary, 408, 16 Fed. 728—*Glenn v. Dorshelmer*, 23 Fed. 697—*Brundage v. Monumental Gold & S. Min. Co.* 12 Or. 325, 7 Pac. 314—*Vanderwerken v. Glenn*, 85 Va. 12, 6 S. E. 806.

174. Where a creditors' bill is filed against a corporation and certain of the corporation debtors, the debtors who are made defendants cannot object that other debtors of the corporation are not also made parties. *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16: 349
Cited in *Hatch v. Dana*, 101 U. S. 211, 25 L. ed. 886—*Swan Land & Cattle Co. v. Frank*, 148 U. S. 611, 37 L. ed. 580, 13 Sup. Ct. Rep. 691—*Marsh v. Burroughs*, 1 Woods, 467, Fed. Cas. No. 9,112—*Upton v. Hansbrough*, 3 Bliss, 426, Fed. Cas. No. 16,801—*First Nat. Bank v. Smith*, 6 Fed. 216—*Holmes v. Sherwood*, 3 McCrary, 408, 16 Fed. 728—*Glenn v. Dorshelmer*, 23 Fed. 697—*Brundage v. Monumental Gold & S. Min. Co.* 12 Or. 325, 7 Pac. 314—*Vanderwerken v. Glenn*, 85 Va. 12, 6 S. E. 806.

Creditors.

Bill to Enjoin Enforcement of Judgment, see Injunction, 200.

See also *supra*, 171; *infra*, 181.

175. Mortgage creditors are necessary parties to a bill to set aside the sale and distribution of an insolvent's property. That they were out of the jurisdiction of the court does not excuse their not being

made parties. *Coiron v. Millaudon*, 19 How. 113, 15: 575
Distinguished in *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 420.

Cited in *Gregory v. Stetson*, 138 U. S. 587, 33 L. ed. 794, 10 Sup. Ct. Rep. 422—*Swan Land & Cattle Co. v. Frank*, 148 U. S. 611, 37 L. ed. 580, 13 Sup. Ct. Rep. 691—*Abbot v. American Hard Rubber Co.* 4 Blatchf. 491, Fed. Cas. No. 9—*Alexander v. Horner*, 1 McCrary, 645, Fed. Cas. No. 169—*Cookingham v. Ferguson*, 8 Blatchf. 495, Fed. Cas. No. 3,182—*Florence Sewing-Mach. Co. v. Singer Mfg. Co.* 8 Blatchf. 128, 4 Fisher, Pat. Cas. 345, Fed. Cas. No. 4,884—*Myers v. Dorr*, 13 Blatchf. 28, Fed. Cas. No. 9,988—*United States v. Parrott*, McAll. 283, Fed. Cas. No. 15,998—*United States v. Central P. R. Co.* 8 Sawy. 92, 11 Fed. 458—*Judson v. Courier Co.* 15 Fed. 545—*Gregory v. Swift*, 39 Fed. 712—*Chadbourne v. Coe*, 2 C. C. A. 320, 10 U. S. App. 78, 51 Fed. 481—*Gray v. Havemeyer*, 3 C. C. A. 505, 10 U. S. App. 456, 53 Fed. 178—*Lawrence v. Times Printing Co.* 90 Fed. 28—*Treadway v. Sehnauer*, 1 Dak. 284, 46 N. W. 464—*Sloan v. Sloan*, 21 Fla. 598.

176. Creditors of a canal fund who have become such since the transfer of the canal property to trustees, and holders of canal stock certificates whose interest remains unpaid, are properly represented by the trustees in a suit by an owner or state bonds issued for canal purposes, brought on behalf of himself and all others interested in the same issue, to establish a paramount lien on the canal property. *Wabash & E. Canal Co. v. Beers*, 2 Black, 448, 17: 327
Cited in *Flash v. Wilkerson*, 22 Fed. 691—*Compton v. Jesup*, 15 C. C. A. 432, 31 U. S. App. 486, 68 Fed. 299—*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 82 Fed. 646.

177. On a bill filed by an executor against the devisee of lands charged with the payment of debts, for an account of the trust fund, etc., the creditors are not indispensable parties to the suit. The fund may be brought into court and distributed under its direction. *Potter v. Gardner*, 12 Wheat. 498, 6: 706

Cited in *Smith v. Hunter*, 23 Ind. 582.

Bankrupts.

See also Witnesses, 75.

178. A bankrupt is not a necessary party to a bill filed by his assignee in bankruptcy to set aside a conveyance of his as fraudulent as to creditors. *Buffington v. Harvey*, 95 U. S. 99, 24: 381
Cited in *Loving v. Arnold*, 84 Fed. 218—*Cox v. Wall*, 2 N. B. N. Rep. 575, 99 Fed. 549—*Coffey v. Norwood*, 81 Ala. 516, 8 So. 199—*Staton v. Rising*, 103 Ala. 457, 15 So. 848—*Kennedy v. First Nat. Bank*, 107 Ala. 207, 36 L.R.A. 321, 18 So. 396—*Dunn v. Wolf*, 81 Iowa, 690, 47 N. W. 887—*Williamson v. Selden*, 53 Minn. 77, 54 N. W. 1055—*Bierschenk v. King*, 38 App. Div. 364, 58 N. Y. Supp. 696—*First Nat. Bank v. Shuler*, 153 N. Y. 169, 60 Am. St. Rep. 601, 47 N. E. 262.

Corporations.

In Proceeding before Interstate Commerce Commission, see *Interstate Commerce Commission*, 5.

For Purpose of Determining Right to Remove Cause, see *Removal of Causes*, 168.

See also *Courts*, 732.

179. To a suit which affects corporate rights or liabilities, the corporation is an indispensable party. *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. Rep. 691, 37: 577

Cited in Security Sav. & L. Asso. v. Buchanan, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 803—*Auer v. Lombard*, 19 C. C. A. 740, 33 U. S. App. 438, 72 Fed. 210—*Consolidated Water Co. v. Babcock*, 76 Fed. 252—*D. A. Tompkins Co. v. Catawba Mills*, 82 Fed. 782—*James H. Rice Co. v. Libbey*, 85 Fed. 826—*Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 30 C. C. A. 635, 58 U. S. App. 83, 87 Fed. 254—*Consolidated Water Co. v. San Diego*, 35 C. C. A. 634, 93 Fed. 851—*Medberry v. Troutman*, 94 Fed. 954—*Taylor v. Southern P. Co.* 122 Fed. 154—*Redfield v. Baltimore & O. R. Co.* 124 Fed. 930—*Miller v. Clifford*, 5 L.R.A.(N.S.) 61, 67 C. C. A. 57, 133 Fed. 885—*Homestead Min. Co. v. Reynolds*, 30 Colo. 332, 70 Pac. 422—*Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 7 Pa. Dist. R. 289.

180. A corporation is a necessary party to a suit brought by its stockholders to enforce its rights. *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. Rep. 1008, 37: 815
Cited in Taylor v. Matteson, 86 Wis. 126, 56 N. W. 829.

181. Neither the creditors nor the bank are necessary parties to a suit by the receiver of a national bank, in his own name, to enforce the personal liability of the stockholders. *Kennedy v. Gibson*, 8 Wall. 498, 19: 476

Cited in National Bank v. Kennedy, 17 Wall. 21, 21 L. ed. 555—*Cadle v. Tracy*, 11 Blatchf. 119, Fed. Cas. No. 2,279—*Stanton v. Wilkeson*, 8 Ben. 359, Fed. Cas. No. 13,299—*Harvey v. Lord*, 11 Bliss. 145, 10 Fed. 237—*Irons v. Manufacturers' Nat. Bank*, 6 Bliss. 304, 17 Fed. 312—*Irons v. Manufacturers' Nat. Bank*, 27 Fed. 593—*Balley v. Mosher*, 11 C. C. A. 307, 27 U. S. App. 339, 63 Fed. 491—*National Park Bank v. Peavey*, 64 Fed. 918—*Jackson v. Fidelity & C. Co.* 21 C. C. A. 401, 41 U. S. App. 552, 75 Fed. 367—*Speckart v. German Nat. Bank*, 85 Fed. 18—*Cockrill v. Abeles*, 30 C. C. A. 227, 58 U. S. App. 648, 86 Fed. 508—*McCartney v. Earle*, 53 C. C. A. 395, 115 Fed. 465—*Boyd v. Schneider*, 124 Fed. 242—*Hill v. Graham*, 11 Colo. App. 540, 53 Pac. 1060—*Ryan v. Ray*, 105 Ind. 106, 4 N. E. 214—*Schaberg v. McDonald*, 60 Neb. 502, 83 N. W. 737—*Howarth v. Angle*, 39 App. Div. 157, 57 N. Y. Supp. 187—*Beckham v. Hague*, 44 App. Div. 147, 60 N. Y. Supp. 767.

182. Where a company is directly interested, though no relief is prayed against it, but rather in its favor, it is proper that it should be made a party complainant or defendant. *Jones v. Bolles*, 9 Wall. 364, 19: 734

Cited in State ex rel. Hart v. Burke, 33 La. Ann. 505.

183. On a bill by the owner of stock to compel its retransfer from one who had obtained control of the books of the company and made a fraudulent transfer, the corporation itself is a necessary party. *Kendig v. Dean*, 97 U. S. 423, 24: 1061

Cited in Alexander v. Horner, 1 McCrary, 645, Fed. Cas. No. 169—*First Nat. Bank v. Smith*, 6 Fed. 216—*Hazard v. Durant*, 19 Fed. 476—*Swan Land & Cattle Co. v. Frank*, 39 Fed. 461—*Chadbourne v. Coe*, 2 C. C. A. 329, 10 U. S. App. 78, 51 Fed. 481—*Putnam v. Ruch*, 54 Fed. 220—*St. Louis City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 75, 49 U. S. App. 523, 82 Fed. 126—*Donovan v. Camplon*, 29 C. C. A. 32, 56 U. S. App. 388, 85 Fed. 72—*Lawrence v. Times Printing Co.* 90 Fed. 28—*Woodward v. McConnaughey*, 45 C. C. A. 604, 106 Fed. 760—*Ban v. Columbia Southern R. Co.* 54 C. C. A. 413, 117 Fed. 27—*New Orleans v. Seixas*, 35 La. Ann. 40.

184. In an action brought in a state court against an incorporated company of that state and a citizen of another state, to compel the transfer of stock on the books of the company, the company is a necessary party, although the citizen of the other state raises a separate issue as to the validity of the proceedings under which said sale was had. *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. Rep. 738, 29: 66
Cited in Taylor v. Southern P. Co. 122 Fed. 154—*Douglas v. Richmond & D. R. Co.* 106 N. C. 80, 10 S. E. 1048.

185. An action for an account of profits and an injunction against the further use of a patented invention should be against the corporation which used it, in its corporate capacity, and not against a part only of its stockholders and directors, individually. *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. Rep. 556, 27: 322
Cited in Boston Woven Hose Co. v. Star Rubber Co. 40 Fed. 168—*Glucose Sugar Ref. Co. v. St. Louis Syrup & Preserving Co.* 135 Fed. 543.

186. A *de facto* corporation may be treated as such by the state, and brought into court as the party defendant, without making its members parties, for the purpose of obtaining a decree against it to annul its charter on the ground that the incorporation was illegal because made for an illegal purpose. *New Orleans Debenture Redemption Co. v. Louisiana*, 180 U. S. 320, 21 Sup. Ct. Rep. 378, 45: 550

187. A bill by a state against a corporation of another state to enjoin that corporation, its officers, representatives, agents, servants, or stockholders from interfering in any way with the management or control, and from holding any of the stock, of either of two railroad corporations of the complainant state, is one to which the domestic corporations are necessary parties for the representation of the interests of all other stockholders and of the general public. *Minnesota v. Northern Securities Co.* 184 U. S. 199, 22 Sup. Ct. Rep. 308, 46: 499

Cited in City Water Supply Co. v. Ottumwa, 120 Fed. 311—*Taylor v. Southern P. Co.*

122 Fed. 152—Interstate Commerce Commission v. Southern P. Co. 123 Fed. 599—Conklin v. United States Shipbuilding Co. 123 Fed. 916—Weidenfeld v. Northern P. R. Co. 63 C. C. A. 543, 129 Fed. 811—Young v. Mercantile Trust Co. 140 Fed. 63—Grand Trunk Western R. Co. v. Chicago & E. I. R. Co. 73 C. C. A. 58, 141 Fed. 800—Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 513, 39 So. 392—Wilson v. American Palace Car Co. 67 N. J. Eq. 264, 58 Atl. 195.

188. A corporation referred to in a bill to restrain any further action by the Secretary of the Interior upon applications for leases of Indian lands for mining purposes, as one of the successful applicants, is not a necessary party defendant to the suit, which is instituted on the theory of the want of power in the Secretary to execute leases affecting such lands. Cherokee Nation v. Hitchcock, 187 U. S. 294, 23 Sup. Ct. Rep. 115, 47: 183
Cited in United States v. Clark, 129 Fed. 243.

Partners.

Joinder of Action against Partners, see *infra*, 261, 265a-267.

Dismissal for Failure to Join Partner, see Dismissal and Discontinuance, 39.

189. To a bill for the settlement of the partnership accounts, all the members of the firm are indispensable parties. Fourth Nat. Bank v. New Orleans & C. R. Co. 11 Wall. 624, 20: 82
Cited in Gray v. Larrimore, 2 Abb. (U. S.) 554, Fed. Cas. No. 5,721—Consolidated Water Co. v. Babcock, 76 Fed. 252—Eldred v. American Palace Car Co. 44 C. C. A. 558, 105 Fed. 459—Cobb v. Fogg, 168 Mass. 477, 44 N. E. 534—Manderfield v. Field, 7 N. M. 25, 32 Pac. 146—Heaton v. Wilson, 123 N. C. 399, 31 S. E. 671.

190. A partner who has sold his interest to another partner is not a necessary party to an action for an accounting of the partnership affairs. Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. Rep. 594, 32: 1005

191. Two of three members of a partnership may be sued in a Federal court on a note executed by the firm, which, under La. Civ. Code, arts. 2080, 2086, is a contract *in solido* on which the parties may be sued severally or jointly, and on which each is liable for the whole,—especially where the third member is not within the jurisdiction of the court. Breedlove v. Nicolet, 7 Pet. 413, 8: 731

Stockholders, directors, and bondholders.

Federal Question as to, see Appeal and Error, 1607, 2217.

Bondholders as Parties to Foreclosure Suit, see Mortgage, 325-329.

See also *supra*, 167, 186; Corporations, 610.

192. Where stockholders are fully represented, both by the corporation and a committee chosen and appointed by them, they are not necessary parties to a suit against the corporation and certain other parties

holding assets of the corporation, to prevent the fund from being distributed among the stockholders before the debts due to the complainants are paid. Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19: 117
Cited in Clyde v. Richmond & D. R. Co. 55 Fed. 448—Central Trust Co. v. Western North Carolina R. Co. 89 Fed. 28—James v. Central Trust Co. 39 C. C. A. 129, 98 Fed. 492.

193. In a suit brought by a stockholder of a bank to enjoin the collection of a tax assessed by the state against the bank, the directors of the bank are properly made parties defendant, where they have refused to institute such suit. Dodge v. Woolsey, 18 How. 331, 15: 401
Cited in Ribon v. Chicago, R. I. & P. R. Co. 16 Wall. 451, 21 L. ed. 369—Adams v. Douglas County, McCahon, 255, Fed. Cas. No. 52—Newby v. Oregon C. R. Co. 1 Sawy. 69, Fed. Cas. No. 10,145—McKee v. Chautauqua Assembly, 124 Fed. 811—Zuelly v. Casper, 160 Ind. 460, 63 L.R.A. 135, 67 N. E. 103.

194. Where a creditor's bill is brought against the purchaser of the railroad of an insolvent corporation, the corporation itself, and the committee or trustees who made the sale, to reach the unpaid part of the purchase price, neither the stockholders nor bondholders of the corporation are necessary parties. Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19: 117

195. Individual owners of bonds issued by the state of North Carolina, each of which is secured by a separate mortgage of ten shares of railroad stock belonging to that state, are not necessary parties defendant to a suit by the state of South Dakota, as the owner of certain of these bonds, to compel payment and a subjection of the mortgaged property to the satisfaction of the debt. South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. Rep. 269, 48: 448

196. One who has paid for and received certificates of paid-up capital stock of a bank and has pledged them as collateral security, is a necessary party to an action brought by the pledgee to be subrogated to the pledgor's rights on account of the stock and the moneys paid therefor, against the assets of the bank in the hands of a receiver. Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. Rep. 572, 38: 470

Grantors and vendors.

197. On a bill to set aside a fraudulent conveyance, the grantor is a necessary party. Gaylord v. Kelshaw, 1 Wall. 81, 17: 612
Denied in Taylor v. Webb, 54 Miss. 42.

Distinguished in Coffey v. Norwood, 81 Ala. 516, 8 So. 199—Hickox v. Elliott, 10 Sawy. 427, 22 Fed. 20.

Cited in Swan Land & Cattle Co. v. Frank, 148 U. S. 610, 37 L. ed. 580, 13 Sup. Ct. Rep. 691—Chester v. Chester, 7 Fed. 4—Judson v. Courier Co. 25 Fed. 708—Hays v. Humphreys, 37 Fed. 285—Fuller v. Montague, 8 C. C. A. 102, 16 U. S. App. 391, 59 Fed. 214—Consolidated Water Co. v. San Diego, 35 C. C. A. 634, 93 Fed. 852—Darnold v. Simpson, 114 Fed. 370—Bromberg v. Heyer,

69 Ala. 25—Homestead Min. Co. v. Reynolds, 30 Colo. 332, 70 Pac. 422—Larson v. Ross, 10 Colo. App. 270, 50 Pac. 730—Weightman v. Washington Critic Co. 4 App. D. C. 167—Richman v. Donnell, 53 N. J. Eq. 34, 30 Atl. 533—Hill v. Alexander, 77 Mo. 302—Purdy v. Gault, 19 Mo. App. 204—Huneke v. Dold, 7 N. M. 18, 32 Pac. 45—First Nat. Bank v. Schuler, 153 N. Y. 169, 60 Am. St. Rep. 601, 47 N. E. 262.

198. A bill to set aside a deed of land for fraud and inadequate consideration, which sets up a lien in favor of the vendor of the complainant, but in which such vendor is not made a party, shows no ground for relief. *Dean v. Harvey* (*Dean v. Younell*) 8 Wall. 14, note, 19: 365

199. On a bill for specific performance of a contract for the conveyance of land, the vendor should be made a party, although he has, subsequently to the contract, conveyed the estate to others by a legal and formal conveyance, duly executed. *Findlay v. Hinde*, 1 Pet. 241, 7: 128
Cited in Bowman v. Wathen, 2 McLean, 381, Fed. Cas. No. 1,740—*Hinde v. Vattler*, Fed. Cas. No. 6,512—*Platt v. Vattler*, 1 McLean, 150, Fed. Cas. No. 11,117—*Smith v. Shane*, 1 McLean, 31, Fed. Cas. No. 13,105—*Chester v. Chester*, 7 Fed. 4—*Crane v. Chicago & N. W. R. Co.* 20 Fed. 406—*First Nat. Bank v. Henry*, 156 Ind. 8, 58 N. E. 1057.

Encumbrancers.

Prior Encumbrancers in Foreclosure Suit, see Mortgage, 308-315.

Subsequent Encumbrancers in Foreclosure Suit, see Mortgage, 316-319.

Mortgagor as Necessary Party for Purpose of Determining Right to Remove Cause, see Removal of Causes, 69, 70.

200. It is proper to make a prior encumbrancer a party to a creditors' bill to set aside a conveyance; but if he is beyond the jurisdiction, the court may order a sale subject to his encumbrance. *Hagan v. Walker*, 14 How. 29, 14: 312
Cited in Sutherland v. Lake Superior Ship Canal, R. & Iron Co. 9 Nat. Bankr. Reg. 313, Fed. Cas. No. 13,643—*McClure v. Adams*, 76 Fed. 901—*Boatmen's Bank v. Fritzen*, 68 C. C. A. 298, 135 Fed. 660—*Byran v. May*, 9 App. D. C. 390.

Mortgagees.

On Foreclosure of Mortgage, see Mortgage, 308-315, 318, 319, 323.

201. In proceedings to set aside a sale of real estate made in fraud of the rights of creditors, it is not necessary to make a mortgagee of the estate a party, where his claim is not disputed. *Venable v. Bank of United States*, 2 Pet. 107, 7: 364

Contractors.

Joint Action against Contractor and Subcontractor, see *infra*, 273.

202. A subcontractor who has defrauded the United States by instigating the original contractor to procure an increase of mail service, and has himself received, by means of fraudulent vouchers, money in excess of

that which was legally due, may be sued by the United States without joining the original contractor. *United States v. Salisbury*, 157 U. S. 121, 15 Sup. Ct. Rep. 501.

39: 642

Receivers.

203. The receiver is the proper party to enforce the rights of an insolvent corporation, and must be made a party defendant in case he does not sue, if suit is brought by a stockholder. *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. Rep. 1008, 37: 815
Cited in Hampton Roads R. & Electric Co. v. Newport News & O. P. R. & Electric Co. 131 Fed. 538—*Real Estate Title Ins. & T. Co. v. Mahoning Rolling Mill Co.* 6 Pa. Dist. R. 410.

204. A receiver of a railroad appointed in a foreclosure action is the only necessary party defendant in an action to compel the specific performance of a contract made by the railroad company. *Southern Exp. Co. v. Western North Carolina R. Co.* 99 U. S. 191, 25: 319
Cited in Atlantic Trust Co. v. Dana, 62 C. C. A. 670, 128 Fed. 222—*Southern Mut. Bldg. & L. Asso. v. Andrews*, 122 Ala. 601, 26 So. 113.

Assignors.

205. If a defendant not only had notice of an assignment of a cause of action to the plaintiff, but consented to that assignment, there would be a new and direct promise from the defendant to the plaintiff, and the assignors would not be necessary parties to the cause of action. *Delaware County v. Diebold Safe & Lock Co.* 133 U. S. 473, 10 Sup. Ct. Rep. 399, 33: 674

Assignees.

Effect of Assignment by Defendant, see Abatement and Revival, 6.

206. Assignees are necessary parties to a bill by a creditor to reach a fund arising from the claims included in an assignment for the benefit of creditors. *Goodman v. Niblack*, 102 U. S. 556, 26: 229

Principals.

Joinder of Principal and Surety, see *infra*, 268.

In Suit for Injunction against Agent, see Injunction, 198.

207. A surety is entitled to have his principal made a party to a bill against him. *Robertson v. Carson*, 19 Wall. 94, 22: 178

208. Under the practice of Louisiana, sureties may be sued without joining the principal. *United States v. Hodge*, 6 How. 279, 12: 437

209-10. A bill to rescind a purchase at auction, for fraudulent bidding by the auctioneer for the benefit of the owners, may be brought against the owners without joining the auctioneer. *Veazie v. Williams*, 8 How. 134, 12: 1018

211. The purchaser of personal property from executors, giving his bond with surety for the proceeds, is an indispensable party to a bill by a legatee, charging fraud and

conspiracy, and seeking to charge him and his surety with the amount, in the absence of an averment of his insolvency or of the reason why he should not or could not be brought before the court. *Robertson v. Carson*, 19 Wall. 94, 22: 178

Agents.

212. An agent need not be made a party to an action on a submission to arbitration, which he has entered into as agent. *Smith v. Morse*, 9 Wall. 76, 19: 597

Sureties.

Joinder of Principal and Surety, see *infra*, 268.

213-14. The sureties of an administrator are proper parties to a suit, on his official bond, to recover a share of the estate. *Payne v. Hook*, 7 Wall. 425, 19: 260
Cited in Jerome v. McCarter, 94 U. S. 736, 24 L. ed. 137, 15 Nat. Bankr. Reg. 549—*Omaha Hotel Co. v. Wade*, 97 U. S. 21, 24 L. ed. 919—*Florence Sewing Mach. Co. v. Singer Mfg. Co.* 8 Blatchf. 128, 4 Fisher, Pat. Cas. 345, Fed. Cas. No. 4:884—*Donahue v. Roberts*, 1 McCrary, 113, 1 Fed. 449—*Andrews v. Smith*, 19 Blatchf. 111, 5 Fed. 844—*Debris Case*, 18 Fed. 84—*Hornford v. Gudger*, 35 Fed. 392—*Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 419.

Indorsers.

215. A remote indorser who is sued has a right to insist that the other indorsers be made parties. *Riddle v. Mandeville*, 5 Cranch, 322, 3: 114
Cited in Watkins v. Worthington, 2 Bland, Ch. 523.

216. A bill for an injunction was filed, alleging that the parties who had obtained a judgment at law for the amount of a bill of exchange of which the complainant was the first indorser, had, before the suit was instituted, obtained payment of the bill from a subsequent indorser, who obtained the funds from one of the drawers. Held, it was not necessary to make the subsequent indorser a party to the injunction bill. *Atkins v. Dick*, 14 Pet. 114, 10: 378

Tenants.

217. A suit to enforce a lien for advances to a tenant, against the landlord, who has seized and sold the crop for rent, is an equitable one for an account, and to such a suit the tenant is a necessary party. *Saloy v. Bloch*, 136 U. S. 338, 10 Sup. Ct. Rep. 996, 34: 468

218. On a bill for conveyance of the legal title of a tract of land tenants should not be made parties to the bill until it is charged and shown that they obtained and retained their possession in contravention of some equity subsisting between them and the complainants. *Ringo v. Binns*, 10 Pet. 269, 9: 420

Cited in Clarkson v. Morgan, 6 B. Mon. 446.

Cotenants.

In Partition Suit, see *Partition*, 9-12.

219. Cotenants who do not convey need not be made parties defendant to a bill to

enforce a conveyance made by another cotenant. *Stephen v. Beall*, 22 Wall. 329, 22: 786

Married women and children.

See also *Trover*, 2.

220. The bankrupt's wife and children are not necessary parties defendant to an action by his assignee against him and the insurer to enjoin collection of insurance policies transferred in contemplation of insolvency. *Vetterlein v. Barnes*, 124 U. S. 169, 8 Sup. Ct. Rep. 441, 31: 400
Cited in Vetterlein v. Barker, 45 Fed. 742—*Re Thomas*, 45 Fed. 793—*Robertson v. Van Cleave*, 129 Ind. 220, 15 L.R.A. 70, 26 N. E. 899.

221. Under the laws of Oregon, if not at common law, a wife may be joined as co-defendant with her husband, in an action for the possession of real property occupied by both. *Barrell v. Tilton*, 119 U. S. 637, 7 Sup. Ct. Rep. 332, 30: 511

Plaintiffs in attachment.

222. Plaintiffs in an attachment, in levying which the sheriff has exceeded his authority, need not be joined as parties defendant in a writ of injunction to restrain him from the further wrongdoing, where it does not appear that they advised or directed him to seize the property. *North v. Peters*, 138 U. S. 271, 11 Sup. Ct. Rep. 346, 34: 936

Trustee and cestui que trust.

Trustee as Necessary Party for Purpose of Determining Right to Remove Cause, see *Removal of Causes*, 71, 75.

See also *infra*, 237.

223. The *cestui que trust* need not be joined in an action to set aside a trust deed for fraud, where the complainant claims in opposition to it and the alleged fraudulent trustee is the holder of the legal estate. *Vetterlein v. Barnes*, 124 U. S. 169, 8 Sup. Ct. Rep. 441, 31: 400
Cited in Golden v. Bruning, 72 Fed. 4—*Rejaal v. Greenhood*, 35 C. C. A. 90, 92 Fed. 947—*Watkins v. Bryant*, 91 Cal. 504, 27 Pac. 775—*Robertson v. Van Cleave*, 129 Ind. 220, 15 L.R.A. 70, 26 N. E. 899—*Sprogg v. Ditchman*, 28 Misc. 410, 59 N. Y. Supp. 966—*Woodbridge v. Bockes*, 59 App. Div. 517, 69 N. Y. Supp. 417—*Paine v. Foster*, 9 Okla. 287, 60 Pac. 24.

224. On a bill by a creditor to reach a trust fund which has passed into the possession of a third party, the trustee and *cestui que trust* are indispensable parties. *McRea v. Branch Bank*, 19 How. 376, 15: 688
Cited in Shipp v. Williams, 10 C. C. A. 248, 22 U. S. App. 380, 62 Fed. 6.

225. The trustee under a deed of trust is a necessary party to a suit to prevent a sale under the trust deed. *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. Rep. 287, 30: 435
Cited in Shipp v. Williams, 10 C. C. A. 248, 22 U. S. App. 380, 62 Fed. 6.

226. Where a trustee represents his beneficiaries in all things relating to the trust

property, they are not necessary parties to a suit against him to enforce or declare void the trust. *Kerrison v. Stewart*, 93 U. S. 155, 23: 843

Cited in *McArthur v. Scott*, 113 U. S. 396, 28 L. ed. 1033, 5 Sup. Ct. Rep. 652—*Rand v. Walker*, 117 U. S. 344, 29 L. ed. 909, 6 Sup. Ct. Rep. 760—*Wescott v. Wayne Agri. Works*, 11 Fed. 303—*Ross v. Ft. Wayne*, 11 C. C. A. 291, 24 U. S. App. 113, 63 Fed. 470—*Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 171—*Atlantic Trust Co. v. Dana*, 62 C. C. A. 672, 128 Fed. 224—*Anderson v. Stockdale*, 62 Tex. 63.

227. Where a trustee represents his beneficiaries in all things relating to their common interest in the trust property, they are not necessary parties to a suit by him against a stranger to enforce the trust, or to one by a stranger against him to defeat it, in whole or in part. *Rand v. Walker*, 117 U. S. 340, 6 Sup. Ct. Rep. 769, 29: 907
Cited in *Watkins v. Bryant*, 91 Cal. 504, 27 Pac. 775.

228. A trustee having large powers over the trust estate, and important duties to perform with respect to it, is a necessary party to a suit by a stranger to defeat the trust. *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. Rep. 652. 28: 1015

Cited in *Miller v. Texas & P. R. Co.* 132 U. S. 671, 33 L. ed. 404, 10 Sup. Ct. Rep. 206.

229. While, as a general rule, the *cestuis que trust*, as well as the trustee, are necessary parties in suits respecting the trust property, brought either by or against the trustee, this rule does not apply in a suit by the trustee to recover the trust property, which in no wise affects his relation with the *cestuis que trust*. *Carey v. Brown*, 92 U. S. 171, 23: 469

Cited in *Wescott v. Wayne Agri. Works*, 11 Fed. 303—*Hickox v. Elliott*, 10 Sawy. 425, 22 Fed. 20—*Smith v. Portland*, 30 Fed. 737—*Ross v. Ft. Wayne*, 11 C. C. A. 291, 24 U. S. App. 113, 63 Fed. 469—*Grisswold v. Bacheller*, 75 Fed. 473—*Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 463, 41 U. S. App. 766, 77 Fed. 791—*Alger v. Anderson*, 78 Fed. 734—*Hunter v. Robbins*, 117 Fed. 922—*Buckingham v. Eates*, 63 C. C. A. 22, 128 Fed. 584—*McKleroy v. Gadsden Land & Improv. Co.* 126 Ala. 192, 28 So. 660—*Boyd v. Jones*, 44 Ark. 316—*Dickenson v. Harris*, 48 Ark. 358, 3 S. W. 58—*Martel v. Desjardin*, 93 Me. 417, 45 Atl. 522—*Stewart v. Firemen's Ins. Co.* 53 Md. 574—*Re Straut*, 126 N. Y. 212, 27 N. E. 259.

230-31. To divest a *feme covert* or minor of an interest in real estate, the title being in a trustee for her use, and the trust an active one, the trustee must be a party to the suit. *O'Hara v. McConnell*, 93 U. S. 150, 23: 840

Cited in *McArthur v. Scott*, 113 U. S. 396, 28 L. ed. 1033, 5 Sup. Ct. Rep. 652—*Woodward v. McConnaughey*, 45 C. C. A. 604, 106 Fed. 760—*Re Tuscombe*, 109 Wis. 201, 85 N. W. 341.

232. A will being proved and recorded in the county where the land was situated, it was not necessary, in a suit in chancery by the life annuitant to establish the annuity

as a lien on the land, to make defendant the trustee in a deed of trust made by the devisee under the will; provided, in a suit to enforce the deed of trust brought by the beneficiaries under it, they were given the right to contest the validity of the lien claimed by the life annuitant, and to redeem the land from such lien when established. *Canal Bank v. Hudson*, 111 U. S. 66, 4 Sup. Ct. Rep. 303, 28: 354

233. The *cestui que trust* of land, conveyed to his trustee, is not a necessary party to an action to enjoin a suit at law pending against the grantee of the trustee by the heirs of the trustee, to recover possession of the land, when the legal title never vested in the *cestui que trust*, and the heirs did not recognize any privity or connection with him. *Gridley v. Wynant*, 23 How. 500, 16: 411

234. The Choctaw Nation is not a necessary party to a suit to enforce a trust in moneys received by the defendant under a contract with such nation for services rendered by himself and others in collecting a claim against the United States. *McKee v. Lamon*, 159 U. S. 317, 16 Sup. Ct. Rep. 11, 40: 165

235. Where a trustee died, and another was appointed in a proceeding relative to the execution of the trust, the heirs at law of the first trustee should be made parties to the same, as the legal title to the trust property is in them. *Greenleaf v. Queen*, 1 Pet. 138, 7: 85
Cited in *Bryan v. Stevens*, Fed. Cas. No. 2,066a—*Abbott's Appeal*, 55 Me. 593.

236. To a bill by nonconsenting stockholders to set aside a sale of railroad property in accordance with an agreement entered into by a majority of the holders of stocks and bonds of the railroad company, under a decree in an amicable foreclosure suit by the trustees in a mortgage securing some of the bonds, against the trustees in mortgages securing the other bonds, the trustees and assenting holders of stocks and bonds, among whom the proceeds of the sale had been distributed, are indispensable parties. If the latter are too numerous, some may be sued as representatives of the whole. *Ribon v. Chicago, R. I. & P. R. Co.* 16 Wall. 446, 21: 367

Executors and administrators.

In Scire Facias to Revive Judgment, see *Judgment*, 1137.

For Purposes of Determining Right to Remove Cause, see *Removal of Causes*, 176.

See also *infra*, 250; *Appeal and Error*, 2384.

237. Where executors are trustees under a will, they are necessary parties to a suit to set it aside. *American Bible Soc. v. Price*, 110 U. S. 61, 3 Sup. Ct. Rep. 440, 28: 70

238. The administrator was made a party to a creditor's bill filed for the purpose of subjecting the real estate of a deceased per-

son as assets to the payment of his debts. *Bank of United States v. Ritchie*, 8 Pet. 128.

8: 890

Cited in Plumb v. Bateman, 2 App. D. C. 167.

Heirs; devisees; legatees.

Creditors' Suits to Subject Land to Payment of Debts, see Executors and Administrators, 173, 176, 177.

In Proceeding to Sell Decedent's Land for Payment of Debts, see Executors and Administrators, 224-225a.

See also *supra*, 235.

239. It is no objection to a bill filed in the circuit court, to compel an accounting by executors and to recover a share of the estate, that there are other distributees besides the complainants. *Payne v. Hook*, 7 Wall. 425.

19: 260

Cited in Van Bokkelen v. Cook, 5 Sawy. 539. Fed. Cas. No. 16,831—*Pulliam v. Pulliam*, 10 Fed. 80—*Perea v. Barela*, 6 N. M. 245, 27 Pac. 507.

240. The personal representative of a deceased party may maintain a suit for his interest in the proceeds of lands sold, and it is not necessary that his heirs-at-law should be parties. *Seymour v. Freer*, 8 Wall. 202.

19: 306

241. The heirs of the universal legatee in a will which, from lack of knowledge of its revocation by a later will, is admitted to probate, are not necessary parties to an action by the universal legatee in the later will to recover property admitted to have been a part of the testator's estate, which the executors under the earlier will had sold to defendants under a power of attorney from the legatee therein, which, upon its face, was irregularly executed and notice, of itself, that the sales were not in accordance with the requirements of the laws of the state. *Gaines v. Hennen*, 24 How. 553.

16: 770

242. Upon a bill in equity for a legacy, by a legatee against a person who had married the residuary legatee of the testator, the residuary legatee is a necessary defendant. *Lewis v. Darling*, 16 How. 1.

14: 819

Cited in McKee v. Cochrane, 7 Mackey, 467—*State ex rel. Hart v. Burke*, 33 La. Ann. 505.

243. In a suit by a legatee to charge the lands of a residuary legatee, it is not necessary to join a special devisee of other lands, who is also a nonresident. *West v. Smith*, 8 How. 402.

12: 1130

244. The heirs of a deceased alien who left a foreign will which has been proved in this country should be made parties to a suit brought by a legatee in such will to establish his claim to assets in the hands of an administrator with the will annexed. *Armstrong v. Lear*, 8 Pet. 52.

8: 863

Cited in Gordon v. Green, 113 Mass. 260—*Sears v. Hardy*, 120 Mass. 531—*Cassidy v. Shimmmin*, 122 Mass. 411.

245. Where a legacy for which suit is instituted is given jointly to several persons

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in different families, and the legatees take equally, the number in neither family being ascertained by the will, all the claimants ought to be brought before the court. *Pray v. Belt*, 1 Pet. 670.

7: 309

246. Legatees need not be joined in a suit by daughters who are also executrices, although they do not sue as such but bring suit in their own right, to establish an indebtedness of the estate to them. *Glover v. Patten*, 165 U. S. 394, 17 Sup. Ct. Rep. 411.

41: 760

247. In a suit by an heir to set aside a judicial sale made to a receiver of the estate, the complainant in the decree of sale and the other heirs are indispensable parties. *Hooey v. Wilson (Hoe v. Wilson)*, 9 Wall. 501.

19: 762

Cited in Loomis v. Rosenthal, 67 Fed. 371—*Cassidy v. Shimmmin*, 122 Mass. 410—*McPike v. Wells*, 54 Miss. 146.

248. In a suit in equity brought by heirs at law to set aside a conveyance obtained from their ancestor, a final decree for the sale of the property cannot be pronounced until all the heirs are brought before the court as parties, if they are within the jurisdiction. If all the heirs cannot be brought before the court, the undivided interest of those who are made parties may be sold. *Harding v. Handy*, 11 Wheat. 103.

6: 429

Cited in Shields v. Barrow, 17 How. 140, 15 L. ed. 160—*Barney v. Baltimore*, 6 Wall. 285, 18 L. ed. 826—*Minnesota v. Northern Securities Co.* 184 U. S. 237, 46 L. ed. 516, 22 Sup. Ct. Rep. 308—*Harrison v. Urann*, 1 Story, 66, Fed. Cas. No. 6,146—*Rateau v. Bernard*, 3 Blatchf. 248, Fed. Cas. No. 11,579—*Conolly v. Wells*, 33 Fed. 208—*Horsford v. Gudger*, 35 Fed. 303—*Mackay v. Gabel*, 117 Fed. 878—*Eddie v. Parke*, 31 Mo. 515—*Young v. Bilderback*, 3 N. J. Eq. 206—*Colt v. Lasnier*, 9 Cow. 334.

249. Where the specific performance of a contract of an ancestor is prayed for, all the heirs ought to be made parties to the bill; and if one of the heirs, not a party, be dead, this should be proved. *Morgan v. Morgan*, 2 Wheat. 290.

4: 242

Cited in Shields v. Barrow, 17 How. 142, 15 L. ed. 161—*Phillips v. Mariner*, 5 Biss. 28, Fed. Cas. No. 11,105—*Bland v. Fleeman*, 29 Fed. 672—*Fagan v. Barnes*, 14 Fla. 57—*Gallatin Land, Coal & Oil Co. v. Davis*, 44 W. Va. 115, 28 S. E. 747.

250. In a suit for specific performance, where the court may give a money judgment for the value of the land instead of decreeing a conveyance; the presence of the executors of the person holding title to the land is sufficient. For such a judgment it is not necessary that the devisees of the land should be parties. *May v. Le Claire*, 11 Wall. 217.

20: 50

251. In a suit by a distributee of the estate of a decedent to recover a distributive share, it is not necessary to make parties all who are entitled to distribution, nor can a decree be made in their favor. If they should appear and claim an interest, if there are

controverted matters between them and the administrator, outside of the mere accounting to be made by him, this can be decided only on proper pleadings and regular hearing by the court. *Hook v. Payne*, 14 Wall. 252, 20: 887

Cited in New Orleans v. Warner, 175 U. S. 132, 44 L. ed. 103, 20 Sup. Ct. Rep. 44—*Pulliam v. Pulliam*, 10 Fed. 64—*Miller v. Merline*, 43 Fed. 289—*Perrin v. Lepper*, 72 Mich. 552, 40 N. W. 859.

252. A bill to set aside a fraudulent receipt obtained by an administrator from one distributee, and to recover the amount coming to him, is not a suit in which all other persons interested in the estate can be heard, unless they are made parties. *Hook v. Payne*, 14 Wall. 252, 20: 887

253. A decree in an action against an administrator for the creation of a lien upon lands, and directing a sale thereof, is invalid, where the heirs at law and devisees are not properly before the court. *Boyce v. Grundy*, 9 Pet. 275, 9: 127

254. Where, by a will, a fund was to be first distributed, in a suit for the distribution of this fund the residuary legatees need not be made parties. In such cases the executors represent the interests of such residuary legatees. *Dandridge v. Washington*, 2 Pet. 370, 7: 454

Cited in Carey v. Roosevelt, 81 Fed. 610—*Rankin v. Big Rapids*, 66 C. C. A. 570, 133 Fed. 672—*Ward v. Durham*, 134 Ill. 200, 25 N. E. 745—*Ford v. First Nat. Bank*, 201 Ill. 128, 66 N. E. 316—*Evans v. Wall*, 150 Mass. 169, 38 Am. St. Rep. 410, 34 N. E. 183—*Read v. Patterson*, 44 N. J. Eq. 218, 6 Am. St. Rep. 877, 14 Atl. 400—*Davidson v. Rake*, 45 N. J. Eq. 772, 18 Atl. 752.

255. An administrator of a partner may bring a suit in chancery to settle the partnership affairs, without making the heir at law of the deceased partner a party. *Moore v. Huntington*, 17 Wall. 417, 21: 642
Cited in Blackburn v. Fitzgerald, 130 Ala. 588, 30 So. 568.

256. The lands of a deceased debtor in Georgia are liable in equity for the payment of his debts, without making the heir a party to the suit. *Telfair v. Stead*, 2 Cranch, 407, 2: 320

b. Joinder.

Joinder of Different Causes of Action, see Action or Suit, 60-66.

In Admiralty, see Admiralty, 359, 360, 373, 374, 379.

First Objecting on Appeal to Misjoinder, see Appeal and Error, VIII. j, 10.

Dismissal for Misjoinder, see Misjoinder and Discontinuance, 51.

Necessity for Total Diversity to Support Federal Jurisdiction, see Courts, 678-687.

Joint or Several Judgments Against Defendants, see Judgment, I. c.

Distinct Judgments Against Same Person in Different Capacities, see Judgment, 9.

Multifariousness or Misjoinder in Pleading

Generally, see Pleading, I. t; 277-281.
Effect of Joining Formal or Nominal Parties on Right to Remove Cause, see Removal of Causes, 66-68.

See also *supra*, 137.

257. Objection to nonjoinder of parties defendant does not go to the jurisdiction of the court. *Delaware County v. Diebold Safe & Lock Co.* 133 U. S. 473, 10 Sup. Ct. Rep. 399, 33: 674

258. Where the liability of four insurance companies depended upon the same evidence, and was founded upon the same policy, and their defense rested on the same issues, the action may be joint by consent. *Germania F. Ins. Co. v. Boykin (Insurance Cos. v. Boykin)* 12 Wall. 433, 20: 442

259. A child who, because of infancy, was not a party to a document settling and adjusting an indebtedness of a mother as guardian to her children, but who ratified it after maturity, may be joined as a party in an action to charge the mother's estate with the indebtedness thereby acknowledged. *Glover v. Patten*, 165 U. S. 394, 17 Sup. Ct. Rep. 411, 41: 760

Joint and several cause of action.

Causes of Action against Partners, see *infra*, 266, 267.

Removal of, to Federal Court, see Removal of Causes, 135, 138-158.

260. The laws of Mississippi allow an action to be maintained against one of the parties to an obligation signed by several obligors. *Rogers v. Batchelor*, 12 Pet. 221, 9: 1063

261. By a statute of Mississippi, contracts and liabilities of copartners are joint and several, and a creditor may declare against any one or more of them; and where suit is brought against several, a discontinuance may be entered against one, and judgment rendered against others by default. *Amis v. Smith*, 16 Pet. 303, 10: 973

Cited in Griffin v. Reynolds, 17 How. 612, 15 L. ed. 231—*Hawes v. Marchant*, 1 Curt. C. C. 147, Fed. Cas. No. 6,240—*Sillivant v. Reardon*, 5 Ark. 152—*Whiting v. Beebe*, 12 Ark. 548—*Biscoe v. Sandefur*, 14 Ark. 583.

262. Where the cause of action is several as well as joint, the plaintiff may elect to sue each defendant separately or all jointly, and the defendants are not permitted to object. *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. Rep. 1034, 1161, 29: 334

Cited in Torrence v. Shedd, 144 U. S. 531, 36 L. ed. 531, 12 Sup. Ct. Rep. 726—*Powers v. Chesapeake & O. R. Co.* 169 U. S. 97, 42 L. ed. 675, 18 Sup. Ct. Rep. 264—*Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 138, 45 L. ed. 125, 21 Sup. Ct. Rep. 67—*Woodrum v. Clay*, 33 Fed. 898—*Seddon v. Virginia, T. & C. Steel & I. Co.* 1 L.R.A. 110, 36 Fed. 9—*Stanbrough v. Cook*, 3 L.R.A. 402, 38 Fed. 373—*Kattel v. Wylie*, 38 Fed. 867—*Bacon v. Felt*, 38 Fed. 871—*Sexton v. Seelye*, 39 Fed. 705—*Ames v. Chicago S. F. & C. R. Co.* 39 Fed. 883—*Texas v. Day*

Land & Cattle Co. 49 Fed. 597—**Ferguson v. Chicago, M. & St. P. R. Co.** 63 Fed. 178—**Brown v. Cox** Bros. & Co. 75 Fed. 690—**Creagh v. Equitable Life Assur. Soc.** 88 Fed. 3—**Moore v. Los Angeles Iron & Steel Co.** 89 Fed. 78—**Bates v. Carpenter**, 98 Fed. 454—**McCormick v. Illinois C. R. Co.** 100 Fed. 252—**Smedley v. Smedley**, 110 Fed. 258—**Ward v. Franklin**, 110 Fed. 796—**Fogarty v. Southern P. Co.** 123 Fed. 974—**Shaffer v. Union Brick Co.** 128 Fed. 98—**American Bridge Co. v. Hunt**, 64 C. C. A. 550, 130 Fed. 304—**Vulcan Detinning Co. v. American Can Co.** 130 Fed. 637—**Myers v. Chicago & N. W. R. Co.** 118 Iowa, 317, 91 N. W. 1076—**Winston v. Illinois C. R. Co.** 111 Ky. 958, 55 L.R.A. 604, 65 S. W. 13—**Baltimore County v. United Railways & Electric Co.** 99 Md. 89, 57 Atl. 675—**Zeller v. Martin**, 84 Wis. 6, 54 N. W. 330.

263. Under the Code of Arkansas, where two or more persons are jointly bound by contract, an action may be brought against all or any of them, and judgment may be rendered against any of the defendants summoned severally, where the plaintiff would be entitled to judgment against such defendants if the action had been against them alone. **Sawin v. Kenny**, 93 U. S. 289, 23: 926

Cited in **Hanley v. Donoghue**, 116 U. S. 3, 29 L. ed. 536, 6 Sup. Ct. Rep. 242—**Chils v. Gronlund**, 41 Fed. 505.

264. Suit upon a joint and several bond must be brought either against all of the obligors or against one of them; joining less than the whole number as defendants is matter of abatement. **Minor v. Mechanics' Bank**, 1 Pet. 46, 7: 47
Cited in **United States v. Archer**, 1 Wall. Jr. 184, Fed. Cas. No. 14,464—**Chandler v. Byrd**, Hemps. 223—**Blagden v. United States**, 18 App. D. C. 373—**Webber v. Libby**, 70 Me. 413—**Walsh v. Smyth**, 3 Bland. Ch. 26—**Price v. Spencer**, 7 Phila. 181, 27 Phila. Leg. Int. 4.

265. No intermediate number between one and all of the obligors upon a joint and several bond may be sued jointly, though each may be sued severally or all jointly. **United States v. Leffler**, 11 Pet. 86, 9: 642
Cited in **Blagden v. United States**, 18 App. D. C. 373.

Partners.

See also *supra*, 261.

265a. A creditor may sue a single member of a partnership upon a firm obligation. **Sheehy v. Mandeville**, 6 Cranch, 253, 3: 215
Cited in **Oldham v. Henderson**, 4 Mo. 300.

266. In partnerships there is not such several liability of the copartners that each may be sued separately. The members undertake joint enterprises, they assume joint risks, and they incur, in all cases, joint liabilities. **Mason v. Eldred**, 6 Wall. 231, 18: 783

Cited in **Raphael v. Trask**, 118 Fed. 779—**Blagden v. United States**, 18 App. D. C. 373—**Crosby v. Jeroloman**, 37 Ind. 274—**Outcait v. Collier**, 8 Okla. 477, 58 Pac. 642.

267. Where a contract is made and the work executed by a person in his own name, the fact that he is a member of a partnership, even if the other partners share in the profits, does not make it necessary to join them as parties. **Simpson v. Baker** (The Potomac) 2 Black, 581, 17: 263
Law v. Cross, 1 Black, 533, 17: 185
Cited in **The Potomac** (Simpson v. Baker) 2 Black, 584, 17 L. ed. 264—**The Pirate**, 32 Fed. 490.

Principal and sureties.

268. Action is maintainable against principal and sureties in an administration bond, to recover amount of former's default and liability. **Ennis v. Smith**, 14 How. 400, 14: 472
Cited in **Clark v. Shelton**, 16 Ark. 480—**Moren v. McCown**, 23 Ark. 97.

Parties to promissory note.

Rule in Federal Courts, see **Courts**, 1283, 1284.

269. A statute of Mississippi allows suit to be brought against the maker and payee of a promissory note jointly, by the indorsee. **Dromgoole v. Farmers' & M. Bank**, 2 How. 241, 11: 252

270. By D. C. Rev. Stat. § 827, relating to the District of Columbia, the holder of a note may join the makers and indorsers in the same action. **Burdette v. Bartlett**, 95 U. S. 637, 24: 534
Cited in **Keyser v. Fendall**, 5 Mackey, 58—**Chesley v. Riley**, 9 Mackey, 168—**Blagden v. United States**, 18 App. D. C. 372—**Fisk v. Fisk**, 6 App. Div. 435, 39 N. Y. Supp. 537.

Wrongdoers.

Suit to Recover Proceeds of Preferential Levy, see **Bankruptcy**, 239, 240.

271-2. When several persons have jointly committed a wrongful act, they may all be charged jointly as principals, or the plaintiff may sue any one of them separately. **Sessions v. Johnson**, 95 U. S. 347, 24: 596
Distinguished in **Chils v. Gronlund**, 41 Fed. 505.

Cited in **United States v. Ames**, 99 U. S. 46, 25 L. ed. 301—**Atlantic & P. R. Co. v. Laird**, 164 U. S. 399, 41 L. ed. 487, 17 Sup. Ct. Rep. 120—**Gudger v. Western North Carolina R. Co.** 21 Fed. 84—**Engstrand v. Kleffman**, 86 Minn. 405, 91 Am. St. Rep. 359, 90 N. W. 1054.

273. A mail contractor and his subcontractor who unite to defraud the government may be joined as defendants in an action to recover back money paid them by the government. **United States v. Piatt**, 157 U. S. 113, 15 Sup. Ct. Rep. 498, 39: 639

Parties claiming interest in real estate.

Creditors' Suits to Subject Land to Payment of Debts, see **Executors and Administrators**, 173, 176.

274. Parties who hold in severalty by distinct titles, and cannot therefore be joined at common law in a writ of right, cannot

be so joined by virtue of a Kentucky statute which authorizes a recovery although plaintiff proves only a part of the claim in his declaration. *Green v. Liter*, 8 Cranch, 229, 3: 545

275. If there are several tenants claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ of right; and if they are, they may plead in abatement of the writ. *Green v. Liter*, 8 Cranch, 229, 3: 545
Greer v. Mezes, 24 How. 268, 16: 661
Cited in Harris v. Preston, 10 Ark. 209.

276. Under the statute of Kentucky passed in 1796, several defendants may be joined in the same suit, although claiming separate tracts of land from distinct sources of title. *Lewis v. Marshall*, 5 Pet. 470, 8: 195
Cited in Lorman v. Clarke, 2 McLean, 576, Fed. Cas. No. 8,516.

277. In an action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers on his single, separate, and distinct tenement or parcel of land. *Greer v. Mezes*, 24 How. 268, 16: 661
Cited in Gibbons v. Martin, 4 Sawy. 208, Fed. Cas. No. 5,381—*McGuire v. Pensacola City Co.* 44 C. C. A. 672, 105 Fed. 679—*Andrews v. Carille*, 20 Colo. 372, 38 Pac. 465.

278. When a bill by a widow for the partition of a trust estate, for an account of rents and profits, and for the appointment of a new trustee, alleges that several named persons all claim through a deed made by her during coverture, which she alleges was void for want of her free consent, no demurrer lies to the bill for misjoinder of parties defendant on the ground that they had separate and distinct interests which could not be joined in one suit. *House v. Mullen*, 22 Wall. 42, 22: 838
Cited in Torrent v. Hamilton, 95 Mich. 161, 54 N. W. 634.

279. The real owner of land may bring a suit against either of two different parties holding adversely to him, without joining the other. *Williams v. United States*, 138 U. S. 514, 11 Sup. Ct. Rep. 457, 34: 1026

Effect of misjoinder.

On Competency as Witness, see Witnesses, 81.

280. That parties who are not subject to the jurisdiction of the court have been improperly joined in a suit in equity will not affect the jurisdiction as to the parties properly before it. *Carneal v. Banks*, 10 Wheat. 181, 6: 297
Mallow v. Hinde, 12 Wheat. 193, 6: 599

281. The rights of the principal parties to a suit to enforce a resulting trust in land are not affected by the joinder of one named as trustee to whom they had made conveyances merely to enable him to bring suit, and who had brought a suit which was voluntarily dismissed before the present bill

was filed. *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. Rep. 401, 41: 739

III. Bringing in; Intervention.

In Admiralty, see Admiralty, III. b, 3.
 Finality of Decision of Circuit Court of Appeals on Intervention, see Appeal and Error, III. d, 2, c.
 Appealability of Order Denying Leave to Intervene, see Appeal and Error, 111.
 Appealability of Order on Motion to Intervene, see Appeal and Error, 137.
 Appeal from Order Dismissing Intervention, see Appeal and Error, 75.
 Intervener's Right to Appeal, see Appeal and Error, 2411-2418, 2449, 2474, 2483.
 Right of Interveners to be heard on Appeal, see Appeal and Error, 4044.
 Motion in Appellate Court by Intervener, see Appeal and Error, 3735.
 Reviewability of Discretion as to, see Appeal and Error, 4384.
 After Remand to Trial Court, see Appeal and Error, 5557.
 Rights of Assignors to Interfere in Suit by Assignee, see Assignment, 68, 69.
 In Confiscation Proceedings, see Confiscation and Sequestration, 90-92.
 Stockholder's Right to Defend Suit Against Corporation, see Corporations, IX. d. 4.
 Attachment to Enforce Costs against Interveners, see Costs, 90.
 Estoppel by Filing Petition to be Made a Party, see Estoppel, 283.
 Intervention Generally, see Intervention.
 Effect of Dismissal as to one Party on his Right to Intervene in Subsequent Proceedings Affecting his Interest, see Judgment, 324.
 Conclusiveness of Judgment against Intervener, see Judgment, 697.
 In Foreclosure Suit, see Mortgage, VII. c. 3.
 Rights of Intervening Prior Mortgagee to Payment from Proceeds of Foreclosure, see Mortgage, 275.
 Right of Claimants to Intervene in Suit to Cancel Land Patent, see Public Lands, 1160.
 Where Property is in Hands of Receiver, see Receiver, 62.
 Intervening Petition for Payment of Taxes from Proceeds on Foreclosure, see Receivers, 97.
 Removal of Cause after Intervention of Party, see Removal of Causes, 141, 159, 160.
 Effect of Intervention on Right to Remove Cause, see Removal of Causes, 202.

282. A court of equity adapts its decrees to the necessities of each case, and where suit terminates in a decree against defendants, it is easy to do substantial justice to all parties in interest, and prevent a multiplicity of suits, by allowing the other distributees, either through a reference to a master, or by some proper proceeding, to

come in and share in the benefit of the litigation. *Payne v. Hook*, 7 Wall. 425,

19: 260

Cited in *Lockhart v. Horn*, 3 Woods, 547, Fed. Cas. No. 8,446—*United States v. Houston*, 48 Fed. 210—*Bowdoin College v. Merritt*, 54 Fed. 62—*Thornton v. Tison*, 95 Ala. 592, 10 So. 639.

283. Suggestion presented by the Attorney General of Canada, requesting the aid of the court for the petitioner, who was a subject of Great Britain, for a writ of prohibition. *Re Cooper*, 143 U. S. 472, 12 Sup. Ct. Rep. 453, 36: 232
Cited in *Percy Summer Club v. Astle*, 110 Fed. 489.

284. A person who has not been named as defendant to a bill may, with the consent of all the parties to the cause, appear at the hearing. *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. Rep. 449, 34: 1078

285. A complaint of intervention must be filed, under Dak. Code, § 90, by leave of the court; and the right to intervene ought to be claimed within a reasonable time, and may be properly refused where the action has been pending two years and is about to be tried. *Smith v. Gale*, 144 U. S. 509, 12 Sup. Ct. Rep. 674, 36: 521

Editorial note.

[Right of surety to intervene in action against principal or principal in action against surety. 68 L.R.A. 736.]

Parties interested in subject-matter, generally.

Necessity of Original Parties in Bill to Enjoin a Judgment, see *Injunction*, 199.

By Insurance Company in Collision Suit, see *Insurance*. 699.

286. The right of a party interested in the subject-matter of the litigation to intervene in a suit in equity, recognized. *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243, 34: 843

Cited in *Mercantile Trust Co. v. Atlantic & P. R. Co.* 63 Fed. 517—*Union Trust Co. v. Atchison, T. & S. F. R. Co.* 8 N. M. 338, 43 Pac. 701.

287. Parties holding obligations of the same nature and kind as plaintiff in a suit brought by him on his own behalf, as well as on behalf of all such persons, may, after a decree in his favor, come in and prove their claims, without formal interventions or special leave. *New Orleans v. Warner*, 180 U. S. 199, 21 Sup. Ct. Rep. 353, 45: 493

288. A city that has, by statute, assumed the position of a county and its liability upon bonds issued in aid of a railroad, is entitled to intervene and be substituted and subrogated to the rights and liability of the county, and to enforce a lien upon the property and earnings of the railroad, upon foreclosure. *Ketchum v. St. Louis*, 101 U. S. 306, 25: 999
Cited in *Central Trust Co. v. Florida R. & Nav. Co.* 43 Fed. 758.

289. The interest mentioned in the Dakota Code, which entitles a person to intervene in a suit between other parties, must be that created by a claim to or lien upon the property, or some part thereof, which is the subject of litigation. *Smith v. Gale*, 144 U. S. 509, 12 Sup. Ct. Rep. 674, 36: 521

Cited in *Murray v. American Surety Co.* 17 C. C. A. 142, 44 U. S. App. 43, 70 Fed. 346—*Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 326—*Clarke v. Eureka County Bank*, 116 Fed. 537—*Bray v. Booker*, 6 N. D. 533, 72 N. W. 933—*McClurg v. State Bindery Co.* 3 S. D. 366, 44 Am. St. Rep. 799, 53 N. W. 428—*Vanmeter v. Fidelity Trust & Safety Vault Co.* 107 Ky. 113, 53 S. W. 10.

290. After a decree for the sale of property, the owners of rights and equities under contracts concerning it, and their assignees, may intervene and have their rights in the premises ascertained and established, or paid for from the proceeds of the sale. *French v. Gapen*, 105 U. S. 509, 26: 951

Cited in *Gest v. Packwood*, 39 Fed. 536—*Perry v. Godbe*, 82 Fed. 143—*Rice v. Durham Water Co.* 91 Fed. 434—*East Coast Cedar Co. v. People's Bank*, 49 C. C. A. 426, 111 Fed. 450—*Atlantic Trust Co. v. Dana*, 62 C. C. A. 669, 128 Fed. 221—*Flournoy v. Champion*, 11 N. M. 103, 55 L.R.A. 750, 66 Pac. 547—*Hockaday v. Drye*, 7 Okla. 295, 54 Pac. 475.

Parties Interested in attached property.

291. Where property is attached by process issued by the United States circuit court, a person not a party to the proceedings may intervene, for the protection of his rights, by petition *pro interesse suo*, or by a bill in equity, or by motion; or, in actions at law, a proceeding in the nature of an interpleader may be ordered by the court, and the final judgment or decree in this matter is reviewable. *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27, 28: 145

Cited in *Labette County v. United States*, 112 U. S. 221, 28 L. ed. 699, 5 Sup. Ct. Rep. 108—*Phelps v. Oaks*, 117 U. S. 241, 29 L. ed. 800, 6 Sup. Ct. Rep. 714—*Krippendorf v. Hyde*, 28 Fed. 789—*Osborne v. Barge*, 30 Fed. 806—*Boltz v. Eagon*, 34 Fed. 446—*Tefft v. Sternberg*, 5 L.R.A. 225, 40 Fed. 7—*Pickett v. Filer & S. Co.* 40 Fed. 314—*Farmers' Loan & T. Co. v. Houston & T. C. R. Co.* 44 Fed. 116—*Mercantile Trust Co. v. Atlantic & P. R. Co.* 63 Fed. 517—*Gregory v. Pike*, 15 C. C. A. 40, 21 U. S. App. 658, 67 Fed. 845—*Compton v. Jesup*, 15 C. C. A. 414, 31 U. S. App. 486, 68 Fed. 250—*Society of Shakers v. Watson*, 15 C. C. A. 638, 37 U. S. App. 141, 68 Fed. 736—*St. Paul, M. & M. R. Co. v. Drake*, 19 C. C. A. 256, 44 U. S. App. 271, 72 Fed. 949—*Grand Trunk R. Co. v. Central Vermont R. Co.* 88 Fed. 624—*Rice v. Durham Water Co.* 91 Fed. 434—*Lillenthal v. McCormick*, 54 C. C. A. 482, 117 Fed. 96—*Re Boyd*, 120 Fed. 1001—*Louisville Trust Co. v. Knott*, 65 C. C. A. 164, 130 Fed. 826—*Bond v. Carter Hardware Co.* 15 App. D. C. 80—*Neun v. Blackston Bldg. & L. Asso.* 149 Mo. 83, 50 S. W. 436—*Union Trust Co. v. Atchison, T. & S. F. R. Co.* 8 N. M. 338, 43 Pac. 701—*Morrison v. Menhaden Co.* 37 Hun, 525—*Hockaday v. Drye*, 7 Okla. 295, 54 Pac. 475.

292. When a Federal marshal takes property of one not named in the writ of attachment, the rightful owner may obtain relief by intervening by petition in the action. *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. Rep. 379, 31: 374

Cited in Put-in-Bay Waterworks Light & R. Co. v. Ryan, 181 U. S. 433, 45 L. ed. 938, 21 Sup. Ct. Rep. 709—*Clafin v. Beaver*, 35 Fed. 261—*Tefft v. Sternberg*, 5 L.R.A. 225, 40 Fed. 7—*Clafin v. Beaver*, 41 Fed. 206—*Farmers' Loan & T. Co. v. San Diego Street-Car Co.* 49 Fed. 197—*Compton v. Jesup*, 15 C. C. A. 415, 31 U. S. App. 486, 68 Fed. 281—*Summers v. White*, 17 C. C. A. 634, 36 U. S. App. 395, 71 Fed. 109—*Maitland v. Gibson*, 79 Fed. 138—*Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 163, 95 Fed. 505—*Connor v. Tennessee C. R. Co.* 54 L.R.A. 694, 48 C. C. A. 738, 109 Fed. 938—*Corblitt v. Farmers' Bank*, 114 Fed. 604—*Bond v. Carter Hardware Co.* 15 App. D. C. 81—*Goodbar v. Brooks*, 57 Ark. 458, 22 S. W. 96—*Apreda v. Romano*, 24 W. N. C. 127—*National Foundry & Pipe Works v. Oconto City Water Supply Co.* 105 Wis. 66, 81 N. W. 125.

United States.

Necessity of Consent, see *United States*, 160.

293. Where property of the government is concerned, the attorney for the United States may intervene by way of suggestion; and in such case, if the suit be not stayed the court will adjust its judgment according to the rights disclosed on the part of the government thus intervening. *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. Rep. 418, 37: 259

Cited in South Carolina v. Wesley, 155 U. S. 544, 39 L. ed. 254, 15 Sup. Ct. Rep. 230—*United States v. American Surety Co.* 110 Fed. 914—*Giddings v. Holter*, 19 Mont. 267, 48 Pac. 8.

294. Where a bill is filed by one state against another to establish a disputed boundary, the United States have an interest in the controversy, and the Attorney General, on his application, may intervene and appear in behalf of the United States, adduce evidence, and be heard in argument, without making the United States a party in the technical sense of the term; but he will have no right to interfere in the pleading, or evidence or admissions of the states, or either of them. The judgment cannot be either for or against the United States. *Florida v. Georgia*, 17 How. 478, 15: 181

Cited in Georgia v. Stanton, 6 Wall. 73, 18 L. ed. 724—*Virginia v. West Virginia*, 11 Wall. 54, 20 L. ed. 71—*Coffee v. Groover*, 123 U. S. 17, 31 L. ed. 58, 8 Sup. Ct. Rep. 1—*Wisconsin v. Pelican Ins. Co.* 127 U. S. 288, 32 L. ed. 242, 8 Sup. Ct. Rep. 1370—*United States v. Texas*, 143 U. S. 640, 36 L. ed. 291, 12 Sup. Ct. Rep. 488—*Missouri v. Illinois*, 180 U. S. 231, 45 L. ed. 508, 21 Sup. Ct. Rep. 331—*Northern Securities v. United States*, 191 U. S. 556, 48 L. ed. 299, 24 Sup. Ct. Rep. 119—*Alexander v. Horner*, 1 McCrary, 645, Fed. Cas. No. 169—*Lee v. Kaufman*, 3 Hughes, 102, Fed. Cas. No. 8-191—*Potter v. Beal*, 2 C. C. A. 64, 5 U. S. App. 49, 50 Fed. 864—*Percy Summer Club v. Astle*, 110 Fed. 490—*Ex parte Cox*, 44

Fla. 540, 61 L.R.A. 736, 33 So. 509—*Briggs v. The Upper Cedar Point*, 11 Allen, 178—*State v. Cincinnati Tin & Japan Co.* 66 Ohio St. 208, 64 N. E. 68—*State ex rel. Atty. Gen. v. Frost*, 113 Wis. 655, 89 N. W. 915.

State.

295. The circuit court should not arrest proceedings in a suit for the possession of lands to which the state is not a party, upon the mere suggestion of the attorney general of the state, that the land is occupied and possessed through an officer of the state, who is the custodian of the same, and used by the state for public uses, where such averments were neither proved nor admitted. *South Carolina v. Wesley*, 155 U. S. 542, 15 Sup. Ct. Rep. 230, 39: 254

Cited in Percy Summer Club v. Astle, 110 Fed. 488.

Bondholders.

296-57. Holders of the bonds of a corporation guaranteed by another, who assert that they are bona fide holders, and that their securities are valid obligations of the company which guaranteed them, may become defendants in a suit filed by the stockholders of the latter company to restrain the payment of the interest on the bonds, on the ground that the contract to do so is *ultra vires*. *Zabriskie v. Cleveland, C. & C. R. Co.* 23 How. 381, 16: 488

Creditors.

On Foreclosure, see *Mortgage*, VII. c, 3.

298. Where judgment creditors come in and make themselves parties to a creditors' bill without objection, and thereby obtain the benefit of the same, assuming their portion of the costs and expenses, there is no error. *Myers v. Fenn*, 5 Wall. 205, 18: 604
Cited in Ex parte Cutting, 94 U. S. 21, 24 L. ed. 51—*Flash v. Wilkerson*, 22 Fed. 691—*Hunt v. Fisher*, 29 Fed. 807—*Perry v. Godbe*, 82 Fed. 143—*Taber v. Royal Ins. Co.* 124 Ala. 688, 26 So. 252—*Gorrell v. Gates*, 79 Iowa, 636, 44 N. W. 905—*Fleischner v. First Nat. Bank*, 36 Or. 566, 60 Pac. 603—*Piedmont & A. L. Ins. Co. v. Maury*, 75 Va. 513.

299. In a creditors' bill filed on behalf of the complainant and all other creditors who choose to come in and share the expense, for the purpose of securing the due administration and application of a trust fund, it is the usual and correct course to give other creditors who have filed claims against the fund an opportunity to come in and have the benefit of the decree. *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. Rep. 619, 28: 547
Myers v. Fenn, 5 Wall. 205, 18: 604
Cited in Handley v. Stutz, 137 U. S. 369, 34 L. ed. 708, 11 Sup. Ct. Rep. 117—*Grant v. Buckner*, 172 U. S. 233, 43 L. ed. 430, 19 Sup. Ct. Rep. 163—*Flash v. Wilkerson*, 22 Fed. 691—*George v. St. Louis Cable & W. R. Co.* 44 Fed. 121—*Martin v. Rainwater*, 5 C. C. A. 401, 12 U. S. App. 232, 56 Fed. 11—*Compton v. Jesup*, 15 C. C. A. 432, 31 U. S. App. 486, 68 Fed. 299—*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 82 Fed. 646—*Wahl v. Franz*, 49 L.R.A. 73, 40 C. C. A. 656, 100 Fed. 698—*Security Trust Co. v. Dent*, 43 C. C. A. 600, 104 Fed. 386—*Jones v. Mutual Fidelity Co.* 123

Fed. 513—*Taber v. Royal Ins. Co.* 124 Ala. 688, 26 So. 252—*Moore v. Parker Drug Co.* 135 Ala. 291, 33 So. 439—*Doherty v. Holliday*, 137 Ind. 285, 32 N. E. 315—*Grant v. Buckner*, 49 La. Ann. 672, 21 So. 580—*Clafin v. Gordon*, 39 Hun, 61.

300-3. Submission to the jurisdiction of the court by a foreign corporation cannot be overruled at the instance of stockholders and creditors, not parties to the suit as brought, but who have been permitted to become such by an intervening petition. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. Rep. 286, 38: 98

Landlord.

304. [When a landlord means to defend in ejectment, he should make himself a party on the record. *Clayton v. Alshouse* (Pa. Sup. Ct.) 2 Dall. 150, 1: 327]

Assignees pendente lite.

305. If a person *pendente lite* takes an assignment of the interest of one of the parties to a suit for specific performance, he may, if he pleases, make himself a party by bill; but he cannot by petition pray to be admitted as a party defendant. All that the court will do is to make an order that the assignor shall not take the property out of court without notice. *Secombe v. Steele*, 20 How. 94, 15: 833

Executors and administrators.

306. An executor or administrator of a defendant who dies after the filing of a complaint, which is declared by statute to constitute the commencement of the action, may be made a party by scire facias under U. S. Rev. Stat. § 955, U. S. Comp. Stat. 1901, p. 697, although such defendant died before summons was served upon him,—especially if there is another defendant in the case, against whom the cause of action survives. *Re Connaway*, 178 U. S. 421, 20 Sup. Ct. Rep. 951, 44: 1134
Cited in *Dillard v. Central Virginia Iron Co.* 125 Fed. 159—*Brown v. Fletcher*, 140 Fed. 641—*Shute v. Patterson*, 78 C. C. A. 77, 147 Fed. 511.

Purchasers at foreclosure.

307. A stipulation between the parties to a mortgage on a portion of a railroad, to reform a decree on the foreclosure of such mortgage so as to provide for payment in full of the bonds secured by the mortgage, instead of for payment of one half their face value, cannot affect the purchasers on foreclosure of a prior mortgage on a different and distinct portion of the same road, so as to entitle them to intervene to prevent the carrying out of such stipulation, although they claim that under their purchase they obtained the personal property, machinery, rolling stock, franchises, rights, and privileges of the entire road, as their rights under their purchase could not be affected by the judgment on foreclosure of the junior mortgage. *Bronson v. La Crosse & M. R. Co.* 2 Black, 524, 17: 347

Bringing in.

In Court of Claims, see Court of Claims, 8.

Effect of Bringing in New Parties to Destroy Diversity of Citizenship, see Courts, 718, 719.

Bringing in Parties to Judicial Sale in Order to Sell Clear Title, see Equity, 29.

Mandamus to Bring in New Parties, see Mandamus, 48, 49.

Effect of, on Right to Remove Cause to Federal Court, see Removal of Causes, IV. i.

By Bill of Interpleader, see Interpleader, 3.

By Cross Bill, see Pleading, 813.

308. Indispensable new parties cannot be introduced by a cross bill. *Shields v. Barrow*, 17 How. 130, 15: 158
Cited in *Ayres v. Carver*, 17 How. 595, 15 L. ed. 181—*Fourth Nat. Bank v. New Orleans*, & C. R. Co. 11 Wall. 632, 20 L. ed. 84—*The Dove (The Mayflower v. The Dove)* 91 U. S. 385, 23 L. ed. 355—*Greeley v. Lowe*, 155 U. S. 70, 39 L. ed. 74, 15 Sup. Ct. Rep. 24—*Bowker v. United States*, 186 U. S. 141, 46 L. ed. 1093, 22 Sup. Ct. Rep. 802—*Brandon Mfg. Co. v. Prime*, 14 Blatchf. 374, 3 Bann. & Ard. 194, Fed. Cas. No. 1,810—*Randolph v. Robinson*, Fed. Cas. No. 11,561—*Weaver v. Atler*, 3 Woods, 154, Fed. Cas. No. 17,308—*The Ping-On*, 7 Sawy. 489, 11 Fed. 612—*First Nat. Bank v. Salem Capital Flour-Mills Co.* 31 Fed. 583—*Simmons v. Taylor*, 38 Fed. 699—*Bound v. South Carolina R. Co.* 47 Fed. 33—*Adelbert College v. Toledo, W. & W. R. Co.* 47 Fed. 846—*Book v. Justice Min. Co.* 58 Fed. 831—*Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 170—*Gregory v. Pike*, 15 C. C. A. 40, 21 U. S. App. 658, 67 Fed. 845—*Mercantile Trust Co. v. Atlantic & P. R. Co.* 70 Fed. 525—*Office Specialty Mfg. Co. v. Cooke & C. Co.* 73 Fed. 686—*Thurston v. Big Stone Gap*, 86 Fed. 485—*McKee v. Cochrane*, 7 Mackey, 467—*Phoenix Mut. L. Ins. Co. v. Grant*, 3 MacArth. 47—*Jones v. Smith*, 14 Ill. 233—*Griffin v. Griffin*, 112 Mich. 89, 70 N. W. 423—*McKenzie v. A. P. Cook Co.* 113 Mich. 454, 71 N. W. 868—*Ladner v. Ogden*, 31 Miss. 340—*Bishop v. Miller*, 48 Miss. 369—*Richman v. Donnell*, 53 N. J. Eq. 35, 30 Atl. 533—*Perea v. Harrison*, 7 N. M. 675, 41 Pac. 529—*Comfort v. McTeer*, 7 Lea, 602—*Pollard v. Wellford*, 99 Tenn. 120, 42 S. W. 23—*Cobb v. Baxter*, 1 Tenn. Ch. 406—*Stretch v. Stretch*, 2 Tenn. Ch. 143—*McMullen v. Eagan*, 21 W. Va. 250—*Kanawha Lodge v. Swann*, 37 W. Va. 178, 16 S. E. 462.

309. The act of June 1, 1872 (17 Stat. at L. 198, § 13), relating to the notification of defendants who cannot be found, in equity cases in the United States courts, properly applies to the bringing in of additional parties to a suit then pending. Such an application of the statute is not retrospective. *McBurney v. Carson*, 99 U. S. 567, 25: 378

310. A suit against an insolvent corporation to subject its property to the payment of its debts and to remove a lien on it created by a trust deed and chattel mortgage is one within the act of Congress of March 3, 1875, authorizing an order to bring in an absent defendant in a suit to remove a lien, etc., upon property within the jurisdiction.

Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. Rep. 781, 33: 178
 Cited in Greeley v. Lowe, 155 U. S. 73, 39 L. ed. 75, 15 Sup. Ct. Rep. 24—Dick v. Foraker, 155 U. S. 411, 39 L. ed. 204, 15 Sup. Ct. Rep. 124—Jellenik v. Huron Copper Min. Co. 177 U. S. 10, 44 L. ed. 650, 20 Sup. Ct. Rep. 559—Lancaster v. Asheville Street R. Co. 90 Fed. 132.

311. The proceedings conformed to the act of Congress of March 3, 1875, as to bringing in an absent defendant, where, before the final decree was rendered, such defendant had been served with a copy of the several orders requiring him to appear and plead, answer and demur, to the original and supplemental bills and to the cross bill, and was in default with respect to each order. Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. Rep. 781, 33: 178
 Cited in Arndt v. Griggs, 134 U. S. 327, 33 L. ed. 922, 10 Sup. Ct. Rep. 557—Brooks v. Dun, 51 Fed. 146—Deck v. Whitman, 96 Fed. 890.

312. Shares of stock in a Michigan corporation, being by the laws of that state deemed personal property, must be so considered within the meaning of the act of Congress of March 3, 1875, authorizing an order of publication to bring in absent defendants who are not inhabitants of or found within the district, in a suit to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought. Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 20 Sup. Ct. Rep. 559, 44: 647
 Cited in York County Sav. Bank v. Abbot, 131 Fed. 983.

313-14. Where the plaintiffs in the circuit court claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction, and there was a defect of proper parties, the court ought to have given leave to make new parties; and, on their failing to bring the proper parties before the court, the dismissal should have been without prejudice. Hunt v. Wickliffe, 2 Pet. 201, 7: 397

Cited in Walsh v. Smyth, 3 Bland, Ch. 25—Greiner v. Klein, 28 Mich. 18—Grewar v. Henderson, 1 Tenn. Ch. 78.

315. Where all interested parties are not included by a bill, a court of equity will direct that they be made parties before it proceeds to the examination of the controversy presented. Caldwell v. Taggart, 4 Pet. 190, 7: 828

Cited in Fisher v. Rutherford, Baldw. 194, Fed. Cas. No. 4,823—Sutherland v. Lake Superior Ship Canal R. & Iron Co. 9 Nat. Bankr. Reg. 305, Fed. Cas. No. 13,043—Hannegan v. Roth, 12 Wash. 697, 44 Pac. 256.

316. The introduction of new defendants upon the death of the original defendant after remand to the circuit court is the elongation of the original action, and not the institution of a new suit, where counsel for the respective parties in error signed and filed an agreement reciting the death, and requesting the clerk to enter the appearance of said defendants by their coun-

sel, "they being alone interested as defendants in said property," and a further agreement was signed and filed by the same counsel "that the original pleadings shall stand *mutatis mutandis*." Kearney v. Denn ex dem. Sansbury, 15 Wall. 51, 21: 41

317. The introduction of a use plaintiff after issue joined will not affect the right to make a defense set up against the original plaintiff. Gaither v. Farmers & M. Bank, 1 Pet. 37, 7: 43

IV. Substitution.

In Admiralty, see Admiralty, 367.

On Appeal or Error, see Appeal and Error, IV. b. 5.

In Mandamus Proceeding, see Mandamus, 222-224.

Federal Question as to, see Appeal and Error, 2218.

Effect of Bankruptcy, see Bankruptcy, 128. Authority of Assignee in Bankruptcy, see Bankruptcy, 307, 308.

Continuation by or against Assignee in Bankruptcy, 311, 312.

Effect as Destroying Federal Jurisdiction by Destroying Diversity of Citizenship, see Courts, 720.

Substitution of Administrator *de Bonis non*, see Executors and Administrators, 89.

Right of Substituted Party to Remove Cause, see Removal of Causes, 203.

Disability of United States Supreme Court to Substitute in Proceedings Removed or Appealed, see Supreme Court of the United States, 2.

See also *supra*, 288.

318. An executor must, if required, produce his letters testamentary before he can be made a party in place of the plaintiff; but after an order for his admission, it is too late to question his capacity. Wilson v. Codman, 3 Cranch, 193, 2: 408

Cited in North v. Clark, 3 Cranch, C. C. 93, Fed. Cas. No. 10,308—Equitable Life Assur. Soc. v. Trimble, 27 C. C. A. 406, 48 U. S. App. 565, 83 Fed. 87—Taylor v. Western P. R. Co. 45 Cal. 337—Hobbs v. Bush, 19 N. C. (2 Dev. & B. L.) 512.

319. Where a decree is pronounced against an executor as defendant, and, before an appeal is prayed, the executor is removed, and an administrator *de bonis non* with the will annexed is appointed, further proceedings on appeal are irregular until the administrator, at the instance of either party, is made a party to the suit in the court below. Taylor v. Savage, 1 How. 282, 11: 132

Taylor v. Savage, 2 How. 395, 11: 313
 Cited in National Bank v. Stanton, 118 Mass. 438—Miller v. Neff (Miller v. McMichen) 33 W. Va. 199, 6 L.R.A. 516, 10 S. E. 378.

320. Only those can be substituted, upon the death of a party, who succeed to the interest he had. Barribeau v. Brant, 17 How. 43, 15: 34

321. An assignee can elect whether he will be substituted in place of the bankrupt in an action pending in state court, and, in either event, its judgment will be binding upon him. *McHenry v. La Société Française D'Epargnes*, 95 U. S. 58, 24: 370

Cited in *Thatcher v. Rockwell*, 105 U. S. 469, 26 L. ed. 950—*Winchester v. Heiskell*, 119 U. S. 453, 30 L. ed. 464, 7 Sup. Ct. Rep. 281
Young v. Cardwell, 6 Lea, 197—*Jackson v. Elliott*, 49 Tex. 69.

322. The successor in office cannot be substituted as defendant for a Secretary of the Interior who resigns his office while a bill is pending against him for a mandatory injunction against exercising further jurisdiction over certain lands, and to compel him to issue a patent therefor. *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 17 Sup. Ct. Rep. 225, 41: 621

PARTISANSHIP.

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PARTITION.

I. In General, 1-4.

II. Right to, 5-6a.

III. Procedure, 6b-16.

IV. Deeds, 17-20.

Jurisdictional Amount on Appeal, see *Appeal and Error*, 353, 354, 376.

Among Grantees from Foreign Government, Federal Question as to, see *Appeal and Error*, 1743.

Trustee's Power to Submit to Arbitration, see *Arbitration*, 4.

Costs in Partition Suit, see *Costs and Fees*, 14.

Presumption of, from Possession in Severalty, see *Evidence*, 736.

Proof of Tenancy at Will Under Plea of *Non Tenet Insimul*, see *Evidence*, 2714.

Ratification of, by Infant, see *Husband and Wife*, 16.

Of Real Estate in Which Infant has an Interest, see *Infants*, 26.

Legislative Provisions for Cure of Defective Deed in Partition Sale, see *Judicial Sale*, 154.

Effect of, on Right to Enforce Mortgage, see *Mortgage*, 267.

Power to Make, under Power to Sell and Exchange, see *Powers*, 12.

Under Private Act, see *Statutes*, 113.

By Trustees, see *Trusts*, 131, 132.

I. In General.

1. [The fee in land which is adjudged to one of several heirs without division, under the laws of Pennsylvania, does not vest in him until the shares of the others are

paid or secured. *Walton v. Willis* (Pa. Sup. Ct.) 1 Dall. 351, 1: 171]

2. Under the Maryland act of 1786, providing for the partition of intestate estates, the jurisdiction of the court does not depend upon the question whether any of the heirs are of age or not; it attaches when the ancestor dies intestate, and any one of the persons entitled to his estate is a minor. *Thompson v. Tolmie*, 2 Pet. 157, 7: 381

3. A power of attorney from one of the heirs cannot be construed as an acceptance of a partition made by deed among the other heirs, where no notice is taken therein of such deed of partition, and it is predicated throughout on the fact that the decedent's estate remains undivided. *Dubois v. Hepburn*, 10 Pet. 1, 9: 325

4. A partition is inchoate until made by all parties, or until made by one and so accepted by the others, either by deed or *in pais* so as to amount to an estoppel. *Dubois v. Hepburn*, 10 Pet. 1, 9: 325

Editorial notes.

[Validity of agreement against right to. 16 L.R.A. 220.

Parol, to give legal title or color of title. 16 L.R.A. 326.

Of homestead. 4 L.R.A. (N.S.) 786.]

II. Right To.

Of Common Property of Association, see *Contracts*, 54.

5. In a court having general jurisdiction in equity to grant partition, as in a court of law, a tenant in common whose title in an undivided share of the land is clear is entitled to a partition as a matter of right. *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. Rep. 818, 36: 644
Cited in *West v. East Coast Cedar Co.* 41 C. C. A. 530, 101 Fed. 618—*Bearden v. Benner*, 120 Fed. 693—*Williams v. Paine*, 7 App. D. C. 143—*Smith v. Butler*, 15 App. D. C. 355—*Crocker v. Cotting*, 170 Mass. 70, 39 L.R.A. 217, 64 Am. St. Rep. 278, 48 N. E. 1023.

6. In equity, as at law, a pending lease for years is no obstacle to partition between owners of the fee. *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. Rep. 818, 36: 644

6a. [The question whether a tenant by the curtesy can maintain a suit for partition was raised but not determined because of an amicable partition of the premises by deed, which terminated the controversy. *Walker v. Dilworth* (Pa. Sup. Ct.) 2 Dall. 257, 1: 372]

Editorial note.

[Right to, by one out of possession. 20 L.R.A. 624.]

III. Procedure.

Jurisdiction of Courts, see *Courts*, 344, 345.
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Jurisdiction as Between Law and Equity, see Equity, 149.

Appearance by Infant in Partition Suit, see Infants, 57.

Sufficiency of Allegations, see Pleading, 579.

Removal of Suit to Federal Court, see Removal of Causes, 126.

Rule for Division of Alluvion, see Waters, 175, 176.

6b. [Variance between the descriptions of the property in the summons, the writ, and the inquisition, in an action of partition, where it created no uncertainty, is held not fatal. *Ewing v. Houston* (H. Ct. Er. & Ap. Pa.) 4 Dall. 67, 1: 744]

7. Where a bill to wind up a partnership seeks also to partition real estate, and has all the necessary elements of a bill in partition, it may be treated as the latter, if it be necessary to hold it to be one or the other. *Malbec de Montjoc de Briges v. Sperry* (Briges v. Sperry) 95 U. S. 401, 24: 390 *Cited in Bernheimer v. Schmid*, 73 App. Div. 440, 77 N. Y. Supp. 138.

8. [The orphans' court must require recognizances, and not bonds, to secure payment of the distributive shares due for lands of an intestate, in Pennsylvania, from an heir who takes the lands. *Walton v. Willis* (Pa. Sup. Ct.) 351, 1: 171]

Parties.

Joinder of Parties Defendant, see Parties, 278.

9. [A tenant in curtesy is a necessary party to proceedings in partition. *Walton v. Willis* (Pa. Sup. Ct.) 1 Dall. 351, 1: 171]

10. On bill to declare void for fraud a decree of partition, where the parties interested are not before the court, the court has no jurisdiction. *Coy v. Mason*, 17 How. 580, 15: 125

Cited in Ribon v. Chicago, R. I. & P. R. Co. 16 Wall. 451, 21 L. ed. 369.

11. Persons having an interest in the land of which partition is sought should be made parties. When they are not parties to the suit, and have no opportunity to be heard, as the decree cannot bind them, the court cannot, for that very reason, afford the relief asked, to the other parties. *Barney v. Baltimore*, 6 Wall. 280, 18: 825 *Cited in Greeley v. Lowe*, 155 U. S. 70, 39 L. ed. 74, 15 Sup. Ct. Rep. 24—*Alexander v. Horner*, 1 McCrary, 645, Fed. Cas. No. 169—*Cole Silver Min. Co. v. Virginia & G. H. Water Co.* 1 Sawy. 476, Fed. Cas. No. 2,989—*Gray v. Larrimore*, 2 Abb. (U. S.) 554, Fed. Cas. No. 5,721—*Judson v. Courier Co.* 15 Fed. 545—*Santa Clara Min. Asso. v. Quicksilver Min. Co.* 8 Sawy. 334, 17 Fed. 659—*Gregory v. Swift*, 39 Fed. 712—*Wall v. Thomas*, 41 Fed. 622—*Consolidated Water Co. v. Babcock*, 76 Fed. 248—*Smith v. Consumers' Cotton Oil Co.* 30 C. C. A. 106, 52 U. S. App. 603, 86 Fed. 302—*Backus Portable Steam Heater Co. v. Simonds*, 2 App. D. C. 294—*State ex rel. Hart v. Burke*, 33 La. Ann. 505—*Greiner v. Klein*, 28 Mich. 18—*McPike v. Wells*, 54 Miss. 155

—*Lilly v. Menke*, 126 Mo. 215, 28 S. W. 643.

12. Part owners of land to be divided are necessary parties to a suit in partition which asks for an account of rents and profits; their interest in the subject-matter of the suit and in the relief sought is so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. *Barney v. Baltimore*, 6 Wall. 280, 18: 825 *Cited in Florida, C. & P. R. Co. v. Bell*, 176 U. S. 333, 44 L. ed. 492, 20 Sup. Ct. Rep. 399—*Conolly v. Wells*, 33 Fed. 208—*Rich v. Bray*, 2 L.R.A. 229, 37 Fed. 279—*Estes v. Nell*, 108 Mo. 177, 18 S. W. 1006—*Hiles v. Rule*, 121 Mo. 256, 25 S. W. 959—*Johnson v. Johnson*, 170 Mo. 57, 59 L.R.A. 753, 70 S. W. 241.

Decree.

Appealability of, see Appeal and Error, 81, 82.

Reviewability of Decree Confirming Commissioner's Report, see Appeal and Error, 191.

Conclusiveness of, see Judgment, 237, 281, 631-634a, 728, 760.

Enforcement of, see Judgment, 1134.

13. A decree in partition in chancery does not, like a writ of partition at common law, transfer or change the legal title to any of the property, unless by force of some statute. *Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. Rep. 456, 27: 256

14. The difference between a judgment and writ of partition at common law, and a partition by decree in chancery, as it affects the title, is, that the former operates by way of delivery of possession and estoppel, while in the latter the transfer of title can be effected only by the execution of conveyances between the parties, which may be decreed by the court and compelled by attachment. *Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. Rep. 456, 27: 256 *Cited in Austin v. Rutland R. Co.* 21 Blatchf. 361, 17 Fed. 469—*Fuller v. Montague*, 8 C. C. A. 105, 16 U. S. App. 391, 59 Fed. 216—*Heinze v. Butte & B. Consol. Min. Co.* 61 C. C. A. 89, 126 Fed. 27—*Nash v. Simpson*, 78 Me. 151, 3 Atl. 53.

Sale.

Collateral Attack on Order Appointing Commissioner, see Judgment, 377.

Effect of Irregularity in, on Title of Purchaser, see Judgment, 633.

15. In proceedings for the partition of property consisting of about 2,000 acres, in two distinct parcels of land, including all the well-known big trees of Calaveras, which are ranked among the curiosities of the world, it is held that division cannot be made without great prejudice, and that a sale thereof is consequently proper, under the California Code of Civil Procedure. The joint ownership of the property must make it more valuable than it would be if split up, and held by persons who would become rivals for the profits arising from visitors. *Malbec de Montjoc de Briges v. Sperry*

(Briges v. Sperry) 95 U. S. 401, 24: 390
Cited in Mason v. Pewabic Min. Co. 133 U.
 S. 63, 33 L. ed. 531, 10 Sup. Ct. Rep. 224.

Title.

15a. Proceedings in partition are not appropriate for a contest in respect to title. Doe ex dem. McCall v. Carpenter, 18 How. 297, 15: 389
Cited in Fuller v. Montague, 8 C. C. A. 105, 16 U. S. App. 391, 59 Fed. 216—Weest v. East Coast Cedar Co. 41 C. C. A. 534, 101 Fed. 819—Heinze v. Butte & B. Consol. Min. Co. 61 C. C. A. 89, 126 Fed. 27—Howard v. Howard, 21 D. C. 226—Smith v. Butler, 15 App. D. C. 355—May v. May, 19 Fla. 389.

16. Proceedings in a partition suit in which a possession adverse to complainants is asserted under a tax title should be postponed until complainants shall have established their title at law. Clark v. Roller, 199 U. S. 541, 26 Sup. Ct. Rep. 141, 50: 300

IV. Deeds.

Right to Close Alley under Provisions of, see Alleys.

Estoppel by, see Estoppel, 24.

Fee Vested under Private Act, see Statutes, 113.

See also *supra*, 4.

17. Recitals in deeds of partition have no binding force or effect beyond what is derived from the decree of the court appointing the commissioners to make the deed; where the decree simply authorizes the execution of mutual conveyances and releases, any recital going beyond this is nugatory; and the simple confirmation of the deed by the court will not be construed as intending to go beyond the terms and directions of the decree. Doe ex dem. McCall v. Carpenter, 18 How. 297, 15: 389

18. A deed by commissioners to purchasers on division of an intestate estate in Maryland need not set out the commission and proceedings *in hæc verba*, but only the substance of them. Thompson v. Tolmie, 2 Pet. 157, 7: 381

19. Mutual deeds of release are not necessary, in a suit for partition in Illinois, to invest the several parties with the title to the parcels respectively allowed to them. Carpenter v. Dexter, 8 Wall. 513, 19: 426

20. A release of the bare legal title to the equitable owner in fee, on partition between the parties as tenants in common, need not contain words of inheritance. Webb v. Den ex dem. Weatherhead, 17 How. 576, 15: 35

Editorial note.

[Deed in partition as distinguished from ordinary deed. 57 L.R.A. 332.]

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I. Nature; Creation.

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Editorial notes.

What constitutes, as between parties.

36: 836

[By parol, for dealing in land. 16 L.R.A. 745.]

Intention of parties.

See also *infra*, 23.

1. Persons cannot be made to assume the relation of partners as between themselves, when their purpose is that no partnership shall exist. *Paul v. Callum*, 132 U. S. 539, 10 Sup. Ct. Rep. 151, 33: 430
Cited in Cannon v. Brush Electric Co. 96 Md. 470, 94 Am. St. Rep. 598, 54 Atl. 121—*Heye v. Tilford*, 2 App. Div. 350, 37 N. Y. Supp. 751.

Community of interest in capital and profits or losses.

2. Partnership is a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. *Berthold v. Goldsmith*, 24 How. 536, 16: 762
Cited in Stockwell v. United States, 3 Cliff. 305, Fed. Cas. No. 13,486—*Fleming v. Lay*, 48 C. C. A. 752, 109 Fed. 955—*LeFevre v. Castagnio*, 5 Colo. 572—*Winslow v. Young*, 94 Me. 161, 47 Atl. 149—*Burke v. Concord R. Co.* 61 N. H. 243—*Magovern v. Robertson*, 116 N. Y. 65, 5 L.R.A. 590, 22 N. E. 398—*Harvey v. Childs*, 28 Ohio St. 321, 22 Am. Rep. 387.

3. A contract of partnership exists where parties join together their money, goods, labor, or skill, for the purposes of trade or gain, and where there is a community of profits. *Ward v. Thompson*, 22 How. 330, 16: 249

4. Whenever there is a community of interest in the capital stock, and also a community of interest in the profit and loss, the case is one of actual partnership; but it is seldom or never essential that both of these ingredients should concur in order to establish that relation. *Berthold v. Goldsmith*, 24 How. 536, 16: 762
Cited in Omaha & G. Smelting & Ref. Co. v. Rucker, 6 Colo. App. 340, 40 Pac. 853—*Parchen v. Anderson*, 5 Mont. 443, 5 Pac. 588—*Galveston, H. & S. A. R. Co. v. Davis*, 4 Tex. Civ. App. 474, 23 S. W. 301—*Chapline v. Conant*, 3 W. Va. 519, 100 Am. Dec. 766.

5. A union of services and money, and a division of profits and losses, include all the essentials of a partnership. Postponement of division of profits until capital advanced by one or more of the partners is repaid with interest is immaterial. *Beauregard v. Case*, 91 U. S. 134, 23: 263
Distinguished in Meehan v. Valentine, 145 U. S. 624, 36 L. ed. 842, 12 Sup. Ct. Rep. 972

—*Hughes v. Ewing*, 162 Mo. 301, 62 S. W. 465.

Cited in *Bybee v. Hawckett*, 8 Sawy. 184, 12 Fed. 656—*Blair v. Shaeffer*, 33 Fed. 222—*Fleming v. Lay*, 48 C. C. A. 752, 109 Fed. 955—*Chaffraix v. Lafitte*, 30 La. Ann. 654—*Burke v. Concord R. Co.* 61 N. H. 243.

6. Where the parties have joined together to carry on a certain adventure or trade for their mutual profit,—one contributing the vessel, the other his skill, labor, and experience, etc.,—and there is a communion of profits on a fixed ratio, it is a partnership. *Ward v. Thompson*, 22 How. 330, 16: 249
Cited in *Meehan v. Valentine*, 145 U. S. 618, 36 L. ed. 839, 12 Sup. Ct. Rep. 972—*The Monte A.*, 12 Fed. 338—*Fleming v. Lay*, 48 C. C. A. 750, 109 Fed. 954—*H. B. Claflin Co. v. Gross*, 50 C. C. A. 302, 112 Fed. 388—*Donald v. Guy*, 127 Fed. 232—*Robinson v. Parker*, 11 App. D. C. 140—*Whiting v. Lenkin*, 66 Md. 265, 7 Atl. 688—*Ross v. Willett*, 76 Hun, 213, 27 N. Y. Supp. 785.

7. An agreement which provides that one person shall obtain in his own name, but for the joint account of two others, a lease of a railroad, and take charge of and control and manage it, at a designated monthly salary, for their mutual benefit; and that the other parties, who furnish the necessary money to carry out the enterprise, are to be reimbursed, with interest, out of the annual net profits, and then, after payment of the capital and interest, the annual net profits should be divided, share and share alike, and all losses equally borne between them, constitutes a partnership such as is designated in the law of Louisiana an ordinary partnership, as distinguished from those which are commercial. *Beauregard v. Case*, 91 U. S. 134, 23: 263

8. While every partnership is founded on a community of interest, every community of interest does not constitute a partnership. *Berthold v. Goldsmith*, 24 How. 536, 16: 762

9. A contract does not create a partnership when there is no community of interest in the capital employed, or in the profits and losses. *Beckwith v. Talbot*, 95 U. S. 289, 24: 496

— Editorial note.

When a community of profits creates a partnership. 16: 249

Participation in profits and losses.

See also *infra*, 29, 31, 36, 81.

10. One who is to receive a certain share of the profits, and bear a like share of the losses, in the business of selling goods of a firm, is a partner. *Paul v. Callum*, 132 U. S. 539, 10 Sup. Ct. Rep. 151, 33: 430
Cited in *Duden v. Maloy*, 11 C. C. A. 123, 26 U. S. App. 187, 63 Fed. 187—*Baker v. Safe Deposit & T. Co.* 90 Md. 759, 78 Am. St. Rep. 463, 45 Atl. 1028—*Broadfoot v. Fraser*, 73 Vt. 314, 50 Atl. 1054.

11. The contribution of money or property by an incoming partner is not essential to the creation of a partnership. It is competent for the prior partners, in considera-

tion of the new partner undertaking the entire charge and control of the business of the company, to give him an interest as partner in the property which is to constitute, at the outset, the whole capital of the partnership. *Paul v. Callum*, 132 U. S. 539, 10 Sup. Ct. Rep. 151, 33: 430

Agreements for purchase and sale of real estate.

See also *infra*, 26.

12. A copartnership may exist in the purchase and sale of real property. *Thompson v. Bowman*, 6 Wall. 316, 18: 736
Shaeffer v. Blair, 149 U. S. 248, 13 Sup. Ct. Rep. 856, 37: 721
Clay v. Freeman, 118 U. S. 97, 6 Sup. Ct. Rep. 964, 30: 104
Pendleton v. Wambersie, 4 Cranch, 73, 2: 554

Cited in *Shaeffer v. Blair*, 149 U. S. 258, 37 L. ed. 725, 13 Sup. Ct. Rep. 856—*Lenow v. Pones*, 48 Ark. 564, 4 S. W. 56—*Hirbourn v. Reedling*, 3 Mont. 25—*Young v. Thrasher*, 115 Mo. 231, 21 S. W. 1104—*Chester v. Dickinson*, 45 How. Pr. 332—*Chester v. Dickerson*, 54 N. Y. 7, 13 Am. Rep. 350.

13. The fact that real property is held in the joint names of several owners, or in the name of one for the benefit of all, is no evidence of copartnership between them with respect to it. *Thompson v. Bowman*, 6 Wall. 316, 18: 736

14. An agreement between partners engaged in brokerage business, to furnish to each other information as to bargains in real estate and give to each other the option of taking the benefit of such bargains, is only an agreement for a future partnership in respect to such properties as might be specially selected for purchase. In such case no partnership takes place until the contemplated event actually occurs. *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. Rep. 201, 37: 1169

Cited in *Hughes v. Ewing*, 162 Mo. 302, 62 S. W. 465.

15. An agreement between partners engaged in the business of "real estate and note brokers," to furnish information as to bargains in real estate, and give the copartners the option of taking the benefit of such bargains, does not enlarge the scope of the partnership business so as to include therein the purchase and sale of real estate on joint account. *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. Rep. 201, 37: 1169

16. A joint purchase of land by two does not constitute a copartnership in respect thereto, nor does an agreement to share the profits and losses on the sale of land create a partnership; the parties are only tenants in common. *Clark v. Sidway*, 142 U. S. 682, 12 Sup. Ct. Rep. 327, 35: 1157
Distinguished in *Trice v. Yoeman*, 8 Kan. App. 540, 54 Pac. 288.

17. A contract by which a person is to make searches and explorations in certain states and territories, and receive and invest in land the money of another, himself con-

tributing his time, labor, skill, and judgment, but no money except what he might expend in such service; and under which title was to be taken in the name of the party who furnished the money, and the property sold within five years, one half of the profits to go to the party doing the work,—does not constitute the parties co-partners in respect to the lands to be bought; the one is trustee, the other is *cestui que trust*, the trust following the land, and, on sale, the proceeds of the land. *Seymour v. Freer*, 8 Wall. 202, 19: 306

Editorial note.

[What constitutes a partnership to deal in real estate. 5 L.R.A. (N.S.) 503.]

Agreements for division of profits.

See also *infra*, 35, 36.

18. Receiving part of the profits of a commercial partnership, in lieu of or in addition to interest, by way of compensation for a loan of money, does not make the lender a partner. *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. Rep. 972, 36: 835
Cited in *Shaeffer v. Blair*, 149 U. S. 258, 37 L. ed. 725, 13 Sup. Ct. Rep. 856—*The J. P. Donaldson*, 167 U. S. 606, 42 L. ed. 295, 17 Sup. Ct. Rep. 951—*Karrick v. Hannaman*, 168 U. S. 334, 42 L. ed. 489, 18 Sup. Ct. Rep. 135—*Stevens v. McKibbin*, 15 C. C. A. 504, 30 U. S. App. 363, 68 Fed. 411—*Randle v. Barnard*, 26 C. C. A. 569, 53 U. S. App. 377, 81 Fed. 683—*Fleming v. Lay*, 48 C. C. A. 750, 109 Fed. 954—*American Surety Co. v. Lawrenceville Cement Co.* 110 Fed. 723—*H. B. Claflin Co. v. Gross*, 50 C. C. A. 302, 112 Fed. 888—*Donald v. Guy*, 127 Fed. 232—*Gentry v. Singleton*, 63 C. C. A. 234, 128 Fed. 682—*Union Selling Co. v. Jones*, 63 C. C. A. 229, 128 Fed. 677—*Fechtel v. Palm Bros. & Co.* 66 C. C. A. 340, 133 Fed. 466—*Slater v. Van Der Hoogt*, 23 App. D. C. 421—*Dubos v. Jones*, 34 Fla. 552, 16 So. 392—*Webster v. Clark*, 34 Fla. 647, 27 L.R.A. 129, 43 Am. St. Rep. 217, 16 So. 601—*State Nat. Bank v. Butler*, 149 Ill. 534, 36 N. E. 1000—*McMurtre v. Guiler*, 183 Mass. 453, 67 N. E. 358—*Hazell v. Clark*, 80 Mo. App. 84—*Zabriskie v. Coates*, 58 N. Y. Supp. 523, 41 App. Div. 319—*Moore v. Williams*, 26 Tex. Civ. App. 146, 62 S. W. 977.

19. One who lends money to a partnership, for which the firm gives him his promissory notes, with interest, and agrees also to pay him one tenth of the net yearly profits of the partnership business if those profits exceed the sum loaned, is not a partner liable for the debts of the firm. *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. Rep. 972, 36: 835

20. A voluntary promise to give a person, for procuring a loan to purchase cotton, a share of the profits, if any were made, but naming no sum or proportion of profits, does not constitute a partnership. *Pleasants v. Fant*, 22 Wall. 116, 22: 780
Cited in *Meehan v. Valentine*, 145 U. S. 625, 36 L. ed. 842, 12 Sup. Ct. Rep. 972—*Re Ward*, 2 Flipp. 464, Fed. Cas. No. 17,144—*Priest v. Chouteau*, 85 Mo. 405, 55 Am. Rep. 373—*Priest v. Chouteau*, 12 Mo. App. 258—*Dake v. Butler*, 7 Misc. 304, 28 N. Y. Supp. 134—*Moore v. Williams*, 26 Tex. Civ. App. 146, 62 S. W. 977.

21-2. An agreement by which, in consideration of moneys loaned by defendant to a firm of brokers, they were to purchase for him at a discount a certain class of securities, to be placed in his possession after purchase, and upon their collection they were to reinvest the proceeds in like securities, and the profits received by defendant on the purchases were to be credited on the notes of the firm given for the moneys and interest,—did not make defendant a member of said firm. *Wilson v. Edmonds*, 130 U. S. 472, 9 Sup. Ct. Rep. 563, 32: 1025
Cited in *Meehan v. Valentine*, 145 U. S. 624, 36 L. ed. 841, 12 Sup. Ct. Rep. 972—*Hazell v. Clark*, 89 Mo. App. 84.

23. A partnership is not created where one party is owner of the property, and the others are employees rendering services in connection with that property, their compensation depending upon the value of the property above a certain amount when sold, and being interested in the losses only as their ultimate compensation might be affected thereby. *Beckwith v. Talbot*, 95 U. S. 289, 24: 496
Cited in *Meehan v. Valentine*, 145 U. S. 620, 36 L. ed. 840, 12 Sup. Ct. Rep. 972.

24. Where one employed by the owner to negotiate sales of goods has no interest in the property, which is to remain for sale in the custody and control of commission merchants, who know the facts and stand responsible for the proceeds; and he does not rely upon the profits for his compensation, although he is to have one half the profits, with a guaranty of \$1,800 a year, he is not a partner as to such commission merchants. *Berthold v. Goldsmith*, 24 How. 536, 16: 762

Joint-stock company.

Citizenship of Express Company for Purpose of Federal Jurisdiction, see Courts, 666.

See also *infra*, 107.

25. A joint-stock company is not a corporation, but a partnership. *Chapman v. Barney*, 129 U. S. 667, 9 Sup. Ct. Rep. 426, 32: 800
Cited in *Gregg v. Sanford*, 12 C. C. A. 327, 28 U. S. App. 313, 65 Fed. 153—*Boatner v. American Exp. Co.* 122 Fed. 718—*State ex rel. Railroad & W. Commission v. United States Exp. Co.* 81 Minn. 90, 50 L.R.A. 668, 83 Am. St. Rep. 366, 83 N. W. 465.

26. A joint-stock company, formed for the purpose of dealing in real estate, is a partnership. *Claggett v. Kilbourne*, 1 Black. 346, 17: 213
Cited in *McElroy v. Swope*, 47 Fed. 386—*Hirbour v. Reeding*, 3 Mont. 22—*Flower v. Barnekoff*, 20 Or. 145, 11 L.R.A. 154, 25 Pac. 370.

b. Name.

27. A name assumed and publicly used becomes the legitimate name of the firm, although no name is adopted by the articles of partnership. *Le Roy v. Johnson*, 3 Pet. 186, 7: 393
Cited in *Pursley v. Ramsey*, 31 Ga. 409.

c. As to Third Persons.

28. Private arrangements between the partners as to relative influence and responsibility do not disprove the partnership. *Porter v. Graves*, 104 U. S. 171, 26: 691

29. Actual participation in the profits as principal creates a partnership as between the parties and third persons, whatever may be their intention, and not withstanding the dormant partner was not to participate in the loss beyond the amount of the profits. *Berthold v. Goldsmith*, 24 How. 536, 16: 762

Cited in Re Francis, 2 Sawy. 297, Fed. Cas. No. 5,031—*Donald v. Guy*, 127 Fed. 232—*Fechtel v. Palm Bros. & Co.* 66 C. C. A. 341, 133 Fed. 467—*Parchen v. Anderson*, 5 Mont. 455, 5 Pac. 588.

30. The only ground for holding a person who is not in fact a partner liable to third persons, because he has been held out as a partner is, upon the principle of equitable estoppel, that he authorized himself to be so held out, and that the plaintiffs gave credit to him. *Thompson v. First Nat. Bank*, 111 U. S. 529, 4 Sup. Ct. Rep. 689, 28: 507

Distinguished in Wechselberg v. Flour City Nat. Bank, 26 L.R.A. 477, 12 C. C. A. 64, 24 U. S. App. 308, 64 Fed. 98.

Cited in Willis v. Rector, 1 C. C. A. 612, 4 U. S. App. 288, 50 Fed. 685—*Dubos v. Jones*, 34 Fla. 555, 16 So. 392—*Crahn v. First Nat. Bank*, 114 Ill. 526, 2 N. E. 486—*Sheldon v. Bigelow*, 118 Iowa, 590, 92 N. W. 701—*Fletcher v. Pullen*, 70 Md. 213, 14 Am. St. Rep. 355, 16 Atl. 887—*Brown v. Grant*, 39 Minn. 405, 40 N. W. 268—*Hahlo v. Mayer*, 102 Mo. 97, 22 Am. St. Rep. 753, 13 S. W. 804—*Bloch v. Price*, 24 Mo. App. 19—*Seabury v. Bolles* (*Seabury v. Crowell*) 51 N. J. L. 105, 11 L.R.A. 136, 16 Atl. 54—*People v. Brandt*, 110 N. Y. 659, 18 N. E. 480—*Deavitt v. Hooker*, 73 Vt. 146, 50 Atl. 800.

31. A party not in fact a partner, having no interest in partnership business, not sharing in the profits and sought to be charged with debts because held out as a partner, may be charged generally, if the holding out has been so public and long continued as to justify the inference as a matter of fact, without direct testimony to that effect, that one dealing with the partnership knew it and relied upon it. *Sun Mut. Ins. Co. v. Kountz Line*, 122 U. S. 583, 7 Sup. Ct. Rep. 1278, 30: 1137

Cited in Braithwaite v. Atkin, 1 N. D. 469, 48 N. W. 354—*Howard v. Chesapeake & O. R. Co.* 11 App. D. C. 340—*Chesapeake & O. R. Co. v. Howard*, 14 App. D. C. 272.

32. Where all the business done for a series of years by several transportation companies was done in the name of the "Kountz Line," and in no instance was business transacted for any of them as representing the particular company by whose boat the business was done, and all had a common agent, the Kountz Line Corporation, permitted to exercise during that time unlimited authority in the general management and in respect to rates of transporta-

tion, the companies were held to constitute a partnership, although owning no property in common, and between themselves each being entitled to the net earnings of its own boat. *Sun Mut. Ins. Co. v. Kountz Line*, 122 U. S. 583, 7 Sup. Ct. Rep. 1278, 30: 1137

33. A person who is not actually a partner, and who has no interest in the partnership, cannot, by reason of having held himself out to the world as a partner, be held liable as on a contract made by the partnership with one who had no knowledge of the holding out. *Thompson v. First Nat. Bank*, 111 U. S. 529, 4 Sup. Ct. Rep. 689, 28: 507
Cited in Sun Mut. Ins. Co. v. Kountz Line, 122 U. S. 592, 30 L. ed. 1139, 7 Sup. Ct. Rep. 1278—*Meehan v. Valentine*, 145 U. S. 625, 36 L. ed. 842, 12 Sup. Ct. Rep. 972—*Preston v. Foellinger*, 24 Fed. 682—*Bloch v. Price*, 32 Fed. 564—*Webster v. Clark*, 34 Fla. 644, 27 L.R.A. 128, 43 Am. St. Rep. 217, 16 So. 601—*Parchen v. Anderson*, 5 Mont. 454, 5 Pac. 588—*Elmira Iron & Steel Rolling Mill Co. v. Harris*, 124 N. Y. 288, 26 N. E. 541—*Thayer v. Goss*, 91 Wis. 94, 64 N. W. 312.

34. Where it is shown beyond question that neither of the defendants ever agreed to become partners in a firm of which it is alleged they were members, that they never held themselves out as partners, or contributed anything to the capital of the firm, or derived any profit whatever from its business, the facts that the defendants held a mortgage upon the firm property, and that one of them indorsed the paper of the firm, his son-in-law being a member thereof, does not tend to prove that they were partners. *Hunt v. Oliver*, 118 U. S. 211, 6 Sup. Ct. Rep. 1083, 30: 128

35. A member of a mercantile firm does not necessarily make his firm parties to a contract which he makes in his own name with another individual or firm, even if he agrees to make the other members equal sharers in the profits arising from his contract. The fact that some of the correspondence in carrying out the transaction, in accordance with the contract, was carried on in the firm name, and the words "we" and "us" were used, does not alter the relation of the parties. *Law v. Cross*, 1 Black, 533, 17: 185

36. The rule that, as to third persons, a partnership exists where there is a participation in the profits, notwithstanding an agreement between the partners against the usual incidents of the relation, has no application to a case of service or special agency, where the employee has no power as a partner in the firm, and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services. *Berthold v. Goldsmith*, 24 How. 536, 16: 762

Cited in Seymour v. Freer, 8 Wall, 215, 19 L. ed. 311—*Hunt v. Oliver*, 118 U. S. 221, 30 L. ed. 132, 6 Sup. Ct. Rep. 1083—*Meenan v. Valentine*, 145 U. S. 620, 36 L. ed. 840,

12 Sup. Ct. Rep. 972—Einstein v. Gourdln, 4 Woods, 419, Fed. Cas. No. 4,320—Re Ward, 2 Filpp, 464, Fed. Cas. No. 17,144—Meehan v. Valentine, 29 Fed. 279—Gentry v. Singleton, 63 C. C. A. 234, 128 Fed. 682—Fechteler v. Palm Bros. & Co. 66 C. C. A. 343, 133 Fed. 469—Kaiser v. State, 58 Ind. 384—Spaulding v. Nathan, 21 Ind. App. 126, 51 N. E. 742—Chaffraix v. Lafitte 30 La. Ann. 635—Mason v. Hackett, 4 Nev. 425—Eastman v. Clark, 53 N. H. 306, 16 Am. Rep. 192—Wild v. Davenport, 48 N. J. L. 132, 57 Am. Rep. 552, 7 Atl. 295—Kootz v. Tuvlan, 118 N. C. 395, 24 S. E. 776—Flower v. Barnekoff, 20 Or. 144, 11 L.R.A. 153, 25 Pac. 370—Meehan v. Valentine, 19 W. N. C. 208—Robinson v. Allen, 85 Va. 726, 8 S. E. 835—Sodlker v. Applegate, 24 W. Va. 415, 49 Am. Rep. 252.

Editorial notes.

What constitutes as to third persons.

36: 836

[Liability, as partners, of stockholders in defective or illegal incorporation. 17 L.R.A. 549.]

II. Rights and Powers of Partners as to Third Persons.

a. In General.

Power to Bind Former Partners after Dissolution, see *infra*, VI. h.

Power to Employ Proctor, see Appearance, 5.

To Execute Deed of Trust to Pay Debts, see Assignment for Creditors, 1.

Partner's Knowledge of Letter Written by Individual Partner, see Evidence, 255.

Declarations to Disprove Partnership, see Evidence, 1920, 1921.

Acts and Declarations of One Partner as Evidence Against Other, see Evidence, 1993-1996.

Interruption of Limitations by Payment by Surviving Partners, see Limitation of Actions, 613.

Interruption of Limitations by Acknowledgment by one Partner, see Limitation of Actions, 614, 632-634.

Correctness of Instruction as to Whether Defendants Contracted as Partners or Agents of Corporation, see Trial, 606.

37. The act of each partner, during the continuance of the partnership, and within the scope of its objects, binds all the others. Bell v. Morrison, 1 Pet. 351, 7: 174—Cited in Lingan v. Henderson, 1 Bland. Ch. 278—Gulick v. Gulick, 14 N. J. L. 582.

38. A partner has power to transact the whole business of the firm, whatever that may be, and to bind his partners in such transactions. Winship v. Bank of United States, 5 Pet. 529. 8: 216

Cited in Way v. Arnold, 18 Ga. 190—Byington v. Woodward, 9 Iowa, 364—Philbrook v. Handley, 27 Me. 57—Hehn v. McLaughan, 32 Miss. 43, 66 Am. Dec. 588—Bloom v. Helm, 53 Miss. 29—Tilford v. Ramsey, 37 Mo. 566—Low v. Blodgett, 21 N. H. 124—Gano v. Samuel, 14 Ohio, 601—Hill v. Voor-

hies, 22 Pa. 73—Hoskinson v. Elliot, 62 Pa. 400—Parker v. Burgess, 5 R. I. 280.

39. In partnership business, each partner is the authorized agent of all; and it is of no consequence, as to its validity, what is the secret understanding of the partners. Andrews v. Congar, 131 U. S. clxxxiii. Appx. and 26: 90

40. Independent of any stipulations between partners as to the power and authority to be exercised by the individual partners, each partner possesses an equal and general power and authority in behalf of the firm to transact any business within the scope and objects of the partnership, and in the course of its trade and business. Kimbro v. Bullitt, 22 How. 256, 16: 313

41-2. Third persons are not bound to inquire whether the partner with whom they are contracting is acting on the partnership account or for his individual advantage. Le Roy v. Johnson, 2 Pet. 186, 7: 391

Cited in Warren Deposit Bank v. Younglove, 112 Ky. 773, 66 S. W. 749—Faler v. Jordau, 44 Miss. 288—Richardson v. Farmer, 36 Mo. 43, 88 Am. Dec. 129.

43. [Partners are all liable for the acts of each, whether ignorant of them or not. Crawford v. Willing (Pa. Sup. Ct.) 4 Dall. 286, 1: 836]

Secret restrictions.

See also *supra*, 28, 39.

44. A restriction which, by agreement among the partners, is imposed upon the authority which one partner possesses as a general agent for the other, is operative only between the partners themselves, and does not affect one dealing with the firm, and from whom it is concealed. Winship v. Bank of United States, 5 Pet. 529. 8: 216

Cited in Omaha & G. Smelting & Ref. Co. v. Rucker, 6 Colo. App. 339, 40 Pac. 853—Tate v. Clements, 16 Fla. 352.

45. A restriction which, by agreement among the partners, is imposed upon the authority which one partner possesses as a general agent for the other, is operative only between the partners themselves, and does not limit the authority of one of the partners as to third persons who acquire rights by its exercise, unless they know that such restrictions have been made. Kimbro v. Bullitt, 22 How. 256, 16: 313—Cited in Allen v. Cary, 33 La. Ann. 1460—Stimson v. Whitney, 130 Mass. 595—Davis v. Richardson, 45 Miss. 507, 7 Am. Rep. 732.

Fraudulent representations.

See also *infra*, 91.

46. Fraudulent misrepresentations of fact, by a partner, to the injury of innocent persons dealing with him as representing the firm, and without notice of any limitations upon his general authority as agent for the partnership, bind his partners: especially where the firm appropriates the fruits of the fraudulent conduct of such partner. Strang

v. Bradner, 114 U. S. 555, 5 Sup. Ct. Rep. 1038, 29: 248
Cited in Re Schultz, 3 N. B. N. Rep. 844, 100 Fed. 265—Brundage v. Mellon, 5 N. D. 73, 63 N. W. 209.

Submission to arbitration.

47. One partner, during the continuation of the partnership, cannot bind the other partner to a submission of the interests of both to arbitration, but he might bind himself so as to submit his own interests to such decision. Karthaus v. Ferrer, 1 Pet. 222, 7: 121

Cited in Hall v. Lanning, 91 U. S. 170, 23 L. ed. 275—Harper v. Cunningham, 8 App. D. C. 438—Haywood v. Harmon, 17 Ill. 480—Woody v. Pickard, 8 Blackf. 56—Buchos v. Grandjean, 1 Mich. 369—Walker v. Bean, 34 Minn. 429, 26 N. W. 232—Harrington v. Elgham, 13 Barb. 662—Becker v. Boon, 61 N. Y. 323.

Confession of judgment.

Vacation of Judgment Confessed by One Partner, see Judgment, 1187.

48. A partner has no power to bind his co-partners by confession of a judgment. Clark v. Bowen, 22 How. 270, 16: 337
 [Gerard v. Basse (Ct. Com. Pl. Phila.) 1 Dall. 119, 1: 63]
Cited in Harper v. Cunningham, 8 App. D. C. 438—Bank of Shelton v. Willey, 7 Wash. 539, 35 Pac. 411.

Petition in bankruptcy.

See also *infra*, 164.

49. [One partner may be, in the name of his firm, a petitioning creditor in bankruptcy proceedings, under the Pennsylvania bankrupt law of 1785. Pleasants v. Meng (Ct. Com. Pl. Phila.) 1 Dall. 380, 1: 185]

b. Contracts.

Power to Dispose of Partnership Funds and Property, see *infra*, II. d.
 Presumption that Partner in Making Contract Acts for Firm, see Evidence, 353.

50-1. Partners who did not sign a bond given to procure the release of partnership property seized as prize of war cannot be rendered liable for the value of the property, although the release was obtained for the benefit of the partnership. United States v. Ames, 99 U. S. 35, 25: 295

52. The delivery of a bond to one partner is a delivery to all. Moss v. Riddle, 5 Cranch, 351, 3: 123

53. The business of dealing in grain by a partnership does not necessarily authorize each partner to bind the others by unknown contracts, in distant markets, for unlimited sales and purchases of grain for future delivery. Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. Rep. 160, 28: 225
Distinguished in Gruner v. Stucken, 30 La. Ann. 1078, 3 So. 338.

Cited in Dowling v. National Exch. Bank, 145 U. S. 516, 36 L. ed. 797, 12 Sup. Ct. Rep. 928—National Exch. Bank v. White, 30 Fed. 415—Osborne v. Barge, 35 Fed. 94—Pres-
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brey v. Thomas, 1 App. D. C. 178—Standard Wagon Co. v. Few, 119 Ga. 296, 46 S. E. 109—Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co. 86 Mo. App. 443—Cavanaugh v. Salisbury, 22 Utah, 472, 63 Pac. 39—Chase v. Soule, 76 Vt. 357, 57 Atl. 754.

54. A partner who purchases on credit in the name of the firm binds the firm. Winship v. Bank of United States, 5 Pet. 529, 8: 216

Cited in Buckner v. Lee, 8 Ga. 293—Sylvester v. Atkinson, 45 Miss. 87—Richardson v. Farmer, 36 Mo. 44, 88 Am. Dec. 129—De Cordova v. Korte, 7 N. M. 685, 41 Pac. 526.

55. A promise by individual partners, made in their individual names, respecting a matter that has no connection with the firm business, does not create a firm liability. Forsyth v. Woods, 11 Wall. 484, 20: 207

Distinguished in Berkshire Woolen Co. v. Julliard, 75 N. Y. 540, 31 Am. Rep. 488.

Cited in Re Nims, 10 Ben. 56, Fed. Cas. No. 10,268—Re Nims, 16 Blatchf. 444, Fed. Cas. No. 10,269—Sutherland v. Lake Superior Ship Canal R. & Iron Co. 9 Nat. Bankr. Reg. 311, Fed. Cas. No. 13,643—Re Tesson, 9 Nat. Bankr. Reg. 380, Fed. Cas. No. 13,844—Re Welsenberg, 131 Fed. 518—Freedman v. Holberg, 89 Mo. App. 347—Berkshire Woolen Co. v. Julliard, 13 Hun, 512—Second Nat. Bank v. Burt, 93 N. Y. 245.

c. Negotiable Paper.

Power after Dissolution, see *infra*, 173-175.

Authority to Fill Blanks, see Alteration of Instruments, 8.

Consideration for Note made by Individual Partner, see Bills and Notes, 29.

Notice of Dishonor to one Partner as Notice to the Other, see Bills and Notes, 146.

Right of Bona Fide Holder, see Bills and Notes, 296, 300.

Effect of Missappropriation of Proceeds by Partner, see Bills and Notes, 343.

Parol Evidence to Show Character of Liability of Partners as Endorsers, see Evidence, 1698.

Estoppel to Deny Partner's Authority to Execute as Question for Jury, see Trial, 296a.

Competency of Partner to Testify to Facts Invalidating Firm Note, see Witnesses, 39-41, 47.

See also *infra*, 154.

Trading or manufacturing partnership.

See also *infra*, 63.

56. One of several partners composing a trading firm has power to draw bills of exchange in the name of the firm, unless restricted by the copartnership agreement. Kimbro v. Bullitt, 22 How. 256, 16: 313

56a. If a bill of exchange is drawn by one partner in the name of the firm, or if a bill drawn on the firm by their usual name and style be accepted by one of the part-

ners, all the partners are bound. *Le Roy v. Johnson*, 2 Pet. 186. 7: 391
Cited in Winship v. Bank of United States, 5 Pet. 576, 8 L. ed. 233—*Goodrich v. Leland*, 18 Mich. 120—*Bloom v. Helm*, 53 Miss. 30—*Morrill v. Morrill*, 5 N. H. 334—*McIntire v. McLaurin*, 2 Humph. 72, 38 Am. Dec. 300.

57. If promissory notes are offered for discount at a bank, in the usual course of the business of a partnership, by the partner intrusted to conduct the business, and are discounted, and such discount was with-in such business, the subsequent misapplication of the money, the holders not being privy thereto, would not deprive them of their right of action against the dormant partners in such copartnership. *Winship v. Bank of United States*, 5 Pet. 529, 8: 216
Cited in Phillips v. Nash, 47 Ga. 228—*Bancher v. Bell*, 2 Rob. (La.) 184—*Davis v. Cook*, 14 Nev. 287.

58. In a manufacturing partnership, the capital of which is paid in by two partners, and the business managed by the third one, it is within the general authority of the active partner to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm. *Winship v. Bank of United States*, 5 Pet. 529, 8: 216
Cited in Kimbro v. Bullitt, 22 How. 268, 16 L. ed. 317—*Dowling v. National Exch. Bank*, 145 U. S. 516, 36 L. ed. 797, 12 Sup. Ct. Rep. 928—*National Exch. Bank v. White*, 30 Fed. 415—*Deits v. Regnier*, 27 Kan. 106—*Lee v. First Nat. Bank*, 45 Kan. 9, 11 L. R.A. 239, 25 Pac. 196—*Etheridge v. Binney*, 9 Pick. 279—*Eastman v. Winship*, 14 Pick. 46—*Smith v. Collins*, 115 Mass. 399—*Stimson v. Whitney*, 130 Mass. 595—*Stevens v. McLachlan*, 120 Mich. 289, 79 N. W. 627—*Faler v. Jordan*, 44 Miss. 288—*Carter-Montgomerie v. Steele*, 83 Mo. App. 215—*Dow v. Moore*, 47 N. H. 424—*National State Capital Bank v. Noyes*, 62 N. H. 39—*Webster v. Rackett*, 7 Hun, 229—*Mohawk Nat. Bank v. Van Slyck*, 29 Hun, 192—*National Bank v. Thomas*, 47 N. Y. 19—*Ontario Bank v. Hennessey*, 48 N. Y. 553—*Planters' Bank v. Bivingsville Cotton Mfg. Co.* 10 Rich. L. 102.

59. A guaranty of a promissory note, made by one partner for the firm, and with a view to the protection and improvement in value of the stock of a corporation which made the note,—a majority of which stock was owned by the partnership,—is within the line of the regular business of the partnership. *Andrews v. Congar*, 131 U. S. clxxxiii. Appx. and 26: 90

60. [One of two partners may authorize a clerk to accept bills, and sign or indorse notes in the firm name. *Tillier v. Whitehead* (Pa. Sup. Ct.) 1 Dall 269, 1: 131]

Other partnerships.

Limited Partnership, see *infra*, 212.

61. The doctrine that each partner may bind the firm by promissory notes and other negotiable instruments is generally limited to partnerships in trade and commerce, and does not apply to other partnerships, unless it is the common custom or usage of such business to bind the firm by negotiable in-

struments, or it is necessary for the due transaction thereof. *Dowling v. National Exch. Bank*, 145 U. S. 512, 12 Sup. Ct. Rep. 928, 36: 795
Cited in Presbrey v. Thomas, 1 App. D. C. 173—*Schellenbeck v. Studebaker*, 13 Ind. App. 440, 55 Am. St. Rep. 240, 41 N. E. 845—*Stevens v. McLachlan*, 120 Mich. 289, 79 N. W. 627—*Rumsey v. Briggs*, 139 N. Y. 330, 84 N. E. 929—*Salt Lake City Brewing Co. v. Hawke*, 24 Utah, 207, 66 Pac. 1058—*Walker v. Walker*, 66 Vt. 287, 29 Atl. 146.

62. Partners in the business of farming have no implied authority to draw bills of exchange in the name of the firm. *Kimbro v. Bullitt*, 22 How. 256, 16: 313
Cited in Pease v. Cole, 53 Conn. 63, 55 Am. Rep. 53, 22 Atl. 681—*Presbrey v. Thomas*, 1 App. D. C. 178—*Lee v. First Nat. Bank*, 45 Kan. 9, 11 L.R.A. 239, 25 Pac. 196—*Harris v. Baltimore*, 73 Md. 33, 8 L.R.A. 679, 25 Am. St. Rep. 565, 20 Atl. 111—*Levi v. Latham*, 15 Neb. 510, 48 Am. Rep. 361, 19 N. W. 460—*National State Capital Bank v. Noyes*, 62 N. H. 40.

63-4. Where farming was not the sole business of the partners composing the firm, but they were also engaged in running a steam saw-mill for manufacturing purposes, they were held a trading firm, with authority to bind each other by negotiable paper. *Kimbro v. Bullitt*, 22 How. 256, 16: 313
Cited in Dowling v. National Exch. Bank, 145 U. S. 516, 36 L. ed. 797, 12 Sup. Ct. Rep. 928—*National Exch. Bank v. White*, 30 Fed. 415—*Schellenbeck v. Studebaker*, 13 Ind. App. 441, 55 Am. St. Rep. 240, 41 N. E. 845—*Stevens v. McLachlan*, 120 Mich. 289, 79 N. W. 627—*Blackston Mercantile Co. v. McPherson*, 77 Miss. 405, 27 So. 523—*Holt v. Simmons*, 16 Mo. App. 111—*Carter-Montgomerie v. Steele*, 83 Mo. App. 214—*Dow v. Northern R. Co.* 67 N. H. 12, 36 Atl. 510—*Randall v. Merideth*, 76 Tex. 683, 13 S. W. 576—*Masteron v. Mansfield*, 25 Tex. Civ. App. 265, 61 S. W. 505.

Firm paper for use of individual partner.

65. If notes drawn by a partner in the name of the firm, payable to himself and indorsed for a personal consideration, are passed to a second indorsee before their maturity in the due course of business, and the second indorsee has no knowledge of the circumstances of their execution, he may be entitled to recover against the firm, although the partner who drew the notes committed a fraud by antedating them. *Smyth v. Strader*, 4 How. 404, 11: 1031

Limitations on power in articles.

Right of Bona Fide Holder, see *Bills and Notes*, 296.

66. [The limitations in articles of copartnership cannot affect the authority of a clerk, derived from a partner, to use the firm name in the acceptance, drawing, and indorsement of bills of exchange. *Tillier v. Whitehead* (Pa. Sup. Ct.) 1 Dall. 269.

1: 131]

d. Disposal of Partnership Funds and Property.

Preference between Partnership and Individual Creditors under Assignment by Partnership, see *infra*, 96.

Right of Partners to Appropriate Partnership Property to Individual Member's Debts, see *infra*, 98-102.

Dissolution of Partnership by Assignment, see *infra*, 162, 163.

Authority of one Partner to make Assignment for Creditors see Assignment for Creditors, 43-45.

Power of partner in general.

67. It is a well-settled rule, though a very technical one, that one partner cannot bind his copartners by deed. And it is equally well settled that one partner may dispose of the personal property of the firm. One partner may bind his copartner by deed, if he be present and assent to it. The seal of one partner, with the assent of the copartner, will bind the firm. *Anthony v. Butler*, 13 Pet. 423, 10: 229

Cited in Kirby v. Ingersoll, 1 Dougl. (Mich.) 501—*Central City Sav. Bank v. Walker*, 66 N. Y. 430.

68. Where real estate stands in the names of the several persons comprising a co-partnership, none of the several owners possesses authority to sell or bind the interest of his co-owners, unless the same was purchased with partnership funds, and for partnership purposes. *Thompson v. Bowman*, 6 Wall. 316, 18: 736

69. A partner having title in fee to an undivided three fourths of lands devoted to partnership use can make a valid mortgage of such three fourths to secure partnership notes,—at least as against other firm creditors. *McGahan v. National Bank of Rondout* (*McGahan v. Bank of Rondout*) 156 U. S. 218, 15 Sup. Ct. Rep. 347, 39: 403

70. A partner will be bound as if present at and assenting to the execution of a mortgage by his copartner, where their resolution to give the mortgage and the execution of it bear the same date, and there is no evidence rebutting the presumption of the presence and assent of both partners to the transaction. *Anthony v. Butler*, 13 Pet. 423, 10: 229

71. A mortgage executed pursuant to a resolution of the same date, by one of two stockholders in an alleged corporation having no existence in fact by reason of the invalidity of the act of incorporation, is *prima facie* valid as the debt of the partnership, where there is no evidence rebutting the presumption of the presence and assent of both partners to the transaction. *Anthony v. Butler*, 13 Pet. 423, 10: 229

72. A chattel mortgage on partnership property, executed by one of the partners, is good, if the other partners authorized or

acquiesced in its execution. *Gibson v. Warden*, 14 Wall. 244, 20: 797
Distinguished in Herzog v. Sawyer, 61 Md. 352.

Cited in Ferguson v. Hanauer, 56 Ark. 183, 19 S. W. 749—*Jeffreys v. Coleman*, 20 Fla. 540—*Walsh v. Lennon*, 98 Ill. 32, 38 Am. Rep. 75—*Sibley v. Young*, 26 S. C. 419, 2 S. E. 314—*Gordon v. Funkhouser*, 100 Va. 682, 42 S. E. 677.

73-77. The implied authority of each partner to dispose of partnership funds extends only to the transactions of the partnership; and any disposition of the funds by any partner beyond such purposes is a misappropriation of those funds, for which the partner is responsible, though in case of a bona fide purchaser without notice, for a valuable consideration, the partnership may be bound. *Rogers v. Batchelor*, 12 Pet. 221, 9: 1063

Cited in Allen v. St. Louis Bank, 120 U. S. 40, 30 L. ed. 578, 7 Sup. Ct. Rep. 460—*Re Sauls*, 5 Fed. 716—*Davis v. Blackwell*, 5 Ill. App. 37—*Allen v. Cary*, 33 La. Ann. 1460—*Philips v. McFarlane*, 3 Minn. 112, 74 Am. Dec. 743, 61: 61—*Catron v. Shepherd*, 8 Neb. 314, 1 N. W. 204.

— Editorial note.

Power of partner to assign or dispose of partnership assets. 33: 879

Form of transfer.

78. Where a firm name is signed to an assignment of a firm demand, the firm will be bound, although but one member of it is named in the body of the instrument. *George v. Tate*, 102 U. S. 564, 26: 232

III. Liability of Partners; Rights of Creditors.**a. In General.**

Set-off of Individual Claim of Partner against Partnership Debt, see Set-Off and Counterclaim, 31.

Laches Interfering with Creditors' Rights in Assets, see Limitation of Actions, 122.

Lien on Partnership Assets for Payment of Partnership Debts, see Limitation of Actions, 328.

Acknowledgment by Partner Removing Bar of Limitations, see Limitation of Actions, 614, 631a-633.

Right to Sue Part of Members on Firm Note, see Parties, 191.

Setting off Partnership Debt against Separate Claim of Survivor's Assignee in Bankruptcy, see Set-off and Counterclaim, 29, 30.

Rights of Creditors as against Deceased Partner's Estate where Firm Business is Continued, see *infra*, 193-198.

Liability of Members of Limited Partnership, see *infra*, 213-216.

Effect on Sureties on Judgment Bond of Failure to Secure Judgment Against all Members, see Attachment, 39.

Validity of Compromise with Creditor, see Compromise and Settlement, 7.

Relief from Settlement with Creditor Because of Mistake, see Compromise and Settlement, 20.
 Election of Remedy by Creditor after Death of one Partner, see Election of Remedies, 12.
 Evidence of Joint Assumpsit in Action on Partnership Transaction Against One Partner, see Evidence, 2643.
 Excessive Withdrawals and Settlement on Wife, as Fraud upon Creditors, see Fraudulent Conveyances, 124.
 Bar of Limitations against Recovery of Debt, see Limitations of Actions, 14.

79. A debt contracted by a partner before entering the partnership, and afterwards assumed by the firm, does not constitute a demand at law against the firm, but may in equity. *Finley v. Lynn*, 6 Cranch, 238, 3: 211

Editorial notes.

How far partners are liable for each other's acts. 12: 81

[Assumption of partner's individual debt. 29 L.R.A. 681.]

Criminal and penal liability for act of partner. 41 L.R.A. 650.]

Individual liability of partners.

Effect of Discharge in Bankruptcy, see Bankruptcy, 403.

Necessity of Joint Partners as Defendants, see Parties, 265a-267.

Responsiveness to Issues of Verdict Against Individual Partners, see Trial, 837.

80. A contract made by copartners is several as well as joint, and the assumpsit is made by all and by each. *Barry v. Foyles*, 1 Pet. 311, 7: 157
Cited in Presbrey v. Thomas, 1 App. D. C. 176.

81-2. One who shares in the profits of a partnership is responsible for all its debts. *Winship v. Bank of United States*, 5 Pet. 529, 8: 216

Cited in Meehan v. Valentine, 145 U. S. 619, 38 L. ed. 840, 12 Sup. Ct. Rep. 972—*Manville v. Parks*, 7 Colo. 136, 2 Pac. 212—*McDonald v. Millaudon*, 5 La. 409—*Chaffraix v. Lafitte*, 30 La. Ann. 653—*Allen v. Cary*, 33 La. Ann. 1460—*Tournade v. Methfessel*, 3 Hun. 145—*Chapman v. Devereaux*, 32 Vt. 620—*Chapline v. Conant*, 3 W. Va. 519, 100 Am. Dec. 768.

83. By the law of Louisiana, under an ordinary partnership, as distinguished from a commercial one, a partner is not individually liable upon partnership debts for any greater sum than his proportional share of the indebtedness. *Beauregard v. Case*, 91 U. S. 134, 23: 263

— Editorial note.

Liability of partners on bills and notes.

7: 391

Right to follow partnership property.

84. Partnership creditors have no specific lien upon the joint funds for their debts, and have no such relation with the partnership as entitles them to interfere with the complete control of the joint property by

the partners, during the existence of the partnership. *Emerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. Rep. 981, 30: 49

85. If a partner pay his own separate debts out of the partnership funds, without his partners' consent, the act is an illegal conversion of the funds; and the title to the property is not divested in favor of such separate creditor, whether he knew it to be partnership property or not. *Rogers v. Batchelor*, 12 Pet. 221, 9: 1063

Matthews v. McStea, 91 U. S. 7, 23: 188
Cited in Allen v. St. Louis Nat. Bank, 120 U. S. 40, 30 L. ed. 578, 7 Sup. Ct. Rep. 460—*Almy v. Wilbur*, 2 Woodb. & M. 395, Fed. Cas. No. 256—*Bowen v. Clark*, 1 Blss. 132, Fed. Cas. No. 1,721—*Re Corbett*, 5 Sawy. 207, Fed. Cas. No. 3,220—*Donovan v. Dymond*, 3 Woods, 144, Fed. Cas. No. 3,993—*Wall v. McIntyre*, 31 Ala. 534—*Goldsmith v. Elchold Bros.* 94 Ala. 121, 33 Am. St. Rep. 97, 10 So. 80—*Drake v. Thyng*, 37 Ark. 230—*Fillee v. Phelps*, 18 Conn. 301—*Wiley v. Allen*, 26 Ga. 574—*Manning v. Manning*, 61 Ga. 140—*Maynard v. Cleveland*, 76 Ga. 63—*Hier v. Miller*, 68 Kan. 265, 63 L.R.A. 957, 75 Pac. 77—*Carter Bros. v. Gallo-way*, 36 La. Ann. 734—*Johnson v. Hersey*, 70 Me. 76, 35 Am. Rep. 303—*Johnson v. Crichton*, 56 Md. 112—*Homer v. Wood*, 11 Cush. 69—*Williams v. Brimhall*, 13 Gray. 466—*Neely v. Flumerfelt*, 116 Mich. 345, 74 N. W. 1118—*Minor v. Gaw*, 11 Smedes & M. 326—*Buck v. Mosley*, 24 Miss. 172—*Ackley v. Staehlin*, 56 Mo. 561—*Sexton v. Anderson*, 95 Mo. 381, 8 S. W. 564—*Hagar v. Graves*, 25 Mo. App. 169—*Warren v. Martin*, 24 Neb. 280, 38 N. W. 849—*Cady v. South Omaha Nat. Bank*, 46 Neb. 763, 65 N. W. 906—*Caldwell v. Scott*, 54 N. H. 417—*Babcock v. Standish*, 53 N. J. Eq. 383, 30 L.R.A. 607, 51 Am. St. Rep. 633, 33 Atl. 385—*Kemeyers v. Richards*, 11 Barb. 314—*Wright v. Ames*, 2 Keyes, 227—*Germania F. Ins. Co. v. Home Ins. Co.* 4 Misc. 444, 24 N. Y. Supp. 357—*Union Nat. Bank v. Underhill*, 102 N. Y. 340, 7 N. E. 293—*Cliff v. Moses*, 112 N. Y. 442, 20 N. E. 392—*Wheatland v. Pryor*, 133 N. Y. 101, 30 N. E. 652—*Hartness v. Wallace*, 106 N. C. 432, 11 S. E. 259—*Lance v. Butler*, 135 N. C. 423, 47 S. E. 488—*Clay v. Cottrell*, 18 Pa. 412—*Rowland v. Slate*, 58 Pa. 199—*Cornells v. Stanhope*, 14 E. L. 99—*Bank of Tennessee v. Saffarans*, 3 Humph. 611—*Rogers v. Betterton*, 93 Tenn. 635, 27 S. W. 1017—*Nugent v. Allen*, 95 Tenn. 104, 32 S. W. 9—*Powell v. Messer*, 18 Tex. 407—*Schneider v. Sansom*, 62 Tex. 202, 50 Am. Rep. 521—*Binns v. Waddill*, 32 Gratt. 594—*Liberty Sav. Bank v. Campbell*, 75 Va. 539—*Viles v. Bangs*, 36 Wis. 135.

86. So long as a partner retains an interest, as partner, in firm assets which have been transferred by the separate conveyances of individual partners, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them. *Case v. Beauregard*, 99 U. S. 119, 25: 370

Cited in Fitzpatrick v. Flannagan, 106 U. S. 655, 27 L. ed. 213, 1 Sup. Ct. Rep. 369—*Re Keller*, 3 N. B. N. Rep. 847, 109 Fed. 121—*Re Green*, 116 Fed. 120—*Sickman v. Abernathy*, 14 Colo. 179, 23 Pac. 447—

Durant v. Pierson, 124 N. Y. 453, 12 L.R.A. 149, 21 Am. St. Rep. 686, 26 N. E. 1095
—**Johnston v. Standard Shoe Co.** 5 Tex. Civ. App. 400, 24 S. W. 580—**Batchelor v. Sanger Bros.** 15 Tex. Civ. App. 113, 38 S. W. 359
—**Douglas v. Alder**, 13 Utah, 311, 44 Pac. 706—**Vietor v. Glover**, 17 Wash. 40, 40 L.R.A. 300, 48 Pac. 788.

87. If, before the interposition of the court, property has ceased to belong to the partnership, by a bona fide transfer to one partner or to a third person, the equities of the partners are extinguished, and, consequently, the derivative equities of the creditors are at an end. **Case v. Beauregard**, 99 U. S. 119, 25: 370

Cited in **Goodbar v. Cary**, 4 Woods, 686, 16 Fed. 319—**Goldsmith v. Elchold Bros.** 94 Ala. 121, 33 Am. St. Rep. 97, 10 So. 80
—**Hudgins v. Rix**, 60 Ark. 22, 28 S. W. 422
—**Rouse v. Wallace**, 10 Colo. App. 97, 50 Pac. 366—**Bates v. Callender**, 3 Dak. 264, 16 N. W. 506—**Smith v. Smith Bros.** 87 Iowa, 99, 43 Am. St. Rep. 359, 54 N. W. 73
—**Harris v. Peabody**, 73 Me. 267—**Collier v. Hanna**, 71 Md. 260, 17 Atl. 1017—**Tennant v. McKean**, 46 Mo. App. 492—**Krueger v. Speith**, 8 Mont. 492, 3 L.R.A. 294, 20 Pac. 664—**Noyes v. Ross**, 23 Mont. 437, 47 L.R.A. 405, 75 Am. St. Rep. 543, 59 Pac. 367—**Arnold v. Hagerman**, 45 N. J. Eq. 208, 14 Am. St. Rep. 712, 17 Atl. 93—**Hodgskin v. Heim**, 33 Misc. 551, 67 N. Y. Supp. 876
—**Stahl v. Osmer**, 31 Or. 202, 49 Pac. 958
—**Bedford v. McDonald**, 102 Tenn. 365, 52 S. W. 157—**Douglas v. Alder**, 13 Utah, 312, 44 Pac. 706—**Passumpsic Sav. Bank v. First Nat. Bank**, 53 Vt. 91—**Patton v. Leftwich**, 86 Va. 426, 6 L.R.A. 572, 19 Am. St. Rep. 902, 10 S. E. 686—**Thayer v. Humphrey**, 91 Wis. 303, 30 L.R.A. 558, 51 Am. St. Rep. 837, 64 N. W. 1007—**Excelsior Mill Co. v. Hanover**, 102 Wis. 317, 78 N. W. 737.

88. Where the guardian of minor heirs conveys under proper legislative authority their interest in the property of a partnership to a corporation which assumes all the partnership debts, a debt due the minors from the partnership does not continue to be a lien upon the property, but becomes a general debt of the corporation. **Franclyn v. Sprague**, 121 U. S. 215, 7 Sup. Ct. Rep. 951, 30: 936
Cited in **Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co.** 60 Ohio St. 106, 64 L.R.A. 398, 53 N. E. 711—**Sayers v. Texas Land & Mortg. Co.** 78 Tex. 247, 14 S. W. 578.

b. Liability for Torts.

89. Partners are all liable to make indemnity for the tort of one of their number, committed by him in the course of the partnership business. **Stockwell v. United States**, 13 Wall. 531, 20: 491

90. The principle that whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal, and may be proved as well in a criminal as a civil case, and in like manner as if the evidence applied personally to the principal, applies to the case of one partner acting for the partnership

in the importation of goods; and his guilty knowledge in the transaction is the knowledge of the partnership, such as to make the partnership liable to forfeitures or penalties consequent upon such guilty knowledge. **Stockwell v. United States**, 13 Wall. 531, 20: 491

Cited in **Strang v. Bradner**, 114 U. S. 561, 29 L. ed. 250, 5 Sup. Ct. Rep. 1038—**United States v. Hughes**, 12 Blatchf. 561, Fed. Cas. No. 15,417—**McVickar v. Jones**, 70 Fed. 757
—**Atlanta v. Chattanooga Foundry & Pipe-works**, 64 L.R.A. 728, 61 C. C. A. 390, 127 Fed. 26—**Guarantee Trust & S. D. Co. v. E. C. Drew Invest. Co.** 107 La. 255, 31 So. 736
—**Rippetoe v. Dwyer**, 65 Tex. 708.

91. Where goods were in the custody of partners, for sale on commission, and one of the partners made false representations as to credit and responsibility of the party to whom they were to be sold by them, the partnership is liable if, in consequence of such representations, the plaintiff consented to the sale on credit, and the sale was actually made, whereby he was injured by the loss of the goods on account of the insolvency of the purchaser, and his consequent inability to collect the purchase price. **Castle v. Bullard**, 23 How. 172, 16: 424
Cited in **Lightner v. Brooks**, 2 Cliff. 291, Fed. Cas. No. 8,344—**Murray v. Lovejoy**, 2 Cliff. 196, Fed. Cas. No. 9,963—**Stockwell v. United States**, 3 Cliff. 306, Fed. Cas. No. 13,466—**Durant v. Rogers**, 87 Ill. 511—**Tenney v. Foote**, 95 Ill. 108—**Judah v. Vincennes University**, 16 Ind. 70—**Robinson v. Goings**, 63 Miss. 505—**Carson v. Cummings**, 69 Mo. 332—**Hornblower v. Crandall**, 7 Mo. App. 232—**Sheridan Electric Light Co. v. Chatham Nat. Bank**, 52 Hun, 585, 5 N. Y. Supp. 529.

Editorial notes.

[Attachment of partner's property for co-partner's fraud. 25 L.R.A. 645.

Liability for torts. 51 L.R.A. 463.

Liability of partner to action for false imprisonment for act of copartner. 3 L.R.A.(N.S.) 221.]

c. Relative Rights of Individual and Firm Creditors.

Right of Partners to have Partnership Assets Applied to Payment of Firm Debts, see *infra*, 128.

Property Passing under Assignment for Creditors, see *Assignment for Creditors*, 64, 65.

Validity of Assignment for Creditors, see *Assignment for Creditors*, 43-45, 81.

Estoppel of Partner to Claim Invalidity of Assignment by Firm, see *Estoppel*, 88.

Attachment of Firm Credits for Individual Debt, see *Attachment*, 31, 32.

In Bankruptcy Generally, see *Bankruptcy*, 371, 372.

Effect of Bankruptcy Proceedings against Firm or Members, see *Bankruptcy*, 93.

Rights of Assignee in Bankruptcy of Partner, see *Bankruptcy*, 275, 276, 278.

Creditors' Bill to Reach Individual Partners' Interest, see *Creditors' Bill*, 30.

See also *infra*, 187.

Editorial note.

Rights of individual and partnership creditors in assets. 8: 941

Equity of partnership creditors.

Right of Firm in Individual's Property Pledged for Firm Debt, see Bankruptcy, 277.

Right of United States as Creditor of Partnership to Priority in Individual Assets, see United States, 225.

See also *supra*, 86.

92. The partnership assets constitute a fund to be appropriated primarily to the discharge of partnership liabilities. *Emerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. Rep. 981, 30: 49

Cited in *Fay v. Allen*, 30 Fed. 447—*Everest v. Buffalo Lubricating Oil Co.* 31 Fed. 744—*Roemer v. Simon*, 31 Fed. 42—*Bell v. United States Stamping Co.* 32 Fed. 551—*Welling v. La Bau*, 34 Fed. 43—*Royer v. Shultz Belting Co.* 45 Fed. 53—*Mosher v. Joyce*, 2 C. C. A. 325, 6 U. S. App. 107, 51 Fed. 444—*Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 11, 43 N. E. 464—*Bulger v. Rosa*, 53 Hun, 241, 6 N. Y. Supp. 38—*Douglas v. Alder*, 13 Utah, 312, 44 Pac. 706.

93. Partnership creditors have a right to payment out of partnership funds in preference to individual creditors, or claims of the partners themselves. *Inbusch v. Farwell*, 1 Black, 566, 17: 188

Distinguished in *Rich v. Solari*, 6 Mackey, 376. *Cited in* *Norris v. McCanna*, 29 Fed. 761—*Carlisle v. McAlester*, 3 Ind. Terr. 172, 53 S. W. 531—*Worthley v. Goodbar*, 53 Ark. 4, 13 S. W. 216.

94. The lien of partnership creditors against partnership assets is superior to the lien of a creditor of an individual partner. *Murrill v. Neill*, 8 How. 414, 12: 1135

Cited in *Bartlett v. Meyer-Schmidt Grocer Co.* 65 Ark. 293, 45 S. W. 1065—*Carlisle v. McAlester*, 3 Ind. Terr. 172, 53 S. W. 531—*Poole v. Seney*, 66 Iowa, 508, 24 N. W. 27—*Smith v. Smith Bros.* 87 Iowa, 98, 43 Am. St. Rep. 359, 54 N. W. 73—*Funk v. Seehorn*, 99 Mo. App. 598, 74 S. W. 445—*Field v. Romero*, 7 N. M. 644, 41 Pac. 517.

95. The equity of partnership creditors, in the nature of a privilege or preference of payment out of the funds of a partnership, before payment of the debts of an individual partner, is a derivative one, and practically a subrogation to the equity of an individual partner. *Case v. Beauregard*, 99 U. S. 119, 25: 370

Cited in *Jones v. Fletcher*, 42 Ark. 451—*Lamkin v. Baldwin & L. Mfg. Co.* 72 Conn. 62, 44 L.R.A. 789, 43 Atl. 593—*First Nat. Bank v. Cody*, 93 Ga. 150, 19 S. E. 831—*Hanford v. Prouty*, 133 Ill. 352, 24 N. E. 565—*Hoffman v. Schoyer*, 37 Ill. App. 461—*Winslow v. Wallace (Fletcher v. Sharpe)* 116 Ind. 326, 1 L.R.A. 184, 17 N. E. 923—*Purple v. Farrington*, 119 Ind. 171, 4 L.R.A. 538, 21 N. E. 543—*Calder v. Their Creditors*, 47 La. Ann. 354, 16 So. 852—*Broadway Nat. Bank v. Wood*, 165 Mass. 316, 43 N. E. 100—*Roach v. Brannon*, 57 Miss. 500—*Hanover Nat. Bank v. Klein*, 64 Miss. 150, 60 Am. Rep. 47, 8 So. 208—*Saunders v. Reilly*, 105 N. Y. 19, 59 Am. Rep. 472, 12 N. E. 170—*Durant v. Pierson*, 124 N. Y. 453, 12 L.R.A.

149, 21 Am. St. Rep. 686, 26 N. E. 1095—*Robinson v. Allen*, 85 Va. 730, 8 S. E. 835.

96. An assignment which includes all the property of the grantors as partners and individually, for the benefit of partnership and individual creditors, should be construed distributively, and the partnership assets be applied to the payment of partnership debts, and the individual assets to individual liabilities. *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. Rep. 354, 33: 696

Cited in *Jummel v. Mann*, 80 Ill. App. 208—*Gibbs v. Humphrey*, 91 Wis. 115, 64 N. W. 750.

97. Where three persons form a partnership, and agree to bear the losses and share the profits in proportion to their contribution to the capital, and two of the partners furnish all of the capital and do all of the work, they are entitled to be repaid their advances out of the partnership assets, before payment of the individual creditors of the other partner. *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. Rep. 870, 29: 940

Cited in *Henderson v. Ries*, 47 C. C. A. 630, 108 Fed. 714.

Right of partners to appropriate property to debt of individual partner.

98. Partners who are solvent have a right to control the possession of the partnership funds, and determine that the whole or any part shall go into the possession of either partner, and where they have assigned to a trustee all their partnership property, with instructions as to its disposal, and subsequently appoint an arbitrator, recognizing in their arbitration bonds the directions given to the trustee, the arbitrator cannot deviate from those directions to make any other disposition of the property, even for the purpose of preferring creditors, before paying money to one of the partners as directed. *McCormick v. Gray*, 13 How. 26, 14: 36

99. A bona fide transfer of partnership property to one partner or a third person, before interposition of a court is sought, extinguishes the equities of the partners and the derivative equities of partnership creditors. *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 7 Sup. Ct. Rep. 899, 30: 971

Cited in *Re Keller*, 3 N. B. N. Rep. 847, 109 Fed. 121—*Hanford v. Prouty*, 133 Ill. 352, 24 N. E. 565—*Franklin Sugar Ref. Co. v. Henderson*, 86 Md. 460, 63 Am. St. Rep. 524, 38 Atl. 991—*Tennant v. McKean*, 46 Mo. App. 492—*Arnold v. Hagerman*, 45 N. J. Eq. 208, 14 Am. St. Rep. 712, 17 Atl. 93—*Hodgskin v. Heim*, 33 Misc. 551, 67 N. Y. Supp. 876—*Douglas v. Alder*, 13 Utah, 312, 44 Pac. 706—*Vietor v. Glover*, 17 Wash. 40, 40 L.R.A. 300, 48 Pac. 788—*McLaren v. First Nat. Bank*, 76 Wis. 265, 45 N. W. 223—*Thayer v. Humphrey*, 91 Wis. 303, 30 L.R.A. 558, 51 Am. St. Rep. 887, 64 N. W. 1007.

100. The transfer in good faith, by partners, of the firm property in payment of the individual debt of one member, is not a fraud upon the firm creditors. *Case v. Beauregard*, 99 U. S. 119, 25: 370

Cited in *Huiskamp v. Moline Wagon Co.* 121 U. S. 323, 30 L. ed. 976, 7 Sup. Ct. Rep. 899—

Johnson v. Straus, 4 Hughes, 628, 26 Fed. 62—*Coffin v. Day*, 34 Fed. 690—*Merchants' Bank v. Thomas*, 57 C. C. A. 378, 121 Fed. 310—*Reynolds v. Johnson*, 54 Ark. 452, 16 S. W. 124—*Ellison v. Lucas*, 87 Ga. 227, 27 Am. St. Rep. 242, 13 S. E. 445—*Purple v. Farrington*, 119 Ind. 171, 4 L.R.A. 538, 21 N. E. 543—*Johnson v. McClary*, 131 Ind. 106, 30 N. E. 888—*Simmons Hardware Co. v. Thomas*, 147 Ind. 321, 46 N. E. 645—*Woodmansie v. Holcomb*, 34 Kan. 38, 7 Pac. 603—*Kincaid v. National Wallpaper Co.* 63 Kan. 291, 54 L.R.A. 414, 88 Am. St. Rep. 243, 65 Pac. 247—*Myers v. Tyson*, 2 Kan. App. 469, 43 Pac. 91—*Hanover Nat. Bank v. Klein*, 64 Miss. 151, 60 Am. Rep. 47, 8 So. 208—*Jackson Bank v. Dufrey*, 72 Miss. 976, 31 L.R.A. 471, 48 Am. St. Rep. 596, 18 So. 456—*Sexton v. Anderson*, 95 Mo. 381, 8 S. W. 564—*Reyburn v. Mitchell*, 106 Mo. 376, 27 Am. St. Rep. 350, 16 S. W. 592—*Re Edwards*, 122 Mo. 431, 29 L.R.A. 687, 25 S. W. 904—*McDonald v. Cash*, 57 Mo. App. 545—*Bulger v. Rosa*, 53 Hun. 241, 6 N. Y. Supp. 38—*Wiggins v. Blackshear*, 86 Tex. 670, 26 S. W. 939—*Harris v. Meyer*, 84 Wis. 147, 53 N. W. 1127.

101. Where one partner by dissolution, has become the owner of partnership property, and has mortgaged it for his individual debt, the fact of notice or no notice to a creditor of the partnership who has no lien upon the property is immaterial. *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 7 Sup. Ct. Rep. 899, 30: 971

102. One of two partners, with the consent of the other, may subject partnership property against which there is no specific lien, to the payment of his individual debts. *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 7 Sup. Ct. Rep. 899, 30: 971
Cited in *Lockett v. Rumbaugh*, 45 Fed. 33—*Dorrance v. McAlester*, 1 Ind. Terr. 486, 45 S. W. 141—*Mannen v. Bailey*, 51 Kan. 447, 32 Pac. 1085—*Tootle v. Rice*, 53 Kan. 581, 36 Pac. 990—*Broadway Nat. Bank v. Wood*, 165 Mass. 316, 43 N. E. 100—*Reyburn v. Mitchell*, 106 Mo. 373, 27 Am. St. Rep. 350, 16 S. W. 592—*Re Edwards v. Wigginton*, 122 Mo. 431, 29 L.R.A. 687, 25 S. W. 904—*Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 225, 60 S. W. 87—*Stahl v. Osmeris*, 31 Or. 204, 49 Pac. 958—*Bedford v. McDonald*, 102 Tenn. 363, 52 S. W. 157—*Johnston v. Standard Shoe Co.* 5 Tex. Civ. App. 400, 24 S. W. 580—*Batchelor v. Sanger Bros.* 15 Tex. Civ. App. 112, 38 S. W. 359—*Excelsior Mill Co. v. Hanover*, 102 Wis. 317, 78 N. W. 737.

— Editorial note.

[Right of partnership, as against firm creditors, to sell or mortgage firm property to discharge or secure individual debt of one of its members. 2 L.R.A.(N.S.) 256.]

Right of creditor of individual partner as to partnership property.

Right to Levy on Joint Property, and Effect of Levy, see Execution, 41.

Title Acquired by Purchaser of Partnership Property at Judicial Sale, see Judicial Sale, 105-109.

Rights of Purchasers at Judicial Sale, against Individual Partner, see Judicial Sale, 106-109.

See also *supra*, 79; Pledge, 28.

103. The interest of each partner in the partnership property being his share in the surplus after the partnership debts are paid, that surplus only is liable for the separate debts of such partner. *United States v. Hack*, 8 Pet. 271, 8: 941
Cited in *Pritchett v. Pollock*, 82 Ala. 173, 2 So. 735—*Fillee v. Phelps*, 18 Conn. 300—*Phillips v. Cook*, 24 Wend. 398—*Maddock v. Skinner*, 93 Va. 485, 25 S. E. 535—*Scruggs Burruss*, 25 W. Va. 675.

104-6. [An action is not maintainable against a surviving partner, who has money in his hands belonging to the partnership, on a separate debt of the deceased partner. *Vienne v. M'Carty* (Ct. Com. Pl. Phila.) 1 Dall. 154, 1: 79]

107. Where the legal title to land is in the trustees of a joint-stock company, the equity of a judgment creditor of an individual member is an interest in the land, after a sufficient portion of it has been disposed of to pay the debts of the association. *Claggett v. Kilbourne*, 1 Black, 346, 17: 213

— Editorial note.

[Levy on partnership property for debt of a partner. 46 L.R.A. 481.]

Priority of creditors of individual partner in individual estate.

Property Passing under Assignment for Creditors, see Assignment for Creditors, 65.

108. The priority of the United States does not extend so as to take the property of a partner from partnership effects to pay a separate debt due by such partner to the United States, when the partnership effects are not sufficient to satisfy the creditors of the partnership. *United States v. Hack*, 8 Pet. 271, 8: 941
Cited in *Re Clap*, 2 Low. Dec. 170, Fed. Cas. No. 2,783—*United States v. Couch*, Fed. Cas. No. 14,874—*United States v. Duncan*, 4 McLean, 619, Fed. Cas. No. 15,008—*United States v. Duncan*, 12 Ill. 533.

109. Creditors of an individual partner must have payment from his individual estate, in preference to partnership creditors. *Murrill v. Neill*, 8 How. 414, 12: 1135

Cited in *Re Clap*, 2 Low. Dec. 170, Fed. Cas. No. 2,783—*Re Collier*, 12 Nat. Bankr. Reg. 276, Fed. Cas. No. 3,002—*Re Corbett*, 5 Sawy. 207, Fed. Cas. No. 8,220—*Re Johnson*, 2 Low. Dec. 132, Fed. Cas. No. 7,369—*Re McLean*, 15 Nat. Bankr. Reg. 337, Fed. Cas. No. 8,879—*Swann v. Sanborn*, 4 Woods, 634, Fed. Cas. No. 13,675—*Re Wilcox*, 94 Fed. 103—*Smith v. Mallory*, 24 Ala. 635—*Weyer v. Thornburgh*, 15 Ind. 127—*Gillaspay v. Peck*, 46 Iowa, 462—*Hundley v. Farris*, 103 Mo. 85, 12 L.R.A. 256, 23 Am. St. Rep. 863, 15 S. W. 312—*Level v. Farris*, 24 Mo. App. 452—*Bowen v. Billings*, 13 Neb. 443, 14 N. W. 152—*Banks v. Steele*, 27 Neb. 141, 42 N. W. 883—*Jarvis v. Brooks*, 23 N. H. 147—*Crockett v. Crain*, 33 N. H. 550—*Re Spitz Bros.* 8 N. M. 631, 34 L.R.A. 607, 45 Pac. 1122—*Rodgers v. Meranda*, 7 Ohio St. 190—*Black's Appeal*, 44 Pa. 507—*Pennington v. Bell*, 4 Sneed, 203—*Gordon v. Cannon*, 18 Gratt. 421—*Davie v. Humphrey*, 91 Wis. 301, 30 L.R.A. 557, 64 N. W. 1007.

110. A deed of trust of his individual property, made by one who was a member of several mercantile firms, providing for the payment of his creditors, without mentioning his mercantile firms, does not include within its benefits the creditors of the partnerships. *Murrill v. Neill*, 8 How. 414, 12: 1135

111. It is not a fraud upon partnership creditors to apply to the payment of individual debts goods belonging to the surviving partner, which never belonged to the partnership, merely because they had been mingled with the stock formerly belonging to the firm. *McGinty v. Flannagan*, 106 U. S. 661, 1 Sup. Ct. Rep. 380, 27: 215
Cited in *Cowan v. Gill*, 11 Lea, 685.

IV. Partnership Real Estate.

What Constitutes Partnership, see *supra*, 12-17.

Joint-Stock Company Dealing in Real Estate as a Partnership, see *supra*, 26.

Power of one Partner to Sell or Mortgage, see *supra*, 67-71.

Dissolution of Partnership by Sale of, see *infra*, 160.

Surviving Partner's Right to Sell for Payment of Debts, see *infra*, 182.

Cotenancy or Partnership, see *Cotenancy*, 2, 3.

Remedy of Heir of Partner Seeking to Redeem from Tax Sale Land Assigned for Creditors, see *Equity*, 187.

Presumption of Deed from One Partner to Firm, see *Evidence*, 737.

Rights of Purchasers at Judicial Sale. against Individual Partner, see *Judicial Sale*, 106-109.

See also *supra*, 107; *infra*, 125.

112-3. Real estate used for partnership uses is in equity treated as personal property, in paying debts and adjusting the equities of the partners. *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 924, 34: 282
Shanks v. Klein, 104 U. S. 18, 26: 635
Claggett v. Kilbourne, 1 Black, 346, 17: 213
Cited in *Cooper v. Newton*, 68 Ark. 167, 56 S. W. 867—*Re Groetzinger*, 31 Pittsb. L. J. N. S. 320.

114. Real property owned by a partnership, and purchased with partnership funds, is, for the purpose of settling the debts of the partnership and distributing its effects, treated in equity as personal property. *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. Rep. 517, 28: 90

Cited in *Emerson v. Senter*, 118 U. S. 8, 30 L. ed. 51, 6 Sup. Ct. Rep. 981—*Riddle v. Whitehill*, 135 U. S. 635, 84 L. ed. 288, 10 Sup. Ct. Rep. 924—*A. & W. Sprague Mfg. Co. v. Hoyt*, 29 Fed. 426—*Bright v. Land & River Improv. Co.* 42 Fed. 482—*Holladay v. Land & River Improv. Co.* 6 C. C. A. 571, 18 U. S. App. 308, 57 Fed. 785—*Breen v. Richardson*, 6 Colo. 608—*VanAken v. Clark*, 82 Iowa, 264, 48 N. W. 73—*Dunlap v. Byers*, 110 Mich. 117, 67 N. W. 1087—*Darrow v. Calkins*, 154 N. Y. 515, 48 L.R.A.

303, 61 Am. St. Rep. 637, 49 N. E. 61—*Sparger v. Moore*, 117 N. C. 452, 23 S. E. 859—*Re Groetzinger*, 31 Pittsb. L. J. N. S. 320—*Harrington v. Johnson*, 10 Wash. 544, 39 Pac. 141—*Kruschke v. Stefan*, 83 Wis. 385, 53 N. W. 679.

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Conveyance of partnership realty. 20: 797
[Rights of dower, curtesy, inheritance, etc., infirm real property. 27 L.R.A. 340.]

What real estate considered partnership property. 27 L.R.A. 449.

Rights of partners *inter se* in firm real property. 28 L.R.A. 86.

Rights of creditors and third persons generally as to partnership real estate. 28 L.R.A. 161.]

V. Rights and Liabilities of Partners as to Each Other.

a. In General.

Right of Action between Partners, see *infra*, VII.

Right of One Partner to Sue Separately for Interest on Debt Due Firm, see *Action or Suit*, 56.

Adverse Possession by One Partner, see *Adverse Possession*, 14.

Petition in Bankruptcy by One against Another not Voluntary, see *Bankruptcy*, 146.

Presumption of Access to Books, see *Evidence*, 586.

Insurable Interest in Copartner's Life, see *Insurance*, 96, 97.

Nature of One Partner's Agreement to Pay Firm Debts, see *Principal and Surety*, 79.

Partner as Constructive Trustee for Copartner, see *Trusts*, 52.

115. The right of an assignee of a partner is only an equity to share in the surplus remaining after payment of the partnership debts. *Fourth Nat. Bank v. New Orleans & C. R. Co.* 11 Wall. 624, 20: 82

Cited in *Beecher v. Stevens*, 75 Fed. 127—*Mellor v. Smither*, 52 C. C. A. 70, 114 Fed. 122—*Line v. McCall*, 126 Mich. 505, 85 N. W. 1089—*Churchill v. Proctor*, 31 Minn. 135, 16 N. W. 694—*Re Splitz Bros.* 8 N. M. 631, 34 L.R.A. 607, 45 Pac. 1122.

Fiduciary nature of relation.

In Mining Partnership, see *infra*, 219.

Rights of Partner for Advances as against Creditors of other Partner, see *supra*, 97.

116. Each partner is the agent of his co-partners in all transactions relating to partnership business, and is forbidden to traffic therein for his own advantage; and, if he does, he will be held accountable for the profits. *Wheeler v. Sage*, 1 Wall. 518, 17: 646

Cited in *McKenzie v. Dickinson*, 43 Cal. 184—*Milton v. Kingsley*, 7 App. D. C. 537—*Metcalfe v. Bradshaw*, 43 Ill. App. 291—*Drew v. Beard*, 107 Mass. 73.

117. If one member of a partnership in a particular business secretly engage on his his own account in such business, and keep his earnings to himself, a court of equity will subject such earnings to the benefit of the partnership. *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. Rep. 355, 32: 764
Cited in *Gunn v. Black*, 8 C. C. A. 538, 19 U. S. App. 477, 60 Fed. 156—*Harris v. Lloyd*, 11 Mont. 402, 28 Am. St. Rep. 475, 28 Pac. 736—*Butler v. Prentiss*, 158 N. Y. 60, 52 N. E. 652.

118. One partner cannot secretly use partnership assets, or information acquired in partnership business, in any way to his own advantage or to the disadvantage of the firm. *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. Rep. 201, 37: 1169
Cited in *Williamson v. Monroe*, 101 Fed. 334.

119. If a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, for purposes which are wholly without the scope of the partnership business and not competing with it, the firm is not entitled to an account of the benefits he receives from the use of such information. *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. Rep. 201, 37: 1169

120. Where one partner is made sole agent of the partnership by another, who relies on him wholly for true accounts, and the party thus made agent manages the business at a distance from the other, communicating to him no information, the relation of partners, whatever it may be in general, becomes fiduciary, and the law governing such relations applies. *Brooks v. Martin*, 2 Wall. 70, 17: 732

Cited in *Bowman v. Patrick*, 36 Fed. 139—*McKinley v. Williams*, 20 C. C. A. 319, 36 U. S. App. 749, 74 Fed. 102—*Splier v. Hyde*, 92 App. Div. 482, 87 N. Y. Supp. 285—*Butler v. Prentiss*, 158 N. Y. 61, 52 N. E. 652.

121. Where partners in a patent make an agreement that one of them alone shall conduct the business, and manufacture the patented articles, the partner selling cannot secretly acquire an outstanding right and set it up against the other. *Kinsman v. Parkhurst*, 18 How. 289, 15: 385

122. If a partner who exclusively superintends the business and accounts of the firm, by concealment of the true state of their accounts and business, purchase the share of the other partner for an inadequate price, by means of such concealment, the purchase will be held void. In order to sustain such a sale, it must be made to appear that the price paid was a fair and adequate consideration; and that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, was communicated by the former to the latter. *Brooks v. Martin*, 2 Wall. 70, 17: 732

Distinguished in *Colton v. Stanford*, 82 Cal. 389, 16 Am. St. Rep. 137, 23 Pac. 16.

Cited in *Patrick v. Bowman*, 149 U. S. 426, 37 L. ed. 795, 13 Sup. Ct. Rep. 811—*Baker*

v. Cummings, 4 App. D. C. 279—*Marmion v. McClellan*, 11 App. D. C. 488—*Smith v. Howlett*, 29 App. Div. 188, 51 N. Y. Supp. 910—*Tennant v. Dunlop*, 97 Va. 242, 33 S. E. 620.

123. Where one partner is present in sole charge of the business, while the other is at a distance, in order to sustain a sale to the former of the absent partner's interest, it must be made to appear that the price paid approximates a fair consideration for the thing purchased, and that all the information in the possession of the purchaser necessary to enable the seller to form a sound judgment of the value of what he sells was communicated by the buyer to him. *Patrick v. Bowman*, 149 U. S. 411, 13 Sup. Ct. Rep. 811, 866, 37: 790

124. A partner may traffic outside of the scope of the firm's business for his own benefit and advantage. *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. Rep. 201, 37: 1169

125. Where a partnership was for the purpose of doing a general produce business, and contemplated no dealings in real estate, each partner is at liberty to buy and sell real estate, and under no legal liability to account in such matters to his copartners; and the fact that the partnership holds a mortgage against the premises will not prevent one of the partners from negotiating for the purchase, on his own account, of the premises mortgaged. *Wheeler v. Sage*, 1 Wall. 518, 17: 646

126. A partner in possession of firm property must pay the taxes thereon, which are a joint liability on the property; and he is not discharged from so doing by the copartner's statement that he would not repay him or allow him credit therefor. *Chapin v. Streeter*, 124 U. S. 360, 8 Sup. Ct. Rep. 529, 31: 475

Cited in *Bibbins v. Clark*, 90 Iowa, 234, 29 L.R.A. 282, 57 N. W. 884.

Interest of partner in property of firm.

127. The property of a partnership belongs to the firm, and not to the partners, each of whom is entitled only to a share of the surplus that may remain after payment of the partnership debts. *United States v. Hack*, 8 Pet. 271, 8: 941

Fourth Nat. Bank of New York v. New Orleans & C. R. Co. 11 Wall. 624, 20: 82
Cited in *Karrick v. Hannaman*, 108 U. S. 334, 42 L. ed. 489, 18 Sup. Ct. Rep. 135—*Warren v. Taylor*, 60 Ala. 224—*Beecher v. Stevens*, 43 Conn. 592—*Pratt v. McGuinness*, 173 Mass. 172, 53 N. E. 380—*Moore v. Rawson*, 185 Mass. 272, 70 N. E. 64—*Gaines v. Coney*, 51 Miss. 328—*Re Spitz Bros.* 8 N. M. 631, 34 L.R.A. 607, 45 Pac. 1122—*Rommerdahl v. Jackson*, 102 Wis. 448, 78 N. W. 742.

128. A member of a partnership has the right as against the other partners to have the partnership assets applied to the payment of partnership obligations. *Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 Sup. Ct. Rep. 369, 27: 211

Cited in *Re Green*, 116 Fed. 120—*Goldsmith*

v. Elchold Bros. 94 Ala. 121, 33 Am. St. Rep. 97, 10 So. 80—Sickman v. Abernathy, 14 Colo. 179, 23 Pac. 447—Hanford v. Prouty, 133 Ill. 352, 24 N. E. 595—Saunders v. Reilly, 105 N. Y. 20, 59 Am. Rep. 472, 12 N. E. 170—Johnston v. Standard Shoe Co. 5 Tex. Civ. App. 400, 24 S. W. 580—Robinson v. Allen, 85 Va. 730, 8 S. E. 835.

129. Where two of three partners are entitled, under the articles of partnership, to a sum due from the government on a contract with the third partner, an agreement executed by such third partner to pay the sum due to each, out of moneys he might thereafter receive from the government, does not, as against the assignee in bankruptcy of such third partner, deprive the other partners of their right to the funds paid by the government. It leaves their rights as they were before. *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. Rep. 870, 29: 940

b. Compensation.

Of Surviving Partner, see *infra*, 186.

130. Every partner is under obligation to exercise due diligence and skill, and to devote his services to the promotion of the common benefit of the firm, without any compensation, unless there be an express stipulation for compensation. *Denver v. Roane*, 99 U. S. 355, 25: 476
Cited in *Clifton v. Clark*, 88 Miss. 467, 66 L.R.A. 827, 102 Am. St. Rep. 458, 36 So. 251.

131. An agreement, in articles of partnership, that each partner shall pay his own individual expenses, applies only when the partners are at home, and does not include expenses incurred while traveling on partnership business. *Withers v. Withers*, 8 Pet. 355, 8: 972

132. A partner traveling abroad on the business of the partnership is not entitled to reimbursement for his extra personal expenses, under an agreement that he shall be liable for all debts or engagements which he may have entered into on account of the partnership, and for which the firm has not received the full benefit and advantage. *Withers v. Withers*, 8 Pet. 355, 8: 972

c. Accounting; Settlement.

Distribution of Assets in Suit for Dissolution, see *infra*, 168.

Accounting by Surviving Partner, see *infra*, 190, 191.

Right of Administrator of Deceased Partner to Reach Intestate's Share of Surplus, see *infra*, 204.

In Mining Partnership, see *infra*, 220, 221.
Admiralty Jurisdiction of, see Admiralty, 227.

Submission to Arbitration by, see Arbitration, 44, 45.

Accounting by Partnership which is Part of an Illegal Contract, see Contracts, 511, 513.

Assignee's Right to Maintain Bill for, see Discovery and Inspection, 8.

Running of Limitations against Right to Account, see Limitations of Actions, 359.

Promise to Render Account as Acknowledgment, Removing Bar of Limitations, see Limitation of Actions, 634.

Necessary Parties to Accounting, see Parties, 190.

See also *supra*, 125; *infra*, 151, 201.

133. So far as the accounts between partners are closed by the articles of dissolution, no reason can be assigned for opening them; but if rights growing out of the articles of dissolution require a settlement, a partner is entitled to an accounting. *Finley v. Lynn*, 6 Cranch, 238, 3: 211
Cited in *Davis v. Dodge*, 30 Mich. 270.

134. A partner who, in violation of the act of partnership, enters into another firm, does not thereby give the right to his original copartner to claim a share of the profits of the new firm. *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. Rep. 201, 37: 1169

As dependent upon existence of partnership.

135. A person cannot maintain an action for an accounting under an agreement of partnership which he has never complied with, and which has never gone into effect. *Davis v. Key*, 123 U. S. 79, 8 Sup. Ct. Rep. 55, 31: 112

136. Although a new member cannot be admitted into a firm without the consent of all the partners, yet one who has acquired a share in the concern may, after its dissolution, maintain a suit in equity for his share of the profits. *Mathewson v. Clarke*, 6 How. 122, 12: 370

137. One who merely had reason to expect that he would be included as a party in a project of buying bonds and bidding at the sale of railroads, but was not included in the actual transaction, and furnished no part of the moneys used and no services, cannot, as partner, maintain an action for an account. *Farley v. Hill*, 150 U. S. 572, 14 Sup. Ct. Rep. 186, 37: 1186

Cited in *Hyer v. Richmond Traction Co.* 26 C. C. A. 180, 42 U. S. App. 522, 80 Fed. 844—*Patty v. City Bank*, 15 Tex. Civ. App. 483, 41 S. W. 173.

As affected by misconduct of partner.

See also *supra*, 116, 117, 119; *infra*, 161.

138. If one partner assume to dissolve the partnership and take to himself all the benefits, he is liable to account therefor as trustee, and to refund to the other partner his share, although no dissolution of the partnership is prayed for, where it is assumed by both parties to be already dissolved. *Ambler v. Whipple*, 20 Wall. 546, 22: 403
Cited in *Pearce v. Ham*, 113 U. S. 593, 28 L. ed. 1070, 5 Sup. Ct. Rep. 676—*Kennedy v. Hazelton*, 128 U. S. 673, 32 L. ed. 573, 9 Sup. Ct. Rep. 202—*Karrick v. Hannaman*, 108 U. S. 337, 42 L. ed. 490, 18 Sup. Ct.

Rep. 135—*Ambler v. Chouteau*, 3 Cent. L. J. 334, Fed. Cas. No. 272—*Miller v. O'Boyle*, 89 Fed. 143—*Williamson v. Monroe*, 101 Fed. 333—*Murjahn v. Hall*, 119 Fed. 188.

139. A conspiracy between one partner and a third person, whereby they undertook to exclude the other partner from an interest in a valuable contract in which the partnership was concerned, and succeeded in obtaining and appropriating all the profits of the contract, cannot affect the rights of such partner; and he is entitled to recover his share of the profits of such contract from the others. *Pearce v. Ham*, 113 U. S. 585, 5 Sup. Ct. Rep. 676, 28: 1067
Cited in *Karrick v. Hannaman*, 168 U. S. 337, 42 L. ed. 490, 18 Sup. Ct. Rep. 135—*Miller v. O'Boyle*, 89 Fed. 143—*Williamson v. Monroe*, 101 Fed. 331.

140. A partner who ousts his copartner from the business before the expiration of a stipulated period of copartnership, during which each is entitled to an equal share of the profits and a monthly allowance for expenses, cannot complain of a decree which requires him to account for any pay over the ousted partner's share of the capital and one half of the wrongful disbursements, and also one half of the net profits of the business made after the ousting, while monthly allowances for the subsequent period are made to him only, and not to the ousted partner; and it is immaterial in this respect whether the ousting is deemed to effect a dissolution of the partnership or not. *Karrick v. Hannaman*, 168 U. S. 328, 18 Sup. Ct. Rep. 135, 42: 484
Cited in *Towle v. Hammond*, 99 Fed. 517—*Williamson v. Monroe*, 101 Fed. 332.

141. Where an attorney-at-law refuses to act as a partner, or to perform the functions of such in the prosecution of a cause which has been intrusted to his firm, and repudiates his obligations, he is not entitled to any part of the fees subsequently earned by his partners in the cause. *Denver v. Roane*, 99 U. S. 355, 25: 476
Cited in *Shaeffer v. Blair*, 149 U. S. 258, 37 L. ed. 725, 13 Sup. Ct. Rep. 856—*Blair v. Shaeffer*, 33 Fed. 224—*Grafton v. Paine*, 7 App. D. C. 270—*Justice v. Lalry*, 19 Ind. App. 279, 65 Am. St. Rep. 405, 49 N. E. 459—*Miller v. Hale*, 98 Mo. App. 430, 70 S. W. 258—*Yoos v. Doyle*, 4 Lack. Legal News, 131.

142. A partner renting his copartner's share of the firm property, and permitting it to be sold for the taxes of the latter, and afterwards renting it from the tax purchaser, cannot be allowed rent paid to the latter in an action by the copartner to recover the rent due him. *Chapin v. Streeter*, 124 U. S. 360, 8 Sup. Ct. Rep. 529, 31: 475

143. In a suit to dissolve a partnership and for an accounting, where the want of success in the business and the losses were not occasioned by the misconduct of a partner, and there was no scheme on his part to defraud his partner, they should not be reinstated at his expense in the same position as if they had not entered upon an

enterprise which turned out to be unfortunate. *Oteri v. Scalzo*, 145 U. S. 578, 12 Sup. Ct. Rep. 895, 36: 824

Charges and credits.

Presumption of Assent to, see Evidence, 224.

144. In stating partnership accounts, the partner who has had entire charge of the business is to be debited with the whole capital, as well as with the proceeds of sales realized by him. *Gunnell v. Bird*, 10 Wall. 304, 19: 913

145. If part of the capital consisted of stock which had been used in the business, or disposed of and the proceeds charged against one partner, he should be credited with such stock, as a disbursement, to the amount at which it was originally charged against him. *Gunnell v. Bird*, 10 Wall. 304, 19: 913
Cited in *Hellebush v. Coughlin*, 87 Fed. 295—*Keaton v. Mayo*, 71 Ga. 653.

146. Where a partner has authority to sell the partnership property "as may in his judgment appear for the best interest of all concerned," he is not chargeable personally with the par value of stock received therefrom, although he also had authority to sell the property and apply the proceeds to payment of debts due him from the other partners, where he has never received the stock as cash or accepted it as his own property. *Simonton v. Sibley*, 122 U. S. 220, 7 Sup. Ct. Rep. 1351, 30: 1225

147. Where the personal property of a firm consisted almost wholly of slaves, which in a short time after the death of one of the partners were made free through the effect of a public war, the surviving partner ought not to be compelled to account for their value, but only for the value of their use as long as they were slaves, where failure to sell them until it became too late was excusable. *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. Rep. 419, 34: 1044

Settlement.

Settlement by Surviving Partner, see *infra*, VI. i.

Limitation of Action for, see Limitation of Actions, 326, 327.

Necessary Parties, see Parties, 189, 190.
Sufficiency of Allegations, see Pleading, 562.

See also *supra*, 133.

148. Where a partnership settlement was made on the basis that one partner was liable to pay certain bonds, which obligations had been incurred on partnership account, although the estate of such partner was afterwards relieved from liability, the settlement cannot be impeached in consequence, when it was made with full knowledge of all the facts. *Bispham v. Price*, 15 How. 162, 14: 644

Cited in *Smith v. Evans*, 37 Ind. 532—*Setzer v. Beale*, 19 W. Va. 288.

VI. Dissolution and Change.**a. In General.**

Application to Individual Debts of Goods Belonging to Surviving Partner, see *supra*, 111.

Right and Duty as to Accounting after Dissolution, see *supra*, 133, 136, 138-140.

Validity of Transfer of Interest of Insane Minor Heir of Deceased Partner, see Incompetent Persons, 3.

Interruption of Limitations by Partner's Acknowledgment after Dissolution, see Limitation of Actions, 632, 633.

Heir of Deceased Partner as Necessary Party to Suit, see Parties, 255.

Partition of Real Estate Sought in Bill to Wind up Partnership, see Partition, 7.

Sufficiency of Pleading Setting up Damages for Inducing Dissolution, see Pleading, 837.

Removal to Federal Court of Suit to Close up Partnership, see Removal of Causes, 87, 123.

149. A contract of partnership containing no stipulation as to its duration may be dissolved at any time, by either partner at his will. *Karrick v. Hannaman*, 168 U. S. 328, 18 Sup. Ct. Rep. 135, 42: 484
Cited in *Lapenta v. Lettieri*, 72 Conn. 383, 77 Am. St. Rep. 315, 44 Atl. 730.

150. Where a person has been induced by fraudulent representations to enter into a partnership, equity has jurisdiction to rescind the contract at his instance and put an end to it *ab initio*. *Oteri v. Scalzo*, 145 U. S. 578, 12 Sup. Ct. Rep. 895, 36: 824
Cited in *Southern P. Co. v. Burke*, 9 C. C. A. 240, 23 U. S. App. 1, 60 Fed. 715—*Powell v. Cash*, 54 N. J. Eq. 227, 34 Atl. 131—*Cann v. Cann*, 40 W. Va. 152, 20 S. E. 910.

151. A partner who assumes to dissolve the partnership before the end of the term agreed on in the partnership articles is liable, in an action at law against him by his copartner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received. *Karrick v. Hannaman*, 168 U. S. 328, 18 Sup. Ct. Rep. 135, 42: 484
Cited in *Dukes v. Bash*, 29 Ind. App. 108, 84 N. E. 47.

Editorial notes.

[Assumption of debts on dissolution of. 9 L.R.A.(N.S.) 49.

Defenses in action for debts assumed on dissolution of partnership. 9 L.R.A.(N.S.) 111.]

Effect of war.

152. Partnership with a foreigner is dissolved by the same event which makes him an alien enemy. *Hanger v. Abbott*, 6 Wall. 532, 18: 939

153. The effect of war is to dissolve a partnership between citizens of the belligerent nations; and nonresident partners

should withdraw their interest in the partnership, or dispose of it, else it will be considered enemy's property. *The Wm. Bagaley v. United States (The William Bagaley)* 5 Wall. 377, 18: 583
Hanger v. Abbott, 6 Wall. 532, 18: 939
Cited in *Woods v. Wilder*, 43 N. Y. 170, 3 Am. Rep. 684—*McStea v. Matthews*, 50 N. Y. 170.

154. A partnership where one member of the firm resided in New York and the other in Louisiana, was not dissolved by the war of the Rebellion prior to April 23, 1861, and an acceptance, at that date, of a bill by the firm, bound all the members of it. *Matthews v. McStea*, 91 U. S. 7.

23: 188
Cited in *Chesapeake & O. R. Co. v. United States*, 20 Ct. Cl. 67—*Kahnweiler v. Anderson*, 78 N. C. 138—*Small v. Lumpkin*, 28 Gratt. 835—*Alexandria Sav. Inst. v. McVeigh*, 84 Va. 48, 3 S. E. 885—*Haymond v. Camden*, 22 W. Va. 189.

b. By Death.

Right of Surviving Partner, see *infra*, VI. i. Mining Partnership, see *infra*, 218.

Election of Remedies by Creditor after Death of one Partner, see Election of Remedies, 12.

155. In the absence of any stipulation continuing a deceased partner's interest in the profits of the firm, even in the case of a copartnership for a term of years, death dissolves the concern. *Scholefield v. Eichelberger*, 7 Pet. 586, 8: 793

c. Purchase of Copartner's Interest.

In Mining Partnership, see *infra*, 220, 221. Right of Judicial Purchaser to Accounting, see Judicial Sale, 105.

Laches as Bar to Relief from, see Limitation of Actions, 169.

156. A surviving partner may purchase his deceased partner's interest. *Brown v. Slee*, 103 U. S. 828, 26: 618
Cited in *Holladay v. Land & River Improv. Co.* 6 C. C. A. 571, 18 U. S. App. 308, 57 Fed. 785—*Valentine v. Wysox*, 123 Ind. 56, 7 L.R.A. 796, 23 N. E. 1076.

157. Certain members of a copartnership agreed to pay a retiring member a fixed amount as his capital, all erroneously believing the firm to be solvent. The new firm borrowed on its own notes, and applied the proceeds in payment of part of the capital so agreed upon, and of some of the debts of the old firm. Upon the failure of the new firm, the holders of its notes cannot charge the old firm, or the retiring partner, with the money loaned. *Penn Nat. Bank v. Furness*, 114 U. S. 376, 5 Sup. Ct. Rep. 900, 29: 168
Cited in *Peyser v. Myers*, 56 Hun. 179, 30 N. Y. S. R. 837, 9 N. Y. Supp. 229.

158. Where new members are added to a firm, the new firm will not be bound by a contract previously made with the old firm.

First Nat. Bank of Quincy v. Hall (National Bank v. Hall) 101 U. S. 43, 25: 822
Distinguished in Horst v. Boehm, 84 Fed. 568.
Offed in Equitable Life Assur. Soc. v. McElroy, 28 C. C. A. 375, 40 U. S. App. 548, 83 Fed. 641—American Bonding & T. Co. v. Baltimore & O. S. W. R. Co. 60 C. C. A. 66, 124 Fed. 880—Crittenden v. Armour, 80 Iowa, 223, 45 N. W. 888.

d. Admission of New Partners.

159. A mortgage to secure future advances by a firm can stand as security for advances made after the admission of new partners into the firm. *Lawrence v. Tucker*, 23 How. 14, 16: 474
Cited in Walker v. Walker, 17 S. C. 338.

e. What Amounts to Dissolution.

Effect of Adjudications in Bankruptcy, see Bankruptcy, 89.

160. Where land is the only subject of a partnership, the sale of the property dissolves the relation of partners between the parties. *Thompson v. Bowman*, 6 Wall. 316, 18: 736
Cited in Pennville Natural Gas & Oil Co. v. Thomas, 21 Ind. App. 6, 51 N. E. 351.

161. Bad character, drunkenness, and dishonesty of one partner does not authorize the other partner, of his own motion, to treat the partnership as ended, and take to himself all the benefits of their joint labors and joint property. *Ambler v. Whipple*, 20 Wall. 546, 22: 403

162. [An assignment of the partnership effects is not an actual dissolution of the partnership, unless the joint transactions are at an end. *Pleasants v. Meng* (Ct. Com. Pl. Phila.) 1 Dall. 380, 1: 185]

163. An assignment for creditors by one partner dissolves the partnership, if the partnership is at will; if it is not at will, the assignment is cause for dissolution. *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 924, 34: 282

164. Bankruptcy of a partner dissolves the copartnership; but the joint property remains in the hands of the solvent partners, clothed with a trust to be applied to the firm obligations, and to account to the bankrupt for his share of the surplus. *Amsinck v. Bean*, 22 Wall. 395, 22: 801
Cited in Crompton v. Conkling, 9 Ben. 228, Fed. Cas. No. 3,407—*Re Jewett*, 7 Bliss. 334, Fed. Cas. No. 7,306—*Jones v. Newsom*, 7 Bliss. 323, Fed. Cas. No. 7,484—*Wilkins v. Davis*, 2 Low. Dec. 515, Fed. Cas. No. 17,664—*Browning v. Marvin*, 22 Hun. 550.

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Assignment or bankruptcy of partner as working dissolution of partnership.

Wrongful dissolution.

34: 282; 42: 484

42: 484

f. Effect of Dissolution.

Authority of One Partner to Enter Appearance for Others After Dissolution of Law Partnership, see Attorneys, 58.
 Effect on Good Will, see Good Will, 3.

165-6. On a note given, with sureties, by one partner to his firm, he becomes, upon dissolution, entitled to his share of it, and his sureties are *pro tanto* discharged. *McMicken v. Webb*, 6 How. 292, 12: 443

167. After a dissolution, one partner cannot enter an appearance for the other partners, who are nonresidents and have not been served with process. Such partners can question such a judgment in a suit thereon in another state. *Hall v. Lanning*, 91 U. S. 160, 23: 271

Cited in Renaud v. Abbott, 116 U. S. 287, 29 L. ed. 632, 6 Sup. Ct. Rep. 1194—*Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 295, 34 L. ed. 672, 11 Sup. Ct. Rep. 92—*Goldney v. Morning News*, 156 U. S. 521, 39 L. ed. 518, 15 Sup. Ct. Rep. 559—*National Exch. Bank v. Wiley*, 195 U. S. 270, 49 L. ed. 190, 25 Sup. Ct. Rep. 70—*Graham v. Spencer*, 14 Fed. 605—*Downs v. Allen*, 23 Blatchf. 60, 22 Fed. 808—*Citizens' Bank v. Brooks*, 23 Blatchf. 138, 23 Fed. 22—*Atchison Sav. Bank v. Templar*, 26 Fed. 581—*Larison v. Hager*, 44 Fed. 50—*Brooks v. Dun*, 51 Fed. 147—*Hatch v. Ferguson*, 57 Fed. 971—*Ralya Market Co. v. Armour & Co.* 102 Fed. 532—*Moredock v. Kirby*, 118 Fed. 182—*Cady v. Associated Colonies*, 119 Fed. 424—*Caldwell v. Armour & Co.* 1 Penn. (Del.) 551, 43 Atl. 517—*Harper v. Cunningham*, 8 App. D. C. 438—*Fisher v. Fielding*, 67 Conn. 105, 32 L.R.A. 239, 52 Am. St. Rep. 270, 34 Atl. 714—*Abbott v. North Andover*, 145 Mass. 486, 14 N. E. 754—*Willbur v. Abbot*, 60 N. H. 51—*Davis v. Megroz*, 55 N. J. L. 432, 26 Atl. 1009—*Hoffman v. Wight*, 1 App. Div. 518, 37 N. Y. Supp. 282—*Durant v. Pierson*, 124 N. Y. 449, 12 L.R.A. 148, 21 Am. St. Rep. 686, 26 N. E. 1095—*Smith v. Cunningham*, 2 Tenn. Ch. 575—*Bowler v. Huston*, 30 Gratt. 279, 32 Am. Rep. 673.

168. In a suit for the dissolution of a partnership, the court may proceed in the distribution of the assets without decreeing such dissolution, where the consent of the defendants to a dissolution of the partnership is shown by their answer. *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. Rep. 817, 34: 193

169. The decree of the circuit court was reversed on a question of fact as to whether an agreement of a certain character was made between copartners in a firm, on its dissolution, as to the interest which such copartners should have in a portion of its assets. *Chouteau v. Barlow*, 110 U. S. 238, 3 Sup. Ct. Rep. 620, 28: 132
Cited in Riddle v. Whitehill, 135 U. S. 639, 34 L. ed. 289, 10 Sup. Ct. Rep. 924—*Currier v. Studley*, 159 Mass. 28, 33 N. E. 709.

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When partner liable on contracts in firm name after dissolution. 23: 851

- Effect of dissolution as between partners. 33: 524
 Effect of dissolution generally. 42: 484

g. Notice of Dissolution.

Evidence of Knowledge of, see Evidence, 2073.

Effect of Failure to Notify Insurance Company, see Insurance, 206.

Power to Bind Former Partners in Absence of Notice, see *infra*, 177.

See also *supra*, 101.

170. As to persons who have had no previous dealings with the firm, the question of notice is one of duty and diligence on the part of the withdrawing partner. If he do all that the law requires, he is exempt, although the notice did not reach them. *Lovejoy v. Spafford*, 93 U. S. 430, 23: 851

171. The rule that the retiring partner should make publication of the dissolution of the partnership in a newspaper, in order to protect himself against future liabilities of the partnership, is not inflexible. Notice of the dissolution in any other public or notorious manner is proper to be considered on the question of notice, which is one of duty and diligence on the part of the withdrawing partner. He is exempt as to a stranger if he did all that the law requires, although the notice did not reach him. *Lovejoy v. Spafford*, 93 U. S. 430, 23: 851.

Distinguished in Central Nat. Bank v. Frye, 148 Mass. 500, 20 N. E. 325.

Cited in Preston v. Foellinger, 24 Fed. 682—*Rocky Mountain Nat. Bank v. McCaskill*, 16 Colo. 418, 26 Pac. 821—*Askew v. Silman*, 95 Ga. 682, 22 S. E. 573—*Strecker v. Conn.* 90 Ind. 471—*Solomon v. Kirkwood*, 55 Mich. 261, 21 N. W. 336—*Swigert v. Aspdon*, 52 Minn. 569, 54 N. W. 738—*Polk v. Oliver*, 56 Miss. 570—*Holt v. Allenbrand*, 52 Hun. 220, 4 N. Y. Supp. 922—*Ellison v. Sexton*, 105 N. C. 361, 18 Am. St. Rep. 907, 11 S. E. 180—*Homburger v. Alexander*, 11 Utah. 377, 40 Pac. 260—*Clement v. Clement*, 69 Wis. 604, 2 Am. St. Rep. 760, 35 N. W. 17—*Continental Nat. Bank v. McGeoch*, 92 Wis. 305, 66 N. W. 606.

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What notice of dissolution is necessary to avoid liability. 23: 851

h. Power to Bind Former Partners.

Declarations of Partner as Evidence Against Former Partners, see Evidence, 1993.

172. After a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. *Bell v. Morrison*, 1 Pet. 351, 7: 174

Cited in Hall v. Lanning, 91 U. S. 169, 23 L. ed. 274—*Bispham v. Patterson*, 2 McLean, 90, Fed. Cas. No. 1,441—*Lockwood v. Comstock*, 4 McLean, 384, Fed. Cas. No. 8,449—*Wilson v. Torbert*, 3 Stew. (Ala.) 304, 21 Am. Dec. 632—*Burr v. Williams*, 20 Ark. 188—*Cooper v. Wood*, 1 Colo. App. 106, 27 Pac. 884—*Flannery v. Maine Red. Granite Co.* 3 App. D. C. 400—*Harper v. Cunn-*

ham, 8 App. D. C. 438—*Tate v. Clements*, 16 Fla. 355, 26 Am. Rep. 709—*Humphries v. Chastain*, 5 Ga. 167, 48 Am. Dec. 247—*Green v. Baird*, 53 Ill. App. 213—*State v. Peden*, 2 Blackf. 373—*Doughton v. Tillay*, 4 Blackf. 435—*Dickerson v. Turner*, 12 Ind. 230—*Bentley v. White*, 3 B. Mon. 266, 38 Am. Dec. 186—*Merritt v. Pollys*, 16 B. Mon. 356—*Lachomette v. Thomas*, 5 Rob. (La.) 175—*Parker v. Merrill*, 6 Me. 47—*Greenleaf v. Quincy*, 12 Me. 14, 28 Am. Dec. 145—*Ellicott v. Nichols*, 7 Gill, 100, 48 Am. Dec. 546—*Hurst v. Hill*, 8 Md. 404, 63 Am. Dec. 705—*Rose v. Coffield*, 53 Md. 23, 36 Am. Rep. 389—*Atwood v. Gillett*, 2 Dougl. (Mich.) 216—*Whitney v. Reese*, 11 Minn. 147, Gill. 87—*National Bank v. Norton*, 1 Hill, 575—*Van Keuren v. Parmelee*, 2 N. Y. 531, 51 Am. Dec. 322—*Willis v. Hill*, 19 N. C. (2 Dev. & B. Law.) 234—*Palmer v. Dodge*, 4 Ohio St. 35, 62 Am. Dec. 271—*Felgley v. Whitaker*, 22 Ohio St. 612, 10 Am. Rep. 778—*Kerper v. Wood*, 48 Ohio St. 621, 15 L.R.A. 659, 29 N. E. 501—*Hogg v. Orgill*, 34 Pa. 348—*Meggett v. Finney*, 4 Strobb. L. 221—*Belote v. Wynne*, 7 Yerg. 544—*Muse v. Donelson*, 2 Humph. 168, 36 Am. Dec. 309—*Speake v. White*, 14 Tex. 369—*Willis v. Morrison*, 44 Tex. 31—*Woodson v. Wood*, 84 Va. 485, 5 S. E. 277—*First Nat. Bank v. Payne*, 85 Va. 895, 3 L.R.A. 286, 9 S. E. 153—*Conrad v. Buck*, 21 W. Va. 407.

173. If a partner, after dissolution, draws notes in the name of the firm, payable to himself, and then indorses them to a third party for a personal, and not a partnership, consideration, the first indorsee cannot maintain an action upon them against the firm, if he knew the notes were antedated. *Smyth v. Strader*, 4 How. 404, 11: 1031
Cited in Re McIntire, 132 Fed. 298—*Lang v. Waring*, 17 Ala. 157.

174-5. If a bill is drawn, after a dissolution of partnership, in the name of one partner whose name was sometimes used in relation to the business concerns, and the proceeds were used to pay the firm's notes, which he had agreed to pay, the other partner is not bound by the bill. *Le Roy v. Johnson*, 2 Pet. 186, 7: 391

176. An agreement executed by one partner, in the partnership name, after the dissolution of the partnership, is good, where it was ratified by the other partner. *Kelly v. Crawford*, 5 Wall. 785, 18: 562
Cited in Williston v. Camp, 9 Mont. 97, 22 Pac. 501.

In absence of notice of dissolution.

177. If one of the partners contracted with a third person in the name of the firm after the dissolution, but that fact was not made public, or known by such third person, the law considers the contract as being made with the firm. *Le Roy v. Johnson*, 2 Pet. 186, 7: 391

Cited in National Bank v. Thomas, 47 N. Y. 20—*Kelley v. Bourne*, 15 Or. 482, 16 Pac. 40—*Dawson v. Pogue*, 18 Or. 125, 6 L.R.A. 181, 22 Pac. 637.

— Editorial note.

[Necessity of actual notice of retirement of member of firm to relieve retiring member from liability on obligation renewed after his retirement. 4 L.R.A.(N.S.) 800.]

1. Surviving Partner's Rights, Powers, and Duties.

- Suit against Surviving Partner for Debt of Deceased Partner, see *supra*, 104.
 Right to Purchase Deceased Partner's Interest, see *supra*, 156.
 Power to Make Assignment for Creditors, see Assignment for Creditors, 43.
 Surviving Partner as Counsel for Party Employing Deceased Partner, see Attorneys, 34.
 Question of Law or Fact as to, see Trial, 311.

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Rights and powers of surviving partners.
 21: 642

Possession and control of property.

Effect of Cession under Insolvent Law by Surviving Partners, see Judgment, 392.

See also Limitation of Actions, 328.

178. Where dissolution comes by death or assignment of one partner, the surviving or solvent partners hold the partnership property for the purpose of closing up its affairs. *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 924, 34: 282
Distinguished in *Ricketts v. Murray*, 19 C. C. A. 649, 34 U. S. App. 666, 78 Fed. 691.
Cited in *Cole v. Fowler*, 68 Conn. 457, 36 Atl. 807—*Wilson v. Meyer*, 23 Utah, 536, 65 Pac. 488.

179. The surviving partner is entitled to the possession and control of the joint property for the purpose of closing up the partnership business, and may dispose of the same for that purpose. *Emerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. Rep. 981, 30: 49
Cited in *Danzig v. Saks*, 9 Mackey, 190—*Durant v. Pierson*, 124 N. Y. 452, 12 L.R.A. 149, 21 Am. St. Rep. 686, 26 N. E. 1095—*Wilson v. Meyer*, 23 Utah, 536, 65 Pac. 488—*Millhiser v. McKinley*, 98 Va. 209, 35 S. E. 446.

180. Upon the death of a partner, unless a partnership creditor or the personal representatives of the deceased commence proceedings to liquidate the affairs of the partnership, there is nothing to prevent a surviving partner from dealing with partnership property as his own, and, acting in good faith, to make a valid disposition of it. *Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 Sup. Ct. Rep. 369, 27: 211
Cited in *Re Keller*, 3 N. B. N. Rep. 847, 109 Fed. 120—*Burchinell v. Koon*, 8 Colo. App. 465, 46 Pac. 932—*Hoffman v. Schoyer*, 87 Ill. App. 461—*Broadway Nat. Bank v. Wood*, 165 Mass. 316, 43 N. E. 100—*Hanover Nat. Bank v. Klein*, 64 Miss. 150, 60 Am. Rep. 47, 8 So. 208—*Tennant v. McKean*, 46 Mo. App. 492—*Lindner v. Adams County Bank*, 49 Neb. 738, 68 N. W. 1028—*Durant v. Pierson*, 58 Hun, 195, 11 N. Y. Supp. 842—*Hodgskin v. Helm*, 33 Misc. 551, 67 N. Y. Supp. 876—*Stahl v. Osmer*, 31 Or. 202, 49 Pac. 958—*Douglas v. Alder*, 13 Utah, 311, 44 Pac. 706—*Vietor v. Glover*, 17 Wash. 40, 40 L.R.A. 300, 48 Pac. 788—*Thayer v. Humphrey*, 91 Wis. 303, 30 L.R.A. 558, 51 Am. St. Rep. 887, 64 N. W. 1007.

— Editorial note.

[Surviving partner's position as to firm real estate. 28 L.R.A. 129.]

Collection and disposition of firm assets.

181. It is a legal right of surviving partners to close out the concern, collect and dispose of its property, pay what it owes, and then pay the heirs of a deceased partner her just share of the remainder, and they are bound to use reasonable care and diligence in closing out the business and taking care of the decedent's interest. *Moore v. Huntington*, 17 Wall. 417.

21: 642
Distinguished in *Forrester v. Oliver*, 1 Ill. App. 266.

Cited in *Hoyt v. Sprague*, 8 Rep. 617, Fed. Cas. No. 6,810—*Oliver v. Forrester*, 96 Ill. 829—*Freeman v. Freeman*, 186 Mass. 264—*Inglis v. Floyd*, 83 Mo. App. 582.

182. For the purpose of paying the debts of the partnership, in case of the death of one partner, the survivor can sell the real estate, and, although he cannot transfer the legal title, which passes to the heirs or the devisees of the deceased, the sale vests the equitable ownership; and the purchaser can, in a court of equity, compel them to convey that title. *Shanks v. Klein*, 104 U. S. 18, 26: 635
Cited in *Riddle v. Whitehill*, 135 U. S. 635, 34 L. ed. 288, 10 Sup. Ct. Rep. 924—*Goodbar v. Cary*, 4 Woods, 667, 16 Fed. 320—*A. & W. Sprague Mfg. Co. v. Hoyt*, 29 Fed. 426—*August v. Calloway*, 35 Fed. 383—*Megibben v. Perin*, 49 Fed. 185—*Holladay v. Land & River Improv. Co.* 6 C. C. A. 571, 18 U. S. App. 308, 57 Fed. 785—*Hill v. Draper*, 54 Ark. 398, 15 S. W. 1025—*First Nat. Bank v. Cody*, 93 Ga. 155, 19 S. E. 831—*Walling v. Burgess*, 122 Ind. 307, 7 L.R.A. 484, 22 N. E. 419—*Gable v. Williams*, 59 Md. 53—*Riley v. Carter*, 76 Md. 593, 19 L.R.A. 494, 35 Am. St. Rep. 443, 25 Atl. 667—*Kennedy v. Dickey*, 99 Md. 305, 57 Atl. 621—*Emerson v. Atkinson*, 159 Mass. 361, 34 N. E. 516—*Hanson v. Metcalf*, 46 Minn. 28, 48 N. W. 441—*State ex rel. Richardson v. Withrow*, 141 Mo. 77, 41 S. W. 980—*Moody v. Downs*, 63 N. H. 51—*Darrow v. Calkins*, 6 App. Div. 30, 89 N. Y. Supp. 527—*Haynes v. Brooks*, 42 Hun, 529—*Re Groetzinger*, 31 Pittsb. L. J. N. S. 320—*Patton v. Leftwich*, 86 Va. 426, 6 L.R.A. 572, 19 Am. St. Rep. 902, 10 S. E. 686—*State ex rel. Bogey v. Neal*, 29 Wash. 393, 69 Pac. 1103—*Kruschke v. Stefan*, 83 Wis. 385, 53 N. W. 679.

183. The surviving partner is the legal owner of the partnership choses in action. *Wickliffe v. Eve*, 17 How. 468, 15: 163
Cited in *Emerson v. Senter*, 118 U. S. 8, 30 L. ed. 51, 6 Sup. Ct. Rep. 981—*Hargadine v. Gibbons*, 45 Mo. App. 467.

184. [A surviving partner has the sole right of receiving moneys due to the company, and payment of part to the executor or administrator of a deceased partner is no defense. *Wallace v. Fitzsimmons* (Ct. Com. Pl. Phila.) 1 Dall. 248, 1: 122]

185. Action by the executors of the sur-

viving partner on a note due the firm sustained. *Childress v. Emory*, 8 Wheat. 642, 5: 705

Cited in Christmas v. Griswold, 8 Ohio St. 582.

Compensation of surviving partner.

186. Where there is no stipulation in the partnership agreement for compensation to a surviving partner for settling up the partnership business, he is entitled to none. *Denver v. Roane*, 99 U. S. 355, 25: 476
Cited in Osment v. McElrath, 68 Cal. 471, 58 Am. Rep. 17, 9 Pac. 731—*Little v. Caldwell*, 101 Cal. 560, 40 Am. St. Rep. 89, 36 Pac. 107—*Porter v. Long*, 124 Mich. 592, 83 N. W. 601—*Dye v. Bowling*, 82 Mo. App. 592—*Burgess v. Badger*, 82 Hun, 493, 31 N. Y. Supp. 614.

Rights of personal representative of deceased partner.

187. The administrator of a deceased partner may, in equity, compel the surviving partner to pay the firm debts with the firm property. After the creditors of the partnership are paid, such administrator may, by bill, reach his intestate's share of the surplus. *Wickliffe v. Eve*, 17 How. 468, 15: 163

188-9. The personal representative of a deceased partner may invoke the interference of a court of equity where the surviving partner is not exercising due diligence in settling the partnership business, or where he is acting in bad faith. *Emerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. Rep. 981, 30: 49

190. On a bill by the administrator of a partner against the remaining partners for an account, they should be charged only with what, by reasonable care and diligence, they should have realized from the partnership property. Charging them with everything at the date of the decedent's death, at its value at that time, is not the true rule. *Moore v. Huntington*, 17 Wall. 417, 21: 642

— Editorial note.

[Rights of estate of law partner in compensation for work unfinished at time of his death. 66 L.R.A. 821.]

j. Continuing Business after Partner's Death.

See also *supra*, 155.

191. If, on the dissolution of a firm by the death of one of the two partners, the survivor continues the business of the firm on the partnership property, he is liable for losses and for half the profits, or for deceased's share in the capital and interest after deducting his indebtedness to the firm, at the option of deceased's representatives. *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. Rep. 419, 34: 1044

Editorial note.

Continuation of business after dissolution by some of the partners. 33: 524

Continuance by agreement of legal representative.

192. The liability of a deceased copartner, as well as his interest in the profits of a concern, may, by contract, be extended beyond his death. *Scholefield v. Eichelberger*, 7 Pet. 586, 8: 793
Cited in Burwell v. Cawood, 2 How. 576, 11 L. ed. 385—*Lucht v. Behrens*, 28 Ohio St. 239, 22 Am. Rep. 378—*Goodburn v. Stevens*, 5 Gill, 22—*Goodburn v. Stevens*, 1 Md. Ch. 428—*Stanwood v. Owen*, 14 Gray, 199—*Exchange Bank v. Tracy*, 77 Mo. 600—*First Nat. Bank v. Farmers' Deposit Nat. Bank*, 4 Sadler (Pa.) 332—*Wild v. Davenport*, 48 N. J. L. 137, 57 Am. Rep. 552, 7 Atl. 295—*Buckley v. Buckley*, 11 Barb. 76—*Laughlin v. Lorenz*, 48 Pa. 283, 86 Am. Dec. 592.

193. Where the legal representatives of a deceased partner, and all the beneficiaries of the estate, consent to the continued employment of the partnership property in the business of the partnership, subsequently carried on by the surviving partners, they cease to have a lien upon the property as against the subsequent creditors of the concern. *Hoyt v. Sprague*, 103 U. S. 613, 26: 585

Cited in Re Vetterlein, 26 Fed. 146—*Standish v. Babcock*, 52 N. J. Eq. 632, 29 Atl. 327—*Stanford v. Lockwood*, 95 N. Y. 588—*Bell v. Hepworth*, 134 N. Y. 447, 31 N. E. 918—*Thomas Adams & Co. v. Albert*, 155 N. Y. 365, 63 Am. St. Rep. 675, 49 N. E. 929.

Continuance by direction of testator.

Pledging or Applying to Firm Purpose, Property of Estate Invested with Firm as Misappropriation, see Executors and Administrators, 68, 79.

194. A partner may, by his will, provide that the partnership shall continue, notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory. *Burwell v. Cawood*, 2 How. 560, 11: 378
Cited in Lincoln v. Orthwein, 57 C. C. A. 544, 120 Fed. 884—*Stanwood v. Owen*, 14 Gray, 199—*Shaw's Appeal*, 81 Me. 228, 16 Atl. 662—*Alexander v. Lewis*, 47 Tex. 485.

195. A testator directing the continuance of a partnership may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose, and then the creditors can resort to that fund or amount only, and not to the general assets of the testator's estate; although the partner, or executor, or other person carrying on the trade, may be personally responsible for all the debts contracted. *Burwell v. Cawood*, 2 How. 560, 11: 378

Cited in Smith v. Ayer, 101 U. S. 329, 25 L. ed. 959—*Jones v. Walker*, 103 U. S. 446, 20 L. ed. 404—*Cook v. Rogers*, 3 Fed. 75—*Vose v. Philbrook*, 3 Story, 346, Fed. Cas. No. 17,010—*Wells-Stone Mercantile Co. v. Aultman, M. & Co.* 9 N. D. 525, 84 N. W. 375—*Fillyau v. Laverty*, 3 Fla. 100—*Ferris v. Van Ingen*, 110 Ga. 108, 35 S. E. 347—*Mason v. Pomeroy*, 151 Mass. 167, 7 L.R.A.

774, 24 N. E. 202—Packard v. Kingman, 109 Mich. 506, 67 N. W. 551—Exchange Bank v. Tracy, 77 Mo. 600—Lalbie v. Ferry, 32 N. J. Eq. 796—Wild v. Davenport, 48 N. J. L. 137, 57 Am. Rep. 552, 7 Atl. 295—Wilks v. Sharp, 113 N. Y. 590, 4 L.R.A. 494, 21 N. E. 705—Laughlin v. Lorenz, 48 Pa. 283, 86 Am. Dec. 592—Whitman's Estate, 196 Pa. 148, 45 Atl. 673—First Nat. Bank v. Farmers' Deposit Nat. Bank, 4 Sadler (Pa.) 332—Morrow v. Morrow, 2 Tenn. Ch. 560—Davis v. Christian, 15 Gratt. 33.

196. Nothing but the most clear and unambiguous language, that the testator intended that his general assets should be liable for all debts contracted in the continued trade after his death, will justify the court in arriving at such conclusion. *Burwell v. Cawood*, 2 How. 560, 11: 378
Oked in Fridenburg v. Wilson, 20 Fla. 369—*Marvel v. Phillips*, 162 Mass. 402, 26 L.R.A. 418, 44 Am. St. Rep. 370, 38 N. E. 1117—*Hardee v. Cheatham*, 52 Miss. 48—*Buckley v. Buckley*, 11 Barb. 76—*Jacquin v. Buisson*, 11 How. Pr. 388—*Delaware, L. & W. R. Co. v. Gilbert*, 44 Hun, 204—*Stewart v. Robinson*, 48 Hun, 329, 2 N. Y. Supp. 309—*Stewart v. Robinson*, 115 N. Y. 335, 5 L.R.A. 418, 22 N. E. 160—*Lucht v. Behrens*, 28 Ohio St. 239, 22 Am. Rep. 378—*Wilcox v. Derickson*, 168 Pa. 336, 81 Atl. 1080—*Huber v. Wood*, 14 Pa. Co. Ct. 19—*Roesler's Estate*, 19 Pa. Co. Ct. 163—*Roesler's Estate*, 5 Pa. Dist. R. 778.

197. The following codicil, "It is my will that my interest in the copartnership subsisting between Daniel Cawood and myself, under the firm of Daniel Cawood & Co., shall be continued therein until the term limited," etc., and the profit or loss to be distributed in the manner the said articles provide, will not hold the estate of the testator for partnership debts contracted after the death of the testator, beyond the funds already embarked in the partnership. *Burwell v. Cawood*, 2 How. 560, 11: 378
Oked in Steiner v. Steiner Land & Lumber Co. 120 Ala. 144, 26 So. 494—*Filley v. Phelps*, 18 Conn. 304—*Brasfield v. French*, 59 Miss. 638—*M. Eisenstadt Jewelry Co. v. Mississippi Valley Trust Co.* 72 Mo. App. 521—*Thomas Adams & Co. v. Albert*, 155 N. Y. 365, 63 Am. St. Rep. 675, 49 N. E. 929—*Waddell's Estate*, 196 Pa. 300, 46 Atl. 304—*McArdle v. West Philadelphia Title & T. Co.* 7 Pa. Super. Ct. 336—*McArdle v. West Philadelphia Title & T. Co.* 42 W. N. C. 241.

198. Where a testator in his will declares that his capital and interest in a partnership concern shall be continued therein after his death, and shall be chargeable for its debts and liabilities, but his other property shall not be so chargeable, such other property is not chargeable with the partnership debts subsequently incurred. *Jones v. Walker*, 103 U. S. 444, 26: 404

199. If dividends of profits are honestly and fairly made after the testator's death, the persons receiving them under the will cannot be called on to refund them, to pay debts owing by the firm, contracted subsequently to the payment of the dividends. *Jones v. Walker*, 103 U. S. 444, 26: 404
Oked in Altheimer v. Hunter, 56 Ark. 162, 19 S. W. 496—*Wells-Stone Mercantile Co. v. U. S. Dig.*—268

Aultman, 9 N. D. 525, 84 N. W. 375—*Mason v. Pomeroy*, 151 Mass. 167, 7 L.R.A. 774, 24 N. E. 202—*Whitman's Estate*, 196 Pa. 148, 45 Atl. 673—*McArdle v. West Philadelphia Title & T. Co.* 42 W. N. C. 242, 2 Pa. Super. Ct. 337.

VII. Actions.

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 Right of Assignee to Maintain Bill for Discovery, see *Discovery and Inspection*, 8.
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 Burden of Proving Partnership or Joint Liability in First Instance, see *Evidence*, 353a.
 Sufficiency of Pleading, see *Pleading*, 482.
 Service of Process on, see *Writ and Process*, 46.

200. The principle that a partner cannot sue a partner on a partnership transaction does not apply to any case where a note in writing is given for money, not to the firm, but to an individual member. *Van Ness v. Forrest*, 8 Cranch, 30, 3: 478
Oked in Grigsby v. Nance, 3 Ala. 351—*Lyon v. Malone*, 4 Port. (Ala.) 500—*Huyck v. Meador*, 24 Ark. 194—*Caswell v. Cooper*, 18 Ill. 535—*Martin v. Stubbings*, 27 Ill. App. 129—*Berry v. De Bruyn*, 77 Ill. App. 361—*Causen v. Burke*, 2 Harr. & G. 302, 18 Am. Dec. 297—*Coursey v. Baker*, 7 Harr. & J. 32—*Cook v. Canny*, 96 Mich. 401, 55 N. W. 987—*Gibson v. Moore*, 6 N. H. 554—*Gridley v. Dole*, 4 N. Y. 492—*Crater v. Blininger*, 45 N. Y. 548—*Wilson v. Wilson*, 26 Or. 258, 38 Pac. 185.

201. [In an action of account render, brought by one partner against another, it is sufficient to charge the defendant generally with the receipt of money to their joint benefit. *James v. Browne* (Pa. Sup. Ct.) 1 Dall. 339, 1: 165]

When right of action accrues.

202. [One partner cannot recover of the other in assumpsit his share of the proceeds of a partnership adventure, until they have settled their accounts and struck the balance. *Ozeas v. Johnson* (Pa. Sup. Ct.) 4 Dall. 434, 1: 897]

203. The right of action for the recovery, by two of three partners, as assets of the firm, of moneys collected on a contract (the subject of the partnership) between the third partner and the government, does not accrue until the moneys have actually been paid over by the government to the defendant. The bankruptcy and death of the third partner, and the substitution of his assignee in bankruptcy as defendant, in no respect affects this question. *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. Rep. 870, 29: 940

204. After the creditors of the partnership

are paid, the administrator of a deceased partner may, by bill, reach his intestate's share of the surplus. *Wickliffe v. Eve*. 17 How. 468, 15: 163

Right to maintain action.

205-7. An action for partnership liability against one in no sense a partner, and who has not held himself out as such, cannot be maintained. *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. Rep. 972, 36: 835
Cited in Sparf v. United States, 156 U. S. 100, 39 L. ed. 360, 15 Sup. Ct. Rep. 273—*Southern P. Co. v. Johnson*, 16 C. C. A. 828, 44 U. S. App. 1, 69 Fed. 586—*Travelers' Ins. Co. v. Randolph*, 24 C. C. A. 311, 47 U. S. App. 260, 78 Fed. 760—*McPeck v. Central Vermont R. Co.* 25 C. C. A. 111, 50 U. S. App. 27, 79 Fed. 591—*Monroe v. British & Foreign Marine Ins. Co.* 8 C. C. A. 290, 5 U. S. App. 179, 52 Fed. 787—*Gowen v. Harley*, 6 C. C. A. 197, 12 U. S. App. 574, 56 Fed. 980—*Minneapolis v. Lundin*, 7 C. C. A. 348, 19 U. S. App. 245, 58 Fed. 529.

Equitable jurisdiction.

Injunction to Protect Contract Rights where no Dissolution is Contemplated, see Injunction, 18.

208. Equity may entertain jurisdiction of a suit to settle the partnership affairs of a firm of attorneys, where a discovery is necessary. *Denver v. Roane*, 99 U. S. 355, 25: 476

209. Where an agreement is made, upon dissolution of a partnership, that the partners continuing the business should collect the debts, and pay to the retiring partners a certain sum, after a sufficient amount had been received to pay it in addition to the debts, equity has jurisdiction, not only to compel a discovery of the amount collected, but also to give relief. *Kelsey v. Hobby*, 16 Pet. 269, 10: 961

VIII. Limited or Special Partnership.

Admiralty Jurisdiction for Breach of Contract, see Admiralty, 247.

Power to Make Assignment for Creditors, see Assignment for Creditors, 44.

Property Passing under Assignment for Creditors, see Assignment for Creditors, 64.

Stock Owned by Special Partners Carrying on Insurance Business, as Capital, see Corporations, 445.

Existence and Citizenship for Purpose of Jurisdiction, see Courts, 665, 666.

Estoppel to Deny Nature of Partnership, see Estoppel, 160.

Allegations as to Citizenship of Members, see Pleading, 371.

Removability of Suit to Reach Property of, see Removal of Causes, 122.

210. A secret partnership is one where the existence of certain persons as partners is not avowed or made known to the public by any of the partners. *Winship v. Bank of United States*, 5 Pet. 529, 8: 216

211. An agreement between owners of vessels to form a line for carrying passengers and freight between New York and San Francisco is but a contract for a limited partnership, and the remedy for a breach is in the common-law courts. *Verderwater v. Mills (Vandewater v. Mills)* 19 How. 82, 15: 554

Cited in Fleming v. Lay, 48 C. C. A. 752, 169 Fed. 955—*Graham v. Oregon R. & Nav. Co.* 184 Fed. 463.

Authority of partners.

Right of Special Partner to Set up in Abatement Pending Proceedings in Bankruptcy against Firm, see Abatement and Revival, 44.

Authority to Make Assignment for Creditors, see Assignment for Creditors, 44.

212. In limited partnerships it is within the general authority of the partners to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm. *Winship v. Bank of United States*, 5 Pet. 529, 8: 216

Liability of secret partner.

Effect of Discharge of Firm in Bankruptcy, see Bankruptcy, 403.

213. The responsibility of unavowed partners depends on the general principle of commercial law, not on the particular stipulations of the articles. *Winship v. Bank of United States*, 5 Pet. 529, 8: 216
Cited in Bigelow v. Elliot, 1 Chf. 85, Fed. Cas. No. 1,392—*Re Munn*, 8 Biss. 447, 7 Nat. Bankr. Reg. 472, Fed. Cas. No. 9,925—*First Nat. Bank v. Newton*, 10 Colo. 168, 14 Pac. 428—*Wiley v. Deering*, 34 Ill. App. 172—*Holt v. Simmons*, 16 Mo. App. 109—*Sorg v. Thornton*, 1 Cin. Sup. Ct. Rep. 386—*Lou-don Sav. Fund. Soc. v. Hagerstown Sav. Bank*, 36 Pa. 504, 78 Am. Dec. 390—*Commercial Bank v. Miller*, 96 Va. 364, 31 S. E. 812—*Moore v. May*, 117 Wis. 204, 94 N. W. 46.

214. The legal existence of a special partnership does not depend upon the notice of its formation; the only effect of failure to publish the required notice is that the partnership is to be deemed general. *Tracy v. Tuffy*, 134 U. S. 206, 10 Sup. Ct. Rep. 527, 33: 879

215. The New York statute, in fixing the liability of a special partner on account of noncompliance with its provisions, does not change his special partnership into a general one, but simply makes him liable as a general partner to creditors. *Abendroth v. Van Dolsen*, 131 U. S. 66, 9 Sup. Ct. Rep. 619, 33: 57
Cited in Hotopp v. Huber, 18 Misc. 553, 41 N. Y. Supp. 991.

216. In an action under the New York statute, to render a special partner liable for the firm debts by reason of his failure to comply with the statute in reference to limited partnerships, the action being against all the members of the firm, it is sufficient to charge him, in the complaint, as a general partner, and it is not necessary

to allege the special omissions which rendered him liable as such. *Abendroth v. Van Dolsen*, 131 U. S. 66, 9 Sup. Ct. Rep. 619, 33: 57

IX. Mining Partnership.

Restrictions on Foreign Mining Corporation, see Corporations, 774.

217. An agreement between a mining company and a creditor, whereby a manager was appointed to operate and control a mine and to pay over profits thereof to the creditor, who was given power to remove the manager and appoint a new one in his stead, being merely for the security of the creditor, did not make him a partner with the company, nor the principal of the manager. *Davis v. Patrick*, 122 U. S. 138, 7 Sup. Ct. Rep. 1102, 30: 1090

Distinguished in American Bonding T. Co. v. Takahashi, 49 C. C. A. 274, 111 Fed. 132.
Cited in *Mechan v. Valentine*, 145 U. S. 623, 36 L. ed. 841, 12 Sup. Ct. Rep. 972.

218. Where several owners unite and co-operate in working a mine, they form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself; one of which is that the death or bankruptcy of one of the members, or the conveyance of his interest in the mine and business, does not dissolve the partnership. The *delectus personae*, which is essential to constitute an ordinary partnership, has no place in these mining associations. *Kahn v. Central Smelting Co.* 102 U. S. 641. 26: 266

Cited in *Bissell v. Foss*, 114 U. S. 260, 29 L. ed. 129, 5 Sup. Ct. Rep. 851—*Kimberly v. Arms*, 129 U. S. 530, 32 L. ed. 771, 9 Sup. Ct. Rep. 355—*Mills v. Hurd*, 29 Fed. 411—*Thomas v. Hurst*, 73 Fed. 874—*G. V. B. Min. Co. v. First Nat. Bank*, 35 C. C. A. 513, 95 Fed. 38—*Meagher v. Reed*, 14 Colo. 354, 9 L.R.A. 462, 24 Pac. 681—*People ex rel. Platt v. Wemple*, 52 Hun, 438, 5 N. Y. Supp. 581—*Harris v. Lloyd*, 11 Mont. 404, 28 Am. St. Rep. 475, 28 Pac. 736—*Congdon v. Olds*, 18 Mont. 491, 46 Pac. 261—*Childers v. Neely*, 47 W. Va. 73, 49 L.R.A. 469, 81 Am. St. Rep. 777, 84 S. E. 828.

219. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner of his share in the property and business to a stranger, or to one of the associates without consulting the other. *Bissell v. Foss*, 114 U. S. 252, 5 Sup. Ct. Rep. 851. 29: 126

Distinguished in Kimberly v. Arms, 129 U. S. 529, 32 L. ed. 770, 9 Sup. Ct. Rep. 355.

Cited in *Turner v. Sawyer*, 150 U. S. 566, 37 L. ed. 1191, 14 Sup. Ct. Rep. 192—*Davis v. Chapman*, 24 Fed. 678—*Mills v. Hurd*, 29 Fed. 411—*Thomas v. Hurst*, 73 Fed. 374—*G. V. B. Min. Co. v. First Nat. Bank*, 35 C. C. A. 514, 95 Fed. 39—*Meagher v. Reed*, 14 Colo. 354, 9 L.R.A. 462, 24 Pac. 681—*Harris v. Lloyd*, 11 Mont. 402, 28 Am. St. Rep. 475,

28 Pac. 736—*Brundy v. Mayfield*, 15 Mont. 211, 38 Pac. 1067—*Congdon v. Olds*, 18 Mont. 491, 46 Pac. 261.

220. In a mining partnership a member may convey his interest to another person without dissolving the partnership, or may purchase interests in other mines for his own benefit without being required to account therefor to the partnership. *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. Rep. 355, 32: 764
Cited in *Kimberly v. Arms*, 40 Fed. 550.

221. A mining partner or cotenant is not entitled to share in the purchase by his co-partner or cotenants of the share of another, in the absence of an express contract that the purchase should be for the benefit of all. *Bissell v. Foss*, 114 U. S. 252, 5 Sup. Ct. Rep. 851, 29: 126

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[Enforcement of obligation to contribute to cost of, by or against grantees of successors in title. 66 L.R.A. 673.]

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I. Power of Congress.

1. The power of Congress to legislate on the subject of patents is plenary by the terms of the Constitution; and, as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents. *McClurg v. Kingland*, 1 How. 202, 11: 102.

Cited in Hardeman v. Downer, 39 Ga. 427—*Hollida v. Hunt*, 70 Ill. 111, 22 Am. Rep. 63—*Com v. Petty*, 96 Ky. 454, 29 L.R.A. 789, 29 S. W. 291.

2. The power of Congress to give an exclusive right to an inventor is domestic in its character, and necessarily confined within the limits of the United States. *Brown v. Duchesne*, 19 How. 183, 15: 595.

3. Assuming that Congress may decide the fact that an individual is an author or inventor, the court can never presume Congress to have decided that question where the words of the act do not render such a construction unavoidable. *Evans v. Eaton*, 3 Wheat. 454, 4: 433.

Cited in Blanchard v. Sprague, 3 Sumn. 541, Fed. Cas. No. 1,518—*Fire Extinguisher Mfg. Co. v. Graham*, 16 Fed. 552—*Fire Extinguisher Case*, 21 Fed. 42—*United States ex rel. Stapleton v. Duell*, 17 App. D. C. 578.

4. Congress cannot lawfully deprive a citizen of the right to use patented machines after he has lawfully purchased them from the patentee; it cannot reinvest in the latter rights which he had before conveyed for a valuable and fair consideration. *Bloomer v. McQuewan*, 14 How. 539, 14: 532.

II. The Patent Office.

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5. The Commissioner of Patents has quasi-judicial functions. *United States v. American Bell Teleph. Co.* 167 U. S. 224, 17 Sup. Ct. Rep. 809. 42: 144
Cited in Beach v. Hobbs, 82 Fed. 925—*Beach v. Hobbs*, 34 C. C. A. 252, 63 U. S. App. 626, 92 Fed. 140.

6. The Commissioner of Patents, in issuing or withholding patents, in reissues, interferences, and extensions, exercises quasi-judicial functions. *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25. 28: 656
Cited in United States v. American Bell Teleph. Co. 167 U. S. 267, 42 L. ed. 163, 17 Sup. Ct. Rep. 809—*Crown Cork & Seal Co. v. Aluminum Stopper Co.* 48 C. C. A. 82, 108 Fed. 856—*Bruhl Bros. v. Wilson*, 123 Fed. 961—*United States ex rel. Wedderburn v. Bliss*, 12 App. D. C. 496.

7. Patents are public records; and it is the duty of the Commissioner to give authenticated copies of them upon proper demand, on tender of the fee. A demand accompanied with rudeness and insult is not a legal demand. *Boyden v. Burke*, 14 How. 575. 14: 548
Cited in Blackinton v. Douglass, 1 McArthur Pat. Cas. 625, Fed. Cas. No. 1,470—*Bierbower v. Miller*, 80 Neb. 181, 47 N. W. 1.

III. Nature and Extent of Right.**a. In General.**

See also *infra*, 414.

Statutory foundation of patent rights.

8. Patent rights are founded exclusively on statutory provisions; although in England the right emanates from the royal prerogative. *Shaw v. Cooper*, 7 Pet. 292, 8: 689

Cited in Ex parte O'Hara, Fed. Cas. No. 10,484—*Crown Cork & Seal Co. v. Aluminum Stopper Co.* 48 C. C. A. 96, 108 Fed. 869—*Keene v. Wheatley*, 5 Clark (Pa.) 540.

9. A patentee has no exclusive right of property in his invention, except under and by virtue of the statutes securing it to him, and according to the regulations and restrictions of those statutes. *Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 11 Sup. Ct. Rep. 8, 34: 618

10. An inventor has no right of property in his invention, upon which he can maintain a suit, unless he obtains a patent for it, according to the acts of Congress. *Brown v. Duchesne*, 19 How. 183, 15: 595
Cited in Dable Grain Shovel Co. v. Flint, 137 U. S. 43, 34 L. ed. 620, 11 Sup. Ct. Rep. 8—*Durham v. Seymour*, 161 U. S. 238, 40 L. ed. 684, 16 Sup. Ct. Rep. 452—*Kirk v. United States*, 163 U. S. 55, 41 L. ed. 69, 16 Sup. Ct. Rep. 911—*Rein v. Clayton*, 3 L.R.A. 79, 37 Fed. 356—*Kortenhaus v. American Watch Co.* 17 Phila. 136.

Patent rights as property.

Abandonment as Assets in Bankruptcy, see Bankruptcy, 254.

Effect of Abandonment by Assignee in Bankruptcy, see Bankruptcy, 259.

Leviability of Patent Rights, see Execution, 18, 19.

11. An invention secured by patent is property, and as much entitled to protection as other property. *Cammeyer v. Newton*, 94 U. S. 225, 24: 72
Cited in McCormick Harvesting Mach. Co. v. C. Aultman Co. 169 U. S. 609, 42 L. ed. 876, 18 Sup. Ct. Rep. 443—*McKeever v. United States*, 14 Ct. Cl. 422—*Campbell v. James*, 4 Bann. & Ard. 468, Fed. Cas. No. 2,361—*Faulks v. Kamp*, 5 Bann. & Ard. 75, 17 Blatchf. 434, 3 Fed. 900—*Reeves v. Corning*, 51 Fed. 784—*Re Dann*, 129 Fed. 497—*Crown Cork & Seal Co. v. State*, 87 Md. 698, 53 L.R.A. 419, 67 Am. St. Rep. 371, 40 Atl. 1074.

12. The privileges granted by letters patent are an incorporeal kind of personal property. *De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 209, 13 Sup. Ct. Rep. 283, 37: 138
Cited in Fruit Cleaning Co. v. Fresno Home Packing Co. 94 Fed. 848—*Winkler v. Studebaker Bros. Mfg. Co.* 105 Fed. 190.

13. The government of the United States, when it grants letters patent for a new invention or discovery, confers upon the patentee an exclusive property in the patented invention, which cannot be used by the government itself without just compensation.

United States v. Palmer, 128 U. S. 262, 9
 Sup. Ct. Ren. 104, 32: 442

Cited in Belknap v. Schild, 161 U. S. 16, 40 L.
 ed. 601, 16 Sup. Ct. Rep. 443—Schilling v.
 United States, 24 Ct. Cl. 292—Talbert v.
 United States, 25 Ct. Cl. 155—Gill v. United
 States, 25 Ct. Cl. 426—Berdan Fire-Arms
 Mfg. Co. v. United States, 26 Ct. Cl. 76—
 Pasqueau v. United States, 26 Ct. Cl. 537—
 Lanman v. United States, 27 Ct. Cl. 264—
 Kelton v. United States, 32 Ct. Cl. 349—
 Dickerson v. Sheldon, 39 C. C. A. 192, 98
 Fed. 622—United States v. Morgan, 39 C. C.
 A. 656, 99 Fed. 573—Sheriff v. Turner, 119
 Fed. 784—Nilsson v. De Haven, 47 App. Div.
 540, 62 N. Y. Supp. 506.

14. The right of the patentee under letters
 patent for an invention granted by the
 United States is exclusive of the government
 of the United States as well as of all
 others. Hollister v. Benedict & B. Mfg. Co.
 113 U. S. 59, 5 Sup. Ct. Rep. 717, 28: 901
Cited in International Postal Supply Co. v.
 Bruce, 194 U. S. 608, 48 L. ed. 1138, 24 Sup.
 Ct. Rep. 820.

15. The government cannot use a patent
 without a license or compensation to the
 owner. Cammeyer v. Newton, 94 U. S. 225,
 24: 72

Cited in Belknap v. Schild, 161 U. S. 16, 40
 L. ed. 601, 16 Sup. Ct. Rep. 443—Internation-
 al Postal Supply Co. v. Bruce, 194 U. S. 608,
 48 L. ed. 1138, 24 Sup. Ct. Rep. 820—Berdan
 Fire-Arms Mfg. Co. v. United States, 26
 Ct. Cl. 75—Allen v. New York, 17 Blatchf.
 352, Fed. Cas. No. 232—Campbell v. James,
 17 Blatchf. 54, Fed. Cas. No. 2,361—Colgate
 v. International Ocean Teleg. Co. 4 Bann. &
 Ard. 611, 17 Blatchf. 311, Fed. Cas. No.
 2,993—Wren v. Spencer Optical Mfg. Co. 5
 Bann. & Ard. 61, Fed. Cas. No. 18,062—
 Head v. Porter, 48 Fed. 486—Dickerson v.
 Sheldon, 39 C. C. A. 192, 98 Fed. 622.

16. The government cannot appropriate a
 man's property invested in a patent, without
 compensation, although the inventor is in
 the employ of the government at the time of
 his invention. Solomons v. United States,
 137 U. S. 342, 11 Sup. Ct. Rep. 88, 34: 667
Distinguished in Gardiner v. Howe, 2 Cliff. 464,
 Fed. Cas. No. 5,219.

Cited in Lane & B. Co. v. Locke, 150
 U. S. 199, 37 L. ed. 1051, 14 Sup. Ct.
 Rep. 78—McAleer v. United States, 150 U. S.
 429, 37 L. ed. 1132, 14 Sup. Ct. Rep. 160—
 Gill v. United States, 160 U. S. 426, 40 L. ed.
 482, 16 Sup. Ct. Rep. 322—Gill v. United
 States, 160 U. S. 431, 40 L. ed. 482, 16 Sup.
 Ct. Rep. 322—Withington-Cooley Mfg. Co. v.
 Kinney, 15 C. C. A. 537, 37 U. S. App. 117,
 68 Fed. 505—Blauvelt v. Interior Conduit &
 Insulation Co. 26 C. C. A. 246, 51 U. S. App.
 291, 80 Fed. 909—Fry v. Rookwood Pottery
 Co. 90 Fed. 500—Boston v. Allen, 33 C. C.
 A. 487, 50 U. S. App. 447, 91 Fed. 250—
 Dielman v. White, 102 Fed. 895—Internation-
 al Postal Supply Co. v. Bruce, 114 Fed.
 513—Sheriff v. Turner, 119 Fed. 784—Barber
 v. National Carbon Co. 5 L.R.A.(N.S.) 1166,
 64 C. C. A. 44, 129 Fed. 374—Pressed Steel
 Car Co. v. Hansen, 2 L.R.A.(N.S.) 1182, 71
 C. C. A. 215, 137 Fed. 411—Ft. Wayne, C.

& L. R. Co. v. Haberkorn, 15 Ind. App. 483,
 44 N. E. 322—Burton v. Burton Stock Car
 Co. 171 Mass. 439, 50 N. E. 1029—Eustis
 Mfg. Co. v. Eustis, 51 N. J. Eq. 570, 27 Atl.
 489—Nilsson v. De Haven, 47 App. Div.
 540, 62 N. Y. Supp. 506—Niagara Radiator
 Co. v. Meyers, 16 Misc. 595, 40 N. Y. Supp.
 572—Dempsey v. Dobson, 174 Pa. 130, 32
 L.R.A. 763, 52 Am. St. Rep. 816, 34 Atl. 459
 —Dempsey v. Dobson, 184 Pa. 593, 40 L.R.A.
 551, 41 W. N. C. 540, 63 Am. St. Rep. 809,
 39 Atl. 498—Hale & K. Mfg. Co. v. Nor-
 cross, 199 Pa. 290, 49 Atl. 80—D. M. Steward
 Mfg. Co. v. Steward, 109 Tenn. 305, 70 S. W.
 808.

17. The rights of property and exclusive
 use granted to a patentee does not extend
 to a foreign vessel lawfully entering one of
 our ports. Brown v. Duchesne, 19 How. 183,
 15: 595

Subordination to police power.

18. Rights secured to inventors by patents
 must be enjoyed in subordination to the po-
 lice powers of the state over all property
 within its limits. Webber v. Virginia, 103
 U. S. 344, 26: 565
Patterson v. Kentucky, 97 U. S. 501,

24: 1115
Cited in Bowman v. Chicago & N. W. R. Co.
 125 U. S. 513, 31 L. ed. 717, 1 Inters. Com.
 Rep. 837, 8 Sup. Ct. Rep. 689—Lelsay v. Har-
 din, 135 U. S. 121, 34 L. ed. 136, 3 Inters.
 Com. Rep. 45, 10 Sup. Ct. Rep. 681—Covington
 & C. Bridge Co. v. Kentucky, 154 U. S.
 210, 38 L. ed. 966, 4 Inters. Com. Rep. 653,
 14 Sup. Ct. Rep. 1087—Re Brosnahan, 4
 McCrary, 7, 18 Fed. 65—United States v.
 American Bell Teleph. Co. 29 Fed. 43—Ex
 parte Kinnebrew, 35 Fed. 55—Western U.
 Teleg. Co. v. New York, 3 L.R.A. 451, 2 In-
 ters. Com. Rep. 536, 38 Fed. 555—Reeves v.
 Corning, 51 Fed. 786—United States v. Boy-
 er, 85 Fed. 434—Edison Phonograph Co. v.
 Pike, 116 Fed. 866—Fuller v. Berger, 65 L.
 R. A. 385, 56 C. C. A. 593, 120 Fed. 279—
 Pegram v. American Alkali Co. 122 Fed. 1004
 —Joseph v. Randolph, 71 Ala. 508, 46 Am.
 Rep. 347—State v. Deschamp, 53 Ark. 493, 3
 Inters. Com. Rep. 577, 14 S. W. 653—Wig-
 gins Ferry Co. v. East St. Louis, 102 Ill.
 570—Burdick v. People, 149 Ill. 609, 24 L.
 R. A. 155, 41 Am. St. Rep. 329, 36 N. E. 948
 —Fry v. State, 63 Ind. 585, 30 Am. Rep. 238
 —Western U. Teleg. Co. v. Pendleton, 95 Ind.
 14, 48 Am. Rep. 692—Hockett v. State, 105
 Ind. 256, 55 Am. Rep. 201, 5 N. E. 178—
 Central Union Teleph. Co. v. Bradbury, 106
 Ind. 9, 5 N. E. 721—Central Union Teleph.
 Co. v. State, 118 Ind. 208, 10 Am. St. Rep.
 114, 19 N. E. 604—Jamieson v. Indi-
 ana Natural Gas & Oil Co. 128 Ind.
 579, 12 L.R.A. 660, 3 Inters. Com. Rep.
 621, 28 N. E. 76—Mason v. McLeod, 57
 Kan. 109, 41 L.R.A. 551, 57 Am. St.
 Rep. 327, 45 Pac. 76—Crown Cork & Seal
 Co. v. State, 87 Md. 699, 53 L.R.A. 419, 67
 Am. St. Rep. 871, 40 Atl. 1074—Com. v.
 Huntley, 156 Mass. 242, 15 L.R.A. 843, 30
 N. E. 1127—Colt & Co. v. Sutton, 102 Mich.
 327, 25 L.R.A. 820, 4 Inters. Com. Rep. 770,
 60 N. W. 690—People ex rel. A. J. Johnson
 Co. v. Roberts, 159 N. Y. 75, 45 L.R.A. 131,
 53 N. E. 685—Straus v. American Publish-
 ers' Asso. 177 N. Y. 476, 64 L.R.A. 706, 101
 Am. St. Rep. 819, 69 N. E. 1107—Wallace v.
 Reno, 27 Nev. 81, 63 L.R.A. 341, 103 Am. St.
 Rep. 747, 73 Pac. 528—Palmer v. State, 39
 Ohio St. 239, 48 Am. St. Rep. 429—Titus-

ville v. Brennan, 143 Pa. 649, 14 L.R.A. 102, 3 Inters. Com. Rep. 737, 24 Am. St. Rep. 580, 22 Atl. 893—Com. v. United Gas Improv. Co. 7 Pa. Co. Ct. 118—Philadelphia & S. Mall S. S. Co. v. Com. 44 Phila. Leg. Int. 376—Titusville v. Brennan, 143 Pa. 649, 14 L.R.A. 102, 3 Inters. Com. Rep. 737, 24 Am. St. Rep. 580, 22 Atl. 893—State v. Cook, 107 Tenn. 509, 62 L.R.A. 176, 64 S. W. 720.

b. Effect of Foreign Patent.

Date and Duration of Foreign Patent, see *infra*, IV. b.

Anticipation of Domestic Patent by, see *infra*, 326, 348.

Infringement of Foreign Patent, see *infra*, 1066.

Expiration of United States Patent at Time Prior Foreign Patent Expires, see *infra*, 28-37.

Effect of Novelty, see *infra*, 275.

Foreign Patent as Defense in Infringement Suit, see *infra*, 1154.

19. An English patent for an invention having become null and void on account of the failure of the patentees to pay a stamp duty, a patent cannot thereafter be granted for that invention in the United States. Huber v. N. O. Nelson Mfg. Co. 148 U. S. 270, 13 Sup. Ct. Rep. 603, 37: 447
Cited in Accumulator Co. v. Julien Electric Co. 57 Fed. 615.

20. A patent is not invalidated by a prior foreign patent when the specifications of the latter do not sufficiently describe the essentials of the former, so that a mechanic skilled in the mechanical art could construct and carry into practical operation the former patent. Illinois C. R. Co. v. Turrill (Cawood Patent) 94 U. S. 695, 24: 238
Cited in Carnegie Steel Co. v. Cambria Iron Co. 185 U. S. 421, 46 L. ed. 980, 22 Sup. Ct. Rep. 698—Hood v. Boston Car-Spring Co. 21 Fed. 69—Carnegie Steel Co. v. Cambria Iron Co. 89 Fed. 738.

21. The addition of a new improvement does not exempt a patent from the operation of the law in regard to patenting inventions previously patented in a foreign country. Guarantee Ins. Trust & S. D. Co. v. Sellers (Siemen v. Sellers) 123 U. S. 276, 8 Sup. Ct. Rep. 117, 31: 153
Cited in Brush Electric Co. v. Electrical Accumulator Co. 47 Fed. 52.

22. A patent for a process for the method of insulating telegraph wire by filling the pores of the covering, and subsequently compressing this covering, and thereby polishing its surface, being invalid because anticipated by a foreign patent, a patent for the product is also invalid. Western Electric Mfg. Co. v. Ansonia Brass & Copper Co. 114 U. S. 447, 5 Sup. Ct. Rep. 941, 29: 210

Editorial note.

Foreign patents and their effects. 37: 553

c. Division of Invention.

23. The monopoly granted by a patent is-

sued under the laws of the United States for an invention or discovery is one entire thing, and cannot be divided into parts, except as authorized by those laws. Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. Rep. 334, 34: 923

24. It cannot be divided into parts by assignment of separate claims. Pope Mfg. Co. v. Gormully & J. Mfg. Co. 144 U. S. 248, 12 Sup. Ct. Rep. 641, 36: 423

IV. Date and Duration.

a. In General.

Rights of Licensee during and after Term of Patent, see *infra*, 841-844.

Setting Aside Patent after its Expiration, see *infra*, 1166.

Date.

Allegations as to, see Pleading, 483.

25. The date of letters patent is considered as the date of the application therefor. Worley v. Loker Tobacco Co. 104 U. S. 340, 26: 827

Cited in Drewson v. Hartje Paper Mfg. Co. 65 C. C. A. 552, 181 Fed. 738.

26. The date of the application, and not the date of the patent, controls in determining the legal effect to be given to two patents issued at different dates to the same inventor, and the order in which they are to be considered. Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co. (Re Barbed Wire Patent) 143 U. S. 275, 12 Sup. Ct. Rep. 443, 450, 36: 154
Cited in Westinghouse Electric & Mfg. Co. v. Dayton Fan & Motor Co. 106 Fed. 726—Electric Storage Battery Co. v. Buffalo Electric Carriage Co. 117 Fed. 315.

Surrender.

Remedy of Assignee, see Patents, 1081.

27. Where the holder of a defective patent surrenders it to the department, and obtains a new one, the time of the privilege still runs from the date of the original patent. Shaw v. Cooper, 7 Pet. 292, 8: 689
Cited in Hussey v. Bradley, 5 Blatchf. 149, 2 Fisher, Pat. Cas. 379, Fed. Cas. No. 6,946.

Expiration with prior foreign patent.

See also *infra*, 563, 564; Evidence, 492.

28. Patents issued in a foreign country pending an application in the United States for a patent on the same invention, but before such patent is issued, bring the case within U. S. Rev. Stat. § 4887, U. S. Comp. Stat. 1901, p. 3382, which provides that an American patent for an invention "previously patented in a foreign country" must expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, although this may make the life of the American patent less than seventeen years. Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 15 Sup. Ct. Rep. 508, 39: 601
Cited in Hobbs v. Beach, 180 U. S. 398, 45 L.

ed. 594, 21 Sup. Ct. Rep. 409—Bonsack Mach. Co. v. Smith, 70 Fed. 391—Welsbach Light Co. v. Apollo Incandescent Gaslight Co. 37 C. C. A. 510, 96 Fed. 334—Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. 71 C. C. A. 192, 138 Fed. 828.

29-30. Under U. S. Rev. Stat. § 4887, U. S. Comp. Stat. 1901, p. 3382, a United States patent for an invention previously patented in a foreign country expires at the same time with the term limited by the foreign patent, or, if there be more than one foreign patent, at the same time with the one having the shortest time to run. Pohl v. Anchor Brewing Co. 134 U. S. 381, 10 Sup. Ct. Rep. 577, 33: 953

Bate Refrigerator Co. v. George H. Hammond & Co. 129 U. S. 151, 9 Sup. Ct. Rep. 225, 32: 645
Fletcher v. Blake, 131 U. S. cxvii. Appx. and, 26: 156
Cited in Edison Electric Light Co. v. Westinghouse, 40 Fed. 667.

31. The words "expiration of term," in U. S. Rev. Stat. § 4887, U. S. Comp. Stat. 1901, p. 3382, relating to foreign patents, do not mean expiration of term through a forfeiture by breach of a condition, but mean expiration by a lapse of time. Pohl v. Anchor Brewing Co. 134 U. S. 381, 10 Sup. Ct. Rep. 577, 33: 953

32. The duration of a United States patent is not to be limited by any lapsing or forfeiture of any portion of the term of a foreign patent, by means of the failure to perform a condition subsequent, according to the foreign statute. Pohl v. Anchor Brewing Co. 134 U. S. 381, 10 Sup. Ct. Rep. 577, 33: 953

Cited in Huber v. N. O. Nelson Mfg. Co. 148 U. S. 274, 37 L. ed. 449, 13 Sup. Ct. Rep. 603—Hobbs v. Beach, 180 U. S. 398, 45 L. ed. 594, 21 Sup. Ct. Rep. 409—Edison Electric Light Co. v. Perkins Electric Lamp Co. 42 Fed. 827—Consolidated Roller-Mill Co. v. Walker, 43 Fed. 580—Edison Electric Light Co. v. United States Electric Lighting Co. 8 C. C. A. 96, 11 U. S. App. 1, 52 Fed. 312—Pohl v. Heyman, 58 Fed. 570—Diamond Match Co. v. Adirondack Match Co. 65 Fed. 804—Bonsack Mach. Co. v. Smith, 70 Fed. 392—Welsbach Light Co. v. Apollo Incandescent Gaslight Co. 37 C. C. A. 510, 96 Fed. 333—Atlas Glass Co. v. Simonds Mfg. Co. 102 Fed. 843.

33. A patent for an invention does not expire at the same time with a foreign patent for the same invention, by force of U. S. Rev. Stat. § 4887, U. S. Comp. Stat. 1901, p. 3382, unless the foreign patent was obtained by the American patentee or with his consent. Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. Rep. 409, 45: 586
Cited in John R. Williams Co. v. Miller, D. B. & P. Mfg. Co. 115 Fed. 526—Sawyer Spindle Co. v. Carpenter, 188 Fed. 242.

34. The term of an American patent issued after an English patent for the same inven-

tion runs from the date or sealing of the latter. The provision to this effect in the act of 1839 is not repealed by the act of 1861. Guarantee Ins. Trust & S. D. Co. v. Sellers (Siemen v. Sellers) 123 U. S. 276, 8 Sup. Ct. Rep. 117, 31: 153

Cited in Telephone Cases, 126 U. S. 572, 31 L. ed. 1002, 8 Sup. Ct. Rep. 778—Accumulator Co. v. Julien Electric Co. 57 Fed. 607—J. L. Mott Iron Works v. Henry McShane Mfg. Co. 80 Fed. 518—Western Electric Co. v. Citizens' Teleph. Co. 106 Fed. 219.

35. A Canadian patent having been originally issued for five years, but twice extended for a term of five years each, under the Canadian statute making such extension a matter entirely of right at the option of the patentee on payment of the required fee; the fifteen-year term of the patent having been continuous and without interruption,—a United States patent for the same invention, issued during the original term of the Canadian patent, does not expire before the end of the fifteenth year and of the duration of the Canadian patent. Bate Refrigerating Co. v. George H. Hammond & Co. 129 U. S. 151, 9 Sup. Ct. Rep. 225, 32: 645

Cited in Pohl v. Anchor Brewing Co. 134 U. S. 384, 33 L. ed. 954, 10 Sup. Ct. Rep. 577—Huber v. N. O. Nelson Mfg. Co. 148 U. S. 273, 37 L. ed. 448, 13 Sup. Ct. Rep. 603—Hobbs v. Beach, 180 U. S. 398, 45 L. ed. 594, 21 Sup. Ct. Rep. 409—Huber v. N. O. Nelson Mfg. Co. 38 Fed. 832—Pohl v. Anchor Brewing Co. 39 Fed. 783—Edison Electric Light Co. v. Perkins Electric Lamp Co. 42 Fed. 827—Consolidated Roller-Mill Co. v. Walker, 43 Fed. 581—Edison Electric Light Co. v. United States Electric Lighting Co. 3 C. C. A. 95, 11 U. S. App. 1, 52 Fed. 311—Accumulator Co. v. Julien Electric Co. 57 Fed. 615—Pohl v. Heyman, 58 Fed. 570—Edison Electric Light Co. v. Electric Engineering & Supply Co. 60 Fed. 408—Diamond Match Co. v. Adirondack Match Co. 65 Fed. 803—Bonsack Mach. Co. v. Smith, 70 Fed. 393—Welsbach Light Co. v. Apollo Incandescent Gaslight Co. 37 C. C. A. 509, 96 Fed. 333—Sproull v. Pratt & W. Co. 101 Fed. 265—John R. Williams Co. v. Miller, D. B. & P. Mfg. Co. 115 Fed. 526.

36-7. Where an inventor, after filing his caveat in this country, obtained a French patent, and upon his return to this country obtained the issue of his patent here for the period of fourteen years from its date, instead of from the date of his French patent, it was held valid. O'Reilly v. Morse, 15 How. 62, 14: 601
Smith v. Ely, 15 How. 137, 14: 634
Cited in Telephone Cases, 126 U. S. 533, 31 L. ed. 989, 8 Sup. Ct. Rep. 778—Sawyer Spindle Co. v. Carpenter, 188 Fed. 239.

b. Of Foreign Patent.

Expiration of United States Patent at Time Prior Foreign Patent Expires, see supra, 28-37.

38. A foreign patent showing on its face a definite term was held to be prima facie evidence of its duration. *Pohl v. Anchor Brewing Co.* 134 U. S. 381, 10 Sup. Ct. Rep. 577, 33: 953

Cited in Edison Electric Light Co. v. Electric Engineering & Supply Co. 60 Fed. 408.

39. An English patent dates from the filing of the completed specification, and not the provisional specification. *Smith v. Good-year Dental Vulcanite Co.* 93 U. S. 486, 23: 952

Cited in American Diamond Rock Boring Co. v. Sheldon, 17 Blatchf. 305, 4 Bann. & Ard. 805, Fed. Cas. No. 297—*Coburn v. Schroeder*, 20 Blatchf. 392, 11 Fed. 425—*Emerson v. Lippert*, 31 Fed. 913—*Bilas v. Merrill*, 33 Fed. 40—*Electrical Accumulator Co. v. Julien Electric Co.* 38 Fed. 141—*Ireson v. Pierce*, 39 Fed. 798—*American Roll-Paper Co. v. Weston*, 45 Fed. 692—*American Bell Teleph. Co. v. Cushman*, 57 Fed. 845—*George Frost Co. v. Cohn*, 112 Fed. 1010.

V. Patentability of Inventions.

Necessity of Pleading Lack of Patentability, see Pleading, 696-698.

a. Nature of Patentable Matters.

See also *infra*, 187-190, 192, 196-202.

40. An idea, of itself, is not patentable, but a new device by which it may be made practically useful is. *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 22: 410

41. Nothing short of invention or discovery will support a patent for a manufacture, any more than for an art. *Union Paper Collar Co. v. Van Deusen*, 23 Wall. 530, 23: 128

Distinguished in Celluloid Mfg. Co. v. American Zylonite Co. 35 Fed. 420.

Cited in Cone v. Morgan Envelope Co. 4 Bann. & Ard. 109, Fed. Cas. No. 3096—*Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co.* 1 C. C. A. 164, 2 U. S. App. 55, 49 Fed. 63—*Galt v. Parlin & O. Co.* 9 C. C. A. 53, 18 U. S. App. 518, 60 Fed. 422—*Campbell v. Bayley*, 11 C. C. A. 287, 18 U. S. App. 486, 63 Fed. 465—*American Sulphite Pulp Co. v. Howland Falls Pulp Co.* 70 Fed. 999—*Antisdel v. Chicago Hotel Cabinet Co.* 32 C. C. A. 221, 80 U. S. App. 572, 89 Fed. 313—*Tyler v. Kelch*, 19 App. D. C. 188—*Dice v. Joliet Mfg. Co.* 11 Ill. App. 114—*Fuller & J. Mfg. Co. v. Bartlett*, 68 Wis. 86, 60 Am. Rep. 838, 31 N. W. 747.

42. The use of the motive power of the electric or galvanic current, however developed, for making or printing intelligible characters, signs, or letters at any distance,

is not patentable. *O'Reilly v. Morse*, 15 How. 62, 14: 601

Distinguished in United Nickel Co. v. Pendleton, 21 Blatchf. 235, 15 Fed. 746.

Cited in Silsby v. Foote, 20 How. 388, 15 L. ed. 956, 1 Whitman, Pat. Cas. 1080—*Burr v. Duryee*, 1 Wall. 576, 17 L. ed. 659, 2 Whitman, Pat. Cas. 106—*Tilghman v. Proctor*, 102 U. S. 726, 26 L. ed. 286—*Burden v. Corning*, 2 Fisher, Pat. Cas. 489, Fed. Cas. No. 2,143—*Ransom v. New York*, 1 Fisher, Pat. Cas. 262, Fed. Cas. No. 11,573—*Singer v. Walmsley*, 1 Fisher, Pat. Cas. 567, Fed. Cas. No. 12,900—*Union Paper Collar Co. v. White*, 2 Bann. & Ard. 64, Fed. Cas. No. 14,396—*McMillin v. Rees*, 5 Bann. & Ard. 271, 1 Fed. 724—*American Bell Teleph. Co. v. Spencer*, 8 Fed. 512—*Palmer v. Gatling Gun Co.* 19 Blatchf. 395, 8 Fed. 516—*McKay v. Jackman*, 20 Blatchf. 472, 12 Fed. 619—*American Bell Teleph. Co. v. Dolbear*, 15 Fed. 453—*United Nickel Co. v. Melchior*, 17 Fed. 343—*New Process Fermentation v. Maus*, 20 Fed. 780—*Johnston Ruffer Co. v. Avery Mach. Co.* 28 Fed. 194—*Rousseau v. Peck*, 66 Fed. 761—*Roberts v. Dickey*, 4 Brewst. (Pa.) 265.

43. The application of the principle of the expansion and contraction of a metallic rod by the fire in a stove, which, in a combination, operates the dampers and regulates the heat of the stove, is not invention, and is not patentable. (*Per Grier, J., dissenting.*) *Silsby v. Foote*, 20 How. 378, 15: 953
Cited in New Process Fermentation Co. v. Maus, 20 Fed. 781.

44. However brilliant the discovery of a new principle may be, it must be applied to some practical purpose, or no patent can be granted. *Le Roy v. Tatham*, 22 How. 132, 16: 366

Cited in Andrews v. Carman, 13 Blatchf. 313, 2 Bann. & Ard. 282, Fed. Cas. No. 371—*Milligan & H. Glue Co. v. Upton*, 4 Clif. 252, 1 Bann. & Ard. 514, Fed. Cas. No. 9,607—*New Process Fermentation Co. v. Maus*, 20 Fed. 781—*Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co.* 59 Fed. 907—*Wall v. Leck*, 13 C. C. A. 632, 29 U. S. App. 458, 66 Fed. 555.

45. A discovery that lead recently set will, under heat and pressure in a close vessel, reunite perfectly after a separation of its parts, so as to make wrought instead of cast pipe, is not patentable; but a new process or method in the art of making lead pipe, which this discovery enables one to invent and employ, may be patented. *Le Roy v. Tatham*, 14 How. 156, 14: 367
Cited in O'Reilly v. Morse, 15 How. 117, 14 L. ed. 625, 1 Whitman, Pat. Cas. 818—*Le Roy v. Tatham*, 22 How. 137, 16 L. ed. 368, 1 Whitman, Pat. Cas. 1120—*Ex parte Mann*, Fed. Cas. No. 9,032—*New Process Fermentation Co. v. Maus*, 20 Fed. 781.

46. A new property discovered in matter, when practically applied in the construction of a useful article of commerce or manufacture, is patentable. *Le Roy v. Tatham*, 14 How. 156, 14: 367
Cited in Milligan & H. Glue Co. v. Upton, 4 Clif. 251, 1 Bann. & Ard. 513, Fed. Cas. No. 9,607—*American Sulphite Pulp Co. v. Howland Falls Pulp Co.* 25 C. C. A. 505, 50 U. S. App. 52, 80 Fed. 400.

47. The end to be accomplished is not the subject of a patent. The invention consists in the new and useful means of obtaining the end. *Carver v. Hyde*, 16 Pet. 513, 10: 1051

Le Roy v. Tatham, 14 How. 156, 14: 367
Offered in Knapp v. Moras, 150 U. S. 228, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Magin v. Karle*, 150 U. S. 392, 37 L. ed. 1120, 14 Sup. Ct. Rep. 153—*Arkell v. Hurd Paper Bag Co.* 7 Blatchf. 477, Fed. Cas. No. 532—*Burden v. Corning*, 2 Fisher, Pat. Cas. 489, Fed. Cas. No. 2,143—*McCloskey v. DuBois*, 20 Blatchf. 8, 9 Fed. 38—*Johnston Ruffer Co. v. Avery Mach. Co.* 28 Fed. 194—*Rousseau v. Peck*, 68 Fed. 761—*American Strawboard Co. v. Elkhart Egg-Case Co.* 84 Fed. 964—*Taber Bas-Relief Photograph Co. v. Marceau*, 87 Fed. 873—*Union Gas-Engine Co. v. Doak*, 88 Fed. 89—*Powell v. Leicester Mills Co.* 103 Fed. 485—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 559, 106 Fed. 708.

48. A man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it. *Corning v. Burden*, 15 How. 252, 14: 683

Burr v. Duryee, 1 Wall. 531, 17: 650
Fuller v. Yentzer, 94 U. S. 288, 24: 103
Distinguished in Union Paper Collar Co. v. White, 11 Phila. 481, 32 Phila. Leg. Int. 143.

Offered in Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103—*Werner v. King*, 96 U. S. 230, 24 L. ed. 614—*Knapp v. Moras*, 150 U. S. 228, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Magin v. Karle*, 150 U. S. 392, 37 L. ed. 1120, 14 Sup. Ct. Rep. 153—*Miller v. Eagle Mfg. Co.* 151 U. S. 201, 38 L. ed. 129, 14 Sup. Ct. Rep. 810—*Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 77, 39 L. ed. 903, 15 Sup. Ct. Rep. 745—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 555, 42 L. ed. 1143, 18 Sup. Ct. Rep. 707—*Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 425, 46 L. ed. 981, 22 Sup. Ct. Rep. 698—*Berdan Fire-Arms Mfg. Co. v. United States*, 26 Ct. Cl. 72—*Burden v. Corning*, 2 Fisher, Pat. Cas. 489, Fed. Cas. No. 2,143—*Henderson v. Cleveland Co-Op. Stove Co. 2 Bann. & Ard.* 608, Fed. Cas. No. 6,351—*Hoffheins v. Brandt*, 3 Fisher, Pat. Cas. 236, Fed. Cas. No. 6,575—*Rose v. Sibley Mach. Co.* Fed. Cas. No. 12,051—*Union Paper Collar Co. v. White*, 2 Bann. & Ard. 64, Fed. Cas. No. 14,396—*Vogler v. Semple*, 7 Biss. 387, Fed. Cas. No. 16,987—*Wells v. Gill*, 6 Fisher, Pat. Cas. 93, Fed. Cas. No. 17,394—*Wells v. Hagaman*, Fed. Cas. No. 17,396—*Wells v. Jacques*, 1 Bann. & Ard. 65, Fed. Cas. No. 17,398—*Brett v. Quintard*, 20 Blatchf. 321, 10 Fed. 742—*McKay v. Jackman*, 20 Blatchf. 472, 12 Fed. 619—*Brett v. Quintard*, 17 Fed. 529—*Hill v. Sawyer*, 31 Fed. 285—*Phillips v. Kochert*, 31 Fed. 40—*Gray v. Bangs*, 31 Fed. 343—*Spencer v. Pennsylvania R. Co.* 34 Fed. 901—*Grant v. Walter*, 38 Fed. 596—*Smith v. Thomson*, 38 Fed. 607—*Dederick v. Gardner*, 50 Fed. 100—*Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co.* 59 Fed. 907—*Appleton Mfg. Co. v. Star Mfg. Co.* 9 C. C. A. 46, 18 U. S. App. 492, 60 Fed. 414—*Galt v. Parlin*, & O. Co. 9 C. C. A. 54, 18 U. S. App. 518, 60 Fed. 422—*Wall v. Leck*, 13 C. C. A. 634, 29 U. S. App. 458, 66 Fed. 556—*Wells Glass Co. v. Henderson*, 15 C. C. A. 89, 34 U. S. App. 19, 67 Fed. 935—*Craig v. Michigan Lubricator Co.* 72 Fed. 176—*Sosben Sweeper Co. v. Bissell Carpet*

Sweeper Co. 19 C. C. A. 21, 37 U. S. App. 555, 72 Fed. 75—*Blakesley Novelty Co. v. Connecticut Web Co.* 78 Fed. 481—*Fairbank v. Cincinnati, N. O. & T. P. R. Co.* 38 L.R.A. 274, 26 C. C. A. 406, 47 U. S. App. 744, 81 Fed. 292—*Societe Anonyme Du Filtre Chamberland Systeme Pasteur v. Allen*, 84 Fed. 828—*Taber Bas-Relief Photograph Co. v. Marceau*, 87 Fed. 873—*Union Gas-Engine Co. v. Doak*, 88 Fed. 89—*Carnegie Steel Co. v. Cambria Iron Co.* 89 Fed. 754—*Melvin v. Thomas Potter, Sons & Co.* 91 Fed. 152—*Magic Light Co. v. Economy Gas-Lamp Co.* 38 C. C. A. 59, 97 Fed. 90—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 99 Fed. 767—*Plumb v. New York, N. H. & H. R. Co.* 97 Fed. 649—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 559, 106 Fed. 708—*Powell v. Leicester Mills Co.* 103 Fed. 485—*Brammer v. Schroeder*, 46 C. C. A. 51, 106 Fed. 928—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 559, 106 Fed. 709—*Farmers' Mfg. Co. v. Spruks Mfg. Co.* 119 Fed. 597—*Manhattan General Constr. Co. v. Hellos-Upton Co.* 135 Fed. 788—*Georgia P. R. Co. v. Brooks*, 84 Ala. 140, 4 So. 289—*Re Weston*, 17 App. D. C. 436—*Lamson v. Martin*, 159 Mass. 563, 35 N. E. 78—*Burke v. Partridge*, 58 N. H. 352—*Union Paper Collar Co. v. White*, 1 W. N. C. 362.

b. Invention; What Constitutes.

1. Generally.

Lack of Invention as Defense to Infringement Suit, see *infra*, 1129.
 Estoppel to Deny Invention, see *Appeal and Error*, 4354.
 Judicial Notice of State of Art as Affecting Patentability, see *Evidence*, 129-140.
 Presumption of Patentability From Issuance of Patent, see *Evidence*, 767-770.
 Evidence of State of Art, see *Evidence*, 1447, 1612, 2254.
 Expert Testimony Generally, see *Evidence*, 1827-1830.
 Conclusiveness of Judgment as to Invention, see *Judgment*, 582.
 See also *supra*, 41.

Editorial notes.

Invention generally. 4: 433; 14: 683; 37: 553; 38: 138; 39: 285; 40: 1025

Mechanical skill.

In New Application of Old Devices, see *infra*, 91-118.

In Improvements, see *infra*, 248-252.
 See also *infra*, 70, 71.

49. Patents should be granted only for some substantial discovery or invention which adds to our knowledge, and makes a step in advance in the useful arts. The exercise of invention must be somewhat above ordinary mechanical or engineering skill. *Hotchkiss v. Greenwood*, 11 How. 248, 13: 683

Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. Rep. 225, 27: 438
Jacobs v. Baker, 7 Wall. 295, 19: 200
Stimpson v. Woodman, 10 Wall. 117, 19: 866

Dunbar v. Meyers, 94 U. S. 187, 24: 34
 Pearce v. Mulford, 102 U. S. 112, 26: 93
 Packing Company Cases, 105 U. S. 566, 26: 1172
 Phillips v. Detroit, 111 U. S. 604, 4 Sup. Ct. Rep. 580, 28: 532
Offed in Winans v. Denmead, 15 How. 345, 14 L. ed. 723, 1 Whittman, Pat. Cas. 903—Union Paper Collar Co. v. Van Dusen, 23 Wall. 583, 23 L. ed. 183—Brown v. Piper, 91 U. S. 41, 23 L. ed. 201—Dunbar v. Myers, 94 U. S. 187, 24 L. ed. 38—Roemer v. Simon, 95 U. S. 218, 24 L. ed. 386—Vinton v. Hamilton, 104 U. S. 492, 26 L. ed. 810—Wilson Packing Co. v. Chicago Packing & Provision Co. 105 U. S. 672, 26 L. ed. 1174—King v. Gallun, 109 U. S. 102, 27 L. ed. 871, 3 Sup. Ct. Rep. 85—Slawson v. Grand Street, P. P. & F. R. Co. 107 U. S. 653, 29 L. ed. 577, 2 Sup. Ct. Rep. 663—Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co. 110 U. S. 494, 28 L. ed. 223, 4 Sup. Ct. Rep. 220—Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co. 110 U. S. 494, 28 L. ed. 223, 4 Sup. Ct. Rep. 220—Phillips v. Detroit, 111 U. S. 608, 28 L. ed. 533, 4 Sup. Ct. Rep. 580—Mahn v. Harwood, 112 U. S. 358, 28 L. ed. 667, 5 Sup. Ct. Rep. 174—Morris v. McMillin, 112 U. S. 249, 28 L. ed. 704, 5 Sup. Ct. Rep. 218—Thompson v. Boltseller, 114 U. S. 12, 29 L. ed. 80, 5 Sup. Ct. Rep. 1042—Stephenson v. Brooklyn, C. T. R. Co. 114 U. S. 156, 29 L. ed. 61, 5 Sup. Ct. Rep. 777—Eachus v. Broomall, 115 U. S. 436, 29 L. ed. 422, 6 Sup. Ct. Rep. 229—Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 559, 29 L. ed. 954, 6 Sup. Ct. Rep. 846—Pomace Holder Co. v. Ferguson (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—Hendy v. Golden State & Miner's Iron Works, 127 U. S. 375, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—Brown v. District of Columbia, 130 U. S. 100, 32 L. ed. 868, 9 Sup. Ct. 437—Burt v. Ivory, 133 U. S. 358, 33 L. ed. 661, 10 Sup. Ct. Rep. 394—Butler v. Steckel, 137 U. S. 29, 34 L. ed. 585, 11 Sup. Ct. Rep. 25—Florsheim v. Shilling, 137 U. S. 77, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—Fond Du Lac County v. May, 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—International Tooth Crown Co. v. Gaylord, 140 U. S. 62, 35 L. ed. 350, 11 Sup. Ct. Rep. 716—Magowan v. New York Belting & Packing Co. 141 U. S. 342, 35 L. ed. 785, 12 Sup. Ct. Rep. 71—Topliff v. Topliff, 145 U. S. 163, 36 L. ed. 661, 12 Sup. Ct. Rep. 825—C. & A. Potts & Co. v. Creager, 155 U. S. 608, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co. 174 U. S. 498, 43 L. ed. 1060, 19 Sup. Ct. Rep. 641—Marchand v. Emken, 23 Blatchf. 39—Alcott v. Young, 16 Blatchf. 138, 4 Bann. & Ard. 202, Fed. Cas. No. 149—Bailey Washing & Wringing Mach. Co. v. Lincoln, 4 Fisher, Pat. Cas. 385, Fed. Cas. No. 750—Ex parte Berry, Fed. Cas. No. 1,353—Carter v. Messinger, 11 Blatchf. 43 Fed. Cas. No. 2478—Milligan & H. Glue Co. v. Upton, 4 Cliff. 251, 1 Bann. & Ard. 512, Fed. Cas. No. 9,607—Sarven v. Hall, 9 Blatchf. 535, 5 Fisher, Pat. Cas. 428, Fed. Cas. No. 12,369—Teese v. Phelps, McAll. 52, Fed. Cas. No. 13,819—Hoe v. Cottrell, 17 Blatchf. 552, 5 Bann. & Ard. 262, 1 Fed. 603—Root v. Welch Mfg. Co. 17 Blatchf. 483, 4 Fed. 427—Nicomemus v. Frasier, 19 Fed. 261—Collins Co. v. Coes, 21 Fed. 39—Fricke v. Hum, 22 Fed. 304—Rosenwasser v. Berry, 22 Fed. 843—Scheidler v. Tustin, 23 Fed. 889—Scott Mfg. Co. v. Sayre, 26 Fed.

154—Forschner v. Baumgarten, 26 Fed. 859—Calkins v. Oshkosh Carriage Co. 27 Fed. 298—Muller v. Ellison, 27 Fed. 457—Leonard v. Lovell, 29 Fed. 814—Cluett v. Chaffin, 30 Fed. 924—Pneets v. Bransford, 31 Fed. 462—Landesmann v. Jonasson, 32 Fed. 591—Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 33 Fed. 256—I.owski Clay-Pigeon Co. v. American Clay-Bird Co. 34 Fed. 332—Brahn v. Ramapo Iron Works, 35 Fed. 66—National Sheet-Metal Roofing Co. v. Garwood, 35 Fed. 660—Schlicht & F. Co. v. Sherwood Letter File Co. 36 Fed. 592—Williams Mfg. Co. v. Franklin, 41 Fed. 394—Innis v. Oil City Boiler Works, 41 Fed. 790—Westinghouse Co. v. Chartiers Valley Gas Co. 43 Fed. 589—American Road-Mach. Co. v. Pennock & S. Co. 45 Fed. 255—Campbell v. Bailey, 45 Fed. 566—Anderson v. Saint, 46 Fed. 764—Root v. Sonntag, 47 Fed. 312—Johnson Co. v. Pacific Rolling-Mills Co. 47 Fed. 592—Johnson Co. v. Tidewater Steel-Works, 50 Fed. 94—Ellbert v. St. Paul Gaslight Co. 50 Fed. 211—Kilbourne v. W. Bingham Co. 1 C. C. A. 623, 6 U. S. App. 65, 50 Fed. 703—Bromley Bros. Carpet Co. v. Stewart, 51 Fed. 916—Eagle Pencil Co. v. American Lead Pencil Co. 53 Fed. 889—Wilson v. Ansonia Brass & Copper Co. 4 C. C. A. 485, 11 U. S. App. 758, 54 Fed. 496—Vincent v. Rigby, 58 Fed. 372—Bowman v. DeGrauw, 60 Fed. 910—Electric R. Co. v. Jamaica & B. R. Co. 61 Fed. 673—Stirrat v. Excelsior Mfg. Co. 10 C. C. A. 220, 27 U. S. App. 13, 61 Fed. 984—Johnson Co. v. Pennsylvania Steel Co. 62 Fed. 158—Maitland v. Gibson, 63 Fed. 128—Westinghouse v. Edison Electric Light Co. 11 C. C. A. 350, 28 U. S. App. 1, 63 Fed. 596—McClery v. Baker, 11 C. C. A. 453, 24 U. S. App. 124, 63 Fed. 843—Front Rank Steel Furnace Co. v. Wrough Iron Range Co. 63 Fed. 997—Bernheim v. Boehme, 67 Fed. 550—Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co. 14 C. C. A. 649, 33 U. S. App. 188, 67 Fed. 793—Haslem v. Pittsburg Plate Glass Co. 68 Fed. 481—Griswold v. Wagner, 15 C. C. A. 580, 37 U. S. App. 171, 68 Fed. 499—Sampson v. Donaldson, 16 C. C. A. 345, 32 U. S. App. 712, 69 Fed. 624—P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co. 70 Fed. 495—Brunswick-Balke-Collender Co. v. Phelan Billiard Ball Co. 76 Fed. 979—Klein v. Seattle, 23 C. C. A. 119, 44 U. S. App. 741, 77 Fed. 204—William Schwarzwalder & Co. v. Detroit, 77 Fed. 891—Birmingham Cement Mfg. Co. v. Gates Iron Works, 24 C. C. A. 143, 41 U. S. App. 201, 78 Fed. 361—Dunbar v. Eastern Elevating Co. 26 C. C. A. 334, 51 U. S. App. 319, 81 Fed. 204—Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 131, 54 U. S. App. 591, 85 Fed. 228—Tiemann v. Kraatz, 29 C. C. A. 259, 56 U. S. App. 545, 85 Fed. 440—United States Repair & G. Co. v. Standard Paving Co. 87 Fed. 344—Union Gas-Engine Co. v. Doak, 88 Fed. 90—Pease v. White Mfg. Co. 89 Fed. 591—King v. Anderson, 90 Fed. 504—Tower v. Eagle Pencil Co. 90 Fed. 663—Letteller v. Mann, 91 Fed. 915—Christy v. Hygeia Pneumatic Bicycle Saddle Co. 36 C. C. A. 36, 93 Fed. 970—Sperry Mfg. Co. v. J. L. Owens Co. 96 Fed. 977—Parsons v. Minneapolis Threshing Mach. Co. 106 Fed. 944—Union Hardware Co. v. Selchow, 112 Fed. 1008—Kinloch Teleph. Co. v. Western Electric Co. 51 C. C. A. 375, 113 Fed. 665—Western Electric Co. v. Anthracite Teleph. Co. 113 Fed. 843—Stetson v. Herreshoff Mfg. Co. 113 Fed. 956—Hanifen v. Armitage, 117 Fed. 849—Farmers' Mfg. Co. v. Spruks Mfg. Co. 119 Fed. 596—L. E. Waterman Co. v. Forsyth, 121 Fed. 106—

Hoeke v. New York C. & H. B. Co. 58 C. C. A. 629, 122 Fed. 460—*Thomas v. Spencer*, 122 Fed. 878—*Drake Castle Pressed Steel Lug Co. v. Brownell*, 59 C. C. A. 218, 123 Fed. 88—*National Tube Co. v. Sprang*, 125 Fed. 29—*Union Blacuit Co. v. Peters*, 60 C. C. A. 345, 125 Fed. 609—*Rodiger v. Thalidens Davids Mfg. Co.* 126 Fed. 965—*National Casket Co. v. Stoltz*, 127 Fed. 160—*Thomson-Houston Electric Co. v. Ohio Brass Co.* 129 Fed. 379—*Wilce v. Bush Temple of Music Co.* 134 Fed. 391—*Re Cheneau*, 5 App. D. C. 201—*Durham v. Seymour*, 6 App. D. C. 100—*Re Musgrave*, 10 App. D. C. 170—*Doyle v. McRoberts*, 10 App. D. C. 468—*Re Marshutz*, 13 App. D. C. 280—*Re Iwan*, 17 App. D. C. 571—*Stephenson v. Brooklyn Cross-Town R. Co.* 42 Phila. Leg. Int. 162—*Brown v. Texas Cactus Hedge Co.* 64 Tex. 399.

50. It involves no invention to cast in one piece an article which has formerly been cast in two pieces and put together. *Howard v. Detroit Stove Works*, 150 U. S. 164, 14 Sup. Ct. Rep. 68, 37: 1039
Cited in Olmsted v. A. H. Andrews & Co. 23 C. C. A. 493, 46 U. S. App. 608, 77 Fed. 840—*Standard Caster & Wheel Co. v. Caster Socket Co.* 51 C. C. A. 112, 118 Fed. 166—*General Electric Co. v. Yost Electric Mfg. Co.* 131 Fed. 878.

51. The proper location of the seat of a machine does not require the exercise of inventive power. *Brown v. Guild* (The Cornplanter Patent) 23 Wall. 181, 23: 161
Cited in American Sulphite Pulp Co. v. Howland Falls Pulp Co. 70 Fed. 998—*Lamson v. Martin*, 159 Mass. 565, 35 N. E. 78.

52. A peg or stop to prevent the rear part of a machine from tipping is too frivolous to form the subject of a patent; any mechanic would be sure to provide some such arrangement to a machine that he was constructing. *Brown v. Guild* (The Cornplanter Patent) 23 Wall. 181, 23: 161

Unsuccessful experiments.

Speculation or Experiment as Anticipation, see *infra*, 308, 309.

53. A conception of the mind is not an invention until represented in some physical form. Unsuccessful experiments or projects abandoned by the inventor do not amount to invention. *Clark Thread Co. v. Willimantic Linen Co.* 140 U. S. 481, 11 Sup. Ct. Rep. 846, 35: 521
Cited in Electric R. Co. v. Jamaica & B. R. Co. 61 Fed. 672—*Von Schmidt v. Bowers*, 25 C. C. A. 342, 48 U. S. App. 120, 80 Fed. 140—*Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* 86 Fed. 331—*American Bell Teleph. Co. v. National Tel. Mfg. Co.* 109 Fed. 1035—*Lamson v. Martin*, 159 Mass. 565, 35 N. E. 78.

54. The existence of an invention in a single die to cut bretzels on a flat surface is not shown by the fact that a large number of persons had before attempted unsuccessfully to make a machine to cut and twist bretzels, or cut them with dies set in revolving cylinders, and had expended considerable money and time for that purpose. *Butler v. Steckel*, 137 U. S. 21, 11 Sup. Ct. Rep. 25, 34: 582

2. Change of Form.

Effect of Change in Form to Prevent Infringement, see *infra*, 892-897, 980, 981, 1053-1055.

See also *infra*, 222, 236.

55. A person, to be entitled to a patent, must have invented and discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof; and it is not enough that a thing is new, in the sense that in the shape or form in which it is produced it has not been known, and that it is useful, but it must amount to an invention or discovery. *Burt v. Ivory*, 133 U. S. 349, 10 Sup. Ct. Rep. 394, 33: 647
Hill v. Wooster, 132 U. S. 693, 10 Sup. Ct. Rep. 228, 33: 502
Thompson v. Boisselier, 114 U. S. 1, 5 Sup. Ct. Rep. 1042, 29: 76
Gardner v. Herz, 118 U. S. 180, 6 Sup. Ct. Rep. 1027, 30: 158

Cited in Gardner v. Herz, 118 U. S. 191, 30 L. ed. 163, 6 Sup. Ct. Rep. 1027—*Pomace Holder Co. v. Ferguson* (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 388, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—*Thatcher Heating Co. v. Burtis*, 121 U. S. 295, 30 L. ed. 946, 7 Sup. Ct. Rep. 1034—*Hendy v. Golden State & Miner's Iron Works*, 127 U. S. 375, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—*Watson v. Cincinnati, I. St. L. & C. R. Co.* 132 U. S. 167, 33 L. ed. 298, 10 Sup. Ct. Rep. 45—*Hill v. Wooster*, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—*Howe Mach. Co. v. National Needle Co.* 134 U. S. 397, 33 L. ed. 968, 10 Sup. Ct. Rep. 570—*Fond Du Lac County v. May*, 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—*Consolidated Roller Mill Co. v. Walker*, 138 U. S. 132, 34 L. ed. 923, 11 Sup. Ct. Rep. 292—*Patent Clothing Co. v. Glover*, 141 U. S. 563, 35 L. ed. 859, 12 Sup. Ct. Rep. 79—*Lovell Mfg. Co. v. Cary* 147 U. S. 636, 37 L. ed. 812, 13 Sup. Ct. Rep. 472—*Hartford Woven Wire Mattress Co. v. Peerless Wire Mattress Co.* 23 Blatchf. 233, 23 Fed. 591—*Hoe v. Kahler*, 23 Blatchf. 362, 25 Fed. 277—*Scott Mfg. Co. v. Sayre*, 26 Fed. 154—*Calkins v. Oshkosh Carriage Co.* 27 Fed. 298—*Celluloid Mfg. Co. v. Comstock & C. Co.* 27 Fed. 360—*Consolidated Fruit Jar Co. v. Bellaire Stamping Co.* 28 Fed. 94—*Leonard v. Lovell*, 29 Fed. 814—*Cluett v. Clafin*, 30 Fed. 924—*Cooke v. Globe Files Co.* 31 Fed. 44—*J. L. Mott Iron Works v. Cassidy*, 31 Fed. 48—*United States Bung Mfg. Co. v. Independent Bung & Bushing Co.* 31 Fed. 79—*Puets v. Bransford*, 31 Fed. 462—*Landesmann v. Jonasson*, 32 Fed. 591—*Brahn v. Ramapo Iron Works*, 35 Fed. 66—*Williams Mfg. Co. v. Franklin*, 41 Fed. 396—*Consolidated Roller-Mill Co. v. Walker*, 43 Fed. 579—*Heine Safety Boiler Co. v. Anheuser-Busch Brewing Assn.* 43 Fed. 790—*Simmonds v. Morrison*, 44 Fed. 761—*American Road Mach. Co. v. Pennock & S. Co.* 45 Fed. 255—*Campbell v. Bailey*, 45 Fed. 567—*Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 589—*Haughey v. Lee*, 48 Fed. 384—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 727—*Haughey v. Lee*, 48 Fed. 384—*Williams v. Goodyear Metallic Rubber Shoes Co.* 49 Fed. 246—*Foss Mfg. Co. v. Springfield Engine & Thresher Co.* 1 C. C. A. 412, 6 U. S. App. 14, 49 Fed. 643—*Vulcanized Fiber Co. v. Taylor*, 49 Fed. 745—*Stauffer v. Spangler*, 50 Fed. 86—*Johnson Co. v. Tidewater*

Steel-Works, 50 Fed. 94—Mahon v. McGuire Mfg. Co. 51 Fed. 684—Bromley Bros. Carpet Co. v. Stewart, 51 Fed. 914—Marshall v. Packard, 51 Fed. 756—Deere & Co. v. J. I. Case Plow Works, 6 C. C. A. 160, 9 U. S. App. 567, 56 Fed. 844—Bowman v. De Grauw, 60 Fed. 911—Bonnell v. Stoll, 10 C. C. A. 50, 17 U. S. App. 543, 61 Fed. 768—Brunswick-Balke-Collender Co. v. Phelan Billiard Ball Co. 76 Fed. 979—Klein v. Seattle, 23 C. C. A. 119, 44 U. S. App. 741, 77 Fed. 204—Olmsted v. A. H. Andrews & Co. 23 C. C. A. 493, 46 U. S. App. 608, 77 Fed. 840—William Schwarzwelder & Co. v. Detroit, 77 Fed. 891—Interior Lumber Co. v. Perkins, 25 C. C. A. 616, 53 U. S. App. 66, 80 Fed. 531—J. J. Warren Co. v. Rosenblatt, 25 C. C. A. 627, 53 U. S. App. 234, 80 Fed. 542—Rynear Co. v. Evans, 83 Fed. 700—Tiemann v. Kraatz, 29 C. C. A. 259, 56 U. S. App. 545, 85 Fed. 439—Kelly v. Clow, 32 C. C. A. 211, 60 U. S. App. 338, 89 Fed. 303—Antisdel v. Chicago Hotel Cabinet Co. 32 C. C. A. 221, 60 U. S. App. 572, 89 Fed. 313—Chuse v. Ide, 32 C. C. A. 267, 60 U. S. App. 610, 89 Fed. 497—Corser v. Brattleboro Overall Co. 93 Fed. 810—Christy v. Hygeia Pneumatic Bicycle Saddle Co. 36 C. C. A. 36, 93 Fed. 970—Johnston v. Woodbury, 96 Fed. 434—Arlington Mfg. Co. v. Celluloid Co. 38 C. C. A. 61, 97 Fed. 92—Stetson v. Herreshoff Mfg. Co. 118 Fed. 956—United Blue-Flame Oil Stove Co. v. Glasler, 55 C. C. A. 558, 119 Fed. 162—Farmers' Mfg. Co. v. Spruks Mfg. Co. 119 Fed. 596—Voightmann v. Wels & R. Cornice Co. 133 Fed. 803—Durham v. Seymour, 6 App. D. C. 103—Re Musgrave, 10 App. D. C. 170—Siemens v. Chambers & M. Glass Co. 23 Pittsb. L. J. N. S. 22.

56. To make the shape of the grate in a stove correspond with that of the firepot is not an exercise of invention. Howard v. Detroit Stove Works, 150 U. S. 164, 14 Sup. Ct. Rep. 68, 37: 1039

57. The change of form of an article, from its condition in bulk to small particles, by breaking, bruising, slicing, rasping, filing, grinding, sifting, or other simple mechanical means, does not make it a new article, in the sense of the patent law, although more merchantable, and in many ways more convenient and advantageous to use. Milligan & H. Glue Co. v. Upton, 97 U. S. 3, 24: 985
Distinguished in Everett v. Haulenbeek, 68 Fed. 912.

Cited in Mahn v. Harwood, 112 U. S. 358, 28 L. ed. 667, 5 Sup. Ct. Rep. 174—Pratt v. Rosenfield, 18 Blatchf. 236, 5 Bann. & Ard. 490, 3 Fed. 337—Badische Anilin & Soda Fabrik v. Kalle, 94 Fed. 171—Rumford Chemical Works v. New York Baking Powder Co. 125 Fed. 233—Rumford Chemical Works v. New York Baking Powder Co. 67 C. C. A. 368, 134 Fed. 386—Re Cheneau, 5 App. D. C. 202—Durham v. Seymour, 6 App. D. C. 103.

58. A claim for an article of manufacture, to wit, a bale of plasterers' hair, consisting of several bundles enclosed in bags, and compressed and secured to form a package, does not describe a patentable invention. King v. Gallun, 109 U. S. 99, 3 Sup. Ct. Rep. 85, 27: 870

Cited in Phillips v. Detroit, 111 U. S. 608, 28 L. ed. 534, 4 Sup. Ct. Rep. 580—Mahn v. Harwood, 112 U. S. 359, 28 L. ed. 667, 5 Sup.

Ct. Rep. 174—Thompson v. Boisseller, 114 U. S. 12, 29 L. ed. 80, 5 Sup. Ct. Rep. 1042—Stephenson v. Brooklyn C. T. R. Co. 114 U. S. 156, 29 L. ed. 61, 5 Sup. Ct. Rep. 777—Pomace Holder Co. v. Ferguson (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—Leonard v. Lovell, 29 Fed. 314—Root v. Sontag, 47 Fed. 310—Stirrat v. Excelsior Mfg. Co. 10 C. C. A. 220, 27 U. S. App. 13, 61 Fed. 984—Sampson v. Donaldson, 16 C. C. A. 345, 32 U. S. App. 712, 69 Fed. 624.

59. A solid conical bolt having been used for the purpose of securely fastening together a series of plates for safe doors or casings, adding a screw thread to such bolt is not a patentable invention. Hall v. Macneale, 107 U. S. 90, 2 Sup. Ct. Rep. 73, 27: 367

Cited in Thompson v. Boisseller, 114 U. S. 11, 29 L. ed. 80, 5 Sup. Ct. Rep. 1042—Eachus v. Broomall, 115 U. S. 436, 29 L. ed. 422, 6 Sup. Ct. Rep. 229—Pomace Holder Co. v. Ferguson (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—Burt v. Evory, 133 U. S. 359, 33 L. ed. 651, 10 Sup. Ct. Rep. 394—Fond Du Lac County v. May, 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—Wright v. Yuengling, 155 U. S. 54, 39 L. ed. 67, 15 Sup. Ct. Rep. 1—Leonard v. Lovell, 29 Fed. 314—Rodiger v. Thaddeus Davids Mfg. Co. 126 Fed. 965.

60. A horizontal plate attached by a vertical arm in a carriage door, having been long in use as a step cover, the arms serving as a wheel fender, there is no invention in extending the width of the arm so as to dispense with the horizontal plate; but joining it to the step, and having it yielding and flexible, so that its elasticity may keep the door open and closed, is patentable. Gosling v. Roberts, 106 U. S. 39, 1 Sup. Ct. Rep. 26, 27: 61

61. When a propeller has been used stern first for dredging, there is no invention in building one with screws at the bow, or in making them with longer blades and sharpened at the points. Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. Rep. 225, 27: 438

62. A device upon rope halters claimed in the Covert patent, 161,757, consisting of a sliding tube into one side of which enters a sharp pointed set-screw with an eye in the head, is not patentable where the prior device differed only in the use of a blunt set-screw with two eyes in the head of it. Sargent v. Covert, 152 U. S. 516, 14 Sup. Ct. Rep. 676, 38: 536

63. Improvements of the Gory lock, covered by patent 138,148, which consist of the practical removal of the connecting walls between the front and back plates by extending those plates laterally, and the extension of the front plate beyond the back plate, its projecting edges being adapted to fit a countersunk recess around the routed cavity, and the extension inward of the top plate or selvedge so as to cover the increased depth or cavity, for an extended key-post,—do not constitute an inventive

novelty in view of the fact that the old style of locks prior to the Gory patent often had both back and front plates extended beyond the case, and an extended front plate in a countersunk recess, and usually had the extended key-post. *Corbin Cabinet Lock Co. v. Eagle Lock Co.* 150 U. S. 38, 14 Sup. Ct. Rep. 28, 37: 989

Velocipedes.

64. The application of a rubber ball or cushion upon the extremities of a handle for a velocipede, if it involves any invention at all, is not patentable where rubber has been used for the same purpose in but slightly different form. *Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 144 U. S. 238, 12 Sup. Ct. Rep. 637, 36: 420

65. There is no patentable invention in a mere change of the shape of rubber coverings for velocipede pedals, or in the form of corrugations or groovings therein. *Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 144 U. S. 238, 12 Sup. Ct. Rep. 637, 36: 420
Distinguished in Overman Wheel Co. v. Curtis, 53 Fed. 249.

Cited in Dederick v. Gardner, 50 Fed. 100—*Newark Watch-Case Material Co. v. Wilmot & H. Mfg. Co.* 60 Fed. 617.

Railroad frog.

66. Where an invention of a railroad frog consisted in forming a metallic plate into a U-shaped trough for the purpose of connecting the outer rails, leaving the V-shaped ends of the point rails to be secured by means of a V-shaped recess in the bed of the plate at the wide end of the trough, there is no invention in dividing that trough into two, so as to connect the center rails on each side by means of a separate channel iron or U-shaped trough with the outer rail exterior to them. *Weir v. Morden*, 125 U. S. 98, 8 Sup. Ct. Rep. 369, 31: 645

Cited in Dickinson v. Parker, 88 Fed. 412—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 58 Fed. 780—*American Road-Mach. Co. v. Pennock & S. Co.* 45 Fed. 255—*Haughey v. Lee*, 48 Fed. 384—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 281, 37 U. S. App. 299, 69 Fed. 393—*Long v. Pope Mfg. Co.* 21 C. C. A. 537, 83 U. S. App. 551, 75 Fed. 839—*Muller v. Lodge & D. Mach. Tool Co.* 23 C. C. A. 366, 47 U. S. App. 189, 77 Fed. 630—*American Tobacco Co. v. Streat*, 28 C. C. A. 22, 42 U. S. App. 617, 83 Fed. 704—*Ross-Moyer Mfg. Co. v. Randall*, 43 C. C. A. 582, 104 Fed. 359—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 565, 106 Fed. 714.

3. Change of Size.

Effect of Change of Size to Prevent Infringement, see *infra*, 980.

67. Mere enlargement is not invention. *Woodbury Patent Planing-Mach. Co. v. Keith*, 101 U. S. 479, 25: 939
Phillips v. Page, 24 How. 164, 16: 639
Cited in Seymour v. Osborne, 11 Wall. 548, 20 L. ed. 40, 2 Whitman, Pat. Cas. 317—*Union Paper Collar Co. v. Van Dusen*, 23 Wall. 563, 23 L. ed. 133—*Slawson v. Grand Street*

P. P. & F. R. Co. 107 U. S. 658, 27 L. ed. 577, 2 Sup. Ct. Rep. 663—*King v. Gallun*, 109 U. S. 102, 27 L. ed. 871, 3 Sup. Ct. Rep. 85—*Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.* 110 U. S. 494, 28 L. ed. 223, 4 Sup. Ct. Rep. 220—*Peters v. Active Mfg. Co.* 129 U. S. 537, 32 L. ed. 741, 9 Sup. Ct. Rep. 389—*Peters v. Active Mfg. Co.* 21 Fed. 320—*Kittle v. Hall*, 29 Fed. 514—*Fillely v. Littlefield Stove Co.* 30 Fed. 436—*Simonds Mfg. Co. v. E. C. Atkins & Co.* 63 Fed. 587—*Wilgus v. Germain*, 19 C. C. A. 192, 44 U. S. App. 369, 72 Fed. 777—*Union Gas-Engine Co. v. Doak*, 88 Fed. 90—*Newton Mfg. Co. v. Wilgus*, 90 Fed. 485—*Thomson-Houston Electric Co. v. Nassau Electric R. Co.* 98 Fed. 111—*Tod v. Wick Bros.* 36 Ohio St. 393

68. Reed-boards in organs having been constructed with two sets of reeds and a third partial set, there was no invention in making the length and size of the valve opening greater or less in a reed-board of a given width, or where the reed-board was made wider or narrower, or had more or less sets of reeds in it, either full or partial. *Estey v. Burdett*, 109 U. S. 633, 3 Sup. Ct. Rep. 531, 27: 1058

Cited in Thompson v. Bolsseller, 114 U. S. 12, 29 L. ed. 80, 5 Sup. Ct. Rep. 1042—*Pomace Holder Co. v. Ferguson* (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—*Grant v. Walter*, 148 U. S. 554, 37 L. ed. 557, 13 Sup. Ct. Rep. 699—*Leonard v. Lovell*, 29 Fed. 314—*Cluett v. Claffin*, 30 Fed. 924—*Wright v. Yuengling*, 33 Fed. 656—*Grant v. Walter*, 38 Fed. 596—*Bonnell v. Stoll*, 57 Fed. 307—*Bonnell v. Stoll*, 10 C. C. A. 50, 17 U. S. App. 543, 81 Fed. 768—*Stirrat v. Excelsior Mfg. Co.* 10 C. C. A. 220, 27 U. S. App. 13, 61 Fed. 984—*Simonds Mfg. Co. v. E. C. Atkins & Co.* 63 Fed. 587—*Sampson v. Donaldson*, 16 C. C. A. 345, 32 U. S. App. 712, 69 Fed. 624.

69. Patent 325,410, for an oval roll of toilet paper, is invalid because rolls of the same shape, though of smaller size, had been previously in use. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 14 Sup. Ct. Rep. 627, 38: 500

70. Cutting in two a double-roll spring used to attach a sweat-pad to a horse-collar, and using only one roll of it for clasp-ing only the fore-wale or small roll of the collar, does not involve an act of invention as distinguished from mere mechanical skill. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76, 35: 800
Cited in Patent Clothing Co. v. Glover, 141 U. S. 563, 35 L. ed. 859, 12 Sup. Ct. Rep. 79—*Doyle v. McRoberts*, 10 App. D. C. 468.

71. Where, in the manufacture of cider, the use of a rack on which to place the pomace, and a cloth to cover the pomace, within an inclosure, enabling the operator to make the pomace of uniform depth and prevent the lateral spreading of the pomace, was old, there is no invention in making the rack larger than the guide frame. *Clark Pomace Holder Co. v. Ferguson* (Pomace Holder Co. v. Ferguson) 119 U. S. 335, 7 Sup. Ct. Rep. 382, 30: 406
Cited in Dreyfus v. Searle, 124 U. S. 64, 31 L. ed. 354, 8 Sup. Ct. Rep. 390—*Hendy v.*

Golden State & Miner's Iron Works, 127 U. S. 375, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—Royer v. Roth, 132 U. S. 206, 33 L. ed. 324, 10 Sup. Ct. Rep. 58—Hill v. Wooster, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—Butler v. Steckel, 137 U. S. 29, 34 L. ed. 585, 11 Sup. Ct. Rep. 25—Cluett v. Clafin, 30 Fed. 924—United States Bung Mfg. Co. v. Independent Bung & Bushing Co. 31 Fed. 79—Landesmann v. Jonasson, 32 Fed. 591—Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 33 Fed. 256—Brahn v. Ramapo Iron-Works, 35 Fed. 66—Root v. Sontag, 47 Fed. 313—Johnson Co. v. Pacific Rolling-Mills Co. 47 Fed. 590—Briggs v. Central Ice Co. 54 Fed. 379—Olmsted v. A. H. Andrews & Co. 23 C. C. A. 493, 46 U. S. App. 608, 77 Fed. 840.

72. There is no invention in providing, at the part of the frame of a carriage dash where the foot is to be attached, a bearing surface to support a brace and dash, either by an increase in the quantity of metal or otherwise. *Peters v. Hanson*, 129 U. S. 541, 9 Sup. Ct. Rep. 393, 32: 742
Cited in Knapp v. Morris, 150 U. S. 227, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81.

73. Circular plates attached to circular saws secured by rivets or screws, for the purpose of strengthening the central portion of the saw-plate, being old, as is also a deflecting plate covering the upper part of the stiffening plate, for the purpose of spreading the lumber sawed, there is no invention in putting such a plate on each side of the saw, although two plates may be better than one. *Dunbar v. Meyers*, 94 U. S. 187, 24: 34

4. Substitution of Materials and Equivalents.

Change of materials.

See also *infra*, 757.

74. The substitution of one material for another, which does not involve change of method or novelty of use, even though it may result in a superior article, is not necessarily a patentable invention. *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. Rep. 20, 34: 574
Cited in Kilbourne v. W. Bingham Co. 1 C. C. A. 623, 6 U. S. App. 65, 50 Fed. 703.

75. To suspend a woven wire fabric well known as a bed bottom, in substantially the same manner that other fabrics used for that purpose had been suspended, is not patentable. *Ryan v. Hard*, 145 U. S. 241, 12 Sup. Ct. Rep. 919, 36: 691
Cited in Lovell Mfg. Co. v. Cary, 147 U. S. 637, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*Saunders v. Allen*, 53 Fed. 110—*Vulcan Iron Works v. Smith*, 10 C. C. A. 497, 15 U. S. App. 577, 62 Fed. 449.

76. The change of one material for another in the formation of a product constitutes invention, where more is supplied than mere mechanical judgment and good taste. *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23: 952
Cited in Brown v. District of Columbia, 130 U. S. 100, 32 L. ed. 868, 9 Sup. Ct. Rep. 437—*C. & A. Potts & Co. v. Creager*, 155 U. S.

609, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—*Comstock v. Sandusky Seat Co.* 3 Bann. & Ard. 190, Fed. Cas. No. 3,082—*Terry Clock Co. v. New Haven Clock Co.* 4 Bann. & Ard. 123, Fed. Cas. No. 13,840—*Welling v. Crane*, 21 Fed. 708—*New York Bung & Bushing Co. v. Doelger*, 23 Blatchf. 171, 23 Fed. 184—*Celluloid Mfg. Co. v. Tower*, 26 Fed. 454—*Butler v. Bainbridge*, 29 Fed. 145—*White v. Surdam*, 41 Fed. 791—*Vulcanized Fiber Co. v. Taylor*, 49 Fed. 746—*Ballard v. McCluskey*, 58 Fed. 882—*Beach v. American Box-Mach. Co.* 63 Fed. 602—*A. B. Dick Co. v. Wichelmann*, 74 Fed. 801—*J. G. Brill Co. v. Wilson*, 75 Fed. 1003—*American Sulphite Pulp Co. v. Howland Falls Pulp Co.* 25 C. C. A. 513, 50 U. S. App. 52, 80 Fed. 408—*King v. Anderson*, 90 Fed. 505—*Hallock v. Davidson*, 107 Fed. 486—*Armat Moving Picture Co. v. American Mutoscope Co.* 118 Fed. 849.

77. The substitution of metal for wood is destitute both of patentable invention and utility. *Terhune v. Phillips*, 99 U. S. 592, 25: 293
Cited in C. & A. Potts & Co. v. Creager, 155 U. S. 608, 39 L. ed. 279, 15 Sup. Ct. Rep. 194.

78. The substitute of metal for wood and metal in a known machine is not a patentable invention. *Hicks v. Kelsey*, 18 Wall. 670, 21: 852

Distinguished in Goodyear Dental Vulcanite Co. v. Willis, 1 Bann. & Ard. 578, Fed. Cas. No. 5,603.

Cited in Reckendorfer v. Faber, 92 U. S. 354, 23 L. ed. 722—*Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 496, 23 L. ed. 955—*Dunbar v. Myers*, 94 U. S. 198, 24 L. ed. 39—*Heald v. Rice*, 104 U. S. 755, 26 L. ed. 916—*Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.* 110 U. S. 494, 28 L. ed. 223, 4 Sup. Ct. Rep. 220—*Brown v. District of Columbia*, 130 U. S. 100, 32 L. ed. 868, 9 Sup. Ct. Rep. 437—*Florsheim v. Schilling*, 137 U. S. 76, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—*C. & A. Potts & Co. v. Creager*, 155 U. S. 608, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—*Alcott v. Young*, 16 Blatchf. 138, 4 Bann. & Ard. 202, Fed. Cas. No. 149—*Dalton v. Nelson*, 18 Blatchf. 359, 2 Bann. & Ard. 228, Fed. Cas. No. 3,549—*Milligan & H. Glue Co. v. Upton*, 4 Clif. 251, 1 Bann. & Ard. 513, Fed. Cas. No. 9,607—*Rumford Chemical Works v. Hecker*, 2 Bann. & Ard. 361, Fed. Cas. No. 12,133—*Simmons v. Blackinton*, 3 Bann. & Ard. 484, Fed. Cas. No. 12,866—*United States Stamping Co. v. King*, 17 Blatchf. 64, 4 Bann. & Ard. 477, 7 Fed. 868—*New York Bung & Bushing Co. v. Doelger*, 23 Blatchf. 171, 23 Fed. 194—*Florsheim v. Schilling*, 26 Fed. 260—*J. L. Mott Iron Works v. Cassidy*, 31 Fed. 48—*National Sheet-Metal Roofing Co. v. Garwood*, 35 Fed. 660—*Celluloid Mfg. Co. v. Frederick Crane Chemical Co.* 36 Fed. 111—*Potts v. Creager*, 44 Fed. 683—*Kilbourne v. W. Bingham Co.* 47 Fed. 58—*Vulcanized Fiber Co. v. Taylor* 49 Fed. 746—*Kilbourne v. W. Bingham Co.* 1 C. C. A. 623, 6 U. S. App. 65, 50 Fed. 703—*Klein v. Seattle*, 23 C. C. A. 119, 44 U. S. App. 741, 77 Fed. 205—*Brunswick-Balke-Collender Co. v. Phelan Billiard-Ball Co.* 24 C. C. A. 453, 51 U. S. App. 9, 79 Fed. 87—*Union Gas-Engine Co. v. Doak*, 88 Fed. 90—*Union Hardware Co. v. Selchow*, 112 Fed. 1008—*George Frost Co. v. Cohn*, 112 Fed. 1010—*Stetson v. Herreshoff Mfg. Co.* 113 Fed. 936—*Thomas v. Spencer*, 122 Fed. 878—*Drake Castle Pressed Steel Lug Co. v.*

Brownell, 59 C. C. A. 217, 123 Fed. 87—
Re Cheneau, 5 App. D. C. 202—Durham v.
Seymour, 6 App. D. C. 100.

79. The substitution of porcelain or clay
for metal or wood, in combination with a
particular shank in making door knobs, is
no invention. Hotchkiss v. Greenwood, 11
How. 248, 13: 683

Limited in Celluloid Mfg. Co. Frederick Crane
Chemical Co 36 Fed. 111.

Cited in Hicks v. Kelsey, 18 Wall. 674, 21 L.
ed. 853, 2 Whitman, Pat. Cas. 475—Recken-
dorfer v. Faber, 92 U. S. 362, 23 L. ed.
722—Smith v. Goodyear Dental Vulcanite
Co. 93 U. S. 492, 23 L. ed. 953—Heald v.
Rice, 104 U. S. 755, 26 L. ed. 916—Phillips
v. Detroit, 111 U. S. 607, 28 L. ed. 533, 4
Sup. Ct. Rep. 580—Brown v. District of
Columbia, 130 U. S. 100, 32 L. ed. 868, 9
Sup. Ct. Rep. 437—Florsheim v. Schilling,
137 U. S. 76, 34 L. ed. 579, 11 Sup. Ct.
Rep. 20—Carter v. Messinger, 11 Blatchf.
43, Fed. Cas. No. 2,478—Comstock v. San-
dusky Seat Co. 3 Bann. & Ard. 190, Fed.
Cas. No. 3,082—Goodyear Dental Vulcanite
Co. v. Smith, Holmes, 362, 1 Bann. & Ard.
211, Fed. Cas. No. 5,598—Goodyear Dental
Vulcanite Co. v. Willis, 1 Bann. & Ard. 578,
Fed. Cas. No. 5,603—Re Maynard, MacArth.
Pat. Cas. 537, Fed. Cas. No. 9,352—Phillip
v. Detroit, 4 Bann. & Ard. 350, Fed. Cas.
No. 11,100—Putnam v. Weatherbee, Holmes,
499, 2 Bann. & Ard. 80, Fed. Cas. No. 11-
485—Simmons v. Blackinton, 3 Bann. &
Ard. 484, Fed. Cas. No. 12,866—Union Pa-
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Crane, 21 Fed. 708—New York Bung & Bush-
ing Co. v. Doelger, 23 Blatchf. 170, 23 Fed.
194—Florsheim v. Schilling, 26 Fed. 260—
J. L. Mott Iron Works v. Cassidy, 31 Fed.
48—National Sheet-Metal Roofing Co. v. Gar-
wood, 35 Fed. 660—Brush Electric Co. v.
Julien Electric Co. 41 Fed. 693—Potts v.
Creager, 44 Fed. 683—Kilbourne v. W. Bing-
ham Co. 47 Fed. 58—Vulcanized Fibre Co.
v. Taylor, 49 Fed. 746—Kilbourne v. W.
Bingham Co. 1 C. C. A. 623, 6 U. S. App. 65,
50 Fed. 703.

80. Wagon reaches having an upward
bend or curve to allow the forward wheels
to turn under them, made of wood strength-
ened by strips of iron, having long been
used, there is no invention in substituting
iron as the material for the curved portion
of the reach. Hicks v. Kelsey, 18 Wall. 670,
21: 852

81. Shawl straps with handles attached
to leather cross pieces having loops at the
ends in which the cross pieces had been
sometimes doubled and stitched so as to
render them firm, having been previously
known and publicly used, a patent for an
alleged invention in stiffening the cross
piece by artificial means, such as the ad-
dition of metal or other substance, is void,
there being no change of the substantial
elements. Crouch v. Roemer, 103 U. S.
797, 26: 426
Cited in Brown v. Texas Cactus Hedge Co. 64
Tex. 399.

Equivalents.

Infringement by Use of Equivalent,
see *infra*, XIV. c.
U. S. Dig.—269

Infringement of Patent for Combina-
tions by Substitution of, see *infra*,
935-949.

On Application for Reissue, see *infra*,
632, 633.

See also *infra*, 100.

82. A mere substitution of mechanical
equivalents does not constitute invention.
Imhaeuser v. Buerk, 101 U. S. 647,
25: 945

Cited in Rowell v. Lindsay, 113 U. S. 102,
28 L. ed. 908, 5 Sup. Ct. Rep. 507—Electric
R. S. Co. v. Hall R. Signal Co. 114 U. S.
98, 29 L. ed. 99, 5 Sup. Ct. Rep. 1069—
Westinghouse v. Boyden Power Brake Co.
170 U. S. 567, 42 L. ed. 1147, 18 Sup.
Ct. Rep. 707—Campbell v. Bailey, 45 Fed.
565—Norton v. Jensen, 1 C. C. A. 460, 7
U. S. App. 676, 49 Fed. 868—Holloway v.
Dow, 54 Fed. 517—Pacific Cable R. Co. v.
Butte City Street R. Co. 58 Fed. 421—Gil-
bert v. Reinhardt Numbering Mach. Co. 58
Fed. 976—Rhodes v. Lincoln Press Drill Co.
64 Fed. 219—Norton v. Jensen, 81 Fed. 498
—National Folding-Box & Paper Co. v. El-
sas, 30 C. C. A. 489, 57 U. S. App. 66, 36
Fed. 919—Beach v. Hobbs, 34 C. C. A.
253, 63 U. S. App. 626, 92 Fed. 150—
National Hollow Brake-Beam Co. v. Inter-
changeable Brake-Beam Co. 45 C. C. A. 562,
106 Fed. 711—Brammer v. Schroeder, 46
C. C. A. 44, 106 Fed. 921.

83. The substitution of a vertical for a
horizontal mid-feather in a patent for a
rag-engine for paper-making is merely the
use of an old and well-known mechanical
equipment. Hoyt v. Horne, 145 U. S. 302,
12 Sup. Ct. Rep. 922, 36: 713

Cited in Deering v. Winona Harvester Works,
155 U. S. 295, 39 L. ed. 157, 15 Sup. Ct.
Rep. 118—Harmon v. Struthers, 57 Fed.
689—Reece Button-Hole Mach. Co. v. Globe
Button-Hole Mach. Co. 10 C. C. A. 202, 21
U. S. App. 244, 61 Fed. 966—Hoe v. Scott,
65 Fed. 609—Bundy Mfg. Co. v. Detroit
Time Register Co. 36 C. C. A. 391, 94 Fed.
540—Adam v. Folger, 56 C. C. A. 543, 120
Fed. 263.

5. New Application of Old Devices.

Combination of Old Device, see *infra*, 168,
171, 173.

As Infringement, see *infra*, 1028.

See also *infra*, 181, 278, 502, 585.

Adaptation.

See also *infra*, 92, 98, 100, 419.

84. The adaptation of a mechanical instru-
ment to a new use is not a new invention,
and is not patentable. Tucker v. Spalding,
13 Wall. 453, 20: 519
Roberts v. Ryer, 91 U. S. 150, 23: 267
Phillips v. Page, 24 How. 164, 16: 639
Distinguished in Overweight Counterbalance
Elevator Co. v. Improved Order, R. M. H.
Asso. 36 C. C. A. 128, 94 Fed. 158—Gott-
fried v. Phillip Best Brewing Co. 5 Bann. &
Ard. 36, Fed. Cas. No. 5,633.

Cited in Dunbar v. Myers, 94 U. S. 198, 24
L. ed. 38—Stow v. Chicago, 104 U. S. 550, 26
L. ed. 817—Pennsylvania R. Co. v. Loco-
motive Engine Safety Truck Co. 110 U. S.
494, 28 L. ed. 223, 4 Sup. Ct. Rep. 220—

Morris v. McMillin, 112 U. S. 249, 28 L. ed. 704, 5 Sup. Ct. Rep. 218—Eachus v. Broomall, 115 U. S. 436, 29 L. ed. 422, 6 Sup. Ct. Rep. 229—Royer v. Schultz Belting Co. 135 U. S. 325, 34 L. ed. 218, 10 Sup. Ct. Rep. 833—Fond Du Lac County v. May, 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—Ansonia Brass & C. Co. v. Electrical Supply Co. 144 U. S. 18, 36 L. ed. 329, 12 Sup. Ct. Rep. 601—Lovell Mfg. Co. v. Cary, 147 U. S. 634, 37 L. ed. 311, 13 Sup. Ct. Rep. 472—Miller v. Eagle Mfg. Co. 151 U. S. 201, 38 L. ed. 129, 14 Sup. Ct. Rep. 310—C. & A. Potts & Co. v. Creager, 155 U. S. 607, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—Alcott v. Young, 16 Blatchf. 138, 4 Bann. & Ard. 202, Fed. Cas. No. 149—Bray v. Hartshorn, 1 Cliff. 541, Fed. Cas. No. 1,820—Gottfried v. Phillip Best Brewing Co. 5 Bann. & Ard. 33, Fed. Cas. No. 5,633—Milligan & H. Glue Co. v. Upton, 4 Cliff. 251, 1 Bann. & Ard. 512, Fed. Cas. No. 9,607—Warth v. Browning, 5 Bann. & Ard. 344, Fed. Cas. No. 17,209a—Tinker v. Wilbers Eureka Mower & Reaper Mfg. Co. 5 Bann. & Ard. 94, 1 Fed. 139—Yale Lock Mfg. Co. v. Norwich Nat. Bank, 19 Blatchf. 130, 6 Fed. 385—Smith v. Merriam, 6 Fed. 718—Gottfried v. Crescent Brewing Co. 9 Fed. 766—Cottler v. Stimson, 10 Sawy. 216, 20 Fed. 909—New Process Fermentation Co. v. Koch, 21 Fed. 582—Odell v. Stout, 22 Fed. 162—Leonard v. Lovell, 29 Fed. 314—McClain v. Ortmayer, 33 Fed. 286—Thompson v. Gildersleeve, 34 Fed. 45—Thompson v. American Bank Note Co. 35 Fed. 204—Rapid Service Store R. Co. v. Taylor, 48 Fed. 253—Stelner Fire Extinguisher Co. v. Adrian, 52 Fed. 733—Aerated Fuel Co. v. Woodbury Glass Co. 54 Fed. 388—McCormick Harvesting Mach. Co. v. C. Aultman & Co. 58 Fed. 777—Appleton Mfg. Co. v. Star Mfg. Co. 9 C. C. A. 46, 18 U. S. App. 492, 60 Fed. 415—Galt v. Parlin & O. Co. 9 C. C. A. 54, 18 U. S. App. 518, 60 Fed. 422—H. W. Johns Mfg. Co. v. Robertson, 60 Fed. 904—Browning v. Colorado Teleph. Co. 10 C. C. A. 113, 27 U. S. App. 81, 61 Fed. 847—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 203, 21 U. S. App. 244, 61 Fed. 966—Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co. 14 C. C. A. 649, 33 U. S. App. 188, 67 Fed. 793—Griswold v. Wagner, 15 C. C. A. 530, 37 U. S. App. 171, 68 Fed. 499—Thomson-Houston Electric Co. v. Elmira & H. R. Co. 18 C. C. A. 156, 38 U. S. App. 55, 71 Fed. 406—Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co. 19 C. C. A. 20, 37 U. S. App. 555, 72 Fed. 75—L. Schreiber & Sons Co. v. Grimm, 19 C. C. A. 70, 43 U. S. App. 10, 72 Fed. 675—Wilgus v. Germain, 19 C. C. A. 192, 44 U. S. App. 369, 72 Fed. 777—H. W. Johns Mfg. Co. v. Robertson, 23 C. C. A. 602, 45 U. S. App. 298, 77 Fed. 987—Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 129, 54 U. S. App. 591, 85 Fed. 226—Union Gas-Engine Co. v. Doak, 88 Fed. 90—Newton Mfg. Co. v. Wilgus, 90 Fed. 485—Falk Mfg. Co. v. Missouri R. Co. 91 Fed. 158—National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co. 45 C. C. A. 560, 106 Fed. 709—De Lamar v. De Lamar Min. Co. 110 Fed. 543—Standard Caster & Wheel Co. v. Caster Socket Co. 51 C. C. A. 112, 113 Fed. 165—Johnson Co. v. Toledo Traction Co. 56 C. C. A. 423, 119 Fed. 893—Antislade v. Bent, 122 Fed. 814—Hill v. Hodge, 12 App. D. C. 531—Ruete v. Elwell, 15 App. D. C. 28—Rosell v. Allen, 16 App. D. C. 566—Burke v. Partridge, 58 N. H. 353.

85. A common umbrella having all the elements of a combination for an adjustable dress form, there is no invention in adapting the old device to a new one. Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. Rep. 81, 37: 1059

Cited in Electric R. Co. v. Jamaica & B. R. Co. 61 Fed. 873—Browning v. Colorado Teleph. Co. 10 C. C. A. 113, 27 U. S. App. 81, 61 Fed. 847—Gamewell Fire-Alarm Teleph. Co. v. Municipal Signal Co. 10 C. C. A. 189, 21 U. S. App. 157, 61 Fed. 932—New Departure Bell Co. v. Bevin Bros. Mfg. Co. 64 Fed. 864—Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co. 14 C. C. A. 649, 33 U. S. App. 188, 67 Fed. 793—Andrews v. Thum, 15 C. C. A. 69, 33 U. S. App. 39, 67 Fed. 913—Eastman Co. v. Getz, 77 Fed. 419—Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 133, 54 U. S. App. 591, 85 Fed. 230—Hickory Wheel Co. v. Frazier, 40 C. C. A. 299, 100 Fed. 102—Goodyear Fire & Rubber Co. v. Rubber Fire Wheel Co. 53 C. C. A. 589, 116 Fed. 369.

86. Changes in the construction and operation of an old machine, so as to adapt it to a new and valuable use, are patentable. Seymour v. Osborne, 11 Wall. 516.

20: 33
Cited in Sewall v. Jones, 91 U. S. 190, 23 L. ed. 279—Cantrell v. Wallick, 117 U. S. 694, 29 L. ed. 1018, 6 Sup. Ct. Rep. 970—Calkins v. Bertraud, 6 Biss. 496, Fed. Cas. No. 2,317—Cook v. Ernest, 5 Fisher, Pat. Cas. 406, Fed. Cas. No. 3,155—Henderson v. Cleveland Co-op. Stove Co. 2 Bann. & Ard. 608, Fed. Cas. No. 6,351—Jones v. Sewall, 3 Cliff. 574, 6 Fisher, Pat. Cas. 351, Fed. Cas. No. 7,495—McComb v. Ernest, 1 Woods. 204, Fed. Cas. No. 8,710—Thomson v. Citizens' Nat. Bank, 3 C. C. A. 521, 10 U. S. App. 500, 53 Fed. 253—Griswold v. Harker, 10 C. C. A. 438, 21 U. S. App. 122, 62 Fed. 391—Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co. 19 C. C. A. 20, 37 U. S. App. 555, 72 Fed. 74—P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co. 22 C. C. A. 668, 40 U. S. App. 200, 76 Fed. 975—Adams Electric R. Co. v. Lindell R. Co. 23 C. C. A. 231, 40 U. S. App. 482, 77 Fed. 441—National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co. 45 C. C. A. 557, 106 Fed. 707—Sperry Mfg. Co. v. J. L. Owens Co. 49 C. C. A. 402, 111 Fed. 391—Kinloch Teleph. Co. v. Western Electric Co. 51 C. C. A. 375, 113 Fed. 665—Ide v. Thorlicht, D. & R. Carpet Co. 53 C. C. A. 347, 115 Fed. 143—Moore v. Schaw, 118 Fed. 607—Lamb Knit Goods Co. v. Lamb Glove & Mitten Co. 56 C. C. A. 552, 120 Fed. 272—Anderson v. Collins, 58 C. C. A. 677, 122 Fed. 459.

Analogous use.

87. The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. Howe Mach. Co. v. National Needle Co. 134 U. S. 388, 10 Sup. Ct. Rep. 570, 33: 963

Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co. 110 U. S. 490, 4 Sup. Ct. Rep. 220, 28: 222
King v. Gallun, 109 U. S. 99, 3 Sup. Ct. Rep. 85, 27: 870

Miller v. Foree, 116 U. S. 22, 6 Sup. Ct. Rep. 204, 29: 552
 de St. Germain v. Brunswick (St. Germain v. Brunswick) 135 U. S. 227, 10 Sup. Ct. Rep. 822, 34: 122
 Consolidated Roller Mill Co. v. Walker, 138 U. S. 124, 11 Sup. Ct. Rep. 292, 34: 920
 Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. Rep. 472, 37: 307
 Grant v. Walter, 148 U. S. 547, 13 Sup. Ct. Rep. 699, 37: 552
 Blake v. San Francisco, 113 U. S. 679, 5 Sup. Ct. Rep. 692, 28: 1070
Distinguished in Bell v. United States Stamp- ing Co. 32 Fed. 550—Hoe v. Kahler, 23 Blatchf. 362, 25 Fed. 277.
Cited in Morris v. McMillin, 112 U. S. 248, 28 L. ed. 704, 5 Sup. Ct. Rep. 218—Blake v. San Francisco, 113 U. S. 682, 28 L. ed. 1072, 5 Sup. Ct. Rep. 692—Thompson v. Botsseller, 114 U. S. 12, 29 L. ed. 80, 3 Sup. Ct. Rep. 1042—Stephenson v. Brooklyn C. T. R. Co. 114 U. S. 154, 29 L. ed. 60, 5 Sup. Ct. Rep. 777—Western Electric Mfg. Co. v. Ansonia Brass & C. Co. 114 U. S. 451, 29 L. ed. 211, 5 Sup. Ct. Rep. 941—Eachus v. Broom- all, 115 U. S. 436, 29 L. ed. 422, 6 Sup. Ct. Rep. 229—Miller v. Foree, 116 U. S. 27, 29 L. ed. 554, 6 Sup. Ct. Rep. 204—Gardner v. Herz, 118 U. S. 193, 30 L. ed. 164, 6 Sup. Ct. Rep. 1027—Peters v. Active Mfg. Co. 129 U. S. 541, 32 L. ed. 742, 9 Sup. Ct. Rep. 389—Howe Mach. Co. v. National Needle Co. 134 U. S. 397, 33 L. ed. 968, 10 Sup. Ct. Rep. 570—Fond Du Lac County v. May, 137 U. S. 407, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—Consolidated Roller Mill Co. v. Walker, 138 U. S. 132, 34 L. ed. 923, 11 Sup. Ct. Rep. 292—Patent Clothing Co. v. Glover, 141 U. S. 563, 35 L. ed. 859, 12 Sup. Ct. Rep. 79—Ansonia Brass & Copper Co. v. Electrical Supply Co. 144 U. S. 18, 36 L. ed. 329, 12 Sup. Ct. Rep. 601—Lovell Mfg. Co. v. Cary, 147 U. S. 636, 37 D. ed. 312, 13 Sup. Ct. Rep. 472—Grant v. Walker, 148 U. S. 553, 37 L. ed. 556, 13 Sup. Ct. Rep. 699—C. & A. Potts & Co. v. Creager, 155 U. S. 607, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—National Cash Register Co. v. Boston Cash Indicator & Recorder Co. 156 U. S. 515, 39 L. ed. 516, 15 Sup. Ct. Rep. 434—McCarty v. Lehigh Valley R. Co. 160 U. S. 118, 40 L. ed. 362, 16 Sup. Ct. Rep. 240—Collins Co. v. Coes, 21 Fed. 39—Howe Mach. Co. v. National Needle Co. 21 Fed. 631—Spill v. Celluloid Mfg. Co. 22 Blatchf. 442, 21 Fed. 632—Goodyear v. Hartford Spring Axle Co. 23 Blatchf. 161, 23 Fed. 37—Kappes v. Hartung, 23 Blatchf. 154, 23 Fed. 188—United States v. Gunning, 23 Fed. 669—Scheidler v. Tustin, 23 Fed. 890—Hoe v. Kahler, 23 Blatchf. 362, 25 Fed. 277—Scott Mfg. Co. v. Sayre, 26 Fed. 154—Niles Tool-Works v. Betts Mach. Co. 27 Fed. 305—Leonard v. Lovell, 29 Fed. 314—Gloucester Isinglass & Glue Co. v. Le Page, 30 Fed. 372—Celluloid Mfg. Co. v. American Zylonite Co. 31 Fed. 910—Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 33 Fed. 256—Babcock & W. Co. v. Pioneer Iron-Works, 34 Fed. 339—Hale & K. Mfg. Co. v. Hartford Woven Wire Mattress Co. 36 Fed. 764—Electrical Accumulator Co. v. Julien Electric Co. 38 Fed. 139—Grant v. Walter, 38 Fed. 596—Consolidated Roller Mill Co. v. Walker, 43 Fed. 578—Foster v. Crossin, 44 Fed. 63—Campbell v. Bailey, 45 Fed. 565—Zins- ser v. Krueger, 45 Fed. 577—Campbell v. New York, 47 Fed. 516—Haughey v. Lee, 48 Fed. 384—Zinsser v. Kreuger, 1 C. C. A.

76, 3 U. S. App. 1, 48 Fed. 300—Foos Mfg. Co. v. Springfield Engine & Thresher Co. 1 C. C. A. 412, 6 U. S. App. 14, 49 Fed. 643—Dederick v. Gardner, 50 Fed. 100—Watson v. Stevens, 2 C. C. A. 503, 5 U. S. App. 101, 51 Fed. 759—Siemens v. Chambers & M. Glass Co. 51 Fed. 908—Bromley Bros. Carpet Co. v. Stewart, 51 Fed. 914—Rich- mond v. Atwood, 17 L.R.A. 618, 2 C. C. A. 607, 5 U. S. App. 151, 52 Fed. 21—Fox v. Perkins, 3 C. C. A. 40, 6 U. S. App. 200, 52 Fed. 213—Steiner Fire Extinguisher Co. v. Adrian, 52 Fed. 733—Stutz v. Robson, 54 Fed. 507—Bonnell v. Stoll, 57 Fed. 397—Burnham & D. Railway Appliance Co. v. Naumkeag Street R. Co. 57 Fed. 652—Mc- Kay & C. Lasting Mach. Co. v. Claffin, 58 Fed. 350—McCormick Harvesting Mach. Co. v. C. Aultman & Co. 58 Fed. 777—Steiner Fire Extinguisher Co. v. Adrian, 8 C. C. A. 48, 16 U. S. App. 409, 59 Fed. 136—Wales v. Waterbury Mfg. Co. 59 Fed. 288—Briggs v. Central Ice Co. 8 C. C. A. 483, 20 U. S. App. 374, 60 Fed. 90—Appleton Mfg. Co. v. Star Mfg. Co. 9 C. C. A. 46, 18 U. S. App. 492, 60 Fed. 414—Newark Watch-Case Ma- terial Co. v. Wilmot & H. Mfg. Co. 60 Fed. 617—Bowman v. De Grauw, 60 Fed. 911—Electric R. Co. v. Jamalca & B. R. Co. 61 Fed. 673—MacKnight v. McMeice, 64 Fed. 118—New Departure Bell Co. v. Bevin Bros. Mfg. Co. 64 Fed. 863—Crossley v. Duggan, 71 Fed. 969—L. Schreiber & Sons Co. v. Grimm, 19 C. C. A. 70, 43 U. S. App. 10, 72 Fed. 675—Eastman Co. v. Getz, 77 Fed. 419—Olmsted v. A. H. Andrews & Co. 23 C. C. A. 493, 46 U. S. App. 608, 77 Fed. 840—Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 133, 54 U. S. App. 591, 85 Fed. 230—United States Repair & Guaranty Co. v. Standard Paving Co. 87 Fed. 344—Briggs v. Duell, 87 Fed. 480—Union Gas Engine Co. v. Doak, 88 Fed. 90—Falk Mfg. Co. v. Missouri R. Co. 91 Fed. 158—Cushman Paper Box Mach. Co. v. Goddard, 87 C. C. A. 223, 95 Fed. 666—Ryan v. Newark Spring Mat- tress Co. 96 Fed. 103—Plumb v. New York, N. H. & H. R. Co. 97 Fed. 647—National Chemical & Fertilizer Co. v. Swift & Co. 43 C. C. A. 423, 104 Fed. 89—National Meter Co. v. Thomson Meter Co. 106 Fed. 540—De Lamar v. De Lamar Min. Co. 54 C. C. A. 219, 117 Fed. 247—United Blue-Flame Oil Stove Co. v. Glasier, 55 C. C. A. 558, 119 Fed. 162—Johnson Co. v. Toledo Traction Co. 56 C. C. A. 421, 119 Fed. 891—Farrell v. Boston & M. Consol. Copper & S. Min. Co. 121 Fed. 846—United States Peg Wood, Shank & Leather Board Co. v. B. F. Sturte- vant Co. 122 Fed. 472—Antislid v. Bent, 122 Fed. 814—Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co. 60 C. C. A. 537, 125 Fed. 769—Neptune Meter Co. v. National Meter Co. 62 C. C. A. 349, 127 Fed. 567—Re Faure, 8 Mackey, 268—Re Briggs, 9 App. D. C. 481—Zinsser v. Krueger, 1 Pa. Dist. R. 68—Siemens v. Chambers & McK. Glass Co. 23 Pittsb. L. J. N. S. 26—Stephenson v. Brook- lyn Cross Town R. Co. 42 Phila. Leg. Int. 162.
 88. The application of an old process to a new and analogous purpose does not involve invention, even if the new result had not before been contemplated. Ansonia Brass & Copper Co. v. Electrical Supply Co. 144 U. S. 11, 12 Sup. Ct. Rep. 601, 36: 327
Cited in Lovell Mfg. Co. v. Cary, 147 U. S. 637, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—Watson v. Stevens, 2 C. C. A. 503, 5 U. S. App. 101, 51 Fed. 759—Westinghouse v.

New York Air-Brake Co. 59 Fed. 580—
Browning v. Colorado Teleph. Co. 10 C. C. A. 113, 27 U. S. App. 81, 61 Fed. 847—
Gibbon v. Loewer Sole-Rounder Co. 24 C. C. A. 614, 29 U. S. App. 554, 79 Fed. 327—
American Sulphite Pulp Co. v. Howland Falls Pulp Co. 25 C. C. A. 505, 50 U. S. App. 52, 80 Fed. 400—United States Repair & G. Co. v. Standard Paving Co. 87 Fed. 843—
Ryan v. Newark Spring Mattress Co. 96 Fed. 103—Falk Mfg. Co. v. Missouri R. Co. 43 C. C. A. 247, 103 Fed. 302—Johnson Co. v. Toledo Traction Co. 56 C. C. A. 423, 119 Fed. 893.

89. The application of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any new or original idea, is not patentable. Brown v. Piper, 91 U. S. 37, 23: 200
Noted in Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co. 110 U. S. 494, 28 L. ed. 223, 4 Sup. Ct. Rep. 220—Eachus v. Bromall, 115 U. S. 436, 29 L. ed. 422, 6 Sup. Ct. Rep. 129—Florsheim v. Schilling, 137 U. S. 77, 34 L. ed. 579, 11 Sup. Ct. Rep. 17—Fond Du Lac County v. May, 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—Grant v. Walter, 148 U. S. 553, 37 L. ed. 558, 13 Sup. Ct. Rep. 699—C. A. Potts & Co. v. Creager, 155 U. S. 607, 39 L. ed. 279, 15 Sup. Ct. Rep. 104—National Cash Register Co. v. Boston Cash Indicator & Recorder Co. 156 U. S. 515, 39 L. ed. 516, 15 Sup. Ct. Rep. 434—Alcott v. Young, 16 Blatchf. 139, Fed. Cas. No. 149—Cone v. Morgan Envelope Co. 4 Bann. & Ard. 109, Fed. Cas. No. 3,096—Root v. E. N. Welch Mfg. Co. 17 Blatchf. 483, 4 Fed. 427—Western Electric Mfg. Co. v. Ansonia Brass & Copper Co. 20 Blatchf. 173, 9 Fed. 708—Cotler v. Stimson, 10 Sawy. 216, 20 Fed. 909—New York Bung & Bushing Co. v. Doelger, 23 Blatchf. 171, 23 Fed. 194—Leonard v. Lovell, 29 Fed. 314—Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 33 Fed. 256—Appleton Mfg. Co. v. Star Mfg. Co. 9 C. C. A. 45, 18 U. S. App. 492, 60 Fed. 413—Browning v. Colorado Teleph. Co. 10 C. C. A. 113, 27 U. S. App. 81, 61 Fed. 847—Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co. 14 C. C. A. 649, 33 U. S. App. 188, 67 Fed. 793—Griswold v. Wagner, 15 C. C. A. 530, 37 U. S. App. 171, 68 Fed. 499—L. Schreiber & Sons Co. v. Grimm, 19 C. C. A. 70, 43 U. S. App. 10, 72 Fed. 675—Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 131, 54 U. S. App. 591, 85 Fed. 228—Union Gas-Engine Co. v. Doak, 88 Fed. 90—Briggs v. Duell, 36 C. C. A. 40, 93 Fed. 974—Standard Caster & Wheel Co. v. Caster Socket Co. 51 C. C. A. 112, 113 Fed. 165—Johnson Co. v. Toledo Traction Co. 56 C. C. A. 423, 119 Fed. 893—Capewell v. Goldsmith, 138 Fed. 686—Fitzgerald Meat Tree Co. v. Nelson Morris & Co. 142 Fed. 765—Voigtmann v. Weis & Ridge Cornice Co. 78 C. C. A. 538, 148 Fed. 853.

90. If the relation between the new and the former use of a device is remote, and especially if the use of the old device produces a new result, it may involve the exercise of the inventive faculty. C. & A. Potts & Co. v. Creager, 155 U. S. 597, 15 Sup. Ct. Rep. 194, 39: 275
Distinguished in Griswold v. Wagner, 15 C. C. A. 529, 37 U. S. App. 171, 68 Fed. 498—Palmer v. John E. Brown Mfg. Co. 84 Fed. 457—Falk Mfg. Co. v. Missouri R. Co. 43 C. C. A. 246, 103 Fed. 302—Standard

Caster & Wheel Co. v. Caster Socket Co. 51 C. C. A. 111, 113 Fed. 164—Durham v. Seymour, 6 App. D. C. 104.

Cited in Hobbs v. Beach, 180 U. S. 390, 45 L. ed. 591, 21 Sup. Ct. Rep. 409—Consolidated Electric Mfg. Co. v. Holtzer, 15 C. C. A. 66, 33 U. S. App. 80, 67 Fed. 910—Collins v. Gleason, 68 Fed. 916—Thomson-Houston Electric Co. v. Elmira & H. R. Co. 69 Fed. 264—American Pneumatic Tool Co. v. Fisher, 69 Fed. 332—Taws v. Laughlins, 70 Fed. 107—Gould Coupler Co. v. Pratt, 70 Fed. 626—Tannage Patent Co. v. Zahn, 17 C. C. A. 554, 28 U. S. App. 620, 70 Fed. 1004—Bray v. United States Net & Twine Co. 70 Fed. 1007—Thomson-Houston Electric Co. v. Winchester Ave. R. Co. 71 Fed. 202—L. Schreiber & Sons Co. v. Grimm, 19 C. C. A. 69, 43 U. S. App. 10, 72 Fed. 674—A. B. Dick Co. v. Wicheman, 74 Fed. 802—Taylor v. Sawyer Spindle Co. 22 C. C. A. 210, 39 U. S. App. 257, 75 Fed. 308—Dunbar v. Eastern Elevating Co. 75 Fed. 569—Independent Electric Co. v. Jeffrey Mfg. Co. 76 Fed. 989—McKay-Copeland Lasting Mach. Co. v. Copeland Rapid Laster Mfg. Co. 77 Fed. 811—Adams Electric R. Co. v. Lindell R. Co. 23 C. C. A. 237, 40 U. S. App. 482, 77 Fed. 447—Rogers v. Fitch, 77 Fed. 886—Consolidated Fastener Co. v. Columbia Fastener Co. 79 Fed. 800—Kinnear & G. Co. v. Capital Sheet-Metal Co. 81 Fed. 492—Mast, F. & Co. v. Dempster Mill Mfg. Co. 27 C. C. A. 198, 49 U. S. App. 508, 82 Fed. 384—Heap v. Tremont & S. Mills, 27 C. C. A. 322, 50 U. S. App. 180, 82 Fed. 456—Beach v. Hobbs, 82 Fed. 922—Strom Mfg. Co. v. Weir Frog Co. 27 C. C. A. 507, 54 U. S. App. 330, 83 Fed. 175—Diamond State Iron Co. v. Goldie, 28 C. C. A. 592, 56 U. S. App. 68, 84 Fed. 975—Safeguard Account Co. v. Wellington, 86 Fed. 148—Western Electric Co. v. Capital Teleph. & Teleg. Co. 86 Fed. 775—King v. Anderson, 90 Fed. 505—Tower v. Eagle Pencil Co. 90 Fed. 664—McConway & T. Co. v. Shickie, H. & H. Iron Co. 92 Fed. 167—L. E. Waterman Co. v. Vassar College, 99 Fed. 564—Electric Vehicle Co. v. Winton Motor-Carriage Co. 104 Fed. 815—Krajewski v. Pharr, 44 C. C. A. 578, 105 Fed. 520—Chisholm v. Johnson, 106 Fed. 206—National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. 45 C. C. A. 554, 106 Fed. 703—John R. Williams v. Miller, D. B. & P. Mfg. Co. 107 Fed. 292—Hallock v. Davidson, 107 Fed. 485—Justi v. Clark, 47 C. C. A. 575, 108 Fed. 669—Westinghouse Electric & Mfg. Co. v. Union Carbide Co. 112 Fed. 421—Moore v. Schaw, 118 Fed. 607—Diamond Drill & Mach. Co. v. Kelley Bros. 120 Fed. 292—National Meter Co. v. Neptune Meter Co. 122 Fed. 79—Hale & K. Mfg. Co. v. Oneonta, C. & R. S. R. Co. 124 Fed. 519—Thomson-Houston Electric Co. v. Ohio Brass Co. 130 Fed. 544.

91. If the new use of a device be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use. C. & A. Potts & Co. v. Creager, 155 U. S. 597, 15 Sup. Ct. Rep. 194, 39: 275
Distinguished in Electric Smelting & Aluminum Co. v. Carborundum Co. 42 C. C. A. 550, 102 Fed. 681.

Noted in Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 493, 44 L. ed. 860, 20 Sup. Ct. Rep. 708—Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 130, 54 U. S. App.

591, 85 Fed. 227—Edison Electric Light Co. v. E. G. Bernard Co. 88 Fed. 276—Stover Mfg. Co. v. Mast, F. & Co. 32 C. C. A. 237, 60 U. S. App. 325, 89 Fed. 340—Corser v. Brattleboro Overall Co. 93 Fed. 807—Briggs v. Duell, 36 C. C. A. 40, 93 Fed. 974—Johnson Co. v. Toledo Traction Co. 56 C. C. A. 421, 119 Fed. 891—Betendorf Patents Co. v. J. R. Little Metal Wheel Co. 59 C. C. A. 475, 123 Fed. 435—Davis-Colby Ore Roaster Co. v. Lackawanna Iron & Steel Co. 128 Fed. 457—Kip-Armstrong Co. v. King Phillip Mills, 130 Fed. 31—Lackawanna Iron & Steel Co. v. Davis-Colby Ore Roaster Co. 65 C. C. A. 310, 181 Fed. 72—Mallon v. Gregg, 69 C. C. A. 57, 137 Fed. 77—Capewell v. Goldsmith, 138 Fed. 686—Re Briggs, 9 App. D. C. 482—Re Smith, 14 App. D. C. 184.

92. If an old device or process be put to a new use which is not analogous to the old one, and the adaptation of such process to the new use is of such a character as to require the exercise of inventive skill to produce it, such new use is patentable. *Ansonia Brass & Copper Co. v. Electrical Supply Co.* 144 U. S. 11, 12 Sup. Ct. Rep. 601, 36: 327 *Cited in Wales v. Waterbury Mfg. Co.* 59 Fed. 288.

93. The Kirk patent, 268,411, claim 6, for an open sluice under the gates of a bear-trap dam to relieve the hydraulic pressure, although the use of wasteways was a common and well-known method of relieving the pressure of water, was a patentable application of an old device to meet a novel exigency. *Du Bois v. Kirk*, 158 U. S. 58, 15 Sup. Ct. Rep. 729, 39: 895 *Cited in Thomson-Houston Electric Co. v. Elmira & H. R. Co.* 69 Fed. 265—*Bray v. United States Net & Twine Co.* 70 Fed. 1007—*Gould Coupler Co. v. Pratt*, 70 Fed. 626—*Taylor v. Sawyer Spindle Co.* 22 C. C. A. 211, 39 U. S. App. 257, 75 Fed. 309—*Peters v. Union Biscuit Co.* 120 Fed. 684—*Anderson v. Collins*, 58 C. C. A. 676, 122 Fed. 458—*Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co.* 68 C. C. A. 526, 133 Fed. 170—*Fenton Metallic Mfg. Co. v. Office Specialty Co.* 12 App. D. C. 218.

94. The Ritty and Birch patent, 271,363, for a cash register and indicator, which included the use of a connecting mechanism operated by a bar under the keys, which when the key was pressed down moved a wing which kept up the indicator or tablet, so that independently of the operation of any tablet rod the wing would be turned back and let the exposed tablet or indicator fall before the other went up,—is not lacking in invention because such connecting mechanism had been previously used to ring the bell and open the cash drawer, but not to operate the bar or other device for holding up the indicators, in which previous machines had been defective and uncertain in operation. *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.* 156 U. S. 502, 15 Sup. Ct. Rep. 434, 39: 511 *Cited in National Cash-Register Co. v. Leland*, 37 C. C. A. 383, 94 Fed. 512—*National Cash-Register Co. v. Navy Cash-Register Co.* 99 Fed. 566.

Mechanical skill.

Mechanical Skill in Improvements, see *infra*, 248-252.

See also *supra*, 91-93.

95. The application of a patented device to a use which was only new in the patented machine, but was well known in other machinery, constitutes mere mechanical skill, and does not constitute a patentable invention. *Mast, F. & Co. v. Stover Mfg. Co.* 177 U. S. 485, 20 Sup. Ct. Rep. 708, 44: 856 *Cited in Justi v. Clark*, 47 C. C. A. 575, 108 Fed. 669.

96. A shifting device being old, its application to a fulling machine for treating rawhides did not require the exercise of invention. *Royer v. Roth*, 132 U. S. 201, 10 Sup. Ct. Rep. 58, 33: 322 *Cited in Hill v. Wooster*, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—*Lovell Mfg. Co. v. Cary*, 147 U. S. 637, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*Brush Electric Co. v. Julien Electric Co.* 41 Fed. 694—*Foos Mfg. Co. v. Springfield Engine & Thresher Co.* 44 Fed. 598—*Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 590—*Foos Mfg. Co. v. Springfield Engine & Thresher Co.* 1 C. C. A. 412, 6 U. S. App. 14, 49 Fed. 642—*J. L. Mott Iron Works v. Standard Mfg. Co.* 51 Fed. 85—*J. L. Mott Iron Works v. Standard Mfg. Co.* 4 C. C. A. 31, 3 U. S. App. 386, 58 Fed. 823—*McKay & C. Lasting Mach. Co. v. Claflin*, 58 Fed. 359—*Bowers v. Von Schmidt*, 63 Fed. 582—*Von Schmidt v. Bowers*, 25 C. C. A. 351, 48 U. S. App. 120, 80 Fed. 150—*American Wheel Works v. F. C. Austin Mfg. Co.* 98 Fed. 993—*Campbell Printing-Press & Mfg. Co. v. Duplex Printing Press Co.* 41 C. C. A. 363, 101 Fed. 294.

97. A variation of a previous device, which would occur to a mechanic of ordinary skill, is not patentable, although it makes the invention a commercial success. *Duer v. Corbin Cabinet Lock Co.* 149 U. S. 216, 13 Sup. Ct. Rep. 850, 37: 707 *Distinguished in New Departure Bell Co. v. Bervin Bros. Mfg. Co.* 64 Fed. 864.

98. A mechanical adaptation of an old device to new use in a combination with other elements already existing is not patentable. *Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 144 U. S. 248, 12 Sup. Ct. Rep. 641, 36: 423 *Cited in Dowagiac Mfg. Co. v. Brennan*, 118 Fed. 147.

99. If changes in old instrumentalities, to adapt them to the use contemplated, involve only the exercise of ordinary mechanical skill, they do not sanction a patent. *Aron v. Manhattan R. Co.* 132 U. S. 84, 10 Sup. Ct. Rep. 24, 33: 272 *Cited in Howe Mach. Co. v. National Needle Co.* 134 U. S. 397, 33 L. ed. 968, 10 Sup. Ct. Rep. 570—*Fond Du Lac County v. May*, 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—*Consolidated Roller Mill Co. v. Walker*, 138 U. S. 132, 34 L. ed. 923, 11 Sup. Ct. Rep. 292—*Lovell Mfg. Co. v. Cary*, 147 U. S. 637, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*Knapp v. Morsa*, 150 U. S. 228, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Woolensak v. Sargent*, 151 U. S. 226, 38 L. ed. 140, 14 Sup. Ct. Rep. 291—*National Cash-Register*

Co. v. Boston Cash Indicator & Recorder
 Co. 156 U. S. 515, 39 L. ed. 516, 15 Sup.
 Ct. Rep. 434—Consolidated Roller Mill Co.
 v. Walker, 43 Fed. 579—Potts v. Creager,
 44 Fed. 683—American Road-Mach. Co. v.
 Pennock & S. Co. 45 Fed. 255—Campbell
 v. Bailey, 45 Fed. 565—Haughey v. Lee,
 48 Fed. 384—Foss Mfg. Co. v. Springfield
 Engine & Thresher Co. 1 C. C. A. 412, 6
 U. S. App. 14, 49 Fed. 643—Johnson Co. v.
 Tidewater Steel-Works, 50 Fed. 94—Stauffer
 v. Spangler, 50 Fed. 86—Bromley Bros. Car-
 pet Co. v. Stewart, 51 Fed. 914—Briggs v.
 Central Ice Co. 8 C. C. A. 483, 20 U. S.
 App. 374, 60 Fed. 90—Bowman v. DeGrauw,
 60 Fed. 912—Newark Watch-Case Material
 Co. v. Wilmot & H. Mfg. Co. 60 Fed. 617
 —Browning v. Colorado Teleph. Co. 10 C.
 C. A. 113, 27 U. S. App. 81, 61 Fed. 847
 —Electric R. Co. v. Jamaica & B. R. Co. 61
 Fed. 673—Andrews v. Thum, 15 C. C. A.
 69, 33 U. S. App. 39, 67 Fed. 913—Fuller &
 J. Mfg. Co. v. Bender, 69 Fed. 1001—P. H.
 Murphy Mfg. Co. v. Excelsior Car-Roof Co.
 70 Fed. 496—Eastman Co. v. Getz, 77 Fed.
 419—Green v. American Soda-Fountain Co.
 24 C. C. A. 46, 39 U. S. App. 510, 78 Fed.
 123—Dunbar v. Eastern Elevating Co. 26
 C. C. A. 334, 51 U. S. App. 319, 81 Fed.
 205—Rogers v. Fitch, 27 C. C. A. 26, 51
 U. S. App. 517, 81 Fed. 962—Frederick R.
 Stearns & Co. v. Russell, 29 C. C. A. 133, 54
 U. S. App. 591, 85 Fed. 230—Briggs v.
 Duell, 87 Fed. 481—Letteller v. Mann, 91
 Fed. 912—Christy v. Hygela Pneumatic Bi-
 cycle Saddle Co. 36 C. C. A. 36, 93 Fed.
 970—Plumo v. New York, N. H. & H. R.
 Co. 97 Fed. 647—Thomson-Houston Electric
 Co. v. Lorain Steel Co. 46 C. C. A. 598,
 107 Fed. 716—Justi v. Clark, 47 C. C. A.
 575, 108 Fed. 689—Dolg v. Morgan Mach.
 Co. 122 Fed. 463—Re Briggs, 9 App. D.
 C. 481.

100. Mechanism for opening and closing
 apertures distant from the operator, in
 which the devices used for the purpose are
 the mechanical equivalents of those employed
 in patent 288,494, for an improvement in
 railway car gates, is old; and what the
 patentee did was to adapt well-known de-
 vices to the special purpose mentioned
 in the patent. Aron v. Manhattan R. Co. 132
 U. S. 84, 10 Sup. Ct. Rep. 24, 33: 272

101. A cinder notch having been long used
 in blast furnaces, there is no invention in
 making one in a cupola furnace. Vinton v.
 Hamilton, 104 U. S. 485, 26: 807
Cited in Thompson v. Boisselier, 114 U. S. 11,
 29 L. ed. 80, 5 Sup. Ct. Rep. 1042—Stephenson
 v. Brooklyn C. T. R. Co. 114 U. S. 154,
 29 L. ed. 60, 5 Sup. Ct. Rep. 777—Western
 Electric Mfg. Co. v. Ansonia Brass & Copper
 Co. 114 U. S. 451, 29 L. ed. 211, 5 Sup.
 Ct. Rep. 941—Pomace Holder Co. v. Fergu-
 son (Clark Pomace Holder Co. v. Ferguson)
 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct.
 Rep. 382—Fond Du Lac County v. May,
 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct.
 Rep. 98—Lovell Mfg. Co. v. Cary, 147 U.
 S. 636, 37 L. ed. 312, 13 Sup. Ct. Rep.
 472—Leonard v. Lovell, 29 Fed. 314—Ellbert
 v. St. Paul Gaslight Co. 50 Fed. 211—
 Stirrat v. Excelsior Mfg. Co. 10 C. C. A.
 220, 27 U. S. App. 13, 61 Fed. 984—Samp-
 son v. Donaldson, 16 C. C. A. 345, 32 U.
 S. App. 712, 69 Fed. 624—Green v. Ameri-
 can Soda-Fountain Co. 24 C. C. A. 46, 39
 U. S. App. 510, 78 Fed. 123—Wisconsin Com-
 pressed Air House Cleaning Co. v. American

Compressed Air Cleaning Co. 60 C. C. A.
 537, 125 Fed. 769—Stephenson v. Brooklyn
 C. T. R. Co. 42 Phila. Leg. Int. 162.

102. A patent for two bell cords, each pro-
 vided with a system of pull straps, and ar-
 ranged in such a manner as to pass along
 the lower margin of the roof on the opposite
 sides of a street car, and connected with a
 bell or gong near the driver, is void for lack
 of invention, when a bell strap or cord
 running from one end of an omnibus or
 street car, under the middle of the ceiling,
 was a well-known device, as was also the
 use of pendent bell pulls or hand straps at-
 tached to it. Stephenson v. Brooklyn Ct. R.
 Co. 114 U. S. 149, 5 Sup. Ct. Rep. 777,
 29: 58

103. A contrivance which consists simply
 in making an aperture in the top of an
 ordinary fare box in a street car, and turn-
 ing through it the rays of the head lamp,
 by means of a reflector, is not patentable,
 since it involves only mechanical skill. Slaw-
 son v. Grand Street P. P. & F. R. Co. 107 U.
 S. 649, 2 Sup. Ct. Rep. 663, 27: 576

104. It being a matter of common knowl-
 edge that the effect of a diagonal cut on a
 penetrating point was to force the
 point, when driven, in a direction away
 from the cut, and double-pointed sta-
 ples with a diagonal cut on each point,
 but on the outer side of the points, so as
 to bring the points together when driven, be-
 ing in use, there is no invention in putting
 the diagonal cuts on the same side of each
 leg of the staple, so as to incline both points,
 when driven, in the same direction since only
 mechanical skill is involved. Double-Pointed
 Tack Co. v. Two Rivers Mfg. Co. 109 U. S.
 117, 3 Sup. Ct. Rep. 105, 27: 877

Cited in Thompson v. Boisselier, 114 U. S. 11,
 29 L. ed. 80, 5 Sup. Ct. Rep. 1042—
 Pomace Holder Co. v. Ferguson (Clark Po-
 mace Holder Co. v. Ferguson) 119 U. S. 338,
 30 L. ed. 408, 7 Sup. Ct. Rep. 382—Collins
 County v. Coes, 21 Fed. 39—Leonard v.
 Lovell, 29 Fed. 314—Root v. Sontag, 47 Fed.
 313—Johnson Co. v. Pacific Rolling-Mills Co.
 47 Fed. 591—Stirrat v. Excelsior Mfg. Co.
 10 C. C. A. 220, 27 U. S. App. 13, 61 Fed.
 984—Sampson v. Donaldson, 16 C. C. A. 345,
 32 U. S. App. 712, 69 Fed. 624.

105. The application to a capstan of power
 from an auxiliary engine which requires only
 ordinary mechanical skill is not invention, as
 such power has been previously applied to a
 windlass, and the only change required is in
 the use of the old and familiar arrangement
 of shafts and cogwheels to change the di-
 rection from a horizontal to a perpendicular
 shaft. Morris v. McMillin, 112 U. S. 244,
 5 Sup. Ct. Rep. 218, 28: 702
Cited in Thompson v. Boisselier, 114 U. S. 11,
 29 L. ed. 80, 5 Sup. Ct. Rep. 1042—Pomace
 Holder Co. v. Ferguson, 119 U. S. 338, 30
 L. ed. 408, 7 Sup. Ct. Rep. 382—Tatcher
 Heating Co. v. Burtis, 121 U. S. 295, 30 L.
 ed. 946, 7 Sup. Ct. Rep. 1034—Ansonia Brass
 & Copper Co. v. Electrical Supply Co. 144
 U. S. 19, 36 L. ed. 330, 12 Sup. Ct. Rep.
 601—Mellon v. Smith-Davis Mfg. Co. 23 Fed.
 153—Hoe v. Kahler, 23 Blatchf. 362, 25
 Fed. 277—Niles Tool-Works v. Betts Mach.

Co. 27 Fed. 305—Leonard v. Lovell, 29 Fed. 314—Campbell v. Bailey, 45 Fed. 566—Stirrat v. Excelsior Mfg. Co. 10 C. C. A. 220, 27 U. S. App. 13, 61 Fed. 984—Sampson v. Donaldson, 16 C. C. A. 345, 32 U. S. App. 712, 69 Fed. 624—Wisconsin Compressed Air House Cleaning Co. v. America Compressed Air Cleaning Co. 60 C. C. A. 537, 125 Fed. 769—Neptune Meter Co. v. National Meter Co. 62 C. C. A. 349, 127 Fed. 567.

106. Chains having alternate open and closed links, the open links being spiral and sprung into the closed links, being known, as well as chains made entirely of spiral links, and chains with hollow links or tubing, in which the ends of the spiral links were bent outward, and the coils soldered together after the links had been sprung into each other,—there is no invention in leaving the links open after they have been sprung into the closed links, although the elasticity of the spiral tubing was thus left more free, and the chain could be more freely taken in pieces without injury to its structure, since the improvement involves nothing more than the exercise of ordinary mechanical skill. *Pearce v. Mulford*, 102 U. S. 112, 26: 93

107. A detachable base-pan being old, and hearths and ash-pans having been attached by lugs and hooks in a certain way, there is no invention in applying that mode of attachment to the base-pan. *Bussey v. Excelsior Mfg. Co.* 110 U. S. 131, 4 Sup. Ct. Rep. 38, 28: 951

Cited in Stirrat v. Excelsior Mfg. Co. 10 C. C. A. 220, 27 U. S. App. 13, 61 Fed. 984—*Bowers v. Von Schmidt*, 63 Fed. 583—*Sampson v. Donaldson*, 16 C. C. A. 345, 32 U. S. App. 712, 69 Fed. 624—*William Schwarzwaelder & Co. v. Detroit*, 77 Fed. 892—*Brown v. Puget Sound Reduction Co.* 110 Fed. 388.

108. It requires no invention to make a single die to cut dough, on a flat surface, into any particular shape desired, whether the shape of a pretzel or any other shape. *Butler v. Steckel*, 137 U. S. 21, 11 Sup. Ct. Rep. 25, 34: 582

Cited in Potts v. Creager, 44 Fed. 684—*Mahon v. McGuire Mfg. Co.* 51 Fed. 684—*Baumer v. Will*, 53 Fed. 875—*Dayton Loop & Crupper v. Ruhl*, 55 Fed. 651—*American Patents Co. v. De Beer*, 57 Fed. 625.

109. A patent for an improvement in pantaloon, which consists in re-enforcing or bridging with a continuous strip of cloth as an inelastic bridge or check piece the junction of the button and button-hole strips in the fly, or by turning the end of one of such strips and running it up along the side of the other and fastening it to it,—is invalid for lack of patentable invention, as substantially the same idea has been illustrated whenever a tear has been mended by placing a patch underneath, and also in case of gloves by the use of an overlapping piece to re-enforce a seam. *Patent Clothing Co. v. Glover*, 141 U. S. 560, 12 Sup. Ct. Rep. 79, 35: 858

Cited in Dederick v. Gardner, 50 Fed. 100—*Saunders v. Allen*, 53 Fed. 110—*Dalby v. Lynes*, 64 Fed. 380—*Chase v. Catlin*, 64 Fed. 771—*Olmstead v. A. H. Andrews & Co.* 23

C. C. A. 493, 46 U. S. App. 608, 77 Fed. 840.

110. There is no patentable invention in applying to the heating of wine, from the inside of a cask, an apparatus previously used to heat another liquid in the same manner. *Dreyfus v. Searle*, 124 U. S. 60, 8 Sup. Ct. Rep. 390, 31: 352

Cited in Marchand v. Emken, 132 U. S. 200, 33 L. ed. 334, 10 Sup. Ct. Rep. 65—*Royer v. Roth*, 132 U. S. 206, 33 L. ed. 324, 10 Sup. Ct. Rep. 58—*Grant v. Walker*, 148 U. S. 553, 37 L. ed. 556, 13 Sup. Ct. Rep. 699—*Lovell Mfg. Co. v. Cary*, 147 U. S. 636, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*Zinsser v. Kremer*, 39 Fed. 114.

111. There is no invention in applying an apparatus for forcing heated air inside of a flask to a cask instead of a flask. *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 9 Sup. Ct. Rep. 83, 32: 390

112. Where a device to allow a lateral motion for the purpose of securing safety and steadiness in turning a curve is already in use in trucks for railroad cars, the application of the same device to the forward truck of a locomotive engine, although it could be applied only at the forward end of the engine, by reason of the driving wheels, is not patentable. The effect of the invention upon the engine, as compared with its effect upon the car, is the same in kind, though perhaps less in degree. *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.* 110 U. S. 490, 4 Sup. Ct. Rep. 220, 28: 222

Cited in Pomace Holder Co. v. Ferguson (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—*Thatcher Heating Co. v. Burtis*, 121 U. S. 295, 30 L. ed. 945, 7 Sup. Ct. Rep. 1034—*Cluett v. Clafin*, 30 Fed. 924—*American Road-Mach. Co. v. Pennock & S. Co.* 45 Fed. 255—*Campbell v. Bailey*, 45 Fed. 585—*Root v. Sontag*, 47 Fed. 313—*Mahon v. McGuire Mfg. Co.* 51 Fed. 684—*Steiner Fire Extinguisher Co. v. Adrian*, 8 C. C. A. 49, 16 U. S. App. 409, 59 Fed. 136—*Bonnell v. Stoll*, 10 C. C. A. 50, 17 U. S. App. 543, 61 Fed. 768—*Gamewell Fire-Alarm Teleg. Co. v. Municipal Signal Co.* 10 C. C. A. 188, 21 U. S. App. 157, 61 Fed. 952—*Clinton Wire-Cloth Co. v. Wright & C. Wire-Cloth Co.* 65 Fed. 427—*Tannage Patent Co. v. Zahn*, 66 Fed. 994—*Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co.* 14 C. C. A. 649, 33 U. S. App. 188, 67 Fed. 793—*Marden v. Campbell Printing-Press & Mfg. Co.* 15 C. C. A. 30, 33 U. S. App. 123, 67 Fed. 813—*Griswold v. Wagner*, 15 C. C. A. 530, 37 U. S. App. 171, 68 Fed. 499—*Rogers v. Fitch*, 27 C. C. A. 26, 51 U. S. App. 517, 81 Fed. 902—*Frederick R. Stearns & Co. v. Russell*, 29 C. C. A. 130, 59 U. S. App. 591, 85 Fed. 227—*Briggs v. Duell*, 87 Fed. 481—*American Graphophone Co. v. Leeds*, 87 Fed. 876—*Union Gas-Engine Co. v. Doak*, 88 Fed. 90—*R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co.* 111 Fed. 930—*L. E. Waterman Co. v. Forsyth*, 121 Fed. 106—*Colt's Patent Firearms Mfg. Co. v. Wesson*, 122 Fed. 94—*North Jersey Street R. Co. v. Brill*, 67 C. C. A. 384, 134 Fed. 584—*Re Briggs*, 9 App. D. C. 481.

113. The application to the turning of

machine awls and needles from metal, of mechanism old and familiar in the art of wood turning, is not invention, and is not patentable. *Howe Mach. Co. v. National Needle Co.* 134 U. S. 388, 10 Sup. Ct. Rep. 570, 33: 963

114. The application to the bar of the Coes wrench, for the purpose of securing and supporting the step and resisting the strain, of a nut already in use for the same purpose on the Hewitt or Dixie wrench, lacks the novelty of invention requisite to support a patent. *Collins Co. v. Coes*, 130 U. S. 56, 9 Sup. Ct. Rep. 514, 32: 858
Cited in Smith v. Thomson, 38 Fed. 606—*Chittenden v. Mallory*, 41 Fed. 219—*Richmond v. Atwood*, 17 L.R.A. 618, 2 C. C. A. 607, 5 U. S. App. 151, 52 Fed. 21.

115. The Pattee patent, 187,899, for constructing the arch, or central and main part, of straddle row cultivator beam-yokes or axles, of curved adjacent bars of iron or steel, to the ends of which cast-iron parts may be attached by riveting, is invalid because embracing nothing but a mode of construction which is old and not patentable. *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 9 Sup. Ct. Rep. 259, 32: 700
Cited in Hill v. Wooster, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—*Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 500.

116. The interposition of a grating between the jailer and the prisoners at every stage of opening or shutting a door, which is the novel idea in May's patent, 25,662, for improvements in prisons, to protect a keeper from contact with the prisoners, is not patentable, as the mechanical operation of the device described for operating the doors is old, and is the same whether the mechanism passes through a barrier of solid iron or other material, or a grating, or through no barrier at all. *Fond du Lac County v. May*, 137 U. S. 395, 11 Sup. Ct. Rep. 98, 34: 714
May v. Juneau County, 137 U. S. 408, 11 Sup. Ct. Rep. 102, 34: 729

117. The use of safety break pins for saving machinery from the strain of a sudden jar is old; and their use for such a purpose, in connection with the driving gear of a stone-crushing machine, is not patentable. *Gates Iron Works v. Fraser*, 153 U. S. 332, 14 Sup. Ct. Rep. 883, 38: 734
Cited in Birmingham Cement Mfg. Co. v. Gates Iron Works, 24 C. C. A. 133, 41 U. S. App. 201, 78 Fed. 351—*Justi v. Clark*, 47 C. C. A. 575, 108 Fed. 669—*Johnson v. Chisholm*, 53 C. C. A. 130, 115 Fed. 632.

118. A pendant between a horse's legs, on a strap fastened to one leg for the cure of interference, is not a patentable device, a pendant on a leg strap having been used to cure kicking, and a strap with a boot thereon covered with bristles having been used for interference. *Haughey v. Lee*, 151 U. S. 282, 14 Sup. Ct. Rep. 331, 38: 162

Spring.

119. The grouping of springs in a corset being old, a different arrangement of the

groupings as they appear in patent 238,100 is not an invention, but is a mere matter of mechanical judgment, the natural outgrowth of the development of mechanical skill as distinguished from invention. *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. Rep. 20, 34: 574

Cited in Potts v. Creager, 44 Fed. 685—*Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 591—*J. G. Brill Co. v. Wilson*, 75 Fed. 1004—*Brush Electric Co. v. Western Electric Co.* 22 C. C. A. 547, 46 U. S. App. 355, 76 Fed. 765—*J. L. Mott Iron Works v. Hoffman & B. Mfg. Co.* 110 Fed. 775.

120. The principle set forth in the patent granted to Alanson Cary, 116,266, for an improvement in modes of tempering springs, was developed in the manufacture of wire bells for clocks and hair balance springs; and there was no patentable invention in applying that principle to other springs. *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. Rep. 472, 37: 307

Rollers.

121. Where the process of pebbling leather by means of a figured roller operated by hand devices, with pressure upon the leather while spread upon a table, was old, engraving the figure upon a smooth roller in use in an old machine for finishing leather involves simply mechanical skill and is not patentable. *Stimpson v. Woodman*, 10 Wall. 117, 19: 866

Cited in Reckendorfer v. Faber, 92 U. S. 353, 23 L. ed. 722—*Dunbar v. Myers*, 94 U. S. 198, 24 L. ed. 89—*Burt v. Ivory*, 133 U. S. 359, 33 L. ed. 651, 10 Sup. Ct. Rep. 394—*Wright v. Yuengling*, 155 U. S. 54, 39 L. ed. 67, 15 Sup. Ct. Rep. 1—*Alcott v. Young*, 16 Blatchf. 138, Fed. Cas. No. 149—*Bailey Washing & Wringing Mach. Co. v. Lincoln*, 4 Fisher, Pat. Cas. 385, Fed. Cas. No. 750—*Milligan & H. Glue Co. v. Upton*, 4 Cliff. 251, Fed. Cas. No. 9,607—*Putnam v. Weatherbee*, Holmes, 499, Fed. Cas. No. 11,486—*Sarven v. Hall*, 9 Blatchf. 535, Fed. Cas. No. 12,369—*Woodman Pebbling Mach. Co. v. Guild*, 4 Cliff. 186, Fed. Cas. No. 17,981—*Flower v. Rayner*, 5 Fed. 800—*Kappes v. Hartung*, 23 Blatchf. 154, 23 Fed. 183—*Cluett v. Cladin*, 30 Fed. 924—*Appleton Mfg. Co. v. Star Mfg. Co.* 9 C. C. A. 46, 18 U. S. App. 492, 60 Fed. 415—*Galt v. Parlin & O. Co.* 9 C. C. A. 54, 18 U. S. App. 518, 60 Fed. 422—*Kursheedt Mfg. Co. v. Naday*, 103 Fed. 950—*Rodiger v. Thaddeus Davids Mfg. Co.* 126 Fed. 965—*North Jersey Street R. Co. v. Brill*, 67 C. C. A. 384, 184 Fed. 584—*Re Fisher*, 1 Mackey, 215—*Flower v. Rayner*, 38 Phila. Leg. Int. 128.

122. The Peters patent, 197,289, claim 2, for the bearings in an anti-friction journal box with the shoulder beveled or notched and the nut or its equivalent correspondingly beveled or notched, being in substance for the use of elongated rollers between the spindle or bearing of an axle of a shaft or cylinder and the encasing hub or journal box, involves no patentable invention, in view of the prior use of longitudinal metallic rollers in a hub box around an axle with the ends somewhat beveled to correspond with the tapering portions of the journal and nut, or various similar devices in which spherical

balls are used to revolve around a journal or axle. *Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 144 U. S. 238, 12 Sup. Ct. Rep. 637, 36: 420

123. The Gray patent, 228,325, for the combination, in a roller grinding-mill, of countershafts provided with pulleys at both ends, which are mounted in vertically and independently adjustable bearings, and rolls having pulleys connected by belts with one end of the countershaft, so as to give the countershaft a direction reverse to that of the rolls, involves only ordinary mechanical or engineering skill, as the use of belt gearing in place of cog gearing was old and common, as was also the use of tightening pulleys which did other work about the machine, and the use of journal boxes or hangers for independently adjusting the ends of the countershaft. *Consolidated Roller Mill Co. v. Walker*, 138 U. S. 124, 11 Sup. Ct. Rep. 292, 34: 920

Vehicles.

124. Claims 1, 2, and 3 of the Peters patent, 213,529, which all relate to the means of adjusting laterally the feet of a dash by making several holes, or a long hole or slot, in the lower rail of the dash, so that it can be made to fit carriages of different widths, are merely applications of old devices to new uses, not involving invention. *Peters v. Hanson*, 129 U. S. 541, 9 Sup. Ct. Rep. 393, 32: 742

Cited in Howe Mach. Co. v. National Needle Co. 134 U. S. 397, 33 L. ed. 968, 10 Sup. Ct. Rep. 570—*Foster v. Crossin*, 44 Fed. 63.

125. Claims 1, 2, 3, and 11 in the Peters reissued patent, 9891, which all relate to channelling or recessing the rail or bar in vehicle dash frames, so that the metal on each side will be thick enough to form a bearing, leaving that part in the channel capable of easy perforation, are applications of old devices to new uses, not involving invention. *Peters v. Hanson*, 129 U. S. 541, 9 Sup. Ct. Rep. 393, 32: 742

126. The Peters patent, 178,463 for an improvement in tools for attaching sheet-metal mouldings to carriage dashes, is invalid because it is merely an adaptation to the application of mouldings to carriage dash boards of the machine in prior use by Noyes for putting mouldings on combs, in which the moulding was held in a sheath fitting it closely, and having an extension enough smaller to fit the comb, with a sliding follower to abut against the end of the comb, and a slot across the sheath containing a key or stop to prevent the sliding of the moulding, which operated to force the comb into the molding by the action of the follower, while the sheath prevented the comb from bending. *Peters v. Active Mfg. Co.* 129 U. S. 530, 9 Sup. Ct. Rep. 389, 32: 738

Cited in Howe Mach. Co. v. National Needle Co. 134 U. S. 397, 33 L. ed. 968, 10 Sup. Ct. Rep. 570—*Foster v. Crossin*, 44 Fed. 63—*Chase v. Catlin*, 64 Fed. 771.

Block pavement.

Liability of City for Infringement, see *infra*, 1125.

127. To cut blocks of wood so as to get the grain in a particular way, and so as to avoid waste, requires simple mechanical skill, without involving invention. *Brown v. District of Columbia*, 130 U. S. 87, 9 Sup. Ct. Rep. 437, 32: 863

Cited in C. & A. Potts & Co. v. Creager, 155 U. S. 608, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—*Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co.* 19 C. C. A. 20, 37 U. S. App. 555, 72 Fed. 34—*Thomson Meter Co. v. National Meter Co.* 12 C. C. A. 673, 28 U. S. App. 275, 65 Fed. 429—*J. G. Brill Co. v. Wilson*, 75 Fed. 1004—*King v. Anderson*, 90 Fed. 504.

128. A wood pavement composed of blocks, each side having a single plain surface, and one or more of the sides being inclined, and the blocks being so laid on their larger ends as to form wedge-shaped grooves or spaces to receive concrete or other suitable filling, was not, in view of the state of the art, patentable April 5, 1870. *Brown v. District of Columbia*, 130 U. S. 87, 9 Sup. Ct. Rep. 437, 32: 863

Cited in Hill v. Wooster, 182 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—*Florsheim v. Schilling*, 137 U. S. 76, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—*Lovell Mfg. Co. v. Cary*, 147 U. S. 637, 37 L. ed. 812, 13 Sup. Ct. Rep. 472—*Potts v. Creager*, 44 Fed. 683—*Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 590—*Kilbourne v. W. Bingham Co.* 1 C. C. A. 623, 6 U. S. App. 65, 50 Fed. 703.

129. The use of wood for street pavements and the laying of the blocks directly upon a sand foundation in rows, with spaces between, being old devices, there is no invention in using wedge-shaped blocks, or blocks with the ends wedge-shaped, for all or part of the blocks in such pavement. *Stow v. Chicago*, 104 U. S. 547, 26: 816

Cited in Heald v. Rice, 104 U. S. 755, 26 L. ed. 916—*Leonard v. Lovell*, 29 Fed. 315.

130. A patent which covers simply the use, for a pavement, of stone blocks in the form of parallelopipeds, with the ends sufficiently smooth and the sides sufficiently rough so that, by putting the ends parallel to the street and the sides at right angles, the rough edges of the sides will keep the transverse joints sufficiently open to make a good foothold for horses, is invalid for lack of invention. *Guidet v. Brooklyn*, 105 U. S. 550, 26: 1106

Cited in Preston v. Manard, 116 U. S. 664, 29 L. ed. 764, 6 Sup. Ct. Rep. 695—*Wright v. Yuengling*, 155 U. S. 54, 39 L. ed. 67, 15 Sup. Ct. Rep. 1—*Wood v. Packer*, 17 Fed. 652—*Caverly v. Deere*, 52 Fed. 763—*Baldwin v. Kresl*, 22 C. C. A. 596, 46 U.S.App. 511, 76 Fed. 826—*Galvin v. Grand Rapids*, 53 C. C. A. 171, 115 Fed. 517.

6. Combinations.

Infringement of Patent for, see *infra*, XIV. d.

Novelty in, see *infra*, 282, 289, 290, 301.

Anticipation of, *see infra*, 312-314, 342, 343.
 Claim for, *see infra*, 465, 477.
 Claim for Part of, *see infra*, 474.
 Restrictive Effect of Claim for, *see infra*, 515, 527-539.
 Construction of Patent for, *see infra*, 715, 743, 758.
 Limiting Patentee to Particular Combination Described, *see infra*, 735.
 Enlarging Claim for, by Reissue, *see infra*, 616.
 Change of Claim in Reissue for, *see infra*, 631-636.
 Identity of Reissued Patent for, *see infra*, 672-679.
 Disclaimer of Part of Claim for, *see infra*, 783.
 See also *infra*, 196, 235, 238, 250, 263, 264, 270, 271, 410, 1152.

What constitutes.

131. The use in succession of two distinct pair of dies of well-known kinds, not combined in one machine, nor co-operating to one result, but each pair doing by itself its own work, is not a combination that will sustain a patent. *Beecher Mfg. Co. v. Atwater Mfg. Co.* 114 U. S. 523, 5 Sup. Ct. Rep. 1007, 29: 232

Cited in Thatcher Heating Co. v. Burtis, 121 U. S. 204, 30 L. ed. 946, 7 Sup. Ct. Rep. 1034—Florsheim v. Schilling, 187 U. S. 77, 34 L. ed. 679, 11 Sup. Ct. Rep. 20—Celluloid Mfg. Co. v. American Zylonite Co. 31 Fed. 910—National Progress Bunching Mach. Co. v. John B. Williams Co. 12 L.R.A. 109, 44 Fed. 192—Johnson Co. v. Pacific Rolling-Mills Co. 47 Fed. 592—Bowers v. Von Schmidt, 63 Fed. 583—Consolidator Fastener Co. v. Columbian Fastener Co. 79 Fed. 797—Von Schmidt v. Bowers, 25 C. C. A. 351, 48 U. S. App. 120, 80 Fed. 150.

Omission of element.

Effect of Omission on Liability for Infringement, *see infra*, 534, 951-978.
 On Reissue of Patent, *see infra*, 636.

132. The omission of an element in a combination may constitute invention, if the result of the new combination be the same as before; yet, if the omission of an element is attended by a corresponding omission of the function performed by that element, there is no invention, if the elements retained perform the same function as before. *Richards v. Chase Elevator Co.* 159 U. S. 477, 16 Sup. Ct. Rep. 53, 40: 225
Cited in Engle Sanitary & Cremation Co. v. Elwood, 73 Fed. 485—Campbell v. H. T. Conde Implement Co. 74 Fed. 747—Loewenbach v. Hake-Stirn Co. 34 C. C. A. 611, 92 Fed. 663.

133. A patent for a grain elevator which differs from ordinary elevators only in omitting the storage feature, by weighing the grain in the hopper, and discharging the grain into the receiving car without mixing it with other grain, is invalid for lack of invention. *Richards v. Chase Elevator Co.* 159 U. S. 477, 16 Sup. Ct. Rep. 53, 40: 225
Cited in *Richards v. Michigan C. R. Co.* 186 U. S. 479, 46 L. ed. 1259, 22 Sup. Ct. Rep. 942.

Aggregation of old elements.

See also *infra*, 156, 157, 159, 161.

134. A patented invention may embrace both a new device or element, and a new combination of old devices. *Parks v. Booth*, 102 U. S. 96, 26: 54

Cited in *Leary v. Hohenstein*, 37 Fed. 680—*Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. 32—*Electric Gaslight Co. v. Fuller*, 42 Fed. 294—*National Cash Register Co. v. American Register Co.* 3 C. C. A. 564, 3 U. S. App. 340, 53 Fed. 372—*S. F. Heath Cycle Co. v. Hay*, 67 Fed. 249—*Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co.* 19 C. C. A. 20, 37 U. S. App. 555, 72 Fed. 74—*Regent Mfg. Co. v. Penn Electrical & Mfg. Co.* 57 C. C. A. 337, 121 Fed. 83—*Milwaukee Carving Co. v. Brunswick-Balke Collender Co.* 61 C. C. A. 187, 126 Fed. 183—*McMichael & W. Mfg. Co. v. Ruth*, 63 C. C. A. 306, 128 Fed. 708—*Stephenson v. Allison*, 123 Ala. 448, 26 So. 290—*Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co.* 12 App. D. C. 216.

135. The claim of a patent for a convex metallic washer, in combination with a bail-fastening staple and loop in the bail, where neither the staple nor the washer affects the action of the other, is not a patentable combination, but only an aggregation of parts. *Double-Pointed Tack Co. v. Two Rivers Mfg. Co.* 109 U. S. 117, 3 Sup. Ct. Rep. 105, 27: 877
Distinguished in *Sessions v. Romadka*, 21 Fed. 181.

Cited in *Pomace Holder Co. v. Ferguson* (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—*Royer v. Roth*, 132 U. S. 206, 33 L. ed. 324, 10 Sup. Ct. Rep. 58—*Florsheim v. Schilling*, 137 U. S. 77, 34 L. ed. 579, 11 Sup. Ct. Rep. 26—*Fond Du Lac County v. May*, 137 U. S. 407, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—*Hayes v. Bickelhaupt*, 22 Blatchf. 464, 21 Fed. 567—*Scott Mfg. Co. v. Sayre*, 26 Fed. 154—*Bowers v. Von Schmidt*, 63 Fed. 533—*Heaton Peninsular Button Fastener Co. v. Schlochtermeyer*, 69 Fed. 597—*Heaton Peninsular Button-Fastener Co. v. Schlochtermeyer*, 18 C. C. A. 678, 37 U. S. App. 764, 73 Fed. 524.

136. It is not a patentable combination to arrange a portable base pan or flue shell and warming closet in connection with a three-flue stove, with a damper for the middle flue, where all the parts were old. *Bussey v. Excelsior Mfg. Co.* 110 U. S. 131, 4 Sup. Ct. Rep. 38, 28: 95

137. The Evory and Heston patent, 59,375, for shoes constructed with an extension gore flap on each side, involves no invention, but is a mere aggregation of old parts. *Burt v. Evory*, 133 U. S. 349, 10 Sup. Ct. Rep. 394, 33: 647

138. The application, to an ordinary lantern, of a lid secured by a hinge on one side and by any kind of locking device on the opposite side, is not patentable. *Adams v. Bellaire Stamping Co.* 141 U. S. 539, 12 Sup. Ct. Rep. 66, 35: 849

Cited in *St. Paul Plow Works v. Deere & Co.* 54 Fed. 502—*Butte City Street R. Co. v. Pacific Cable R. Co.* 8 C. C. A. 485, 15 U. S. App. 313, 60 Fed. 91.

139. A patent for lead-holders for pencils, having at the lower end two or more longitudinal slots, a screw thread, and a clamped sleeve outside, is void for want of invention, each part of the patent having previously been used in similar lead-holders. *Holland v. Shipley*, 127 U. S. 396, 8 Sup. Ct. Rep. 1089. 32: 185

Cited in Hill v. Wooster, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—*American Road-Mach. Co. v. Pennock & S. Co.* 45 Fed. 255—*Johnson Co. v. Pacific Rolling-Mills Co.* 47 Fed. 590—*Haughey v. Lee*, 48 Fed. 384—*Wilson v. Ansonia Brass & Copper Co.* 4 C. C. A. 485, 11 U. S. App. 758, 54 Fed. 496.

140. In a patent for an improved hose carriage, certain elements and their combination being old, the description of the hose reel as "a reel of large diameter, to allow the water to pass through the hose when partially wound thereon," is not sufficient to sustain the patent. *Preston v. Manard*, 116 U. S. 661, 6 Sup. Ct. Rep. 695, 29: 763
Cited in Jones v. Clow, 39 Fed. 788—*Steiner Fire Extinguisher Co. v. Adrian*, 52 Fed. 736—*Steiner Fire Extinguisher Co. v. Adrian*, 8 C. C. A. 49, 16 U. S. App. 409, 59 Fed. 136.

141. The Kenna patent, 224,923, for combined child's chair and carriage, which takes the Patten or Chichester chair bodily, pivoted as they are at the lower front corners to a supplemental frame, and applies to them the bail and catch of the Pearl chair, is merely an aggregation of old elements and does not involve invention. *Derby v. Thompson*, 146 U. S. 476, 13 Sup. Ct. Rep. 181, 36: 1051
Cited in Baumer v. Will, 53 Fed. 375—*Parry Mfg. Co. v. Hitchcock Mfg. Co.* 58 Fed. 403—*Vulcan Iron Works v. Smith*, 10 C. C. A. 493, 15 U. S. App. 577, 62 Fed. 449—*Jensen v. Norton*, 12 C. C. A. 326, 29 U. S. App. 125, 64 Fed. 601—*Letteller v. Mann*, 91 Fed. 913.

142. There is no patentable invention in a chair seat made from an old fabric, where the shaping of it in a former is old, its perforation for ventilation and ornamentation is old, and the giving of a concave shape to it by a pressure is likewise old. *Gardner v. Herz*, 118 U. S. 180, 6 Sup. Ct. Rep. 1027, 30: 158

Cited in Gardner v. Herz, 118 U. S. 180, 30 L. ed. 158, 6 Sup. Ct. Rep. 1027—*Pomace Holder Co. v. Ferguson*, 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—*Thatcher Heating Co. v. Burtis*, 121 U. S. 295, 30 L. ed. 946, 7 Sup. Ct. Rep. 1034—*Hill v. Wooster*, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—*Florsheim v. Schilling*, 137 U. S. 76, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—*Consolidated Fruit Jar Co. v. Bellaire Stamping Co.* 28 Fed. 94—*Cluett v. Clafin*, 30 Fed. 924—*Cooke v. Globe Files Co.* 31 Fed. 44—*J. L. Mott Iron Works v. Cassidy*, 31 Fed. 48—*United States Bung Mfg. Co. v. Independent Bung & Bushing Co.* 31 Fed. 70—*Landesman v. Jonasson*, 32 Fed. 591—*Celluloid Mfg. Co. v. American Zylonite Co.* 35 Fed. 420—*Potts v. Creager*, 44 Fed. 683—*Simmonds v. Morrison*, 44 Fed. 761—*Johnson Co. v. Pacific Rolling-Mills Co.* 47 Fed. 590—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 727—*Haughey v. Lee*, 48 Fed. 884—*Foos Mfg. Co. v. Springfield Engine &*

Thresher Co. 1 C. C. A. 412, 6 U. S. App. 14, 49 Fed. 643—*Kilbourne v. W. Bingham Co.* 1 C. C. A. 623, 6 U. S. App. 65, 50 Fed. 703—*Tiemann v. Kraatz*, 29 C. C. A. 259, 56 U. S. App. 545, 85 Fed. 439—*Chuse v. Ide*, 32 C. C. A. 267, 60 U. S. App. 610, 89 Fed. 498—*Fruit-Cleaning Co. v. Fresno Home-Packing Co.* 94 Fed. 863—*Stetson v. Herreshoff Mfg. Co.* 113 Fed. 956—*Farmers' Mfg. Co. v. Spruks Mfg. Co.* 119 Fed. 596.

143. Patent 273,585, for an improvement in fireproof safes, claiming the combination of the frames, the sheet-metal cover bent around the top, sides, and lower corners, with projecting metal bars and a removable bottom plate; and patent 281,640, claim 3, for the combination of the front and back frames, formed of single bent angle-bars, having one side cut away to leave curved ends, upon which the uncut side is bent to form rounded corners, and a metal sheet bent around and secured to the frames to form the top and sides of the safe,—are invalid, the combination in each being nothing more than an aggregation, which is not patentable. *Mosler Safe & Lock Co. v. Mosler B. & Co.* 127 U. S. 354, 8 Sup. Ct. Rep. 1148, 32: 182

Cited in Knapp v. Morss, 150 U. S. 227, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Muller v. Lodge & D. Mach. Tool Co.* 23 C. C. A. 365, 47 U. S. App. 189, 77 Fed. 628—*Thann Societe v. Lueders*, 105 Fed. 632.

144. The combination of an angle door with a safe lock or bolt, as claimed in May's patent, 25,662, claim 1, is not new or patentable; and the combination of such door with a lock of any kind is not a patentable invention. *Fond du Lac County v. May*, 137 U. S. 395, 11 Sup. Ct. Rep. 98, 34: 714
Distinguished in Singer Mfg. Co. v. Brill, 4 C. C. A. 376, 7 U. S. App. 601, 54 Fed. 882.

Cited in May v. Juneau County, 137 U. S. 409, 34 L. ed. 729, 11 Sup. Ct. Rep. 102—*Market Street Cable R. Co. v. Rawley*, 155 U. S. 625, 39 L. ed. 287, 15 Sup. Ct. Rep. 224—*National Progress Bunching Mach. Co. v. John R. Williams Co.* 12 L.R.A. 109, 44 Fed. 193—*Potts v. Creager*, 44 Fed. 685—*Campbell v. Bailey*, 45 Fed. 565—*Overweight Counterbalance Elevator Co. v. Improved Order, R. M. H. Asso.* 36 C. C. A. 131, 94 Fed. 161.

145. As the mechanical operation and effect of the patented devices in May's patent for an improvement in prisons, 25,662, are the same, whether there be a grating or other barrier or not, combination of the devices and the grating is not patentable. The case is one of mere aggregation. *Fond du Lac County v. May*, 137 U. S. 395, 11 Sup. Ct. Rep. 98, 34: 714

146. Patent 173,284, issued Feb. 8, 1876, to Charles H. Helms, for an improvement in sole-edge burnishing machines, claiming the combination of a burnishing tool with a flange at the lower edge against which the operator may rest the sole, and a finger rest, is not for a patentable combination, as it is a mere aggregation of old elements. *Union Edge Setter Co. v. Keith*, 139 U. S. 530, 11 Sup. Ct. Rep. 621, 35: 261

147. The addition of a known cantile to a

known saddle did not, in view of the fact that such use of the cantle was common, in itself involve genius or invention, or produce a patentable design. *Smith v. Whitman Saddle Co.* 148 U. S. 674, 13 Sup. Ct. Rep. 768, 37: 606

148. The device of the Martin patent, No. 433,531, for an improvement in a windmill, which consists of the combination of an external toothed pinion with an internal toothed spur wheel, is invalid for lack of invention, because that kind of a combination had been previously well known in other machinery. *Mast, F. & Co. v. Stover Mfg. Co.* 177 U. S. 485, 20 Sup. Ct. Rep. 708, 44: 856

Distinguished in *Hallock v. Davison*, 107 Fed. 485.

Cited in *Johnson v. Chisholm*, 53 C. C. A. 130, 115 Fed. 632—*Farmers' Mfg. Co. v. Spruks Mfg. Co.* 119 Fed. 596—*Johnson Co. v. Toledo Traction Co.* 56 C. C. A. 422, 119 Fed. 892—*Bettendorf Patents Co. v. J. R. Little Metal Wheel Co.* 59 C. C. A. 475, 123 Fed. 435—*Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co.* 60 C. C. A. 536, 125 Fed. 768—*McMichael & W. Mfg. Co. v. Ruth*, 63 C. C. A. 308, 128 Fed. 708—*Felt & T. Mfg. Co. v. Mechanical Accountant Co.* 129 Fed. 389—*Wilce v. Bush Temple of Music Co.* 134 Fed. 391—*Nenney Mfg. Co. v. J. L. Mott Iron Works*, 137 Fed. 434—*Covel Mfg. Co. v. Rich*, 73 C. C. A. 586, 142 Fed. 470—*Lincoln Iron Works v. W. H. McWhirter Co.* 74 C. C. A. 232, 142 Fed. 970—*Voightmann v. Wels & R. Cornice Co.* 78 C. C. A. 543, 148 Fed. 853.

149. Taking a truck or bolster previously in use on cars, and turning it into a floating bolster by adding a plate to guide the rise and fall of the bolster, and resting the ends of it upon springs, which had also been previously used, is, if anything more than an aggregation of familiar devices, an invention of such limited character as to require a narrow construction. *McCarty v. Lehigh Valley R. Co.* 160 U. S. 110, 16 Sup. Ct. Rep. 240, 40: 358
Cited in *Baldwin v. Kresl*, 22 C. C. A. 596, 46 U. S. App. 511, 76 Fed. 826.

150. The Clapp patent 134,978, for a grate elevated above the catch basin of a sewer, resting on a ring or support below the top of the basin, on pins between which spaces are left to allow the passage of water under the grating, does not involve invention. *Palmer v. Corning*, 156 U. S. 342, 15 Sup. Ct. Rep. 381, 39: 445

151. An improvement consisting in the use of round blocks of wood formed of the sections of small trees, set vertically on a foundation of sand or gravel, and in filling the spaces between the blocks with sand or gravel, where the use of blocks thus set was old, the foundation was old, and the use of filling between the blocks was old, and the only thing new was the bringing together, in the construction of a pavement, of these old and well-known elements, was invalid for lack of invention. *Phillips v. Detroit*, 111 U. S. 604, 4 Sup. Ct. Rep. 580, 28: 532

152. Portable reservoirs upon stoves, with

an escape pipe or flue forming part of the reservoir, being old, and a detachable base-pan also being old, putting these parts together in a new form is not a patentable combination. *Bussey v. Excelsior Mfg. Co.* 110 U. S. 131, 4 Sup. Ct. Rep. 33, 28: 95

153. Where a patent merely applied a process which was old to a material which was in existence and was old, to obtain an old form, the fact that the result is a mechanically better article than any which preceded it does not render the improvement a patentable one. Nor will the popularity and success achieved by the article over its predecessors afford evidence of the utility and patentable novelty of the invention, where the success is probably due to a feature which is not suggested in the original patent; that is, its adaptability for use by unskilled workmen. *Gardner v. Herz*, 118 U. S. 180, 6 Sup. Ct. Rep. 1027, 30: 158
Cited in *Pomace Holder Co. v. Ferguson* (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—*Thatcher Heating Co. v. Burtis*, 121 U. S. 295, 30 L. ed. 946, 7 Sup. Ct. Rep. 1034—*Florsheim v. Schilling*, 137 U. S. 76, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—*J. L. Mott Iron Works v. Cassidy*, 31 Fed. 48—*Celluloid Mfg. Co. v. American Zylonite Co.* 35 Fed. 420—*Potts v. Creager*, 44 Fed. 683—*Kilbourne v. W. Bingham Co.* 1 C. C. A. 617, 6 U. S. App. 65, 50 Fed. 703—*Fruit Cleaning Co. v. Fresno Home Packing Co.* 94 Fed. 863—*Farmers' Mfg. Co. v. Spruks Mfg. Co.* 119 Fed. 596—*Lafferty Mfg. Co. v. Acme R. Signal & Mfg. Co.* 71 C. C. A. 286, 138 Fed. 730—*Lafferty Mfg. Co. v. Acme R. Signal & Mfg. Co.* 74 C. C. A. 521, 143 Fed. 321.

154. A combination of old elements will not be deemed so obvious as to merit no title to invention, where it so greatly increased the effectiveness of a loom that it increased its capacity from 40 to 50 yards per day, and had never occurred even to skilful persons during the operation of such looms for a period of years. *Webster Loom Co. v. Higgins*, 105 U. S. 580, 26: 1177
Distinguished in *Lettell v. Mann*, 91 Fed. 915—*Durham v. Seymour*, 6 App. D. C. 104.
Cited in *Cantrell v. Wallick*, 117 U. S. 694, 29 L. ed. 1018, 6 Sup. Ct. Rep. 970—*Magowan v. New York Belting & Packing Co.* 141 U. S. 343, 35 L. ed. 785, 12 Sup. Ct. Rep. 71—*Barbed Wire Patent* (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.) 143 U. S. 283, 36 L. ed. 158, 12 Sup. Ct. Rep. 443—*Krements v. S. Cottle Co.* 148 U. S. 561, 37 L. ed. 559, 13 Sup. Ct. Rep. 719—*Mundy v. Lidgerwood Mfg. Co.* 20 Fed. 116—*Odell v. Stout*, 22 Fed. 168—*Phillips v. Carroll*, 23 Fed. 251—*Cary v. Wolff*, 23 Blatchf. 94, 24 Fed. 140—*Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co.* 32 Fed. 403—*Touder v. Chambers*, 37 Fed. 335—*Maltby v. Graham*, 37 Fed. 691—*Webster Loom Co. v. Higgins*, 39 Fed. 462—*American Automaton Weighing Mach. Co. v. Blauvelt*, 50 Fed. 214—*Watson v. Stevens*, 2 C. C. A. 503, 5 U. S. App. 101, 51 Fed. 760—*Francis v. Kirkpatrick*, 52 Fed. 825—*Featherstone v. George E. Bidwell Cycle Co.* 53 Fed. 116—*Thomson v. Citizens' Nat. Bank*, 3 C. C. A. 523, 10 U. S. App. 500, 53 Fed. 255—*Carter v. Wollschlaeger*, 53 Fed. 576—*Holloway v. Dow*, 54 Fed. 516—*American Cable R. Co. v. New York*, 56 Fed. 151—

Westinghouse v. New York Air-Brake Co. 59 Fed. 590—Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. 59 Fed. 909—Richardson v. Shepard, 60 Fed. 275—Johnson v. Johnston, 60 Fed. 622—Holtzer v. Consolidated Electric Mfg. Co. 60 Fed. 750—Western Electric Co. v. Capital Teleph. & Teleg. Co. 86 Fed. 774—Ginna v. Mersereau Mfg. Co. 34 C. C. A. 414, 63 U. S. App. 307, 92 Fed. 370—Star Brass Works v. General Electric Co. 49 C. C. A. 411, 111 Fed. 400—R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co. 111 Fed. 930—Westinghouse Electric & Mfg. Co. v. Union Carbide Co. 112 Fed. 421—Kinloch Teleph. Co. v. Western Electric Co. 51 C. C. A. 375, 113 Fed. 685—Cimioti Unhairing Co. v. American Unhairing Mach. Co. 53 C. C. A. 234, 115 Fed. 502—Consolidated Rubber Tire Co. v. Finley Rubber Tire Co. 116 Fed. 633—Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. 53 C. C. A. 591, 116 Fed. 371—Peters v. Union Blacnit Co. 120 Fed. 684—Klauder-Weldon Dyeing Mach. Co. v. Steadwell Dyeing Mach. Co. 122 Fed. 642—Farmers' Mfg. Co. v. Spruks Mfg. Co. 62 C. C. A. 453, 127 Fed. 697—Thomson-Houston Electric Co. v. Ohio Brass Co. 129 Fed. 381—Albright v. Langfeld, 131 Fed. 475—Rumford Chemical Works v. New York Baking Powder Co. 67 C. C. A. 370, 134 Fed. 388—Lamson v. Martin, 159 Mass. 563, 35 N. E. 78.

Old mode of operation.

155. A combination of old elements does not constitute a patentable invention, where they are all found, some in one and some in another of earlier devices for the same purpose, in which each element performs the same function that it has in the new combination. Busell Trimmer Co. v. Stevens, 137 U. S. 423, 11 Sup. Ct. Rep. 150, 34: 719 Burt v. Ivory, 133 U. S. 349, 10 Sup. Ct. Rep. 394, 33: 647

Knapp v. Morass, 150 U. S. 221, 14 Sup. Ct. Rep. 81, 37: 1059

Cited in French v. Carter, 137 U. S. 245, 34 L. ed. 667, 11 Sup. Ct. Rep. 90—Fond Du Lac County v. May, 137 U. S. 407, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—Ansonia Brass & Copper Co. v. Electrical Supply Co. 144 U. S. 19, 36 L. ed. 330, 12 Sup. Ct. Rep. 601—Lovell Mfg. Co. v. Cary, 147 U. S. 637, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—National Progress Bunching-Mach. Co. v. John R. Williams Co. 12 L.R.A. 109, 44 Fed. 192—Campbell v. Bailey, 45 Fed. 565—Johnson Co. v. Pacific Rolling-Mills Co. 47 Fed. 591—Johnson Co. v. Tidewater Steel-Works, 50 Fed. 94—Fox v. Perkins, 3 C. C. A. 40, 6 U. S. App. 200, 52 Fed. 213—Bowman v. De Grauw, 60 Fed. 912—Electric R. Co. v. Jamaica & B. R. Co. 61 Fed. 673—Vulcan Iron Works v. Smith, 10 C. C. A. 497, 15 U. S. App. 577, 92 Fed. 448—MacKnight v. McNiece, 64 Fed. 118—New Departure Bell Co. v. Bevin Bros. Mfg. Co. 64 Fed. 864—Frank v. Wm. P. Mockridge Mfg. Co. 65 Fed. 522—Wells v. Curtis, 13 C. C. A. 499, 31 U. S. App. 123, 66 Fed. 323—Ferris v. Batcheller, 70 Fed. 715—Cleveland Faucet Co. v. Vulcan Brass Co. 72 Fed. 507—L. Schrieber & Sons Co. v. Grimm, 19 C. C. A. 71, 43 U. S. App. 10, 72 Fed. 675—Baldwin v. Kresl, 22 C. C. A. 596, 46 U. S. App. 511, 76 Fed. 826—Klein v. Seattle, 23 C. C. A. 119, 44 U. S. App. 741, 77 Fed. 205—William Schwarzwelder & Co. v. Detroit, 77 Fed. 892—Gibbon v. Loewer Sole-Rounder Co. 24 C. C. A. 615, 39 U. S. App. 554, 79 Fed. 327—Frederick

R. Stearns & Co. v. Russell, 54 U. S. App. 591, 20 C. C. A. 133, 85 Fed. 230—Kelly v. Clow, 32 C. C. A. 211, 60 U. S. App. 338, 89 Fed. 303—Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co. 91 Fed. 990—Christy v. Hygeia Pneumatic Bicycle Saddle Co. 36 C. C. A. 37, 93 Fed. 970—Justi v. Clark, 47 C. C. A. 575, 108 Fed. 669.

156. A patent cannot be upheld where it consists in a mere aggregation of parts, each to perform its separate and independent function substantially in the same manner as before combination with the other, and without contributing to a new and combined result. Watson v. Cincinnati, I. St. L. & C. R. Co. 132 U. S. 161, 10 Sup. Ct. Rep. 45, 33: 295

Union Edge Setter Co. v. Keith, 139 U. S. 530, 11 Sup. Ct. Rep. 621, 35: 261

Adams v. Bellaire Stamping Co. 141 U. S. 539, 12 Sup. Ct. Rep. 66, 35: 849

Cited in Fond Du Lac County v. May, 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—Brush Electric Co. v. Julien Electric Co. 41 Fed. 698—Foos Mfg. Co. v. Springfield Engine & Thresher Co. 1 C. C. A. 412, 6 U. S. App. 14, 49 Fed. 643—J. L. Mott Iron Works v. Standard Mfg. Co. 51 Fed. 85—Watson v. Stevens, 2 C. C. A. 503, 5 U. S. App. 101, 51 Fed. 759—J. L. Mott Iron Works v. Standard Mfg. Co. 4 C. C. A. 34, 3 U. S. App. 386, 53 Fed. 823—Ball & Socket Fastener Co. v. Ball Glove Fastening Co. 7 C. C. A. 504, 5 U. S. App. 588, 58 Fed. 824—Newark Watch-Case Material Co. v. Willmot & H. Mfg. Co. 60 Fed. 618—Vulcan Iron Works v. Smith, 10 C. C. A. 497, 15 U. S. App. 577, 62 Fed. 449—Wells v. Curtis, 13 C. C. A. 499, 31 U. S. App. 123, 66 Fed. 322—Interior Lumber Co. v. Perkins, 25 C. C. A. 616, 53 U. S. App. 66, 80 Fed. 531—Kelly v. Clow, 32 C. C. A. 211, 60 U. S. App. 338, 89 Fed. 303—MacCall v. Knowles Loom Works, 37 C. C. A. 350, 95 Fed. 986—Johnston v. Woodbury, 96 Fed. 434—Hickory Wheel Co. v. Frasier, 40 C. C. A. 299, 100 Fed. 102—Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. 41 C. C. A. 368, 101 Fed. 294—Brown Holsting & Conveying Mach. Co. v. King Bridge Co. 46 C. C. A. 438, 107 Fed. 504—J. L. Mott Iron Works v. Hoffmann & B. Mfg. Co. 110 Fed. 775—Voightmann v. Wels & R. Cornice Co. 133 Fed. 304.

157. A combination of parts which amounts merely to an aggregation operating in the same manner as formerly is not patentable. Hendy v. Golden State & Miner's Iron Works, 127 U. S. 370, 8 Sup. Ct. Rep. 1275, 32: 207

Cited in Florsheim v. Schilling, 137 U. S. 77, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—Fond Du Lac County v. May, 137 U. S. 407, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—Union Edge Setter Co. v. Keith, 139 U. S. 539, 35 L. ed. 264, 11 Sup. Ct. Rep. 621—United States Axle Lubricator Co. v. Wurster, 38 Fed. 430—Campbell v. Bailey, 45 Fed. 565—J. L. Mott Iron Works v. Standard Mfg. Co. 51 Fed. 85—J. L. Mott Iron Works v. Standard Mfg. Co. 4 C. C. A. 33, 3 U. S. App. 386, 53 Fed. 823—Frank v. Wm. P. Mockridge Mfg. Co. 65 Fed. 522—William Schwarzwelder & Co. v. Detroit, 77 Fed. 892.

158. A multiplicity of elements does not make a combination patentable so long as each element performs some old and well-

known function. *Richards v. Chase Elevator Co.* 158 U. S. 299, 15 Sup. Ct. Rep. 931.

39: 991

Cited in *Holmes v. Hurst*, 174 U. S. 89, 43 L. ed. 907, 19 Sup. Ct. Rep. 606—*Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.* 174 U. S. 498, 43 L. ed. 1060, 19 Sup. Ct. Rep. 641—*Richards v. Michigan C. R. Co.* 186 U. S. 479, 46 L. ed. 1259, 22 Sup. Ct. Rep. 942—*Fuller & J. Mfg. Co. v. Bender*, 69 Fed. 1001—*Osgood Dredge Co. v. Metropolitan Dredging Co.* 21 C. C. A. 493, 33 U. S. App. 581, 75 Fed. 672—*Loewenback v. Hake-Stirn Co.* 34 C. C. A. 611, 92 Fed. 663—*Sperry Mfg. Co. v. J. L. Owens Co.* 96 Fed. 977—*Richards v. Michigan C. R. Co.* 42 C. C. A. 484, 102 Fed. 509—*Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.* 53 C. C. A. 591, 116 Fed. 371—*Fowler v. New York*, 58 C. C. A. 116, 121 Fed. 750—*Drake Castle Pressed Steel Lug Co. v. Brownell*, 59 C. C. A. 220, 123 Fed. 90.

159. To make a combination of old elements patentable there must be some new result accomplished; and where the result is a mere aggregation of the several functions of the different elements of the combination, each performing its old function in the old ways, there is no invention. *Richards v. Chase Elevator Co.* 159 U. S. 477, 16 Sup. Ct. Rep. 53.

40: 225

Cited in *Michigan Stove Co. v. Fuller-Warren Co.* 81 Fed. 378—*Richards v. Michigan C. R. Co.* 42 C. C. A. 484, 102 Fed. 509.

160. An improvement consisting of the insertion, in a groove, in one end of a lead pencil, of a piece of prepared India rubber, glued at one edge, is not a patentable invention. *Reckendorfer v. Faber*, 92 U. S. 347.

23: 719

161. Taking a fire-pot from one stove, a flue from another, a coal reservoir from a third, and putting them into a new stove, where each fulfils the office it had fulfilled in its old situation, is not a patentable invention. *Hailes v. Van Wormer*, 20 Wall. 353.

22: 241

162. There is no patentable novelty in the transfer of the well known fuel magazine from its use in an outstanding base-burning stove to a fireplace heater, equally well known and common, in which it performs precisely the same functions as in its old place, although the fireplace heater is thereby made a better heater than before, where the claim is not for any device for effecting the combination, but for the combination, no matter how or by what means effected. *Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 7 Sup. Ct. Rep. 1034.

30: 942

Cited in *Dreyfus v. Searle*, 124 U. S. 64, 31 L. ed. 354, 8 Sup. Ct. Rep. 390—*Royer v. Roth*, 132 U. S. 206, 33 L. ed. 324, 10 Sup. Ct. Rep. 58—*Florsheim v. Schilling*, 137 U. S. 77, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—*Knapp v. Moras*, 150 U. S. 228, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Miller v. Eagle Mfg. Co.* 151 U. S. 203, 38 L. ed. 129, 14 Sup. Ct. Rep. 310—*Palmer v. Corning*, 156 U. S. 346, 39 L. ed. 447, 15 Sup. Ct. Rep. 381—*Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.* 33 Fed. 256—*Wright v. Yuengling*, 33 Fed. 656—*Electrical Accumulator Co. v. Julien Electric Co.*

38 Fed. 139—*Steiner Fire-Extinguisher Co. v. Holloway*, 43 Fed. 307—*Foos Mfg. Co. v. Springfield Engine & Thresher Co.* 44 Fed. 598—*National Progress Bunching Mach. Co. v. John B. Williams Co.* 12 L.R.A. 109, 44 Fed. 192—*Campbell v. Bailey*, 45 Fed. 565—*Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 592—*Foos Mfg. Co. v. Springfield Engine & Thresher Co.* 1 C. C. A. 411, 6 U. S. App. 14, 49 Fed. 642—*Briggs v. Central Ice Co.* 54 Fed. 379—*H. W. Johns Mfg. Co. v. Robertson*, 60 Fed. 907—*Bowers v. Von Schmidt*, 63 Fed. 582—*Olmstead v. A. H. Andrews & Co.* 23 C. C. A. 493, 46 U. S. App. 608, 77 Fed. 840—*Green v. American Soda-Fountain Co.* 24 C. C. A. 40, 39 U. S. App. 510, 78 Fed. 123—*Consolidated Fastener Co. v. Columbian Fastener Co.* 79 Fed. 797—*American Tobacco Co. v. Streat*, 28 C. C. A. 24, 42 U. S. App. 617, 83 Fed. 706—*Clisby v. Reese*, 32 C. C. A. 83, 59 U. S. App. 721, 88 Fed. 648—*Air House Cleaning Co. v. American Compressed Air Cleaning Co.* 60 C. C. A. 537, 125 Fed. 769—*Durham v. Seymour*, 6 App. D. C. 103.

163. A patent cannot be granted for a combination differing from a previous patented combination only by a change in the arrangement of the parts, unless some additional novelty and utility are introduced into the combination by a substantial change in the form or mode of operation of the parts. *Hartshorn v. Saginaw Barrel Co.* 119 U. S. 664, 7 Sup. Ct. Rep. 421.

30: 539

Cited in *Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.* 86 Fed. 319.

164. The combination of prior patented inventions in a corset, making it a superior and cheaper article, does not necessarily make a patentable invention. *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. Rep. 20.

34: 574

Cited in *Busell Trimmer Co. v. Stevens*, 137 U. S. 433, 34 L. ed. 723, 11 Sup. Ct. Rep. 150—*Lovell Mfg. Co. v. Cary*, 147 U. S. 637, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*Campbell v. Bailey*, 45 Fed. 565—*Foos Mfg. Co. v. Springfield Engine & Thresher Co.* 1 C. C. A. 412, 6 U. S. App. 14, 49 Fed. 643—*Mahon v. McGuire Mfg. Co.* 51 Fed. 684—*Deere & Co. v. J. I. Case Plow Works*, 6 C. C. A. 160, 9 U. S. App. 567, 56 Fed. 844—*Frank v. Wm. P. Mockridge Mfg. Co.* 65 Fed. 522—*Klein v. Seattle*, 23 C. C. A. 119, 44 U. S. App. 741, 77 Fed. 205—*William Schwarzwaelder & Co. v. Detroit*, 77 Fed. 892—*Interior Lumber Co. v. Perkins*, 25 C. C. A. 616, 53 U. S. App. 66, 80 Fed. 531—*Kelly v. Clow*, 32 C. C. A. 211, 60 U. S. App. 338, 89 Fed. 303—*Union Hardware Co. v. Selchow*, 112 Fed. 1009—*Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.* 53 C. C. A. 589, 116 Fed. 369—*Durham v. Seymour*, 6 App. D. C. 100.

165. The connection of a suspender end to a piece which is attached to a buckle, as in the case of the Shenfield patent, 169.885, gives no patentable character to a loop which is old, as is also the attachment to the buckle, where no new mode of operation is produced by the combination. *Shenfield v. Nashawan-nuck Mfg. Co.* 137 U. S. 56, 11 Sup. Ct. Rep. 5.

34: 573

166. It did not involve invention to make a suspender end of flat cord in substantially the same way that suspender ends of round

cord had been made, and in substantially the same way in which flat button ends had been made for the purpose of fastening or securing other articles of wearing apparel than trousers. *Shenfield v. Nashawannuck Mfg. Co.* 137 U. S. 56, 11 Sup. Ct. Rep. 5,

34: 573

167. The Ide patent, 301,720, for a "steam-engine governor," consisting of a combination with a dash pot of a fly-wheel governor of relatively movable parts, is nothing more than the mere fastening of an old governor to the arms of the fly or balance wheel of the engine, instead of leaving it on the driving shaft as formerly, no new function being obtained by the combination. *Ide v. Ball Engine Co.* 149 U. S. 550, 13 Sup. Ct. Rep. 941,

37: 843

168. The Hoffman patent, 450,124, for a supporting rack or shelf for books, composed of metallic strips with a re-entrant bend or recess in its front edge for the insertion of the hand, with rollers projecting above and in front of each side or recess,—is invalid for lack of invention, as every element of the combination described is found performing the same function in some one or more of the prior devices. *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.* 174 U. S. 492, 19 Sup. Ct. Rep. 641,

43: 1058

Cited in Sperry Mfg. Co. v. J. L. Owens Co. 96 Fed. 976—*Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.* 53 C. C. A. 589, 116 Fed. 369—*American Saddle Co. v. Sager Gear Co.* 122 Fed. 648—*Voightman v. Perkinson*, 133 Fed. 935—*North Jersey Street R. Co. v. Brill*, 67 C. C. A. 384, 134 Fed. 584.

New result.

169. A patentable invention may consist entirely of a new combination of old ingredients, whereby a new and useful result is obtained. *Rees v. Gould (Gould v. Rees)* 15 Wall. 187, 21: 39
Hailes v. Van Wormer, 20 Wall. 353,

22: 241

Dane v. Chicago Mfg. Co. 131 U. S. cxvii.
Appx. and 23: 82
Webster Loom Co. v. Higgins, 105 U. S. 580,

26: 1177

Wieke v. Ostrum, 103 U. S. 461, 26: 409
Brown v. Guild (The Corn-Planter Patent)

23 Wall. 181, 23: 161
Gill v. Wells, 22 Wall. 1, 22: 699
Distinguished in Williams v. Rome, W. & O. R. Co. 15 Blatchf. 210, 3 Bann. & Ard. 422, Fed. Cas. No. 17,735—*Steiner Fire-Extinguisher Co. v. Holloway*, 43 Fed. 807—*Schroeder v. Brammer*, 98 Fed. 888.

Cited in Reckendorfer v. Faber, 92 U. S. 353, 23 L. ed. 722—*Pickering v. McCullough*, 104 U. S. 317, 26 L. ed. 751—*Phillips v. Detroit*, 111 U. S. 607, 28 L. ed. 533, 4 Sup. Ct. Rep. 580—*Morris v. McMillin*, 112 U. S. 249, 28 L. ed. 704, 5 Sup. Ct. Rep. 218—*Stephenson v. Brooklyn C. T. R. Co.* 114 U. S. 158, 29 L. ed. 61, 5 Sup. Ct. Rep. 777—*Beecher Mfg. Co. v. Atwater Mfg. Co.* 114 U. S. 524, 29 L. ed. 282, 5 Sup. Ct. Rep. 1007—*Cantrell v. Wallick*, 117 U. S. 694, 29 L. ed. 1018, 6 Sup. Ct. Rep. 970—*Thatcher Heating Co. v. Burtis*, 121 U. S. 295, 30 L.

ed. 945, 7 Sup. Ct. Rep. 1034—*Mosler Safe & Lock Co. v. Mosler, B. & Co.* 127 U. S. 361, 32 L. ed. 184, 8 Sup. Ct. Rep. 1148—*Hendy v. Golden State & M. Iron Works*, 127 U. S. 375, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—*Florsheim v. Schilling*, 137 U. S. 77, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—*Union Edge Setter Co. v. Kelth*, 139 U. S. 539, 35 L. ed. 264, 11 Sup. Ct. Rep. 621—*Adams v. Bellaire Stamping Co.* 141 U. S. 542, 35 L. ed. 851, 12 Sup. Ct. Rep. 66—*Lovell Mfg. Co. v. Cary*, 147 U. S. 638, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*Knapp v. Mors*, 150 U. S. 227, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*C. & A. Potts & Co. v. Creager*, 155 U. S. 608, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—*Palmer v. Corning*, 156 U. S. 345, 39 L. ed. 447, 15 Sup. Ct. Rep. 381—*Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.* 174 U. S. 498, 43 L. ed. 1060, 19 Sup. Ct. Rep. 641—*Holmes v. Hurst*, 174 U. S. 89, 43 L. ed. 907, 19 Sup. Ct. Rep. 606—*Alcott v. Young*, 16 Blatchf. 138, 4 Bann. & Ard. 202, Fed. Cas. No. 149—*Booth v. Parks*, 1 Flipp. 383, 1 Bann. & Ard. 227, Fed. Cas. No. 1,648—*Bullinger v. Mackey*, 15 Blatchf. 561, Fed. Cas. No. 2,127—*Herring v. Nelson*, 14 Blatchf. 299, 3 Bann. & Ard. 97, Fed. Cas. No. 6,424—*Kerosene Lamp Heater Co. v. Littell*, 3 Bann. & Ard. 318, Fed. Cas. No. 7,724—*Reckendorfer v. Faber*, 12 Blatchf. 79, Fed. Cas. No. 11,625—*Stillwell & B. Mfg. Co. v. Cincinnati Gaslight & Coke Co.* 1 Bann. & Ard. 614, Fed. Cas. No. 13,453—*Webster Loom Co. v. Higgins*, 15 Blatchf. 456, Fed. Cas. No. 17,342—*Perfection Window Cleaner Co. v. Bosley*, 9 Biss. 388, 5 Bann. & Ard. 451, 2 Fed. 577—*Slawson v. Grand Street, P. P. & F. R. Co.* 17 Blatchf. 515, 5 Bann. & Ard. 218, 4 Fed. 534—*Fitch v. Bragg*, 8 Fed. 590—*Beatty v. Hodges*, 19 Blatchf. 382, 8 Fed. 611—*Detroit Lubricator Mfg. Co. v. Renchard*, 9 Fed. 298—*Doubleday v. Roess*, 11 Fed. 739—*Sheriff v. Fulton*, 12 Fed. 140—*Perry v. Co-Operative Foundry Co.* 20 Blatchf. 501, 12 Fed. 437—*Clark Pomace Holder Co. v. Ferguson*, 21 Blatchf. 378, 17 Fed. 80—*Wood v. Packard*, 17 Fed. 651—*Tower v. Bemis & C. Hardware & Tool Co.* 19 Fed. 500—*Mosler Safe & Lock Co. v. Mosler*, 22 Fed. 905—*Peard v. Johnson*, 23 Fed. 510—*Niles Tool-Works v. Betts Mach. Co.* 27 Fed. 305—*Leonard v. Lovell*, 29 Fed. 314—*National Sheet-Metal Roofing Co. v. Garwood*, 35 Fed. 660—*Schlicht & F. Co. v. Sherwood Letter File Co.* 36 Fed. 589—*Brinkerhoff v. Aloe*, 37 Fed. 96—*Worswick Mfg. Co. v. Kansas*, 38 Fed. 248—*Jones v. Clow*, 39 Fed. 787—*Tatum v. Gregory*, 41 Fed. 144—*National Progress Bunching Mach. Co. v. John R. Williams Co.* 12 I. R. A. 109, 44 Fed. 192—*Kane v. Huggins Cracker & Candy Co.* 44 Fed. 292—*Foos Mfg. Co. v. Springfield Engine & Thresher Co.* 44 Fed. 598—*Campbell v. Bailey*, 45 Fed. 565—*Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 591—*Standard Oil Co. v. Southern P. R. Co.* 48 Fed. 110—*Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co.* 1 C. C. A. 164, 2 U. S. App. 55, 49 Fed. 63—*Foos Mfg. Co. v. Springfield Engine & Thresher Co.* 1 C. C. A. 411, 6 U. S. App. 14, 49 Fed. 642—*Pacific Cable R. Co. v. Butte City Street R. Co.* 52 Fed. 864—*National Cash Register Co. v. American Cash Register Co.* 3 C. C. A. 564, 3 U. S. App. 340, 53 Fed. 372—*J. L. Mott Iron Works v. Standard Mfg. Co.* 4 C. C. A. 33, 3 U. S. App. 386, 53 Fed. 823—*St. Paul Plow Works v. Deere & Co.* 54 Fed. 502—*Standard Oil Co. v. Southern P. Co.* 4 C. C. A. 497, 7 U. S. App. 636, 54 Fed. 526—*Sayre v. Scott*, 5 C. C. A. 369, 3 U. S. App.

643, 55 Fed. 975—Newark Watch-Case Material Co. v. Wilmot & H. Mfg. Co. 60 Fed. 618—Electric R. Co. v. Jamaica & B. R. Co. 61 Fed. 669—Griawold v. Harker 10 C. C. A. 438, 27 U. S. App. 122, 62 Fed. 391—Thomson Meter Co. v. National Meter Co. 12 C. C. A. 673, 28 U. S. App. 275, 65 Fed. 430—S. F. Heath Cycle Co. v. Hay, 67 Fed. 249—De La Vergne Refrigerating Mach. Co. v. Featherstone, 67 Fed. 940—Davock v. Chicago & N. W. R. Co. 69 Fed. 469—Bray v. United States Net & Twine Co. 70 Fed. 1007—Pittsburgh Wire Co. v. Roberts, 18 C. C. A. 306, 39 U. S. App. 44, 71 Fed. 710—Chambers-Bering-Quinlan Co. v. Farles, 75 Fed. 664—Johnson v. Brooklyn Heights R. Co. 75 Fed. 670—Osgood Dredge Co. v. Metropolitan Dredging Co. 21 C. C. A. 493, 33 U. S. App. 581, 75 Fed. 672—P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co. 22 C. C. A. 668, 40 U. S. App. 200, 76 Fed. 975—Adams Electric R. Co. v. Lindell R. Co. 23 C. C. A. 231, 40 U. S. App. 482, 77 Fed. 441—Muller v. Lodge & D. Mach. Tool Co. 23 C. C. A. 365, 47 U. S. App. 189, 77 Fed. 628—William Schwarzwaelder & Co. v. Detroit, 77 Fed. 892—Von Schmidt v. Bowers, 25 C. C. A. 351, 48 U. S. App. 120, 80 Fed. 150—American Sulphite Pulp Co. v. Howland Falls Pulp Co. 25 C. C. A. 507, 50 U. S. App. 52, 80 Fed. 403—Michigan Stove Co. v. Fuller-Warren Co. 81 Fed. 378—Mast, F. & Co. v. Dempster Mill Mfg. Co. 27 C. C. A. 198, 49 U. S. App. 508, 82 Fed. 334—American Street Car Advertising Co. v. Newton Street R. Co. 82 Fed. 734—Beach v. Hobbs, 82 Fed. 923—Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 132, 54 U. S. App. 591, 85 Fed. 229—Clisby v. Reese, 32 C. C. A. 84, 59 U. S. App. 721, 88 Fed. 648—Antisdel v. Chicago Hotel Cabinet Co. 32 C. C. A. 220, 60 U. S. App. 572, 89 Fed. 312—Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 997—Bowers v. San Francisco Bridge Co. 91 Fed. 416—McConway & T. Co. v. Shickle, H. & H. Iron Co. 92 Fed. 166—Fruit Cleaning Co. v. Fresno Home Packing Co. 94 Fed. 858—Sperry Mfg. Co. v. J. L. Owens Co. 96 Fed. 977—Irwin v. Hasselman, 38 C. C. A. 591, 97 Fed. 968—Dodge v. Porter, 98 Fed. 628—Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. 41 C. C. A. 363, 101 Fed. 204—Bliss v. Reed, 102 Fed. 906—Overweight Counterbalance Elevator Co. v. Henry Vogt Mach. Co. 43 C. C. A. 84, 102 Fed. 961—Krajewski v. Pharr, 44 C. C. A. 577, 105 Fed. 519—Winslow v. Bronson, 106 Fed. 131—National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co. 45 C. C. A. 558, 106 Fed. 707—Dodge Mfg. Co. v. Collins, 46 C. C. A. 56, 106 Fed. 938—Hallock v. Davison, 107 Fed. 484—Sperry Mfg. Co. & J. L. Owens Co. 49 C. C. A. 402, 111 Fed. 391—Westinghouse Electric & Mfg. Co. v. Union Carbide Co. 112 Fed. 422—Klinckh Teleph. Co. v. Western Electric Co. 51 C. C. A. 375, 113 Fed. 665—Ide v. Trorlicht, D. & R. Carpet Co. 53 C. C. A. 347, 115 Fed. 143—Goodyear Tire & Rubber Tire Wheel Co. 53 C. C. A. 589, 116 Fed. 369—Emerson Electric Mfg. Co. v. Van Nort Bros. Electric Co. 116 Fed. 982—West Coast Safety Faucet Co. v. Jackson Brewing Co. 54 C. C. A. 536, 117 Fed. 298—Moore v. Schaw, 118 Fed. 607—Anderson v. Collins, 58 C. C. A. 677, 122 Fed. 459—Lowrie v. H. A. Meldrum Co. 124 Fed. 762—Rodiger v. Thaddeus Davids Mfg. Co. 126 Fed. 964—Bechtold v. Nowacke, 131 Fed. 277—Voightman v. Wels & R. Cornice Co. 133 Fed. 300—Voightman v. Perkinson, 133 Fed. 935—Stephenson v. Allison, 123 Ala.

448, 26 So. 290—Durham v. Seymour, 6 App. D. C. 103—Re Briggs, 9 App. D. C. 482—Re Draper, 10 App. D. C. 547—Fenton Metallic Mfg. Co. v. Office Specialty Co. 12 App. D. C. 217—Re Davenport, 23 App. D. C. 371—Re Fisher, 1 Mackey, 214—Re Faure, 8 Mackey, 261—Stephenson v. Brooklyn C. T. R. Co. 42 Phila. Leg. Int. 163.

170. The principle that the production of a new and useful result by a combination of old elements constitutes patentable invention, applied. Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 6 Sup. Ct. Rep. 934, 29: 954

Cited in National Cash Register Co. v. American Cash Register Co. 3 C. C. A. 564, 3 U. S. App. 340, 53 Fed. 372—S. F. Heath Cycle Co. v. Hay, 67 Fed. 249.

171. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention. The combination, to be patentable, must produce a new result. Pickering v. McCullough, 104 U. S. 310, 26: 749
Hailes v. Van Wormer, 20 Wall. 353, 22: 241

Distinguished in National Cash Register Co. v. American Cash Register Co. 3 C. C. A. 563, 3 U. S. App. 340, 53 Fed. 371—Clark Pomace-Holder Co. v. Ferguson, 21 Blatchf. 378, 17 Fed. 80.

Cited in Stephenson v. Brooklyn C. T. R. Co. 114 U. S. 158, 29 L. ed. 61, 5 Sup. Ct. Rep. 777—Beecher Mfg. Co. v. Atwater Mfg. Co. 114 U. S. 524, 29 L. ed. 232, 5 Sup. Ct. Rep. 1007—Mosler Safe & Lock Co. v. Mosler, 127 U. S. 361, 32 L. ed. 184, 8 Sup. Ct. Rep. 1148—Hendy v. Golden State & Miners' Iron Works, 127 U. S. 375, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—Brush v. Condit, 132 U. S. 48, 33 L. ed. 256, 10 Sup. Ct. Rep. 1—Florsheim v. Schilling, 137 U. S. 77, 34 L. ed. 679, 11 Sup. Ct. Rep. 20—Fond Du Lac County v. May, 137 U. S. 407, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—Union Edge Setter Co. v. Keith, 139 U. S. 539, 35 L. ed. 264, 11 Sup. Ct. Rep. 621—International Tooth-Crown Co. v. Gaylord, 140 U. S. 62, 35 L. ed. 350, 11 Sup. Ct. Rep. 716—Adams v. Bellaire Stamping Co. 141 U. S. 542, 35 L. ed. 851, 12 Sup. Ct. Rep. 66—Knapp v. Moras, 150 U. S. 227, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—Palmer v. Corning, 156 U. S. 345, 39 L. ed. 447, 15 Sup. Ct. Rep. 381—Rison Iron & Locomotive Works v. Medart, 158 U. S. 82, 39 L. ed. 905, 15 Sup. Ct. Rep. 745—Holmes v. Hurst, 174 U. S. 89, 43 L. ed. 907, 19 Sup. Ct. Rep. 606—Perry v. Co-operative Foundry Co. 20 Blatchf. 501, 12 Fed. 437—Bradley & H. Mfg. Co. v. Charles Parker Co. 17 Fed. 243—Tower v. Bemis & C. Hardware & Tool Co. 19 Fed. 500—Sessions v. Romadka, 21 Fed. 131—Hayes v. Bickelbaupt, 22 Blatchf. 463, 21 Fed. 567—New York Bung & Bushing Co. v. Doelger, 23 Blatchf. 171, 23 Fed. 194—Peard v. Johnson, 23 Fed. 509—Scott Mfg. Co. v. Sayre, 26 Fed. 155—Niles Tool-Works v. Betts Mach. Co. 27 Fed. 605—Leonard v. Lovell, 29 Fed. 316—Mosler Safe & Lock Co. v. Mosler, 22 Fed. 905—National Sheet-Metal Roofing Co. v. Garwood, 35 Fed. 660—Schlicht & F. Co. v. Sherwood Letter File Co. 36 Fed. 589—Brinkerhoff v. Aloe, 37 Fed. 96—Ide v. Ball Engine Co. 39 Fed. 550—Jones v. Clow, 39 Fed. 787—National Progress Punching-Mach. Co. v. John R. Williams Co. 12 L.R.A. 109, 44 Fed. 192—Foss

Mfg. Co. v. Springfield Engine & Thresher Co. 44 Fed. 598—Campbell v. Bailey, 45 Fed. 565—Johnson Co. v. Pacific Rolling-Mills Co. 47 Fed. 591—Standard Oil Co. v. Southern P. R. Co. 48 Fed. 110—Foos Mfg. Co. v. Springfield Engine & Thresher Co. 1 C. C. A. 411, 6 U. S. App. 14, 49 Fed. 642—J. L. Mott Iron Works v. Standard Mfg. Co. 51 Fed. 85—J. L. Mott Iron Works v. Standard Mfg. Co. 4 C. C. A. 33, 3 U. S. App. 386, 53 Fed. 823—St. Paul Plow Works v. Deere & Co. 54 Fed. 502—Standard Oil Co. v. Southern P. Co. 4 C. C. A. 497, 7 U. S. App. 636, 54 Fed. 527—Deere & Co. v. J. I. Case Plow Works, 6 C. C. A. 160, 9 U. S. App. 567, 56 Fed. 844—Bagley & S. Co. v. Empire Wood-Pulp Co. 7 C. C. A. 195, 14 U. S. App. 517, 53 Fed. 217—National Cash-Register Co. v. Lamson Consol. Store-Service Co. 60 Fed. 604—Thomson Meter Co. v. National Meter Co. 12 C. C. A. 673, 28 U. S. App. 275, 65 Fed. 430—S. F. Heath Cycle Co. v. Hay, 67 Fed. 248—William Schwarzwaelder & Co. v. Detroit, 77 Fed. 892—Consolidated Fastener Co. v. Columbian Fastener Co. 79 Fed. 797—Interior Lumber Co. v. Perkins, 25 C. C. A. 616, 53 U. S. App. 66, 80 Fed. 531—Kelly v. Clow, 32 C. C. A. 211, 60 U. S. App. 338, 89 Fed. 303—Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 997—Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co. 91 Fed. 991—J. L. Mott Iron Works v. Hoffmann & B. Mfg. Co. 110 Fed. 775—Dodge Mfg. Co. v. Collins, 46 C. C. A. 56, 106 Fed. 938—Westinghouse Electric & Mfg. Co. v. Union Carbide Co. 112 Fed. 422—Durham v. Seymour, 6 App. D. C. 103—Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co. 12 App. D. C. 218.

172. A combination, to be patentable, must produce a different force, effect, or result in the combined forces or separate parts. There must be a new result produced by their union, otherwise it is only an aggregation of separate elements. Reckendorfer v. Faber, 92 U. S. 347. 23: 719
Distinguished in Williams v. Rome, W. & O. R. Co. 15 Blatchf. 210, 3 Bann. & Ard. 422, Fed. Cas. No. 17,735.

Cited in Pickering v. McCullough, 104 U. S. 318, 26 L. ed. 751—Phillips v. Detroit, 111 U. S. 608, 28 L. ed. 533, 4 Sup. Ct. Rep. 580—Stephenson v. Brooklyn C. T. R. Co. 114 U. S. 158, 29 L. ed. 61, 5 Sup. Ct. Rep. 777—Mosler Safe & Lock Co. v. Mosler B. & Co. 127 U. S. 361, 32 L. ed. 184, 8 Sup. Ct. Rep. 1148—Hendy v. Golden State & Miners' Iron Works, 127 U. S. 375, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—Florsheim v. Schilling, 137 U. S. 77, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—Union Edge Setter Co. v. Keith, 139 U. S. 539, 35 L. ed. 264, 11 Sup. Ct. Rep. 621—Huber v. N. O. Nelson Mfg. Co. 148 U. S. 291, 37 L. ed. 454, 13 Sup. Ct. Rep. 603—Knapp v. Moras, 150 U. S. 227, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—Palmer v. Corning, 156 U. S. 345, 39 L. ed. 447, 15 Sup. Ct. Rep. 381—Holmes v. Hurst, 174 U. S. 89, 43 L. ed. 907, 19 Sup. Ct. Rep. 606—Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co. 174 U. S. 498, 43 L. ed. 1060, 19 Sup. Ct. Rep. 641—Alcott v. Young, 4 Bann. & Ard. 202, Fed. Cas. No. 149—Herring v. Nelson, 3 Bann. & Ard. 61, Fed. Cas. No. 6, 424—Perfection Window Cleaner Co. v. Bosley, 5 Bann. & Ard. 451, 2 Fed. 576—Yale Lock Mfg. Co. v. Norwich Nat. Bank, 19 Blatchf. 140, 6 Fed. 395—Beatty v. Hodges, 19 Blatchf. 382, 8 Fed. 611—Doubleday v. Roess, 11 Fed. 739—Perry v. Co-operative U. S. Dig.—270

Foundry Co. 20 Blatchf. 501, 12 Fed. 437—Sawyer v. Miller, 4 Woods, 474, 12 Fed. 727—Clark Pomace Holder Co. v. Ferguson, 21 Blatchf. 378, 17 Fed. 80—Tower v. Bemis & C. Hardware & Tool Co. 19 Fed. 500—Mosler Safe & Lock Co. v. Mosler, 22 Fed. 905—Peard v. Johnson, 23 Fed. 510—Scott Mfg. Co. v. Sayre, 26 Fed. 155—Niles Tool-Works v. Betts Mach. Co. 27 Fed. 305—Leonard v. Lovell, 29 Fed. 314—National Sheet-Metal Roofing Co. v. Garwood, 35 Fed. 660—Schlicht & F. Co. v. Sherwood Letter File Co. 36 Fed. 589—Brinkerhoff v. Aloe, 37 Fed. 96—Huber v. N. O. Nelson Mfg. Co. 38 Fed. 839—Ide v. Ball Engine Co. 39 Fed. 550—Jones v. Clow, 39 Fed. 787—Campbell v. Bailey, 45 Fed. 565—Root v. Sontag, 47 Fed. 313—Johnson Co. v. Pacific Rolling-Mills Co. 47 Fed. 591—Standard Oil Co. v. Southern P. R. Co. 48 Fed. 110—Pacific Cable R. Co. v. Butte City Street R. Co. 52 Fed. 866—J. L. Mott Iron Works v. Standard Mfg. Co. 4 C. C. A. 33, 3 U. S. App. 386, 53 Fed. 823—Standard Oil Co. v. Southern P. Co. 4 C. C. A. 497, 7 U. S. App. 636, 54 Fed. 527—Butte City Street R. Co. v. Pacific Cable R. Co. 8 C. C. A. 485, 15 U. S. App. 313, 60 Fed. 91—Newark Watch-Case Material Co. v. Wilmot & H. Mfg. Co. 60 Fed. 618—Campbell v. Bayley, 11 C. C. A. 287, 18 U. S. App. 486, 63 Fed. 465—Bowers v. Von Schmidt, 63 Fed. 583—Thomson Meter Co. v. National Meter Co. 12 C. C. A. 673, 28 U. S. App. 275, 65 Fed. 430—P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co. 70 Fed. 495—Osgood Dredge Co. v. Metropolitan Dredging Co. 21 C. C. A. 493, 33 U. S. App. 581, 75 Fed. 672—Brunswick Balke-Collender Co. v. Phelan Billiard Ball Co. 76 Fed. 979—Von Schmidt v. Bowers, 25 C. C. A. 351, 48 U. S. App. 120, 80 Fed. 150—Deere & Co. v. Rock Island Plow Co. 28 C. C. A. 313, 55 U. S. App. 534, 84 Fed. 176—Cilsby v. Reese, 32 C. C. A. 84, 59 U. S. App. 721, 88 Fed. 648—Antisdell v. Chicago Hotel Cabinet Co. 32 C. C. A. 220, 60 U. S. App. 572, 89 Fed. 312—Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co. 91 Fed. 991—Sperry Mfg. Co. v. J. L. Owens Co. 96 Fed. 977—J. L. Mott Iron Works v. Hoffman & B. Mfg. Co. 110 Fed. 777—Westinghouse Electric & Mfg. Co. v. Union Carbide Co. 112 Fed. 422—Galvin v. Grand Rapids, 53 C. C. A. 171, 115 Fed. 517—Dowagiac Mfg. Co. v. Superior Drill Co. 53 C. C. A. 46, 115 Fed. 896—Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. 53 C. C. A. 590, 116 Fed. 370—American Sales Book Co. v. Bullivant, 54 C. C. A. 290, 117 Fed. 258—American Salesbook Co. v. Carter-Crume Co. 125 Fed. 501—Thomson-Houston Electric Co. v. Ohio Brass Co. 129 Fed. 379—Durham v. Seymour, 6 App. D. C. 103—Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co. 12 App. D. C. 218—Re Davenport, 23 App. D. C. 371—Stephenson v. Brooklyn Cross-Town R. Co. 42 Phila. Leg. Int. 162.

173. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. Palmer v. Corning, 156 U. S. 342, 15 Sup. Ct. Rep. 381, 39: 445
Cited in Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co. 174 U. S. 498, 43 L. ed. 1060, 19 Sup. Ct. Rep. 641—Osgood Dredge Co. v. Metropolitan Dredging Co. 21 C. C. A. 493, 33 U. S. App. 581, 75 Fed. 672—American Tobacco Co. v. Streator, 28 C. C. A. 23, 42 U. S. App. 617, 83 Fed. 705—Wilkins Shoe-But-

ton Fastener Co. v. Webb, 89 Fed. 907—
Sperry Mfg. Co. v. J. L. Owens, 96 Fed.
977.

174. A combination is patentable only
when the several elements of which it is
composed produce by their joint action a
new and useful result, or an old result in a
cheaper or otherwise more advantageous
way. *Stephenson v. Brooklyn C. T. R. Co.*
114 U. S. 149, 5 Sup. Ct. Rep. 777, 29: 58
Cited in Beecher Mfg. Co. v. Atwater Mfg. Co.

114 U. S. 524, 29 L. ed. 232, 5 Sup. Ct. Rep.
1007—*Pomace Holder Co. v. Ferguson* (Clark
Pomace Holder Co. v. Ferguson) 119 U. S.
338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—
Watson v. Cincinnati, I. St. L. & C. R. Co.
132 U. S. 167, 33 L. ed. 298, 10 Sup. Ct.
Rep. 45—*Hill v. Wooster*, 132 U. S. 701, 33
L. ed. 506, 10 Sup. Ct. Rep. 228—*Florsheim*
v. Schilling, 137 U. S. 77, 34 L. ed. 570, 11
Sup. Ct. Rep. 20—*Fond Du Lac County v.*
May, 137 U. S. 406, 34 L. ed. 718, 11 Sup.
Ct. Rep. 98—*Union Edge Setter Co. v. Kelth*,
139 U. S. 539, 35 L. ed. 264, 11 Sup. Ct.
Rep. 621—*Railway Register Mfg. Co. v. North*
Hudson County R. Co. 24 Fed. 795—*Hoe*
v. Kahler, 23 Blatchf. 362, 25 Fed. 277—
Railway Register Mfg. Co. v. North Hudson
County R. Co. 26 Fed. 412—*Niles Tool-Works*
v. Betts Mach. Co. 27 Fed. 305—*Leonard v.*
Lovell, 29 Fed. 314—*Cluett v. Claffin*, 30
Fed. 924—*Holmes Electric Protective Co. v.*
Metropolitan Burglar Alarm Co. 33 Fed. 256
—*National Progress Bunching Mach. Co. v.*
John R. Williams Co. 12 L.R.A. 109, 44 Fed.
192—*Johnson Co. v. Pacific Rolling-Mills Co.*
47 Fed. 589—*Western Electric Co. v. Capital*
Teleph. & Teleg. Co. 86 Fed. 777—*National*
Casket Co. v. Stoltz, 127 Fed. 160.

175. A device for closing the rear door of
a street car from the front end is not
patentable, other devices having been in
use for closing the rear door from the front
end, and such a rod or shaft having been
used to open and close the doors of furnaces,
and the window and door openings of sugar
refineries by persons at a distance, and for
other similar purposes. *Stephenson v.*
Brooklyn C. T. R. Co. 114 U. S. 149, 5 Sup.
Ct. Rep. 777, 29: 58

176. If a new combination and arrange-
ment of known elements produce a new and
beneficial result never attained before, it is
evidence of invention. *Krementz v. S. Cot-*
tle Co. 148 U. S. 556, 13 Sup. Ct. Rep. 719,
37: 558

Washburn & M. Mfg. Co. v. Beat 'em All
Barbed Wire Co. (Barbed Wire Patent)
143 U. S. 275, 12 Sup. Ct. Rep. 443, 450,
36: 154

Distinguished in L. Schrelber & Sons Co. v.
Grimm, 19 C. C. A. 71, 43 U. S. App. 10,
72 Fed. 675.

Cited in Kremantz v. S. Cottle Co. 148 U. S.
562, 37 L. ed. 560, 13 Sup. Ct. Rep. 719—
Knapp v. Morss, 150 U. S. 230, 37 L. ed.
1063, 14 Sup. Ct. Rep. 81—*H. Tibbe & Sons*
Mfg. Co. v. Lamparter, 51 Fed. 764—*Mack*
v. Spencer Optical Mfg. Co. 52 Fed. 821—
Corbin Cabinet Lock Co. v. Eagle Lock Co.
52 Fed. 985—*Briggs v. Central Ice Co.* 54
Fed. 379—*American Cable R. Co. v. New*
York, 56 Fed. 161—*Wales v. Waterbury Mfg.*
Co. 59 Fed. 288—*Consolidated Brake-Shoe*
Co. v. Detroit Steel & Spring Co. 59 Fed. 909
—*Johnson v. Johnston*, 60 Fed. 622—*Holt-*

zer v. Consolidated Electric Mfg. Co. 60
Fed. 750—*Griswold v. Harker*, 10 C. C. A.
439, 27 U. S. App. 122, 62 Fed. 393—
Beach v. American Box-Mach. Co. 63 Fed.
602—*Stahl v. Williams*, 64 Fed. 124—
S. F. Heath Cycle Co. v. Hay, 67
Fed. 250—*Davock v. Chicago & N. W.*
R. Co. 69 Fed. 469—*Gould Coupler*
Co. v. Pratt, 70 Fed. 626—*American Sulphite*
Pulp Co. v. Howland Falls Pulp Co. 70 Fed.
998—*Muller v. Lodge & D. Mach. Tool Co.*
23 C. C. A. 365, 47 U. S. App. 189, 77 Fed.
629—*Olmstead v. A. H. Andrews & Co.* 23
C. C. A. 493, 46 U. S. App. 608, 77 Fed. 840
—*Consolidated Fastener Co. v. Columbian*
Fastener Co. 79 Fed. 800—*Janowitz v. Levi-*
son, 80 Fed. 732—*Goldie v. Diamond State*
Iron Co. 81 Fed. 175—*Mast, F. & Co. v.*
Dempster Mill Mfg. Co. 27 C. C. A. 195, 49
U. S. App. 508, 82 Fed. 335—*Western Elec-*
tric Co. v. Capital Teleph. & Teleg. Co. 58
Fed. 776—*Wilkins Shoe-Button Fastener Co.*
v. Webb, 89 Fed. 997—*Cushman Paper Box*
Mach. Co. v. Goddard, 37 C. C. A. 224, 95
Fed. 666—*Ball & Socket Fastener Co. v.*
C. A. Edgarton Mfg. Co. 37 C. C. A. 525,
96 Fed. 490—*Plumb v. New York. N. H. &*
H. R. Co. 97 Fed. 647—*Irwin v. Hasselman*,
38 C. C. A. 591, 97 Fed. 968—*Krajewski*
v. Pharr, 44 C. C. A. 578, 105 Fed. 520—
National Hollow Brake-Beam Co. v. Inter-
changeable Brake-Beam Co. 45 C. C. A. 554,
106 Fed. 708—*Hallock v. Davison*, 107 Fed.
486—*Kitselman v. Kokomo Fence-Mach. Co.*
108 Fed. 659—*Star Brass Works v. General*
Electric Co. 49 C. C. A. 411, 111 Fed. 400—
Goodyear Tire & Rubber Co. v. Rubber Tire
Wheel Co. 53 C. C. A. 591, 116 Fed. 371—
Fenton Metallic Mfg. Co. v. Office Specialty
Mfg. Co. 12 App. D. C. 217—*Trecktonius v.*
Scott, 110 Wis. 454, 86 N. W. 672.

177. The original patentee may obtain a
new patent for improvements, consisting of
a new combination or arrangement pro-
ducing a new result, although covered by a
void claim of the original patent. *O'Reilly*
v. Morse, 15 How. 62, 14: 601

Cited in Perry v. Starrett, 3 Bann. & Ard. 489,
Fed. Cas. No. 11,012—*Piper v. Brown*,
Holmes, 22 Fed. Cas. No. 11,180—*McMillin*
v. Rees, 5 Bann. & Ard. 273, 1 Fed. 726—
American Bell Teleph. Co. v. People's Teleph.
Co. 22 Blatchf. 558, 22 Fed. 328—*Thomson-*
Houston Electric Co. v. Ohio Brass Co. 26
C. C. A. 119, 54 U. S. App. 1, 80 Fed. 724—
Westinghouse Electric & Mfg. Co. v. Dayton
Fan & Motor Co. 106 Fed. 726.

178. The new combination or arrange-
ment of the parts of the terminal
Morse electro-magnetic telegraph instru-
ment, whereby the local and independent
circuit is opened by the electric current as
it passes on the main line without inter-
ruption, constitutes a patentable improve-
ment. *O'Reilly v. Morse*, 15 How. 62,
14: 601

179. A new and useful result accom-
plished through a combination and modifica-
tion of machinery of which part, if not all,
was old, is sufficient to sustain the *Tatham*
patent for making pipe and tubes from
lead, tin, or soft metals. *Le Roy v. Tat-*
ham, 22 How. 132, 16: 366

Cited in Stimpson v. Woodman, 10 Wall. 124,
19 L. ed. 869, 2 Whitman, Pat. Cas. 265—
Pollon v. Schmidt, 6 Blatchf. 304, 3 Fisher,
Pat. Cas. 482, Fed. Cas. No. 11,241—*Wood*

v. Cleveland Rolling Mill. Co. 4 Fisher, Pat. Cas. 558, Fed. Cas. No. 17,941—American Strawboard Co. v. Elkhart Egg-Case Co. 84 Fed. 964—Eldred v. Kirkland, 124 Fed. 554.

180. The Glidden patent, 157,124, for an improvement in wire fences, consisting of the combination, with twisted fence wires, of a short traverse wire coiled or bent in the middle about one of the wire strands of the twist, with its free ends projecting as barbs,—involves a patentable invention although various attempts to fix barbs upon wire for fencing had been previously made. Washburn & M. Mfg. Co. v. Beat'em All Barbed Wire Co. (Barbed Wire Patent) 143 U. S. 275, 12 Sup. Ct. Rep. 443, 450, 36: 154

181. Where a combination was already in public use on steamships, its application to a similar use on land is not a new combination or a new invention. Blake v. San Francisco, 113 U. S. 679, 5 Sup. Ct. Rep. 692, 28: 1070

182. The combination of a mirror placed in the hood of a street car, over the driver's platform, and a glass panel in the front end of the car, over the door, is not patentable; the result attained is merely the reflection of an object in a mirror. Neither of the elements contributes to any new result, but each performs its own function unchanged. Stephenson v. Brooklyn C. T. R. Co. 114 U. S. 149, 5 Sup. Ct. Rep. 777, 29: 58

183. A combination of grooved spring-jaws, rods of iron with curvilinear projections like those called "plungers," cams, treadles, levers, adjustable carriages, tables, and slides, to produce a machine useful for driving nails, is patentable, although all the parts are old. Wicke v. Ostrum, 103 U. S. 461, 26: 409

Cited in Westinghouse v. Boyden Power Brake Co. 170 U. S. 557, 42 L. ed. 1144, 18 Sup. Ct. Rep. 707—Morley Sewing Mach. Co. v. Lancaster, 23 Fed. 344—United States Axle Lubricator Co. v. Wurster, 38 Fed. 430—Norton v. Jensen, 1 C. C. A. 461, 7 U. S. App. 676, 49 Fed. 860—Holloway v. Dow, 54 Fed. 517—Campbell Printing Press & Mfg. Co. v. Duplex Printing-Press Co. 86 Fed. 320—Manhattan General Constr. Co. v. Helios-Upton Co. 135 Fed. 788—Stephenson v. Allison, 123 Ala. 449, 28 So. 290.

184. A combination of an incline with the tube, slot, and slide of a rectal speculum is not patentable, where such incline had been used in a similar speculum not provided with a slide, and its use or action is in no sense modified by the new relation in which it is placed, and produces no new result by its union with the other elements of the combination. Brinkerhoff v. Aloe, 146 U. S. 515, 13 Sup. Ct. Rep. 221, 36: 1068

Cited in Osgood Dredge Co. v. Metropolitan Dredging Co. 21 C. C. A. 493, 33 U. S. App. 581, 75 Fed. 672—Sperry Mfg. Co. v. J. L. Owens Co. 96 Fed. 977—Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. 53 C. C. A. 590, 116 Fed. 370—Emerson Electric Mfg. Co. v. Van Nort Bros. Electric Co. 116 Fed. 977.

7. Processes and Products.

Infringement of Patent for, see *infra*, XIV.

Specifications for Patents, see *infra*, 434, 437, 445, 450, 451, 453.

Validity of Claim for, see *infra*, 471.

Uniting Process and Apparatus Claims, see *infra*, 475, 476.

Claim for, Based on Novelty, see *infra*, 478. Reissue for Extending Beyond Scope of Original Patent, see *infra*, 626.

Identity of Reissued Patent for, see *infra*, 658, 661, 666-671.

Construction of Patent for, see *infra*, 737-748.

Expert Evidence as to *Modus Operandi*, see Evidence, 1828.

See also *supra*, 153; *infra*, 412.

Editorial notes.

Processes and products. 4: 433; 14: 683

Definition of process.

See also *infra*, 192.

185. Process is a mode of treatment of certain materials to produce a given result. It is an act or series of acts performed upon the subject-matter to be transformed and reduced to a different state or thing. *Cochrane v. Deener*, 94 U. S. 780. 24: 139

Cited in *McKay v. Jackman*, 20 Blatchf. 471, 12 Fed. 618—*Clement Mfg. Co. v. Upson & H. Co.* 50 Fed. 541—*Kirchberger v. American Acetylene Burner Co.* 124 Fed. 773—*United States ex rel. Steilmetz v. Allen*, 22 App. D. C. 63.

186. The terms "mechanical" and "processes" as made use of in patent controversies defined. *Corning v. Burden*, 15 How. 252. 14: 683

Distinguished in Arkell v. Hurd Paper-Bag Co. 7 Blatchf. 477, Fed. Cas. No. 532.

Cited in *Tilghman v. Proctor*, 102 U. S. 722, 26 L. ed. 285—*New Process Fermentation Co. v. Maus*, 122 U. S. 427, 30 L. ed. 1198, 7 Sup. Ct. Rep. 1304—*Telephone Cases*, 126 U. S. 275, 31 L. ed. 863, 8 Sup. Ct. Rep. 778—*Boyd v. Cherry*, 4 McCrary, 74—*Bridge v. Brown Holmes*, 58, Fed. Cas. No. 1,857—*Piper v. Brown Holmes*, 22, 4 Fisher, Pat. Cas. 179, Fed. Cas. No. 11,180—*McKay v. Jackman*, 20 Blatchf. 471, 12 Fed. 618—*American Bell Teleph. Co. v. Dolbear*, 15 Fed. 453—*New Process Fermentation Co. v. Maus*, 20 Fed. 729—*New Process Fermentation Co. v. Koch*, 21 Fed. 582—*Gage v. Kellogg*, 23 Fed. 894—*Phillips v. Kochert*, 31 Fed. 40—*Celluloid Mfg. Co. v. American Zylonite Co.* 31 Fed. 910—*Excelsior Needle Co. v. Union Needle Co.* 23 Blatchf. 151, 32 Fed. 223—*Boyd v. Cherry*, 50 Fed. 282—*Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co.* 55 Fed. 316—*Chicago Sugar-Ref. Co. v. Charles Pope Glucose Co.* 28 C. C. A. 598, 56 U. S. App. 158, 84 Fed. 981—*Badische Anilin & Soda Fabrik v. Kalle*, 94 Fed. 171—*Burrell v. Elgin Creamery Co.* 96 Fed. 235—*Re Weston*, 17 App. D. C. 438—*Brown v. Texas Cactus Hedge Co.* 64 Tex. 399.

Process patentable generally.

New Application of Old Process, see *supra*, 87, 89.

Lack of Novelty, see *infra*, 284.

Effect of Want of Utility, see *infra*, 259.

Separate Patents for Process and Product, see *infra*, 575, 576.

See also *supra*, 45; *infra*, 206-208.

187. Patents cover the means employed to effect results. *Miller v. Eagle Mfg. Co.* 151 U. S. 186, 14 Sup. Ct. Rep. 310, 38: 121
Cited in Gosben Sweeper Co. v. Bissell Carpet-Sweeper Co. 19 C. C. A. 20, 37 U. S. App. 555, 72 Fed. 75—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 550, 106 Fed. 708—*Dayton Fan & Motor Co. v. Westinghouse Electric & Mfg. Co.* 55 C. C. A. 401, 118 Fed. 573—*Hill v. Hodge*, 12 App. D. C. 531—*Rosell v. Allen*, 16 App. D. C. 587.

188. The patent for an art does not necessarily involve a patent for the particular means employed for using it. A useful art or process is the subject of a patent. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

Cited in Electrical Accumulator Co. v. Julien Electric Co. 38 Fed. 121—*Grant v. Walter*, 38 Fed. 596—*Davis Electrical Works v. Edison Electric Light Co.* 8 C. C. A. 619, 21 U. S. App. 74, 60 Fed. 280—*Westinghouse Electric & Mfg. Co. v. Catskill Illuminating & Power Co.* 94 Fed. 871—*Chisholm v. Johnson*, 106 Fed. 200—*Plaget Novelty Co. v. Headley*, 107 Fed. 136—*Re Weston*, 17 App. D. C. 438.

189. The patent law is not confined to new machines and new compositions of matter, but extends to any new and useful art or manufacture. A manufacturing process is clearly an art, within the meaning of the law. *Tilghman v. Proctor*, 102 U. S. 707, 26: 279

Cited in Telephone Cases, 126 U. S. 533, 31 L. ed. 989, 8 Sup. Ct. Rep. 778—*McKay v. Jackman*, 20 Blatchf. 471, 12 Fed. 618—*American Bell Teleph. Co. v. Dolbear*, 15 Fed. 449—*New Process Fermentation Co. v. Koch*, 21 Fed. 582—*Appleton Mfg. Co. v. Star Mfg. Co.* 9 C. C. A. 45, 18 U. S. App. 492, 60 Fed. 413—*Bonsack Mach. Co. v. Elliott*, 63 Fed. 837—*Tannage Patent Co. v. Zahn*, 66 Fed. 992—*Carnegie Steel Co. v. Cambria Iron Co.* 89 Fed. 755—*Re Weston*, 17 App. D. C. 438.

190. In respect to process and its result, patentability may exist as to either, neither, or both, according to the fact of novelty or the opposite; the patentability, or the issuing of a patent, as to one, in no wise affects the rights of the inventor or discoverer in respect to the other. *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 19: 566

Cited in Sewall v. Jones, 91 U. S. 190, 23 L. ed. 279—*Jones v. Sewall*, 3 Cliff. 574, 6 Fisher, Pat. Cas. 351, Fed. Cas. No. 7,495—*Milligan & H. Glue Co. v. Upton*, 4 Cliff. 246, 1 Bann. & Ard. 507, Fed. Cas. No. 9,607—*Tucker v. Burditt*, 4 Bann. & Ard. 570, Fed. Cas. No. 14,216—*McKay v. Dibort*, 5 Fed. 590—*Tucker v. Dana*, 7 Fed. 214—*New Process Fermentation Co. v. Maus*, 20 Fed. 731—*Holliday v. Pickhardt*, 29 Fed. 860—*Excelsior Needle Co. v. Union Needle Co.* 23 Blatchf. 151, 32 Fed. 223—*Boyd v. Cherry*, 50 Fed. 282—*Matheson v. Campbell*, 77 Fed. 283—*Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* 90 Fed. 210—*Badische Anilin &*

Soda Fabrik v. Kalle, 94 Fed. 171—*Maurer v. Dickerson*, 51 C. C. A. 498, 113 Fed. 874

191. A new application of a power of nature, accomplishing a new and useful result, is patentable though the product is old. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, 30: 1064

Distinguished in Hake v. Brown, 37 Fed. 784.
Cited in Chicago Sugar-Ref. Co. v. Charles Pope Glucose Co. 28 C. C. A. 598, 56 U. S. App. 158, 84 Fed. 981—*Chisholm v. Johnson*, 106 Fed. 200.

192. A process may be patentable irrespective of the particular form of the instrumentalities used. A process is a mode of treatment of certain materials to produce a given result; if new and useful, it is just as patentable as a piece of machinery. *Cochrane v. Deener*, 94 U. S. 780, 24: 139

Cited in New Process Fermentation Co. v. Maus, 122 U. S. 427, 30 L. ed. 1198, 7 Sup. Ct. Rep. 1304—*Telephone Cases*, 126 U. S. 533, 38 L. ed. 989, 8 Sup. Ct. Rep. 778—*Ford Du Lac County v. May*, 137 U. S. 407, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—*Eastern Paper Bag Co. v. Standard Paper Bag Co.* 30 Fed. 64—*Phillips v. Kochert*, 31 Fed. 40—*Celluloid Mfg. Co. v. American Zylonite Co.* 31 Fed. 910—*Hake v. Brown*, 37 Fed. 784—*Grant v. Walter*, 38 Fed. 596—*Boyd v. Cherry*, 4 McCrary, 74, 50 Fed. 282—*Appleton Mfg. Co. v. Star Mfg. Co.* 9 C. C. A. 45, 18 U. S. App. 492, 60 Fed. 413.

193. Letters patent for a process, irrespective of the particular mode or form of apparatus for carrying it into effect, are admissible under the patent laws of the United States. *Tilghman v. Proctor*, 102 U. S. 707, 26: 279

Cited in New Process Fermentation Co. v. Maus, 122 U. S. 427, 30 L. ed. 1198, 7 Sup. Ct. Rep. 1304—*Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 277, 32 L. ed. 720, 9 Sup. Ct. Rep. 299—*Risdon Iron & Locomotive Works v. Medort*, 158 U. S. 73, 39 L. ed. 902, 15 Sup. Ct. Rep. 745—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 578, 42 L. ed. 1151, 18 Sup. Ct. Rep. 707—*United Nickel Co. v. Pendleton*, 21 Blatchf. 235, 15 Fed. 747—*New Process Fermentation Co. v. Maus*, 20 Fed. 728—*Phillips v. Kochert*, 31 Fed. 40—*Celluloid Mfg. Co. v. American Zylonite Co.* 31 Fed. 910—*Tilghman v. Werk*, 39 Fed. 682—*Brush Electric Co. v. Electric Improv. Co.* 52 Fed. 976—*Burdon Wire & Supply Co. v. Williams*, 128 Fed. 935—*Re Barratt*, 14 App. D. C. 259—*Busch v. Jones*, 16 App. D. C. 35.

194. A claim for the manufacture of fat acids, and glycerin from fatty bodies, by the action of water at a high temperature, and pressure, in which the only conditions are the constant and intimate commixture of the fat with the water, and a high degree of heat, and a pressure sufficiently powerful to resist the conversion of the water into steam, is sustainable as a patent for a process, irrespective of the form of apparatus described in the specification. *Tilghman v. Proctor*, 102 U. S. 707, 26: 279

Cited in Western Electric Co. v. Standard Electric Co. 28 C. C. A. 516, 55 U. S. App. 620, 84 Fed. 657.

195. The process of preparing and preserving beer for market by holding it under controllable pressure of carbonic acid gas from the beginning of the *kracusen* stage until such time as it is transferred to kegs and bunged, is patentable. *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 7 Sup. Ct. Rep. 1304. 30: 1193

Cited in Telephone Cases, 126 U. S. 533, 31 L. ed. 989, 8 Sup. Ct. Rep. 778—*Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 76, 39 L. ed. 903, 15 Sup. Ct. Rep. 745—*Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 425, 46 L. ed. 981, 22 Sup. Ct. Rep. 698—*Celluloid Mfg. Co. v. American Zylonite Co.* 31 Fed. 910—*Frankfort Process Whiskey Co. v. Mill Creek Distilling Co.* 37 Fed. 540—*Consolidated Bunging Apparatus Co. v. H. Clausen & Son Brewing Co.* 39 Fed. 279—*Chisholm v. Johnson*, 106 Fed. 200—*Re Weston*, 17 App. D. C. 438.

Natural agency; principle.

196. Process used to extract, modify, and concentrate natural agencies constitute invention. Whether the machinery used be novel, or consist of a new combination of parts known, the right of the inventor is secured against all who use the same, or substantially the same, mechanical power. *Le Roy v. Tatham*, 14 How. 156, 14: 367
Cited in Andrews v. Carmon, 13 Blatchf. 317, 2 Bann. & Ard. 285, Fed. Cas. No. 371—*Re Corbin, McArth. Pat. Cas.* 529, Fed. Cas. No. 3,224—*Singer v. Walmsley*, 1 Fisher, Pat. Cas. 566, Fed. Cas. No. 12,900.

197. To support a method or process patent there must be a tangible product or change in character or quality brought about, and not simply a principle or result underlying or involved in certain mechanical means or steps. *O'Reilly v. Morse*, 15 How. 62, 14: 601

Distinguished in Brush Electric Co. v. Electric Improv. Co. 52 Fed. 975.

Cited in Bate Refrigerating Co. v. George H. Hammond Co. 129 U. S. 169, 32 L. ed. 650, 9 Sup. Ct. Rep. 225—*Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 278, 32 L. ed. 721, 9 Sup. Ct. Rep. 299—*Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 73, 39 L. ed. 901, 15 Sup. Ct. Rep. 745—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 579, 42 L. ed. 1151, 18 Sup. Ct. Rep. 707—*Arkell v. Hurd Paper-Bag Co.* 7 Blatchf. 477, Fed. Cas. No. 532—*Spencer v. Pennsylvania R. Co.* 34 Fed. 901—*Celluloid Mfg. Co. v. Frederick Crane Chemical Co.* 36 Fed. 113—*Electrical Accumulator Co. v. Julien Electric Co.* 38 Fed. 136—*Rapid Service Store R. Co. v. Taylor*, 43 Fed. 250—*Hoke Engraving Plate Co. v. Schraubstadter*, 47 Fed. 507—*Brush Electric Co. v. Electric Improv. Co.* 52 Fed. 971—*Appleton Mfg. Co. v. Star Mfg. Co.* 9 C. C. A. 45, 18 U. S. App. 402, 60 Fed. 413—*Boyden Power-Brake Co. v. Westinghouse Air-Brake Co.* 17 C. C. A. 445, 25 U. S. App. 475, 70 Fed. 831—*Cowles Electric Smelting & Aluminum Co. v. Lowrey*, 24 C. C. A. 636, 47 U. S. App. 531, 79 Fed. 352—*National Meter Co. v. Neptune Meter Co.* 122 Fed. 80—*Thomas v. Spencer*, 122 Fed. 879—*Manhattan General Constr. Co. v. Hellos-Upton Co.* 135 Fed. 788—*Re Weston*, 17 App. D. C. 438—*Fraser v. Gates*, 118 Ill. 111, 1 N. E. 817—*Lamson v. Martin*, 159 Mass. 563, 35 N. E. 78—*Union Paper Collar Co. v. White*, 11 Phila. 481.

198. Applying the well-known principle that cold air will descend from an ice box to a lower chamber, to an apparatus for cooling beer by taking sand or gravel out of a case leaving an open chamber for the passage of air, is not invention. *Magin v. Karle*, 150 U. S. 387, 14 Sup. Ct. Rep. 153, 37: 1118

Cited in Parlin & O. Co. v. Moline Plow Co. 32 C. C. A. 225, 60 U. S. App. 297, 89 Fed. 333.

199. Bell had the right to a patent for the discovery that the process of transmitting speech could be accomplished by gradually changing the intensity of a continuous electric current, so as to make it correspond exactly to the changes in the density of the air caused by the sound of the voice, and in devising a way in which those changes of intensity could be made and speech actually transmitted. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

Cited in Risdon Iron & Locomotive Works v. Medart, 158 U. S. 76, 39 L. ed. 903, 15 Sup. Ct. Rep. 745—*American Bell Teleph. Co. v. Southern Teleph. Co.* 34 Fed. 796—*American Bell Teleph. Co. v. American Cushman Teleph. Co.* 1 L.R.A. 60, 35 Fed. 735—*American Bell Teleph. Co. v. McKeesport Teleph. Co.* 57 Fed. 661—*American Bell Teleph. Co. v. Cushman*, 57 Fed. 843.

200. *O'Reilly v. Morse*, 15 How. 62, 14: 601, holding that the use of magnetism as a motive power, without regard to the particular process with which it was connected in a patent could not be claimed, but that its use in that connection could, sustains Bell's claim, which is not one for the use of electricity distinct from the particular process with which it is connected in his patent. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

Cited in Brush Electric Co. v. Electric Improv. Co. 52 Fed. 975—*Sawyer Spindle Co. v. Carpenter*, 133 Fed. 239.

201. Bell's patent is for the process that the apparatus was designed to bring into use; and the process can be operated by the vibration or motion of bodies capable of inductive action, or by the vibration of the conducting wire itself in the neighborhood of such bodies, which is the magnetic method; or by alternately increasing and diminishing the resistance of the circuit or the power of the battery, which is the variable-resistance method; and the patent is for both these methods, and for the particular magneto apparatus described, or its equivalent. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

Cited in Westinghouse v. Boyden Power Brake Co. 170 U. S. 579, 42 L. ed. 1151, 18 Sup. Ct. Rep. 707—*Busch v. Jones*, 16 App. D. C. 35.

202. A patent for such discovery is not confined to the mere means improvised to prove the reality of the conception. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

Function.

Patent for Single Function of Patented Invention, see *infra*, 571.

203. The operation or function of a ma-

chine is not patentable as a process. *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. Rep. 745, 39: 899
Cited in Westinghouse v. Boyden Power Brake Co. 170 U. S. 556, 42 L. ed. 1143, 18 Sup. Ct. Rep. 707—*Busch v. Jones*, 184 U. S. 607, 46 L. ed. 712, 22 Sup. Ct. Rep. 511—*Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 425, 46 L. ed. 981, 22 Sup. Ct. Rep. 698—*Wells Glass Co. v. Henderson*, 15 C. C. A. 89, 34 U. S. App. 19, 67 Fed. 935—*International Tooth-Crown Co. v. Bennett*, 72 Fed. 170—*American Fibre-Chamois Co. v. Buckskin Fibre Co.* 18 C. C. A. 668, 37 U. S. App. 742, 72 Fed. 514—*Blakesley Novelty Co. v. Connecticut Web Co.* 78 Fed. 481—*Clinton Wire-Cloth Co. v. Hendrick Mfg. Co.* 78 Fed. 639—*Philadelphia Creamery Supply Co. v. Davis & R. Bldg. & Mfg. Co.* 79 Fed. 358—*Goldie v. Diamond State Iron Co.* 81 Fed. 178—*Evans v. Suess Ornamental Glass Co.* 81 Fed. 200—*Strom Mfg. Co. v. Weir Frog Co.* 27 C. C. A. 505, 54 U. S. App. 330, 83 Fed. 172—*Pratt v. Thompson & T. Splice Co.* 83 Fed. 518—*Evans v. Suess Ornamental Glass Co.* 28 C. C. A. 25, 53 U. S. App. 567, 83 Fed. 707—*Patent Button Co. v. Consolidated Fastener Co.* 84 Fed. 191—*American Strawboard Co. v. Elkhart Egg-Case Co.* 84 Fed. 966—*Diamond State Iron Co. v. Goldie*, 28 C. C. A. 590, 56 U. S. App. 68, 84 Fed. 973—*Chicago Sugar Ref. Co. v. Charles Pope Glucose Co.* 28 C. C. A. 598, 56 U. S. App. 158, 84 Fed. 981—*Frederick R. Stearns & Co. v. Russell*, 20 C. C. A. 128, 54 U. S. App. 591, 85 Fed. 225—*Ballou v. Potter*, 88 Fed. 787—*Carnegie Steel Co. v. Cambria Iron Co.* 89 Fed. 754—*Melvin v. Thomas Potter Sons & Co.* 91 Fed. 152—*Stokes Bros. Mfg. Co. v. Heller*, 96 Fed. 106—*National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 99 Fed. 767—*United States Repair & Guaranty Co. v. Assyrian Asphalt Co.* 41 C. C. A. 132, 100 Fed. 974—*Dodge Mfg. Co. v. Ohio Valley Pulley Works*, 101 Fed. 586—*Chisholm v. Johnson*, 106 Fed. 200—*Ballou v. Potter*, 110 Fed. 970—*Busch v. Jones*, 16 App. D. C. 33—*Re Weston*, 17 App. D. C. 437.

204. A process involving nothing more than the operation of a piece of mechanism, or the function of a machine, is not patentable. *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136

Cited in Cleveland Foundry Co. v. Detroit Vapor Stove Co. 131 Fed. 743—*Manhattan General Constr. Co. v. Hellos-Upton Co.* 135 Fed. 789.

205. The Medart patent, 248,599 for an improvement in the art of manufacturing belt-pulleys, which consists in centering the pulley center or spider, and then grinding the same concentrically with the axis, but which, while describing machinery for doing this, makes no claim for the machinery itself,—is invalid. *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. Rep. 745, 39: 899

Patentability of product.

Infringement of Patent for Product, see *infra*, XIV. f.

See also *supra*, 191; *infra*, 575, 576.

206. A patent can be granted for a process and also for the product of the process.

(Per Clifford, J.) *Sewall v. Jones*, 91 U. S. 171, 23: 275
Distinguished in Miller v. Eagle Mfg. Co. 151 U. S. 199, 38 L. ed. 128, 14 Sup. Ct. Rep. 310.

Cited in Jones v. McMurray, 2 Hughes, 529, Fed. Cas. No. 7,479.

207. A manufacture or a product may be unpatentable for want of novelty, while the process producing it may be both new and useful. *American Wood Paper Co. v. Fiber Disintegrating Co. (Wood-Paper Patent)* 23 Wall. 566, 23: 31

Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 293, 4 Sup. Ct. Rep. 455, 28: 433

Cited in Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 311, 28 L. ed. 439, 4 Sup. Ct. Rep. 455—*Mahn v. Harwood*, 112 U. S. 359, 28 L. ed. 667, 5 Sup. Ct. Rep. 174—*Badische Anilin & Soda Fabrik v. Cochrane*, 4 Bann. & Ard. 220, Fed. Cas. No. 719—*McCloskey v. Dubois*, 19 Blatchf. 208, 8 Fed. 712—*Wooster v. Handy*, 22 Blatchf. 333, 21 Fed. 66—*Campbell v. Bayley*, 11 C. C. A. 287, 18 U. S. App. 486, 63 Fed. 465.

208. In cases of chemical invention, when the manufacture claimed is not a new composition of matter, but an extract from the decomposition or disintegration of substances, it is immaterial, in respect to its patentability, from what it has been extracted. If the substance was old, the process of obtaining it from different materials may be patentable, but the product cannot be. *American Wood Paper Co. v. Fiber Disintegrating Co. (Wood-Paper Patent)* 23 Wall. 566, 23: 31

Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 293, 4 Sup. Ct. Rep. 455, 28: 433

Cited in Cottle v. Krements, 31 Fed. 43—*Campbell v. Bayley*, 11 C. C. A. 287, 18 U. S. App. 486, 63 Fed. 465—*American Tube Works v. Bridgewater Iron Co.* 65 C. C. A. 637, 132 Fed. 17—*Societe Fabriques v. Lueders*, 135 Fed. 103.

209. If a claim for a process in a reissued patent is void for want of novelty, a second claim for the product made by the employment of the process is also invalid. *Packing Company Cases*, 105 U. S. 566, 26: 1172

Cited in Odell v. Stout, 22 Fed. 168.

210. Paper pulp extracted from wood by chemical agencies alone is not a different manufacture from paper pulp obtained from vegetable substance by chemical and mechanical processes. *American Wood Paper Co. v. Fiber Disintegrating Co. (Wood-Paper Patent)* 23 Wall. 566, 23: 31

211. Where the substance of two articles produced by different processes is the same, and their uses are the same, they cannot be considered different manufactures. *American Wood Paper Co. v. Fiber Disintegrating Co. (Wood-Paper Patent)* 23 Wall. 566, 23: 31

212. A new product, differing in kind from those preceding it, and having new uses and

properties, is invention. *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23: 952
Distinguished in Schultz Belting Co. v. Willemssen Belting Co. 40 Fed. 157.

Cited in Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 224, 28 L. ed. 149—*Lovell Mfg. Co. v. Cary*, 147 U. S. 638, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*Re Arkell*, 15 Blatchf. 439, Fed. Cas. No. 531—*Goodyear Dental Vulcanite Co. v. Davis*, 3 Bann. & Ard. 116, Fed. Cas. No. 5589—*Goodyear Dental Vulcanite Co. v. Preterre*, 15 Blatchf. 274, 3 Bann. & Ard. 471, Fed. Cas. No. 5596—*Bell v. United States Stamping Co.* 22 Blatchf. 29, 19 Fed. 313—*Cary v. Wolff*, 23 Blatchf. 94, 24 Fed. 140—*Celluloid Mfg. Co. v. Chrollthlon Collar & Cuff Co.* 25 Fed. 483—*Celluloid Mfg. Co. v. American Zylonite Co.* 31 Fed. 910—*White v. Surdam*, 41 Fed. 791—*Corbin Cabinet Lock Co. v. Eagle Lock Co.* 52 Fed. 985—*Ballard v. McCloskey*, 58 Fed. 882—*Krajewski v. Pharr*, 44 C. C. A. 578, 105 Fed. 520—*Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co.* 12 App. D. C. 217.

Lack of invention.

213. The process of japanning articles being old, there is no invention in applying it to furniture springs for the purpose of preserving and protecting them. *Eagleton Mfg. Co. v. West, B. & C. Mfg. Co.* 111 U. S. 490, 4 Sup. Ct. Rep. 593, 28: 493

214. A patent for the process of compressing the coating of wax or paraffin placed upon the fibrous material placed around telegraph wires for the purpose of insulating them, whereby the wax or paraffin is forced into the pores of the fibrous substance, covers an old process, with no change in the manner of applying it, and with no result substantially distinct in its nature, and is invalid. *Western Electric Mfg. Co. v. Ansonia Brass & Copper Co.* 114 U. S. 447, 5 Sup. Ct. Rep. 941, 29: 210

215. Any change in the manner of turning down a collar, whether of paper, paper and cloth, or all cloth, is not patentable, if collars of either of the other fabrics have been turned down before in the same manner and for the same purpose. *Union Paper Collar Co. v. Van Dusen*, 23 Wall. 530, 23: 128
Cited in Dunbar v. Myers, 94 U. S. 197, 24 L. ed. 38—*Roemer v. Simon*, 95 U. S. 218, 24 L. ed. 386—*Cone v. Morgan Envelope Co.* 4 Bann. & Ard. 109, Fed. Cas. No. 3,090—*McCloskey v. Dubois*, 20 Blatchf. 9, 9 Fed. 39—*McKny v. Jackman*, 20 Blatchf. 472, 12 Fed. 619.

216. The use of vessels with flaring sides as receptacles and moulds for edible substances, being as old as the art of cookery, and the putting of cooked meat in cans so that the cans served as a mould for the meat, and the meat formed a solid cake, being old, there is no invention in using a pyramidal can for the purpose of receiving the meat cake, so that it can be discharged from the cans as a solid cake. *Packing Company Cases*, 105 U. S. 566, 26: 1172

Cited in Clark Pomace Holder Co. v. Ferguson, 21 Blatchf. 378, 17 Fed. 80—*Tower v. Bemis & C. Hardware & Tool Co.* 19 Fed. 500—*Peard v. Johnson*, 23 Fed. 510—*Na-*

tional Progress Punching Mach. Co. v. John R. Williams Co. 12 L.R.A. 109, 44 Fed. 192.

217. A patent which covers only the process of cooking meat by boiling, and, while it is still warm, pressing it compactly in cases and sealing it up airtight, is invalid for lack of invention. *Packing Company Cases*, 105 U. S. 566, 26: 1172

218. A patent for the application of heated air under blast to the interior of casks, if construed as for a process, is not valid where the only change from the former process is by operating the apparatus from outside, instead of from within, the cask. *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 9 Sup. Ct. Rep. 83, 32: 390
Cited in Marchand v. Emken, 132 U. S. 200, 33 L. ed. 334, 10 Sup. Ct. Rep. 65—*Smith v. Thomson*, 38 Fed. 606—*Sackett v. Smith*, 42 Fed. 853.

219. The fact that glue hot from the tubs before it has ever cooled is in the best condition being previously known, and the use of hot glue which has been melted, to coat or line the inside of oil barrels, being old, there is no invention in using hot glue which has never been cooled, for such purposes, although it had never previously been done. *Leggett v. Standard Oil Co.* 149 U. S. 287, 13 Sup. Ct. Rep. 902, 37: 737

220. Giving to oxygenated water a well-known rotary motion is not an exercise of inventive faculty. *Marchand v. Emken*, 132 U. S. 195, 10 Sup. Ct. Rep. 65, 33: 332
Cited in Hill v. Wooster, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—*Lovell Mfg. Co. v. Cary*, 147 U. S. 637, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*American Patents Co. v. DeBeer*, 57 Fed. 625.

221. Dies which act upon two pieces of metal which are capable of being welded to each other, and which are brought to a welding heat, will necessarily weld them together by the impact and action of the dies. There is no patentable invention in securing the result of welding or swaging by the action of the dies, if there be no patentable invention in the construction and use of the dies to produce a given shape in the article acted upon by them. The patent granted to George M. Peters, July 17, 1873, for an improvement in dies for making dash frames, is therefore void for want of invention. *Peters v. Active Mfg. Co.* 130 U. S. 626, 9 Sup. Ct. Rep. 643, 32: 1057
Cited in Butler v. Steckel, 137 U. S. 29, 34 L. ed. 585, 11 Sup. Ct. Rep. 25—*Wineland v. Pittsburgh Forge & Iron Co.* 41 Fed. 787—*Mahon v. McGuire Mfg. Co.* 51 Fed. 684—*Ballou v. Potter*, 110 Fed. 971.

222. In patent 281,640, for an improvement in fireproof safes, claim 1 being for an anglebar for safe frames consisting of a right-angled iron bar, one side of which is cut away, leaving a curve facing the uncut side, which may be bent to bear upon such curve to form a rounded corner: and claim 2 being for an anglebar consisting of a right-angled iron bar, one side of which is cut away, with curved cuts meeting a right-angled cut, whereby the uncut side may be

bent to form rounded corners,—the claim in patent 283,136, for the process of bending such irons so as to produce the identical article covered by the previous patent, is invalid, there being no exercise of the inventive faculty. *Mosler Safe & Lock Co. v. Mosler, B. & Co.* 127 U. S. 354, 8 Sup. Ct. Rep. 1148, 32: 182

8. Designs.

Infringement of Patent for, see *infra*, XIV.

8. Sufficiency of Description and Claim for, see *infra*, 467.

Construction of Claim for, see *infra*, 513.

Construing Second Claim as a Design Merely, see *infra*, 526.

Combining Claim for, with Separate Claim for Parts, see *infra*, 567.

Mode of Raising Question as to Novelty, see Pleading, 899.

223. The acts of Congress which authorize the grant of a patent for designs contemplate utility less than that which gives a peculiar or distinctive appearance to the manufacture or article to which it is applied. *Gorham Mfg. Co. v. White*, 14 Wall. 511, 20: 731

Distinguished in Smith v. Whitman Saddle Co. 148 U. S. 678, 37 L. ed. 609, 13 Sup. Ct. Rep. 768—*Post v. T. C. Richards Hardware Co.* 26 Fed. 619.

Cited in Western Electric Mfg. Co. v. Odell, 18 Fed. 323—*Untermeyer v. Freund*, 37 Fed. 345—*Redway v. Ohio Stove Co.* 38 Fed. 583—*Foster v. Crossin*, 44 Fed. 63—*Paine v. Snowden*, 46 Fed. 190—*Anderson v. Saint*, 46 Fed. 762—*Smith v. Stewart*, 55 Fed. 482—*Britton v. White Mfg. Co.* 61 Fed. 97—*Westinghouse Electric Mfg. Co. v. Triumph Electric Co.* 38 C. C. A. 67, 97 Fed. 101—*Berlin Bros. Mfg. Co. v. Starr Bros. Bell Co.* 114 Fed. 363—*General Gaslight Co. v. Matchless Mfg. Co.* 120 Fed. 138—*Re Tournier*, 17 App. D. C. 484.

224. In a patent for an improvement in machines for graining pails, and other analogous uses,—consisting of an elastic bed containing the impression or impressions of the device to be engraved upon the pail, in separate panels, each of different design, so that by moving the pail over the same the various designs will be stamped upon the pail, producing a pail whose staves are painted in imitation of various kinds of wood,—a claim for the series of staves or designs is not merely for a design, under the act of 1861, but is an indispensable part of the machine, and patentable as such. *Clark v. Bousfield*, 10 Wall. 133, 19: 862
Cited in Dryfoos v. Friedman, 21 Blatchf. 565, 18 Fed. 825—*Dederick v. Cassell*, 9 Fed. 812—*Foster v. Crossin*, 44 Fed. 63—*Dedrick v. Cassell*, 88 Phila. Leg. Int. 414.

225. A design patent for all ornamentation upon rubber mats by parallel ridges and depressions, to produce variations of light and shade, does not involve any patentable novelty. *New York Belting & Packing Co. v. New Jersey Car Spring &*

Rubber Co. 137 U. S. 445, 11 Sup. Ct. Rep. 193, 34: 741

Cited in Lalance & G. Mfg. Co. v. Mosheim, 48 Fed. 452—*New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.* 48 Fed. 556—*Indurated Fibre Industries Co. v. Grace*, 52 Fed. 128—*New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.* 4 C. C. A. 23, 11 U. S. App. 637, 53 Fed. 812—*Heulings v. Reid*, 58 Fed. 870.

226. There is no novelty in printing or stamping rubber cloth with designs in an ink of a different color or shade as specified in the *Aldrich* patent, 203,057. *Brigham v. Coffin*, 149 U. S. 557, 13 Sup. Ct. Rep. 939, 37: 845

227. A shape produced must, in order to be patentable, under U. S. Rev. Stat. § 4929, U. S. Comp. Stat. 1901, p. 3398, be the result of industry, effort, genius, or expense, and new and original as applied to articles of manufacture. *Smith v. Whitman Saddle Co.* 148 U. S. 674, 13 Sup. Ct. Rep. 768, 37: 606

Cited in Untermeyer v. Freund, 7 C. C. A. 187, 20 U. S. App. 32, 58 Fed. 209—*Henderson v. Tompkins*, 60 Fed. 764—*Eclipse Mfg. Co. v. Holland*, 62 Fed. 468—*Hammond v. Stockton Combined Harvester & Agricultural Works*, 17 C. C. A. 357, 44 U. S. App. 106, 70 Fed. 717—*Sagendorph v. Hughes*, 95 Fed. 479—*Westinghouse Electric & Mfg. Co. v. Triumph Electric Co.* 38 C. C. A. 67, 97 Fed. 101—*Myers v. Sternheim*, 38 C. C. A. 346, 97 Fed. 626—*Cary Mfg. Co. v. Neal*, 39 C. C. A. 190, 98 Fed. 618—*Rowe v. Blodgett & C. Co.* 103 Fed. 874—*Feder v. Stewart, H. & M. Co.* 105 Fed. 629—*Buerkle v. Standard Heater Co.* 105 Fed. 780—*Rowe v. Blodgett & C. Co.* 50 C. C. A. 121, 112 Fed. 62.

228. Where a new and original shape or configuration of an article of manufacture is claimed to be patentable, its utility may be also an element for consideration. *Smith v. Whitman Saddle Co.* 148 U. S. 674, 13 Sup. Ct. Rep. 768, 37: 606

Editorial notes.

Design patents. 37: 606; 38: 138

9. Improvements.

Addition of, to Invention Previously Patented in Foreign Country, see *supra*, 21.

Construction of Patent for, see *infra*, 738, 749-758.

Effect of Prior Public Use on Right to Patent, see *infra*, 369.

Infringement of Patent for, see *infra*, XIV.

Novelty in, see *infra*, 283.

Lack of Novelty, see *infra*, 279.

Anticipation of, see *infra*, 350-352, 361, 362.

Description of, see *infra*, 436, 449, 457.

Claim for, see *infra*, 465.

Restriction of Claim for, by Specification, see *infra*, 504.

Restrictive Effect of Claim for, see *infra*, 539.

Mode of Determining Scope of Patent for, see *infra*, 507b.

Application for, as Abandonment of Pending Application, see *infra*, 541.

Combining Several Inventions for, in One Patent, see *infra*, 565.

Invalidity of Second Patent for Same Improvement, see *infra*, 568.

Presumption from Grant of Separate Patents for, see *infra*, 574.

Subsequent Improvements Covered by Re-issue of Patent, see *infra*, 628-630.

Burden of Proof, see Evidence, 775.

See also *supra*, 177, 205.

Advance in art.

229. Any achievement which marks a distinct advance in the art should be sustained as an invention. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. Rep. 409, 45: 586
Cited in Hallock v. Davison, 107 Fed. 486—*George Frost Co. v. Cohn*, 112 Fed. 1012—*Cimioti Unhairing Co. v. American Unhairing Mach. Co.* 53 C. C. A. 234, 115 Fed. 502—*Peters v. Union Biscuit Co.* 120 Fed. 685—*Lowrie v. H. A. Meldrum Co.* 124 Fed. 762—*Boyer v. Keller Tool Co.* 62 C. C. A. 252, 127 Fed. 138—*Otis Elevator Co. v. Portland Co.* 62 C. C. A. 345, 127 Fed. 563—*Thomson-Houston Electric Co. v. Ohio Brass Co.* 130 Fed. 547—*Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co.* 68 C. C. A. 529, 183 Fed. 173—*Manhattan General Constr. Co. v. Helios-Upton Co.* 185 Fed. 804—*Mallon v. Gregg*, 69 C. C. A. 57, 137 Fed. 77—*Killeen v. Buffalo Furnace Co.* 140 Fed. 35—*Bragg Mfg. Co. v. New York*, 141 Fed. 120—*International Time Recording Co. v. Dey*, 74 C. C. A. 75, 142 Fed. 743—*Los Angeles Art Organ Co. v. Aeolian Co.* 75 C. C. A. 91, 143 Fed. 883—*Comptograph Co. v. Mechanical Accountant Co.* 76 C. C. A. 210, 145 Fed. 336—*Weld Mfg. Co. v. Johnson Service Co.* 77 C. C. A. 380, 147 Fed. 238—*Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co.* 147 Fed. 270—*Louden Machinery Co. v. Janesville Hay Tool Co.* 78 C. C. A. 554, 148 Fed. 692.

230. Something more is required to support a patent than a slight advance over what has preceded it, or mere superiority in workmanship or finish. *International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 11 Sup. Ct. Rep. 716, 35: 347
Cited in Hickory Wheel Co. v. Frasier, 40 C. C. A. 299, 100 Fed. 102—*National Tooth Crown Co. v. MacDonald*, 117 Fed. 619.

231. It is no invention, within the meaning of the law, to perform with increased speed a series of surgical operations in dentistry, old in themselves and in the order in which they have been performed. *International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 11 Sup. Ct. Rep. 716, 35: 347

232. Improvements on an existing patent, in gas burners, which allow them to be made in two pieces instead of three, and at less expense, and vary the construction so as to leave the flame always in one position, are new, useful, and patentable. *Clough v. Gilbert & B. Mfg. Co.* 106 U. S. 178, 1 Sup. Ct. Rep. 198, 27: 138
Cited in Bowers v. San Francisco Bridge Co. 91 Fed. 410—*Crown Cork & Seal Co. v. Aluminum Stoppper Co.* 48 C. C. A. 93, 108 Fed. 866—*Durfee v. Bawo*, 118 Fed. 859.

233. The person who has taken a patented

device, and, by improvements thereon, has adapted it to a different industry, may draw to himself the quality of inventor. *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. Rep. 194, 39: 275
Cited in Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 491, 44 L. ed. 859, 20 Sup. Ct. Rep. 708—*American Sulphite Pulp Co. v. Howland Falls Pulp Co.* 70 Fed. 990—*Briggs v. Duell*, 87 Fed. 480—*New Departure Bell Co. v. Corbin*, 88 Fed. 902.

Addition of new device.

234. A new and distinct device may be engrafted upon an old invention, and be an improvement. In such case it is patentable. The prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former. *Smith v. Nichols*, 21 Wall. 112, 22: 566
Robertson v. Blake (Blake v. Robertson) 94 U. S. 728, 24: 245
Fuller v. Yentzer, 94 U. S. 299, 24: 107
Cited in Sessions v. Romadka, 145 U. S. 40, 38 L. ed. 614, 12 Sup. Ct. Rep. 799—*Niles Tool-Works v. Betts Mach. Co.* 27 Fed. 304—*Murphy v. Trenton Rubber Co.* 45 Fed. 570—*Stonemets Printers' Mach. Co. v. Brown Folding Mach. Co.* 57 Fed. 604.

235. If the same combination existed before in machines of the same nature, up to a certain point, and the party's invention consists in adding some new machinery, or some improved mode of operation, to the old, the patent should be limited to such improvement. *Evans v. Eaton*, 7 Wheat. 356, 5: 472
Cited in Hovey v. Stevens, 3 Woodb. & M. 23, Fed. Cas. No. 6,746.

Change in degree.

See also *supra*, 231.

236. A mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent. *Belding Mfg. Co. v. Challenge Corn Planter Co.* 152 U. S. 100, 14 Sup. Ct. Rep. 492, 38: 370
Smith v. Nichols, 21 Wall. 112, 22: 566
Roberts v. Ryer, 91 U. S. 150, 23: 267
Grant v. Walter, 148 U. S. 547, 13 Sup. Ct. Rep. 699, 37: 552
Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. Rep. 394, 33: 647
Ansonia Brass & Copper Co. v. Electrical Supply Co. 144 U. S. 11, 12 Sup. Ct. Rep. 601, 36: 327
Busell Trimmer Co. v. Stevens, 137 U. S. 423, 11 Sup. Ct. Rep. 150, 34: 719
Consolidated Roller Mill Co. v. Walker, 138 U. S. 124, 11 Sup. Ct. Rep. 292, 34: 920
Market Street Cable R. Co. v. Rowley, 155 U. S. 621, 15 Sup. Ct. Rep. 224, 39: 284
Cited in Roberts v. Ryer, 91 U. S. 159, 23 L. ed. 270—*Reckendorfer v. Faber*, 92 U. S. 354, 23 L. ed. 722—*Dunbar v. Myers*, 94 U. S. 199, 24 L. ed. 39—*Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.* 110 U. S. 494, 28 L. ed. 223, 4 Sup. Ct. Rep. 220—*Phillips v. Detroit*, 111 U. S. 607, 28 L. ed. 533, 4 Sup. Ct. Rep. 580—*Morris v. McMillin*, 112 U. S. 249, 28 L. ed. 704, 5 Sup. Ct. Rep. 218—*Stephenson v. Brooklyn*

C. T. R. Co. 114 U. S. 154, 29 L. ed. 60, 5 Sup. Ct. Rep. 777—Burt v. Ivory, 133 U. S. 358, 33 L. ed. 651, 10 Sup. Ct. Rep. 394—Butler v. Steckel, 137 U. S. 29, 34 L. ed. 585, 11 Sup. Ct. Rep. 25—Florsheim v. Schilling, 137 U. S. 77, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—Busell Trimmer Co. v. Stevens, 137 U. S. 435, 34 L. ed. 724, 11 Sup. Ct. Rep. 150—Consolidated Roller Mill Co. v. Walker, 138 U. S. 132, 34 L. ed. 923, 11 Sup. Ct. Rep. 292—International Tooth Crown Co. v. Gaylord, 140 U. S. 62, 35 L. ed. 350, 11 Sup. Ct. Rep. 716—Ansonia Brass & Copper Co. v. Electrical Supply Co. 144 U. S. 19, 36 L. ed. 329, 12 Sup. Ct. Rep. 601—Lovell Mfg. Co. v. Cary, 147 U. S. 634, 37 L. ed. 311, 13 Sup. Ct. Rep. 472—Grant v. Walter, 148 U. S. 553, 37 L. ed. 557, 13 Sup. Ct. Rep. 699—Knapp v. Moras, 150 U. S. 228, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—Miller v. Eagle Mfg. Co. 151 U. S. 203, 38 L. ed. 129, 14 Sup. Ct. Rep. 310—Belding Mfg. Co. v. Challenge Corn Planter Co. 152 U. S. 103, 38 L. ed. 371, 14 Sup. Ct. Rep. 492—Wright v. Yuengling, 155 U. S. 54, 39 L. ed. 67, 15 Sup. Ct. Rep. 1—C. A. Potts & Co. v. Creager, 155 U. S. 607, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—Ridgdon Iron & Locomotive Works v. Medart, 158 U. S. 82, 39 L. ed. 904, 15 Sup. Ct. Rep. 745—Alcott v. Young, 16 Blatchf. 138, 4 Bann. & Ard. 202, Fed. Cas. No. 149—Cone v. Morgan Envelope Co. 4 Bann. & Ard. 109, Fed. Cas. No. 3,096—Gottfried v. Philip Best Brewing Co. 5 Bann. & Ard. 33, Fed. Cas. No. 5,633—Hedden v. Eaton, Fed. Cas. No. 6,318—Putnam v. Yerrington, 2 Bann. & Ard. 240, Fed. Cas. No. 11,486—Zane v. Peck, 3 Bann. & Ard. 38, Fed. Cas. No. 18,200—Flower v. Rayner, 5 Fed. 800—Boykin v. Baker, 4 Hughes, 289, 9 Fed. 704—Sawyer v. Miller, 4 Woods, 474, 12 Fed. 727—Theberath v. Rubber & Celluloid Harness Trimming Co. 15 Fed. 251—McMurray v. Miller, 16 Fed. 476—Wood v. Packer, 17 Fed. 652—Spill v. Celluloid Mfg. Co. 22 Blatchf. 450, 21 Fed. 637—New York Bung & Bushing Co. v. Doelger, 23 Blatchf. 171, 23 Fed. 194—Leonard v. Lovell, 29 Fed. 314—United States Bung Mfg. Co. v. Independent Bung & Bushing Co. 31 Fed. 80—Excelsior Needle Co. v. Union Needle Co. 23 Blatchf. 152, 32 Fed. 221—MacDonald v. McLean, 38 Fed. 330—Brush Electric Co. v. Julien Electric Co. 41 Fed. 603—Blumenthal v. Burrell, 43 Fed. 670—Kane v. Huggins Cracker & Candy Co. 44 Fed. 201—Murphy v. Trenton Rubber Co. 45 Fed. 571—Johnson Co. v. Pacific Rolling-Mills Co. 47 Fed. 591—Williams v. Goodyear Metallic Rubber Shoe Co. 49 Fed. 249—Johnson Co. v. Tidewater Steel Works, 50 Fed. 94—Stemens v. Chambers & M. Glass Co. 51 Fed. 908—Fox v. Perkins, 3 C. C. A. 40, 6 U. S. App. 200, 52 Fed. 213—Caverly v. Deere, 52 Fed. 763—Williams v. Goodyear Metallic Rubber Shoe Co. 4 C. C. A. 487, 14 U. S. App. 55, 54 Fed. 500—Ronnell v. Stoll, 57 Fed. 397—C. T. Ham Mfg. Co. v. R. E. Dietz Co. 13 C. C. A. 690, 14 U. S. App. 709, 58 Fed. 370—Ballard v. McCluskey, 58 Fed. 882—Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. 59 Fed. 909—Newark Watch-Case Material Co. v. Wilmot & H. Mfg. Co. 60 Fed. 616—Johnson v. Johnston, 60 Fed. 622—Holtzer v. Consolidated Electric Mfg. Co. 60 Fed. 750—Bowman v. DeGrauw, 60 Fed. 912—Electric R. Co. v. Jamaica & B. R. Co. 61 Fed. 673—Simonds Mfg. Co. v. E. C. Atkins & Co. 63 Fed. 587—Front Rank Steel Furnace Co. v. Wrought Iron Range Co. 63 Fed. 997—Dalby v. Lynes, 64 Fed. 330—New

Departure Bell Co. v. Bevin Bros. Mfg. Co. 64 Fed. 863—Moore v. Clark, 65 Fed. 526—P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co. 70 Fed. 495—Carter Mach. Co. v. Hanes, 70 Fed. 866—Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co. 19 C. C. A. 20, 37 U. S. App. 689, 72 Fed. 72—L. Schreiber & Sons Co. v. Grimm, 19 C. C. A. 70, 43 U. S. App. 10, 72 Fed. 675—Wilgus v. Germain, 19 C. C. A. 192, 44 U. S. App. 369, 72 Fed. 777—A. B. Dick Co. v. Henry, 75 Fed. 389—J. G. Brill Co. v. Willson, 75 Fed. 1004—Baldwin v. Kresl, 22 C. C. A. 596, 46 U. S. App. 511, 76 Fed. 826—Plastic Fireproof Constr. Co. v. San Francisco, 97 Fed. 624—William Schwarz waelder & Co. v. Detroit, 77 Fed. 891—Gibbon v. Loewer Sole-Rounder Co. 24 C. C. A. 615, 39 U. S. App. 554, 79 Fed. 327—J. I. Warren Co. v. Rosenblatt, 25 C. C. A. 627, 53 U. S. App. 234, 80 Fed. 542—Soehner v. Favorite Stove & Range Co. 28 C. C. A. 322, 54 U. S. App. 389, 84 Fed. 187—Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 133, 54 U. S. App. 591, 85 Fed. 230—Newton Mfg. Co. v. Wilgus, 90 Fed. 485—Letteller v. Mann, 91 Fed. 911—Plastic Fireproof Constr. Co. v. San Francisco, 97 Fed. 625—Thomson-Houston Electric Co. v. Nassau Electric R. Co. 98 Fed. 111—National Chemical & Fertilizer Co. v. Swift & Co. 43 C. C. A. 423, 104 Fed. 89—National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. 45 C. C. A. 562, 106 Fed. 711—Brammer v. Schroeder, 46 C. C. A. 44, 106 Fed. 921—De Lamar v. De Lamar Min. Co. 110 Fed. 548—Standard Caster & Wheel Co. v. Caster Socket Co. 51 C. C. A. 112, 113 Fed. 165—Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. 53 C. C. A. 583, 591, 116 Fed. 371—De Lamar v. De Lamar Min. Co. 54 C. C. A. 279, 117 Fed. 247—United Blue-Flame Oil Stove Co. v. Glazier, 55 C. C. A. 553, 558, 119 Fed. 162—Farrell v. Boston & M. Consol. Copper & S. Min. Co. 121 Fed. 846—Eames v. Worcester Polytechnic Institute, 60 C. C. A. 44, 123 Fed. 74—Drake Castle Pressed Steel Lug Co. v. Brownell, 59 C. C. A. 220, 123 Fed. 90—Hirsch v. Union Stoveworks, 126 Fed. 190—Standard Computing Scale Co. v. Computing Scale Co. 61 C. C. A. 551, 126 Fed. 649—Rodiger v. Thaddeus Davids Mfg. Co. 126 Fed. 965—Fay v. Mason, 62 C. C. A. 161, 127 Fed. 327—Neptune Meter Co. v. National Meter Co. 62 C. C. A. 350, 127 Fed. 568—North Jersey Street R. Co. v. Brill, 67 C. C. A. 384, 134 Fed. 584—West Boylston Mfg. Co. v. Wallace, 137 Fed. 927—Durham v. Seymour, 6 App. D. C. 103—Re Musgrave, 10 App. D. C. 174—Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co. 12 App. D. C. 218—Re Marshuts, 13 App. D. C. 234—Re Iwan, 17 App. D. C. 571—Re Klemm, 21 App. D. C. 190—Flower v. Rayner, 38 Phila. Leg. Int. 128.

237. A mere difference in degree from what has been attained, a more perfect result, a carrying forward of an old idea, which does not rise to the dignity of invention, will not sustain a patent. Wright v. Yuengling, 155 U. S. 47, 15 Sup. Ct. Rep. 1. 39: 64
Cited in Wells v. Curtis, 13 C. C. A. 590, 31 U. S. App. 123, 68 Fed. 324—Coburn Trolley-Track Mfg. Co. v. McCabe Mfg. Co. 80 Fed. 918—Bannerman v. Sanford, 85 Fed. 449—Corser v. Brattleboro Overall Co. 93 Fed. 807—Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co. 41 C. C. A. 363, 101 Fed. 294—West Coast

Safety Faucet Co. v. Jackson Brewing Co. 54 C. C. A. 536, 117 Fed. 298—Hirsch v. Union Stoveworks, 128 Fed. 190—Volghtmann v. Weis & R. Cornice Co. 133 Fed. 303—Re Millett, 18 App. D. C. 189—

238. The combination of a cylindrical guide with the trough in a horizontal steam engine frame, where the guide performs the same function as in other prior combinations of the trough with flat guides, even if it is an improvement, is not patentable. Wright v. Yuengling, 155 U. S. 47, 15 Sup. Ct. Rep. 1, 39: 64

239. The improvement, if any, in the use of a circular clamp over a rectangular clamp, in an electric lamp, around the carbon rod, is only a question of degree in the use of substantially the same means. Brush v. Condit, 132 U. S. 39, 10 Sup. Ct. Rep. 1, 33: 251

240. If a certain device differs from what precedes it only in superiority of finish, or in greater accuracy of detail, it is but the carrying forward of an old idea, and does not amount to invention. Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. Rep. 745, 39: 899
Cited in Rynear Co. v. Evans, 83 Fed. 699—Parsons v. Seelye, 40 C. C. A. 485, 100 Fed. 453—Dodge Mfg. Co. v. Collins, 46 C. C. A. 56, 106 Fed. 938—Edison v. American Mutoscope Co. 52 C. C. A. 555, 114 Fed. 935.

241. An apparatus for the use of a heated-air blast, having a nozzle which terminates in the air by which the blast is partially re-oxygenated, is not changed, so that the improvement will be patentable, by the use of a nozzle terminating in the interior of a cask or keg, by the use of which the blast reaches its objective point without being affected by the air. Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 9 Sup. Ct. Rep. 83, 32: 390
Cited in Gaff v. Gottfried, 128 U. S. 170, 32 L. ed. 395, 9 Sup. Ct. Rep. 87.

242. The fact that air passages in a refrigerator are not prolonged into the lid or cover is not a patentable improvement on those which are thus extended. Belding Mfg. Co. v. Challenge Corn Planter Co. 152 U. S. 100, 14 Sup. Ct. Rep. 492, 38: 370

243. A revenue stamp so arranged that a removable part of the stamp proper, the contents of which identify the stamp with the stub after the stamp has been attached, and which part can be so removed as to retain its own integrity, mutilates and thereby cancels the stamp by its removal, although a new idea, yet is not such an improvement as is entitled to be regarded as an invention within the patent laws. Hollister v. Benedict & B. Mfg. Co. 113 U. S. 59, 5 Sup. Ct. Rep. 717, 28: 901
Cited in Pomace Holder Co. v. Ferguson (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—Thatcher Heating Co. v. Burtis, 121 U. S. 295, 30 L. ed. 946, 7 Sup. Ct. Rep. 1034

Consolidated Roller Mill Co. v. Walker, 138 U. S. 132, 34 L. ed. 923, 11 Sup. Ct. Rep. 292—Magowan v. New York Belting & Packing Co. 141 U. S. 843, 35 L. ed. 785, 12 Sup. Ct. Rep. 71—New York Bung &

Bushing Co. v. Doelger, 23 Blatchf. 170, 23 Fed. 194—Scott Mfg. Co. v. Sayre, 26 Fed. 154—Sax v. Taylor Iron-Works, 30 Fed. 838—J. L. Mott Iron Works v. Cassidy, 31 Fed. 48—Wilcox v. Bookwalter, 31 Fed. 229—Landesmann v. Jonasson, 32 Fed. 591—Brahn v. Ramapo Iron-Works, 35 Fed. 66—Williams Mfg. Co. v. Franklin, 41 Fed. 395—American Split-Feather Duster Co. v. Levy, 43 Fed. 382—McCarty v. Lehigh Valley R. Co. 43 Fed. 385—Consolidated Roller Mill Co. v. Walker, 43 Fed. 578—American Road-Mach. Co. v. Pennock & S. Co. 45 Fed. 254—Anderson v. Saint, 46 Fed. 764—Peoria Target Co. v. Cleveland Target Co. 47 Fed. 727—Haughey v. Lee, 48 Fed. 384—Stauffer v. Spangler, 50 Fed. 86—Waite v. Robinson, 52 Fed. 297—Cleveland Target Co. v. United States Pigeon Co. 52 Fed. 386—Westinghouse v. New York Air-Brake Co. 59 Fed. 598—Newark Watch-Case Material Co. v. Willmot & H. Mfg. Co. 60 Fed. 617—Bonnell v. Stoll, 10 C. C. A. 50, 17 U. S. App. 543, 61 Fed. 768—Stirrat v. Excelsior Mfg. Co. 10 C. C. A. 220, 27 U. S. App. 13, 61 Fed. 984—Westinghouse v. Edison Electric Light Co. 11 C. C. A. 350, 28 U. S. App. 1, 63 Fed. 596—Klein v. Seattle, 63 Fed. 703—Sampson v. Donaldson, 16 C. C. A. 345, 32 U. S. App. 712, 69 Fed. 624—Klein v. Seattle, 23 C. C. A. 119, 44 U. S. App. 741, 77 Fed. 204—Olmsted v. A. H. Andrews & Co. 23 C. C. A. 493, 46 U. S. App. 608, 77 Fed. 840—J. J. Warren Co. v. Rosenblatt, 25 C. C. A. 627, 53 U. S. App. 234, 80 Fed. 542—Berry v. Wynkoop, H.-C. Co. 28 C. C. A. 506, 55 U. S. App. 375, 84 Fed. 648—Safeguard Account Co. v. Wellington, 86 Fed. 148—Chuse v. Ide, 32 C. C. A. 267, 60 U. S. App. 610, 89 Fed. 498—Letteller v. Mann, 91 Fed. 912—Christy v. Hygeia Pneumatic Bicycle Saddle Co. 36 C. C. A. 36, 93 Fed. 970—Way v. McClarin, 37 C. C. A. 517, 96 Fed. 417—Johnston v. Woodbury, 96 Fed. 434—National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. 99 Fed. 775—National Hollow Brake-Beam Co. v. Interchangeable Brake Beam Co. 45 C. C. A. 574, 106 Fed. 723—Durham v. Seymour, 6 App. D. C. 103—Re Musgrave, 10 App. D. C. 174.

244. An improvement in the structure of the canvas, making possible the construction of a practical canvas belt, previous attempts to do which had been failures, discovered after several years of experiment, is not a change in degree only, or one that would have occurred to an ordinary mechanic, but involves an exercise of the inventive faculty. Gandy v. Main Belting Co. 143 U. S. 587, 12 Sup. Ct. Rep. 598, 36: 272
Cited in Ansonia Brass & Copper Co. v. Electrical Supply Co. 144 U. S. 17, 36 L. ed. 329, 12 Sup. Ct. Rep. 601—Krementz v. S. Cottle Co. 148 U. S. 562, 37 L. ed. 560, 13 Sup. Ct. Rep. 719—Knapp v. Morris, 150 U. S. 230, 37 L. ed. 1063, 14 Sup. Ct. Rep. 81—Watson v. Stevens, 2 C. C. A. 504, 5 U. S. App. 101, 51 Fed. 760—Sayre v. Scott, 5 C. C. A. 370, 3 U. S. App. 643, 55 Fed. 975—American Cable R. Co. v. New York, 56 Fed. 151—Ballard v. McCluskey, 58 Fed. 882—Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. 59 Fed. 909—Davock v. Chicago & N. W. R. Co. 69 Fed. 469—Consolidated Fastener Co. v. Columbian Fastener Co. 79 Fed. 800.

245. Where elastic fabric has been previously manufactured, an invention which includes nothing new in such manufacture ex-

cept, perhaps, greater tightness of the weaving, a firmer grasping of the elastic cords by the weft threads half round, above and below, and greater beauty and value of the fabric, is not patentable. *Smith v. Nichols*. 21 Wall. 112, 22: 566

246. The Gately patent, 86,296, for an improvement in vulcanized india-rubber packing, to secure a greater elasticity than is found in the McBurney packing, which is made of bias piles of cloth coated with rubber and vulcanized by placing upon it a backing of pure rubber gum vulcanized to it so as to form but a single piece, of which the McBurney portion furnishes a wearing surface always the same and not altered by wear, and the pure rubber backing by its elasticity always keeps such wearing surface in close contact with the piston rod, making a tight joint, involves a patentable invention. *Magowan v. New York Belting & Packing Co.* 141 U. S. 332, 12 Sup. Ct. Rep. 71, 35: 781

Cited in Dugan v. Gregg, 48 Fed. 228—*Dedrick v. Gardner*, 50 Fed. 98—*Watson v. Stevens*, 2 C. C. A. 504, 5 U. S. App. 101, 51 Fed. 760—*Indurated Fibre Industries Co. v. Grace*, 52 Fed. 129—*Francis v. Kirkpatrick*, 52 Fed. 825—*Featherstone v. Bidwell Cycle Co.* 53 Fed. 116—*Thomson v. Citizens' Nat. Bank*, 3 C. C. A. 521, 10 U. S. App. 500, 53 Fed. 253—*Carter v. Wollschlaeger*, 53 Fed. 576—*Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co.* 59 Fed. 909—*Richardson v. Shepard*, 60 Fed. 276—*Hallock v. Davison*, 107 Fed. 486.

247. The Cowles patent, 272,660, for an insulated electric conductor, which varied from a prior process of insulating wires only by applying a second coat of braid before paint on the first coat was dry, thereby thoroughly filling the second coat of braid with the paint, and by which the product was not made much, if any, more incombustible than by the former process, does not involve any patentable invention, although the users of the prior process may not have discovered the fact of the incombustibility. *Ansonia Brass & C. Co. v. Electrical Supply Co.* 144 U. S. 11, 12 Sup. Ct. Rep. 601, 36: 327

Cited in Westinghouse Electric & Mfg. Co. v. Union Carbide Co. 112 Fed. 423.

Mechanical skill.

248. A change in a mechanical device which would occur to an unskilled mechanic is not patentable. *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554, 6 Sup. Ct. Rep. 846, 29: 952

Cited in Gardner v. Herz, 118 U. S. 192, 30 L. ed. 163, 6 Sup. Ct. Rep. 1027—*Pomace Holder Co. v. Ferguson*, 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—*Hendy v. Golden State & Miner's Iron Works*, 127 U. S. 375, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—*Hill v. Wooster*, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—*Consolidated Fruit Jar Co. v. Bellaire Stamping Co.* 28 Fed. 94—*Cluett v. Claffin*, 30 Fed. 924—*United States Bung Mfg. Co. v. Independent Bung & Bunting Co.* 31 Fed. 70—*Root v. Sontag*, 47 Fed. 313—*Chuse v. Ide*, 32 C. C. A. 267, 60 U. S. App. 610, 80 Fed. 498.

249. An improvement which is but the

usual skill of the inventor's calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice, is not the creative work of that inventive faculty which it is the purpose of the Constitution and of the patent laws to encourage and reward. *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 5 Sup. Ct. Rep. 717, 28: 901

Distinguished in Johnson v. Johnston, 60 Fed. 621.

Cited in Thompson v. Boisselier, 114 U. S. 12, 29 L. ed. 80, 5 Sup. Ct. Rep. 1042—*Pomace Holder Co. v. Ferguson* (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 382—*Marchand v. Emken*, 132 U. S. 200, 33 L. ed. 334, 10 Sup. Ct. Rep. 65—*Howe Mach. Co. v. National Needle Co.* 134 U. S. 397, 33 L. ed. 968, 10 Sup. Ct. Rep. 370—*Patent Clothing Co. v. Glover*, 141 U. S. 563, 35 L. ed. 859, 12 Sup. Ct. Rep. 79—*Lovell Mfg. Co. v. Cary*, 147 U. S. 635, 37 L. ed. 311, 13 Sup. Ct. Rep. 472—*Marchand v. Emken*, 23 Blatchf. 439—*Kappes v. Hartung*, 23 Blatchf. 154, 23 Fed. 189—*Day v. Fair Haven & W. R. Co.* 23 Fed. 191—*Hartford Woven Wire Mattress Co. v. Peerless Wire Mattress Co.* 23 Blatchf. 233, 23 Fed. 591—*Forschner v. Baumgarten*, 26 Fed. 859—*Calkins v. Oshkosh Carriage Co.* 27 Fed. 298—*Celluloid Mfg. Co. v. Comstock & C. Co.* 27 Fed. 359—*Muller v. Ellison*, 27 Fed. 457—*Leonard v. Lovell*, 29 Fed. 314—*Cluett v. Claffin*, 30 Fed. 924—*Puetz v. Bransford*, 31 Fed. 462—*Root v. Sontag*, 47 Fed. 311—*Johnson Co. v. Tidewater Steel Works*, 50 Fed. 94—*Kilbourne v. W. Bingham Co.* 1 C. C. A. 620, 6 U. S. App. 65, 50 Fed. 699—*Bromley Bros. Carpet Co. v. Stewart*, 51 Fed. 914—*Thomson v. Citizens' Nat. Bank*, 3 C. C. A. 521, 10 U. S. App. 500, 53 Fed. 253—*McKay & C. Lasting Mach. Co. v. Claffin*, 58 Fed. 359—*Bowman v. DeGrauw*, 60 Fed. 911—*Farmers' Mfg. Co. v. Spruks Mfg. Co.* 119 Fed. 596—*Fay v. Mason*, 62 C. C. A. 162, 127 Fed. 328—*Neptune Meter Co. v. National Meter Co.* 62 C. C. A. 350, 127 Fed. 568—*Wilce v. Bush Temple of Music Co.* 134 Fed. 391.

250. Where it is found necessary to hold the rims of the wheels in a permutation lock rigidly immovable while the combination of the lock is being changed, there is no invention in making the aperture in the wheels through which the key passes of the shape and size exactly to fit the key, so that the key may perform the function desired. *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554, 6 Sup. Ct. Rep. 846, 29: 952

251. Patent 140,250, for an improvement in ore stamp feeders, is void as not involving a patentable invention, since merely putting rollers under an article to make it movable, when without rollers it would not be movable, does not involve the inventive faculty. *Hendy v. Golden State & Miner's Iron Works*, 127 U. S. 370, 8 Sup. Ct. Rep. 1275, 32: 207

Cited in Royer v. Roth, 132 U. S. 206, 33 L. ed. 324, 10 Sup. Ct. Rep. 58—*Hill v. Wooster*, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—*Black Diamond Coal*

Min. Co. v. Excelsior Coal Co. 156 U. S. 617, 39 L. ed. 555, 15 Sup. Ct. Rep. 482—Johnson Co. v. Pacific Rolling-Mills Co. 47 Fed. 590—McCormick Harvesting Mach. Co. v. C. Aultman & Co. 16 C. C. A. 281, 37 U. S. App. 299, 69 Fed. 393—Gaskill v. Myers, 26 C. C. A. 646, 48 U. S. App. 494, 81 Fed. 858.

252. The Kremenz patent, 298,303, for a collar button having a hollow round head and stem being made of one continuous plate of sheet metal, is not void for want of invention, although a busk fastening had previously been made of a single piece of metal by raising the stud out of a strip of malleable metal, producing a solid rivet like and flat head intended to resist a great strain, and another button has also been previously made with a head open on the underside, but with side seams in the post, and a base plate of separate parts, and not usable for a collar button, but intended for permanent fastening to eyelet holes or to a fabric. *Kremenz v. S. Cottle Co.* 148 U. S. 556, 13 Sup. Ct. Rep. 719, 37: 558
Cited in Ball & Socket Fastener Co. v. C. A. Edgerton Mfg. Co. 37 C. C. A. 525, 96 Fed. 491.

10. Result or Purpose.

New Result from Combination, see *supra*, 169-184.

Infringement of Patent for Means of Producing Result, see *infra*, 1010.

Evidence of Method of Operation, see Evidence, 2255.

See also *supra*, 44-47, 87, 236, 237; *infra*, 258.

253. The end or purpose sought to be accomplished by the device is not the subject of a patent. The subject of a patent is the device or mechanical means by which the desired result is to be secured. *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. Rep. 81, 37: 1059

Cited in Magin v. Karle, 150 U. S. 392, 37 L. ed. 1120, 14 Sup. Ct. Rep. 153—*Wollensak v. Sargent*, 151 U. S. 227, 38 L. ed. 140, 14 Sup. Ct. Rep. 291—*National Cash Register Co. v. Boston Cash Indicator & Recorder Co.* 156 U. S. 515, 39 L. ed. 516, 15 Sup. Ct. Rep. 434—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 559, 10 Fed. 708—*William Schwarzwelder & Co. v. Detroit*, 77 Fed. 892—*Taber Bas-Relief Photograph Co. v. Marceau*, 87 Fed. 873—*Union Gas-Engine Co. v. Doak*, 88 Fed. 89—*Durham v. Seymour*, 6 App. D. C. 93.

254. The end or purpose sought to be accomplished by a device is not the subject of a patent, but only the new and useful means for obtaining that end. *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.* 156 U. S. 502, 15 Sup. Ct. Rep. 434, 39: 511

Cited in Davock v. Chicago & N. W. R. Co. 69 Fed. 469—*Tannage Patent Co. v. Zahn*, 17 C. C. A. 554, 28 U. S. App. 620, 70 Fed. 1005—*McKay-Copeland Lasting Mach. Co. v. Copeland Rapid-Laster Mfg. Co.* 77 Fed. 311—*Beach v. Hobbs*, 82 Fed. 922—*Palmer*

v. John E. Brown Mfg. Co. 84 Fed. 457—*Adams & W. Co. v. E. T. Burrows Co.* 93 Fed. 464.

255. Important results, together with ingenuity in bringing them about, amount to invention. *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.* 156 U. S. 502, 15 Sup. Ct. Rep. 434, 39: 511
Cited in Heap v. Tremont & S. Mills, 27 C. C. A. 322, 50 U. S. App. 180, 82 Fed. 456—*Consolidated Car Heating Co. v. American Electric Heating Corp.* 82 Fed. 997—*Palmer v. John E. Brown Mfg. Co.* 84 Fed. 457—*Safeguard Account Co. v. Wellington*, 86 Fed. 148—*Plumb v. New York, N. H. & H. R. Co.* 97 Fed. 648—*Busch v. Jones*, 16 App. D. C. 43.

256. Where a patentee was not the first to conceive the idea of a device for which the patent was issued, he cannot cover, by his patent, all other devices of every other form for producing the like result, but only the precise device which he has invented. *Blake v. San Francisco*, 113 U. S. 679, 5 Sup. Ct. Rep. 692, 28: 1070
Bridge v. Excelsior Mfg. Co. 105 U. S. 618, 26: 1190

Cited in Norton v. Haight, 22 Fed. 789.

c. Utility.

Presumption of, see Evidence, 768, 768a, 774.

Description in Encyclopedia as Evidence of Successful Operation, see Evidence, 1418.

Evidence of Generally, see Evidence, 2255.

Expert Evidence of, see Evidence, 1828.

Issuance of Patent as Evidence of, see Evidence, 2255a.

General Use as Evidence of, see Evidence, 2255b.

Infringement as Evidence of, see Evidence, 2606a.

See also *supra*, 55, 57, 77, 97, 153, 154, 162, 163, 174, 223, 228, 232; *infra*, 293.

257. A patentable invention must be not only new, but of practical utility. *Smith v. Nichols*, 21 Wall. 112, 22: 566

Cited in Head v. Porter, 70 Fed. 504—*Edison v. American Mutoscope Co.* 52 C. C. A. 555, 114 Fed. 935—*Farmers' Mfg. Co. v. Spruks Mfg. Co.* 119 Fed. 596.

258. A patent for a useful result is void, if the described result cannot be obtained by the described means. *Mitchell v. Tilghman*, 19 Wall. 287, 22: 125

259. A patent for a process in the manufacture of car wheels is not invalid for want of utility because an attempt to use it has sometimes resulted in failure, where it has been successfully applied in the manufacture of a vast number of wheels, and something is left, by the description, to the judgment of the operator in respect to the degree of heating. *Mowry v. Whitney*, 14 Wall. 620, 20: 860

260. Convenience and use in trade are not conclusive of patentability. *Richards v.*

Chase Elevator Co. 159 U. S. 477, 16 Sup. Ct. Rep. 53. 40: 225
Cited in American Sales Book Co. v. Bullivant, 54 C. C. A. 291, 117 Fed. 259.

261. That a patented machine is capable of doing more work and at less expense than prior devices is not decisive upon the question whether the machine involves invention, and is only available to turn the scale in case of grave doubt upon that question. *National Hat Pouncing Mach. Co. v. Hedden*, 148 U. S. 482, 13 Sup. Ct. Rep. 680.

37: 529
Cited in Morrin v. Lawlor, 40 C. C. A. 207, 99 Fed. 980.

262. An invention which constantly exposes the operator to the loss of his life or to great bodily harm cannot be regarded as useful, within the meaning of the patent law. *Mitchell v. Tilghman*, 19 Wall. 287. 22: 125

263. Although torsional springs were well known, and so were telegraph keys and squanders without such springs, the combination in a telegraph key of the lever fulcrumed upon the torsional spring, with adjusting screws for regulating the amplitude of the lever movement and the retractile resistance of the torsional spring,—is not void for lack of invention or utility. *Western Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. Rep. 670. 35: 294

264. The fact that an arm or detent arranged on a shade roller moves toward and away from the center or axis of the roller by the action of gravity, in consequence of the motion of the roller itself, is not patentable independently of any useful combination in which it performs a necessary part. *Hartshorn v. Saginaw Barrel Co.* 119 U. S. 664, 7 Sup. Ct. Rep. 421. 30: 539

General use.

General Use as Indicative of Novelty, see *infra*, 284a-238.

Strict Construction of Patent in Determining Utility, see *infra*, 716.

General Use as Evidence of Utility, see Evidence, 2606b.

265. The extent to which a patented device has gone into use is an unsafe criterion of its patentability. *McClain v. Ortmayer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76. 35: 800

266. Especially where its popularity is not due to any patentable feature. *Duer v. Corbin Cabinet Lock Co.* 149 U. S. 216, 13 Sup. Ct. Rep. 850. 37: 707

Cited in Olin v. Timken, 155 U. S. 155, 39 L. ed. 105, 15 Sup. Ct. Rep. 49—*Saunders v. Allen*, 9 C. C. A. 159, 20 U. S. App. 446, 60 Fed. 612—*Newark Watch Case Material Co. v. Wilmot & H. Mfg. Co.* 60 Fed. 616—*Bowman v. De Grauw*, 60 Fed. 912—*Stahl v. Williams*, 64 Fed. 123—*P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co.* 70 Fed. 497—*Richardson v. American Pin Co.* 73 Fed. 480—*William Schwarzwaelder & Co. v. Detroit*, 77 Fed. 892—*Falk Mfg. Co. v. Missouri R. Co.* 43 C. C. A. 247, 103 Fed. 302—*Goss Printing-Press Co. v. Scott*, 103 Fed. 657—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A.

558, 106 Fed. 707—*Standard Caster & Wheel Co. v. Caster Socket Co.* 51 C. C. A. 113, 113 Fed. 166—*American Sales Book Co. v. Bullivant*, 54 C. C. A. 291, 117 Fed. 259—*Durham v. Seymour*, 6 App. D. C. 93.

267. The fact that a patented device has gone into general use and has displaced other devices is entitled to weight when the question is whether it exhibits patentable invention. *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. Rep. 295. 38: 103
Adams v. Bellaire Stamping Co. 141 U. S. 539, 12 Sup. Ct. Rep. 66. 35: 849
Smith v. Goodyear Dental Vulcanite Co. 93 U. S. 486. 23: 952

Explained in Lettettier v. Mann, 91 Fed. 915.
Cited in Magowan v. New York Belting & Packing Co. 141 U. S. 343, 35 L. ed. 785.

12 Sup. Ct. Rep. 71—*Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed-Wire Co.)* 143 U. S. 284, 36 L. ed. 158, 12 Sup. Ct. Rep. 443—*Keystone Mfg. Co. v. Adams*, 151 U. S. 143, 38 L. ed. 104, 14 Sup. Ct. Rep. 295—*Eppinger v. Richey*, 14 Blatchf. 312, 3 Bann. & Ard. 74, Fed. Cas. No. 4,505—*Phillips v. Detroit*, 4 Bann. & Ard. 348, Fed. Cas. No. 11,100—*Terry Clock Co. v. New Haven Clock Co.* 4 Bann. & Ard. 123, Fed. Cas. No. 13,840—*Washburn & M. Mfg. Co. v. Halsh*, 10 Biss. 73, 4 Fed. 907—*United States Stamping Co. v. King*, 17 Blatchf. 64, 4 Bann. & Ard. 477, 7 Fed. 868—*Lindsay v. Stein*, 20 Blatchf. 379, 10 Fed. 915—*Hill v. Biddle*, 27 Fed. 561—*Asmus v. Alden*, 27 Fed. 687—*Hill v. Sawyer*, 31 Fed. 283—*Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co.* 32 Fed. 403—*Stegner v. Blake*, 36 Fed. 185—*Tondner v. Chambers*, 37 Fed. 335—*Rapid Service Store R. Co. v. Taylor*, 43 Fed. 254—*Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co.* 47 Fed. 898—*Watson v. Stevens*, 2 C. C. A. 504, 5 U. S. App. 101, 51 Fed. 760—*Indurated Fibre Industries Co. v. Grace*, 52 Fed. 129—*Sayre v. Scott*, 5 C. C. A. 369, 3 U. S. App. 643, 55 Fed. 974—*Eastman Co. v. Blair Camera Co.* 62 Fed. 403—*Klein v. Seattle*, 23 C. C. A. 118, 44 U. S. App. 741, 77 Fed. 204—*William Schwarzwaelder & Co. v. Detroit*, 77 Fed. 892—*Mast, F. & Co. v. Dempster Mill Mfg. Co.* 27 C. C. A. 198, 49 U. S. App. 508, 82 Fed. 335—*Patent Button Co. v. Consolidated Fastener Co.* 84 Fed. 191—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 997—*Thomas Roberts Stevenson Co. v. McFassell*, 33 C. C. A. 251, 61 U. S. App. 473, 90 Fed. 708—*Bowers v. San Francisco Bridge Co.* 91 Fed. 416—*Falk Mfg. Co. v. Missouri R. Co.* 43 C. C. A. 247, 103 Fed. 302—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 558, 106 Fed. 707—*Goss Printing-Press Co. v. Scott*, 47 C. C. A. 308, 108 Fed. 259—*Kalamazoo Railway Supply Co. v. Duff Mfg. Co.* 51 C. C. A. 225, 113 Fed. 268—*Kinloch Teleph. Co. v. Western Electric Co.* 51 C. C. A. 373, 113 Fed. 665—*Peters v. Union Blacult Co.* 120 Fed. 685—*Rodiger v. Thaddeus Davids Mfg. Co.* 126 Fed. 964—*Thomson-Houston Electric Co. v. Ohio Brass Co.* 130 Fed. 547.

268. The extensive use to which a device has been put is an aid in resolving the doubt as to its patentability in favor of the patentee. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. Rep. 825. 36: 658

Cited in Corbin Cabinet Lock Co. v. Eagle Lock Co. 52 Fed. 985—*Singer Mfg. Co. v. Brill*,

4 C. C. A. 377, 7 U. S. App. 601, 54 Fed. 383—Holloway v. Dow, 54 Fed. 517—Sayre v. Scott, 5 C. C. A. 369, 3 U. S. App. 643, 55 Fed. 974—Holtzer v. Consolidated Electric Mfg. Co. 60 Fed. 750—Eastman Co. v. Blair Camera Co. 62 Fed. 403—Consolidated Brake-Shoe Co. v. Chicago, P. & St. L. R. Co. 69 Fed. 414—Davock v. Chicago & N. W. R. Co. 69 Fed. 469—Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 997—Bowers v. San Francisco Bridge Co. 91 Fed. 417—Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co. 91 Fed. 992—Irwin v. Hasselman, 38 C. C. A. 591, 97 Fed. 968—National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co. 45 C. C. A. 553, 106 Fed. 718—Kalamazoo Railway Supply Co. v. Duff Mfg. Co. 51 C. C. A. 225, 113 Fed. 268—Kinloch Teleph. Co. v. Western Electric Co. 51 C. C. A. 375, 113 Fed. 665—Durham v. Seymour, 6 App. D. C. 93.

269. When the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, is sufficient to turn the scale in favor of the existence of invention. *Krementz v. S. Cottle Co.* 148 U. S. 556, 13 Sup. Ct. Rep. 719. 37: 558

Cited in Kilmer Mfg. Co. v. Griswold, 62 Fed. 124—*Davock v. Chicago & N. W. R. Co.* 69 Fed. 469—*William Schwarzwaelder & Co. v. Detroit*, 77 Fed. 892—*Consolidated Fastener Co. v. Columbian Fastener Co.* 79 Fed. 800—*Rowers v. San Francisco Bridge Co.* 91 Fed. 416—*Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co.* 91 Fed. 992—*Beer v. Walbridge*, 40 C. C. A. 498, 100 Fed. 466—*Standard Caster & Wheel Co. v. Caster Socket Co.* 51 C. C. A. 112, 113 Fed. 165—*Kalamazoo Railway Supply Co. v. Duff Mfg. Co.* 51 C. C. A. 226, 113 Fed. 269—*Peters v. Union Blacutt Co.* 120 Fed. 684—*Durham v. Seymour*, 6 App. D. C. 93—*Re Draper*, 10 App. D. C. 547—*Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co.* 12 App. D. C. 217.

270. The combination, in a stone-crushing machine, of a fixed jaw with a movable one, both being nearly upright, but so far convergent that the space between at the top is sufficient to receive the stones, and adjustable at the bottom to different distances, in accordance with the size to which it is desired to reduce the pieces, and in which the movable jaw alternately advances and recedes with a vibratory motion communicated by a revolving shaft and fly wheel, must be considered of practical value and utility, at least where a large number of them have been sold. *Robertson v. Blake* (*Blake v. Robertson*) 94 U. S. 728, 24: 245

271. An improvement is new and useful, within the requirements of the patent law, if the combination is new, and the machine can be beneficially used for the purpose for which it was designed. It does not need to be of such general utility as to supersede all other inventions in practice to accomplish the same object. *Seymour v. Osborne*, 11 Wall. 516, 20: 33
Cited in Strobbridge v. Lindsay, 5 Bann. & Ard. 414, 2 Fed. 695—*Gibbs v. Hoefner*, 22 Blatchf. 36, 19 Fed. 324.

272. An apparently trifling change in the device of a connecting rod with rigid upright links, placed on the rear axle of a vehicle as supports for the rear ends of side springs, and so arranged that the rod turns with a depression or reaction of the spring, by which change the device is made applicable to the front end of the vehicle also, by turning the links horizontally, so that the springs can rest upon them at both ends and thus secure a more perfect equalization, and can be used on any vehicle, not merely, as before, upon one made expressly for that purpose,—is held patentable in view of the extensive use to which the springs have been put. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. Rep. 825, 36: 658

d. Novelty.

Claim Based on Novelty, see *infra*, 478.

Reading Element into Claim to Show Novelty, see *infra*, 492.

What Regarded as Novel in Claim, see *infra*, 531.

Rigid Construction of Claims in Determining Novelty, see *infra*, 715a.

Effect of Lack of, on Liability for Royalties, see *infra*, 857.

Lack of Novelty as Defense in Infringement Suit, see *infra*, 1130.

Raising Question of, after Remand to Lower Court, see *Appeal and Error*, 5550.

Estoppel to Deny, see *Estoppel*, 274.

Judicial Notice of, see *Evidence*, 129-140.

Presumption From Issuance of Patent, see *Evidence*, 768, 769.

Evidence of Generally, see *Evidence* 2255.

Expert Evidence of, see *Evidence*, 1828-1830.

Sufficiency of Evidence of Want of, see *Evidence*, 2606.

Admissibility of Patents not Set Up in Answer to Show State of Art, see *Evidence*, 2664.

Mode of Raising Question of, see *Pleading*, 899.

Questions of Law or Fact, see *Trial*, 367, 368.

Cross Examination of Witness Called to Prove Want of, see *Witnesses*, 163.

See also *supra*, 63, 93, 114, 153, 163, 207, 209, 225, 226, 257; *infra*, 409, 467.

Prior knowledge.

Prior Knowledge as Defense in Infringement Suit, see *infra*, 1145.

Scientific Dictionary as Evidence of, see *Evidence*, 1420.

See also *infra*, 362.

273. An instruction asked to the effect that if the jury believed the treatment under the patent "was known to others more than two years before the plaintiff applied for his patent, his patent is void," inaccurately states the rule of law applicable to a patent involving the issue of novelty, as it relates back to the date of invention, and not to the time of the application for the issue of the patent. *Klein v. Russell*, 19 Wall. 433, 22: 116

274. The French patent, 244,224, for an improvement in vault roofs, consisting of front and rear gable stones, to which by mortise and tenon, or equivalent connections, continuous roof stones are held, and upon these are laid a cap stone, formed with a rabbet and resting upon the gables, thus forming a complete roof securely locked, is invalid for lack of novelty in view of existing knowledge in regard to similar structures, the question being one of degree only as to the size of the ridge stone, or cap stone, and the corresponding width of the roof stones. *French v. Carter*, 137 U. S. 239, 11 Sup. Ct. Rep. 90, 34: 664
Cited in Bonnell v. Stoll, 57 Fed. 397—*Bonnell v. Stoll*, 10 C. C. A. 50, 17 U. S. App. 543, 61 Fed. 768—*Simonda Mfg. Co. v. E. C. Atkins & Co.* 63 Fed. 587—*Hickory Wheel Co. v. Frazier*, 40 C. C. A. 299, 100 Fed. 102.

275. The Perkins patent, 501,537, for a method of repairing asphalt pavements, consisting of so heating the spot to be repaired and the adjacent surface that the asphalt is reduced to the soft, pliable state in which it was originally laid, then mixing in enough new material to fill up the spot to be repaired, and then subjecting it to the useful finishing operations, is void for lack of novelty by reason of the prior French patent to Crochet, the process in which differed chiefly in the fact that the old asphalt was removed from the spot to be repaired, while this was not done by the Perkins method. *United States Repair & Guaranty Co. v. Assyrian Asphalt Co.* 183 U. S. 591, 22 Sup. Ct. Rep. 87, 46: 342

Prior use.

Effect of Prior Use on Right to Patent, see *infra*, V. f.

Effect of Public Use before Application for Patent, see *infra*, 363-376.

Effect of Previous Experimental Use on Right to Patent, see *infra*, 377-379.

Prior Use as Defense in Infringement Suit, see *infra*, 1145-1148.

Sufficiency of Oral Testimony as to, see Evidence, 2273.

See also *supra*, 247.

276. A patent is not valid where the thing patented is not new, but has been previously known and used. *Smith v. Nichols*, 21 Wall. 112, 22: 566
Dalton v. Jennings, 93 U. S. 271, 23: 925
Johnson v. Flushing & N. S. R. Co. 105 U. S. 539, 26: 1162
Estey v. Burdett, 109 U. S. 633, 3 Sup. Ct. Rep. 531, 27: 1058
Cook v. Sandusky Tool Co. 4 Sup. Ct. Rep. 4, 28: 124
Western Electric Mfg. Co. v. Ansonia Brass & Copper Co. 114 U. S. 447, 5 Sup. Ct. Rep. 941, 29: 210
Cited in Ansonia Brass & Copper Co. v. Electrical Supply Co. 144 U. S. 18, 36 L. ed. 329, 12 Sup. Ct. Rep. 601—*Grant v. Walter*, 148 U. S. 554, 37 L. ed. 557, 13 Sup. Ct. Rep. 699—*Johnson Co. v. Pacific Rolling-Mills Co.* 47 Fed. 539—*Ashton Valve Co. v. Coale Muffler & Safety Valve Co.* 3 C. C. A. 102,

8 U. S. App. 169, 52 Fed. 318—*Stutz v. Robson*, 54 Fed. 508—*H. W. Johns Mfg. Co. v. Robertson*, 60 Fed. 905—*Union Gas-Engine Co. v. Doak*, 88 Fed. 90—*Falk Mfg. Co. v. Missouri R. Co.* 91 Fed. 158—*Sperry Mfg. Co. v. J. L. Owens Co.* 96 Fed. 977—*Schilling v. Cranford*, 4 Mackey, 469.

277. A structure not designed for the same purpose as a patent in question, and which no person looking at or using would understand was to be used, and that in fact never was used, for the same purpose, does not deprive the invention of novelty. *Clough v. Gilbert & B. Mfg. Co.* (*Clough v. Barker*) 106 U. S. 166, 1 Sup. Ct. Rep. 188, 27: 134

278. A patent for preserving fish or other articles in a close chamber, by means of a freezing mixture having no contact with the atmosphere of the preserving chamber, is void for want of novelty, substantially the same process having been in use in ice cream freezers and in several other similar appliances. *Brown v. Piper*, 91 U. S. 37, 23: 200

Cited in Slawson v. Grand Street, P. P. & F. R. Co. 107 U. S. 653, 27 L. ed. 577, 2 Sup. Ct. Rep. 663—*Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.* 110 U. S. 494, 28 L. ed. 223, 4 Sup. Ct. Rep. 220—*Eachus v. Broomall*, 115 U. S. 436, 29 L. ed. 422, 6 Sup. Ct. Rep. 229—*Florsheim v. Schilling*, 137 U. S. 77, 34 L. ed. 579, 11 Sup. Ct. Rep. 20—*Fond Du Lac County v. May*, 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—*Grant v. Walter*, 148 U. S. 553, 37 L. ed. 556, 13 Sup. Ct. Rep. 699—*Potts & Co. v. Creager*, 155 U. S. 607, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—*National Cash Register Co. v. Boston Cash Indicator & Recorder Co.* 156 U. S. 515, 39 L. ed. 516, 15 Sup. Ct. Rep. 434—*Alcott v. Young*, 4 Bann. & Ard. 202, Fed. Cas. No. 149—*Cone v. Morgan Envelope Co.* 4 Bann. & Ard. 109, Fed. Cas. No. 3,096—*Snow v. Taylor*, 4 Bann. & Ard. 6, Fed. Cas. No. 13,148—*Root v. E. N. Welch Mfg. Co.* 17 Blatchf. 483, 4 Fed. 427—*Western Electric Mfg. Co. v. Ansonia Brass & C. Co.* 20 Blatchf. 173, 9 Fed. 708—*Cottier v. Stimson*, 10 Sawy. 216, 20 Fed. 909—*New York Bung & Bushing Co. v. Doelger*, 23 Blatchf. 171, 23 Fed. 194—*Leonard v. Lovell*, 29 Fed. 314—*Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.* 33 Fed. 256—*Appleton Mfg. Co. v. Star Mfg. Co.* 9 C. C. A. 45, 18 U. S. App. 492, 60 Fed. 413—*Browning v. Colorado Teleph. Co.* 10 C. C. A. 113, 27 U. S. App. 81, 61 Fed. 847—*Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co.* 14 C. C. A. 649, 33 U. S. App. 188, 67 Fed. 793—*Griswold v. Wagner*, 15 C. C. A. 530, 37 U. S. App. 171, 68 Fed. 499—*L. Schreiber & Sons Co. v. Grimm*, 19 C. C. A. 70, 43 U. S. App. 10, 72 Fed. 675—*Frederick R. Stearns & Co. v. Russell*, 29 C. C. A. 131, 54 U. S. App. 591, 85 Fed. 228—*Union Gas-Engine Co. v. Doak*, 88 Fed. 90—*Briggs v. Duell*, 36 C. C. A. 40, 93 Fed. 974—*Standard Caster & Wheel Co. v. Caster Socket Co.* 51 C. C. A. 112, 113 Fed. 165—*Johnson Co. v. Toledo Traction Co.* 56 C. C. A. 423, 119 Fed. 893.

279. Patent 243,674, for an improvement in sectional honey-frames by bending and uniting the ends of a blank consisting of a single piece, is void for want of novelty, similar frames having been in use at the

time of its issuance. *Fornbrook v. Root*, 127 U. S. 176, 8 Sup. Ct. Rep. 1247, 32: 97
Cited in Fond Du Lac County v. May, 137 U. S. 408, 34 L. ed. 719, 11 Sup. Ct. Rep. 98.

280. The novelty of an invention for a process for casting car wheels, so as to prevent injury or strain from unequal contraction consequent on the different thickness of different parts of the wheel, is not disproved by evidence that glass, or speculum metal, or even other iron castings, had been annealed and slow-cooled prior to that time; the discovery and process patented were needed for no other castings, and disclaimed annealing in the ordinary mode. *Mowry v. Whitney*, 14 Wall. 620, 20: 860

281. Bars, perforated plates, and wire nettings, being equivalent devices for arresting sparks in a locomotive, and some of these having been previously used for that purpose, the Kearney and Tronson reissued patent, 5,184, for vertical bars making a grating for such purpose, is void for want of patentable novelty. *Lehigh Valley R. Co. v. Kearney*, 158 U. S. 461, 15 Sup. Ct. Rep. 871, 39: 1055

282. A patent for combining two large tanks with a car, making them practically a part of the car, set directly over the car trucks, is not a patentable invention, when a single iron tank built in boiler shape has been previously in use, as well as small and large casks, and when the universal practice has been to arrange loads as far as possible so as to bring the weight directly over the trucks. *Densmore v. Scofield*, 102 U. S. 375, 26: 214
Cited in Standard Oil Co. v. Southern P. R. Co. 48 Fed. 112—*Henderson v. Tompkins*, 60 Fed. 761.

283. Improvements on the Gory lock, covered by patent 138,148, which consists of the practical removal of the connecting walls between the front and back plates by extending those plates laterally, and the extension of the front plate beyond the back plate, its projecting edges being adapted to fit a countersunk recess around the routed cavity, and the extension inward of the top plate or selvage so as to cover the increased depth of cavity for an extended key-post,—do not constitute an inventive novelty in view of the fact that the old style of locks prior to the Gory patent often had both back and front plates extended beyond the case, and an extended front plate in a countersunk recess, and usually had the extended key-post. *Duer v. Corbin Cabinet Lock Co.* 149 U. S. 216, 13 Sup. Ct. Rep. 850, 37: 707
Cited in Corbin Cabinet Lock Co. v. Eagle Lock Co. 150 U. S. 39, 37 L. ed. 989, 14 Sup. Ct. Rep. 28.

284. A patent for a process of tanning by the use of fat liquor is void for want of novelty, where the use of fat liquor in the treatment of bark-tanned skin was general for many years previous to the alleged invention. *Russell v. Dodge*, 93 U. S. 460, 23: 973
Cited in Russell v. Place, 94 U. S. 606, 24 L. U. S. Dig.—271

ed. 214—*Herring v. Nelson*, 14 Blatchf. 304, 3 Bann. & Ard. 66, Fed. Cas. No. 6,424—*Arnold v. Phelps*, 20 Fed. 316—*American Strawboard Co. v. Elkhart Egg-Case Co.* 84 Fed. 967.

General use.

As Indicative of Utility, see *supra*, 265–272.

Judicial Notice of, see Evidence, 130–135, 137–139.

General Use as Proof of Novelty, see Evidence, 2606b, 2607.

284a. The fact that the patented article may have been popular and met with large sales is not important when the alleged invention is without patentable novelty. *Olin v. Timken*, 155 U. S. 141, 15 Sup. Ct. Rep. 49, 39: 100

Cited in Consolidated Electric Mfg. Co. v. Holtzer, 15 C. C. A. 64, 33 U. S. App. 80, 67 Fed. 908—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 558, 106 Fed. 707—*Durham v. Seymour*, 6 App. D. C. 93.

285. The fact that a patented rubber packing goes at once into such an extensive public use as almost to supersede all packings made under other methods is pregnant evidence of its novelty, value, and usefulness. *Magowan v. New York Belting & Packing Co.* 141 U. S. 332, 12 Sup. Ct. Rep. 71, 35: 781

Cited in McClain v. Ortmyer, 141 U. S. 429, 35 L. ed. 804, 12 Sup. Ct. Rep. 76—*Re Barbed Wire Patent* (Washburn M. & Mfg. Co. v. Beat 'Em All Barbed Wire Co.) 143 U. S. 284, 36 L. ed. 158, 12 Sup. Ct. Rep. 443—*Gandy v. Main Belting Co.* 143 U. S. 595, 36 L. ed. 278, 12 Sup. Ct. Rep. 598—*Krementz v. S. Cottle Co.* 148 U. S. 562, 37 L. ed. 560, 13 Sup. Ct. Rep. 719—*C. & A. Potts & Co. v. Creager*, 155 U. S. 609, 39 L. ed. 280, 15 Sup. Ct. Rep. 194—*Electrical Accumulator Co. v. New York & H. R. Co.* 50 Fed. 83—*Richmond v. Atwood*, 17 L.R.A. 618, 2 C. C. A. 603, 5 U. S. App. 151, 52 Fed. 21—*Sayre v. Scott*, 5 C. C. A. 369, 3 U. S. App. 643, 55 Fed. 974—*American Cable R. Co. v. New York*, 56 Fed. 151—*Ballard v. McCluskey*, 58 Fed. 882—*Johnson v. Johnston*, 60 Fed. 822—*Walslow v. Harker*, 10 C. C. A. 439, 27 U. S. App. 122, 62 Fed. 393—*Eastman Co. v. Blair Camera Co.* 62 Fed. 403—*Consolidated Brake-Shoe Co. v. Chicago, P. & St. L. R. Co.* 69 Fed. 414—*Davock v. Chicago & N. W. R. Co.* 69 Fed. 469—*Consolidated Fastener Co. v. Columbian Fastener Co.* 79 Fed. 800—*Mast, F. & Co. v. Dempster Mill Mfg. Co.* 27 C. C. A. 198, 49 U. S. App. 508, 82 Fed. 335—*Patent Button Co. v. Consolidated Fastener Co.* 84 Fed. 191—*Wilkins Shoe-Button Fastener Co. v. Webb*, 80 Fed. 997—*King v. Anderson*, 90 Fed. 505—*Bowers v. San Francisco Bridge Co.* 91 Fed. 417—*Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co.* 91 Fed. 992—*Christy v. Hygeia Pneumatic Bicycle Saddle Co.* 26 C. C. A. 35, 93 Fed. 969—*Plumb v. New York, N. H. & H. R. Co.* 97 Fed. 647—*Falk Mfg. Co. v. Missouri R. Co.* 43 C. C. A. 247, 103 Fed. 302—*Krajewski v. Pharr*, 44 C. C. A. 578, 105 Fed. 520—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 558, 106 Fed. 707—*Kalamazoo Railway Supply Co. v. Duff Mfg. Co.* 51 C. C. A. 225, 113 Fed. 298—*Kinloch Teleph. Co. v. Western Electric Co.* 51 C. C. A. 375, 113 Fed. 665—*Consolidated*

Rubber Tire Co. v. Finley Rubber Tire Co. 116 Fed. 634—Armat Moving Picture Co. v. American Mutoscope Co. 118 Fed. 840—Peters v. Union Bliscult Co. 120 Fed. 685—Albright v. Langfeld, 131 Fed. 475—Kotten v. Knight, 137 Fed. 599—Revere Rubber Co. v. Consolidated Hoof Pad Co. 138 Fed. 902—Tecktonius v. Scott, 110 Wis. 454, 86 N. W. 672.

286. That an invention brings to success what prior invention has essayed and partly accomplished, and that the prior patented valves were not used, and the speedy and extensive adoption of the new valve, are facts which support the conclusion as to the novelty and patentability of the new valve. Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co. 113 U. S. 157, 5 Sup. Ct. Rep. 513, 28: 939
Distinguished in Consolidated Safety Valve Co. v. Ashton Valve Co. 26 Fed. 320.

Cited in Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.) 143 U. S. 283, 36 L. ed. 158, 12 Sup. Ct. Rep. 447—Krementz v. S. Cattle Co. 148 U. S. 562, 37 L. ed. 560, 13 Sup. Ct. Rep. 719—Tonduer v. Chambers, 37 Fed. 335—Harmon v. Struthers, 43 Fed. 444—Featherstone v. George C. Bldwll Cycle Co. 53 Fed. 116—Thomson v. Citizens' Nat. Bank, 3 C. C. A. 523, 10 U. S. App. 500, 53 Fed. 255—Aerated Fuel Co. v. Woodbury Glass Co. 54 Fed. 388—Sayre v. Scott, 5 C. C. A. 370, 3 U. S. App. 643, 55 Fed. 975—Ames & F. Co. v. Woven-Wire Mach. Co. 59 Fed. 707—Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. 59 Fed. 909—Richardson v. Shepard, 60 Fed. 275—Electric R. Co. v. Jamaica & B. R. Co. 61 Fed. 669—Griawold v. Harker, 10 C. C. A. 439, 27 U. S. App. 122, 62 Fed. 393—Eastman Co. v. Blair Camera Co. 62 Fed. 403—S. F. Heath Cycle Co. v. Hay, 67 Fed. 251—Davock v. Chicago & N. W. R. Co. 69 Fed. 469—Mast, F. & Co. v. Dempster Mill. Mfg. Co. 27 C. C. A. 198, 49 U. S. App. 508, 82 Fed. 335—Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. 86 Fed. 338—Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 997—Bowers v. San Francisco Bridge Co. 91 Fed. 417—Krajewski v. Pharr, 44 C. C. A. 578, 105 Fed. 520—Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 93, 108 Fed. 866—Peters v. Union Bliscult Co. 120 Fed. 685—Farmers' Mfg. Co. v. Spruks Mfg. Co. 62 C. C. A. 453, 127 Fed. 697—Albright v. Langfeld, 131 Fed. 475—Glidden v. Noble, 5 App. D. C. 494.

287. Doubt as to the novelty of an invention is aided by the fact that it has gone into general use and displaced other devices. C. & A. Potts & Co. v. Creager, 155 U. S. 597, 15 Sup. Ct. Rep. 194, 39: 275
Cited in Mast, F. & Co. v. Dempster Mill Mfg. Co. 27 C. C. A. 198, 49 U. S. App. 508, 82 Fed. 335—Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co. 12 App. D. C. 217.

288. The circulation of the material around the roll in vertical planes, securing greatly increased speed in cutting, is the salient feature of the Hoyt patent, 303,374, for a rag-engine for paper-making, and its utility is shown in its general adoption by paper-makers. Hoyt v. Horne, 145 U. S. 302, 12 Sup. Ct. Rep. 922, 36: 713
Cited in Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co. 86 Fed. 327.

Patentable novelty.

See also *supra*, 55; *infra*, 981.

289. A patentable novelty must be a novelty in the means or mechanical device, and not in the use to which the combination is put. Wollensak v. Sargent, 151 U. S. 221, 14 Sup. Ct. Rep. 291, 38: 137
Cited in National Cash Register Co. v. Boston Cash Indicator & Recorder Co. 156 U. S. 515, 39 L. ed. 516, 15 Sup. Ct. Rep. 434—Hickory Wheel Co. v. Frazier, 40 C. C. A. 300, 100 Fed. 102.

290. A distinction must be observed between a new article of commerce and a new article which, as such, is patentable. To render an article new in the sense of the patent law, it must be more or less efficacious, or possess new properties by a combination with other ingredients. Milligan & H. Glue Co. v. Upton, 97 U. S. 3, 24: 985

Cited in Hurd v. Snow, 35 Fed. 425—Palmer Pneumatic Tire Co. v. Tozler, 84 Fed. 668—Krajewski v. Pharr, 44 C. C. A. 576, 105 Fed. 518—Farmers' Mfg. Co. v. Spruks Mfg. Co. 119 Fed. 595.

291. Common contrivances for opening and closing apertures at a distance from the hand of the operator lack patentable novelty. Wollensak v. Sargent, 151 U. S. 221, 14 Sup. Ct. Rep. 291, 38: 137

292. A mere extension of a transom-lifter rod at its upper end, and its confinement within an additional loop or eye, lacks patentable novelty. Wollensak v. Sargent, 151 U. S. 221, 14 Sup. Ct. Rep. 291, 38: 137

293. Although a patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which can be operated efficiently by an attendant at a distance, his right to a patent must rest upon the novelty of the means he contrives to carry his idea into practical application. Aron v. Manhattan R. Co. 132 U. S. 84, 10 Sup. Ct. Rep. 24, 33: 272

294. There was nothing new or patentable in flexible or rigid doors, outside and inside, for grain cars, or in the use of outside and inside rigid doors in combination, the inside door filling only part of the opening. Watson v. Cincinnati, I. St. L. & C. R. Co. 132 U. S. 161, 10 Sup. Ct. Rep. 45, 33: 295

Cited in Hill v. Wooster, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—Howe v. National Needle Co. 134 U. S. 397, 33 L. ed. 968, 10 Sup. Ct. Rep. 570—Butler v. Steckel, 137 U. S. 29, 34 L. ed. 583, 11 Sup. Ct. Rep. 25—Lovell Mfg. Co. v. Cary, 147 U. S. 667, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—American Road-Mach. Co. v. Pennock & S. Co. 45 Fed. 255—Campbell v. Bailey, 45 Fed. 565—Johnson Co. v. Pacific Rolling-Mills R. Co. 47 Fed. 500—Haughev v. Lee, 48 Fed. 384—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—Yale & T. Mfg. Co. v. Sargent, 97 Fed. 107—Hickory Wheel Co. v. Frazier, 40 C. C. A. 299, 100 Fed. 102.

295. A patent granted to Munson April 2, 1867, for improvements in preserving, filing, and canceling bonds, etc., is void because containing no patentable novelty, as the only change from former blank books for the purpose consists in providing spaces for the bonds and changing the order of arrangement of the coupons. *Munson v. New York*, 124 U. S. 601, 8 Sup. Ct. Rep. 622, 31: 586

Cited in *Burt v. Evory*, 133 U. S. 358, 33 L. ed. 651, 10 Sup. Ct. Rep. 304—*United States Credit System Co. v. American Credit Indemnity Co.* 53 Fed. 819—*Front Rank Steel Furnace Co. v. Wrought Iron Range Co.* 63 Fed. 997—*Berry v. Wynkoop-Hallenbeck-Crawford Co.* 77 Fed. 835.

296. Patent 273,569, granted to Charles Marchand, March 6, 1883, for an improvement in the manufacture of hydrogen peroxide, is invalid for want of novelty. *Marchand v. Emken*, 132 U. S. 195, 10 Sup. Ct. Rep. 65, 33: 332

Cited in *Brush Electric Co. v. Julien Electric Co.* 41 Fed. 694—*Johnson Co. v. Pacific Rolling-Mills Co.* 47 Fed. 590—*Olmsted v. A. H. Andrews & Co.* 23 C. C. A. 493, 46 U. S. App. 608, 77 Fed. 840.

297. Patent 156,880, granted Nov. 17, 1874, to Robert Cluett for an improvement in shirts, which consists simply of a shirt bosom bound at its edges and stitched through its binding to the body of the shirt, is invalid for want of patentable novelty. *Cluett v. Clafin*, 140 U. S. 180, 11 Sup. Ct. Rep. 725, 35: 385

Cited in *Dederick v. Gardner*, 50 Fed. 100—*Dalby v. Lynes*, 64 Fed. 380—*Chase v. Catlin*, 64 Fed. 771—*Ypsilanti Dress-Stay Mfg. Co. v. Van Valkenburg*, 72 Fed. 281—*Baldwin v. Kreal*, 22 C. C. A. 596, 46 U. S. App. 511, 76 Fed. 826.

298. It is not a patentable invention to add a lower compartment to a box creamery on legs. *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. Rep. 228, 33: 502

Cited in *Antisdel v. Chicago Hotel Cabinet Co.* 32 C. C. A. 220, 60 U. S. App. 572, 89 Fed. 312—*Letteller v. Mann*, 91 Fed. 911.

299. A patent for the manufacture of a metal ring enveloped in a composition of ivory or similar material is void for the want of novelty. *Rubber Coated Harness Trimming Co. v. Welling*, 97 U. S. 7, 24: 942
Bronson v. Kimpton, 8 Wall. 444, 19: 433
Cited in *Welling v. Rubber-Coated Harness Trimming Co.* 2 Bann. & Ard. 3, Fed. Cas. No. 17,383—*Antisdel v. Chicago Hotel Cabinet Co.* 32 C. C. A. 220, 60 U. S. App. 572, 89 Fed. 312.

300. A rubber or erasive head for lead pencils, with an opening somewhat smaller than the pencil, so that the elasticity of the rubber would hold it to the pencil when it was inserted, is not a patentable invention. *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 22: 410

Cited in *Reckendorfer v. Faber*, 92 U. S. 353, 23 L. ed. 722—*Wilson Packing Co. v. Chicago Packing & Provision Co.* 105 U. S. 572, 26 L. ed. 1174—*Phillips v. Detroit*, 111 U. S. 608, 28 L. ed. 534, 4 Sup. Ct. Rep. 580—*Miller v. Eagle Mfg. Co.* 151 U. S. 201, 38 L. ed.

129, 14 Sup. Ct. Rep. 310—*Alcott v. Young*, 16 Blatchf. 138, 4 Bann. & Ard. 202, Fed. Cas. No. 149—*Root v. Sontag*, 47 Fed. 313—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 559, 106 Fed. 708—*L. E. Waterman Co. v. Lockwood*, 60 C. C. A. 334, 125 Fed. 498—*Thomson-Houston Electric Co. v. Ohio Brass Co.* 129 Fed. 379.

301. A patent for an improvement in locks which consists in combining with the ordinary combination wheels and the other working parts of a combination lock, which has no sliding lock bolt, a bolt turning on a pivot or bearing, which is so isolated or removed from contact with the said wheels as to receive any pressure or strain which may be applied through the separate bolt work of a safe or vault door, and cut off the communication between the bolt work of the door and the wheels or fence lever of the lock, is not void for want of novelty. *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 6 Sup. Ct. Rep. 934, 29: 954

Cited in *Dryfoos v. Wiese*, 124 U. S. 37, 31 L. ed. 364, 8 Sup. Ct. Rep. 354—*Fornecrook v. Root*, 127 U. S. 181, 32 L. ed. 99, 8 Sup. Ct. Rep. 1247.

302. The employment of a diagonal brace to a track-scraper, to prevent lateral displacement, does not involve patentable novelty. *Day v. Fair Haven & W. R. Co.* 132 U. S. 98, 10 Sup. Ct. Rep. 11, 33: 265

Cited in *Hill v. Wooster*, 132 U. S. 701, 33 L. ed. 506, 10 Sup. Ct. Rep. 228—*Wollensak v. Sargent*, 151 U. S. 226, 38 L. ed. 140, 14 Sup. Ct. Rep. 291—*Wollensak v. Sargent*, 41 Fed. 55—*Brush Electric Co. v. Julien Electric Co.* 41 Fed. 693—*Foos Mfg. Co. v. Springfield Engine & Thresher Co.* 44 Fed. 597—*American Road-Mach. Co. v. Pennock & S. Co.* 45 Fed. 255—*Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 590—*Haughey v. Lee*, 48 Fed. 384—*Foos Mfg. Co. v. Springfield Engine & Thresher Co.* 1 C. C. A. 412, 6 U. S. App. 14, 49 Fed. 643—*Burnham & D. Railway Appliance Co. v. Naumkeag Street R. Co.* 57 Fed. 651—*McKay & C. Lasting Mach. Co. v. Clafin*, 58 Fed. 354—*H. W. Johns Mfg. Co. v. Robertson*, 60 Fed. 903—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 207, 21 U. S. App. 244, 61 Fed. 971—*Standard Elevator Co. v. Crane Elevator Co.* 22 C. C. A. 578, 46 U. S. App. 411, 76 Fed. 796—*American Bell Teleph. Co. v. National Teleph. Mfg. Co.* 109 Fed. 997.

303. The 6th claim of the Beach reissued patent No. 11,167, for a machine to attach stays to the corners of boxes, introduces a novel and patentable feature, which consists of making one of the opposing clamping dies having diverging faces elastic, so as to enable the dies to operate upon box corners of different thicknesses. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. Rep. 409, 45: 586

304. The increase of the weight of the hand wheels in road machines described in claims 4, 10, 11, and 13 of the Taft patent, 331,920, in order to correct the tendency of smaller wheels to reverse, did not involve patentable novelty. *American Road Mach. Co. v. Pennock & S. Co.* 164 U. S. 26, 17 Sup. Ct. Rep. 1, 41: 337

Cited in *Hickory Wheel Co. v. Frazier*, 40

C. A. 299, 100 Fed. 102—*Justi v. Clark*, 47 C. C. A. 575, 108 Fed. 609—*Johnson v. Chisholm*, 53 C. C. A. 130, 115 Fed. 632.

e. Anticipation.

1. In General.

As Defense in Infringement Suit, see *infra*, 1149-1154, 1161.

Conclusiveness of Finding as to, see Appeal and Error, 4810.

Burden of Proof, see Evidence, 776, 778.

Declarations of Inventor as Evidence of Date of Invention, see Evidence, 1919.

Weight of Testimony of Patentee as to Time of Invention, see Evidence, 2608.

Sufficiency of Proof of, see Evidence, 2610-2612.

305. Putting an invention into public use, by another inventor, about four years previously, constitutes an anticipation. *Brown v. Davis*, 116 U. S. 237, 6 Sup. Ct. Rep. 379, 2: 659

Cited in Parlin & O. Co. v. Moline Plow Co. 32 C. C. A. 235, 60 U. S. App. 207, 89 Fed. 333.

306. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, or adapted, or actually used, for the performance of such function. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. Rep. 825, 38: 658

Cited in Huber v. N. O. Nelson Mfg. Co. 148 U. S. 292, 37 L. ed. 454, 13 Sup. Ct. Rep. 603—*Kremenz v. S. Cottle Co.* 148 U. S. 562, 37 L. ed. 560, 13 Sup. Ct. Rep. 710—*Knapp v. Morass*, 150 U. S. 230, 37 L. ed. 1063, 14 Sup. Ct. Rep. 81—*Watson v. Stevens*, 2 C. C. A. 502, 5 U. S. App. 101, 51 Fed. 758—*American Cable R. Co. v. New York*, 56 Fed. 151—*McKay & C. Lasting Mach. Co. v. Claffin*, 58 Fed. 357—*Chase v. Fillebrown*, 58 Fed. 370—*Ballard v. McCluskey*, 58 Fed. 882—*Westinghouse v. New York Air-Brake Co.* 59 Fed. 590—*Kilmer Mfg. Co. v. Griswold*, 62 Fed. 124—*Beach v. American Box-Mach. Co.* 63 Fed. 601—*New Departure Bell Co. v. Bevin Bros. Mfg. Co.* 64 Fed. 863—*S. F. Heath Cycle Co. v. Hay*, 67 Fed. 250—*Kilmer Mfg. Co. v. Griswold*, 15 C. C. A. 164, 35 U. S. App. 246, 67 Fed. 1020—*Sawyer Spindle Co. v. Taylor*, 69 Fed. 840—*Gould Coupler Co. v. Pratt*, 70 Fed. 626—*Bray v. United States Nat. & Twine Co.* 70 Fed. 1007—*Thomson-Houston Electric Co. v. Winchester Ave. R. Co.* 71 Fed. 208—*Taylor Burner Co. v. Diamond*, 72 Fed. 185—*L. Schrelber & Sons Co. v. Grimm*, 19 C. C. A. 71, 43 U. S. App. 10, 72 Fed. 675—*Taylor v. Sawyer Spindle Co.* 22 C. C. A. 211, 39 U. S. App. 257, 75 Fed. 309—*Muller v. Lodge & D. Mach. Tool Co.* 23 C. C. A. 365, 47 U. S. App. 189, 77 Fed. 629—*Kinnear & G. Co. v. Capital Sheet-Metal Co.* 81 Fed. 492—*Western Electric Co. v. Home Teleph. Co.* 85 Fed. 655—*Wickelman v. A. B. Dick Co.* 31 C. C. A. 533, 59 U. S. App. 616, 88 Fed. 266—*Bowers v. San Francisco Bridge Co.* 91 Fed. 410—*Western Electric Co. v. American Rheostat Co.* 91 Fed. 653—*Ryan v. Newark Spring Mattress Co.* 96 Fed. 103—*Plumb v. New York, N. H. & H. R. Co.* 97 Fed. 647—

Dodge v. Porter, 98 Fed. 627—*Brill v. Third Ave. R. Co.* 103 Fed. 293—*German-American Filter Co. v. Loew Filter Co.* 103 Fed. 310—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 553, 106 Fed. 702—*Hallock v. Davison*, 107 Fed. 486—*Climotti Unhailing Co. v. American Unhailing Mach. Co.* 53 C. C. A. 234, 115 Fed. 502—*Moore v. Schaw*, 118 Fed. 607—*Armat Moving Picture Co. v. American Mutoscope Co.* 118 Fed. 847—*Fenton Metallic Mfg. Co. v. Office Specialty Co.* 12 App. D. C. 217.

307. Upon the question whether plaintiff's invention has been anticipated, after defendant has given evidence of earlier patents it is proper for plaintiff to show that prior to the date of any of them he had reduced his invention to practice, in a working form. *St. Paul Plow Works v. Starling*, 140 U. S. 184, 11 Sup. Ct. Rep. 803, 35: 404
Distinguished in Hunt v. Moline Plow Co. 52 Fed. 748.

Cited in Clark Thread Co. v. Willmantic Linen Co. 140 U. S. 492, 35 L. ed. 526, 11 Sup. Ct. Rep. 846—*Pacific Cable R. Co. v. Butte City Street R. Co.* 55 Fed. 765—*Untermeyer v. Freund*, 7 C. C. A. 186, 20 U. S. App. 32, 58 Fed. 208—*American Sulphite Pulp Co. v. Howland Falls Pulp Co.* 70 Fed. 996—*Von Schmidt v. Bowers*, 25 C. C. A. 342, 48 U. S. App. 120, 80 Fed. 140—*Westinghouse Electric & Mfg. Co. v. Saranac Lake Electric Light Co.* 108 Fed. 222.

Editorial notes.

What is anticipation.

4: 433; 37: 737; 38: 138; 40: 1025

Speculation or experiment.

Unsuccessful Experiment as Invention, see *supra*, 53, 54.

308. If the thing alleged to have been an anticipation of a patent was embryotic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation,—it cannot avail to defeat a patent founded upon a discovery or invention which was completed. *Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co. (Re Barbed Wire Patent)* 143 U. S. 275, 12 Sup. Ct. Rep. 443, 450, 36: 154

Cited in Thomson v. Citizens' Nat. Bank, 3 C. C. A. 521, 10 U. S. App. 500, 53 Fed. 253—*Aerated Fuel Co. v. Woodbury Glass Co.* 54 Fed. 388—*Holloway v. Dow*, 54 Fed. 516—*Sayre v. Scott*, 5 C. C. A. 370, 3 U. S. App. 643, 55 Fed. 975—*Kilmer Mfg. Co. v. Griswold*, 62 Fed. 124—*Mast v. Iowa Windmill & Pump Co.* 68 Fed. 223—*Western Electric Co. v. Home Teleph. Co.* 85 Fed. 656—*Streator Cathedral Glass Co. v. Wire-Glass Co.* 38 C. C. A. 580, 97 Fed. 957—*Santa Clara Valley Mill & Lumber Co. v. Prescott*, 42 C. C. A. 483, 102 Fed. 507—*Kalamazoo Railway Supply Co. v. Duff Mfg. Co.* 51 C. C. A. 225, 113 Fed. 268—*Severy Process Co. v. Harper*, 113 Fed. 584—*Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.* 53 C. C. A. 591, 116 Fed. 371—*Armat Moving Picture Co. v. American Mutoscope Co.* 118 Fed. 849—*Fay v. Mason*, 120 Fed. 509—*Peters v. Union Biscuit Co.* 120 Fed. 684.

309. Unsuccessful and abandoned experiments do not affect the validity of a subse-

quent patent. *Deering v. Winona Harvester Works*, 155 U. S. 286, 15 Sup. Ct. Rep. 118, 39: 153

Cited in *Mast, F. & Co. v. Iowa Windmill & Pump Co.* 68 Fed. 224—*Westinghouse Electric & Mfg. Co. v. Beacon Lamp Co.* 95 Fed. 464—*R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co.* 111 Fed. 927.

Private or secret use.

Effect of Prior Use on Right to Patent, see *infra*, V. f.

Effect of Public Use on Right to Patent, see *infra*, 363-376.

Effect of Previous Experimental Use on Right to Patent, see *infra*, 377-379.

Effect of Unknown Prior Use on Validity of Patent, see *infra*, 382.

310. Anticipation by a prior inventor who did not make his discovery public, but used his invention for his own private purposes, and it was subsequently forgotten or abandoned, does not preclude a subsequent inventor from obtaining a patent under the act of 1836, chap. 357, § 6, authorizing issuance of patent to a party whose improvement was "not known or used by others before his discovery or invention;" or prevent him from suing for infringement under § 15, as the "original and first inventor or discoverer of the thing patented." *Gayler v. Wilder*, 10 How. 477, 13: 504

Cited in *Bullock Printing Press Co. v. Jones*, 3 Bann. & Ard. 197, Fed. Cas. No. 2,132—*Burrows v. Wetherhill*, *McArthur*, Pat. Cas. 328, Fed. Cas. No. 2,208—*Sturtevant v. Greenough*, Fed. Cas. No. 13,579—*Mason v. Hepburn*, 18 App. D. C. 92—*Reeves v. Keystone Bridge Co.* 9 Phila. 871—*Shoup v. Henriel*, 11 Phila. 515.

311. An invention is not concealed or used in secret because hidden from view by its position in the machinery in which it is used. *Brush v. Condit*, 132 U. S. 39, 10 Sup. Ct. Rep. 1, 33: 251

Combinations.

See also *infra*, 342, 343.

312. Where the combinations patented, as well as their separate elements, have been anticipated, the patent is invalid. *Dane v. Chicago Mfg. Co.* 131 U. S. cxxvi. Appx. and 23: 82

313. The fact that others had done something quite similar, and had used separately, or in different combinations, the ingredients of the patentee's claim, should not affect his patent. *Seabury & Johnson v. Am. Ende*, 152 U. S. 561, 14 Sup. Ct. Rep. 683, 38: 553
Cited in *Consolidated Rubber Tire Co. v. Finley Rubber Tire Co.* 116 Fed. 634.

314. Where a patent covers a combination of the furnace of a threshing engine with a detachable box or tube, the office of which is to furnish means for the supply of straw as fuel in such manner as to prevent the entrance of air after the straw has been pushed through the tube,—although it is of little or no value as applied to engines then in use,—it anticipates a claim for the use of such combination applied to an engine subsequent-

ly invented, which more successfully uses straw as fuel. *Heald v. Rice*, 104 U. S. 737, 26: 910

Cited in *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.* 110 U. S. 494, 28 L. ed. 224, 4 Sup. Ct. Rep. 220—*Morris v. McMillin*, 112 U. S. 249, 28 L. ed. 704, 5 Sup. Ct. Rep. 218—*Eachus v. Broomall*, 115 U. S. 436, 29 L. ed. 422, 6 Sup. Ct. Rep. 229—*Thatcher Heating Co. v. Burtis*, 121 U. S. 295, 30 L. ed. 945, 7 Sup. Ct. Rep. 1034—*Burt v. Ivory*, 133 U. S. 359, 33 L. ed. 651, 10 Sup. Ct. Rep. 394—*Fond Du Lac County v. May*, 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—*Leonard v. Loveall*, 29 Fed. 314—*United States Bung Mfg. Co. v. Independent Bung & Bushing Co.* 31 Fed. 79—*Appleton Mfg. Co. v. Star Mfg. Co.* 9 C. C. A. 46, 18 U. S. App. 492, 60 Fed. 415—*Galt v. Parlin & O. Co.* 9 C. C. A. 54, 18 U. S. App. 518, 60 Fed. 422—*Russell v. Kern*, 16 C. C. A. 157, 34 U. S. App. 90, 69 Fed. 97—*Green v. American Soda-Fountain Co.* 24 C. C. A. 46, 39 U. S. App. 510, 78 Fed. 123—*Union Gas-Engine Co. v. Doak*, 88 Fed. 90—*Yale & T. Mfg. Co. v. Sargent*, 97 Fed. 107—*National Meter Co. v. Thomson Meter Co.* 106 Fed. 540—*Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co.* 60 C. C. A. 537, 125 Fed. 760—*Rodiger v. Thaddeus Davids Mfg. Co.* 126 Fed. 965.

Infringement as test of anticipation.

315. That which infringes a patent if later, anticipates it if earlier. *Miller v. Eagle Mfg. Co.* 151 U. S. 186, 14 Sup. Ct. Rep. 310, 38: 121
Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. Rep. 81, 37: 1059
Peters v. Active Mfg. Co. 129 U. S. 530, 9 Sup. Ct. Rep. 389, 32: 738

Cited in *Knapp v. Morss*, 150 U. S. 228, 37 L. ed. 1002, 14 Sup. Ct. Rep. 81—*Miller v. Eagle Mfg. Co.* 151 U. S. 203, 38 L. ed. 129, 14 Sup. Ct. Rep. 310—*Electrical Accumulator Co. v. Julien Electric Co.* 38 Fed. 141—*Smith v. Pittsburgh Gas Co.* 42 Fed. 151—*H. W. Johns Mfg. Co. v. Robertson*, 60 Fed. 907—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 203, 21 U. S. App. 244, 61 Fed. 967—*Wells v. Curtis*, 13 C. C. A. 501, 31 U. S. App. 123, 66 Fed. 324—*P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co.* 70 Fed. 494—*Muller v. Lodge & D. Mach. Tool Co.* 23 C. C. A. 364, 47 U. S. App. 189, 77 Fed. 628—*American Tobacco Co. v. Streat*, 28 C. C. A. 24, 42 U. S. App. 617, 83 Fed. 706—*Deere & Co. v. Rock Island Plow Co.* 28 C. C. A. 311, 55 U. S. App. 534, 84 Fed. 174—*Brazel v. Eau Claire Mill Supply Co.* 89 Fed. 589—*Excelsior Needle Co. v. Morse-Keefer Cycle-Supply Co.* 97 Fed. 629—*Plumb v. New York, N. H. & H. R. Co.* 97 Fed. 647—*National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 99 Fed. 772—*Bracewell v. Pas-sale Print Works*, 107 Fed. 472—*Eames v. Worcester Polytechnic Institute*, 60 C. C. A. 42, 123 Fed. 72.

Commercial success.

316. The fact that the invention had been a commercial success was considered in determining whether it had been anticipated. *Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co. (Barbed Wire Patent)* 143 U. S. 275, 12 Sup. Ct. Rep. 443, 450, 36: 154

Cited in *Electrical Accumulator Co. v. New*

York & H. R. Co. 50 Fed. 83—Dederick v. Gardner, 50 Fed. 98—Watson v. Stevens, 2 C. C. A. 504, 5 U. S. App. 101, 51 Fed. 760—Francis v. Kirkpatrick, 52 Fed. 825—Corbin Cabinet Lock Co. v. Eagle Lock Co. 52 Fed. 985—Carter v. Wollschlaeger, 53 Fed. 576—Richardson v. Shepard, 60 Fed. 276—Consolidated Brake-Shoe Co. v. Chicago, P. & St. L. R. Co. 69 Fed. 414—Bowers v. San Francisco Bridge Co. 91 Fed. 417—Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co. 91 Fed. 992—Caster Socket Co. v. Clark, 110 Fed. 979—Armat Moving Picture Co. v. American Mutoscope Co. 118 Fed. 840—Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co. 12 App. D. C. 217—Tecktonius v. Scott, 110 Wis. 454, 86 N. W. 672.

2. Processes.

Invention in Processes, see *supra*, V. b, 7.
Anticipation by Foreign Patent, see *supra*, 22.
Construction of Patent for, see *infra*, 737-748.

317. It is not an anticipation of a patented process if the products of such process were previously produced accidentally and unwittingly, while the operators were in pursuit of other and different results, without exciting attention and without its even being known what was done or how it had been done. *Tilghman v. Proctor*, 102 U. S. 707.

26: 279
Cited in Campbell v. New York, 20 Blatchf. 71, 9 Fed. 502—Cary v. Wolff, 23 Blatchf. 95, 24 Fed. 141—Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co. 32 Fed. 403—Electrical Accumulator Co. v. Jullen Electric Co. 38 Fed. 128—Schultz Belting Co. v. Willemssen Belting Co. 40 Fed. 158—Boyd v. Cherry, 4 McCrary, 75, 50 Fed. 283—Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. 55 Fed. 307—McKay & C. Mach. Co. v. Clafin, 58 Fed. 357—Chase v. Fillebrown, 58 Fed. 377—Hoyle v. Kerr, 7 C. C. A. 271, 17 U. S. App. 200, 58 Fed. 397—Wickelman v. A. B. Dick Co. 31 C. C. A. 533, 59 U. S. App. 616, 88 Fed. 286—Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co. 90 Fed. 209—Tannage Patent Co. v. Donallan, 93 Fed. 821—Badische Anilin & Soda Fabrik v. Kalle, 94 Fed. 187—Chisholm v. Johnson, 106 Fed. 200—Cimlotti Unhairing Co. v. Comstock Unhairing Co. 115 Fed. 524—Durfee v. Bawo, 118 Fed. 855—National Meter Co. v. Neptune Meter Co. 122 Fed. 86—Chisholm v. Fleming, 133 Fed. 930—Rosell v. Allen, 16 App. D. C. 567.

318. A patent for hermetically sealing all vegetable substances in their raw or crude state, for preservation, after heating them for such length of time as shall be required for the particular substances treated, and puncturing them, anticipates a patent for preserving Indian corn after the kernels have been removed from the cob, by hermetically sealing after it is heated for one and a half hours before puncturing the kernels, and about two and a half hours after that. *Sewall v. Jones*, 91 U. S. 171, 23: 275

Cited in Western Electric Co. v. La Rue, 139 U. S. 606, 35 L. ed. 297, 11 Sup. Ct. Rep. 670—Ansonia Brass & C. Co. v. Electrical Supply Co. 144 U. S. 18, 38 L. ed. 329, 12

Sup. Ct. Rep. 601—*Jones v. McMurray*, 2 Hughes, 529, Fed. Cas. No. 7,479.

319. The use of hard rubber in the production of a plate for artificial teeth, which is light and elastic, easily adapted to the contour of the mouth, flexible, yet firm and strong, consisting of one piece with no crevices between the teeth, and the plate impervious to the fluids of the mouth, and unaffected by chemical action in the mouth, is patentable as the result of inventive effort and as a novel production, and is not anticipated by teeth cast on a tin base, which, however, from the weight, could be only used for the lower jaw, and, in consequence of the shrinkage of the metal in cooling, could not obtain tight joints between the teeth and the base, or a close fit to the roof of the mouth, and which was affected by chemical action,—the use of which, in consequence of such defects, had been practically abandoned. *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23: 952

320. A process patent is not anticipated by mechanism which might, with slight alterations, have been adapted to carry out that process, unless such use of it would have occurred to one whose duty it was to make practical use of the mechanism described. *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 22 Sup. Ct. Rep. 698, 46: 968

321. The process claim of the Jones patent, No. 404,414, for mixing molten pig iron so as to secure greater uniformity in chemical composition and avoid the necessity of remelting before further treatment in converters, the dominant idea of which is the permanent retention in a large covered reservoir of so large a quantity of the molten metal as will absorb variations of the product from the blast furnaces received into it and discharged from it into the converters, was not anticipated by prior patents or publications which contemplated the storage or mixture in reservoirs of molten metal from blast furnaces for use in casting or converters, in none of which was the retention of a quantity of the molten metal recognized as essential; or by the practice in steel works of mixing remelted pig iron from cupola furnaces in receiving or reservoir ladles in which a considerable residue was generally maintained. *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 22 Sup. Ct. Rep. 698, 46: 968

Cited in Davis-Colby Ore Roaster Co. v. Lackawanna Iron & Steel Co. 128 Fed. 457—Lackawanna Iron & Steel Co. v. Davis-Colby Ore Roaster Co. 65 C. C. A. 310, 131 Fed. 72—Chisholm v. Fleming, 133 Fed. 930—United States Mtils Co. v. Midvale Steel Co. 135 Fed. 108—National Enameling & Stamping Co. v. New England Enameling Co. 139 Fed. 653—Johnson v. Foos Mfg. Co. 72 C. C. A. 116, 141 Fed. 84—American Graphophone Co. v. Universal Talking Mach. Mfg. Co. 145 Fed. 638—Stone v. Goss, 65 N. J. Eq. 760, 63 L.R.A. 345, 103 Am. St. Rep. 794, 55 Atl. 736.

322. The use of paint as a waterproof

covering for telegraph cables is not an anticipation of its use as noncombustible insulating covering for electric wires. *Ansonia Brass & Copper Co. v. Electrical Supply Co.* 144 U. S. 11, 12 Sup. Ct. Rep. 601, 36: 327
Cited in National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co. 45 C. C. A. 553, 106 Fed. 702—*Moore v. Schaw*, 118 Fed. 607.

Telephones.

323. The discovery of Bell that the true way to produce the delicate forms of the air vibrations caused by the human voice in articulate speech was to operate on an unbroken current by diminishing and increasing its intensity was new. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863
Cited in American Bell Teleph. Co. v. American Cushman Teleph. Co. 1 L.R.A. 60, 35 Fed. 735—*Hake v. Brown*, 37 Fed. 784—*Manhattan General Constr. Co. v. Hellos-Upton Co.* 135 Fed. 789.

324. Bell's discovery was not anticipated by the discovery of Reis as to how to produce musical tones, since the latter never succeeded in transmitting speech. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

Cited in Fruit Cleaning Co. v. Fresno Home Packing Co. 94 Fed. 858—*American Bell Teleph. Co. v. National Teleph. Mfg. Co.* 109 Fed. 1019.

325. McDonough was anticipated by Reis in what he asked for in his application for a patent filed in 1876. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

326. Varley's English patents of 1868 and 1870 did not include Bell's discovery. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

327. Drawbaugh may have conceived the idea that speech could be transmitted by electricity, and was experimenting on the subject, but he did not discover the art of doing it before Bell. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863
Cited in Bowers v. San Francisco Bridge Co. 91 Fed. 409—*Re Drawbaugh*, 9 App. D. C. 233.

328. The 5th claim of Bell's patent of Jan. 30, 1887, is not anticipated by the Schellen magnet, since the patent is not for a magnet, but for a telephone, of which it forms a part. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

3. Implements; Devices; Machinery; Manufactures.

Implements.

329. The Mills and Hershey patent, 218,300, for a hair crimper consisting of a nonelastic metal core with braided covering cemented for its entire length, to prevent fraying out when cut, is anticipated by the prior use of such crimpers having one coat of cotton with another of braid, all cemented together for the same purpose. *Giles v. Heysinger*, 150 U. S. 627, 14 Sup. Ct. Rep. 211, 37: 1204

330. Patent 232,975, granted to Henry G.

Thompson as assignee of Moses C. Johnson for an improvement in cutting pliers, is invalid because Johnson was not the first inventor. *Thompson v. Hall*, 130 U. S. 117, 9 Sup. Ct. Rep. 497, 32: 876

331. A patent for an apparatus in which both sides of steak might be cooked equally and at the same time, and in which the drippings might be caught in a pan where they would be protected from the injurious effects of the heat,—which apparatus consisted of a nonconductor filling upon which a drip-pan rested, and which filled a V-shaped trough in the bottom of an upright cylinder closed at the top; the V-shaped trough dividing the otherwise open bottom of the cylinder into two equal openings through which the flame of the gas stove over which the apparatus was placed might enter in two equal sheets, and cook the two sides of the steak, held in a vertical position by a wire broiler with its flat sides equally exposed to the flame,—was not anticipated by a cylindrical vessel having a central opening in the bottom, and an annular opening around the central opening, and a series of vertical rods inserted in the annular bottom that intervened between the two openings, with an inverted conical deflector suspended from the central space from above; but which had no V-shaped trough, or dripping-pan, or removable wire broiler, and did not evenly distribute the flame along the two sides of the steak. *Sharp v. Dover Stamping Co.* 103 U. S. 250, 26: 445

332. Nor was such invention anticipated by a heating or broiling chamber whose front vertical side could be removed, and which was constructed as a thin, hollow box attached to a drip-pan or gravy-receiver, and against and alongside the inner face of which, and within the heating chamber, a steak-holder was placed, composed of two wire frames; the heat entering through a long opening in the bottom of the chamber, over which was arranged an inclined deflecting plate which extended across the chamber from end to end, with another deflecting plate arranged in the upright part of the chamber, over the first one, for the purpose of obtaining a more equal distribution of the heat; but which had no V-shaped trough, and no apparatus for dividing the flame so as to cook the steak simultaneously and equally on both sides. *Sharp v. Dover Stamping Co.* 103 U. S. 250, 26: 445

Devices.

New Application of Old Devices, see *supra*, V. b. 5.

Invention in Device, see *supra*, 168, 171, 173.

Invention in Improvement of, see *supra*, 233, 234, 240.

Restricting Patent for, to Precise Device Invented, see *supra*, 256.

333. The Meyers patent, 208,258, for an improvement in handle sockets for shovels, etc., consisting of two straps terminating in a socket, was anticipated by the Ames Cali-

fornia spade, and is invalid. *Myers v. Groom Shovel Co.* 141 U. S. 674, 12 Sup. Ct. Rep. 108, 35: 898

334. The Benham patent 310,776, for a method of attaching a horizontal handle bar to the steering head of a bicycle, by the use of a threaded lug or detent at the middle, through which the bar is thrust and upon which sleeve nuts can be screwed, is anticipated by the use of a cross-hollow bracket open at the ends and top, upon which screw collars are fastened. *Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 144 U. S. 238, 12 Sup. Ct. Rep. 637, 36: 420

335. The Wright patent, 242,497, for the increased lifting effect of a spring in a cultivator, is void because the device is the same as that covered in the prior patent, 222,767, issued to the same person, for a spring to serve the double purpose of lifting or holding down the plows at will, and also because it is anticipated by the Brown patent, 190,716, for a similar cultivator spring. *Miller v. Eagle Mfg. Co.* 151 U. S. 186, 14 Sup. Ct. Rep. 310, 38: 121

336. The Rosenwasser patent, granted April 18, 1882, for a percolator having one end open, serving both to receive the drug from which an extract is to be made and to discharge the extract, and a perforated or porous diaphragm to hold the drug in place, and regulating the pressure of the liquid by means of a tube from the reservoir to the small opening in the covered end of the percolator,—is, even if it constitutes invention, invalid because anticipated in the Real press, described in Geiger's Handbuch der Pharmacie, published in 1830, at Stuttgart, in Germany. *Rosenwasser v. Berry (Rosenwasser v. Spieth)* 129 U. S. 47, 9 Sup. Ct. Rep. 229, 32: 628

337. The claim for the invention of the clamp arrangement, in letters patent granted to Charles F. Brush, for improvement in electric lamps, was anticipated by that of Charles H. Hayes, made in June, 1876. *Brush v. Condit*, 132 U. S. 39, 10 Sup. Ct. Rep. 1, 33: 251
Cited in Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co. 54 Fed. 693
—United States Mineral Wool Co. v. Manville Covering Co. 60 C. C. A. 290, 125 Fed. 772—*Letson v. Alaska Packers Assn.* 64 C. C. A. 477, 130 Fed. 143—*Bradley v. Eccles*, 138 Fed. 915.

338. The Taylor patent, 128,925, for a trunk fastener to take the place of the old-fashioned strap and buckle, of which the essential feature is a plate attached to the body of the trunk, with a socket and hinged catch and double-acting spring to hold the catch either open or shut, into which socket a tang fastened to the lid drops when the lid is closed, and is held by the catch, thus holding the lid in place and also acting as a dowel to keep the core from racking,—involves a patentable novelty and is not anticipated by devices somewhat similar or trunk locks as distinguished from a trunk

fastener. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. Rep. 799, 36: 609

339. Claim 1 of patent 77,878, for an improvement in grain-harvesters, consisting of a feature of a binding device capable of adjustment so as to bind the sheaf in the centre, must be limited to the specific combination, including the rake as an element and cannot be enlarged to cover all binding devices adjustable to separate machines, as the proceedings in the patent office show that such claim was limited to the binding arm in combination with the automatic twisting device; and as so limited the claim is valid, and is not anticipated by previous patents. *Gordon v. Warder*, 150 U. S. 47, 14 Sup. Ct. Rep. 32, 37: 992

340. The use of a gate or valve in a bear-trap dam which is operated by a float in the stream above the dam to vary the height of the dam in accordance with the variations of the height of the water above, does not anticipate a patent for an open sluice under the gates of such a dam, to relieve them from unnecessary pressure, as both object and means are different. *Du Bois v. Kirk*, 158 U. S. 58, 15 Sup. Ct. Rep. 729, 39: 895

341. In reissued letters patent 6,990, for improved hydrants, claim 3 for the combination of the hydrant, supply-pipe, valve-casing, and stuffing-box, if the casing has no end play, is anticipated by patent 19,206. *Flower v. Detroit*, 127 U. S. 563, 8 Sup. Ct. Rep. 1291, 32: 175

342. A bat-winged burner in combination with a burner-tube perforated at its base with small holes or passages for gas to escape, enclosed by another tube open at the top and closed at the bottom, and united to the burner-tube below the perforations, for furnishing a regulated supply of gas outside of the burner, but directed to the tip of the burner by the surrounding tube,—was not anticipated by a bat-winged burner slitted nearly to the base, with a surrounding tube smaller at the top than at the bottom, with a screw upon the inside of the lower part, by the screwing down of which the top of the tube was made to press against the conical and enlarged part of the burner near its top, and close the slit; the object and effect of which arrangement was to operate as a clamp to enlarge or diminish the slit at pleasure, and prevent the escape of gas, and not to allow an additional supply of gas through the outside tube. *Clough v. Gilbert & B. Mfg. Co.* 106 U. S. 166, 1 Sup. Ct. Rep. 188, 27: 134

343. The combination of a tubular valve, which is a third and separate instrument carried by an adjustable cylinder inserted within the burner tube from below, with a bat-winged burner perforated at the base, with a surrounding tube united to it below the perforations, is not anticipated by a combination which had no tubular valve extending up into the burner-tube, but in which the tubular valve formed part of the surrounding tube, and reached or left its

seat by screwing down or up the surrounding tube, which therefore could not be permanently attached to the burner. *Clough v. Gilbert & B. Mfg. Co.* 106 U. S. 166, 1 Sup. Ct. Rep. 188, 27: 134

Distinguished in Cleveland Target Co. v. United States Pigeon Co. 52 Fed. 386.

Cited in American Bell Teleph. Co. v. Dolbear, 17 Fed. 605—*Kittle v. Hall,* 29 Fed. 515—*Electrical Accumulator Co. v. Julien Electric Co.* 38 Fed. 128—*National Cash Register Co. v. American Cash Register Co.* 3 C. C. A. 564, 3 U. S. App. 340, 53 Fed. 372—*Western Electric Co. v. Home Teleph. Co.* 85 Fed. 658—*Chisholm v. Johnson,* 106 Fed. 200—*Pettibone v. Pennsylvania Steel Co.* 133 Fed. 738—*Chisholm v. Fleming,* 133 Fed. 930.

344. A patent for a lubricator in which a lubricant reservoir stands vertically, and hydrostatic pressure is applied near its base, at the bottom of the lubricant, was not anticipated by a somewhat similar arrangement in which the steam pipe of an engine was connected, from a point above the top of the reservoir, by a condensing pipe having a regulating cock, with the lower part of a Roscoe lubricator, for the purpose of melting the tallow in the lubricator. *Garratt v. Seibert,* 98 U. S. 75, 25: 84

Cited in Miller v. Eagle Mfg. Co. 151 U. S. 199, 38 L. ed. 128, 14 Sup. Ct. Rep. 810—*Siebert Cylinder Oil Cup Co. v. Harper Steam Lubricator Co.* 4 Fed. 331—*Siebert Cylinder Oil-Cup Co. v. Nightingale,* 32 Fed. 172.

345. The Lyon and Munro patent, 365,754, for a car-axle lubricator consisting of an oil cup connected by a pipe with the axle box, and a plug opened by a gauge when the car jolts, is void by reason of various prior devices of the same kind, as it is not limited to any particular shape or form of either of the parts. *Market Street Cable R. Co. v. Rowley,* 155 U. S. 621, 15 Sup. Ct. Rep. 224, 39: 284

346. The Timken patent, 197,689, for improvement in carriage springs, is invalid for anticipation. *Olin v. Timken,* 155 U. S. 141, 15 Sup. Ct. Rep. 49, 39: 100

347. The use of transverse tie bars upon which carriage springs are hung, to secure an equality in the backward and upward swaying movement of the vehicle, and not to secure an equalization of the pressure on the springs, although by a slight modification it might be made to perform this function, does not anticipate an invention by which such equalization is secured by the use of a somewhat similar combination. *Topliff v. Topliff,* 145 U. S. 156, 12 Sup. Ct. Rep. 825, 36: 658

348. Claims 2 and 3 of the Wallace patent, 249,278, for an axle bearing for vehicle wheels, are anticipated by English patents. *Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 144 U. S. 238, 12 Sup. Ct. Rep. 637, 36: 420

Machinery.

Infringement of Patent for, see *infra*, XIV. h.

349. A subsequent apparatus, substantial-

ly different in construction and operation from a preceding one, is the subject of a patent. *Fuller v. Yentzer,* 94 U. S. 299, 24: 107

350. A patent for an improvement in anvils or swedge blocks for re-forming the ends of railroad rails, which consists of a large anvil with a fixed block having a face formed to fit the side of the rail, and a movable block having its face in a similar, but reversed form, for the other side of the rail, operated by cams or other equivalent device, so as to hold the rail between them when closed, and to enclose it except upon the top,—which machine is intended to preserve the shape of an already formed rail, and to resist the lateral pressure caused by the hammering,—is not anticipated by an ordinary angle-iron machine for welding together iron bars at right angles to each other, making a fillet in the interior angle to strengthen the rail, in which the movable block is beveled or rounded off at the top, and its function is to support one of the two bars designed for the formation of the angle-iron, and to act as one of the jaws of a vise to hold the other bar against the fixed block. *Illinois C. R. Co. v. Turrill (Cawood Patent)* 94 U. S. 695, 24: 238

351. The Cawood patent for an improvement in the common anvil or swedge block for re-forming the ends of railroad rails is not anticipated by a machine which has no fixed block cast as part of an anvil, but which has a stationary die,—part of a frame against which one side of the rail is placed to resist the lateral pressure exerted upon it by a sliding lateral die on the other side of the rail, with a horizontal bar above, which is forced downwards, by a series of levers carrying another die, upon the upper surface of the rail; which machine is used for straightening and flattening rails and for similar uses, but which does not show how the blocks or jaws can be combined to leave the upper face of the rail to be repaired exposed for the action of a swedge and hammer. *Illinois C. R. Co. v. Turrill (Cawood Patent)* 94 U. S. 695, 24: 238

352. The Cawood patent for an improvement in the common anvil or swedge block for re-forming the ends of railroad rails is not anticipated by a bayonet machine which is in form and substance nothing but a hinged vise with a peculiar shape of the jaws, intended to facilitate operations upon the shank and socket of a bayonet; the jaws being fitted to hold the bayonet in place while the shank is turned upward through and above the upper surface, in order that a flat piece of iron may be welded upon the shank; their sole function being to sustain the shaft of the bayonet in an upright position, while a flat piece of iron is being welded upon its end; and not to maintain the shape of the shank during the process of welding. *Illinois C. R. Co. v. Turrill (Cawood Patent)* 94 U. S. 695, 24: 238

353. A stone-crushing machine consisting of an upright movable jaw, with a revolving

shaft and a fly-wheel imparting a definitely limited vibration, is not anticipated by a machine for crushing ice, which consists of a hopper with two parallel sides, and with a diagonal fixed side, and the side opposite to it movable, and with dental projections on the diagonal fixed side and the movable side. *Robertson v. Blake* (Blake v. Robertson) 94 U. S. 728, 24: 245

354. A stone-crushing machine consisting of an upright movable jaw with a revolving shaft and fly wheel, imparting a definitely limited vibration, is not anticipated by the use of a cylindrical nut or pestle in a similarly-formed basin, for crushing and grinding quartz or other substances; in which the pestle has a partial rotary and crushing motion communicated to it by means of a lever, but which has nothing of the vibratory motion of a movable jaw alternately advancing and receding. *Robertson v. Blake* (Blake v. Robertson) 94 U. S. 728, 24: 245

355. The Gray patent, 238,677, for an improvement in roller mills, consisting of a mechanism for simultaneously moving both ends of two rolls, and also that for moving both ends of one roll, was anticipated by the Nemelka machine, patented in Austria and England. *Consolidated Rolling Mill Co. v. Barnard & L. Mfg. Co.* (The Roller Mill Patent) 156 U. S. 261, 15 Sup. Ct. Rep. 333, 39: 417

356. A cylinder in a wood-polishing apparatus having glass bars does not anticipate a cylinder of similar form with steel bars working against a smooth-faced parallel roller for the disintegration of clay. *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. Rep. 194, 39: 275

357. The Potts patent, 322,393, claim 6, for a cylinder having a series of longitudinal grooves in which scraping bars are secured adjustably, for the disintegration of clay, was not anticipated by a cylinder with cutting knives used for grinding apples; or by a cylinder with longitudinal knives in a paper-pulp machine; or by a roller for grinding-mills, with blades in longitudinal grooves, alternately hard and soft, so as to keep the roller corrugated, or by a cylinder in a cotton-seed huller with knives set in grooves; or by a similar cylinder in a grinding-mill used by farmers. Neither is it anticipated by a clay pulverizer in which the roller had rather a grinding than a disintegrating effect, working in the clay on an elastic bed. *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. Rep. 194, 39: 275
Cited in *Thomson-Houston Electric Co. v. Winchester Ave. R. Co.* 71 Fed. 195—*Potts v. Creager*, 77 Fed. 454—*Anderson Foundry & Mach. Works v. Potts*, 47 C. C. A. 410, 108 Fed. 380—*Penfield v. Potts*, 61 C. C. A. 373, 126 Fed. 477.

358. The Beach reissued patent No. 11,167, for a machine for attaching stays to the corners of boxes, was not anticipated by the Dennis and York addressing machine for pasting printed addresses upon newspapers, although the change necessary to make the

Beach machine was merely to make the addressing machine much heavier and stronger, and to substitute clamping dies with diverging faces in place of the flat head and platen of the addressing machine, since this change had not previously occurred to anyone engaged in the manufacture of paper boxes, though the addressing machine had been for many years upon the market; nor is this Beach patent anticipated by the Cohn patent, the Lieb patent, or the English patent to Hadden, covering machines for stitching wire or attaching metallic stays, which have clamping dies with diverging faces, but lack most of the other elements of the Beach patent; nor is it anticipated by the Maxfield and Terry patents for making paper boxes, which relate to mechanism for pressing a strip of glued paper upon the edge of circular collar boxes at the junction of the bottom and sides or rim, so as to form a union of the circular end with the cylindrical side of the box; as the operation of these machines seems to be only partly mechanical, and differs widely from the Beach patent. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. Rep. 409, 45: 586

359. Letters patent and the reissue thereof, for an alleged improvement in finishing and marking tobacco plugs, are invalid, where the evidence shows that the invention was anticipated, and when the state of the art at the time of the application for the patent was such as to leave no ground for its issue. *Miller v. Foree*, 116 U. S. 22, 6 Sup. Ct. Rep. 204, 29: 552

360. The Jones patent, No. 204,741, for a press for removing type indentations from printed sheets, in which the sheets can be so tied while under pressure that the subsequent pressure necessary to remove the indentations is continued in the tied-up bundle when removed from the press, was not anticipated by hay, cotton, tobacco, wool, and other presses used for applying pressure to substances placed between compressing heads or followers to compact them into bundles, which afford facilities for tying the bundles while under pressure. *Busch v. Jones*, 184 U. S. 598, 22 Sup. Ct. Rep. 511, 46: 707

Manufactures.

361. The patent granted to Rathbone and Hales, Nov. 21, 1865, for improvement in coal stoves, was anticipated by prior patents. *Hales v. Albany Stove Co.* 123 U. S. 582, 8 Sup. Ct. Rep. 262, 31: 284
Cited in *American Patents Co. v. De Beer*, 57 Fed. 625.

362. A description, in a publication, of an invention for an improvement in corsets, which describes everything in a subsequent patent except that the corset slots or cases are required to be woven of a varying length, but which does not intimate that those pockets are to vary in length, must be considered to cover all that is involved in the patent, where the necessity of such variation in length was known to every person skilled in corset making. *Cohn v. United States Corset Co.* 93 U. S. 366, 23: 907

f. Prior Use or Sale.

Effect of Prior Use on Novelty, see *supra*, 276-284.

Anticipation by, see *supra*, 305, 329.

Prior Use as Defense in Infringement Suit, see *infra*, 1145-1148.

Effect on Alien's Rights, see *Aliens*, 24.

Evidence in Rebuttal, see *Evidence*, 2185.

Public use avoids patent.

Effect of Public Use as Between Inventors, see *infra*, 418.

Effect of Experimental Use, see *infra*, 377-379.

Consent to Use, see *infra*, 380, 381.

Single Use or Sale as Public Use, see *infra*, 383-385.

Abandonment of Rights by Permitting Public Use, see *infra*, 392, 393.

See also *infra*, 371-376.

363. Under the act of 1793, the first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent. *Fennock v. Dialogue*, 2 Pet. 1,

7: 327

Shaw v. Cooper, 7 Pet. 292, 8: 689
Cited in *Andrews v. Hovey*, 124 U. S. 707, 31 L. ed. 560, 8 Sup. Ct. Rep. 676—*Adams v. Jones*, 1 Fisher, Pat. Cas. 529, Fed. Cas. No. 57—*Allen v. Blunt*, 2 Woodb. & M. 142, Fed. Cas. No. 217—*Cooper v. Mattheys*, 3 Clark (Pa.) 186, Fed. Cas. No. 3,200—*Elithorp v. Robertson*, 1 MacArth. Pat. Cas. 597, Fed. Cas. No. 4,409—*Heath v. Hildreth*, 1 MacArth. Pat. Cas. 26, Fed. Cas. No. 6,309—*Judson v. Bradford*, 3 Bann. & Ard. 549, Fed. Cas. No. 7,564—*Loveridge v. Dutcher*, Fed. Cas. No. 8,553—*Manning v. Cape Ann Isinglass & Glue Co.* 4 Bann. & Ard. 614, Fed. Cas. No. 9,041—*Marcy v. Trotter*, Fed. Cas. No. 9,063—*Noe v. Prentiss*, Fed. Cas. No. 10,284—*Parton v. Prang*, 3 Cliff. 550, Fed. Cas. No. 10,784—*Pierson v. Eagle Screw Co.* 3 Story, 408, Fed. Cas. No. 11,156—*Ryan v. Goodwin*, 3 Sumn. 518, Fed. Cas. No. 12,186—*Savary v. Lauth*, 1 MacArth. Pat. Cas. 695, Fed. Cas. No. 12,389—*Spear v. Belson*, 1 MacArth. Pat. Cas. 701, Fed. Cas. No. 13,223—*Whitney v. Emmett*, Baldw. 310, Fed. Cas. No. 17,585—*Campbell v. New York*, 47 Fed. 520—*Re Drawbaugh*, 3 App. D. C. 239—*Re Drawbaugh*, 9 App. D. C. 259—*Earl v. Page*, 6 N. H. 479, 28 Am. Dec. 711—*Adams v. Jones*, 7 Pittsb. L. J. 170.

364. Whatever the intention of the inventor, if he suffers his invention to go into public use through any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent; nor will a patent obtained under such circumstances protect his right. *Shaw v. Cooper*, 7 Pet. 292, 8: 689

Distinguished in *Davis v. Fredericks*, 19 Fed. 100.

Cited in *McClurg v. Kingsland*, 1 How. 207, 11 L. ed. 104—*Kendall v. Winsor*, 21 How. 329, 16 L. ed. 168—*Elizabeth v. American Nicholson Pav. Co.* 97 U. S. 134, 24 L. ed. 1004—*Woodbury Patent Planing-Mach. Co. v. Keith*, 101 U. S. 484, 25 L. ed. 941—*Egbert v. Lippmann*, 104 U. S. 336, 26 L.

ed. 756—*Smith & G. Mfg. Co. v. Sprague*, 123 U. S. 257, 31 L. ed. 144, 8 Sup. Ct. Rep. 122—*Andrews v. Hovey*, 124 U. S. 707, 31 L. ed. 560, 8 Sup. Ct. Rep. 676—*Gill v. United States*, 160 U. S. 430, 40 L. ed. 482, 16 Sup. Ct. Rep. 322—*Allen v. Blunt*, 2 Woodb. & M. 142, Fed. Cas. No. 217—*Blackinton v. Douglass*, 1 MacArth. Pat. Cas. 627, Fed. Cas. No. 1,470—*Henry v. Providence Tool Co.* 3 Bann. & Ard. 513, Fed. Cas. No. 6,384—*Hunt v. Howe*, 1 MacArth. Pat. Cas. 376, Fed. Cas. No. 6,891—*Jones v. Sewall*, 3 Cliff. 588, Fed. Cas. No. 7,495—*Keene v. Wheatley*, 9 Am. L. Reg. 73, Fed. Cas. No. 7,644—*Loveridge v. Dutcher*, Fed. Cas. No. 8,553—*Marcy v. Trotter*, Fed. Cas. No. 9,063—*Mowry v. Barber*, 1 MacArth. Pat. Cas. 568, Fed. Cas. No. 9,892—*Noe v. Prentiss*, Fed. Cas. No. 10,284—*Pierson v. Eagle Screw Co.* 3 Story, 408, Fed. Cas. No. 11,156—*Root v. Ball*, 4 McLean, 179, 2 Robb. Pat. Cas. 515, Fed. Cas. No. 12,035—*Savary v. Lauth*, 1 MacArth. Pat. Cas. 695, Fed. Cas. No. 12,389—*Spear v. Belson*, 1 MacArth. Pat. Cas. 701, Fed. Cas. No. 13,223—*Wilson v. Rousseau*, 1 Blatchf. 89, Fed. Cas. No. 17,832—*Andrews v. Hovey*, 5 McCrary, 184, 16 Fed. 389—*Western Electric Co. v. Sperry Electric Co.* 7 C. C. A. 169, 18 U. S. App. 177, 58 Fed. 191—*Eastman v. New York*, 134 Fed. 853—*Re Drawbaugh*, 9 App. D. C. 259—*Keene v. Wheatley*, 5 Clark (Pa.) 517—*Nilsson v. De Haven*, 47 App. Div. 539, 62 N. Y. Supp. 506.

365. Under the act of 1839, public use or sale of an invention, with the consent of the inventor, for more than two years prior to the application for a patent, renders the patent void. *McClurg v. Kingsland*, 1 How. 202, 11: 102

Manning v. Cape Ann Isinglass & Glue Co. 108 U. S. 462, 2 Sup. Ct. Rep. 860,

27: 793

Agawam Woolen Co. v. Jordan, 7 Wall. 583, 19: 177

Bates v. Coe, 98 U. S. 31, 25: 68

Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24: 68

Limited in *Re Mower*, 15 App. D. C. 152.

Distinguished in *Andrews v. Hovey*, 124 U. S. 703, 31 L. ed. 558, 8 Sup. Ct. Rep. 676—*Mason v. Hepburn*, 13 App. D. C. 91.

Cited in *Agawam Woolen Co. v. Jordan*, 7 Wall. 607, 19 L. ed. 183—*Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 94, 24 L. ed. 69—*Manning v. Cape Ann Isinglass & Glue Co.* 108 U. S. 466, 27 L. ed. 794, 2 Sup. Ct. Rep. 860—*Allen v. Blunt*, 2 Woodb. & M. 142, Fed. Cas. No. 217—*Henry v. Providence Tool Co.* 3 Bann. & Ard. 514, Fed. Cas. No. 6,384—*Jennings v. Pierce*, 15 Blatchf. 46, 3 Bann. & Ard. 365, Fed. Cas. No. 7,283—*Jones v. Sewall*, 3 Cliff. 588, 6 Fisher, Pat. Cas. 363, Fed. Cas. No. 7,495—*Manning v. Cape Ann Isinglass & Glue Co.* 4 Bann. & Ard. 614, Fed. Cas. No. 9,041—*Noe v. Prentice*, Fed. Cas. No. 10,284—*Pierson v. Eagle Screw Co.* 3 Story, 408, Fed. Cas. No. 11,156—*Wood v. Cleveland Rolling Mill Co.* 4 Fisher, Pat. Cas. 556, Fed. Cas. No. 17,941—*Perkins v. Nashua Card & Glazed Paper Co.* 5 Bann. & Ard. 396, 2 Fed. 453—*Clark Pomace Holder Co. v. Ferguson*, 21 Blatchf. 382, 17 Fed. 83—*Kittle v. Hall*, 29 Fed. 514—*Fire-Extinguisher Case*, 21 Fed. 42—*Smith & D. Mfg. Co. v. Mellon*, 52 Fed. 149—*Smith & D. Mfg. Co. v. Mellon*, 7 C. C. A. 441, 19 U. S. App. 259, 58 Fed. 707—

United States v. American Bell Teleph. Co. 65 Fed. 89—American Bell Teleph. Co. v. United States, 15 C. C. A. 585, 33 U. S. App. 236, 68 Fed. 558—Craig v. Michigan Lubricator Co. 72 Fed. 182—Farlin & O. Co. v. Moline Plow Co. 32 C. C. A. 225, 60 U. S. App. 297, 89 Fed. 333—Swain v. Holyoke Mach. Co. 102 Fed. 914.

366. The act of 1839 has no effect to invalidate a patent, unless there be proof of an abandonment or use of the invention for more than two years prior to application for the patent. *Beedle v. Bennet*, 122 U. S. 71, 7 Sup. Ct. Rep. 1090, 30: 1074

367. Where parties publicly use the invention of another before his application for a patent, which invention he makes and uses while in their employ, their license to use it is presumed, and their unmolested and notorious use of it is a public use, such as will be fatal to the patent, under the act of 1839. *McClurg v. Kingsland*, 1 How. 202, 11: 102

368. Patents to L. A. Sprague, for making buckle levers, are void by reason of prior public use for more than two years before application. *Smith & G. Mfg. Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. Rep. 122, 31: 141
Cited in *Whitney v. Boston & A. R. Co.* 50 Fed. 73—*Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.* 86 Fed. 328.

369. Where an inventor of an improvement in corset springs made and presented one pair, in 1855, to a lady whom he afterwards married, and another pair in 1858 with no obligation of secrecy, or any condition or restriction whatever, and the donee used them for years in corsets which she wore, a patent granted to the inventor upon an application which was not made until 1866, and after the invention had found its way into general use, was invalid by reason or more than two years' public use. *Egbert v. Lippmann*, 104 U. S. 333, 26: 755

370. The use of bolts by the inventor in two safes, which were exhibited at fairs and sold for use, constitutes a use and sale of the invention, which defeats a claim for a patent upon them, after two years. *Hall v. Macneale*, 107 U. S. 90, 2 Sup. Ct. Rep. 73, 27: 367

Cited in *Smith & G. Mfg. Co. v. Sprague*, 123 U. S. 286, 31 L. ed. 147, 8 Sup. Ct. Rep. 122—*Brush v. Condit*, 132 U. S. 49, 33 L. ed. 256, 10 Sup. Ct. Rep. 1—*Root v. Thrd Ave. R. Co.* 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 100—*Driven-Well Cases*, 16 Fed. 411—*Campbell v. New York*, 47 Fed. 517—*Delemater v. Heath*, 7 C. C. A. 283, 20 U. S. App. 14, 58 Fed. 417—*Swain v. Holyoke Mach. Co.* 102 Fed. 914—*Swain v. Holyoke Mach. Co.* 48 C. C. A. 269, 109 Fed. 158—*Eastman v. New York*, 69 C. C. A. 642, 134 Fed. 858—*Mason v. Hepburn*, 13 App. D. C. 91.

Knowledge or use.

Question of Law or Fact, see *Trial*, 272.
See also *supra*, 362; *infra*, 380.

371. The phrase, "not known nor used before the application for a patent" means not

known or used by others before the application. *Kendall v. Winsor*, 21 How. 322.

16: 165
Pennock v. Dialogue, 2 Pet. 1, 7: 327
Shaw v. Cooper, 7 Pet. 292, 8: 689
Cited in *Bates v. Coe*, 98 U. S. 46, 25 L. ed. 73—*Andrews v. Hovey*, 124 U. S. 701, 31 L. ed. 558, 8 Sup. Ct. Rep. 676—*Wade v. Metcalf*, 129 U. S. 205, 32 L. ed. 663, 9 Sup. Ct. Rep. 271—*Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 20, 39 L. ed. 605, 15 Sup. Ct. Rep. 508—*Henry v. Providence Tool Co.* 3 Bann. & Ard. 513, Fed. Cas. No. 8,384—*Hunt v. Howe*, 1 MacArth. Pat. Cas. 378, Fed. Cas. No. 6,891—*Kelleher v. Darling*, 4 Cliff. 441, 3 Bann. & Ard. 448, Fed. Cas. No. 7,653—*Reed v. Cutter*, 1 Story. 594, Fed. Cas. No. 11,645—*Perkins v. Nashua Card & Glaze Paper Co.* 5 Bann. & Ard. 396, 2 Fed. 453—*Campbell v. New York*, 1 L.R. A. 50, 35 Fed. 507—*Campbell v. New York*, 47 Fed. 519—*Eastman v. New York*, 134 Fed. 852—*Mason v. Hepburn*, 13 App. D. C. 91—*Thomson v. Weston*, 19 App. D. C. 379—*Cooper v. Mattheys*, 3 Clark (Pa.) 185—*McCay v. Burr*, 6 Pa. 153, 47 Am. Dec. 441.

372. It is not a public knowledge of his invention that precludes the inventor from obtaining a patent for it, but a public use or sale of it. *Elizabeth v. American Nicholson Pav. Co.* 97 U. S. 126, 24: 1000

373. Whether the use of an invention is public or private does not necessarily depend upon the number of persons to whom its use is known. *Egbert v. Lippmann*, 104 U. S. 333, 26: 755

374. Where the public has acquired in any way the right to use a machine or device for a particular purpose, it has the right to use it for all the like purposes to which it can be applied. *Blake v. San Francisco*, 113 U. S. 679, 5 Sup. Ct. Rep. 692, 28: 1070

375. The effect of the prior public use of a patented invention is not nullified by assigning an interest in the invention or patent to the person by whom the invention was thus used. *Worley v. Loker Tobacco Co.* 104 U. S. 340, 26: 821

376. A claim that an invention was in public use or on sale for more than two years before the inventor's application cannot be sustained where such application was a continuation of an effort instituted by a former application. *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23: 952
Cited in *Woodbury Patent Planing Mach. Co. v. Keith*, 101 U. S. 488, 25 L. ed. 942—*Mahn v. Harwood*, 112 U. S. 366, 28 L. ed. 670, 6 Sup. Ct. Rep. 451—*Colgate v. Western U. Tele. Co.* 15 Blatchf. 394, 4 Bann. & Ard. 64, Fed. Cas. No. 2,995—*Howes v. McNeal*, 15 Blatchf. 123, 3 Bann. & Ard. 395, Fed. Cas. No. 6,789—*United States Rifle & Cartridge Co. v. Whitney Arms Co.* 14 Blatchf. 100, 2 Bann. & Ard. 499, Fed. Cas. No. 16,793—*Kells v. McKenzie*, 9 Fed. 291—*Lindsey v. Stein*, 20 Blatchf. 377, 10 Fed. 913—*Graham v. McCormick*, 5 Bann. & Ard. 248, 11 Fed. 862—*Consolidated Bunting Apparatus Co. v. Woerle*, 20 Fed. 452—*International Tooth Crown Co. v. Richmond*, 30 Fed. 779—*Ligowsky Clay-Pigeon Co. v. American Clay-Bird Co.* 34 Fed. 334—*Frank*

fort Whiskey Process Co. v. Mill Creek Distilling Co. 37 Fed. 539—American Bell Teleph. Co. v. Cushman, 57 Fed. 845.

Experimental use.

Abandonment of Rights by Permitting, see *infra*, 394.

Sufficiency of Proof of, see Evidence, 2610.

377. The use of an invention by way of experiment, and in order to bring the invention to perfection, is not a public use, such as will make a subsequent patent void. *Elizabeth v. American Nicholson Pav. Co.* 97 U. S. 126, 24: 1000

378. The use of a pavement by the public, where it was put down by the inventor himself, for the express purpose of testing it by varied and constant use to ascertain its durability and liability to decay, is not a public use such as will defeat the right of the inventor, although continued more than two years before his application for a patent. *Elizabeth v. American Nicholson Pav. Co.* 97 U. S. 126, 24: 1000

Distinguished in Swain v. Holyoke Mach. Co. 102 Fed. 915.

Cited in *Egbert v. Lippmann*, 104 U. S. 336, 26 L. ed. 756—*Smith & G. Mfg. Co. v. Sprague*, 123 U. S. 257, 31 L. ed. 144, 8 Sup. Ct. Rep. 122—*Andrews v. Hovey*, 123 U. S. 273, 31 L. ed. 163, 8 Sup. Ct. Rep. 111—*International Tooth Crown Co. v. Gaylord*, 140 U. S. 63, 35 L. ed. 350, 11 Sup. Ct. Rep. 716—*St. Paul Plow Works v. Starling*, 140 U. S. 198, 35 L. ed. 408, 11 Sup. Ct. Rep. 803—*Root v. Third Ave. R. Co.* 146 U. S. 225, 36 L. ed. 949, 13 Sup. Ct. Rep. 100—*Campbell v. James*, 17 Blatchf. 49, 4 Bann. & Ard. 463, Fed. Cas. No. 2,361—*Draper v. Wattles*, 3 Bann. & Ard. 620, Fed. Cas. No. 4,073—*Campbell v. New York*, 20 Blatchf. 71, 9 Fed. 503—*Emery v. Cavanagh*, 17 Fed. 243—*Railway Register Mfg. Co. v. Broadway & Seventh Ave. R. Co.* 22 Fed. 636—*Innis v. Oil City Boiler Works*, 22 Fed. 781—*Duffy v. Reynolds*, 24 Fed. 860—*Railway Register Mfg. Co. v. Broadway & Seventh Ave. R. Co.* 26 Fed. 527—*Celluloid Mfg. Co. v. American Zylonite Co.* 23 Blatchf. 453, 26 Fed. 698—*Campbell v. New York*, 1 L.R.A. 50, 35 Fed. 507—*Root v. Third Ave. R. Co.* 37 Fed. 676—*Harmon v. Struthers*, 43 Fed. 443—*Campbell v. New York*, 47 Fed. 520—*Pacific Cable R. Co. v. Butte City Street R. Co.* 55 Fed. 765—*Harmon v. Struthers*, 57 Fed. 641—*Delemater v. Heath*, 7 C. C. A. 280, 20 U. S. App. 14, 58 Fed. 415—*Smith & D. Mfg. Co. v. Mellon*, 7 C. C. A. 441, 19 U. S. App. 259, 58 Fed. 707—*Covert v. Covert*, 106 Fed. 187—*Westinghouse Electric & Mfg. Co. v. Saranac Lake Electric Light Co.* 108 Fed. 227—*Swain v. Holyoke Mach. Co.* 48 C. C. A. 270, 109 Fed. 159—*Huntington Dry Pulverizer Co. v. Newell Universal Mill Co.* 109 Fed. 271—*Thomson-Houston Electric Co. v. Lorain Steel Co.* 54 C. C. A. 284, 117 Fed. 252—*Eastman v. New York*, 134 Fed. 857—*Colbourn v. Hodgson*, 5 App. D. C. 25—*Hyatt v. Ingalls*, 124 N. Y. 106, 26 N. E. 285.

379. The use of an invention for the purposes of trade and profit, experiment being merely incidental, defeats the right to a pat-

ent. *Smith & G. Mfg. Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. Rep. 122, 31: 141
Distinguished in *De Lamater v. Deeley*, 53 Fed. 381.

Cited in *International Tooth Crown Co. v. Gaylord*, 140 U. S. 62, 35 L. ed. 350, 11 Sup. Ct. Rep. 716—*Root v. Third Ave. R. Co.* 146 U. S. 225, 36 L. ed. 950, 13 Sup. Ct. Rep. 100—*Root v. Third Ave. R. Co.* 37 Fed. 675—*Simonds Counter Mach. Co. v. Knox*, 39 Fed. 703—*Harmon v. Struthers*, 43 Fed. 443—*Campbell v. New York*, 47 Fed. 520—*Smith & D. Mfg. Co. v. Mellon*, 52 Fed. 149—*Harmon v. Struthers*, 57 Fed. 642—*Delemater v. Heath*, 7 C. C. A. 283, 20 U. S. App. 14, 58 Fed. 417—*Smith & D. Mfg. Co. v. Mellon*, 7 C. C. A. 441, 19 U. S. App. 259, 58 Fed. 707—*Craig v. Michigan Lubricator Co.* 72 Fed. 180—*Letteller v. Mann*, 91 Fed. 918—*King Ax Co. v. Hubbard*, 38 C. C. A. 431, 97 Fed. 803—*Swain v. Holyoke Mach. Co.* 102 Fed. 914—*Westinghouse Electric & Mfg. Co. v. Saranac Lake Electric Light Co.* 108 Fed. 230—*Swain v. Holyoke Mach. Co.* 48 C. C. A. 269, 109 Fed. 158—*Swain v. Holyoke Mach. Co.* 49 C. C. A. 420, 111 Fed. 408—*Thomson-Houston Electric Co. v. Lorain Steel Co.* 54 C. C. A. 284, 117 Fed. 252—*Re Tournier*, 17 App. D. C. 488.

Consent of inventor.

See also *supra*, 365; *infra*, 415.

380. Under the act of 1839, as well as under U. S. Rev. Stat. § 4886, U. S. Comp. Stat. 1901, p. 3382, public use for more than two years prior to the application renders the patent void, whether such use was or was not with the knowledge or consent of the applicant. Under this rule driven well patent, 4372, is invalid. *Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. Rep. 111, 31: 160
Cited in *Andrews v. Hovey*, 124 U. S. 700, 31 L. ed. 558, 8 Sup. Ct. Rep. 676—*Wade v. Metcalf*, 129 U. S. 205, 32 L. ed. 663, 9 Sup. Ct. Rep. 271—*Graham v. Plano Mfg. Co.* 33 Fed. 921—*Blessing v. John Trageser Steam Copper Works*, 34 Fed. 754—*Campbell v. New York*, 1 L.R.A. 49, 35 Fed. 505—*Campbell v. New York*, 36 Fed. 261—*Campbell v. New York*, 47 Fed. 515—*Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co.* 47 Fed. 895—*Coop v. Dr. Savage Physical Development Institute*, 47 Fed. 900—*United States Electric Lighting Co. v. Edison Lamp Co.* 51 Fed. 28—*Smith & D. Mfg. Co. v. Mellon*, 52 Fed. 149—*Green v. Lynn*, 55 Fed. 517—*Smith & D. Mfg. Co. v. Mellon*, 7 C. C. A. 441, 19 U. S. App. 259, 58 Fed. 707—*American Roll-Paper Co. v. Weston*, 8 C. C. A. 60, 16 U. S. App. 559, 59 Fed. 151—*Front Rank Steel Furnace Co. v. Wrought Iron Range Co.* 63 Fed. 998—*American Bell Teleph. Co. v. United States*, 15 C. C. A. 585, 33 U. S. App. 236, 68 Fed. 558—*Mast, F. & Co. v. Dempster Mill Mfg. Co.* 71 Fed. 702—*Craig v. Michigan Lubricator Co.* 72 Fed. 182—*Beach v. Hobbs*, 82 Fed. 920—*Welsbach Light Co. v. American Incandescent Lamp Co.* 39 C. C. A. 188, 98 Fed. 616—*Covert v. Covert*, 106 Fed. 187—*Eastman v. New York*, 69 C. C. A. 635, 134 Fed. 851—*Bradley v. Eccles*, 138 Fed. 914—*Re Drawbaugh*, 3 App. D. C. 241.

381. The enforcement of the rule of the patent office, that prior use of a patent for more than two years with consent of the patentee invalidates it, is not a judicial ad-

judication of the question whether the patent granted had been in use for such time with such consent. *Andrews v. Hovey*, 124 U. S. 694, 8 Sup. Ct. Rep. 676, 31: 557

Unknown prior use.

382. A patent is void for prior use or description under the patent act of 1793, although the patentee had no knowledge of such previous use or description. *Evans v. Eaton*, 3 Wheat. 454, 4: 433

Cited in Pettibone v. Derringer, 4 Wash. C. C. 217, Fed. Cas. No. 11,043—*Thomas v. Weeks*, 2 Paine, 100, Fed. Cas. No. 13,914—*Whitney v. Emmett*, Baldw. 312, Fed. Cas. No. 17,585—*Sanders v. Hancock*, 128 Fed. 433—*Cross v. Huntly*, 13 Wend. 386—*Hiatt v. Twomey*, 21 N. C. (1 Dev. & B. Eq.) 317.

Single instance of sale or use.

383. A single instance of the public sale or use of his invention by a patentee, more than two years before the date of his application, is sufficient to constitute public use. *McClurg v. Kingsland*, 1 How. 202, 11: 102—*Worley v. Loker Tobacco Co.* 104 U. S. 340, 26: 821

Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24: 68—*Egbert v. Lippmann*, 104 U. S. 333, 26: 755—*Manning v. Cape Ann Isinglass & Glue Co.* 108 U. S. 462, 2 Sup. Ct. Rep. 860, 27: 793

Cited in Manning v. Cape Ann Isinglass & Glue Co. 108 U. S. 466, 27 L. ed. 794, 2 Sup. Ct. Rep. 860—*International Tooth Crown Co. v. Gaylord*, 140 U. S. 63, 35 L. ed. 350, 11 Sup. Ct. Rep. 716—*Clark Pomace Holder Co. v. Ferguson*, 21 Blatchf. 382, 17 Fed. 83—*Delemater v. Heath*, 7 C. C. A. 283, 20 U. S. App. 14, 58 Fed. 417—*Smith & D. Mfg. Co. v. Mellon*, 7 C. C. A. 441, 19 U. S. App. 259, 58 Fed. 707—*American Roll-Paper Co. v. Weston*, 8 C. C. A. 60, 16 U. S. App. 559, 59 Fed. 151—*Craig v. Michigan Lubricator Co.* 72 Fed. 181—*Farlin & O. Co. v. Moline Plow Co.* 32 C. C. A. 225, 60 U. S. App. 297, 89 Fed. 333—*Letteller v. Mann*, 91 Fed. 918—*Swain v. Holyoke Mach. Co.* 102 Fed. 914—*Swain v. Holyoke Mach. Co.* 48 C. C. A. 268, 109 Fed. 158—*Eastman v. New York*, 134 Fed. 858.

384. If an inventor, having made his device, gives or sells it to another without reserving any control over it, to be used by the donee or vendee, not as an experiment, but without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, within the meaning of the statute, even though the knowledge of the use may be confined to one person. *Root v. Third Ave. R. Co.* 146 U. S. 210, 13 Sup. Ct. Rep. 100, 36: 946

Cited in Smith & D. Mfg. Co. v. Mellon, 7 C. C. A. 441, 19 U. S. App. 259, 58 Fed. 707.

385. The use, for more than two years, of an invention which, by its character, is capable of being used only where it cannot be seen or observed by the public eye, may be public use within the meaning of the patent law, such as to defeat the right to a patent for it, although used by one person only. *Egbert v. Lippmann*, 104 U. S. 333, 26: 755

Cited in Worley v. Loker Tobacco Co. 104 U. S. 344, 26 L. ed. 822—*Hall v. Macneale*,

107 U. S. 97, 27 L. ed. 369, 2 Sup. Ct. Rep. 73—*Manning v. Cape Ann Isinglass & Glue Co.* 108 U. S. 465, 27 L. ed. 794, 2 Sup. Ct. Rep. 860—*Smith & G. Mfg. Co. v. Sprague*, 123 U. S. 257, 31 L. ed. 144, 8 Sup. Ct. Rep. 122—*Andrews v. Hovey*, 123 U. S. 270, 31 L. ed. 161, 8 Sup. Ct. Rep. 101—*International Tooth Crown Co. v. Gaylord*, 140 U. S. 63, 35 L. ed. 350, 11 Sup. Ct. Rep. 716—*Root v. Third Ave. R. Co.* 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 100—*Andrews v. Hovey*, 5 McCrary, 190, 16 Fed. 393—*Clark Pomace-Holder Co. v. Ferguson*, 21 Blatchf. 382, 17 Fed. 83—*Davis v. Fredericks*, 19 Fed. 100—*Campbell v. New York*, 1 L.R.A. 50, 35 Fed. 508—*Campbell v. New York*, 47 Fed. 517—*United States Electric Lighting Co. v. Edison Lamp Co.* 51 Fed. 28—*Smith & D. Mfg. Co. v. Mellon*, 52 Fed. 149—*De Lamater v. Deeley*, 53 Fed. 381—*Delemater v. Heath*, 7 C. C. A. 281, 20 U. S. App. 14, 58 Fed. 416—*Smith & D. Mfg. v. Mellon*, 7 C. C. A. 441, 19 U. S. App. 259, 58 Fed. 707—*American Roll-Paper Co. v. Weston*, 8 C. C. A. 60, 16 U. S. App. 559, 59 Fed. 151—*Dalbly v. Lynes*, 64 Fed. 378—*Craig v. Michigan Lubricator Co.* 72 Fed. 181—*Letteller v. Mann*, 91 Fed. 917—*Swain v. Holyoke Mach. Co.* 102 Fed. 914—*Swain v. Holyoke Mach. Co.* 48 C. C. A. 268, 109 Fed. 158—*Thomson-Houston Electric Co. v. Lorain Steel Co.* 54 C. C. A. 284, 117 Fed. 252—*Young v. Clipper Mfg. Co.* 121 Fed. 561—*Eastman v. New York*, 134 Fed. 858.

Sale abroad.

386. The right of a patentee to his invention should not be denied because he had made use of it or put it on sale abroad more than two years before the application, provided it was not so used or sold in this country. *Gandy v. Main Belting Co.* 143 U. S. 587, 12 Sup. Ct. Rep. 598, 36: 272

Cited in Chase v. Fillebrown, 58 Fed. 377.

g. Abandonment or Dedication.

Abandonment of Claim, see *infra*, VII. f.

Of Right to Reissued Patent, see *infra*, IX. g.

Effect of Abandonment on Right to Patent, see *infra*, 422-424.

Review of Decision on Question of Abandonment, see *infra*, 556.

Inclusion of Abandoned Claims in Reissued Patent, see *infra*, 700-702.

Right of Inventor Withholding Invention from Public to Restrain its Use, see *infra*, 1156.

See also *supra*, 366; *infra*, 543.

Right to abandon.

387. An inventor may abandon his patent, and surrender or dedicate it to the public. *Pennock v. Dialogue*, 2 Pet. 1, 7: 327

What constitutes abandonment.

Second Application as, see *infra*, 432.

See also *infra*, 631.

388. The taking out of a patent is notice to all the world that all those parts of the art, machine, or manufacture described in the specification, which are not embraced in the specific claim, are not claimed by the patentee, but are public property. *Mahn v. Har-*

wood, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451. 28: 665

Cited in Underwood v. Gerber, 149 U. S. 280, 37 L. ed. 713, 13 Sup. Ct. Rep. 854—Dunham v. Dennison Mfg. Co. 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 986—Railway Register Mfg. Co. v. Broadway & S. Ave. R. Co. 26 Fed. 525—Eastern Paper Bag Co. v. Standard Paper Bag Co. 30 Fed. 65—Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 33 Fed. 258—Kane v. Huggins Cracker & Candy Co. 44 Fed. 289—Durand v. Schulze, 10 C. C. A. 98, 17 U. S. App. 620, 61 Fed. 820—Burlington's Iron Bldg. Co. v. Eustis, 13 C. C. A. 146, 27 U. S. App. 693, 65 Fed. 808—Adams Electric R. Co. v. Lindell E. Co. 23 C. C. A. 242, 40 U. S. App. 482, 77 Fed. 451—Tecktonius v. Scott, 110 Wis. 455, 86 N. W. 672.

389. A patentee may claim the whole or only a part of his invention; and if he describe and claim only a part he is presumed to have abandoned the residue to the public. *McClain v. Ortmayer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76, 35: 800

Cited in Deering v. Winona Harvester Works, 155 U. S. 296, 39 L. ed. 157; 15 Sup. Ct. Rep. 118—Stirrat v. Excelsior Mfg. Co. 10 C. C. A. 221, 27 U. S. App. 13, 61 Fed. 985—American Soda-Fountain Co. v. Zwletusch, 75 Fed. 577—Seabury v. Johnson, 76 Fed. 459—Huntington Dry Pulverizer Co. v. Whittaker Cement Co. 89 Fed. 326—Schreiber & C. Mfg. Co. v. Adams Co. 54 C. C. A. 132, 117 Fed. 834—Lanyon Zinc Co. v. Brown, 64 C. C. A. 347, 129 Fed. 915.

390. A claim of a specific device or combination, and an omission to claim others apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed. *Miller v. Bridgeport Brass Co.* 104 U. S. 350, 26: 783

Cited in Clements v. Odorless Excavating Apparatus Co. 109 U. S. 649, 27 L. ed. 1063, 3 Sup. Ct. Rep. 525—Rowell v. Lindsay, 113 U. S. 102, 28 L. ed. 907, 5 Sup. Ct. Rep. 507—Underwood v. Gerber, 149 U. S. 230, 37 L. ed. 713, 13 Sup. Ct. Rep. 854—Hayes v. Seton, 20 Blatchf. 488, 12 Fed. 123—McKay v. Jackman, 20 Blatchf. 470, 12 Fed. 617—Fay v. Fraser, 11 Bliss. 424, 14 Fed. 653—New York Belting & Packing Co. v. Sibley, 15 Fed. 389—Swift v. Jenks, 19 Fed. 642—Baltimore Car-Wheel Co. v. North Baltimore Pass. R. Co. 21 Fed. 47—Flower v. Detroit, 22 Fed. 301—Railway Register Mfg. Co. v. Broadway & S. Ave. R. Co. 26 Fed. 525—Hubel v. Dick, 28 Fed. 137—Eastern Paper Bag Co. v. Standard Paper Bag Co. 30 Fed. 65—Burdall v. Curran, 31 Fed. 919—Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 33 Fed. 259—Hutchinson v. Everett, 33 Fed. 504—Dickinson v. Parker, 38 Fed. 412—McBride v. Grand De Tour Plow Co. 44 Fed. 75—Stirrat v. Excelsior Mfg. Co. 10 C. C. A. 221, 27 U. S. App. 13, 61 Fed. 985—Burlington's Iron Bldg. Co. v. Eustis, 13 C. C. A. 146, 27 U. S. App. 693, 65 Fed. 808—Wells v. Curtis, 13 C. C. A. 498, 31 U. S. App. 123, 66 Fed. 321—Independent Electric Co. v. Jeffrey Mfg. Co. 76 Fed. 989—Adams Electric R. Co. v. Lindell E. Co. 23 C. C. A. 240, 40 U. S. App. 482, 77 Fed. 450—Birmingham Cement Mfg. Co. v. Gates Iron Works, 24 C. C. A. 137, 41 U. S. App. 201, 78 Fed. 355—Cleveland Foundry Co. v. Detroit Vapor Stove Co. 131 Fed. 751—Hill

v. Commissioner of Patents, 4 Mackey, 268—Durham v. Seymour, 6 App. D. C. 89.

391. If an inventor describes and claims only a part of his invention in his application for a patent, he is presumed to have abandoned the residue to the public. *Deering v. Winona Harvester Works*, 155 U. S. 286, 15 Sup. Ct. Rep. 118, 39: 153

Cited in McBride v. Kingman, 72 Fed. 911—Thomson-Houston Electric Co. v. Union R. Co. 84 Fed. 890—Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co. 90 Fed. 210—MacColl v. Knowles Loom Works, 37 C. C. A. 350, 95 Fed. 987—Durham v. Seymour, 6 App. D. C. 90.

392. An invention is abandoned to the public, so as to preclude the issuance of a patent, where the inventor, by his voluntary act or acquiescence, suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for patent. *Pennock v. Dialogue*, 2 Pet. 1, 7: 327

393. If an inventor makes his discovery public, and permits others to use it without objection, he abandons the inchoate right to the exclusive use of the invention, to which a patent would have entitled him, had it been previously applied for. *McClurg v. Kingsland*, 1 How. 202, 11: 102 *Cited in* Nilsson v. De Haven, 47 App. Div. 540, 62 N. Y. Supp. 506.

394. Where an inventor taught his invention to a large number throughout the country, with no suggestion that it was an experiment, and received pay for such instruction, this constituted such an abandonment of his claim as to preclude his obtaining a valid patent for it. *International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 11 Sup. Ct. Rep. 716, 35: 347

395. Acquiescence in a mistake for nine or ten years, by an inventor, by which a patent is issued for his invention to another inventor, must be considered an abandonment. *Hartshorn v. Saginaw Barrel Co.* 119 U. S. 664, 7 Sup. Ct. Rep. 421, 30: 539

Cited in Carpenter Straw-Sewing Mach. Co. v. Searle, 52 Fed. 813—Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 84, 108 Fed. 858.

396. Mutual mistakes made, whereby each received the patent due to the other, cannot be construed as correcting each other. *Hartshorn v. Saginaw Barrel Co.* 119 U. S. 664, 7 Sup. Ct. Rep. 421, 30: 539

397. An application for a patent pending before the commissioner repels any inference of abandonment or dedication, from the omission to again claim it in a subsequent patent. *Suffolk Mfg. Co. v. Hayden*, 3 Wall. 315, 18: 76

Cited in Jones v. Sewall, 3 Cliff. 591, 6 Fisher. Pat. Cas. 366, Fed. Cas. No. 7,495—M'Millin v. Rees, 5 Bann. & Ard. 274, 1 Fed. 727—Butler v. Shaw, 21 Fed. 327—Thomson-Houston Electric Co. v. Winchester Ave. R. Co. 71 Fed. 206—Thomson-Houston Electric Co. v. Elmira & H. R. Co. 18 C. C. A. 154, 38 U. S. App. 55, 71 Fed. 404—

Independent Electric Co. v. Jeffrey Mfg. Co. 76 Fed. 989—Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co. 90 Fed. 210—Palmer Pneumatic Tire Co. v. Lozier, 33 C. C. A. 268, 62 U. S. App. 651, 90 Fed. 745—Palmer v. John E. Brown Mfg. Co. 35 C. C. A. 89, 92 Fed. 929—Ide v. Thorlicht, D. & R. Carpet Co. 53 C. C. A. 349, 115 Fed. 145—Anderson v. Collins, 58 C. C. A. 676, 122 Fed. 458—Thomson-Houston Electric Co. v. Black River Traction Co. 124 Fed. 513—Thomson-Houston Electric Co. v. Black River Traction Co. 68 C. C. A. 466, 135 Fed. 764—McMillan v. Rees, 37 Phila. Lex. Int. 158.

Proof of abandonment.

398. Abandonment may be proved, either by express declarations of an intention to abandon, or by conduct inconsistent with any other conclusion. United States Rifle & Cartridge Co. v. Whitney Arms Co. 118 U. S. 22, 6 Sup. Ct. Rep. 950, 30: 53 Kendall v. Winsor, 21 How. 322, 16: 165 Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25: 939 Elizabeth v. American Nicholson Pav. Co. 97 U. S. 126, 24: 1000 Cited in Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 484, 25 L. ed. 941—Berg v. Thistle, Fed. Cas. No. 1,337—Consolidated Fruit Jar Co. v. Wright, 12 Blatchf. 156, 1 Bann. & Ard. 327, Fed. Cas. No. 3,135—Marcy v. Trotter, Fed. Cas. No. 9,063—Russell & E. Mfg. Co. v. Mallory, 10 Blatchf. 148, 5 Fisher, Pat. Cas. 640, Fed. Cas. No. 12,166—United States Rifle & Cartridge Co. v. Whitney Arms Co. 14 Blatchf. 101, 2 Bann. & Ard. 500, Fed. Cas. No. 16,793—Walker v. Forbes, Fed. Cas. No. 17,069—Wickersham v. Singer, McArthur. Pat. Cas. 681, Fed. Cas. No. 17,610—Re Drawbaugh, 9 App. D. C. 259—Re Mower, 15 App. D. C. 155—United States Electric Lighting Co. v. Consolidated Light Co. 33 Fed. 871—Anderson v. Eller, 46 Fed. 779—Mast, F. & Co. v. Dempster Mill Mfg. Co. 71 Fed. 702—Craig v. Michigan Lubricator Co. 72 Fed. 182.

Delay in applying for patent.

Delay in Acting on Application, see infra, 426.

399. Mere forbearance to apply for a patent during the progress of experiments, and until the invention is perfected, affords no grounds for the presumption of abandonment. Agawam Woolen Co. v. Jordan, 7 Wall. 583, 19: 177 Cited in Henry v. Francetown Soap-Stone Stove Co. 2 Bann. & Ard. 223, Fed. Cas. No. 6,382—Jennings v. Pierce, 15 Blatchf. 46, 3 Bann. & Ard. 365, Fed. Cas. No. 7,283—Jones v. Sewall, 3 Cliff. 590, Fed. Cas. No. 7,495—Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co. 1 Bann. & Ard. 483, Fed. Cas. No. 8,453—Mast, F. & Co. v. Dempster Mill. Mfg. Co. 27 C. C. A. 195, 49 U. S. App. 508, 82 Fed. 331—Ide v. Thorlicht, D. & R. Carpet Co. 53 C. C. A. 348, 115 Fed. 144—Yates v. Huson, 8 App. D. C. 98—Mason v. Hepburn, 13 App. D. C. 95—Christensen v. Noyes, 15 App. D. C. 106—Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co. 10 Phila. 261.

400. Where the inventor of a process for driving wells delayed to make application for a patent until 1865, after having made

two successful experiments in 1861, and during that delay had been part of the time in the army and the rest of the time engaged in a series of trials of various kinds, civil and criminal, which were attended with very great anxiety, it was held that there was no abandonment of the invention. Beedle v. Bennet, 122 U. S. 71, 7 Sup. Ct. Rep. 1090, 30: 1074 Cited in Swain v. Holyoke Mach. Co. 102 Fed. 915.

401. Inventors may keep their inventions secret, and do not thereby forfeit their right to a patent, unless another, in the meantime, has made the invention and secured a patent therefor. Bates v. Coe, 98 U. S. 31, 25: 68 Cited in Consolidated Bunting Apparatus Co. v. Woerle, 29 Fed. 452—Eck v. Kutz, 132 Fed. 777.

Failure to prosecute application.

402. Abandonment of a patent by failure, which is not unavoidable, to prosecute it within two years after notice of any action upon it, applies to a case by bill in equity under U. S. Rev. Stat. § 4915, U. S. Comp. Stat. 1901, p. 3392, after refusal of a patent by the patent office or by the supreme court of the District of Columbia on appeal. Gandy v. Marble, 122 U. S. 432, 7 Sup. Ct. Rep. 1290, 30: 1223 Distinguished in Re Hien, 166 U. S. 438, 41 L. ed. 1068, 17 Sup. Ct. Rep. 624. Cited in Fassett v. Ewart Mfg. Co. 10 C. C. A. 444, 24 U. S. App. 74, 62 Fed. 407—American Bell Teleph. Co. v. United States, 15 C. C. A. 591, 33 U. S. App. 236, 68 Fed. 564—Bernardin v. Northall, 77 Fed. 851—Durham v. Seymour, 6 App. D. C. 87.

Delay in renewing application.

Delay in Acting on Application, see infra, 426.

See also infra, 542.

403. Where the applicant for a patent did nothing for sixteen years after the rejection of his first application, during which time his invention was in public use without objection from him, he must be held to have abandoned it. Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25: 939

404. Where the first application for a patent had been rejected and withdrawn, a delay of eight years in renewing the application, because the applicant regarded the invention as of less value than others for which he took out patents, will be held an abandonment when the subject-matter of the invention has been incorporated into the substance of many other subsequent inventions. United States Rifle & Cartridge Co. v. Whitney Arms Co. 118 U. S. 22, 6 Sup. Ct. Rep. 950, 30: 53 Cited in Western Electric Co. v. Sperry Electric Co. 7 C. C. A. 169, 18 U. S. App. 177, 58 Fed. 192.

405. An inventor may forfeit his rights by a wilful or negligent postponement of his claims. There may be an abandonment as well after an application for a patent

has been made and rejected or withdrawn, as before. *Woodbury Patent Planing-Mach. Co. v. Keith*, 101 U. S. 479, 25: 939
Cited in Consolidated Fruit Jar Co. v. Bellaire Stamping Co. 27 Fed. 382.

406. An interval of nine years before renewing application does not necessarily indicate an abandonment to the public. *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23: 952
Distinguished in Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 488, 25 L. ed. 942.

Cited in Colgate v. Western U. Teleg. Co. 15 Blatchf. 394, Fed. Cas. No. 2,995—*Howes v. McNeal*, 15 Blatchf. 123, Fed. Cas. No. 6,789—*American Bell Teleph. Co. v. United States*, 15 C. C. A. 591, 33 U. S. App. 238, 68 Fed. 564—*Cain v. Park*, 14 App. D. C. 47.

Resuming right after abandonment.

407. An inventor who has abandoned his invention, and surrendered or dedicated it to the public, cannot resume his inchoate right at pleasure, as a dedication is absolute. *Pennock v. Dialogue*, 2 Pet. 1, 7: 327
Cited in Gill v. United States, 160 U. S. 430, 40 L. ed. 482, 16 Sup. Ct. Rep. 322.

408. One who has abandoned his invention is estopped against subsequently claiming the right of an inventor. *Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 92, 24: 68

Distinguished in Sprague v. Adriance, 3 Bann. & Ard. 125, Fed. Cas. No. 13,248.

Cited in Colgate v. Western U. Teleg. Co. 15 Blatchf. 396, 4 Bann. & Ard. 66, Fed. Cas. No. 2,995—*The Driven-Well Cases*, 5 McCrary, 185, 16 Fed. 389—*Consolidated Fruit Jar Co. v. Bellaire Stamping Co.* 27 Fed. 382—*United States Electric Lighting Co. v. Consolidated Electric Light Co.* 33 Fed. 871—*Mast, F. & Co. v. Dempster Mill Mfg. Co.* 71 Fed. 702—*Warren Featherbone Co. v. Warren Bros. Co.* 92 Fed. 991—*Eck v. Kutz*, 132 Fed. 777—*Re Drawbaugh*, 9 App. D. C. 259—*Re Mower*, 15 App. D. C. 154.

VI. Who Entitled to Patents.

Government's Right to Use Patented Invention, see *supra*, 13-16.

Rights of Aliens, see *Aliens*, 20-24.

a. Original Inventors Generally.

Defense that Patentee was not Original Inventor as Defense in Infringement Suit, see *infra*, 1155-1157.

Fact that Claimant was Inventor, as Legislative or Judicial Question, see *Courts*, 176.

Presumption From Issuing Patent, see *Evidence*, 764-766.

Conclusiveness of Presumption that Patentee is Original Inventor, see *Evidence*, 2605.

See also *infra*, 1100, 1151, 1152; *Estoppel*, 171.

409. A party cannot entitle himself to a U. S. Dig.—272

patent for more than his own invention; and if the patent be for the whole of a machine, he can maintain a title to it only by establishing that it is substantially new in its structure and mode of operation. *Evans v. Eaton*, 7 Wheat. 356, 5: 472
Cited in Brooks v. Blacknell, 3 McLean, 254, Fed. Cas. No. 1,944—*Wyeth v. Stone*, 1 Story, 286, Fed. Cas. No. 18,107—*Cross v. Huntly*, 13 Wend. 386.

410. No invention can possibly be made consisting of a combination of different elements of power, without a thorough knowledge of the properties of each of them, and the mode in which they operate on each other. And the inquiries which a patentee makes, or the information or advice he receives from men of science in the course of his researches, cannot impair his right to the character of an inventor. And it can make no difference in this respect whether he derives his information from books or from conversation with men skilled in the science. *O'Reilly v. Morse*, 15 How. 62, 14: 601

Cited in Corser v. Brattleboro Overall Co. 93 Fed. 808.

411. One who has obtained the whole idea of an invention from another cannot obtain a valid patent upon it for himself. *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. Rep. 225, 27: 438

412. The fact that a patentee learned from experiments that he wanted paper of certain described qualities to use in the manufacture of paper collars, and that he said so to the paper manufacturer, but did not give to him any directions respecting the process by which it could be produced, did not entitle him to a patent for the invention for either the product or process, where the manufacturer of the paper, after many experiments, succeeds in producing the desired result without any assistance from the patentee. *Union Paper Collar Co. v. Van Deusen*, 23 Wall. 530, 23: 128

413. A previous discovery in a foreign country does not render a patent here void, unless such discovery, or some substantial part of it, had been before patented or described in a printed publication. *O'Reilly v. Morse*, 15 How. 62, 14: 601

Cited in Keene v. Wheatley, 5 Clark (Pa.) 532, Fed. Cas. No. 7,644—*New American File Co. v. Nicholson File Co.* 8 Fed. 820—*Illingworth v. Spaulding*, 9 Fed. 612—*Canan v. Pound Mfg. Co.* 23 Blatchf. 175, 23 Fed. 186—*Gold & S. Teleg. Co. v. Commercial Telegram Co.* 23 Blatchf. 204, 23 Fed. 343.

414. A patentee is entitled to every use of which his invention is susceptible, whether such use be known or unknown to him. *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. Rep. 194, 39: 275

Cited in Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co. 14 C. C. A. 648, 33 U. S. App. 188, 67 Fed. 792—*Codman v. Amla*, 70 Fed. 710—*Parsons v. Seelye*, 40 C. C. A. 485, 100 Fed. 456—*Williams Patent Crusher & Pulverizer Co. v. St. Louis Pulverizer Co.* 104 Fed. 799—*Potts v. Penfield*,

109 Fed. 325—Ruete v. Elwell, 15 App. D. C. 28.

b. Employers and Employees.

Rights of Assignee of Employee, see *infra*, 808.

Assignment of Right to Obtain Patents for Inventions by Employee, see *infra*, 820.
License of Employer to Use Invention of Employee, see *infra*, 845-847.

Royalties for Use of Invention by Employee, see *infra*, 851-853.

Right of Government to Use Article Patented by Employee, see *supra*, 14, 15, *infra*, 879a-879c.

415. Where an employee makes experiments at the expense of his employer, has his wages increased in consequence of the usefulness of his invention, and permits his employer to use thereof without compensation, and then obtains a patent, the patent is void. McClurg v. Kingsland, 1 How. 202, 11: 102

Cited in Worley v. Loker Tobacco Co. 104 U. S. 344, 28 L. ed. 822—Kelton v. United States, 32 Ct. Cl. 344.

416. Parties engaging the services of an inventor under an agreement that he shall devote his time and ingenuity to the perfecting of a machine for their benefit, where his experiments are unsuccessful and are abandoned, cannot lay any claim to an invention conceived by him after the termination of his services and the expiration of such agreement. Appleton v. Bacon, 2 Black, 699, 17: 338

417. Suggestions from an employee, not amounting to a new method or arrangement, are not sufficient to deprive the employer of the exclusive property in the perfected improvement. Agawam Woolen Co. v. Jordan, 7 Wall. 583, 19: 177
Cited in Hudson v. Draper, 4 Cliff. 180, Fed. Cas. No. 6,834—Corser v. Brattleboro Overall Co. 93 Fed. 808—Huebel v. Bernard, 15 App. D. C. 514—Gedge v. Cromwell, 19 App. D. C. 187—Gallagher v. Hastings, 21 App. D. C. 99—Garrels v. Freeman, 21 App. D. C. 211—Dice v. Joliet Mfg. Co. 11 Ill. App. 114—Burden v. Burden Iron Co. 39 Misc. 565, 80 N. Y. Supp. 390—Fuller & J. Mfg. Co. v. Bartlett, 68 Wis. 86, 60 Am. Rep. 838, 31 N. W. 747.

Editorial note.

[Right of master to inventions of servant. 2 L.R.A.(N.S.) 1173.]

c. Several Inventors; Priority.

Prior Invention as Defense in Infringement Suit, see *infra*, 1155.

Prior Patent as Defense in Infringement Suit, see *infra*, 1158-1162.

Public use.

418. Of two original inventors, the first will be entitled to letters patent unless the other puts the invention into public use more than two years before the application

for them. Webster Loom Co. v. Higgins, 105 U. S. 580, 26: 1177

Cited in St. Paul Plow Works v. Starling, 140 U. S. 198, 35 L. ed. 408, 11 Sup. Ct. Rep. 803—American Sulphite Pulp Co. v. Howland Falls Pulp Co. 70 Fed. 1002—Von Schmidt v. Bowers, 25 C. C. A. 342, 48 U. S. App. 120, 80 Fed. 140—Westinghouse Electric & Mfg. Co. v. Saranac Lake Electric Light Co. 108 Fed. 224.

Adaptation to actual use.

419. Whoever first perfects a machine, and adapts it to actual use, is the real inventor, and is entitled to the patent for it. Agawam Woolen Co. v. Jordan, 7 Wall. 583, 19: 177

Whiteley v. Swayne, 7 Wall. 685, 19: 199
Seymour v. Osborne, 11 Wall. 516, 20: 33
Cited in Union Paper Collar Co. v. Van Dusen, 23 Wall. 564, 23 L. ed. 134—Albright v. Celluloid Harness Trimming Co. 2 Bann. & Ard. 635, Fed. Cas. No. 147—Coffin v. Ogden, 7 Blatchf. 72, 3 Fisher, Pat. Cas. 651, Fed. Cas. No. 2,950—Doherty v. Haynes, 4 Cliff. 294, Fed. Cas. No. 3,963—Jordan v. Dobson, Fed. Cas. No. 7,519—Judson v. Bradford, 3 Bann. & Ard. 549, Fed. Cas. No. 7,564—Moore v. Thomas, 3 Bann. & Ard. 17, Fed. Cas. No. 9,776—Union Paper Bag Mach. Co. v. Pultz & W. Co. 15 Blatchf. 166, 3 Bann. & Ard. 408, Fed. Cas. No. 14,392—Feather Duster Co. v. Hubbard, 11 Biss. 80, 9 Fed. 561—Whittlesey v. Ames, 9 Biss. 233, 3 Bann. & Ard. 103, 13 Fed. 898—Pennsylvania Diamond Drill Co. v. Simpson, 29 Fed. 290—Johnson v. Forty-Second Street, M. & St. N. Ave. R. Co. 33 Fed. 502—Pacific Cable R. Co. v. Butte City Street R. Co. 52 Fed. 865—Christie v. Seybold, 5 C. C. A. 39, 6 U. S. App. 520, 55 Fed. 75—Ecaubert v. Appleton, 15 C. C. A. 78, 35 U. S. App. 221, 67 Fed. 922—American Sulphite Pulp Co. v. Howland Falls Pulp Co. 70 Fed. 998—Standard Cartridge Co. v. Peters Cartridge Co. 23 C. C. A. 381, 47 U. S. App. 205, 77 Fed. 645—Wheaton v. Kendall, 83 Fed. 672—Coffee v. Guerrant, 3 App. D. C. 499—Milton v. Kingsley, 7 App. D. C. 538—Lloyd v. Antidel, 17 App. D. C. 495—Funk v. Haines, 20 App. D. C. 288—Lamson v. Martin, 159 Mass. 565, 35 N. E. 78.

Exhibition.

420. An invention relating to machinery may be exhibited as well in a drawing as in a model, so as to lay the foundation of a claim to priority as to the person to whom the drawing is shown, if sufficiently plain to enable those skilled in the art to understand it. Webster Loom Co. v. Higgins, 105 U. S. 580, 26: 1177

Cited in Deering v. Winona Harvester Works, 155 U. S. 302, 39 L. ed. 159, 15 Sup. Ct. Rep. 118—Bowers v. Von Schmidt, 63 Fed. 577—Standard Elevator Co. v. Crane Elevator Co. 22 C. C. A. 580, 46 U. S. App. 411, 76 Fed. 798—Standard Cartridge Co. v. Peters Cartridge Co. 23 C. C. A. 382, 47 U. S. App. 205, 77 Fed. 646—Glidden v. Noble, 5 App. D. C. 488—Porter v. Loudon, 7 App. D. C. 74—Mergenthaler v. Scudder, 11 App. D. C. 278—Christensen v. Noyes, 15 App. D. C. 118—Hulett v. Long, 15 App. D. C. 292.

Silence.

See also *supra*, 401; *infra*, 423.

421. The fact that one claiming to ante-date another in the invention of an article did, during and after the time when the invention was put before the public, put his attention to other matters, and remain silent as to his claims, tends to disprove his claim. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

Cited in Mack v. Spencer Optical Mfg. Co. 52 Fed. 821—*Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.* 54 Fed. 693—*Edison Electric Light Co. v. Electric Mfg. Co.* 57 Fed. 621—*Oval Wood Dish Co. v. Sandy Creek, N. Y. Wood Mfg. Co.* 60 Fed. 288—*Electric Mfg. Co. v. Edison Electric Light Co.* 10 C. C. A. 111, 18 U. S. App. 637, 61 Fed. 839—*Dodge v. Post*, 76 Fed. 810—*Brown v. Zaubitz*, 105 Fed. 244—*Croskey v. Atterbury*, 9 App. D. C. 218—*Beals v. Finkenbinder*, 12 App. D. C. 29—*Pickles v. Aglar*, 13 App. D. C. 560—*Ingersoll v. Holt*, 15 App. D. C. 526—*Slater v. Hamacher*, 15 App. D. C. 572.

Abandonment.

Abandonment of Invention, see *supra*, V. g.

Abandonment of Claim, see *infra*, VII. f.

Of Right to Reissued Patent, see *infra*, IX. g.

Inclusion of Abandoned Claim in Reissued Patents, see *infra*, 700-702.

422. A prior invention or discovery, never perfected or used, but abandoned, is only an unsuccessful experiment, and does not detract from the merit or rights of another, as an original inventor, who takes up the subject and perfects the invention for actual use. *Whiteley v. Swayne*, 7 Wall. 685, 19: 199

Seymour v. Osborne, 11 Wall. 516, 20: 33
Brown v. Guild ("The Corn-planter Patent") 23 Wall. 181, 23: 161

Cited in Gottfried v. Phillips Best Brewing Co. 5 Bann. & Ard. 30, Fed. Cas. No. 5,633—*Kelleher v. Darling*, 4 Cliff. 442, Fed. Cas. No. 7,853—*Moore v. Thomas*, 3 Bann. & Ard. 17, Fed. Cas. No. 9,776—*Phillips v. Carroll*, 23 Fed. 251—*Dixon-Woods Co. v. Black*, 102 Fed. 348—*Re Drawbaugh*, 9 App. D. C. 239—*Lamson v. Martin*, 159 Mass. 565, 35 N. E. 78.

423. Where the alleged prior inventor had not made his discovery public, but had used it simply for his own private purpose, and it had been finally forgotten or abandoned, such a discovery and use does not constitute anticipation which will preclude the taking out of a patent by a subsequent inventor, if he be an original, though not the first, inventor. *Gayler v. Wilder*, 10 How. 477, 13: 504

Distinguished in Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co. 1 Bann. & Ard. 190, Fed. Cas. No. 10,337.

Cited in Babcock v. Degener, MacArth. Pat. Cas. 617, Fed. Cas. No. 698—*Burrows v. Wetherill*, MacArth. Pat. Cas. 328, Fed. Cas. No. 2,208—*Cahoon v. Ring*, 1 Cliff. 611, 1 Fisher, Pat. Cas. 410, Fed. Cas. No. 2,292

—*Hall v. Bird*, 6 Blatchf. 443, 3 Fisher, Pat. Cas. 599, Fed. Cas. No. 5,926—*Harts-horn v. Tripp*, 7 Blatchf. 125, Fed. Cas. No. 6,168—*Johnson v. Root*, 2 Cliff. 126, 2 Fisher, Pat. Cas. 307, Fed. Cas. No. 7,409—*Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.* 10 Phila. 234, Fed. Cas. No. 10,337—*Ransom v. New York*, 1 Fisher, Pat. Cas. 271, Fed. Cas. No. 11,573—*Rich v. Lippincott*, 2 Fisher, Pat. Cas. 8, Fed. Cas. No. 11,758—*Shoup v. Hendri*, 2 Bann. & Ard. 251, Fed. Cas. No. 12,814—*White v. Allen*, 2 Cliff. 230, 2 Fisher, Pat. Cas. 446, Fed. Cas. No. 17,535—*Wilson v. Coon*, 18 Blatchf. 547, 6 Fed. 626—*Davis v. Brown*, 19 Blatchf. 275, 9 Fed. 656—*Searls v. Bouton*, 20 Blatchf. 429, 12 Fed. 142—*Electrical Accumulator Co. v. Jullen Electric Co.* 38 Fed. 128—*Zinsser v. Kremer*, 39 Fed. 114—*Olds v. Brown*, 41 Fed. 703—*Corser v. Brattleboro Overall Co.* 59 Fed. 782—*Dalby v. Lynes*, 64 Fed. 379—*Acme Flexible Clasp Co. v. Cary Mfg. Co.* 96 Fed. 347—*Wurts v. Harrington*, 10 App. D. C. 155—*Lamson v. Martin*, 159 Mass. 565, 35 N. E. 78—*Rich v. Lippincott*, 1 Pittsb. L. J. 25.

424. An application for a patent is not a bar to a further patent. It can have a bearing only on priority of invention or discovery. It cannot take a case out of the category of unsuccessful experiments, where the alleged prior invention was never perfected, but was abandoned. *Brown v. Guild* ("The Corn-planter Patent"), 23 Wall. 181, 23: 161

Limited in United States ex rel. Pollok v. Hall, 7 Mackey, 20, 1 L.R.A. 740.

Cited in Deering v. Winona Harvester Works, 155 U. S. 302, 39 L. ed. 159, 15 Sup. Ct. Rep. 118—*Albright v. Celluloid Harness Trimming Co.* 2 Bann. & Ard. 635, Fed. Cas. No. 147—*Herring v. Nelson*, 14 Blatchf. 305, 3 Bann. & Ard. 67, Fed. No. 6,424—*Rubber Step Mfg. Co. v. Metropolitan R. Co.* 3 Bann. & Ard. 253, Fed. Cas. No. 12,101—*Union Paper Bag Mach. Co. v. Pultz & W. Co.* 3 Bann. & Ard. 407, 15 Blatchf. 165, Fed. Cas. No. 14,392—*Putnam v. Hutchinson*, 11 Bliss. 237, 12 Fed. 129—*Westinghouse v. Chartiers Valley Gas Co.* 43 Fed. 588—*Kitselman v. Kokomo Fence-Mach. Co.* 108 Fed. 650—*Lamson v. Martin*, 159 Mass. 565, 35 N. E. 78.

Decision of patent office.

425. In a suit under U. S. Rev. Stat. § 4915, to establish the right to a patent which has been refused, the decision of the patent office against the priority of plaintiff's invention to that of another claimant will control if the question of priority is doubtful. *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. Rep. 772, 38: 657

Distinguished in Durham v. Seymour, 161 U. S. 239, 40 L. ed. 684, 16 Sup. Ct. Rep. 452.

Cited in United States v. American Bell Teleph. Co. 167 U. S. 267, 42 L. ed. 164, 17 Sup. Ct. Rep. 800—*Rudolph v. Williams*, 62 Fed. 581—*Appleton v. Ecaubert*, 62 Fed. 747—*Ecaubert v. Appleton*, 15 C. C. A. 77, 35 U. S. App. 221, 67 Fed. 921—*American Bell Teleph. Co. v. United States*, 15 C. C. A. 595, 33 U. S. App. 236, 68 Fed. 569—*Standard Cartridge Co. v. Peters Cartridge Co.* 69 Fed. 410—*American Sulphite Pulp Co. v. Howland Falls Pulp Co.* 70 Fed. 903—*Adams v. Kinzer & J. Mfg. Co.* 22 C. C.

A. 584, 39 U. S. App. 431, 76 Fed. 802—Standard Cartridge Co. v. Peters Cartridge Co. 23 C. C. A. 369, 47 U. S. App. 205, 77 Fed. 633—Brooks v. Sacks, 26 C. C. A. 458, 50 U. S. App. 151, 81 Fed. 405—Wheaton v. Kendall, 85 Fed. 669—Sacks v. Brooks, 85 Fed. 971—John R. Williams Co. v. Miller, D. B. & P. Mfg. Co. 107 Fed. 293—Swain v. Holyoke Mach. Co. 49 C. C. A. 420, 111 Fed. 409—R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co. 111 Fed. 929—Wells v. Reynolds, 4 App. D. C. 48 Burr v. Ford, 5 App. D. C. 28—Hisey v. Peters, 6 App. D. C. 72—Durham v. Seymour, 6 App. D. C. 90—Re Griswold, 9 App. D. C. 497—Wurts v. Harrington, 10 App. D. C. 153—Arnold v. Tyler, 10 App. D. C. 179—Doyle v. McRoberts, 10 App. D. C. 451—Tecktonius v. Scott, 110 Wis. 454, 86 N. W. 672.

VII. Application and Issue; Claims and Specifications.

a. In General.

Date of Application, see supra, 25, 26.
Abandonment by Acquiescing in Mistaken Issue to Wrong Person, see supra, 395, 396.

Abandonment by Failure to Prosecute Application, see supra, 402.

Inference of Abandonment Repelled by Pending Application, see supra, 397.

Application as Bar to Further Patent, see supra, 424.

Application for Reissue, see infra, IX. e.
Effect of Void Reissue on Original Application, see infra, 640.

Mandamus to Secure Appeal to Board of Examiners in Chief, see Mandamus, 126.

Delay.

Abandonment by Delay in Applying for Patent, see supra, 399-401.

Abandonment by Delay in Renewing Application, see supra, 403-406.

Lack of Diligence in Pursuing Application, see infra, VII. f.

426. An applicant for a patent who complies with the terms and conditions prescribed will not suffer or lose rights by reason of any delay on the part of the officials in acting upon his application, whether the delay is reasonable or unreasonable, unless it has been brought about through his corruption of the officials, or through his inducement, or at his instance. *United States v. American Bell Teleph. Co.* 167 U. S. 224, 17 Sup. Ct. Rep. 809, 42: 144

Oath.

Oath by Administrator to Amendments, see infra, 462.

Presumption as to Belief that Applicant is First Inventor, see Evidence, 259.

Conclusiveness of Recital that Oath was Taken, see Evidence, 2603.

427. A patent which is not supported by the oath of the inventor, but applied for by one who is not the inventor, is unauthorized

by law, and void, and, whether taken out in the name of the applicant or of his assignee, confers no rights as against the public. *Kennedy v. Hazelton*, 128 U. S. 667, 9 Sup. Ct. Rep. 202, 32: 576
United States Rifle & Cartridge Co. v. Whitney Arms Co. 118 U. S. 22, 6 Sup. Ct. Rep. 950, 30: 53

Death of inventor.

See also infra, 462, 463.

428. A patent to the inventor, his heirs or assigns, is not void because of his death before it is issued. It is a grant in the alternative to him or his heirs or assigns, including a grantee in being capable of taking the patent and to whose benefit it enures. *De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 209, 13 Sup. Ct. Rep. 283, 37: 138

Correction of mistakes.

Mistake in Claim, see infra, 482.

429. The power of an officer of the Patent Office to give effect to any of his acts is at an end when he goes out of office, and no efficacy can be given to them by antedating the patent, even though the act be the correction of a mere mistake or omission; if corrected at all, it must be by the officers in power at the time of the correction, who have succeeded to his authority. *Marsh v. Nichols, S. & Co.* 128 U. S. 655, 9 Sup. Ct. Rep. 168, 32: 538
Cited in Lockwood v. Gehlert, 127 N. Y. 232, 27 N. E. 812.

When patent operative.

When Surrender of Patent for Reissue Becomes Operative, see infra, 644.
See also infra, 560.

430. The Department has power to remedy an omission of a signature to a patent, but it must be remedied by existing officers of the Department,—not by former officers who have gone out of office. The signature of the acting Secretary of the Interior at the time is sufficient. *Marsh v. Nichols, S. & Co.* 128 U. S. 605, 9 Sup. Ct. Rep. 168, 32: 538

Distinguished in Miller v. Donahue, 96 Wis. 506, 71 N. W. 900.

431. Only from the time at which the execution of a patent was completed by the proper signatures does the instrument operate as a patent for the invention claimed. *Marsh v. Nichols, S. & Co.* 128 U. S. 605, 9 Sup. Ct. Rep. 168, 32: 538

Second application.

432-3. Where the proceedings to obtain a patent are continuous and constitute a continued effort, a second application does not indicate an abandonment of a former. *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23: 952

Distinguished in Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 488, 25 L. ed. 942—*American Bell Teleph. Co. v. United States*, 33 U. S. App. 236, 15 C. C. A. 579, 68 Fed. 552.

Cited in Mahn v. Harwood, 112 U. S. 366.

28 L. ed. 670, 6 Sup. Ct. Rep. 451—Howes v. McNeal, 15 Blatchf. 123, 3 Bann. & Ard. 395, Fed. Cas. No. 6,789—United States Rifle & Cartridge Co. v. Whitney Arms Co. 14 Blatchf. 100, Fed. Cas. No. 16,793—Stirling Co. v. St. Louis Brewing Asso. 79 Fed. 81—Goodyear Dental Vulcanite Co. v. Brightwell, MacArth. & M. 76.

b. Description and Specification.

Insufficiency of Specifications in Foreign Patent, see *supra*, 20.

Change of Claim in Reissue so as to Extend beyond Scope of Original Specifications, see *infra*, IX. d.

Construction of Specifications Generally, see *infra*, XI.

Disclaimer of Statements in, see *infra*, XII.

Enlargement of Claim by Specification, see *infra*, 499.

Limitation of Specification by Claim, see *infra*, 500.

Limitation of Claim by, see *infra*, 501–506.

Reference to in Construing Claims, see *infra*, 507–515.

Claim for Patent Described in Previous Claim, see *infra*, 572, 573.

Cancellation of Patent for Defective Specification, see *infra*, 603.

Reissue of Patent for Defective Specification, see *infra*, 612, 621.

Description more Minute in Application for Reissue, see *infra*, 661.

Considering State of the Art in Construing, see *infra*, 735–736.

Question of Law or Fact as to, see Trial, 370–374.

See also *infra*, 467, 729, 732.

What specification should include.

434. The specifications must set forth the process or manner of making or using an invention, irrespective of whether it is regarded as an art or as a machine, under the act of 1836, providing, in § 5, that the inventor shall have the exclusive right of making, using, and vending to others to be used, his invention or discovery, referring to the specifications for the particulars thereof, and in § 6, for the issuance of a patent to any person who has discovered or invented a new and useful art, machinery, manufacture, or composition of matter, or an improvement thereof, provided he delivers a written description thereof, and of the manner and process of making, constructing, using, and compounding the same, sufficient to enable any one skilled in the particular or most nearly cognate art or science to make, construct, compound, and use the same. O'Reilly v. Morse, 15 How. 62, 14: 601

Cited in Kennedy v. Solar Ref. Co. 69 Fed. 724
Union Switch & Signal Co. v. Philadelphia & R. R. Co. 87 Fed. 918—Carnegie Steel Co. v. Cambria Iron Co. 89 Fed. 755—Masseth v. Larkin, 56 C. C. A. 170, 119 Fed. 174—Diamond Match Co. v. Ruby Match Co. 127 Fed. 848.

435. A feature claimed to be advantageous should be included in the specifications.

Ball v. Socket Fastener Co. v. Kroetzer, 150 U. S. 111, 14 Sup. Ct. Rep. 48, 37: 1019
Cited in Ball & Socket Fastener Co. v. Ball Glove Fastening Co. 8 C. C. A. 679, 21 U. S. App. 87, 60 Fed. 400—Wells v. Curtis, 13 C. C. A. 499, 31 U. S. App. 123, 66 Fed. 322—MacColl v. Knowles Loom Works, 37 C. C. A. 350, 95 Fed. 986—Santa Clara Valley Mill & Lumber Co. v. Prescott, 42 C. C. A. 482, 102 Fed. 506—Kursheedt Mfg. Co. v. Naday, 103 Fed. 950.

436. When the patent is for an improvement, the nature and extent of the improvement must be stated in the specification; and it is not sufficient that it be made out and shown at the trial, or established by comparing the machine specified in the patent with former machines in use. Evans v. Eaton, 7 Wheat, 356, 5: 472
Seymour v. Osborne, 11 Wall. 516, 20: 33
Cited in Bates v. Coe, 98 U. S. 39, 25 L. ed. 71—Brooks v. Jenkins, 3 McLean, 444, Fed. Cas. No. 1,953—Stanley Rule & Level Co. v. Davis, Fed. Cas. No. 13,288—Webster Loom Co. v. Higgins, 15 Blatchf. 455, 4 Bann. & Ard. 97, Fed. Cas. No. 17,342—Whitney v. Emmett, Baldw. 314, Fed. Cas. No. 17,585—Sawyer v. Miller, 4 Woods, 474, 12 Fed. 727.

437. To sustain a patent for a process, the patentee should be the first and original inventor of the process, should claim it in his patent, and if the means of carrying it out are not obvious to ordinary mechanics skilled in the art, his specification should describe some mode of carrying it out which will produce a useful result. Tilghman v. Proctor, 102 U. S. 707, 26: 279

Part of invention not described.

Limitation of Claim by Specification or Description, see *infra*, 501–506.

438. Under Rev. Stat. § 4888, U. S. Comp. Stat. 1901, p. 3383, an element of an invention not described in the specification is not covered by the patent. Western Electric Mfg. Co. v. Ansonia Brass & Copper Co. 114 U. S. 447, 5 Sup. Ct. Rep. 941, 29: 210
Cited in Thomasson v. Bumpass, 24 C. C. A. 180, 42 U. S. App. 295, 78 Fed. 492—Schillinger v. Cranford, 4 Mackey, 469.

439. What was suggested in the original specification, or patent office model, is not considered part of the invention covered by the original patent, unless shown to have been so intended by the specification. Flower v. Detroit, 127 U. S. 563, 8 Sup. Ct. Rep. 1291, 32: 175

440. All matters indispensable to the successful operation of the patented article are necessarily implied, though not specifically stated, in the original specification. Eames v. Andrews, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, 30: 1064
Cited in Hutchinson v. Everett, 33 Fed. 505—Thomson Meter Co. v. National Meter Co. 12 C. C. A. 673, 28 U. S. App. 275, 65 Fed. 429—McCormick Harvesting Mach. Co. v. C. Aultman & Co. 16 C. C. A. 266, 37 U. S. App. 299, 69 Fed. 378—Haggenmacher v. Nelson, 88 Fed. 493.

Certainty of description.

441. The descriptions in the application

and specifications must be plain and clear, so that the public will know what to avoid. *Grant v. Raymond*, 6 Pet. 218, 8: 376
Cited in Re Incandescent Lamp Patent, 159 U. S. 474, 40 L. ed. 224, 16 Sup. Ct. Rep. 75—*Chemical Rubber Co. v. Raymond Rubber Co.* 18 C. C. A. 35, 39 U. S. App. 11, 71 Fed. 183—*Badische Anilin & Soda Fabrik v. Kalle*, 94 Fed. 167—*Schroeder v. Brammer*, 98 Fed. 883—*De Lamar v. De Lamar Min. Co.* 54 C. C. A. 279, 117 Fed. 247—*Wolff v. E. I. Du Pont De Nemours & Co.* 122 Fed. 958.

442. Where a specification, by ambiguity and needless multiplication of nebulous claims, is calculated to deceive and mislead the public, the patent is void. *Carlton v. Bokee*, 17 Wall. 463, 21: 517
Cited in Combined Patent Can Co. v. Lloyd, 11 Fed. 154.

443. A patent will be void if the description is so vague and uncertain that no one can tell, except by independent experiments, how to construct the patented device. *Re Incandescent Lamp Patent*, 159 U. S. 465, 16 Sup. Ct. Rep. 75, 40: 221
Cited in Palmer v. John E. Brown Mfg. Co. 84 Fed. 454—*Badische Anilin & Soda Fabrik v. Kalle*, 94 Fed. 167—*Schroeder v. Brammer*, 98 Fed. 882—*Electric Smelting & Aluminum Co. v. Carborundum Co.* 42 C. C. A. 547, 102 Fed. 628—*Overweight Counterbalance Elevator Co. v. Henry Vogt Mach. Co.* 43 C. C. A. 83, 102 Fed. 961—*De Lamar v. De Lamar Min. Co.* 54 C. C. A. 279, 117 Fed. 247—*Stevens v. Seher*, 11 App. D. C. 263.

444. A patent is void in not describing with sufficient accuracy the component parts necessary to accomplish the desired result. *Howard v. Detroit Stove Works*, 150 U. S. 164, 14 Sup. Ct. Rep. 68, 37: 1039
Cited in Re Incandescent Lamp Patent, 159 U. S. 475, 40 L. ed. 224, 16 Sup. Ct. Rep. 75—*H. W. Johns Mfg. Co. v. Robertson*, 60 Fed. 905—*Electric R. Co. v. Jamaica & B. R. Co.* 61 Fed. 668—*Overweight Counterbalance Elevator Co. v. Henry Vogt Mach. Co.* 43 C. C. A. 83, 102 Fed. 961—*Hensel Colladay Co. v. Rosenau*, 105 Fed. 969—*De Lamar v. De Lamar Min. Co.* 54 C. C. A. 280, 117 Fed. 248—*Wolff v. De Nemours*, 122 Fed. 958.

Scientific theory or principle.

445. The fact that the scientific theory or principle, the application of which is supposed to constitute the invention secured by a patent for a process, is not set out in either the original or reissued patent, is immaterial, if by the specification the thing to be done is so set forth that it can be reproduced. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, 30: 1064
Cited in Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co. 19 C. C. A. 20, 37 U. S. App. 555, 72 Fed. 75—*Cowles Electric Smelting & Aluminum Co. v. Lowrey*, 24 C. C. A. 636, 47 U. S. App. 531, 79 Fed. 352—*Emerson Co. v. Nimocks*, 40 C. C. A. 90, 99 Fed. 740—*Williams Patent Crusher & Pulverizer Co. v. St. Louis Pulverizer Co.* 104 Fed. 799.

Intelligibility to skilled person.

Question for Jury, see Trial, 374.

446. A discoverer or inventor need not

have brought his art to the highest degree of perfection in order to obtain a patent: it is sufficient if he describes his method with sufficient precision to enable those skilled in the matter to understand what the process is, and points out some practicable way of putting it in operation. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

Distinguished in American Sulphite Pulp Co. v. Howland Falls Pulp Co. 70 Fed. 958.

Cited in Packard v. Lacing-Stud Co. 16 C. C. A. 640, 33 U. S. App. 306, 70 Fed. 67—*Independent Electric Co. v. Jeffrey Mfg. Co.* 76 Fed. 991—*American Sulphite Pulp Co. v. Howland Falls Pulp Co.* 25 C. C. A. 505, 50 U. S. App. 52, 80 Fed. 401—*Ford v. Bancroft*, 85 Fed. 459—*Dowagiac Mfg. Co. v. Superior Drill Co.* 53 C. C. A. 45, 115 Fed. 895—*Brislin v. Carnegie Steel Co.* 118 Fed. 600—*Lamson Consol. Store Service Co. v. Hillman*, 59 C. C. A. 516, 123 Fed. 422—*Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co.* 68 C. C. A. 527, 133 Fed. 171—*Marconi Wireless Telegr. Co. v. DeForest Wireless Telegr. Co.* 138 Fed. 673—*Porter v. Loudon*, 7 App. D. C. 73—*Lamson v. Martin*, 159 Mass. 563, 35 N. E. 78.

447. A specification in letters patent is sufficiently clear and descriptive when expressed in terms intelligible to a person skilled in the art to which it relates. *Webster Loom Co. v. Higgins*, 105 U. S. 580, 26: 1177

Seabury & Johnson v. Am Ende, 152 U. S. 561, 14 Sup. Ct. Rep. 683, 38: 553
Cited in Telephone Cases, 126 U. S. 536, 31 L. ed. 990, 8 Sup. Ct. Rep. 778—*Seabury & Johnson v. Am Ende*, 152 U. S. 567, 38 L. ed. 555, 14 Sup. Ct. Rep. 683—*Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 437, 46 L. ed. 986, 22 Sup. Ct. Rep. 608—*Vogel v. Noel*, 18 Fed. 828—*Electric Gas Lighting Co. v. Tillotson*, 22 Blatchf. 483, 21 Fed. 570—*Hancock Inspirator Co. v. Jenks*, 21 Fed. 916—*Odell v. Stout*, 22 Fed. 165—*Jenkins v. Gurney*, 23 Fed. 899—*Tondeur v. Stewart*, 28 Fed. 562—*Am Ende v. Seabury*, 36 Fed. 595—*Electrical Accumulator Co. v. Julien Electric Co.* 38 Fed. 122—*Tamagie Patent Co. v. Zahn*, 66 Fed. 992—*Consolidated Brake-Shoe Co. v. Chicago, P. & St. L. R. Co.* 69 Fed. 414—*Palmer Pneumatic Tire Co. v. Lozier*, 84 Fed. 608—*Union Writing Mach. Co. v. Domestic Sewing Mach. Co.* 95 Fed. 142—*Bracewell v. Passaic Print Works*, 107 Fed. 470—*Dowagiac Mfg. Co. v. Superior Drill Co.* 53 C. C. A. 45, 115 Fed. 895—*Wolff v. De Nemours*, 67 C. C. A. 491, 134 Fed. 865.

448. A patent is not defective in description where any good mechanic, having the patent and diagram before him, could adopt the improvement. *Ives v. Hamilton*, 92 U. S. 426, 23: 494
Hogg v. Emerson, 11 How. 587, 13: 824
Hogg v. Emerson, 6 How. 437, 12: 505
Cited in American Diamond Rock Boring Co. v. Sheldon, 17 Blatchf. 304, 4 Bann. & Ard. 605, Fed. Cas. No. 297—*Mable v. Haskell*, 2 Cliff. 511, Fed. Cas. No. 8,653—*Caverly v. Deere*, 52 Fed. 764.

449. If an improvement of a well-known appendage to a machine is fully described in a specification, it is not necessary to show the ordinary modes of attaching the append-

age to the machine; the patent is to be read as if the machine and its appendage were present, or in the mind of the reader, and he a person skilled in the art. Webster Loom Co. v. Higgins, 105 U. S. 580, 26: 1177

Distinguished in Sharples v. Moseley & S. Mfg. Co. 75 Fed. 598.

Cited in Thompson v. Gildersleeve, 34 Fed. 45—Rapid Service Store R. Co. v. Taylor 43 Fed. 251—Walte v. Chichester Chair Co. 45 Fed. 259—Standard Cartridge Co. v. Peters Cartridge Co. 23 C. C. A. 383, 47 U. S. App. 205, 77 Fed. 647—Brammer v. Schroeder, 46 C. C. A. 53, 108 Fed. 930—Keller v. Plesen, 114 Fed. 608—Westinghouse Air Brake Co. v. Christensen Engineering Co. 123 Fed. 309—Kip-Armstrong Co. v. King Philip Mills, 130 Fed. 30—Chicago Wooden Ware Co. v. Miller Ladder Co. 66 C. C. A. 522, 133 Fed. 546—Thomson-Houston Electric Co. v. Black River Traction Co. 68 C. C. A. 465, 135 Fed. 763.

450. Under U. S. Rev. Stat. § 4888, U. S. Comp. Stat. 1901, p. 3383, the specification of a patent for a process of refining and bleaching hair must describe the invention and the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, compound, and use the same. *Béné v. Jeantet*, 129 U. S. 683, 9 Sup. Ct. Rep. 428, 32: 803

Cited in Re Incandescent Lamp Patent, 159 U. S. 475, 40 L. ed. 224, 16 Sup. Ct. Rep. 75—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 199, 21 U. S. App. 244, 61 Fed. 963—De Lamar v. De Lamar Min. Co. 54 C. C. A. 280, 117 Fed. 248.

451. A specification in a patent for a process in making cast-iron railroad car wheels, which aims to regulate the cooling of the casting so that the different parts of the wheel which are of different thickness shall not be strained or injured by the more sudden cooling of the thin parts, which states that, at a certain point in the process, the temperature of all parts of the wheels "may be raised to the same point (say a little below that at which fusion commences)," is sufficiently definite although the fusing point of cast iron is twelve or fifteen hundred degrees above the point at which the chill of the tread of a car wheel would be destroyed. Anyone skilled in the business can see, in view of the specification, that the object of the process is to relieve from and guard against hurtful strain, without destroying the chill of the wheel, and that heat is applied only for that purpose. The heat must not reach the point of fusion, but all parts of the wheel must be raised to the same temperature; within those limits the degree is left to the judgment of the operator. *Mowry v. Whitney*, 14 Wall. 620, 20: 860

452. A specification is to be addressed to those skilled in the art to which the patent relates, and is to be comprehensible by them; it may be sufficient, though the unskilled may not be able to gather from it

how to use the invention. *Mowry v. Whitney*, 14 Wall. 620, 20: 860
Cited in Roberts v. Schreiber, 5 Bann. & Ard. 503, 2 Fed. 867—Bracewell v. Passaic Print Works, 107 Fed. 470—Burdon Wire & Supply Co. v. Williams, 128 Fed. 934.

453. The specification of a patent for a new composition of matter must describe it in such full, clear, and exact terms as to enable one skilled in the art to which it appertains to compound it without any experiments of his own. *Wood v. Underhill*, 5 How. 1, 12: 23

Le Roy v. Tatham, 14 How. 156, 14: 367
Tyler v. Boston, 7 Wall. 327, 19: 93
Cited in Hogg v. Emerson, 6 How. 484, 12 L. ed. 525—Re Incandescent Lamp Patent, 159 U. S. 474, 40 L. ed. 224, 16 Sup. Ct. Rep. 75—Jenkins v. Walker, Holmes, 123. 5 Fisher, Pat. Cas. 351, Fed. Cas. No. 7,275—Lockwood v. Faber, 27 Fed. 63—Tannage Patent Co. v. Zahn, 66 Fed. 990—Chemical Rubber Co. v. Raymond Rubber Co. 18 C. C. A. 35, 39 U. S. App. 11, 71 Fed. 183—Badische Anilin & Soda Fabrik v. Kalle, 94 Fed. 167—De Lamar v. De Lamar Min. Co. 54 C. C. A. 279, 117 Fed. 247—Wolff v. De Nemours, 122 Fed. 958—United States Mineral Wool Co. v. Manville Covering Co. 60 C. C. A. 288, 290, 125 Fed. 772—Stevens v. Seher, 11 App. D. C. 263—Lane v. Levi, 21 App. D. C. 175.

Proportions of ingredients.

Question for Jury, see Trial, 371.

454. Not merely the names of the ingredients, but their proportions, must be given. *Wood v. Underhill*, 5 How. 1, 12: 23
Cited in Chemical Rubber Co. v. Raymond Rubber Co. 18 C. C. A. 35, 39 U. S. App. 11, 71 Fed. 183.

455. A patent for borated cotton is not void for failure to describe the strength of the solution or the proportion of glycerine, when it prescribes the preparation of "a solution of boracic acid in the usual manner," and the addition of a "small proportion of glycerine," as an intelligent chemist could act on such directions. *Seabury & Johnson v. Am Ende*, 152 U. S. 561, 14 Sup. Ct. Rep. 683, 38: 553

Variations.

456. Where the general rule is given with entire exactness, notice of variations to be made under special circumstances will not render specifications invalid for uncertainty. *Wood v. Underhill*, 5 How. 1, 12: 23

457. In the specification of a patent for a new improvement in making brick, tile, and other earthen ware, the proportions of the ingredients are sufficiently stated as "three fourths of a bushel of coal dust (mixed with clay) to one thousand bricks, some clay requiring one eighth more, and some not exceeding a half bushel. *Wood v. Underhill*, 5 How. 1, 12: 23

Cited in Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co. 113 U. S. 177, 28 L. ed. 945, 5 Sup. Ct. Rep. 513.

458-59. The direction given in a patent for a safety-valve, that the flange or lip fitting around the seat of the valve, to form an additional chamber, should be separated

from it about one sixty-fourth of an inch for an ordinary spring, with less space for a strong spring, and more space for a weak spring, to regulate the capacity of steam, cannot be declared insufficient, as a matter of law. Consolidated Safety-valve Co. v. Crosby Steam Gauge & Valve Co. 113 U. S. 157, 5 Sup. Ct. Rep. 513, 28: 939

c. Change of Specification.

Amendment of Claim, see *infra*, VII. d. 2.
On Application for Reissue, see *infra*, 632.
Foreign Patent Dating from Filing of Completed Specification, see *supra*, 39.

460. The applicant for a patent has 'a right to change his specification after receiving the suggestions of the Commissioner, before he has given his formal judgment. *Godfrey v. Eames*, 1 Wall. 17, 17: 684

461. A change in the specification as filed, or the filing of a new one, whereby a patent is still sought for the substance of the invention as originally claimed, cannot affect the sufficiency of the original application, unless the new or amended specification is for a distinct and different invention. *Godfrey v. Eames*, 1 Wall. 317, 17: 684
Cited in Badische Anilin & Soda Fabrik v. A. Klipstein & Co. 125 Fed. 555.

462. Where an inventor dies before obtaining a patent and after making application and oath, and the amendments to the application make an entire change in the specification, a new application and oath should be made and sworn to by his administrator. *Eagleton Mfg. Co. v. West, B. & C. Mfg. Co.* 111 U. S. 490, 4 Sup. Ct. Rep. 593, 28: 493

463. Where a person applied for a patent for japanning furniture springs for the purpose of strengthening and preserving them, and for such springs as an article of manufacture, which were not patentable for lack of novelty or invention, a patent issued after his death, on amended specifications claiming the use of the process of japanning, for the purpose not only of preserving, but of tempering the springs by the operation of the moderate heat used in the japanning process,—which claim he never made, and as to which there is no evidence that he ever had any knowledge,—is void. *Eagleton Mfg. Co. v. West, B. & C. Mfg. Co.* 111 U. S. 490, 4 Sup. Ct. Rep. 593, 28: 493
Distinguished in John R. Williams Co. v. Miller, D. B. & P. Mfg. Co. 107 Fed. 292.

Cited in De La Vergne Refrigerating Mach. Co. v. Featherstone. 147 U. S. 227, 37 L. ed. 144, 13 Sup. Ct. Rep. 238—*Milligan v. Lalance & G. Mfg. Co.* 21 Fed. 572—*Cary v. Wolff.* 23 Blatchf. 94, 24 Fed. 140—*Cary v. Lovell Mfg. Co.* 24 Fed. 142—*Hoe v. Kahler.* 23 Blatchf. 366, 25 Fed. 279—*Railway Register Mfg. Co. v. Broadway & S. Ave. R. Co.* 26 Fed. 525—*Cary v. Domestic Spring Bed Co.* 27 Fed. 300—*Kittle v. Hall.* 29 Fed. 514—*Wirt v. Hicks.* 45 Fed. 257—*De La Vergne Refrigerating Mach. Co. v. Featherstone.* 49 Fed. 919—*De La Vergne Bottle & Seal Co. v. Valentine Blatz Brewing Co.* 14 C. C. A. 83, 24 U. S. App. 649, 66 Fed. 772

—*Michigan C. R. Co. v. Consolidated Car-Heating Co.* 14 C. C. A. 238, 31 U. S. App. 462, 67 Fed. 126—*Erle Rubber Co. v. American Dunlop Tire Co.* 16 C. C. A. 636, 28 U. S. App. 470, 70 Fed. 62—*Patent-Button Co. v. Pilcher.* 95 Fed. 483.

d. Claims.

1. In General.

New Patent for Improvements Covered by Void Claim of Original Patent, see *supra*, 177.

Abandonment of Matters not Included in Claim, see *supra*, 388–391.

Construction of Claims Generally, see *infra*, XI.

Claim for Patent Described in Previous Claims, see *infra*, 572, 573.

Disclaimer of, see *infra*, XII.

Effect of, on Void Claim, see *infra*, 579.

Effect of Invalidity of New Claim in Reissued Patent on Validity of Original Claim, see *infra*, 641.

Dealing with All of Claims on Application for Reissue, see *infra*, 642.

Strict or Liberal Construction of Claim, see *infra*, 715–716.

Necessity for distinct claims.

464. Distinct and formal claims are necessary to ascertain the scope of the invention for which a patent is granted. *Grant v. Walter*, 148 U. S. 547, 13 Sup. Ct. Rep. 699, 37: 552

Cited in Thomasson v. Bumpass. 24 C. C. A. 180, 42 U. S. App. 295, 78 Fed. 492—*American Tobacco Co. v. Streat.* 28 C. C. A. 24, 42 U. S. App. 617, 83 Fed. 700—*Christy v. Hygela Pneumatic Bicycle Saddle Co.* 36 C. C. A. 36, 93 Fed. 970.

465. An applicant for a patent, in case of a machine, must explain the principle thereof and the best mode of applying the same; and point out and distinctly claim the part, improvement, or combination which he claims. *Parks v. Booth*, 102 U. S. 96, 26: 54

Seymour v. Osborne, 11 Wall. 516, 20: 33

Sufficiency.

466. Where a patent is for an invention which embraces an entire machine, it is sufficient if the claim is coextensive with the invention. *Seymour v. Osborne*, 11 Wall. 516, 20: 33

467. A sufficient description and claim is contained in the following specification of letters patent for a design for a carpet: "The nature of my design is fully represented in the accompanying photographic illustration, to which reference is made. I claim as my invention the configuration of the design hereunto annexed, when applied to carpeting." The illustration contained a single figure or design. The claim covers the design as a whole, and not any part of it as a part, and it is to be tested as a whole, as to

novelty and infringement. *Dobson v. Dobson*, 118 U. S. 10, 6 Sup. Ct. Rep. 946,

30: 63

Cited in Anderson v. Saint, 46 Fed. 761—
Britton v. White Mfg. Co. 61 Fed. 96.

468. The idea of the permanent retention in a reservoir of a large quantity of molten meal as a basis for unification of the product of blast furnaces received into it is sufficiently disclosed in the claim of the Jones patent, No. 404,414, for a process of mixing molten pig iron so as to secure greater uniformity in chemical composition, preparatory to further treatment, which specifies neither the size of the reservoir nor the amount of metal to be left therein, where the specifications call for a reservoir of any convenient size, "holding, say, 100 tons of metal," with the bottom of the discharge spout 2 feet above the bottom of the vessel in a 100-ton tank, "and more or less according to the capacity of the vessel," for the purpose of leaving a considerable quantity remaining and unpoured with which the fresh additions may mix. *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 22 Sup. Ct. Rep. 698, 46: 968

469. The Sawyer and Man patent, 317, 076, for an incandescing conductor for an electric lamp of carbonized fibrous or textile material, cannot be sustained to cover the Edison lamp using carbonized bamboo, in *See Sawyer and Man* supposed they had discovered in carbonized paper the best material for the conductor, and there is no generic quality in vegetable fibers because they are fibrous which adapts them to the purpose, and no description in the application which would enable an expert to make the Edison lamp, which was the product of long-continued experiments with different species of vegetable growth to discover the best incandescent conductor. *Re Incandescent Lamp Patent*, 159 U. S. 465, 16 Sup. Ct. Rep. 75, 40: 221
Cited in Holliday v. Schulze-Berge, 78 Fed. 495—*American Bell Teleph. Co. v. National Tel. Mfg. Co.* 109 Fed. 994.

Validity.

Joinder of Claims for Design With Separate Claims for Parts, see *infra*, 567.

470. A claim for a patent may be valid without stating all the means necessary to make it operative, as in such case any appropriate means for making it operative will be understood. *Deering v. Winona Harvester Works*, 155 U. S. 286, 15 Sup. Ct. Rep. 118, 39: 153
Cited in Taylor v. Sawyer Spindle Co. 22 C. C. A. 210, 39 U. S. App. 257, 75 Fed. 309—*Chambers-Bering-Quinlan Co. v. Faries*, 75 Fed. 663—*Willcox & G. Sewing-Mach. Co. v. Merrow Mach. Co.* 35 C. C. A. 274, 60 U. S. App. 451, 93 Fed. 211—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 566, 106 Fed. 716—*Brammer v. Schroeder*, 46 C. C. A. 50, 106 Fed. 928.

471. The claim of the Jones patent, No. 204,741, for a process for removing type

indentations from printed sheets by tying them while under pressure into compact bundles, and allowing them to remain tied when removed from the press to fix and complete the dry pressing, is invalid because it describes nothing but the operation and effect of the press for applying the pressure, which is covered by the other claims of such patent. *Busch v. Jones*, 184 U. S. 598, 22 Sup. Ct. Rep. 511, 46: 707

472. A claim for a belt-pulley as a new article of manufacture, made in the Medart patent, 218,702, claim 1, which is for a wrought-metal rimmed pulley having a crown formed on its rim during the process of manufacture, is invalid, since it is entirely immaterial how it is made so far as the completed article is concerned. *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. Rep. 745, 39: 899

473. The Medart patent, 248,598, which is in reality for a belt-pulley differing from others only in the fact that the rim and ends of the spider arms are ground off concentrically with the axis, is not valid, because, while the claims are that it must be made in a peculiar way, the patent, if valid, would cover every such pulley having a rim practically concentric with its axis, however, it might be made. *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. Rep. 745, 39: 899

Claim for part of combination.

474. If a person has invented a combination of three elements, all of which are necessary to the operation of his device, he cannot, by making a claim for two of them, forestall another who has so combined these two elements that they perform the same function that the three elements of the former patent performed. *National Hat Pouncing Mach. Co. v. Hedden*, 148 U. S. 482, 13 Sup. Ct. Rep. 680, 37: 529

Uniting process and apparatus claims.

475. An inventor is not estopped from insisting upon his application for a patent in which were united process and apparatus claims for essentially the same invention by requiring his process claims to be placed in interference with those of an existing patent, after receiving a letter from the primary examiner permitting the retention of the process and apparatus claims pending the determination of the interference, but stating that the acceptance of an interference on one of the process claims would be held by the office to be an election of the prosecution of such claims, and further prosecution of the apparatus claims would not be permitted. *United States ex rel. Steinmetz v. Allen*, 192 U. S. 543, 24 Sup. Ct. Rep. 416, 48: 555

476. So far as rule 41 of the Patent Office rules of practice prevents an inventor from uniting in one application process and apparatus claims which are essentially the same invention, it is invalid as an abuse of the discretion vested in the Patent Office to permit or deny a joinder of inventions.

United States ex rel. Steinmetz v. Allen, 192 U. S. 543, 24 Sup. Ct. Rep. 416, 48: 555
Cited in Lehigh Valley R. Co. v. Mellon, 104 U. S. 118, 26 L. ed. 641—Boyd v. Jamesville Hay Tool Co. 158 U. S. 263, 39 L. ed. 975, 15 Sup. Ct. Rep. 837—*Ex parte* Frasch, 192 U. S. 587, 48 L. ed. 565, 24 Sup. Ct. Rep. 424—Untermeyer v. Jeannot, 20 Fed. 504—Ney v. Ney Mfg. Co. 18 C. C. A. 296, 37 U. S. App. 371, 69 Fed. 408—Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co. 86 Fed. 334—MacColl v. Knowles Loom Works, 37 C. C. A. 350, 95 Fed. 987—Lehigh Valley R. Co. v. Mellon, 38 Phila. Leg. Int. 442.

When patentability of principle or function involved.

477. Where an application for a patent contained the following: "We do not claim on our inventions and improvements any of the parts of the above described machinery, independently of their arrangement and combination above set forth;" "What we claim as our invention, and desire to secure by letter patent, is the combination of the following parts above described" (naming them),—an instruction to the jury "that the originality of the invention did not consist in the novelty of the machinery, but in bringing a newly-discovered principle into practical application," was erroneous. The patentability of the principle without the invention of machinery was not in the case. *Le Roy v. Tatham*, 14 How. 156, 14: 367
Cited in Stephenson v. Hoyt, 1 McArthur. Pat. Cas. 296, Fed. Cas. No. 13,373.

478. The patentability of a function is not involved when there is no claim made for an independent process, and the whole theory of the specification and claims is based upon the novelty of the mechanism. *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136
Cited in Busch v. Jones, 184 U. S. 607, 46 L. ed. 712, 22 Sup. Ct. Rep. 511—*Huntington Dry Pulverizer Co. v. Whittaker Cement Co.* 89 Fed. 328—*Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* 90 Fed. 209—*Westinghouse Air-Brake Co. v. New York Air-Brake Co.* 37 C. C. A. 650, 96 Fed. 991—*Magie Light Co. v. Economy Gas-Lamp Co.* 38 C. C. A. 60, 97 Fed. 91—*Plumb v. New York, N. H. & H. R. Co.* 97 Fed. 649—*National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 99 Fed. 767—*Crown Cork & Seal Co. v. Aluminum Stopper Co.* 48 C. C. A. 84, 108 Fed. 857—*American Bell Teleph. Co. v. National Tel. Mfg. Co.* 109 Fed. 1051—*Busch v. Jones*, 16 App. D. C. 33—*Re Weston*, 17 App. D. C. 439.

2. Amendment.

Change of Specifications, see *supra*, VII. c.
 Amendment of Application, see *supra*, 462, 463.

Change of Claims in Reissue, see *infra*, IX. d.

479. An amendment, after the death of the applicant for a patent of the original specification, made within the scope of the invention described therein and of the original oath, and in limitation of the claims, without filing any new oath or power of

attorney, does not render the patent void. *De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 209, 13 Sup. Ct. Rep. 283, 37: 138
Cited in *De La Vergne Bottle & Seal Co. v. Valentine Blatz Brewing Co.* 14 C. C. A. 83, 24 U. S. App. 649, 60 Fed. 772—*Michigan v. R. Co. v. Consolidated Car-Heating Co.* 14 C. C. A. 238, 31 U. S. App. 462, 67 Fed. 127—*Erle Rubber Co. v. American Dunlap Tire Co.* 16 C. C. A. 636, 28 U. S. App. 470, 70 Fed. 62.

480. The authority given by an inventor to his attorneys in respect to amending his application ends at his death. *Eagleton Mfg. Co. v. West, B. & C. Mfg. Co.* 111 U. S. 499, 4 Sup. Ct. Rep. 593, 28: 493

481. Amendments of the claim of a patent, to correct defects in the original application which have been discovered in the course of litigation, will not invalidate the patent, if this is not essentially broadened thereby to cover intervening devices. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. Rep. 409, 45: 586
Cited in *American Bell Teleph. Co. v. National Tel. Mfg. Co.* 109 Fed. 1005—*Cleveland Foundry Co. v. Detroit-Vapor Store Co.* 69 C. C. A. 238, 131 Fed. 858.

482. The correction, within a short time after the issue of the original patent, of a clear mistake in the claim, is within the power of the Commissioner. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. Rep. 825, 36: 658
Cited in *Mast v. Iowa Windmill v. Pump Co.* 69 Fed. 222.

3. Restrictive Effect of Claims.

Restricting or Enlarging Claim on Surrender and Reissue, see *infra*, IX. d.
 Expansion of Original Patent in Reissued Patent, see *infra*, 649-665.
 Power of Courts to Enlarge or Restrict Scope of Patent, see *infra*, 708.

Construction conformable to claim.

483. A patent must be construed conformably with the self-imposed limitations contained in the claims. *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. Rep. 199, 39: 263
Cited in *Cramer v. Fry*, 68 Fed. 211—*New Departure Bell Co. v. Hardware Specialty Co.* 69 Fed. 153—*Carter Mach. Co. v. Hanes*, 70 Fed. 867—*Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* 56 C. C. A. 549, 120 Fed. 269.

484. The claim is a statutory requirement prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms. *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. Rep. 72, 30: 303
Howe Mach. Co. v. National Needle Co. 134 U. S. 388, 10 Sup. Ct. Rep. 570, 33: 963
Cited in *Gerard v. Diebold Safe & Lock Co.* 9 C. C. A. 452, 23 U. S. App. 341, 61 Fed. 210—*Durand v. Schulze*, 10 C. C. A. 98, 17 U. S. App. 620, 61 Fed. 820—*Western Teleph. Constr. Co. v. Stromberg*, 66 Fed. 552—

Wheaton v. Norton, 17 C. C. A. 456, 44 U. S. App. 118, 70 Fed. 842—Stirling Co. v. Pierpoint Boiler Co. 72 Fed. 788—McBride v. Kingman, 72 Fed. 911—Seabury v. Johnson, 76 Fed. 459—Paul Boynton Co. v. Morris Chute Co. 82 Fed. 443—Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co. 86 Fed. 337—Paul Boynton Co. v. Morris Chute Co. 30 C. C. A. 618, 58 U. S. App. 53, 87 Fed. 226—Edison Electric Light Co. v. E. G. Bernard Co. 88 Fed. 275—MacColl v. Knowles Loom Works, 37 C. C. A. 350, 95 Fed. 987—Santa Clara Valley Mill & Lumber Co. v. Prescott, 42 C. C. A. 482, 102 Fed. 506—Bracewell v. Passaic Print Works, 107 Fed. 479—American Bell Teleph. Co. v. National Tel. Mfg. Co. 109 Fed. 997—Schreiber & C. Mfg. Co. v. Adams Co. 54 C. C. A. 133, 117 Fed. 835—Westinghouse Air Brake Co. v. New York Air Brake Co. 56 C. C. A. 414, 119 Fed. 884—Canda v. Michigan Malleable Iron Co. 61 C. C. A. 198, 124 Fed. 490—Lanyon Zinc Co. v. Brown, 64 C. C. A. 347, 129 Fed. 915—Cleveland Foundry Co. v. Detroit Vapor Stove Co. 131 Fed. 744—Bechman v. Wood, 15 App. D. C. 503—Ruete v. Elwell, 15 App. D. C. 25—Re Starkey, 21 App. D. C. 525.

Enlargement by construction.

Enlargement by Specifications, see infra, 499.

Construing so as to Cover Rejected Claims, see infra, 516-525.

See also infra, 1052.

485. When a claim is explicit, the courts cannot alter or enlarge it, and the patentee is bound by it, and can claim nothing beyond it. *Keystone Bridge Co. v. Phoenix Iron Co.* 95 U. S. 274, 24: 344

Cited in *Lehigh Valley R. Co. v. Mellon*, 104 U. S. 118, 26 L. ed. 642—*Duff v. Sterling Pump Co.* 107 U. S. 639, 27 L. ed. 518, 2 Sup. Ct. Rep. 487—*Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 539, 29 L. ed. 953, 6 Sup. Ct. Rep. 846—*White v. Dunbar*, 119 U. S. 52, 30 L. ed. 305, 7 Sup. Ct. Rep. 72—*Coupe v. Royer*, 155 U. S. 576, 39 L. ed. 267, 15 Sup. Ct. Rep. 199—*Union Paper Bag Mach. Co. v. Pultz & W. Co.* 16 Blatchf. 77, 4 Bann. & Ard. 181, Fed. Cas. No. 14,393—*Fetter v. Newhall*, 20 Fed. 113—*Blades v. Rand, McN. & Co.* 27 Fed. 97—*Gerard v. Diebold Safe & Lock Co.* 9 C. C. A. 452, 23 U. S. App. 341, 61 Fed. 211—*Durand v. Schulze*, 10 C. C. A. 98, 17 U. S. App. 620, 61 Fed. 820—*Buffington's Iron Bldg. Co. v. Eustis*, 13 C. C. A. 146, 27 U. S. App. 693, 65 Fed. 808—*Westinghouse v. Boyden Power-Brake Co.* 68 Fed. 1003—*New Home Sewing-Mach. Co. v. Singer Mfg. Co.* 68 Fed. 226—*New Departure Bell Co. v. Hardware Specialty Co.* 69 Fed. 155—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 282, 37 U. S. App. 299, 69 Fed. 394—*Stirling Co. v. Pierpoint Boiler Co.* 72 Fed. 788—*McBride v. Kingman*, 72 Fed. 910—*Engle Sanitary & Cremation Co. v. Elwood*, 73 Fed. 485—*Seabury v. Johnson*, 76 Fed. 459—*Adams Electric R. Co. v. Lindell R. Co.* 23 C. C. A. 242, 40 U. S. App. 482, 77 Fed. 451—*Bundy Mfg. Co. v. Detroit Time-Register Co.* 36 C. C. A. 391, 94 Fed. 540—*Union Writing Mach. Co. v. Domestic Sewing Mach. Co.* 95 Fed. 144—*Bowers v. Pacific Coast Dredging & Reclamation Co.* 99 Fed. 747—*Metallic Extraction Co. v. Brown*, 43 C. C. A. 577, 104 Fed. 354—*Pelzer v. Brown*, 106 Fed. 940—*Bracewell v. Passaic Print Works*, 107 Fed. 480—*Safety Oiler Co. v. Scoville Mfg. Co.* 110 Fed.

205—*Schreiber & C. Mfg. Co. v. Adams Co.* 54 C. C. A. 132, 117 Fed. 834—*Durfee v. Bawo*, 118 Fed. 858—*Westinghouse Air Brake Co. v. New York Air Brake Co.* 56 C. C. A. 414, 119 Fed. 884—*Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* 56 C. C. A. 549, 120 Fed. 269—*United States Peg Wood, Shank & Leather Board Co. v. B. F. Sturtevant Co.* 122 Fed. 472—*Lanyon Zinc Co. v. Brown*, 64 C. C. A. 347, 129 Fed. 915—*Lehigh Valley R. Co. v. Mellon*, 38 Phila. Leg. Int. 442.

486. The claim is the measure of a patentee's right to relief; and while the specification may be referred to, to limit the claim, it can never be made available to expand it. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76, 35: 800

Cited in *Gerard v. Diebold Safe & Lock Co.* 48 Fed. 382—*Dederick v. Gardner*, 50 Fed. 100—*Masten v. Hunt*, 51 Fed. 219—*Celluloid Mfg. Co. v. Arlington Mfg. Co.* 3 C. C. A. 273, 3 U. S. App. 287, 52 Fed. 744—*Gerard v. Diebold Safe & Lock Co.* 4 C. C. A. 648, 13 U. S. App. 73, 54 Fed. 890—*Winchester Repeating Arms Co. v. American Buckle & Cartridge Co.* 58 Fed. 311—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 58 Fed. 782—*Simplex Railway Appliance Co. v. Wands*, 53 C. C. A. 175, 115 Fed. 521—*United States Peg Wood, Shank & Leather Board Co. v. B. F. Sturtevant Co.* 122 Fed. 479.

487. Courts should not enlarge, by construction, the claim which the patent office has admitted; and which the patentee has acquiesced in, beyond the fair interpretation of its terms. *Burns v. Meyer*, 100 U. S. 671, 25: 738

Cited in *Duff v. Sterling Pump Co.* 107 U. S. 639, 27 L. ed. 518, 2 Sup. Ct. Rep. 487—*McClain v. Ortmyer*, 141 U. S. 425, 35 L. ed. 802, 12 Sup. Ct. Rep. 76—*Coupe v. Royer*, 155 U. S. 577, 39 L. ed. 267, 15 Sup. Ct. Rep. 199—*Otis Bros. Mfg. Co. v. Crane Mfg. Co.* 27 Fed. 555—*Brown v. Stilwell & B. Mfg. Co.* 6 C. C. A. 537, 6 U. S. App. 427, 57 Fed. 740—*Durand v. Schulze*, 10 C. C. A. 98, 17 U. S. App. 620, 61 Fed. 820—*Craig v. Michigan Lubricator Co.* 72 Fed. 176—*United States Glass Co. v. Atlas Glass Co.* 88 Fed. 500—*Thompson v. Second Ave. Traction Co.* 89 Fed. 322—*Schreiber & C. Mfg. Co. v. Adams Co.* 54 C. C. A. 132, 117 Fed. 834.

488. A claim admitted by the patent office and acquiesced in by the patentee should not be enlarged by construction beyond the fair interpretation of its terms. *Haines v. McLaughlin*, 135 U. S. 584, 10 Sup. Ct. Rep. 876, 34: 290

489. The terms of the claim in letters patent define what the Patent Office, after a full examination of previous inventions and the state of art, determines the applicant is entitled to, and the court should not enlarge by construction beyond the fair interpretation of its terms the claim which the Patent Office has admitted, and which the patentee has acquiesced in. *Burns v. Meyer*, 100 U. S. 671, 25: 738

490. The courts have no right to enlarge a patent beyond the scope of its claim as allowed by the patent office or the appellate tribunal to which contested applications referred. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76, 35: 800

491. The court cannot import into the claim of a patent elements that would operate so to enlarge its scope as to cover an invention not indicated upon its face. *Wollensack v. Sargent*, 151 U. S. 221, 14 Sup. Ct. Rep. 291, 38: 137
Cited in H. W. Johns Mfg. Co. v. Robertson, 60 Fed. 903—*Standard Elevator Co. v. Crane Elevator Co.* 22 C. C. A. 578, 46 U. S. App. 411, 76 Fed. 796—*Plumb v. New York, N. H. & H. R. Co.* 97 Fed. 648.

492. An element cannot be read into a claim for a patent which does not specify it, for the purpose of making out a case of novelty or infringement. *McCarty v. Lehigh Valley R. Co.* 160 U. S. 110, 16 Sup. Ct. Rep. 240, 40: 358
Cited in Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 127, 54 U. S. App. 591, 85 Fed. 224—*Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* 86 Fed. 337—*Wilson v. McCormick Harvesting Mach. Co.* 34 C. C. A. 287, 92 Fed. 174—*Adams & W. Co. v. E. T. Burrowes Co.* 93 Fed. 463—*Bracewell v. Passaic Print-Works*, 107 Fed. 480—*Anderson Foundry & Mach. Works v. Potts*, 47 C. C. A. 414, 108 Fed. 384—*Metallic Extraction Co. v. Brown*, 49 C. C. A. 150, 110 Fed. 668—*Westinghouse Air Brake Co. v. New York Air Brake Co.* 56 C. C. A. 414, 119 Fed. 884—*Diamond Drill & Mach. Co. v. Kelly Bros.* 120 Fed. 293—*B. F. Avery & Sons v. J. I. Case Plow Works*, 139 Fed. 883.

493. Ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated, by its wide generalizations and ambiguous language, to discourage further invention in the same department of industry, and to cover antecedent inventions, cannot be approved. *Carlton v. Bokee*, 17 Wall. 463, 21: 517
Cited in Union Paper Collar Co. v. White, 2 Bann. & Ard. 62, Fed. Cas. No. 14,306—*Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co.* 59 Fed. 905—*American Bell Teleph. Co. v. National Tel. Mfg. Co.* 109 Fed. 994—*Electric Smelting & Aluminum Co. v. Pittsburgh Reduction Co.* 111 Fed. 750—*Union Paper Collar Co. v. White*, 11 Phila. 480—*Combined Patents Can Co. v. Lloyd*, 15 Phila. 485.

494. Where a patentee, after describing his machine, has set forth his claim in rather ambiguous and equivocal terms, which may be construed to mean either a process or a machine, the construction should be that which is most favorable to the patentee. *Corning v. Burden*, 15 How. 252, 14: 683

Cited in Winans v. Denmead, 15 How. 342, 14 L. ed. 722—*Providence Rubber Co. v. Goodyear*, 9 Wall. 795, 19 L. ed. 568—*Singer v. Walmsley*, 1 Fisher, Pat. Cas. 568, Fed. Cas. No. 12,900.

495. In the construction of the claim of a patentee, the presumption is that, having a just right to cover his whole invention, he intended to do so. *Winans v. Denmead*, 15 How. 330, 14: 717

Cited in George Frost Co. v. Silvermann, 62 Fed. 465—*Albright v. Langfeld*, 131 Fed. 470—*Oehrie v. William H. Horstmann Co.* 131 Fed. 490—*Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co.* 132 Fed. 616.

496. The devising of means for utilizing a vertical double or cross brace cast in one place as a support for a sewing-machine treadle cannot be deemed to have involved such an exercise of the inventive faculty as to make the Cramer patent, No. 271,426, for a new and improved sewing-machine treadle, a primary one, and entitle the patentee to a liberal construction of his claim, where, at the time of his alleged invention, a vertical cross brace and a lower cross brace or tie rod were common adjuncts of sewing machines, and it was customary to support the lower cross rod or brace in the web of the legs of sewing machines, and to utilize the legs as bearings, and the employment of solid castings as bearings or supports for oscillating shafts where a fixed alignment was essential was a well-known method of machine construction. *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 24 Sup. Ct. Rep. 291, 48: 437

Undescribed uses.

497-8. A patentee who is the first to make an invention is entitled to his claim for all uses and advantages which belong to it, whether he perceives and states them all or not. *Stow v. Chicago*, 104 U. S. 547, 26: 816

Tucker v. Spalding, 13 Wall. 453, 20: 515
Cited in Brown v. District of Columbia, 130 U. S. 100, 32 L. ed. 868, 9 Sup. Ct. Rep. 437—*Lovell Mfg. Co. v. Cary*, 147 U. S. 634, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*Miller v. Eagle Mfg. Co.* 151 U. S. 201, 38 L. ed. 120, 14 Sup. Ct. Rep. 310—*Appleton Mfg. Co. v. Star Mfg. Co.* 9 C. C. A. 46, 18 U. S. App. 492, 60 Fed. 415—*Galt v. Parlin & O. Co.* 9 C. C. A. 54, 18 U. S. App. 518, 60 Fed. 422—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 203, 21 U. S. App. 244, 61 Fed. 966—*Thomson Meter Co. v. National Meter Co.* 12 C. C. A. 673, 25 U. S. App. 275, 65 Fed. 429—*Thomson-Houston Electric Co. v. Elmira & H. R. Co.* 18 C. C. A. 156, 38 U. S. App. 55, 71 Fed. 406—*Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co.* 19 C. C. A. 20, 37 U. S. App. 555, 72 Fed. 75—*Eames v. Worcester Polytechnic Institute*, 60 C. C. A. 41, 123 Fed. 71—*H. v. Hodge*, 12 App. D. C. 531—*Ruete v. Ellwell*, 15 App. D. C. 28—*Rosell v. Allen*, 16 App. D. C. 567—*Brown v. Texas Cactus Hedge Co.* 64 Tex. 399.

Enlargement of claim by specification.

499. The scope of letters patent should be limited to the invention covered by the claim; and, though the claim may be illustrated, it cannot be enlarged, by the language in other parts of the specification. *Lehigh Valley R. Co. v. Mellon*, 104 U. S. 112, 26: 639

Western Electric Mfg. Co. v. Ansonia Brass & Copper Co. 114 U. S. 447, 5 Sup. Ct. Rep. 941, 29: 210
Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 6 Sup. Ct. Rep. 846, 29: 952
Distinguished in La Rue v. Western Electric Co. 28 Fed. 88.

Cited in Western Electric Mfg. Co. v. Ansonia Brass & Copper Co. 114 U. S. 453, 29 L. ed. 212, 5 Sup. Ct. Rep. 941—*Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 559, 29 L. ed. 953, 6 Sup. Ct. Rep. 846—*McClain v.*

Ortmayer, 141 U. S. 424, 35 L. ed. 802, 12 Sup. Ct. Rep. 76—Hill v. Sawyer, 31 Fed. 284—Brush Electric Co. v. Ft. Wayne Electric Light Co. 40 Fed. 835—Wollensak v. Sargent, 41 Fed. 55—Johnson Co. v. Pacific Rolling Mills Co. 47 Fed. 589—Smead Warming & Ventilating Co. v. Fuller & W. Co. 6 C. C. A. 486, 14 U. S. App. 578, 57 Fed. 631—H. W. Johns. Mfg. Co. v. Robertson, 60 Fed. 906—Gerard v. Diebold Safe & Lock Co. 9 C. C. A. 453, 23 U. S. App. 341, 61 Fed. 211—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 200, 21 U. S. App. 244, 61 Fed. 984—Westinghouse v. Edison Electric Light Co. 11 C. C. A. 346, 28 U. S. App. 1, 63 Fed. 592—Western Teleph. Constr. Co. v. Stromberg, 66 Fed. 552—Craig v. Michigan Lubricator Co. 72 Fed. 176—McBride v. Kingman, 72 Fed. 911—Seabury v. Johnson, 76 Fed. 459—Standard Elevator Co. v. Crane Elevator Co. 22 C. C. A. 578, 46 U. S. App. 411, 76 Fed. 796—Tiemann v. Kraatz, 29 C. C. A. 258, 56 U. S. App. 545, 85 Fed. 438—Bowers v. Pacific Coast Dredging & Reclamation Co. 99 Fed. 747—Stokes Bros. Mfg. Co. v. Heller, 41 C. C. A. 336, 101 Fed. 267—Santa Clara Valley Mill & Lumber Co. v. Prescott, 42 C. C. A. 482, 102 Fed. 506—Pelfer v. Brown, 106 Fed. 940—American Bell Teleph. Co. v. National Tel. Mfg. Co. 109 Fed. 997—Schreiber & C. Mfg. Co. v. Adams Co. 54 C. C. A. 132, 117 Fed. 834—Schilling v. Cranford, 4 Mackey, 469.

Limitation of specification by claim.

500. Where the actual invention described in the specification is larger than the claims of the patent, the patentees in a suit for infringement must be limited to what is specified in the claims. *Bates v. Coe*, 98 U. S. 31, 25: 68

Cited in Sessions v. Romadka, 21 Fed. 131—Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 32—Holloway v. Dow, 54 Fed. 517—Barnes Automatic Sprinkler Co. v. Walworth Mfg. Co. 9 C. C. A. 155, 18 U. S. App. 538, 60 Fed. 606—Rhodes v. Lincoln Press-Drill Co. 64 Fed. 219—Diamond Match Co. v. Ohio Match Co. 80 Fed. 118—Von Schmidt v. Bowers, 25 C. C. A. 342, 48 U. S. App. 120, 80 Fed. 140—Palmer Pneumatic Tire Co. v. Lozier, 84 Fed. 668—Kelly v. Clow, 32 C. C. A. 212, 60 U. S. App. 338, 89 Fed. 304—Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 986—Chisholm v. Johnson, 106 Fed. 213—National News Board Co. v. Elkhart Egg Case Co. 115 Fed. 329—Chisholm, B. & W. Co. v. Anderson Foundry & Mach. Works, 115 Fed. 742.

Limitation by specification or description.

Claim for Combination, see *infra*, 539.
See also *supra*, 499; *infra*, 885, 1092.

501. Where the patentee was not a pioneer, and many patents had been issued for improvements similar to his, the patentee is only entitled, at the most, to the precise devices mentioned in the claims. *Boyd v. Janesville Hay Tool Co.* 158 U. S. 260, 15 Sup. Ct. Rep. 837, 39: 973

Cited in Roemer v. Peddle, 71 Fed. 409—Craig v. Michigan Lubricator Co. 72 Fed. 177—St. Louis Car-Coupler Co. v. National Malleable Castings Co. 81 Fed. 725—Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. 86 Fed. 323—Taber Bas-Relief Photograph Co. v. Marceau, 87 Fed. 872—William Mann Co. v. Hoffmann, 43 C.

C. A. 523, 104 Fed. 254—Dowagiac Mfg. Co. v. Brennan, 118 Fed. 147.

502. The patentee of an automatic device for raising a stove shelf upright, and inclosing it within the door when the latter is closed, and letting it down to a horizontal position when the door is opened, by a cam or arm, is only entitled to the precise device which he has described and claimed in his patent; cam movements, and others of like character producing simultaneous operations, according to the needs of the case, being in such common use that but little invention is required to adapt them to a particular case. *Bridge v. Excelsior Mfg. Co.* 105 U. S. 618, 26: 1190

503. The reduction of boards to a uniform thickness is not included in a claim for a machine for planing, tonguing, and grooving plank or boards, within the act of 1835, § 6, requiring the inventor to state the principle and its application so as to distinguish it from other inventions, "and shall particularly specify and point out the part," improvement, and combination, which he claims as his own invention or discovery. *Brooks v. Fiske*, 15 How. 212, 14: 665
Cited in Union Steam-Pump Co. v. Battle Creek Steam-Pump Co. 43 C. C. A. 566, 104 Fed. 343.

504. The claims for a patent on an article which is but one in a series of improvements of the same idea, must be restricted to the precise form and arrangement described in the specifications. *Bragg v. Fitch*, 121 U. S. 478, 7 Sup. Ct. Rep. 978, 30: 1008
Cited in Crawford v. Heysinger, 123 U. S. 607, 31 L. ed. 274, 8 Sup. Ct. Rep. 399—Roemer v. Peddle, 132 U. S. 317, 33 L. ed. 383, 10 Sup. Ct. Rep. 98—Knapp v. Moss, 150 U. S. 228, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—Hill v. Sawyer, 31 Fed. 284—Brahn v. Ramapo Iron Works, 35 Fed. 65—Schmid v. Scovill Mfg. Co. 37 Fed. 348—Smith v. Thomson, 38 Fed. 607—Sackett v. Smith, 42 Fed. 851—Heine Safety Boiler Co. v. Anheuser-Busch Brewing Assn. 43 Fed. 790—Dederick v. Gardner, 50 Fed. 100—J. L. Mott Iron Works v. Standard Mfg. Co. 51 Fed. 84—Fox v. Perkins, 3 C. C. A. 40, 6 U. S. App. 200, 52 Fed. 214—J. L. Mott Iron Works v. Standard Mfg. Co. 4 C. C. A. 34, 3 U. S. App. 386, 53 Fed. 824—Lamson Cash B. Co. v. Godehard, 8 C. C. A. 269, 19 U. S. App. 380, 59 Fed. 780—Frank v. Wm. P. Mockridge Mfg. Co. 65 Fed. 524—Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co. 14 C. C. A. 649, 33 U. S. App. 188, 67 Fed. 793—Davis v. Parkman, 18 C. C. A. 400, 33 U. S. App. 340, 71 Fed. 983—J. G. Brill Co. v. Wilson, 75 Fed. 1004—De Beaumont v. Williams, 26 C. C. A. 300, 39 U. S. App. 697, 80 Fed. 996—St. Louis Car-Coupler Co. v. National Malleable Castings Co. 81 Fed. 724—Truman v. Holmes, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—St. Louis Car-Coupler Co. v. National Malleable Castings Co. 31 C. C. A. 281, 57 U. S. App. 310, 87 Fed. 901—Stokes Bros. Mfg. Co. v. Heller, 41 C. C. A. 338, 101 Fed. 269—National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. 45 C. C. A. 565, 106 Fed. 714.

505. A suspending device in a fruit dryer, attached to the lowermost tray, where the

outer wall of the dryer is made up of the frames of the several trays, must be limited to the mechanism described and shown, where movable trays, the outer walls of which constituted the drying chambers, had been previously used in combination with apparatus to raise a tray or rack with those above it. *Grier v. Wilt*, 120 U. S. 412, 7 Sup. Ct. Rep. 718, 30: 712
Cited in Hill v. Sawyer, 31 Fed. 286—*Sackett v. Smith*, 42 Fed. 853.

505a. The Royer patent, 77,920, for a machine for treating hides, which is described as a vertical shaft within a vertical cylindrical crib, with a weight aided by pressure to crowd down the hides, being carefully restricted by the claim to a shaft and crib in a vertical position and the use of a weight aided by pressure,—cannot be construed to cover a machine with a horizontal crib having pressure applied at the ends by false heads by weights, spring, and a crank. *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. Rep. 199, 39: 263

505b. Patent 140,250, for an improvement in ore stamp feeders, the specification of which requires the feeding cylinder to have chambers or depressions, does not cover a cylinder with a smooth surface not formed into chambers. *Hendy v. Golden State & Miner's Iron Works*, 127 U. S. 370, 8 Sup. Ct. Rep. 1275, 32: 207
Cited in McCormick Harvesting Mach. Co. v. C. Aultman & Co. 58 Fed. 780—*Jonsen Can-Filling Mach. Co. v. Norton*, 14 C. C. A. 389, 29 U. S. App. 248, 67 Fed. 241—*Muller v. Lodge & D. Mach. Tool Co.* 69 Fed. 740—*Muller v. Lodge & D. Mach. Tool Co.* 23 C. C. A. 366, 47 U. S. App. 189, 77 Fed. 629—*American Tobacco Co. v. Streat*, 28 C. C. A. 22, 42 U. S. App. 617, 83 Fed. 704—*Ross-Moyer Mfg. Co. v. Randall*, 43 C. C. A. 582, 104 Fed. 359—*National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 45 C. C. A. 565, 106 Fed. 715.

505c. In the description of a patent for a seed-planting machine, the framework is not to be considered a part of the patent, because the description of it is included, where the fair meaning of the language, taken in connection with the whole specification, shows that the inventor was evidently attempting to show how simple and cheaply the thing could be made, and not to confine it to that specific form. *Brown v. Guild (The Corn-Planter Patent)* 23 Wall. 181, 23: 161

Cited in Fond du Lac County v. May, 137 U. S. 406, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 558, 42 L. ed. 1144, 18 Sup. Ct. Rep. 707—*Hobbs v. Beach*, 180 U. S. 400, 45 L. ed. 595, 21 Sup. Ct. Rep. 409—*Atwood v. Portland Co.* 5 Bann. & Ard. 538, 10 Fed. 287—*Illinois Watch Co. v. Robbins*, 3 C. C. A. 49, 9 U. S. App. 55, 52 Fed. 221—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 202, 21 U. S. App. 244, 61 Fed. 966—*Columbus Watch Co. v. Robbins*, 12 C. C. A. 185, 22 U. S. App. 601, 64 Fed. 395—*Craig v. Michigan Lubricator Co.* 72 Fed. 176—*Electric Smelting & Aluminum Co. v. Carborundum Co.* 42 C. C. A. 548, 102 Fed. 629—*Stillwell-Bierce & S. V.*

Co. v. Eufaula Cotton Oil Co. 54 C. C. A. 588, 117 Fed. 414.

505d. In a patent for improvements in looms, which describes a combination of "the lay and its ridged shuttle-box, the pivoted wire trough, the reciprocating driving-slide, and the latch moving thereon, the latter being operated by the wire box, etc." the reciprocating driving-slide on which the latch moves, and which rides on the trough, and which is the only slide used in one modification of the invention, must be taken to be the one intended, although another reciprocating driving-slide is mentioned in the specification, but which the patentee showed could at any time be dispensed with, and which would render the claim a practical nullity, while the former one is indispensable to the operation of the apparatus. *Webster Loom Co. v. Higgins*, 105 U. S. 580, 26: 1177

505e. A patent for a floating coffer-dam to be used in building piers, whereby the masonry is laid in a tight box, to slide down by its own weight around guide piles, which box is to be extended by sections where the depth of the water requires it,—in which a claim is made for the use of the tube which constitutes the dam, and for encasing and strengthening the pier, covers the use of a tube of one section only, as well as the use of tubes composed of more than one section, where the claim refers to the specification which discloses that the tube is not necessarily constituted by several sections. *Philadelphia, W. & B. R. Co. v. Dubois*, 12 Wall. 47, 20: 265

506. An original patent being destroyed by the burning of the patent office, and the only record of the specifications being a publication in the *Franklin Journal*, the claim is not limited by that publication, because the whole of the specifications are not set forth in it. *Stimpson v. Westchester R. Co.* 4 How. 380, 11: 1020

Reference to specifications or drawings.
 Claim for Combinations, see *infra*, 532, 533.

507. A claim is to be construed in connection with the explanation contained in the specification, and it may be so drawn as in effect to make the specification an essential part of it; but the specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and not for the purpose of changing it. *Howe Mach. Co. v. National Needle Co.* 134 U. S. 388, 10 Sup. Ct. Rep. 570, 33: 963

Cited in Wheaton v. Norton, 17 C. C. A. 456, 44 U. S. App. 118, 70 Fed. 842—*Gibson v. Loewer Sole-Rounder Co.* 24 C. C. A. 614, 39 U. S. App. 554, 79 Fed. 327—*American Sulphite Pulp. Co. v. Howland Falls Pulp Co.* 25 C. C. A. 510, 50 U. S. App. 52, 80 Fed. 405—*American Bell Telephone Co. v. National Tel. Mfg. Co.* 109 Fed. 997—*Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* 56 C. C. A. 549, 120 Fed. 269—*Ruete v. Elwell*, 15 App. D. C. 25.

507a. Although, prior to 1836, the law did not require the specifications to be made a part of the patent, yet it was proper that this be done; and in a case where it was done it is to be considered in construing the patent. *Hogg v. Emerson*, 11 How. 587, 13: 824

507b. The scope of a patent for an improvement, "a description whereof is given in the words of" the inventor "in the schedule hereto annexed, and is made a part of these presents," is to be ascertained from the letters, together with the specifications annexed. *Hogg v. Emerson*, 6 How. 437, 12: 505

Cited in Hogg v. Emerson, 11 How. 606, 13 L. ed. 832—*Le Roy v. Tatham*, 14 How. 179, 14 L. ed. 377—*Forbes v. Barstow Stave Co.* 2 Clif. 392, Fed. Cas. No. 4,923—*Hoffhelms v. Brandt*, 3 Fisher, Pat. Cas. 228, Fed. Cas. No. 6,575—*King v. Gedney*, 1 MacArth. Pat. Cas. 451, Fed. Cas. No. 7,795—*Tinker v. Wilbers Eureka Mower & Reaper Mfg. Co.* 5 Bann. & Ard. 93, 1 Fed. 139—*Burke v. Partidge*, 58 N. H. 351.

507c. Where the claims of a patent immediately follow the description of the invention, it may be construed in connection with the explanations given in the description. *Fuller v. Yentzer*, 94 U. S. 288, 24: 103

Cited in Spencer v. Pennsylvania R. Co. 34 Fed. 901—*Gerard v. Diebold Safe & Lock Co.* 48 Fed. 381—*Stillwell-Bierce & S. V. Co. v. Eufaula Cotton Oil Co.* 54 C. C. A. 588, 117 Fed. 414.

508. The words "substantially as set forth," in a claim for a patent, import into the claim the particulars of the specification. *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136

Cited in Hobbs v. Beach, 180 U. S. 400, 45 L. ed. 595, 21 Sup. Ct. Rep. 400—*Thompson v. Second Ave. Traction Co.* 89 Fed. 322—*Western Electric Co. v. Citizens' Teleph. Co.* 89 Fed. 672—*Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* 90 Fed. 206—*Parsons v. Seelye*, 92 Fed. 1006—*Adams & S. Co. v. E. T. Burrows Co.* 93 Fed. 463—*National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 99 Fed. 774—*Anderson Foundry & Mach. Works v. Potts*, 47 C. C. A. 413, 108 Fed. 383—*Stillwell-Bierce & S. V. Co. v. Eufaula Cotton Oil Co.* 54 C. C. A. 588, 117 Fed. 414—*Seller v. Fuller & J. Mfg. Co.* 57 C. C. A. 343, 121 Fed. 89—*Cleveland Foundry Co. v. Detroit Vapor Stove Co.* 131 Fed. 754.

509. The claim of a patent is limited to the description contained in the specifications, when the claim is "as substantially described." *Hailes v. Van Wormer*, 20 Wall. 353, 22: 241

Cited in Stillwell-Bierce & S. V. Co. v. Eufaula Cotton Oil Co. 54 C. C. A. 588, 117 Fed. 414—*Canda v. Michigan Malleable Iron Co.* 61 C. C. A. 198, 124 Fed. 490.

510. The use of the phrase "substantially as shown" limits a claim for patent to the particular kind of article shown in the

drawings and specifications. *Weir v. Mordeu*, 125 U. S. 98, 8 Sup. Ct. Rep. 869, 31: 645

Cited in Muller v. Lodge & D. Mach. Tool Co. 69 Fed. 740—*Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.* 86 Fed. 322.

511. The words "substantially as described," in a claim for a patent, confine such claim to the mechanism described, where the underlying idea is already in public use. *Brown v. Davis*, 116 U. S. 237, 6 Sup. Ct. Rep. 379, 29: 659

Cited in Heine Safety Boiler Co. v. Annheuser-Busch Brewing Asso. 43 Fed. 790—*Craig v. Michigan Lubricator Co.* 72 Fed. 170—*Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.* 86 Fed. 334.

512. The words "substantially as described or set forth," in the claim of a patent, do not limit the patentee to the exact mechanism described in his specifications, or prevent recovery against infringers who have adopted mechanical equivalents for such mechanism. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. Rep. 409, 45: 586

Cited in Diamond Drill & Mach. Co. v. Kelly Bros. 120 Fed. 292—*General Electric Co. v. International Specialty Co.* 61 C. C. A. 332, 126 Fed. 758—*Cleveland Foundry Co. v. Detroit Vapor Stove Co.* 131 Fed. 754—*B. F. Avery & Sons v. J. I. Case Plow Works*, 139 Fed. 882—*Leadam v. Ringgold*, 140 Fed. 616.

512a. The claim of the patentee is not to be taken alone, but in connection with the specification and drawings, as aids in interpreting the claim. *Hogg v. Emerson*, 11 How. 587, 13: 824

Brooks v. Fiske, 15 How. 212, 14: 665
Turrill v. Michigan S. & N. I. R. Co. 1 Wall. 491, 17: 668

Seymour v. Osborne, 11 Wall. 516, 20: 33
Cited in Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 104—*Bates v. Coe*, 98 U. S. 38, 25 L. ed. 71—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 558, 42 L. ed. 1144, 18 Sup. Ct. Rep. 707—*Hobbs v. Beach*, 180 U. S. 400, 45 L. ed. 595, 21 Sup. Ct. Rep. 409—*Berdan Fire-Arms Mfg. Co. v. United States*, 26 Ct. Cl. 72—*Cahill v. Brown*, 3 Bann. & Ard. 584, Fed. Cas. No. 2,291—*Geler v. Goettinger*, 1 Bann. & Ard. 554, Fed. Cas. No. 5,299—*Giant Powder Co. v. California Powder Work*, 3 Sawy. 468, 2 Bann. & Ard. 150, Fed. Cas. No. 5,379—*Gottfried v. Phillip Best Brewing Co.* 5 Bann. & Ard. 36, Fed. Cas. No. 5,633—*Henderson v. Cleveland Co-operative Stove Co.* 2 Bann. & Ard. 608, Fed. Cas. No. 6,351—*Ingels v. Mast*, 6 Fisher, Pat. Cas. 417, Fed. Cas. No. 7,033—*Parham v. American Button-Hole, Over-Seaming & Sewing Mach. Co.* 4 Fisher, Pat. Cas. 472, Fed. Cas. No. 10,713—*Roberts v. Dickey*, 4 Fisher, Pat. Cas. 540, Fed. Cas. No. 11,899—*Westinghouse v. Gardner Air-Brake Co.* 2 Bann. & Ard. 57, Fed. Cas. No. 17,450—*Banker v. Bostwick*, 5 Bann. & Ard. 464, 3 Fed. 517—*Holly v. Vergennes Machine Co.* 18 Blatchf. 330, 4 Fed. 78—*Bortree v. Jackson*, 43 Fed. 138—*Rapid Service Store R. Co. v. Taylor*, 43 Fed. 251—*St. Paul Plow Works v. Deere & Co.* 54 Fed. 502—*Durnham & D. R. Appliance Co. v. Naumkeag Street R. Co.* 57 Fed. 651—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 199, 21 U. S. App. 244, 61 Fed. 963—*Rousseau v. Peck*, 24 C. C. A.

8, 45 U. S. App. 266, 78 Fed. 115—American Sulphite Pulp Co. v. Howland Falls Pulp Co. 25 C. C. A. 510, 50 U. S. App. 52, 80 Fed. 405—Stillwell-Bierce & S.-V. Co. v. Eufaula Cotton Oil Co. 54 C. C. A. 588, 117 Fed. 414—Stephenson v. Allison, 123 Ala. 449, 26 So. 290—Burke v. Partridge, 58 N. H. 351.

512b. The law does not permit enlargements of an original specification, which would interfere with other subsequent inventors; and in construing a patent the original application, drawings, and models will be given particular attention. Chicago & N. W. R. Co. v. Sayles, 97 U. S. 554, 24: 1053

Distinguished in Beach v. American Box Mach. Co. 63 Fed. 604—Hillborn v. Hale & K. Mfg. Co. 18 C. C. A. 575, 28 U. S. App. 525, 69 Fed. 964.

Cited in Hobbs v. Beach, 180 U. S. 396, 45 L. ed. 593, 21 Sup. Ct. Rep. 409—Eagleton Mfg. Co. v. West B. & C. Mfg. Co. 18 Blatchf. 224, 2 Fed. 780—Yale Lock Mfg. Co. v. Scovill Mfg. Co. 18 Blatchf. 257, 3 Fed. 296—Putnam v. Tinkham, 4 Fed. 414—Giant Powder Co. v. California Vigorite Powder Co. 6 Sawy. 523, 4 Fed. 726—McMurry v. Mallory, 4 Hughes, 270, 5 Fed. 598—Flower v. Rayner, 5 Fed. 798—Edgerton v. Furst & B. Mfg. Co. 10 Biss. 407, 9 Fed. 454—Railway Register Mfg. Co. v. Broadway & Seventh Ave. R. Co. 26 Fed. 525—Kittle v. Hall, 29 Fed. 514—Electrical Accumulator Co. v. Julien Electric Co. 38 Fed. 141—Brush Electric Co. v. Julien Electric Co. 41 Fed. 690—Michigan C. R. Co. v. Consolidated Car-Heating Co. 14 C. C. A. 237, 31 U. S. App. 462, 67 Fed. 128—Patent-Button Co. v. Pilcher, 95 Fed. 483—American Bell Teleph. Co. v. National Tel. Mfg. Co. 109 Fed. 1005—Mayo Knitting Mach. & Needle Co. v. Jenckes Mfg. Co. 121 Fed. 123—Kirchberger v. American Acetylene Burner Co. 64 C. C. A. 114, 128 Fed. 606—Cleveland Foundry Co. v. Detroit Vapor Stove Co. 131 Fed. 744—Durham v. Seymour, 6 App. D. C. 94—Re Neill, 11 App. D. C. 588—Hulett v. Long, 15 App. D. C. 291—Bechman v. Wood, 15 App. D. C. 491—Luger v. Browning, 21 App. D. C. 206—Flower v. Rayner, 38 Phila. Leg. Int. 128.

513. A claim of "the design for a carpet substantially as shown" refers to the description as well as to the drawing. Dobson v. Hartford Carpet Co. 114 U. S. 439, 5 Sup. Ct. Rep. 945, 29: 177
Cited in Dobson v. Dornam, 118 U. S. 16, 30 L. ed. 64, 6 Sup. Ct. Rep. 946—Britton v. White Mfg. Co. 61 Fed. 95—Whittall v. Lowell Mfg. Co. 79 Fed. 789.

514. The auxiliary valve must be read into claim 2 of the Westinghouse patent 360,070, as the claim refers to the specifications describing such valve and these, as amended, contain a disclaimer of a device involving a different operation. Westinghouse v. Boyden Power Brake Co. 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136

515. The claim of the Cramer patent, No. 271,426, for the use in combination of a vertical double brace and a sewing-machine treadle provided with trunnions fitted to oscillate in such brace on bearings therein "substantially as specified," must be deemed to cover only elements in combinations hav-

ing substantially the form and constructed substantially as described in the final specifications and shown in the accompanying drawing, where the Patent Office, after twice refusing to allow the patent because of certain prior patents, evidently was led to take favorable action because of the peculiar form of the described bearing when situated in a vertical cross brace, such as was shown in the drawing, with the described accessories. Singer Mfg. Co. v. Cramer, 192 U. S. 265, 24 Sup. Ct. Rep. 291, 48: 437

Cited in Cimlotto Unhairing Co. v. American Fur Ref. Co. 198 U. S. 406, 49 L. ed. 1104, 25 Sup. Ct. Rep. 697—Simmons Mfg. Co. v. Southern Spring Bed Co. 131 Fed. 280—Greene v. Buckley, 68 C. C. A. 81, 135 Fed. 531—Donchlan v. Kingston, 138 Fed. 896—O. H. Jewell Filter Co. v. Jackson, 72 C. C. A. 308, 140 Fed. 344—Western Electric Co. v. Robertson, 73 C. C. A. 595, 142 Fed. 478.

Rejected claims.

Inclusion of Abandoned Claims in Reissued Patent, see *infra*, 700-702.

Effect on Liability for Royalties, see *infra*, 856.

Inclusion of, in Reissued Patent, see *infra*, 627, 637-639.

Withdrawal of Application for Reissue after Decision Rejecting Claims, see *infra*, 643.

Diligence in Renewing Application, see *infra*, 542.

Disclaimer of Part of Claim, see *infra*, XII.

See also *infra*, 529.

516. A claim in a patent must be interpreted with reference to the rejected claims and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office, or disclosed by prior devices. Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. Rep. 81, 37: 1059

Distinguished in Hillborn v. Hale & K. Mfg. Co. 16 C. C. A. 571, 28 U. S. App. 525, 69 Fed. 960.

Cited in Lehigh Valley R. Co. v. Kearney, 158 U. S. 469, 39 L. ed. 1058, 15 Sup. Ct. Rep. 871—Hubbell v. United States, 179 U. S. 80, 45 L. ed. 98, 21 Sup. Ct. Rep. 24—Electric Gaslighting Co. v. Fuller, 8 C. C. A. 443, 21 U. S. App. 3, 59 Fed. 1004—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—Rhodes v. Lincoln Press-Drill Co. 64 Fed. 220—Frank v. Wm. P. Mockridge Mfg. Co. 65 Fed. 522—Cramer v. Fry, 63 Fed. 211—Craig v. Michigan Lubricator Co. 72 Fed. 177—McBride v. Kingman, 72 Fed. 912—Griffith v. Shaw, 89 Fed. 318—Noonan v. Chester Park Athletic Club Co. 39 C. C. A. 429, 99 Fed. 93—Reineke v. Dixon-Woods Co. 42 C. C. A. 392, 102 Fed. 353—Durham v. Seymour, 6 App. D. C. 102—Fenton Metallic Co. v. Office Specialty Mfg. Co. 12 App. D. C. 218—Re Smith, 14 App. D. C. 184—Davis v. Parkman, 18 C. C. A. 400, 33 U. S. App. 340, 71 Fed. 963—Putnam v. Brooker, 72 Fed. 273—Missouri Lamp & Mfg. Co. v. Stempel, 75 Fed. 588—Jan v. Mackenzie, 26 C. C. A. 127, 48 U. S. App. 304, 80 Fed. 734—Steel-Clad Bath Co. v. Davison, 26 C. C. A. 220, 51 U. S. App. 296, 80 Fed. 906—

Jeffrey Mfg. Co. v. Independent Electric Co. 27 C. C. A. 522, 54 U. S. App. 348, 83 Fed. 201—American Tobacco Co. v. Streat, 28 C. C. A. 22, 42 U. S. App. 617, 83 Fed. 704—Walder v. Ulrich, 83 Fed. 481—Brazel v. Eau Claire Mill-Supply Co. 89 Fed. 589—National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. 99 Fed. 764—Stokes Bros. Mfg. Co. v. Heller, 41 C. C. A. 338, 101 Fed. 269—Peifer v. Brown & Co. 106 Fed. 940—National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co. 45 C. C. A. 585, 106 Fed. 714.

517. The claim for a patent, as allowed, must be read and interpreted with reference to a claim that has been rejected and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices. *Hubbell v. United States*, 179 U. S. 77, 86, 21 Sup. Ct. Rep. 24, 28, 45: 95, 100

Cited in *Computing Scale Co. v. Automatic Scale Co.* 204 U. S. 617, 51 L. ed. 650, 27 Sup. Ct. Rep. 307—*Victor Talking Mach. Co. v. American Graphophone Co.* 145 Fed. 191—*Welsbach Light Co. v. Cremo Incandescent Light Co.* 145 Fed. 523—*Williams Calk Co. v. Kemmerer*, 76 C. C. A. 468, 145 Fed. 930—*Lane v. Levi*, 21 App. D. C. 176—*Computing Scale Co. v. Automatic Scale Co.* 26 App. D. C. 249.

518. The doctrine of equivalents, or the liberal construction allowed to pioneer inventions, cannot be invoked in behalf of a patentee whose claim must be strictly limited in order to save it from anticipation by previous patents, so as to broaden the claim and practically make it cover what was rejected by the Patent Office. *Gordon v. Warder*, 150 U. S. 47, 14 Sup. Ct. Rep. 32, 37: 992
Cited in *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 199, 21 U. S. App. 244, 61 Fed. 963.

519. Where a patentee has modified his claim in obedience to the requirements of the Patent Office, he cannot have for it an extended construction which has been rejected by the Patent Office. *Phoenix Caster Co. v. Spiegel*, 133 U. S. 360, 10 Sup. Ct. Rep. 409, 33: 663

Cited in *Royer v. Coupe*, 146 U. S. 532, 36 L. ed. 1077, 13 Sup. Ct. Rep. 166—*Coll v. Seneca*, 56 Fed. 156—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—*McBride v. Kingman*, 72 Fed. 912—*Olmsted v. A. H. Andrews & Co.* 23 C. C. A. 492, 46 U. S. App. 608, 77 Fed. 839—*United States Glass Co. v. Atlas Glass Co.* 88 Fed. 500.

520. Where a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it. *Royer v. Coupe*, 146 U. S. 524, 13 Sup. Ct. Rep. 166, 36: 1073

Roemer v. Peddie, 132 U. S. 313, 10 Sup. Ct. Rep. 98, 33: 382
Cited in *Corbin Cabinet Lock Co. v. Eagle Lock*

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Co. 150 U. S. 40, 37 L. ed. 990, 14 Sup. Ct. Rep. 28—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 582, 42 L. ed. 1152, 18 Sup. Ct. Rep. 707—*J. L. Mott Iron Works v. Standard Mfg. Co.* 51 Fed. 84—*Fox v. Perkins*, 3 C. C. A. 36, 6 U. S. App. 200, 52 Fed. 208—*Merritt v. Middleton*, 55 Fed. 977—*Vulcan Iron Works v. Smith*, 10 C. C. A. 498, 15 U. S. App. 577, 62 Fed. 450—*Smith v. Macbeth*, 64 Fed. 798—*Frank v. Wm. P. Mockridge Mfg. Co.* 65 Fed. 524—*Kennedy v. Solar Ref. Co.* 69 Fed. 719—*Hillborn v. Hale & K. Mfg. Co.* 16 C. C. A. 571, 28 U. S. App. 525, 69 Fed. 960—*Carter Mach. Co. v. Hanes*, 70 Fed. 868—*Craig v. Michigan Lubricator Co.* 72 Fed. 176—*McBride v. Kingman*, 72 Fed. 912—*Missouri Lamp & Mfg. Co. v. Stempel*, 75 Fed. 588—*Olmsted v. A. H. Andrews & Co.* 23 C. C. A. 492, 46 U. S. App. 608, 77 Fed. 839—*Truman v. Holmes*, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—*United States Glass Co. v. Atlas Glass Co.* 88 Fed. 500—*Griffith v. Shaw*, 89 Fed. 318—*Anthony v. Gennert*, 99 Fed. 100—*National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 99 Fed. 762—*Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.* 41 C. C. A. 364, 101 Fed. 295—*Lepper v. Randall*, 105 Fed. 977—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 584, 106 Fed. 714—*Durham v. Seymour*, 6 App. D. C. 90.

521. Acquiescence in the rejection of a claim by the Patent Office restricts the patentee to the claim in the form in which it was finally allowed. *McCarty v. Lehigh Valley R. Co.* 160 U. S. 110, 16 Sup. Ct. Rep. 240, 40: 358

Cited in *Griffith v. Shaw*, 89 Fed. 317—*Westinghouse Electric & Mfg. Co. v. Cutler Electric & Mfg. Co.* 136 Fed. 221.

522. Where the patentee has once presented his claim in a particular form, and the Patent Office has rejected it, and he has acquiesced in such rejection, he is estopped to claim the benefit of his rejected claim, or such a construction of his claim in the subsequently issued patent as would be equivalent thereto. The principle is the same if the rejected claim be narrower than the one allowed. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 14 Sup. Ct. Rep. 627, 38: 500

Distinguished in *Jackson v. Birmingham Brass Co.* 25 C. C. A. 201, 51 U. S. App. 22, 79 Fed. 806—*Hillborn v. Hale & K. Mfg. Co.* 16 C. C. A. 571, 28 U. S. App. 525, 69 Fed. 960.

Cited in *Hubbell v. United States*, 170 U. S. 84, 45 L. ed. 90, 21 Sup. Ct. Rep. 24—*Johnson v. Olsen*, 61 Fed. 833—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 968—*Walter A. Wood Mowing & Reaping Mach. Co. v. William Deering & Co.* 66 Fed. 550—*Craig v. Michigan Lubricator Co.* 72 Fed. 176—*Thomas v. Rocker Spring Co.* 23 C. C. A. 221, 47 U. S. App. 125, 77 Fed. 431—*Palmer Pneumatic Tire Co. v. Lozier*, 84 Fed. 606—*Irwin v. Hasselman*, 86 Fed. 644—*Truman v. Carvill Mfg. Co.* 87 Fed. 472—*United States Glass Co. v. Atlas Glass Co.* 88 Fed. 500—*Kelly v. Clow*, 32 C. C. A. 214, 60 U. S. App. 338, 89 Fed. 306—*Michaels v. Larkin*, 91 Fed. 780—*Irwin v. Hasselman*, 38 C. C. A. 591, 97 Fed. 968—

Reineke v. Dixon-Woods Co. 42 C. C. A. 392, 102 Fed. 353—Lepper v. Randall, 105 Fed. 977—National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co. 45 C. C. A. 565, 106 Fed. 714—Peifer v. Brown, 106 Fed. 940—Safety Oiler Co. v. Scovill Mfg. Co. 110 Fed. 205.

523. A patentee is estopped from claiming the benefit of his rejected claim, or any such construction of his present claim as would be equivalent thereto. *Leggett v. Avery*, 101 U. S. 256, 25: 865

Distinguished in Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 204, 21 U. S. App. 244, 61 Fed. 968.

Cited in Crawford v. Heysinger, 123 U. S. 606, 31 L. ed. 274, 8 Sup. Ct. Rep. 399—Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U. S. 429, 38 L. ed. 502, 14 Sup. Ct. Rep. 627—Palmer Pneumatic Tire Co. v. Losler, 84 Fed. 666—Rhodes v. Lincoln Press-Drill Co. 64 Fed. 220.

523a. A patentee cannot insist upon a construction of his patent which will include what he was expressly required to abandon and disavow as a condition of the grant. *Sutter v. Robinson*, 119 U. S. 531, 7 Sup. Ct. Rep. 376, 30: 492

Cited in Crawford v. Heysinger, 123 U. S. 607, 31 L. ed. 274, 8 Sup. Ct. Rep. 399—Roemer v. Peddie, 132 U. S. 317, 33 L. ed. 383, 10 Sup. Ct. Rep. 98—Electric Gas-Lighting Co. v. Boston Electric Co. 139 U. S. 500, 35 L. ed. 260, 11 Sup. Ct. Rep. 586—McClain v. Ortmyer, 141 U. S. 425, 35 L. ed. 802, 12 Sup. Ct. Rep. 76—Knapp v. Morris, 150 U. S. 225, 37 L. ed. 1061, 14 Sup. Ct. Rep. 81—Electrical Accumulator Co. v. Julien Electric Co. 38 Fed. 122—Smith v. Pittsburgh Gas Co. 42 Fed. 150—National Progress B. Mach. Co. v. John R. Williams Co. 12 L.E.A. 110, 44 Fed. 194—Fox v. Perkins, 3 C. C. A. 36, 6 U. S. App. 200, 52 Fed. 208—Parry Mfg. Co. v. Hitchcock Mfg. Co. 58 Fed. 404—McCormick Harvesting Mach. Co. v. C. Aultman & Co. 58 Fed. 778—Reece Button-Hole Mach. Co. v. Glove Button-Hole Mach. Co. 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—Walter A. Wood Mowing & Reaping Mach. Co. v. Deering, 66 Fed. 550—McCormick Harvesting Mach. Co. v. C. Aultman & Co. 16 C. C. A. 287, 37 U. S. App. 299, 69 Fed. 399—Missouri Lamp & Mfg. Co. v. Stempe, 75 Fed. 588—Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 128, 54 U. S. App. 591, 85 Fed. 225—Truman v. Holmes, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—Brill v. St. Louis Car Co. 33 C. C. A. 216, 62 U. S. App. 276, 90 Fed. 669—Cimioti Unhairing Co. v. Bowsky, 95 Fed. 477—Simplex Railway Appliance Co. v. Wands, 53 C. C. A. 175, 115 Fed. 521—Schreiber & C. Mfg. Co. v. Adams Co. 54 C. C. A. 132, 117 Fed. 834.

524. Where a patentee, after the rejection of his application, inserted in his specification a statement that his invention related to a new construction of lock-case, whereby it was made "to dispense with an extended bottom plate," he cannot contend that his specifications and claims are to be interpreted so as to cover a construction which has an extended bottom plate. *Roemer v. Peddie*, 132 U. S. 313, 10 Sup. Ct. Rep. 98, 33: 382

Cited in Phenix Caster Co. v. Spiegel, 133 U. S. 368, 33 L. ed. 686, 10 Sup. Ct. Rep. 409—

Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 379, 34 L. ed. 183, 10 Sup. Ct. Rep. 884—*Dobson v. Lees*, 137 U. S. 265, 34 L. ed. 655, 11 Sup. Ct. Rep. 71—*Royer v. Coupe*, 146 U. S. 532, 36 L. ed. 1077, 13 Sup. Ct. Rep. 166—*Corbin Cabinet Lock Co. v. Eagle Lock Co.* 150 U. S. 40, 37 L. ed. 990, 14 Sup. Ct. Rep. 28—*J. L. Mott Iron Works v. Standard Mfg. Co.* 4 C. C. A. 31, 3 U. S. App. 386, 53 Fed. 821—*Coll v. Seneca*, 56 Fed. 156—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—*Truman v. Carvill Mfg. Co.* 87 Fed. 472.

525. The Kearney and Tronson reissued patent, 5,184, for an improvement in spark-arresters, which, after rejection of a claim for a combination of a spark-arrester with the smokehead of a locomotive, was made to claim a grate with longitudinal bars, which grating was described in no other form than that of a series of long vertical bars,—must be limited to that form of grating. *Lehigh Valley R. Co. v. Kearney*, 158 U. S. 461, 15 Sup. Ct. Rep. 871, 39: 1055
Cited in Walder v. Ulrich, 83 Fed. 481—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 565, 106 Fed. 714.

Part of machine as design.

526. A second claim in letters patent, which is an indispensable part of the machine, cannot be considered a design merely so as to render the patent void. *Clark v. Bousfield*, 10 Wall. 133, 19: 862

Combinations.

Identity of Reissued Patent for, see *infra*, 672-679.

See also *supra*, 515.

527. In a suit on a patent, a claim must be limited, where it is a combination of parts, to a combination of all the elements included in the claim as necessarily constituting that combination. *Phoenix Caster Co. v. Spiegel*, 133 U. S. 360, 10 Sup. Ct. Rep. 409, 33: 663

Cited in Consolidated Roller Mill Co. v. Walker, 138 U. S. 133, 34 L. ed. 923, 11 Sup. Ct. Rep. 292—*Consolidated Roller-Mill Co. v. Walker*, 43 Fed. 579—*Strobridge v. L. H. Smith Wooden-Ware Co.* 46 Fed. 924—*Johnson Co. v. Tidewater Steel Works*, 50 Fed. 95—*Fox v. Perkins*, 3 C. C. A. 41, 6 U. S. App. 200, 52 Fed. 214—*Lamson Cash R. Co. v. Godehard*, 8 C. C. A. 269, 19 U. S. App. 360, 59 Fed. 780—*Wells v. Curtis*, 13 C. C. A. 503, 31 U. S. App. 123, 66 Fed. 326—*St. Louis Car-Coupler Co. v. National Malleable Castings Co.* 81 Fed. 724.

528. Where the patent is for a combination, it cannot be permitted to read into it any delicate adjusting apparatus not originally included in the claim. *Howe Mach. Co. v. National Needle Co.* 134 U. S. 388, 10 Sup. Ct. Rep. 570, 33: 963
Cited in Stutz v. Robson, 54 Fed. 508.

529. Where an applicant for a patent to cover a new combination is compelled, by the rejection of his application by the Patent Office, to narrow his claim by the introduction of a new element, he cannot, after the issue of the patent, broaden his claim by

dropping such element. *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. Rep. 493, 29: 723
Distinguished in *Wirt v. Brown*, 32 Fed. 286.

Cited in *Sutter v. Robinson*, 119 U. S. 541, 30 L. ed. 496, 7 Sup. Ct. Rep. 376—*Crawford v. Heysinger*, 123 U. S. 607, 31 L. ed. 274, 8 Sup. Ct. Rep. 399—*Hendy v. Golden State & Miner's Iron Works*, 127 U. S. 376, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—*Roemer v. Peddle*, 132 U. S. 317, 33 L. ed. 383, 10 Sup. Ct. Rep. 98—*Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 379, 34 L. ed. 183, 10 Sup. Ct. Rep. 884—*Dobson v. Lees*, 137 U. S. 265, 34 L. ed. 655, 11 Sup. Ct. Rep. 71—*Corbin Cabinet Lock Co. v. Eagle Lock Co.* 150 U. S. 40, 37 L. ed. 990, 14 Sup. Ct. Rep. 28—*Knapp v. Morris*, 150 U. S. 225, 37 L. ed. 1061, 14 Sup. Ct. Rep. 81—*Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 162 U. S. 429, 38 L. ed. 502, 14 Sup. Ct. Rep. 627—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 582, 42 L. ed. 1152, 18 Sup. Ct. Rep. 707—*Hubbell v. United States*, 179 U. S. 80, 45 L. ed. 98, 21 Sup. Ct. Rep. 24—*Dobson v. Lees*, 30 Fed. 627—*Yale Lock Mfg. Co. v. New Haven Sav. Bank*, 32 Fed. 171—*Electrical Accumulator Co. v. Julien Electric Co.* 38 Fed. 122—*Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 42 Fed. 906—*Smith v. Pittsburgh Gas Co.* 42 Fed. 150—*National Progress Bunching-Mach. Co. v. J. R. Williams Co.* 12 L.R.A. 110, 44 Fed. 194—*Lane v. Park*, 49 Fed. 458—*Fox v. Perkins*, 3 C. C. A. 36, 6 U. S. App. 200, 52 Fed. 208—*Coll v. Seneca*, 56 Fed. 156—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 58 Fed. 778—*Johnson v. Olsen*, 61 Fed. 833—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—*Walter A. Wood Mowing & Reaping Mach. Co. v. William Deering & Co.* 66 Fed. 550—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 287, 37 U. S. App. 299, 69 Fed. 399—*Wheaton v. Norton*, 17 C. C. A. 456, 44 U. S. App. 118, 70 Fed. 842—*Engle Sanitary & Cremation Co. v. Elwood*, 73 Fed. 485—*Missouri Lamp & Mfg. Co. v. Stempel*, 75 Fed. 588—*Thomas v. Rocker Spring Co.* 23 C. C. A. 221, 47 U. S. App. 125, 77 Fed. 431—*Frederick R. Stearns & Co. v. Russell*, 29 C. C. A. 128, 54 U. S. App. 591, 85 Fed. 225—*Truman v. Holmes*, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—*Brill v. St. Louis Car Co.* 33 C. C. A. 216, 62 U. S. App. 276, 90 Fed. 669—*Safety Oilier Co. v. Scovill Mfg. Co.* 110 Fed. 205—*Rembert Roller Compress Co. v. American Cotton Co.* 64 C. C. A. 38, 129 Fed. 368—*Dobson v. Lees*, 18 Phila. 552.

530. The claims of a patent for a combination of parts found in reversed position in a former device are construed as covering only the precise combinations described. *Crawford v. Heysinger*, 123 U. S. 589, 8 Sup. Ct. Rep. 399, 31: 269

531. Where a patentee claims as his invention a certain combination, or device, or part of a machine, this is a declaration that this is all that the patentee regards as new. *Brown v. Guild* (The Corn-planter Patent) 23 Wall. 181, 23: 161
Distinguished in *Kerosene Lamp Heater Co. v. Littell*, 3 Bann. & Ard. 318, Fed. Cas. No. 7,724.

Cited in *Rowell v. Lindsay*, 113 U. S. 101, 28 L. ed. 907, 5 Sup. Ct. Rep. 507—*Christman*

v. Rumsey, 17 Blatchf. 155, Fed. Cas. No. 2,704—*Herring v. Nelson*, 14 Blatchf. 304, Fed. Cas. No. 6,424—*Rowell v. Lindsay*, 10 Blas. 221, 6 Fed. 294—*Westinghouse v. Edison Electric Light Co.* 11 C. C. A. 346, 28 U. S. App. 1, 63 Fed. 592—*Wells v. Curtis*, 13 C. C. A. 498, 31 U. S. App. 123, 66 Fed. 321—*Cleveland Faucet Co. v. Vulcan Brass Co.* 72 Fed. 508—*Carter Mach. Co. v. Hanes*, 24 C. C. A. 129, 42 U. S. App. 314, 78 Fed. 347—*St. Louis Car-Coupler Co. v. National Malleable Castings Co.* 31 C. C. A. 274, 57 U. S. App. 310, 87 Fed. 894—*Overweight-Counterbalance Elevator Co. v. Improved Order R. M. H. Asso.* 36 C. C. A. 128, 94 Fed. 158—*Thomson-Houston Electric Co. v. Nasau Electric R. Co.* 98 Fed. 106—*United States Peg Wood, Shank & Leather Board Co. v. B. F. Sturtevant Co.* 122 Fed. 479.

532. A clause of a claim, "substantially as and for the purpose set forth," may refer back to the specification for a qualification of the claim and for the several elements composing the combination. *Brown v. Guild* (The Corn-planter Patent) 23 Wall. 181, 23: 161

Cited in *Berdan Fire-Arms Mfg. Co. v. United States*, 26 Ct. Cl. 72—*Robbins v. Columbus Watch Co.* 50 Fed. 550—*Celluloid Mfg. Co. v. Arlington Mfg. Co.* 3 C. C. A. 273, 3 U. S. App. 287, 52 Fed. 744.

533. Where the claims sued on are claims for combinations, if the patentee specifies any element as entering into the combination, either directly, by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim, and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality. *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. Rep. 236, 27: 979

Cited in *Sargent v. Hall Safe & Lock Co.* 114 U. S. 86, 29 L. ed. 76, 5 Sup. Ct. Rep. 1021—*Electric Railroad Signal Co. v. Hall Railway Signal Co.* 114 U. S. 98, 29 L. ed. 99, 5 Sup. Ct. Rep. 1069—*Shepard v. Carrigan*, 116 U. S. 597, 29 L. ed. 724, 6 Sup. Ct. Rep. 493—*Falls Rivet Co. v. Wolfe*, 40 Fed. 470—*Wheaton v. Norton*, 17 C. C. A. 455, 44 U. S. App. 118, 70 Fed. 841—*Muller v. Lodge & D. Mach. Tool Co.* 23 C. C. A. 366, 47 U. S. App. 189, 77 Fed. 629—*Norton v. Jensen*, 81 Fed. 502—*Truman v. Holmes*, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—*Griffith v. Shaw*, 89 Fed. 318—*Norton v. Jensen*, 33 C. C. A. 149, 61 U. S. App. 291, 90 Fed. 422—*Reineke v. Dixon-Woods Co.* 42 C. C. A. 392, 102 Fed. 353—*Ross-Moyer Mfg. Co. v. Randall*, 43 C. C. A. 581, 104 Fed. 358—*Moore v. Eggers*, 46 C. C. A. 430, 107 Fed. 496—*Dowaglac Mfg. Co. v. Smith*, 108 Fed. 70—*United Blue-Flame Oil Stove Co. v. Glazier*, 55 C. C. A. 559, 119 Fed. 163—*Levy v. Harris*, 124 Fed. 71—*Rembert Roller Compress Co. v. American Cotton Co.* 64 C. C. A. 39, 129 Fed. 369—*Schillinger v. Cranford*, 4 Mackey, 477—*Lane v. Levi*, 21 App. D. C. 176.

534. A patentee having described a feature

in his specifications and declared it to be an essential feature of his invention, and having made it an element of his claims, is not at liberty to say that it is immaterial, or that a device which dispenses with it is an infringement, though it accomplish the same purpose in, perhaps, an equally effective manner. *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. Rep. 1, 39: 64
Wright v. Beggs, 155 U. S. 54, 15 Sup. Ct. Rep. 4, 39: 67

Cited in *Pittsburg Meter Co. v. Pittsburg Supply Co.* 48 C. C. A. 587, 109 Fed. 651—*American Fur Ref. Co. v. Clmottl Unhairing Mach. Co.* 59 C. C. A. 362, 123 Fed. 874—*Levy v. Harris*, 124 Fed. 71—*Levy v. Harris*, 65 C. C. A. 117, 130 Fed. 715—*Lane v. Levi*, 21 App. D. C. 175.

535. The claim of the Hubbell patent, No. 212,313, for an improvement in metallic cartridges, which specifies as part of the claimant's combination "an anvil over the fulminate provided with two or more openings, whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge,"—makes the relative position of the vents and the walls of the fulminate chamber a material part of the patent, since the examiners had refused to allow the claim until the vents were thus distinctly located. *Hubbell v. United States*, 179 U. S. 77, 86, 21 Sup. Ct. Rep. 24, 28, 45: 95, 100

536. A combination is always an entirety. In such cases the patentee cannot abandon a part and claim the rest. He must stand by his claim as he has made it. *Schumacher v. Cornell*, 96 U. S. 549, 24: 676

537. A finger beam in harvesters, which could rise and fall freely at either end, being well known and in common use, and also its connection with a lever, by which the driver could tip up the front edge arbitrarily and set it at any inclination, but leaving it free to tip up further automatically, the Graham patent, 74,342, for the combination, in a harvester, of the finger-beam with a gearing carriage, by means of a vibratable link, a draft-rod, and two swivel joints, so that the finger beam may both rise and fall at either end and rock forward and backward,—must be limited to the special arrangement set forth therein. *McCormick v. Whitmer* (*McCormick v. Graham*) 129 U. S. 1, 9 Sup. Ct. Rep. 213, 32: 593
Cited in *Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* 86 Fed. 334.

538. Under the Richardson patent, No. 85,963, granted for an improvement in safety valves for steam boilers or generators, a claim for a combination of the surface beyond the seat of the safety valve, with the specified means for regulating or adjusting the area of the passage for the escape of steam, entitles the patentee to cover the combination with the surface of the huddling chamber and the structured orifice of a screw ring, to be moved up or down to obstruct such orifice more or less. *Consolidated Safety-Valve Co. v. Crosby Steam Gage*

& Valve Co. 113 U. S. 157, 5 Sup. Ct. Rep. 513, 28: 93)

Cited in *Westinghouse v. Boyden Power-Brake Co.* 66 Fed. 1003—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 275, 37 U. S. App. 299, 69 Fed. 387—*Consolidated Brake-Shoe Co. v. Chicago, P. & St. L. R. Co.* 69 Fed. 414—*Von Schmidt v. Bowers*, 25 C. C. A. 349, 48 U. S. App. 120, 80 Fed. 148—*Consolidated Safety-Valve Co. v. Ashton Valve Co.* 81 Fed. 385—*Ford v. Bancroft*, 85 Fed. 458—*Bowers v. Pacific Coast Dredging & Reclamation Co.* 99 Fed. 748—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 559, 106 Fed. 708—*Lamson Consol. Store Service Co. v. Hillman*, 59 C. C. A. 517, 123 Fed. 423—*Otis Elevator Co. v. Portland Co.* 62 C. C. A. 345, 127 Fed. 563.

539. The Kitselman patent, No. 356,322, for an improvement in wire-fabric machines cannot be regarded as embodying a pioneer invention of a field machine for weaving wire fencing fabric, in view of prior patents for stationary machines for weaving such fabric and for field machines for making wire-and-picket fence, and of the rejection of the claim for a pioneer field machine by the Patent Office, with the acquiescence of the patentee, who thereupon withdrew such claim; and the claims of such patent must therefore be limited in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements of different construction and arrangement. *Kokomo Fence Mach. Co. v. Kitselman*, 189 U. S. 8, 23 Sup. Ct. Rep. 521, 47: 689

Cited in *Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co.* 60 C. C. A. 537, 125 Fed. 769—*Brown v. Crane Co.* 66 C. C. A. 678, 133 Fed. 237—*Rich v. Baldwin*, 66 C. C. A. 468, 133 Fed. 924—*Kenney Mfg. Co. v. J. L. Mott Iron Works*, 137 Fed. 434.

e. Drawings.

Exhibition of Invention in, see supra, 420.
 Replacing of Drawings after Burning of Records, see infra, 1095.
 Reasonable Time for Restoring Drawings as Question for Jury, see Trial, 162.
 See also infra, 606.

540. Drawings which were burned when the Patent Office was destroyed should be restored within a reasonable time; and it was proper that they should be corrected, if they appeared in some degree erroneous. *Hogg v. Emerson*, 11 How. 587. 13: 824

f. Abandonment; Lack of Diligence.

Abandonment of Invention, see supra, V. g.
 Effect of Abandonment on Right to Patent, see supra, 422-424.
 Rejection of Claims and Acquiescence therein, see supra, 516-525.
 Abandonment of Claim in Reissue, see infra, 659.
 Abandonment of Right to Reissued Patent, see infra, IX. g.

Inclusion of Rejected Claim in Reissued Patent, see *infra*, 627, 637-639.

Inclusion of Abandoned Claims in Reissued Patent, see *infra*, 700-702.

Withdrawal of Application for Purpose of Renewal, see *infra*, 545.

541. An application for an improvement, not including the claim of a pending application, does not operate as an abandonment thereof. *Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co. (Barbed Wire Patent)* 143 U. S. 275, 12 Sup. Ct. Rep. 443, 450, 36: 154

Cited in Electric Mfg. Co. v. Edison Electric Light Co. 10 C. C. A. 109, 18 U. S. App. 637, 61 Fed. 839—*Dalby v. Lynes*, 64 Fed. 379—*Thomson-Houston Electric Co. v. Winchester Ave. R. Co.* 71 Fed. 206—*Thomson-Houston Electric Co. v. Elmira & H. R. Co.* 18 C. C. A. 154, 38 U. S. App. 55, 71 Fed. 404—*Palmer v. John E. Brown Mfg. Co.* 84 Fed. 457—*Covert v. Covert*, 106 Fed. 185.

542. The rule of the Patent Office prior to 1869, that an application not prosecuted within two years after its rejection or withdrawal should be conclusively presumed to have been abandoned, was not a statutory rule, but only a rule of practice, and was not always enforced; and under the act of 1870, giving six months for the renewal of such an application which had been rejected prior to that act, and declaring that abandonment should be considered as a question of fact, that rule is no sufficient explanation of the conduct of an applicant in making no serious attempt to procure a re-examination, or to renew the application, for more than twenty years, during more than sixteen of which the improved device was in common use. *Woodbury Patent Planing-Mach. Co. v. Keith*, 101 U. S. 479, 25: 939 *Distinguished in American Bell Teleph. Co. v. United States*, 15 C. C. A. 578, 33 U. S. App. 236, 68 Fed. 552.

Cited in Western Electric Co. v. Sperry Electric Co. 7 C. C. A. 169, 18 U. S. App. 177, 58 Fed. 191.

543. One must pursue his invention with reasonable diligence until he has perfected it, and must use due diligence in applying for, and pursuing his application for, a patent until he has obtained it. *Gayler v. Wilder*, 10 How. 477, 13: 504 *Cited in Seymour v. Osborne*, 11 Wall. 552, 20 L. ed. 41, 2 Whitman, Pat. Cas. 320—*Ex parte Dedericks*, Fed. Cas. No. 3,734—*Ex parte Hayden*, Fed. Cas. No. 6,250—*Pickering v. McCullough*, 3 Bann. & Ard. 280, Fed. Cas. No. 11,121—*Russell & E. Mfg. Co. v. Mallory*, 10 Blatchf. 149, 5 Fisher, Pat. Cas. 641, Fed. Cas. No. 12,166—*Wickersham v. Singer, MacArth.* Pat. Cas. 685, Fed. Cas. No. 17,610.

Conclusiveness of Commissioner's decision.

Conclusiveness as to Invention, see *infra*, 1134.

Conclusiveness on Question of Fraud, see *infra*, 1140.

544. The decision of the Commissioner in favor of the applicant upon a renewed application for a patent, upon the question

whether the invention has been abandoned, is not conclusive, but may be contested and reviewed in a suit brought for the infringement of the patent. *Woodbury Patent Planing Mach. Co. v. Keith*, 101 U. S. 479, 25: 939

Cited in United States Rifle & Cartridge Co. v. Whitney Arms Co. 118 U. S. 24, 30 L. ed. 53, 6 Sup. Ct. Rep. 950.

g. Renewal of Application.

Abandonment by Delay in, see *supra*, 403.

Second Application as Abandonment, see *supra*, 432.

Renewing Application after Rejection of Claim, see *supra*, 542.

Conclusiveness of Commissioner's Decision on Renewed Application, see *supra*, 544.

Review of Question of Abandonment on, see *infra*, 556.

Continuity of Application as Question for Jury, see *Trial*, 369.

545. If a party withdraws his application for a patent, intending to file a new petition, and does so, the two petitions are to be considered as constituting one continuous application. *Godfrey v. Eames*, 1 Wall. 317, 17: 684

Distinguished in Bevin v. East Hampton Bell Co. 9 Blatchf. 60, 5 Fisher, Pat. Cas. 33, Fed. Cas. No. 1,379—*Lindsay v. Stein*, 20 Blatchf. 377, 10 Fed. 913.

Cited in Smith v. Goodyear Dental Vulcanite Co. 93 U. S. 500, 23 L. ed. 956—*Colgate v. Western U. Teleg. Co.* 15 Blatchf. 394, 4 Bann. & Ard. 64, Fed. Cas. No. 2,995—*Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 567, 3 Fisher, Pat. Cas. 97, Fed. Cas. No. 3,810—*Goodyear Dental Vulcanite Co. v. Smith, Holmes*, 361, 1 Bann. & Ard. 209, Fed. Cas. No. 5,598—*Goodyear Dental Vulcanite Co. v. Willis*, 1 Bann. & Ard. 583, Fed. Cas. No. 5,603—*Henry v. Francetown Soap-Stone Stove Co.* 2 Bann. & Ard. 223, Fed. Cas. No. 6,382—*Howe v. Newton*, 2 Fisher, Pat. Cas. 532, Fed. Cas. No. 6,771—*Howes v. McNeal*, 15 Blatchf. 123, 3 Bann. & Ard. 395, Fed. Cas. No. 6,789—*Jones v. Sewall*, 3 Cliff. 591, 6 Fisher, Pat. Cas. 366, Fed. Cas. No. 7,495—*Weston v. White*, 13 Blatchf. 452, 2 Bann. & Ard. 368, Fed. Cas. No. 17,459—*International Tooth Crown Co. v. Richmond*, 30 Fed. 779—*Ligowski Clay-Pigeon Co. v. American Clay-Bird Co.* 34 Fed. 334—*Frankfort Whiskey Process Co. v. Mill Creek Distilling Co.* 37 Fed. 539—*Stirling Co. v. St. Louis Brewing Asso.* 79 Fed. 81—*Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co.* 121 Fed. 103—*Cain v. Park*, 14 App. D. C. 47—*Re Fay*, 15 App. D. C. 517.

546. The second petition for patent, after rejection of the first, does not sever the second application from the first, or deprive the applicant of any advantage he would have had, had the patent been granted without a renewal of the application. *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23: 952

h. Compelling Issue.

Mode of Reviewing Refusal of Commissioner of Patents to Forward Appeal, see Appeal and Error, 710.

Exclusiveness of Federal Jurisdiction, see Courts, 1416-1421.

547. Under U. S. Rev. Stat. § 4915, U. S. Comp. Stat. 1901, p. 3392, the circuit court may adjudge that the applicant is entitled, according to law, to receive a patent for his invention or for any part thereof; and if the adjudication is in favor of the right of the applicant, it shall authorize the Commissioner to issue the patent. *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. Rep. 228, 33: 502

548. No adjudication can be made in favor of the applicant unless the alleged invention for which a patent is sought is a patentable invention. Neither the circuit court nor the United States Supreme Court can overlook the question of patentability. *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. Rep. 228, 33: 502
Distinguished in *Durham v. Seymour*, 161 U. S. 239, 40 L. ed. 684, 16 Sup. Ct. Rep. 452.

Cited in *Burt v. Evory*, 133 U. S. 359, 33 L. ed. 651, 10 Sup. Ct. Rep. 394—*Fond Du Lac County v. May*, 137 U. S. 407, 34 L. ed. 718, 11 Sup. Ct. Rep. 98—*Consolidated Roller Mill Co. v. Walker*, 138 U. S. 132, 34 L. ed. 923, 11 Sup. Ct. Rep. 292—*Lovell Mfg. Co. v. Cary*, 147 U. S. 637, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*Brush Electric Co. v. Julien Electric Co.* 41 Fed. 693—*Consolidated Roller-Mill Co. v. Walker*, 43 Fed. 579—*Campbell v. Bailey*, 45 Fed. 567—*Johnson Co. v. Pacific Rolling-Mills Co.* 47 Fed. 589—*United States Credit System Co. v. American Credit Indemnity Co.* 53 Fed. 818—*Christie v. Seybold*, 5 C. C. A. 36, 6 U. S. App. 520, 55 Fed. 72—*Deere & Co. v. J. I. Case Plow Works*, 6 C. C. A. 160, 9 U. S. App. 567, 56 Fed. 844—*Klein v. Seattle*, 23 C. C. A. 118, 44 U. S. App. 741, 77 Fed. 204—*Interior Lumber Co. v. Perkins*, 25 C. C. A. 616, 53 U. S. App. 66, 80 Fed. 531—*J. J. Warren Co. v. Rosenblatt*, 25 C. C. A. 627, 53 U. S. App. 234, 80 Fed. 542—*Palmer Pneumatic Tire Co. v. Lozier*, 84 Fed. 660—*Kelly v. Clow*, 32 C. C. A. 211, 60 U. S. App. 333, 89 Fed. 303—*Christy v. Hygeia Pneumatic Bicycle Saddle Co.* 36 C. C. A. 361, 93 Fed. 969—*Leslie v. Tracy*, 100 Fed. 476—*Re Musgrave*, 10 App. D. C. 170—*Doyle v. McRoberts*, 10 App. D. C. 467—*Re McNeill*, 20 App. D. C. 297.

i. Remedy for Refusal to Issue.

Bill in equity.

Place for Bringing Suit, see Courts, 963.

549. The provision of U. S. Rev. Stat. § 4915, U. S. Comp. Stat. 1901, p. 3392, for remedy by bill in equity where an application for patent is refused, refers to a proceeding in a court of the United States having original equity jurisdiction under the patent laws, according to the ordinary course of equity practice and procedure. Per *Matthews, J.* *Butterworth v. United*

States ex rel. Hoe, 112 U. S. 50, 5 Sup. Ct. Rep. 25, 28: 656

Cited in *Gandy v. Marble*, 122 U. S. 439, 30 L. ed. 1224, 7 Sup. Ct. Rep. 1290—*Re Hill*, 166 U. S. 439, 41 L. ed. 1069, 17 Sup. Ct. Rep. 624—*United States v. Duell*, 172 U. S. 583, 43 L. ed. 562, 19 Sup. Ct. Rep. 286—*American Bell Teleph. Co. v. United States*, 15 C. C. A. 594, 33 U. S. App. 236, 68 Fed. 567—*Bernardin v. Northall*, 77 Fed. 631—*Ingersoll v. Holt*, 104 Fed. 684—*Durham v. Seymour*, 6 App. D. C. 87.

550. The remedy of an applicant for a patent, by bill in equity under U. S. Rev. Stat. § 4915, U. S. Comp. Stat. 1901, p. 3392, to compel the issuance of a patent applies only when the Commissioner decides to reject an application for a patent on the ground that the applicant is not, on the merits, entitled to it. *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25, 28: 656

551. A bill in equity filed on the refusal to grant a patent under U. S. Rev. Stat. § 4915, U. S. Comp. Stat. 1901, p. 3392, while not a technical appeal from the Patent Office, is in fact a part of the application for a patent. *Gandy v. Marble*, 122 U. S. 432, 7 Sup. Ct. Rep. 1290, 30: 1223
Cited in *Durham v. Seymour*, 161 U. S. 237, 40 L. ed. 683, 16 Sup. Ct. Rep. 452.

Reviewing decision of Commissioner.

Reviewing Decision of Commissioner on Application for Reissue, see *infra*, 645, 646.

See also *supra*, 544.

552. The determination of the Commissioner of Patents in granting a patent does not conclude the determination of the courts in regard thereto. *Andrews v. Hovey*, 124 U. S. 694, 8 Sup. Ct. Rep. 676, 31: 557

553. Patents are often granted with a view to leaving open for the decision of the courts questions which the Patent Office does not deem it proper to adjudicate against the applicant by withholding the patent. *Andrews v. Hovey*, 124 U. S. 694, 8 Sup. Ct. Rep. 676, 31: 557
Cited in *American Sulphite Pulp Co. v. Howland Falls Pulp Co.* 70 Fed. 993—*Palmer Pneumatic Tire Co. v. Lozier*, 84 Fed. 663—*Wheaton v. Kendall*, 85 Fed. 673.

554. The Supreme Court will not review the decision of the Commissioner upon the question of inadvertence, accident, or mistake unless the matter is manifest from the record; but the question whether the application was made within a reasonable time is, in most, if not in all, such cases, a question of law, for the court. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. Rep. 825, 36: 658

Cited in *United States v. American Bell Teleph. Co.* 167 U. S. 263, 42 L. ed. 162, 17 Sup. Ct. Rep. 809—*Hobbs v. Beach*, 180 U. S. 395, 45 L. ed. 593, 21 Sup. Ct. Rep. 409—*Beach v. American Box-Mach. Co.* 63 Fed. 603—*Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co.* 115 Fed. 813.

555. The decision of the Commissioner of

Patents refusing a patent stands as the final judgment of the Patent Office, and of the executive department, of which it is a part; but an appeal is allowed therefrom to the supreme court of the District of Columbia, or the applicant may have remedy by bill in equity. *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25, 28: 656
Cited in Appleton v. Ecaubert, 62 Fed. 747—
United States v. Beebe, 117 Fed. 679.

556. The decision of the Commissioner in favor of the applicant upon a renewed application for a patent, upon the question whether the invention has been abandoned, is not conclusive, but may be contested and reviewed in a suit brought for the infringement of the patent. *United States Rifle & Cartridge Co. v. Whitney Arms Co.* 118 U. S. 22, 6 Sup. Ct. Rep. 950, 30: 53

557. The Secretary of the Interior has no power by law to revise and reverse the action of the Commissioner of Patents in awarding to an applicant for a patent priority of invention, and adjudging him entitled to a patent. *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25, 28: 656
Cited in United States v. Waters, 133 U. S. 213, 33 L. ed. 595, 10 Sup. Ct. Rep. 249—
Orchard v. Alexander, 157 U. S. 385, 39 L. ed. 742, 15 Sup. Ct. Rep. 635—*Griffith v. United States*, 22 Ct. Cl. 193—*United States v. American Bell Teleph. Co.* 32 Fed. 603.

558. The remedies provided in patent cases by U. S. Rev. Stat. §§ 4911, 4915, respectively, by appeal from the Commissioner of Patents to the supreme court of the District of Columbia, or by bill in equity, as the case may be, preclude an appeal to the Secretary of the Interior under the general supervisory authority of that officer, as the special proceeding expressly ordained is presumed exclusive. *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25, 28: 656

Reviewing decision of primary examiner.

See also *infra*, 643.

559. An appeal from a decision of the primary examiner upon a motion to dissolve an interference, holding that the party had the right to make the interfering claims, may be prohibited by the rules of the Patent Office without infringing the right of appeal in interferences given by U. S. Rev. Stat. §§ 482, 483, 4904, 4909, U. S. Comp. Stat. 1901, pp. 272, 3389, 3390, since the appeal therein provided for must be deemed limited to final decisions upon the question of priority of invention, which, under these statutes, is the sole question for determination in interference cases. *United States ex rel. Lowry v. Allen*, 203 U. S. 476, 27 Sup. Ct. Rep. 141, 51: 281

VIII. *Requisites and Validity of Letters Patent.*

a. *In General.*

Lack of Invention, see *supra*, V. b.
 Lack of Utility, see *supra*, V. c.
 Lack of Novelty, see *supra*, V. d.
 Anticipation, see *supra*, V. e.
 Effect of Prior Use or Sale, see *supra*, V. f.
 Identity as Requisite to Validity of Reissued Patent, see *infra*, IX. f.
 Reissued Patent, see *infra*, 586.
 Effect of Void Reissue on Original Patent, see *infra*, 640.
 Invalidity of Patent as Defense in Suit for Infringement, see *infra*, 1127-1132.
 Presumption from Issuance of Patent, see Evidence, 491.
 Conclusiveness of Presumption of Regularity of Issue, see Evidence, 2602.
 Conclusiveness of Recital that Required Oath was Taken, see Evidence, 2603.
 Deciding Invalidity on Demurrer, see Pleading, 850.
 Retroactive Statute Validating Letters Patent, see Statutes, 579.
 See also *infra*, 1018.

Signing.

Parol Evidence of Lack of Signature, see Evidence, 1552.
 See also *infra*, 1103.

560. A patent for an invention must be signed by all the officers required by the statute (U. S. Rev. Stat. § 4883, U. S. Comp. Stat. 1901, p. 3381). Such a patent issued without the signature of the Secretary of the Interior is inoperative to create any right. *Marsh v. Nichols, S. & Co.* 128 U. S. 605, 9 Sup. Ct. Rep. 168, 32: 538
Cited in Dable Grain Shovel Co. v. Flint, 137 U. S. 43, 34 L. ed. 620, 11 Sup. Ct. Rep. 8.

561. A patent countersigned and sealed by "Henry H. Sylvester, acting Com'r of Patents," upheld as valid. *Wilson v. Rouseau*, 4 How. 646, 11: 1141
Cited in York & M. Line R. Co. v. Winans, 17 How. 41, 15 L. ed. 30—*Woodworth v. Hall*, 1 Woodb. & M. 397, 2 Robb, Pat. Cas. 517, Fed. Cas. No. 18,017—*Gibson v. Van Dresar*, 1 Blatchf. 585, Fed. Cas. No. 5,402.

Delay.

Delay as Abandonment or Waiver of Right to Reissued Patent, see *infra*, 684-693.

Delay as Defense to Infringement Suit, see *infra*, 1135.

562. Thirteen years' delay of the application in the Patent Office does not invalidate the Berliner patent, 463,569, where the proof shows that the applicant did not induce the delay, but, on the contrary, urgently requested action upon it, and that the delay was due, not only to the pressure of business in the office, but in part to the pendency of the protracted litigation over telephone patents and interferences, or probable interferences, with other applications. *United States v. American Bell*

Teleph. Co. 167 U. S. 224, 17 Sup. Ct. Rep. 809, 42: 144
Cited in Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 78, 108 Fed. 852—*Pond v. United States*, 49 C. C. A. 589, 111 Fed. 996—*Electric Storage Battery Co. v. Buffalo Electric Carriage Co.* 117 Fed. 315—*Hayes-Young The Plate Co. v. St. Louis Transit Co.* 70 C. C. A. 4, 137 Fed. 83.

Limitation of duration.

563. U. S. Rev. Stat. § 4887, U. S. Comp. Stat. 1901, p. 3382, does not make an American patent not bearing the same date as a foreign patent for the same invention, invalid, but only limits its term. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

564. Although it may be proper to insert, in a United States patent, a statement of the limitation of its duration, where there has been granted a prior foreign patent for the same invention, its validity is not affected by the fact that it is, on its face, expressed to run for seventeen years from date, and is not to be limited by the duration of the foreign patent. *Bate Refrigerating Co. v. George H. Hammond & Co.* 129 U. S. 151, 9 Sup. Ct. Rep. 225, 32: 645

b. Combining Invention in One Patent.

565. The act of 1808 for the relief of Oliver Evans authorized the granting of a patent for improvements in several machines separately, as well as a right to the use of those machines in combination; but a doubt arises whether this could be done under the general patent law alone. *Evans v. Eaton*, 3 Wheat. 454, 4: 433

Cited in Barrett v. Hall, 1 Mason, 474, Fed. Cas. No. 1,047—*Emerson v. Hogg*, 2 Blatchf. 7, Fed. Cas. No. 4,440—*Wyeth v. Stone*, 1 Story, 288, Fed. Cas. No. 18,107—*Sessions v. Romadka*, 21 Fed. 132—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 985.

566. Two or more patents may be included in one set of letters, where they relate to a like subject, and are in their nature or operation connected together. *Hogg v. Emerson*, 6 How. 437, 12: 505
Hogg v. Emerson, 11 How. 587, 13: 824
Cited in United States ex rel. Steinmetz v. Allen, 192 U. S. 557, 48 L. ed. 560, 24 Sup. Ct. Rep. 416—*Parham v. American Button-hole Over-Seaming Mach. Co.* 4 Fisher, Pat. Cas. 475, Fed. Cas. No. 10,713—*Maxheimer v. Meyer*, 20 Blatchf. 20, 9 Fed. 462—*The Fire Extinguisher Case*, 21 Fed. 44—*Sessions v. Romadka*, 21 Fed. 132—*Elgin Co-op. Butter-Tub Co. v. Creamery Package Mfg. Co.* 25 C. C. A. 427, 53 U. S. App. 104, 80 Fed. 294—*Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.* 86 Fed. 321—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 983—*Parham v. Machine Co.* 1 Legal Gazette Rep. 149.

567. Joinder of claims for a design, with separate claims for each of its parts, does not invalidate the patent or any particular claim. *Dobson v. Hartford Carpet Co.* 114 U. S. 439, 5 Sup. Ct. Rep. 945, 29: 177
Cited in New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co. 4 C. C. A. 28, 11 U. S. App. 637, 53 Fed. 817.

c. Different Patents for Same Invention.

Setting Aside of Patent, see *infra*, XVI.
 Cancellation of First Patent, see *infra*, 603.
 See also *infra*, 1162.

Second patent void.

568. Where two patents are granted for the same improvement, the last is void. *Suffolk Mfg. Co. v. Hayden*, 3 Wall. 315, 18: 76

Cited in Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.) 143 U. S. 280, 36 L. ed. 157, 12 Sup. Ct. Rep. 443—*Miller v. Eagle Mfg. Co.* 151 U. S. 197, 38 L. ed. 127, 14 Sup. Ct. Rep. 310—*Jones v. Sewall*, 3 Cliff, 575, 6 Fisher, Pat. Cas. 352, Fed. Cas. No. 7,495—*McMillin v. Rees*, 5 Bann. & Ard. 274, 1 Fed. 727—*Mathews v. Flower*, 25 Fed. 830—*Eagle Mfg. Co. v. Bradley*, 35 Fed. 297—*American Bell Teleph. Co. v. United States*, 15 C. C. A. 591, 33 U. S. App. 236, 68 Fed. 565—*Thomson-Houston Electric Co. v. Ohio Brass Co.* 26 C. C. A. 120, 54 U. S. App. 1, 80 Fed. 725—*Porter v. Loudon*, 7 App. D. C. 68.

569. If an earlier patent be identical with a later one, or only a colorable variation from it, the second patent is void, as a patentee cannot take out two patents for the same invention. *McCreary v. Pennsylvania Canal Co.* 141 U. S. 459, 12 Sup. Ct. Rep. 40, 35: 817

Cited in Miller v. Eagle Mfg. Co. 151 U. S. 197, 38 L. ed. 127, 14 Sup. Ct. Rep. 310—*Sterling Co. v. Pierpoint Boiler Co.* 72 Fed. 790—*Davis Pressed-Steel Co. v. Morris Box-Lid Co.* 26 C. C. A. 467, 39 U. S. App. 664, 81 Fed. 415—*Thomson-Houston Electric Co. v. Black River Traction Co.* 124 Fed. 512—*Williams Calk Co. v. Neverslip Mfg. Co.* 136 Fed. 212.

570. No patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ. In such case the second patent is void. *Miller v. Eagle Mfg. Co.* 151 U. S. 186, 14 Sup. Ct. Rep. 310, 38: 121

Cited in Oval Wood Dish Co. v. Sandy Creek. N. Y., Wood Mfg. Co. 60 Fed. 288—*Game-well Fire-Alarm Teleg. Co. v. Municipal Signal Co.* 10 C. C. A. 189, 21 U. S. App. 157, 61 Fed. 953—*Fassett v. Ewart Mfg. Co.* 10 C. C. A. 443, 24 U. S. App. 74, 62 Fed. 403—*Westinghouse v. Edison Electric Light Co.* 11 C. C. A. 350, 28 U. S. App. 1, 63 Fed. 596—*Russell v. Kern*, 64 Fed. 583—*United States v. American Bell Teleph. Co.* 65 Fed. 87—*Reynolds v. Standard Paint Co.* 15 C. C. A. 520, 28 U. S. App. 457, 68 Fed. 487—*American Bell Teleph. Co. v. United States*, 15 C. C. A. 571, 33 U. S. App. 236, 68 Fed. 544—*Russell v. Kern*, 16 C. C. A. 157, 34 U. S. App. 90, 69 Fed. 97—*Thomson-Houston Electric Co. v. Elmira & H. R. Co.* 69 Fed. 263—*Thomson-Houston Electric Co. v. Elmira & H. R. Co.* 18 C. C. A. 155, 38 U. S. App. 55, 71 Fed. 405—*Bidwell v. Toledo Consol. Street R. Co.* 72 Fed. 14—*National Mach. Co. v. Wheeler & W. Mfg. Co.* 72 Fed. 198—*McBride v. Kingman*, 72 Fed. 918—*Birmingham Cement Mfg. Co. v. Gates Iron Works*, 24 C. C. A. 186, 41 U. S. App. 201, 78 Fed. 359—*Thomson-Houston Electric Co. v. Ohio Brass Co.* 26 C. C. A. 122, 54 U. S. App. 1, 80 Fed. 725.

App. 1, 80 Fed. 727—Thomson-Houston Electric Co. v. Hoosick R. Co. 27 C. C. A. 426, 51 U. S. App. 437, 82 Fed. 468—Western Electric Co. v. Home Teleph. Co. 85 Fed. 654—Allington & C. Mfg. Co. v. Globe Co. 89 Fed. 868—Palmer Pneumatic Tire Co. v. Lozier, 33 C. C. A. 267, 62 U. S. App. 651, 90 Fed. 744—Thomson-Houston Electric Co. v. Jeffrey Mfg. Co. 41 C. C. A. 249, 101 Fed. 122—Powell v. Leicester Mills Co. 103 Fed. 487—Westinghouse Electric & Mfg. Co. v. Dayton Fan & Motor Co. 106 Fed. 726—Western Electric Co. v. Williams-Abbott Electric Co. 48 C. C. A. 162, 108 Fed. 955—Industrial Mfg. Co. v. Wilcox & G. Sewing Mach. Co. 50 C. C. A. 389, 112 Fed. 537—Electric Storage Battery Co. v. Buffalo Electric Carriage Co. 117 Fed. 315—Otis Elevator Co. v. Portland Co. 119 Fed. 931—McCarthy v. Westfield Plate Co. 124 Fed. 898—Durham v. Seymour, 6 App. D. C. 90—Porter v. Loudon, 7 App. D. C. 69.

Single element or function.

571. A single element or function of a patented invention cannot be made the subject of a separate and subsequent patent. *Miller v. Eagle Mfg. Co.* 151 U. S. 186, 13 Sup. Ct. Rep. 310, 38: 121

Distinguished in Thomson-Houston Electric Co. v. Winchester Ave. R. Co. 71 Fed. 205.

Cited in Gessner v. Phillips, 63 Fed. 960—*Allington & C. Mfg. Co. v. Glor*, 83 Fed. 1015—*American Bell Teleph. Co. v. National Tel. Mfg. Co.* 109 Fed. 1033.

Element claimed or described.

572. A patentee cannot claim in a patent the same thing claimed by him in a prior patent, or what he omitted to claim in a prior patent in which the invention was described, he not having reserved the right to claim it in a separate patent, and not having seasonably applied therefor. *James v. Campbell*, 104 U. S. 356, 26: 786

Cited in Clements v. Odorless Excavating Apparatus Co. 109 U. S. 649, 27 L. ed. 1063, 3 Sup. Ct. Rep. 525—*Corbin Cabinet Lock Co. v. Eagle Lock Co.* 150 U. S. 43, 37 L. ed. 991, 14 Sup. Ct. Rep. 28—*Miller v. Eagle Mfg. Co.* 151 U. S. 197, 38 L. ed. 127, 14 Sup. Ct. Rep. 310—*Vermont Farm Mach. Co. v. Marble*, 22 Blatchf. 32, 19 Fed. 307—*Baltimore Car-Wheel Co. v. North Baltimore Pass. R. Co.* 21 Fed. 47—*Railway Register Mfg. Co. v. Broadway & S. Ave. R. Co.* 22 Fed. 655—*Mathews v. Flower*, 25 Fed. 830—*Railway Register Mfg. Co. v. Broadway & S. Ave. R. Co.* 26 Fed. 525—*Eastern Paper Bag Co. v. Standard Paper Bag Co.* 30 Fed. 65—*Burdall v. Curran*, 31 Fed. 919—*Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.* 33 Fed. 259—*Eagle Mfg. Co. v. Bradley*, 35 Fed. 297—*Eastern Paper Bag Co. v. Nixon*, 35 Fed. 753—*Consolidated Roller Mill Co. v. Coombs*, 39 Fed. 38—*Adee v. J. L. Mott Iron Works*, 5 C. C. A. 289, 14 U. S. App. 392, 55 Fed. 877—*Gessner v. Phillips*, 63 Fed. 950—*Craig v. Michigan Lubricator Co.* 72 Fed. 174—*Davis Pressed-Steel Co. v. Morris Box-Lid Co.* 26 C. C. A. 467, 39 U. S. App. 664, 81 Fed. 415—*Bannerman v. Sanford*, 85 Fed. 449—*Cary Mfg. Co. v. Neal*, 90 Fed. 726—*McBride v. Klingman*, 38 C. C. A. 130, 97 Fed. 224—*Morrin v. Lawlor*, 40 C. C. A. 207, 99 Fed. 980—*Ide v. Troilicht, D. & R. Carpet Co.* 53 C. C. A. 349, 115 Fed. 145—*Davis Calyx Drill Co. v. Plunger Elevator Co.* 135 Fed. 120—*Hunt v. McCaslin*, 10 App. D. C. 534—*Hill v. Commissioner of Patents*, 4 Mackey, 267.

573. Where a second patent covers matters described in the prior patent, essentially distinct and separable from the invention covered thereby and claims made thereunder, its validity may be sustained if for a separate invention. *Miller v. Eagle Mfg. Co.* 151 U. S. 186, 14 Sup. Ct. Rep. 310, 38: 121

Cited in Palmer v. John E. Brown Mfg. Co. 35 C. C. A. 88, 92 Fed. 927—*Thomson-Houston Electric Co. v. Black River Traction Co.* 124 Fed. 512—*Milwaukee Carving Co. v. Brunswick-Balke Collender Co.* 61 C. C. A. 187, 126 Fed. 183—*Otis Elevator Co. v. Portland Co.* 62 C. C. A. 341, 127 Fed. 559.

Presumption of substantial difference.

574. There is a presumption, from the grant of separate letters patent for two improvements on a prior art, that there is a substantial difference between the inventions. *Kokomo Fence Mach. Co. v. Kitzelman*, 189 U. S. 8, 23 Sup. Ct. Rep. 521, 47: 689

Cited in Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co. 60 C. C. A. 535, 125 Fed. 767—*Milwaukee Carving Co. v. Brunswick-Balke Collender Co.* 61 C. C. A. 187, 126 Fed. 183—*Kemp v. McBride*, 129 Fed. 386—*Los Angeles Art Organ Co. v. Aeolian Co.* 75 C. C. A. 92, 143 Fed. 884.

Process and product.

Anticipation by Foreign Patent, see *supra*, 22.

Reissued Patent for Process, see *infra*, 666-671.

Construction of Patent for, see *infra*, 737-748.

575. Two patents, one for a process, and the other for the product of that process, may cover but one invention. *Plummer v. Sargent*, 120 U. S. 442, 7 Sup. Ct. Rep. 640, 30: 737

Cited in Accumulator Co. v. Julien Electric Co. 57 Fed. 614—*Oval Wood Dish Co. v. Sandy Creek, N. Y. Wood Mfg. Co.* 60 Fed. 290—*Palmer Pneumatic Tire Co. v. Lozier*, 33 C. C. A. 268, 62 U. S. App. 651, 90 Fed. 744—*Thann Societe v. Lueders*, 105 Fed. 632.

576. After a patent is granted for an article described as made by causing it to pass through a certain method of operation, the inventor cannot afterwards, on an independent application, secure a patent for the method of producing the identical article covered by the prior patent. *Mosler Safe & Lock Co. v. Mosler B. & Co.* 127 U. S. 354, 8 Sup. Ct. Rep. 1148, 32: 182

Cited in Miller v. Eagle Mfg. Co. 151 U. S. 197, 38 L. ed. 127, 14 Sup. Ct. Rep. 310—*Eastern Paper-Bag Co. v. Nixon*, 35 Fed. 753—*Accumulator Co. v. Julien Electric Co.* 57 Fed. 614—*Oval Wood Dish Co. v. Sandy Creek, N. Y. Wood Mfg. Co.* 60 Fed. 288—*Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* 90 Fed. 210—*Palmer Pneumatic Tire Co. v. Lozier*, 33 C. C. A. 267, 62 U. S. App. 651, 90 Fed. 744.

Discretionary power of Commissioner.

Power of Commissioners to Grant Re-issue, see *infra*, 680, 681.

Excess of Authority in Granting Patent as Defense in Infringement Suit, see *infra*, 1128, 1129.

Conclusiveness of Commissioner's Decision, see *infra*, 1134, 1140.

577. Discretion is given to the head of the Patent Office to determine when a given invention or improvement shall be embraced in one, two, or more patents. *Bennett v. Fowler*, 8 Wall. 445, 19: 431
Cited in United States ex rel. Steinmets v. Allen, 192 U. S. 560, 48 L. ed. 562, 24 Sup. Ct. Rep. 416—*Tucker v. Burditt*, 4 Bann. & Ard. 570, Fed. Cas. No. 14,216—*McKay v. Dibert*, 5 Fed. 590—*Smith v. Merriam*, 6 Fed. 718—*Sessions v. Romadka*, 21 Fed. 131—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 985—*Re Frasch*, 20 App. D. C. 303—*United States ex rel. Steinmets v. Allen*, 22 App. D. C. 66.

d. Fraud.

Conclusiveness of Commissioner's Decision as to Fraud in Securing Extension, see *infra*, 707.

In Surrender and Reissue, see *infra*, 587.
 Effect of, on Right to Disclaim, see *infra*, 761.

Setting up as Defense in Action for Royalties, see *infra*, 862.

Fraud as Defense in Infringement Suit, see *infra*, 1135-1140.

Setting Aside Patent for, see *infra*, 1168.
 Sufficiency of Proof of Authority to Annul, see Evidence, 2604.

Allegations of Fraud in Procuring Patent, see Pleading, 544.

See also *infra*, 582, 583.

578. A proceeding by the United States against a patentee is the appropriate remedy where a patent has been issued through fraud, mistake, or error, or because of errors or mistakes in the instrument itself. *United States v. American Bell Teleph. Co.* 159 U. S. 548, 16 Sup. Ct. Rep. 69, 40: 255
Cited in United States v. American Bell Teleph. Co. 167 U. S. 286, 42 L. ed. 163, 17 Sup. Ct. Rep. 809.

579. One void claim does not vitiate the entire patent, if made by mistake or inadvertence, and without any wilful default or intent to defraud or mislead the public. *Carlton v. Bokee*, 17 Wall. 463, 21: 517
Cited in Wood v. Packer, 17 Fed. 651.

e. Canceling or Annuling.

Setting Aside of Patent, see *infra*, XVI.
 Sufficiency of Proof of Authority to Annul, see Evidence, 2604.
 See also *infra*, 603, 604.

Scire facias.

580. A patent is not repealed *de facto* by making absolute the rule granted by a judge of a Federal district upon the patentee, under the act of February 21, 1793, § 10, to show cause why process should not issue to repeal the patent, but the process to be awarded is in the nature of a scire facias at common law, to show cause why the patent should not be repealed, with the costs of the suit, and, upon the return of such proc-

ess duly served, the judge is to proceed to try the cause upon the pleadings filed by the parties and the issue joined thereon. *Re Wood*, 9 Wheat. 603, 6: 171
Cited in Delano v. Scott, Gilpin, 493, Fed. Cas. No. 3,753—*United States v. American Bell Teleph. Co.* 32 Fed. 602—*Atty-Gen. ex rel. Hecker v. Rumford Chemical Works*, 2 Bann. & Ard. 811, 32 Fed. 622.

581. The ancient mode of annulling or repealing the king's patent was by scire facias, generally brought in chancery, where the record of the instrument was found. *Mowry v. Whitney*, 14 Wall. 434, 20: 858
Cited in Knapp v. Thomas, 39 Ohio St. 386, 45 Am. Rep. 462.

Bill in equity.

582. In modern times, the court of chancery, sitting in equity, entertains jurisdiction by bill for annulling or repealing a patent when the ground of relief is fraud in obtaining the patent; and in this country it is the usual mode in all cases, because better adapted to the investigation and to the relief to be administered. *Mowry v. Whitney*, 14 Wall. 434, 20: 858
Cited in Tilghman v. Proctor, 125 U. S. 144, 31 L. ed. 666, 8 Sup. Ct. Rep. 894—*Foster v. Lindsay*, 1 Bann. & Ard. 607, Fed. Cas. No. 4,975—*Foster v. Lindsay*, 3 Dill. 128, 2 Bann. & Ard. 174, Fed. Cas. No. 4,976—*Lockwood v. Cleveland*, 6 Fed. 726—*United States v. Gunning*, 21 Blatchf. 518, 18 Fed. 512—*Lockwood v. Cleveland*, 20 Fed. 163—*Pentlarge v. New York Bung & Bushing Co.* 20 Fed. 314—*Nathan Mfg. Co. v. Craig*, 49 Fed. 370.

Fraudulent concealment or addition.

Setting Aside Patent for Fraud, see *infra*, 1168.

583. If the defendant, sued for infringement under the act of 1793, seeks to annul the patent, he must proceed in precise conformity to the 6th section of the act; and the concealment or addition must fully appear to have been made for the purpose of deceiving the public, in order to render the patent void; and that this was the purpose must be found by the jury. *Grant v. Raymond*, 6 Pet. 218, 8: 376
Cited in Hogg v. Emerson, 6 How. 481, 12 L. ed. 524—*Webster Loom Co. v. Higgins*, 105 U. S. 588, 26 L. ed. 1180—*Gill v. United States*, 160 U. S. 430, 40 L. ed. 482, 16 Sup. Ct. Rep. 322—*Day v. New England Car Spring Co.* 3 Blatchf. 181, Fed. Cas. No. 3,687—*Crown Cork & Seal Co. v. Aluminum Stopper Co.* 48 C. C. A. 79, 108 Fed. 852.

Wrongful issuance.

584. Where the specification and application were in the name of the inventor, who also paid the patent fee, and the patent was issued to another person who had no right to it, the assignees of the inventor are entitled to a decree that the patentee surrender

the patent to be canceled. *Appleton v. Bacon*, 2 Black. 699. 17: 338
Cited in Fuller & J. Mfg. Co. v. Bartlett, 68 Wis. 80, 60 Am. Rep. 838, 31 N. W. 747.

585. In an action to cancel a patent on the ground that the invention was covered by a prior patent it was considered that a telephone transmitter does not differ essentially from the receiver. *United States v. American Bell Teleph. Co.* 167 U. S. 224, 17 Sup. Ct. Rep. 809. 42: 144
Cited in American Bell Teleph. Co. v. National Tel. Mfg. Co. 109 Fed. 1002.

IX. Surrender and Reissue.

a. In General.

Surrender of Rights to Public, see *supra*, V. g.
 Right to Surrender, see *supra*, 387.
 Surrender for Cancellation, see *supra*, 584.
 Extension of Patent, see *infra*, X.
 Disclaimer in Case of Reissue, see *infra*, 768, 784-787.
 Fraud in Inducing Reissue as Defense to Action for Royalties, see *infra*, 862.
 Right to Damages for Infringement of Reissued Patent, see *infra*, 1097.
 Sale of, as Protection from Liability as Infringer, see *infra*, 1141.
 Dismissal of Appeal on Surrender, see Appeal and Error, 3891.
 Right to Recover Back Amounts Paid on Judgment in Infringement Suit After, see Assumpsit, 52.
 Effect of, on Issues in Arbitration, see Evidence, 556.
 Presumption and Burden of Proof as to Validity of Reissued Patent, see Evidence, 771-773.
 Original Patent as Evidence in Action for Infringement of Reissued Patent, see Evidence, 2643.
 Effect of Surrender and Reissue in Executor's Name as Vesting Title in Him, see Executors and Administrators, 51.
 Conclusiveness of Judgment on Reissue, see Judgment, 581.
 Application of Rule of Laches in Reference to Reissues, see Limitation of Actions, 78.
 Allegations as to Date of, see Pleading, 483.
 See also *supra*, 209.

586. A reissued patent need not recite that the prerequisites to the grant of it have been duly complied with. *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 10: 535
Cited in Blake v. Stoddard, 6 Blatchf. 200, Fed. Cas. No. 1,504—*Cahoon v. Ring*, 1 Cliff. 632, Fed. Cas. No. 2,292—*House v. Young*, 3 Fisher, Pat. Cas. 837, Fed. Cas. No. 6,738.

587. The proceedings before the Commissioner, in the surrender and reissue of a patent, are not open for investigation, except on the ground of fraud. *Battin v. Taggart*, 17 How. 74, 15: 37
Cited in Seymour v. Osborne, 11 Wall. 544, 20 L. ed. 38—*Aultman v. Holley*, 11 Blatchf.

319, 6 Fisher, Pat. Cas. 538, Fed. Cas. No. 656—*Bridge v. Brown*, Holmes, 55, Fed. Cas. No. 1,857—*Cahoon v. Ring*, 1 Cliff. 632, Fed. Cas. No. 2,292—*Chicago Fruit-House Co. v. Busch*, 2 Blas. 478, 4 Fisher, Cas. 401, Fed. Cas. No. 2,669—*Forbes v. Barstow Stove Co.* 2 Cliff. 387, Fed. Cas. No. 4,923—*Goodyear v. Providence Rubber Co.* 2 Cliff. 376, 2 Fisher, Pat. Cas. 515, Fed. Cas. No. 5,583—*Hoffheins v. Brandt*, 3 Fisher, Pat. Cas. 240, Fed. Cas. No. 6,575—*Hussey v. Bradley*, 5 Blatchf. 141, 2 Fisher, Pat. Cas. 371, Fed. Cas. No. 6,946—*Miller & P. Mfg. Co. v. Du Brul*, 2 Bann. & Ard. 619, Fed. Cas. No. 9,597—*Morris v. Royer*, 2 Bond, 73, 3 Fisher, Pat. Cas. 181, Fed. Cas. No. 9,835—*Parham v. American Button Hole, Over-Seaming & Sewing-Mach. Co.* 4 Fisher, Pat. Cas. 471, Fed. Cas. No. 10,713—*Whitely v. Swayne*, 4 Fisher, Pat. Cas. 123, Fed. Cas. No. 17,568—*Wilson v. Singer*, Fed. Cas. No. 17,835—*Parham v. Machine Co.* 1 Legal Gaz. Rep. 147.

588. The question whether, where a patent has been surrendered and reissued, and such reissue is held to be void, the patentee may proceed upon his original patent, discussed but not decided. *Eby v. King*, 158 U. S. 366, 15 Sup. Ct. Rep. 972, 39: 1018
Cited in Allen v. Culp, 166 U. S. 505, 41 L. ed. 1095, 17 Sup. Ct. Rep. 644—*McCormick Harvesting Mach. Co. v. C. Aultman Co.* 169 U. S. 611, 42 L. ed. 877, 18 Sup. Ct. Rep. 443.

Editorial notes.

Validity of reissue. 37: 644
 What reissue may cover. 14: 601

b. Right to Obtain.

By what law right determined.

589. A second patent granted on the surrender of a prior one, being a continuation of the first, the rights of the patentee must be ascertained by the law under which the original application was made. *Shaw v. Cooper*, 7 Pet. 292, 8: 689
Cited in Read v. Bowman, 2 Wall. 604, 17 L. ed. 817.

Defective specification.

Disclaimer in Case of, see *infra*, 784.

590. A patentee may surrender his patent and file an amended specification, when the patent issued is inoperative or invalid by reason of a defective or insufficient description or specification. *Morey v. Lockwood*, 8 Wall. 230, 19: 339
Grant v. Raymond, 6 Pet. 218, 8: 376
Shaw v. Cooper, 7 Pet. 292, 8: 689
Gill v. Wells, 22 Wall. 1, 22: 699
Distinguished in Wilson v. Rousseau, 1 Blatchf. 100, Fed. Cas. No. 17,832.

Cited in Shaw v. Cooper, 7 Pet. 315, 8 L. ed. 698—*Wilson v. Rousseau*, 4 How. 685, 11 L. ed. 1159—*Battin v. Taggart*, 17 How. 83, 15 L. ed. 40—*Read v. Bowman*, 2 Wall. 604, 17 L. ed. 817—*Russell v. Dodge*, 93 U. S. 463, 23 L. ed. 974—*Fames v. Andrews*, 122 U. S. 63, 30 L. ed. 1072, 7 Sup. Ct. Rep. 1073—*Parker & W. Co. v. Yale Clock Co.* 123 U. S. 100, 31 L. ed. 106, 8 Sup. Ct. Rep. 38—*Allen v. Blunt*, 2 Woodb. & M. 142, Fed. Cas. No. 217—*Ames v. Howard*, 1 Sumn. 488, 1 Robb. Pat. Cas. 696, Fed. Cas. No. 326—*Ex parte Ball*, Fed. Cas. No. 810—*Brooks v. Jenkins*, 3 McLean, 438, Fed. Cas. No. 1,953—*Carew v. Boston Elastic Fabric Co.* Holmes, 47, Fed.

Cas. No. 2,398—Child v. Adams, 1 Fisher, Pat. Cas. 192, Fed. Cas. No. 2,673—French v. Rogers, 1 Fisher, Pat. Cas. 137, Fed. Cas. No. 5,103—Herring v. Nelson, 14 Blatchf. 303, Fed. Cas. No. 6,424—House v. Young, 3 Fisher, Pat. Cas. 336, Fed. Cas. No. 6,738—Miller v. Bridgeport Brass Co. 3 Bann. & Ard. 25, Fed. Cas. No. 9,563—Mini v. Adams, 3 Wall. Jr. 27, Fed. Cas. No. 9,632—Richardson v. Lockwood, 4 Cliff. 129, Fed. Cas. No. 11,786—Richardson v. Lockwood, 6 Fisher, Pat. Cas. 456, Fed. Cas. No. 11,787—Smith v. Downing, 1 Fisher, Pat. Cas. 69, Fed. Cas. No. 13,036—Stevens v. Pritchard, 4 Cliff. 419, Fed. Cas. No. 13,407—Tucker v. Tucker Mfg. Co. 4 Cliff. 402, Fed. Cas. No. 14,227—Wilson v. Rousseau, 1 Blatchf. 17, Fed. Cas. No. 17,832—Woodworth v. Hall, 1 Woodb. & M. 401, Fed. Cas. No. 18,017—Giant Powder Co. v. California Vigorite Powder Co. 6 Sawy. 523, 4 Fed. 725—Marsh v. Nichols, 15 Fed. 917—Scrivner v. Oakland Gas Co. 10 Sawy. 392, 22 Fed. 99—Hutchinson v. Everett, 33 Fed. 505—Yale Lock Co. v. New Haven Sav. Bank, 32 Fed. 171—Whitcomb v. Spring Valley Coal Co. 47 Fed. 658.

Inadvertence, accident, or mistake.

Change of Claims in Reissue Because of, see *infra*, 607-617.

Review of Finding of Commissioner on Question of, see *infra*, 646.

Abandonment by Delay in Seeking to Correct Mistake, see *infra*, 685.

Disclaimer of Parts Claimed by, see *infra*, 768.

See also *infra*, 603, 1139.

591. A reissue of a patent is an amendment and cannot be allowed unless the imperfections in the original patent arose without fraud and from inadvertence, accident, or mistake. *Dobson v. Lees*, 137 U. S. 258, 11 Sup. Ct. Rep. 71. 34: 652

Cited in Wollensak v. Sargent, 151 U. S. 229, 38 L. ed. 141, 14 Sup. Ct. Rep. 291—Coll v. Seneca, 56 Fed. 156—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 960—American Soda-Fountain Co. v. Zwietusch, 75 Fed. 577—Olmsted v. A. H. Andrews & Co. 23 C. C. A. 402, 46 U. S. App. 608, 77 Fed. 839.

592. Repetition, word for word, of the original specification in the reissue, proves that there was no defect or insufficiency in the original specification, and no error, inadvertence, or mistake in framing it. *Matthews v. Ironclad Mfg. Co.* 124 U. S. 347, 8 Sup. Ct. Rep. 639. 31: 477

Cited in Electric Gas-Lighting Co. v. Boston Electric Co. 139 U. S. 502, 35 L. ed. 260, 11 Sup. Ct. Rep. 586—Peoria Target Co. v. Cleveland Target Co. 47 Fed. 736.

Excessive claim.

593. A patentee, who may have claimed as his own invention more than he had a right to claim as new, may correct the mistake at any time. *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. Rep. 788. 29: 105

Cited in Hubel v. Dick, 28 Fed. 657.

Correction of drawings.

594. The reissue of a patent merely to correct an obvious error in one of the drawings is within the jurisdiction of the Commissioner of Patents, although the error

was not such as would have impaired the patentee's rights under his original design, where the application for the reissue is made in good faith and with a design only of securing to the patentee what he has actually invented. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. Rep. 409. 45: 586

Cited in Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. 115 Fed. 813—Weston Electrical Instrument Co. v. Stevens, 119 Fed. 185—Kirchberger v. American Acetylene Burner Co. 64 C. C. A. 113, 128 Fed. 607—Keesbey & M. Co. v. Phillip Carey Mfg. Co. 139 Fed. 578.

Product.

595. An inventor who has discovered a new and useful product, and has procured a patent only for the process of manufacture, is entitled to surrender his patent and procure a reissue in which the process and product must be clearly and distinctly claimed and described. *Merrill v. Yeomans*, 94 U. S. 568. 24: 235

Cited in Miller v. Eagle Mfg. Co. 151 U. S. 199, 38 L. ed. 128, 14 Sup. Ct. Rep. 310—Badische Anilin & Soda Fabrik v. Kalle, 4 Fed. 171—Maurer v. Dickerson, 51 C. C. A. 498, 113 Fed. 874—Dayton Fan & Motor Co. v. Westinghouse Electric & Mfg. Co. 55 C. C. A. 401, 118 Fed. 573.

Expiration of original patent.

See also *infra*, 603.

596. The Commissioner of Patents can lawfully receive a surrender of letters patent, for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted, and pending the existence of an extended term. Such surrender and renewal may be made at any time during such extended term. *Wilson v. Rousseau*, 4 How. 646. 11: 1141

Cited in Woodworth v. Wilson, 4 How. 716, 11 L. ed. 1173—Wilson v. Simpson, 9 How. 124, 13 L. ed. 73—Bloomer v. McQuewan, 14 How. 549, 14 L. ed. 537—Chaffee v. Boston Belting Co. 22 How. 223, 16 L. ed. 242—Bloomer v. Millinger, 1 Wall. 351, 17 L. ed. 584—Eunson v. Dodge, 18 Wall. 416, 21 L. ed. 768—De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 223, 37 L. ed. 143, 13 Sup. Ct. Rep. 283—Brooks v. Jenkins, Fed. Cas. No. 1,053—Carew v. Boston Elastic Fabric Co. Holmes, 47, Fed. Cas. 2,398—Case v. Redfield, 4 McLean, 528, Fed. Cas. No. 2,494—Clum v. Brewer, 2 Curt. C. C. 520, Fed. Cas. No. 2,900—Crompton v. Belknap Mills, 3 Fisher, Pat. Cas. 546, Fed. Cas. No. 3,406—Gibson v. Cook, 2 Blatchf. 146, 1 Fisher, Pat. Cas. 418, Fed. Cas. No. 5,393—Gibson v. Harris, 1 Blatchf. 169, 1 Fisher, Pat. Cas. 117, Fed. Cas. No. 5,396—Goodyear v. Cary, 4 Blatchf. 303, Fed. Cas. No. 5,362—Mowry v. Grand Street R. Co. 10 Blatchf. 92, 5 Fisher, Pat. Cas. 589, Fed. Cas. No. 9,893—Prime v. Brandon Mfg. Co. 16 Blatchf. 457, 4 Bann. & Ard. 384, Fed. Cas. No. 11,421—Smith v. Mercer, Fed. Cas. No. 13,078—Stevens v. Gladding, 8 N. Y. Legal Obs. 299, Fed. Cas. No. 13,400—Woodworth v. Edwards, 3 Woodb. & M. 127, Fed. Cas. No. 18,014—Woodworth v. Hall, 1 Woodb. & M. 254, 256 2 Robb. Pat. Cas. 501, Fed. Cas. No. 18,016—Whitcomb v. Spring Valley Coal Co. 47 Fed. 657.

Expiration of foreign patent.

597. A reissue of a patent for an invention, after the expiration of foreign patents for the same invention is invalid. *Commercial Mfg. Co. v. Fairbank Canning Co.* 135 U. S. 176, 10 Sup. Ct. Rep. 718, 34: 88
Distinguished in *Weisbach Light Co. v. Apollo Incandescent Gaslight Co.* 37 C. C. A. 510, 96 Fed. 333.

Cited in *Consolidated Roller-Mill Co. v. Walker*, 43 Fed. 582—*Brush Electric Co. v. Electrical Accumulator Co.* 47 Fed. 52—*John R. Williams Co. v. Miller, D. & P. Mfg. Co.* 108 Fed. 987.

598. The Bavarian patent which expired April 8, 1876, and the Austrian patent which expired May 26, 1876, were for the same invention as the American reissued letters patent 10,137, granted June 13, 1882, the original of which was granted Dec. 3, 1873, to Hippolyte Mege for an improvement in treating animal fats. Hence such reissue was invalid. *Commercial Mfg. Co. v. Fairbank Canning Co.* 135 U. S. 176, 10 Sup. Ct. Rep. 718, 34: 88

Reissue to assignee.

599. Where an assignee applies for the reissue of a patent, the Commissioner must decide whether the applicant was an assignee with such an interest as entitled him to a reissue. *Holloway v. Whiteley* (Commissioner of Patents v. Whiteley) 4 Wall. 522, 18: 335

c. Surrender of Original.

Time of Privilege Running from Date of Original, see *supra*, 27.
 Infringement of Reissue as New Cause of Action, see *infra*, 1089.
 See also *infra*, 1148.

600. The surrender of a patent extinguishes the patent, and a right cannot be asserted under it after the surrender. Existing suits fail unless the patent exists at the time of trial and judgment. *Reedy v. Scott*, 23 Wall. 352, 23: 109
Moffitt v. Garr, 1 Black, 273, 17: 207
Meyer v. Pritchard, 131 U. S. cxix. Appx. and 23: 961
Distinguished in *Burdett v. Estey*, 19 Blatchf. 4, 5 Bann. & Ard. 311, 3 Fed. 568.

Cited in *Reedy v. Scott*, 23 Wall. 364, 23 L. ed. 109—*Peck v. Collins*, 103 U. S. 663, 26 L. ed. 514—*Eby v. King*, 158 U. S. 373, 39 L. ed. 1021, 15 Sup. Ct. Rep. 972—*Allen v. Culp*, 166 U. S. 504, 41 L. ed. 1094, 17 Sup. Ct. Rep. 644—*Buckner v. Street*, 1 Dill. 254, 7 Nat. Bankr. Reg. 261, Fed. Cas. No. 2,098—*Fry v. Quinlan*, 13 Blatchf. 205, Fed. Cas. No. 5,140—*Potter v. Braunsdorf*, 7 Blatchf. 111, Fed. Cas. No. 11,321—*Burrell v. Hackley*, 35 Fed. 834—*Rein v. Clayton*, 3 L.R.A. 80, 37 Fed. 354—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 288, 37 U. S. App. 299, 69 Fed. 400—*Franklin v. Illinois Moulding Co.* 128 Fed. 48—*Billings v. Stark*, 15 Fla. 304.

601. The surrender of a patent after final judgment or decree can have no effect upon a right passed previously into judgment. *Meyers v. Conover*, 131 U. S. cxlii. Appx. and 23: 1008

602. A patent surrendered for reissue is canceled in law, as well when the reissue is denied as when it is granted. *Peck v. Collins*, 103 U. S. 660, 26: 512
Cited as obiter *McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 288, 37 U. S. App. 299, 69 Fed. 400.

Cited in *Eby v. King*, 158 U. S. 373, 39 L. ed. 1021, 15 Sup. Ct. Rep. 972—*Allen v. Culp*, 166 U. S. 504, 41 L. ed. 1094, 17 Sup. Ct. Rep. 644—*McCormick Harvesting Mach. Co. v. C. Aultman* 169 U. S. 610, 42 L. ed. 877, 18 Sup. Ct. Rep. 443—*Celluloid Manufg. Co. v. Zylonite Brush & Comb Co.* 27 Fed. 294—*Burrell v. Hackley*, 35 Fed. 834—*Rein v. Clayton*, 3 L.R.A. 80, 37 Fed. 358—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 58 Fed. 779—*Ingersoll v. Holt*, 104 Fed. 684—*Franklin v. Illinois Moulding Co.* 128 Fed. 48.

603. Under the patent law of February 21, 1793, a Secretary of State has power to accept a surrender of and to cancel the first letters patent, where a defective specification arose from inadvertence or mistake and without any fraud or misconduct on the part of the patentee; and he can cancel the record of the patent, and issue a new patent for the unexpired part of the fourteen years granted under the first patent. *Grant v. Raymond*, 6 Pet. 218, 8: 376
Cited in *Odell v. Stout*, 22 Fed. 161—*United States v. Rider*, 50 Fed. 408—*Thomson-Houston Electric Co. v. Black River Traction Co.* 68 C. C. A. 468, 135 Fed. 766.

d. Change of Claims in Reissue.

Disclaimer in Case of Reissued Patent, see *infra*, 784-787.

Right to enlarge or restrict claim generally.

See also *infra*, 649, 1093.

604. The patentee may restrict or enlarge his claim, so as to give it validity and to effectuate his invention, upon surrender and cancellation of letters patent, and the issue of new letters patent on an amended specification, under the express provisions of the act of 1836, December 13. *Battin v. Taggart*, 17 How. 74, 15: 37

Distinguished in *Railway Register Mfg. Co. v. Broadway & S. Ave. R. Co.* 26 Fed. 525.

Cited in *Providence Rubber Co. v. Goodyear*, 9 Wall. 795, 19 L. ed. 568—*Heald v. Rice*, 104 U. S. 749, 26 L. ed. 914—*Ex parte Ball*, Fed. Cas. No. 810—*Cahart v. Austin*, 2 Cliff. 535, 2 Fisher, Pat. Cas. 562, Fed. Cas. No. 2,288—*Calkins v. Bertraud*, 2 Bann. & Ard. 217, 6 Biss. 496, Fed. Cas. No. 2,317—*Crompton v. Belknap Mills*, 3 Fisher, Pat. Cas. 544, Fed. Cas. No. 3,406—*Flint v. Roberts*, 4 Bann. & Ard. 166, Fed. Cas. No. 4, 875—*Goodyear v. Providence Rubber Co.* 2 Cliff. 374, 2 Fisher, Pat. Cas. 513, Fed. Cas. No. 5,583—*Herring v. Nelson*, 14 Blatchf. 301, 3 Bann. & Ard. 63, Fed. Cas. No. 6,424—*Hussey v. McCormick*, 1 Biss. 308, 1 Fisher, Pat. Cas. 515, Fed. Cas. No. 6,948—*Jordan v. Dobson*, 2 Abb. (U. S.) 406, 4 Fisher, Pat. Cas. 239, Fed. Cas. No. 7,519—*Milligan & H. Glue Co. v. Upton*, 4 Cliff. 239, 1 Bann. & Ard. 500, Fed. Cas. No. 9,607—*Parham v. American Button-Hole Over-Seaming & Sewing-Mach. Co.* 4 Fisher, Pat. Cas. 472, Fed. Cas. No. 10,713—*Pennsylvania Salt Mfg. Co.*

v. Thomas, 5 Fisher, Pat. Cas. 149, Fed. Cas. No. 10,956—Poppenhusen v. Falke, 4 Blatchf. 496, Fed. Cas. No. 11,279—Sickles v. Evans, 2 Cluff. 222, 2 Fisher, Pat. Cas. 438, Fed. Cas. No. 12,839—Woodward v. Dinsmore, 4 Fisher, Pat. Cas. 165, Fed. Cas. No. 13,003—Wilson v. Coon, 18 Blatchf. 537, 6 Fed. 617—Smith v. Merriam, 6 Fed. 718—Kells v. McKenzie, 9 Fed. 286—Atwood v. Portland Co. 5 Bann. & Ard. 537, 10 Fed. 287—Vermont Farm Mach. Co. v. Marble, 22 Blatchf. 33, 19 Fed. 307—Holmes Burglar Alarm Teleg. Co. v. Domestic Teleg. & Teleph. Co. 42 Fed. 224—Jordan v. Dobson, 7 Phila. 537—Pennsylvania Salt Mfg. Co. v. Thomas, 8 Phila. 144—Salt Mfg. Co. v. Thomas, 1 Legal Gaz. Rep. 275.

605. It is the right of the patentee and his representatives to enlarge or restrict the claim so as to give it validity and secure the invention by a reissue of letters patent. Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19: 566

Cited in Carew v. Boston Elastic Fabric Co. 3 Cluff. 359, 5 Fisher, Pat. Cas. 98, Fed. Cas. No. 2,397—Smith v. Merriam, 6 Fed. 718—Atwood v. Portland County, 5 Bann. & Ard. 538, 10 Fed. 287—Combined Patents Can. Co. v. Lloyd, 11 Fed. 151.

606. To warrant new and broader claims in a reissue, such claims must not be merely suggested or indicated in the original specification, drawings, or models, but it must further appear from the original patent that they constitute parts or portions of the invention, which were intended or sought to be covered or secured by such original patent. Corbin Cabinet Lock Co. v. Eagle Lock Co. 150 U. S. 38, 14 Sup. Ct. Rep. 28, 37: 989

For inadvertence; accident; mistake.

Right to Obtain Reissue for Inadvertence, Accident or Mistake, see *supra*, 591, 592.

Disclaimer of Parts Claimed by, see *infra*, 768.

607. Where no inadvertence, accident, or mistake is shown, a reissue with new claims cannot be sustained. Electric Gas-lighting Co. v. Boston Electric Co. 139 U. S. 481, 11 Sup. Ct. Rep. 586, 35: 250
Worden v. Searls, 121 U. S. 14, 7 Sup. Ct. Rep. 814, 30: 853
Cited in Electric Gas Lighting Co. v. Boston Electric Co. 139 U. S. 502, 35 L. ed. 260, 11 Sup. Ct. Rep. 586.

608. A patent cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake, inadvertently committed, in the wording of the claim. Dunham v. Dennison Mfg. Co. 154 U. S. 103, 14 Sup. Ct. Rep. 986, 38: 924
Distinguished in Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 84, 108 Fed. 858.

Cited in Eby v. King, 158 U. S. 373, 39 L. ed. 1021, 15 Sup. Ct. Rep. 972—Mast, F. & Co. v. Iowa Windmill & Pump Co. 68 Fed. 222.

609. A patent cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake, inadvertently committed, in the wording of the claim, and the application for reissue is made within a reasonably short time. Mahn v.

Harwood, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451, 28: 665
Miller v. Bridgeport Brass Co. 104 U. S. 350, 26: 783

Cited in Mathews v. Boston Mach. Co. 105 U. S. 58, 26 L. ed. 1023—Torrent & A. Lumber Co. v. Rodgers, 112 U. S. 669, 28 L. ed. 846, 5 Sup. Ct. Rep. 501—Coon v. Wilson, 113 U. S. 277, 28 L. ed. 966, 5 Sup. Ct. Rep. 537—Wollensak v. Reiher, 115 U. S. 98, 29 L. ed. 350, 5 Sup. Ct. Rep. 1137—White v. Dunbar, 119 U. S. 52, 30 L. ed. 305, 7 Sup. Ct. Rep. 72—Hartshorn v. Saginaw Barrel Co. 119 U. S. 673, 30 L. ed. 542, 7 Sup. Ct. Rep. 421—Crawford v. Hersinger, 123 U. S. 603, 31 L. ed. 274, 8 Sup. Ct. Rep. 399—Matthews v. Ironclad Mfg. Co. 124 U. S. 351, 31 L. ed. 479, 8 Sup. Ct. Rep. 639—Yale Lock Mfg. Co. v. James, 125 U. S. 464, 31 L. ed. 812, 8 Sup. Ct. Rep. 967—Yale Lock Mfg. Co. v. Berkshire Nat. Bank 135 U. S. 379, 34 L. ed. 183, 10 Sup. Ct. Rep. 884—Freeman v. Asmus, 145 U. S. 239, 36 L. ed. 690, 12 Sup. Ct. Rep. 939—Huber v. N. O. Nelson Mfg. Co. 148 U. S. 288, 37 L. ed. 453, 13 Sup. Ct. Rep. 603—Leggett v. Standard Oil Co. 149 U. S. 292, 37 L. ed. 741, 13 Sup. Ct. Rep. 902—Corbin Cabinet Lock Co. v. Eagle Lock Co. 150 U. S. 43, 37 L. ed. 991, 14 Sup. Ct. Rep. 28—Dunham v. Dennison Mfg. Co. 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 986—Putnam v. Hutchinson, 11 Bliss. 238, 12 Fed. 130—Singer Mfg. Co. v. Goodrich, 15 Fed. 456—Ives v. Sargent, 21 Blatchf. 420, 17 Fed. 449—Reay v. Raynor, 22 Blatchf. 16, 19 Fed. 310—Yale Lock Mfg. Co. v. James, 22 Blatchf. 296, 20 Fed. 905—Wooster v. Handy, 22 Blatchf. 309, 21 Fed. 53—Scribner v. Oakland Gas Co. 10 Sawy. 391, 22 Fed. 99—Bate Refrigerating Co. v. Eastman, 24 Fed. 649—Gunn v. Savage, 25 Fed. 102—Mathews v. Flower, 25 Fed. 834—Phillips v. Risser, 26 Fed. 312—Boland v. Thompson, 23 Blatchf. 442, 26 Fed. 634—Russell v. Laughlin, 26 Fed. 700—Hoe v. Knap, 27 Fed. 212—Yale Lock Mfg. Co. v. New Haven Sav. Bank, 32 Fed. 170—Union Paper Bag Mach. Co. v. Waterbury, 39 Fed. 393—Sawyer Spindle Co. v. Eureka Spindle Co. 38 Fed. 837—Putnam v. Keystone Bottle Stopper Co. 38 Fed. 235—Yale & T. Mfg. Co. v. Consolidated Time-Lock Co. 38 Fed. 917—Dunham v. Dennison Mfg. Co. 40 Fed. 670—International Terra Cotta Lumber Co. v. Maurer, 44 Fed. 622—Johnston v. American Heat Insulating Co. 48 Fed. 448—Cochran v. Zimmerman, 53 Fed. 803—Featherstone v. George B. Bidwell Cycle Co. 6 C. C. A. 492, 14 U. S. App. 632, 57 Fed. 636—Mast, F. & Co. v. Iowa Windmill & Pump Co. 68 Fed. 222—American Soda-Fountain Co. v. Zwietusch, 75 Fed. 578—Mast, F. & Co. v. Iowa Windmill & Pump Co. 22 C. C. A. 592, 40 U. S. App. 362, 76 Fed. 822—Pfenninger v. Heubner, 99 Fed. 443—Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 81, 108 Fed. 855—United Blue-Flame Oil Stove Co. v. Glazier, 55 C. C. A. 556, 119 Fed. 160—Thomson-Houston Electric Co. v. Black River Traction Co. 68 C. C. A. 463, 135 Fed. 766—Re Starkey, 21 App. D. C. 525—Tectonius v. Scott, 110 Wis. 455, 86 N. W. 672.

610. A patent cannot be reissued to enlarge a claim unless there has been a clear mistake in the wording of the claim, and an application is made within a reasonably short period after the original patent was

granted. *Parker & W. Co. v. Yale Clock Co.* 123 U. S. 87, 8 Sup. Ct. Rep. 38, 31: 100
Wollensak v. Reiher, 115 U. S. 96, 5 Sup. Ct. Rep. 1137, 29: 350
Hoskin v. Fisher, 125 U. S. 217, 8 Sup. Ct. Rep. 834, 31: 759
Huber v. N. O. Nelson Mfg. Co. 148 U. S. 270, 13 Sup. Ct. Rep. 603, 37: 447
Cited in Halles v. Albany Stove Co. 123 U. S. 587, 31 L. ed. 286, 8 Sup. Ct. Rep. 262—*Matthews v. Ironclad Mfg. Co.* 124 U. S. 351, 31 L. ed. 479, 8 Sup. Ct. Rep. 639—*Hoskin v. Fisher*, 125 U. S. 223, 31 L. ed. 762, 8 Sup. Ct. Rep. 834—*Yale Lock Mfg. Co. v. James*, 125 U. S. 464, 31 L. ed. 812, 8 Sup. Ct. Rep. 967—*Flower v. Detroit*, 127 U. S. 571, 32 L. ed. 178, 8 Sup. Ct. Rep. 1291—*Electric Gas-Lighting Co. v. Boston Electric Co.* 139 U. S. 502, 35 L. ed. 260, 11 Sup. Ct. Rep. 586—*Topliff v. Topliff*, 145 U. S. 169, 36 L. ed. 664, 12 Sup. Ct. Rep. 825—*Freeman v. Asmus*, 145 U. S. 239, 36 L. ed. 690, 12 Sup. Ct. Rep. 939—*Huber v. N. O. Nelson Mfg. Co.* 148 U. S. 292, 37 L. ed. 454, 13 Sup. Ct. Rep. 603—*Leggett v. Standard Oil Co.* 149 U. S. 202, 37 L. ed. 741, 13 Sup. Ct. Rep. 902—*Dunham v. Dennison Mfg. Co.* 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 986—*Olin v. Timken*, 155 U. S. 147, 39 L. ed. 103, 15 Sup. Ct. Rep. 49—*Hutchinson v. Everett*, 33 Fed. 504—*Wallensak v. Sargent*, 33 Fed. 843—*Philadelphia Novelty Mfg. Co. v. Rous*, 39 Fed. 274—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 734—*Carpenter Straw-Sewing Mach. Co. v. Searle*, 52 Fed. 813—*Featherstone Co. v. George E. Bidwell Cycle Co.* 6 C. C. A. 492, 14 U. S. App. 632, 57 Fed. 636—*Peoria Target Co. v. Cleveland Target Co.* 7 C. C. A. 209, 16 U. S. App. 78, 58 Fed. 239—*Carpenter Straw-Sewing Mach. Co. v. Searle*, 8 C. C. A. 480, 20 U. S. App. 301, 60 Fed. 86—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 200, 21 U. S. App. 244, 61 Fed. 963—*Buffington's Iron Bldg. Co. v. Rustis*, 13 C. C. A. 146, 27 U. S. App. 693, 65 Fed. 808—*Mast. F. & Co. v. Iowa Windmill & Pump Co.* 68 Fed. 222—*Heaton Peninsular Button-Fastener Co. v. Schlochtmeier*, 69 Fed. 593—*American Soda-Fountain Co. v. Zwietsch*, 75 Fed. 578—*Mast. F. & Co. v. Iowa Windmill & Pump Co.* 22 C. C. A. 592, 40 U. S. App. 362, 76 Fed. 822—*Adams Electric R. Co. v. Lindell R. Co.* 23 C. C. A. 242, 40 U. S. App. 482, 77 Fed. 451—*Welsbach Light Co. v. Apollo Incandescent Gaslight Co.* 37 C. C. A. 510, 96 Fed. 334—*Societe Anonyme v. General Electric Co.* 97 Fed. 605—*Pelzer v. Meyberg*, 97 Fed. 970—*Pfenninger v. Heubner*, 99 Fed. 443—*United Blue-Flame Oil Stove Co. v. Glazier*, 55 C. C. A. 555, 119 Fed. 159—*Re Messinger*, 12 App. D. C. 534.

611. A clear mistake, inadvertently committed, in the wording of a claim, is necessary, without reference to the length of time, to make valid an enlargement of the claim on a reissue of the patent. *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 10 Sup. Ct. Rep. 884, 34: 168

612. The power to reissue a patent may be exercised when the patent is inoperative by reason of the fact that the specification as originally drawn was defective or insufficient, or the claims were narrower than the actual invention of the patentee, provided the error has arisen from inadvertence or mistake and the patentee is guilty of no

fraud or deception. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. Rep. 825, 36: 658
Cited in Rucker-Spring Co. v. Thomas, 68 Fed. 200—*Bowers v. San Francisco Bridge Co.* 69 Fed. 644—*American Soda-Fountain Co. v. Zwietsch*, 75 Fed. 578—*Haggenmacher v. Nelson*, 88 Fed. 493—*Pelzer v. Meyberg*, 97 Fed. 970—*United Blue-Flame Oil Stove Co. v. Glazier*, 55 C. C. A. 555, 119 Fed. 159—*Re Messinger*, 12 App. D. C. 534.

613. A patent may be reissued for an enlarged claim, where there had been a mistake, and the patentee has been guilty of no want of reasonable diligence in discovering it, and no third persons have in the meantime acquired the right to manufacture or sell what he has failed to claim, and the reissue covers no more than the actual invention of the patentee. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. Rep. 825, 36: 658
Cited in Freeman v. Asmus, 145 U. S. 241, 36 L. ed. 691, 12 Sup. Ct. Rep. 939—*Corbin Cabinet Lock Co. v. Eagle Lock Co.* 150 U. S. 43, 37 L. ed. 991, 14 Sup. Ct. Rep. 28—*Dunham v. Dennison Mfg. Co.* 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 986—*Carpenter Straw-Sewing Mach. Co. v. Searle*, 52 Fed. 812—*Featherstone v. George E. Bidwell Cycle Co.* 53 Fed. 116—*Carpenter Straw-Sewing Mach. Co. v. Searle*, 8 C. C. A. 478, 20 U. S. App. 301, 60 Fed. 84—*Gaskill v. Myers*, 26 C. C. A. 643, 48 U. S. App. 494, 81 Fed. 854—*Graham v. Earl*, 34 C. C. A. 272, 48 U. S. App. 691, 82 Fed. 741—*Pfenninger v. Heubner*, 99 Fed. 443—*Crown Cork & Seal Co. v. Aluminum Stopper Co.* 48 C. C. A. 83, 108 Fed. 856—*Ide v. Thorlight, D. & R. Carpet Co.* 53 C. C. A. 351, 115 Fed. 147—*Fay v. Mason*, 120 Fed. 510—*Bechman v. Wood*, 15 App. D. C. 503.

614. An action for infringement will not be sustained on a reissued patent, where the original patent, if unaltered, would not sustain it, and where the reissue was taken out a year or two after the patentee knew that defendant was making the article alleged to infringe, and the specification in the reissue is substantially the same as the original, showing that it was not defective by mistake in framing it. *Matthews v. Iron Clad Mfg. Co.* 124 U. S. 347, 8 Sup. Ct. Rep. 639, 31: 477

Cited in Yale Lock Mfg. Co. v. James, 125 U. S. 464, 31 L. ed. 812, 8 Sup. Ct. Rep. 967—*Freeman v. Asmus*, 145 U. S. 239, 36 L. ed. 690, 12 Sup. Ct. Rep. 939—*Cimlotti Unhailing Co. v. Bowsky*, 95 Fed. 477.

615. Where the claim of a reissued patent is not covered by the original patent, and before the issue of the latter it was passed upon and rejected and withdrawn, and an interference dissolved upon condition of the amendment, and the issue of the original patent was predicated upon its abandonment, there was no inadvertence, accident, or mistake in its omission therefrom. *Dobson v. Lees*, 137 U. S. 258, 11 Sup. Ct. Rep. 71, 34: 652

616. A misapprehension when a patent is taken out, consisting in the assumption that the omission of a certain element in a patented combination would leave a practically valueless combination, is not such a mistake as will authorize enlarging the claim by re-

issue by omitting that element. *Huber v. N. O. Nelson Mfg. Co.* 148 U. S. 270, 13 Sup. Ct. Rep. 603, 37: 447

617. The last clause of the act of 1870, § 53, as to proof of mistake where there is no model or drawing relates to the matter of evidence alone, and cannot enlarge the power of the Commissioner as to the invention for which a reissue may be granted. *Parker & W. Co. v. Yale Clock Co.* 123 U. S. 87, 8 Sup. Ct. Rep. 38, 31: 100

Extension beyond scope of original patent.

Right to Enlarge Claim, see *supra*, 604-606.

Expansion of Original Patent in Reissued Patent, see *infra*, 649-665.

618. A reissued patent is void when it enlarges and expands the claims of the original patent. *Case v. Brown*, 2 Wall. 320, 17: 817

Leggett v. Standard Oil Co. 149 U. S. 287, 13 Sup. Ct. Rep. 902, 37: 737

Cited in Dunham v. Dennison Mfg. Co. 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 986—*Coffin v. Ogden*, 3 Fisher, Pat. Cas. 645, Fed. Cas. No. 2,950—*Crompton v. Belknap Mills*, 3 Fisher, Pat. Cas. 546, Fed. Cas. No. 3,406—*Seymour v. Osborne*, 3 Fisher, Pat. Cas. 564, Fed. Cas. No. 12,688—*Taylor v. Garretson*, 9 Blatchf. 164, 5 Fisher, Pat. Cas. 124, Fed. Cas. No. 13,792—*Westinghouse v. New York Air-Brake Co.* 59 Fed. 602—*Game-well Fire-Alarm Teleg. Co. v. Municipal Signal Co.* 10 C. C. A. 189, 21 U. S. App. 157, 61 Fed. 953

619. The reissue of a patent cannot be permitted to enlarge the claims of the original patent by including matter once intentionally omitted. *Dobson v. Lees*, 137 U. S. 258, 11 Sup. Ct. Rep. 71, 34: 652

Cited in Royer v. Coupe, 146 U. S. 532, 38 L. ed. 1077, 13 Sup. Ct. Rep. 166—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 737.

620. Any extension in the reissue of a patent beyond the scope of the original patent, which was not inoperative or invalid by means of a defective or insufficient specification, is fatal. *Swain Turbine & Mfg. Co. v. Ladd*, 102 U. S. 408, 26: 184

Giant Powder Co. v. California Powder Works, 98 U. S. 126, 25: 77

Hopkins & D. Mfg. Co. v. Corbin, 103 U. S. 786, 26: 610

Bantz v. Frantz, 105 U. S. 160, 26: 1013

Johnson v. Flushing & N. S. R. Co. 105 U. S. 539, 26: 1162

McMurray v. Mallory, 111 U. S. 97, 4 Sup. Ct. Rep. 375, 28: 365

Turner & S. Mfg. Co. v. Dover Stamping Co. 111 U. S. 319, 4 Sup. Ct. Rep. 401, 28: 442

Torrent & A. Lumber Co. v. Rodgers, 112 U. S. 659, 5 Sup. Ct. Rep. 501, 28: 842

Cited in Hopkins & D. Mfg. Co. v. Corbin, 103 U. S. 702, 26 L. ed. 612—*Torrent & A. Lumber Co. v. Rodgers*, 112 U. S. 669, 28 L. ed. 846, 5 Sup. Ct. Rep. 501—*Yale Lock Mfg. Co. v. James*, 125 U. S. 463, 31 L. ed. 812, 8 Sup. Ct. Rep. 967—*Dobson v. Lees*, 137 U. S. 263, 34 L. ed. 654, 11 Sup. Ct. Rep. 71—*Topliff v. Topliff*, 145 U. S. 169, 36 L. ed.

664, 12 Sup. Ct. Rep. 825—*McMurry v. Mallory*, 4 Hughes, 270—*Washburn Mfg. Co. v. Halse*, 10 Blas. 89, 7 Fed. 913—*Meyer v. Maxheimer*, 20 Blatchf. 17, 9 Fed. 100—*Kells v. McKenzie*, 9 Fed. 288—*Brainard v. Cramme*, 20 Blatchf. 534, 12 Fed. 624—*Holt v. Keeler*, 13 Fed. 472—*Andrews v. Hovey*, 5 McCrary, 198, 16 Fed. 399—*Yale Lock Mfg. Co. v. James*, 22 Blatchf. 297, 20 Fed. 915—*Wooster v. Handy*, 22 Blatchf. 333, 21 Fed. 66—*Matthews v. Iron Clad Mfg. Co.* 22 Blatchf. 432, 21 Fed. 643—*Odell v. Stout*, 22 Fed. 162—*Hammond v. Franklin*, 23 Blatchf. 82, 22 Fed. 836—*Electric Gas-Lighting Co. v. Smith & R. Electric Co.* 23 Fed. 196—*Holt v. Kendall*, 26 Fed. 625—*Tubular Rivet Co. v. Copeland*, 26 Fed. 707—*Otis Bros. Mfg. Co. v. Crane Bros. Mfg. Co.* 27 Fed. 555—*Tarrant v. Duluth Lumber Co.* 39 Fed. 832—*Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. 30—*International Terra Cotta Lumber Co. v. Maurer*, 44 Fed. 621—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 735—*Carpenter Straw-Sewing Mach. Co. v. Searle*, 52 Fed. 813—*Lang v. Baxter*, 63 Fed. 828—*Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.* 86 Fed. 321—*American Bell Telephone Co. v. National Tel. Mfg. Co.* 109 Fed. 1009—*Hyatt v. Ingalls*, 124 N. Y. 103, 26 N. E. 285.

621. Where an amended specification does not enlarge the scope of the patent by extending the claim so as to cover more than was embraced in the original, and thus cause the patent to include an invention not within the original, the rights of the public are not thereby narrowed, and the case is within the remedy intended by act of July 8th, 1870, § 53, providing for the reissue in accordance with a corrected specification of a patent invalid by reason of a defective specification. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, 30: 1064

Cited in Yale Lock Mfg. Co. v. New Haven Sav. Bank, 32 Fed. 171—*Norton Door Check & Spring Co. v. Hall*, 37 Fed. 691—*Johnston v. American Heat Insulating Co.* 48 Fed. 443—*Westinghouse v. New York Air Brake Co.* 59 Fed. 602.

621a. A reissued patent based on specifications so extended as to include the invention of another which the patentee had examined, will not be upheld. *Burr v. Duryee*, 1 Wall. 579, 17: 660

622. The claims of a reissued patent must be held to be limited to the specific mechanism claimed in the original patent. *Electric Gas-Lighting Co. v. Boston Electric Co.* 139 U. S. 481, 11 Sup. Ct. Rep. 586, 35: 250

Cited in Electric Gaslighting Co. v. Tillotson, 139 U. S. 503, 35 L. ed. 261, 11 Sup. Ct. Rep. 594—*Huber v. N. O. Nelson Mfg. Co.* 148 U. S. 292, 37 L. ed. 454, 13 Sup. Ct. Rep. 603—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 737—*Hillborn v. Hale & K. Mfg. Co.* 16 C. C. A. 575, 28 U. S. App. 525, 69 Fed. 964—*Cimlott Unhairing Co. v. Bowsky*, 95 Fed. 477.

623. Where the specification and first claim of an original patent for manufacturing counters for boots and shoes were intended to cover an elongated heel-shaped former, eccentrically set upon its shaft, against which the material of which the counter was to be made was pressed by a

revolving roller or rollers; and the first claim of the reissued patent was expanded so that it might cover a former circular in cross section, concentrically set, and revolving in the semicircular groove of a stationary mould, by which the material was pressed against the former,—the reissue is void for covering more than the original. *Moffitt v. Rogers*, 106 U. S. 423, 1 Sup. Ct. Rep. 70, 27: 76

Cited in Topliff v. Topliff, 145 U. S. 169, 36 L. ed. 664, 12 Sup. Ct. Rep. 825—*Moffitt v. Cavanagh*, 17 Fed. 338—*Moffitt v. Cavanagh*, 27 Fed. 512—*Kane v. Huggins Cracker & Candy Co.* 44 Fed. 290.

624. Where an original patent for a water wheel claimed nothing but the annular chamber, peculiar gate, and guide arrangement, and step adjustment described therein, a reissue twelve years and a half after, which would give a monopoly of all water wheels which have simultaneously an effective inward and downward flow and discharge, whatever might be the shape of the floats or the crown, is invalid. *Swain Turbine & Mfg. Co. v. Ladd*, 102 U. S. 408, 26: 184

625. The enlargement of the claims in the reissue of a patent, so as to embrace machines which do not contain the only new features of the machine claimed in the original patent, is void. *Farmers' Friend Mfg. Co. v. Challenge Corn Planter Co.* 128 U. S. 506, 9 Sup. Ct. Rep. 146, 32: 529

626. Where a patent for a process involves the use of a pump for creating a vacuum, an air-tight connection is indispensable, and is implied if not expressly stated. In such a case the express statement of such connection included in the reissue does not broaden the original. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, 30: 1064

627. An applicant who, in order to get his patent, accepts one with a narrower claim than that contained in his original application, cannot get a reissue based on the broader claim, the proper remedy being by appeal from the decision rejecting the original application. *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. Rep. 493, 29: 723
Cited in Boland v. Thompson, 23 Blatchf. 442, 26 Fed. 635.

Reissue covering subsequent improvement.

628. The claims of a reissue cannot cover an improvement made after the granting of the original patent, under the act of July 4, 1836 (5 Stat. at L. 122, chap. 357), § 13, providing for a surrender and the issuing of a new patent "for the same invention," "in accordance with the patentee's corrected description and specification." *Union Metallic Cartridge Co. v. United States Cartridge Co.* 112 U. S. 624, 5 Sup. Ct. Rep. 475, 28: 828

629. A patent cannot be amended so as to cover an improvement invented by others
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after its issue. *Parker & W. Co. v. Yale Clock Co.* 123 U. S. 87, 8 Sup. Ct. Rep. 38, 31: 100

630. Where the original patent for a collar described and claimed only a collar with short or sectional bands, that is, a band along the lower edge of the collar, made in parts or sections, and with a graduated curve, a reissued patent so framed as to cover a continuous band with a graduated curve, but not in sections, cannot be valid, where there was no inadvertence or mistake, but an attempt merely to enlarge the claim to cover collars which had been put upon the market after the original patent. *Coon v. Wilson*, 113 U. S. 268, 5 Sup. Ct. Rep. 537, 28: 963

Cited in Ives v. Sargent, 119 U. S. 663, 30 L. ed. 548, 7 Sup. Ct. Rep. 436—*Parker & W. Co. v. Yale Clock Co.* 123 U. S. 103, 31 L. ed. 107, 8 Sup. Ct. Rep. 38—*Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 370, 34 L. ed. 183, 10 Sup. Ct. Rep. 884—*Electric Gas-Lighting Co. v. Boston Electric Co.* 139 U. S. 502, 35 L. ed. 260, 11 Sup. Ct. Rep. 586—*Freeman v. Asmus*, 145 U. S. 239, 36 L. ed. 690, 12 Sup. Ct. Rep. 939—*Huber v. N. O. Nelson Mfg. Co.* 148 U. S. 288, 37 L. ed. 453, 13 Sup. Ct. Rep. 603—*Dunham v. Dennison Mfg. Co.* 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 986—*Gage v. Kellogg*, 23 Fed. 894—*Western U. Teleg. Co. v. Baltimore & O. Teleg. Co.* 25 Fed. 34—*Hoe v. Kahler*, 23 Blatchf. 369, 25 Fed. 281—*Arnheim v. Finster*, 26 Fed. 280—*Railway Register Mfg. Co. v. Broadway & S. A. R. Co.* 26 Fed. 525—*Boland v. Thompson*, 23 Blatchf. 442, 26 Fed. 634—*Russell v. Laughlin*, 26 Fed. 700—*Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.* 33 Fed. 259—*Brewster v. Shauler*, 37 Fed. 787—*Huber v. N. O. Nelson Mfg. Co.* 38 Fed. 836—*Union Paper-Bag Mach. Co. v. Waterbury*, 39 Fed. 393—*Dunham v. Dennison Mfg. Co.* 40 Fed. 670—*International Terra Cotta Lumber Co. v. Maurer*, 44 Fed. 621—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 786—*Carpenter Straw-Sewing Mach. Co. v. Searle*, 52 Fed. 813—*Mast, F. & Co. v. Iowa Windmill & Pump Co.* 68 Fed. 222—*American Soda-Fountain Co. v. Zwietusch*, 75 Fed. 578—*Mast, F. & Co. v. Iowa Windmill & Pump Co.* 22 C. C. A. 592, 40 U. S. App. 362, 76 Fed. 822—*American Soda-Fountain Co. v. Swietusch*, 29 C. C. A. 507, 53 U. S. App. 723, 85 Fed. 969—*Pfenninger v. Heubner*, 99 Fed. 443—*Crown Cork & Seal Co. v. Aluminum Stopper Co.* 48 C. C. A. 83, 108 Fed. 856.

Combinations.

Identity of Reissued Patent for, see infra, 672-679.

631. The omission to claim subcombinations in the combinations claimed, the existence of such subcombinations being apparent on the face of the patent, is in law such a dedication of them, if new, to the public, that a reissue to cover such subcombinations, in revocation of such dedication, cannot be availed of to the prejudice of rights acquired by the public before the reissue was applied for. *Clements v. Odorless Excavating Ap-*

paratus Co. 109 U. S. 641, 3 Sup. Ct. Rep. 525, 27: 1060
Distinguished in *Hillborn v. Hale & K. Mfg. Co.* 16 C. C. A. 575, 28 U. S. App. 525, 69 Fed. 964.

Cited in *Turner & S. Mfg. Co. v. Dover Stamp- ing Co.* 111 U. S. 327, 28 L. ed. 444, 4 Sup. Ct. Rep. 401—*Torrent & A. Lumber Co. v. Rodgers*, 112 U. S. 669, 28 L. ed. 846, 5 Sup. Ct. Rep. 501—*Electric Gas Lighting Co. v. Boston Electric Co.* 139 U. S. 501, 35 L. ed. 260, 11 Sup. Ct. Rep. 586—*Topliff v. Topliff*, 145 U. S. 189, 36 L. ed. 664, 12 Sup. Ct. Rep. 825—*Baltimore Car Wheel Co. v. North Baltimore Pass. R. Co.* 21 Fed. 48—*Wooster v. Handy*, 22 Blatchf. 333, 21 Fed. 66—*Electric Gas Lighting Co. v. Tillotson*, 22 Blatchf. 483, 21 Fed. 570—*Matthews v. Iron Clad Mfg. Co.* 22 Blatchf. 432, 21 Fed. 643—*Odell v. Stout*, 22 Fed. 162—*Hammond v. Franklin*, 23 Blatchf. 81, 22 Fed. 836—*Tubular Rivet Co. v. Copeland*, 26 Fed. 707—*Hutchinson v. Everett*, 33 Fed. 504—*Schwarzenbach v. Odorless Excavating Apparatus Co.* 65 Md. 38, 57 Am. Rep. 301, 3 Atl. 676.

632. A patentee cannot surrender a patent for a combination of old ingredients, and amend the specification by striking out one of the ingredients and inserting in lieu thereof other devices, without an allegation that they are the equivalents of the one stricken out. *Gill v. Wells*, 22 Wall. 1, 22: 699

Cited in *American Whip Co. v. Lombard*, 4 Cliff. 505, 3 Bann. & Ard. 603, Fed. Cas. No. 319—*Goodyear Dental Vulcanite Co. v. Preterre*, 15 Blatchf. 280, Fed. Cas. No. 5,598—*Johnson v. Flushing & N. S. R. Co.* 15 Blatchf. 198, Fed. Cas. No. 7,384.

633. An equivalent, in such a case, means that the ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent as a proper substitute for the one omitted. *Gill v. Wells*, 22 Wall. 1, 22: 699

Cited in *Storrs v. Howe*, 4 Cliff. 389, Fed. Cas. No. 13,495—*Babcock v. Judd*, 5 Bann. & Ard. 130, 1 Fed. 411—*Rowell v. Lindsay*, 10 Bliss. 227, 6 Fed. 299.

634. Where the original patent shows a special device for supporting a special arrangement of rakes in a harvester, such device being located on a particular part of the platform other than, and not possible to be, a part of the finger beam, a reissue claiming any device for supporting a revolving rake, even one located on the finger beam, is invalid. *Hoffheins v. Russell*, 107 U. S. 132, 1 Sup. Ct. Rep. 570, 27: 332
Cited in *Wooster v. Handy*, 22 Blatchf. 333, 21 Fed. 66.

635. Where the claim of the original patent is for a lock as such a claim of a reissue for a combination of that lock with something not claimed as an element in the original patent is void. *Corbin Cabinet Lock Co. v. Eagle Lock Co.* 150 U. S. 38, 14 Sup. Ct. Rep. 28, 37: 989

636. Right to reissue of patent for a combination of fewer elements than were claimed in the original patent recognized. *Brown v.*

Guild ("The Corn-Planter Patent") 23 Wall. 181, 23: 161
Cited in *Parker & W. Co. v. Yale Clock Co.* 123 U. S. 104, 31 L. ed. 107, 8 Sup. Ct. Rep. 38—*Christman v. Rumsey*, 4 Bann. & Ard. 513, Fed. Cas. No. 2,704—*Herring v. Nelson*, 14 Blatchf. 304, Fed. Cas. No. 6,424—*Kerosene Lamp Heater Co. v. Littell*, 3 Bann. & Ard. 318, Fed. Cas. No. 7,724—*Wilson v. Coon*, 18 Blatchf. 540, 6 Fed. 619—*Dederick v. Cassell*, 9 Fed. 308—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 734—*Christman v. Rumsey*, 58 How. Pr. 123.

Rejected claim.

Withdrawal of Application for Reissue after Decision Rejecting Claims, see *infra*, 643.

Enlarging Claim so as to Cover Abandoned Claims, see *infra*, 700-702.

See also *supra*, 627.

637. A claim rejected by the Patent Office with the acquiescence of the patentee, on the application for the original patent, cannot be included in the reissued patent. *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451, 28: 665
Cited in *Shepard v. Carrigan*, 116 U. S. 597, 29 L. ed. 724, 6 Sup. Ct. Rep. 493—*Roemer v. Peddie*, 132 U. S. 317, 33 L. ed. 383, 10 Sup. Ct. Rep. 98—*Arnheim v. Finster*, 24 Fed. 277—*Arnheim v. Finster*, 26 Fed. 279—*Boland v. Thompson*, 23 Blatchf. 442, 26 Fed. 634—*Hutchinson v. Everett*, 33 Fed. 504—*Wheaton v. Norton*, 17 C. C. A. 456, 44 U. S. App. 118, 70 Fed. 842—*Truman v. Holmes*, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—*Warren v. Casey*, 36 C. C. A. 31, 93 Fed. 965—*Rembert Roller Compress Co. v. American Cotton Co.* 64 C. C. A. 39, 129 Fed. 369.

638. Reissued letters patent are void when they contain claims that have once been formally disclaimed by the patentee or rejected with his acquiescence, and he has consented to such rejection in order to obtain his letters patent. *Leggett v. Avery*, 101 U. S. 256, 25: 865
Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26: 149
Distinguished in *Yale Lock Mfg. Co. v. Norwich Nat. Bank*, 19 Blatchf. 142, 6 Fed. 397—*Atwater Mfg. Co. v. Beecher Mfg. Co.* 6 Fed. 609.

Cited in *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 228, 26 L. ed. 151—*Mahn v. Harwood*, 112 U. S. 359, 28 L. ed. 867, 5 Sup. Ct. Rep. 174—*Union Metallic Cartridge Co. v. United States Cartridge Co.* 112 U. S. 644, 28 L. ed. 834, 5 Sup. Ct. Rep. 475—*Shepard v. Carrigan*, 116 U. S. 597, 29 L. ed. 724, 6 Sup. Ct. Rep. 493—*Crawford v. Heysinger*, 123 U. S. 607, 31 L. ed. 274, 8 Sup. Ct. Rep. 399—*Roemer v. Peddie*, 132 U. S. 317, 33 L. ed. 383, 10 Sup. Ct. Rep. 98—*Dobson v. Lees*, 137 U. S. 263, 34 L. ed. 654, 11 Sup. Ct. Rep. 71—*Hubbell v. United States*, 179 U. S. 80, 45 L. ed. 98, 21 Sup. Ct. Rep. 24—*Union Metallic Cartridge Co. v. United States Cartridge Co.* 7 Fed. 346—*Moffitt v. Rogers*, 8 Fed. 149—*Atwater Mfg. Co. v. Beecher Mfg. Co.* 8 Fed. 609—*Kells v. McKenzie*, 9 Fed. 291—*Edgerton v. Furst & B. Mfg. Co.* 10 Bliss. 406, 9 Fed. 453—*New York Belting & Packing Co. v. Sibley*, 15 Fed. 389—*Arnheim v. Finster*, 26 Fed. 279—*Boland v. Thompson*, 23 Blatchf. 442, 26

Fed. 634—Dobson v. Lees, 30 Fed. 626—Yale Lock Mfg. Co. v. New Haven Sav. Bank, 32 Fed. 171—Relter v. Jones, 35 Fed. 422—Rodebaugh v. Jackson, 37 Fed. 884—Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 30—Lapham Dodge Co. v. Severin, 40 Fed. 764—Peoria Target Co. v. Cleveland Target Co. 47 Fed. 734—Coll v. Seneca, 56 Fed. 156—Johnson v. Olsen, 61 Fed. 833—Wheaton v. Norton, 17 C. C. A. 456, 44 U. S. App. 118, 70 Fed. 842—Thomas v. Rocker Spring Co. 23 C. C. A. 221, 47 U. S. App. 125, 77 Fed. 431—Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 128, 54 U. S. App. 591, 85 Fed. 225—Truman v. Holmes, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. 115 Fed. 813—Rembert Roller Compress Co. v. American Cotton Co. 64 C. C. A. 39, 129 Fed. 369—Dobson v. Lees, 18 Phila. 551.

639. Neither the patentee nor his assignees can be allowed to insist upon such construction of the allowed claim of a reissued patent as would cover what had been previously rejected, where they have acquiesced in such rejection. Corbin Cabinet Lock Co. v. Eagle Lock Co. 150 U. S. 38, 14 Sup. Ct. Rep. 28, 37: 989

Cited in Dunham v. Dennison Mfg. Co. 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 986—Westinghouse v. Boyden Power Brake Co. 170 U. S. 582, 42 L. ed. 1152, 18 Sup. Ct. Rep. 707—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—Eagle Lock Co. v. Corbin Cabinet Lock Co. 12 C. C. A. 422, 26 U. S. App. 388, 64 Fed. 792—Mast, F. & Co. v. Iowa Windmill & Pump Co. 68 Fed. 222—Hillborn v. Hale & K. Mfg. Co. 16 C. C. A. 571, 28 U. S. App. 525, 69 Fed. 960—Olmsted v. A. H. Andrews & Co. 23 C. C. A. 492, 46 U. S. App. 608, 77 Fed. 839.

Impairment of original application or claim.

640. A void reissue of a patent does not affect the original application upon which the patent was granted, or the previous patent. Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co. (Barbed Wire Patent) 143 U. S. 275, 12 Sup. Ct. Rep. 443, 450, 36: 154

Cited in Thomson-Houston Electric Co. v. Ohio Brass Co. 26 C. C. A. 120, 54 U. S. App. 1, 80 Fed. 725.

641. The invalidity of a new claim in a reissued patent does not impair the validity of the original claim, which is repeated and made the first claim of the reissue patent. Leggett v. Standard Oil Co. 149 U. S. 287, 13 Sup. Ct. Rep. 902, 37: 737

e. Application and Proceedings.

Mandamus to Compel Commissioner to Examine Application, see Mandamus, 142. See also *supra*, 604.

641a. Jurisdiction of the Patent Office over a patent is lost by its issue and is not regained by the application for a reissue. Mc-

Cormick Harvesting Mach. Co. v. C. Aultman Co. 169 U. S. 606, 18 Sup. Ct. Rep. 443, 42: 875

642. On application for the reissue of a patent, the Patent Office may deal with all its claims, including those of the original patent, and may declare them to be invalid, but such action will not affect the claims of the original patent, which remains in full force if the application for a reissue is rejected or abandoned. McCormick Harvesting Mach. Co. v. C. Aultman Co. 169 U. S. 606, 18 Sup. Ct. Rep. 443, 42: 875

643. Withdrawal of an application for the reissue of a patent may be made after a decision of the assistant or primary examiner rejecting some of the claims, and no appeal need be taken from such decision. McCormick Harvesting Mach. Co. v. C. Aultman Co. 169 U. S. 606, 18 Sup. Ct. Rep. 443, 42: 875

644. A surrender of a patent for reissue becomes operative under the patent act of 1870, § 53, only when a reissue is granted; and if a reissue be refused the surrender never takes effect, and the patent stands as if no application had ever been made for a reissue, even if in making his surrender the patentee declared that the patent was inoperative and invalid. Allen v. Culp, 166 U. S. 501, 17 Sup. Ct. Rep. 644, 41: 1093
Cited in McCormick Harvesting Mach. Co. v. C. Aultman Co. 169 U. S. 611, 42 L. ed. 877, 18 Sup. Ct. Rep. 443.

Reviewing finding of commissioner.

Power of Commissioner to Grant Reissue, see *infra*, 680, 681.

Conclusiveness of Commissioner's Decision on Reissue, see *infra*, 682.

Conclusiveness of Commissioner's Decision as to Unreasonable Delay, see *infra*, 698.

645. Where an assignee applies for the reissue of a patent, the Commissioner must decide whether the applicant was an assignee with such an interest as entitled him to a reissue. From this decision, whether right or wrong, the applicant has a right, under the statute, to appeal. Holloway v. Whiteley (Commissioner of Patents v. Whiteley) 4 Wall. 522, 18: 335

646. Where all the evidence that was before the commissioner of patents tending to show inadvertence or mistake is offered by plaintiffs in a suit for the infringement of the reissued patent, supplemented by additional testimony, the circuit court can review the finding of the commissioner on the point that the original patent was inoperative by reason of inadvertence and mistake,—at least to the extent of determining whether, as matter of law, what was alleged as a mistake was such a mistake as warranted a reissue. Huber v. N. O. Nelson Mfg. Co. 148 U. S. 270, 13 Sup. Ct. Rep. 603, 37: 447

f. Identity of Invention.

Presumption as to Identity, see Evidence, 771, 773.

Raising by Demurrer Objection that Reissue is for Different Invention, see Pleading, 898.

Questions of Law or Fact, see Trial, 219, 219a, 220.

Validity of reissue for different invention.

647. Where the claim of a reissued patent is for a different invention from that described in the original, the reissue is void. Wing v. Anthony, 106 U. S. 142, 1 Sup. Ct. Rep. 93, 27: 110
Burr v. Duryee, 1 Wall. 531, 17: 650
Burr v. Duryee, 1 Wall. 579, 17: 660
Gill v. Wells, 22 Wall. 1, 22: 699
American Wood Paper Co. v. Fiber Disintegrating Co. ("The Wood-Paper Patent") 23 Wall. 566, 23: 31

Union Paper Collar Co. v. Van Deusen, 23 Wall. 530, 23: 128

Reedy v. Scott, 23 Wall. 352, 23: 109

Russell v. Dodge, 93 U. S. 460, 23: 973

Marsh v. Seymour, 97 U. S. 348, 24: 963

Giant Powder Co. v. California Powder Works, 98 U. S. 126, 25: 77

Leggett v. Avery, 101 U. S. 256, 25: 865

Ball v. Langles, 102 U. S. 128, 26: 104

Garneau v. Dozier, 102 U. S. 230, 26: 133

Swain Turbine & Mfg. Co. v. Ladd, 102 U. S. 408, 26: 184

Hopkins & D. Mfg. Co. v. Corbin, 103 U. S. 786, 26: 610

Miller v. Bridgeport Brass Co. 104 U. S. 350, 26: 783

James v. Campbell, 104 U. S. 356, 26: 786

Heald v. Rice, 104 U. S. 737, 26: 910

Bantz v. Frantz, 105 U. S. 160, 26: 1013

Johnson v. Flushing & N. S. R. Co. 105 U. S. 539, 26: 1162

McMurray v. Mallory, 111 U. S. 97, 4 Sup. Ct. Rep. 375, 28: 365

Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 293, 4 Sup. Ct. Rep. 455, 28: 433

Distinguished in Goodyear v. Berry, 2 Bond. 203, 3 Fisher, Pat. Cas. 450, Fed. Cas. No. 5,556.

Cited in Case v. Brown, 2 Wall. 328, 17 L. ed. 818—Gill v. Wells, 22 Wall. 27, 22 L. ed. 711—Brown v. Guild, 23 Wall. 239, 23 L. ed. 175—Union Paper Collar Co. v. Van Deusen, 23 Wall. 558, 23 L. ed. 132—Giant Powder Co. v. California Powder Works, 98 U. S. 139, 25 L. ed. 82—Hopkins & D. Mfg. Co. v. Corbin, 103 U. S. 792, 26 L. ed. 612—James v. Campbell, 104 U. S. 370, 26 L. ed. 791—Heald v. Rice, 104 U. S. 749, 26 L. ed. 914—Johnson v. Flushing & N. S. R. Co. 105 U. S. 547, 26 L. ed. 1165—Wing v. Anthony, 106 U. S. 146, 27 L. ed. 111, 1 Sup. Ct. Rep. 93—Moffitt v. Rogers, 108 U. S. 428, 27 L. ed. 77, 1 Sup. Ct. Rep. 70—Gage v. Herring, 107 U. S. 645, 27 L. ed. 603, 2 Sup. Ct. Rep. 819—McMurray v. Mallory, 111 U. S. 103, 28 L. ed. 366, 4 Sup. Ct. Rep. 375—Mahn v. Harwood, 112 U. S. 350, 28 L. ed. 667, 5 Sup. Ct. Rep. 174—Torrent & A. Lumber Co. v. Rodgers, 112 U. S. 669, 28 L. ed. 846, 5 Sup. Ct. Rep. 501—Eachus v. Broomall, 115 U. S. 438, 29 L. ed. 423, 6

Sup. Ct. Rep. 229—Parker & W. Co. v. Yale Clock Co. 123 U. S. 100, 31 L. ed. 106, 8 Sup. Ct. Rep. 38—Yale Lock Mfg. Co. v. James, 125 U. S. 458, 31 L. ed. 811, 8 Sup. Ct. Rep. 967—Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 371, 34 L. ed. 180, 10 Sup. Ct. Rep. 884—Dobson v. Lees, 137 U. S. 263, 34 L. ed. 654, 11 Sup. Ct. Rep. 71—Topliff v. Topliff, 145 U. S. 166, 36 L. ed. 662, 12 Sup. Ct. Rep. 825—Huber v. N. O. Nelson Mfg. Co. 148 U. S. 290, 37 L. ed. 453, 13 Sup. Ct. Rep. 603—Blackman v. Hibbler, 17 Blatchf. 338, 4 Bann. & Ard. 645, Fed. Cas. No. 1,471—Cabart v. Austin, 2 Cliff. 536, 2 Fisher, Pat. Cas. 552, Fed. Cas. No. 2,288—Christman v. Rumsey, 17 Blatchf. 155, 4 Bann. & Ard. 513, Fed. Cas. No. 2,704—Crompton v. Belknap Mills, 3 Fisher, Pat. Cas. 546, Fed. Cas. No. 3,406—Good-year v. Providence Rubber Co. 2 Cliff. 374, 2 Fisher, Pat. Cas. 513, Fed. Cas. No. 5,583—Hale v. Stimpson, 2 Fisher, Pat. Cas. 570, Fed. Cas. No. 5,915—Herring v. Nelson, 14 Blatchf. 303, 3 Bann. & Ard. 65, Fed. Cas. No. 6,424—Kerosene Lamp Heater Co. v. Littell, 3 Bann. & Ard. 318, Fed. Cas. No. 7,724—Miller v. Bridgeport Brass Co. 14 Blatchf. 287, Fed. Cas. No. 9,563—Seymour v. Osborne, 3 Fisher, Pat. Cas. 564, Fed. Cas. No. 12, 688—Taylor v. Garretson, 9 Blatchf. 164, Fed. Cas. No. 13,792—Whitely v. Swayne, 4 Fisher, Pat. Cas. 129, Fed. Cas. No. 17,568—Crompton v. Belknap Mills, 3 Fisher, Pat. Cas. 546, Fed. Cas. No. 18,285—Yale Lock Mfg. Co. v. Scovill Mfg. Co. 18 Blatchf. 255, 5 Bann. & Ard. 525, 3 Fed. 296—Siebert Cylinder Oil Cup Co. v. Harper Steam Lubricator Co. 4 Fed. 331—Putnam v. Tinkham, 4 Fed. 414—Washburn & M. Mfg. Co. v. Haish, 10 Biss. 76, 4 Fed. 910—Flower v. Rayner, 5 Fed. 799—Wilson v. Coon, 18 Blatchf. 538, 6 Fed. 618—Smith v. Merriam, 6 Fed. 718—Tucker v. Dana, 7 Fed. 214—Washburn & M. Mfg. Co. v. Haish, 10 Biss. 89, 7 Fed. 913—Atwater Mfg. Co. v. Beecher Mfg. Co. 8 Fed. 609—Kells v. McKenzie, 9 Fed. 287—Edgerton v. Furst & B. Mfg. Co. 10 Biss. 407, 9 Fed. 455—Averill Chemical Paint Co. v. National Mixed Paint Co. 20 Blatchf. 44, 9 Fed. 464—Atwood v. Portland Co. 5 Bann. & Ard. 538, 10 Fed. 286—Tyler v. Galloway, 20 Blatchf. 446, 12 Fed. 568—Cote v. Moffitt, 15 Fed. 345—Doane & W. Mfg. Co. v. Smith, 15 Fed. 461—Andrews v. Hovey, 5 Mcrary, 198, 16 Fed. 399—The Driven-Well Cases, 16 Fed. 399—Gold & Stock Teleg. Co. v. Wiley, 17 Fed. 235—Parker & W. Co. v. Yale Clock Co. 18 Fed. 46—Reay v. Raynor, 22 Blatchf. 16, 19 Fed. 309—Dryfoos v. Wiese, 22 Blatchf. 21, 19 Fed. 316—Wooster v. Handy, 22 Blatchf. 333, 21 Fed. 66—Matthews v. Iron Clad Mfg. Co. 22 Blatchf. 432, 21 Fed. 643—Odell v. Stout, 22 Fed. 162—Flower v. Detroit, 22 Fed. 295—Spaeth v. Barney, 22 Fed. 829—Hammond v. Franklin, 23 Blatchf. 82, 22 Fed. 836—Electric Gas-Lighting Co. v. Smith & R. Electric Co. 23 Fed. 196—Tubular Rivet Co. v. Copeland, 26 Fed. 707—Eastern Paper Bag Co. v. Standard Paper Bag Co. 30 Fed. 65—Huber v. N. O. Nelson Mfg. Co. 38 Fed. 836—Walker v. Terre Haute, 44 Fed. 73—Peoria Target Co. v. Cleveland Target Co. 47 Fed. 734—Carpenter Straw-Sewing Mach. Co. v. Searle, 52 Fed. 814—Cochran v. Zimmerman, 53 Fed. 803—Carter Mach. Co. v. Hanes, 70 Fed. 865—Haggenmacher v. Nelson, 88 Fed. 493—Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 80, 108 Fed. 853—Cleveland Foundry Co. v. Detroit Vapor

Stove Co. 131 Fed. 744—Christman v. Rumsey, 58 How. Pr. 122.

648. A reissued patent is invalid where it is not for the same invention as the original patent. Freeman v. Asmus, 145 U. S. 226, 12 Sup. Ct. Rep. 939, 36: 685
Cited in Carpenter Straw-Sewing Mach. Co. v. Searle, 52 Fed. 813—Pfenninger v. Heubner, 99 Fed. 443—United Blue-Flame Oil Stove Co. v. Glazier, 55 C. C. A. 556, 119 Fed. 160.

Expansion of original patent.

In Reissued Patent for Combination, see *infra*, 678.

649. A reissue can only be granted for the same invention intended to be embraced by the original patent; and the specification cannot be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the invention as intended to be originally claimed. Pattee Plow Co. v. Kingman, 129 U. S. 294, 9 Sup. Ct. Rep. 259, 32: 700

Hartshorn v. Saginaw Barrel Co. 119 U. S. 664, 7 Sup. Ct. Rep. 421, 30: 539
Cited in Huber v. N. O. Nelson Mfg. Co. 38 Fed. 835—International Terra Cotta Lumber Co. v. Maurer, 44 Fed. 621—Featherstone v. George R. Bidwell Cycle Co. 6 C. C. A. 492, 14 U. S. App. 632, 57 Fed. 636—Westinghouse v. New York Air-Brake Co. 59 Fed. 602.

650. Interpolations in a reissued patent of new features, ingredients, or devices, which were neither described, suggested, nor indicated in the original patent, or Patent-Office model, are not allowed, as reissued letters must be for the same invention. Seymour v. Osborne, 11 Wall. 516, 20: 33
Cited in Giant Powder Co. v. California Powder Works, 98 U. S. 139, 25 L. ed. 82—Ball v. Langley, 102 U. S. 130, 26 L. ed. 105—Parker & W. Co. v. Yale Clock Co. 123 U. S. 97, 31 L. ed. 105, 8 Sup. Ct. Rep. 38—Freeman v. Asmus, 145 U. S. 240, 36 L. ed. 690, 12 Sup. Ct. Rep. 939—Atlantic Giant Powder Co. v. Goodyear, 3 Bann. & Ard. 165, Fed. Cas. No. 623—Badische Anilin & Soda Fabrik v. Higgins, 15 Blatchf. 291, 3 Bann. & Ard. 464, Fed. Cas. No. 722—Calkins v. Bertraud, 6 Biss. 496, 2 Bann. & Ard. 217, Fed. Cas. No. 2,317—Carew v. Boston Elastic Fabric Co. 3 Cliff. 360, 5 Fisher, Pat. Cas. 96, Fed. Cas. No. 2,397—Chicago Fruit House Co. v. Busch, 2 Biss. 478, Fed. Cas. No. 2,669—Decker v. Grote, 10 Blatchf. 343, Fed. Cas. No. 3,726—Giant Powder Co. v. California Powder Works, 3 Sawy. 467, 2 Bann. & Ard. 149, Fed. Cas. No. 5,379—Herring v. Nelson, 14 Blatchf. 305, 3 Bann. & Ard. 62, Fed. Cas. No. 6,424—Kelleher v. Darling, 4 Cliff. 437, 3 Bann. & Ard. 444, Fed. Cas. No. 7,653—Reissner v. Anness, 3 Bann. & Ard. 178, Fed. Cas. No. 11,688—Sarven v. Hall, 9 Blatchf. 526, 5 Fisher, Pat. Cas. 420, Fed. Cas. No. 12,369—Wilson v. Coon, 18 Blatchf. 538, 6 Fed. 618—Smith v. Merriam, 6 Fed. 718—Kells v. McKenzie, 9 Fed. 286—Dederick v. Cassell, 9 Fed. 308—Combined Patents Can Co. v. Lloyd, 11 Fed. 150—Washburn & M. Mfg. Co. v. Fuchs, 5 McCrary, 245, 16 Fed. 668—Holmes Burglar Alarm Teleg. Co. v. Domestic Teleg. & Teleph. Co. 42 Fed. 224—United States Whip Co. v. Hassler, 134 Fed. 402—

Seymour v. Marsh, 9 Phila. 381—Combined Patents Can Co. v. Lloyd, 15 Phila. 483.

651. If letters patent fully and clearly describe and claim a specific invention, complete in itself, a reissue cannot be had for the purpose of expanding and generalizing the claim to embrace an invention not specified in the original. James v. Campbell, 104 U. S. 356, 26: 786
Cited in Johnson v. Flushing & N. S. R. Co. 105 U. S. 547, 26 L. ed. 1185—Moffitt v. Rogers, 106 U. S. 428, 27 L. ed. 78, 1 Sup. Ct. Rep. 70—McMurray v. Mallory, 111 U. S. 103, 28 L. ed. 866, 4 Sup. Ct. Rep. 375—Mahn v. Harwood, 112 U. S. 859, 28 L. ed. 667, 5 Sup. Ct. Rep. 176—Torrent & A. Lumber Co. v. Rodgers, 112 U. S. 669, 28 L. ed. 846, 5 Sup. Ct. Rep. 501—Coon v. Wilson, 113 U. S. 277, 28 L. ed. 965, 5 Sup. Ct. Rep. 537—White v. Dunbar, 119 U. S. 52, 30 L. ed. 305, 7 Sup. Ct. Rep. 72—Combined Patents Can Co. v. Lloyd, 11 Fed. 150—McKay v. Jackman, 20 Blatchf. 470, 12 Fed. 617—Searls v. Bouton, 20 Blatchf. 530, 12 Fed. 875—Newton v. Furst & B. Mfg. Co. 11 Biss. 413, 14 Fed. 470—Fay v. Fraser, 11 Biss. 424, 14 Fed. 653—New York Belting & Packing Co. v. Sibley, 15 Fed. 389—Doane & W. Mfg. Co. v. Smith, 15 Fed. 461—Driven-Well Cases, 16 Fed. 399—Fetter v. Newhall, 21 Blatchf. 448, 17 Fed. 844—Dryfoos v. Wiese, 22 Blatchf. 21, 19 Fed. 316—Stutz v. Armstrong, 20 Fed. 845—Yale Lock Mfg. Co. v. James, 22 Blatchf. 296, 20 Fed. 905—Wooster v. Handy, 22 Blatchf. 309, 21 Fed. 53—Atlantic Giant Powder Co. v. Hullings, 21 Fed. 522—Matthews v. Iron Clad Mfg. Co. 22 Blatchf. 432, 21 Fed. 643—Hammond v. Franklin, 23 Blatchf. 81, 22 Fed. 836—Phillips v. Risser, 26 Fed. 312—Tubular Rivet Co. v. Copeland, 26 Fed. 707—Stirling Co. v. Pierpoint Boiler Co. 72 Fed. 790—Johnson v. Brooklyn Heights R. Co. 75 Fed. 670—Pfenninger v. Heubner, 99 Fed. 443—Wooster v. Trowbridge, 115 Fed. 724.

652. The Dunham reissued patent 10,438 for a combined tag and envelope, claiming to cover an envelope with a flap of any size is invalid as the original covered only one with a flap covering the whole of one side. Dunham v. Dennison Mfg. Co. 154 U. S. 103, 14 Sup. Ct. Rep. 986, 38: 924

653. In reissue letters patent 6,990, for improvement in hydrants, claim 1 for a movable casing which is allowed to slide up and down a space left between its upper terminus and the bead or flag above it, is void, as being an unlawful expansion of the original patent, which contained no suggestion of such arrangement or space. Flower v. Detroit, 127 U. S. 563, 8 Sup. Ct. Rep. 1291, 32: 175

Cited in Freeman v. Asmus, 145 U. S. 239, 36 L. ed. 690, 12 Sup. Ct. Rep. 939—Featherstone v. George R. Bidwell Cycle Co. 6 C. C. A. 492, 14 U. S. App. 632, 57 Fed. 636.

654. Claim 1 of the Asmus reissued patent 3204, for any kind of blast furnace with a closed breast having a slag discharge opening cooled in any manner or to any extent by water, is invalid, as the original patent claimed only a slag discharge piece or cinder block constructed and attached in

a specific manner. *Freeman v. Asmus*, 145 U. S. 226, 12 Sup. Ct. Rep. 939, 36: 685

655. The second clause of the Pattee reissued patent, 6080, for the axle of a cultivator hinged to the wheel-spindle or draft plates so that the wheels are retained in the line of progression by the draft of the animals when one is in advance of the other, is void as an expansion of the original patent, 124,218, because permitting a direct attachment of the draft animals to the draft-plates, omitting from the device of attachment the eveners, to one end of which the animals were to be attached, by the plan specified in the original patent. *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 9 Sup. Ct. Rep. 259, 32: 700

656. Where a patent for metallic bushings for the bungs of casks is distinctly limited to a bushing having a notch to aid in forcing it into place, a reissue, obtained seven years afterwards, for a bushing without any notch, is void. *Cornell v. Weidner*, 127 U. S. 261, 8 Sup. Ct. Rep. 1152, 32: 148

657. A patent for a complete whipstock with an opening or slot in the side, extending nearly its whole length, with a fastening lever secured in the slot by a fulcrum-pin, will not sustain a reissue for the use of a lever with the "stationary or upright portion of the socket," implying that the socket has a part which is not stationary. *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. Rep. 814, 30: 853

658. Where a patent for preserving shrimps, etc., claimed the use of a textile fabric between the shrimps and the can, a reissue making a claim for interposing between the metal can and the shrimps an enveloping material for the shrimps is invalid, being broader than the original. *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. Rep. 72, 30: 303
Offd. in Topliff v. Topliff, 145 U. S. 169, 36 L. ed. 664, 12 Sup. Ct. Rep. 825—*Eby v. King*, 158 U. S. 373, 39 L. ed. 1021, 15 Sup. Ct. Rep. 972—*National Progress Bunching Mach. Co. v. John B. Williams Co.* 12 L.R.A. 110, 44 Fed. 194—*Truman v. Holmes*, 31 C. C. A. 220, 56 U. S. App. 730, 87 Fed. 747—*Crown Cork & Seal Co. v. Aluminum Stopper Co.* 48 C. C. A. 84, 108 Fed. 858.

659. Where an original patent was for a return-flue boiler for the use of straw as fuel in operating steam engines, a reissue which abandons the claim for the boiler, and claims, instead, a particular mode of using it with straw as fuel, by means of an attachment to the furnace door for that purpose, is invalid, although the patentee might have been entitled to patents for both. *Heald v. Rice*, 104 U. S. 737, 26: 910
Offd. in Wing v. Anthony, 108 U. S. 146, 27 L. ed. 112, 1 Sup. Ct. Rep. 93—*Moffitt v. Rogers*, 106 U. S. 428, 27 L. ed. 78, 1 Sup. Ct. Rep. 70—*Gage v. Herring*, 107 U. S. 645, 27 L. ed. 603, 2 Sup. Ct. Rep. 819—*McMurray v. Mallory*, 111 U. S. 103, 28 L. ed. 366, 4 Sup. Ct. Rep. 375—*Torrent & A. Lumber Co. v. Rodgers*, 112 U. S. 669, 28 L. ed.

846, 5 Sup. Ct. Rep. 501—*Corbin Cabinet Lock Co. v. Eagle Lock Co.* 150 U. S. 43, 37 L. ed. 991, 14 Sup. Ct. Rep. 28—*Wooster v. Handy*, 22 Blatchf. 333, 21 Fed. 68.

660. A patent for an oven, with a space beneath it through which the products of combustion passed into flues behind and at the sides, which connected with the oven by perforations or openings, will not sustain a reissue for an oven which has no partition separating it from the furnace by which it is heated, but which is thus made a part of the passageway from the fire chamber to the chimney. *Ball v. Langles*, 102 U. S. 128, 26: 104

Garneau v. Dozier, 102 U. S. 230, 26: 133

661. Where the original description of a patent is sufficiently full to be understood, and to enable an operator to make the manufacture, the reissued patent cannot be considered for a different invention merely because its description of the process is more minute, and because it describes also another process which is not claimed as a part of the invention. *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23: 952

662. Where an original patent was for a device including the use of a toothed bar working in a fixed plane, for turning a log upon its axis when placed upon the carriage of a sawmill, so that the opposite parts of the log might be successively presented to the saw, and slabs cut therefrom; and the device was so made as to prevent the rolling of the log from one place to another, by knees against which the log was pressed, and which held it in position, and formed part of the means by which the log was made to revolve on its axis,—a reissue declaring the invention to be a device for turning or rolling logs to or upon the carriage, and which described a device adapted not only to turning logs on their axis, but to roll them from one place to another; for the latter of which uses the knees included in the first device were to be omitted; and in which the latter use the toothed bar, instead of working necessarily in the same plane, as it did do in turning the log upon the carriage, must work in constantly changing planes as it follows the changing position of the log, is for a different invention, and therefore invalid. *Torrent & A. Lumber Co. v. Rodgers*, 112 U. S. 659, 5 Sup. Ct. Rep. 501, 28: 842

663. The reissue, No. 9,542, of the Tilton & Stivers patent for vehicle springs, claim 5, which uses the word "preferably" for the first time in respect to the use of the connection of cross-springs, while the original patent made such crossing connection an essential element, is an invalid attempt to expand the patent, there being structures of this kind in public and common use at the date of reissue. *Olin v. Timken*, 155 U. S. 141, 15 Sup. Ct. Rep. 49, 39: 100

664. The statement in the original specification of the object of an invention, in general terms, does not make the reissue one for the same invention as that of the orig-

inal, when it otherwise would not be. *Parker & W. Co. v. Yale Clock Co.* 123 U. S. 87, 8 Sup. Ct. Rep. 38, 31: 100

665. Parol testimony is not admissible, in an application for a reissued patent, to enlarge the scope and effect of the invention. A reissue is only to render effectual the actual invention for which the original patent should have been granted. *Union Paper Collar Co. v. Van Deusen*, 23 Wall. 530, 23: 128

Cited in *Mahn v. Harwood*, 112 U. S. 359, 28 L. ed. 667, 5 Sup. Ct. Rep. 174—*Abbe v. Clarke*, 3 Bann. & Ard. 213, Fed. Cas. No. 5—*Spaeth v. Barney*, 22 Fed. 829.

Process or composition.

Construction of Patent for, see *infra*, 737-748.

See also *supra*, 658.

666. In the absence of any error arising from inadvertence, accident, or mistake, a patent for a machine will not sustain a reissue for a process. *Eachus v. Broomall*, 115 U. S. 429, 6 Sup. Ct. Rep. 229, 29: 419
Heald v. Rice, 104 U. S. 737, 26: 910
James v. Campbell, 104 U. S. 356, 26: 786
Cited in *Grant v. Walker*, 148 U. S. 554, 37 L. ed. 557, 13 Sup. Ct. Rep. 699—*United States ex rel. Steinmets v. Allen*, 192 U. S. 561, 48 L. ed. 562, 24 Sup. Ct. Rep. 416—*Scrivner v. Oakland Gas Co.* 10 Sawy. 391, 22 Fed. 99—*Electric Gas Lighting Co. v. Smith & R. Electric Co.* 23 Fed. 106—*Arnheim v. Finster*, 26 Fed. 280—*Eastern Paper Bag Co. v. Standard Paper Bag Co.* 30 Fed. 65—*Grant v. Walter*, 38 Fed. 596—*United States ex rel. Steinmets v. Allen*, 22 App. D. C. 63.

667. Original letters for a process will not support reissued letters for a composition, unless it is the result of the process, and the invention of the one involves the invention of the other. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 25: 77

668. Letters granted for a certain process of exploding nitroglycerin will not support reissued letters for a composition of nitroglycerin and gunpowder or other substances, even although the original application claimed the invention of the process and the compound; they are distinct inventions. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 25: 77
Cited in *James v. Campbell*, 104 U. S. 377, 26 L. ed. 794—*Atlantic Giant Powder Co. v. Hulings*, 21 Fed. 521.

669. Where an original patent is for a mechanism, a reissue which covers the process by which the result is obtained, without regard to the mechanism, is invalid. *Wing v. Anthony*, 106 U. S. 142, 1 Sup. Ct. Rep. 93, 27: 110
Cited in *Rousseau v. Peck*, 66 Fed. 761—*Kirchberger v. American Acetylene Burner Co.* 64 C. C. A. 115, 128 Fed. 607—*Cleveland Foundry Co. v. Detroit Vapor Stove Co.* 131 Fed. 744.

670. Where the patent was for a process of treating bark-tanned lamb or sheep skin, by means of a compound in which heated fat liquor was an essential ingredient, and

a change was made in the original specification by eliminating the necessity of using the fat liquor in a heated condition, and making, in the new specification, its use in that condition a mere matter of convenience, and by inserting an independent claim for the use generally of fat liquor in the treatment of leather, the character and scope of the invention, as originally claimed, were held to be so enlarged as to constitute a different invention. *Russell v. Dodge*, 93 U. S. 460, 23: 973

Distinguished in *Scrivner v. Oakland Gas Co.* 10 Sawy. 392, 22 Fed. 99.

Explained in *Wilson v. Coon*, 18 Blatchf. 540, 6 Fed. 620.

Cited in *Ball v. Langles*, 102 U. S. 130, 26 L. ed. 105—*Hopkins & D. Mfg. Co. v. Corbin*, 103 U. S. 791, 26 L. ed. 612—*Eames v. Andrews*, 122 U. S. 63, 30 L. ed. 1072, 7 Sup. Ct. Rep. 1073—*Atlantic Giant Powder Co. v. Goodyear*, 3 Bann. & Ard. 164, Fed. Cas. No. 623—*Christman v. Rumsey*, 17 Blatchf. 155, 4 Bann. & Ard. 513, Fed. Cas. No. 2,704—*Gould v. Ballard*, 3 Bann. & Ard. 327, Fed. Cas. No. 5,635—*Herring v. Nelson*, 14 Blatchf. 304, Fed. Cas. No. 6,424—*Putnam v. Tinkham*, 4 Fed. 414—*Giant Powder Co. v. California Vigorit Powder Co.* 6 Sawy. 523, 4 Fed. 725—*Washburn & M. Mfg. Co. v. Halsh*, 10 Biss. 77, 4 Fed. 910—*Flower v. Rayner*, 5 Fed. 798—*Smith v. Merriam*, 6 Fed. 719—*Edgerton v. Furst & B. Mfg. Co.* 10 Biss. 407, 9 Fed. 454—*Atwood v. Portland Co.* 5 Bann. & Ard. 538, 10 Fed. 286—*Reay v. Raynor*, 22 Blatchf. 16, 19 Fed. 309—*Hammond v. Franklin*, 23 Blatchf. 82, 22 Fed. 836—*Haines v. Peck*, 26 Fed. 626—*Yale Lock Co. v. New Haven Sav. Bank*, 32 Fed. 171—*Holmes Burglar Alarm Teleg. Co. v. Domestic Teleg. & Teleph. Co.* 42 Fed. 224—*Carpenter Straw-Sewing Mach. Co. v. Searle*, 52 Fed. 813—*Cochran v. Zimmerman*, 53 Fed. 803—*Hyatt v. Ingalls*, 124 N. Y. 103, 26 N. E. 285.

671. Where the original specification and claim in a patent for a process were clearly confined to the use of heated fat liquor, the claim in the reissue should be construed to cover only the use of heated liquor, where it can be done consistently with the language used, so as to sustain the reissued patent, and where this construction is contended for by the patentee. *Klein v. Russell*, 19 Wall. 433, 22: 116

Distinguished in *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 109, 21 U. S. App. 244, 61 Fed. 963.

Cited in *Adams v. Joliet Mfg. Co.* 3 Bann. & Ard. 4, Fed. Cas. No. 56—*Wilson v. Coon*, 18 Blatchf. 540, 6 Fed. 620—*Bradley v. Dull*, 19 Fed. 915—*Tondeur v. Stewart*, 28 Fed. 564—*Tonduer v. Chambers*, 37 Fed. 337—*Richardson v. Campbell*, 72 Fed. 529—*Soehner v. Favorite Stove & Range Co.* 28 C. C. A. 320, 54 U. S. App. 389, 84 Fed. 185—*Palmer Pneumatic Tire Co. v. Lozier*, 84 Fed. 669—*United States Mitts Co. v. Carnegie Steel Co.* 89 Fed. 349—*Hallock v. Davison*, 107 Fed. 485—*Canada v. Michigan Malleable Iron Co.* 61 C. C. A. 198, 124 Fed. 490—*Smeech v. Perkins*, 60 C. C. A. 203, 125 Fed. 289—*Burke v. Partridge*, 58 N. H. 351—*Lane v. Levi*, 21 App. D. C. 175.

Combination.

Forfeiture of Right to Reissue by Delay, see *infra*, 692.

672. A reissued patent claiming the several parts of a combination, which the original covered only as a combination, is void, because it is broader than the original patent. *Bantz v. Frantz*, 105 U. S. 160, 26: 1013

Johnson v. Flushing & N. S. R. Co. 105 U. S. 539, 26: 1162

Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. Rep. 819, 27: 601

Cited in Wing v. Anthony, 106 U. S. 147, 27 L. ed. 112, 1 Sup. Ct. Rep. 93—*Mommt v. Rogers*, 106 U. S. 428, 27 L. ed. 78, 1 Sup. Ct. Rep. 70—*Gage v. Herring*, 107 U. S. 645, 27 L. ed. 604, 2 Sup. Ct. Rep. 819—*McMurray v. Mallory*, 111 U. S. 103, 28 L. ed. 366, 4 Sup. Ct. Rep. 375—*Torrent & A. Lumber Co. v. Rodgers*, 112 U. S. 609, 28 L. ed. 846, 5 Sup. Ct. Rep. 501—*Topliff v. Topliff*, 145 U. S. 169, 36 L. ed. 664, 12 Sup. Ct. Rep. 825—*Corbin Cabinet Lock Co. v. Eagle Lock Co.* 150 U. S. 43, 37 L. ed. 991, 14 Sup. Ct. Rep. 28—*Turrell v. Bradford*, 21 Blatchf. 487, 15 Fed. 810—*National Pump Cylinder Co. v. Gunnison*, 17 Fed. 813—*Wooster v. Handy*, 22 Blatchf. 333, 21 Fed. 66—*Matthews v. Iron Clad Mfg. Co.* 22 Blatchf. 432, 21 Fed. 643—*Tubular Rivet Co. v. Copeland*, 26 Fed. 707—*International Terra Cotta Lumber Co. v. Maurer*, 44 Fed. 622—*Johnston v. American Heat Insulating Co.* 48 Fed. 448—*Hyatt v. Ingalls*, 124 N. Y. 103, 26 N. E. 285.

673. Reissue letters patent 7947, claim 3 granted Nov. 3, 1877, to James Sargent, for an improvement in combined time lock, combination lock, and bolt-work for safes, is invalid because it is an enlargement of the original patent. *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 10 Sup. Ct. Rep. 884, 34: 168

674. A patent for the combination of a circular disk of sufficient diameter to cover the lid of a can, with a recess on the under side sufficient to give room for the convexity of the lid, with a movable rod to hold the lid while it is being soldered, which is operated by heating the disk and pressing it upon the lid, which it touches only at the edges where the soldering is to be done, will not sustain a reissue which would cover the use of a soldering tool adjustable radially from a hinged joint, in order to adopt it to be used with caps of varying sizes, and which in fact would cover the use of all soldering irons, no matter what their shape or size, in combination with the movable rod. *McMurray v. Mallory*, 111 U. S. 97, 4 Sup. Ct. Rep. 375, 28: 365

675. A patent for a combination of a post-marking device with a blotting device, consisting of a tube containing a type blotter of wood, cork, rubber, or other similar material, which by the context is shown to mean some elastic substance, as distinguished from iron or other hard substance,—will not sustain a reissue for the use of any material, including iron or steel, in such blotting device. *James v. Campbell*, 104 U. S. 356, 26: 786

676. Where every element of the combination claimed in an original patent is thereby made material to such combination, a reissued patent for a combination in which one of those elements is left out is for a different combination, and void. *Huber v. N. O. Nelson Mfg. Co.* 148 U. S. 270, 13 Sup. Ct. Rep. 603, 37: 447

677. Claims 1 and 2 of the reissued patent, 10,826, granted to James E. Boyle April 19, 1887, for an improvement in flushing apparatus for water-closet, are invalid by reason of leaving out the flushing chamber, which was an element of the combination in the claims of the original patent. *Huber v. N. O. Nelson Mfg. Co.* 148 U. S. 270, 13 Sup. Ct. Rep. 603, 37: 447

678. Where no mistake or inadvertence is shown, a reissued patent which includes additional elements in a patented combination cannot be sustained. *Newton v. Furst & B. Mfg. Co.* 119 U. S. 373, 7 Sup. Ct. Rep. 369, 30: 442

Cited in Electric Gas-Lighting Co. v. Boston Electric Co. 139 U. S. 502, 35 L. ed. 260, 11 Sup. Ct. Rep. 586—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 730—*Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co.* 14 C. C. A. 649, 33 U. S. App. 188, 67 Fed. 793—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 565, 106 Fed. 714—*Bechman v. Wood*, 13 App. D. C. 503.

679. A patent for a cylindrical door bolt, claiming a combination of a bolt, pitman, and hub, without pivot pins or any additional devices, although the additional device in such a case is usually a spring, cannot be held to claim that the pitman should operate as both a pitman and a spring; and a reissue claiming such double operation as a part of the combination or as a separate claim is invalid. *Ives v. Sargent*, 119 U. S. 652, 7 Sup. Ct. Rep. 436, 30: 544

Cited in Eby v. King, 158 U. S. 373, 39 L. ed. 1021, 15 Sup. Ct. Rep. 972—*Hill v. Sawyer*, 31 Fed. 286—*Thompson v. Gildersleeve*, 34 Fed. 45—*Sackett v. Smith*, 42 Fed. 853—*Carpenter Straw-Sewing Mach. Co. v. Searle*, 52 Fed. 813—*American Soda-Fountain Co. v. Zwietusch*, 75 Fed. 578—*Horn & B. Mfg. Co. v. Pelzer*, 34 C. C. A. 49, 62 U. S. App. 528, 91 Fed. 669—*Pelzer v. Meyberg*, 97 Fed. 970—*United Blue-Flame Oil Stove Co. v. Glazier*, 55 C. C. A. 556, 119 Fed. 160.

Power of commissioner.

Excess of Authority in Granting as Defense in Infringement Suit, see *infra*, 1129.

680. The last clause of § 53 of the act of July 8, 1870 (16 Stat. at L. 205, chap. 230. Rev. Stat. § 4916, U. S. Comp. Stat. 1901, p. 3393), relates merely to the evidence to which the Commissioner of Patents may resort, but does not increase his power to grant a reissue for anything but the original invention. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 25: 77

Cited in Huber v. N. O. Nelson Mfg. Co. 148 U. S. 292, 37 L. ed. 454, 13 Sup. Ct. Rep. 603—*Haggenmacher v. Nelson*, 88 Fed. 493—*Crown Cork & Seal Co. v. Aluminum Stopper*

Co. 48 C. C. A. 81, 108 Fed. 855—Bechman v. Wood, 15 App. D. C. 503—Flower v. Rayner, 38 Phila. Leg. Int. 128.

681. The power of the Commissioner of Patents in granting reissues is restricted to the "same invention" which was the subject of the original patent. *American Wood Paper Co. v. Fibre Disintegrating Co.* (The Wood-Paper Patent) 23 Wall. 566, 23: 31 *Cited in* *Giant Powder Co. v. California Powder Works*, 98 U. S. 139, 25 L. ed. 82—*Hopkins & D. Mfg. Co. v. Corbin*, 102 U. S. 791, 26 L. ed. 812—*Wing v. Anthony*, 106 U. S. 147, 27 L. ed. 112, 1 Sup. Ct. Rep. 93—*Mommt v. Rogers*, 106 U. S. 428, 27 L. ed. 77, 1 Sup. Ct. Rep. 70—*McMurray v. Malory*, 111 U. S. 103, 28 L. ed. 368, 4 Sup. Ct. Rep. 375—*Torrent & A. Lumber Co. v. Rodgers*, 112 U. S. 680, 28 L. ed. 846, 5 Sup. Ct. Rep. 501.

Finality of commissioner's decision.

Conclusiveness of Commissioner's Decision as to Unreasonable Delay, see *infra*, 698.

Conclusiveness of Decision as to Fraud in Obtaining Reissue, see *infra*, 1140.

682. The Commissioner's decision upon the reissue of a patent is final and conclusive, except that if the reissued patent is not for the same invention as the original patent, then the reissued patent is invalid. *Union Paper Collar Co. v. Van Deusen*, 23 Wall 530, 23: 128
Russell v. Dodge, 93 U. S. 460, 23: 973
Seymour v. Osborne, 11 Wall. 516, 20: 33
Mahn v. Harwood, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451, 28: 665

Gardner v. Herz, 118 U. S. 180, 6 Sup. Ct. Rep. 1027, 30: 158
Cited in *Reckendorfer v. Faber*, 92 U. S. 354, 23 L. ed. 722—*Russell v. Dodge*, 93 U. S. 464, 23 L. ed. 975—*McCormick Harvesting Mach. Co. v. C. Aultman Co.* 169 U. S. 609, 42 L. ed. 876, 18 Sup. Ct. Rep. 443—*Badische Anilin & Soda Fabrik v. Higgins*, 15 Blatchf. 291, 3 Bann. & Ard. 463, Fed. Cas. No. 722—*Carew v. Boston Elastic Fabric Co.* 3 Cliff. 359, 5 Fisher, Pat. Cas. 99, Fed. Cas. No. 2,397—*Chicago Fruit House Co. v. Busch*, 2 Biss. 478, 4 Fisher, Pat. Cas. 401, Fed. Cas. No. 2,669—*Christman v. Rumsey*, 17 Blatchf. 151, 4 Bann. & Ard. 509, Fed. Cas. No. 2,704—*Decker v. Grote*, 10 Blatchf. 343, Fed. Cas. No. 3,726—*Dorsey Harvester Revolving Rake Co. v. Marsh*, 6 Fisher, Pat. Cas. 395, Fed. Cas. No. 4,014—*Gear v. Grosvenor, Holmes*, 219, Fed. Cas. No. 5,291—*Giant Powder Co. v. California Powder Works*, 3 Sawy. 467, Fed. Cas. No. 5,379—*Goodyear Dental Vulcanite Co. v. Smith, Holmes*, 357, Fed. Cas. No. 5,598—*Kerosene Lamp Heater Co. v. Littell*, 3 Bann. & Ard. 315, Fed. Cas. No. 7,724—*La Baw v. Hawkins*, 1 Bann. & Ard. 429, Fed. Cas. No. 7,960—*Metropolitan Washing Mach. Co. v. Providence Tool Co.* Holmes 163, Fed. Cas. No. 9,507—*Miller & P. Mfg. Co. v. Du Brul*, 2 Bann. & Ard. 619, Fed. Cas. No. 9,597—*Milligan & H. Glue Co. v. Upton*, 4 Cliff. 239, 1 Bann. & Ard. 500, Fed. Cas. No. 9,607—*Parham v. American Button-Hole, Over-Seaming & Sewing-Mach. Co.* 4 Fisher, Pat. Cas. 471, Fed. Cas. No. 10,713—*Seymour v. Marsh*, 6 Fisher, Pat. Cas. 122, Fed. Cas. No.

12,687—*Thomas v. Shoe Machinery Mfg. Co.* 3 Bann. & Ard. 580, Fed. Cas. No. 13,911—*Tilghman v. Mitchell*, 9 Blatchf. 27, 4 Fisher, Pat. Cas. 624, Fed. Cas. No. 14,042—*Wells v. Jacques*, 1 Bann. & Ard. 68, Fed. Cas. No. 17,398—*Hoe v. Cottrell*, 17 Blatchf. 549, 5 Bann. & Ard. 259, 1 Fed. 600—*Smith v. Merriam*, 6 Fed. 719—*Selden v. Stockwell Self Lighting Gas Burner Co.* 19 Blatchf. 554, 9 Fed. 397—*Flower v. Detroit*, 22 Fed. 294—*Spaeth v. Barney*, 22 Fed. 829—*Hutchison v. Everett*, 33 Fed. 505—*American Bell Teleph. Co. v. United States*, 15 C. C. A. 595, 83 U. S. App. 236, 68 Fed. 568—*Hallock v. Babcock Mfg. Co.* 124 Fed. 228—*Re Conklin*, 1 MacArth. 379—*Christman v. Rumsey*, 58 How. Pr. 118—*Combined Patents Can Co. v. Lloyd*, 39 Phila. Leg. Int. 82—*Parham v. Machine Co.* 1 Legal Gaz. Rep. 146.

g. Abandonment and Waiver.

Abandonment of Invention, see *supra*, V. g.
Abandonment of Original Claim, see *supra*, VII. f.

Effect of Abandoning Invention on Right to Patent, see *supra*, 422-424.

Question of Law or Fact as to Intent to Abandon, see *Trial*, 261, 262.

Editorial note.

What is abandonment. 7: 327; 38: 138

Reasonable time.

See also *supra*, 609-611; *infra*, 684, 1132.

683. A patentee who has claimed less than that to which he is entitled is bound to discover the defect within a reasonable time, or he loses his right to a reissue. *Wollensak v. Reiher*, 115 U. S. 96, 5 Sup. Ct. Rep. 1137, 29: 350
Miller v. Bridgeport Brass Co. 104 U. S. 350, 26: 783
Bantz v. Frantz, 105 U. S. 160, 26: 1013
Matthews v. Boston Mach. Co. 105 U. S. 54, 26: 1022
Turner & S. Mfg. Co. v. Dover Stamping Co. 111 U. S. 319, 4 Sup. Ct. Rep. 401, 28: 442
Mahn v. Harwood, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451, 28: 665
Cited in *James v. Campbell*, 104 U. S. 371, 26 L. ed. 792—*Bantz v. Frantz*, 105 U. S. 160, 26 L. ed. 1014—*Gage v. Herring*, 107 U. S. 645, 27 L. ed. 603, 2 Sup. Ct. Rep. 819—*Wollensak v. Reiher*, 115 U. S. 101, 29 L. ed. 351, 5 Sup. Ct. Rep. 1137—*Ives v. Sargent*, 119 U. S. 661, 30 L. ed. 547, 7 Sup. Ct. Rep. 436—*Hoskin v. Fisher*, 125 U. S. 222, 31 L. ed. 762, 8 Sup. Ct. Rep. 834—*Flower v. Detroit*, 127 U. S. 572, 32 L. ed. 179, 8 Sup. Ct. Rep. 1291—*Electric Gas Lighting Co. v. Boston Electric Co.* 139 U. S. 502, 35 L. ed. 260, 11 Sup. Ct. Rep. 586—*Topliff v. Topliff*, 145 U. S. 169, 36 L. ed. 664, 12 Sup. Ct. Rep. 825—*Wollensak v. Sargent*, 151 U. S. 224, 38 L. ed. 140, 14 Sup. Ct. Rep. 291—*Combined Patents Can Co. v. Lloyd*, 11 Fed. 150—*Scott v. Evans*, 11 Fed. 728—*Worswick Mfg. Co. v. Stelger*, 17 Fed. 253—*Hartshorn v. Eagle Shade Roller Co.* 18 Fed. 92—*Stutz v. Armstrong*, 20 Fed. 845—*Crandal v. Parker Carriage Goods Co.* 20 Fed. 852—*Odell v. Stout*, 22 Fed. 162—*Matthews v. Iron Clad Mfg. Co.* 22 Blatchf. 432, 21 Fed. 643—*Frazer v. Gates & S. Iron Works*, 22 Fed. 440—*Wollensak v. Reiher*, 22 Fed.

652—Norton v. Haight, 22 Fed. 780—Hammond v. Franklin, 23 Blatchf. 81, 22 Fed. 836—Sewing Mach. Co. v. Frame, 24 Fed. 598—Hoe v. Kahler, 23 Blatchf. 366, 25 Fed. 279—Mathews v. Flower, 25 Fed. 833—Arnheim v. Finster, 26 Fed. 280—Haines v. Peck, 26 Fed. 627—Russell v. Laughlin, 26 Fed. 700—Tubular Rivet Co. v. Copeland, 26 Fed. 707—Asmus v. Alden, 27 Fed. 688—Hubel v. Dick, 28 Fed. 137—Kittle v. Hall, 29 Fed. 511—Archer v. Arnd, 31 Fed. 476—Huber v. N. O. Nelson Mfg. Co. 38 Fed. 836—Alaska Refrigerator Co. v. Wisconsin Refrigerator Co. 47 Fed. 328—Whitcomb v. Spring Valley Coal Co. 47 Fed. 658—Peoria Target Co. v. Cleveland Target Co. 47 Fed. 735—Carpenter Straw-Sewing Mach. Co. v. Searle, 52 Fed. 818—Featherstone v. George R. Bidwell Cycle Co. 53 Fed. 118—Mast v. Iowa Windmill & Pump Co. 68 Fed. 222—Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. 86 Fed. 338—Post v. Beacon Vacuum Pump & Electric Co. 82 C. C. A. 154, 50 U. S. App. 407, 89 Fed. 4—Pelzer v. Meyberg, 97 Fed. 970—Fay v. Mason, 120 Fed. 510.

Delay.

684. No invariable rule can be laid down as to what is a reasonable time within which the patentee must seek for the correction of a claim which he considers too narrow. It is for the court to judge in each case. A delay of more than two years will, in general, require special circumstances for its excuse. *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451, 28: 665
Cited in *Electric Gas Lighting Co. v. Boston Electric Co.* 139 U. S. 501, 35 L. ed. 260, 11 Sup. Ct. Rep. 586—*Wollensak v. Sargent*, 151 U. S. 228, 38 L. ed. 141, 14 Sup. Ct. Rep. 291—*United Blue-Flame Oil Stove Co. v. Glazier*, 55 C. C. A. 556, 119 Fed. 160.

685. A delay of more than two years in seeking the correction of a mistake in a patent can be excused only by special circumstances. *Ives v. Sargent*, 119 U. S. 652, 7 Sup. Ct. Rep. 436, 30: 544

686. A delay of nearly four years in seeking a correction by reissue in unreasonable; and the patent is held invalid so far as the claims were broader than those in the original patent. *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451, 28: 665
Cited in *Topliff v. Topliff*, 145 U. S. 168, 36 L. ed. 663, 12 Sup. Ct. Rep. 825—*Electric Gas Lighting Co. v. Smith & R. Electric Co.* 23 Fed. 196—*Tuttle v. Loomis*, 24 Fed. 790—*Shirley v. Mayer*, 23 Blatchf. 250, 25 Fed. 39—*Holt v. Kendall*, 26 Fed. 625—*Archer v. Arnd*, 31 Fed. 476—*Pelzer v. Meyberg*, 97 Fed. 971—*Crown Cork & Seal Co. v. Aluminum Stopper Co.* 48 C. C. A. 84, 108 Fed. 858—*Re Starkey*, 21 App. D. C. 525.

686a. The delay of two years or more before correcting specifications and obtaining a reissue, being *prima facie* unlawful, it is incumbent on the party seeking to establish the jurisdiction of the Patent Office to grant the reissue, to show the facts on which it rests. *Wollensak v. Reiher*, 115 U. S. 96, 5 Sup. Ct. Rep. 1137, 29: 350
Cited in *Felix v. Patrick*, 145 U. S. 332, 30 L. ed. 726, 12 Sup. Ct. Rep. 862—*Boland v.*

Thompson, 23 Blatchf. 442, 26 Fed. 634—*New York Security & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 233—*Re Starkey*, 21 App. D. C. 525.

687. The reissue of a patent four years after the original was issued, with claims broadened, for the purpose of covering that which is presumed to have been once abandoned to the public, without any claim of inadvertence, accident, or mistake, or of defective or insufficient specification, or that the patentee had claimed more than he had a right to,—is invalid. *Eby v. King*, 158 U. S. 366, 15 Sup. Ct. Rep. 972, 39: 1018
Cited in *Horn & B. Mfg. Co. v. Pelzer*, 34 C. C. A. 49, 62 U. S. App. 528, 91 Fed. 669.

688. Unexplained delay for nearly nine years in applying for the reissue of a patent is fatal to the claims of the reissue. *Electric Gas-Lighting Co. v. Boston Electric Co.* 139 U. S. 481, 11 Sup. Ct. Rep. 586, 35: 250

Cited in *Freeman v. Asmus*, 145 U. S. 239, 36 L. ed. 690, 12 Sup. Ct. Rep. 939.

689. Where an original patent for changing seeding shoes or hoes in a drill described a rotating crank shaft as the mechanism for operating it, a reissue eleven years afterwards, and after machines effecting the shifting by other means than a rotating crank shaft had gone into use, cannot enlarge the claim to include such other machines, where no sufficient excuse is given for the laches and delay. *Brown v. Davis*, 116 U. S. 237, 6 Sup. Ct. Rep. 379, 29: 659
Cited in *Wright v. Yuengling*, 155 U. S. 52, 39 L. ed. 66, 15 Sup. Ct. Rep. 1—*Bechman v. Wood*, 15 App. D. C. 503—*Re Starkey*, 21 App. D. C. 525.

690. Where an original patent for an improvement in lamps described a combination of devices, including, among other things, two domes or reflectors, one above the other, elevated above a perforated cap, through which a wick tube and a vapor tube ascended, dispensing with the use of a chimney, a reissue, fifteen years afterwards, for a single dome with a chimney, is invalid. *Miller v. Bridgeport Brass Co.* 104 U. S. 350, 26: 783

Cited in *Heald v. Rice*, 104 U. S. 749, 26 L. ed. 914—*Wing v. Anthony*, 106 U. S. 147, 27 L. ed. 112, 1 Sup. Ct. Rep. 93—*Moffitt v. Rogers*, 106 U. S. 428, 27 L. ed. 78, 1 Sup. Ct. Rep. 70—*Gage v. Herring*, 107 U. S. 645, 27 L. ed. 603, 2 Sup. Ct. Rep. 819—*McMurray v. Mallory*, 111 U. S. 103, 28 L. ed. 366, 4 Sup. Ct. Rep. 375—*Mahn v. Harwood*, 112 U. S. 368, 29 L. ed. 670, 6 Sup. Ct. Rep. 431—*Torrent & A. Lumber Co. v. Rodgers*, 112 U. S. 669, 28 L. ed. 846, 5 Sup. Ct. Rep. 501—*Fay v. Fraser*, 11 Bias. 424—*Tyler v. Galoway*, 20 Blatchf. 446, 12 Fed. 568—*Searls v. Bouton*, 20 Blatchf. 530, 12 Fed. 875—*Holt v. Keeler*, 21 Blatchf. 79, 13 Fed. 472—*Newton v. Furst & B. Mfg. Co.* 11 Bias. 413, 14 Fed. 470—*Cote v. Moffitt*, 15 Fed. 345—*Doane & W. Mfg. Co. v. Smith*, 15 Fed. 461—*Andrews v. Hovey*, 5 McCrary. 198, 16 Fed. 399—*Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 17 Fed. 531—*Atlantic Giant Powder Co. v. Hullings*, 21 Fed. 522—*Gage v. Kellogg*, 23 Fed. 894—*Tubular Rivet Co. v. Copeland*, 26 Fed. 707—*Pope Mfg. Co. v. Owsley*,

27 Fed. 107—Hoe v. Knap, 27 Fed. 212—Electric Gas-Light Co. v. Boston Electric Co. 29 Fed. 456—Norton v. Jensen, 33 C. C. A. 155, 61 U. S. App. 291, 90 Fed. 429—Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 80, 108 Fed. 853—Troy Laundry Machinery Co. v. Adams Laundry Machinery Co. 112 Fed. 439—Wooster v. Trowbridge, 115 Fed. 724—Bechman v. Wood, 15 App. D. C. 503—Hyatt v. Ingalls, 124 N. Y. 103, 26 N. E. 285.

691. While the fact that a reissue was applied for and granted fourteen years after the date of the original patent is strongly presumptive of unreasonable delay, yet it might be explained, and neither the court nor the master, after a decree has been taken *pro confesso* on a bill for an infringement of the reissued patent, can say, as matter of law, that it is not susceptible of explanation. Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. Rep. 788, 29: 105 Cited in Schofield v. Horse Springs Cattle Co. 65 Fed. 436.

692. If the specification in the original patent dated June 22, 1858, was defective in claiming a combination of several devices instead of making a distinct claim for every device entering into the combination, the right of the patentee to make the requisite correction in reissued letters dated February 6, 1872, was forfeited by his delay and laches. Bantz v. Frantz, 105 U. S. 160, 26: 1013

Cited in Pope Mfg. Co. v. Marqua, 15 Fed. 400—Turrell v. Bradford, 21 Blatchf. 287, 15 Fed. 810.

693. Where it appears from the bill that the sole object of the reissue was to enlarge and expand the claims of the original patent, and that a delay of two or more years has taken place in applying for the reissue, not explained by special circumstances showing it to be reasonable, a general demurrer lies to the bill for want of equity. Wollensak v. Reiher, 115 U. S. 96, 5 Sup. Ct. Rep. 1137, 29: 350 Cited in Edison v. American Mutoscope & Biograph Co. 127 Fed. 362.

Excuse for delay.

694. It is not a sufficient excuse for two years' delay in applying for a reissue of a patent, that the patentee followed the advice of his solicitor. Wollensak v. Sargent, 151 U. S. 221, 14 Sup. Ct. Rep. 291, 38: 137 Cited in United Blue-Flame Oil Stove Co. v. Glazier, 55 C. C. A. 558, 119 Fed. 160—Porter v. Loudon, 7 App. D. C. 77.

695. The fact that a mistake in a claim of a patent was not the fault of the patentee, but of his solicitor, does not excuse him from the necessity of having it corrected within reasonable time. Ives v. Sargent, 119 U. S. 652, 7 Sup. Ct. Rep. 436, 30: 544

Conclusiveness of decision of patent office.

696. The decision of the patent office as to the reasonableness of the delay of a patentee, who has waited for more than two years before asking for the reissue of a patent to enlarge its scope, is not con-

clusive upon the court in a suit for infringement, but the question of reasonableness is one for the court to determine upon special circumstances of the case. Wollensak v. Reiher, 115 U. S. 96, 5 Sup. Ct. Rep. 1137, 29: 350

697. Whether delay in applying for the reissue of a patent has been reasonable is a question of law; and the action of the Patent Office in granting a reissue is not sufficient to explain delay in the application which otherwise constitutes laches. Hoskin v. Fisher, 125 U. S. 217, 8 Sup. Ct. Rep. 834, 31: 759

698. Whether there has been an inadvertent mistake, on account of which a reissue of a patent may be had, is in general a matter of fact for the Commissioner to decide; but whether the application is made in reasonable time is matter of law, which the court may determine, and which is not concluded by such decision of the Commissioner. Mahn v. Harwood, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451, 28: 665 Distinguished in Peoria Target Co. v. Cleveland Target Co. 47 Fed. 735.

Cited in Western Union Telegraph Co. v. Baltimore & O. Telegraph Co. 25 Fed. 34—Huber v. N. O. Nelson Mfg. Co. 38 Fed. 836—Peoria Target Co. v. Cleveland Target Co. 7 C. C. A. 209, 16 U. S. App. 78, 58 Fed. 240—Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. 115 Fed. 813.

Waiver.

699. Where it does not appear that any attempt has been made to secure by the original patent enlarged claims in the reissue, those claims are regarded waived, so far as the reissue is concerned. Hoskin v. Fisher, 125 U. S. 217, 8 Sup. Ct. Rep. 834, 31: 759

Abandoned claim.

See also *supra*, 659, 661.

700. Where a claim is abandoned in the application for a patent, on a reissue of the patent the claim cannot be enlarged so as to include the abandoned claim. Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 342, 10 Sup. Ct. Rep. 884, 34: 168

Cited in Dobson v. Lees, 137 U. S. 265, 34 L. ed. 655, 11 Sup. Ct. Rep. 71—Freeman v. Asmus, 145 U. S. 239, 36 L. ed. 690, 12 Sup. Ct. Rep. 939—Royer v. Coupe, 146 U. S. 532, 36 L. ed. 1077, 13 Sup. Ct. Rep. 160—International Terra Cotta Lumber Co. v. Maurer, 44 Fed. 621—Peoria Target Co. v. Cleveland Target Co. 47 Fed. 734—Richmond v. Atwood, 17 L.R.A. 618, 2 C. C. A. 607, 5 U. S. App. 151, 52 Fed. 21—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—Olmsted v. A. H. Andrews & Co. 23 C. C. A. 492, 46 U. S. App. 608, 77 Fed. 839—Pfenninger v. Heubner, 99 Fed. 443.

701. A patentee abandoning, under pressure from the Patent Office, clauses in his application and claim for a reissue, cannot insist that it was the intent of the office to include in the patent the abandoned clauses

and parts. *Yale Lock Mfg. Co. v. James*, 125 U. S. 447, 8 Sup. Ct. Rep. 967,

31: 807

Cited in *Cornell v. Weldner*, 127 U. S. 265, 32 L. ed. 150, 8 Sup. Ct. Rep. 1152—*Freeman v. Asmus*, 145 U. S. 241, 36 L. ed. 691, 12 Sup. Ct. Rep. 939—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 736—*Craig v. Michigan Lubricator Co.* 72 Fed. 176.

702-4. The original claims of a patent being void for anticipation, the patentee cannot abandon these *in toto* and reconstruct his patent upon a different theory, in order to make it salable or to hold as infringers other manufacturers who in the meantime had entered the field, relying upon his original patent as representing what he claimed to have invented. *Eby v. King*, 158 U. S. 366, 15 Sup. Ct. Rep. 972,

39: 1018

Cited in *Carter Mach. Co. v. Hanes*, 70 Fed. 867.

X. Extensions.

Effect on Domestic Patent of Extension of Foreign Patent, see *supra*, 35.
Agreement for Assignment of, see *infra*, 816.

Rights of Assignee, see *infra*, 822-826.

Fraud in Obtaining as Defense in Infringement Suit, see *infra*, 1138, 1139.

Sale of Right to Use Extension as Protection from Liability as Infringer, see *infra*, 1141.

Setting Aside Extension after Expiration of Patent, see *infra*, 1166.

See also *infra*, 879.

Executors or administrators.

705. The extension of a patent is authorized on the application of the executor or administrator of a deceased patentee, by the act of 1836, § 18, providing for the extension when desired by a patentee who shows that he has not received reasonable remuneration; although § 10 provides for the issuing of a patent to the executor or administrator in case of the inventor's death before it is taken out, and § 13 provides for the surrender of a patent defective by reason of an insufficient description, and the reissuing of a new one; the patentee has a right of property in the extended term at the time of death. *Wilson v. Rousseau*, 4 How. 646, 11: 1141
Woodworth v. Wilson, 4 How. 712,

11: 1171

Cited in *Woodworth v. Hall*, 1 Woodb. & M. 254, 2 Robb. Pat. Cas. 501, Fed. Cas. No. 18,016—*Goodyear v. Blake*, Fed. Cas. No. 5,560.

706. The extension could be applied for and obtained by the administrator, although the original patentee had, in his lifetime, disposed of all his interest in the then existing patent; such sale did not carry anything beyond the term of the original patent. *Wilson v. Rousseau*, 4 How. 646,

11: 1141

Finality of decision of commissioner.

707. Courts cannot, in a collateral proceeding, go behind the decision of the commissioner of patents in extending a patent, to inquire into alleged fraud in securing the extension. *Providence Rubber Co. v. Goodyear*, 9 Wall. 788,

19: 566

Cited in *Eureka Clothes Wringing Mach. Co. v. Bailey Washing & Wringing Mach. Co.* 11 Wall. 492, 20 L. ed. 211, 2 Whitman, Pat. Cas. 290—*Scymour v. Osborne*, 11 Wall. 543, 20 L. ed. 38, 2 Whitman, Pat. Cas. 313—*Philadelphia, W. & B. R. Co. v. Dubois*, 12 Wall. 64, 20 L. ed. 269—*Adams v. Joliet Mfg. Co.* 3 Bann. & Ard. 4, Fed. Cas. No. 56—*American Wood-Paper Co. v. Glen's Falls Paper Co.* 8 Blatchf. 515, 4 Fisher, Pat. Cas. 326, Fed. Cas. No. 321—*Birdsall v. McDonald*, 1 Bann. & Ard. 170, Fed. Cas. No. 1,434—*Carew v. Boston Elastic Fabric Co.* 3 Cliff. 359, Fed. Cas. No. 2,397—*Dorsey Harvester Revolving Rake Co. v. Marsh*, 6 Fisher, Pat. Cas. 391, Fed. Cas. No. 4,014—*Gear v. Grosvenor, Holmes*, 216, 6 Fisher, Pat. Cas. 316, Fed. Cas. No. 5,291—*Herring v. Gage*, 15 Blatchf. 130, 3 Bann. & Ard. 402, Fed. Cas. No. 6422—*Miller & P. Mfg. Co. v. Du Brul*, 2 Bann. & Ard. 619, Fed. Cas. No. 9,597—*Moorman v. Hoge*, 2 Sawy. 84, Fed. Cas. No. 9,783—*Parham v. American Buttonhole, Overseaming & Sewing Mach. Co.* 4 Fisher, Pat. Cas. 471, Fed. Cas. No. 10,713—*Thomas v. Shoe Machinery Mfg. Co.* 3 Bann. & Ard. 560, Fed. Cas. No. 13,911—*Tilghman v. Mitchell*, 9 Blatchf. 27, 4 Fisher, Pat. Cas. 624, Fed. Cas. No. 14,042—*Whitney v. Mowry*, 4 Fisher, Pat. Cas. 209, Fed. Cas. No. 17,594—*Hoe v. Cottrell*, 17 Blatchf. 549, 5 Bann. & Ard. 259—*Hartshorn v. Eagle Shade Roller Co.* 18 Fed. 91—*Hancock Inspirator Co. v. Jenks*, 21 Fed. 914—*Odell v. Stout*, 22 Fed. 162—*Railway Register Mfg. Co. v. North Hudson C. R. Co.* 23 Fed. 504—*Re Day*, 27 Fed. 680—*Dorsey Harvester Revolving Rake Co. v. Marsh*, 30 Phila. Leg. Int. 169.

XI. Construction of Letters Patent.

Restrictive Effect of Claims, see *supra*, VII. d. 3.

Construing Conformably to Claim, see *supra*, 483, 484.

Enlargement of Claim by Specification, see *supra*, 499.

Limitation of Specification by Claim, see *supra*, 500.

Limitation of Claim by Specification or Description, see *supra*, 501-506.

Reference to Specifications or Drawings in Construing Claim, see *supra*, 507-515.

Construing Patent with Reference to Rejected Claims, see *supra*, 516-525.

Construction of Disclaimer, see *infra*, 762-766.

Construction of Assignment, see *infra*, 798-800.

Presumption as to Correctness of Decision of Arbitrator, see *Evidence*, 556.

Evidence Explaining Terms, see *Evidence*, 1612.

Expert Testimony as to, see *Evidence*, 1800-1802.

See also *supra*, 439; *infra*, 887.

Editorial notes.

How patent is construed. 4: 433;
36: 1073; 37: 737; 37: 749; 40: 1025

Power of court.

See also Trial, 226, 232, 233.

708. It is not within the rightful power of the courts to enlarge or restrict the scope of patents which, by mistake, were issued in terms too narrow or too broad to cover the invention, however manifest the fact and extent of the mistake may be shown to have been. *United States Repair & Guaranty Co. v. Assyrian Asphalt Co.* 183 U. S. 591, 22 Sup. Ct. Rep. 87, 46: 342 *Cited in Universal Brush Co. v. Sonn*, 146 Fed. 520.

Liberal construction.

Enlargement of Claim by Construction, see *supra*, 485-496.

Enlargement of Claim by Specifications, see *supra*, 499.

Construing Patent so as to Cover Rejected Claims, see *supra*, 516-525.
See also *infra*, 717, 885, 1052.

709. Patents will be construed most favorably to the patentee. *Grant v. Raymond*, 6 Pet. 218, 8: 376 *Cited in Wilson v. Rousseau*, 4 How. 708, 11 L. ed. 1169—*Hogg v. Emerson*, 6 How. 486, 12 L. ed. 526—*Winans v. Denmead*, 15 How. 341, 14 L. ed. 722—*Davoll v. Brown*, 1 Woodb. & M. 57, Fed. Cas. No. 3,862—*Ex parte Dyson*, Fed. Cas. No. 4,228.

710. Construction that will save rather than destroy a patent is preferred by the court. *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. Rep. 922, 36: 713 *Cited in Galsman v. Gallert*, 105 Fed. 958.

711. Patents for inventions are to receive a liberal construction, to uphold, and not to destroy, the right of the inventor. *Winans v. Denmead*, 15 How. 330, 14: 717 *Brown v. Guild* ("The Corn-planter Patent"), 23 Wall. 181, 23: 161 *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 19: 566

Turrill v. Michigan S. & N. I. R. Co. 1 Wall. 491, 17: 668 *Cited in Stimpson v. Woodman*, 10 Wall. 123, 19 L. ed. 869—*Illinois C. R. Co. v. Turrill*, 94 U. S. 696, 24 L. ed. 238—*Adams v. Joliet Mfg. Co.* 3 Bann. & Ard. 4, Fed. Cas. No. 56—*Andrews v. Carman*, 13 Blatchf. 317, 2 Bann. & Ard. 285, Fed. Cas. No. 371—*Carew v. Boston Elastic Fabric Co.* 3 Cliff. 364, 5 Fisher, Pat. Cas. 108, Fed. Cas. No. 2,397—*Francis v. Mellor*, 5 Fisher, Pat. Cas. 157, 8 Phila. 158, Fed. Cas. No. 5,039—*Goodyear Dental Vulcanite Co. v. Gardiner*, 3 Cliff. 411, 4 Fisher, Pat. Cas. 227, Fed. Cas. No. 5,591—*Ingels v. Mast*, 6 Fisher, Pat. Cas. 417, Fed. Cas. No. 7,033—*Milligan & H. Glue Co. v. Upton*, 4 Cliff. 243, 1 Bann. & Ard. 504, Fed. Cas. No. 9,607—*Thomas v. Shoe Machinery Mfg. Co.* 3 Bann. & Ard. 561, Fed. Cas. No. 13,911—*Turrill v. Illinois C. R. Co.* 3 Fisher, Pat. Cas. 331, Fed. Cas. No. 14,270—*Tondur v. Chambers*, 37 Fed. 337—*Consolidated Roller Mill Co. v. Coombs*, 39 Fed. 31—*Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. 31—*Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co.* 1 C. C. A. 166, 2 U. S. App. 55, 49 Fed. 65—*Pacific Ca-*

ble R. Co. v. Butte City Street R. Co. 55 Fed. 764—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 200, 21 U. S. App. 244, 61 Fed. 964—*Hoe v. Scott*, 65 Fed. 609—*Rocker Spring Co. v. Thomas*, 68 Fed. 200—*Mast, F. & Co. v. Iowa Windmill & Pump Co.* 68 Fed. 219—*McBride v. Kingman*, 72 Fed. 911—*Matheson v. Campbell*, 77 Fed. 282—*Soehner v. Favorite Stove & Range Co.* 28 C. C. A. 320, 54 U. S. App. 389, 84 Fed. 185—*McEwan Bros. Co. v. McEwan*, 91 Fed. 790—*Galsman v. Gallert*, 105 Fed. 958—*Regina Music Box Co. v. Otto*, 114 Fed. 506—*Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* 56 C. C. A. 549, 120 Fed. 269—*Smeeth v. Perkins*, 60 C. C. A. 202, 125 Fed. 288—*Ryder v. Schlichter*, 61 C. C. A. 474, 126 Fed. 492—*Francis v. Mellor*, 8 Phila. 158, 28 Phila. Leg. Int. 333.

712. In determining whether the means employed in the infringing machine are substantially the same means as those employed in the patent machine, the patent should receive a liberal construction, where the patentee was the pioneer in the construction of such a machine. *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299, 32: 715 *Cited in Royer v. Schultz Belting Co.* 135 U. S. 323, 34 L. ed. 217, 10 Sup. Ct. Rep. 833—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 576, 42 L. ed. 1150, 18 Sup. Ct. Rep. 707—*Hobbs v. Beach*, 180 U. S. 401, 45 L. ed. 595, 21 Sup. Ct. Rep. 409—*National Progress Bunching-Mach. Co. v. John R. Williams Co.* 12 L.R.A. 110, 44 Fed. 194—*Wirt v. Hicks*, 45 Fed. 257—*Masten v. Hunt*, 51 Fed. 219—*Masseth v. Palm*, 51 Fed. 824—*Celluloid Mfg. Co. v. Arlington Mfg. Co.* 3 C. C. A. 273, 3 U. S. App. 287, 52 Fed. 744—*Brush Electric Co. v. Electric Improv. Co.* 52 Fed. 974—*National Cash Register Co. v. American Cash Register Co.* 3 C. C. A. 564, 3 U. S. App. 340, 53 Fed. 372—*Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co.* 55 Fed. 320—*Norton v. Wheaton*, 57 Fed. 927—*Buchanan v. Goodwin*, 57 Fed. 1040—*Morrow v. Shoemaker*, 59 Fed. 129—*Lamson Cash R. Co. v. Godehard*, 8 C. C. A. 268, 19 U. S. App. 360, 59 Fed. 779—*Groth v. International Postal Supply Co.* 9 C. C. A. 300, 20 U. S. App. 636, 61 Fed. 287—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 198, 21 U. S. App. 244, 61 Fed. 962—*Bowers v. Von Schmidt*, 63 Fed. 580—*Rogers Typograph Co. v. Mergenthaler Linotype Co.* 12 C. C. A. 424, 28 U. S. App. 146, 64 Fed. 801—*Westinghouse v. Boyden Power-Brake Co.* 68 Fed. 1003—*Mast v. Iowa Windmill & Pump Co.* 68 Fed. 219—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 18 C. C. A. 275, 37 U. S. App. 299, 69 Fed. 387—*Craig v. Michigan Lubricator Co.* 72 Fed. 177—*Enterprise Mfg. Co. v. Snow*, 72 Fed. 266—*McBride v. Kingman*, 72 Fed. 914—*Roemer v. Peddle*, 24 C. C. A. 41, 39 U. S. App. 496, 78 Fed. 119—*Cowles Electric Smelting & Aluminum Co. v. Lowrey*, 24 C. C. A. 637, 47 U. S. App. 531, 79 Fed. 352—*Consolidated Fastener Co. v. Columbian Fastener Co.* 79 Fed. 800—*Von Schmidt v. Bowers*, 25 C. C. A. 348, 48 U. S. App. 120, 80 Fed. 147—*Boston Lasting Mach. Co. v. Woodward*, 27 C. C. A. 71, 50 U. S. App. 164, 82 Fed. 99—*Ford v. Bancroft*, 85 Fed. 458—*Western Electric Co. v. Home Teleph. Co.* 85 Fed. 661—*Western Electric Co. v. Citizens' Teleph. Co.* 89 Fed. 671—*Beach v. Hobbs*, 34 C. C. A. 254, 63 U. S. App. 626, 92 Fed. 151—*Ford v. Bancroft*,

39 C. C. A. 95, 98 Fed. 312—Thomson-Houston Electric Co. v. Lorain Steel Co. 103 Fed. 645—Eldred v. Kessler, 45 C. C. A. 462, 106 Fed. 517—Moore v. Eggers, 46 C. C. A. 431, 107 Fed. 497—Otis Elevator Co. v. Portland Co. 119 Fed. 931—Fay v. Mason, 120 Fed. 510.

713. Where one has invented an entirely new process which has revolutionized the art, it may be that the court ought to give a broad construction to the patent; but when all the substantial steps in the process are old, the utmost that the inventor is entitled to is protection against those who use in substance his precise process. *Royer v. Coupe*, 146 U. S. 524, 13 Sup. Ct. Rep. 166, 36: 1073

Cited in Briggs v. Central Ice Co. 54 Fed. 378—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—*United States Glass Co. v. Atlas Glass Co.* 88 Fed. 500—*Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* 41 C. C. A. 364, 101 Fed. 295—*Safety Oiler Co. v. Scovill Mfg. Co.* 110 Fed. 205.

714. The broad construction claimed for a patent as a pioneer and foundation invention in the art of refining hair cannot extend the rights of the patentee beyond the compositions of matter and processes which, as stated in the patent, embody his real invention. *Béné v. Jeantet*, 129 U. S. 683, 9 Sup. Ct. Rep. 428, 32: 803
Cited in Celluloid Mfg. Co. v. Arlington Mfg. Co. 3 C. C. A. 273, 3 U. S. App. 287, 52 Fed. 744—*Carl L. Jensen Co. v. Clay*, 59 Fed. 291.

Strict construction.

Limitation of Specification by Claim, see *supra*, 500.

Of Claim in Reissue, see *supra*, 671.

See also *infra*, 1050.

715. In patents for combinations of mechanism, limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor, and be looked upon as in the nature of disclaimers. *Sargeant v. Hall Safe & Lock Co.* 114 U. S. 63, 5 Sup. Ct. Rep. 1021, 29: 67

Cited in Brown v. Davis, 116 U. S. 249, 29 L. ed. 663, 6 Sup. Ct. Rep. 379—*Shepard v. Carrigan*, 116 U. S. 597, 29 L. ed. 724, 6 Sup. Ct. Rep. 498—*Crawford v. Heysinger*, 123 U. S. 607, 31 L. ed. 274, 8 Sup. Ct. Rep. 899—*Hendy v. Golden State & Miner's Iron Works*, 127 U. S. 370, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—*Roemer v. Peddle*, 132 U. S. 817, 33 L. ed. 383, 10 Sup. Ct. Rep. 98—*Knapp v. Morris*, 150 U. S. 229, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Hubbell v. United States*, 179 U. S. 82, 45 L. ed. 99, 21 Sup. Ct. Rep. 24—*Otis Bros. Mfg. Co. v. Crane Bros. Mfg. Co.* 27 Fed. 555—*Wirt v. Brown*, 32 Fed. 286—*Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. 29—*Falls Rivet Co. v. Wolfe*, 40 Fed. 470—*Smith v. Pittsburgh Gas Co.* 42 Fed. 150—*Heine Safety Boiler Co. v. Anheuser-Bush Brewing Assn.* 43 Fed. 790—*Johnson Co. v. Pacific Rolling-Mills Co.* 47 Fed. 589—*Lane v. Park*, 49 Fed. 458—*J. L. Mott Iron Works v. Standard Mfg. Co.* 51 Fed. 84—*J. L. Mott Iron Works v. Standard Mfg. Co.* 4 C. C. A. 31, 3 U. S. App. 386, 53 Fed. 821—*Reece Button-Hole Mach. Co. v.*

Globe Button-Hole Mach. Co. 10 C. C. A. 201, 21 U. S. App. 244, 61 Fed. 965—*Frank v. Wm. P. Mockridge Mfg. Co.* 65 Fed. 524—*Walter A. Wood Mowing & Reaping Mach. Co. v. Deering*, 66 Fed. 550—*Wheaton v. Norton*, 17 C. C. A. 456, 44 U. S. App. 118, 70 Fed. 842—*Carter Mach. Co. v. Hanes*, 70 Fed. 866—*Craig v. Michigan Lubricator Co.* 72 Fed. 176—*Engle Sanitary & Cremation Co. v. Elwood*, 73 Fed. 485—*Muller v. Lodge & D. Mach. Tool Co.* 23 C. C. A. 366, 47 U. S. App. 189, 77 Fed. 629—*Norton v. Jensen*, 81 Fed. 497—*Truman v. Holmes*, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—*Griffith v. Shaw*, 89 Fed. 318—*Norton v. Jensen*, 33 C. C. A. 148, 61 U. S. App. 291, 90 Fed. 422—*Warren v. Casey*, 36 C. C. A. 31, 93 Fed. 965—*National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 99 Fed. 764—*New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co.* 103 Fed. 320—*Regina Music Box Co. v. Otto*, 114 Fed. 507—*Simplex Railway Appliance Co. v. Wauds*, 53 C. C. A. 175, 115 Fed. 521—*Rembert Roller Compress Co. v. American Cotton Co.* 64 C. C. A. 39, 129 Fed. 369—*Schillinger v. Cranford*, 4 Mackey, 477—*Lane v. Levi*, 21 App. D. C. 176—*Rodebaugh v. Jackson*, 37 Fed. 884.

715a. Where the novelty of the invention is at least open to doubt, the patentee should be held to a rigid construction of his claims. *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. Rep. 1.

Wright v. Beggs, 155 U. S. 54, 15 Sup. Ct. Rep. 4, 39: 64

Cited in Wells v. Curtis, 13 C. C. A. 500, 31 U. S. App. 123, 66 Fed. 325—*Cramer v. Fry*, 68 Fed. 211—*New Departure Bell Co. v. Hardware Specialty Co.* 69 Fed. 155—*Ginna v. Mersereau Mfg. Co.* 69 Fed. 346—*Carter Mach. Co. v. Hanes*, 70 Fed. 867—*Roemer v. Peddle*, 71 Fed. 408—*Craig v. Michigan Lubricator Co.* 72 Fed. 177—*Muller v. Lodge & D. Mach. Tool Co.* 23 C. C. A. 366, 47 U. S. App. 189, 77 Fed. 630—*Zan v. Mackenzie*, 26 C. C. A. 127, 48 U. S. App. 304, 80 Fed. 784—*De Beaumont v. Williams*, 26 C. C. A. 300, 39 U. S. App. 697, 80 Fed. 996—*Bates v. Keith*, 82 Fed. 101—*Union Writing Mach. Co. v. Domestic Sewing Mach. Co.* 95 Fed. 144—*Stokes Bros. Mfg. Co. v. Heller*, 41 C. C. A. 336, 101 Fed. 268—*De Lamar v. De Lamar Min. Co.* 54 C. C. A. 273, 117 Fed. 241.

716. A claim for an invention of doubtful utility, which has never gone into practical use, should receive a strict construction. *Deering v. Winona Harvester Works*, 155 U. S. 286, 15 Sup. Ct. Rep. 118, 39: 153

Cited in Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. 86 Fed. 330—*Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* 90 Fed. 209—*Electric Smelting & Aluminum Co. v. Pittsburgh Reduction Co.* 111 Fed. 757.

717-28. When it appears that after repeated and futile attempts a machine has been contrived which accomplishes the result desired, and when the Patent Office has granted a patent to the successful inventor, the courts should not adopt a narrow or astute construction, fatal to the grant. *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. Rep. 295, 38: 103
Cited in Holtz v. Consolidated Electric Mfg.

Co. 60 Fed. 750—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 193, 21 U. S. App. 244, 61 Fed. 962—Stahl v. Williams, 64 Fed. 124—New Departure Bell Co. v. Bevin Bros. Mfg. Co. 64 Fed. 864—Westinghouse v. Boyden Power-Brake Co. 66 Fed. 1006—S. F. Heath Cycle Co. v. Hay, 67 Fed. 251—Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co. 91 Fed. 992—Westinghouse Electric & Mfg. Co. v. Union Carbide Co. 112 Fed. 421—Kalamazoo Railway Supply Co. v. Duff Mfg. Co. 51 C. C. A. 226, 113 Fed. 269—Kinloch Teleph. Co. v. Western Electric Co. 51 C. C. A. 370, 113 Fed. 665—Consolidated Rubber Tire Co. v. Finley Rubber Tire Co. 116 Fed. 634—Peters v. Union Biscuit Co. 120 Fed. 684—Farmers' Mfg. Co. v. Spruks Mfg. Co. 62 C. C. A. 453, 127 Fed. 697—Albright v. Langfeld, 131 Fed. 475—Mayo Knitting Mach. & Needle Co. v. E. Jenckes Mfg. Co. 66 C. C. A. 517, 133 Fed. 541—Stirling Co. v. Standard Snuff Co. 137 Fed. 96.

Ambiguity.

See also *supra*, 494.

729. Where the language employed in the specification of a patent is clear and unambiguous, it must speak its own construction. *Mitchell v. Tilghman*, 19 Wall. 287, 22: 125

Distinguished in *Lowrie v. H. A. Meldrum Co.* 124 Fed. 764.

Cited in *Hobbs v. Beach*, 180 U. S. 400, 45 L. ed. 595, 21 Sup. Ct. Rep. 409—*Henderson v. Cleveland Co-op Stove Co.* 2 Bann. & Ard. 608, Fed. Cas. No. 6,351—*Westinghouse v. Gardner & R. Air-Brake Co.* 2 Bann. & Ard. 57, Fed. Cas. No. 17,450—*Zan v. McKenzie*, 62 Fed. 286—*Adams Electric R. Co. v. Lindell R. Co.* 23 C. C. A. 240, 40 U. S. App. 482, 77 Fed. 449—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 983—*Brill v. St. Louis Car Co.* 33 C. C. A. 218, 62 U. S. App. 276, 90 Fed. 669—*Thomson-Houston Electric Co. v. Nassau Electric R. Co.* 110 Fed. 648—*Expanded Metal Co. v. Board of Education*, 49 C. C. A. 408, 111 Fed. 398—*Burke v. Partridge*, 58 N. H. 351.

730. The construction of a patent must depend on the words of the instrument. But where they are ambiguous, there may be circumstances which ought to have great influence in expounding them. The intention of the parties—if that intention can be collected from sources which the principles of law permit to be explored—is entitled to great consideration. *Evans v. Eaton*, 3 Wheat. 454, 4: 433

Cited in *Carew v. Boston Elastic Fabric Co.* 3 Cliff. 364, Fed. Cas. No. 2,397—*Goodyear v. Providence Rubber Co.* 2 Fish. Pat. Cas. 512, Fed. Cas. No. 5,583—*Whitney v. Emmett, Baldw.* 312, Fed. Cas. No. 17,586—*Burke v. Partridge*, 58 N. H. 351.

731. Although a patent, like any other written instrument, is to be interpreted by its own terms, when it bears on its face a particular construction, it is reasonable to hold that such a construction may be confirmed by what the patentee said when he was making his application. *Goodyear*

Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26: 149

Cited in *Rodebaugh v. Jackson*, 37 Fed. 884—*Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 42 Fed. 906—*Sugar Apparatus Mfg. Co. v. Yaryan Mfg. Co.* 43 Fed. 148—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—*Consolidated Fastener Co. v. Columbian Fastener Co.* 79 Fed. 798.

732. Where the issue of a patent is authorized by a special act, that act, as well as the petition for issue and specifications, may be resorted to for an explanation of an ambiguity. *Evans v. Eaton*, 3 Wheat. 454, 4: 433

Statutes.

733. In determining the scope of patent rights under a special statute, the court must take into consideration, aside from such special act, the general laws relating to patents, and also any other special act which may have been enacted for the benefit of the particular patentee,—as they are statutes *in pari materia*. *Bloomer v. McQueen*, 14 How. 539, 14: 532

State of the art.

See also *supra*, 359, 516, 517; *infra*, 896, 1025, 1042.

734. The courts may interpret the state of the art at the time the application for a patent was filed, for the purpose of determining the extent of the invention. *Eachus v. Broomall*, 115 U. S. 429, 6 Sup. Ct. Rep. 229, 29: 419

Cited in *Grier v. Willt*, 120 U. S. 420, 30 L. ed. 718, 7 Sup. Ct. Rep. 718—*Britton v. White Mfg. Co.* 61 Fed. 96—*Martin & H. Cash-Carrier Co. v. Martin*, 14 C. C. A. 643, 33 U. S. App. 157, 87 Fed. 787—*Kennedy v. Solar Ref. Co.* 69 Fed. 719—*Missouri Lamp & Mfg. Co. v. Stempel*, 75 Fed. 584—*Parsons v. New Home Sewing Mach. Co.* 125 Fed. 387.

734a. To determine the extent of the invention, the state of the art at the time when the patent was granted must be considered. *Garneau v. Dozier*, 102 U. S. 230, 28: 133

735. The state of the art at the time of the grant of the patent must be taken into consideration, and the patentee must be limited to the particular combination described, where the state of the art is advanced. *Wollensak v. Reiher*, 115 U. S. 87, 5 Sup. Ct. Rep. 1132, 29: 355
Cited in *Wollensak v. Sargent*, 151 U. S. 224, 38 L. ed. 140, 14 Sup. Ct. Rep. 291—*Gage v. Kellogg*, 23 Fed. 894—*Wollensak v. Reiher*, 28 Fed. 425—*Wollensak v. Sargent*, 33 Fed. 841—*Wollensak v. Sargent*, 41 Fed. 54—*Heine Safety Boiler Co. v. Anheuser-Busch Brewing Assn.* 43 Fed. 790.

735a. The specification of a patent is to be construed in the light of that knowledge which existed in the art at the time of its date. *Lawther v. Hamilton*, 124 U. S. 1, 8 Sup. Ct. Rep. 342, 31: 325
Burt v. Ivory, 133 U. S. 349, 10 Sup. Ct. Rep. 394, 33: 647

736. The claims of the Hayden patent No. 700,919, for an improvement in a spring-balance computing scale, must be deemed to be limited to the specific means shown for translating the vertical movement of the runner into the rotary movement of the vertical inner computing cylinder, in view of the action of the Patent Office in requiring, as a means of saving the first claim, that such claim call for "a spring-supported, load-bearing, and cylinder-revolving rod," and "connecting means between rod and computing cylinder" to secure the rotary movement of the inner cylinder, in which action the applicant acquiesced, though "without prejudice to the claims which remain," because "the allowed claims appear to cover the invention as it would be constructed in practice," and in view of the state of the art, which shows that the elements of the invention, broadly considered, were previously disclosed in horizontal machines, and that the idea of vertical construction was old. *Computing Scale Co. v. Automatic Scale Co.* 204 U. S. 609, 27 Sup. Ct. Rep. 307, 51: 645

Process or product.

See also *supra*, 713, 714.

737. A patent for a product, which is obtained in a defined manner, covers the process as well as the product. *Smith v. Good-year Dental Vulcanite Co.* 93 U. S. 486, 23: 952

Distinguished in *Grant v. Walter*, 38 Fed. 596.

Cited in *King v. Gallun*, 109 U. S. 102, 27 L. ed. 871, 3 Sup. Ct. Rep. 85—*Lovell Mfg. Co. v. Cary*, 147 U. S. 638, 37 L. ed. 312, 13 Sup. Ct. Rep. 472—*Holliday v. Pickhardt*, 29 Fed. 860—*Celluloid Mfg. Co. v. American Zylonite Co.* 31 Fed. 910—*Hake v. Brown*, 37 Fed. 784—*Schultz Belting Co. v. Williamson Belting Co.* 40 Fed. 157—*Olds v. Brown*, 41 Fed. 704—*Kilbourne v. W. Birmingham Co.* 1 C. C. A. 621, 6 U. S. App. 65, 50 Fed. 700—*Carl L. Jensen Co. v. Clay*, 59 Fed. 291—*Everett v. Haulenbeck*, 68 Fed. 913—*Matheson v. Campbell*, 77 Fed. 283—*Expanded Metal Co. v. Board of Education*, 103 Fed. 288—*National Meter Co. v. Neptune Meter Co.* 122 Fed. 85—*Goodyear Dental Vulcanite Co. v. Brightwell, MacArth. & M.* 84—*Edison v. American Mutoscope Co.* 110 Fed. 664.

738. The patent granted Lawther, Sept. 28, 1875, for improvements in processes in treating oleaginous seeds, is valid as a patent for a process; the process is to be limited by the specification to the use of powerful revolving rollers for crushing seeds between them under pressure. *Lawther v. Hamilton*, 124 U. S. 1, 8 Sup. Ct. Rep. 342, 31: 325

Distinguished in *Appleton Mfg. Co. v. Star Mfg. Co.* 9 C. C. A. 45, 18 U. S. App. 492, 60 Fed. 413.

Cited in *Crescent Brewing Co. v. Gottfried*, 128 U. S. 167, 32 L. ed. 394, 9 Sup. Ct. Rep. 83—*Lawther v. Hamilton*, 64 Fed. 222—*Wall v. Leck*, 13 C. C. A. 633, 29 U. S. App. 458, 66 Fed. 556—*Chisholm v. Johnson*, 106 Fed. 200—*Stephenson v. Allison*, 123 Ala. 440, 26 So. 290.

739. Where the claim is for "the above-

described new manufacture of the deodorized heavy carbon oils, by treating them substantially as is hereinbefore described," with a minute description of the apparatus and process of producing them, the word "manufacture" must be taken to mean the process, and not the product. *Merrill v. Yeomans*, 94 U. S. 568, 24: 235

Cited in *Keystone Bridge Co. v. Phoenix Iron Co.* 95 U. S. 278, 24 L. ed. 346—*Duff v. Sterling Pump Co.* 107 U. S. 639, 27 L. ed. 518, 2 Sup. Ct. Rep. 487—*McClain v. Ort-mayer*, 141 U. S. 425, 35 L. ed. 802, 12 Sup. Ct. Rep. 76—*Grant v. Walker*, 148 U. S. 554, 37 L. ed. 557, 13 Sup. Ct. Rep. 699—*Cone v. Morgan Envelope Co.* 4 Bann. & Ard. 108, Fed. Cas. No. 3,096—*Gottfried v. Phillip Best Brewing Co.* 5 Bann. & Ard. 36, Fed. Cas. No. 5,633—*Knox v. Quicksilver Min. Co.* 4 Fed. 811—*Van Camp v. Maryland Pav. Co.* 34 Fed. 744—*Polisdorfer v. St. Louis Wooden-Ware Works*, 37 Fed. 58—*Dickinson v. Parker*, 38 Fed. 412—*Sackett v. Smith*, 42 Fed. 852—*Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 589—*Smead Warming & Ventilating Co. v. Fuller & W. Co.* 6 C. C. A. 486, 14 U. S. App. 578, 57 Fed. 631—*H. W. Johns Mfg. Co. v. Robertson*, 60 Fed. 905—*Durand v. Schulze*, 10 C. C. A. 98, 17 U. S. App. 620, 61 Fed. 820—*Edison Electric Light Co. v. Boston Incandescent Lamp Co.* 62 Fed. 398—*Bracewell v. Passaic Print Works*, 107 Fed. 480—*American Bell Teleph. Co. v. National Tel. Mfg. Co.* 109 Fed. 997—*Schreiber & C. Mfg. Co. v. Adams Co.* 54 C. C. A. 132, 117 Fed. 834—*Durfee v. Bawo*, 118 Fed. 858—*West-inghouse Air Brake Co. v. New York Air Brake Co.* 56 C. C. A. 414, 119 Fed. 884.

740. Where a patent is for a process, or for different processes and appliances, for producing the explosion of nitroglycerin, but contains no hint of any new mixture or any new composition of matter, although the claim is for the "use of nitroglycerin or its equivalent, substantially in the manner and for the purposes described," the patent is for a process and method, and not for a composition of matter. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 25: 77

Cited in *Thann Societe v. Lueders*, 105 Fed. 632—*Kirchberger v. American Acetylene Burner Co.* 64 C. C. A. 115, 128 Fed. 607.

741. Where a patent for a driven well described the process as one to be applied "where no rock is to be penetrated," the omission of these words from the reissue is immaterial; and the fair construction of it is to the effect that it was not applicable to the penetration of rock, but did not imply that it might not be used where some rock was found, provided other means were adopted to penetrate the rock. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, 30: 1064

742. Letters patent 73,425 and reissued letters patent 4372 cover a process the element of novelty in which consists in driving a tube tightly into the earth without removing the earth upwards, to serve as a well-pit, and attaching thereto a pump, thereby putting into practical use the new principle of forcing the water in the water-

bearing strata of the earth into a well-pit, by the use of artificial power to create a vacuum. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, 30: 1064
Beedle v. Bennet, 122 U. S. 71, 7 Sup. Ct. Rep. 1090, 30: 1074
Cited in Andrews v. Hovey, 123 U. S. 268, 31 L. ed. 161, 8 Sup. Ct. Rep. 111—*Andrews v. Hovey*, 124 U. S. 701, 31 L. ed. 558, 8 Sup. Ct. Rep. 676—*Beedle v. Bennet*, 122 U. S. 76, 30 L. ed. 1076, 7 Sup. Ct. Rep. 1090—*Green v. Lynn*, 55 Fed. 520—*Shaw v. Andrews*, 62 Fed. 460—*Beach v. Hobbs*, 82 Fed. 920.

743. A patent to insure the cooling of all parts of a car wheel with equal slowness, by taking the wheels from the moulds before they become so much cooled as to produce strain on any part sufficiently to impair their ultimate strength; then placing them immediately in a heated furnace or chamber, and applying heat until all parts are again raised to the same temperature; after which they are allowed to cool so fast as, and no faster than, is necessary for each part to cool and shrink simultaneously,—is a patent for a process, and not for a combination. *Mowry v. Whitney*, 14 Wall. 620, 20: 860

Cited in Risdon Iron & Locomotive Works v. Medart, 158 U. S. 75, 39 L. ed. 902, 15 Sup. Ct. Rep. 745—*New Process Fermentation Co. v. Maus*, 20 Fed. 729—*Cary v. Lovell Mfg. Co.* 31 Fed. 346—*American Strawboard Co. v. Elkhart Egg-Case Co.* 84 Fed. 964—*Carnegie Steel Co. v. Cambria Iron Co.* 89 Fed. 753—*Chisholm v. Johnson*, 106 Fed. 200—*Re Weston*, 17 App. D. C. 438.

744. A patent for building and setting piers by means of a floating coffer-dam, in which the masonry of the pier is laid upon a platform in a rectangular or other desirable form of box, fitted to slide down and over guide piles, and in which the masonry is sunk to its foundation by its own gravity, and to which box sections are to be added when required by the depth of the water,—is a patent for a device or instrument to be employed in a process, and not a patent for a process. *Philadelphia, W. & B. R. Co. v. Dubois*, 12 Wall. 47, 20: 265

Cited in Dederick v. Cassell, 9 Fed. 312—*Dederick v. Cassell*, 14 Phila. 508.

745. The claims of the Grant patent, 267, 192, for (1) "a skein of silk or other thread wound . . . in the manner described, and laced back and forth to preserve its form," etc.; and (2) "the combination of the lacing B with a wide skein . . . in which the strands are diagonally crossed,"—are for the product and not for a process, although the specifications declare that such skeins are in better condition for dyeing. *Grant v. Walter*, 148 U. S. 547, 13 Sup. Ct. Rep. 699, 37: 552

746. Construing the specification of a patent which stated that in "treating leather with the fat liquor, it is desirable to heat the latter to or near the boiling point," the court correctly charged that it should be applied at or near the boiling point unless the common knowledge of persons skilled in U. S. Dig.—275

the art of treating this leather, to procure softness and pliability, would make them wait until it was partially cool before its application; and if the jury believe that the application of fat liquor at such a temperature to leather as is required by the specification under this qualification is injurious and pernicious, the patent is void for want of utility. *Klein v. Russell*, 19 Wall. 433, 22: 116

Distinguished in Andrews v. Hovey, 124 U. S. 711, 31 L. ed. 561, 8 Sup. Ct. Rep. 676.

Cited in Brown v. Stillwell & B. Mfg. Co. 6 C. C. A. 537, 6 U. S. App. 427, 57 Fed. 740—*Kennedy v. Solar Ref. Co.* 69 Fed. 718.

747. A construction of the claim of the Jones patent, No. 404,414, for a process of mixing molten pig metal, as covering a method for avoiding abrupt variations in its chemical constituents, preparatory to further treatment, in converting it into steel, is not inconsistent with the specification of the patent that its primary object was to render the product of steel works uniform in chemical composition. *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 22 Sup. Ct. Rep. 698, 46: 968

748. Whether the process claim of the Jones patent, No. 404,414, for mixing molten metal, which, when read in connection with the specifications, clearly covered the product of blast furnaces, was intended to include the products of cupola furnaces as well, and is therefore invalid, need not be considered in a suit for infringement by the use of an apparatus for mixing molten metal taken from blast furnaces. *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 22 Sup. Ct. Rep. 698, 46: 968

Improvement.

See also *supra*, 738.

749. Where an invention is developed in different and independent forms, all original, and yet all bearing a somewhat general resemblance to each other, if one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly and subjects them to tribute. *Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554, 24: 1053
Distinguished in Piaget Novelty Co. v. Headley, 107 Fed. 136.

Cited in Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 274, 32 L. ed. 719, 9 Sup. Ct. Rep. 290—*Warth v. Browning*, 5 Bann. & Ard. 342, Fed. Cas. No. 17,209a—*Holly v. Vergennes Mach. Co.* 18 Blatchf. 332, 4 Fed. 79—*Steam Gauge & Lantern Co. v. Miller*, 8 Fed. 322—*Hubel v. Dick*, 28 Fed. 136—*Thompson v. American Bank-Note Co.* 39 Fed. 275—*Falls Rivet Co. v. Wolfe*, 40 Fed. 470—*Williams v. Steam-Gauge & Lantern Co.* 47 Fed. 324—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 275, 37 U. S. App. 299, 69 Fed. 387—*Von Schmidt v. Bowers*, 25 C. C. A. 349, 48 U. S. App. 120, 80 Fed. 148—*Bowers v. San Francisco Bridge Co.* 91 Fed. 417—*Bowers v. Pacific Coast Dredging & Reclamation Co.* 99 Fed. 748—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 563, 106 Fed. 711—*Brammer v. Schroeder*, 46 C. C. A. 43, 106

Fed. 920—Rofe Electric Co. v. Sterling Electric Co. 113 Fed. 431.

750. But if the advance toward the thing is gradual, and proceeds step by step, so that one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of its competitors, and does not include theirs. Chicago & N. W. R. Co. v. Sayles, 97 U. S. 554, 24: 1053

Distinguished in Gilbert v. Reinhardt Numbering Mach. Co. 58 Fed. 976.

Cited in Duff v. Sterling Pump Co. 107 U. S. 639, 27 L. ed. 518, 2 Sup. Ct. Rep. 487—Roemer v. Peddle, 132 U. S. 316, 33 L. ed. 383, 10 Sup. Ct. Rep. 98—Huber v. N. O. Nelson Mfg. Co. 148 U. S. 291, 37 L. ed. 454, 13 Sup. Ct. Rep. 603—Warth v. Brownling, 5 Bann. & Ard. 342, Fed. Cas. No. 17,209a—Delaware Coal & Ice Co. v. Packer, 5 Bann. & Ard. 296, 1 Fed. 852—Nathan v. New York Elev. R. Co. 5 Bann. & Ard. 284, 2 Fed. 228—Williams v. Barker, 5 Bann. & Ard. 454, 2 Fed. 650—Sharp v. Tiff, 18 Blatchf. 135, 5 Bann. & Ard. 402, 3 Fed. 699—Whitnum v. Seaman, 5 Bann. & Ard. 95, 4 Fed. 437—Adair v. Thayer, 17 Blatchf. 472, 5 Bann. & Ard. 121, 4 Fed. 444—New York Bung & Bushing Co. v. Hoffman, 20 Blatchf. 6, 9 Fed. 201—Doane & W. Mfg. Co. v. Smith, 15 Fed. 461—Parsons v. Colgate, 21 Blatchf. 175, 15 Fed. 603—Bell v. United States Stamping Co. 22 Blatchf. 29, 19 Fed. 313—Pentlarge v. New York Bung & Bushing Co. 20 Fed. 314—Untermeyer v. Jeannot, 20 Fed. 504—Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 22 Blatchf. 471, 21 Fed. 459—Morley Sewing Mach. Co. v. Lancaster, 23 Fed. 346—Roemer v. Peddle, 27 Fed. 703—Johnston Ruffler Co. v. Avery Mach. Co. 28 Fed. 194—Hill v. Sawyer, 31 Fed. 283—Polsdorfer v. St. Louis Wooden-Ware Works, 37 Fed. 58—Smith v. Thomson, 38 Fed. 607—Schuette v. Anderson, 42 Fed. 158—Westinghouse v. Chartiers Valley Gas Co. 43 Fed. 587—Strobridge v. L. H. Smith Wooden-Ware Co. 46 Fed. 924—Johnson Co. v. Tidewater Steel-Works, 50 Fed. 95—Dedrick v. Gardner, 50 Fed. 100—J. L. Mott Iron Works v. Standard Mfg. Co. 51 Fed. 84—J. L. Mott Iron Works v. Standard Mfg. Co. 4 C. C. A. 34, 3 U. S. App. 386, 53 Fed. 824—Lalance & G. Mfg. Co. v. Haberman Mfg. Co. 54 Fed. 518—Smead Warming & Ventilating Co. v. Fuller & W. Co. 6 C. C. A. 486, 14 U. S. App. 578, 57 Fed. 631—International Postal Supply Co. v. Groth, 57 Fed. 659—Vincent v. Rigby, 58 Fed. 373—Parry Mfg. Co. v. Hitchcock Mfg. Co. 58 Fed. 403—Bundy Mfg. Co. v. Columbian Time-Recorder Co. 59 Fed. 295—Lamson Cash R. Co. v. Godehard, 8 C. C. A. 268, 19 U. S. App. 360, 59 Fed. 779—Bundy Mfg. Co. v. Columbian Time-Recorder Co. 12 C. C. A. 443, 26 U. S. App. 421, 64 Fed. 853—Blount Mfg. Co. v. Bardsley, 66 Fed. 764—New Departure Bell Co. v. Hardware Specialty Co. 69 Fed. 155—American Pneumatic Tool Co. v. Fisher, 69 Fed. 332—Craig v. Michigan Lubricator Co. 72 Fed. 178—McBride v. Klingman, 72 Fed. 912—Foster v. Werthelmer, 76 Fed. 981—Adams Electric R. Co. v. Lindell R. Co. 23 C. C. A. 231, 40 U. S. App. 482, 77 Fed. 440—De Beaumont v. Williams, 26 C. C. A. 299, 39 U. S. App. 697, 80 Fed. 996—American

Graphophone Co. v. Walcutt, 87 Fed. 558—Norton v. Jensen, 33 C. C. A. 149, 61 U. S. App. 291, 90 Fed. 423—Corser v. Brattleboro Overall Co. 93 Fed. 807—Ryan v. Runyan, 38 C. C. A. 37, 93 Fed. 971—Meisinger Bicycle Saddle Co. v. Humber, 94 Fed. 673—Union Writing Mach. Co. v. Domestic Sewing Mach. Co. 95 Fed. 144—William Mann Co. v. Hoffman, 43 C. C. A. 523, 104 Fed. 254—National Hollow Brake Beam Co. v. Interchangeable Break Beam Co. 45 C. C. A. 563, 106 Fed. 712—Bradner Adjustable Hanger Co. v. Waterbury Button Co. 106 Fed. 736—Kinloch Teleph. Co. v. Western Electric Co. 51 C. C. A. 378, 113 Fed. 668—Ide v. Trorlicht, D. & R. Carpet Co. 53 C. C. A. 347, 115 Fed. 143—Farmer's Mfg. Co. v. Spruks Mfg. Co. 119 Fed. 597—Sander v. Rose, 58 C. C. A. 176, 121 Fed. 840—Anderson v. Collins, 58 C. C. A. 677, 122 Fed. 459—Wilson v. Townley Shingle Co. 60 C. C. A. 381, 125 Fed. 495—Fay v. Mason, 62 C. C. A. 164, 127 Fed. 330—Diamond Match Co. v. Ruby Match Co. 127 Fed. 346.

751. There is no substantial difference in meaning whether a patent is granted for an improved machine or for an improvement on a machine. Evans v. Eaton, 3 Wheat. 454, 4: 433

Cited in Olcott v. Hawkins, Fed. Cas. No. 10,480—Parham v. American Button Hole Over-Seaming & Sewing-Mach. Co. 4 Fish Pat. Cas. 475, Fed. Cas. No. 10,718—Whitney v. Emmett, Baldw. 312, Fed. Cas. No. 17,585—Parham v. Machine Co. 1 Legal Gazette Rep. 149.

752. In a patent for a reaping machine, a claim for "the reversed angle of the teeth of the blade in manner described" cannot be construed to claim the reversed angle of the teeth in connection with the spear-shaped fingers arranged for the purpose of securing the grain in the operation of the cutting, but simply the reversed angle of the cutters. Seymour v. McCormick, 19 How. 96, 15: 557

753. Claim 1 of the Olin patent, 223,812, for an improvement in harvesters, which describes a swinging elevator located upon the grain or ascending side of the main belt pivoted at its lower end and movable at its upper end, cannot be construed, in view of prior devices and of the doubtful utility of the invention, to cover a similar device located upon the stubble side, pivoted at its upper end, and swinging at its lower end. Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. Rep. 118, 89: 153
Distinguished in Thomson-Houston Electric Co. v. Mahar, 112 Fed. 535.

Cited in Cramer v. Fry, 68 Fed. 211—New Departure Bell Co. v. Hardware Specialty Co. 69 Fed. 155—Ford v. Bancroft, 85 Fed. 461—Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. 86 Fed. 322—Branson v. Kuts, 105 Fed. 975—General Electric Co. v. Winsted Gas Co. 110 Fed. 960.

754. The 5th claim of the Bell patent of March 7, 1876, for improvement in telegraphy, as follows: "The method of, and apparatus for, transmitting vocal or other sounds telegraphically, by causing electrical

undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds substantially as set forth"—embraces the art of transferring to or impressing upon an undulatory current of electricity the vibrations of air produced by the human voice in articulate speech, so that the speech will be carried to and received by the listener at a distance on the line of the current. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

Cited in United States v. American Bell Teleph. Co. 128 U. S. 353, 32 L. ed. 457, 9 Sup. Ct. Rep. 90—*Richmond v. Southern Bell Teleph. & Teleg. Co.* 28 C. C. A. 664, 42 U. S. App. 686, 85 Fed. 24—*State, Duke, Prosecutor, v. Central New Jersey Teleph. Co.* 53 N. J. L. 346, 11 L.R.A. 666, 21 Atl. 460—*Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 136, 25 L.R.A. 642, 38 N. E. 202—*Gulf, C. & S. F. R. Co. v. Southwestern Teleg. & Teleph. Co.* 18 Tex. Civ. App. 501, 45 S. W. 151.

755. Articulate speech is included in the description of the patent to Alexander Graham Bell of March 7th, 1876; the sound thereof being one of the "vocal or other sounds" referred to in the claim. *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, 31: 863

756. A patent for a shovel plough, which does not claim to cover passing a portion of the earth from the mould board into the furrow behind, nor the use of an inclined mould board, nor the use of projecting blades at the outer ends of the share, but which claims an inclined mould board constructed highest at its outer edges, so as to form on each side of the standard a recess through which a portion of the earth may fall into the furrow in the rear, can be held to cover only the particular shape of the recess; and where the claim is, "scalloped out so as to form a recess," it is not sufficient to describe any particular shape, and is invalid as claiming too much. *Eddy v. Dennis*, 95 U. S. 560, 24: 363

757. Where the precise improvement covered by a patent is the substitute of a wooden vessel for a metallic one to hold tobacco while being resweated, the patent cannot sustain a claim for a process of steaming tobacco, or for any process whatever. *Sutter v. Robinson*, 119 U. S. 531, 7 Sup. Ct. Rep. 376, 30: 492
Cited in Phillips v. Kochert, 81 Fed. 40.

758-60. A patent for an improved safety-valve, the head of which is extended to form a circular or annular flange or lip extending over, slightly below, and fitting loosely around, the outer edge of the valve seat, forming a circular or annular chamber into which the steam immediately passes when the valve lifts, opening downward in the opposite direction, so that when the steam escapes into this chamber it shall continue to act, the orifice through which the steam escapes from this chamber being proportionate to the strength of the spring or balance which acts to keep the valve in place,—covers a valve in which are combined an initial area, an additional area, and huddling

chamber beneath the additional area, and a strictured orifice leading from the huddling chamber to the open air, the orifice being proportionate to the strength of the spring. *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.* 113 U. S. 157, 5 Sup. Ct. Rep. 513, 28: 939

XII. Disclaimer.

See also *supra*, 514.

Power.

761. The power to disclaim is a beneficial one, and ought not to be denied except where it is resorted to for a fraudulent and deceptive purpose. *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 22 Sup. Ct. Rep. 698, 46: 968
Cited in Carnegie Steel Co. v. Cambria Iron Co. 185 U. S. 435, 46 L. ed. 985, 22 Sup. Ct. Rep. 698—*Office Specialty Mfg. Co. v. Globe Co.* 65 Fed. 605—*Carnegie Steel Co. v. Cambria Iron Co.* 89 Fed. 757—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 987.

Construction.

See also *infra*, 715.

762. A disclaimer becomes a part of the original specification, in construction of the patent, and in ascertaining the rights of the parties to a suit for infringement. *Dunbar v. Meyers*, 94 U. S. 187, 24: 34
Ashcroft v. Boston & L. R. Co. 97 U. S. 189, 24: 982

Cited in Sessions v. Romadka, 145 U. S. 42, 36 L. ed. 614, 12 Sup. Ct. Rep. 799—*Alcott v. Young*, 16 Blatchf. 139, Fed. Cas. No. 149—*Sawyer v. Miller*, 4 Woods, 474, 12 Fed. 727—*Atlantic Giant Powder Co. v. Hullings*, 21 Fed. 521—*Electrical Accumulator Co. v. Julien Electric Co.* 38 Fed. 136—*Schwarzwalder v. New York Filter Co.* 13 C. C. A. 385, 26 U. S. App. 547, 66 Fed. 158—*Bracewell v. Passaic Print Works*, 107 Fed. 469—*Sample v. American Soda Fountain Co.* 134 Fed. 403—*Manhattan General Constr. Co. v. Hellos-Upton Co.* 135 Fed. 802.

763. A disclaimer of statements in the specifications of a patent may be entered in a suit for its infringement, when such statements, if retained, might be construed as having the effect of illegally broadening the claim, and there is no purpose of thus obtaining the benefit of a reissue. *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 22 Sup. Ct. Rep. 698, 46: 968
Cited in Sample v. American Soda Fountain Co. 134 Fed. 403—*Manhattan General Constr. Co. v. Hellos-Upton Co.* 135 Fed. 802.

Sufficiency.

764. The provision of the act of 1836 that, when any patentee shall have in his specification claimed to be the first and original inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just claim to the same, he must disclaim in order to

protect so much of the claim as is legally patented, is remedial, not penal, and is intended for the protection of the patentee as well as the public. It should not, therefore, receive a construction which would limit its operation within narrower limits than its words fairly import. *O'Reilly v. Morse*, 15 How. 62, 14: 601

765. The patentee having described his invention, and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms. *Winans v. Denmead*, 15 How. 330, 14: 717

Cited in *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 575, 42 L. ed. 1150, 18 Sup. Ct. Rep. 707—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 204, 21 U. S. App. 244, 61 Fed. 968—*Beach v. American Box-Mach. Co.* 63 Fed. 606—*Devlin v. Paynter*, 12 C. C. A. 190, 28 U. S. App. 115, 64 Fed. 400—*Travers v. American Cordage Co.* 64 Fed. 774—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 275, 37 U. S. App. 299, 69 Fed. 387—*Robbins v. Dueber Watch-Case Mfg. Co.* 71 Fed. 191—*Societe Anonyme v. Reh-fuss*, 75 Fed. 660—*Long v. Pope Mfg. Co.* 21 C. C. A. 536, 33 U. S. App. 551, 75 Fed. 838—*Independent Electric Co. v. Jeffrey Mfg. Co.* 76 Fed. 991—*Cowles Electric Smelting & Aluminum Co. v. Lowrey*, 24 C. C. A. 637, 47 U. S. App. 531, 79 Fed. 352—*Lovell v. Johnson*, 82 Fed. 208—*Heap v. Greene*, 34 C. C. A. 87, 63 U. S. App. 56, 91 Fed. 794—*Bladon Iron & Locomotive Works v. Trent*, 92 Fed. 389—*Thompson v. Second Ave. Traction Co.* 35 C. C. A. 622, 93 Fed. 826—*Bundy Mfg. Co. v. Detroit Time Register Co.* 36 C. C. A. 390, 94 Fed. 539—*Metallic Extraction Co. v. Brown*, 43 C. C. A. 575, 104 Fed. 352—*McMichael & W. Mfg. Co. v. Stafford*, 105 Fed. 383—*Singer Mfg. Co. v. Cramer*, 48 C. C. A. 591, 109 Fed. 655—*Electric Smelting & Aluminum Co. v. Pittsburgh Reduction Co.* 111 Fed. 756—*Adam v. Folger*, 56 C. C. A. 543, 120 Fed. 263—*Lowell Mach. Shop v. Saco & P. Mach. Shops*, 58 C. C. A. 328, 122 Fed. 636—*Klauder-Weldon Dyeing Mach. Co. v. Steadwell Dyeing Mach. Co.* 122 Fed. 645—*Pettibone v. Pennsylvania Steel Co.* 133 Fed. 734—*Huggins v. Hubby*, Fed. Cas. No. 6,839—*Jackson v. Allen*, 120 Mass. 75.

766. The claim actually made in an application for a patent operates in law as a disclaimer of matter set out in the specification, but not embraced in the specific claim. *Underwood v. Gerber*, 149 U. S. 224, 13 Sup. Ct. Rep. 854, 37: 710
Cited in *United States Credit System Co. v. American Credit Indemnity Co.* 8 C. C. A. 53, 20 U. S. App. 172, 50 Fed. 143.

767. A disclaimer in a claim for a patent, which states that the patent was obtained by the petitioner, and is silent as to any transfer of interest, is not open to the objection that it does not state the extent of the petitioner's interest. *Silsby v. Foote*, 14 How. 218, 14: 394

As affecting recovery for infringement.
See also *supra*, 762, 763.

768. A reissued patent is within the letter and spirit of those provisions of the patent act which permit a patentee to make a disclaimer of those parts of his claim which he has wrongfully claimed through inadvertence, accident, or mistake, and which permit him to maintain a suit, in such a case, upon that part which he is entitled to hold. *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. Rep. 819, 27: 601
Cited in *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 553, 29 L. ed. 960, 6 Sup. Ct. Rep. 934—*Watson v. Cincinnati, I. St. L. & C. R. Co.* 132 U. S. 166, 33 L. ed. 279, 10 Sup. Ct. Rep. 45—*Topliff v. Topliff*, 145 U. S. 169, 36 L. ed. 664, 12 Sup. Ct. Rep. 825—*Eby v. King*, 158 U. S. 374, 39 L. ed. 1022, 15 Sup. Ct. Rep. 972—*McKay v. Stowe*, 17 Fed. 519—*Fetter v. Newhall*, 17 Fed. 844—*Reay v. Raynor*, 22 Blatchf. 16, 19 Fed. 310—*Dryfoos v. Wiese*, 22 Blatchf. 21, 19 Fed. 317—*Giant Powder Co. v. Safety Nitro Powder Co.* 10 Sawy. 27, 19 Fed. 512—*Wooster v. Handy*, 22 Blatchf. 333, 21 Fed. 66—*Worden v. Searls*, 21 Fed. 408—*Electric Gas Lighting Co. v. Tillotson*, 22 Blatchf. 483, 21 Fed. 570—*Matthews v. Iron Clad Mfg. Co.* 22 Blatchf. 432, 21 Fed. 643—*Odell v. Stout*, 22 Fed. 168—*Western U. Teleg. Co. v. Baltimore & O. Teleg. Co.* 25 Fed. 34—*Reed v. Chase*, 25 Fed. 95—*Hoe v. Kahler*, 23 Blatchf. 369, 25 Fed. 281—*American Diamond Rock-Boring Co. v. Sheldon*, 25 Fed. 770—*Tubular Rivet Co. v. Copeland*, 26 Fed. 707—*Hubel v. Dick*, 28 Fed. 137—*Craver v. Weyhrich*, 31 Fed. 608—*Hammerschlag Mfg. Co. v. Brancroft*, 32 Fed. 586—*Electrical Accumulator Co. v. Julien Electric Co.* 33 Fed. 136—*Fox v. Perkins*, 3 C. C. A. 34, 6 U. S. App. 200, 52 Fed. 207—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 58 Fed. 777—*Griffith v. Shaw*, 89 Fed. 318—*Norton v. Jensen*, 33 C. C. A. 149, 61 U. S. App. 291, 90 Fed. 422.

769. Recovery allowed for infringement of the valid portion of a claim, although no disclaimer of the invalid portion was made, where patent expired before the invalidity was asserted. *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 6 Sup. Ct. Rep. 934, 29: 954

Cited in *Kittle v. Hall*, 80 Fed. 240.

770. A disclaimer on letters patent estops those claiming under the patent from claiming an infringement thereof on grounds within such disclaimer, where the disclaimer was filed under a decision requiring the disclaimer as a condition precedent to an extension, and under the act of July 8, 1870, chap. 230, § 54 (16 Stat. at L. 205. U. S. Comp. Stat. 1901, p. 3393), a disclaimer can be made only by a patentee who has claimed more than that of which he was original or first inventor or discoverer, or by his assigns; and such disclaimer covers only such parts of the thing patented as he ought not to claim or hold by virtue of the patent. *Union Metallic Cartridge Co. v. United States Cartridge Co.* 112 U. S. 624, 5 Sup. Ct. Rep. 475, 28: 628
Cited in *Shepard v. Carrigan*, 116 U. S. 597.

29 L. ed. 724, 6 Sup. Ct. Rep. 493—Crawford v. Heysinger, 123 U. S. 607, 31 L. ed. 274, 8 Sup. Ct. Rep. 390—Roemer v. Peddie, 132 U. S. 317, 33 L. ed. 383, 10 Sup. Ct. Rep. 98—Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 379, 34 L. ed. 183, 10 Sup. Ct. Rep. 884—Dobson v. Lees, 137 U. S. 265, 34 L. ed. 655, 11 Sup. Ct. Rep. 71—Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U. S. 429, 38 L. ed. 502, 14 Sup. Ct. Rep. 627—Holt v. Kendall, 26 Fed. 625—Dobson v. Lees, 30 Fed. 627—Reiter v. Jones, 35 Fed. 422—Electrical Accumulator Co. v. Julien Electric Co. 38 Fed. 136—Smith v. Pittsburgh Gas Co. 42 Fed. 150—Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co. 54 Fed. 887—Ball & Socket Fastener Co. v. Ball Glove Fastening Co. 7 C. C. A. 504, 5 U. S. App. 588, 58 Fed. 824—Johnson v. Olsen, 61 Fed. 833—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 969—Thomas v. Rocker Spring Co. 23 C. C. A. 221, 47 U. S. App. 125, 77 Fed. 431—Graham v. Earl, 34 C. C. A. 271, 48 U. S. App. 691, 82 Fed. 740—Truman v. Holmes, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—Graham v. Earl, 34 C. C. A. 271, 48 U. S. App. 691, 92 Fed. 159—Cambria Iron Co. v. Carnegie Steel Co. 37 C. C. A. 595, 96 Fed. 852—Rembert Roller Compress Co. v. American Cotton Co. 64 C. C. A. 39, 129 Fed. 369—Dobson v. Lells, 18 Phila. 552, 44 Phila. Leg. Int. 395.

Disclaimer after suit brought.

771. Under the patent act of 1837 disclaimers can be made as well after as before the commencement of the suit; but the court should, when a disclaimer is made after suit commenced, impose such terms as justice may require. *Smith v. Nichols*, 21 Wall. 112, 22: 566
Cited in Dunbar v. Myers, 94 U. S. 193, 24 L. ed. 37—*Burdett v. Estey*, 15 Blatchf. 364, 4 Bann. & Ard. 22, Fed. Cas. No. 2,145—*Carnegie Steel Co. v. Cambria Iron Co.* 89 Fed. 757—*Sample v. American Soda Fountain Co.* 134 Fed. 403.

772. When a disclaimer is served after the commencement of the action, the court should see that the defendant is not prejudiced, and should impose such terms as right and justice require. *Silsby v. Foote*, 14 How. 218, 14: 394
Cited in Smith v. Nichols, 21 Wall. 117, 22 L. ed. 567—*Tuck v. Bramhill*, 6 Blatchf. 101, 3 Fisher, Pat. Cas. 406, Fed. Cas. No. 14,213.

773. Under U. S. Rev. Stat. § 4922, U. S. Comp. Stat. 1901, p. 3396, the effect of delaying a disclaimer of a separate claim in a patent until after commencement of the suit for infringement of the patent, goes only to the recovery of the costs. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. Rep. 799, 36: 609

774. After an action in equity for the infringement of letters patent has been heard and decided upon its merits, the plaintiff cannot file a disclaimer in court, or introduce new evidence upon that or any other subject, except at a rehearing granted by the court upon such terms as it thinks fit to impose. *Roemer v. Neumann (Roemer v.*

Bernheim) 132 U. S. 103, 10 Sup. Ct. Rep. 12, 33: 277

Delay.

See also *supra*, 773.

775. Unreasonable delay of disclaimer of any part of improvement not new deprives plaintiff of the right to recover against an infringer. *O'Reilly v. Morse*, 15 How. 62, 14: 601

775a. Unreasonable delay of disclaimer of any part of improvement not new deprives plaintiff of the right to recover against an infringer. *Seymour v. McCormick*, 19 How. 96, 15: 557
Cited in Seymour v. McCormick, 19 How. 106, 15 L. ed. 562, 1 Whitman, Pat. Cas. 1014—*Gage v. Herring*, 107 U. S. 646, 27 L. ed. 604, 2 Sup. Ct. Rep. 819—*American Wood-Paper Co. v. Heft*, 3 Fisher, Pat. Cas. 322, Fed. Cas. No. 322—*Burdett v. Estey*, 15 Blatchf. 364, 4 Bann. & Ard. 22, Fed. Cas. No. 2,145—*Stutz v. Armstrong*, 20 Fed. 848—*Mathews v. Flower*, 25 Fed. 834—*Electrical Accumulator Co. v. Julien Electric Co.* 38 Fed. 136.

776. The granting of the patent, including the objectionable claim, and decision that it is valid, by the circuit court, repel any inference of unreasonable delay in making a disclaimer. *O'Reilly v. Morse*, 15 How. 62, 14: 601
Seymour v. McCormick, 19 How. 96, 15: 557
Cited in Singer v. Wamsley, 1 Fisher, Pat. Cas. 575, Fed. Cas. No. 12,900—*Office Specialty Mfg. Co. v. Globe Co.* 65 Fed. 606—*Goodyear Dental Vulcanite Co. v. Brightwell, MacArth. & M.* 77.

777. In such case patentee need not disclaim until decision of the highest court. *Seymour v. McCormick*, 19 How. 96, 15: 557
O'Reilly v. Morse, 15 How. 62, 14: 601

778. Whether a disclaimer has been made without unreasonable delay is a question of law, in a case where a patent has been issued covering the invalid part of a claim, and a decision has been given by a circuit court in favor of the validity of such part of the claim. *Seymour v. McCormick*, 19 How. 96, 15: 557

779. U. S. Rev. Stat. § 4917, U. S. Comp. Stat. 1901, p. 3393, authorizing a disclaimer to be filed in certain cases, and § 4922 (U. S. Comp. Stat. 1901, p. 3396), enabling the patentee to sue in these cases provided a disclaimer is filed without unreasonable delay, apply to the same class of cases and have one purpose. *Hailes v. Albany Stove Co.* 123 U. S. 582, 8 Sup. Ct. Rep. 262, 31: 284

Excessive claim.

Removal of Cause from State Court, see Removal of Causes, 214-216.

780. The duty of disclaiming under the act of 1836 exists as well where a patentee claims more than the law permits, as where he claims something which had been known before. *O'Reilly v. Morse*, 15 How. 62, 14: 601
Cited in Dunbar v. Myers, 94 U. S. 194, 24 L.

ed. 37—*Alken v. Dolan*, 3 Fisher, Pat. Cas. 207, Fed. Cas. No. 110—*Yale Lock Mfg. Co. v. Scovill Mfg. Co.* 18 Blatchf. 258, 5 Bann. & Ard. 529, 3 Fed. 298—*Tyler v. Galloway*, 20 Blatchf. 447, 12 Fed. 569—*Giant Powder Co. v. Safety Nitro Powder Co.* 10 Sawy. 27, 19 Fed. 512.

781. Disclaimers may be made a part of a claim of a patent under U. S. Rev. Stat. § 4917, U. S. Comp. Stat. 1901, p. 3393, to avoid the effect of having included in the patent more devices than can properly be made the subject of a single patent. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. Rep. 799, 36: 609

Changing character of invention.

Concurrent Jurisdiction of State Courts, see *infra*, 1419-1421.

782. A disclaimer cannot be used to change the character of the invention. *Hailes v. Albany Stove Co.* 123 U. S. 582, 8 Sup. Ct. Rep. 262, 31: 284
Collins Co. v. Coes, 130 U. S. 56, 9 Sup. Ct. Rep. 514, 32: 858

Distinguished in Electrical Accumulator Co. v. Julien Electric Co. 38 Fed. 136—*Thompson v. N. T. Bushnell Co.* 37 C. C. A. 459, 96 Fed. 241.

Offered in Collins Co. v. Coes, 130 U. S. 68, 32 L. ed. 862, 9 Sup. Ct. Rep. 514—*Sessions v. Romadka*, 145 U. S. 41, 36 L. ed. 614, 12 Sup. Ct. Rep. 799—*National Folding Box & Paper Co. v. Stecher Lithographic Co.* 26 C. C. A. 452, 51 U. S. App. 395, 81 Fed. 399.

783. A disclaimer of so much of claims for a skein of silk or other thread wound in a manner specified, and for a combination of a lacing with such a skein, as might make such claims apply to a skein not in condition for dyeing, cannot have the effect to change the patent into one for a process instead of for a product. *Grant v. Walter*, 148 U. S. 547, 13 Sup. Ct. Rep. 699, 37: 552

Reissue.

784. If it requires an amended specification or supplemental description to make an altered claim intelligible or relevant, whilst it may possibly present a case for a surrender and reissue, it is clearly not adapted to a disclaimer. *Collins Co. v. Coes*, 130 U. S. 56, 9 Sup. Ct. Rep. 514, 32: 858

785. It is not competent for the patentee or his assignees, by merely disclaiming all the changes made in the reissued patent, to revive and restore the original patent. *McMurray v. Mallory*, 111 U. S. 97, 4 Sup. Ct. Rep. 375, 28: 365
Offered in Eby v. King, 158 U. S. 374, 39 L. ed. 1022, 15 Sup. Ct. Rep. 972.

786. In disclaiming or limiting a claim, descriptive matter on which the disclaimed claim was based might be erased; but if there was merely a defective description, as distinguished from a claim, the only mode of correcting it was by a reissue. *Union Metallic Cartridge Co. v. United States Cartridge Co.* 112 U. S. 624, 5 Sup. Ct. Rep. 475, 28: 828

787. A claim for a reissued patent is bad,

where it is for something the patentee had expressly disclaimed in the original patent, and when there is nothing new in the apparatus used. *Beecher Mfg. Co. v. Atwater Mfg. Co.* 114 U. S. 523, 5 Sup. Ct. Rep. 1007, 29: 232

Offered in Gunn v. Savage, 25 Fed. 103—*Brick-ill v. Hartford*, 49 Fed. 374.

XIII. Transfer of Rights; License.

a. In General.

Nature and Extent of Rights, see *supra*, III
Sale of Rights as Protection from Liability as Infringer, see *infra*, 1141.

Federal Question as to, see *Appeal and Error*, 1364, 1428, 1813-1819.

Abandonment to Bankrupt by Assignee in Bankruptcy, see *Bankruptcy*, 254.

Jurisdiction of Courts Generally as to Agreements Collateral to Patents, see *Courts*, 556-561.

Creditor's Bill to Compel, see *Creditors' Bill*, 32, 33.

Agreement Between Partners in Patent, see *Partnership*, 121.

Removal from State Court of Suit for Consideration for Transfer, see *Removal of Causes*, 214.

788. The right of manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee. *Adams v. Burke*, 17 Wall. 453, 21: 700
Offered in Montross v. Mable, 30 Fed. 235—*Hatfield v. Smith*, 44 Fed. 355—*Anderson v. Eller*, 46 Fed. 781.

789. An agreement to place the patent so that it will inure to the benefit of another and his licensees, and appointing the latter's agent a trustee to hold such patent, so that no one shall have a license without such trustee's consent, reserving the personal use of it, transfers the patentee's entire interest to such other and his licensees. *Hartshorn v. Day*, 19 How. 211, 15: 605
Day v. Union India Rubber Co. 20 How. 216, 15: 883

Offered in De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 228, 37 L. ed. 145, 13 Sup. Ct. Rep. 283.

State regulation of sale of patent rights.

State License Tax Discriminating Against Manufacturers of Other States, see *Commerce*, 397.

790. The requirement that a negotiable instrument taken on a sale of rights under a patent shall show on its face for what it was given, or be void, which is made by Kirby's (Ark.) Dig. § 513, does not violate U. S. Const. art. I, § 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor U. S. Rev. Stat. § 4898, U. S. Comp. Stat. 1901, p. 3387, authorizing written assignments of patents or interests therein, which shall be

void as against subsequent purchasers unless recorded in the Patent Office. *Woods v. Carl*, 203 U. S. 358, 27 Sup. Ct. Rep. 99, 51: 219

791. The regulation of the sale of patent rights made by Kan. Laws 1889, chap. 182, which compels one selling a patent right in any county in the state to file with the clerk of such county an authenticated copy of the letters patent, together with an affidavit of the genuineness of the letters patent and as to other matters, and provides that any written obligation given for the purchase price of a patent right shall contain the words "given for a patent right,"—does not violate U. S. Const. art. 1, § 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor U. S. Rev. Stat. § 4898, U. S. Comp. Stat. 1901, p. 3387, authorizing written assignments of patents or interests therein, which shall be void as against subsequent purchasers unless recorded in the Patent Office. *Allen v. Riley*, 203 U. S. 347, 27 Sup. Ct. Rep. 95, 51: 216

— Editorial note.

[Power of states to restrict and regulate the sale of patent rights. 29 L.R.A. 786.]

State regulation of sale of patented article.

792. The right conferred upon a patentee and his assignee to use and sell within the state an oil for illuminating purposes, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations of the state prohibiting the sale of burning fluids which ignite or permanently burn at less than a prescribed temperature. *Patterson v. Kentucky*, 97 U. S. 501, 24: 1115

793. A state may require a license for the sale of sewing machines, although the machines are patented under the laws of the United States, where there is no discrimination against machines from outside the state. *Webber v. Virginia*, 103 U. S. 344, 26: 565

Distinguished in Minnesota v. Barber, 136 U. S. 326, 34 L. ed. 460, 3 Inters. Com. Rep. 190, 10 Sup. Ct. Rep. 862—*Re Sheffield*, 64 Fed. 834.

Cited in Webber v. Virginia, 103 U. S. 348, 26 L. ed. 566—*Mugler v. Kansas*, 123 U. S. 665, 31 L. ed. 212, 8 Sup. Ct. Rep. 273—*Lelsey v. Hardin*, 135 U. S. 121, 34 L. ed. 136, 3 Inters. Com. Rep. 45, 10 Sup. Ct. Rep. 681—*De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 222, 37 L. ed. 142, 13 Sup. Ct. Rep. 283—*Campbell v. Haverhill*, 155 U. S. 618, 39 L. ed. 283, 15 Sup. Ct. Rep. 217—*Belknap v. Schild*, 161 U. S. 24, 40 L. ed. 604, 16 Sup. Ct. Rep. 443—*Walla Walla v. Walla Walla Water Co.* 172 U. S. 16, 43 L. ed. 348, 19 Sup. Ct. Rep. 77—*E. Bement & Sons v. National Harrow Co.* 186 U. S. 91, 46 L. ed. 1068, 22 Sup. Ct. Rep. 747—*Re Brosnahan*, 4 McCrary, 6, 18 Fed. 65—*Castle v. Hutchinson*, 25 Fed. 394—*United States v. American Bell Teleph. Co.* 29 Fed. 43—*Delaware ex rel. Postal Telegr. Cable Co. v. Delaware & A. Telegr. & Teleph. Co.* 47 Fed. 635—*Reeves v. Corning*, 51 Fed.

784—*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L.R.A. 731, 25 C. C. A. 273, 47 U. S. App. 146, 77 Fed. 293—*Howell v. Miller*, 33 C. C. A. 412, 62 U. S. App. 17, 91 Fed. 134—*Dickerson v. Sheldon*, 39 C. C. A. 193, 98 Fed. 623—*Arbuckle v. Blackburn*, 65 L.R.A. 873, 51 C. C. A. 133, 113 Fed. 627—*Tilson v. Gatling*, 60 Ark. 119, 29 S. W. 35—*Territory ex rel. McMahon v. O'Connor*, 5 Dak. 413, 3 L.R.A. 361, 41 N. W. 746—*Siegel v. Brooke*, 25 Ill. App. 211—*Brechbill v. Randall*, 102 Ind. 529, 52 Am. Rep. 695, 1 N. E. 362—*New v. Walker*, 108 Ind. 367, 58 Am. Rep. 40, 9 N. E. 386—*Hankey v. Downey*, 116 Ind. 119, 1 L.R.A. 448, 18 N. E. 271—*Mason v. McLeod*, 57 Kan. 109, 41 L.R.A. 551, 57 Am. St. Rep. 327, 45 Pac. 76—*Com. v. Petty*, 96 Ky. 454, 20 L.R.A. 789, 29 S. W. 291—*Bohon v. Brown* (Union Nat. Bank v. Brown) 101 Ky. 358, 38 L.R.A. 504, 72 Am. St. Rep. 420, 41 S. W. 273—*Chesapeake & P. Teleph. Co. v. Baltimore & O. Telegr. Co.* 66 Md. 416, 59 Am. Rep. 167, 7 Atl. 809—*Crown Cork & Seal Co. v. State*, 87 Md. 699, 53 L.R.A. 419, 67 Am. St. Rep. 371, 40 Atl. 1074—*People v. Russell*, 49 Mich. 619, 43 Am. Rep. 478, 14 N. W. 568—*Herdic v. Roessler*, 39 Hun, 202—*Herdic v. Roessler*, 109 N. Y. 132, 16 N. E. 198—*People ex rel. Edison Electric Illuminating Co. v. Board of Assessors*, 156 N. Y. 421, 42 L.R.A. 292, 51 N. E. 269—*State ex rel. American Union Telegr. Co. v. Bell Teleph. Co.* 36 Ohio St. 311, 38 Am. Rep. 583—*Tod v. Wick Bros.* 36 Ohio St. 383—*Palmer v. State*, 39 Ohio St. 239, 48 Am. Rep. 429—*State ex rel. Atty. Gen. v. Halliday*, 61 Ohio St. 381, 49 L.R.A. 434, 56 N. E. 118—*Powell v. Com.* 114 Pa. 277, 60 Am. Rep. 350, 7 Atl. 913—*Titusville v. Brennan*, 143 Pa. 649, 14 L.R.A. 102, 3 Inters. Com. Rep. 737, 24 Am. St. Rep. 580, 22 Atl. 893—*Com. v. Central Dist. & Printing Telegr. Co.* 145 Pa. 127, 27 Am. St. Rep. 677, 22 Atl. 841—*Com. v. Edison Electric Light Co.* 145 Pa. 140, 27 Am. St. Rep. 683, 22 Atl. 841—*State v. Cook*, 107 Tenn. 507, 62 L.R.A. 176, 64 S. W. 720—*People's State Bank v. Jones*, 26 Ind. App. 587, 84 Am. St. Rep. 310, 58 N. E. 852.

b. Assignment.

Assignment of Separate Claims, see *supra*, 24.

Right of Purchaser of Specific Article to Use Same, see *infra*, XIII. f.

Priority of Mortgage over, see *infra*, 829.

Assignment as License, see *infra*, 832-835.

Validity of Oral License as against Subsequent Assignee, see *infra*, 836.

Assignability of License to Use Patent, see *infra*, 848, 849.

Liability of Assignee for Royalties, see *infra*, 855-858.

Right to Use Patented Article Purchased from Assignee, see *infra*, 869, 870.

When Right of Action for Savings Realized from Patent Accrues, see *Action or Suit*, 31.

Naming Assignors as Plaintiffs in Suit for Infringement, see *Appeal and Error*, 4673.

Oral Agreement to Assign, see *Contracts*, 114.

Declarations of Assignor after Assignment, see *Evidence*, 1952.

Rescission of Contract of, see Sale, 148, 149.
Validity of Assignment of Patent under which United States Holds License, see United States, 359.

See also *supra*, 375; Contracts, 606, 611.

Editorial note.

[Agreement to assign future inventions on sale of patent. 2 L.R.A.(N.S.) 1094.]

Definition of assignee.

See also *infra*, 800.

794. An assignee of a patent is one who holds, by a valid assignment in writing, the whole interest of a patent, or any undivided part of such whole interest, throughout the United States. *Moore v. Marsh*, 7 Wall. 515, 19: 37

Seal.

795. Assignments of patents are not required to be under seal. *Gottfried v. Miller*, 104 U. S. 521, 26: 851

Compulsory assignment.

796. A court of equity can compel an insolvent debtor or appoint a trustee to execute an assignment of his patent rights. *Ager v. Murray*, 105 U. S. 126, 26: 942
Cited in Hart v. Sansom, 110 U. S. 155, 28 L. ed. 103, 3 Sup. Ct. Rep. 586—*Edison Electric Light Co. v. United States Electric Lighting Co.* 35 Fed. 236—*Barton v. White*, 144 Mass. 283, 59 Am. St. Rep. 84, 10 N. E. 840—*Keach v. Chadwick*, 14 R. I. 574.

797. Where a patent, upon the plaintiff's own showing, conferred no title or right upon the defendant, a court of equity will not order him to assign to the plaintiff. *Kennedy v. Hazelton*, 128 U. S. 667, 9 Sup. Ct. Rep. 202, 32: 576

Construction.

Parol Evidence to Establish Condition, see Evidence, 1566.

See also *infra*, 809, 818.

798. An assignment of an interest in an invention secured by letters patent is a contract, and is to be construed so as to carry out the intention of the parties to it. *Nicholson Pav. Co. v. Jenkins*, 14 Wall. 452, 20: 777

Cited in Gear v. Holmes, 6 Fisher, Pat. Cas. 598, Fed. Cas. No. 5,292—*Waterman v. Wallace*, 2 Bann. & Ard. 129, Fed. Cas. No. 17,261—*Wetherill v. Passaic Zinc Co.* 6 Fisher, Pat. Cas. 54, Fed. Cas. No. 17,465—*Johnson v. Wilcox & G. Sewing Mach. Co.* 23 Blatchf. 533, 27 Fed. 690.

799. Where, before application for a patent, the inventor agreed to assign one half of it for money to be advanced to obtain it; and, the inventor dying before the patent was issued, an agreement was made by his widow, who was afterwards administratrix of his estate, with such assignee, that he should press the application for a patent, and, if patented, introduce the machine, and divide with her the profits until she received \$5,000, after which she was to release all further interest in the patent to him,—the patent when issued should be construed as a

grant to him as assignee, and held to have been obtained by his authority and that of the administratrix. *De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 209, 13 Sup. Ct. Rep. 233, 37: 138

800. The terms "assignee" and "grantee," though each has an interest in the patent, are not synonymous in patent law. *Moore v. Marsh*, 7 Wall. 515, 19: 37

— Editorial notes.

Construction and effect of assignment.

37: 749

Rights of assignee generally.

Right of Inventor's Assignee to Have Patent to Third Person Canceled, see *supra*, 584.

In Case of Extension, see *infra*, 822-826.

Right to Royalties, see *infra*, 854.

Remedy of Assignee for Previous Infringements, see *infra*, 1081.

Right to Sue for Infringement, see *infra*, 1109-1114b.

Estoppel of Assignor to Claim Title as against Second Assignee after Assignment by First Assignee, see Estoppel, 340.

See also *infra*, 814-817.

801. An assignment of a patent absolute in form conveys the legal title, which is not defeated by a subsequent conditional contract that, if the payments are not made, the title is to return to the assignor, particularly where the payments are made in full. *Boesch v. Gräff*, 133 U. S. 697, 10 Sup. Ct. Rep. 378, 33: 787

802. A provision in an absolute assignment of letters patent made by the patentee, that the net profits arising from the sales, royalties, settlements, or other source, are to be divided between the parties to the assignment so as to give the patentee one fourth thereof, does not, in any respect, modify or limit the absolute transfer of the title. *Rude v. Westcott*, 130 U. S. 152, 9 Sup. Ct. Rep. 463, 32: 888

803. By an assignment of an imperfect invention, with all improvements on it that an inventor may make, the assignee becomes the equitable owner of a patent granted upon the perfected invention. *Littlefield v. Perry*, 21 Wall. 205, 22: 577

Cited in Warren v. Keep, 155 U. S. 269, 39 L. ed. 146, 15 Sup. Ct. Rep. 83—*Aspinwall Mfg. Co. v. Gill*, 32 Fed. 700—*Regan Vapor-Engine Co. v. Pacific Gas-Engine Co.* 47 Fed. 513—*Regan Vapor-Engine Co. v. Pacific Gas-Engine Co.* 1 C. C. A. 171, 7 U. S. App. 73, 49 Fed. 70—*Independent Electric Co. v. Jeffrey Mfg. Co.* 76 Fed. 984—*Westinghouse Air Brake Co. v. Chicago Brake & Mfg. Co.* 85 Fed. 791—*Union Trust Co. v. Walker Electric Co.* 122 Fed. 815—*Milwaukee Carving Co. v. Brunswick-Balke Collender Co.* 61 C. C. A. 186, 126 Fed. 182—*National Cash Register Co. v. New Columbus Watch Co.* 63 C. C. A. 616, 129 Fed. 116—*Harrison v. Morton*, 83 Md. 479, 35 Atl. 99—*McFarland v. Stanton Mfg. Co.* 53 N. J. Eq. 651, 51 Am. St. Rep. 647, 33 Atl. 962—*Kane v. Lodor*, 56 N. J. Eq. 274, 38 Atl. 966—*Bear*

v. Hall Signal Co. 22 App. Div. 490, 48 N. Y. Supp. 203—Murphy v. Christian Press Assn. Pub. Co. 38 App. Div. 429, 58 N. Y. Supp. 597—Herzog v. Heyman, 8 Misc. 28, 28 N. Y. Supp. 74—Blakeney v. Goode, 30 Ohio St. 360—Jarecki v. Hays, 161 Pa. 616, 29 Atl. 118.

804. Where the assignment is upon condition that it shall cease and be void in case the assignee shall, after a reasonable notice, neglect to make and sell the patented article, there can be no forfeiture for a neglect to make and sell, until after reasonable notice of the default. *Littlefield v. Perry*, 21 Wall. 205, 22: 577

805. A clause in the assignment of a patent, appointing the assignees attorneys of the assignor, with authority to use his name in the management of the business, does not restrict in any way the power of the assignees after the transfer of the property. *Rude v. Westcott*, 130 U. S. 152, 9 Sup. Ct. Rep. 463, 32: 888

806. The assignees do not hold the property under an assignment of a patent for one fourth of the net profits, as trustees for the benefit of the patentee; they are only trustees for him of one fourth of the profits which may be received by them. *Rude v. Westcott*, 130 U. S. 152, 9 Sup. Ct. Rep. 463, 32: 888

807. The assignee of a patent right takes it subject to the legal consequences of the patentee's previous acts. *McClurg v. Kingsland*, 11 How. 202, 11: 102
Cited in *Worley v. Loker Tobacco Co.* 104 U. S. 344, 26 L. ed. 822—*Woodmanse & H. Mfg. Co. v. Williams*, 15 C. C. A. 523, 37 U. S. App. 109, 68 Fed. 492.

808. Where one was in the employ of the government as chief of the bureau of engraving and printing when he invented a stamp, and his experiments were wholly at the expense of the government, and he was consulted as to the proper stamp to be used, and it was adopted upon his recommendation, and he notified the government that he would make no charge if it adopted and used his stamp, for the express reason that he was in its employ and had used its machinery in perfecting his stamp, and he never pretended to make a charge against the government for its use,—his assignee to whom a patent was issued for the invention cannot recover against the government for its use of the patented stamp. *Solomons v. United States*, 137 U. S. 342, 11 Sup. Ct. Rep. 88, 34: 667

809–10. The assignee of "one half interest in all the benefits and net profits arising from and belonging to a patented invention" takes a one half interest in a contract made by the Secretary of War for the use of the patent by the government. *United States v. Burns*, 12 Wall. 246, 20: 388

811. The reduction of license fees of which the purchaser of a patent was to pay a portion to his assignor when collected does not require the purchaser to make good the de-

ficiency, when it is due to the necessity of making a new arrangement with the licensee because of a compromise with another licensee to which the assignor agreed. *Thorn Wire Hedge Co. v. Washburn & M. Mfg. Co.* 159 U. S. 423, 16 Sup. Ct. Rep. 94, 40: 205

812. A company which, by assignment, has the exclusive right to use the Morse patent telegraph between certain cities, cannot complain because messages are diverted from those lines, and sent by circuitous routes, where no contract to the contrary exists. *Western Teleg. Co. v. Magnetic Teleg. Co.* 21 How. 456, 16: 189
Western Teleg. Co. v. Penniman, 21 How. 460, 16: 191

Sale before patent obtained.
See also *infra*, 1029.

813. The rights growing out of an invention may be sold before a patent is obtained, with the right to use the invention when patented. *Hammond v. Mason & H. Organ Co.* 92 U. S. 724, 23: 767
Hendrie v. Sayles, 98 U. S. 546, 25: 176
Cited in *Durham v. Seymour*, 161 U. S. 238, 40 L. ed. 683, 16 Sup. Ct. Rep. 452—*Hammond v. Hunt*, 4 Bann. & Ard. 111, Fed. Cas. No. 6,003—*Lamson v. Martin*, 159 Mass. 562, 35 N. E. 78—*Burton v. Burton Stock Car Co.* 171 Mass. 439, 50 N. E. 1029—*Harrigan v. Smith*, 57 N. J. Eq. 640, 42 Atl. 579—*Fuller & J. Mfg. Co. v. Bartlett*, 68 Wis. 80, 60 Am. Rep. 838, 31 N. W. 747.

814. Where an invention is assigned before a patent is obtained therefor, and the assignment is recorded, the exclusive title to the invention vests in the assignee, and the patent for the original and extended term may be issued to him. *Hendrie v. Sayles*, 98 U. S. 546, 25: 176
Gayler v. Wilder, 10 How. 477, 13: 504
Hammond v. Mason & H. Organ Co. 92 U. S. 724, 23: 767
Distinguished in Maurice v. Devol, 23 W. Va. 255.

Cited in *Philadelphia, W. & B. R. Co. v. Trimble*, 10 Wall. 379, 19 L. ed. 952—*Littlefield v. Perry*, 21 Wall. 225, 22 L. ed. 580—*Hendrie v. Sayles*, 98 U. S. 546, 25 L. ed. 177—*Root v. Lake Shore & M. S. R. Co.* 105 U. S. 204, 26 L. ed. 980—*Oliver v. Rumford Chemical Works*, 109 U. S. 82, 27 L. ed. 864, 3 Sup. Ct. Rep. 61—*De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 223, 37 L. ed. 143, 13 Sup. Ct. Rep. 283—*Durham v. Seymour*, 161 U. S. 238, 40 L. ed. 683, 16 Sup. Ct. Rep. 452—*Baldwin v. Sibbey*, 1 Cliff. 155, Fed. Cas. No. 805—*Emmons v. Sladdin*, 2 Bann. & Ard. 204, Fed. Cas. No. 4,470—*Perry v. Corning*, 7 Blatchf. 203, Fed. Cas. No. 11,004—*Prime v. Brandon Mfg. Co.* 16 Blatchf. 457, Fed. Cas. No. 11,421—*Sargent v. Seagrave*, 2 Curt. C. C. 555, Fed. Cas. No. 12,365—*United States Stamping Co. v. Jewett*, 18 Blatchf. 477, 7 Fed. 877—*Wright v. Randel*, 19 Blatchf. 502, 8 Fed. 596—*Fire Extinguisher Mfg. Co. v. Graham*, 16 Fed. 555—*Consolidated Electric Light Co. v. Edison Electric Light Co.* 23 Blatchf. 413, 25 Fed. 721—*Pontiac Knit Boot Co. v. Merino Shoe Co.* 31 Fed. 287—*May v. Saginaw County*, 32 Fed. 632—*Consolidated Electric Light Co. v. McKeesport Light Co.* 34 Fed. 335—*Fruit Cleaning Co. v. Fresno Home*

Packing Co. 94 Fed. 848—Currier v. Hallowell, 158 Mass. 256, 33 N. E. 497—Iamson v. Martin, 159 Mass. 562, 35 N. E. 78—Burton v. Burton Stock Car Co. 171 Mass. 439, 50 N. E. 1029—Union Mfg. Co. v. Lounsbury, 41 N. Y. 870—May v. Page, 60 N. Y. 629—Gillett v. Bate, 86 N. Y. 94—Bezer v. Hall Signal Co. 22 App. Div. 490, 48 N. Y. Supp. 203—Blakeney v. Goode, 30 Ohio St. 359—Fuller & J. Mfg. Co. v. Bartlett, 68 Wis. 80, 60 Am. Rep. 838, 31 N. W. 747.

815. Such assignee may convey the entire interest in the patent to a purchaser, including any extension thereof. Hendrie v. Sayles, 98 U. S. 546, 25: 176
Cited in Prime v. Brandon Mfg. Co. 16 Blatchf. 457, 4 Bann. & Ard. 384, Fed. Cas. No. 11,421—Adams v. Bridgewater Iron Co. 26 Fed. 326—Johnson v. Wilcox & G. Sewing Mach. Co. 23 Blatchf. 582, 27 Fed. 689—Harrison v. Morton, 83 Md. 479, 35 Atl. 99.

816. An agreement, by a patentee, to assign a renewed patent as soon as obtained, vests in the assignee, equitably, the entire interest in such patent during the extended term. Hartshorn v. Day, 19 How. 211, 15: 605

Day v. Union India Rubber Co. 20 How. 216, 15: 883

Explained in Day v. Stelman, 1 Fisher, Pat. Cas. 505, Fed. Cas. No. 3,690.

Cited in De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 229, 37 L. ed. 145, 13 Sup. Ct. Rep. 283—Day v. Stelman, 1 Fisher, Pat. Cas. 505, Fed. Cas. No. 3,690—Newell v. West, 13 Blatchf. 117, 2 Bann. & Ard. 116, Fed. Cas. No. 10,150—Prime v. Brandon Mfg. Co. 16 Blatchf. 457, 4 Bann. & Ard. 383, Fed. Cas. No. 11,421—Wetherill v. Passaic Zinc Co. 6 Fisher, Pat. Cas. 60, Fed. Cas. No. 17,465—Union Mfg. Co. v. Lounsbury, 41 N. Y. 374—Wetherill v. Passaic Zinc Co. 9 Phila. 391, 29 Phila. Leg. Int. 357—Maurice v. Devol, 23 W. Va. 256.

817. Where a contract was made by the assignee of an improvement to give certain notes for it as soon as the patent for the improvement is obtained, the assignee is bound to execute the notes when the letters patent are issued, and upon a refusal to execute them, is liable for the amount thereof. Bowman v. Read (Read v. Bowman) 2 Wall. 591, 17: 812

818. It must be assumed that the parties to an agreement to give notes for an improvement as soon as a patent should be obtained knew that the specifications might be amended or withdrawn, or a reissue of the patent obtained, and contracted in view of the probability that such changes would be made. Bowman v. Read (Read v. Bowman), 2 Wall. 591, 17: 812
Cited in Crompton v. Belknap Mills, 3 Fisher, Pat. Cas. 546, Fed. Cas. No. 3,406, Fed. Cas. No. 18,285.

819. An oral agreement for the sale and assignment of the right to obtain a patent for an invention is not within U. S. Rev. Stat. § 4898, U. S. Comp. Stat. 1901, p. 3387, requiring assignments of patents to be in writing, and may be specifically enforced in equity upon sufficient proof there-

of. Dalzell v. Dueber Watch Case Mfg. Co. 149 U. S. 315, 13 Sup. Ct. Rep. 886, 37: 749

820. The employment by a manufacturing corporation of a skilled workman, for a stated compensation, to take charge of its works and to devote his time and services to devising and making improvements in articles there manufactured, does not amount to a sale and assignment of the right to obtain patents for such workman's inventions while engaged in such employment. Dalzell v. Dueber Watch Case Mfg. Co. 149 U. S. 315, 13 Sup. Ct. Rep. 886, 37: 749
Cited in Schmitt v. Nelson Valve Co. 60 C. C. A. 525, 125 Fed. 757—Pressed Steel Car Co. v. Hansen, 128 Fed. 445—Pressed Steel Car Co. v. Hansen, 2 L.R.A.(N.S.) 1182, 71 C. C. A. 214, 137 Fed. 411.

821. Assignment of interest in an invention without request to the Commissioner of Patents to issue letters patent to the assignee, conveys only the equitable title to the latter. Troy Iron & Nail Factory v. Corning, 14 How. 193, 14: 383
Cited in Harrison v. Morton, 83 Md. 479, 35 Atl. 99.

— Editorial note.

Assignment before issuing and reissuing patent. 13: 504

Extension.

See also supra, 816.

822. An assignee under an old patent, when such is renewed, has a right to continue the use of the patented machine, but not to vend to others. Simpson v. Wilson, 4 How. 709, 11: 1169
Cited in Wilson v. Simpson, 9 How. 122, 13 L. ed. 72, 1 Fisher, Pat. Rep. 469, 1 Whitman, Pat. Cas. 528—Blanchard's Gun-Stock Turning Factory v. Warner, 1 Blatchf. 276, 1 Fisher, Pat. Cas. 204, Fed. Cas. No. 1,521—Wood v. Michigan, S. & N. I. R. Co. 2 Biss. 67, 3 Fisher, Pat. Cas. 469, Fed. Cas. No. 17,957—Howe v. Wooldredge, 12 Allen, 23.

822a. An extension does not inure to the benefit of assignees under the original patent, but to the benefit of the administrator (when granted to an administrator) in his capacity as such, under the provision of the act of 1836, § 18, providing that the benefit of a renewal, authorized where the patentee had not obtained reasonable remuneration during the original term of the patent, "shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein." Wilson v. Rousseau, 4 How. 646, 11: 1141

822b. The assignee of a patent during the original term has the right to continue during an extended term the use of a machine used by him during the original term. Eunsen v. Dodge, 18 Wall. 414, 21: 766

823. The assignment of all the patentee's title and interest in the invention secured by a patent, and of all the right and title which should be secured for alterations and improvements in the invention, from time to time thereafter, covers the extension of a patent thereafter obtained, and carries the

legal as well as the equitable interest in the extension. Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19: 948
Cited in Nicholson Pav. Co. v. Jenkins, 14 Wall. 457, 20 L. ed. 779—Hendrie v. Sayles, 98 U. S. 553, 25 L. ed. 179—De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 223, 37 L. ed. 143, 13 Sup. Ct. Rep. 283—Gear v. Grosvenor, Holmes, 219, Fed. Cas. No. 5,291—Mowry v. Grand Street & N. R. Co. 10 Blatchf. 92, 5 Fisher, Pat. Cas. 589, Fed. Cas. No. 9,893—Prime v. Brandon Mfg. Co. 16 Blatchf. 457, 4 Bann. & Ard. 383, Fed. Cas. No. 11,421—Ruggles v. Eddy, 10 Blatchf. 54, 5 Fisher, Pat. Cas. 584, Fed. Cas. No. 12,117—Thayer v. Wales, 5 Fisher, Pat. Cas. 451, Fed. Cas. No. 13,872—Wetherill v. Passaic Zinc Co. 6 Fisher, Pat. Cas. 54, Fed. Cas. No. 17,465—Campbell v. James, 18 Blatchf. 105, 5 Bann. & Ard. 367, 2 Fed. 351—Fire Extinguisher Mfg. Co. v. Graham, 16 Fed. 554—Adams v. Bridgewater Iron Co. 26 Fed. 328—Johnson v. Wilcox & G. Sewing Mach. Co. 23 Blatchf. 533, 27 Fed. 690—Levy v. Dattlebaum, 63 Fed. 994—Currier v. Hallowell, 158 Mass. 256, 33 N. E. 497—Burton v. Burton Stock Car Co. 171 Mass. 439, 50 N. E. 1029—Barnes v. Morgan, 8 Hun, 704—Nilsson v. De Haven, 47 App. Div. 540, 62 N. Y. Supp. 506—Wetherill v. Passaic Zinc Co. 9 Phila. 387—Fuller & J. Mfg. Co. v. Bartlett, 68 Wis. 80, 60 Am. Rep. 838, 31 N. W. 747.

824. Assignment of a patent "to the full end of the term for which the letters patent are or may be granted" conveys both a present and a future interest, including renewals and a renewal and extension of the patent. Nicholson Pav. Co. v. Jenkins, 14 Wall. 452, 20: 777
Distinguished in Mowry v. Grand Street & N. R. Co. 10 Blatchf. 94, 5 Fisher, Pat. Cas. 591, Fed. Cas. No. 9,893—Fire Extinguisher Mfg. Co. v. Graham, 16 Fed. 558.

Cited in Hendrie v. Sayles, 98 U. S. 553, 25 L. ed. 179—De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 223, 37 L. ed. 143, 13 Sup. Ct. Rep. 283—Emmons v. Bladdin, 2 Bann. & Ard. 204, Fed. Cas. No. 4,470—Gear v. Holmes, 6 Fisher, Pat. Cas. 598, Fed. Cas. No. 5,292—Ruggles v. Eddy, 5 Fisher, Pat. Cas. 584, Fed. Cas. No. 12,117—Adams v. Bridgewater Iron Co. 26 Fed. 328—Johnson v. Wilcox & G. Sewing Mach. Co. 23 Blatchf. 533, 27 Fed. 690—Burton v. Burton Stock Car Co. 171 Mass. 439, 50 N. E. 1029.

825. A covenant by the patentee, made prior to the law authorizing extensions, that the covenantee should have the benefit of any improvement in the machinery, or alteration or renewal of the patent, did not include the extension by an administrator, under the act of 1836. It must be construed to include only renewals obtained upon the surrender of a patent on account of a defective specification. Wilson v. Rousseau, 4 How. 646, 11: 1141
 Simpson v. Wilson, 4 How. 709, 11: 1169

826. Such an extension does not inure to the benefit of assignees under the original patent, but to the benefit of the administrator (when granted to an administrator) in his capacity as such. Simpson v. Wilson, 4 How. 709, 11: 1169
 Wilson v. Rousseau, 4 How. 646, 11: 1141

— Editorial note.

When assignment transfers extended terms. 13: 504

Right to damages for infringement.

Assignee's Right to Sue for Infringement, see *infra*, 1109-1114b.

See also *infra*, 1081, 1096.

827. The assignment of a patent does not carry with it a transfer of the right to damages for an infringement committed before such assignment. Moore v. Marsh, 7 Wall. 515, 19: 37

Cited in United States v. Loughrey, 172 U. S. 212, 43 L. ed. 422, 19 Sup. Ct. Rep. 153—Boomer v. United Power Press Co. 13 Blatchf. 112, 2 Bann. & Ard. 112, Fed. Cas. No. 1,638—Dibble v. Augur, 7 Blatchf. 91, Fed. Cas. No. 3,879—Gordon v. Anthony, 16 Blatchf. 249, 4 Bann. & Ard. 263, Fed. Cas. No. 5,605—May v. Juneau County, 30 Fed. 245—May v. Saginaw County, 32 Fed. 630—Emerson v. Hubbard, 34 Fed. 327—Jones v. Berger, 58 Fed. 1007—Matheson v. Campbell, 60 Fed. 614—Webb v. Goldsmith, 127 Fed. 572.

828. The assignment of an undivided half of letters patent, subsequent to an infringement, but before the commencement of the suit, is no bar to the patentee's recovery of damages for such infringement. Moore v. Marsh, 7 Wall. 515, 19: 37

c. Mortgage.

829. A conveyance of a patent right, made to secure the payment of a debt, upon condition that it shall be avoided by the subsequent payment of that debt at a time fixed, is a mortgage; and, if recorded, a subsequent assignment of the patent right is subject to that mortgage, though not in terms so expressed. Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. Rep. 334, 34: 923
Cited in Savings & Loan Soc. v. Multnomah County, 169 U. S. 429, 42 L. ed. 805, 18 Sup. Ct. Rep. 392—Waterman v. Shipman, 5 C. C. A. 374, 14 U. S. App. 312, 55 Fed. 984—Moore Mfg. & Foundry Co. v. Cronk Hanger Co. 69 Fed. 909—Crauche v. Pare, 21 C. C. A. 333, 44 U. S. App. 544, 75 Fed. 287—Wallach v. Wigmore, 87 Fed. 469—Excelsior Wooden Pipe Co. v. Allen, 44 C. C. A. 32, 104 Fed. 555—Dole v. Hickey, 67 N. H. 498, 32 Atl. 761—Waterman v. Shipman, 130 N. Y. 308, 29 N. E. 111.

830. The recording of a mortgage of a patent right in the Patent Office, in accordance with the act of Congress, is equivalent to a delivery of possession, and makes the title of the mortgagee complete towards all persons, including the mortgagor. Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. Rep. 334, 34: 923

d. License.

Necessity of License to Use of Invention by Government, see *supra*, 15.

Right to Royalties under, see *infra*, 855.

Liability of License for Royalties, see *infra*, 859, 860.

Right of Licensee to Sue for Infringement, see *infra*, 1107, 1113, 1115-1118.

License to Third Party as Defense in Infringement Suit, see *infra*, 1142.

Validity of Licensee's Contract not to Contest Validity of Patent, see *Contracts*, 410.

Jurisdiction of Courts over Royalty and License Contracts, see *Courts*, 556-561.

Measure of Recovery, see *Damages*, 262-267, 289, 315.

Burden of Proving Delivery in Escrow, see *Evidence*, 780.

Conclusiveness Against Licensee of Judgment against Patentee, see *Judgment*, 587, 721.

Monopolistic Agreement between Parties to, see *Monopoly and Combination*, 20-23.

Specific Performance of Contract in Consideration of, see *Specific Performance*, 55.

See also *supra*, 789, 793, 811.

830a. The purchaser from the licensee of a patented machine takes the risk, as against the real owner, whether the title of the seller is such as to enable him to make a valid conveyance. Notice is not required. *Mitchell v. Hawley*, 16 Wall. 544, 21: 322. *Cited in Chase v. Sanborn*, 4 Cliff. 311, Fed. Cas. No. 2,628—*Waterman v. Wallace*, 13 Blatchf. 130, 2 Bann. & Ard. 128, Fed. Cas. No. 17,261.

Editorial note.

License to use.

37: 749

Patentee's duty to grant license.

831. A patentee, if he sees fit, may reserve to himself the exclusive use of his invention, and he is neither bound to use it himself nor to permit others to use it. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 22 Sup. Ct. Rep. 747, 46: 1058. *Cited in Edison Phonograph Co. v. Pike*, 116 Fed. 865—*Fuller v. Berger*, 65 L.R.A. 385, 56 C. C. A. 591, 120 Fed. 277—*Bobbs-Merrill Co. v. Straus*, 139 Fed. 170—*Hoe v. Miehle Printing Press & Mfg. Co.* 141 Fed. 115—*Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.* 142 Fed. 536—*Dr. Miles Medical Co. v. Platt*, 142 Fed. 609—*United States Fastener Co. v. Meyers*, 145 Fed. 537.

What constitutes.

See also *infra*, 1107, 1113.

832. An assignment, by the patentee, of the right, upon a certain consideration, of making and vending the patented article in certain territory, reserving, however, to the patentee the same right upon paying the assignee a similar consideration, is a mere license. *Gayler v. Wilder*, 10 How. 477,

13: 504

Cited in Waterman v. Mackenzie, 138 U. S. 255, 34 L. ed. 925, 11 Sup. Ct. Rep. 334—*Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 144 U. S. 250, 36 L. ed. 424, 12 Sup. Ct. Rep. 641—*Farrington v. Gregory*, 4 Fisher, Pat. Cas. 223, Fed. Cas. No. 4,688—*Hammond v. Hunt*, 4 Bann. & Ard. 113, Fed. Cas. No. 6,003—*Sanford v. Messer*, Holmes, 150, 5 Fisher, Pat. Cas. 413, Fed. Cas. No. 12,314—*Theberath v. Celluloid Mfg. Co.* 5 Bann. & Ard. 580, 3 Fed. 147—*Ingalls v. Tice*, 14 Fed. 207—*Haffcke v. Clark*, 1 C. C. A. 574, 8 U. S. App. 69, 50 Fed. 530—*Russell v. Kern*, 58 Fed. 383—*Heaton-Peninsular Button-Fasten-*

er Co. v. Eureka Specialty Co. 38 L.R.A. 730, 25 C. C. A. 270, 47 U. S. App. 146, 77 Fed. 290—*Excelsior Wooden-Pipe Co. v. Allen*, 44 C. C. A. 32, 104 Fed. 555—*Excelsior Wooden Pipe Co. v. Seattle*, 55 C. C. A. 160, 117 Fed. 144—*Peters v. Union Biscuit Co.* 120 Fed. 687—*Empire City Amusement Co. v. Wilton*, 134 Fed. 133—*Jackson v. Allen*, 120 Mass. 77—*Standard Button Fastening Co. v. Ellis*, 159 Mass. 449, 34 N. E. 682—*Poe v. Stockton*, 39 Mo. App. 559—*Buss v. Putney*, 38 N. H. 46—*Springfield v. Drake*, 58 N. H. 21—*Pitts v. Jameson*, 15 Barb. 315—*Tuttle v. La Dow*, 54 Hun, 151, 7 N. Y. Supp. 277.

833. An assignment which does not transfer the whole patent or an undivided part of the whole, or an exclusivs right in any part of the country, is a mere license, and gives the licensee no title in the patent, and no right to sue at law in his own name for an infringement. *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334, 34: 923. *Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 144 U. S. 248, 12 Sup. Ct. Rep. 641, 36: 423

Cited in Russell v. Kern, 58 Fed. 383—*Johnson Railroad Signal Co. v. Union Switch & Signal Co.* 59 Fed. 23—*Union Switch & Signal Co. v. Johnson Railroad Signal Co.* 10 C. C. A. 179, 17 U. S. App. 609, 61 Fed. 943—*Van Orden v. Nashville*, 67 Fed. 333—*D. M. Sechler Carriage Co. v. Deere & M. Co.* 51 C. C. A. 244, 113 Fed. 287—*Empire Paving & Constr. Co. v. Prather*, 58 Mo. App. 490.

834. An assignment of all the patentee's right, title, and interest in and to certain letters patent on velocipedes, so far as said patent relates to or covers the adjustable hammock seat or saddle, which is the 2d claim of the patent, except the right to use said seat or saddle in connection with the velocipede made by the assignor,—is a mere license, and does not vest in the assignee or his assigns the legal title to the 2d claim or the right to sue in his own name upon it. *Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 144 U. S. 248, 12 Sup. Ct. Rep. 641, 36: 423

835. An instrument by which one is granted "the sole and exclusive right and license to manufacture and sell" a patented article "throughout the United States," and which does not include the right to use such article, at least if manufactured by third persons, is a mere license, and not an assignment of any title, and does not give the licensee the right to sue alone, at law or in equity, for an infringement of the patent. *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334, 34: 923

Cited in Van Orden v. Nashville, 67 Fed. 333—*Newton v. Buck*, 72 Fed. 779—*Owatonna Mfg. Co. v. F. B. Fargo & Co.* 94 Fed. 520—*New York Continental Jewell Filtration Co. v. Sullivan*, 111 Fed. 181—*Bowers Hydraulic Dredging Co. v. Vare*, 112 Fed. 64—*D. M. Sechler Carriage Co. v. Deere & M. Co.* 51 C. C. A. 244, 113 Fed. 287—*Atwood Lock Co. v. Yale & T. Mfg. Co.* 115 Fed. 333—*Excelsior Wooden Pipe Co. v. Seattle*, 55 C. C. A. 160, 117 Fed. 144—*Ft. Wayne, C. & L. R. Co. v. Haberkorn*, 15 Ind. App. 481, 44 N. E. 322—*Eclipse Wind Engine Co. v. Zimmerman Mfg. Co.* 16 Ind. App. 499, 44 N. E. 1115—*Empire Paving & Constr. Co. v. Prather*, 58 Mo. App. 490.

Oral license.

836. An oral license to use a patent is valid as against a subsequent assignee of the patent without notice of the license. *Gates Iron Works v. Fraser*, 153 U. S. 332, 14 Sup. Ct. Rep. 883, 38: 734

Construction.

837. A license to use an invention at a particular establishment owned by the licensee does not authorize a use at an establishment owned by himself and others. *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 19: 566
Cited in Putnam v. Hollender, 19 Blatchf. 58, 6 Fed. 891—*Lillenthal v. Washburn*, 4 Woods, 69, 8 Fed. 709—*Gibbs v. Hoefner*, 22 Blatchf. 38, 19 Fed. 325—*Rice v. Boss*, 46 Fed. 196—*Waterman v. Shipman*, 5 C. C. A. 375, 14 U. S. App. 312, 55 Fed. 986.

Exclusive right.

838. The exclusive right of a license to the use of a patented machine in a certain territory continues no longer than the term of the original patent. *Union Paper-Bag Mach. Co. v. Nixon (Paper-Bag Machine Cases)* 105 U. S. 766, 26: 959
Simpson v. Wilson, 4 How. 709, 11: 1169
Bloomer v. Milliger, 1 Wall. 340, 17: 581

839. An assignment of an exclusive right to use a machine, and to vend the same to others for use, within a specified territory, authorizes the assignee to vend elsewhere, out of the said territory the product of said machines. The restriction is only as to the use of the machine. *Simpson v. Wilson*, 4 How. 709, 11: 1169
Cited in Pitcher v. United States, 1 Ct. Cl. 11—*Wilson v. Sherman*, 1 Blatchf. 541, Fed. Cas. No. 17,833—*Stevens v. Gladding*, 8 N. Y. Legal Obs. 300, Fed. Cas. No. 13,400.

Restrictions.

See also *infra*, 843.

840. A patentee may, under his right to a monopoly in the patented article, impose restrictions as to the terms of sale, in licenses for the manufacture and sale of such article, and recover damages for a breach of such restrictions. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 22 Sup. Ct. Rep. 747, 46: 1058
Cited in New Jersey Patent Co. v. Shaeffer, 144 Fed. 438—*Hartman v. John D. Park & Sons Co.* 145 Fed. 366—*Cortelyou v. Johnson*, 76 C. C. A. 459, 145 Fed. 937—*Ingersoll v. Snellenberg*, 147 Fed. 524.

Term of patent.

841. A contract by a patentee granting the right to make and sell the patented article in a specified territory, by which the grantee binds itself to make and sell the article and to pay a certain royalty for each one sold, is not revocable by the grantee without the consent or fault of the patentee, but continues until the expiration of the patent. *St. Paul Plow Works v. Starling*, 140 U. S. 184, 11 Sup. Ct. Rep. 803, 35: 404

Cited in Edison Electric Light Co. v. Peninsular Light, Power & Heat Co. 95 Fed. 675.

842. A license from the patentee to make,

use, and sell machines gives the licensee the right to do so, within the scope of the license, throughout the term of the patent; and has the same effect upon machines sold by the licensee under authority of his license that a sale by the patentee has upon machines sold by himself, of wholly releasing them from the monopoly, and discharging all claim of the patentee for their use by anybody; because such is the effect of the patentee's voluntary act of licensing or selling, in consideration of the sum paid him for the license or sale. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244, 28: 768
Cited in Wade v. Metcalf, 129 U. S. 205, 32 L. ed. 663, 9 Sup. Ct. Rep. 271—*Hobble v. Jennison*, 149 U. S. 363, 38 L. ed. 769, 13 Sup. Ct. Rep. 879—*Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 432, 38 L. ed. 503, 14 Sup. Ct. Rep. 627—*Jackson v. Vaughan*, 73 Fed. 839—*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L.R.A. 735, 25 C. C. A. 278, 47 U. S. App. 146, 77 Fed. 299.

843. A license by the licensee of the right to make, use, and vend to others a certain patented machine,—such right being limited to making and using the machines during the original term of the patent, with an express stipulation against granting any license beyond the expiration of such term,—to purchasers of the machines, authorizing them to run and use the machines under the patentee's patent, "bearing date as specified in the original letters patent," is sufficient to put such purchasers on inquiry as to the restriction against using the machines beyond the extended term. *Mitchell v. Hawley*, 16 Wall. 544, 21: 322

844. Where the license from the patentee to make, use, and license others to use, the patented machines during the remainder of the original term of the patent, expressly stipulates that the grantee shall not sell or grant any license to use the patented machine beyond the expiration of such term, although it also stipulates for the continuance of the right, if the patent is extended, on terms as favorable as may be offered to any other persons,—purchasers of machines from such licensee, with the right to run the same, may be restrained from using such machines after such term expired, and during an extended term of the patent. *Mitchell v. Hawley*, 16 Wall. 544, 21: 322

Invention by employee.

Presumption of License, see *Evidence*, 239.

845. The right of a government department to use the device patented by an employee will, under certain circumstances, be implied. *McAleer v. United States*, 150 U. S. 424, 14 Sup. Ct. Rep. 160, 37: 1130
Cited in Blauvelt v. Interior Conduit & Insulation Co. 26 C. C. A. 246, 51 U. S. App. 291, 80 Fed. 909—*Fry v. Rookwood Pottery Co.* 90 Fed. 500—*Pressed Steel Car Co. v. Hansen*, 2 L.R.A.(N.S.) 1184, 71 C. C. A. 218, 137 Fed. 414.

846. When a person in the employ of an

other, in a certain line of work, devises an improved method or instrument for doing that work, and uses the property of his employer to develop and put in form his invention, and explicitly assents to the use by the employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has given to such employer an irrevocable license to use such invention. *Lane & B. Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. Rep. 78, 37: 1049

Cited in Kelton v. United States, 32 Ct. Cl. 345—*Blauvelt v. Interior Conduit & Insulation Co.* 26 C. C. A. 246, 51 U. S. App. 291, 80 Fed. 909—*Fry v. Rookwood Pottery Co.* 90 Fed. 500—*Boston v. Allen*, 33 C. C. A. 487, 50 U. S. App. 447, 91 Fed. 250—*Barber v. National Carbon Co.* 5 L.R.A. (N.S.) 1168, 64 C. C. A. 45, 129 Fed. 375—*Pressed Steel Car Co. v. Hansen*, 2 L.R.A. (N.S.) 1182, 71 C. C. A. 214, 137 Fed. 410—*D. M. Steward Mfg. Co. v. Steward*, 109 Tenn. 306, 70 S. W. 808.

847. Where a contract did not expressly or by implication require an employee to exercise his inventive faculties for his employer's benefit, the fact that while in such employ he invented patentable improvements to implements manufactured by the corporation employing him, the expense of perfecting which was paid by such corporation, and that he never while in such employ made any claim of property in such improvements, or claimed any right to a patent therefor,—cannot be construed to give such corporation anything more than a license to use such improvements; and such right, if any exists, is not transferable, and is extinguished with the dissolution of the corporation. *Hapgood v. Hewitt*, 119 U. S. 226, 7 Sup. Ct. Rep. 193, 30: 369

Cited in Dalzell v. Duerber Watch Case Mfg. Co. 149 U. S. 320, 37 L. ed. 753, 13 Sup. Ct. Rep. 886—*Locke v. Lane*, 35 Fed. 294—*Electric R. Co. v. Jamaica & B. R. Co.* 61 Fed. 678—*Withington-Cooley Mfg. Co. v. Kinney*, 15 C. C. A. 533, 37 U. S. App. 117, 68 Fed. 502—*Burton v. Burton Stock Car Co.* 171 Mass. 439, 50 N. E. 1029—*Connell Mfg. Co. v. Wattles*, 49 N. J. Eq. 93, 23 Atl. 123—*Eustis Mfg. Co. v. Eustis*, 51 N. J. Eq. 570, 27 Atl. 439—*Baldwin v. Von Micheroux*, 5 Misc. 387, 25 N. Y. Supp. 857—*Little v. Gallus*, 4 App. Div. 579, 38 N. Y. Supp. 487.

Assignability.

848. A license to use an invention, implied from circumstances, is not transferable. *Hapgood v. Hewitt*, 119 U. S. 226, 7 Sup. Ct. Rep. 193, 30: 369

Cited in Lane & B. Co. v. Locke, 150 U. S. 195, 37 L. ed. 1050, 14 Sup. Ct. Rep. 78—*Montross v. Mable*, 30 Fed. 235—*Thomson v. Citizens' Nat. Bank*, 3 C. C. A. 524, 10 U. S. App. 500, 53 Fed. 256—*Kraatz v. Tieiman*, 79 Fed. 324—*Boston v. Allen*, 33 C. C. A. 487, 50 U. S. App. 447, 91 Fed. 250.

849. The nonassignability of a license to use a patent may be waived if the patentee ratifies the transfer of the license by treating the assignee as the licensee was entitled to be treated. *Lane & B. Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. Rep. 78, 37: 1049
Cited in Rowell v. Rowell, 122 Wis. 21, 90 N. W. 472.

c. Royalties.

Revocability of Contract for, see *supra*, 841.
Effect of Receiving Royalty on Right to Recover for Subsequent Infringement, see *infra*, 1143.

Federal Question as to, see *Appeal and Error*, 1429, 1818.

Conclusiveness of Finding as to, see *Appeal and Error*, 4398.

Right to Recover Back, see *Assumpsit*, 51.

Measure of Recovery, see *Damages*, 265, 266.

Estoppel to Deny Liability for, see *Estoppel*, 275.

Royalties within Scope of Reference, see *Reference*, 23.

Release from, see *Release*, 11, 18.

Removal of Suit for, from State Court, see *Removal of Causes*, 214, 216.

Editorial note.

Royalties. 37: 749

Equitable jurisdiction.

Jurisdiction of Courts over Royalty and License Contracts, see *Courts*, 556-561.

Propriety of Injunction in Aid of Suit for Accounting, see *Injunction*, 194.

850. Equity will not take jurisdiction of a suit for the use of a patent, with the knowledge and assent of the owner and without any complaint on his part except of the failure to pay royalties. *Keyes v. Eureka Consol. Min. Co.* 158 U. S. 150, 15 Sup. Ct. Rep. 772, 39: 929

Invention of employee.

851. An implied license to use a patented improvement without payment of any royalties during the continuance of employment of the inventor, and thereafter on the same terms and royalties fixed for other parties, is shown where the inventor applies the patent to his employer's work, without any agreement for compensation for its use, further than a notice that he would require pay after his employment terminated. *Keyes v. Eureka Consol. Min. Co.* 158 U. S. 150, 15 Sup. Ct. Rep. 772, 39: 929

Cited in Gill v. United States, 160 U. S. 432, 40 L. ed. 483, 16 Sup. Ct. Rep. 322—*Boston v. Allen*, 33 C. C. A. 487, 50 U. S. App. 447, 91 Fed. 250—*Ft. Wayne, C. & L. R. Co. v. Haberkorn*, 15 Ind. App. 486, 44 N. E. 322.

852. An employee who uses property or labor of his employer to put an invention into practical form, and assents to the latter's use of it, cannot recover from him a royalty or other compensation therefor on taking out a patent on the invention. *Gill v. United States*, 160 U. S. 426, 16 Sup. Ct. Rep. 322, 40: 480

Cited in Blauvelt v. Interior Conduit & Insulation Co. 26 C. C. A. 246, 51 U. S. App. 291, 80 Fed. 908—*Boston v. Allen*, 33 C. C. A. 487, 50 U. S. App. 447, 91 Fed. 250—*Nilsson v. DeHaven*, 47 App. Div. 539, 62 N. Y. Supp. 506.

853. An employee is estopped, by permitting his employer to make use of an inven-

tion which he perfects while in the master's service, from afterwards claiming a royalty therefor on patenting the invention. *Gill v. United States*, 160 U. S. 426, 16 Sup. Ct. Rep. 322, 40: 480

Cited in Kelton v. United States, 32 Ct. Cl. 341—*Dielman v. White*, 102 Fed. 895—*Barber v. National Carbon Co.* 5 L.R.A. (N.S.) 1168, 64 C. C. A. 45, 129 Fed. 375—*Pressed Steel Car Co. v. Hansen*, 2 L.R.A. (N.S.) 1180, 71 C. C. A. 211, 137 Fed. 407—*D. M. Steward Mfg. Co. v. Steward*, 109 Tenn. 307, 70 S. W. 808.

Right of assignee.

See also *supra*, 802.

854. A patent for letter boxes already in use by the Postoffice Department, issued against the protest of an agent of the government to a person who was not the inventor of the boxes, but who furnished them to the government under a contract which had expired and which the government had refused to renew, does not give to his assignee any right to recover royalties upon the theory of an implied promise to pay for the previous use of such boxes, in a suit which was pending when the patent was issued. *Kirk v. United States*, 163 U. S. 49, 16 Sup. Ct. Rep. 911, 41: 66
Cited in Henry v. United States, 38 Ct. Cl. 648—*Ball & Socket Fastener Co. v. Cohn*, 90 Fed. 685—*Hamilton v. Park & McK. Co.* 125 Mich. 76, 83 N. W. 1018.

Liability of vendee or assignee.

Effect of Fraud, see also Fraud and Deceit, 66.

855. To take promissory notes from licensees occasionally in lieu of cash, for accrued royalties, if done in good faith, is not so far out of the course of ordinary business transactions as to render the owner of a patent liable to his assignor, under a contract to pay over a part of the royalties when collected, for losses occurring through the insolvency of any of the licensees. *Thorn Wire Hedge Co. v. Washburn & M. Mfg. Co.* 159 U. S. 423, 16 Sup. Ct. Rep. 94, 40: 205

856. The refusal of patents for some of the claims of invention only exonerates the vendee of such invention from any obligation to pay further royalties on devices made and sold by it which do not embody what remains of the claims, where the contract requires the payment of royalties on all devices embodying the invention until final adverse action by the Patent Office. *Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 26 Sup. Ct. Rep. 150, 50: 317

857. The lack of novelty in a supposed invention does not, until the final adverse action by the Patent Office, which is to terminate the contract for its sale, relieve the vendee of its obligation under the contract to pay royalties "on all the devices made or sold embodying the invention," where the vendee took an assignment of the inventor's right, title, and interest, took charge of his applications for patents, and agreed to defend the invention against infringement.

Eclipse Bicycle Co. v. Farrow, 199 U. S. 581, 26 Sup. Ct. Rep. 150, 50: 317

858. The obligation of the vendee in a contract for the sale of an invention of an improved automatic coaster brake for bicycles to pay royalties on all devices made or sold embodying the invention, and to use due business diligence to push their sale, cannot be so extended as to require an account for the manufacture and sale of a new device, accomplishing the same results, but differing radically in construction and operation, which may reasonably and honestly have been regarded as superior to the vendor's invention. *Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 26 Sup. Ct. Rep. 150, 50: 317

Liability of licensee.

859. A licensee of the right to make and sell a patented plow, who has agreed to pay a royalty on each sale, and who after renouncing the license makes and sells a plow substantially like the patented plow, is liable for the royalty thereon. *St. Paul Plow Works v. Starling*, 140 U. S. 184, 11 Sup. Ct. Rep. 803, 35: 404

860. An agreement to pay royalty on all fence wire made and sold under specified letters patent does not exclude the right to manufacture articles under a different patent without paying royalty. *Thorn Wire Hedge Co. v. Washburn & M. Mfg. Co.* 159 U. S. 423, 16 Sup. Ct. Rep. 94, 40: 205

Omission to pay agreed sum.

861. Where a personal condition in the agreement to pay the patentee an annuity is not made a condition precedent, the omission to pay such annuity does not give the patentee a right to rescind the contract, or remit to him his interest as patentee. *Hartshorn v. Day*, 19 How. 211, 15: 605
Cited in Prime v. Brandon Mfg. Co. 16 Blatchf. 463, 4 Bann. & Ard. 389, Fed. Cas. No. 11,421—*Goodyear v. Union India Rubber Co.* 4 Blatchf. 69, Fed. Cas. No. 5,536—*White v. Lee*, 5 Bann. & Ard. 574, 3 Fed. 224—*Rapp v. Kelling*, 41 Fed. 792.

Defenses.

862. A fraud of the plaintiff by which the Commissioner of Patents was misled and deceived and induced to reissue the patent cannot be set up in an action to recover stipulated royalties. The question can only be considered in a direct suit to impeach and set aside the patent. *Eureka Clothes Wringing Mach. Co. v. Bailey Washing & Wringing Mach. Co.* 11 Wall. 488, 20: 209
Cited in Marsh v. Nichols, S. & Co. 128 U. S. 610, 32 L. ed. 540, 9 Sup. Ct. Rep. 168—*Gear v. Grosvenor, Holmes*, 216, 6 Fisher, Pat. Cas. 316, Fed. Cas. No. 5,291—*Moorman v. Hoge*, 2 Sawy. 84, Fed. Cas. No. 9,783.

863. The alleged invalidity of the patent for the Harvey process of treating armor plate cannot be set up by the United States as a defense to a suit for the royalties due under a contract for the use of the process, which provided that the payment of royalties was to cease "in case it should at any time be judicially decided" that the patent

was invalid. *United States v. Harvey Steel Co.* 196 U. S. 310, 25 Sup. Ct. Rep. 240,

49: 492

864. The defense that the United States has not used the patent for the Harvey process of treating armor plate, if such patent be properly construed, is not available in a suit for the royalties due under a contract for the use of the process "known as the Harvey process," although the process is also identified in the contract as a patented one, where it is not denied that the United States has used the process communicated to it under the contract, which is known in common speech as the "Harvey process." *United States v. Harvey Steel Co.* 196 U. S. 310, 25 Sup. Ct. Rep. 240,

49: 492

865. Where it is agreed that a partner shall be accountable to the patentee for a certain sum for each machine sold, he must pay over that sum, whether he collects it of the purchaser or not; and he is estopped, in a suit for such accounting, to deny the validity of the patent. *Kinsman v. Parkhurst*, 18 How. 289,

15: 385

f. Use of Specific Article.

Rights of Licensee, see *supra*, XIII. d.

Equitable Jurisdiction of Suit for, see *supra*, 850.

Effect of Agreement between Parties Mutually Charging Infringement, see *infra*, 1026.

Effect of Payment of Damages for Infringement on Right to Use, see *infra*, 1098, 1099.

Accounting for Profits from Use of Void Patent, see *infra*, 1104.

Patentee's Right to Sue User, see *infra*, 1119.

As Against Inventor Withholding Invention from Public, see *infra*, 1156.

Estoppel by Agreement not to Use Process, see *Estoppel*, 132.

Judgment against One Person as Bar to Judgment against Another, see *Judgment*, 722.

Admission of, by Pleadings, see *Pleading*, 141, 142.

Implied Contract by United States, see *United States*, 276.

See also *supra*, 565, 788, 792; *infra*, 1020, 1085, 1121.

Rights of purchaser.

Rights of one Purchasing from Purchaser to Use Article, see *infra*, 880.

See also *supra*, 4.

866. The purchaser of an implement or machine, for the purpose of using it in the ordinary pursuits of life, stands on different ground from the purchaser of the right of making or vending the article. When the former purchases the machine, it is no longer within the limits of the patent monopoly. *Bloomer v. McQuewan*, 14 How. 539,

14: 532

Mitchell v. Hawley, 16 Wall. 544, 21: 322

Chaffee v. Boston Belting Co. 22 How. 217,

16: 240

Bloomer v. Milliger, 1 Wall. 340, 17: 581
Distinguished in Day v. Union India Rubber Co. 3 Blatchf. 491, Fed. Cas. No. 3,691.

Cited in Bloomer v. Millinger, 1 Wall. 351, 17 L. ed. 584, 2 Whitman, Pat. Cas. 51—*Mitchell v. Hawley*, 16 Wall. 547, 21 L. ed. 323, 6 Fisher, Pat. Cas. 333, 2 Whitman, Pat. Cas. 446—*Adams v. Burke*, 17 Wall. 456, 21 L. ed. 703—*Eunson v. Dodge*, 18 Wall. 416, 21 L. ed. 768, 2 Whitman, Pat. Cas. 471—*Paper Bag Mach. Cases*, 105 U. S. 770, 26 L. ed. 961—*Wade v. Metcalf*, 129 U. S. 205, 32 L. ed. 663, 9 Sup. Ct. Rep. 271—*Boesch v. Graff*, 133 U. S. 702, 33 L. ed. 789, 10 Sup. Ct. Rep. 378—*Waterman v. Mackenzie*, 138 U. S. 256, 34 L. ed. 926, 11 Sup. Ct. Rep. 334—*Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 432, 38 L. ed. 503, 14 Sup. Ct. Rep. 627—*Adams v. Burke*, 4 Fisher, Pat. Cas. 393, Fed. Cas. No. 50—*Alken v. Manchester Print Works*, 2 Cliff. 437, Fed. Cas. No. 113—*England v. Thompson*, 3 Cliff. 276, Fed. Cas. No. 4,487—*Gear v. Grosvenor*, Holmes, 220, 6 Fisher, Pat. Cas. 321, Fed. Cas. No. 5,291—*Goodyear v. Beverly Rubber Co.* 1 Cliff. 355, Fed. Cas. No. 5,557—*Hawley v. Mitchell*, Holmes, 44, 4 Fisher, Pat. Cas. 390, Fed. Cas. No. 6,250—*Hill v. Whitcomb*, 1 Bann. & Ard. 40, Holmes, 324, Fed. Cas. No. 6,502—*Hodge v. Hudson River R. Co.* 6 Blatchf. 91, Fed. Cas. No. 6,559—*Jenkins v. Nicolson Pav. Co.* 1 Abb. (U. S.) 569, 4 Fisher, Pat. Cas. 204, Fed. Cas. No. 7,273—*May v. Chaffee*, 2 Dill. 389, Fed. Cas. No. 9,332—*Wetherill v. Passaic Zinc Co.* 6 Fisher, Pat. Cas. 57, Fed. Cas. No. 17,465—*Wood v. Michigan S. & N. I. R. Co.* 2 Biss. 67, Fed. Cas. No. 17,957—*Wooster v. Sidenberg*, 13 Blatchf. 92, 2 Bann. & Ard. 95, Fed. Cas. No. 18,039—*Fire Extinguisher Mfg. Co. v. Graham*, 16 Fed. 552—*Holliday v. Matheson*, 23 Blatchf. 241, 24 Fed. 186—*Singer Mfg. Co. v. Springfield Foundry Co.* 34 Fed. 394—*Kelley v. Ypsilanti Dress-Stay Mfg. Co.* 10 L.R.A. 688, 44 Fed. 22—*Rice v. Boss*, 46 Fed. 195—*Jackson v. Vaughan*, 73 Fed. 839—*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L. R.A. 734, 25 C. C. A. 278, 47 U. S. App. 146, 77 Fed. 299—*Excelsior Wooden Pipe Co. v. Seattle*, 55 C. C. A. 160, 117 Fed. 144—*Ft. Wayne, C. & L. R. Co. v. Haberkorn*, 15 Ind. App. 481, 44 N. E. 322—*Eclipse Wind Engine Co. v. Zimmerman Mfg. Co.* 16 Ind. App. 499, 44 N. E. 1115—*Pratt v. Mareau*, 25 Ill. App. 520—*Howe v. Wooldredge*, 12 Allen, 23—*De La Vergne Refrigerating Mach. Co. v. Hub Brewing Co.* 175 Mass. 421, 56 N. E. 584—*Union Mfg. Co. v. Lounsbury*, 41 N. Y. 374—*Commercial Union Teleph. Co. v. New England Teleph. & Teleg. Co.* 61 Vt. 251, 5 L.R.A. 161, 15 Am. St. Rep. 803, 17 Atl. 1071.

867. If, in a patented machine, a constituent part of the combination is meant to be only temporary, as compared with other parts, and is intended to be frequently replaced, such as the cutting-knives in a planing-machine, the replacement of such part does not alter the identity of the machine, and is within the right of a purchaser of the machine. *Wilson v. Simpson*, 9 How. 109,

13: 66

Criticized in Day v. Union India Rubber Co. 3 Blatchf. 491, Fed. Cas. No. 3,691.

Cited in Morgan Envelope Co. v. Albany Per-

Fletcher v. Blake, 131 U. S. excvii. Appx. and 26: 156

Cited in Fink v. O'Neill, 106 U. S. 282, 27 L. ed. 200, 1 Sup. Ct. Rep. 325—Hollister v. Benedict & B. Mfg. Co. 113 U. S. 67, 28 L. ed. 903, 5 Sup. Ct. Rep. 717—United States v. Palmer, 128 U. S. 270, 32 L. ed. 445, 9 Sup. Ct. Rep. 104—Schilling v. United States, 155 U. S. 173, 39 L. ed. 112, 15 Sup. Ct. Rep. 85—Belknap v. Schild, 161 U. S. 16, 40 L. ed. 601, 16 Sup. Ct. Rep. 443—McCormick Harvesting Mach. Co. v. C. Aultman Co. 169 U. S. 609, 42 L. ed. 876, 18 Sup. Ct. Rep. 443—International Postal Supply Co. v. Bruce, 194 U. S. 807, 48 L. ed. 1137, 24 Sup. Ct. Rep. 820—Schilling v. United States, 24 Ct. Cl. 296—Lanman v. United States, 27 Ct. Cl. 263—Brooks v. United States, 39 Ct. Cl. 503—Campbell v. James, 31 Fed. 526—Head v. Porter, 48 Fed. 481—Reeves v. Corning, 51 Fed. 784—Grosvenor v. Dashiell, 62 Fed. 587—Dashiell v. Grosvenor, 27 L.R.A. 70, 13 C. A. 598, 25 U. S. App. 227, 66 Fed. 338—Dickerson v. Sheldon, 39 C. C. A. 192, 98 Fed. 622—International Postal Supply Co. v. Bruce, 114 Fed. 511—Sheriff v. Turner, 119 Fed. 784—United States v. Lesnet, 9 N. M. 280, 50 Pac. 321.

879b. The United States have no right to use a patented invention without license of the patentee, or making compensation to him. Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40: 599
Cited in Dickerson v. Sheldon, 39 C. C. A. 193, 98 Fed. 622.

879c. The government cannot, after a patent for an improvement in arms, tents, and other kind of war materials is issued to an army officer, make use of such improvement without the license of the inventor, or making compensation to him. United States v. Burns, 12 Wall. 246, 20: 388

Cited in Cammeyer v. Newton, 94 U. S. 235, 24 L. ed. 75—Belknap v. Schild, 161 U. S. 16, 40 L. ed. 601, 16 Sup. Ct. Rep. 443—International Postal Supply Co. v. Bruce, 194 U. S. 808, 48 L. ed. 1138, 24 Sup. Ct. Rep. 820—McKeever v. United States, 14 Ct. Cl. 422—Hubbell v. United States, 20 Ct. Cl. 365—Solomons v. United States, 21 Ct. Cl. 482—Cole v. United States, 29 Ct. Cl. 50—Berdan Fire-Arms Mfg. Co. v. United States, 26 Ct. Cl. 75—Southworth v. United States, 30 Ct. Cl. 83—Kelton v. United States, 32 Ct. Cl. 344—Rhine v. United States, 33 Ct. Cl. 482—Brady v. Atlantic Works, 4 Cliff. 416, 2 Bann. & Ard. 441, Fed. Cas. No. 1,794—Campbell v. James, 17 Blatchf. 54, 4 Bann. & Ard. 408, Fed. Cas. No. 2,361—Colgate v. International Ocean Teleg. Co. 17 Blatchf. 311, 4 Bann. & Ard. 611, Fed. Cas. No. 2,993—Head v. Porter, 48 Fed. 487—Dickerson v. Sheldon, 39 C. C. A. 192, 98 Fed. 622—Sheriff v. Turner, 119 Fed. 784.

g. Sale of Specific Article.

By Licensee, see *supra*, 830a.
Patentee's Right to Sue Seller, see *infra*, 1119.
Estoppel to Set up Invalidity of Patent as Defense, see Estoppel, 273.
Estoppel by Sale to Prosecute for Infringement of Patent, see Estoppel, 310.
See also *supra*, 4, 788, 792, 793, 873, 875, 877; *infra*, 933.

may repair it or improve upon it. *Chaffee v. Boston Belting Co.* 22 How. 217,

16: 240

Mitchell v. Hawley, 16 Wall. 544, 21: 322
Limited and Distinguished in *Davis Electrical Works v. Edison Electric Light Co.* 8 C. C. A. 617, 21 U. S. App. 74, 60 Fed. 278.

Distinguished in *Sheldon Axle Co. v. Standard Axle Works*, 3 L.R.A. 657, 37 Fed. 791.

Cited in *Adams v. Burke*, 17 Wall. 456, 21 L. ed. 703, 2 Whitman, Pat. Cas. 451—*Keeler v. Standard Folding Bed Co.* 157 U. S. 662, 30 L. ed. 849, 15 Sup. Ct. Rep. 738—*American Cotton-Tie Co. v. Simmons*, 3 Bann. & Ard. 321, Fed. Cas. No. 203—*American Cotton-Tie Supply Co. v. Bullard*, 17 Blatchf. 160, Fed. Cas. No. 294—*Hodge v. Hudson River R. Co.* 3 Fisher, Pat. Cas. 416, Fed. Cas. No. 6,559—*Gottfried v. Conrad Selppe Brewing Co.* 10 Biss. 370, 8 Fed. 323—*Porter Needle Co. v. National Needle Co.* 17 Fed. 538—*Holliday v. Matheson*, 23 Blatchf. 241, 24 Fed. 186—*Syracuse Chilled Plow Co. v. Robinson*, 35 Fed. 503—*Young v. Foerster*, 37 Fed. 204—*Dickerson v. Matheson*, 6 C. C. A. 470, 14 U. S. App. 569, 57 Fed. 527—*Moore Mfg. & Foundry Co. v. Cronk Hanger Co.* 69 Fed. 999—*St. Louis Car-Coupler Co. v. Shickle, H. & H. Iron Co.* 70 Fed. 785—*Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.* 72 Fed. 1019—*Jackson v. Vaughan*, 73 Fed. 839—*Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.* 22 C. C. A. 3, 45 U. S. App. 95, 75 Fed. 1008—*International Pav. Co. v. Richardson*, 75 Fed. 592—*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L.R.A. 730, 25 C. C. A. 269, 47 U. S. App. 146, 77 Fed. 290—*Shickle, H. & H. Iron Co. v. St. Louis Car-Coupler Co.* 23 C. C. A. 435, 40 U. S. App. 728, 77 Fed. 741—*Alaska Packer's Asso. v. Pacific Steam Whaling Co.* 93 Fed. 674—*Pacific Steam Whaling Co. & Alaska Packers' Asso.* 40 C. C. A. 495, 100 Fed. 463—*Doan v. American Book Co.* 45 C. C. A. 48, 105 Fed. 777—*Goodyear Shoe Machinery Co. v. Jackson*, 55 L.R.A. 694, 50 C. C. A. 162, 112 Fed. 149—*National Phonograph Co. v. Fletcher*, 117 Fed. 154.

Extended term.

873. The owner of a patented machine, without any conditions attached to his ownership, may continue the use of his machine during an extended term of the patent, and may also sell it to others to be used during the same period. *Union Paper Bag Mach. Co. v. Nixon (Paper Bag Mach. Cases)* 105 U. S. 766,

26: 959

Bloomer v. McQuewan, 14 How. 539, 14: 532
Wilson v. Turner, 4 How. 712, 11: 1171
Wilson v. Rousseau, 4 How. 646, 11: 1141
Eunson v. Dodge, 18 Wall. 414, 21: 766
Mitchell v. Hawley, 16 Wall. 544, 21: 322
Bloomer v. Milliger, 1 Wall. 340, 17: 581

Cited in *Dean v. Mason*, 20 How. 203, 15 L. ed. 878—*Chaffee v. Boston Belting Co.* 22 How. 223, 16 L. ed. 242—*Mitchell v. Hawley*, 16 Wall. 547, 21 L. ed. 323, 6 Fisher, Pat. Cas. 333—*Eunson v. Dodge*, 18 Wall. 416, 21 L. ed. 768—*Paper Bag Mach. Cases*, 105 U. S. 770, 26 L. ed. 961—*Wade v. Metcalf*, 129 U. S. 205, 32 L. ed. 663, 9 Sup. Ct. Rep. 271—*Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 432, 38 L. ed. 503, 14 Sup. Ct. Rep. 627—*Keeler v. Standard Folding Bed Co.* 157 U. S. 662, 39 L. ed. 849, 15 Sup. Ct. Rep. 738—

Adams v. Burks, Holmes, 41, 4 Fisher, Pat. Cas. 303, Fed. Cas. No. 50—*Alken v. Manchester Print Works*, 2 Cliff. 438, Fed. Cas. No. 113—*Black v. Hubbard*, 3 Bann. & Ard. 39, Fed. Cas. No. 1,460—*Hodge v. Hudson River R. Co.* 6 Blatchf. 91, 3 Fisher, Pat. Cas. 416, Fed. Cas. No. 6,559—*Spaulding v. Page*, 1 Sawy. 707, 4 Fisher, Pat. Cas. 646, Fed. Cas. No. 13,219—*Wood v. Michigan S. & N. I. R. Co.* 2 Biss. 67, 3 Fisher, Pat. Cas. 469, Fed. Cas. No. 17,957—*Neills v. Pennock Mfg. Co.* 13 Fed. 454—*Fire Extinguisher Mfg. Co. v. Graham*, 16 Fed. 551—*Blake v. Greenwood Cemetery*, 21 Blatchf. 225, 16 Fed. 679—*Steam Stone Cutter Co. v. Sheldon*, 22 Blatchf. 488, 21 Fed. 878—*Holliday v. Matheson*, 23 Blatchf. 241, 24 Fed. 186—*American Tube Works v. Bridgeport Iron Co.* 26 Fed. 336—*Sheldon Axle Co. v. Standard Axle-Works*, 3 L.R.A. 657, 37 Fed. 791—*Dickerson v. Matheson*, 6 C. C. A. 470, 14 U. S. App. 569, 57 Fed. 527—*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L.R.A. 734, 25 C. C. A. 278, 47 U. S. App. 146, 77 Fed. 299—*Lalanc & G. Mfg. Co. v. Haberman Mfg. Co.* 93 Fed. 198—*Withers v. Hopkins Place Sav. Bank*, 104 Ga. 95, 30 S. E. 766—*Everett Piano Co. v. Bash*, 31 Ind. App. 504, 68 N. E. 329—*Neills v. Pennock Mfg. Co.* 15 Phila. 495, 39 Phila. Leg. Int. 299.

874. Where one purchased a patented machine from an infringer, and then purchased from the patentees the entire right for the county where his machine was then used, this was equivalent to an original lawful purchase of the machine; and his right to use it remains when the patent is subsequently extended. *Eunson v. Dodge*, 18 Wall. 414,

21: 766

Invention subsequently patented.

See also *infra*, 1030, 1102.

875. Every person who purchases of the inventor any machine, or other portable article, prior to his application for a patent, shall have the right to use, and vend to others to be used, the specific thing so purchased, without liability therefor. *McClurg v. Kingsland*, 1 How. 202, 11: 102
Cited in *Wilson v. Turner*, Taney, 294, Fed. Cas. No. 17,845—*Anderson v. Eiler*, 30 W. N. C. 239.

876. Where machines, afterwards patented, were constructed and put in use in the defendants' grain elevators by the inventor himself, while he was in their employment as superintendent of machinery and before his application for a patent, defendants have the right to continue to use these specific machines after they are patented, without paying any compensation to the inventor or his assigns. *Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 11 Sup. Ct. Rep. 8,

34: 618

877. After a machine has been constructed by any person, with the inventor's knowledge and consent, before the application for a patent, every other person who either sells or uses that machine is within the protection of U. S. Rev. Stat. § 4899, U. S. Comp. Stat. 1901, p. 3388, and needs no new consent or permission of the inventor.

Wade v. Metcalf, 129 U. S. 202, 9 Sup. Ct. Rep. 271, 32: 661

Cited in Dable Grain Shovel Co. v. Flint, 137 U. S. 43, 34 L. ed. 620, 11 Sup. Ct. Rep. 8—Hobble v. Jennison, 149 U. S. 363, 37 L. ed. 769, 13 Sup. Ct. Rep. 879—Anderson v. Eller, 46 Fed. 781—Boston v. Allen, 33 C. C. A. 487, 58 U. S. App. 447, 91 Fed. 250—Anderson v. Eller, 30 W. N. C. 239.

878. The words "newly invented machine, manufacture, etc.," in the act of 1839, § 7—providing that one who has constructed or purchased an unpatented machine shall have the right to use or sell the specific machine after the invention has been patented, mean the invention patented, and include an invention for giving a new direction to some parts of an old machine for the purpose of producing a desired effect; and "specific machine" means the thing as originally invented, but not any subsequently patented improvement. *McClurg v. Kingsland*, 1 How. 202, 11: 102

Distinguished in New Process Fermentation Co. v. Maus, 20 Fed. 729—Wall v. Leck, 13 C. C. A. 634, 29 U. S. App. 458, 66 Fed. 556—Lamson v. Martin, 159 Mass. 563, 35 N. E. 78.

Cited in Wilson v. Rousseau, 4 How. 683, 11 L. ed. 1157, 2 Robb, Pat. Cas. No. 427, 1 Whitman, Pat. Cas. 396—O'Reilly v. Morse, 15 How. 131, 14 L. ed. 631, 1 Whitman, Pat. Cas. 832—Burr v. Duryee, 1 Wall. 568 17 L. ed. 657, 2 Whitman, Pat. Cas. 99—Andrews v. Carman, 13 Blatchf. 313, 2 Bann. & Ard. 282, Fed. Cas. No. 371—Day v. Union India-Rubber Co. 3 Blatchf. 504, Fed. Cas. No. 3,691—Smith v. Downing, 1 Fisher, Pat. Cas. 71, Fed. Cas. No. 13,036—Wetherill v. Passaic Zinc Co. 6 Fisher, Pat. Cas. 57, Fed. Cas. No. 17,465—Brickill v. New York, 18 Blatchf. 275, 5 Bann. & Ard. 546, 7 Fed. 481—Duffy v. Reynolds, 24 Fed. 858—Wetherill v. Passaic Zinc Co. 9 Phila. 389, 29 Phila. Leg. Int. 357.

879. The act of March 3, 1839, § 7, exempting from liability to an inventor any person who, prior to an application for a patent, has purchased or made an article covered by the patent subsequently issued, has exclusive reference to an original application for a patent, and not to a renewal of it. *Stimpson v. West Chester R. Co.* 4 How. 380, 11: 1020

Cited in Agawam Woolen Co. v. Jordan, 7 Wall. 607, 19 L. ed. 183, 2 Whitman, Pat. Cas. 206—Henry v. Francetown Soapstone Stove Co. 2 Bann. & Ard. 223, Fed. Cas. No. 6,382—Hoffhelms v. Brandt, 3 Fisher Pat. Cas. 239, Fed. Cas. No. 6,575—Howe v. Williams, 2 Cliff. 262, 2 Fisher, Pat. Cas. 413, Fed. Cas. No. 6,778—Hussey v. Bradley, 5 Blatchf. 149, 2 Fisher, Pat. Cas. 379, Fed. Cas. No. 6,946—Jones v. Sewall, 3 Cliff. 588, 6 Fisher, Pat. Cas. 363, Fed. Cas. No. 7,495—McWilliams Mfg. Co. v. Blundell, 11 Fed. 421.

Right of government to use.

Remedy in Case of Use, see *infra*, 1090, 1091.

See also *supra*, 13-15.

879a. The government of the United States has no right to use a patented invention without compensation to the owner. *James v. Campbell*, 104 U. S. 356, 26: 786

Fletcher v. Blake, 131 U. S. excvii. Appx. and 26: 156

Cited in Fink v. O'Neill, 106 U. S. 282, 27 L. ed. 200, 1 Sup. Ct. Rep. 325—Hollister v. Benedict & B. Mfg. Co. 113 U. S. 67, 28 L. ed. 903, 5 Sup. Ct. Rep. 717—United States v. Palmer, 128 U. S. 270, 32 L. ed. 445, 9 Sup. Ct. Rep. 104—Schilling v. United States, 155 U. S. 173, 39 L. ed. 112, 15 Sup. Ct. Rep. 85—Belknap v. Schild, 161 U. S. 16, 40 L. ed. 601 16 Sup. Ct. Rep. 443—McCormick Harvesting Mach. Co. v. C. Aultman Co. 169 U. S. 609, 42 L. ed. 876, 18 Sup. Ct. Rep. 443—International Postal Supply Co. v. Bruce, 194 U. S. 607, 48 L. ed. 1137, 24 Sup. Ct. Rep. 820—Schilling v. United States, 24 Ct. Cl. 296—Lanman v. United States, 27 Ct. Cl. 263—Brooks v. United States, 39 Ct. Cl. 503—Campbell v. James, 31 Fed. 526—Head v. Porter, 48 Fed. 481—Reeves v. Corning, 51 Fed. 784—Grosvenor v. Dashiell, 62 Fed. 587—Dashiell v. Grosvenor, 27 L.R.A. 70, 13 C. C. A. 598, 25 U. S. App. 227, 66 Fed. 338—Dickerson v. Sheldon, 39 C. C. A. 192, 98 Fed. 622—International Postal Supply Co. v. Bruce, 114 Fed. 511—Sheriff v. Turner, 119 Fed. 784—United States v. Leaset, 9 N. M. 280, 50 Pac. 321.

879b. The United States have no right to use a patented invention without license of the patentee, or making compensation to him. *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40: 599

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879c. The government cannot, after a patent for an improvement in arms, tents, and other kind of war materials is issued to an army officer, make use of such improvement without the license of the inventor, or making compensation to him. *United States v. Burns*, 12 Wall. 246, 20: 388

Cited in Cammeyer v. Newton, 94 U. S. 235, 24 L. ed. 75—Belknap v. Schild, 161 U. S. 16, 40 L. ed. 601, 16 Sup. Ct. Rep. 443—International Postal Supply Co. v. Bruce, 194 U. S. 608, 48 L. ed. 1138, 24 Sup. Ct. Rep. 820—McKeever v. United States, 14 Ct. Cl. 422—Hubbell v. United States, 20 Ct. Cl. 365—Solomons v. United States, 21 Ct. Cl. 482—Cole v. United States, 29 Ct. Cl. 50—Berdan Fire-Arms Mfg. Co. v. United States, 28 Ct. Cl. 75—Southworth v. United States, 30 Ct. Cl. 83—Kelton v. United States, 32 Ct. Cl. 344—Rhine v. United States, 33 Ct. Cl. 482—Brady v. Atlantic Works, 4 Cliff. 416, 2 Bann. & Ard. 441, Fed. Cas. No. 1,794—Campbell v. James, 17 Blatchf. 54, 4 Bann. & Ard. 468, Fed. Cas. No. 2,361—Colgate v. International Ocean Teleg. Co. 17 Blatchf. 311, 4 Bann. & Ard. 611, Fed. Cas. No. 2,993—Head v. Porter, 48 Fed. 487—Dickerson v. Sheldon, 39 C. C. A. 192, 98 Fed. 622—Sheriff v. Turner, 119 Fed. 784.

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By Licensee, see *supra*, 830a.

Patentee's Right to Sue Seller, see *infra*, 1119.

Estoppel to Set up Invalidity of Patent as Defense, see Estoppel, 273.

Estoppel by Sale to Prosecute for Infringement of Patent, see Estoppel, 310.

See also *supra*, 4, 788, 792, 793, 873, 875, 877; *infra*, 933.

880. The purchaser of a patented machine from one authorized to sell it has the absolute ownership, and may sell it, with the right to use it, to another. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 14 Sup. Ct. Rep. 627, 38: 500

881. The sale of an oval roll of toilet paper which is not patentable in itself, together with a secondhand patented fixture, which the original purchaser from the patentee had sold after using up the paper bought with it,—does not constitute infringement. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 14 Sup. Ct. Rep. 627, 38: 500

882. Where patented cotton ties, consisting each of a buckle and a band, are manufactured and sold by the owners of the patents, and stamped "licensed for use once only," and defendant buys them after first use—the bands being cut—as scrap iron, and makes of the pieces a new band, which he sells with the old buckles thereon, to be used in bailing cotton, exactly as in the first use, it is an infringement. *American Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. Rep. 52, 27: 79

Distinguished in *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 40 Fed. 581.

Cited in *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 433, 38 L. ed. 503, 14 Sup. Ct. Rep. 627—*Vermont Farm Mach. Co. v. Gibson*, 46 Fed. 489—*Davis Electrical Works v. Edison Electric Light Co.* 8 C. C. A. 618, 21 U. S. App. 74, 60 Fed. 279—*St. Louis Car-Coupler Co. v. Shickle, H. & H. Iron Co.* 70 Fed. 785—*Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.* 22 C. C. A. 4, 45 U. S. App. 95, 75 Fed. 1008—*Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L.R.A. 730, 25 C. C. A. 270, 47 U. S. App. 146, 77 Fed. 291—*Shickle, H. & H. Iron Co. v. St. Louis Car-Coupler Co.* 23 C. C. A. 435, 40 U. S. App. 728, 77 Fed. 741—*Brown v. Puget Sound Reduction Co.* 110 Fed. 388—*Goodyear Shoe Machinery Co. v. Jackson*, 55 L.R.A. 694, 50 C. C. A. 162, 112 Fed. 149—*National Phonograph Co. v. Schlegel*, 117 Fed. 628.

882a. When a patent is exclusively for a process by which a new oil is made, and not for a new article, defendants have not infringed the patent by buying and selling the new article, if they never have used such process in its manufacture. *Merrill v. Yeomans*, 94 U. S. 568, 24: 235

Cited in *Welsbach Light Co. v. Union Incandescent Light Co.* 41 C. C. A. 255, 101 Fed. 131—*National Chemical & Fertilizer Co. v. Swift & Co.* 43 C. C. A. 428, 104 Fed. 89.

883. A dealer residing in the United States cannot purchase in another country articles patented there, from a person authorized to sell them, and import them to and sell them in the United States, without the license of the owners of the United States patent. *Boesch v. Gräff*, 133 U. S. 637, 10 Sup. Ct. Rep. 378, 33: 787

Cited in *Hobble v. Jennison*, 149 U. S. 363, 37 L. ed. 769, 13 Sup. Ct. Rep. 879—*Keeler v.*

Standard Folding Bed Co. 157 U. S. 664, 39 L. ed. 850, 15 Sup. Ct. Rep. 738—*California Electrical Works v. Finck*, 47 Fed. 538—*Featherstone v. Ormonde Cycle Co.* 53 Fed. 111—*Dickerson v. Matheson*, 6 C. C. A. 470, 14 U. S. App. 569, 57 Fed. 527—*Dickerson v. Tinling*, 28 C. C. A. 140, 55 U. S. App. 217, 84 Fed. 194—*Edison Phonograph Co. v. Pike*, 116 Fed. 864.

884. One who buys patented articles from a person who has a right to sell them, though within a restricted territory, has a right to use and sell such articles in all and any part of the United States, even within territory of other assignees of the patent rights. *Keeler v. Standard Folding-Bed Co.* 157 U. S. 659, 15 Sup. Ct. Rep. 738, 39: 848

Otted in *Jackson v. Vaughan*, 73 Fed. 839—*Dickerson v. Tinling*, 28 C. C. A. 141, 55 U. S. App. 217, 84 Fed. 194—*Edison Phonograph Co. v. Pike*, 116 Fed. 864—*Victor Talking Mach. Co. v. The Fair*, 118 Fed. 611.

XIV. Infringements; What Constitutes.

a. In General.

Infringement as Test of Anticipation, see supra, 315.

Sale of Patented Article as Infringement, see supra, 881, 882.

Reading Element into Claim for Purpose of Showing Infringement, see supra, 492.

Use of, by Government, see supra, 14, 15, 879a-879c.

Raising Question of, after Remand to Lower Court, see Appeal and Error, 5550.

Presumptions and Burden of Proof in Actions for, see Evidence, II. k. 5, 556, 777.

Infringement as Evidence of Utility, see Evidence, 2806a.

Infringement of Trademark, see Trademark, IV.

Question of Law or Fact, see Trial, 221, 224.

Liability of United States where Contractor Used Patented Article, see United States, 276.

885-6. Where the claim is fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention; but nothing can be held to be an infringement of a patent which does not fall within the terms the patentee has himself chosen to express his invention. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76, 35: 800

Cited in *Coupe v. Boyer*, 155 U. S. 577, 39 L. ed. 267, 15 Sup. Ct. Rep. 199—*Westinghouse v. New York Air-Brake Co.* 59 Fed. 605—*Gerard v. Diebold Safe & Lock Co.* 9 C. C. A. 453, 23 U. S. App. 341, 61 Fed. 211—*Groth v. International Postal Supply Co.* 9 C. C. A. 509, 20 U. S. App. 636, 61 Fed. 287—*New Home Sewing-Mach. Co. v. Singer Mfg. Co.* 68 Fed. 226—*Chemical Rubber Co. v. Raymond Rubber Co.* 68 Fed. 574—*New Departure Bell Co. v. Hardware Specialty Co.* 69 Fed. 155—*Matheson v. Campbell*, 69

Fed. 607—Carter Mach. Co. v. Hanes, 70 Fed. 868—McBride v. Klingman, 72 Fed. 911—Thomasson v. Bumpass, 24 C. C. A. 180, 42 U. S. App. 205, 78 Fed. 492—Patent Button Co. v. Consolidated Fastener Co. 84 Fed. 191—Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co. 86 Fed. 337—Paul Boynton Co. v. Morris Chute Co. 30 C. C. A. 619, 58 U. S. App. 53, 87 Fed. 227—Edison Electric Light Co. v. E. G. Bernard Co. 88 Fed. 275—Thatcher Mfg. Co. v. Creamery Package Mfg. Co. 34 C. C. A. 182, 91 Fed. 920—MacColl v. Knowles Loom Works, 37 C. C. A. 350, 95 Fed. 986—Mesick v. Moore, 100 Fed. 846—Stokes Bros. Mfg. Co. v. Heller, 41 C. C. A. 336, 101 Fed. 267—Pelfer v. Brown, 106 Fed. 940—Hendey Mach. Co. v. Prentiss Tool & Supply Co. 113 Fed. 584—Kinloch Teleph. Co. v. Western Electric Co. 51 C. C. A. 385, 113 Fed. 655—Lamb Knit-Goods Co. v. Lamb-Glove & Mitten Co. 56 C. C. A. 549, 120 Fed. 269—Ruete v. Elwell, 15 App. D. C. 25.

Editorial notes.

What constitutes infringement. 36: 1073
40: 1025

b. Identity or Similarity of Devices.

Patentability of New Application of Old Devices, see *supra*, V. b, 5.

Identity of Design, see *infra*, 1021-1023.

Judicial Notice of Mechanical Difference, see Evidence, 122.

Proof of Substantial Similarity as Evidence of Infringement, see Evidence, 2609.

Question of Law or Fact as to Identity, see Trial, 218-233.

See also *infra*, 1039-1043.

887. A device within the letter of the claims of a patent is not necessarily an infringement, if these, literally construed, do not represent the actual invention. *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136
Cited in Norton v. Wheaton, 97 Fed. 641—*Severy Process Co. v. Harper*, 113 Fed. 584—*Standard Computing Scale Co. v. Computing Scale Co.* 61 C. C. A. 551, 126 Fed. 640.

Performance of same function in same way.

888. Two mechanical devices are identical in the sense of the patent law when they perform substantially the same function in substantially the same way, to obtain the same result. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. Rep. 970, 29: 1017
Marsh v. Seymour, 97 U. S. 348, 24: 963
Cited in Merrow v. Shoemaker, 59 Fed. 128—*Beach v. American Box-Mach. Co.* 63 Fed. 606—*Travers v. American Cordage Co.* 64 Fed. 774—*Bowers v. Pacific Coast Dredging & Reclamation Co.* 99 Fed. 747—*Tecktonius v. Scott*, 110 Wis. 454, 86 N. W. 672—*Adams Co. v. Schreiber & C. Mfg. Co.* 111 Fed. 188.

889. To constitute identity of invention, and therefore infringement, not only must the result obtained be the same, but, in case of a combination of known elements, the elements combined must be the same, and combined in the same way, so that each element shall perform the same function; and differences alleged which are merely colorable, according to the rule forbidding the use of

known equivalents, will not destroy the identity. *Electric Railroad Signal Co. v. Hall Railway Signal Co.* 114 U. S. 87, 5 Sup. Ct. Rep. 1069, 29: 96

890. If two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape. *Union Paper-Bag Mach. Co. v. Murphy*, 97 U. S. 120, 24: 935

890a. A machine for making paper bags, in which a knife is raised by two cams on a rotating shaft, and falls by its own weight, is infringed by a machine which has all the essential elements of the former, varying from it chiefly in having a fixed knife and a striker with a blunt edge, which is operated by the shaft so that it first raises and then makes a vertical blow upon the paper, causing it to be cut by the knife as effectually as if the knife itself struck. *Union Paper-Bag Mach. Co. v. Murphy*, 97 U. S. 120, 24: 935

Cited in Gage v. Herring, 107 U. S. 647, 27 L. ed. 604, 2 Sup. Ct. Rep. 819—*Cantrell v. Wallick*, 117 U. S. 685, 29 L. ed. 1019, 6 Sup. Ct. Rep. 970—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 568, 42 L. ed. 1147, 18 Sup. Ct. Rep. 707—*American Diamond Rock Boring Co. v. Sheldon*, 17 Blatchf. 215, 4 Bann. & Ard. 557, Fed. Cas. No. 296—*Union Paper Bag Mach. Co. v. Pultz & W. Co.* 15 Blatchf. 167, 3 Bann. & Ard. 409, Fed. Cas. No. 14,392—*Holly v. Vergennes Mach. Co.* 18 Blatchf. 332, 4 Fed. 80—*New York Bung & Bushing Co. v. Hoffman*, 20 Blatchf. 6, 9 Fed. 201—*Steam Gauge & L. Mfg. Co. v. Ham Mfg. Co.* 28 Fed. 619—*Shaver v. Skinner Mfg. Co.* 30 Fed. 71—*Wright v. Yuengling*, 33 Fed. 656—*Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co.* 34 Fed. 138—*Harmon v. Struthers*, 43 Fed. 443—*Norton v. Jensen*, 1 C. C. A. 461, 7 U. S. App. 676, 49 Fed. 869—*Pacific Cable R. Co. v. Butte City Street R. Co.* 52 Fed. 864—*Holloway v. Dow*, 54 Fed. 517—*Sayre v. Scott*, 5 C. C. A. 369, 3 U. S. App. 643, 55 Fed. 974—*Jonathan Mills Mfg. Co. v. Whitehurst*, 56 Fed. 594—*Westinghouse v. New York Air-Brake Co.* 59 Fed. 598—*Edison Electric Light Co. v. Boston Incandescent Lamp Co.* 62 Fed. 399—*George Frost Co. v. Silvermann*, 62 Fed. 465—*Beach v. American Box Mach. Co.* 63 Fed. 606—*Devlin v. Paynter*, 12 C. C. A. 190, 28 U. S. App. 115, 64 Fed. 400—*Travers v. American Cordage Co.* 64 Fed. 774—*Thomson Meter Co. v. National Meter Co.* 12 C. C. A. 673, 28 U. S. App. 275, 65 Fed. 430—*Hoe v. Scott*, 65 Fed. 609—*Westinghouse v. Boyden Power-Brake Co.* 66 Fed. 1003—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 275, 37 U. S. App. 299, 69 Fed. 387—*Wilgus v. Germain*, 19 C. C. A. 192, 44 U. S. App. 369, 72 Fed. 777—*Engle Sanitary & Cremation Co. v. Elwood*, 73 Fed. 486—*Societe Anonyme v. Rehfuess*, 75 Fed. 680—*Tiemann v. Kraatz*, 29 C. C. A. 260, 58 U. S. App. 545, 85 Fed. 441—*Western Electric Co. v. Home Teleph. Co.* 85 Fed. 660—*Newton Mfg. Co. v. Wilgus*, 90 Fed. 485—*Bundy Mfg. Co. v. Detroit Time Register Co.* 36 C. C. A. 390, 94 Fed. 539—*Fruit-Cleaning Co. v. Fresno Home Packing Co.* 94 Fed. 863—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 562, 106 Ind. 711—*Brammer v. Schroeder*, 46 C. C. A. 44, 106 Fed. 921—*Singer Mfg. Co. v. Cramer*, 48 C. C. A. 591,

109 Fed. 655—Adams Co. v. Schreiber & C. Mfg. Co. 111 Fed. 189—Kinloch Teleph. Co. v. Western Electric Co. 51 C. C. A. 365, 113 Fed. 655—Cimlotti Unhairing Co. v. American Unhairing Mach. Co. 53 C. C. A. 237, 115 Fed. 505—Dowaglac Mfg. Co. v. Brennan, 118 Fed. 147—Brislin v. Carnegie Steel Co. 118 Fed. 598—Julius King Optical Co. v. Bilhoefer, 124 Fed. 530—Standard Computing Scale Co. v. Computing Scale Co. 61 C. C. A. 551, 126 Fed. 649—Lourie Implement Co. v. Lenhart, 64 C. C. A. 463, 130 Fed. 129—Letson v. Alaska Packers' Assn. 64 C. C. A. 477, 130 Fed. 143—Calculagraph Co. v. Wilson, 132 Fed. 29—Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co. 132 Fed. 616—Eck v. Kutz, 132 Fed. 766.

Mode of attachment.

See also *infra*, 995, 1055.

891. Where a patent is for the form of a rib in a cotton gin and the mode of its attachment, a rib of a substantially different form, or differently attached, or not fastened at all to the framework, is no infringement, although it produces the same result. *Carver v. Hyde*, 16 Pet. 513, 10: 1051
Cited in *Stimpson v. Baltimore & S. R. Co.* 10 How. 345, 13 L. ed. 448, 1 Whitman, Pat. Cas. 552—*Stimpson v. Woodman*, 10 Wall. 126, 19 L. ed. 870, 2 Whitman, Pat. Cas. 267—*Gould v. Rees*, 15 Wall. 194, 21 L. ed. 41—*Gill v. Wells*, 22 Wall. 28, 22 L. ed. 711—*Reedy v. Scott*, 23 Wall. 367, 23 L. ed. 111—*Hale v. Stimpson*, 2 Fisher, Pat. Cas. 570, Fed. Cas. No. 5,915.

Difference in form.

In Combinations, see *infra*, 980, 981.

892. Where form is of the essence of the invention, it is necessarily material; and if, in such case, the same object can be attained by a machine different in form, there is no infringement. *Werner v. King*, 96 U. S. 218, 24: 613
Cited in *McMurry v. Mallory*, 4 Hughes, 270, 5 Fed. 598.

893. Corrugated metal washboards, with channels for water to run off, being previously in use, a patent for such a board should cover only the form shown and described in the patent. *Duff v. Sterling Pump Co.* 107 U. S. 636, 2 Sup. Ct. Rep. 487, 27: 517
Explained in *Duff v. St. Louis Wooden-Ware Works*, 22 Fed. 341.

Cited in *Miller v. Eagle Mfg. Co.* 151 U. S. 208, 38 L. ed. 131, 14 Sup. Ct. Rep. 310—*Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 588—*Johnson Co. v. Tidewater Steel Works*, 50 Fed. 95—*Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co.* 14 C. C. A. 649, 33 U. S. App. 188, 67 Fed. 793—*Glina v. Mercereau Mfg. Co.* 69 Fed. 346—*Davis v. Parkman*, 18 C. C. A. 400, 33 U. S. App. 340, 71 Fed. 963—*McBride v. Kingman*, 72 Fed. 914—*De Beaumont v. Williams*, 26 C. C. A. 300, 39 U. S. App. 697, 80 Fed. 998—*Ryan v. Runyon*, 36 C. C. A. 37, 93 Fed. 971—*Stokes Bros. Mfg. Co. v. Heller*, 41 C. C. A. 338, 101 Fed. 269—*William Mann Co. v. Hoffmann*, 43 C. C. A. 523, 104 Fed. 254.

894. A patent for a sheet metal washboard with transverse and longitudinal grooves crossing each other is not infringed by one with diagonal grooves crossing to

form diamond-shaped projections. *Duff v. Sterling Pump Co.* 107 U. S. 636, 2 Sup. Ct. Rep. 487, 27: 517
Cited in *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 276, 32 L. ed. 720, 9 Sup. Ct. Rep. 299—*Knapp v. Morsa*, 150 U. S. 228, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Polsdorfer v. St. Louis Wooden-Ware Works*, 37 Fed. 58—*Schuetz v. Anderson*, 42 Fed. 158—*Strobridge v. L. H. Smith Wooden-Ware Co.* 46 Fed. 924—*Vincent v. Rigby*, 58 Fed. 373—*Ball & Socket Fastener Co. v. Ball Glove Fastening Co.* 7 C. C. A. 505, 5 U. S. App. 588, 58 Fed. 825.

895. A patent for a frame avowed to be for the support of a clothes-wringer, which exhibits no means of support except the semicircular bottom of the space between two uprights on which the journal of the wringer may rest, while the uprights serve to keep it in position, includes only that particular form of a frame, and is not infringed by a frame shaped like an inverted M, although that also has two uprights connected at the bottom. *Metropolitan Washing Mach. Co. v. Providence Tool Co.* 20 Wall. 342, 22: 303
Cited in *Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* 86 Fed. 322.

896. A patent for an improvement in the manufacture of blanks for carriage-thill shackles, by which a blank in the form of a cross is taken, and, by dies of proper shape, the arms are bent into an oblique direction, and the body into a curved form, so that the parts where the arms join the body are rounded on the outside as well as the inside; and so that, when subsequently the curved body is straightened, there will be in it sufficient metal to form sharp outside corners by being pushed out into them. is not infringed by the manufacture of blanks where the arms are not bent in an oblique direction, and the body is not curved, and the parts where the arms join the body are not rounded either on the outside or the inside, and, in afterwards straightening the body, surplus metal is not pushed towards or into the corners, but the existing corners before formed are forced further apart by driving surplus metal into the back between the corners. In the existing state of the art at the time of the patent it must be confined to a shape which, for practical use in subsequent manipulation, has a disposition of metal which causes a sharp corner to be formed in substantially the same way as by the blank described in the patent. *Clark v. Beecher Mfg. Co.* 115 U. S. 79, 5 Sup. Ct. Rep. 1190, 29: 352
Cited in *Johnson Co. v. Pacific Rolling Mills Co.* 47 Fed. 589—*Heine Safety Boller Co. v. Annheuser-Bush Brewing Assn.* 43 Fed. 790.

897. Spring fastenings in glove wrists having been previously in use, a patent for such an improvement, consisting of a spring which pulls constantly upon the parts of the material until they come together and overlap is not infringed by a spring fastening of a different form which acts in a different manner, and pulls the parts together only when partly closed, and which, when

open, has a tendency to remain open. *Field v. De Comeau*, 116 U. S. 187, 6 Sup. Ct. Rep. 363, 29: 596

Different arrangement.

898. Cup leathers having been previously in use in the central valves of the plungers of pumps, as well as a variable chamber to effect, by the gradual escape of water from it, the slow and gradual closing of a valve, a patent for a cup leather in a valve for water-closets, with an arrangement for leakage, consisting of a screw through the cap, with part of the screw filed away, can, if it involves a patentable invention at all, cover only that particular device, and is not infringed by an arrangement in which the leakage is effected by a groove in the periphery of a cylindrical plunger by which the valve is opened and closed. *Thompson v. Boisselier*, 114 U. S. 1, 5 Sup. Ct. Rep. 1042, 29: 76

899. A patent for an improvement in a faucet, consisting in the employment of a screw on the upper part of the valve stem, is not infringed by the use of a cam arranged at the lower extremity by the valve inside the faucet, where a similar arrangement had been in use before the patent, although then placed at the top of the stem on the outside of the faucet. *Zane v. Soffe*, 110 U. S. 200, 3 Sup. Ct. Rep. 562, 28: 119

900. A drip cup or drip box; a pipe to convey away drippings, in machinery, from a drip box arranged in connection with a cock; a drip cup applied to the valve of a water-closet, the leakage from the valve falling into a saucer, and thence finding its way, through a hole into the inside of the trunk; a valve on the floor at the foot of the trunk; a valve attached to the trunk and below its top; a valve above its top; a valve with a drip-pan conducting the drip into the soil pipe at the foot of the trunk, and a provision, by means of a hollow arm, to conduct the drip into the trunk,—being all old devices, a claim in a patent for an "improved water-closet," for a drip box "arranged upon the top of or over the trunk," and below and around the supply cock, must, if patentable at all, be limited to a drip box arranged above or on top of the closet; and it is not infringed by a drip box near the top. *Thompson v. Boisselier*, 114 U. S. 1, 5 Sup. Ct. Rep. 1042, 29: 76

901. A difference merely in form or in a rearrangement of the same elements of a combination, made by an invention which is functional, constitutes an infringement, even if it is an improvement. *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136
Cited in *Cushman Paper Box Mach. Co. v. Goddard*, 37 C. C. A. 226, 95 Fed. 669—*Cleveland Target Co. v. Empire Target Co.* 97 Fed. 73—*De Lamar v. De Lamar Mfg. Co.* 54 C. C. A. 273, 117 Fed. 241—*Dowagiac Mfg. Co. v. Brennan*, 118 Fed. 147.

902. The McCarty patent, 339,913, claims 3 and 4, for an improvement in car trucks, in which there is nothing new except the use

of guide plates to adapt a bolster to the purposes of a floating bolster by resting its ends on springs, is not infringed by the use of a bolster, which, instead of using the guide plates, has a cap on the ends of the bolster bar, with flanges thereon, accomplishing the same result as the plate, since it was not novel to rest the ends of the bolster upon springs, but the novelty consisted only in resting them thereon by means of a guide plate. *McCarty v. Lehigh Valley R. Co.* 160 U. S. 110, 16 Sup. Ct. Rep. 240, 40: 358

903. The Timken patent buggy springs having their heels attached at the sides of the wagonbed and crossing each other from one side to the other, with both flexible for the entire distance between the shacklebar and the first attaching bolt, are not infringed, even if the patent is valid, by springs attached at about the center of the wagonbed and which do not cross each other, and are flexible for less than half the length between the shackle end and the bolt. *Olin v. Timken*, 155 U. S. 141, 15 Sup. Ct. Rep. 49, 39: 100

904. A grating made up of short vertical slots, none of which run the entire height or even half the height of a spark-arrester, does not infringe a spark-arrester made of vertical bars with spaces between them for their whole length. *Lehigh Valley R. Co. v. Kearney*, 158 U. S. 461, 15 Sup. Ct. Rep. 871, 39: 1055

905. The Robert's reissued patent, 7,341, for an improvement in coal screens and chutes, one claim of which is for a portable machine including the use of the screens as an element, other claims including screens, while still another claim omits the screen but claims a false bottom or metal blank in lieu of the screen in a reservoir underneath the hopper,—is not infringed by a portable machine which has no screens and which has no reservoir beneath the hopper, but which merely drops the coal through the bottom of the hopper directly upon the chute which is provided with a gate. *Black Diamond Coal Min. Co. v. Excelsior Coal Co.* 156 U. S. 611, 15 Sup. Ct. Rep. 482, 39: 553

906. A patent for "an anti-friction guide, which is adjustable so as to accommodate different thicknesses of saw-blades, and to compensate for wear, in combination with the upper portion of a web saw-blade," which is actuated from below, and alternately pushed and pulled, does not cover the use of an endless band-saw passing over wheels, and running constantly in one direction towards the table on which the stuff lies, and having a tension over the peripheries of the wheels. *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. Rep. 236, 27: 979
Cited in *Brown v. Davis*, 116 U. S. 249, 29 L. ed. 663, 6 Sup. Ct. Rep. 379—*Crawford v. Heysinger*, 123 U. S. 607, 31 L. ed. 274, 8 Sup. Ct. Rep. 399—*Fornbrook v. Root*, 127 U. S. 181, 32 L. ed. 99, 8 Sup. Ct. Rep. 1247—*Hendy v. Golden State & Miner's Iron Works*,

127 U. S. 376, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—Hoe v. Kahler, 23 Blatchf. 380, 25 Fed. 281—Hoe v. Knap, 27 Fed. 208—Rodebaugh v. Jackson, 37 Fed. 885—Peoria Target Co. v. Cleveland Target Co. 47 Fed. 740.

907. Using a two-grooved wheel, adjustable laterally, so that a saw can run in either groove when desired, does not infringe a patent for a smooth-faced wheel so adjustable as to bring different parts of the surface in contact with the saw as desired, when wheels laterally adjustable were old, as also was the device of running a saw in a groove. Fay v. Cordesman, 109 U. S. 408, 3 Sup. Ct. Rep. 236, 27: 979

Cited in Electric Railroad Signal Co. v. Hall, Railway Signal Co. 114 U. S. 98, 29 L. ed. 99, 5 Sup. Ct. Rep. 1069—Watson v. Cincinnati, I. St. L. & C. R. Co. 132 U. S. 166, 33 L. ed. 297, 10 Sup. Ct. Rep. 45—Arnheim v. Finster, 24 Fed. 277—Hoe v. Kahler, 23 Blatchf. 380, 25 Fed. 271—Le Rue v. Western Electric Co. 28 Fed. 87—Wirt v. Brown, 32 Fed. 286—Thompson v. Gildersleeve, 34 Fed. 45—Dickinson v. Parker, 38 Fed. 412—United States Axle Lubricator Co. v. Wurster, 38 Fed. 430—National Progress Bunching Mach. Co. v. John R. Williams Co. 12 L. R. A. 110, 44 Fed. 194—Smith v. Putnam, 45 Fed. 203—Lewis v. Pennsylvania Steel Co. 8 C. C. A. 44, 17 U. S. App. 296, 59 Fed. 132—Dowagiac Mfg. Co. v. Brennan, 118 Fed. 147—Lane v. Levi, 21 App. D. C. 175.

c. Use of Equivalents.

Patentability of Substitution of Equivalents, see *supra*, 82, 83.

Infringement of Patent for Combinations by, see *infra*, 935-949.

908. The term "equivalent," when used with regard to the chemical action of such fluids as can be discovered only by experiment, means equally good. Tyler v. Boston, 7 Wall. 327, 19: 93
Cited in Matheson v. Campbell, 69 Fed. 603—Kennedy v. Solar Ref. Co. 69 Fed. 727—Stevens v. Seher, 11 App. D. C. 263.

909. The meaning of the term "known equivalent," in reference to a pioneer machine, is a known device used as a substitute and which effects the same result. Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. Rep. 299, 32: 715
Cited in Edison Electric Light Co. v. Boston Incandescent Lamp Co. 62 Fed. 399—Simplex Railway Appliance Co. v. Wanda, 53 C. C. A. 175, 115 Fed. 521.

910. A patentee is protected against equivalents for any part of his invention, whether he has claimed them or not. Good-year Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26: 149
Cited in Hunt Bros. Fruit Packing Co. v. Cassidy, 3 C. C. A. 529, 7 U. S. App. 424, 53 Fed. 261—McCormick Harvesting Mach. Co. v. C. Aultman & Co. 16 C. C. A. 282, 37 U. S. App. 299, 69 Fed. 394.

911. Where a lever, or its equivalent as a mechanical instrument, is made an essential element of a claim in a patent, the use of the human hand instead is not the use of an

equivalent. Brown v. Davis, 116 U. S. 237, 6 Sup. Ct. Rep. 379, 29: 659
Cited in Fond Du Lac County v. May, 137 U. S. 408, 34 L. ed. 719, 11 Sup. Ct. Rep. 98—United States Axle Lubricator Co. v. Wurster, 38 Fed. 430—Carter Mach. Co. v. Hanes, 70 Fed. 866.

912. Where a broken line is used, instead of a regular curve, for precisely the same purpose, one is the equivalent of the other. Ives v. Hamilton, 92 U. S. 426, 23: 494
Cited in Gage v. Herring, 107 U. S. 647, 27 L. ed. 604, 2 Sup. Ct. Rep. 819—Deering v. Winona Harvester Works, 155 U. S. 295, 39 L. ed. 157, 15 Sup. Ct. Rep. 118—Westinghouse v. Boyden Power Brake Co. 170 U. S. 568, 42 L. ed. 1147, 18 Sup. Ct. Rep. 707—Hamilton v. Rollins, 5 Dill. 497, Fed. Cas. No. 5,988—Thompson v. Gildersleeve, 34 Fed. 46—Rodebaugh v. Jackson, 37 Fed. 886—Consolidated Roller-Mill Co. v. Coomba, 39 Fed. 34—Reed v. Smith, 40 Fed. 886—Pacific Cable R. Co. v. Butte City Street R. Co. 52 Fed. 864—Pacific Cable R. Co. v. Butte City Street R. Co. 55 Fed. 763—Union Steam-Pump Co. v. Battle Creek Steam-Pump Co. 104 Fed. 342—Singer Mfg. Co. v. Cramer, 48 C. C. A. 591, 109 Fed. 655—Adams Co. v. Schreiber & C. Mfg. Co. 111 Fed. 185—Standard Computing Scale Co. v. Computing Scale Co. 61 C. C. A. 551, 126 Fed. 649—Letson v. Alaska Packers' Assn. 64 C. C. A. 477, 130 Fed. 143—Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co. 132 Fed. 616.

913. A patent for an improvement in a cultivator tooth, in which one of the elements in the combination is a curved brace bar on the back of the shank of the tooth, passing up through a slot or mortise in the beam, where it is clamped to hold the tooth in any desirable position, but so as to yield without breaking against any immovable obstacles; one purpose of which was to strengthen the shank between the tooth and beam, is not infringed by a curved shank passing from the tooth up through a slit in the rear of the beam, and bending forward to the point of fastening, and which is clamped by the sides of the beam so as to be held in position while passing through mellow soil, but not so tight that it will not yield to excessive resistance without breaking. The latter device is not an equivalent for the curved brace bar, as it has no tendency to strengthen the shank between the tooth and the beam, but must in fact be made larger in order to give it the requisite strength. Rowell v. Lindsay, 113 U. S. 97, 5 Sup. Ct. Rep. 507, 28: 906

914. The use of a chain, the links of which engage positively with the teeth of sprocket pulleys, is not an equivalent in mechanism or functions for a tight friction band and belt tightener. Hoffheins v. Russell, 107 U. S. 132, 1 Sup. Ct. Rep. 570, 27: 332
Cited in Campbell Printing-Press & Mfg. Co. v. Duplex Printing Press Co. 86 Fed. 323—Milwaukee Carving Co. v. Brunswick-Balke Colender Co. 61 C. C. A. 192, 126 Fed. 188.

915. A fluting machine in which the redundant fullness which makes the puff is produced by a pressure which is uniform over the surface of the fabric, the two plates of an arched guide giving it the exact form

required, and no other, whatever may be the elasticity or rigidity of the fabric, is not infringed by a machine in which the fabric passes over a flat, smooth surface, and, while thereon, a portion of it, in the center of the part to be crinkled, is seized by a finger and pulled as the material is dragged in between the rollers, so that enough of it is drawn in from the edges toward the center to create the redundancy necessary to the puff or crinkle, and which thus forms V-shaped waves or crinkles more or less irregular. The flat surface and finger, or dent, are not the mechanical equivalents of the double-plated segment of a cylinder. *Werner v. King*, 96 U. S. 218, 24: 613
Cited in Peard v. Johnson, 23 Fed. 509—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 200, 21 U. S. App. 244, 61 Fed. 964.

916. A patent for an improvement in swedge blocks or anvils for re-forming the ends of railroad rails, which consists of a movable press block having its edge formed to the sides of the rail to be mended, in combination with another block with its edge of a similar but reversed form, the movable block to be operated by two cams, or in any other convenient manner, for the purpose of pressing a rail between them,—is not infringed by a machine in which there is no movable block or jaw attached in any manner to the anvil, or connected in any manner with a fixed block or with the anvil, but which consists of two jaws sliding up and down in a V-shaped notch in an anvil, entirely unconnected with each other, and kept in place only by their own weight and that of the superincumbent rail. Bringing the jaws together by their gravity cannot be said to be an equivalent for cams or levers, or any other mechanical device. *Illinois C. R. Co. v. Turrill (Cawood Patent)*, 94 U. S. 695, 24: 238

917. Where a patent for a rotary blower includes the use of plaster-of-paris, or its equivalent, in making the interior true, the properties required being plasticity when the material is applied, and firmness and brittleness afterwards, the substitution of a compound of glycerin and litharge for the plaster-of-paris is the mere use of an equivalent; no chemical change takes place in either; and time alone is necessary to produce the desired hardness of the substance. *Hyndman v. Roots*, 97 U. S. 224, 24: 975

918. Celluloid is not an equivalent for hard rubber in a process for making dental plates by combining mineral or other artificial teeth with a rubber plate, and gums which are vulcanized after the insertion of the teeth,—celluloid not being capable of vulcanization, or of being made into a plate by the process described in the patent. *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 26: 149

919. A patent for a stuffed pad lined with crimped leather, with straps to fasten it to a horse collar, is not infringed by the use of crimped leather stiffened by a metal plate

as a substitute for the stuffed pad, where the use of a single piece of leather, but not stiffened by a pad or other device, has been common before the patent was granted. *Voss v. Fisher*, 113 U. S. 213, 5 Sup. Ct. Rep. 511, 28: 975

920. Three equidistant struts are not the equivalent of a perforated top plate in a stove although performing one of its functions in the support of a hot-air cylinder. *Sharp v. Riessner*, 119 U. S. 631, 7 Sup. Ct. Rep. 417, 30: 507

921. Where devices had been previously in use in agricultural implements for utilizing, by means of a brake, the motion of the carrying wheel through a crank, in raising operative parts of the machine from the ground; which devices were so alike in structure and so analogous in use to those claimed by the patentee of a gang plough as to require his claims to be limited to his specific devices,—a friction band could not be regarded as the same means for engaging and disengaging the carrying wheel and the axle as the brake used by the patentee. *Newton v. Furst & B. Mfg. Co.* 119 U. S. 373, 7 Sup. Ct. Rep. 369, 30: 442
Cited in Knapp v. Morss, 150 U. S. 228, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Hill v. Sawyer*, 31 Fed. 286—*Sackett v. Smith*, 42 Fed. 853.

922. The temporary use of a trowel or cutting instrument to divide the upper course of a pavement into blocks is the equivalent of the tar paper of the Schillinger patent, and infringes the second claim thereof. *Hurlbut v. Schillinger*, 130 U. S. 456, 9 Sup. Ct. Rep. 584, 32: 1011

923. A mechanism in a fruit dryer by which each tray can be lifted independently, and is supported independently, so that the weight of the series of trays need not rest entirely upon the lowermost one, is not the equivalent of that consisting of a crane with suspended ropes attached to the lowermost tray, which in being raised necessarily carries on it the weight of all the trays above it. *Grier v. Wilt*, 120 U. S. 412, 7 Sup. Ct. Rep. 718, 30: 712

924. An independent train of mechanism to operate a sliding bar by the depression of the keys in a cash register, although quite different in detail, is an equivalent for such a train of mechanism in the Ritty and Birch patent, 271,363, to operate a pivoted wing, both wing and sliding bar being well known methods of accomplishing the same result, but the operation thereof by such independent mechanism set in motion by the action of the keys being original in such patent. *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.* 156 U. S. 502, 15 Sup. Ct. Rep. 434, 39: 511

Performing same service in same way.

925. It is not only necessary to an infringement that the arrangement which infringes should perform the same service or produce the same effect, but it must be done

in substantially the same way. *Werner v. King*, 96 U. S. 218, 24: 613
Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26: 149
Burr v. Duryee, 1 Wall. 531, 17: 650
Cited in Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co. 110 U. S. 495, 28 L. ed. 224, 4 Sup. Ct. Rep. 220—*Norton v. Wheaton*, 97 Fed. 641—*Noonan v. Chester Park Athletic Club Co.* 39 C. C. A. 430, 99 Fed. 94—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 558, 106 Fed. 707—*Brammer v. Schroeder*, 46 C. C. A. 40, 106 Fed. 926—*Severy Process Co. v. Harper*, 113 Fed. 584—*Kinloch Teleph. Co. v. Western Electric Co.* 51 C. C. A. 365, 113 Fed. 655—*Kinloch Teleph. Co. v. Western Electric Co.* 51 C. C. A. 376, 113 Fed. 666—*Farmers' Mfg. Co. v. Spruks Mfg. Co.* 119 Fed. 599—*National Meter Co. v. Neptune Meter Co.* 122 Fed. 85—*Standard Computing Scale Co. v. Computing Scale Co.* 61 C. C. A. 551, 128 Fed. 640—*Fay v. Mason*, 62 C. C. A. 164, 127 Fed. 330—*Lourie Implement Co. v. Lenhart*, 64 C. C. A. 463, 130 Fed. 129—*Cook v. Heywood Bros. & W. Co.* 131 Fed. 762—*C. & A. Potts & Co. v. Creager*, 155 U. S. 609, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—*Re Weston*, 17 App. D. C. 440.

926, The substitution of a spiral for a flat spring which performs the same office and attains the same result in the same way will not avoid infringement. *United States v. Berdan Firearms Mfg. Co.* 156 U. S. 552, 15 Sup. Ct. Rep. 420, 39: 530
Cited in Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. 86 Fed. 323.

Interchangeability.

927-9. The interchangeability or noninterchangeability of the devices of two patents is an important test in determining the question of infringement. *Miller v. Eagle Mfg. Co.* 151 U. S. 186, 14 Sup. Ct. Rep. 310, 38: 121

Cited in McBride v. Kingman, 72 Fed. 918—*Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* 86 Fed. 322—*Norton v. Wheaton*, 97 Fed. 644—*Pittsburg Meter Co. v. Pittsburg Supply Co.* 48 C. C. A. 587, 109 Fed. 651—*American Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co.* 123 Fed. 896—*Fay v. Mason*, 62 C. C. A. 167, 127 Fed. 333.

Improvements.

See also *supra*, 913.

930. One who has discovered that a certain material answers a required purpose cannot thereby shut out further efforts to discover in other materials in the same class a better specimen than the patentee employed. *Re Incandescent Lamp Patent*, 159 U. S. 465, 16 Sup. Ct. Rep. 75, 40: 221
Cited in Atlantic Dynamite Co. v. Climax Powder Mfg. Co. 72 Fed. 935—*American Sulphite Pulp Co. v. Howland Falls Pulp Co.* 25 C. C. A. 513, 50 U. S. App. 52, 80 Fed. 409—*Electric Smelting & Aluminum Co. v. Pittsburgh Reduction Co.* 111 Fed. 758.

931. If an invention claimed be itself but an improvement on a known machine, by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or com-

bination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first. *McCormick v. Talcott*, 20 How. 402, 15: 930

Cited in Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 273, 32 L. ed. 719, 9 Sup. Ct. Rep. 290—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 576, 42 L. ed. 1150, 18 Sup. Ct. Rep. 707—*Flint v. Roberts*, 4 Bann. & Ard. 168, Fed. Cas. No. 4,875—*Forbes v. Barstow Stove Co.* 2 Cliff. 391, Fed. Cas. No. 4,923—*Myers v. Duker*, 1 Bann. & Ard. 536, Fed. Cas. No. 9,989—*Sayles v. Chicago & N. W. R. Co.* 3 Blas. 57, 4 Fisher, Pat. Cas. 589, Fed. Cas. No. 12,415—*Steam Gauge & Lantern Co. v. Miller*, 21 Fed. 518—*Morley Sewing Mach. Co. v. Lancaster*, 23 Fed. 345—*Butz Thermo-Electric Regulator Co. v. Jacobs Electric Co.* 36 Fed. 195—*Norton v. Jensen*, 1 C. C. A. 455, 7 U. S. App. 676, 49 Fed. 863—*Ellbert v. St. Paul Gaslight Co.* 50 Fed. 212—*Dederick v. Selgmund*, 2 C. C. A. 171, 1 U. S. App. 222, 51 Fed. 235—*Brush Electric Co. v. Electric Improv. Co.* 52 Fed. 974—*Norton v. Wheaton*, 57 Fed. 927—*Lamson Cash R. Co. v. Godehard*, 8 C. C. A. 268, 19 U. S. App. 360, 59 Fed. 779—*Westinghouse v. Boyden Power-Brake Co.* 66 Fed. 1003—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 275, 37 U. S. App. 299, 69 Fed. 387—*Craig v. Michigan Lubricator Co.* 72 Fed. 177—*P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co.* 22 C. C. A. 60, 40 U. S. App. 200, 76 Fed. 972—*Adams Electric R. Co. v. Lindell R. Co.* 23 C. C. A. 231, 40 U. S. App. 482, 77 Fed. 440—*Von Schmidt v. Bowers*, 25 C. C. A. 349, 48 U. S. App. 120, 80 Fed. 148—*Norton v. Jensen*, 81 Fed. 497—*St. Louis Car-Coupler Co. v. National Malleable Castings Co.* 31 C. C. A. 280, 57 U. S. App. 310, 87 Fed. 900—*Norton v. Jensen*, 33 C. C. A. 149, 61 U. S. App. 291, 90 Fed. 423—*Bowers v. San Francisco Bridge Co.* 91 Fed. 417—*Overweight Counterbalance Elevator Co. v. Improved Order, R. M. H. Asso.* 36 C. C. A. 129, 94 Fed. 159—*Bowers v. Pacific Coast Dredging & Reclamation Co.* 99 Fed. 748—*Coddington v. Proppe*, 105 Fed. 953—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 561, 106 Fed. 710—*Brammer v. Schroeder*, 46 C. C. A. 43, 106 Fed. 920—*Wilson v. Townley Shingle Co.* 60 C. C. A. 331, 125 Fed. 495—*Milwaukee Carving Co. v. Brunswick-Balke Collender Co.* 61 C. C. A. 189, 126 Fed. 185—*Cook v. Heywood Bros. & W. Co.* 131 Fed. 762—*Raymond v. Keystone Lantern Co.* 67 C. C. A. 494, 134 Fed. 868—*Jackson v. Allen*, 120 Mass. 75.

d. Combinations.

Invention in combinations, see *supra*, V. b. 6.
 Anticipation of, see *supra*, 312-314.

Claim for, see *supra*, 477.

Claim for Part of, see *supra*, 474.

Restrictive Effect of Claim for, see *supra*, 515, 527-539.

Change of Claim in Reissue for, see *supra*, 631-636.

Sale of Different Parts as Infringement, see *supra*, 881, 882.

Identity of Devices, see *supra*, 889.

Different Arrangement of Devices, see *supra*, 901, 902.

Defense in Action for Infringement of, see *infra*, 1131.

Correctness of Instruction as to, see *Trial*, 603.

See also *infra*, 1023, 1033, 1034.

931a. Letters patent for an invention consisting of a certain combination of devices to produce a certain effect, both the operation and result of which were well known, is not infringed by any other combination of devices to perform the operation, which are not a mere colorable adoption of the patentee's combination. *Burr v. Duryee*, 1 Wall. 579, 17: 660

Use of single element.

932. Where a patent is for a combination only, none of the separate elements of which the combination is composed are included in the monopoly of the patent. *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. Rep. 507, 28: 906

Cited in *United Blue-Flame Oil Stove Co. v. Glasier*, 55 C. C. A. 559, 119 Fed. 163.

933. The rule that the manufacture and sale of a single element of a combination, with intent that it shall be united to the other elements and so complete the combination, is an infringement, has no application to a case where the element made by the alleged infringer is an unpatentable article of manufacture perishable in its nature—such as toilet paper—which is the object of the mechanism to deliver and which must be renewed periodically whenever the device is put to use. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 14 Sup. Ct. Rep. 627, 38: 500

Cited in *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 65 Fed. 621—*St. Louis Car-Coupler Co. v. Shickle, H. & H. Iron Co.* 70 Fed. 786—*Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.* 72 Fed. 1013—*Thomson-Houston Electric Co. v. Ohio Brass Co.* 26 C. C. A. 116, 54 U. S. App. 1, 80 Fed. 721—*American Tobacco Co. v. Streat*, 28 C. C. A. 23, 42 U. S. App. 617, 83 Fed. 705—*Goodyear Shoe Machinery Co. v. Jackson*, 55 L.R.A. 694, 50 C. C. A. 163, 112 Fed. 149.

Use of invalid part.

934. Where no part of a patent which is valid has been used by defendants, the valid and invalid parts cannot be considered as a unit so as to make them infringers. *Jones v. Morehead*, 1 Wall. 155, 17: 662

Cited in *Union Paper Collar Co. v. Van Dusen*, 23 Wall. 563, 23 L. ed. 133—*Dunbar v. Myers*, 94 U. S. 198, 24 L. ed. 38—*Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.* 110 U. S. 494, 28 L. ed. 223, 4 Sup. Ct. Rep. 220—*Alcott v. Young*, 16 Blatchf. 138, 4 Bann. & Ard. 202, Fed. Cas. No. 149—*Milligan & H. Glue Co. v. Upton*, 4 Cliff. 251, 1 Bann. & Ard. 512, Fed. Cas. No. 9,607—*Union Gas-Engine Co. v. Doak*, 88 Fed. 90.

Equivalents.

See also *supra*, 931; *infra*, 956, 981.

935. Combinations are not identical because intended to obtain the same result,

unless the devices or mechanical means by which the desired result is secured are the same. *Hubbell v. United States*, 179 U. S. 77, 86, 21 Sup. Ct. Rep. 24, 28, 45: 95, 100

Cited in *Lane v. Levi*, 21 App. D. C. 175.

936. A combination of devices in a machine is not necessarily an equivalent for any other combination used for the same purpose and producing the same effect. *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136

Cited in *Beach v. Hobbs*, 34 C. C. A. 253, 63 U. S. App. 626, 92 Fed. 150—*Mayo Knitting Mach. & Needle Co. v. Jenckes Mfg. Co.* 121 Fed. 115.

937. Where one patented combination is asserted to be an infringement of another, a device in one, to be the equivalent of a device in the other, must perform the same functions. *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. Rep. 507, 28: 906

Cited in *Peard v. Johnson*, 23 Fed. 509—*H. W. Johns Mfg. Co. v. Robertson*, 23 C. C. A. 603, 45 U. S. App. 296, 77 Fed. 987—*Dowaglac Mfg. Co. v. Brennan*, 118 Fed. 151—*Alaska Packers' Asso. v. Letson*, 119 Fed. 599.

938. A combination may be infringed when some of the elements are employed, and for the others mechanical equivalents are used which were known to be such at the time when the patent was granted. *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. Rep. 507, 28: 906

Cited in *La Rue v. Western Electric Co.* 28 Fed. 90.

939. The extent to which either the inventor of a device, or of an entire machine, or of a mere combination, can invoke the aid of the doctrine of equivalents, is the same, except that a combination is not infringed unless by a machine containing all the material ingredients patented, or proper substitutes therefor. *Scymour v. Osborne*, 11 Wall. 516, 20: 33

Cited in *Hopkins & D. Mfg. Co. v. Corbin*, 14 Blatchf. 401, 3 Bann. & Ard. 203, Fed. Cas. No. 6,695—*King v. Louisville Cement Co.* 6 Fisher, Pat. Cas. 342, Fed. Cas. No. 7,798—*Odorless Excavating Apparatus Co. v. McCauley*, 2 Bann. & Ard. 572, Fed. Cas. No. 10,436—*Rowell v. Lindsay*, 10 Biss. 224, 6 Fed. 296—*Dederick v. Cassell*, 9 Fed. 308—*Tatum v. Gregory*, 41 Fed. 144—*Norton v. Jensen*, 1 C. C. A. 461, 7 U. S. App. 676, 49 Fed. 869—*Edison Electric Light Co. v. Waring Electric Co.* 59 Fed. 362—*Brammer v. Schroeder*, 46 C. C. A. 44, 106 Fed. 921—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 562, 106 Fed. 711—*Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co.* 12 App. D. C. 220—*Dedrick v. Cassell*, 14 Phila. 505.

940. The law requires the patentee to specify particularly what he claims to be new; and if he claims a combination of certain elements or parts, this court cannot declare that any one of these elements is immaterial. If one is omitted, the only question remaining is whether or not it has been supplied by an equivalent device or instrumen-

talities. Union Water-Meter Co. v. Desper, 101 U. S. 332, 25: 1024
 Sage v. Herring, 107 U. S. 640, 2 Sup. Ct. Rep. 819, 27: 601
 Sargent v. Hall Safe & Lock Co. 114 U. S. 63, 5 Sup. Ct. Rep. 1021, 29: 67
Noted in Fay v. Cordesman, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 236—Sargent v. Hall Safe & Lock Co. 114 U. S. 86, 29 L. ed. 76, 5 Sup. Ct. Rep. 1021—Electric Railroad Signal Co. v. Hall Railway Signal Co. 114 U. S. 98, 29 L. ed. 90, 5 Sup. Ct. Rep. 1069—Brown v. Davis, 116 U. S. 249, 29 L. ed. 663, 6 Sup. Ct. Rep. 379—Yale Lock Mfg. Co. v. Sargent, 117 U. S. 378, 29 L. ed. 952, 6 Sup. Ct. Rep. 981—Wright v. Yuengling, 155 U. S. 52, 39 L. ed. 66, 15 Sup. Ct. Rep. 1—Hubbell v. United States, 179 U. S. 84, 45 L. ed. 99, 21 Sup. Ct. Rep. 24—Williams v. Stolzenbach, 23 Fed. 41—Lapham Dodge Co. v. Severin, 40 Fed. 764—Huber v. N. O. Nelson Mfg. Co. 38 Fed. 839—Page Woven Wire Fence Co. v. Land, 49 Fed. 941—Kinzel v. Luttrell Brick Co. 15 C. C. A. 83, 31 U. S. App. 652, 67 Fed. 927—Muller v. Lodge & D. Mach. Tool Co. 23 C. C. A. 366, 47 U. S. App. 189, 77 Fed. 629—Griffith v. Shaw, 89 Fed. 318—Norton v. Jensen, 33 C. C. A. 149, 61 U. S. App. 291, 90 Fed. 422—Norton v. Wheaton, 97 Fed. 643—Mesick v. Moore, 100 Fed. 846—National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co. 45 C. C. A. 562, 106 Fed. 711—Brammer v. Schroeder, 46 C. C. A. 44, 106 Fed. 921—United Blue-Flame Oil Stove Co. v. Glazier, 55 C. C. A. 560, 119 Fed. 164—Levy v. Harris, 124 Fed. 71—Lane v. Levi, 21 App. D. C. 176.

941. The first person who applied a valve regulation of any kind to a combination of a gas burner with tubes, etc., is entitled to hold as infringements all valve regulations applied to such a combination, which perform the same office in substantially the same way, and were known equivalents for his form of valve regulation. *Clough v. Gilbert & B. Mfg. Co. (Clough v. Barker)* 106 U. S. 166, 1 Sup. Ct. Rep. 188, 27: 134
Noted in Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 275, 32 L. ed. 719, 9 Sup. Ct. Rep. 299—Morley Sewing Mach. Co. v. Lancaster, 23 Fed. 346—Thompson v. Gildersleeve, 34 Fed. 46—Butz Thermo-Electric Regulator Co. v. Jacobs Electric Co. 36 Fed. 106—Edison Electric Light Co. v. Boston Incandescent Lamp Co. 62 Fed. 399—S. F. Heath Cycle Co. v. Hay, 67 Fed. 249—McCormick Harvesting Mach. Co. v. C. Aultman & Co. 16 C. C. A. 275, 37 U. S. App. 299, 69 Fed. 387—Consolidated Fastener Co. v. Columbian Fastener Co. 79 Fed. 797—Von Schmidt v. Bowers, 25 C. C. A. 348, 48 U. S. App. 120, 80 Fed. 147—Bowers v. San Francisco Bridge Co. 91 Fed. 417—Tannage Patent Co. v. Donallan, 93 Fed. 822—Bowers v. Pacific Coast Dredging & Reclamation Co. 99 Fed. 748—Powell v. Leicester Mills Co. 103 Fed. 487—Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 93, 108 Fed. 866—Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. 55 C. C. A. 91, 118 Fed. 141—Cleveland Foundry Co. v. Kauffman, 68 C. C. A. 660, 135 Fed. 362—Rosell v. Allen, 16 App. D. C. 567.

942. Where one was the first inventor of an automatic button-sewing machine, and received a patent therefor, another machine is an infringement in which the sets of mechanisms of the prior machine are combined, provided each mechanism, individually consid-

ered, is a proper equivalent for the corresponding mechanism in the prior machine; and it makes no difference that the infringing machine is more simple and the mechanism is different in mechanical construction, so long as it performs the same function as the prior machine and in substantially the same way, and produces the same result. *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299, 32: 715
Noted in Morley Sewing-Mach. Co. v. Shute, 41 Fed. 52—Harmon v. Struthers, 43 Fed. 444—Celluloid Mfg. Co. v. Arlington Mfg. Co. 44 Fed. 85—Smith & E. Mfg. Co. v. Bridgeport Chain Co. 46 Fed. 395—American Automaton Weighing Mach. Co. v. Blauvelt, 50 Fed. 214—Harmon v. Struthers, 57 Fed. 639—International Postal Supply Co. v. Groth, 57 Fed. 659—Ames & F. Co. v. Woven Wire Mach. Co. 59 Fed. 707—Westinghouse v. New York Air-Brake Co. 59 Fed. 593—Westinghouse Air-Brake Co. v. New York Air-Brake Co. 11 C. C. A. 536, 28 U. S. App. 248, 63 Fed. 969—Shute v. Morley Sewing Mach. Co. 12 C. C. A. 357, 21 U. S. App. 526, 64 Fed. 368—McCormick Harvesting Mach. Co. v. C. Aultman & Co. 16 C. C. A. 275, 37 U. S. App. 299, 69 Fed. 391—Dunbar & Eastern Elevating Co. 75 Fed. 572—Beach v. Hobbs, 82 Fed. 924—Bowers v. San Francisco Bridge Co. 91 Fed. 413.

943. A patent for a lock which combines with the ordinary combination wheels and the other working parts of a combination lock, which has no sliding lock bolt, a bolt turning on a pivot or bearing, which is so isolated or removed from contact with the combination wheels as to receive any pressure or strain applied through the separate bolt work of the safe or vault door, and cut off the communication between the bolt work of the door and the wheels or fence lever of the lock, is infringed by a lock without a sliding bolt, but which has a bolt which turns on a pivot preventing and permitting the retraction of the bolt work of the door, although the bearing of the turning bolt is on the stud which the wheels turn, where the claim of the patent does not require that the bearing of the rotating bolt should be distinct from the bearing of the wheels, and although the end of the lever is pivoted directly to the turning bolt while in the patented device, the fence lever is connected with the turning bolt by a rack on the end of the lever engaging with cog teeth on the bolt. *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 6 Sup. Ct. Rep. 934, 29: 954

944. The Horton patented machine for applying stays to box corners is an infringement of the Beach reissued patent No. 11, 167, as it accomplishes the same result by the employment of the same combination of the same elements, though it introduces the strip to be pasted on the corner of the box by a back feed on a line parallel to the line of the box corner, instead of by a side feed as in the Beach machine, and contains no mechanism for turning the strip into the inside of the corner, as does the Beach machine. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. Rep. 409, 45: 586

945. A patent for a combination in hydro-

carbon stoves, which includes a perforated top plate to a water vessel, for the passage of air through the perforations; is not infringed by an arrangement which does not have such a perforated top plate or any equivalent for it. *Sharp v. Riessner*, 119 U. S. 631, 7 Sup. Ct. Rep. 417, 30: 507
Otited in Hill v. Sawyer, 31 Fed. 284—*Smith v. Thomson*, 38 Fed. 607—*Lamson Cash R. Co. v. Godehard*, 8 C. C. A. 269, 19 U. S. App. 360, 59 Fed. 780—*Henry Huber Co. v. J. L. Mott Iron Works*, 118 Fed. 604.

946. In the Martin patent, 190,152, for casters, the words "rocker-formed collar-bearing, or its mechanical equivalent," describing one element of the combination, must be restricted, in view of the state of the art, to such a bearing resting on a collar beneath the flour-wheel housing as is shown in the specifications; and the patent is not infringed by the Yale caster, which has no equivalent for such "rocker-formed collar-bearing," and no opening in the housing from top to bottom, such as appears in the Martin patent. *Phoenix Caster Co. v. Spiegel*, 133 U. S. 360, 10 Sup. Ct. Rep. 409, 33: 663
Otited in Ginna v. Mersereau Mfg. Co. 69 Fed. 346.

947. A blank for honey-frames, formed of a single piece of wood, having transverse angular grooves, a longitudinal groove, and recesses, is not infringed by a blank not containing the longitudinal groove or any substitute or equivalent for it. *Forncrook v. Root*, 127 U. S. 176, 8 Sup. Ct. Rep. 1247, 32: 97
Otited in Perkins v. Eaton, 40 Fed. 674.

948. The Gray patent, 222,895, for an improvement in roller mills, consisting of a combination of a movable roller bearing, a rod connecting the two bearings of the rollers, an adjustable stop device to limit the inward movement, an outside spring with means of adjusting it, and a stop and holding device at the opposite end of the rod from the spring,—does not cover broadly the devices for roller adjustment and is not infringed by a machine which has no rod connecting the two bearings, nor any equivalent therefor, but in lieu of it an upright rod encircled by a spiral spring at each end of the roller, with a nut operating such spring pressing upon a horizontal arm of the bearing through which the rod passes, so that by screwing down the nut the adjustable roller is separated from the other, and forced back by the spring when the nut is loosened, while the stop and spreading device is not connected at all with the rod, but is located at the bottom of a swinging bearing operated by a lever applied to an eccentric shaft. *Consolidated Rolling Mill Co. v. Barnard & L. Mfg. Co.* (The Roller Mill Patent) 156 U. S. 261, 15 Sup. Ct. Rep. 333, 39: 417
Otited in Carter Mach. Co. v. Hanes, 70 Fed. 867—*Engle Sanitary & Cremation Co. v. Elwood*, 73 Fed. 486.

949. A machine which has no mechanical equivalent of the stationary toothed-card

above the stretcher bar, which is made an essential part of the mechanism described by the combination claim of the Sutton patent, No. 383,258, for an improvement upon machines for plucking furs, does not infringe such claim. *Cimioti Unhairing Co. v. American Fur Ref. Co.* 198 U. S. 399, 25 Sup. Ct. Rep. 697, 49: 1100
Otited in Computing Scale Co. v. Automatic Scale Co. 204 U. S. 621, 51 L. ed. 652, 27 Sup. Ct. Rep. 307—*General Electric Co. v. Garrett Coal Co.* 141 Fed. 125—*Bibb Mfg. Co. v. Bowers*, 78 C. C. A. 359, 142 Fed. 141—*International Time Recording Co. v. Dey*, 74 C. C. A. 75, 142 Fed. 743—*Columbus Chain Co. v. Standard Chain Co.* 78 C. C. A. 397, 148 Fed. 625.

Adding new element.

Right to Broaden Claim by Dropping New Element Added, see *supra*, 529.

950. Adding another element to a patented combination, making a new combination which performs a work which the patented combination could not, is not infringement. *United States v. Berdan Firearms Mfg. Co.* 156 U. S. 552, 15 Sup. Ct. Rep. 420, 39: 530

Otited in Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. 86 Fed. 388—*Davey Pegging Mach. Co. v. Prouty*, 46 C. C. A. 444, 107 Fed. 510.

Substitution of ingredient.

See also *infra*, 958, 984, 1059.

950a. A party who merely substitutes another old ingredient for one of the ingredients of a patented combination is an infringer, if the substitute performs the same function as the ingredient for which it was substituted, and was well known at the date of the patent as a proper substitute for the omitted ingredient. *Gill v. Wells*, 22 Wall. 1, 22: 699

United Water-Meter Co. v. Desper, 101 U. S. 332, 25: 1024
Wicke v. Ostrum, 103 U. S. 461, 26: 409
Imhauser v. Buerk, 101 U. S. 647, 26: 946
Otited in Imhaeuser v. Buerk, 101 U. S. 656, 25 L. ed. 946—*Odorless Excavating Apparatus Co. v. McCauley* 2 Bann. & Ard. 572, Fed. Cas. No. 10,436—*Swain Turbine & Mfg. Co. v. Ladd*, 2 Bann. & Ard. 492, Fed. Cas. No. 13,662—*Brett v. Quintard*, 20 Blatchf. 321, 10 Fed. 742—*Railway Register Mfg. Co. v. Broadway & S. Ave. R. Co.* 26 Fed. 527—*Leary v. Hohenstein*, 37 Fed. 681—*Winchester Repeating Arms Co. v. American Buckle & Cartridge Co.* 58 Fed. 311—*Pacific Cable R. Co. v. Butte City Street R. Co.* 58 Fed. 421—*Holliday v. Schulze-Berge*, 78 Fed. 406—*Norton v. Jensen*, 81 Fed. 499—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 986—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 562, 106 Fed. 711—*Brammer v. Schroeder*, 46 C. C. A. 44, 106 Fed. 921—*Dowagiac Mfg. Co. v. Smith*, 108 Fed. 70—*American Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co.* 123 Fed. 896—*Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co.* 12 App. D. C. 220—*Dedrick v. Cassell*, 14 Phila. 504.

950b. If the ingredient substituted was new, or performed substantially a different function, or was not known at the date of

the plaintiff's patent as a proper substitute for the one omitted, he does not infringe
Gill v. Wells, 22 Wall. 1, 22: 699
Cited in Reedy v. Scott, 23 Wall. 367, 23 L. ed. 111—*Dunbar v. Myers*, 94 U. S. 202, 24 L. ed. 40—*Cochrane v. Deener*, 94 U. S. 702, 24 L. ed. 143—*Electric Railroad Signal Co. v. Hall Railway Signal Co.* 114 U. S. 98, 29 L. ed. 99, 5 Sup. Ct. Rep. 1069—*Burdett v. Estey*, 16 Blatchf. 109, 4 Bann. & Ard. 145, Fed. Cas. No. 2,146—*Storrs v. Howe*, 2 Bann. & Ard. 421, Fed. Cas. No. 13,495—*Rowell v. Lindsay*, 10 Biss. 225, 6 Fed. 297—*Dederick v. Cassell*, 9 Fed. 308—*Travers v. Palmer*, 23 Fed. 512—*Gerard v. Diebold Safe & Lock Co.* 48 Fed. 381.

Omission of element or ingredient.

Patentability of Omission, see *supra*, 132, 133.

Misleading Instruction as to, see *Trial*, 596.

See also *supra*, 534, 940.

951. A patent for a combination of several elements is not infringed by using less than all of them. *Stimpson v. Baltimore & S. R. Co.* 10 How. 329, 13: 441
Prouty v. Ruggles, 16 Pet. 336, 10: 985
Vance v. Campbell, 1 Black, 427, 17: 168
Case v. Brown, 2 Wall. 320, 17: 817
Garratt v. Seibert, 131 U. S. cxv. Appx. and 21: 956

Hailes v. Van Wormer, 20 Wall. 353, 22: 241

Dunbar v. Meyers, 94 U. S. 187, 24: 34

Fuller v. Yentzer, 94 U. S. 288, 24: 103

Schumacher v. Cornell, 96 U. S. 549, 24: 676

Union Water-Meter Co. v. Desper, 101 U. S. 332, 25: 1024

Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. Rep. 819, 27: 601

Slawson v. Grand Street P. P. & F. R. Co. 107 U. S. 649, 2 Sup. Ct. Rep. 663, 27: 576

Fay v. Cordesman, 109 U. S. 408, 3 Sup. Ct. Rep. 236, 27: 979

Merrill v. Yeomans, 94 U. S. 568, 24: 235

Voss v. Fisher, 113 U. S. 213, 5 Sup. Ct. Rep. 511, 28: 975

Cited in Stimpson v. Baltimore & S. R. Co. 10 How. 345, 13 L. ed. 448, 1 Whitman, Pat. Cas. 552—*Eames v. Godfrey*, 1 Wall. 79, 17 L. ed. 547—*Stimpson v. Woodman*, 10 Wall. 126, 19 L. ed. 870—*Seymour v. Osborne*, 11 Wall. 556, 20 L. ed. 43—*Gould v. Rees*, 15 Wall. 194, 21 L. ed. 41—*Gill v. Wells*, 22 Wall. 25, 22 L. ed. 710—*Brown v. Guild*, 23 Wall. 245, 23 L. ed. 177—*Reedy v. Scott*, 23 Wall. 367, 23 L. ed. 111—*Cochrane v. Deener*, 94 U. S. 702, 24 L. ed. 143—*Dunbar v. Myers*, 94 U. S. 202, 24 L. ed. 40—*Fuller v. Yentzer*, 94 U. S. 297, 24 L. ed. 106—*Schumacher v. Cornell*, 96 U. S. 554, 24 L. ed. 678—*Gage v. Herring*, 107 U. S. 644, 27 L. ed. 608, 2 Sup. Ct. Rep. 819—*King v. Gallun*, 109 U. S. 102, 27 L. ed. 871, 3 Sup. Ct. Rep. 85—*McMurray v. Mallory*, 111 U. S. 103, 28 L. ed. 366, 4 Sup. Ct. Rep. 375—*Phillips v. Detroit*, 111 U. S. 608, 28 L. ed. 534, 4 Sup. Ct. Rep. 580—*Rowell v. Lindsay*, 113 U. S. 102, 28 L. ed. 907, 5 Sup. Ct. Rep. 507—*Voss v. Fisher*, 113 U. S. 215, 28 L. ed. 975, 5 Sup. Ct. Rep. 511—*Blake v. San Francisco*, 113 U. S. 681, 28 L. ed. 1071, 5 Sup. Ct. Rep. 692—*Thompson v. Bolsseller*, 114 U. S. 12, 29 L. ed. 80, 5 Sup. Ct. Rep. 1042—*Stephen-*

son v. Brooklyn C. T. R. Co. 114 U. S. 156, 29 L. ed. 61, 5 Sup. Ct. Rep. 777—*Electric Railroad Signal Co. v. Hall Railway Signal Co.* 114 U. S. 98, 29 L. ed. 99, 5 Sup. Ct. Rep. 1069—*Brown v. Davis*, 116 U. S. 249, 29 L. ed. 663, 6 Sup. Ct. Rep. 379—*Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 378, 29 L. ed. 952, 6 Sup. Ct. Rep. 931—*Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 559, 29 L. ed. 953, 6 Sup. Ct. Rep. 846—*Pomace Holder Co. v. Ferguson* (Clark Pomace Holder Co. v. Ferguson) 119 U. S. 338, 30 L. ed. 408, 7 Sup. Ct. Rep. 332—*Cornell v. Weldner*, 127 U. S. 263, 32 L. ed. 150, 8 Sup. Ct. Rep. 1152—*Burt v. Evory*, 133 U. S. 358, 33 L. ed. 651, 10 Sup. Ct. Rep. 394—*McClain v. Ort-mayer*, 141 U. S. 425, 35 L. ed. 802, 12 Sup. Ct. Rep. 76—*Topliff v. Topliff*, 145 U. S. 163, 36 L. ed. 661, 12 Sup. Ct. Rep. 825—*Huber v. N. O. Nelson Mfg. Co.* 148 U. S. 291, 37 L. ed. 454, 13 Sup. Ct. Rep. 603—*Miller v. Eagle Mfg. Co.* 151 U. S. 208, 38 L. ed. 131, 14 Sup. Ct. Rep. 310—*Wright v. Yuengling*, 155 U. S. 52, 39 L. ed. 66, 15 Sup. Ct. Rep. 1—*Campbell v. Haverhill*, 155 U. S. 617, 39 L. ed. 283, 15 Sup. Ct. Rep. 217—*Inubell v. United States*, 179 U. S. 82, 45 L. ed. 99, 21 Sup. Ct. Rep. 24—*Nashua Sav. Bank v. Anglo American Land, Mortg. & Agency Co.* 180 U. S. 228, 47 L. ed. 785, 23 Sup. Ct. Rep. 517—*Pacific Submarine & Earthquake Proof Wall Co. v. United States*, 19 Ct. Cl. 242—*Hubbell v. United States*, 20 Ct. Cl. 368—*Berdan Fire-Arms Mfg. Co. v. United States*, 26 Ct. Cl. 72—*Alken v. Bemis*, 3 Woodb. & M. 355, Fed. Cas. No. 109—*American Nicholson Pavement Co. v. Elizabeth*, 4 Fisher, Pat. Cas. 196, Fed. Cas. No. 312—*Blake v. Smith*, Fed. Cas. No. 1,502—*Re Boughton*, 1 MacArth. Pat. Cas. 285, Fed. Cas. No. 1,696—*Burdett v. Estey*, 16 Blatchf. 109, 4 Bann. & Ard. 145, Fed. Cas. No. 2,146—*Cahart v. Austin*, 2 Cliff. 533, Fed. Cas. No. 2,288—*Coolidge v. McCone*, 2 Sawy. 576, 1 Bann. & Ard. 84, Fed. Cas. No. 3,186—*Craig v. Smith*, 4 Dill, 352, 1 Bann. & Ard. 558, Fed. Cas. No. 3,339—*Crompton v. Belknap Mills*, 3 Fisher, Pat. Cas. 548, Fed. Cas. No. 3,406—*Hale v. Stimpson*, 2 Fisher Pat. Cas. 570, Fed. Cas. No. 5,915—*Henderson v. Cleveland Co-operative Stove Co.* 2 Bann. & Ard. 607, Fed. Cas. No. 6,351—*Herring v. Nelson*, 14 Blatchf. 303, 3 Bann. & Ard. 65, Fed. Cas. No. 6,424—*Hovey v. Stevens*, 3 Woodb. & M. 32, Fed. Cas. No. 6,746—*Huggins v. Hubby*, Fed. Cas. No. 6,839—*Ex parte Larowe*, Fed. Cas. No. 8,093—*Mable v. Haskell*, 2 Cliff. 511, Fed. Cas. No. 8,653—*Many v. Sis-er*, 1 Fisher, Pat. Cas. 40, Fed. Cas. No. 9,057—*Millner v. Schofield*, 4 Hughes, 260, Fed. Cas. No. 9,609a—*Nicholson Pavement Co. v. Hatch*, 4 Sawy. 695, 3 Fisher, Pat. Cas. 436, Fed. Cas. No. 10,251—*Olcott v. Hawkins*, Fed. Cas. No. 10,480—*Sanford v. Merri-mac Hat Co.* 4 Cliff. 408, Fed. Cas. No. 12,313—*Saxe v. Hammond*, Holmes, 459, 1 Bann. & Ard. 632, Fed. Cas. No. 12,411—*Singer v. Walmsley*, 1 Fisher, Pat. Cas. 573, Fed. Cas. No. 12,900—*Ex parte Smith*, Fed. Cas. No. 12,966—*Smith v. Downing*, 1 Fisher, Pat. Cas. 84, Fed. Cas. No. 13,036—*Storrs v. Howe*, 4 Cliff. 389, 2 Bann. & Ard. 421, Fed. Cas. No. 13,495—*Turrell v. Spaeth*, 2 Bann. & Ard. 187, Fed. Cas. No. 14,267—*Valentine v. Marshall*, Fed. Cas. No. 16,812a—*Wallace v. Holmes*, 9 Blatchf. 75, Fed. Cas. No. 17,100—*Waterbury Brass Co. v. Miller*, 9 Blatchf. 97, Fed. Cas. No. 17,254—*Wells v. Jacques*, 1 Bann. & Ard. 67, Fed. Cas. No. 17,398—*Crompton v. Belknap Mills*, 3 Fisher, Pat. Cas. 554, Fed. Cas. No. 18,285—*Crompton v. Belknap Mills*, 3 Fisher, Pat. Cas. 548, Fed. Cas. No. 18,285—*American*

Diamond Rock Boring Co. v. Sutherland Falls Marble Co. 18 Blatchf. 140, 5 Bann. & Ard. 348, 2 Fed. 354—Sharp v. Tift, 18 Blatchf. 136, 5 Bann. & Ard. 403, 2 Fed. 700—Holly v. Vergennes Mach. Co. 18 Blatchf. 334, 4 Fed. 81—Rowell v. Lindsay, 10 Biss. 220, 6 Fed. 300—American Ballist Log Co. v. Barnes, 4 Hughes, 281, 9 Fed. 467—Cross v. Livermore, 9 Fed. 608—Washburn & M. Mfg. Co. v. Griesche, 5 McCrary, 249, 16 Fed. 671—Glant Powder Co. v. Safety Nitro Powder Co. 10 Sawy. 27, 19 Fed. 512—Swift v. Jenks, 10 Fed. 643—Hancock Inspirator Co. v. Jenks, 21 Fed. 915—Travers v. Palmer, 23 Fed. 512—Hoe v. Kahler, 28 Blatchf. 362, 25 Fed. 277—Leonard v. Lovell, 29 Fed. 314—Filley v. Littlefield Stove Co. 30 Fed. 436—Ott v. Barth, 32 Fed. 91—Landesmann v. Jonasson, 32 Fed. 591—Spencer v. Pennsylvania R. Co. 34 Fed. 901—National Sheet-Metal Roofing Co. v. Garwood, 35 Fed. 600—Leary v. Hohenstein, 37 Fed. 681—Dickinson v. Parker, 38 Fed. 412—Smith v. Thomson, 38 Fed. 607—Huber v. N. O. Nelson Mfg. Co. 38 Fed. 840—Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 29—Sackett v. Smith, 42 Fed. 853—Smith v. Putnam, 45 Fed. 203—Campbell v. Bailey, 45 Fed. 566—Gerard v. Diebold Safe & Lock Co. 48 Fed. 381—Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co. 1 C. C. A. 166, 2 U. S. App. 55, 40 Fed. 65—Page Woven Wire Fence Co. v. Land, 49 Fed. 942—Ellbert v. St. Paul Gaslight Co. 50 Fed. 211—Masten v. Hunt, 51 Fed. 210—St. Paul Plow Works v. Deere & Co. 54 Fed. 503—Holloway v. Dow, 54 Fed. 517—Vincent v. Rigby, 58 Fed. 373—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 109, 21 U. S. App. 244, 61 Fed. 963—Stirratt v. Excelsior Mfg. Co. 10 C. C. A. 220, 27 U. S. App. 13, 61 Fed. 984—De Loria v. Whitney, 11 C. C. A. 365, 21 U. S. App. 428, 63 Fed. 620—Front Rank Steel Furnace Co. v. Wrought Iron Range Co. 63 Fed. 907—Burlington's Iron Bldg. Co. v. Eustis, 13 C. C. A. 148, 27 U. S. App. 693, 65 Fed. 810—Kinzel v. Luttrell Brick Co. 15 C. C. A. 83, 31 U. S. App. 652, 67 Fed. 927—Cramer v. Fry, 68 Fed. 210—Sampson v. Donaldson, 16 C. C. A. 345, 32 U. S. App. 712, 69 Fed. 624—Kennedy v. Solar Ref. Co. 69 Fed. 718—Wheaton v. Norton, 17 C. C. A. 457, 44 U. S. App. 118, 70 Fed. 843—McBride v. Kingman, 72 Fed. 915—Engle Sanitary & Cremation Co. v. Elwood, 73 Fed. 485—P. H. Murphy Mfg. Co. v. Excelsior Car Roof Co. 22 C. C. A. 668, 40 U. S. App. 200, 76 Fed. 975—Adams Electric R. Co. v. Lindell R. Co. 23 C. C. A. 242, 40 U. S. App. 482, 77 Fed. 451—Carter Mach. Co. v. Hanes, 24 C. C. A. 129, 42 U. S. App. 314, 78 Fed. 347—American Tobacco Co. v. Streat, 28 C. C. A. 23, 42 U. S. App. 617, 83 Fed. 705—Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. 86 Fed. 323—Antislidel v. Chicago Hotel Cabinet Co. 32 C. C. A. 220, 60 U. S. App. 572, 89 Fed. 312—Pease v. White Mfg. Co. 89 Fed. 591—Norton v. Jensen, 33 C. C. A. 155, 61 U. S. App. 291, 90 Fed. 429—Overweight Counter-balance Elevator Co. v. Improved Order, R. M. H. Asso. 36 C. C. A. 129, 94 Fed. 159—Norton v. Wheaton, 97 Fed. 643—Plumb v. New York, N. H. & H. R. Co. 97 Fed. 648—National Hollow Brake-Beam Co. v. Inter-changeable Brake-Beam Co. 106 Fed. 711—Brammer v. Schroeder, 46 C. C. A. 44, 106 Fed. 921—Parsons v. Minneapolis Threshing Mach. Co. 106 Fed. 944—J. L. Mott Iron Works v. Hoffman & B. Mfg. Co. 110 Fed. 774—Dowagiac Mfg. Co. v. Brennan, 118 Fed. 147—Farmers' Mfg. Co. v. Spruks Mfg.

Co. 119 Fed. 597—Adam v. Folger, 56 C. C. A. 543, 120 Fed. 263—L. E. Waterman Co. v. Forgyth, 121 Fed. 106—United States Peg Wood, Shank & Leather Board Co. v. B. F. Sturtevant Co. 122 Fed. 479—American Fur Ref. Co. v. Cimlotti Unhairing Mach. Co. 59 C. C. A. 362, 123 Fed. 874—Levy v. Harris, 124 Fed. 71—Rodiger v. Thaddeus Davids Mfg. Co. 126 Fed. 965—Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co. 63 C. C. A. 611, 129 Fed. 109—Levy v. Harris, 65 C. C. A. 117, 130 Fed. 715—Brookfield v. Elmer Glassworks, 132 Fed. 312—Schillinger v. Cranford, 4 Mackey, 477—Fenton Metallic Mfg. Co. v. Office Specialty Co. 12 App. D. C. 220—Lane v. Levi, 21 App. D. C. 175—Tod v. Wick Bros. 36 Ohio St. 393—Stephenson v. Brooklyn Cross-Town R. Co. 42 Phila. Leg. Int. 162.

952. There is no infringement of a patent which claims mechanical powers in combination, unless all the parts have been substantially used. Eames v. Godfrey, 1 Wall. 78. 17: 547

Cited in Gage v. Herring, 107 U. S. 648, 27 L. ed. 604, 2 Sup. Ct. Rep. 819—Rowell v. Lindsay, 113 U. S. 102, 28 L. ed. 907, 5 Sup. Ct. Rep. 507—Electric Railroad Signal Co. v. Hall Railway Signal Co. 114 U. S. 98, 29 L. ed. 99, 5 Sup. Ct. Rep. 1069—Huber v. N. O. Nelson Mfg. Co. 148 U. S. 292, 37 L. ed. 454, 13 Sup. Ct. Rep. 603—Miller v. Eagle Mfg. Co. 151 U. S. 208, 38 L. ed. 131, 14 Sup. Ct. Rep. 310—American Nicholson Pav. Co. v. Elizabeth, 4 Fisher, Pat. Cas. 196, Fed. Cas. No. 312—Coolidge v. McCone, 2 Sawy. 576, 1 Bann. & Ard. 84, Fed. Cas. No. 3,186—Crompton v. Belknap Mills, 3 Fisher, Pat. Cas. 548, Fed. Cas. No. 3,406—Hale v. Stimpson, 2 Fisher, Pat. Cas. 570, Fed. Cas. No. 5,915—Millner v. Schofield, 4 Hughes, 280, Fed. Cas. No. 9,600a—Nicholson Pav. Co. v. Hatch, 4 Sawy. 696, 3 Fisher, Pat. Cas. 437, Fed. Cas. No. 10,251—Saxe v. Hammond, 1 Bann. & Ard. 632, Holmes 450, Fed. Cas. No. 12,411—Wallace v. Holmes, 9 Blatchf. 75, 5 Fisher, Pat. Cas. 47, Fed. Cas. No. 17,100—Waterbury Brass Co. v. Miller, 9 Blatchf. 97, 5 Fisher, Pat. Cas. 69, Fed. Cas. No. 17,254—Crompton v. Belknap Mills, 3 Fisher, Pat. Cas. 548, Fed. Cas. No. 18,285—Cross v. Livermore, 9 Fed. 608—Pearce v. Johnson, 23 Fed. 509—Huber v. N. O. Nelson Mfg. Co. 38 Fed. 840—Murphy v. Trenton Rubber Co. 45 Fed. 570—Westinghouse v. New York Air Brake Co. 59 Fed. 607—Gessner v. Phillips, 63 Fed. 957—Carter Mach. Co. v. Hanes, 24 C. C. A. 180, 42 U. S. App. 314, 78 Fed. 349—Norton v. Jensen, 33 C. C. A. 155, 61 U. S. App. 291, 90 Fed. 429—Norton v. Wheaton, 97 Fed. 643—Dowagiac Mfg. Co. Brennan, 118 Fed. 150.

953. A combination of the material parts of an entire machine is not infringed except by the use of the entire combination. Brown v. Guild (The Corn-planter Patent) 23 Wall. 181, 23: 161

Cited in Putnam v. Hutchinson, 11 Biss. 243, 12 Fed. 134—National Progress Bunching Mach. Co. v. John R. Williams Co. 12 L.R.A. 110, 44 Fed. 194—Robbins v. Illinois Watch Co. 27 C. C. A. 22, 53 U. S. App. 404, 81 Fed. 958—Bullock Electric & Mfg. Co. v. Westinghouse Electric Mfg. Co. 63 C. C. A. 611, 129 Fed. 109.

954. Where one of the elements of the combination covered by a patent is wanting in the device used by the defendants, the

patent is not infringed. *Blake v. San Francisco*, 113 U. S. 679, 5 Sup. Ct. Rep. 692, 28: 1070
Noted in Travers v. Palmer, 23 Fed. 512.

955. There can be no infringement by defendant, of a patent for a combination, if a single element of the patentee's combination is left out of the defendant's device. *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. Rep. 81, 37: 1059

Noted in Electric Gaslighting Co. v. Fuller, 8 C. C. A. 443, 21 U. S. App. 3, 59 Fed. 1004—*De Lorle v. Whitney*, 11 C. C. A. 365, 21 U. S. App. 428, 68 Fed. 620—*Rynear Co. v. Evans*, 83 Fed. 700—*Overweight Counterbalance Elevator Co. v. Improved Order, R. M. H. Asso.* 36 C. C. A. 129, 94 Fed. 159.

956. If there is one element of the plaintiff's patented combination which the defendant does not use and for which he does not employ an equivalent, he does not infringe the plaintiff's patent. *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. Rep. 507, 28: 906
Noted in Voss v. Fisher, 113 U. S. 215, 28 L. ed. 975, 5 Sup. Ct. Rep. 511—*Blake v. San Francisco*, 113 U. S. 681, 28 L. ed. 1071, 5 Sup. Ct. Rep. 692—*Travers v. Palmer*, 23 Fed. 512—*Leary v. Hohenstein*, 37 Fed. 681—*Stutz v. Robson*, 54 Fed. 507—*Brown v. Stillwell & B. Mfg. Co.* 6 C. C. A. 534, 6 U. S. App. 427, 57 Fed. 787—*Dowagiac Mfg. Co. v. Brennan*, 118 Fed. 148—*Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co.* 63 C. C. A. 611, 129 Fed. 109—*Lane v. Levi*, 21 App. D. C. 175.

957. Where a patent is for a combination, there can be no infringement unless the combination is infringed. *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. Rep. 507, 28: 906

Noted in Smith v. Putnam, 45 Fed. 203—*Peoria Target Co. v. Cleveland Target Co.* 47 Fed. 734—*Page Woven Wire Fence Co. v. Land*, 49 Fed. 942—*Lewis v. Pennsylvania Steel Co.* 8 C. C. A. 44, 17 U. S. App. 296, 59 Fed. 132—*Wells v. Curtis*, 13 C. C. A. 498, 31 U. S. App. 123, 66 Fed. 321—*Kennedy v. Solar Ref. Co.* 69 Fed. 718—*McBride v. Kingman*, 72 Fed. 914—*Carter Mach. Co. v. Hanes*, 24 C. C. A. 129, 42 U. S. App. 314, 78 Fed. 347—*Norton v. Jensen*, 33 C. C. A. 155, 61 U. S. App. 291, 90 Fed. 429—*Overweight Counterbalance Elevator Co. v. Improved Order, R. M. H. Asso.* 36 C. C. A. 129, 94 Fed. 159—*Cleveland Foundry Co. v. Detroit Vapor Stove Co.* 181 Fed. 751.

958. A patent for a combination is not infringed by a machine from which one element is omitted and no substitute therefor employed. *Weatherhead v. Coupe*, 147 U. S. 322, 13 Sup. Ct. Rep. 312, 37: 188
Noted in Pittsburg Meter Co. v. Pittsburg Supply Co. 48 C. C. A. 587, 109 Fed. 651.

959. In order to constitute an infringement of a combination, it must appear that the alleged infringing device includes every element of the combination as claimed. *Reedy v. Scott*, 23 Wall. 352, 23: 109
Noted in Kinzel v. Luttrell Brick Co. 15 C. C. A. 83, 31 U. S. App. 652, 67 Fed. 927.

960. The fact that a person has been able by a skilful contrivance to dispense with one of the elements of a claim for a patented combination does not make the device an in-

fringement. *Derby v. Thompson*, 146 U. S. 476, 13 Sup. Ct. Rep. 181, 36: 1051
Noted in Briggs v. Central Ice Co. 54 Fed. 379—*C. T. Ham Mfg. Co. v. R. E. Diets Co.* 13 C. C. A. 691, 14 U. S. App. 709, 58 Fed. 371.

961. A combination is not infringed by a new combination which does not use all the material ingredients of the former, or which substitutes for some of the ingredients newly-discovered ones performing new functions, not known at the date of the letters patent of the first combination. *Seymour v. Osborne*, 11 Wall. 516, 20: 33
Noted in Gill v. Wells, 22 Wall. 31, 22 L. ed. 712—*Brown v. Guild*, 23 Wall. 245, 23 L. ed. 177—*Marsh v. Seymour*, 97 U. S. 359, 24 L. ed. 966—*Rowell v. Lindsay*, 113 U. S. 102, 28 L. ed. 907, 5 Sup. Ct. Rep. 507—*Electric Railroad Signal Co. v. Hall Railway Signal Co.* 114 U. S. 98, 29 L. ed. 99, 5 Sup. Ct. Rep. 1069—*Phillips v. Detroit*, 3 Bann. & Ard. 153, Fed. Cas. No. 11,101—*Reading Roofing Co. v. Taylor*, 15 Blatchf. 101, 3 Bann. & Ard. 374, Fed. Cas. No. 11,613—*Rumford Chemical Works v. Hecker*, 10 Blatchf. 139, 5 Fisher, Pat. Cas. 631, Fed. Cas. No. 12,135—*Sanford v. Merrimac Hat Co.* 4 Cliff. 408, 2 Bann. & Ard. 411, Fed. Cas. No. 12,313—*Rowell v. Lindsay*, 10 Blas. 224, 6 Fed. 296—*Travers v. Palmer*, 23 Fed. 512—*National Progress Bunching Mach. Co. v. John R. Williams Co.* 12 L.R.A. 110, 44 Fed. 194—*Seymour v. Marsh*, 9 Phila. 383.

962. A patent of a combination to operate signals at many stations along the line of a railroad, with one battery, by a metallic circuit divisible into a number of subsidiary circuits of unequal size and resistance, and requiring the equalization of the resistances by means of independent and additional devices, is not infringed by a combination for the same purpose, which avoids the necessity of subsequent ratification by an original adjustment of equal resistances, and uses the earth as the return part of the circuit. *Electric Railroad Signal Co. v. Hall Railway Signal Co.* 114 U. S. 87, 5 Sup. Ct. Rep. 1069, 29: 96

963. A patent for an improvement in circuits for electric railroad signals, whereby a series of signals at intervals along the line of a railroad may be operated by a single battery, consisting of a combination of old elements, including insulated sections of the rails as circuit closers, is not infringed by an arrangement which dispenses with the use of insulated sections of the track, and uses a separate instrument as a circuit closer, which is placed near the track and depressed by the wheels of passing trains. *Electric Railroad Signal Co. v. Hall Railway Signal Co.* 114 U. S. 87, 5 Sup. Ct. Rep. 1069, 29: 96

Noted in Electric R. Co. v. Jamaica & B. R. Co. 61 Fed. 672—*Kinzel v. Luttrell Brick Co.* 15 C. C. A. 83, 31 U. S. App. 652, 67 Fed. 927—*Brown v. Puget Sound Reduction Co.* 110 Fed. 389—*Milwaukee Carving Co. v. Brunswick-Balke Collender Co.* 61 C. C. A. 189, 126 Fed. 185—*Lane v. Levi*, 21 App. D. C. 176.

964. A patented combination for drying meal, which includes an automatic conveyor to remove the meal, is not infringed by a

similar combination without the conveyer. *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. Rep. 819, 27: 601

Cited in *Forncrook v. Root*, 127 U. S. 181, 32 L. ed. 99, 8 Sup. Ct. Rep. 1247—*Hill v. Sawyer*, 31 Fed. 284—*Jenkins v. Stetson*, 32 Fed. 400—*Perkins v. Eaton*, 40 Fed. 674—*Smith v. Putnam*, 45 Fed. 203—*Page Woven Wire Fence Co. v. Land*, 49 Fed. 941—*Cochran v. Zimmerman*, 53 Fed. 803.

965. The Boyd patent, 300,687, for an improvement in hay elevators and carriers, being valid, in view of the state of the art, only for the precise devices mentioned in the claims and the specific or distinguishing device therein represented being a peculiar construction of lugs including projections from an upper ledge of a stop to engage with a catch, the Strickler patent, 279,889, which does not have such lugs, is not an infringement. *Boyd v. Janesville Hay Tool Co.* 158 U. S. 260, 15 Sup. Ct. Rep. 837, 39: 973

966. A variation of eccentricity in the rollers being made, by the description and claim, a material feature of the invention secured by letters patent for an improvement in permutation locks, the patent is not infringed by a lock which does not use a combination including that element or an equivalent. *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 373, 6 Sup. Ct. Rep. 931, 29: 950
Cited in *Smith v. Putnam*, 45 Fed. 203—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 199, 21 U. S. App. 244, 61 Fed. 963—*Engle Sanitary & Cremation Co. v. Elwood*, 73 Fed. 485—*Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* 86 Fed. 334—*Kinloch Teleph. Co. v. Western Electric Co.* 51 C. C. A. 365, 113 Fed. 655—*Lane v. Levi*, 21 App. D. C. 176.

967. A patent for improvements in time-locks, in which the patented combination includes a bolt turning on an axis, is not infringed by a structure in which the combination lock has not a turning or revolving bolt. *Sargent v. Hall Safe & Lock Co.* 114 U. S. 63, 5 Sup. Ct. Rep. 1021, 29: 67

968. A patent for the combination of a beam and mould board of a shovel plough with an adjustable roller serving as a gauge or guide to regulate the depth that the point shall penetrate the earth is a patent for a combination of which the adjustable roller is an essential element, and there can be no infringement unless the roller is used. *Eddy v. Dennis*, 95 U. S. 560, 24: 363
Cited in *Knapp v. Morss*, 150 U. S. 229, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Sawyer v. Miller*, 4 Woods, 474, 12 Fed. 727—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 200, 21 U. S. App. 244, 61 Fed. 964.

969. Swivel boxes, being essential to the contemplated greater movement at one end of the countershaft in a rolling mill, under the Gray patent, 228,525, than at the other, although not expressly mentioned in the claim, enter into it by necessary implication; and a mill which does not use them does not infringe the patent. *Consolidated U. S. Dig.*—277

Roller Mill Co. v. Walker, 138 U. S. 124, 11 Sup. Ct. Rep. 292, 34: 920

970. Claim 1 of the Coupe patent, 213,323, for an improvement in hide-stretching machines, which is for a combination of a friction table or beam over which the hide is stretched, with a revolving roller on which the hide is wound, and a stretcher bar between them which is somewhat arched or crowned in the middle so as to stretch the hide transversely at the same time that it is being stretched lengthwise, is not infringed by a machine which has no such stretcher bar, but which stretches the hide in one direction only at each passage, and by which the hide can be stretched in different directions only by successive operations. *Weatherhead v. Coupe*, 147 U. S. 322, 13 Sup. Ct. Rep. 312, 37: 188

971. Claim 3 of the Coupe patent, 213,323, which is for the method of stretching hides by the use of the means described in claim 1, cannot be infringed unless claim 1 is infringed. *Weatherhead v. Coupe*, 147 U. S. 322, 13 Sup. Ct. Rep. 312, 37: 188

972. The omission of the feed roll from the Eickenmeyer patent of 1869, for a hat pouncing machine, and the subsidiary changes necessary to produce the working device of the Taylor patent, involve no patentable invention, and do not avoid infringement in view of the fact that the hat support and pouncing cylinder, with the feed roll omitted, accomplish practically the same result as the Taylor device, though not so perfectly. *National Hat Pouncing Mach. Co. v. Hedden*, 148 U. S. 482, 13 Sup. Ct. Rep. 680, 37: 529

973. In a patent for a steam bell ringer, in which the specifications state that the piston is disconnected from its rod to prevent any lateral strain, thereby decreasing to some extent the wear of the piston in the cylinder, it is held that the detachment of the piston and piston rod is an essential element of the combination, and that a bell-ringer in which the piston and piston rod are not detached is not an infringement. *Snow v. Lake Shore & M. S. R. Co.* 121 U. S. 617, 7 Sup. Ct. Rep. 1343, 30: 1004

Cited in *Crawford v. Heysinger*, 123 U. S. 607, 31 L. ed. 274, 8 Sup. Ct. Rep. 399—*Roemer v. Peddle*, 132 U. S. 317, 33 L. ed. 383, 10 Sup. Ct. Rep. 98—*Thompson v. Gildersleeve*, 34 Fed. 45—*Schmid v. Scoville Mfg. Co.* 37 Fed. 348—*United States Axle Lubricator Co. v. Wurster*, 38 Fed. 430—*Falls Rivet Co. v. Wolfe*, 40 Fed. 470—*Sackett v. Smith*, 42 Fed. 853—*National Progress Bunching-Mach. Co. v. John R. Williams Co.* 12 L.R.A. 110, 44 Fed. 194—*J. L. Mott Iron Works v. Standard Mfg. Co.* 51 Fed. 84—*Vincent v. Rigby*, 58 Fed. 373—*Parry Mfg. Co. v. Hitchcock Mfg. Co.* 58 Fed. 404—*Westinghouse v. New York Air-Brake Co.* 59 Fed. 595—*H. W. Johns Mfg. Co. v. Robertson*, 60 Fed. 905—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 201, 21 U. S. App. 244, 61 Fed. 965—*Traut & H. Mfg. Co. v. Waterbury Buckle Co.* 64 Fed. 494—*Frank v. Wm. P. Mockridge Mfg. Co.* 65 Fed. 524—*Erie Rubber Co. v. American Dunlop Tire Co.*

16 C. C. A. 636, 28 U. S. App. 470, 70 Fed. 62—*De Beaumont v. Williams*, 26 C. C. A. 300, 39 U. S. App. 697, 80 Fed. 996—*Truman v. Holmes*, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—*Union Steam-Pump Co. v. Battle Creek Steam-Pump Co.* 43 C. C. A. 568, 104 Fed. 345.

974. The third claim of patent 178,463, for a sheath and washers, whereby the sheath is rendered capable of adjustment, is not infringed by an apparatus without washers. *Peters v. Active Mfg. Co.* 129 U. S. 530, 9 Sup. Ct. Rep. 389, 32: 738 *Cited in Sackett v. Smith*, 42 Fed. 858.

975. In the reissued patent, 10,806, granted to the National Meter Company, assignee of Lewis H. Nash, for improvements in water meters the piston described is one having a side-rocking and rotating movement which constitutes the compound motion described in the original specification, which motion is due to the fact that the piston has one or several less projections than the cylinder has recesses. The meter constructed under patents granted to Hersey brothers as assignees of Tilden does not have such a piston, and therefore does not infringe any of the claims of the said reissue. *National Meter Co. v. Board of Water Comrs.* 149 U. S. 48, 13 Sup. Ct. Rep. 774, 37: 644 *Cited in Campbell Printing-Press & Mfg. Co. v. Duplex Printing Press Co.* 86 Fed. 321.

976. Safety-valves having no huddling chamber and no strictured orifice leading from such chamber to the open air are not infringements of patents for a combination which includes these elements. *Consolidated Safety-Valve Co. v. Kunkle*, 119 U. S. 45, 7 Sup. Ct. Rep. 50, 30: 302

977. A patent for a machine for driving nails vertically, including the use of spring jaws, and a plunger with globe or disk shaped collar, is not infringed by one for driving them horizontally, which has no spring jaws, and uses a plunger without any such collar,—neither machine being able to do the work of the other. *Wicke v. Ostrum*, 103 U. S. 461, 26: 409 *Cited in Milwaukee Carving Co. v. Brunswick-Balke Collender Co.* 61 C. C. A. 192, 126 Fed. 188.

978. A patent for a skirt protector having a fluted or plaited band or border as one of the essential elements is not infringed by the manufacture or sale of skirt protectors which have neither plaited nor fluted bands or borders. *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. Rep. 493, 29: 723 *Cited in La Rue v. Western Electric Co.* 28 Fed. 87—*United States Axle Lubricator Co. v. Wurster*, 38 Fed. 430.

Separate construction.

979. A patent for a side-saddle tree having the side bars and seat made separate and then united, which is claimed to simplify and cheapen the manufacture, and leave a space for air under the seat, is not infringed by a saddle tree which is made by tough strips of wood steamed and bent to a proper shape, united in one construction,

forming a complete tree, although room is left for the admission of air under the seat, as that by itself is not claimed as the patented invention. *Burns v. Meyer*, 100 U. S. 671, 25: 738

Cited in Polsdorfer v. St. Louis Wooden-Ware Works, 37 Fed. 58—*Smith v. Putnam*, 45 Fed. 203—*Ryan v. Runyon*, 36 C. C. A. 381, 93 Fed. 972.

Change of form or dimension.

See also *infra*, 1055.

980. A person does not escape liability for infringement by changing the form or dimensions of the parts of a patented combination, where such change does not break up or essentially vary the principle or mode of operation pervading the original invention. *Webster Loom Co. v. Higgins*, 105 U. S. 580, 26: 1177

Cited in Dowagiac Mfg. Co. v. Superior Drill Co. 53 C. C. A. 45, 115 Fed. 904—*Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* 53 C. C. A. 91, 118 Fed. 141.

981. Where a patent for a combination at the same end of a shade roller of a spring, rod, and arm or detent, or their mechanical equivalents, must be confined, for lack of novelty, to the precise form of the arm or detent, the use of a roller in which that arm and the ratchet in which it engages are of a different form from those covered by the patent is not an infringement. *Hartshorn v. Saginaw Barrel Co.* 119 U. S. 664, 7 Sup. Ct. Rep. 421, 30: 539

Substantial difference.

See also *infra*, 1033, 1034, 1039-1041, 1052.

982. A patent for a combination is not infringed by a combination which substantially differs from such patent in any of its parts. *McMurray v. Mallory*, 111 U. S. 97, 4 Sup. Ct. Rep. 375, 28: 365 *Cited in Electric Railroad Signal Co. v. Hall Railway Signal Co.* 114 U. S. 98, 29 L. ed. 99, 5 Sup. Ct. Rep. 1069—*Leary v. Hobenstein*, 37 Fed. 681.

983. Bona fide inventors of a combination may suppress every combination not substantially different from what they have invented and patented. *Seymour v. Osborne*, 11 Wall. 516, 20: 33

Cited in Gould v. Rees, 15 Wall. 193, 21 L. ed. 41—*King v. Louisville Cement Co.* 6 Fisher, Pat. Cas. 342, Fed. Cas. No. 7,798—*Phillips v. Detroit*, 2 Flipp. 96, Fed. Cas. No. 11,101—*Ready Roofing Co. v. Taylor*, 15 Blatchf. 101, Fed. Cas. No. 11,613—*Rose v. Sibley Mach. Co.* Fed. Cas. No. 12,051—*Rumford Chemical Works v. Hecker*, 10 Blatchf. 139, Fed. Cas. No. 12,135—*Sanford v. Merrimac Hat Co.* 4 Clift. 408, Fed. Cas. No. 12,313—*Sayles v. Chicago & N. W. R. Co.* 3 Bliss. 58, 4 Fisher, Pat. Cas. 590, Fed. Cas. No. 12,415—*Swain Turbine & Mfg. Co. v. Ladd*, 2 Bann. & Ard. 492, Fed. Cas. No. 13,662—*Norton v. Jensen*, 33 C. C. A. 155, 61 U. S. App. 291, 90 Fed. 429—*Norton v. Wheaton*, 97 Fed. 640—*Bliss v. Reed*, 102 Fed. 906.

984. If the ingredient substituted was new, or performed substantially a different function, or was not known at the date of

the plaintiff's patent as a proper substitute for the one omitted, he does not infringe. *Rees v. Gould* (*Gould v. Rees*) 15 Wall. 187, 21: 39

Distinguished in Sarven v. Hall, 11 Blatchf. 298, 6 Fisher, Pat. Cas. 500, Fed. Cas. No. 12,370.

Cited in Gill v. Wells, 22 Wall. 19, 22 L. ed. 708—*Brown v. Guld*, 23 Wall. 239, 23 L. ed. 175—*Reedy v. Scott*, 23 Wall. 367, 23 L. ed. 111—*Dunbar v. Myers*, 94 U. S. 202, 24 L. ed. 40—*Fuller v. Yentzer*, 94 U. S. 297, 24 L. ed. 106—*Gage v. Herring*, 107 U. S. 644, 27 L. ed. 603, 2 Sup. Ct. Rep. 819—*Rowell v. Lindsay*, 113 U. S. 102, 28 L. ed. 908, 5 Sup. Ct. Rep. 507—*Voss v. Fisher*, 113 U. S. 215, 28 L. ed. 975, 5 Sup. Ct. Rep. 511—*Electric Railroad Signal Co. v. Hall Railway Signal Co.* 114 U. S. 98, 29 L. ed. 99, 5 Sup. Ct. Rep. 1069—*Huber v. N. O. Nelson Mfg. Co.* 148 U. S. 292, 37 L. ed. 454, 13 Sup. Ct. Rep. 603—*Pacific Submarine & Earthquake Proof Wall Co. v. United States*, 19 Ct. Cl. 242—*Schilling v. Cranford*, 4 Mackey, 478—*Wright v. Yuengling*, 155 U. S. 52, 39 L. ed. 68, 15 Sup. Ct. Rep. 1—*American Whip Co. v. Lombard*, 4 Cliff. 505, 3 Bann. & Ard. 603, Fed. Cas. No. 319—*Burdett v. Estey*, 16 Blatchf. 109, 4 Bann. & Ard. 146, Fed. Cas. No. 2,146—*Coolidge v. McCone*, 2 Sawy. 576, 1 Bann. & Ard. 84, Fed. Cas. No. 3,186—*Fisher v. Craig*, 3 Sawy. 73, 1 Bann. & Ard. 368, Fed. Cas. No. 4,817—*Goodyear Dental Vulcanite Co. v. Preterre*, 15 Blatchf. 280, 3 Bann. & Ard. 477, Fed. Cas. No. 5,596—*Herring v. Nelson*, 14 Blatchf. 303, 3 Bann. & Ard. 65, Fed. Cas. No. 6,424—*King v. Louisville Cement Co.* 6 Fisher, Pat. Cas. 341, Fed. Cas. No. 7,798—*Odorless Excavating Apparatus Co. v. McCauley*, 2 Bann. & Ard. 573, Fed. Cas. No. 10,436—*Sanford v. Merrimac Hat Co.* 4 Cliff. 408, 2 Bann. & Ard. 411, Fed. Cas. No. 12,313—*Smith v. Woodruff*, 6 Fisher, Pat. Cas. 478, Fed. Cas. No. 13,128a—*Turrell v. Spaeth*, 2 Bann. & Ard. 187, Fed. Cas. No. 14,267—*Webster v. New Brunswick Carpet Co.* 1 Bann. & Ard. 90, Fed. Cas. No. 17,337—*Willimantic Linen Co. v. Clark Thread Co.* 4 Bann. & Ard. 138, Fed. Cas. No. 17,763—*Rowell v. Lindsay*, 10 Biss. 220, 6 Fed. 293—*Dederick v. Cassell*, 9 Fed. 308—*Putnam v. Hutchinson*, 11 Biss. 243, 12 Fed. 133—*Washburn & M. Mfg. Co. v. Griesche*, 5 McCrary, 249, 16 Fed. 671—*Travers v. Palmer*, 23 Fed. 512—*Richards v. Michigan C. R. Co.* 40 Fed. 166—*Tatum v. Gregory*, 41 Fed. 144—*Gerard v. Diebold Safe & Lock Co.* 48 Fed. 381—*Thomson v. Citizens' Nat. Bank*, 3 C. C. A. 521, 10 U. S. App. 500, 53 Fed. 253—*Edison Electric Light Co. v. Boston Incandescent Lamp Co.* 62 Fed. 399—*Union Steam-Pump Co. v. Battle Creek Steam-Pump Co.* 43 C. C. A. 566, 104 Fed. 343—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 562, 106 Fed. 711—*Brammer v. Schroeder*, 46 C. C. A. 44, 106 Fed. 921—*Dowagiac Mfg. Co. v. Smith*, 108 Fed. 70—*Kinloch Teleph. Co. v. Western Electric Co.* 51 C. C. A. 367, 113 Fed. 637—*Smith v. Woodruff*, 1 MacArth. 461—*Schilling v. Cranford*, 4 Mackey, 478—*Dedrick v. Cassell*, 14 Phila. 505.

985. A combination of other elements, not the equivalents of those included in a combination patented, would be a different

machine, and consequently not an infringement. *Wicke v. Ostrum*, 103 U. S. 461, 26: 409

986. Where a patent is for a combination, and the improvement consists in arranging different portions of a plough to produce a certain effect, and none of the parts are claimed as new, nor is any portion of the combination less than the whole claimed as new, the combination of all the parts, arranged with reference to each other and to the other parts of the plough in the manner described, is the thing patented; and a combination is not the same if it substantially differs in any of its parts, and is not an infringement. *Prouty v. Ruggles*, 16 Pet. 336, 10: 986

987. If a combination has three different known parts, and the result is proposed to be accomplished by the union of all the parts arranged with reference to each other, the combination of two of these parts only with a third, which is substantially different in the manner of its arrangement and connection with the others, is not the same combination, and is no infringement. *Brooks v. Fiske*, 15 How. 212, 14: 665

Cited in Gould v. Rees, 15 Wall. 194, 21 L. ed. 41, 6 Fisher, Pat. Cas. 114—*Gill v. Wells*, 22 Wall. 28, 22 L. ed. 711—*Reedy v. Scott*, 23 Wall. 367, 23 L. ed. 111—*Huber v. N. O. Nelson Mfg. Co.* 148 U. S. 291, 37 L. ed. 454, 13 Sup. Ct. Rep. 603—*Miller v. Eagle Mfg. Co.* 151 U. S. 208, 38 L. ed. 131, 14 Sup. Ct. Rep. 310—*Hill v. Sawyer*, 31 Fed. 286—*Goodyear v. Providence Rubber Co.* 2 Cliff. 370, 2 Fisher, Pat. Cas. 515, Fed. Cas. No. 5,583—*Hale v. Stimpson*, 2 Fisher, Pat. Cas. 570, Fed. Cas. No. 5,915—*Nicholson Fav. Co. v. Hatch*, 4 Sawy. 696, 3 Fisher, Pat. Cas. 437, Fed. Cas. No. 10,251—*Whitely v. Swayne*, 4 Fisher, Pat. Cas. 128, Fed. Cas. No. 17,568.

988. A patent upon a combination consisting of the use of grooves on both sides of a railroad track, either cast in iron plates, or made by placing double lines of flat rails in position, in which grooves the flanges only of car wheels are to run, the grooves to be too narrow to admit the feloes of carriages, and the whole to be depressed to a level with the street, so as to avoid obstructing the passage of ordinary carriages,—the great object of the invention,—is not infringed by placing a double flat rail on the inner side of a curve, and an ordinary rail on the outer side, the whole elevated to the ordinary height of the track, without regard to the convenience of ordinary carriages. *Stimpson v. Baltimore & S. R. Co.* 10 How. 329, 13: 441

989. A patent for a portable and adjustable dam in sliding or telescopic sections, to be in combination with self anchors supported from the deck of a vessel when in use, the sections to adjust themselves to varying depths of water, is not infringed by one which is not supported from the boat or any other floating structure, and which, although capable of being adjusted at different heights, is not self-adjustable to varying

depths of water, and which has no self anchors. *Cammeyer v. Newton*, 94 U. S. 225, 24: 72

Quoted in Gerard v. Diebold Safe & Lock Co. 48 Fed. 381.

990. A patent for a wrench for inserting metallic bung-bushes in casks, barrels, etc., which consists in providing the shank of the wrench with a cylindrical core so arranged as closely to fit the aperture in the bushing, and a V-shaped projection adapted to fit a corresponding notch in the bushing, whereby it may be turned into place without assuming an oblique position within the bung opening, and also to prevent the wrench from slipping from its seat, is not infringed by a wrench with a projection or core attachment which is inserted into the bush, through which core runs a rod with a latch at the lower end, fitting into a recess at the bottom of the core, and the latch of which is turned by means of a knob at the top. *Schumacher v. Cornell*, 96 U. S. 549, 24: 676

991. A patent for a combination of mechanical powers for a new and useful improvement in boot-trees is not infringed by an arrangement which uses all the elements of the combination except that one described for distending the leg of the tree, but which uses a substantially different mechanism for that purpose, although it performs the same function. *Eames v. Godfrey*, 1 Wall. 78, 17: 547

992. In the *Coupe* patent, 213,323, for an improvement in hide-stretching machines, claim 2, which is for a laterally yielding stretcher and a laterally yielding friction table or beam, in combination with a revolving roller, is not infringed by a machine in which the bars used for stretching are not laterally yielding, but one is fixed and the other has a motion up and down. *Weatherhead v. Coupe*, 147 U. S. 322, 13 Sup. Ct. Rep. 312, 37: 188

993. A patent for a metallic glove fastener, the button-hole member of the device consisting of a hollow socket in combination with a rivet and button head, whereby it is centrally attached to the fabric, the spring action being secured in the expansive socket, is to be limited to that form of a socket combined with an imperforated button head, and is not infringed by a patent the button-hole member of which consists of a ring of wire split on one side, so as to be capable of expansion, held loosely in a chamber composed of two pieces of metal united around their edges, one of which has a tubular extension passing through the fabric, and engaging with the cap or button head on the other side. *Ball & Socket Fastener Co. v. Kraetzer*, 150 U. S. 111, 14 Sup. Ct. Rep. 48, 37: 1019

994. Patent 154,989, for a lifting-jack in which a pawl, in inclined slots or grooves formed in the frame, is pressed wholly by gravity against the teeth of the ratchet bar, is not infringed by a jack in which a spring presses the pawl against the teeth of the

ratchet bar, having no slots or grooves formed in the frame to guide the pawl. *Joyce v. Chillicothe Foundry & Mach. Works Co.* 127 U. S. 557, 8 Sup. Ct. Rep. 1311, 32: 171
Quoted in Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co. 86 Fed. 334.

995. Claim 3 of *Gorham* patent, 223,338, for the combination with a washboard of a protector located below the crown piece and between the side pieces of the washboard frame into which it may fold, substantially as described,—the construction shown being that of a protector having a spring, giving it a yielding, elastic, or resilient function,—is not infringed by a protector fastened to a washboard by a tongue and groove joint, which can be packed into the frame only by first detaching it. *Sargent v. Burgess*, 129 U. S. 19, 9 Sup. Ct. Rep. 220, 32: 604

Quoted in Sargent v. Jenkins, 38 Fed. 585—*Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* 86 Fed. 384.

996. No infringement of the combination claim in the *Sutton* patent, No. 383,258, for an improvement upon machines for plucking furs, results from the use of a machine which, in lieu of the "fixed stretcher bar" made a distinct feature of the claim, substitutes a movable one, operated by an entirely different mechanism, capable of accomplishing a much larger amount of work within a given time. *Cimiotti Unhairing Co. v. American Fur Ref. Co.* 198 U. S. 399, 25 Sup. Ct. Rep. 697, 49: 1100

997. No infringement of the claim of the *Cramer* patent, No. 271,426, for the use in combination of a vertical double brace and a sewing-machine treadle fitted to oscillate in the brace on bearings therein "substantially as specified," results from the employment of the device covered by the *Diehl* patent, No. 306,469, for improvements in sewing machine stands and treadles, in which the treadle supports, though serving the same purpose as the device described in the *Cramer* patent, are substantially different in construction. *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 24 Sup. Ct. Rep. 291, 48: 437
Quoted in Simmons Mfg. Co. v. Southern Spring Bed. Co. 72 C. C. A. 179, 140 Fed. 611—*Bibb Mfg. Co. v. Bowers*, 73 C. C. A. 358, 142 Fed. 140—*Ball Bearing Co. v. Star Ball Retainer Co.* 147 Fed. 722.

998. Where a patent for improvements in harvesting and mowing machines consists chiefly in the construction and combination of two frames, the one for supporting the driving-wheel, and the other for supporting the cutting apparatus, and hinging together the same in such a manner that the driving wheel and cutting apparatus may each follow the inequalities of the ground independently of each other, and may be bolted rigidly together for supporting the cutting apparatus at any desired height, a change in the form of some parts, and hinging the frames together at different ends, giving different names to the same things, and using different mechanical arrange-

ments in the gearing to produce corresponding results, does not change the essential character of the apparatus, so as to prevent infringement by its use. *Whiteley v. Kirby*, 11 Wall. 678, 20: 32
Cited in Kirby v. Dodge & S. Mfg. Co. 10 Blatchf. 313, Fed. Cas. No. 7,838.

999. A patent for a rubber or shoe for a car brake, consisting of the combination of a sole formed to fit the periphery of the car wheel, a projection upon which fits into a socket in the shoe in such a manner that the sole can vibrate laterally, and having a lug which fits between lugs on the shoe, and a clevis suspending it from the truck, which has two arms, the lower ends of which embrace the lugs of the shoe, and are connected to the shoe by a bolt passing through the ends of the clevis, the lugs of the shoe, and the lug of the sole between them, does not involve, as a necessary part of the combination, any lateral rocking motion in the shoe; and a shoe which is in other respects similar to it is an infringement, although it does not permit any such lateral motion. *Lake Shore & M. S. R. Co. v. National Car Brake Shoe Co.* 110 U. S. 229, 4 Sup. Ct. Rep. 33, 28: 129

Cited in Clark v. Wooster, 119 U. S. 325, 30 L. ed. 393, 7 Sup. Ct. Rep. 217—*Mershon v. J. F. Pease Furnace Co.* 23 Blatchf. 331, 24 Fed. 742—*Page Woven Wire Fence Co. v. Land*, 49 Fed. 943—*National Cash Register Co. v. American Cash Register Co.* 3 C. C. A. 564, 3 U. S. App. 340, 53 Fed. 372—*Westinghouse v. New York Air-Brake Co.* 59 Fed. 595—*Reece Button-Hole Mach. Co. v. Globe Button Hole Mach. Co.* 10 C. C. A. 207, 21 U. S. App. 244, 61 Fed. 971—*Traut & H. Mfg. Co. v. Waterbury Buckle Co.* 64 Fed. 494—*Westinghouse v. Boyden Power-Brake Co.* 66 Fed. 1006—*S. F. Heath Cycle Co. v. Hay*, 67 Fed. 249—*Consolidated Fastener Co. v. Columbian Fastener Co.* 79 Fed. 797—*Paul Boynton Co. v. Morris Chute Co.* 30 C. C. A. 619, 58 U. S. App. 53, 87 Fed. 227—*Chinnock v. Paterson, P. & S. Tel. Co.* 50 C. C. A. 385, 112 Fed. 532—*Stillwell-Bierce & S. V. Co. v. Eufaula Cotton Oil Co.* 54 C. C. A. 588, 117 Fed. 414—*General Electric Co. v. International Specialty Co.* 61 C. C. A. 333, 126 Fed. 759—*Klip-Armstrong Co. v. King Philip Mills*, 130 Fed. 30.

1000. The Westinghouse patent, 360,070, for a fluid pressure automatic-brake mechanism combining with a main air pipe, an auxiliary reservoir, a brake cylinder, and a triple valve, an auxiliary valve which admits train-pipe air only and is not in the line of travel between the auxiliary reservoir and the brake cylinder, but is a slide valve operated by the direct thrust of the piston, opening a by-passage to which the auxiliary reservoir is merely an adit, is not infringed by the Boyden device, covered by patents 481,134 and 481,135, in which a poppet instead of a slide valve is used, which is in the line of travel both from the auxiliary reservoir and from the train pipe, and admits both currents of air to the brake cylinder, and makes use of a partition separating the valve chamber from the piston chamber, with an aperture therein of such size that the outside pressure upon the feed

valve is greater than that upon the inside, thus forcing it open and admitting a full volume of train-pipe air upon the brake cylinder. *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136

Cited in Westinghouse Air Brake Co. v. Christensen Engineering Co. 121 Fed. 558—*Westinghouse Air Brake Co. v. Christensen Engineering Co.* 123 Fed. 308—*Westinghouse Air Brake Co. v. Christensen Engineering Co.* 63 C. C. A. 181, 128 Fed. 439.

1001. Infringement of a shredding roller in a clay disintegrator which has a solid face with longitudinal grooves inclosing steel bars, is not avoided by making the cylinder in the form of a skeleton with knives on projecting arms, and then forming the periphery by filling in metal plates between the knives. *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. Rep. 194, 39: 275

e. Processes.

Anticipation of Patent, see supra, V. e. 2.

Invention in, see supra, V. b. 7.

Liberal Construction of Patent in Determining Infringement, see supra, 713, 714.

Construction of Patent for, see supra, 737-748.

By Buying and Selling Article Produced, see supra, 882a.

Use of Equivalents, see supra, 918.

See also supra, 971.

Similarity of means.

1002. Where a patent is for the means devised to produce a result, in an action for infringement the question is whether the defendants use the same or equivalent means. *Ives v. Hamilton*, 92 U. S. 426, 23: 494

Elizabeth v. American-Nicholson Pav. Co. 97 U. S. 126, 24: 1000

Cited in Stow v. Chicago, 104 U. S. 551, 26 L. ed. 818—*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 568, 42 L. ed. 1147, 18 Sup. Ct. Rep. 707—*Shaver v. Skinner Mfg. Co.* 30 Fed. 72—*Filley v. Littlefield Stove Co.* 30 Fed. 437—*Bundy Mfg. Co. v. Detroit Time-Register Co.* 36 C. C. A. 391, 94 Fed. 540—*Union Steam-Pump Co. v. Battle Creek Steam-Pump Co.* 43 C. C. A. 565, 104 Fed. 342—*Adams Co. v. Schreiber & C. Mfg. Co.* 111 Fed. 188—*Dowagiac Mfg. Co. v. Superior Drill Co.* 53 C. C. A. 54, 115 Fed. 904—*Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* 55 C. C. A. 91, 118 Fed. 141—*Standard Computing Scale Co. v. Computing Scale Co.* 61 C. C. A. 551, 126 Fed. 649.

1003. The infringement of a patent, even if it is a pioneer patent, must do something more than reach the same result; it must reach it by substantially the same or similar means. *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136

Cited in Bundy Mfg. Co. v. Detroit Time Register Co. 36 C. C. A. 391, 94 Fed. 540—*Westinghouse Air-Brake Co. v. Christensen Engineering Co.* 103 Fed. 493—*Thomson-Houston Electric Co. v. Lorain Steel Co.* 103 Fed. 645—*Krajewski v. Pharr*, 44 C. C. A.

580, 105 Fed. 522—Pittsburg Meter Co. v. Pittsburg Supply Co. 48 C. C. A. 587, 109 Fed. 651—Electric Smelting & Aluminum Co. v. Pittsburgh Reduction Co. 111 Fed. 757—Westinghouse Air Brake Co. v. Christensen Engineering Co. 113 Fed. 595—Moore v. Schaw, 118 Fed. 809—Massey v. Larkin, 56 C. C. A. 170, 119 Fed. 174—American Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co. 123 Fed. 896—Chicago Wooden Ware Co. v. Miller Ladder Co. 66 C. C. A. 521, 133 Fed. 545.

1004. One using a patented process may infringe, although he employs a different apparatus and slightly varies the elements. *Tilghman v. Proctor*, 102 U. S. 707,

26: 279

Cited in *Tilghman v. Proctor*, 125 U. S. 138, 31 L. ed. 664, 8 Sup. Ct. Rep. 894—*United Nickel Co. v. Pendleton*, 21 Blatchf. 235, 15 Fed. 746—*Morley Sewing Mach. Co. v. Lancaster*, 23 Fed. 346—*Cary v. Lovell Mfg. Co.* 24 Fed. 144—*Alabastine Co. v. Payne*, 27 Fed. 560—*Holliday v. Pickhardt*, 29 Fed. 860—*Cary v. Lovell Mfg. Co.* 31 Fed. 347—*American Bell Tel. Co. v. Southern Tel. Co.* 34 Fed. 804—*Celluloid Mfg. Co. v. Arlington Mfg. Co.* 3 C. C. A. 273, 3 U. S. App. 287, 52 Fed. 744—*Pacific Cable R. Co. v. Butte City Street R. Co.* 55 Fed. 762—*Cowles Electric Smelting & Aluminum Co. v. Lawrey*, 24 C. C. A. 637, 47 U. S. App. 531, 70 Fed. 353—*United Indurated Fibre Co. v. Whippany Mfg. Co.* 83 Fed. 487—*Clerk v. Tannage Patent Co.* 28 C. C. A. 502, 55 U. S. App. 507, 84 Fed. 644—*Beach v. Hobbs*, 34 C. C. A. 254, 63 U. S. App. 626, 92 Fed. 151—*Electric Smelting & Aluminum Co. v. Carborundum Co.* 42 C. C. A. 546, 102 Fed. 627—*Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* 56 C. C. A. 549, 120 Fed. 269—*Electric Smelting & Aluminum Co. v. Pittsburgh Reduction Co.* 60 C. C. A. 648, 125 Fed. 938—*Manhattan General Constr. Co. v. Hellos-Upton Co.* 135 Fed. 788—*Re Musgrave*, 10 App. D. C. 170—*Ruete v. Elwell*, 15 App. D. C. 25.

1005. A recommendation or preference between different modes of using a process does not constitute such method a portion of the patent, which may be infringed by one who does not follow the recommendation but accomplishes the same end by another method. *Sewall v. Jones*, 91 U. S. 171,

23: 275

1006. A process in manufacturing flour, which consists in passing the ground meal through a series of bolting-reels clothed with cloth of progressively finer meshes, which pass the superfine flour and retard the escape of the finer and lighter impurities at the same time, being subjected to blasts or currents of air introduced by hollow perforated shafts furnished with pipes so disposed that the force of the blast may act close to the surface of the bolting-cloth, the bolting-chest having an opening at the top for the escape of the air, and of the light particles through a chamber where the particles are arrested, is infringed by a process which varies chiefly in the use of a flat sieve or screen in place of reels, with the use of revolving brushes under the screen to keep it clean. *Cochrane v. Deener*, 94 U. S. 780,

24: 139

Cited in *United States ex rel. Steinhilber v.*

Allen, 192 U. S. 559, 48 L. ed. 561, 24 Sup. Ct. Rep. 416—*American Middlings Purifier Co. v. Atlantic Mill Co.* 4 Bann. & Ard. 153, Fed. Cas. No. 306—*Smith v. Merriam*, 6 Fed. 718—*New Process Fermentation Co. v. Maus*, 20 Fed. 731—*New Process Fermentation Co. v. Koch*, 21 Fed. 582—*Filley v. Littlefield Stove Co.* 30 Fed. 437—*National Cash Register Co. v. American Cash Register Co.* 3 C. C. A. 565, 3 U. S. App. 340, 53 Fed. 373—*Beach v. American Box-Mach. Co.* 63 Fed. 600—*Thompson-Houston Electric Co. v. Elmira & H. R. Co.* 18 C. C. A. 153, 38 U. S. App. 55, 71 Fed. 405—*Palmer v. John E. Brown Mfg. Co.* 35 C. C. A. 89, 92 Fed. 928—*Dowagiac Mfg. Co. v. Superior Drill Co.* 53 C. C. A. 52, 115 Fed. 902—*Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* 55 C. C. A. 91, 118 Fed. 141—*Dowagiac Mfg. Co. v. Brennan*, 62 C. C. A. 264, 127 Fed. 150—*Panzl v. Battle Island Paper & Pulp Co.* 132 Fed. 614—*Manhattan General Constr. Co. v. Hellos-Upton Co.* 135 Fed. 788.

1007. Infringement of the process claim of the Jones patent, No. 404,414, for mixing molten pig iron, the dominant idea of which is the permanent retention in a large covered reservoir of so large a quantity of the molten metal as will absorb the variations of the product from the blast furnaces received into it and discharged from it into the converters, results from the use of a covered refractory lined and turtle-shaped tilting vessel of about 300 tons' capacity for receiving the molten metal from the blast furnaces and supplying the converters, in the practical operation of which, by not allowing the vessel to tilt beyond a certain point gauged by a chalk mark, there is habitually retained in such vessel about 175 tons of molten metal, notwithstanding a long prior use of an intermediate uncovered receiving ladle for cupola metal, which held considerably more than the amount of metal necessary to charge a converter. *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 22 Sup. Ct. Rep. 698,

46: 968

1008. Where bronzing of iron had been previously done by oxidizing the surface of the iron, then covering it with varnish and heating it sufficiently to oxidize the varnish but not the iron, a patent for the process of bronzing by heating the iron coated with oil can be held valid only for a simultaneous joint oxidation of the iron and the oil. *Plummer v. Sargent*, 120 U. S. 442, 7 Sup. Ct. Rep. 640,

30: 737

1009. A patent in which the claimed invention is the manufacture of fat acids and glycerin from fatty bodies by the action of water at a high temperature, and by pressure in a closed receptacle sufficient to prevent formation of steam, is limited to the described method of manufacture, although no claim is made as to the invention of the apparatus, and therefore is not infringed by another process in which the claim is to produce a continuous automatic circulation of highly-heated water permitting the formation of steam, in a very finely divided state, through the bodies under treatment, by means of an apparatus constructed and employed substantially as therein shown and

described, such apparatus differing in many essential respects from that in the first patent. *Mitchell v. Tilghman*, 19 Wall. 287,

22: 125

Overruled in *Tilghman v. Proctor*, 102 U. S. 708, 26 L. ed. 280.

Cited as overruled in *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 578, 42 L. ed. 1151, 18 Sup. Ct. Rep. 707.

Cited in *Tilghman v. Proctor*, 125 U. S. 138, 31 L. ed. 684, 8 Sup. Ct. Rep. 894—*Henderson v. Cleveland Co-op. Stove Co.* 2 Bann. & Ard. 608, Fed. Cas. No. 6,351—*New Process Fermentation Co. v. Maus*, 20 Fed. 728—*Tilghman v. Werk*, 39 Fed. 682—*De Lamar v. De Lamar Min. Co.* 54 C. C. A. 280, 117 Fed. 248—*Re Musgrave*, 10 App. D. C. 171—*Re Barratt*, 14 App. D. C. 259.

Similarity of result.

1010. An infringement of a patent for the means of producing a result must substantially embody the patentee's mode of operation, and thereby attain the same kind of result as his invention, although not necessarily in the same degree. *Sewall v. Jones*, 91 U. S. 171,

23: 275

Cited in *Walker v. Rawson*, 4 Bann. & Ard. 132, Fed. Cas. No. 17,083—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 200, 21 U. S. App. 244, 61 Fed. 984—*King Ax Co. v. Hubbard*, 38 C. C. A. 431, 97 Fed. 803—*White v. Peerless Rubber Mfg. Co.* 111 Fed. 192—*Electric Smelting & Aluminum Co. v. Pittsburgh Reduction Co.* 111 Fed. 756—*Peerless Rubber Mfg. Co. v. White*, 55 C. C. A. 510, 118 Fed. 835—*Lourie Implement Co. v. Lenhart*, 64 C. C. A. 463, 130 Fed. 129.

Use of part of process.

1011. Where the patent is for an entire process made up of several constituents, the exclusive use of them singly is not secured to the patentee. *Mowry v. Whitney*, 14 Wall. 620,

20: 860

1012. A process is not infringed by the use of any number of its stages less than all of them. *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222,

26: 149

1013. Where the plaintiff's patent is for an improved process, it must be shown that the defendants used all the different steps of that process, or there is no infringement. *Royer v. Coupe*, 146 U. S. 524, 13 Sup. Ct. Rep. 166,

36: 1073

1014. The Royer patent, 149,954, for a process of treating rawhide for belting, which describes eight successive steps: (1) the removal of the hair by sweating; (2) drying the hide perfectly hard; (3) inserting it in water for ten or fifteen minutes; (4) fulling or softening it by mechanical means; (5) spreading upon it in a warm, liquid state a mixture of tallow, etc.; (6) fulling or stuffing the mixture into the hide in a suitable machine; (7) moistening the hide with water four or five times during the day; (8) stretching and cutting it,—involves the sweating operation as a necessary element of the process, and is not infringed, therefore, by a process in which the hair is removed by liming, as the substantial steps in the process are all old, and

the invention cannot be considered broadly as covering an entirely new process which had revolutionized the art. *Royer v. Coupe*, 146 U. S. 524, 13 Sup. Ct. Rep. 166,

36: 1073

Extended use.

1015. The mere fact that one who uses a patented process finds it applicable to more extended use than has been perceived by the patentee is not a defense to a charge of infringement. *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. Rep. 472,

37: 307

Cited in *E. M. Miller Co. v. Meriden Bronze Co.* 80 Fed. 525—*Lettelier v. Mann*, 91 Fed. 914—*De Lamar v. De Lamar Min. Co.* 110 Fed. 542—*Electric Smelting Co. & Aluminum Co. v. Pittsburgh Reduction Co.* 111 Fed. 752—*Standard Caster & Wheel Co. v. Caster Socket Co.* 51 C. C. A. 112, 113 Fed. 165—*Rosell v. Allen*, 16 App. D. C. 566.

New mode.

See also *infra*, 1063.

1016-7. A party who subsequently discovers a new mode of carrying out a patented process, and obtains letters patent therefor, is not entitled to use the process without the consent of the patentee thereof. *Tilghman v. Proctor*, 102 U. S. 707,

26: 279

f. Products.

Invention in, see *supra*, V. b, 7.

Construction of Patent for, see *supra*, 737-748.

1018. Every patent for a product or composition of matter must identify it so that it can be recognized aside from the description of the process of making it, or else nothing can be held to infringe the patent which is not made by that process. *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U. S. 293, 4 Sup. Ct. Rep. 455,

28: 433

Cited in *Holliday v. Pickhardt*, 29 Fed. 860—*Van Camp v. Maryland Pav. Co.* 34 Fed. 744—*Carl L. Jensen Co. v. Clay*, 59 Fed. 291—*Matheson v. Campbell*, 77 Fed. 283—*Holliday v. Schulze-Berge*, 78 Fed. 494—*Matheson v. Campbell*, 24 C. C. A. 391, 45 U. S. App. 473, 78 Fed. 917—*Badische Anilin & Soda Fabrik v. Kalle*, 94 Fed. 171.

1019. A process for producing artificial alizarine, meaning the chemical substance known by the formula $C_{14}H_8O_4$, from anthracene or its derivatives, by the monosulpho-acid process, is not infringed by the production of a substance containing, in addition to the alizarine, anthra-purpurine or isopurpurine, the formula of which is $C_{14}H_8O_4$, by the bisulpho-acid process, which puts in two atoms of anhydrous sulphuric acid instead of one. *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U. S. 293, 4 Sup. Ct. Rep. 455,

28: 433

Cited in *Greene v. St. Denis Soc.* 81 Fed. 67—*Kilpstein v. United States*, 94 Fed. 356—*Elberfeld & Co. v. United States*, 99 Fed. 555—*Elberfeld & Co. v. United States*, 42 C. C. A. 527, 102 Fed. 604.

Contract for product.

1020. Where a person contracted for ar-

ticles manufactured by another with a patented machine, if the contract was real, and he had no other connection than that which grew out of the contract with the party using the machine, he was not guilty of a breach of the patent right. *Keplinger v. De Young*, 10 Wheat. 358, 6: 341

g. Designs.

Invention in, see *supra*, V. b, 8
Sufficiency of Description and Claim for, see *supra*, 467.

Identity.

Comparison of Designs to Determine Identity, see Evidence, 1428.

1021. It is not essential to identity of design that the appearance should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one supposing it to be the other, the one first patented is infringed by the other. *Gorham Mfg. Co. v. White*, 14 Wall. 511, 20: 731
Limited in Dryfoos v. Friedman, 21 Blatchf. 566, 18 Fed. 826.

Cited in *McLean v. Fleming*, 96 U. S. 258, 24 L. ed. 832—*Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 84, 25 L. ed. 997—*Cone v. Morgan Envelope Co.* 4 Bann. & Ard. 110, Fed. Cas. No. 3,096—*Manhattan Medicine Co. v. Wood*, 4 Cliff. 478, Fed. Cas. No. 9,026—*Perry v. Starrett*, 3 Bann. & Ard. 489, Fed. Cas. No. 11,012—*Miller v. Smith*, 5 Fed. 365—*Wood v. Dolbey*, 19 Blatchf. 215, 7 Fed. 477—*Jennings v. Kibbe*, 20 Blatchf. 354, 10 Fed. 670—*Liggett & M. Tobacco Co. v. Hynes*, 20 Fed. 884—*Tomkinson v. Willetts Mfg. Co.* 23 Fed. 896—*Dreyfus v. Schnelder*, 25 Fed. 481—*Kraus v. Fitzpatrick*, 34 Fed. 59—*Ripley v. Elson Glass Co.* 49 Fed. 930—*Palne v. Snowden*, 1 C. C. A. 662, 3 U. S. App. 122, 50 Fed. 778—*New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.* 4 C. C. A. 26, 11 U. S. App. 637, 53 Fed. 815—*Anderson v. Monroe*, 55 Fed. 404—*Falk v. Donaldson*, 57 Fed. 35—*Monroe v. Anderson*, 7 C. C. A. 273, 17 U. S. App. 184, 58 Fed. 399—*Britton v. White Mfg. Co.* 61 Fed. 98—*Godillot v. American Grocery Co.* 71 Fed. 874—*Kann v. Diamond Steel Co.* 32 C. C. A. 325, 61 U. S. App. 22, 89 Fed. 707—*Myers v. Sternhelm*, 38 C. C. A. 346, 97 Fed. 626—*Centaur Co. v. Marshall*, 38 C. C. A. 417, 97 Fed. 789—*Buerkle v. Standard Heater Co.* 105 Fed. 780—*American Saddle Co. v. Sager Gear Co.* 122 Fed. 648—*Allen B. Wrisley Co. v. Iowa Soap Co.* 122 Fed. 798—*Williams v. Brooks*, 50 Conn. 285, 47 Am. Rep. 642—*Re Niedringhaus*, 2 MacArth. 157—*Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 328, 37 Am. Rep. 362.

1022. It is the appearance to the eye that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense, and substantial identity of appearance, or sameness of effect upon the eye, is the main test of substantial identity of design. *Gorham Mfg. Co. v. White*, 14 Wall. 511, 20: 731

1023. A patent for a saddle design which

is new in having a sharp drop of the pommel in the rear, as well as in combining parts of old saddles, is not infringed by a design which omits the sharp drop. *Smith v. Whitman Saddle Co.* 148 U. S. 674, 13 Sup. Ct. Rep. 768, 37: 606

Knowledge.

1024. Under the act of Feb. 4, 1887, in order to charge either a manufacturer or a seller of articles to which has been applied a patented design or any colorable imitation thereof, he must have been "knowing that the same has been applied," which is equivalent to saying "with a knowledge of the patent and of his infringement." *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. Rep. 576, 38: 426

h. Machinery.

Liberal Construction of Patent in Determining Infringement, see *supra*, 712.
Judicial Notice, see Evidence, 122.

Evidence of Differences in Mechanical Structure and Operation, see Evidence, 2256.

See also *supra*, 916.

Pioneer invention.

Question of Law or Fact, see Trial, 224.
See also *infra*, 1052.

1025-7. From the state of the art as shown by earlier patents a machine cannot be deemed an infringement of a prior claim which is not entitled to protection as a pioneer invention in its widest form, unlimited by specific details. *Gordon v. Warder*, 150 U. S. 47, 14 Sup. Ct. Rep. 32, 37: 992

Cited in *Knapp v. Moras*, 150 U. S. 228, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Miller v. Eagle Mfg. Co.* 151 U. S. 203, 38 L. ed. 129, 14 Sup. Ct. Rep. 310—*Electric Gaslighting Co. v. Fuller*, 8 C. C. A. 443, 21 U. S. App. 3, 59 Fed. 1004—*Gamewell Fire-Alarm Teleg. Co. v. Municipal Signal Co.* 10 C. C. A. 189, 21 U. S. App. 157, 61 Fed. 953—*American Tobacco Co. v. Streat*, 28 C. C. A. 24, 42 U. S. App. 617, 83 Fed. 706—*Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* 90 Fed. 205.

New use.

1028. The new application of a patented device to another use, which does not involve the exercise of the inventive faculty, is an infringement as much as though the new machine were an exact copy of the old. *Western Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. Rep. 670, 35: 294

Cited in *C. & A. Potts & Co. v. Creager*, 155 U. S. 607, 39 L. ed. 279, 15 Sup. Ct. Rep. 194—*Mast, F. & Co. v. Stover Mfg. Co.* 177 U. S. 491, 44 L. ed. 859, 20 Sup. Ct. Rep. 708—*Foos Mfg. Co. v. Springfield Engine & Thresher Co.* 1 C. C. A. 412, 6 U. S. App. 14, 49 Fed. 643—*Dederick v. Gardner*, 50 Fed. 98—*Watson v. Stevens*, 2 C. C. A. 503, 5 U. S. App. 101, 51 Fed. 759—*Steiner Fire Extinguisher Co. v. Adrian*, 52 Fed. 736—*Carter v. Wollschlaeger*, 53 Fed. 576—*American Cable R. Co. v. New York*, 56 Fed. 151—*Duff Mfg. Co. v. Forgie*, 57 Fed. 750—*Steiner Fire Extinguisher Co. v. Adrian*, 8 C. C.

A. 48, 16 U. S. App. 409, 59 Fed. 136—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 200, 21 U. S. App. 244, 61 Fed. 967—*Beach v. American Box Mach. Co.* 63 Fed. 802—*S. F. Heath Cycle Co. v. Hay*, 67 Fed. 251—*Mast v. Iowa Windmill & Pump Co.* 68 Fed. 219—*Bray v. United States Net & Twine Co.* 70 Fed. 1007—*L. Schreiber & Sons Co. v. Grimm*, 19 C. C. A. 69, 43 U. S. App. 10, 72 Fed. 674—*McKay-Copeland Lasting Mach. Co. v. Copeland Rapid-Laster Mfg. Co.* 77 Fed. 311—*Duff Mfg. Co. v. Forgie*, 78 Fed. 627—*Consolidated Fastener Co. v. Columbian Fastener Co.* 79 Fed. 800—*Forgie v. Duff Mfg. Co.* 26 C. C. A. 654, 55 U. S. App. 27, 81 Fed. 866—*Mast, F. & Co. v. Dempster*, 27 C. C. A. 198, 49 U. S. App. 508, 82 Fed. 334—*Diamond State Iron Co. v. Goldie*, 28 C. C. A. 592, 56 U. S. App. 68, 84 Fed. 975—*Frederick R. Stearns & Co. v. Russell*, 29 C. C. A. 131, 54 U. S. App. 591, 85 Fed. 228—*Safeguard Account Co. v. Wellington*, 86 Fed. 148—*Stover Mfg. Co. v. Mast*, 32 C. C. A. 237, 60 U. S. App. 325, 89 Fed. 340—*Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* 90 Fed. 209—*Falk Mfg. Co. v. Missouri R. Co.* 43 C. C. A. 246, 103 Fed. 301—*Metallic Extraction Co. v. Brown*, 43 C. C. A. 576, 104 Fed. 353—*Hallock v. Davison*, 107 Fed. 486—*Davey Pegging Mach. Co. v. Prouty*, 46 C. C. A. 444, 107 Fed. 510—*Bryant Electric Co. v. Electric Protection Co.* 110 Fed. 217—*George Frost Co. v. Cohn*, 112 Fed. 1012—*Dowagiac Mfg. Co. v. Superior Drill Co.* 53 C. C. A. 52, 115 Fed. 902—*Brislin v. Carnegie Steel Co.* 118 Fed. 597.

Subsequent issuance of patent.

1029. Under the act of 1839, § 7, a machine constructed is no infringement of a patent subsequently applied for. *Troy Iron & Nail Factory v. Odiorne*, 17 How. 73, 15: 37

1030. The right to use a machine after the issuance of a new patent under the act of January 21, 1808, enacted for the relief of the patentee, was not given to those who had erected such machinery between the expiration of the old patent and the issuing of the new one, by the proviso in that act that no person who may have heretofore paid the patentee for license to use his invention shall be obliged to renew the license or be subject to damages for not renewing it, and that no person who shall have used the invention or erected the same for use before the issuing of the patent shall be liable to damages therefor. *Evans v. Jordan*, 9 Cranch, 199, 3: 704

Cited in Bloomer v. McQuewan, 14 How. 560, 14 L. ed. 541, 1 Whitman, Pat. Cas. 751—*Blanchard v. Haynes*, 6 West. L. J. 83, Fed. Cas. No. 1,512—*Day v. Union India Rubber Co.* 3 Blatchf. 495, Fed. Cas. No. 3,691—*Washburn v. Gould*, 3 Story, 135, 2 Robb, Pat. Cas. 219, Fed. Cas. No. 17,214—*Re Fire-Extinguisher Case*, 21 Fed. 43—*Rein v. Clayton*, 3 L.R.A. 78, 37 Fed. 355—*Underhill v. Van Cortlandt*, 2 Johns. Ch. 359.

Infringement generally.

Infringement of Combinations, see supra, 942, 970, 972, 977, 992, 996-998.

Effect of Change in Form, see infra, 1053.

Effect of Change of Location, see infra, 1056, 1057.

Defenses in Suit for Infringement, see infra, 1158, 1159.

See also infra, 1064-1065a.

1031. The Hoff patent, 279,891, for an improvement in the manufacture of coal hods by folding a sheet of metal in the form of a cone, and then crimping the small end to form the bottom, can be supported, if at all, to cover the formation of the entire bottom from the crimped material, with the resultant increase in thickness, in view of the fact that it was old to crimp in and fold the ends of cylindrical cartridges and boxes of pasteboard or other stiff material, and also to turn the edge of metallic cylindrical vessels or packages to hold separate bottoms or heads, and is not infringed by a hod of which the lower end is completed by a cap, although partially formed by crimping. *Hoff v. Iron Clad Mfg Co.* 139 U. S. 326, 11 Sup. Ct. Rep. 580, 35: 179

1032. The use of a hard castiron safety pin does not infringe the Rusk patent, 110-397, for a soft metal pin in a grinding mill, the use of safety pins being old. *Gates Iron Works v. Fraser*, 153 U. S. 332, 14 Sup. Ct. Rep. 883, 38: 734

1033. A patent for a combination in a hot-blast apparatus, including a conductor consisting of a pipe provided with a bow handle, by means of which it can be removed or adjusted in place without liability of burning the hands, is not infringed by an apparatus in which the pipe is screwed fast to the furnace and cannot be removed while the machine is in use, although it is cast separate. *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 9 Sup. Ct. Rep. 83, 32: 390

1034. A patent for a planing machine, in which the rotating cylinder or cutting wheel is placed above the bed and at a fixed distance from it, with a pressure roller also above the bed, to keep the plank which passes between the roller and the bed from being drawn up by the cutter, is not infringed by a machine in which the revolving cutter is placed in a frame at a fixed distance from a pressure roller which constitutes the top of the frame, through which space the plank must pass, and the whole frame is adjustable vertically by sliding up and down, so as to allow it to be forced up to accommodate itself to a greater thickness of plank; rotary cutter wheel, bed plate, and pressure rollers all being old, the patent can be construed to cover only the particular mode of combination described in it. *Brooks v. Fiske*, 15 How. 212, 14: 665

1035. A mechanism for marking cloth on a sewing machine, which consists of a frame piece projecting outward from the presser foot, and supporting a bar running parallel with the bed of the machine, which supports one or more spring arms provided with slides or markers, and another bar projecting horizontally from the needle bar, from which is supported a pencil which operates the spring arms, and causes the points to mark the cloth by the motion of the needle

bar, is not infringed by an apparatus consisting of a spring arm attached to the bed plate of a marker, through a hole in which the needle passes, and allows the lower end of the needle arm to force the spring down on to a double spring blade operating on both sides of an upwardly projecting point, while the cloth passes under the blade and over the point. *Fuller v. Yentzer*, 94 U. S. 288, 24: 103

1036. The Boyden machine for making hat bodies is not an infringement of the Wells patent for the same purpose. *Burr v. Duryee*, 1 Wall. 531, 17: 650

Cultivators.

1037. The Pattee patent for a cultivator axle having draft plates hinged to wheel spindle-plates, so that the wheels retain the line of progression, although one of the draft animals may be in advance of the other, is not infringed by a machine which does not have the wheel spindles or draft plates or side plates on the axle like those in the patented device, and in which the direction of the wheels, instead of retaining the line of progression, turns as the animals may pull. *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 9 Sup. Ct. Rep. 259, 32: 700

1038. The Kendall patent, 174,684, for runners rigidly attached to the axle of a tongueless cultivator, with ploughs suspended therefrom, the rear ends of which are raised automatically by the pulling of the team and lowered by the weight of the plough beams, when hung upon the axle, is not infringed by a machine with runners arranged upon the end of an arm projecting backward from the axle, and which do not work automatically, but are turned up out of the way by hand when the plows are in use, and are prevented from turning by a catch on the arm when the ploughs are raised. *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 9 Sup. Ct. Rep. 259, 32: 700

Harvesters.

Improvement as Infringement, see *infra*, 1067.

1039. The adjustable feature of certain parts of a single combined machine or grain harvester cannot, in the light of the art as disclosed in prior patents, be treated or regarded as the same or substantially the same thing as an independent binding mechanism adjustable as a whole, with all its parts fixed and unadjustable, and which can be entirely removed, leaving a harvester complete, simply because such binding device is used in connection with grain harvesters. *Gordon v. Warder*, 150 U. S. 47, 14 Sup. Ct. Rep. 32, 37: 992

1040. A patent for a rigid connection of an arm with a vibratable link, whereby the finger beam of a harvester is made to rock either backward or forward by positive action in either direction, is not infringed by a device without such rigid arm, whereby the front only can be lifted; while it falls by its own weight. Besides, the later species of lifting device is old. *McCormick v. Whit-*

mer (McCormick v. Graham) 129 U. S. 1, 9 Sup. Ct. Rep. 213, 32: 593
Cited in Falls Rivet Co. v. Wolfe, 40 Fed. 470.

1041. A patent for a combination, in a harvester, of a finger beam with a gearing carriage, by means of a vibratable link and a draft rod having swivel joints at both its forward and rear ends, which joints have substantially a free torsional capacity, allowing the finger beam to rock or tip up freely either at the front or back; which patent, in view of the prior state of the art, is limited to the arrangement set forth therein,—is not infringed by a machine having a similar link, but in which the draft rod is so hinged at its forward end as to afford no torsional action, and is attached to the shoe in front of the finger-beam, instead of the rear, as in the patented machine, and in which the finger-beam is pivoted at the rear, allowing the front part only to rise and fall by swinging thereon. *McCormick v. Whitmer (McCormick v. Graham)* 129 U. S. 1, 9 Sup. Ct. Rep. 213, 32: 593

Metallic staples.

1042. A patent for a device for inserting metallic staples, which in view of the state of the art is to be construed to cover only the precise form claimed, and consists of a stationary staple, support, or anvil, and a reciprocating slotted or recessed hammer or driver, is not infringed by a device in which the anvil or staple blade is movable and the recessed clinching base is fixed or stationary. *Crawford v. Heysinger*, 123 U. S. 589, 8 Sup. Ct. Rep. 399, 31: 269

1043. Claims 1 and 2 of reissued letters patent 9803, for improvement in a device for inserting metallic staples, are not infringed by defendant's device called the "Victor tool." *Crawford v. Heysinger*, 123 U. S. 589, 8 Sup. Ct. Rep. 399, 31: 269

Stone crusher.

1044. A stone-crushing machine consisting of two nearly upright convergent jaws, one fixed and the other movable, the latter alternately approaching towards and receding from the other by a short and powerful vibratory motion communicated, through iron rods and levers, by a revolving shaft with a flywheel upon it, is infringed by a machine which varies from it chiefly by communicating the motion from the revolving shaft through a confined column of water, and in producing a less regular motion. *Robertson v. Blake (Blake v. Robertson)* 94 U. S. 728, 24: 245

Cited in Blake v. Greenwood Cemetery, 14 Blatchf. 342, 3 Bann. & Ard. 113, Fed. Cas. No. 1,497—*Filley v. Littlefield Stove Co.* 30 Fed. 437—*Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co.* 1 C. C. A. 168, 2 U. S. App. 55, 49 Fed. 67—*National Cash Register Co. v. American Cash Register Co.* 3 C. C. A. 564, 3 U. S. App. 340, 53 Fed. 372—*Holloway v. Dow*, 54 Fed. 517—*Westinghouse v. New York Air-Brake Co.* 59 Fed. 597—*S. F. Heath Cycle Co. v. Hay*, 67 Fed. 249.

1045. Claim 4 of the Brown patent, 201,646, for stone-crushing machines having a

shell enclosing at its upper end a concave breaker into which extends the inner edge of an oblique trough, is not infringed by a machine in which the breaking head is not concave. *Gates Iron Works v. Fraser*, 153 U. S. 332, 14 Sup. Ct. Rep. 883, 38: 734

Effect of agreement.

1046. An agreement between owners of rival patents for the manufacture of spikes and for a horseshoe, between whom infringement was mutually charged, and between whom suit for infringement of the patent for the manufacture of spikes was pending, by which it was agreed that the suit was to be discontinued, and that each party should thereafter manufacture and vend spikes of such kind and character as he saw fit, notwithstanding their conflicting claim to the same; and that the plaintiff alone should manufacture the horseshoes; and that each party released to the other all claim, demand, and cause of action, by reason of any violation of the patent rights claimed, up to the date of the agreement, does not entitle the defendant to use the plaintiff's patent for the manufacture of spikes. *Troy Iron & Nail Factory v. Corning*, 14 How. 193, 14: 383

I. Miscellaneous Articles.

Snap hook.

1047. Where prior patents exhibited every feature of a patented snap-hook, except the single one of a falcrum pivot cast as part of the cheek of the hook and not passing through holes in both ears, the patent is not infringed by a hook which does not show this feature and which also uses a different device in the arrangement of the spiral spring. *Bragg v. Fitch*, 121 U. S. 478, 7 Sup. Ct. Rep. 978, 30: 1008
Cited in *Curtis v. Atlanta Street R. Co.* 58 Fed. 600—*Bumington's Iron Bldg. Co. v. Eustis*, 13 C. C. A. 148, 27 U. S. App. 693, 65 Fed. 810—*P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co.* 22 C. C. A. 668, 40 U. S. App. 200, 76 Fed. 975—*Adams Electric R. Co. v. Lindell R. Co.* 23 C. C. A. 242, 40 U. S. App. 482, 77 Fed. 452.

Whip socket.

1048. A patent for a whip socket, with an opening or slot in the side in which a fastening lever is secured by a falcrum pin, is not infringed by a socket composed of two sectional halves exactly alike, each being a cone-shaped half cylinder, the cone being reversed near the bottom, forming a half section, bilged or barrel-shaped, connected at the bilge by an ear-shaped hinge on each half section. *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. Rep. 814, 30: 853

Sweat pad.

1049. A curved hook to attach a sweat-pad to a horse-collar is not an infringement of a double-roll spring made to clasp both the large and the small rolls of the collar. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76, 35: 800

Suspension saddle.

1050. The Veeder patent, 252,280, for a

seat for bicycles, consisting of a suspension saddle with a flexible portion attached at either end to an under spring in two or more parts which are extensible, if not anticipated by prior flexible seats suspended upon springs and in some cases with the feature of adjustability, is to be construed narrowly, and does not cover a seat in which the springs are wholly different in form, and of which the rear one is independently adjustable, and to which the feature of extensibility does not pertain at all, such feature resulting only from the peculiar manner in which the rear spring is adjusted. *Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 144 U. S. 238, 12 Sup. Ct. Rep. 637, 36: 420

Cited in *Campbell Printing Press & Mfg. Co. v. Duplex Printing-Press Co.* 86 Fed. 383.

Gas lighter.

1051. Reissued patent 9743, for "an apparatus for lighting gas by electricity, in combination with a circuit breaker located at the gas-burner, a lever adapted and arranged to open and close the stopcock or valve of the burner and carry the circuit breaker substantially as herein described," which operates in lighting street lamps by successively throwing the current into the magnet at each burner one after another,—is not infringed by an apparatus for the same purpose, but which cannot be used for a series of burners, in which two armatures operate separately, one to open and one to close, the gas valve, but which has no separate lever opening and closing the valve and carrying the circuit breaker. *Electric Gas-Lighting Co. v. Boston Electric Co.* 139 U. S. 481, 11 Sup. Ct. Rep. 586, 35: 250

J. Immaterial or Colorable Differences.

1052. A pioneer in the art of making a practical device, who has invented a principle which has gone into almost universal use in this country, is entitled to a liberal construction of his claim; and another device containing all the elements of his combination should be held an infringement, though there are superficial dissimilarities in their construction. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. Rep. 799, 36: 609
Cited in *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 568, 42 L. ed. 1147, 18 Sup. Ct. Rep. 707—*Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co.* 55 Fed. 320—*Westinghouse v. New York Air-Brake Co.* 59 Fed. 598—*Sessions v. Gould*, 60 Fed. 754—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 275, 37 U. S. App. 299, 69 Fed. 387—*L. Schreiber & Sons Co. v. Grimm*, 19 C. C. A. 71, 43 U. S. App. 10, 72 Fed. 675—*Independent Electric Co. v. Jeffrey Mfg. Co.* 76 Fed. 991—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 907—*Crown Cork & Seal Co. v. Aluminum Stopper Co.* 48 C. C. A. 94, 108 Fed. 867—*Brislin v. Carnegie Steel Co.* 118 Fed. 600—*Busch v. Jones*, 16 App. D. C. 43.

Change in form.

See also *supra*, 892-897, 980, 981.

1053. A mere change in the form of machinery (unless a particular form is speci-

fled as the means by which the effect described is produced), or an alteration in some of its unessential parts, or in the use of known equivalent powers, not varying essentially the machine or its mode of operation or organization, will not make the new machine a new invention. *O'Reilly v. Morse*, 15 How. 62, 14: 601

Morey v. Lockwood, 8 Wall. 230, 19: 339
Cited in Westinghouse v. Boyden Power Brake Co. 170 U. S. 568, 42 L. ed. 1147, 18 Sup. Ct. Rep. 707—*Filley v. Littlefield Stove Co.* 30 Fed. 437—*Butz Thermo-Electric Regulator Co. v. Jacobs Electric Co.* 36 Fed. 106—*Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. 38—*Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co.* 1 C. C. A. 168, 2 U. S. App. 55, 49 Fed. 66—*Risdon Iron & Locomotive Works v. Trent*, 92 Fed. 389—*Pacific Cable R. Co. v. Butte City Street R. Co.* 55 Fed. 763—*Union Steam-Pump Co. v. Battle Creek Steam-Pump Co.* 43 C. C. A. 565, 104 Fed. 342—*Dowagiac Mfg. Co. v. Superior Drill Co.* 53 C. C. A. 54, 115 Fed. 904—*Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* 55 C. C. A. 91, 118 Fed. 141—*Standard Computing Scale Co. v. Computing Scale Co.* 61 C. C. A. 551, 126 Fed. 649.

1054. A patent upon a car constructed with its upper part cylindrical, and the lower part in the form of the frustrum of a cone, is infringed by the construction of a similar car with the upper part octagonal and the lower part pyramidal. *Winans v. Denmead*, 15 How. 330, 14: 717

Cited in Sewall v. Jones, 91 U. S. 183, 23 L. ed. 277—*Eddy v. Dennis*, 95 U. S. 569, 24 L. ed. 365—*Werner v. King*, 96 U. S. 230, 24 L. ed. 614—*Western Electric Co. v. La Rue*, 139 U. S. 806, 35 L. ed. 296, 11 Sup. Ct. Rep. 670—*Hoyt v. Horne*, 145 U. S. 309, 36 L. ed. 716, 12 Sup. Ct. Rep. 922—*American Pln Co. v. Oakville Co.* 3 Blatchf. 193, Fed. Cas. No. 313—*Johnson v. McCullough*, 4 Fisher, Pat. Cas. 175, Fed. Cas. No. 7,394—*Johnson v. Onlon*, 3 Hughes, 294, Fed. Cas. No. 7,401—*Milligan & H. Glue Co. v. Upton*, 4 Cliff. 252, 1 Bann. & Ard. 514, Fed. Cas. No. 9,607—*Murphy v. Eastham*, Holmes, 116 Fed. Cas. No. 9,949—*Parham v. American Button-Hole Over-Seaming & Sewing-Mach. Co.* 4 Fisher, Pat. Cas. 476, Fed. Cas. No. 10,713—*Pearl v. Ocean Mills*, 2 Bann. & Ard. 475, Fed. Cas. No. 10,876—*Sargent v. Larned*, 2 Curt. C. C. 349, Fed. Cas. No. 12,364—*Singer v. Walmsley*, 1 Fisher, Pat. Cas. 569, Fed. Cas. No. 12,900—*Union Paper-Bag Mach. Co. v. Pultz & W. Co.* 15 Blatchf. 168, 3 Bann. & Ard. 410, Fed. Cas. No. 14,392—*Whipple v. Middlesex Co.* 4 Fisher, Pat. Cas. 48, Fed. Cas. No. 17,520—*Whitney v. Mowry*, 2 Bond, 65, 3 Fisher, Pat. Cas. 175, Fed. Cas. No. 17,592—*Sawyer v. Miller*, 4 Woods, 474, 12 Fed. 727—*Grier v. Castle*, 17 Fed. 524—*La Rue v. Western Electric Co.* 28 Fed. 90—*Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co.* 34 Fed. 134—*Tonduer v. Chambers*, 37 Fed. 337—*Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. 30—*Norton v. Jensen*, 1 C. C. A. 458, 7 U. S. App. 676, 49 Fed. 866—*Brush Electric Co. v. Electric Improv. Co.* 52 Fed. 974—*Mast. F. & Co. v. Rude Bros. Mfg. Co.* 53 Fed. 124—*Harmon v. Struthers*, 57 Fed. 639—*Westinghouse v. New York Air-Brake Co.* 59 Fed. 596.

1055. In a patent for picker-staff motions in looms, a combination of a rocker with a bed by loose journals projecting on each side

of a picker-staff, effected by means of a journal-bearing arm to prevent the rocker from sliding on its bed, and to steady the rocker, resisting any lateral movement and preventing wobbling,—being covered by a patent, the mere form or mode of attachment of the journal-bearing arm is immaterial, so long as it performs the same function in substantially the same way. *Mason v. Graham*, 23 Wall. 261, 23: 86

Cited in Railway Register Mfg. Co. v. Broadway & S. Ave. R. Co. 26 Fed. 527—*Thompson v. Gildersleeve*, 34 Fed. 46.

Change of location.

1056. The mere change of location of a joint in a machine, which does not change the substantial identity of the thing or its operation and effect, does not prevent its use from being an infringement. *Brown v. Guild (The Corn-planter Patent)* 23 Wall. 181, 23: 161

Cited in Richards v. Michigan C. R. Co. 40 Fed. 166—*Bortree v. Jackson*, 43 Fed. 135—*Robbins v. Aurora Watch Co.* 43 Fed. 526—*Lamson Cash R. Co. v. Keplinger*, 45 Fed. 249—*Hoyle v. Kerr*, 7 C. C. A. 271, 17 U. S. App. 200, 58 Fed. 397.

1057. The attaching of the lower end of the saw, in a sawmill, to the pitman below the cross-head, instead of above it, and thereby getting the same movement as before, by reversing the motion of the crank, is no change in principle. *Ives v. Hamilton*, 92 U. S. 426, 23: 494

1058. The Richardson patents for an improvement in safety valves are infringed by a valve which produces the same effects and is operated by the same means, although the valve proper is an *annulus*, and the extended surface is a disc inside of the *annulus*, the Richardson valve proper being a disc and the extended surface an *annulus* surrounding the disc; and although the valve proper has two ground joints, and only the steam which passes through one of them goes through the stricture, while, in the Richardson valve, all the steam which passes into the air goes through the stricture; and although the huddling chamber is at the center, instead of the circumference, and is in the seat of the valve, under the head, instead of in the head, and the stricture is at the circumference of the seat of the valve, instead of being at the circumference of the head. *Consolidated Safety-Valve Co. v. Crosby Steam Gage & Valve Co.* 113 U. S. 157, 5 Sup. Ct. Rep. 513, 28: 939
Distinguished in Mayo Knitting Mach. & Needle Co. v. E. Jenckes Mfg. Co. 66 C. C. A. 517, 133 Fed. 541.

Cited in Consolidated Safety-Valve Co. v. Kunkle, 119 U. S. 45, 30 L. ed. 302, 7 Sup. Ct. Rep. 50—*Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 276, 32 L. ed. 720, 9 Sup. Ct. Rep. 200—*Thompson v. Gildersleeve*, 34 Fed. 46—*Harmon v. Struthers*, 57 Fed. 639—*Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* 55 C. C. A. 91, 118 Fed. 141—*Adam v. Folger*, 56 C. C. A. 543, 120 Fed. 263.

What constitutes infringement.

1059. Where a combination of galvanic or electric circuits with batteries is substan-

tially the same as that covered by a patent, and for the same purpose,—which is to impress marks or signs upon paper at a distance,—the substitution of different marks or signs does not prevent its use from being an infringement. *O'Reilly v. Morse*, 15 How. 62, 14: 601

1060. Where a patent rotary blower is copied by another in all material respects, infringement is not effected by casting it in two pieces instead of one, where this appears to be neither reasonable nor necessary. *Hyndman v. Roots*, 97 U. S. 224, 24: 975 *Cited in Holloway v. Dow*, 54 Fed. 517.

1061. A shoe in which there is no bolt hole through the lug on the sole, but which is held in place by the curved lower end of the clevis fitting into a curved depression in the top of the lug, and in which the clevis does not have two arms, but is a vertical piece which fits between the lugs of the shoe, and is bolted between them, consists of the same four parts differing only in form, and is an infringement of the other. *Lake Shore & M. S. R. Co. v. National Car Brake Shoe Co.* 110 U. S. 229, 4 Sup. Ct. Rep. 17, 28: 129

1062. A patent for a postage or revenue stamp having a portion of its surface composed of thin or fragile paper, or other suitable material, on which a portion of the design or other matter is printed, loosely attached as a flap or flaps, covering a portion of the face of the stamp, so that the stamp may be canceled by tearing off the flap or flaps, is not infringed by the use of an ordinary stamp pasted over a loose slip which prevents a portion of the stamp from sticking, so that the part remaining loose may be cut or torn out while the remaining portions remain fixed. *Fletcher v. Blake*, 131 U. S. xcvi. Appx. and 26: 156

1063. A patent for the process of driving wells so as to secure an air-tight connection between the point of the tube and the surrounding earth is infringed by boring, instead of driving, until the water-bearing strata is reached, and then driving the tube downward into the stratum to secure the air-tight connection. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, 30: 1064

k. Improvements.

Invention in, see supra, V. b, 9.

Construction of Patents for, see supra, 738, 749-758.

Different Arrangement of Devices, see supra, 898-907.

Use of Equivalent, see supra, 913, 930, 931. Improvements in Combinations, see supra, 967, 970, 975.

Improved Process, see supra, 1013.

Effect of Unreasonable Delay in Disclaimer of Part of, see supra, 775.

Right to Recover for Infringement before Patent Obtained, see infra, 1102.

See also supra, 847.

1063a. The Boyden patent for an im-

provement in machinery for making hat bodies does not infringe any combination of devices claimed in the Hopkins patent. *Burr v. Duryee*, 1 Wall. 578n, 17: 661

Similar means.

See also supra, 896, 897, 1058.

1064. Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same results are infringements, although they contain improvements in mechanism. *Miller v. Eagle Mfg. Co.* 151 U. S. 186, 14 Sup. Ct. Rep. 310, 38: 121 *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299, 32: 715 *Cited in Miller v. Eagle Mfg. Co.* 151 U. S. 207, 38 L. ed. 131, 14 Sup. Ct. Rep. 310—*Norton v. Jensen*, 1 C. C. A. 455, 7 U. S. App. 676, 49 Fed. 862—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 198, 21 U. S. App. 244, 61 Fed. 962—*Beach v. American Box Mach. Co.* 63 Fed. 606—*Bowers v. Von Schmidt*, 63 Fed. 580—*De Lorleau v. Whitney*, 11 C. C. A. 365, 21 U. S. App. 428, 63 Fed. 620—*Westinghouse Air-Brake Co. v. New York Air-Brake Co.* 11 C. C. A. 536, 26 U. S. App. 248, 63 Fed. 970—*Bundy Mfg. Co. v. Columbian Time-Recorder Co.* 12 C. C. A. 444, 26 U. S. App. 421, 64 Fed. 853—*New Departure Bell Co. v. Bevin Bros. Mfg. Co.* 64 Fed. 864—*Travers v. American Cordage Co.* 64 Fed. 774—*Wells v. Curtis*, 13 C. C. A. 501, 81 U. S. App. 123, 66 Fed. 325—*Western Teleph. Constr. Co. v. Stromberg*, 66 Fed. 552—*Cramer v. Fry*, 68 Fed. 211—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 282, 37 U. S. App. 299, 69 Fed. 394—*Carter Mach. Co. v. Hanes*, 70 Fed. 865—*Erle Rubber Co. v. American Dunlop Tire Co.* 16 C. C. A. 638, 28 U. S. App. 470, 70 Fed. 64—*Craig v. Michigan Lubricator Co.* 72 Fed. 177—*McBride v. Kingman*, 72 Fed. 914—*Muller v. Lodge & D. Mach. Tool Co.* 23 C. C. A. 866, 47 U. S. App. 189, 77 Fed. 630—*Roemer v. Peddle*, 24 C. C. A. 41, 39 U. S. App. 496, 78 Fed. 119—*Consolidated Store-Service Co. v. Wilson*, 88 Fed. 201—*St. Louis Car-Coupler Co. v. National Malleable Castings Co.* 31 C. C. A. 280, 57 U. S. App. 310, 87 Fed. 901—*Bowers v. San Francisco Bridge Co.* 91 Fed. 414—*Beach v. Hobbs*, 34 C. C. A. 253, 63 U. S. App. 626, 92 Fed. 151—*Penfield v. Chambers Bros. Co.* 34 C. C. A. 587, 92 Fed. 638—*Bundy Mfg. Co. v. Detroit Time Register Co.* 36 C. C. A. 397, 94 Fed. 540—*Overweight-Counterbalance Elevator Co. v. Improved Order, R. M. H. Asso.* 36 C. C. A. 129, 94 Fed. 159—*Cushman Paper Box Mach. Co. v. Goddard*, 37 C. C. A. 222, 95 Fed. 685—*Cleveland Target Co. v. Empire Target Co.* 97 Fed. 73—*Lein v. Myers*, 97 Fed. 608—*King Ax. Co. v. Hubbard*, 38 C. C. A. 431, 97 Fed. 803—*McSherry Mfg. Co. v. Dowagiac Mfg. Co.* 41 C. C. A. 632, 101 Fed. 721—*Galsman v. Gallert*, 105 Fed. 958—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 562, 106 Fed. 711—*Henry Huber Co. v. J. L. Mott Iron Works*, 113 Fed. 602—*Simplex Railway Appliance Co. v. Wands*, 53 C. C. A. 175, 115 Fed. 521.

Different means.

1064a. A patent for improvement in quilting machines, in which the machine

gives circular motion to the goods by mechanism accomplishing the result in one way, is not infringed by a machine in which the result is accomplished by different mechanism in a different way. *Dryfoos v. Wiese*, 124 U. S. 32, 8 Sup. Ct. Rep. 354, 31: 362

Cited in Forncrook v. Root, 127 U. S. 181, 82 L. ed. 99, 8 Sup. Ct. Rep. 1247.

1065. The patent granted Dryfoos in 1880, for an improvement in quilting machines, must be limited to the mechanism described, and cannot be extended so as to cover all mechanisms for giving circular direction to feed motion, nor to the process of operation of the mechanism described therein. *Dryfoos v. Wiese*, 124 U. S. 32, 8 Sup. Ct. Rep. 354, 31: 362

Cited in Knapp v. Morss, 150 U. S. 228, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Masten v. Hunt*, 51 Fed. 219—*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 199, 21 U. S. App. 244, 61 Fed. 963—*Wright & C. Wire-Cloth Co. v. Clinton Wire-Cloth Co.* 14 C. C. A. 849, 33 U. S. App. 188, 67 Fed. 793—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 565, 106 Fed. 715—*Farmers Mfg. Co. v. Spruiks Mfg. Co.* 119 Fed. 599.

Inoperative machine.

1065a. An owner of a patented machine that will not do what it is intended to do cannot sustain an action against one who is shown to use a successful and operative machine. *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. Rep. 199, 39: 263

Cited in Glidden v. Noble, 5 App. D. C. 494.

Vessel.

1066. The use of a patented improvement in the construction or equipment of a foreign vessel, while she is coming into or going out of a port of the United States, is not an infringement of the patent, if it was placed upon her in a foreign port and authorized by the laws of the country to which she belongs. *Brown v. Duchesne*, 19 How. 183, 15: 595

Reaping machine.

1067. Wedges having been previously in use on reaping machines to divide the cut from the standing grain, where a patent for a divider consists of the combination of a bow of tough wood and a dividing iron, the latter being but a new form or substitute for one side of the triangle or wedge previously used, and being distinguished from others by these peculiarities, viz.: (1) rising at an angle of about 30 degrees until it reaches the reel; (2) curving under the reel; (3) being adjustable by means of a slot so as to suit the different heights of the reel,—there is no infringement in the use of a wooden projection somewhat in the form of a wedge, which, from the point in front, rises as it approaches the cutting apparatus, with a small curve not approaching to an angle of 30 degrees, but which has no dividing iron, or substitute or equivalent possessing the peculiar qualities of that instrument. As an improvement on former machines it has some peculiarities of form and construction, but it does not adopt the combination of the pat-

ent described. It is a distinct improvement, perhaps inferior to the other, but certainly no infringement. *McCormick v. Talcott*, 20 How. 402, 15: 930

Cited in Burr v. Duryee, 1 Wall. 573, 17 L. ed. 638, 2 Whitman, Pat. Cas. 103—*Case v. Brown*, 2 Wall. 328, 17 L. ed. 818, 2 Whitman, Pat. Cas. 129—*Electric Railroad Signal Co. v. Hall Railway Signal Co.* 114 U. S. 98, 29 L. ed. 99, 5 Sup. Ct. Rep. 1069—*Knapp v. Morss*, 150 U. S. 229, 37 L. ed. 1062, 14 Sup. Ct. Rep. 81—*Burden v. Corning*, 2 Fisher, Pat. Cas. No. 489, Fed. Cas. No. 2,143—*Crompton v. Belknap Mills*, 3 Fisher, Pat. Cas. 549, Fed. Cas. No. 3,406—*Hale v. Stimpson*, 2 Fisher, Pat. Cas. 570, Fed. Cas. No. 5,915—*Seymour v. Osborne*, 3 Fisher, Pat. Cas. 578, Fed. Cas. No. 12,688—*Singer v. Walmsley*, 1 Fisher, Pat. Cas. 572, Fed. Cas. No. 12,900—*Taylor v. Garretson*, 9 Blatchf. 163, 5 Fisher, Pat. Cas. 124, Fed. Cas. No. 13,792—*Crompton v. Belknap Mills*, 3 Fisher, Pat. Cas. 549, Fed. Cas. No. 18,285—*Hill v. Sawyer*, 31 Fed. 285—*Smith v. Thomson*, 38 Fed. 607—*Tatum v. Gregory*, 41 Fed. 143—*National Progress Bunching-Mach. Co. v. John R. Williams Co.* 12 L.R.A. 110, 44 Fed. 194—*Dederick v. Gardner*, 50 Fed. 100—*Merritt v. Middleton*, 55 Fed. 977—*C. T. Ham Mfg. Co. v. R. E. Diets Co.* 13 C. C. A. 691, 14 U. S. App. 709, 58 Fed. 371—*Parry Mfg. Co. v. Hitchcock Mfg. Co.* 58 Fed. 403—*Stirrat v. Excelsior Mfg. Co.* 10 C. C. A. 217, 27 U. S. App. 13, 61 Fed. 981—*Griewold v. Harker*, 10 C. C. A. 438, 27 U. S. App. 122, 62 Fed. 391—*Wheaton v. Norton*, 17 C. C. A. 457, 44 U. S. App. 118, 70 Fed. 843—*Carter Mach. Co. v. Hanes*, 70 Fed. 866—*Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.* 86 Fed. 320—*Noonan v. Chester Park Athletic Club Co.* 39 C. C. A. 430, 99 Fed. 94—*Kinloch Teleph. Co. v. Western Electric Co.* 51 C. C. A. 378, 113 Fed. 668—*Ide v. Thorlitch, D. & R. Carpet Co.* 53 C. C. A. 347, 115 Fed. 143—*Simplex Railway Appliance Co. v. Wands*, 53 C. C. A. 175, 115 Fed. 521—*Sander v. Rose*, 58 C. C. A. 176, 121 Fed. 840—*Anderson v. Collins*, 58 C. C. A. 677, 122 Fed. 459—*Fay v. Mason*, 62 C. C. A. 164, 127 Fed. 330—*Greene v. Buckley*, 68 C. C. A. 81, 135 Fed. 531.

Bridge.

1068. Where the claim for improvement in iron truss bridges extends only to eyebars, or cords made wide and thin and applied on edge, those cylindrical in form, only flattened at the eye, for insertion between ribs or projections of posts, are no infringement. *Keystone Bridge Co. v. Phoenix Iron Co.* 95 U. S. 274, 24: 344

Cited in Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co. 110 U. S. 494, 28 L. ed. 223, 4 Sup. Ct. Rep. 220—*White v. Dunbar*, 119 U. S. 52, 30 L. ed. 305, 7 Sup. Ct. Rep. 72—*McClain v. Ortmyer*, 141 U. S. 424, 35 L. ed. 802, 12 Sup. Ct. Rep. 76—*Polsdorfer v. St. Louis Wooden-Ware Works*, 37 Fed. 58—*Dickinson v. Parker*, 38 Fed. 412—*Sackett v. Smith*, 42 Fed. 852—*National Progress Bunching Mach. Co. v. John R. Williams Co.* 12 L.R.A. 110, 44 Fed. 194—*Smith v. Putnam*, 45 Fed. 203—*Madcock v. Coxon*, 45 Fed. 579—*Johnson Co. v. Pacific Rolling-Mills Co.* 47 Fed. 589—*Brown Mfg. Co. v. David Bradley Mfg. Co.* 51 Fed. 227—*Stutz v. Robson*, 54 Fed. 507—*Gerard v. Diebold Safe & Lock Co.* 4 C. C. A. 647, 13 U. S. App. 73, 54 Fed. 890—*Merritt v. Middleton*, 55 Fed. 977—*Curtis v. Atlanta Street R. Co.* 56 Fed. 600—*Brown v. Stilwell & B.*

Mfg. Co. 6 C. C. A. 537, 6 U. S. App. 427, 57 Fed. 740—Parry Mfg. Co. v. Hitchcock Mfg. Co. 58 Fed. 404—Lewis v. Pennsylvania Steel Co. 8 C. C. A. 44, 17 U. S. App. 296, 59 Fed. 132—Lamson Cash R. Co. v. Godehard, 8 C. C. A. 269, 19 U. S. App. 360, 59 Fed. 780—H. W. Johns Mfg. Co. v. Robertson, 60 Fed. 906—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 199, 21 U. S. App. 244, 61 Fed. 963—Stirrat v. Excelsior Mfg. Co. 10 C. C. A. 221, 27 U. S. App. 13, 61 Fed. 985—Frank v. Wm. P. Mockridge Mfg. Co. 65 Fed. 524—Cramer v. Fry, 68 Fed. 212—Thomson-Houston Electric Co. v. Elmira & H. R. Co. 69 Fed. 266—Union Gas-Engine Co. v. Doak, 88 Fed. 90—Stokes Bros. Mfg. Co. v. Heller, 41 C. C. A. 336, 101 Fed. 267—Moore v. Eggers, 46 C. C. A. 430, 107 Fed. 496—Henry Huber Co. v. J. L. Mott Iron Works, 113 Fed. 604—Kinloch Teleph. Co. v. Western Electric Co. 51 C. C. A. 365, 113 Fed. 655—Schreiber & C. Mfg. Co. v. Adams Co. 54 C. C. A. 131, 117 Fed. 833—Dowaglac Mfg. Co. v. Brennan, 118 Fed. 147—Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co. 132 Fed. 615.

Stoves.

1069. A patent for (1) a diving flue cooking stove, with the exit flue so constructed as to inclose on the sides and bottom a culinary boiler or hot-water reservoir; claiming (2) also such exit flue constructed across the bottom and up the rear upright side of such boiler or reservoir; and (3) an exit passage below the top of the oven, and an exit flue in combination with an uncased reservoir attached to the rear of the stove, and placed just above such exit passage, and so arranged that the gases of combustion, when passing through such exit flue, will impinge upon or come in contact with said reservoir; and (4) an exit passage constructed in the rear of a diving-flue cooking stove and below the top of the oven, in combination with an uncased reservoir attached to the rear of the stove, the bottom of which is also below the top of the oven, and so arranged that the gases of combustion will come in contact with and heat such reservoir by a direct draft from the fire box to the smoke pipe,—is limited to a structure in which the front of the reservoir has no air space in front of it, and in which the exit flue does not expand into a chamber at the bottom of the reservoir, and in which the vertical part of the exit flue does not pass up through the reservoir. *Bussey v. Excelsior Mfg. Co.* 110 U. S. 131, 4 Sup. Ct. Rep. 38, 28: 95

1070. Hence, those claims are not infringed by a stove which, although there are three flues, and an exit passage below the top of the oven, and a reservoir, the bottom of which is below the top of the oven, no part of the rear end vertical plate is removed so as to allow the gases of combustion to come into direct contact with the front of the reservoir, and the exit flue is not a narrow one, the area of which is co-extensive with the entire surface of the bottom of the reservoir; and the vertical passage out of such chamber is in and through the body of the reservoir, and removable with it. *Bussey v. Excelsior Mfg. Co.* 110 U. S. 131, 4 Sup. Ct. Rep. 38, 28: 95

Pavements.

Liability of City for Infringement, see infra, 1125.

1071. The proper construction of reissued letters patent 4364, for an improvement in concrete pavements, is that the invention consists in dividing the pavement into blocks so that one block can be removed and repaired without injury to the rest of the pavement. The effect of the disclaimer filed was to leave the patent to be one for a pavement wherein the blocks are formed by interposing some separating material between them, and the first claim is infringed by a concrete pavement laid in detached blocks or sections, substantially in the manner described in the specifications of the reissue. *Hurlbut v. Schillinger*, 130 U. S. 456, 9 Sup. Ct. Rep. 584, 32: 1011

Cited in Crosby Steam Gage & Valve Co. v. Consolidated Safety Valve Co. 141 U. S. 454, 35 L. ed. 815, 12 Sup. Ct. Rep. 49—*Schillinger v. United States*, 155 U. S. 180, 39 L. ed. 114, 15 Sup. Ct. Rep. 85—*Warren v. Keep*, 155 U. S. 268, 39 L. ed. 145, 15 Sup. Ct. Rep. 83—*Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 436, 46 L. ed. 985, 22 Sup. Ct. Rep. 698—*Keep v. Fuller*, 42 Fed. 899—*Mosher v. Joyce*, 2 C. C. A. 326, 6 U. S. App. 107, 51 Fed. 445—*Richmond v. Atwood*, 17 L.R.A. 618, 2 C. C. A. 607, 5 U. S. App. 151, 52 Fed. 21—*California Artificial Stone Paving Co. v. Starr*, 52 Fed. 298—*Heaton Button-Fastener Co. v. MacDonald*, 57 Fed. 650—*Hanifen v. Price*, 96 Fed. 441—*Wales v. Waterbury Mfg. Co.* 41 C. C. A. 253, 101 Fed. 130—*Coddington v. Proppe*, 112 Fed. 1018—*Plaget Novelty Co. v. Headley*, 123 Fed. 898.

1072. Where a patent claims (1) a concrete pavement laid in detached blocks or sections; (2) the arrangement of tar paper or its equivalent between adjoining blocks of concrete; and the specification makes it essential that the pavement shall be so laid in sections "that each section can be taken up and relaid without disturbing the adjoining sections," and so that the joint between the blocks allows them to heave separately, from the effects of frost,—there is no infringement in a pavement made in one mass and marked crosswise with a blunt marker, to the depth of about one sixteenth of an inch, merely for ornamentation. *California Artificial Stone Paving Co. v. Schalicke*, 119 U. S. 401, 7 Sup. Ct. Rep. 391, 30: 471

Cited in Hurlbut v. Schillinger, 130 U. S. 465, 32 L. ed. 1014, 9 Sup. Ct. Rep. 584—*Hill v. Sawyer*, 31 Fed. 286—*Schillinger v. Middleton*, 31 Fed. 730—*Shannon v. Bruner*, 33 Fed. 290—*Sackett v. Smith*, 42 Fed. 853—*California Artificial Stone Paving Co. v. Starr*, 52 Fed. 298.

Cornsheller.

1073. A patent for a feeding device in a cornsheller consisting of a series of wings, wheels, or projections, so arranged on a shaft as to revolve in the same direction in which the corn is running, is infringed by a spiked shaft revolving in the same direction in which the corn is running. *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. Rep. 295, 38: 103

Cited in McCormick Harvesting Mach. Co. v.

Aultman, M. & Co. 16 C. C. A. 282, 37 U. S. App. 299, 69 Fed. 394.

Banjos.

1074. An improvement in banjos as in the Cubley patent, 253,849, by which the parchment rests directly on the rim, consisting of a metal shell made by turning over the edges of a piece of sheet metal, which, as respects form, is the same as the old round edged wooden rim, but, being made of metal and hollow, imparts distinctive musical properties,—does not infringe the Dobson patent, 203,604, containing a dome-shaped ring of metal or wood to ease the wear of the parchment and to improve the tone; nor patent 249,321, having a metal ring interposed between the parchment and rim composed of wood and metal, serving to ease the wear and producing a metallic ringing sound. *Dobson v. Cubley*, 149 U. S. 117, 13 Sup. Ct. Rep. 796, 37: 671
Cited in Stitrat v. Excelsior Mfg. Co. 10 C. C. A. 221, 27 U. S. App. 13, 61 Fed. 985.

Envelopes.

1075. The Dunham patent, 331,118, for an improvement in envelopes, the peculiar feature of which is the construction of the flap so that it can be opened without tearing, is not infringed by an envelope the flap of which cannot be opened without injury to it. *Dunham v. Dennison Mfg. Co.* 154 U. S. 103, 14 Sup. Ct. Rep. 986, 38: 924
Cited in De Loria v. Whitney, 11 C. C. A. 365, 21 U. S. App. 428, 63 Fed. 620—*Overweight-Counterbalance Elevator Co. v. Improved Order, R. M. H. Asso.* 36 C. C. A. 129, 94 Fed. 159.

Cartridges.

1076. Reloading cartridges, the vents of which are wholly over the fulminate chamber and do not lead directly to the powder chamber, but lead to a channel cut across the upper face of the anvil, and by this to a hole in the base of the powder chamber, so that the explosive force of the fulminate enters the powder chamber in a central stream,—do not infringe the Hubbell patent, No. 212,313, for an improvement in metallic cartridges, the distinguishing feature of which is that the anvil plate has two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate, so that this chamber at its sides or outer extreme edges communicates directly and exclusively with the powder charge, so that the explosive force of the fulminate is not allowed to expand under a larger area of the anvil plate and blow it out, but is compelled to diffuse its explosive force, not in a central stream, but in a diffused body into the base of the powder charge. *Hubbell v. United States*, 179 U. S. 77, 86, 21 Sup. Ct. Rep. 24, 28, 45: 95, 100

1077. The fact that a few loose grains of powder fall down through the base of the powder chamber of a reloading cartridge, and lie loosely in the groove across the upper face of the anvil, so that they come directly in contact with the flame of the fulminate before the latter enters the powder chamber, when they are not relied upon, and do not

in fact operate as a means of igniting the charge in the powder chamber,—will not make a cartridge which is so constructed that the explosive force of the fulminate enters the powder chamber in a central stream infringe the Hubbell patent, No. 212,313, of which the distinguishing feature is that the anvil plate has two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate, so that the explosive force of the fulminate does not enter the powder chamber in a central stream, but in a diffused body into the base of the powder charge. *Hubbell v. United States*, 179 U. S. 77, 86, 21 Sup. Ct. Rep. 24, 28, 45: 95, 100

Cannon.

1078. The Seabury patent, 425,584, claim 1, for an improvement in breech-loading cannon to provide for turning the breech-block, withdrawing it backward, and swinging it aside, by one continuous movement of a single lever, and claiming a combination with such cannon of a breech-block that can be withdrawn backward, a breech-block carrier hinged to the breech, and a breech-block retractor hinged to the breech, separate from the carrier, to move independently of it, to draw the breech-block thereinto and push it therefrom, but capable of moving the carrier while the breech-block is therein, is not infringed by the Dashiell device, in which the retractor is not hinged to the breech at all, but is hinged to the carrier (and is not separate, but is a part of the carrier), since at the date of the Seabury invention it was not a novelty to perform the three movements specified by the continuous movement of a single lever, and the claim must therefore be limited to the precise mechanism described. *Dashiell v. Grosvenor*, 162 U. S. 425, 16 Sup. Ct. Rep. 805, 40: 1025
Cited in Wirt v. Farrelly, 84 Fed. 892—*Union Writing Mach. Co. v. Domestic Sewing Mach. Co.* 95 Fed. 144—*Union Writing Mach. Co. v. Domestic Sewing Mach. Co.* 48 C. C. A. 249, 109 Fed. 90—*International Postal Supply Co. v. Bruce*, 114 Fed. 515.

Scales.

1079. Infringement of the claims of the Hayden patent, 700,919, for an improvement in spring-balance computing scales, does not result from the use of a scale in which the downward movement of the load accomplishes the rotary movement of the inner computing cylinder by other mechanism than the suspended rod with its spiral, which, with its connection with the cylinder, is the essential element of the Hayden invention. *Computing Scale Co. v. Automatic Scale Co.* 204 U. S. 609, 27 Sup. Ct. Rep. 307, 51: 645

Wire fabric.

1080. No infringement of either the Kitzelman patent, No. 356,322, the Davison patent, No. 289,507, or the Connor patent, No. 357,067, for improvements in wire-fabric machines, or of the Pope patent, No. 505,607, for wire-fabric machines, results from the manufacture, under the Whitney patent, No. 502,025, of wire-fence machines which are

substantially differentiated from those manufactured under the earlier patents, none of which embody pioneer invention. *Kokomo Fence Mach. Co. v. Kitselman*, 189 U. S. 8, 23 Sup. Ct. Rep. 521, 47: 689
Cited in Cimolotti Unhairing Co. v. American Fur Ref. Co. 198 U. S. 414, 49 L. ed. 1107, 25 Sup. Ct. Rep. 697—*United States Envelope Co. v. Sherman Envelope Co.* 58 C. C. A. 626, 122 Fed. 466—*American Fur Ref. Co. v. Cimolotti Unhairing Mach. Co.* 59 C. C. A. 362, 123 Fed. 874—*Comptograph Co. v. Mechanical Accountant Co.* 129 Fed. 396—*Cook v. Heywood Bros. & W. Co.* 131 Fed. 762—*Greene v. Buckley*, 68 C. C. A. 81, 135 Fed. 531—*McKenzie Furnace Co. v. Green Engineering Co.* 71 C. C. A. 198, 138 Fed. 832—*McCaslin v. Link Belt Machinery Co.* 139 Fed. 399.

XV. Remedies for Infringement.

a. In General.

Disclaimer after Commencement of Suit, see *supra*, 771-774.
Abatement of Suit for Infringement, see *Abatement and Revival*, 16.
Accounting for Profits on Infringement, see *Accounting*, 8-11.
Reviewability of Decree, see *Appeal and Error*, 126, 127, 163.
Federal Question as to, see *Appeal and Error*, 1817.
Appellate Jurisdiction Regardless of Amount in Controversy, see *Appeal and Error*, 608-611, 627.
Appellate Jurisdiction of Judgment for Contempt in Disobeying Preliminary Injunction, see *Appeal and Error*, 739.
Finality of Decision of Circuit Court of Appeals, see *Appeal and Error*, 801.
Admitting Evidence as to Validity after Decree Pro Confesso Taken, see *Appeal and Error*, 4053.
Appearance by Attorney General in, see *Appearance*, 15.
Certifiableness of Question of Infringement, see *Cases Certified*, 58-60.
Process of Contempt for Supposed Infringement, see *Contempt*, 22.
Costs Generally in Infringement Suit, see *Costs and Fees*, 10.
Costs on Appeal in Infringement Suit, see *Appeal and Error*, 5294, 5332.
Jurisdiction of Courts Generally, see *Courts*, 562-568.
Federal District Where Suit Should be Brought, see *Courts*, 962.
Exclusiveness of Federal Jurisdiction, see *Courts*, 1416-1421.
Dismissal of Bill for Infringement, see *Dismissal and Discontinuance*, 40-42.
Estoppel of Infringer, see *Estoppel*, 231.
Presumptions and Burden of Proof, see *Evidence*, II. k, 5.
Variance Between Allegations and Proof, see *Evidence*, 2773.
Conclusiveness of Judgment Generally, see *Judgment*, 581-587.
Conclusiveness of Judgment Dismissing Infringement Suit, see *Judgment*, 309.
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Conclusiveness against Licensee of Decree against Patentee, see *Judgment*, 721.

Judgment against One Person as Bar to Judgment against Another for Using Same Article, see *Judgment*, 722.

Conclusiveness of State Judgment in Federal Court, see *Judgment*, 1051.

Multifariousness of Bill, see *Pleading*, 298.

Pleading General Issue, see *Pleading*, 616.

Refusal of Requested Instruction Incorrectly Describing Patent and Erroneously Assuming Law, see *Trial*, 738a.

Equitable jurisdiction.

Of Suit for Use of Patent, see *supra*, 850.

Jurisdiction of Courts in District of Columbia, see *Courts*, 427.

Retaining Bill for Injunction to Adjust Equities after Expiration of Patent, see *Equity*, 28.

Jurisdiction to Restrain Defeated Claimant from Harassing Defendant's Customers by Successive Suits, see *Equity*, 86.

Propriety of Injunction, see *Injunction*, 189-191.

Infringements by United States, see *Injunction*, 192, 193.

1081-3. The assignee of a patent, with claims also for damages for previous infringements, cannot by bill in equity enforce the claims assigned; his remedy is at law in the name of his assignor. *Hayward v. Andrews*, 106 U. S. 672, 1 Sup. Ct. Rep. 544.

27: 271

Distinguished in Rogers v. Blesner, 30 Fed. 530.

Cited in Waterman v. Mackenzie, 138 U. S. 256, 34 L. ed. 926, 11 Sup. Ct. Rep. 334—*Hewitt v. Pennsylvania Steel Co.* 24 Fed. 360—*Ullman v. Chickering*, 33 Fed. 582—*California Electrical Works v. Henzel*, 48 Fed. 376—*Hayes v. Hayes*, 45 N. J. Eq. 465, 17 Atl. 634.

1084. The expiration of a patent pending a suit for infringement does not defeat the jurisdiction of a court of equity, although it is a reason for denying an injunction which was the basis of equity jurisdiction. *Beedle v. Bennet*, 122 U. S. 71, 7 Sup. Ct. Rep. 1090, 30: 1074

Distinguished in Ross v. Ft. Wayne, 58 Fed. 408.

Cited in Busch v. Jones, 184 U. S. 600, 46 L. ed. 710, 22 Sup. Ct. Rep. 511—*Ross v. Ft. Wayne*, 11 C. C. A. 290, 24 U. S. App. 113, 63 Fed. 469—*Head v. Porter*, 70 Fed. 499—*Reedy v. Western Electric Co.* 28 C. C. A. 29, 54 U. S. App. 384, 83 Fed. 711—*McDonald v. Miller*, 84 Fed. 345—*Chinnoch v. Paterson P. & S. Tel. Co.* 50 C. C. A. 385, 112 Fed. 532—*Busch v. Jones*, 16 App. D. C. 31—*Van Allen v. New York Elev. R. Co.* 144 N. Y. 180, 38 N. E. 997—*McNulty v. Mt. Morris Electric Light Co.* 172 N. Y. 415, 65 N. E. 196.

1085. Jurisdiction of a court of equity over a suit for the infringement of a patent is not defeated on the theory that because the contract between the patentee and his complainant conveyed only the patent rights to the machine, and not the process claimed

in such patent, the court could not have ordered an injunction against the defendant, who was mere user of the machine, since, the question as to what the contract provided being an issue in the case, preliminary relief by injunction could have been granted pending the decision of such question. *Busch v. Jones*, 184 U. S. 598, 22 Sup. Ct. Rep. 511, 46: 707

1086. Dismissal in the circuit court of a suit in equity for an account and payment of the profits realized by defendant from the unlawful making, using, and selling of a patented invention, and for the recovery of damages which the complainant, the assignee of the patent, has sustained thereby, and for an injunction upon the ground that the complainant has a plain, adequate, and complete remedy at law, without passing upon the validity of the patent,—affirmed in the Supreme Court of the United States by a divided court. *Western Electric Co. v. Reedy*, 140 U. S. 704, Mem. 11 Sup. Ct. Rep. 1031, 35: 743

Nature of wrong.

1087. The infringement of a patent is essentially a tort. *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 26: 975
Cited in *Bray v. Denning*, 56 Fed. 1019—*Edison Electric Light Co. v. Packard Electric Co.* 61 Fed. 1008.

Infringement of several patents.

1088. Several patents may be included in the same suit, where they refer to the same general subject and are all embodied in the same infringing machine. *Seymour v. Osborne*, 11 Wall. 516, 20: 33
Cited in *Horman Patent Mfg. Co. v. Brooklyn City R. Co.* 15 Blatchf. 446, 4 Bann. & Ard. 87, Fed. Cas. No. 6,703—*Nellis v. Pennock Mfg. Co.* 13 Fed. 452—*Diamond Match Co. v. Ohio Match Co.* 80 Fed. 118—*Kansas City Hay-Press Co. v. Devo*, 26 C. C. A. 584, 49 U. S. App. 414, 81 Fed. 732—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 990—*Nellis v. Pennock Mfg. Co.* 15 Phila. 494.

Infringement of reissue.

1089. Where the original patent is surrendered, infringement of the reissue is a new cause of action; but where, in such a case, the complainant files a supplemental bill without objection by the respondent, the court may disregard the irregularity. *Reedy v. Scott*, 23 Wall. 352, 23: 109

Use by government.

Liability of Officers and Agents for Using, see *infra*, 1122, 1123.

Right of Government to Use Generally, see *supra*, 13-15, 879a-879c.

Use as Supporting Claim against United States, see *Claims*, 105, 122-127, 131.

Limitation of Action to Recover for, see *Limitation of Actions*, 542.

1090. Where the government used the claimant's patented improvements, with his consent, and with the expectation on his part of receiving a reasonable compensation for the license, a claim for such compensation arises upon an implied contract; it is

not a claim for an infringement. *United States v. Palmer*, 128 U. S. 262, 9 Sup. Ct. Rep. 104, 32: 442

Cited in *Henry v. United States*, 38 Ct. Cl. 647—*Brooks v. United States*, 39 Ct. Cl. 503—*United States v. Berdan Firearms Mfg. Co.* 156 U. S. 566, 39 L. ed. 534, 15 Sup. Ct. Rep. 420—*McCormick Harvesting Mach. Co. v. Aultman*, 169 U. S. 609, 42 L. ed. 876, 18 Sup. Ct. Rep. 443—*Holmes v. United States*, 78 Fed. 514—*Ft. Wayne, C. & L. R. Co. v. Haberkorn*, 15 Ind. App. 496, 44 N. E. 322—*Burton v. Burton Stock Car Co.* 171 Mass. 439, 50 N. E. 1029—*Montgomery v. Waterbury*, 2 Misc. 147, 21 N. Y. Supp. 631.

1091. It seems that the remedy for an unauthorized use of a patent by the government is an action in the court of claims or an application to Congress, and not a suit against the public officer, acting for and on behalf of the government, who used the patented article. *James v. Campbell*, 104 U. S. 356, 26: 786

Cited in *Lauman v. United States*, 27 Ct. Cl. 263—*Merriam v. United States*, 29 Ct. Cl. 259—*Dashiell v. Grosvenor*, 27 L.R.A. 70, 13 C. C. A. 598, 25 U. S. App. 227, 66 Fed. 338—*Standard Fireproofing Co. v. Toole*, 122 Fed. 632—*Peck v. State*, 137 N. Y. 375, 33 Am. St. Rep. 738, 33 N. E. 317.

Restrictive effect of claim.

1092. The patentees, having founded their claim on a certain specification, can neither modify nor abandon it in whole or in part on the trial of a case involving the question of infringement. *Le Roy v. Tatham*, 14 How. 156, 14: 367

1093. A patentee, imposing words of limitation upon himself in his claim in taking out a reissue, especially when so required by the Patent Office, is bound thereby in subsequent infringement suits on the reissued patent. *Crawford v. Heysinger*, 123 U. S. 589, 8 Sup. Ct. Rep. 399, 31: 269
Cited in *Handy v. Golden State & Miner's Iron Works*, 127 U. S. 376, 32 L. ed. 210, 8 Sup. Ct. Rep. 1275—*Roemer v. Peddle*, 132 U. S. 317, 33 L. ed. 383, 10 Sup. Ct. Rep. 95—*Knapp v. Morris*, 150 U. S. 228, 37 L. ed. 1, 162, 14 Sup. Ct. Rep. 81—*Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 429, 38 L. ed. 502, 14 Sup. Ct. Rep. 627—*Reiter v. Jones*, 35 Fed. 422—*Ball & Socket Fastener Co. v. Ball Glove Fastening Co.* 7 C. C. A. 504, 5 U. S. App. 588, 58 Fed. 824—*Johnson v. Olsen*, 61 Fed. 833—*Reedy Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 205, 21 U. S. App. 244, 61 Fed. 989—*Erle Rubber Co. v. American Dunlap Tire Co.* 16 C. C. A. 636, 28 U. S. App. 470, 70 Fed. 62—*Thomas v. Rocker Spring Co.* 23 C. C. A. 221, 47 U. S. App. 123, 77 Fed. 431—*Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.* 86 Fed. 323—*Truman v. Holmes*, 31 C. C. A. 220, 56 U. S. App. 739, 87 Fed. 747—*United States Glass Co. v. Atlas Glass Co.* 88 Fed. 500—*National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* 45 C. C. A. 565, 106 Fed. 714.

Right to profits and damages.

Assignee's Right to Damages, see *supra*, 827, 828.

Right of Assignee to Damages for Infringement, see *supra*, 827, 828.

Who may Sue for, see *infra*, XV. c.
 Allowing Interest on Profits, see Interest, 12, 76-79, 122, 123.
 Measure of Damages for Infringement, see Damages, VI. o.
 Recovery of Damages under Pleadings, see Pleading, 124.
 See also *supra*, 1086; *infra*, 1104, 1114.

1094. Suits in equity having been begun, in 1879, for the infringement of two patents, and the circuit court having dismissed the bills, this court, in reversing the decrees after the first patent had expired, but not the second, awarded accounts of profits and damages as to both patents, and a perpetual injunction as to the second patent. *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.* 113 U. S. 157, 5 Sup. Ct. Rep. 513, 28: 939
Cited in *Clark v. Wooster*, 119 U. S. 325, 30 L. ed. 393, 7 Sup. Ct. Rep. 217—*Mershon v. J. F. Pease Furnace Co.* 23 Blatchf. 331, 24 Fed. 742—*Kirk v. Du Bois*, 28 Fed. 461—*Head v. Porter*, 70 Fed. 499.

1095. A right to damages for infringement of a patent was not suspended, by the burning of the patent records, until the drawings were replaced. *Hogg v. Emerson*, 6 How. 437, 12: 505
Hogg v. Emerson, 11 How. 587, 13: 824

1096. By U. S. Rev. Stat. § 4900, U. S. Comp. Stat. 1901, p. 3388, the patentee or his assignees, if he makes or sells the article patented, cannot recover damages against infringers of the patent, unless he has given notice of his right, either to the whole public by marking his article "patented," or to the particular defendants by informing them of his patent and of their infringement of it. *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. Rep. 576, 38: 426
Distinguished in *Gimbel v. Hogg*, 38 C. C. A. 422, 97 Fed. 794.

Cited in *Coupe v. Royer*, 155 U. S. 584, 39 L. ed. 270, 15 Sup. Ct. Rep. 199—*Edison Electric Light Co. v. Electric Engineering & Supply Co.* 60 Fed. 408—*Traver v. Brown*, 62 Fed. 935—*New Departure Bell Co. v. Bevin Bros. Mfg. Co.* 64 Fed. 866—*Blount Mfg. Co. v. Bardsley*, 66 Fed. 765—*National Co. v. Belcher*, 68 Fed. 667—*Lowell Mfg. Co. v. Hogg*, 70 Fed. 787—*Pairpoint Mfg. Co. v. Eldridge Co.* 71 Fed. 309—*Matthews & W. Mfg. Co. v. National Brass & Iron Works*, 71 Fed. 518—*Tuttle v. Clafin*, 22 C. C. A. 147, 45 U. S. App. 105, 76 Fed. 230—*Campbell v. New York*, 81 Fed. 184—*Ewart Mfg. Co. v. Baldwin Cycle-Chalu Co.* 91 Fed. 263—*Hogg v. Gimbel*, 94 Fed. 518—*Metallic Extraction Co. v. Brown*, 43 C. C. A. 577, 104 Fed. 334—*Bradner Adjustable Hanger Co. v. Waterbury Button Co.* 106 Fed. 736—*United States Mittis Co. v. Carnegie Steel Co.* 189 Fed. 207.

1097. Damages cannot be recovered for an infringement of a reissued patent, before its reissue. *Agawan Woolen Co. v. Jordan*, 7 Wall. 583, 19: 177

Effect of payment of damages.

1098. The recovery of damages does not vest the infringer with the right to con-

tinue the use of the patent. *Suffolk Mfg. Co. v. Hayden*, 3 Wall. 315, 18: 76
Cited in *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 198, 26 L. ed. 978—*Birdsell v. Shaliol*, 112 U. S. 487, 28 L. ed. 769, 5 Sup. Ct. Rep. 244—*Perrigo v. Spaulding*, 13 Blatchf. 391, 2 Bann. & Ard. 350, Fed. Cas. No. 10,994—*Stutz v. Armstrong*, 25 Fed. 148—*Allington & C. Mfg. Co. v. Booth*, 24 C. C. A. 379, 45 U. S. App. 627, 78 Fed. 880.

1099. An infringer does not, by paying damages for making, using, and selling a machine, acquire any right to its future use, but, in addition to the payment of damages for past infringement, he may be restrained by injunction from further use and, when the whole machine is an infringement of the patent, be ordered to deliver it up to be destroyed. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244, 28: 768
Cited in *Tilghman v. Proctor*, 125 U. S. 140, 31 L. ed. 668, 8 Sup. Ct. Rep. 894—*Callaghan v. Myers*, 128 U. S. 665, 32 L. ed. 562, 9 Sup. Ct. Rep. 177—*Stutz v. Armstrong*, 25 Fed. 148—*Bragg v. Stockton*, 27 Fed. 510—*Tuttle v. Matthews*, 28 Fed. 98—*Brooks v. Miller*, 28 Fed. 617—*Babcock & W. Co. v. Pioneer Iron Works*, 34 Fed. 342—*Thompson v. American Bank Note Co.* 35 Fed. 204—*American Bell Teleph. Co. v. Kiltzell*, 35 Fed. 523—*Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. 806—*Campbell Printing-Press & Mfg. Co. v. Manhattan R. Co.* 49 Fed. 932—*Philadelphia Trust, S. D. & Ins. Co. v. Edison Electric Light Co.* 13 C. C. A. 43, 28 U. S. App. 325, 65 Fed. 554—*United States Printing Co. v. American Playing-Card Co.* 70 Fed. 52—*Electric Gas-Lighting Co. v. Woolensak*, 70 Fed. 790.

Patent as proof of original invention.

1100. A patent, when introduced in evidence in a suit for infringement, affords a prima facie presumption that the patentee is the original and first inventor, which is sufficient to establish that fact in the absence of evidence to the contrary. *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23: 952

Cited in *Cantrell v. Wallick*, 117 U. S. 695, 29 L. ed. 1019, 6 Sup. Ct. Rep. 970—*Shaver v. Skinner Mfg. Co.* 30 Fed. 70—*Blount v. Societe Anonyme*, 3 C. C. A. 459, 6 U. S. App. 335, 53 Fed. 102—*Singer Mfg. Co. v. Brill*, 4 C. C. A. 377, 7 U. S. App. 601, 54 Fed. 383—*Holloway v. Dow*, 54 Fed. 514—*Anderson v. Monroe*, 55 Fed. 397—*Harper & R. Co. v. Wilgus*, 6 C. C. A. 46, 15 U. S. App. 143, 56 Fed. 588—*Electric Mfg. Co. v. Edison Electric Light Co.* 10 C. C. A. 109, 18 U. S. App. 637, 61 Fed. 836—*San Francisco Bridge Co. v. Keating*, 15 C. C. A. 478, 29 U. S. App. 629, 68 Fed. 354—*Standard Cart-ridge Co. v. Peters Cartridge Co.* 69 Fed. 410—*Kraatz v. Tleman*, 70 Fed. 323—*Von Schmidt v. Bowers*, 25 C. C. A. 342, 48 U. S. App. 120, 80 Fed. 140—*Bowers v. Pacific Coast Dredging & Reclamation Co.* 81 Fed. 571—*Consolidated Rubber Tire Co. v. Finley Rubber Tire Co.* 116 Fed. 632—*Farmers' Mfg. Co. v. Spruks Mfg. Co.* 62 C. C. A. 453, 127 Fed. 697—*Doyle v. McRoberts*, 10 App. D. C. 451—*Williams v. Ogle*, 14 App. D. C. 149—*Dedrick v. Cassell*, 14 Phila. 505—*Tecktonius v. Scott*, 110 Wis. 454, 86 N. W. 672.

Rules governing trial.

1101. The act of 1836 prescribes the rules which must govern on trial of actions for

the violation of patent rights, whether granted before or after its passage, provided no right of property shall be impaired which existed in a patentee or his assignee prior thereto. *McClury v. Kingsland*, 1 How. 202, 11: 102

Cited in *McKeever v. United States*, 14 Ct. Cl. 422—*United States v. Woolsey*, Fed. Cas. No. 16,762.

b. Right of action.

See also *supra*, 614, 768.

1102. The inventor of a new and useful improvement certainly has no exclusive right to it until he obtains a patent. This right is created by the patent, and no suit can be maintained by the inventor against anyone for using it before the patent is issued. *Gayler v. Wilder*, 10 How. 477, 13: 504

Marsh v. Nichols, S. & Co. 128 U. S. 605, 9 Sup. Ct. Rep. 168, 32: 538

Cited in *Marsh v. Nichols, S. & Co.* 128 U. S. 612, 32 L. ed. 541, 9 Sup. Ct. Rep. 168—*Dable Grain Shovel Co. v. Flint*, 137 U. S. 43, 34 L. ed. 620, 11 Sup. Ct. Rep. 8—*Durham v. Seymour*, 161 U. S. 238, 40 L. ed. 680, 16 Sup. Ct. Rep. 452—*Kirk v. United States*, 163 U. S. 55, 41 L. ed. 69, 16 Sup. Ct. Rep. 911—*Albright v. Celluloid Harness Trimming Co.* 2 Bann. & Ard. 635, Fed. Cas. No. 147—*Clum v. Brewer*, 2 Curt. C. C. 519, Fed. Cas. No. 2,909—*Dietz v. Wade*, Fed. Cas. No. 3,903—*Keene v. Wheatley*, 9 Am. L. Reg. 73, Fed. Cas. No. 7,644—*Reeves v. Keystone Bridge Co.* 5 Fisher, Pat. Cas. 463, Fed. Cas. No. 11,660—*Rein v. Clayton*, 3 L.R.A. 79, 37 Fed. 357—*Brill v. St. Louis Car Co.* 80 Fed. 910—*Cook v. Sterling Electric Co.* 118 Fed. 46—*Standard Scale & Foundry Co. v. McDonald*, 127 Fed. 712—*Re Dann*, 129 Fed. 497—*Murray v. Ager*, 1 Mackey, 89—*United States ex rel. Pollok v. Hall*, 7 Mackey, 15, 1 L.R.A. 739—*Christensen v. Noyes*, 15 App. D. C. 120—*Hollida v. Hunt*, 70 Ill. 111, 22 Am. Rep. 63—*Com. v. Petty*, 96 Ky. 455, 29 L.R.A. 790, 29 S. W. 201—*Burton v. Burton Stock Car Co.* 171 Mass. 439, 50 N. E. 1029—*Hamilton v. Park & McK. Co.* 125 Mich. 76, 83 N. W. 1018—*Wilch v. Phelps*, 14 Neb. 137, 15 N. W. 361—*Nilsen v. De Haven*, 47 App. Div. 539, 62 N. Y. Supp. 506—*Marston v. Swett*, 66 N. Y. 213, 23 Am. Rep. 43—*Kortenhaus v. American Watch Co.* 41 Phila. Leg. Int. 288—*D. M. Steward Mfg. Co. v. Steward*, 109 Tenn. 301, 70 S. W. 808—*Commercial Union Teleg. Co. v. New England Teleph. & Teleg. Co.* 61 Vt. 251, 5 L.R.A. 165, 15 Am. St. Rep. 893, 17 Atl. 1071.

1103. Until properly signed, a patent is entirely void, and no suit can be maintained upon it; and an action based on the patent, commenced before such signature, should be dismissed. *Marsh v. Nichols, S. & Co.* 128 U. S. 605, 9 Sup. Ct. Rep. 168, 32: 538
Cited in *Marsh v. Nichols S. & Co.* 140 U. S. 358, 35 L. ed. 418, 11 Sup. Ct. Rep. 798.

1104. A bill cannot be maintained for an account of profits received by the defendant from the use of a void patent, because there can be neither legal nor equitable ownership of a void patent. For the same reason, the bill cannot be maintained as a bill to re-

move a cloud upon title. *Kennedy v. Hazelton*, 128 U. S. 667, 9 Sup. Ct. Rep. 202, 32: 576

c. Who May Sue.

Patentee.

Licensee's Right to Sue Patentee for Infringement, see *infra*, 1118.
See also *infra*, 1115, 1119.

1105. A patentee may recover damages for an infringement of his patent, independently of his partner, with whom he is associated in the manufacture of the patented article. *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 6 Sup. Ct. Rep. 934, 23: 954

Cited in *Chisholm v. Johnson*, 106 Fed. 212.

1106. The fact that a patentee had made a contract for the sale of an interest in the patent, which, by failure of the purchaser to make any payments, was by common consent considered as having never gone into operation, will not preclude him from suing for infringement after the grantee's death, without naming the grantee. *Philadelphia, W. & B. R. Co. v. Trimble*, 10 Wall. 367, 19: 943

1107. A transfer by a patentee of an improvement in pulverulent acid for use in the preparation of soda powders, farinaceous food, and for other purposes, with claim for mixing with flour and an alkaline carbonate to make the compound self-raising, of the exclusive right to make, sell, and use, in a specified territory, for five years, self-raising flour made by the use of the acid, all of which is to be purchased from the grantor, and to sell the product in such territory, the grantee using his skill to introduce it, is only a license, which does not carry such right to anyone but the licensee personally: the sale being subject to the provisions of the act of July 4, 1836 (5 Stat. at L. 121, chap. 357), § 11, providing that every patent shall be assignable at law, either as to the whole interest or any undivided part thereof; and such right does not, on the death of the licensee, pass to his administrator, so as to authorize a suit at law, founded on the license, to be brought in the name of the grantor for the use of the administrator, to recover damages for an infringement of the patent, committed after the death of the licensee, by the manufacture and sale of the product in said territory. *Oliver v. Rumford Chemical Works*, 109 U. S. 75, 3 Sup. Ct. Rep. 61, 27: 862
Distinguished in *Lane & B. Co. v. Locke*, 130 U. S. 195, 37 L. ed. 1050, 14 Sup. Ct. Rep. 78.

Cited in *Hagood v. Hewitt*, 119 U. S. 234, 30 L. ed. 372, 7 Sup. Ct. Rep. 193—*Waterman v. Mackenzie*, 138 U. S. 256, 34 L. ed. 926, 11 Sup. Ct. Rep. 334—*Curran v. Craig*, 22 Fed. 101—*Montross v. Mable*, 30 Fed. 237—*Rice v. Boss*, 46 Fed. 196—*Haffcke v. Clark*, 1 C. C. A. 574, 8 U. S. App. 69, 50 Fed. 536—*Thomson v. Citizens' Nat. Bank*, 3 C. C. A. 524, 10 U. S. App. 500, 53 Fed. 256—*Werckmeister v. Pierce & B. Mfg. Co.* 63 Fed.

450—Moore Mfg. & Foundry Co. v. Cronk Hanger Co. 69 Fed. 999—Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 730, 25 C. C. A. 270, 47 U. S. App. 146, 77 Fed. 290—Kraatz v. Tleman, 79 Fed. 324—Edison Electric Light Co. v. Peninsular Light, Power & Heat Co. 95 Fed. 676—Excelsior Wooden Pipe Co. v. Seattle, 55 C. C. A. 161, 117 Fed. 145—Smith v. Preston, 170 Ill. 187, 48 N. E. 688—Empire Paving & Constr. Co. v. Prather, 58 Mo. App. 490—Tuttle v. La Dow, 54 Hun, 152, 7 N. Y. Supp. 277—Com. v. Westinghouse Electric & Mfg Co. 151 Pa. 268, 24 Atl. 1107.

Owner.

See also *supra*, 10; *infra*, 1117.

1108. The meaning of the word "interested," as employed in the last clause of the 14th section of the patent act, is that the right of action is given to the person or persons owning the exclusive right at the time the infringement is committed. *Moore v. Marsh*, 7 Wall. 515, 19: 37

Assignee.

Naming Assignors as Plaintiffs, see Appeal and Error, 4673.

1109. An assignee of the entire right in a patent has the exclusive right to sue either at law or in equity for its subsequent infringement. *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334, 34: 923

Cited in *Topliff v. Topliff*, 145 U. S. 172, 36 L. ed. 655, 12 Sup. Ct. Rep. 825.

1110. An assignee of an exclusive right to use two machines within a particular district can maintain an action for an infringement of the patent within that district, even against the patentee. *Wilson v. Rousseau*, 4 How. 646, 11: 1141

Criticized in *Alken v. Manchester Print Works*, 2 Cliff. 437, Fed. Cas. No. 113.

Cited in *Simpson v. Wilson*, 4 How. 711, 11 L. ed. 1170, 1 Whitman, Pat. Cas. 426—*Wilson v. Turner*, 4 How. 712, 11 L. ed. 1171, 2 Robb. Pat. Cas. 468, 1 Whitman, Pat. Cas. 427—*Hogg v. Emerson*, 6 How. 486, 12 L. ed. 526, 2 Robb. Pat. Cas. 724, 1 Whitman, Pat. Cas. 487—*Wilson v. Simpson*, 9 How. 122, 13 L. ed. 72, 1 Whitman, Pat. Cas. 528—*Philadelphia, W. & B. R. Co. v. Trimble*, 10 Wall. 380, 19 L. ed. 952—*Union Paper-Bag Mach. Co. v. Nixon*, 105 U. S. 771, 26 L. ed. 961—*Boesch v. Graff*, 133 U. S. 702, 33 L. ed. 789, 10 Sup. Ct. Rep. 378—*Waterman v. Mackenzie*, 138 U. S. 256, 34 L. ed. 926, 11 Sup. Ct. Rep. 334—*Keeler v. Standard Folding Bed Co.* 157 U. S. 662, 39 L. ed. 849, 15 Sup. Ct. Rep. 738—*E. Bement & Sons v. National Harrow Co.* 186 U. S. 89, 46 L. ed. 1068, 22 Sup. Ct. Rep. 747—*Adams v. Burks*, Holmes, 41, 4 Fisher, Pat. Cas. 393, Fed. Cas. No. 50—*Baldwin v. Sibley*, 1 Cliff. 156, Fed. Cas. No. 805—*Blanchard's Gun-Stock Turning Factory v. Warner*, 1 Blatchf. 276, Fed. Cas. No. 1521—*Bloomer v. Stolley*, 5 McLean, 163, 1 Fisher, Pat. Cas. 382, Fed. Cas. No. 1,550—*Chambers v. Smith*, 7 Phila. 576, 5 Fisher, Pat. Cas. 14, Fed. Cas. No. 2,582—*Day v. Union India Rubber Co.* 3 Blatchf. 491, 498, Fed. Cas. No. 3,691—*Gear v. Grosvenor*, Holmes, 220, 6 Fisher, Pat. Cas. 321, Fed. Cas. No. 5,291—*Gibson v. Gifford*, 1 Blatchf.

531, 535, 1 Fisher, Pat. Cas. 368, Fed. Cas. No. 5,395—*Goodyear v. Beverly Rubber Co.* 1 Cliff. 355, Fed. Cas. No. 5,557—*Hawley v. Mitchell*, Holmes, 44, 4 Fisher, Pat. Cas. 390, Fed. Cas. No. 6,250—*Hill v. Whitcomb*, Holmes, 324, 1 Bann. & Ard. 40, Fed. Cas. No. 6,502—*Hodge v. Hudson River R. Co.* 6 Blatchf. 89, 3 Fisher, Pat. Cas. 414, Fed. Cas. No. 6,559—*Jenkins v. Nicolson Pav. Co.* 1 Abb. (U. S.) 569, 4 Fisher, Pat. Cas. 204, Fed. Cas. No. 7,273—*Phelps v. Comstock*, 4 MacLean, 354, 1 Fisher, Pat. Cas. 218, Fed. Cas. No. 11,075—*Pierpont v. Fowle*, 2 Woodb. & M. 44, Fed. Cas. No. 11,152—*Wetherill v. Passaic Zinc Co.* 6 Fisher, Pat. Cas. 54, Fed. Cas. No. 17,465—*Wood v. Michigan S. & N. I. R. Co.* 2 Bliss. 66, Fed. Cas. No. 17,957—*Woodworth v. Cook*, 2 Blatchf. 161, Fed. Cas. No. 18,011—*Woodworth v. Curtis*, 2 Woodb. & M. 528, 2 Robb. Pat. Cas. 607, Fed. Cas. No. 18,013—*Brickhill v. New York*, 18 Blatchf. 276, 5 Bann. & Ard. 547, 7 Fed. 482—*Fire Extinguisher Mfg. Co. v. Graham*, 16 Fed. 551—*Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 40 Fed. 581—*Jackson v. Vaughan*, 73 Fed. 839—*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L.R.A. 732, 25 C. C. A. 274, 47 U. S. App. 146, 77 Fed. 295—*Howe v. Wooldredge*, 12 Allen, 23—*Kemp-ton v. Bray*, 99 Mass. 353—*Buss v. Putney*, 38 N. H. 47—*Chambers v. Smith*, 7 Phila. 576—*Wetherill v. Passaic Zinc Co.* 9 Phila. 387.

1111. An assignee of the exclusive right to use ten machines within a certain territory, with the right to sue in his own name or in his name of his assignor, may join his assignor with him in a suit for a violation of the patent right. *Woodworth v. Wilson*, 4 How. 712, 11: 1171

Cited in *Baldwin v. Sibley*, 1 Cliff. 156, Fed. Cas. No. 805—*Blanchard's Gun-Stock Turning Factory v. Warner*, 1 Blatchf. 276, Fed. Cas. No. 1,521—*Gibson v. Van Dresar*, 1 Blatchf. 535, 1 Fisher, Pat. Cas. 375, Fed. Cas. No. 5,402—*Jenkins v. Greenwald*, 1 Bond, 131, 132, 2 Fisher, Pat. Cas. 41, Fed. Cas. No. 7,270—*Nelson v. McMann*, 16 Blatchf. 148, 4 Bann. & Ard. 211, Fed. Cas. No. 10,109—*Olcott v. Hawkins*, Fed. Cas. No. 10,480.

1112. Where the patentee has assigned his whole interest, either before or after the patent is issued, the action must be brought in the name of the assignee, because he alone was interested in the patent at the time the infringement took place; but where the assignment was of an undivided part of the patent, the action for every infringement committed subsequent to the assignment should be brought in the joint names of the patentee and assignee, as representing the entire interests. *Moore v. Marsh*, 7 Wall. 515, 19: 37

Cited in *Waterman v. Mackenzie*, 138 U. S. 253, 34 L. ed. 925, 11 Sup. Ct. Rep. 334—*Spring v. Domestic Sewing Mach. Co.* 13 Fed. 449—*Adams v. Bellaire Stamping Co.* 25 Fed. 271—*Bogart v. Hinds*, 25 Fed. 485—*Babcock & W. Co. v. Pioneer Iron-Works*, 34 Fed. 341—*Van Orden v. Nashville*, 67 Fed. 333.

1113. Under the act of 1836, § 14, providing for the assignment by the patentee of the exclusive right within a specified part of the country, and for suit by the assignee in his own name, the assignment

must be of the entire and unqualified monopoly; any assignment short of this is mere license, and will not carry with it a right to the assignee to sue in his own name. *Gayler v. Wilder*, 10 How. 477, 13: 504

Cited in Moore v. Marsh, 7 Wall. 521, 19 L. ed. 39, 2 Whitman. Pat. Cas. 185—*Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 53, 35 L. ed. 66, 11 Sup. Ct. Rep. 478—*Baldwin v. Sibley*, 1 Cliff. 157, Fed. Cas. No. 805—*Chambers v. Smith*, 5 Fisher, Pat. Cas. 14, Fed. Cas. No. 2,582—*Clum v. Brewer*, 2 Curt. C. C. 523, Fed. Cas. No. 2,909—*Nelson v. McMann*, 4 Bann. & Ard. 210, Fed. Cas. No. 10,109—*Perry v. Corning*, 7 Blatchf. 200, Fed. Cas. No. 11,004—*Potter v. Holland*, 4 Blatchf. 212, 1 Fisher, Pat. Cas. 334, Fed. Cas. No. 11,329—*Game-well Fire-Alarm Teleg. Co. v. Brooklyn*, 14 Fed. 256—*Hewitt v. Pennsylvania Steel Co.* 24 Fed. 369—*Dick v. Struthers*, 25 Fed. 104—*Pope Mfg. Co. v. Gormully & J. Mfg. Co.* 34 Fed. 894—*Rapp v. Kelling*, 41 Fed. 792—*Rice v. Boss*, 46 Fed. 195—*Canton Steel Roofing Co. v. Kanneberg*, 51 Fed. 600—*Blair v. Lippincott Glass Co.* 52 Fed. 226—*Union Switch & Signal Co. v. Johnson R. Signal Co.* 52 Fed. 869—*Newton v. Buck*, 23 C. C. A. 357, 45 U. S. App. 244, 77 Fed. 616—*D. M. Sechler Carriage Co. v. Deere & M. Co.* 51 C. C. A. 244, 113 Fed. 287—*Sacks v. Kupferle*, 127 Fed. 572—*United States ex rel. Pollok v. Hall*, 7 Mackey, 15, 1 L.R.A. 739—*Kempton v. Bray*, 99 Mass. 353—*Barnes v. Morgan*, 3 Hun, 704—*Herzog v. Heyman*, 151 N. Y. 591, 56 Am. St. Rep. 646, 48 N. E. 1148—*Chambers v. Smith*, 7 Phila. 576—*Horne v. Chatham*, 64 Tex. 38.

1114. By equal division the court affirmed the dismissal of a suit in equity by an assignee of the patent for an account and payment of profits by an infringer and for damages as well as an injunction. *Western Electric Co. v. Reedy*, 140 U. S. 704, Mem. 11 Sup. Ct. Rep. 1031, 35: 743

1114a. A transfer of patent rights is not an assignment of the whole right, entitling the transferee to sue in his own name for an infringement, where it is not complete, but excludes particular territory. *Tyler v. Tuel*, 6 Cranch, 324, 3: 237
Cited in Meyer v. Bailey, 2 Bann. & Ard. 76, Fed. Cas. No. 9,516—*Potter v. Holland*, 4 Blatchf. 210, Fed. Cas. No. 11,329

1114b. An assignee of a patent right for a limited territory cannot maintain an action on the case for a violation of the patent. *Tyler v. Tuel*, 6 Cranch, 324, 3: 237
Cited in Moore v. Marsh, 7 Wall. 521, 19 L. ed. 39—*Bryan v. Stevens*, Fed. Cas. No. 2,066a—*Potter v. Holland*, 4 Blatchf. 210, Fed. Cas. No. 11,329—*Valentine v. Marshal*, Fed. Cas. No. 16,812a—*Whittemore v. Cutter*, 1 Gall. 430, Fed. Cas. No. 17,600.

Editorial note.

When assignee may sue for infringement; when patentee must; when they must join. 11: 1141

Licensee.

See also *supra*, 1107, 1113.

1115. Licensees cannot sue for an infringement. All their rights must be enforced through or in the name of the pat-

entee. *Paper-Bag Mach. Cases*, 105 U. S. 766, 26: 959
Gayler v. Wilder, 10 How. 477, 13: 504
Littlefield v. Perry, 21 Wall. 205, 22: 577
Cited in Birdsall v. Shaliol, 112 U. S. 486, 28 L. ed. 769, 5 Sup. Ct. Rep. 244—*Waterman v. Mackenzie*, 138 U. S. 255, 34 L. ed. 925, 11 Sup. Ct. Rep. 334—*Hill v. Whitcomb*, Holmes, 321, 1 Bann. & Ard. 36, Fed. Cas. No. 6,502—*Nelson v. McMann*, 16 Blatchf. 147, Fed. Cas. No. 10,109—*Wilson v. Chickering*, 14 Fed. 918—*Bogart v. Hinds*, 25 Fed. 845—*Cottle v. Krementz*, 25 Fed. 495—*Webster v. Ellsworth*, 36 Fed. 328—*Brush Electric Co. v. California Electric Light Co.* 3 C. C. A. 386, 7 U. S. App. 409, 52 Fed. 960—*Bray v. Demming*, 56 Fed. 1019—*Excelsior Wooden Pipe Co. v. Seattle*, 55 C. C. A. 160, 117 Fed. 144—*Hastings v. Gilles Lithographic Co.* 51 Hun, 371, 4 N. Y. Supp. 319.

1116. A licensee of a patent cannot bring a suit in his own name, at law or in equity, for its infringement by a stranger. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244, 28: 768

Cited in Waterman v. Mackenzie, 138 U. S. 255, 34 L. ed. 925, 11 Sup. Ct. Rep. 334—*Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co.* 48 Fed. 226—*Brush Electric Co. v. Electric Improv. Co.* 49 Fed. 74—*Blair v. Lippincott Glass Co.* 52 Fed. 227—*Moore Mfg. & Foundry Co. v. Cronk Hanger Co.* 69 Fed. 999—*Chauche v. Pare*, 21 C. C. A. 333, 44 U. S. App. 544, 75 Fed. 287—*Chisholm v. Johnson*, 106 Fed. 212—*Excelsior Wooden Pipe Co. v. Seattle*, 55 C. C. A. 160, 117 Fed. 144.

1117. Any rights of the licensee of a patent right must be enforced through or in the name of the owner of the patent, and, if necessary to protect the rights of all parties, joining the licensee with him as plaintiff. *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334, 34: 923
Cited in Pope Mfg. Co. v. Gormully & J. Mfg. Co. 144 U. S. 251, 36 L. ed. 424, 12 Sup. Ct. Rep. 641—*Rice v. Boss*, 46 Fed. 195—*Pope Mfg. Co. v. Clark*, 46 Fed. 792—*Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co.* 48 Fed. 226—*Brush Electric Co. v. Electric Improv. Co.* 49 Fed. 74—*Brush Electric Co. v. California Elect. L. Co.* 3 C. C. A. 382, 7 U. S. App. 409, 52 Fed. 959—*Russell v. Kern*, 58 Fed. 383.

1118. Where the patentee is the infringer, as he cannot sue himself, the licensee, so far as the courts of the United States are concerned, can, in his own name, sue the patentee for infringement. *Littlefield v. Perry*, 21 Wall. 205, 22: 577
Cited in Paper-Bag Mach. Cases, 105 U. S. 771
28 L. ed. 961—*Birdsell v. Shaliol*, 112 U. S. 486, 28 L. ed. 769, 5 Sup. Ct. Rep. 244—*Waterman v. Mackenzie*, 138 U. S. 255, 34 L. ed. 925, 11 Sup. Ct. Rep. 334—*Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 15 U. S. 292, 46 L. ed. 916, 22 Sup. Ct. Rep. 681—*Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co.* 13 Blatchf. 388, Fed. Cas. No. 2,543—*Hammond v. Hunt*, 4 Bann. & Ard. 114, Fed. Cas. No. 6,003—*Nelson v. McMann*, 16 Blatchf. 148, 4 Bann. & Ard. 211, Fed. Cas. No. 10,109—*Stanley Rule & Level Co. v. Bailey*, 14 Blatchf. 512, 3 Bann. & Ard. 299, Fed. Cas. No. 13,287—*Rapp v. Kelling*, 41 Fed. 792—*Brush-Swan Electric Light*

Co. v. Thomson-Houston Electric Co. 48 Fed. 226—**Brush Electric Co. v. Electric Improv. Co.** 49 Fed. 74—**Blair v. Lippincott Glass Co.** 52 Fed. 227—**Brush Electric Co. v. California Electric Light Co.** 3 C. C. A. 382, 7 U. S. App. 409, 52 Fed. 060—**Adriance, P. & Co. v. McCormick Harvesting Mach. Co.** 53 Fed. 290—**Waterman v. Shipman**, 5 C. C. A. 375, 14 U. S. App. 312, 55 Fed. 986—**Bray v. Denning**, 56 Fed. 1019—**Smith v. Rldgely**, 43 C. C. A. 367, 103 Fed. 876—**Excelsior Wooden-Pipe Co. v. Allen**, 44 C. C. A. 31, 104 Fed. 554—**New York Continental Jewell Filtration Co. v. Sullivan**, 111 Fed. 181—**Excelsior Wooden Pipe Co. v. Seattle**, 55 C. C. A. 156, 160, 117 Fed. 144—**Victor Talking Mach. Co. v. The Fair**, 61 C. C. A. 50, 123 Fed. 425—**Blackmer v. Stone**, 51 Ark. 491, 11 S. W. 693—**Mayer v. Hardy**, 127 N. Y. 131, 27 N. E. 837—**Dobson v. Hartford Carpet Co.** 42 Phila. Leg. Int. 205.

d. Who Liable.

Liability of Government for Using Patent, see *supra*, 13-15, 879a-879c.
See also *supra*, 1118.

Manufacturer, seller or user.

1119. A patentee may maintain suits for infringement against the manufacturer, the seller, and the user of the patented article. **Birdsell v. Shaliol**, 112 U. S. 485, 5 Sup. Ct. Rep. 244. 28: 768
Cited in **Edison Electric Light Co. v. Philadelphia Trust, S. D. & Ins. Co.** 60 Fed. 399—**Allington & C. Mfg. Co. v. Booth**, 72 Fed. 773—**Computing Scale Co. v. National Computing Scale Co.** 79 Fed. 966—**Merrimac Mattress Mfg. Co. v. Brown**, 122 Fed. 88—**Van Epps v. International Paper Co.** 124 Fed. 544—**Busch v. Jones**, 16 App. D. C. 33.

1120. A person who has used a driven well on his own premises is an infringer, whether he put down the well or not. **Beeble v. Bennet**, 122 U. S. 71, 7 Sup. Ct. Rep. 1090. 30: 1074

Purchaser.

1121. A contract for the purchase of articles which were to be manufactured by an unlawful use of a patented machine, if connected with evidence from which the jury may legally infer either that the machine was owned wholly or in part by the vendee, or that it was hired to him under color of sale of the articles to be manufactured with it, and with intent to invade the patent right, amounts to a breach of the rights of the patentee. **Keplinger v. De Young**, 10 Wheat. 358, 6: 341
Cited in **Boyd v. McAlpin**, 3 McLean, 430, Fed. Cas. No. 1,748—**Byam v. Bullard**, 1 Curt. C. C. 102, Fed. Cas. No. 2,202—**Putnam v. Sudhoff**, 1 Bann. & Ard. 200, Fed. Cas. No. 11,483.

Officers of United States.

1122. Officers or agents of the United States, although acting under its order, are personally liable to be sued for their own infringement of a patent. **Belknap v. Schild**, 161 U. S. 10, 16 Sup. Ct. Rep. 443. 40: 599

Cited in **Tindal v. Wesley**, 167 U. S. 219, 42 L. ed. 142, 17 Sup. Ct. Rep. 770.

1123. Officers and agents of the United States are not exempt from liability for infringement of a patent because it was used by them, not for their own benefit, but for the benefit of the United States in a navy yard. **Belknap v. Schild**, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40: 599
Cited in **Dashiell v. Grosvenor**, 162 U. S. 434, 40 L. ed. 1130, 16 Sup. Ct. Rep. 805—**Howell v. Miller**, 33 C. C. A. 411, 62 U. S. App. 17, 91 Fed. 133—**National Cash Register Co. v. Leland**, 37 C. C. A. 381, 94 Fed. 510—**International Postal Supply Co. v. Bruce**, 114 Fed. 509.

Railroad company.

1124. A railroad company whose stock is owned, directors chosen, cars furnished, and road run by another company, the gross receipts being nominally divided between them, is liable for infringement of a patent right used in the cars thereon. **York & M. Line R. Co. v. Winans**, 17 How. 30, 15: 27

Cited in **Bate Refrigerating Co. v. Gillett**, 30 Fed. 688—**Arrowsmith v. Nashville & D. R. Co.** 57 Fed. 171—**Brady v. Chicago & G. W. R. Co.** 57 L.R.A. 720, 52 C. C. A. 59, 114 Fed. 111—**Lee v. Southern P. R. Co.** 116 Cal. 103, 38 L.R.A. 73, 58 Am. St. Rep. 140, 47 Pac. 932—**Macon & A. R. Co. v. Mayes**, 49 Ga. 360, 15 Am. Rep. 678—**Balsley v. St. Louis, A. & T. H. R. Co.** 119 Ill. 72, 59 Am. Rep. 784, 8 N. E. 859—**Brown v. Hannibal & St. J. R. Co.** 27 Mo. App. 400—**Thorpe v. New York C. & H. R. Co.** 13 Hun, 75—**Thomas v. West Jersey R. Co.** 9 W. N. C. 70—**Harden v. North Carolina R. Co.** 129 N. C. 361, 55 L.R.A. 787, 85 Am. St. Rep. 747, 40 S. E. 184—**Naglee v. Alexandria & F. R. Co.** 83 Va. 711, 5 Am. St. Rep. 308, 3 S. E. 369—**Ricketts v. Chesapeake & O. R. Co.** 33 W. Va. 435; 7 L.R.A. 355, 25 Am. St. Rep. 901, 10 S. E. 801.

Municipal corporation.

1125. Where a city is sued in equity for infringement of a patent, with a contractor who has infringed the patent in the construction of a payment for the city, and has made all the profits, having received the full value for the work, the contractor alone should be held accountable for the profits. As to the city, a decree for injunction only should have been rendered; although it would have been undoubtedly liable for damages in an action at law. **Elizabeth v. American Nicholson Pav. Co.** 97 U. S. 126, 24: 1000

Cited in **Hurlbut v. Schilling**, 130 U. S. 472, 32 L. ed. 1016, 9 Sup. Ct. Rep. 584—**Crosby Steam Gage & Valve Co. v. Consolidated Safety Valve Co.** 141 U. S. 454, 35 L. ed. 815, 12 Sup. Ct. Rep. 49—**McCreary v. Pennsylvania Canal Co.** 141 U. S. 463, 35 L. ed. 819, 12 Sup. Ct. Rep. 40—**Belford, C. & Co. v. Scribner**, 144 U. S. 507, 36 L. ed. 521, 12 Sup. Ct. Rep. 734—**Asbestine Tiling & Mfg. Co. v. Hepp**, 39 Fed. 328—**Morris v. Union Form Co.** 39 Fed. 472—**Tuttle v. Claffin**, 22 C. C. A. 144, 45 U. S. App. 105, 76 Fed. 233—**Standard Elevator Co. v. Crane Elevator Co.** 22 C. C. A. 554, 48 U. S. App. 411, 76 Fed. 772—**Campbell v. New York**, 81 Fed. 191—**Robbins v. Illinois Watch Co.** 27 C. C. A. 23, 53 U. S. App. 404, 81 Fed. 959—**Elgin Wind Power & Pulp Co. v. Nichols**, 45 C. C. A. 52, 105 Fed. 783—**Klasinger-Ison Co.**

v. Bradford Belting Co. 50 C. C. A. 223, 123 Fed. 93—Glucose Sugar Ref. Co. v. St. Louis Syrup & Preserving Co. 135 Fed. 541—Holt v. Silver, 169 Mass. 456, 48 N. E. 837.

e. Defenses.

1. In General.

To Action for Royalties, see *supra*, 862-865.
 Estoppel by Assuming Defense, see Estoppel, 121.
 Estoppel to Prosecute Purchaser of Patented Article for Infringement, see Estoppel, 310.
 Burden of Proof, see Evidence, II. k. 5.
 Sufficiency and Effect of Notice of Special Matter, see Evidence, 2667-2687.
 Pleading as Equivalent of Notice of Special Matter to be Offered in Evidence, see Evidence, 2672, 2680, 2682, 2685.
 Admissibility of Letters Patent to a Third Person not Set Up as Defense to Infringement, see Evidence, 2678.
 Admissibility of Evidence Under General Denial, see Evidence, 2710-2712.
 Laches as Bar to Relief, see Limitation of Actions, 80, 220.
 Limitation of Action, see Limitation of Actions, 311.
 Necessity of Pleading Defense, see Pleading, 696-700.
 See also *supra*, 769, 770.

Title to patent.

1126. An infringer of a patent cannot set up the right of the assignee in bankruptcy of the patentee to the patent, as against a title to the patent from the bankrupt, acquired with the consent of such assignee. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. Rep. 799, 36: 609

Invalidity of patent.

1127. If the defendant shows that the patentee has failed in any of those prerequisites on which the authority to issue the patent is made to depend, his defense is complete. *Grant v. Raymond*, 6 Pet. 218, 8: 376

1128. It is good defense in a suit on a reissued patent to show that the commissioner exceeded his authority in granting it. *Parker & W. Co. v. Yale Clock Co.* 123 U. S. 87, 8 Sup. Ct. Rep. 38, 31: 100

1129. A defendant in an infringement suit is not limited to the statutory defenses, but may show that the Commissioner of Patents has exceeded his power in granting or reissuing a patent, or that the patented thing does not amount to a patentable invention. *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451, 28: 665
Cited in Gardner v. Herz, 118 U. S. 191, 30 L. ed. 163, 6 Sup. Ct. Rep. 1027—*Parker & W. Co. v. Yale Clock Co.* 123 U. S. 103, 31 L. ed. 106, 8 Sup. Ct. Rep. 38—*Hendy v. Golden State & Miner's Iron Works*, 127 U. S. 375, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—*Marsh v. Nichols, S. & Co.* 128 U. S. 611, 32 L. ed. 540, 9 Sup. Ct. Rep. 168—*Railway Register Mfg. Co. v. North Hudson C. R. Co.* 23 Fed.

596—*Hoe v. Kahler*, 23 Blatchf. 355, 25 Fed. 272—*Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.* 31 Fed. 562—*United States v. American Bell Teleph. Co.* 32 Fed. 603—*Hunt Bros. Fruit Packing Co. v. Cassidy*, 3 C. C. A. 528, 7 U. S. App. 424, 53 Fed. 260—*Jones v. Cyphers*, 62 C. C. A. 23, 126 Fed. 755.

1130. In an action for the infringement of a patent, want of novelty, deviation, and irregularities in the issuance of the patent are available as defenses. *James v. Campbell*, 104 U. S. 356, 26: 786
Cited in Odell v. Stout, 22 Fed. 162—*Hoe v. Kahler*, 23 Blatchf. 366, 25 Fed. 279.

1131. Although, by the act of 1837 (5 U. S. Stat. at L. p. 194, chap. 45), a suit shall not be defeated where the patentee claims more than he has invented, where the part invented can be clearly distinguished from that claimed, but not invented, this provision cannot be applied to a case where the combination is an entirety, because if one of the elements is given up, the thing claimed disappears. *Vance v. Campbell*, 1 Black, 427, 17: 168

1132. The patentee who has claimed less than that to which he was entitled is bound to discover the defect within a reasonable time, or he loses his right to a reissue, and the court may declare a reissue subsequently granted to correct such supposed mistake *pro tanto* void, in any suit founded upon it. *Wollensak v. Reiher*, 115 U. S. 96, 5 Sup. Ct. Rep. 1137, 29: 350

Collateral attack.

Collateral Attack by Suit to Set Patent Aside, see *infra*, 1169.

1133. The rule that a patent of the United States for an invention can be attacked for defects not apparent on its face, only by regular proceedings instituted for that purpose, and is not open to collateral attack, applies only to those cases where the patent has been executed and the authority of the officers to issue the same was complete. *Marsh v. Nichols, S. & Co.* 128 U. S. 605, 9 Sup. Ct. Rep. 168, 32: 538

Conclusiveness of commissioner's decision.

See also *infra*, 1140.

1134. The decision of the commissioner of patents is not conclusive as to an invention; and upon all the questions involved in the allowance and issue of the patent, its validity may be examined by the courts. *Reckendorfer v. Faber*, 92 U. S. 347, 23: 719

Gardner v. Herz, 118 U. S. 180, 6 Sup. Ct. Rep. 1027, 30: 158
Cited in Perfection Window Cleaner Co. v. Bosley, 9 Bliss, 387, 2 Fed. 576—*Sawyer v. Miller*, 4 Woods, 475, 12 Fed. 727—*United States v. American Bell Teleph. Co.* 32 Fed. 603.

Fraud.

1135. The charge that the original patentee fraudulently and surreptitiously obtained a patent for that which he well knew was invented by another, unaccompanied by the

further allegation that the alleged first inventor was at the time using reasonable diligence in adopting and perfecting the invention, is not sufficient to defeat the patent, and constitutes no defense to a charge of infringement. *Agawan Woolen Co. v. Jordan*, 7 Wall. 583, 19: 177

1136. The silence of an inventor when the invention is described to him by a third person before he has taken out his patent is not a fraud which will prevent his maintaining an action for infringement by such third person of his patent after it has been obtained. *Philadelphia, W. & B. R. Co. v. Dubois*, 12 Wall. 47, 20: 265

1137. A patent cannot be avoided for fraud which does not appear upon the face of the patent, except in a suit for that purpose. Fraud in obtaining the patent cannot be set up as a defense to it in a suit for infringement. *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 19: 566
Cited in United States v. American Bell Teleph. Co. 32 Fed. 606—*Northern P. R. Co. v. Cannon*, 46 Fed. 231.

1138. The same rule applies as to fraud in obtaining the extension of a patent. *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 19: 566

Cited in Cahoon v. Ring, 1 Cliff. 632, Fed. Cas. No. 2,292—*Gear v. Grosvenor*, Holmes, 219, 6 Fisher, Pat. Cas. 319, Fed. Cas. No. 5,291—*Jordan v. Dobson*, 2 Abb. (U. S.) 404, 4 Fisher, Pat. Cas. 238, Fed. Cas. No. 7,519—*Parham v. American Buttonhole O. & Sewing-Mach. Co.* 4 Fisher, Pat. Cas. 471, Fed. Cas. No. 10,713—*Tligham v. Mitchell*, 9 Blatchf. 27, 4 Fisher, Pat. Cas. 624, Fed. Cas. No. 14,042—*Woodward v. Dinmore*, 4 Fisher, Pat. Cas. 165, Fed. Cas. No. 18,003.

1139. As the act of 1836, § 13, provides for the renewal of a patent "if the error shall have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention," the fact of the granting of the renewed patent closes all inquiry into the existence of inadvertence, accident, or mistake, and leaves open only the question of fraud for the jury. *Stimpson v. Westchester R. Co.* 4 How. 380, 11: 1020
Limited in Cahart v. Austin, 2 Cliff. 534, 2 Fisher, Pat. Cas. 551, Fed. Cas. No. 2,288

Cited in Brooks v. Fiske, 15 How. 228, 14 L. ed. 672—*Seymour v. Osborne*, 11 Wall. 543, 20 L. ed. 38, 2 Whitman, Pat. Cas. 313—*Blake v. Stafford*, 6 Blatchf. 200, 3 Fisher, Pat. Cas. 300, Fed. Cas. No. 1,504—*Blanchard v. Haynes*, 6 West L. J. 83, Fed. Cas. No. 1,512—*French v. Rogers*, 1 Fisher, Pat. Cas. 139, Fed. Cas. No. 5103—*Thomas v. Shoe Machinery Mfg. Co.* 3 Bann. & Ard. 559, Fed. Cas. No. 13,911—*Whitely v. Swayne*, 4 Fisher, Pat. Cas. 123, Fed. Cas. No. 17,568—*Smith v. Merriam*, 6 Fed. 718—*Combined Patents Can Co. v. Lloyd*, 11 Fed. 151—*Parham v. Machine Co.* 1 Legal Gaz. Rep. 146—*Jordan v. Dobson*, 7 Phila. 536—*Combined Patents Can Co. v. Lloyd*, 15 Phila. 483.

1140. The question of fraud in obtaining a reissue of a patent must be regarded as settled by the decision of the commissioner

of patents. *Brown v. Guild* ("The Corn-planter Patent") 23 How. 181, 23: 161
Seymour v. Osborne, 11 Wall. 516, 20: 33
Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19: 566

Sale.

1141. The rights growing out of an invention may be sold, and their sale, with the right to use the invention, in connection with an existing patent and its reissues or renewals, protects from liability as infringers. *Hammond v. Mason & H. Organ Co.* 92 U. S. 724, 23: 767

License.

Burden of Proof, see Evidence, 780.

Evidence of, see Evidence, 2257.

1142. Proof of license to a third party will not avail a defendant who does not prove any privity between himself and that licensee, either by assignment or otherwise. *Chaffee v. Boston Belting Co.* 22 How. 217, 16: 240
Cited in Burke v. Partridge, 58 N. H. 354.

Receipt of royalty.

1143. A patentee having once received royalty upon a patented device cannot treat a subsequent seller or user as an infringer. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 14 Sup. Ct. Rep. 627, 38: 500
Cited in Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 734, 25 C. C. A. 277, 47 U. S. App. 146, 77 Fed. 298.

Subsequent invention.

Question of Law or Fact, see Trial, 222.

1144. Subsequent invention of the same thing does not protect one from liability for infringement of a patent obtained by a prior inventor. *United States v. Berdan Firearms Mfg. Co.* 156 U. S. 552, 15 Sup. Ct. Rep. 420, 39: 530
Cited in Boston Lasting-Mach. Co. v. Woodward, 27 C. C. A. 71, 50 U. S. App. 164, 82 Fed. 100.

2. Prior Use, Discovery, or Invention.

Necessity, Sufficiency, and Effect of Notice of Special Matter, see Evidence, 2667-2687.

Admissibility of Evidence Under General Denial, see Evidence, 2710-2712.

Prior use.

1145. In an action under the patent act of 1839 for the infringement of a patent, a prior knowledge or use by a single person is sufficient as a defense. *Coffin v. Ogden*, 18 Wall. 120, 21: 821

Cited in Dalby v. Lynes, 64 Fed. 378—*Matheson v. Campbell*, 77 Fed. 281—*Parlin & O. Co. v. Moline Plow Co.* 32 C. C. A. 225, 60 U. S. App. 297, 89 Fed. 333—*Bannerman v. Sanford*, 30 C. C. A. 537, 99 Fed. 297—*United States Mineral Wool Co. v. Manville Covering Co.* 60 C. C. A. 280, 125 Fed. 772—*Daniel v. Restein*, 131 Fed. 473—*Coffee v. Guerrant*, 3 App. D. C. 499—*Burr v. Ford*, 5 App. D. C. 28.

1146. Two years' prior use of an article is sufficient to defeat an action for infringing a patent subsequently granted to another person. *Anderson v. Miller*, 129 U. S. 70, 9 Sup. Ct. Rep. 224, 32: 635

1147. Defense that the respondent's machinery was in use before the patent in suit was granted is no defense to the charge of infringement, where no use was shown prior to the issue of the patent in place of which the one in suit had been reissued. *Agawam Woolen Co. v. Jordan*, 7 Wall. 583, 19: 177

1148. Where a defective patent has been surrendered, and a new one taken out, and the patentee brings an action for a violation of his patent, laying the infringement at a date subsequent to that of the renewed patent, proof of the use of the thing patented during the interval between the original and renewed patents will not defeat the action. *Stimpson v. Westchester R. Co.* 4 How. 380, 11: 1020

Cited in Battin v. Taggart, 17 How. 84, 15 L. ed. 41, 1 Whitman, Pat. Cas. 979.

Prior printed publication.

Question for Jury, see Trial, 232a.

1149. Prior printed publications which describe the process covered by a patent so fully and clearly as to enable persons skilled in the art to which the invention relates to carry on the process will defeat a patent obtained for such process. *Downton v. Yeager Mill. Co.* 108 U. S. 466, 3 Sup. Ct. Rep. 10, 27: 789
Sewall v. Jones, 91 U. S. 171, 23: 275
Cohn v. United States Corset Co. 93 U. S. 366, 23: 907
Pickering v. McCullough, 104 U. S. 310, 26: 749

Distinguished in Matheson v. Campbell, 69 Fed. 604.

Cited in Downton v. Yeager Mill. Co. 108 U. S. 471, 27 L. ed. 791, 3 Sup. Ct. Rep. 10—*Eames v. Andrews*, 122 U. S. 66, 30 L. ed. 1073, 7 Sup. Ct. Rep. 1073—*Re Arkell*, 15 Blatchf. 439, 4 Bann. & Ard. 82, Fed. Cas. No. 531—*United Nickel Co. v. Pendleton*, 15 Fed. 747—*United Nickel Co. v. Melchior*, 17 Fed. 343—*United States Bung Mfg. Co. v. Independent Bung & Bushing Co.* 31 Fed. 80—*Chase v. Fillebrown*, 58 Fed. 378—*Truman v. Carvill Mfg. Co.* 87 Fed. 476—*Carnegie Steel Co. v. Cambria Iron Co.* 89 Fed. 738—*Simonds Rolling Mach. Co. v. Hathorn Mfg. Co.* 90 Fed. 207—*Badische Anilin & Soda Fabrik v. Kalle*, 94 Fed. 167—*Cimioti Unhairing Co. v. Comstock Unhairing Co.* 115 Fed. 524—*Fay v. Mason*, 120 Fed. 509—*Pettibone v. Pennsylvania Steel Co.* 133 Fed. 737—*Re McCloskey*, 3 MacArth. 23—*Re Schaeffer*, 2 App. D. C. 8.

1150. A person sued for infringement of a patent may show in defense that the invention claimed was patented, or described in some printed publication, before the patentee's supposed invention or discovery thereof. *Clark Thread Co. v. Willimantic Linen Co.* 140 U. S. 481, 11 Sup. Ct. Rep. 846, 35: 521
Cited in United States Electric Lighting Co. v. Edison Lamp Co. 51 Fed. 28—*Untermeyer v. Freund*, 7 C. C. A. 186, 20 U. S. App. 32, 58 Fed. 208—*Ecaubert v. Appleton*, 15 C. C.

A. 81, 35 U. S. App. 221, 67 Fed. 925—*Von Schmidt v. Bowers*, 25 C. C. A. 342, 48 U. S. App. 120, 80 Fed. 140.

1151. To recover for the violation of a patent, plaintiff must be the original inventor, not only in relation to the United States, but to other parts of the world. Even if the supposed inventor did not know that the discovery had been made before, still, he is not entitled to the rights of an inventor, if it has been in use or described in public prints, and if he be not in truth the original inventor. *Sewall v. Jones*, 91 U. S. 171, 23: 275
Cited in Sanders v. Hancock, 63 C. C. A. 175, 128 Fed. 433—*Jones v. Burnham*, 67 Me. 97, 24 Am. Rep. 10.

1152. Where the thing patented is an entirety consisting of a separate device, or of a single combination of old elements incapable of division or separate use, the defense that the patentee was not the first and original inventor cannot be sustained by proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another, and so on indefinitely. *Parks v. Booth*, 102 U. S. 96, 26: 54
Imhäuser v. Buerk, 101 U. S. 647, 25: 945
Bates v. Coe, 98 U. S. 31, 25: 68
Cited in Stegner v. Blake, 36 Fed. 186—*Campbell v. Bailey*, 45 Fed. 565—*Consolidated Fastener Co. v. Columbian Fastener Co.* 79 Fed. 798—*Emerson Electric Mfg. Co. v. Van Nort Bros. Electric Co.* 116 Fed. 977—*American Saddle Co. v. Sager Gear Co.* 122 Fed. 646—*McMichael & W. Mfg. Co. v. Ruth*, 63 C. C. A. 306, 128 Fed. 708—*Spear v. Keystone Lantern Co.* 131 Fed. 581—*Nellis v. Pennock Mfg. Co.* 15 Phila. 494.

1153. Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, although of prior date, unless the description and drawings contain an exhibit and substantial representation of the patented improvement in such full, clear, and exact terms as to enable any persons skilled in the art or science to which it appertains, to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, 30: 1064

Cited in Chase v. Fillebrown, 58 Fed. 378—*American Sulphite Pulp Co. v. Howland Falls Pulp Co.* 70 Fed. 994—*Thomson-Houston Electric Co. v. Winchester Ave. R. Co.* 71 Fed. 197—*Heap v. Tremont & S. Mills*, 27 C. C. A. 319, 50 U. S. App. 180, 82 Fed. 453—*Truman v. Carvill Mfg. Co.* 87 Fed. 476—*Carnegie Steel Co. v. Cambria Iron Co.* 89 Fed. 738—*McNeely v. Williams*, 37 C. C. A. 644, 96 Fed. 981—*American Bell Teleph. Co. v. National Tel. Mfg. Co.* 109 Fed. 1046—*Ide v. Thorlicht, D. & B. Carpet Co.* 53 C. C. A. 350, 115 Fed. 146—*Fay v. Mason*, 120 Fed. 509—*Re Schaeffer*, 2 App. D. C. 8.

1154. A foreign patent, or other foreign printed publication describing an invention, is no defense, unless published anterior to the invention or discovery secured by the United States patent, provided that the American patentee, at the time of making application for his patent, believed himself

to be the first inventor or discoverer of the thing patented. *Elizabeth v. American Nicholson Pav. Co.* 97 U. S. 126,

24: 1000

Cited in Ireson v. Pierce, 39 Fed. 798—*Welshbach Light So. v. American Incandescent Lamp Co.* 39 C. C. A. 187, 98 Fed. 615.

Prior invention.

Estoppel to Set up, see *Estoppel*, 171
Variance Between Allegations and Proof, see *Evidence*, 2772.

Necessity of Pleading Defense, see *Pleading*, 699.

Question of Law or Fact, see *Trial*, 223.

1155. In an action under the patent act of 1836 for the infringement of a patent right, a prior invention or discovery relied upon as a defense must have been complete, and capable of producing the result sought to be accomplished. *Coffin v. Ogden*, 18 Wall. 120,

21: 821

Cited in Hall v. Macneale, 107 U. S. 97, 27 L. ed. 369, 2 Sup. Ct. Rep. 73—*Smith & G. Mfg. Co. v. Sprague*, 123 U. S. 266, 31 L. ed. 147, 8 Sup. Ct. Rep. 122—*Brush v. Condit*, 132 U. S. 49, 33 L. ed. 256, 10 Sup. Ct. Rep. 1—*Deering v. Winona Harvester Works*, 155 U. S. 302, 39 L. ed. 159, 15 Sup. Ct. Rep. 118—*Henry v. Providence Tool Co.* 3 Bann. & Ard. 514, Fed. Cas. No. 6,384—*Judson v. Bradford*, 3 Bann. & Ard. 548, Fed. Cas. No. 7,534—*Kelleher v. Darling*, 4 Cliff. 440, 3 Bann. & Ard. 448, Fed. Cas. No. 7,653—*Moore v. Thomas*, 3 Bann. & Ard. 17, Fed. Cas. No. 9,776—*Pickering v. McCullough*, 3 Bann. & Ard. 280, Fed. Cas. No. 11,121—*Wilson v. Coon*, 18 Blatchf. 547, 6 Fed. 626—*Miller v. Foree*, 9 Fed. 607—*Davis v. Brown*, 19 Blatchf. 275, 9 Fed. 656—*Stephenson v. Brooklyn C. T. R. Co.* 19 Blatchf. 476, 14 Fed. 460—*Corser v. Brattleboro Overall Co.* 59 Fed. 782—*National Cash-Register Co. v. Lamson Consol. Store-Service Co.* 60 Fed. 604—*Mast, F. & Co. v. Iowa Windmill & Pump Co.* 68 Fed. 224—*Wheaton v. Kendall*, 85 Fed. 672—*Bowers v. San Francisco Bridge Co.* 91 Fed. 415—*Glidden v. Busell*, 5 App. D. C. 494—*Re Drawbaugh*, 9 App. D. C. 241—*Wurts v. Harrington*, 10 App. D. C. 155—*Hunter v. Stikeman*, 13 App. D. C. 219—*Funk v. Haines*, 20 App. D. C. 288—*Lamson v. Martin*, 159 Mass. 565, 35 N. E. 78—*Ewing's Appeal*, 40 Phila. Leg. Int. 47.

1156. A patented invention, or one brought into use without a patent, cannot be inhibited or restricted by a prior inventor, designedly withholding his invention from the public, unless the delay was required to complete the invention, or the forbearance in proclaiming the discovery has been discreet and reasonable. *Kendall v. Winsor*, 21 How. 322,

16: 165

Cited in Agawam Woolen Co. v. Jordan, 7 Wall. 608, 19 L. ed. 183—*Jones v. Sewall*, 3 Cliff. 590, 6 Fisher, Pat. Cas. 365, Fed. Cas. No. 7,495—*Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co.* 1 Bann. & Ard. 483, Fed. Cas. No. 8,453—*Sturtevant v. Greenough*, Fed. Cas. No. 13,579—*Wood v. Cleveland Rolling Mill Co.* 4 Fisher, Pat. Cas. 556, Fed. Cas. No. 17,941—*Western Electric Co. v. Sperry Electric Co.* 7 C. C. A. 169, 18 U. S. App. 177, 58 Fed. 191—*Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co.* 10 Phila. 261.

1157. The defense that the patentee is not

the original and first inventor, if the thing patented is an entirety, incapable of division or of separate use, must be addressed to the entire invention, and not to a part of it. *Parks v. Booth*, 102 U. S. 96, 26: 54
Bates v. Coe, 98 U. S. 31, 25: 68

Prior patent.

1158. Where defendant's machine infringes plaintiff's machine, it is no answer to prove that the defendant is the owner of another patent, and that his machine is constructed in accordance with it. *Blanchard v. Putnam*, 8 Wall. 420,

19: 433

Cited in Norton v. Eagle Automatic Can Co. 59 Fed. 138—*Ransome v. Hyatt*, 16 C. C. A. 186, 29 U. S. App. 715, 69 Fed. 149.

1159. Where the only issue made by the defense is that of infringement, the only proper comparison is that of the defendant's machine with that of the plaintiff. *Blanchard v. Putnam*, 8 Wall. 420,

19: 433

Cited in Seymour v. Osborne, 11 Wall. 559, 20 L. ed. 43—*Hudson v. Draper*, 4 Cliff. 181, 4 Fisher, Pat. Cas. 259, Fed. Cas. No. 6,834.

1160. Two patents may both be valid when the invention secured by the second is an improvement on that secured by the first; but if the second includes the first, neither grantee can use the invention of the other without his consent; and a stranger who is an infringer of both cannot set up the first patent as an excuse for infringing the second. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. Rep. 970,

29: 1017

Cited in Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co. 34 Fed. 134—*Thompson v. American Bank Note Co.* 35 Fed. 204—*Putnam v. Keystone Bottle Stopper Co.* 38 Fed. 236—*Sayre v. Scott*, 5 C. C. A. 388, 3 U. S. App. 643, 55 Fed. 973—*Westinghouse v. New York Air-Brake Co.* 59 Fed. 598—*Barnes Automatic Sprinkler Co. v. Walworth Mfg. Co.* 9 C. C. A. 156, 18 U. S. App. 538, 60 Fed. 607—*Mast v. Iowa Windmill & Pump Co.* 68 Fed. 224—*Consolidated Fastener Co. v. Columbian Fastener Co.* 79 Fed. 798—*King v. Anderson*, 90 Fed. 504—*Winslow v. Bronson*, 106 Fed. 181—*Westinghouse Electric & Mfg. Co. v. Union Carbide Co.* 112 Fed. 420—*Cimlotti Unhairing Co. v. American Unhairing Mach. Co.* 53 C. C. A. 237, 115 Fed. 505—*American Saddle Co. v. Sager Gear Co.* 122 Fed. 646—*Eldred v. Kirkland*, 124 Fed. 554—*Burr v. Ford*, 5 App. D. C. 28.

1161. Although one conceived the idea of his patent from examination of a prior patent, he is still entitled, in a suit for infringement, to claim that the prior patent was anticipated by prior devices,—especially when such prior devices show a complete anticipation of his own. *Hoff v. Iron Clad Mfg. Co.* 139 U. S. 326, 11 Sup. Ct. Rep. 580,

35: 179

Cited in Vincent v. Rigby, 58 Fed. 374—*Vulcan Iron Works v. Smith*, 10 C. C. A. 408, 15 U. S. App. 577, 62 Fed. 450—*Strom Mfg. Co. v. Weir Frog Co.* 27 C. C. A. 507, 54 U. S. App. 330, 83 Fed. 175.

1162-3. One having taken out two patents,—the first for a novel composition of matter: the second for a combination of this composition with another article,—who brings suit for infringement on the second

patent alone, in which it is held that the mere combination is not patentable, cannot be aided by the first patent; at least where it is not alleged or shown that he is still the owner thereof; but, on the contrary, such first patent may be set up as a prior patent to defeat his claim under the second. *Underwood v. Gerber*, 149 U. S. 224, 13 Sup. Ct. Rep. 854, 37: 710

Cited in *Brigham v. Coffin*, 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 939—*Miller v. Eagle Mfg. Co.* 151 U. S. 198, 38 L. ed. 127, 14 Sup. Ct. Rep. 310—*Bowman v. De Grauw*, 60 Fed. 910—*Palmer v. John E. Brown Mfg. Co.* 84 Fed. 457—*H. W. Johns Mfg. Co. v. Robertson*, 89 Fed. 506—*Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* 90 Fed. 210—*Writing Mach. Co. v. Elliott & H. Book-Type-writer Co.* 106 Fed. 508—*Dolg v. Morgan Mach. Co.* 122 Fed. 462—*Thomson-Houston Electric Co. v. Black River Traction Co.* 124 Fed. 512—*Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co.* 60 C. C. A. 536, 125 Fed. 769.

XVI. Setting Aside.

Canceling or Annuling Patent, see *supra*, VIII. e.

Jurisdiction of Courts, see *Courts*, 427, 555.
District where Suit should be Brought, see *Courts*, 962, 963.

Necessity of Record Showing Proceedings Antecedent to Rule for Process, see *Courts*, 1148.

Exclusiveness of Federal Jurisdiction, see *Courts*, 1416-1421.

Disposition of Issues by Court or Jury, see *Trial*, 14.

Rules of Decision and Scope of Inquiry in Suit by United States, see *United States*, 151.

1164. The only authority competent to set a patent aside or to annul it is vested in the judicial department of the government; and this can be effected only by proper proceedings taken in the courts of the United States. *United States v. American Bell Teleph. Co.* 128 U. S. 315, 9 Sup. Ct. Rep. 90, 32: 450

Cited in *McCormick Harvesting Mach. Co. v. Aultman*, 169 U. S. 608, 42 L. ed. 876, 18 Sup. Ct. Rep. 443—*Muncie Natural Gas Co. v. Muncie*, 160 Ind. 106, 60 L.R.A. 828, 66 N. E. 436.

Who may sue.

1165. No suit can be brought by individuals to set aside, annul, or declare void a patent issued by the government, except by those who claim under conflicting patents, or those who have conflicting claims to a patent. All other suits for such purpose must be brought in the name of the government, or by the authority or permission of the attorney general, so as to be under his control. *Mowry v. Whitney*, 14 Wall. 434, 20: 858

Cited in *Mahn v. Harwood*, 112 U. S. 365, 28 L. ed. 669, 6 Sup. Ct. Rep. 451—*United States v. San Jacinto Tin Co.* 125 U. S. 281, 31 L. ed. 750, 8 Sup. Ct. Rep. 850—*United States v. American Bell Teleph. Co.* 128 U.

S. 368, 32 L. ed. 462, 9 Sup. Ct. Rep. 90—*Atty. Gen. v. Rumford Chemical Works*, 2 Bann. & Ard. 308, Fed. Cas. No. 638a—*Birdsall v. McDonald*, 1 Bann. & Ard. 170, Fed. Cas. No. 1,434—*Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co.* 13 Blatchf. 384, 2 Bann. & Ard. 343, Fed. Cas. No. 2-543—*New York & B. Coffee Polishing Co. v. New York Coffee Polishing Co.* 20 Blatchf. 177, 9 Fed. 581—*Railway Register Mfg. Co. v. North Hudson C. R. Co.* 23 Fed. 595—*Consolidated Electric Light Co. v. Edison Electric Light Co.* 23 Blatchf. 413, 25 Fed. 720—*United States v. American Bell Teleph. Co.* 32 Fed. 604—*Atty. Gen. v. Rumford Chemical Works*, 2 Bann. & Ard. 308, 32 Fed. 620—*Northern P. R. Co. v. Cannon*, 46 Fed. 231—*Northern P. R. Co. v. Cannon*, 4 C. C. A. 310, 7 U. S. App. 507, 54 Fed. 259—*Scott v. Lockey Invest. Co.* 66 Fed. 37—*Meyendorf v. Frohner*, 3 Mont. 321—*United States v. San Pedro & C. D. A. Co.* 4 N. M. 590, 17 Pac. 337—*McCarran v. Cooper*, 16 App. Div. 312, 44 N. Y. Supp. 695—*New York & B. Coffee Polishing Co. v. New York Coffee Polishing Co.* 62 How. Pr. 488.

Expired patent.

1166. Where the extension of a patent has expired before the bill to set it aside was filed, nothing remains which can be the subject of a suit. *United States ex rel. Bourne v. Goodyear (Bourne v. Goodyear)* 9 Wall. 811, 19: 786

Prior patent.

1167. The invalidity of a patent because the invention is covered by a prior patent is not ground for a suit to set aside the patent, since it constitutes a good defense to the patent in an action at law and rests upon matters of record in the patent office. *United States v. American Bell Teleph. Co.* 167 U. S. 224, 17 Sup. Ct. Rep. 809, 42: 144

Fraud.

Fraud as a Defense, see *supra*, 1135-1140.

1168. If a person was aware, when he filed his specifications, asserted his claim, and procured his patents, that the same matter for which the patents were issued had been previously discovered and put into operation by other persons, he was guilty of such a fraud upon the public that the monopoly which such patents grant to him ought to be revoked and annulled. *United States v. American Bell Teleph. Co.* 128 U. S. 315, 9 Sup. Ct. Rep. 90, 32: 450

Collateral attack.

See also *supra*, 1133.

1169. Mere error of judgment on the part of patent officials in granting a patent cannot be collaterally attacked by suit to set aside the patent. *United States v. American Bell Teleph. Co.* 167 U. S. 224, 17 Sup. Ct. Rep. 809, 42: 144

XVII. Enumeration of Patents.

Adams's corn shellers. No. 132,128.

151 U. S. 139, 14 Sup. Ct. Rep. 295 38: 103

- Aldrich's rubber cloths or fabrics, No. 283,057. 149 U. S. 557, 13 Sup. Ct. Rep. 939 37: 845
 Allen's grain drills, Nos. 8,589, 74, 515. 116 U. S. 237, 6 Sup. Ct. Rep. 379, 29: 659
 Allen's machine for making percussion cartridge cases, No. 1,948. 112 U. S. 624, 5 Sup. Ct. Rep. 475, 28: 828
 Allender's washing and wringing machine. 11 Wall. 488, 20: 209
 Ambrose's lamps. 104 U. S. 350, 26: 783
 Anderson's drawers, No. 265,733. 129 U. S. 70, 9 Sup. Ct. Rep. 224, 32: 635
 Angle irons, Mosler's process of bending, No. 283,136. 127 U. S. 354, 8 Sup. Ct. Rep. 1148, 32: 182
 Animal fats, Commercial Mfg. Co.'s process of treating, No. 10,137. 135 U. S. 176, 10 Sup. Ct. Rep. 718, 34: 88
 Anvil, Cawood's. 1 Wall. 491, 17: 668
 Anvil for reforming ends of railroad rails, Cawood's. 94 U. S. 695, 24: 238
 Apparatus for broiling steak by gas, Lazear's. 103 U. S. 250, 26: 445
 Apparatus for cleaning privies, Bull & Lowenstein's, No. 115,565. 109 U. S. 641, 3 Sup. Ct. Rep. 525, 27: 1060
 Apparatus for cleaning privies, Keizer's, No. 6,962. 109 U. S. 641, 3 Sup. Ct. Rep. 525, 27: 1060
 Apparatus for cooling and drawing beer, Gordon's, No. 248,646. 150 U. S. 387, 14 Sup. Ct. Rep. 153, 37: 1118
 Apparatus for enameling moldings. 117 U. S. 689, 6 Sup. Ct. Rep. 970, 29: 1017
 Apparatus for resweating tobacco, Robinson's, No. 216,293. 119 U. S. 531, 7 Sup. Ct. Rep. 376, 30: 492
 Apparatus for transferring grain, No. 308,095. 158 U. S. 299, 15 Sup. Ct. Rep. 931, 39: 991
 159 U. S. 477, 16 Sup. Ct. Rep. 53, 40: 225
 Aron's railway car gates, No. 288, 494. 132 U. S. 84, 10 Sup. Ct. Rep. 24, 33: 272
 Artificial dentures, Richmond's, No. 277,941. 140 U. S. 55, 11 Sup. Ct. Rep. 716, 35: 347
 Artificial dentures, Richmond's process of preparing roots of teeth for, No. 277,943. 140 U. S. 55, 11 Sup. Ct. Rep. 716, 35: 347
 Ashcroft's steam safety valves. 97 U. S. 189, 24: 982
 Asmus's blast furnaces, No. 3,204. 145 U. S. 226, 12 Sup. Ct. Rep. 939, 36: 685
 Asphalt pavements, Perkins's method of repairing, No. 501,537. 183 U. S. 591, 22 Sup. Ct. Rep. 87, 46: 342
 Augur's wagon gearing, No. 108,085. 145 U. S. 156, 12 Sup. Ct. Rep. 825, 36: 658
 Automatic brake, Boyden's Nos. 481,134, 481,135. 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136
 Automatic brake mechanism Westinghouse's, No. 360,070. 170 U. S. 537, 18 Sup. Ct. Rep. 707, 42: 1136
 Automatic fruit dryer, Reynolds's, No. 190,368. 120 U. S. 412, 7 Sup. Ct. Rep. 718, 30: 712
 Axle bearings, Wallace's, Nos. 249, 278, 280,421. 144 U. S. 254, 12 Sup. Ct. Rep. 643, 36: 426
 Bacon's paper folding machine. 2 Black, 699, 17: 338
 Bail ears, Double Pointed Tack Co.'s, No. 147,343. 109 U. S. 117, 3 Sup. Ct. Rep. 105, 27: 877
 Bail ears, Miles's, No. 147,343. 109 U. S. 117, 3 Sup. Ct. Rep. 105, 27: 877
 Bailey's hydrants, No. 6,990. 127 U. S. 563, 8 Sup. Ct. Rep. 1291, 32: 175
 Bailey's valve for water cylinders of steam fire engines. 113 U. S. 679, 5 Sup. Ct. Rep. 692, 28: 1070
 Balancing millstones, improvement in. 9 Wall. 737, 19: 784
 Baled plastering hair, King's, No. 152,500. 109 U. S. 99, 3 Sup. Ct. Rep. 85, 27: 870
 Ball & Fitt's water meters, 101 U. S. 332, 25: 1024
 Ballard & Waddell's wooden pavement, Nos. 94,062, 94,063. 130 U. S. 87, 9 Sup. Ct. Rep. 437, 32: 863
 Ball covers, Osgood's. 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451, 28: 665
 Ball's corsets, No. 238,100. 137 U. S. 64, 11 Sup. Ct. Rep. 20, 34: 574
 Ball's ovens, No. 4,026. 102 U. S. 128, 230, 26: 104, 133
 Band saws, J. A. Fay & Co.'s, No. 78,880, 120,949. 109 U. S. 408, 3 Sup. Ct. Rep. 236, 27: 979
 Banjo, Cubley's, No. 253,849. 149 U. S. 117, 13 Sup. Ct. Rep. 796, 37: 671
 Banjo, Dobson's, Nos. 203,604, 249, 321. 149 U. S. 117, 13 Sup. Ct. Rep. 796, 37: 671
 Barker's gas burners. 106 U. S. 178, 1 Sup. Ct. Rep. 198, 27: 138
 Barker's soddering machine. 111 U. S. 97, 4 Sup. Ct. Rep. 375, 28: 365
 Barnes's corset springs. 104 U. S. 333, 26: 775
 Barrels, Holbeck & Gottfried's method of pitching, No. 42,580. 128 U. S. 158, 9 Sup. Ct. Rep. 83, 32: 390
 Bartholomay's process of making beer, No. 215,679. 122 U. S. 413, 7 Sup. Ct. Rep. 1,304, 30: 1193
 Bartholomew's water closets, No. 21,734. 114 U. S. 1, 5 Sup. Ct. Rep. 1042, 29: 76
 Base burning stoves, Treadwell & Hailes's. 20 Wall. 353, 22: 241
 Beach's machine for attaching stays to the corners of boxes, No. 11,167. 180 U. S. 333, 21 Sup. Ct. Rep. 409, 45: 586
 Beck's quilting machines, No. 9,097. 124 U. S. 32, 8 Sup. Ct. Rep. 354, 31: 362
 Beckwith's stoves, Nos. 123,142, 135, 621, 206,074. 150 U. S. 164, 14 Sup. Ct. Rep. 68, 37: 1039

- Bed bottoms, Dunks & Ryan's, No. 241,321. 145 U. S. 241, 12 Sup. Ct. Rep. 919, **36: 691**
 Beer, Bartholomay's process of making, No. 215,679. 122 U. S. 413, 7 Sup. Ct. Rep. 1,304, **30: 1193**
 Beer, Gordon's apparatus for cooling and drawing, No. 248,646. 150 U. S. 387, 14 Sup. Ct. Rep. 153, **37: 1118**
 Bell ringers, Buffalo Dental Mfg. Co.'s, No. 127,933. 121 U. S. 617, 7 Sup. Ct. Rep. 1343, **30: 1004**
 Bell ringers, Snow's, No. 127,933. 121 U. S. 617, 7 Sup. Ct. Rep. 1343, **30: 1004**
 Bell's improvements in telegraphy, Nos. 174,465, 186,787. 126 U. S. 1, 8 Sup. Ct. Rep. 778, **31: 863**
 Bene's process of refining and bleaching hair, No. 8,637. 129 U. S. 683, 9 Sup. Ct. Rep. 428, **32: 803**
 Benham's velocipedes, No. 310,776. 144 U. S. 238, 12 Sup. Ct. Rep. 637, **36: 420**
 Beyer's steam safety valve. 97 U. S. 189, **24: 982**
 Bicycle seats, Veeder's, No. 252,280. 144 U. S. 238, 12 Sup. Ct. Rep. 637, **36: 420**
 Bing's shoe for car brakes, No. 40,156. 110 U. S. 229, 4 Sup. Ct. Rep. 33, **28: 129**
 Birch's cash register and indicator, No. 271,363. 156 U. S. 502, 15 Sup. Ct. Rep. 434, **39: 511**
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Of Execution, see Execution, II. e.

Of Debts of Decedent, see Executors and
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Of Freight, see Shipping, 100.

Of Insurance Premium, see Insurance, 138-
142.

Of Internal Revenue, see Internal Revenue,
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Of License Tax, see License, 13.

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 Effect of Payment Into Court on Costs, see Costs and Fees, I. e.
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 Double Payment of Debts Due Intestate, see Descent and Distribution, 32.
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 Evidence to Rebut Presumption, see Evidence, 2173.
 Documentary Evidence as to, see Evidence, 1135, 1136, 1222, 1263, 1439.

Parol Evidence to Explain Receipt, see Evidence, VI. d.
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 Sufficiency of Allegations of, see Pleading, III. h, 2.
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 Payment or Tender as Condition Precedent to Relief against Usurious Agreement, see Usury, 117-120.

I. To Whom Made.

To Agent of Public Officer, see Bonds, 79.
 To Agent after Principal's Death, see Principal and Agent, 13.
 To Guardian, see Guardian and Ward, 19.
 To Insurance Agent During Civil War, see Insurance, 51.
 Nondischarge of Claim against Government by Payment to Insolvent after Receiver is Appointed, see Claims, 22.
 Validity of Payment made under Judgment Subsequently Reversed, see Execution, 86.
 Validity of Payment made to Guardian outside of the Jurisdiction Appointing Him, see Executors and Administrators, 211.
 Question of Law or Fact as to, see Trial, 420.

1. Debts can be satisfied only when paid to the creditors to whom they are due, or to others by direction of lawful authority. *Williams v. Bruffy*, 96 U. S. 176, 24: 716

2. Payment to an attorney in fact, constituted such by power of attorney executed by the claimants before the allowance of their claim by Congress or by the proper department, is good as between the government and such claimants, where the power of attorney has not been revoked at the

time payment is made. *Bailey v. United States*, 109 U. S. 432, 3 Sup. Ct. Rep. 272, 27: 988

3. The payment, by the District of Columbia, of certificates of the auditor of the board of public works to a third person, where they have been indorsed in blank and placed in his hands by the owner, in the absence of want of actual authority to collect them, discharges the debt. *Laughlin v. District of Columbia*, 116 U. S. 485, 6 Sup. Ct. Rep. 472, 29: 701

Executors and administrators.

Foreign Executors or Executors in Foreign States, see Executors and Administrators, 260-264.

4. Payment made to one executor is valid, and it is not necessary that his coexecutor should join in the receipt. *Glasgow v. Lipse*, 117 U. S. 327, 6 Sup. Ct. Rep. 757, 29: 901

5. A bona fide payment, to the administrator, of a debt due to the estate, is a legal discharge of the debtor, whether the administration be void or voidable. *Kane v. Paul*, 14 Pet. 33, 10: 341
Cited in *United States ex rel. Halstead v. Wyman*, 2 Mackey, 374.

Payment coerced by unauthorized persons.

6. Debtors cannot claim release from liability to their creditors by the coerced payment of equivalent sums to an unlawful combination. *Williams v. Bruffy*, 96 U. S. 176, 24: 716
Cited in *Mitchell v. Clark*, 110 U. S. 648, 28 L. ed. 284, 4 Sup. Ct. Rep. 312.

7. A statute of the Confederate states, or an order of its postmaster-general, cannot have any legal effect to make valid a payment by a postmaster to a creditor of the United States instead of to the government itself. *United States v. Keebler*, 9 Wall. 83, 19: 574
Cited in *United State v. 1,500 Bales of Cotton*, Fed. Cas. No. 15,958—*United States v. Stark*, 11 Am. L. Reg. N. S. 40, Fed. Cas. No. 16,378—*Ford v. Surget*, 46 Mss. 153—*Spratt v. Pierson*, 4 S. C. N. S. 304—*Vance v. Burtis*, 39 Tex. 91.

8. Voluntary payment to a creditor of the United States is no defense to a suit on the official bond of a postmaster; and the fact that the Confederate Congress had passed an act appropriating balances of the kind shown in this case to the payment of claims against the United States can give no validity to the payment. *United States v. Keebler*, 9 Wall. 83, 19: 574
Cited in *State v. Baetz*, 44 Wis. 634.

9. The order of General Banks, of August 17, 1863, while the city of New Orleans was in the quiet possession of the United States, and after a pledge had been given that the rights of property would be respected, requiring the banks of that city to pay to the quartermaster of the Army all moneys in their possession belonging to enemies of the United States, to be held and accounted

for by the quartermaster's department subject to future adjudication by the United States, was one which he had no authority to make; and payment thereunder to the quartermaster by one bank, of the balance due another bank, did not satisfy the debt. *Planters' Bank of Tennessee v. Union Bank of Louisiana*, 16 Wall. 483, 21: 473
Cited in *Ford v. Surget*, 97 U. S. 618, 24 L. ed. 1026—*Dow v. Johnson*, 100 U. S. 183, 25 L. ed. 641—*Gates v. Goodloe*, 101 U. S. 618, 25 L. ed. 897—*Payne v. United States*, 22 Ct. Cl. 148—*Bennett v. Mechanics' & T. Bank*, 34 Ia. Ann. 157—*Risley v. Phenix Bank*, 83 N. Y. 335, 38 Am. Rep. 421.

II. Mode, Requisites, and Validity.

Payment as "Transfer of Property," within Bankruptcy Act, see Bankruptcy, 157.

Overpayment as Fraudulent Transfer, see Fraudulent Conveyances, 49, 50.

Parol Evidence Respecting Mode, see Evidence, 1524, 1613-1617, 1662-1664.

Of Federal Tax, see Internal Revenue, V. b.

a. What Constitutes.

Validity of Payment under Confiscation Proceedings by Confederate States, see Confiscation and Sequestration, 109, 110.

Of One Railroad Subscription by City by New Subscription, see Contracts, 242.

Rule in Equity to Regard Payment as made where Payer and Payee are the same Person, see Equity, 290.

Opinion as to Whether Transaction was Intended as Payment, see Evidence, 1814.

Admission in Deed as Evidence of Payment of Consideration, see Evidence, 1874.

Recital in Tax Deed as Evidence of Payment of Levee Taxes, see Evidence, 2436.

Recital in Assignment as Evidence of, see Evidence, 2424.

Admissibility of Evidence Under Plea of Payment, see Evidence, 2715-2718.

Effect of Transfer of General Revenues into Special Fund as Paying Debts to that Fund, see Municipal Corporations, 144.
Sufficiency and Effect of Payment by Public Officer into Treasury, see Officers, 56.

Payment distinguished from sale.

10. Payment of the amount due on coupons by one who is not the debtor, and taking them into his possession without the intention to extinguish them, and without any belief in the other party that they are extinguished by the transaction, constitutes a sale of them, and not an extinguishment. *Ketchum v. Duncan*, 96 U. S. 659, 24: 868
Distinguished in *South Covington & C. S. R. Co. v. Gest*, 34 Fed. 645—*Martin v. Citizens' Bank & T. Co.* 94 Tenn. 184, 28 S. W. 1097.
Cited in *Wood v. Guarantee Trust & S. B. Co.* 128 U. S. 421, 32 L. ed. 473, 9 Sup. Ct. Rep. 131—*Morgan's L. & T. R. & S. S. Co. v.*

Texas C. R. Co. 137 U. S. 106, 34 L. ed. 634, 11 Sup. Ct. Rep. 61—Peake v. New Orleans. 139 U. S. 375, 35 L. ed. 143, 11 Sup. Ct. Rep. 541—Claffin v. South Carolina R. Co. 4 Hughes, 36, 8 Fed. 137—Central Trust Co. v. Cincinnati, J. & M. R. Co. 58 Fed. 506—Mowry v. Farmers' Loan & T. Co. 22 C. C. A. 58, 46 U. S. App. 164, 76 Fed. 43—Venner v. Farmers' Loan & T. Co. 33 C. C. A. 106, 62 U. S. App. 141, 90 Fed. 359—McTighe v. Keystone Coal Co. 39 C. C. A. 451, 99 Fed. 138—Illinois Trust & Sav. Bank v. Doud, 52 L.R.A. 487, 44 C. C. A. 399, 105 Fed. 133—Contracting & Bldg. Co. v. Continental Trust Co. 47 C. C. A. 146, 108 Fed. 4—United Waterworks Co. v. Farmers' Loan & T. Co. 11 Colo. App. 232, 53 Pac. 511—Ball v. Serum, 85 Ill. App. 566—Harper v. Wagner, 93 Ky. 651, 21 S. W. 334—Cameron v. Tome, 64 Md. 511, 2 Atl. 837—Child v. New York & N. E. R. Co. 129 Mass. 177—Bockes v. Hathorn, 20 Hun, 510—Hollister v. Stewart, 111 N. Y. 663, 19 N. E. 782—Capwell v. Machon, 21 R. I. 522, 45 Atl. 259—Hand v. Savannah & C. R. Co. 17 S. C. 253—Cussen v. Brandt, 97 Va. 8, 75 Am. St. Rep. 762, 32 S. E. 791.

Transfer of credits and cancelation as payment.

Whether Valid from Making of Credit or from Final Accounting, see Bankruptcy, 219, 220.

11. Where a United States officer undertook to collect debts due to a debtor of the United States, and, when received, to give the debtor credit, the latter is not entitled to such credit until the money gets into the hands of the United States officer. *United States v. Patterson*, 7 Cranch, 575, 3: 444

12. Payment of the purchase money of lands sold by an administrator under an order of the probate court is not shown, where the purchaser, who was a creditor of the estate, merely gave the administrator a receipt for the amount of the bid. *Clay v. Field*, 115 U. S. 260, 6 Sup. Ct. Rep. 36, 29: 375

Money in depository.

13. The proceeds of the sale of a vessel seized as a prize, deposited by a marshal in a national bank which is a special or designated depository of public moneys, do not constitute public moneys of the United States, within the meaning of the statutes applicable to public money and authorizing its deposit in a public depository, and such deposit does not, therefore, constitute a payment of such moneys to the United States, which will make the government liable therefor in case of the failure of the bank pending appeal. *Coudert v. United States*, 175 U. S. 178, 20 Sup. Ct. Rep. 56, 44: 122

b. Medium of Payment.

1. In General.

Proper Medium for Discharge of Execution, see Execution, 87-90.

Of Federal Taxes, see Internal Revenue, 269. Appellate Jurisdiction over Decision as to, see Appeal and Error, 1040.

Prejudicial Error in Instruction as to, see Appeal and Error, 5093.

Error in Refusing Instruction as to, see Appeal and Error, 5133.

Necessity of Paying Deposit in Legal Tender, see Banks, 87.

Collecting Bank Receiving Payment in Depreciated Currency, see Banks, 160.

What Law Governs, see Conflict of Laws, 20.

Impairing Contract Obligations as to, see Constitutional Law, 1292.

Construing Contract as Payable in Foreign Money, see Contracts, 201.

State Rule as to Discharge of Execution Inapplicable to Federal Courts, see Courts, 1333.

Decisions as to Proper Medium for Taxes as Binding Federal Courts, see Courts, 1865, 1866.

Necessity of Assent of Distributees to Distribution in Property, see Executors and Administrators, 210.

Purchase from State with Intent to Raise Judicial Question by Tendering Revenue Bond Scrip as Constituting Fraud, see Fraud and Deceit, 69.

Provisions in Judgment as to Medium, see Judgment, 96-104.

What Agent may Receive as Money, see Principal and Agent, 80, 81.

Course of Action Requiring Notice of Intention as to Medium, see Specific Performance, 122.

Federal Question as to Payment in Coin, see Appeal and Error, 1896, 1897.

Consideration of Medium, in Determining Jurisdictional Amount on Appeal, see Appeal and Error, 398, 399.

Right of Bank Depositor to Payment in Coin, see Banks, 97.

Worn Coin, see Money, 9.

Power of State to Require Assessment and Taxes to be Paid in Coin, see Taxes, 592a.

As to Money Generally, see Money.

14. An obligation of payment generally is discharged by a payment in legal currency. *United States v. Robertson*, 5 Pet. 641, 8: 257

Cited in Higgins v. Bear River & A. Water & Min. Co. 27 Cal. 161—*Griswold v. Hepburn*, 2 Duv. 73—*Shollenberger v. Brinton*, 52 Pa. 70—*Metropolitan Bank v. Van Dyck*, 27 N. Y. 457.

15. A money obligation is not satisfied by the tender of any thing except gold and silver, in the absence of Federal legislation establishing other legal tender. *Griffin v. Thompson*, 2 How. 244, 11: 253

Cited in Hood v. Moore, 9 Ill. 107—*Shackleford v. Cunningham*, 41 Ala. 206—*Alcardi v. Robbins*, 41 Ala. 547, 94 Am. Dec. 614—*Whiting v. Beebe*, 12 Ark. 558.

16. Payment in performance of a contract may be required in the currency which was legal tender at the time the contract was made. *Willard v. Tayloe*, 8 Wall. 557, 19: 501

Cited in Legal Tender Cases, 12 Wall. 624, 20 L. ed. 336—*San Juan v. St. John's Gas Co.* 195 U. S. 520, 49 L. ed. 304, 25 Sup. Ct.

Rep. 108—Proctor v. Heaton, 114 Ind. 253, 15 N. E. 21.

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Stipulations as to medium.

Effect of Stipulation for Specie in Contract Otherwise Payable in Bank Notes, see *infra*, 68, 70.

Effect to Withdraw Debt from Operation of Legal Tender Act, see *infra*, 75.

Making Bonds Payable in Gold, see Bonds, 290.

Parol Evidence of, see Evidence, 1661.

17. Express contracts to pay coined dollars can only be satisfied by the payment of coined dollars. Bronson v. Rodes, 7 Wall. 229, 19: 141
Bronson v. Kimpton, 8 Wall. 444, 19: 433
Butler v. Horwitz, 7 Wall. 258, 19: 149
Dutton v. Palaret, 154 U. S. 563 Appx. 14 Sup. Ct. Rep. 1200, and 19: 165
Distinguished in Breen v. Dewey, 16 Minn. 139, 611. 123—O'Neill v. McKewn, 1 S. C. N. S. 151.

Cited in Bronson v. Kimpton, 8 Wall. 445, 19 L. ed. 433—Heppburn v. Griswold, 8 Wall. 607, 19 L. ed. 521—Dewing v. Sears, 11 Wall. 380, 20 L. ed. 190—Legal Tender Cases, 12 Wall. 624, 20 L. ed. 335—Trebilcock v. Wilson, 12 Wall. 685, 20 L. ed. 462—Thompson v. Butler, 95 U. S. 696, 24 L. ed. 542—Gregory v. Morris, 96 U. S. 624, 24 L. ed. 742—Woodruff v. Mississippi, 162 U. S. 308, 40 L. ed. 979, 16 Sup. Ct. Rep. 820—San Juan v. St. John's Gas Co. 195 U. S. 520, 49 L. ed. 304, 25 Sup. Ct. Rep. 108—The Edith, 5 Ben. 146, Fed. Cas. No. 4,281—The Emily B. Souder, 3 Ben. 161, Fed. Cas. No. 4,454—Murphy v. Smith, 49 Ark. 39, 3 S. W. 891—Hittson v. Davenport, 4 Colo. 174—Roach v. Van Rielwick, MacArthur & M. 186—Bowen v. Darby, 14 Fla. 217—Whitaker v. Dye, 56 Ga. 383—Atkinson v. Lanier, 69 Ga. 463—McGoon v. Shirk, 54 Ill. 411, 5 Am. Rep. 122—People v. Riggs, 56 Ill. 486—Belford v. Woodward, 158 Ill. 123, 29 L.R.A. 597, 41 N. E. 1097—Proctor v. Heaton, 114 Ind. 253, 15 N. E. 21—Lafitte v. Rivera, 23 La. Ann. 33—Caston v. Quimby, 178 Mass. 154, 52 L. R. A. 786, 59 N. E. 653—Re State Bonds, 49 Mo. 224—State ex rel. Seeligman v. Hays, 50 Mo. 36, 11 Am. Rep. 402—Foster v. Atlantic & P. R. Co. 1 Mo. App. 393—Knox v. Gerhauser, 3 Mont. 279—Stranaghan v. Youmans, 65 Barb. 395—Church v. Howard, 17 Hun, 11—Chrysler v. Renols, 43 N. Y. 214—Blanck v. Sadler, 153 N. Y. 558, 40 L.R.A. 669, 47 N. E. 920—Halliburton v. Carson, 100 N. C. 110, 6 Am. St. Rep. 565, 5 S. E. 912—Phillips v. Dugan, 21 Ohio St. 470, 8 Am. Rep. 66—Longworth v. Mitchell, 26 Ohio St. 343—Whipple v. West Philadelphia Pass. R. Co. 11 Phila. 346—Parish v. Kohler, 2 W. N. C. 489—Issett v. Caldwell, 101 Pa. 35—Wills v. Allison, 4 Heisk. 395—Bridges v. Reynolds, 40 Tex. 211.

18. A note for dollars, payable "in specie," is payable in gold or silver dollars, and cannot be discharged by legal tender notes. Trebilcock v. Wilson, 12 Wall. 687,

20: 460

Cited in The Vaughan (The Telegraph v. Gordon) 14 Wall. 270, 20 L. ed. 809—The Emily Souder (The Emily B. Souder v. Pritchard) 17 Wall. 672, 21 L. ed. 685—Maryland v.

Baltimore & O. R. Co. 22 Wall. 111, 22 L. ed. 714—Pollard v. Pleasant Hill, 3 Dill. 197, Fed. Cas. No. 11,253—Cooke v. Davis, 58 N. Y. 320.

19. A bond reciting an indebtedness for a specified number of dollars in gold coin, "which said sum" it promises to pay, while an interest coupon attached is declared payable in currency, is legally solvable in money of the United States whatever its description, and not merely in gold coin. Woodruff v. Mississippi, 162 U. S. 291, 16 Sup. Ct. Rep. 820, 40: 973
Cited in Burnett v. Maloney, 97 Tenn. 710, 34 L.R.A. 545, 37 S. W. 689.

20. No demand by a holder of railroad bonds, which give the company an option to pay interest thereon in scrip, is necessary to entitle him to payment of the interest in money, where the option to pay in scrip is not exercised on the day the interest is due. Texas & P. R. Co. v. Marlor, 123 U. S. 687, 8 Sup. Ct. Rep. 311, 31: 303

21. The word "currency," in a note, describing the medium of payment, means paper money, or notes which are current in the community as dollars. It is the opposite of "specie," which means gold or silver dollars of the coinage of the United States. Trebilcock v. Wilson, 12 Wall. 687,

20: 460

22. United States currency at the rate of exchange prescribed by Congress in the act of April 12, 1900 (31 Stat. at L. 77, 80, chap. 191), § 11, and not at the rate of \$1 for each peso of indebtedness, must be accepted in discharge of the obligation on account of a purchase in 1894 of a plantation in Porto Rico, which was to be satisfied with money current in the province at the rate of 100 centavos for each peso, since this provision evidently contemplated only such change in coins as might occur while Porto Rico remained under the same political power. Serralles v. Esbri, 200 U. S. 103, 26 Sup. Ct. Rep. 176, 50: 391

23. Bonds given for slaves bought on December 5, 1863, in that part of Virginia which was in rebellion, payable "in bankable currency of the day," in a sum five times the specie value of the slaves when at the highest before the war, slaves not being then sold at all for gold, must be considered as intended to be paid in Confederate currency. Rives v. Duke, 105 U. S. 132,

26: 1031

Cited in Effinger v. Kenney, 115 U. S. 573, 29 L. ed. 497, 6 Sup. Ct. Rep. 179—White v. White, 50 La. Ann. 108, 23 So. 93.

— Editorial note.

[Contract to pay in coin. 29 L.R.A. 51^o.]

Implication as to medium.

See also Evidence, 598.

24. An undertaking to pay an obligation in gold cannot be inferred from anything outside of the instrument, nor from the fact that interest thereon has been paid in gold.

Maryland v. Baltimore & O. R. Co. 22 Wall. 105, 22: 713

Cited in United States v. Peck, 102 U. S. 65, 26 L. ed. 47—Mellen v. Ford, 28 Fed. 646—Chicago & I. R. Co. v. Pyne, 30 Fed. 88—Sorensen v. Keyser, 2 C. C. A. 94, 2 U. S. App. 177, 51 Fed. 82—Union Stock-Yards & Transit Co. v. Western Land & Cattle Co. 7 C. C. A. 668, 18 U. S. App. 438, 59 Fed. 57—Shipman v. Saltsburg Coal Co. 10 C. C. A. 315, 17 U. S. App. 625, 62 Fed. 148—Ferguson Contracting Co. v. Manhattan Trust Co. 55 C. C. A. 533, 118 Fed. 795—Barcus v. Gates, 130 Fed. 367—Mason v. Spalding, 7 Mackey, 122—Consolidated Coal & Lime Co. v. Mercer, 16 Ind. App. 511, 44 N. E. 1005—Tuxbury v. French, 41 Mich. 13, 1 N. W. 904—Bruce v. Fulton Nat. Bank, 79 N. Y. 165, 85 Am. Rep. 505—Watrous v. McKie, 54 Tex. 71—Talbot v. Richmond & D. R. Co. 31 Gratt. 689—Bank of Old Dominion v. McVeigh, 32 Gratt. 538—Collier v. Southern Exp. Co. 32 Gratt. 724—Kirschbaum v. Blair, 98 Va. 42, 34 S. E. 895—Isham v. Parker, 3 Wash. 764, 29 Pac. 835—Mississippi River Logging Co. v. Wheelahan, 94 Wis. 102, 68 N. W. 878.

25. Although since the legal tender acts, an undertaking to pay in gold may be implied, and be as obligatory as if made in express words, yet the implication must be found in the language of the contract, and cannot be gathered from the mere expectations of the parties. **Maryland v. Baltimore & O. R. Co.** 22 Wall. 105, 22: 713
Cited in Anderson v. Pacific Coast Co. 99 Fed. 110—Dennis v. Slyfield, 54 C. C. A. 524, 117 Fed. 478.

26. Where, the Baltimore and Ohio Railroad having an unfinished road in which the state of Maryland was largely interested, that state lent to the company its sterling bonds, of which the interest was payable abroad, and, of course, in coin, the company can pay the state in legal-tender notes instead of gold, the contract not specifying coin, although a complete indemnification to the state was specifically and carefully provided for; when there was no difference, existing or anticipated, in the value of currency and coin at the time the contract was made, the difference having been brought about by events supervening long afterwards. **Maryland v. Baltimore & O. R. Co.** 22 Wall. 105, 22: 713
Cited in Julliard v. Greenman, 110 U. S. 438, 28 L. ed. 211, 4 Sup. Ct. Rep. 122—Woodruff v. Mississippi, 162 U. S. 299, 40 L. ed. 975, 16 Sup. Ct. Rep. 820—Mercantile Trust Co. v. Baltimore & O. R. Co. 82 Fed. 372.

27. A promissory note made in Georgia in 1863, when the treasury notes of the Confederate government were the principal currency of the state, in which business transactions were conducted, is presumed to have been solvable in such treasury notes. **Stewart v. Salamon**, 94 U. S. 434, 24: 275
Cited in Bissell v. Heyward, 96 U. S. 587, 24 L. ed. 680—Dugger v. Bocock, 104 U. S. 602, 26 L. ed. 848—Lewis v. Alexander, 51 Tex. 590.

On failure to pay in medium agreed.

Accord and Satisfaction by Payment in Different Medium than that Required by Contract, see Accord and Satisfaction, 2, 8.

28. Where a person is to pay an agreed sum of money by conveying a piece of land on a certain day, if he declines to make the conveyance or is unable to give a good title, such agreed sum, on that day, becomes payable in cash. **McGillin v. Bennett**, 132 U. S. 445, 10 Sup. Ct. Rep. 122, 33: 422
Cited in Barrett v. Twin City Power Co. 118 Fed. 869—Barnum v. Green, 13 Colo. App. 260, 57 Pac. 757.

29. When an option to pay the interest on bonds of a railroad company in scrip, which is stipulated in the bonds, is not exercised on the day interest is due, the bondholder has an immediate action for the interest money. **Texas & P. R. Co. v. Marlor**, 123 U. S. 687, 8 Sup. Ct. Rep. 311, 31: 303

Virginia coupons receivable for taxes, etc.

Impairment of Contract Obligations as to, see Constitutional Law, 1343-1349.

State Decisions as Binding Federal Courts, see Courts, 1866.

Right of Tender as Limited to Taxpayer, see Injunction, 204.

Sufficiency of Allegations of Tender, see Pleading, 742.

See also Replevin, 5.

30. A practising lawyer in Virginia has the right to pay his license tax in the coupons of bonds issued by the state; and the proper officer may be compelled by mandamus to receive coupons tendered to him for verification, under the act of January 4, 1882. **Sands v. Edmunds**, 116 U. S. 585, 6 Sup. Ct. Rep. 516, 29: 739
Cited in McGahey v. Virginia, 135 U. S. 679, 34 L. ed. 310, 10 Sup. Ct. Rep. 972.

31-2. Costs recovered in an action by the state of Virginia for fees paid to officers for their services are a debt due to such state, and may be paid in tax receivable coupons issued under the law of 1871. **McGahey v. Virginia**, 135 U. S. 662, 10 Sup. Ct. Rep. 972, 34: 304

33-4. Under the laws of Virginia an assessment, made by law a condition precedent to obtaining a license for pursuing a profession, is payable in coupons of bonds issued by the state, being within the meaning of the words, "taxes, debts, dues, and demands due the state," as used in the act of March 30, 1871. **Royall v. Virginia**, 116 U. S. 572, 6 Sup. Ct. Rep. 510, 29: 735
Royall v. Virginia, 121 U. S. 102, 7 Sup. Ct. Rep. 826, 30: 883
Cited in Sands v. Edmunds, 116 U. S. 587, 29 L. ed. 739, 6 Sup. Ct. Rep. 516—**Royall v. Virginia**, 121 U. S. 104, 30 L. ed. 883, 7 Sup. Ct. Rep. 826—**McGahey v. Virginia**, 135 U. S. 679, 34 L. ed. 310, 10 S. E. 972—**McCullough v. Virginia**, 172 U. S. 106, 43 L. ed. 383, 19 Sup. Ct. Rep. 134.

Debts made or payable during Rebellion.

Confederate Notes as Currency, see Money, 15.

Laches as Bar to Objection to Payment in Confederate Currency, see Limitation of Actions, 158.

Implication where no Medium was Expressed, see *supra*, 27.

Impairment of Contract Obligations as to, see Constitutional Law, 1515.

Agent's Authority to Take Confederate Money in Payment, see Principal and Agent, 81.

Power of Trustee to Charge Trust with Losses from Payment in Confederate Currency, see Trusts, 134.

See also *supra*, 23.

35. An executor in the Confederate States, during the Rebellion, could not accept in payment of a mortgage anything but lawful money of the United States or its equivalent. *McBurney v. Carson*, 99 U. S. 567, 25: 378 Cited in *Ople v. Castleman*, 32 Fed. 514.

36. Payment in Confederate currency, made to a coexecutor, in Virginia, in 1862, of a debt contracted there in 1860, such payment having been made and accepted in good faith, discharged the debt. *Glasgow v. Lipse*, 117 U. S. 327, 6 Sup. Ct. Rep. 757, 29: 901

Distinguished in *Ople v. Castleman*, 32 Fed. 514.

Cited in *Washington v. Ople*, 145 U. S. 221, 36 L. ed. 684, 12 Sup. Ct. Rep. 822—*Henry v. Benlisa*, 37 Fla. 622, 34 L.R.A. 285, 20 So. 800.

37. Notes given at New Orleans during the war, on which principal, and interest in large amounts, have been paid, and always in lawful money or its equivalent, where no claim was made for fifteen years that Confederate dollars were intended, must be held payable in lawful money. *Cook v. Lillo*, 103 U. S. 792, 26: 460

Cited in *Effinger v. Kenney*, 115 U. S. 572, 29 L. ed. 497, 6 Sup. Ct. Rep. 179—*New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 33, 31 L. ed. 613, 8 Sup. Ct. Rep. 741—*Massie v. Byrd*, 87 Ala. 679, 6 So. 145—*White v. White*, 50 La. Ann. 108, 23 So. 95.

38. Bonds of a North Carolina railroad company, issued in May, 1862, were not payable in Confederate notes, but only in the legal currency of the United States. *Atlantic, T. & O. R. R. Co. v. Carolina Nat. Bank* (Confederate Note Case) 19 Wall. 548, 22: 196

Distinguished in *Howard College v. Turner*, 71 Ala. 431, 46 Am. Rep. 326.

Cited in *Stewart v. Salamon*, 94 U. S. 435, 24 L. ed. 276—*Rives v. Duke*, 105 U. S. 140, 26 L. ed. 1034—*Lamar v. Micou*, 112 U. S. 476, 28 L. ed. 760, 5 Sup. Ct. Rep. 221—*Effinger v. Kenney*, 115 U. S. 573, 29 L. ed. 497, 6 Sup. Ct. Rep. 179—*Mellen v. Ford*, 28 Fed. 646—*Massie v. Byrd*, 87 Ala. 679, 6 So. 145—*Auzerals v. Naglee*, 74 Cal. 67, 15 Pac. 371—*Re Curtis*, 64 Conn. 514, 42 Am. St. Rep. 200, 30 Atl. 769—*New Orleans v. Jackson*, 33 La. Ann. 1042—*United States v. Fuller*, 5 N. M. 87, 20 Pac. 175—*Murray v.*

Northwestern R. Co. 64 S. C. 540, 42 S. E. 617—*Taylor v. Bland*, 60 Tex. 31.

Value of stipulated medium in current money.

In Admiralty Case, see Admiralty, 71. Parol Evidence as to, see Evidence, 1524, 1613-1615, 1662-1664.

Provision in Judgment as to, see Judgment, 104.

Instruction as to, see Trial, 608.

See also *supra*, 23; Money, 16.

39. Upon a bond and mortgage payable in gold coin of the United States, the plaintiff is entitled to recover in lawful money, to be calculated according to the market rate of premium for gold. *Dutton v. Palairot*, 154 U. S. 563 Appx. 14 Sup. Ct. Rep. 1200, and 19: 165

39a. In computing the sum due on a sale of real property, where the purchase money is payable in county scrip or warrants, the payments made therein should be estimated according to the value of the scrip or warrants as shown by the evidence at the time the payments were due. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. Rep. 771, 28: 1141

40. Under the Virginia act of 1781 giving the court power to award such judgment as to them shall appear just and equitable, on contracts made between January 1, 1777, and January 1, 1782, a ground rent of £26, current money, per annum, reserved in a deed made in 1779, is payable in specie, at the actual annual value in specie of the property at the time of sale, to be ascertained by a jury. *Faw v. Marsteller*, 2 Cranch, 10, 2: 191

Distinguished in *Mervine v. Sallor*, 5 Phila. 436. Cited in *Herbert v. Easton*, 43 Ala. 553—*Bozeman v. Rose*, 51 Ala. 325—*Higgins v. Bear River & A. Water & Min. Co.* 27 Cal. 161—*Grisswold v. Hepburn*, 2 Duv. 72—*George v. Concord*, 45 N. H. 448—*Kimpton v. Bronson*, 45 Barb. 630—*Metropolitan Bank v. Van Dyck*, 27 N. Y. 454—*Shollenberger v. Brinton*, 52 Pa. 70—*Dearing v. Rucker*, 18 Gratt. 450—*Holt v. Lynch*, 18 W. Va. 571

41. [A payment made September 16, 1778, of £150 in continental money, on a bond for £250 made May 17, 1776, ought not to be reduced by the scale of depreciation. *Miller v. Leonard* (Pa. Sup. Ct.) 2 Dall. 237, 1: 363]

42. [In case of a bond payable July 30, 1735, "in good public bills of the Province of Massachusetts Bay, or current lawful money of New England, with interest," on which many partial payments in depreciated currency had been made, a tender (made in 1752) of depreciated bills of credit then current, after the Province bills contracted for had been called in, was held not good, and that the loss by depreciation should be divided between the parties. *Deering v. Parker* (App. from N. H. to Privy Council) 4 Dall. Appx. xxiii., 1: 925]

2. Bills, Notes, and Like Paper.

Presumptions as to, see Evidence, 826, 827.

Notes.

Prerequisites to Suit on Note Taken as Conditional Payment, see Action or Suit, 35.

Presumption as to, see Evidence, 827.

Parol Evidence to Show that Confederate Notes Were Meant by Term "Dollars," see Evidence, 1616, 1617.

Extinguishment of Original Debt by Giving Note, see Sale, 119.

Question of Law or Fact, see Trial, 418, 419.

Accepting Notes as Waiver of Vendor's Lien, see Vendor and Purchaser, 195; V. b.

43. The mere acceptance of a negotiable note for an antecedent debt does not operate to extinguish the debt. *Peter v. Beverly*, 10 Pet. 532. 9: 522

Lyman v. Bank of United States, 12 How. 225. 13: 965

Cited in Segrist v. Crabtree, 131 U. S. 280, 33 L. ed. 126, 9 Sup. Ct. Rep. 687—*Embrey v. Jemison*, 131 U. S. 347, 33 L. ed. 176, 9 Sup. Ct. Rep. 776—*Allen v. King*, 4 McLean, 130. Fed. Cas. No. 226—*Baker v. Draper*, 1 Cliff. 422, Fed. Cas. No. 766—*The Betsy & Rhoda*, 2 Ware, 120, Fed. Cas. No. 1,366—*Re Hurst*, 1 Filipp. 469, 13 Nat. Bankr. Reg. 462, Fed. Cas. No. 6,925—*Farmer's & M. Bank v. Hoagland*, 7 Fed. 161—*Griffith v. Grogan*, 12 Cal. 323—*First Nat. Bank v. Newton*, 10 Colo. 171, 14 Pac. 428—*Cheltenham Stone & Gravel Co. v. Gates Iron Works*, 23 Ill. App. 637—*Wilhelm v. Schmidt*, 84 Ill. 188—*Strang v. Hirst*, 61 Me. 14—*Whitcomb v. Williams*, 4 Pick. 231—*Woods v. Ridley*, 27 Miss. 150—*Gulon v. Doherty*, 43 Miss. 553—*The Charlotte v. Lumm*, 9 Mo. 64—*McMurray v. Taylor*, 30 Mo. 267, 77 Am. Dec. 611—*Doebling v. Loos*, 45 Mo. 152—*Knox v. Gerhauser*, 3 Mont. 275—*Conro v. Port Henry Iron Co.* 12 Barb. 55—*Neff v. Clute*, 12 Barb. 470—*Stannus v. Walker*, 1 Handy (Ohio.) 539—*Jackson v. O'Brannin*, 14 Ohio St. 179—*Watson v. Janlon*, 6 Or. 141—*Farmers' & M. Nat. Bank v. Hoagland*, 10 W. N. C. 124—*Brown v. Scott*, 51 Pa. 363—*Commercial & Agri. Bank v. Jones*, 18 Tex. 825.

44. The legal presumption is that the acceptance of a negotiable note is not an extinguishment of an antecedent debt; but there are cases where the court will construe it to have been in satisfaction of such a debt. *Peter v. Beverly*, 10 Pet. 532. 9: 522

Cited in Lear v. Friedlander, 45 Miss. 567.

45. An express agreement must be shown to establish the fact that a bill or note of either the debtor or a third person was taken by the creditor in payment of a pre-existing debt. *Downey v. Hicks*, 14 How. 240. 14: 404

Cited in Baker v. Draper, 1 Cliff. 421, Fed. Cas. No. 766—*Re Hurst*, 1 Filipp. 470, Fed. Cas. No. 6,925—*Kimball v. The Anna Kimball*, 2 Cliff. 16, Fed. Cas. No. 7,772—*Re Morrill*, 2 Sawy. 358, Fed. Cas. No. 9,821—*Re Oulmette*, 1 Sawy. 53, Fed. Cas. No. 10,622—*Knox v. Gerhauser*, 3 Mont. 275.

46. The note of a third person may, by agreement, be received in payment. *Sheehy v. Mandeville*, 6 Cranch, 253, 3: 215
Cited in McIntyre v. Kennedy, 29 Pa. 452.

47. The acceptance of a negotiable note for an antecedent debt will not extinguish the debt, unless it is expressly agreed that it is received as payment. *Lyman v. Bank of United States*, 12 How. 225. 13: 965
Cited in Segrist v. Crabtree, 131 U. S. 280, 33 L. ed. 126, 9 Sup. Ct. Rep. 687—*Harris v. The Kensington*, 8 Am. L. Reg. 152, Fed. Cas. No. 6,122—*Kimball v. The Anna Kimball*, 2 Cliff. 16, Fed. Cas. No. 7,772—*Re Oulmette*, 1 Sawy. 53, Fed. Cas. No. 10,622—*Salomon v. Pioneer Co-operative Co.* 21 Fla. 377, 58 Am. Rep. 667.

48. A promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend the period for the payment of the debt. *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. Rep. 687. 33: 125

49. Negotiable promissory notes are equivalent to the payment of the money, if received by the creditor as payment. *Hendrick v. Lindsay*, 93 U. S. 143, 23: 855

50. Without special agreement the mere acceptance of a negotiable note, executed by a debtor in favor of his creditor, does not amount to payment. *Sheehy v. Mandeville*, 6 Cranch, 253, 3: 215

Cited in Segrist v. Crabtree, 131 U. S. 289, 33 L. ed. 126, 9 Sup. Ct. Rep. 687—*Embrey v. Jemison*, 131 U. S. 347, 33 L. ed. 176, 9 Sup. Ct. Rep. 776—*Harris v. Lindsay*, 4 Wash. C. C. 274, Fed. Cas. No. 6,124—*Brugman v. McGuire*, 32 Ark. 740—*First Nat. Bank v. Newton*, 10 Colo. 171, 14 Pac. 428—*Bill v. Porter*, 9 Conn. 30—*Salomon v. Pioneer Co-op. Co.* 21 Fla. 377, 58 Am. Rep. 667—*Wyllie v. Collins*, 9 Ga. 240—*Vancelef v. Therasson*, 3 Pick. 14—*The Charlotte v. Hammond*, 9 Mo. 63, 43 Am. Dec. 536—*Elliott v. Sleeper*, 2 N. H. 527—*Muldon v. Whitlock*, 1 Cow. 306—*Johnson v. Weed*, 9 Johns. 311—*Brown v. Scott*, 51 Pa. 363—*Watson v. Owens*, 1 Rich. L. 113—*Nichols v. Cheairs*, 4 Sneed, 232—*Poole v. Rice*, 9 W. Va. 77—*Feamster v. Withrow*, 9 W. Va. 326—*Hoeflinger v. Wells*, 47 Wis. 631, 3 N. W. 589.

51. If, by express agreement, a note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. *Sheehy v. Mandeville*, 6 Cranch, 253, 3: 215

Cited in Van Ness v. Forrest, 8 Cranch, 35, 3 L. ed. 479—*Winship v. Bank of United States*, 5 Pet. 568, 8 L. ed. 230—*San Juan v. St. John's Gas Co.* 195 U. S. 521, 49 L. ed. 305, 25 Sup. Ct. Rep. 108—*Arguelles v. Wood*, 2 Cranch, C. C. 380, Fed. Cas. No. 520—*The Betsy & Rhoda*, 2 Ware, 120, Fed. Cas. No. 1,366—*Re Morrill*, 2 Sawy. 358, Fed. Cas. No. 9,821—*Palmer v. Priest*, 1 Sprague, 514, Fed. Cas. No. 10,694—*Slocumb v. Lurty*, Hempst. 433, Fed. Cas. No. 12,949—*United States v. Williams*, 1 Ware, 180, Fed. Cas. No. 16,724—*Wallace v. Agry*, 4 Mason, 343, Fed. Cas. No. 17,006—*Re Parker*, 6 Sawy. 250, 11 Fed. 399—*Mulligan v. Hollingsworth*, 90 Fed. 219—*Lee v. Fontaine*, 10 Ala. 766, 44 Am. Dec. 505—*Pope v. Tunstall*, 2 Ark. 226—*Costar v. Davies*, 8 Ark. 217, 46 Am. Dec. 311—*Levy v. Levy*, 12 Ark.

152—First Nat. Bank v. Newton, 10 Colo. 171, 14 Pac. 428—May v. Gamble, 14 Fla. 493—Salomon v. Pioneer Co-op. Co. 21 Fla. 377, 58 Am. Rep. 667—Jewitt v. Pleak, 43 Ind. 370—Tomlin v. M'Chord, 6 J. J. Marsh. 4—Whitcomb v. Williams, 4 Pick. 231—Tudor v. Whitting, 12 Mass. 214—Morris Canal Bkg. Co. v. Van Vorst, 21 N. J. L. 119—Waydell v. Luer, 3 Denio, 414—Arnold v. Camp, 12 Johns. 411—Boyd v. Hitchcock, 20 Johns. 79—Neff v. Clute, 12 Barb. 470—Terry v. Robbins, 128 N. C. 143, 83 Am. St. Rep. 663, 38 S. E. 470—Anderson v. Levan, 1 Watts. & S. 339—Townsend v. Stevenson, 4 Rich. L. 67—Johnson v. Clarke, 15 S. C. 77—Lapham v. Barnes, 2 Vt. 216—Hutchins v. Olcott, 4 Vt. 555, 24 Am. Dec. 634—Edgell v. Stanford, 6 Vt. 556—Torrey v. Baxter, 13 Vt. 456—Hard v. Burton, 62 Vt. 322, 20 Atl. 269—Ward v. Motter, 2 Rob. (Va.) 554—Blair v. Wilson, 28 Gratt. 174—Brown v. Kern, 21 Wash. 216, 57 Pac. 798—Bantz v. Basnett, 12 W. Va. 792—Bowyer v. Knapp, 15 W. Va. 296.

52. A creditor who takes a note as conditional payment, and indorses it to another, cannot maintain an action on the original contract without reacquiring the note. *Harris v. Johnston*, 3 Cranch, 311,

2: 450

Distinguished in Stebbins v. Kellogg, 5 Conn. 269—*Hill v. Marcy*, 49 N. H. 269.

Cited in Arguelles v. Wood, 2 Cranch, C. C. 580, Fed. Cas. No. 520—*Brown v. Jackson*, 1 Wash. C. C. 516, Fed. Cas. No. 2,015—*Costar v. Davies*, 8 Ark. 217, 46 Am. Dec. 311—*Wade v. Staunton*, 5 How. (Miss.) 635—*Salomon v. Pioneer Co-op. Co.* 21 Fla. 382, 58 Am. Rep. 667—*Wyllie v. Collins*, 7 Ga. 240—*Stevens v. Bradley*, 22 Ill. 247—*Penny v. Crane Mfg. Co.* 80 Ill. 247—*Hoffman v. Johnson*, 1 Bland, Ch. 107—*Watkins v. Worthington*, 2 Bland Ch. 527—*Patapsco Ins. Co. v. Smith*, 6 Harr. & J. 170, 14 Am. Dec. 268—*The Charlotte v. Kingsland*, 9 Mo. 68—*Hutchins v. Olcott*, 4 Vt. 555, 24 Am. Dec. 634—*Torrey v. Baxter*, 13 Vt. 456—*Dickinson v. King*, 28 Vt. 381—*Russell v. Hester*, 10 Ala. 536—*Cocke v. Chaney*, 14 Ala. 66—*Ware v. Russell*, 57 Ala. 45, 29 Am. Rep. 710—*Kinggold v. Newkirk*, 8 Ark. 109.

53. Notes or bills given for the charter money of a vessel do not constitute payment of the same so as to release the lien. *Duncan v. Kimball (The Kimball)* 3 Wall. 37,

18: 50

Cited in The Bird of Paradise (The Bird of Paradise v. Heyneman) 5 Wall. 561, 18 L. ed. 666—*The Emily Souder (The Emily B. Souder v. Pritchard)* 17 Wall. 670, 21 L. ed. 684—*Segrist v. Crabtree*, 131 U. S. 290, 33 L. ed. 126, 9 Sup. Ct. Rep. 687—*Embrey v. Jemison*, 131 U. S. 347, 33 L. ed. 176, 9 Sup. Ct. Rep. 776—*Re Hurst*, 13 Nat. Bankr. Reg. 463, Fed. Cas. No. 6,925—*Re Perkins*, 6 Biss. 191, Fed. Cas. No. 10,983—*Farmers & M. Bank v. Hoagland*, 7 Fed. 161—*Hadden v. Dooley*, 34 C. C. A. 345, 63 U. S. App. 173, 92 Fed. 281—*Re Worcester County*, 42 C. C. A. 643, 3 N. B. N. Rep. 695, 102 Fed. 814—*Day v. Thompson*, 65 Ala. 273—*Akin v. Peters*, 45 Ark. 318—*Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 574—*First Nat. Bank v. Newton*, 10 Colo. 171, 14 Pac. 428—*Salomon v. Pioneer Co-op. Co.* 21 Fla. 376, 58 Am. Rep. 667—*Anderson v. Gill*, 79 Md. 318, 25 L.R.A. 204, 47 Am. St. Rep. 402, 29 Atl. 527—*Combination Steel & I. Co. v. St. Paul City R. Co.* 47 Minn. 208, 49 N.

W. 744—*Davis v. Thomas*, 66 Neb. 29, 92 N. W. 187—*Black v. Sippy*, 15 Or. 576, 16 Pac. 418—*Farmers' & M. Nat. Bank v. Hoagland*, 10 W. N. C. 124—*Ross v. Grubbs*, 30 W. N. C. 200—*Pope v. Graham*, 44 Tex. 199.

— Editorial note.

When note or check is payment. 2: 450

Bills of exchange.

Accepting Bill or Check as Waiver of Vendor's Lien, see Vendor and Purchaser, 208.

54. Acceptances for repairs upon a vessel in a foreign port, given by an insolvent owner, are not payment, where credit was in fact given to the boat. *The James Guy v. Tall (The Guy)* 9 Wall. 758, 19: 710
Cited in The Acme, 7 Blatchf. 373, Fed. Cas. No. 28—*The Eclipse*, 3 Biss. 102, Fed. Cas. No. 4,268—*The Metropolis*, 9 Ben. 83, Fed. Cas. No. 9,503—*The Norfolk*, 2 Hughes, 126, Fed. Cas. No. 10,297—*Southern Bank v. The Alexander McNeil*, Fed. Cas. No. 13,186—*The Newport*, 107 Fed. 749—*Jones v. The Orpheus*, 119 Mass. 184.

— Editorial note.

When bill of exchange is payment.

2: 450

Bonds.

Accepting Bond as Waiver of Vendor's Lien, see Vendor and Purchaser, 206, 207, 208; Evidence, 2174a.

55. [A bond given by the purchaser of a part of certain mortgaged premises, assuming payment of the mortgage, is not a payment *pro tanto*. *Hamilton v. Callender (Pa. Sup. Ct.)* 1 Dall. 420, 1: 204]

Certificate of deposit.

Admission to Rebut Inference of Payment, see Evidence, 1854.

56. A certificate of deposit delivered by a debtor to, and received by, an agent of the creditor, who had no authority to accept such certificate as payment, and afterwards delivered by the agent to the creditor, who did not specifically ratify or confirm the agent's act, does not constitute payment of the pre-existing debt. *Downey v. Hicks*, 14 How. 240, 14: 404

Renewal or substituted notes.

57. A debt of a testator, represented by notes, for which his executors have given their personal notes in renewal, is not extinguished, but remains a debt due the executors from the estate, and they may resort to the trust fund to satisfy the debt. *Peter v. Beverly*, 10 Pet. 532, 9: 522

Cited in Harbin v. Bell, 54 Ala. 392—*Steele v. Steele*, 64 Ala. 459, 38 Am. Rep. 15—*Gowing v. Bland*, 2 How. (Miss.) 815—*Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 129, 16 N. W. 762—*Conger v. Atwood*, 28 Ohio St. 142, 22 Am. Rep. 362—*Lucht v. Behrens*, 28 Ohio St. 240, 22 Am. Rep. 378.

Transfer or retention of paper as working payment.

See also *supra*, 52.

58. [Bills of exchange to be credited in

part payment of a bond when paid, held after protest without offer to return, with 20 per cent damages charged thereon, must, as to a surety on the bond, be considered as accepted in payment. *Watts v. Willing* (Pa. Sup. Ct.) 2 Dall. 100, 1: 306]

59. [Creditors who receive a bill of exchange sent by the payee, their debtor, at his own risk, by refusing to surrender it after protest to their debtor, upon tender of his debt, but surrendering it, instead, to the drawer for his promissory note, including damages, discharge the payee's debt and become liable to him for the damages included in the note, although the maker has become insolvent. *Keppeler v. Carr* (Pa. Sup. Ct.) 4 Dall. 155, 1: 780]

60. Where a railroad company gave a promissory note, payable on demand with interest, to a stockholder, with the agreement that the same should stand against the subscription for stock, and assessments exceeding the amount of the note were made, which the stockholder paid, except to the amount of the note and interest, and the statute in the state where the note was made, and also in the state where the company was incorporated, provided that a demand note should be overdue after sixty days from date, the note was held to be paid as between the company, the payee, and any person taking it after sixty days from its date, and subsequent to the assessments becoming due. *Paine v. Central Vermont R. Co.* 118 U. S. 152, 6 Sup. Ct. Rep. 1019, 30: 193

61. A creditor who receives from his debtor a certificate in writing or a negotiable instrument for the amount of his debt, and sells it to a third person for its market value, cannot, after the debtor has paid it to the purchaser, maintain any action against the debtor on the original debt. *Looney v. District of Columbia*, 113 U. S. 258, 5 Sup. Ct. Rep. 463, 28: 974

3. Forged and Invalid Paper.

62. [If a bank accepts a forged check, and makes entry therefor to the depositor's credit, it is equivalent to cash payment; and the depositor, if innocent, has a vested right to the sum credited. *Levy v. Bank of United States* (Pa. Sup. Ct.) 4 Dall. 234, 1: 814]

63. In general, a payment received in forged paper, or in any base coin, is not good; and if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6: 334
Cited in *Foreman v. Hardwick*, 10 Ala. 326—*Marine Bank v. Rushmore*, 28 Ill. 471—*Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 145, 70 S. W. 173—*Kenny v. First Nat. Bank*, 50 Barb. 114—*Thomas v. Todd*, 6 Hill, 341—*Wheeler v. Miller*, 2 Handy (Ohio) 152—*Currier v. Pennock*, 14 Serg. & R. 63—*Crocker v. Wolford*, 5 Phila. 345—*Rick v. Kelly*, 30 Pa. 530.

64. The principle that payment in forged

paper is of no effect to bar an action on the original demand does not apply to a payment made bona fide to a bank in its own notes, which are received as cash and afterwards discovered to be forged. *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6: 334

Cited in *Hoffman v. National City Bank*, 12 Wall. 193, 20 L. ed. 369—*Legal Tender Cases*, 12 Wall. 625, 20 L. ed. 336—*Cooke v. United States*, 12 Blatchf. 55, Fed. Cas. No. 3,178—*Redington v. Woods*, 45 Cal. 425, 13 Am. Rep. 190—*Wilson v. Alexander*, 4 Ill. 393—*Third Nat. Bank v. Allen*, 59 Mo. 314—*Canal Bk. v. Bank of Albany*, 1 Hill. 291—*Holmes v. Holmes*, 12 Barb. 144—*National Park Bank v. Ninth Nat. Bank*, 55 Barb. 90—*Continental Nat. Bank v. Tradesmen's Nat. Bank*, 36 App. Div. 115, 55 N. Y. Supp. 545—*National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 81, 7 Am. Rep. 310—*Lyndonville Nat. Bank v. Fletcher*, 68 Vt. 86, 54 Am. St. Rep. 874, 34 Atl. 38—*Johnston v. Commercial Bank*, 27 W. Va. 352, 55 Am. Rep. 315.

Editorial note.

In forged or depreciated paper. 6: 335

State bills of credit.

65. Payments actually received by state officers in pursuance of a state statute are not void because made in state treasury warrants which had been illegally issued in violation of constitutional provisions against issuing warrants to circulate as money or against bills of credit, or because they were issued in aid of the Rebellion, even if the offer of the state to receive them was not binding while unexecuted. *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 20 Ct. Rep. 545, 44: 33

4. Bank Notes and Legal Tender Notes.

As to Forged Bank Notes, see *supra*, 64.
Impairment of Agreement by State as to, see *Constitutional Law*, 1247-1249.

Bank notes generally.

66. Bank notes not current at their par value, or redeemable on presentation, are not a good tender as payment. *Ward v. Smith*, 7 Wall. 447, 19: 207
Cited in *Frets v. Stover*, 22 Wall. 208, 22 L. ed. 772—*Juilliard v. Greenman*, 110 U. S. 445, 28 L. ed. 213, 4 Sup. Ct. Rep. 122.

67. A tender of notes made by statute receivable for debts due, to the state, in circulation at the time of the repeal, was good to satisfy a judgment obtained by the state. Whether the notes were in possession of the debtor at the time of the repeal was immaterial. *Paup v. Drew*, 10 How. 218, 13: 394
Trigg v. Drew, 10 How. 224, 13: 397
Woodruff v. Trapnall, 10 How. 190, 13: 383
Cited in *Furman v. Nichol* (Green v. Nichol) 8 Wall. 63, 19 L. ed. 378—*Tatum v. Hines*, 15 Ark. 182—*Fagan v. Stillwell*, 19 Ark. 285—*Peay v. Ramsey*, 21 Ark. 92—*Van Huse v. Kanouse*, 13 Mich. 311—*Breitung v. Lindauer*, 37 Mich. 231—*Graniteville Mfg. Co. v. Roper*, 15 Rich. L. 155—*Farmers Bank v. Anderson*, 19 Gratt. 752.

68. Bank notes made by statute receivable for debts due the state cannot be tendered

in payment of an obligation, either when the debt is due to the state in a fiduciary capacity, or the contract expressly calls for payment "*in specie* or its equivalent." *Paup v. Drew*, 10 How. 218, 13: 394
Trigg v. Drew, 10 How. 224, 13: 397
Cited in Trigg v. Drew, 10 How. 224, 13 L. ed. 397—*Trebilcock v. Wilson*, 12 Wall. 695, 20 L. ed. 462—*McGahey v. Virginia*, 135 U. S. 719, 34 L. ed. 321, 10 Sup. Ct. Rep. 972—*Sessions v. Peay*, 21 Ark. 105—*Van Husean v. Kanouse*, 13 Mich. 311.

69. Where the state sold lands which were held in trust for the benefit of a seminary, and the terms of the sale were that the debtor should pay *in specie* or its equivalent, such debtor was not at liberty to tender in payment the notes of a bank whose charter provided that its notes should be received in payment of all debts due the state, since the right to pay in such notes was defeated by the fact that the fund belonged to the state only as a trustee, as well as by the terms of the sale. *Trigg v. Drew*, 10 How. 224, 13: 397

70. A provision in a bank charter that its notes shall be received in payment of all debts due the state does not inure to the benefit of a purchaser of lands sold by the state, which were held in trust for the benefit of a seminary, where the terms of the sale were that the debtor should pay in specie or its equivalent, since the right to pay in such notes was defeated, not only by the terms of the sale, but by the fact that the fund belonged to the state only as a trustee. *Paup v. Drew*, 10 How. 218, 13: 394

71. The repeal of a provision in a bank charter that the bills of the bank should be receivable for all debts due the state does not affect notes in circulation at the time of the repeal, such charter provisions being a contract within the constitutional protection; but notes issued subsequent to the repeal are not within the contract. *Furman v. Nichol*, 8 Wall. 44, 19: 370
Distinguished in Greenhow v. Vashon, 81 Va. 345.

Cited in Mt. Pleasant v. Beckwith, 100 U. S. 532, 25 L. ed. 704—*Hartman v. Greenhow*, 102 U. S. 680, 26 L. ed. 275—*McGahey v. Virginia*, 135 U. S. 693, 34 L. ed. 314, 10 Sup. Ct. Rep. 972—*Maenhaut v. New Orleans*, 2 Woods, 112, Fed. Cas. No. 8,939—*Opdyke v. Pacific R. Co.* 3 Dill. 74, Fed. Cas. No. 10,546—*Lansing v. County Treasurer*, 1 Dill. 528, Fed. Cas. No. 16,538—*State v. Bank of Tennessee*, 5 Baxt. 60—*Reld v. Albany County*, 60 Hun, 217, 14 N. Y. Supp. 594—*Clark v. Keith*, 8 Lea, 709.

72. Where a state had publicly undertaken and promised that the notes of a bank should be taken in payment of taxes and all other debts to the state, every man who received and held them had a right to rely upon this promise; and when the state intended to terminate this obligation, it was bound to do it openly, intelligibly, and in language not to be misunderstood. It will not be implied from a doubtful or ob-

scure declaration. *South Carolina ex rel. Wagner v. Stoll*, 17 Wall. 425, 21: 659
Cited in Bond Debt Cases, 12 S. C. 248.

73. A marshal who receives bank notes in satisfaction of an execution, when the return has not been set aside by the plaintiff, or amended by the marshal, must account to the plaintiff in gold and silver, the Constitution of the United States recognizing only gold and silver as a legal tender. *Gwin v. Breedlove*, 2 How. 29, 11: 167
Cited in Legal Tender Cases, 12 Wall. 586, 20 L. ed. 323—*Baltimore & O. R. Co. v. State*, 36 Md. 540—*Shackleford v. Cunningham*, 41 Ala. 206—*Alcard v. Robbins*, 41 Ala. 547, 94 Am. Dec. 614—*Lawrence v. Staigg*, 10 R. I. 595.

Legal tender notes.

Effect of Stipulation for Specie, see *supra*, 24.

Bank Notes Made Legally Receivable for Debts Due to State, see *supra*, 68-72.

Constitutionality of Legal Tender Acts, see *Constitutional Law*, 1289-1291.

Legal Tender Acts Generally, see *Money*, 4-7.

Reissued Notes, see *Money*, 8.

Power of State to Prohibit Payment of Taxes in, see *Taxes*, 592a, 593.

74. The legal tender act of February 25, 1862, only applies to debts payable in money generally, and not to obligations payable in commodities, or expressly payable in coin, or obligations of any other kind. *Trebilcock v. Wilson*, 12 Wall. 687, 20: 460

Bronson v. Kimpton, 8 Wall. 444, 19: 433
Butler v. Horwitz, 7 Wall. 258, 19: 149
Bronson v. Rodes, 7 Wall. 229, 19: 141
Cited in Woodruff v. Mississippi, 162 U. S. 296, 40 L. ed. 975, 16 Sup. Ct. Rep. 820—*Pollard v. Pleasant Hill*, 3 Dill. 197, Fed. Cas. No. 11,253—*Hittson v. Davenport*, 4 Colo. 174—*Roach v. Van Rielwick*, *MacArthur & M.* 186—*Atkinson v. Lanier*, 69 Ga. 463—*People v. Riggs*, 56 Ill. 486—*Morrow v. Rainey*, 58 Ill. 359—*Chamblin v. Blair*, 58 Ill. 388—*Belford v. Woodward*, 158 Ill. 130, 29 L.R.A. 598, 41 N. E. 1087—*Churchman v. Martin*, 54 Ind. 384—*Stringer v. Coombs*, 62 Me. 165, 16 Am. Rep. 414—*Baltimore & O. R. Co. v. State*, 36 Md. 541—*Jones v. Childs*, 8 Nev. 126—*Stranaghan v. Youmans*, 65 Barb. 395—*Phillips v. Dugan*, 21 Ohio St. 470, 8 Am. Rep. 66—*Issett v. Caldwell*, 40 Phila. Leg. Int. 91—*Issett v. Caldwell*, 101 Pa. 35—*Smith v. Wood*, 37 Tex. 621—*Bridges v. Reynolds*, 40 Tex. 213—*Wills v. Allison*, 4 Hefak. 390.

75. A contract which is, by its terms, to be satisfied by payment of gold or silver coin, is not a "debt" which may be satisfied by the tender of United States notes. *Bronson v. Rodes*, 7 Wall. 229, 19: 141
Cited in Foxworth v. Colby, 64 Neb. 219, 62 L.R.A. 394, 89 N. W. 800.

76. A bond and mortgage for the payment of a certain sum in gold and silver coin cannot be discharged by a tender of United States notes equal, in nominal amount, to the sum due thereon. *Bronson v. Kimpton*, 8 Wall. 444, 19: 433

77. Interest coupons attached to railroad bonds issued before the passage of the legal tender act may be paid in the legal tender notes authorized by such act instead of in coin. *Norwich & W. R. Co. v. Johnson*, 15 Wall. 195, 21: 178

Cited in *Julliard v. Greenman*, 110 U. S. 438, 28 L. ed. 211, 4 Sup. Ct. Rep. 122—*Munter v. Rogers*, 50 Ala. 292.

78. A decree ordering payment *in specie* of a debt contracted before passage of the legal tender acts is void. *Bigler v. Waller*, 14 Wall. 297, 20: 891
Cited in *Brassell v. McLemore*, 50 Ala. 478—*Bowen v. Clark*, 46 Ind. 410.

79. Acceptance of payment of treasury notes in legal tender notes in lieu of gold, without deception, mistake, or undue advantage, and the surrender of the notes, is a waiver of a claim antecedently made for payment in gold, and amounts to the full discharge of the notes. Protest will not qualify the waiver. *Savage v. United States*, 92 U. S. 382, 23: 660

Cited in *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 163, 48 L. ed. 132, 24 Sup. Ct. Rep. 47—*San Juan v. St. John's Gas Co.* 195 U. S. 521, 49 L. ed. 305, 25 Sup. Ct. Rep. 108—*Hildeburn v. United States*, 13 Ct. Cl. 71—*Davis v. United States*, 17 Ct. Cl. 213—*Cape Ann Granite Co. v. United States*, 20 Ct. Cl. 11—*New York Consol. Card Co. v. United States*, 20 Ct. Cl. 174—*Burwell v. United States*, 22 Ct. Cl. 99—*Dowdy v. United States*, 23 Ct. Cl. 101—*Hughes v. United States*, 25 Ct. Cl. 479—*Brice v. United States*, 32 Ct. Cl. 28—*Merrill v. Monticello*, 18 C. C. A. 638, 34 U. S. App. 615, 72 Fed. 464—*Springfield & M. R. Co. v. Allen*, 46 Ark. 220—*Berry v. Planters' Bank*, 3 Tenn. Ch. 73.

Canceled notes.

80. An attempted payment in canceled treasury notes is in law no payment. *United States v. Morgan*, 11 How. 154, 13: 643

c. Time.

Time to Exercise Right to Direct Application of Payment, see *infra*, 95–97.

Promise to Pay Within Reasonable Time, see *Contracts*, 265, 266.

Extension of, see *Contracts*, 605.

Sufficiency of Allegations as to, see *Pleading*, 737.

81. [Time of payment, if a substantial, and not merely formal, circumstance, enters into the essence of the contract, and must be observed. *Hollingsworth v. Fry* (C. Ct.) 4 Dall. 345, 1: 860]

82. Where no specified time for the payment of money is fixed in a contract, in law the same is payable on demand. *Bank of Columbia v. Hagner*, 1 Pet. 455, 7: 219
Cited in *Pierce v. Whitting*, 63 Cal. 541.

d. Place.

Of Municipal Bonds, see *Bonds*, 488.

To Present Coupon for Payment, see *Coupons*, 23.

83. The designation of a place of payment

in a bond imports a stipulation that its holder should have it at such place when due, to receive payment, and that the obligors would produce there the funds to pay it. *Ward v. Smith*, 7 Wall. 447, 19: 207

Cited in *Cheney v. Libby*, 134 U. S. 82, 33 L. ed. 824, 10 Sup. Ct. Rep. 498—*Stewart v. Henry County*, 66 Fed. 129—*Cheney v. Libby*, 20 C. C. A. 302, 36 U. S. App. 720, 74 Fed. 63—*Mt. Vernon Bridge Co. v. Knox County Sav. Bank*, 46 Ohio St. 232, 20 N. E. 339—*Bartel v. Brown*, 104 Wis. 499, 80 N. W. 801.

84. Acceptance of payment elsewhere is a waiver of a claim to damages for nonpayment at the place specified. *United States v. Gurney*, 4 Cranch, 333, 2: 638
Cited in *McConaughy v. Wiley*, 33 Fed. 452.

e. Demand.

When Payable on Demand, see *supra*, 82.

85. A draft drawn upon a debtor for the amount due, which he refuses to accept, is equivalent to a demand of payment. *Cooper v. Coates*, 21 Wall. 105, 22: 481

III. Application of Payments.

Application of Bank Deposit, see *Banks*, 98, 99.

Of Accommodation Paper, see *Bills and Notes*, 48.

Application of Payments by Officer as Between Two Terms Held by Him, see *Bonds*, 76–77a.

Right to Apply to Payment of Municipal Bonds Fund Raised for Current Expenses, see *Bonds*, 561.

Application to Other Debts as Evidence to Rebut Presumption of Payment of Debt Due Executor, see *Evidence*, 810a.

Provision for, in Foreclosure Decree, see *Mortgage*, 365.

Of Proceeds on Foreclosure, see *Mortgage*, 483.

Application of Property or Funds to Payment of Claims against Receiver, see *Receivers*, III. c, 1.

Duty of Purchaser of Receivers' Certificates to See to Application of Proceeds, see *Receivers*, 170.

Amount Paid into Court for Unpaid Taxes, see *Taxes*, 601.

Application of Moneys Turned in by Officers as between Several Terms of Office or Liabilities, see *United States*, 134–136.

Purchaser's Duty to Look After Application of Purchase Money, see *Trusts*, 225a; *Wills*, 251a, 251b.

86. The debtor or party paying money may, if he chooses to do so, direct its appropriation; if he fails, the right devolves upon the creditor; if the creditor fails, the law will make the application according to

its own notions of justice. *United States v. Irving*, 1 How. 250, 11: 120
Field v. Holland, 6 Cranch, 8, 3: 136
Jones v. United States, 7 How. 681, 12: 870
United States v. January, 7 Cranch, 572, 3: 443

National Bank of Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 437, 24: 176

Distinguished in *Boody v. United States*, 1 Woodb. & M. 168, Fed. Cas. No. 1,636.

Cited in *United States v. Nicholl*, 12 Wheat. 511, 6 L. ed. 710—*Page v. Lloyd*, 5 Pet. 310, 8 L. ed. 137—*United States v. Irving*, 1 How. 261, 11 L. ed. 125—*Jones v. United States*, 7 How. 691, 12 L. ed. 874—*National Bank v. Mechanics Nat. Bank*, 94 U. S. 439, 24 L. ed. 178—*Boody v. United States*, 1 Woodb. & M. 168, Fed. Cas. No. 1,636—*Roddy v. United States*, 2 Pittsb. 376, Fed. Cas. No. 11,990—*United States v. Bicket*, Fed. Cas. No. 14,590—*Whetmore v. Murdock*, 3 Woodb. & M. 395, Fed. Cas. No. 17,510—*Schuelenburg v. Martin*, 1 McCrary, 350, 2 Fed. 749—*Coons v. Tome*, 9 Fed. 536—*Nichols v. Knowles*, 8 McCrary, 479, 17 Fed. 495—*The Martha*, 29 Fed. 710—*United States v. Badeau*, 33 Fed. 578—*United States v. Morgan*, 35 Fed. 490—*Kortlander v. Elston*, 2 C. C. A. 667, 6 U. S. App. 283, 52 Fed. 184—*The Katie O'Neill*, 65 Fed. 117—*United States v. Honsman*, 17 C. C. A. 285, 44 U. S. App. 171, 70 Fed. 583—*First Nat. Bank v. National Surety Co.* 66 L.R.A. 782, 64 C. C. A. 608, 130 Fed. 408—*Martin v. Pope*, 41 Am. Dec. 66, 6 Ala. 540—*Bohe v. Stickney*, 36 Ala. 495—*Dunnington v. Kirk*, 57 Ark. 598, 22 S. W. 430—*Murdock v. Clarke*, 88 Cal. 390, 26 Pac. 601—*White v. Costigan*, 138 Cal. 568, 72 Pac. 178—*Stebbins v. Lardner*, 2 S. D. 143, 48 N. W. 847—*Pickering v. Day*, 2 Del. Ch. 367—*Pickering v. Day*, 3 Houst. (Del.) 538, 95 Am. Dec. 291—*Hughes v. Heyman*, 4 App. D. C. 450—*Allen v. Brown*, 39 Iowa, 332—*First Nat. Bank v. Hollinsworth*, 78 Iowa, 577, 6 L.R.A. 93, 43 N. W. 536—*Illsly v. Grayson*, 105 Iowa, 687, 75 N. W. 518—*Tolerton & S. Co. v. Roberts*, 115 Iowa, 476, 91 Am. St. Rep. 171, 88 N. W. 966—*King v. Sutton*, 42 Kan. 603, 22 Pac. 695—*Neldig v. Whiteford*, 29 Md. 187—*National Mahalwe Bank v. Peck*, 127 Mass. 301—*Brewer v. Knapp*, 1 Pick. 337—*Draffen v. Boonville*, 8 Mo. 398—*Shortridge v. Pardee*, 2 Mo. App. 366—*State v. Hill*, 47 Neb. 517, 68 N. W. 541—*Caldwell v. Wentworth*, 14 N. H. 438—*Summers v. Lodor*, 12 N. J. L. 106—*State v. Sooy*, 39 N. J. L. 547—*Bridenbecker v. Lowell*, 32 Barb. 22—*Pattison v. Hull*, 9 Cow. 771—*People v. American Loan & T. Co.* 36 Misc. 359, 73 N. Y. Supp. 584—*Stone v. Seymour*, 15 Wend. 24—*Jones v. Benedict*, 83 N. Y. 86—*Orleans County Nat. Bank v. Moore*, 112 N. Y. 557, 3 L.R.A. 307, 8 Am. St. Rep. 775, 20 N. E. 357—*Camp v. Smith*, 136 N. Y. 201, 32 N. E. 640—*Raymond v. Newman*, 122 N. C. 54, 29 S. E. 353—*State v. Chadwick*, 10 Or. 432—*Patterson v. Bank of British Columbia*, 26 Or. 621, 38 Pac. 817—*Morton's Estate*, 2 Del. Co. Rep. 195—*Roddy v. United States*, 2 Pittsb. 376—*Stafford v. Walker*, 12 Serg. & R. 195—*Hopper v. Hopper*, 61 S. C. 137, 39 S. E. 366—*Proctor v. Marshall*, 18 Tex. 66—*State v. Middleton*, 57 Tex. 190—*Robinson v. Doolittle*, 12 Vt. 249—*Chapman v. Com.* 25 Gratt. 747—*Taylor v. La Follette*, 49 W. Va. 484, 39 S. E. 276.

87. Where both the debtor and the creditor have omitted to make appropriation of pay-

ments, the law will apply the payments according to its own notions of justice. *United States v. Kirkpatrick*, 9 Wheat. 720, 6: 199

Cited in *Fairchild v. Holly*, 10 Conn. 179—*Stamford Bank v. Benedict*, 15 Conn. 443—*Chester v. Wheelwright*, 15 Conn. 567—*Koch v. Roth*, 150 Ill. 226, 37 N. E. 317—*Milliken v. Tufts*, 31 Me. 500—*Benny v. Rhodes*, 18 Mo. 153, 59 Am. Dec. 293—*Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 833, 21 N. E. 57—*Liem v. Liem*, 5 Kulp, 177—*Garratt's Appeal*, 100 Pa. 602—*State v. Spartanburg & U. R. Co.* 8 S. C. N. S. 165—*Morgan v. Tarbell*, 28 Vt. 503—*Smith v. Loyd*, 11 Leigh, 517, 37 Am. Dec. 621—*Norris v. Beatty*, 6 W. Va. 482.

88-9. The right to elect how payments shall be applied passes to the creditor if the debtor fails to direct their application at the time of making the payment. *Alexandria v. Patten*, 4 Cranch, 317, 2: 633
Cited in *Page v. Lloyd*, 5 Pet. 310, 8 L. ed. 137—*Jones v. United States*, 7 How. 691, 12 L. ed. 874—*Boody v. United States*, 1 Woodb. & M. 168, Fed. Cas. No. 1,636—*Schuelenburg v. Martin*, 1 McCrary, 351, 2 Fed. 749—*Martin v. Pope*, 6 Ala. 540, 41 Am. Dec. 66—*White v. Costigan*, 138 Cal. 568, 72 Pac. 178—*Pickering v. Day*, 3 Houst. (Del.) 538, 95 Am. Dec. 291—*Randall v. Pettes*, 12 Fla. 535—*Bayley v. Wynkoop*, 10 Ill. 452—*Koch v. Roth*, 150 Ill. 226, 37 N. E. 317—*Forelander v. Hicks*, 6 Ind. 450—*Broussard v. Trahan*, 4 Mart. (La.) 501—*Plummer v. Erskine*, 58 Me. 61—*Mitchell v. Dall*, 2 Harr. & G. 173—*Brady v. Hill*, 1 Mo. 317, 13 Am. Dec. 503—*Poulson v. Collier*, 18 Mo. App. 606—*Hilton v. Burley*, 2 N. H. 186—*Caldwell v. Wentworth*, 14 N. H. 437—*Edwards v. Derrickson*, 28 N. J. L. 67—*Hunter v. Osterhoudt*, 11 Barb. 34—*Seymour v. Van Slyck*, 8 Wend. 417—*Stone v. Seymour*, 15 Wend. 32—*Orleans County Nat. Bank v. Moore*, 112 N. Y. 557, 3 L.R.A. 307, 8 Am. St. Rep. 775, 20 N. E. 357—*Moss v. Adams*, 39 N. C. (4 Ired. Eq.) 52—*Miller v. Womble*, 122 N. C. 139, 29 S. E. 102—*Bogart v. Nevins*, 6 Serg. & R. 378—*Hopper v. Hopper*, 61 S. C. 137, 39 S. E. 366—*Robinson v. Doolittle*, 12 Vt. 249—*Chapman v. Com.* 25 Gratt. 747.

90. The creditor may make application of payments, where the debtor has omitted to do so. *Per Story, J. United States v. Kirkpatrick*, 9 Wheat. 720, 6: 199

Cited in *Page v. Lloyd*, 5 Pet. 310, 8 L. ed. 137—*Boody v. United States*, 1 Woodb. & M. 168, Fed. Cas. No. 1,636—*Norton v. Plumb*, 14 Conn. 517—*Randall v. Parramore*, 1 Fla. 428—*King v. Sutton*, 42 Kan. 633, 22 Pac. 695—*Oliver v. Phelps*, 20 N. J. L. 197—*Seymour v. Marvin*, 11 Barb. 90—*Robinson v. Doolittle*, 12 Vt. 249.

91. The debtor has a right to make the appropriation of payments to his creditor. *United States v. Kirkpatrick*, 9 Wheat. 720, 6: 199

Cited in *Jones v. United States*, 7 How. 691, 12 L. ed. 874—*National Bank v. Mechanics' Nat. Bank*, 94 U. S. 439, 24 L. ed. 178—*State use of Buchanan County v. Smith*, 26 Mo. 233, 72 Am. Dec. 204—*Caldwell v. Wentworth*, 14 N. H. 436—*Stone v. Seymour*, 15 Wend. 24.

92. A person owing money under distinct contracts has the right to apply his pay-

ments to whichever debt he chooses. *Taylor v. Sandiford*, 7 Wheat. 13, 5: 384
Cited in Page v. Lloyd, 5 Pet. 310, 8 L. ed. 137—*Nichols v. Knowles*, 3 McCrary, 478, 17 Fed. 494—*Randall v. Pettes*, 12 Fla. 535—*Stafford v. Walker*, 12 Serg. & R. 196.

93. Where debts of different dignities are due to a creditor of the estate of an intestate, and no specific application of the payment is made by an administrator, if the creditor applies the payment to either of his debts by some unequivocal act, his right to do so cannot be questioned. *Backhouse v. Patton*, 5 Pet. 160, 8: 82

94. Credits assigned as collateral, to be applied, on payment to the demand of the creditor, may be credited to any demand existing at the time of such payment, though arising subsequent to the assignment. *Field v. Holland*, 6 Cranch, 8, 3: 136
Cited in National Bank v. Bigler, 83 N. Y. 64.

Editorial note.

Application of payments. 3: 136

Time to exercise right of application.

Of Money Borrowed as Respondentia to Discharge Prior Lien, see *Bottomry and Respondentia*, 17.

95. Neither debtor nor creditor has a right to make an appropriation after controversy has arisen. *United States v. Kirkpatrick*, 9 Wheat. 720, 6: 199

Backhouse v. Patton, 5 Pet. 160, 8: 82
Cited in Harrison v. Nixon, 9 Pet. 522, 9 L. ed. 215—*Randall v. Pettes*, 12 Fla. 535—*Reiss v. Scherner*, 87 Ill. App. 91—*Russell v. Metzgar*, 2 Ind. 352—*Illaly v. Grayson*, 105 Iowa, 687, 75 N. W. 518—*Tolerton & S. Co. v. Roberts*, 115 Iowa, 476, 91 Am. St. Rep. 171, 88 N. W. 966—*Brewer v. Knapp*, 1 Pick. 337—*Allen v. Culver*, 3 Denio, 290—*Pattison v. Hull*, 9 Cow. 771—*Stone v. Seymour*, 15 Wend. 31—*Moss v. Adams*, 39 N. C. (4 Ired. Eq.) 53—*Gaston v. Barney*, 11 Ohio St. 511—*Garrett's Appeal*, 40 Phila. Leg. Int. 366.

96. The creditor does not lose his right of election to make application of payments, where the debtor fails to make such application, because he does not immediately exercise such right; but after making an election he is bound by it. *Alexandria v. Patten*, 4 Cranch, 317, 2: 633
Cited in Fairchild v. Holly, 10 Conn. 184—*Bank of California v. Webb*, 94 N. Y. 471—*Orleans County Nat. Bank v. Moore*, 112 N. Y. 557, 3 L.R.A. 307, 8 Am. St. Rep. 775, 20 N. E. 357—*Hellbron v. Bissell*, Ball. Eq. 434—*Taylor v. Coleman*, 20 Tex. 777—*Frazer v. Miller*, 7 Wash. 527, 35 Pac. 427.

97. Where an administrator has had a reasonable time to make his election as to the appropriation of payments made by him, it is too late to do so after a controversy has arisen. *Backhouse v. Patton*, 5 Pet. 160, 8: 82

What amounts to a direction.

98. A person owing money under distinct contracts has a right to apply his payments to whichever debt he may choose, and this power may be completely exercised without U. S. Dig.—281

any express direction given at the time. A direction may be evidenced by the circumstances as well as by words. *Taylor v. Sandiford*, 7 Wheat. 13, 5: 384

Cited in The Pioneer, Deady, 80, Fed. Cas. No. 11,177—*Hansen v. Rounsavell*, 74 Ill. 241—*Howland v. Rensch*, 7 Blackf. 237—*Adams Exp. Co. v. Black*, 62 Ind. 134—*Lauten v. Rowan*, 59 N. H. 217—*Summers v. Lodor*, 12 N. J. L. 106—*White v. Trumbull*, 15 N. J. L. 319, 29 Am. Dec. 687—*Robinson v. Doolittle*, 12 Vt. 249—*Roakes v. Bailey*, 55 Vt. 543.

99. A positive refusal to pay one debt, and an acknowledgment of another, with a delivery of the sum due upon it, would be a circumstance amounting to a direction. *Taylor v. Sandiford*, 7 Wheat. 13, 5: 384

100. Where a running account is kept at the Postoffice Department between the United States and a postmaster, in which all postages are charged to him, and credit is given for all payments made, this amounts to an election by the creditor to apply the payments, as successively made, to the extinguishment of preceding balances. *Jones v. United States*, 7 How. 681, 12: 870

To older debt or items.

101. A credit or payment is to be applied to the one of two sums first due. *McGillin v. Bennett*, 132 U. S. 445, 10 Sup. Ct. Rep. 122, 33: 422

102. In cases of long-running accounts, where the balances are adjusted merely for the purpose of making rests, the law will apply payments to extinguish the debts according to the priority of time. *United States v. Kirkpatrick*, 9 Wheat. 720, 6: 199
Limited in Pickering v. Day, 2 Del. Ch. 366.

Distinguished in United States v. Linn, 2 McLean, 504, Fed. Cas. No. 15,606—*Callahan v. Boazman*, 21 Ala. 251.

Cited in Jones v. United States, 7 How. 691, 12 L. ed. 874—*Gass v. Stinson*, 3 Sumn. 112, Fed. Cas. No. 5,262—*Leef v. Goodwin*, Taney, 462, Fed. Cas. No. 8,207—*The Pioneer*, Deady, 81, Fed. Cas. No. 11,177—*Postmaster General v. Norvell*, Gilpin, 133, Fed. Cas. No. 11,310—*United States v. Able*, Fed. Cas. No. 14,417—*United States v. Bradbury*, 2 Ware, 152, Fed. Cas. No. 14,635—*United States v. Kershner*, 1 Bond, 438, Fed. Cas. No. 15,527—*Schuelenburg v. Martin*, 1 McCrary, 351, 2 Fed. 750—*Marye v. Strouse*, 6 Sawy. 215, 5 Fed. 494—*Rickerson Roller-Mill Co. v. Farrell Foundry & Mach. Co.* 23 C. C. A. 310, 43 U. S. App. 452, 75 Fed. 562—*First Nat. Bank v. National Surety Co.* 66 L.R.A. 781, 64 C. C. A. 605, 130 Fed. 405—*Lazarus v. Freidheim*, 51 Ark. 378, 11 S. W. 518—*Dunnington v. Kirk*, 57 Ark. 598, 22 S. W. 430—*Haynes v. Waite*, 14 Cal. 450—*Horne v. Planters' Bank*, 32 Ga. 12—*Miller v. Macoupin County*, 7 Ill. 52—*Allen v. Brown*, 39 Iowa, 332—*Helm v. Com.* 79 Ky. 69—*McKenzie v. Nevius*, 22 Me. 148, 38 Am. Dec. 291—*McTavish v. Carroll*, 1 Md. Ch. 164—*Neidig v. Whiteford*, 29 Md. 187—*Barrett v. Lewis*, 2 Pick. 125—*Hersey v. Bennett*, 28 Minn. 91, 41 Am. Rep. 271, 9 N. W. 590—*Draffen v. Boonville*, 8 Mo. 398—*Goetz v. Piel*, 26 Mo. App. 642—*State v. Hill*, 47 Neb. 517, 66 N. W. 541—*Hunter v. Osterhoudt*, 11 Barb. 34—*Allen v. Culver*, 3 Denio, 293—*National Park Bank v. Seaboard Bank*,

44 Hun, 54—Grant v. Lathrop, 77 Hun, 179, 28 N. Y. Supp. 407—Neimcewicz v. Gahn, 3 Paige, 619—Seymour v. Van Slyck, 8 Wend. 417—Webb v. Dickinson, 11 Wend. 64—Stone v. Seymour, 15 Wend. 41—State v. Chadwick, 10 Or. 431—Patterson v. Bank of British Columbia, 26 Or. 521, 38 Pac. 817—Blackmore v. Granbery, 98 Tenn. 282, 39 S. W. 229—Emery v. Tichout, 13 Vt. 20—Shedd v. Wilson, 27 Vt. 482.

To accrued interest.

Payment of Taxes, see Taxes, 601.

See also Interest, 166.

103. [Partial payments should be first applied to the interest accrued. *Penrose v. Hart* (Ct. Com. Pl. Phila.) 1 Dall. 378, 1: 185]

104. The correct rule as to interest is that the creditor shall calculate interest whenever a payment is made, and to this interest the payment is to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal; and this rule applies whether the debt be one which expressly draws interest, or one on which the interest is given as damages. *Story v. Livingston*, 13 Pet. 359, 10: 200

Cited in United States v. McLemore, 4 How. 288, 11 L. ed. 979—*McIntire v. Pryor*, 10 App. D. C. 443—*Jacobs v. Ballenger*, 130 Ind. 232, 15 L.R.A. 171, 29 N. E. 782—*Smith v. Coopers*, 9 Iowa, 387—*Bird v. Lobdell*, 10 La. Ann. 180—*Anderson v. Perkins*, 10 Mont. 159, 25 Pac. 92—*Mills v. Saunders*, 4 Neb. 193—*Cowling v. Howard*, 46 Barb. 584—*Merchants' Bank v. Freeman*, 15 Hun, 381—*Godbe v. Young*, 1 Utah, 62.

105. The creditor shall calculate interest whenever a payment is made. To this interest the payment is first to be applied, and, if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment falls short of the interest, the balance of interest is not to be added to the principal so as to produce interest. *United States v. McLemore*, 4 How. 286, 11: 977

Cited in Hart v. Dorman, 2 Fla. 447, 50 Am. Dec. 285—*Smith v. Coopers*, 9 Iowa, 387.

— Editorial note.

[Application of payment as between principal and interest before due. 15 L.R.A. 169.]

To more precarious debt.

Right of Pledgee of Credits to Apply Amount Realized on Payment of Other Debt, see Payment, 94.

106. Where a payment of a sum of money is to be made in land, and it becomes a cash payment by failure to deliver the deed and at the same time another payment is to be made on the same matter in notes payable at a future day, and the notes are not given, which last payment is secured by a vendor's lien,—a credit must be first applied on the payment to be made in land, and not on the deferred payments to be evidenced by notes. *McGillin v. Bennett*, 132 U. S. 445, 10 Sup. Ct. Rep. 122, 33: 422

107. If neither the debtor nor the creditor has made the application of the payments,

the court will apply them to the debts for which the security is most precarious. *Field v. Holland*, 6 Cranch, 8, 3: 136
Disapproved in Norris v. Beatty, 6 W. Va. 483
—*Pattison v. Hull*, 9 Cow. 771—*Orleans County Nat. Bank v. Moore*, 112 N. Y. 555, 3 L.R.A. 307, 8 Am. St. Rep. 775, 20 N. E. 357.

Cited in Whetmore v. Murdock, 3 Woodb. & M. 395, Fed. Cas. No. 17,510—*Robinson v. Allison*, 36 Ala. 531—*California Nat. Bank v. Ginty*, 108 Cal. 153, 41 Pac. 38—*Stamford Bank v. Benedict*, 15 Conn. 443—*Wilhelm v. Schmidt*, 84 Ill. 188—*Bowen v. Fridley*, 8 Ill. App. 599—*King v. Andrews*, 30 Ind. 430—*Bond v. Armstrong*, 88 Ind. 69—*First Nat. Bank v. Hollinsworth*, 78 Iowa. 577, 6 L.R.A. 93, 43 N. W. 536—*Illisy v. Gravson*, 105 Iowa, 687, 75 N. W. 518—*McDaniel v. Barnes*, 5 Bush, 186—*Lash v. Edgerton*, 13 Minn. 219, Gil. 107—*Poulson v. Collier*, 18 Mo. App. 608—*Goetz v. Piel*, 26 Mo. App. 641—*McMillan v. Grayston*, 83 Mo. App. 432—*Hilton v. Burley*, 2 N. H. 196—*Smith v. Lewiston Steam Mill*, 66 N. H. 615, 34 Atl. 153—*Thomas v. Kelsey*, 30 Barb. 274—*Jones v. Benedict*, 83 N. Y. 86—*Moss v. Adams*, 39 N. C. (4 Ired. Eq.) 53—*Gaston v. Barney*, 11 Ohio St. 514—*Reed v. Board of Education*, 39 Ohio St. 638—*Re Evans*, 2 Ashm. (Pa.) 484—*Morton's Estate*, 2 Del. Co. Rep. 195—*Pierce v. Sweet*, 33 Pa. 157—*Blackmore v. Granbery*, 98 Tenn. 283, 39 S. W. 229—*Robinson v. Doolittle*, 12 Vt. 249—*Morgan v. Tarbell*, 28 Vt. 503—*Smith v. Waddill*, 11 Leigh, 539—*Smythe v. New England Loan & T. Co.* 12 Wash. 427, 41 Pac. 184—*Hempfield v. Thornburg*, 1 W. Va. 267—*Merchants' & M. Bank v. Evans*, 9 W. Va. 389.

PAYROLL.

Of Witness, Fees of Commissioners for, see Commissioners, 25.

Fees for Entering and Indexing, see Elections, 38.

PEACE.

Right of Visitation and Search During, see Prize and Capture, 13.

Effect of, on Government Established in Conquered Territory Under Military Authority, see War, 91.

PEACEABLE POSSESSION.

Covenant of, see Covenant, 18, 19.

PEACE OFFICERS.

Power of United States Marshal, see Marshal, 7.

PÉCUNIARY INTEREST.

Sufficiency of Government Interest to Sustain Suit, see United States, 146, 147.

PEDDLERS.

Interstate Business of, see Commerce, IV. c.
Denial of Equal Privileges to Nonresidents,
see Constitutional Law, 229.

The leading primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. Rep. 367,

39: 430

Cited in Hall v. State, 39 Fla. 669, 23 So. 119
—*South Bend v. Martin*, 142 Ind. 89, 29 L.R.A. 534, 41 N. E. 315—*St. Louis v. Meyer*, 185 Mo. 597, 84 S. W. 914—*Greensboro v. Williams*, 124 N. C. 170, 32 S. E. 492—*Wrought Iron Range Co. v. Campen*, 135 N. C. 524, 47 S. E. 658—*Saulsbury v. State*, 43 Tex. Crim. Rep. 93, 96 Am. St. Rep. 837, 63 S. W. 568.

PEDIGREE.

Hearsay Evidence of, see Evidence, X. c.

PENAL ACTION.

Effect of Death as Abatement in Federal Courts, see Courts, 2093.

PENAL CODE.

Federal Question as to Validity of, see Appeal and Error, 1657.

PENAL LAWS.

Construction of, see Statutes, II. m.
Effect of Repeal of, see Statutes, 674-687.

PENALTY.

Execution of Death Penalty, see Constitutional Law, 817-821.
Liquidated Damages or Penalty, see Damages, V.
In General, see Forfeitures and Penalties.

PENDENCY.

Of Action, Notice of, see *Lis Pendens*.

PENDING CLAIMS.

See Claims, 152-156.

PENITENTIARY.

Power of Court-Martial to Sentence to Confinement in, see Courts-Martial, 29.
Imprisonment in, see Criminal Law, 195-203.
Crime Punishable in, as Infamous Crime, see Criminal Law, 8-12.
Fees of Marshal as Disbursing Officer, see Marshal, 54.

PENNSYLVANIA.

Common Law of, see Common Law, 9-11.
Confiscation under Acts of, see Confiscation and Sequestration, 16-18.
State Land Grants Generally, see Public Lands, II. e.
Compacts with other States and with Nation Generally, see States, VII.
Treason Against, see Treason, 8.

PENSIONS.

Presumption on Appeal from Conviction of Pension Attorney for Unlawful Exactions, see Appeal and Error, 4192.
Delegation of Power to Courts as to, see Constitutional Law, 147, 148.
Due Process in Limiting Compensation for Prosecuting Claim, see Constitutional Law, 596.
Review of Decisions by Courts, see Courts, 247.
Authentication of Record in Pension Office, see Evidence, 1004.
Exemption of Pension Moneys or Property Purchased Therewith, from Execution, see Execution, 38.
Limitation of Time to Prosecute for Wrongfully Withholding Pension Money, see Limitation of Actions, 558, 559.
Mandamus to Commissioner of Pensions, see Mandamus, 133.
Power of Commissioner to Appoint Inferiors, see United States, 65.
Examiner in Pension Service as Officer of the United States, see United States, 83.

1. A right to a pension is not a vested right, but is a bounty of the government. *Walton v. Cotton*, 19 How. 355. 15: 658
Cited in United States v. Teller, 107 U. S. 68, 27 L. ed. 354, 2 Sup. Ct. Rep. 39—*Lochren v. United States*, 6 App. D. C. 510—*People ex rel. Price v. Woodbury*, 38 Misc. 195, 77 N. Y. Supp. 241.

2. Pensions are the bounty of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion. *United States ex rel. Burnett v. Teller*, 107 U. S. 64, 2 Sup. Ct. Rep. 39, 27: 352
Frisbie v. United States, 157 U. S. 160, 15 Sup. Ct. Rep. 586. 39: 657
Cited in Frisbee v. United States, 157 U. S. 166, 39 L. ed. 659, 15 Sup. Ct. Rep. 586—*United States ex rel. Miles Planting Mfg. Co. v. Carlisle*, 5 App. D. C. 146—*Lochren v.*

United States, 6 App. D. C. 510—Opinion of Justices, 175 Mass. 601, 49 L.R.A. 565, 57 N. E. 675—State v. Julow, 129 Mo. 178, 29 L.R.A. 260, 50 Am. St. Rep. 443, 31 S. W. 781—People ex rel. Price v. Woodbury, 38 Misc. 195, 77 N. Y. Supp. 241.

3. One who has received a pension under a special act, and subsequently obtains a larger one under the general law, thereby surrenders his right to the former; he cannot have both. United States ex rel. Burnett v. Teller, 107 U. S. 64, 2 Sup. Ct. Rep. 39,

27: 352

Disabilities.

See *infra*, 13.

4. The words "total disability," in the pension laws, have a technical signification which cannot be disregarded. Burnett v. United States, 116 U. S. 158, 6 Sup. Ct. Rep. 327,

29: 586

5. A pension obtained for partial paralysis claimed to have resulted from disease and sickness contracted in the Army cannot be held fraudulent by showing that the paralysis was the direct, immediate result of a blow or accident, if the prior physical condition caused by ill health and exposure in the Army may fairly be regarded as a concurring cause of the paralysis. Lalone v. United States, 164 U. S. 255, 17 Sup. Ct. Rep. 74,

41: 425

Offenses of pensioners and agents.

Extortion by Surgeon Examining Pensioners, see Extortion, 4.

Indictment for Perjury in Order to Obtain Pension, see Indictment, etc., 67, 68.

Indictment for Taking Excessive Fee, see Indictment, etc., 152, 153.

Power of Congress to Punish Embezzlement of Moneys, see States, 150.

6. To constitute the crime, by an agent or attorney, of wrongfully withholding a pension, there must be such unreasonable delay, or such refusal to pay on demand, or such intent to keep the money wrongfully from the pensioner, as would constitute an unlawful withholding capable of proof to a jury. United States v. Irvine, 98 U. S. 450,

25: 193

Distinguished in Frisbie v. United States, 157 U. S. 168, 39 L. ed. 659, 15 Sup. Ct. Rep. 586.

Cited in United States v. Connally, 9 Biss. 340, 1 Fed. 781—State v. Langdon, 159 Ind. 379, 65 N. E. 1.

7. Wrongfully withholding back pay or bounty, by an agent or attorney, from a claimant, is not an offense, under the act of July 4, 1864, § 13 (13 Stat. at L. 389, chap. 247). The word "claimant," under the act, means a claimant before the pension bureau. United States v. Benecke, 98 U. S. 447,

25: 192

Cited in United States v. Irvine, 98 U. S. 451, 25 L. ed. 193.

8. The guilt of a pension agent in taking more than \$10 as compensation for prosecuting a claim does not turn on his success

in obtaining the pension, or the payment of his commission out of the particular money received for the pension. Frisbie v. United States, 157 U. S. 160, 15 Sup. Ct. Rep. 586,

39: 657

9. Obtaining from a pensioner money which has been paid over to him as pension money does not constitute a withholding of the same from him under that part of U. S. Rev. Stat. § 4786, U. S. Comp. Stat. 1901, p. 3298, which punishes the wrongful "withholding" of pension moneys from a pensioner. Ballew v. United States, 160 U. S. 187, 16 Sup. Ct. Rep. 263,

40: 388

10. Sending to the Commissioner of Pensions an affidavit known by the sender to be false is a fraud on the United States, within the act of March 3, 1823 (3 Stat. at L. 771), making it a felony to falsely make any artificial or other writing for obtaining or receiving, or enabling another to obtain or receive, any money from the United States or its agent. United States v. Staats, 8 How. 41,

12: 979

Cited in United States v. Gowdy, 37 Fed. 333—United States v. Moore, 60 Fed. 739—United States v. Van Leuven, 62 Fed. 70—United States v. Hartman, 65 Fed. 491—Dolan v. United States, 133 Fed. 451—Hewgate v. United States, 7 App. D. C. 234—Palmer v. Colladay, 18 App. D. C. 432.

11. An agent or attorney or person instrumental in prosecuting a claim for a pension can be legally convicted and punished for having, prior to the repeal of the act of Congress of June 20, 1878, received for his services a greater sum than is provided in that act, notwithstanding such act has been repealed, and that such repeal is without any saving clause or reservation of the right to prosecute or punish for offenses in violation of said act committed prior to such repeal. United States v. Reisinger, 128 U. S. 398, 9 Sup. Ct. Rep. 99,

32: 460

Benefits of soldiers' home.

12. Under U. S. Rev. Stat. § 4820, U. S. Comp. Stat. 1901, p. 3332, only invalid pensioners who had not contributed to the funds of the Soldiers' Home were bound to purchase its benefits by surrendering to it their pensions. United States v. Bowen, 100 U. S. 508,

25: 631

Widows and children.

Retrospective Statute as to, see Statutes, 571.

13. Under U. S. Rev. Stat. § 4702, U. S. Comp. Stat. 1901, p. 3241, entitling the widow of one dying of wounds, to receive the same pension to which the husband would have been entitled had he been totally disabled, a widow is entitled to receive only the same pension to which her husband would have been entitled for a "total disability," although in fact he had received a larger pension because of a "permanent specific disability." Burnett v. United States, 116 U. S. 158, 6 Sup. Ct. Rep. 327, 29: 586

14. The word "children," in the pension acts of June 4, 1832, and July 4, 1836, giv-

ing relief to surviving officers of the Revolution, and, in case of their death, to their widows or children, embraces the grandchildren of the deceased pensioner, whether their parents died before or after his decease. *Walton v. Cotton*, 19 How. 355, 15: 658. Cited in *United States v. Hall*, 98 U. S. 357, 25 L. ed. 185—*Cutting v. Cutting*, 6 Sawy. 401, 6 Fed. 264—*Peeler v. Peeler*, 68 Miss. 146, 8 So. 392—*Burgess v. Hargrove*, 64 Tex. 117.

15. Grandchildren of a deceased pensioner are entitled, *per stirpes*, under the acts of June 4, 1832, and July 4, 1836, to a distributive share of their deceased parent, whether the latter died before or after the pensioner. *Walton v. Cotton*, 19 How. 355, 15: 658.

PEONAGE.

As Involuntary Servitude, see Constitutional Law, 1585-1587.

Sufficiency of Evidence to Sustain Conviction of Returning Persons to Condition of Peonage, see Evidence, 2562.

PEORIA DONATIONS.

See Public Lands, I. c, 14.

PER CAPITA.

See Wills, 196, 197.

PERCENTAGE.

Requiring Foreign Insurance Company to pay, as Condition of Doing Business, see Insurance, 7, 7a.

PERCOLATING WATERS.

Appropriation of, see Waters, 163.

PER DIEM.

Of Clerks, see Clerks, 18-22.
Of District Attorney, see District Attorneys, 14, 15.
Of Chief Supervisor of Elections, see Elections, 20.
Of Marshal, see Marshal, 57, 58.
Indivisibility of Days, see United States, 110.

PEREMPTORY CHALLENGE.

To Juror, see Appeal and Error, 5152; Jury, 123-138.

PEREMPTORY INSTRUCTION.

Raising Question for Appeal by Request for, see Appeal and Error, 3727-3729.

PERFORMANCE.

Of Contract Generally, see Contracts, V.
Effect of Part Performance to Take Contract Out of Statute of Frauds, see Contracts, I. e, 6.
Of Prerequisites for Registration as Voter, see Elections, 14.
Necessity of Alleging Performance or Offer to Perform, see Pleading, 525-527.
Specific Performance, see Specific Performance.

PERILS OF THE SEA.

Insurance against, see Insurance, XI. c, 2.
Limitation of Liability for Injury from, see Shipping, 252-261.

PERIODICAL PUBLICATIONS.

Rate of Postage for, see Postoffice, 93, 94.

PERISHABLE PROPERTY.

Right to Order Sale of, see Admiralty, 334.

PERJURY.

By National Bank Officer in Taking Oath to Report, see Banks, 321.
Effect of Invalidity of Oath in Crime of Presenting False Claims, see Claims, 232.
Jurisdiction of State or Federal Court as Dependent on Nature of Tribunal where Committed, see Courts, 1438.
Before Notary Public under Authority of Congress as Federal Crime, see Courts, 1453.
Bar to Prosecution for, see Criminal Law, 76.
Before Federal Officer, Applicability of State Statute, see Criminal Law, 157.
Evidence of General Reputation of Accused for Truth and Veracity, see Evidence, 2069.
Sufficiency of Evidence of, see Evidence, 2558, 2559.
Proof of Corpus Delicti, see Evidence, 2570.
Variance Between Allegations and Proof, see Evidence, 2781.
Indictment for, see Indictment, etc., II. e, 3, a.
Charge of, as Libel, see Libel and Slander, 3.
Register Obtained by as Ground for Forfeiture of Vessel, see Prize and Capture, 135.

In Obtaining Patent as Ground for Cancellation thereof, see Public Lands, 1085, 1086.

Specific Performance of Contract Contemplating, see Specific Performance, 24.

Repeal of Bankruptcy Law as Bar to Prosecution for, see Statutes, 693.

1. At common law, the taking of a false oath with a view to cheat the government or to defeat the administration of public justice, though not taken within the realm, or wholly dependent upon usage and practice, is punishable as a misdemeanor. *United States v. Bailey*, 9 Pet. 238, 9: 113

2. The act of March 1, 1823, providing "that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury,"—creates a new and substantial offense of false swearing, punishable in the same manner as perjury; so that the oath contemplated by the act need not be administered in a judicial proceeding or under judicial jurisdiction, but it is sufficient that it is lawfully administered by the magistrate, and not in violation of his official duty. *United States v. Bailey*, 9 Pet. 238, 9: 113

3. The act of 1823, for the punishment of false swearing with reference to any claim against the United States or the expenditure of public money, should be construed to include all cases of swearing and affirmation required by the practice of the Treasury Department in such cases, since Congress must be presumed to have legislated in view of the known usage of the Treasury Department, and the act should be construed with reference to that usage. *United States v. Bailey*, 9 Pet. 238, 9: 113
Cited in *Re Kollock*, 165 U. S. 533, 41 L. ed. 815, 17 Sup. Ct. Rep. 444—*Wilkins v. United States*, 37 C. C. A. 592, 96 Fed. 840—*United States v. Dastervignes*, 118 Fed. 201—*Filles v. Davis*, 118 Fed. 468—*Dastervignes v. United States*, 58 C. C. A. 351, 122 Fed. 35—*United States v. Hardison*, 135 Fed. 422—*Peters v. United States*, 2 Okla. 122, 33 Pac. 1031.

4. A defendant indicted for perjury cannot be held to be guilty unless the oath in regard to which the perjury is charged was taken before an officer having authority to administer it. *United States v. Hall*, 131 U. S. 50, 9 Sup. Ct. Rep. 663, 33: 97
Cited in *United States v. Manion*, 44 Fed. 800—*United States v. Bedgood*, 49 Fed. 56.

5. It seems that a commissioner of the United States circuit court is not punishable for falsely certifying to an oath which he was without authority to administer. *United States v. Reilly*, 131 U. S. 58, 9 Sup. Ct. Rep. 664, 33: 75
Cited in *United States v. Manion*, 44 Fed. 800.

6. False swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of U. S. Rev. Stat. § 5392, U. S. Comp. Stat. 1901, p.

3653. *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. Rep. 513, 38: 415

7. Under U. S. Rev. Stat. § 5392, U. S. Comp. Stat. 1901, p. 3653, the local land officers in hearing and deciding upon a contest with respect to a homestead entry constitute a competent tribunal; and such contest so pending before them is a case in which the laws of the United States authorize an oath to be administered, the violation of which may constitute perjury. *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. Rep. 513, 38: 415
Cited in *Van Lear v. Elsele*, 126 Fed. 827—*United States v. Hardison*, 135 Fed. 422—*Peters v. United States*, 2 Okla. 141, 37 Pac. 1081.

8. The words "declaration" and "certificate," in U. S. Rev. Stat. § 5392, U. S. Comp. Stat. 1901, p. 3653, defining perjury, are not used as terms of art, or in any technical sense, but in the ordinary and popular sense, to signify any statement of material matters of fact sworn to and subscribed by the party charged. The written statement, and the oath of the party that it is true, all constitute the declaration or certificate of the statute. *United States v. Ambrose*, 108 U. S. 336, 2 Sup. Ct. Rep. 682, 27: 746

9. An oath taken prior to the act of February 26, 1881, before a notary public appointed by a state, to a report required of a national bank officer, under U. S. Rev. Stat. § 5211, U. S. Comp. Stat. 1901, p. 3498, cannot be made the basis of an indictment for perjury, under § 5392, U. S. Comp. Stat. 1901, p. 3653. *United States v. Curtis*, 107 U. S. 671, 2 Sup. Ct. Rep. 501, 27: 534

Editorial notes.

Oath must have been administered by competent authority to convict of perjury. 27: 534

[As affected by invalidity of proceedings in which testimony taken. 54 L.R.A. 513.]

PERMIT.

Recovery Back of Amount Paid for License Fee, see Assumpsit, 53.

For Erection of Building, see Buildings.

Injunction against Erection of Building Different from Permit, see Injunction, 129.

To Foreign Corporation to do Business Within State, see Corporations, 781.

For Purchase of Cotton During War, see Embargo and Nonintercourse, 2, 16, 17: Estoppel, 156.

To Land Cargo under Embargo Act, see Embargo and Nonintercourse, 23, 29, 37.

For Commercial Intercourse During War, see Embargo and Nonintercourse, 97-104.

Permit Tax for Grazing of Live Stock on Indian Lands, see Taxes, 311, 312.

PERPETUAL AGREEMENTS.

Jurisdiction of Equity to Annul, see Equity, 214.

PERPETUITIES.

I. Rule as to; Application Generally, 1-7.

II. Gifts to Charities, 8-13.

Separation of Trust Estate from General Scheme Creating Perpetuities, see Trusts, 8.

I. Rule as to; Application Generally.

1. A perpetuity is a limitation upon the *jus disponendi* of property, upon the common-law right of every man to dispose of his land to any other private man at his own discretion. *Perin v. Carey*, 24 How. 465, 16: 701
Cited in *Re John*, 30 Or. 512, 36 L.R.A. 248, 47 Pac. 341.

2. To come within the rule of the common law against perpetuities, the estate, legal or equitable, granted or devised, must be one which, according to the terms of the grant or devise, is to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother's womb as in being) and twenty-one years afterwards. *Barnitz v. Casey*, 7 Cranch, 456, 3: 403
McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. Rep. 652, 28: 1015
Cited in *Hopkins v. Grimshaw*, 165 U. S. 355, 41 L. ed. 744, 17 Sup. Ct. Rep. 401—*Williams v. Hedrick*, 37 C. C. A. 555, 96 Fed. 660—*Reed v. Alabama & G. Iron Co.* 107 Fed. 595—*Re Fair*, 132 Cal. 578, 84 Am. St. Rep. 70, 60 Pac. 442—*Murphey v. Brown*, 159 Ind. 117, 62 N. E. 275—*McLain v. Howald*, 120 Mich. 277, 77 Am. St. Rep. 597, 79 N. W. 182—*Phillips v. Herron*, 55 Ohio St. 490, 45 N. E. 720—*Re Kopmeyer*, 113 Wis. 239, 89 N. W. 134—*Becker v. Chester*, 115 Wis. 132, 91 N. W. 87.

3. The rule against perpetuities is inapplicable to a resulting trust which arises on the failure of an estate granted for a particular use which has ceased. *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. Rep. 401, 41: 739
Cited in *Lackland v. Walker*, 151 Mo. 246, 52 S. W. 414.

4. Articles of an association which exists at the will of its members, by which the members relinquish the right of individual property, does not constitute a perpetuity. The association may continue an indefinite time in the exercise of the discretion of the members; but there is no obligation to this extent. The majority may require a sale of the property, and break up the association, at any time. *Goesele v. Bimeler*, 14 How. 589, 14: 554
Cited in *Pulitzer v. Livingston*, 89 Me. 367, 36

Atl. 635—*Hunt v. Wright*, 47 N. H. 400, 93 Am. Dec. 451.

5. A clause in a will directing that none of the legacies, bequests, devises, etc., shall be executed or take effect until a building then in course of construction shall be completed and paid for out of the estate, does not violate the rule as to perpetuities. It only declares—what the law requires—that the testator's debts shall be first paid. *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. Rep. 336, 27: 401

6. A will does not violate the Illinois law of perpetuities which prohibits the tying up of property beyond a life or lives in being and twenty-one years afterwards, where, after twenty years from the death of the testator and after the death of his widow and daughter, the title, legal and equitable, in the property, will be vested in persons capable of conveying it. *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. Rep. 1005, 35: 721

7. A power to sell upon the expiration of an estate tail, and to divide the proceeds among persons then ascertainable, is not within the rule against perpetuities. *Barber v. Pittsburg, Ft. W. & C. R. Co.* 166 U. S. 83, 17 Sup. Ct. Rep. 488, 41: 925

Editorial notes.

[Effect on prior takers of the failure of gift violating rule against. 20 L.R.A. 509.

Remainder void for remoteness; effect on particular estate. 3 L.R.A.(N.S.) 639.

Devises of life estates to unborn children of living persons, as contravening the rule against. 6 L.R.A.(N.S.) 330.

Contract for indefinite option, or indefinite renewal of option, as perpetuity. 9 L.R.A.(N.S.) 913.

Limitation of estate upon probate of will as a violation of the rule against perpetuities. 10 L.R.A.(N.S.) 564.]

II. Gifts to Charities.

See also Charities, 19, 46.

8. The rule against perpetuities does not apply to charities. *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. Rep. 336, 27: 401
Ould v. Washington Hospital, 95 U. S. 303, 24: 450
McDonogh v. Murdoch, 15 How. 367, 14: 732

Cited in *Russell v. Allen*, 107 U. S. 171, 27 L. ed. 400, 2 Sup. Ct. Rep. 327—*Jones v. Habersham*, 107 U. S. 185, 27 L. ed. 408, 2 Sup. Ct. Rep. 336—*Hopkins v. Grimshaw*, 165 U. S. 352, 41 L. ed. 742, 17 Sup. Ct. Rep. 401—*White v. Keller*, 15 C. C. A. 689, 30 U. S. App 275, 68 Fed 801—*Brigham v. Peter Bent Brigham Hospital*, 128 Fed. 797—*Brigham v. Peter Bent Brigham Hospital*, 67 C. C. A. 399, 134 Fed. 519—*Storrs Agri. School v. Whitney*, 54 Conn. 347, 8 Atl. 141—*Pulitzer v. Livingston*, 89 Me. 364, 36 Atl. 635—*Codman v. Brigham*, 187 Mass. 313, 105 Am. St. Rep. 394, 72 N. E. 1008—*Penny v. Croul*, 76 Mich. 481, 5 L.R.A. 863, 43 N. W. 649—*Mills v. Davison*, 54 N. J. Eq.

662, 35 L.R.A. 115, 55 Am. St. Rep. 594, 35 Atl. 1072—Brown v. Brown, 7 Or. 298—Casey's Estate, 28 Pa. Co. Ct. 83—Lennig's Estate, 154 Pa. 215, 25 Atl. 1049—Webster v. Wiggin, 19 R. I. 93, 28 L.R.A. 513, 31 Atl. 824—Dodge v. Williams, 46 Wis. 96, 50 N. W. 1103.

Future charities.

9. A gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that may possibly not happen within a life or lives in being, or twenty-one years afterwards, is valid, provided there is no gift of the property meanwhile to or for the benefit of any private corporation,—there being no "substitutions and *fidei commissae*" within the prohibition of La. Code, art. 1507, McDonogh v. Murdoch, 15 How. 367,

14: 732

Ould v. Washington Hospital, 95 U. S. 303, 24: 450

Cited in Perin v. Carey, 24 How. 505. 16 L. ed. 711—United States v. Baltimore & O. R. Co. 17 Wall. 385, 21 L. ed. 602—Russell v. Allen, 107 U. S. 169, 27 L. ed. 399, 2 Sup. Ct. Rep. 327—Jones v. Habersham, 107 U. S. 189, 27 L. ed. 407, 2 Sup. Ct. Rep. 336—Flanders v. Thompson, 3 Woods, 11, Fed. Cas. No. 4,853—Jones v. Habersham, 3 Woods, 477, Fed. Cas. No. 7,465—McArthur v. Allen, Fed. Cas. No. 8,659—Duggan v. Slocum, 34 C. C. A. 678, 63 U. S. App. 149, 92 Fed. 808—Brigham v. Peter Bent Brigham Hospital, 128 Fed. 797—Barnum v. Baltimore, 62 Md. 290, 50 Am. Rep. 219—Odell v. Odell, 10 Allen, 9—Jackson v. Phillips, 14 Allen, 554—Quincy v. Atty. Gen. 160 Mass. 434, 35 N. E. 1066—Chamberlain v. Chamberlain, 3 Lans. 368—Pennoyer v. Wadhams (School Land Comrs. v. Wadhams) 20 Or. 284, 11 L.R.A. 213, 25 Pac. 720—Re John, 30 Or. 516, 36 L.R.A. 249, 47 Pac. 341—Almy v. Jones, 17 R. I. 267, 12 L.R.A. 416, 21 Atl. 616—State v. Smith, 16 Lea, 667—Davis v. Williams, 85 Tenn. 640, 4 S. W. 8—Paschal v. Acklin, 27 Tex. 200.

10. Donations to an eleemosynary institution for perpetual application to its purposes not questioned upon the ground that they constituted perpetuities. Dartmouth College v. Woodward, 4 Wheat. 518, 4: 629 *Cited in* Ould v. Washington Hospital for Foundlings, 95 U. S. 312, 24 L. ed. 452—Gould v. Taylor Orphan Asylum, 46 Wis. 117, 50 N. W. 422.

Schools.

11. In a will devising the rents and profits of land for the support of a school, a direction that the real estate should not be alienated does not make a perpetuity forbidden by law, but one allowed in the case of charitable trusts. Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. Rep. 336, 27: 401 Perin v. Carey, 24 How. 465, 16: 701 *Cited in* Russell v. Allen, 107 U. S. 167, 27 L. ed. 399, 2 Sup. Ct. Rep. 327—Jones v. Habersham, 3 Woods, 472, Fed. Cas. No. 7,465—Stuart v. Easton, 21 C. C. A. 151, 39 U. S. App. 238, 74 Fed. 859—Strong's Appeal, 68 Conn. 530, 37 Atl. 395—Ould v. Washington Hospital for Foundlings, 1 MacArth. 549, 29 Am. Rep. 605—Richmond v. Davis, 103 Ind. 454, 3 N. E. 130—Grant v. Saunders,

121 Iowa, 81, 100 Am. St. Rep. 310, 93 N. W. 411—Odell v. Odell, 10 Allen, 6—Jackson v. Phillips, 14 Allen, 556—Dexter v. Harvard College, 176 Mass. 195, 57 N. E. 371—Missouri Historical Soc. v. Academy of Science, 94 Mo. 467, 8 S. W. 346—Lackland v. Walker, 151 Mo. 242, 52 S. W. 414—Rolf v. R. Asylum v. Lefebvre, 69 N. H. 241, 45 Atl. 1087—Mills v. Davison, 54 N. J. Eq. 662, 35 L.R.A. 115, 55 Am. St. Rep. 594, 35 Atl. 1072—People ex rel. New York Inst. for Blind v. Fitch, 154 N. Y. 32, 38 L.R.A. 596, 47 N. E. 983—Pennoyer v. Wadhams (School Land Comrs. v. Wadhams) 20 Or. 280, 11 L.R.A. 212, 25 Pac. 720—Cameron v. Hinnerdeer, 18 Lanc. L. Rev. 267—Philadelphia v. Girard, 45 Pa. 26, 84 Am. Dec. 470—Yard's Appeal, 64 Pa. 99—Fire Ins. Patrol v. Boyd, 120 Pa. 644, 1 L.R.A. 419, 6 Am. St. Rep. 745, 15 Atl. 553—Kelly v. Nichols, 18 R. I. 71, 19 L.R.A. 428, 23 Atl. 840—Webster v. Wiggin, 19 R. I. 98, 28 L.R.A. 515, 31 Atl. 824—General Assembly v. Guthrie, 86 Va. 146, 6 L.R.A. 330, 10 S. E. 318—Dodge v. Williams, 46 Wis. 96, 50 N. W. 1103—Harrington v. Pier, 105 Wis. 494, 50 L.R.A. 312, 76 Am. St. Rep. 922, 82 N. W. 345—Kronshage v. Varrell, 120 Wis. 169, 97 N. W. 928.

12. A gift in perpetuity for the use of an institution for the education of white orphan boys upheld. Vidal v. Philadelphia (Vidal v. Girard) 2 How. 127, 11: 205 *Cited in* Ould v. Washington Hospital for Foundlings, 1 MacArth. 549, 29 Am. Rep. 605—Brown v. Brown, 7 Or. 297.

13. A devise to the city of Cincinnati of real and personal estate in trust, for the purpose of building and maintaining two colleges for the education of boys and girls, the surplus to be applied to the education and support of poor orphans, preference to be given to testator's relatives and descendants,—is not affected by the English statutes of mortmain, which, if ever in force in Ohio, were repealed by the state act of 1806. Perin v. Carey, 24 How. 465, 16: 701 *Cited in* University of Michigan v. Detroit Young Men's Soc. 12 Mich. 162—Potter v. Thornton, 7 R. I. 260—Dodge v. Williams, 46 Wis. 95, 50 N. W. 1103—Gilbert v. Stockman, 81 Wis. 617, 29 Am. St. Rep. 922, 53 N. W. 1045.

PERSIA.

Effect of Treaty with, on Customs Duties, see Duties, 90.

PERSON.

As Subject of Commerce, see Commerce. Corporation as, see Constitutional Law, 239-242; Corporations, 11-22.

PERSONAL ACTION.

In Admiralty, see Admiralty, III. c.

PERSONAL INJURIES.

Measure of Damages for, see Damages, VI. j.

PERSONAL JUDGMENT.

Necessity of Service or Appearance to Validity of, see Judgment, III. c.

For Street Improvement Assessment, see Public Improvements, 18.

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PERSONAL PROPERTY.

Accession to, and Confusion of, see Accession and Confusion.

State Law Respecting Corporate Stock as Rule of Decision in Federal Courts, see Courts, 1878.

What Law Governs, see Conflict of Laws, I. h, 3; 148-150.

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Lien of Judgment upon, see Judgment, 859-862.

Patent Rights as, see Patents, 11-17.

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Adverse Possession of Slave, see Adverse Possession, I. l.

Specific Performance of Contract Relating to, see Specific Performance, IV. g.

Taxation of, see Taxes.

Equitable Conversion, see Wills, III. i.

Editorial note.

[Classification of growing fruit as. 16 L.R.A. 103.]

PERSONAL TAX.

See Taxes, IV.

PERSONS EQUALLY INNOCENT.

Rule as to Relative Equities, see Equity, 336-338.

PER STIRPES.

See Wills, 196, 197.

PETITION.

For Writ of Error, see Appeal and Error, 2372-2375.

For Issuance of Town Bonds, see Bonds, 273, 550.

For Appointment of Guardian, see Guardian and Ward, 1.

For Writ of Habeas Corpus, see Habeas Corpus, 202-205.

For Land Grant under Spanish or Mexican Government, see Private Land Claims, 83-88.

For Removal of Cause, see Removal of Causes, VI. d.

PETITORY ACTION.

Admiralty Jurisdiction of, see Admiralty, 222, 223.

1. A petitory action in Louisiana is a proceeding at law in the nature of ejectment, and the plaintiff, to recover, must have a legal right to the possession. *Gilmer v. Poindexter*, 10 How. 257, 13: 411 *Cited in Hogan v. Kurtz*, 94 U. S. 775, 24 L. ed. 319—*Staffan v. Zeust*, 10 App. D. C. 268 —*Bledsoe v. Erwin*, 33 La. Ann. 619.

2. The title upon which a plaintiff must rely in a petitory action must be a legal, and not an equitable, title. *Livingston v. Story*, 9 Pet. 632, 9: 255 *Cited in Gilmer v. Poindexter*, 10 How. 267, 13 L. ed. 415.

PETROLEUM.

Loss of Insured Property by Means of, see Insurance, 430.

PEWS.

Effect of Agreement for Renting of, see Religious Societies, 6, 18.

PHILIPPINE COMMISSION.

Delegation of Power to, see Constitutional Law, 156.

Definition of Libel by, see Libel and Slander, 6, 12, 17.

See also Philippine Islands, 1.

PHILIPPINE ISLANDS.

Conclusiveness of Finding by Courts of, see Appeal and Error, VIII. 1, 3, f.

Right of Government to Appeal from Judgment of Acquittal, see Appeal and Error, 316.

Mode of Review in Habeas Corpus Case, see Appeal and Error, 697.

Appellate Jurisdiction Over Decisions of, see Appeal and Error, 1046.

Question as to Action of Philippine Authorities in Suspending Writ of Habeas Corpus as Moot Question, see Appeal and Error, 3918.

Power of Supreme Court to Convict of Higher Degree of Offense Charged, see Appeal and Error, 5281.

Pay of Army Officer Serving in, see Army and Navy, 105.

Delegation of Power to Enact Libel Law for, see Constitutional Law, 146.

Delegation of Power as to, see Constitutional Law, 163.

Delegation of Power to Commission, see Constitutional Law, 156.

Duties on Imports, see Duties, 10, 13, 14.

Duties on Imports from, see Duties, 35.

Ratification of Illegal Collection of Duties on Imports to, see Constitutional Law, 767.

Acquisition of Dominion over, see International Law, 37.

Right to Jury Trial in, see Jury, 14, 15.

Definition of Libel by Philippine Commission, see Libel and Slander, 6, 12, 17.

Construction of Treaty Concerning, see Treaties, 43.

As to Incorporation of Acquired Territory into United States, see United States, 14-16.

1. Measures adopted by the Philippine Commission should be made to conform to the customs, habits, and even prejudices of the people of the Philippine Islands to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government. *Kepler v. United States*, 195 U. S. 100, 24 Sup. Ct. Rep. 797, 49: 114
Cited in *Perez v. Fernandez*, 202 U. S. 82, 50 L. ed. 945, 26 Sup. Ct. Rep. 561.

2. [While the Philippine islands belong to the United States, there is a difference between them and the territories which are a part of the United States, with reference to the Constitution of the United States. *United States v. Dorr* (Philippine Sup. Ct.) 47: 1187]

3. [The Constitution of the United States was not extended to the Philippine islands by the terms of the treaty of Paris, April 11, 1899, but by such treaty the status of the ceded territory was to be determined by Congress. *United States v. Dorr* (Philippine Sup. Ct.) 47: 1187]

4. [Congress having passed no law extending to the Philippines the provision of the Constitution relating to jury trials, and there having been no laws in existence in the Philippines at the date of their cession providing for trial by jury, it was not error for the court of first instance to overrule the application of defendants in a prosecution for criminal libel for a trial by jury. *United States v. Dorr* (Philippine Sup. Ct.) 47: 1187]

5. [The mere cession of the Philippines to the United States did not extend the Constitution to those islands, except such parts as fall within the principles of fundamental limitations in favor of personal rights formulated in the Constitution and its amendments, and which exist rather by inference

and the general spirit of the Constitution, and except those express provisions of the Constitution which prohibit Congress from passing laws in their contravention under any circumstances. The provisions contained in the Constitution in relation to jury trials do not fall within either of these exceptions, and hence the right to trial by jury was not extended to the Philippines by the mere cession of the territory. *United States v. Dorr* (Philippine Sup. Ct.) 47: 1187]

PHILOSOPHICAL INSTRUMENTS.

Duty on, see Duties, V. d, 18.

PHOSPHATE.

The South Carolina act of March 28, 1876, did not give an exclusive right to the Coosaw Mining Company, in perpetuity or for an indefinite period, upon certain conditions, to mine phosphate rocks and deposits in the beds of the navigable waters of that state. *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. Rep. 689, 36: 537
Cited in *Coosaw Min. Co. v. Farmers' Min. Co.* 51 Fed. 108.

PHOTOGRAPH.

Protecting by Copyright, see Copyright, 10.
Notice of Copyright of, see Copyright, 34.
Jurisdiction of Suit for Infringement of Copyright, see Courts, 570.
As Evidence, see Evidence, 1458-1460.

Editorial notes.

[Right to use negative without the consent of the party who has paid for it. 50 L.R.A. 397.

Right to take or retain, in rogue's gallery, picture of one accused of crime. 7 L.R.A. (N.S.) 274.]

PHYSICAL EXAMINATION.

State Statute as Rule of Decision in Federal Court on Right to Examine Plaintiff's Injuries, see Courts, 2113a.
See also Discovery and Inspection, III.

PHYSICIANS AND SURGEONS.

Delegation of Power as to Registration of, see Constitutional Law, 160.

Due Process in Requiring License, see Constitutional Law, 587.

Due Process as to Registration of, see Constitutional Law, 768.

Ex Post Facto Law Prohibiting Practice of Medicine after Conviction, see Constitutional Law, 968.

Ex Post Facto Law, as to Registration, see Constitutional Law, 969.

Medical Testimony, see Evidence, VII. d.

Confidential Communications to as Evidence, see Evidence, 1936.

1. A state may require good character as a condition of the practice of medicine, and may rightfully determine what shall be the evidences of that character. *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. Rep. 573, 42: 1002

Cited in State ex rel. Burroughs, v. Webster, 150 Ind. 621, 41 L.R.A. 218, 50 N. E. 750.

2. Prohibiting the practice of medicine by persons convicted of a felony is not to be regarded as the mere imposition of an additional penalty for the conviction, but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming the appropriate evidence thereof. *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. Rep. 573, 42: 1002

Cited in Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 716, 1 L.R.A.(N.S.) 815, 72 Pac. 247.

Editorial notes.

[Liability for malpractice when employed by third party. 14 L.R.A. 429.

Constitutionality of regulations as to practice. 14 L.R.A. 579.

Care and skill required of. 37 L.R.A. 830.

Physician's right to determine frequency of visits. 51 L.R.A. 298.

Liability for performing surgical operation without consent of patient. 1 L.R.A. (N.S.) 439; 7 L.R.A.(N.S.) 609.

Liability for performing surgical operation on minor without parent's consent. 7 L.R.A.(N.S.) 612.

Power to revoke license of. 1 L.R.A.(N.S.) 811.

Validity of contract by unlicensed physician. 12 L.R.A.(N.S.) 613.

Application of statutes regulating practice of medicine to persons giving special kinds of treatment. 3 L.R.A.(N.S.) 762.

What constitutes practising medicine within the state. 4 L.R.A.(N.S.) 1023.

Right of physician to recover for emergency services rendered unconscious person. 12 L.R.A.(N.S.) 1090.

Administering domestic remedy for pay as practising medicine. 12 L.R.A.(N.S.) 1094.]

PICTORIAL ILLUSTRATIONS.

Protecting by Copyright, see Copyright, 13, 14.

PIERS.

Jurisdiction of Action for Damages by Collision with, see Admiralty, 187-189.

Obstruction to Navigation by, Considering Question of, after Remand, see Appeal and Error, 5548.

Collision of Barge with Unlawful Pier, see Collision, 417.

Liability of Contractor for Negligence while Constructing, see Negligence, 11.

As Nuisances, see Nuisances, 10.

Use of Water Front for, see Waters, 87-100.

See also Wharves.

PILES.

Liability for Injury by Collision with, see Negligence, 12.

PILOT BOATS.

Duty as to Carrying Lights, see Collision, 276, 277.

PILOTS.

I. In General, 1.

II. Control and Regulation Generally, 2-18.

III. Compulsory Pilotage, 19-24.

IV. Compensation, 25-30.

V. Duties and Liabilities, 31-3.

VI. Liability of Vessel for Pilot's Negligence, 34.

Contributory Negligence in Riding on Engine Pilot, see Master and Servant, 166, 107.

Federal Question as to, see Appeal and Error, 2162.

Presumption that Captain and First Mate are Licensed Pilots, see Evidence, 182.

Sufficiency of Bill Enjoining Conspiracy to Injure Complainant's Business as Pilot, see Injunction, 215.

I. In General.

1. Pilots on the navigable rivers of the interior are selected, examined, and licensed mainly for their knowledge of the topography of the streams where they are employed; and a constant and familiar acquaintance with the towns, banks, trees, etc., and the relation of the channel to them, and of the snags, sand-bars, sunken barges, and other dangers of the river as they may arise, is essential to the character of a skillful pilot. *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 22: 619

Cited in The Oregon, 45 Fed. 67—*The Tom Lysle*, 48 Fed. 693—*Harrison v. Hughes*, 110 Fed. 551—*The Mable S.*, 113 Fed. 973—*Harrison v. Hughes*, 60 C. C. A. 447, 125 Fed. 865—*Thompson v. Winslow*, 128 Fed. 82.

II. Control and Regulation Generally.

See also *supra*, 1.

2. Pilot regulations are regulations of commerce, and half pilotage is a necessary and usual provision. *Re McNiel*, 13 Wall. 236, 20: 624

Cited in The Princess Alexandra, 8 Ben. 200, Fed. Cas. No. 11,430—*Williams v. The Lizzie Henderson*, Fed. Cas. No. 17,726a—*Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 468, 59 N. W. 838—*Darden v. Thompson*, 101 Va. 641, 44 S. E. 755.

State regulation.

Compulsory Pilotage Laws, see *infra*, III.

Effect of Federal Legislation, see *infra*, 11-18.

3. State legislation concerning pilotage is not necessarily repugnant to the commerce clause of the Federal Constitution. *Olsen v. Smith*, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49: 224

4. No inherent rights guaranteed by the Federal Constitution are infringed by state regulations providing for the appointment of pilots, and restricting the rights to pilot to those duly appointed. *Olsen v. Smith*, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49: 224

5. The power conferred on Congress by the United States Constitution to regulate commerce does not exclude the exercise of authority by the states to regulate pilots. *Cooley v. Board of Wardens of Port of Philadelphia use of Society for Relief of D. P. (Cooley v. Port Wardens)* 12 How. 299, 13: 996

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17: 805

Re McNeil, 13 Wall. 236, 20: 624

Wilson v. McNamee, 102 U. S. 572, 26: 234

Cited in Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 468, 17 L. ed. 810—*Gilman v. Philadelphia*, 3 Wall. 727, 18 L. ed. 100—*Crandall v. Nevada*, 6 Wall. 42, 18 L. ed. 746—*Ex parte McNiel*, 18 Wall. 242, 20 L. ed. 626—*The Lottawanna (Rodd v. Heartt)* 21 Wall. 582, 22 L. ed. 664—*Pound v. Turck*, 95 U. S. 462, 24 L. ed. 526—*Ex parte Siebold*, 100 U. S. 385, 25 L. ed. 722—*Wilson v. McNamee*, 102 U. S. 575, 26 L. ed. 235—*Mobile County v. Kimball*, 102 U. S. 698, 26 L. ed. 240—*Turner v. Maryland*, 107 U. S. 56, 27 L. ed. 377, 2 Sup. Ct. Rep. 44—*Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 585, 30 L. ed. 254, 1 Inters. Com. Rep. 41, 7 Sup. Ct. Rep. 4—*Robbins v. Taxing District*, 120 U. S. 492, 30 L. ed. 696, 1 Inters. Com. Rep. 46, 7 Sup. Ct. Rep. 592—*Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 339, 30 L. ed. 1202, 1 Inters. Com. Rep. 311, 7 Sup. Ct. Rep. 1118—*Western U. Teleg. Co. v. Pendleton*, 122 U. S. 357, 30 L. ed. 1189, 1 Inters. Com. Rep. 307, 7 Sup. Ct. Rep. 1126—*Stoutenburgh v. Hennick*, 129 U. S. 148, 32 L. ed. 639, 9 Sup. Ct. Rep. 256—*Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 211, 38 L. ed. 966, 4 Inters. Com. Rep. 653, 14 Sup. Ct. Rep. 1087—*Hennington v. Georgia*, 163 U. S. 311, 41 L. ed. 171, 16 Sup. Ct. Rep. 1086—*New York v. Roberts*, 171 U. S. 669, 43 L. ed. 328, 19 Sup. Ct. Rep. 58—*The Roanoke*, 189 U. S. 197, 47 L. ed. 774, 23 Sup. Ct. Rep. 491—*Olsen v. Smith*, 195 U. S. 341, 49 L. ed. 229, 25

Sup. Ct. Rep. 52—*The America*, 1 Low. Dec. 177, Fed. Cas. No. 289—*The California*, 1 Sawy. 467, Fed. Cas. No. 2,312—*The Clifton Bridge*, Woolw. 166, Fed. Cas. No. 2,900—*Leitch v. The George Law*, 6 Am. L. Reg. 370, Fed. Cas. No. 8,223—*The Panama*, Deady, 35, Fed. Cas. No. 10,702—*Holmes v. Oregon & C. R. Co.* 6 Sawy. 272, 5 Fed. 84—*The Clymene*, 9 Fed. 166—*The Chase*, 14 Fed. 855—*The South Cambria*, 27 Fed. 526—*The Alcalde*, 12 Sawy. 270, 30 Fed. 135—*United States v. Tyndale*, 54 C. C. A. 326, 116 Fed. 822—*The Energia*, 124 Fed. 847—*Mobile Bay Pilotage Comrs. v. The Cuba*, 28 Ala. 197—*Dorman v. State*, 34 Ala. 250—*Hinson v. Lott*, 40 Ala. 132—*Lott v. Morgan*, 41 Ala. 251—*Groton v. Hurlburt*, 22 Conn. 184—*Cribb v. State*, 9 Fla. 418—*Webb v. Dunn*, 18 Fla. 728—*Chicago v. Law*, 144 Ill. 579, 33 N. E. 855—*Barnaby v. State*, 21 Ind. 453—*Western U. Teleg. Co. v. Pendleton*, 96 Ind. 13, 48 Am. Rep. 692—*Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 580, 12 L.R.A. 660, 3 Inters. Com. Rep. 621, 22 N. E. 76—*Council Bluffs v. Kansas City, St. J. & C. B. R. Co.* 45 Iowa, 350, 24 Am. Rep. 713—*Gatton v. Chicago, R. I. & P. R. Co.* 95 Iowa, 129, 28 L.R.A. 562, 63 N. W. 589—*Hardy v. Atchison, T. & S. F. R. Co.* 32 Kan. 714, 5 Pac. 6—*Stewart v. Harry*, 3 Bush, 446—*Dryden v. Com.* 16 B. Mon. 602—*Newport v. Taylor*, 16 B. Mon. 797—*Master & Wardens v. The Martha J. Ward*, 14 La. Ann. 289—*State ex rel. Williams v. Livaudais*, 36 La. Ann. 127—*Myers v. Baltimore County*, 83 Md. 389, 34 L.R.A. 311, 55 Am. St. Rep. 349, 35 Atl. 144—*Com. v. Vincent*, 108 Mass. 447—*Hudson County v. State*, 24 N. J. L. 729—*State v. Delaware, L. & W. R. Co.* 30 N. J. L. 478—*Delaware & L. R. Co. v. State*, 31 N. J. L. 545—*State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 530, 2 Inters. Com. Rep. 65, 14 Atl. 604—*People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 8, 19 L.R.A. 697, 33 N. E. 720—*People v. Welch*, 141 N. Y. 274, 24 L.R.A. 120, 38 Am. St. Rep. 793, 36 N. E. 328—*Bagg v. Wilmington, C. & A. R. Co.* 109 N. C. 281, 14 L.R.A. 597, 3 Inters. Com. Rep. 804, 26 Am. St. Rep. 569, 14 S. E. 79—*Edwards v. The Panama*, 1 Or. 424—*Philadelphia & R. R. Co. v. Com.* 4 Brewst. (Pa.) 218—*Virden's Appeal*, 13 Phila. 152—*Com. ex rel. Reed v. The Sheriff*, 13 Phila. 447—*The Lotawana*, 32 Phila. Leg. Int. 211—*Hartley v. Lee*, 6 W. N. C. 562—*Baker v. Wise*, 16 Gratt. 202—*Western U. Teleg. Co. v. Tyler*, 90 Va. 299, 4 Inters. Com. Rep. 481, 44 Am. St. Rep. 910, 18 S. E. 280—*Darden v. Thompson*, 101 Va. 640, 44 S. E. 753—*Stacy v. La Belle*, 99 Wis. 523, 41 L.R.A. 421, 67 Am. St. Rep. 879, 75 N. W. 60.

6. A state statute regulating pilotage is a regulation of commerce, but is not repugnant to the commerce clause of the Constitution of the United States, so long as Congress has not found it necessary to exercise its power to legislate upon that subject. *Cooley v. Board of Wardens of Port of Philadelphia use of Society for Relief of D. P. (Cooley v. Port Wardens)* 12 How. 299, 13: 996

Cited in Conway v. Taylor, 1 Black, 635, 17 L. ed. 203—*Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 457, 17 L. ed. 807—*Hinson v. Lott*, 8 Wall. 152, 19 L. ed. 389—*State Tonnage Tax Cases (Cox v. Lott)* 12 Wall. 219, 20 L. ed. 375—*Ex parte McNiel*, 13 Wall. 242, 20 L. ed. 626—*Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. 280, 21 L. ed. 163—

Osborne v. Moblle, 16 Wall. 482, 21 L. ed. 473—*Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 569, 21 L. ed. 714—*Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 272, 23 L. ed. 549—*Hall v. De Cuir*, 95 U. S. 488, 24 L. ed. 548—*Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 563, 26 L. ed. 1171—*Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 702, 27 L. ed. 588, 2 Sup. Ct. Rep. 732—*Brown v. Houston*, 114 U. S. 630, 29 L. ed. 260, 5 Sup. Ct. Rep. 1091—*Walling v. Michigan*, 116 U. S. 456, 29 L. ed. 694, 6 Sup. Ct. Rep. 454—*Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 465, 30 L. ed. 242, 6 Sup. Ct. Rep. 1114—*Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 585, 30 L. ed. 254, 1 Inters. Com. Rep. 41, 7 Sup. Ct. Rep. 4—*Robbins v. Taxing District*, 120 U. S. 492, 30 L. ed. 696, 1 Inters. Com. Rep. 46, 7 Sup. Ct. Rep. 592—*Ouachita & M. River Packet Co. v. Alken*, 121 U. S. 447, 30 L. ed. 978, 1 Inters. Com. Rep. 381, 7 Sup. Ct. Rep. 907—*Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 481, 31 L. ed. 705, 1 Inters. Com. Rep. 828, 8 Sup. Ct. Rep. 689—*Kidd v. Pearson*, 128 U. S. 23, 32 L. ed. 351, 2 Inters. Com. Rep. 237, 9 Sup. Ct. Rep. 6—*Lelsy v. Hardin*, 135 U. S. 109, 34 L. ed. 132, 3 Inters. Com. Rep. 41, 10 Sup. Ct. Rep. 681—*Manchester v. Massachusetts*, 139 U. S. 266, 35 L. ed. 167, 11 Sup. Ct. Rep. 559—*Re Rahrer* (*Wilkinson v. Rahrer*) 140 U. S. 560, 35 L. ed. 576, 11 Sup. Ct. Rep. 865—*Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 211, 38 L. ed. 966, 4 Inters. Com. Rep. 653, 14 Sup. Ct. Rep. 1087—*Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 587, 39 L. ed. 544, 5 Inters. Com. Rep. 43, 15 Sup. Ct. Rep. 415—*Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 104, 39 L. ed. 912, 15 Sup. Ct. Rep. 802—*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 631, 41 L. ed. 854, 17 Sup. Ct. Rep. 418—*Rhodes v. Iowa*, 170 U. S. 428, 42 L. ed. 1097, 18 Sup. Ct. Rep. 664—*Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 298, 43 L. ed. 707, 19 Sup. Ct. Rep. 465—*Huus v. New York & P. R. S. Co.*, 182 U. S. 393, 45 L. ed. 1149, 21 Sup. Ct. Rep. 827—*Olsen v. Smith*, 195 U. S. 341, 49 L. ed. 229, 25 Sup. Ct. Rep. 52—*Banta v. McNeill*, 5 Ben. 75, Fed. Cas. No. 966—*Re Freeman*, 2 Curt. C. C. 495, Fed. Cas. No. 3,083—*Sillman v. Troy & W. T. Bridge Co.*, 11 Blatchf. 284, Fed. Cas. No. 12,853—*United States v. Duluth*, 1 Dill. 472, Fed. Cas. No. 15,001—*The Glenearne*, 7 Sawy. 202, 7 Fed. 607—*The William Law*, 14 Fed. 794—*Huse v. Glover*, 11 Bliss. 554, 15 Fed. 295—*Pacific Coast S. S. Co. v. Railroad Comrs.*, 9 Sawy. 256, 18 Fed. 12—*The Alameda*, 31 Fed. 368—*Re Christian*, 39 Fed. 638—*The City of Norwalk*, 55 Fed. 106—*Cuban S. S. Co. v. Fitzpatrick*, 66 Fed. 67—*Re Minor*, 5 Inters. Com. Rep. 332, 69 Fed. 235—*Peirce v. Van Dusen*, 69 L.R.A. 705, 24 C. C. A. 285, 47 U. S. App. 339, 78 Fed. 698—*United States v. Hopkins*, 82 Fed. 540—*Cotting v. Kansas City Stock Yards Co.*, 82 Fed. 844—*North Bloomfield Gravel Min. Co. v. United States*, 32 C. C. A. 94, 59 U. S. App. 377, 88 Fed. 675—*Arkansas v. Kansas & T. Coal Co.*, 96 Fed. 365—*The Energla*, 124 Fed. 846—*McDonald v. State*, 81 Ala. 283, 60 Am. Rep. 158, 2 So. 829—*Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 574—*Harmon v. Chicago*, 140 Ill. 395, 29 N. E. 732—*Sherlock v. Alling*, 44 Ind. 196—*Standard Oil Co. v. Combs*, 96 Ind. 184, 49 Am. Rep. 156—*Brechbill v. Randall*, 102 Ind. 529, 52 Am. Rep. 695, 1 N. E. 362—*Jameson v. Indiana Natural Gas &*

Oil Co., 128 Ind. 573, 12 L.R.A. 660, 3 Inters. Com. Rep. 621, 28 N. E. 76—*Carton v. Illinois C. R. Co.*, 59 Iowa, 151, 44 Am. Rep. 672, 18 N. W. 87—*State v. Fulker*, 43 Kan. 241, 7 L.R.A. 185, 22 Pac. 1020—*State ex rel. Williams v. Livaudais*, 36 La. Ann. 127—*Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 36 La. Ann. 670—*Stetson v. Bangor*, 56 Me. 284—*Com. v. Huntley*, 156 Mass. 248, 15 L.R.A. 844, 30 N. E. 1127—*Benedict v. Vanderbilt*, 25 How. Pr. 210—*Cisco v. Roberts*, 33 How. Pr. 425—*Wallack v. New York*, 3 Hun. 87—*Lemmon v. People*, 20 N. Y. 614—*Utica v. Churchill*, 33 N. Y. 241—*Nell v. Wilson*, 14 Or. 413, 12 Pac. 810—*Lelsy v. Hardin*, 47 Phila. Leg. Int. 236—*Rutherford v. The Ornen*, 2 W. N. C. 123—*American S. S. Co. v. Philadelphia*, 8 W. N. C. 187—*Chambers v. The Clymene*, 10 W. N. C. 539—*Kline v. Craig*, 65 Pa. 409—*Collins v. Society for Relief of Distressed & D. Pilots*, 73 Pa. 197—*Smith v. State*, 100 Tenn. 499, 41 L.R.A. 434, 46 S. W. 566—*Norfolk & W. R. Co. v. Com.*, 88 Va. 99, 13 L.R.A. 109, 29 Am. St. Rep. 705, 13 S. E. 340—*State v. Baltimore & O. R. Co.*, 24 W. Va. 789, 49 Am. Rep. 290—*J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 93, 7 Am. St. Rep. 837, 38 N. W. 529.

7. The pilot laws of New York are valid under the Constitution of the United States. *Wilson v. McNamee*, 102 U. S. 572, 26: 234

8. The appropriation to the uses of a society for the relief of distressed and decayed pilots and their widows and children, under the Pennsylvania act of March 2, 1803, of the compulsory pilotage fees prescribed by that statute, does not render it open to the objection that it is a revenue law enacted under the guise of pilotage regulations. *Cooley v. Board of Wardens of Port of Philadelphia use of Society for Relief of D. P.* (*Cooley v. Port Wardens*) 12 How. 299, 13: 996

9. State pilotage laws, as applied to a British vessel coming from a foreign port, "no higher or other duties or charges shall be imposed in any ports of the United States do not conflict with a treaty provision that on British vessels than those payable in the same ports by vessels of the United States," because of the exemption of coastwise steam vessels of the United States from pilotage, resulting from U. S. Rev. Stat. § 4444, U. S. Comp. Stat. 1901, p. 3037, or of any lawful exemption of coastwise vessels, created by the state laws. *Olsen v. Smith*, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49: 224
Cited in *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 414, 45 L. ed. 1160, 21 Sup. Ct. Rep. 831—*The Carrie L. Tyler*, 43 L.R.A. 238, 45 C. C. 375, 106 Fed. 423.

10. No monopoly or combination forbidden by the Federal anti-trust laws is created by state regulations providing for the appointment of pilots, and restricting the right to pilot to those duly appointed. *Olsen v. Smith*, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49: 224

— Editorial note.

Effect on state pilotage laws of congressional prohibition against discrimination. 49: 224

Effect of Federal legislation.

Validity under, of State Pilotage Laws, see *supra*, 9.

11. Although Congress has legislated upon the subject of pilotage, its legislation, with a single exception (relating to waters which constitute the boundary between states), manifests an intention not to regulate the subject, but to leave it to the states. *Re McNiel*, 13 Wall. 236, 20: 624

Cited in Chicago & N. W. R. Co. v. Fuller, 17 Wall. 568, 21 L. ed. 714—*Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 34, 23 L. ed. 199—*Inman S. S. Co. v. Tinker*, 94 U. S. 242, 24 L. ed. 121—*Foster v. Master & Wardens*, 94 U. S. 248, 24 L. ed. 123—*Wilson v. McNamee*, 102 U. S. 574, 26 L. ed. 234—*Gulf, C. & S. F. R. Co. v. Hefey*, 158 U. S. 104, 39 L. ed. 912, 15 Sup. Ct. Rep. 802—*The Illinois*, 2 Flipp. 408, Fed. Cas. No. 7,005—*The Robert Dollar*, 115 Fed. 224—*The Emergia*, 124 Fed. 846—*Glover v. Love*, 68 Ala. 220—*McDonald v. State*, 81 Ala. 283, 60 Am. Rep. 158, 2 So. 829—*Sherlock v. Alling*, 44 Ind. 196—*State ex rel. Williams v. Livaudais*, 36 La. Ann. 127—*Ford v. New York C. & H. R. R. Co.* 33 App. Div. 477, 53 N. Y. Supp. 764—*Hade v. McVay*, 31 Ohio St. 237—*Virden's Appeal*, 13 Phila. 152—*Com. ex rel. Reed v. Sheriff*, 13 Phila. 447—*National Exch. Bank v. Boylen*, 26 W. Va. 557, 53 Am. Rep. 113.

12. Congressional legislation on the subject of pilotage as expressed in the act of March 2, 1837, in relation to waters which are the boundaries between two states, when considered in connection with the act of August 7, 1789, providing that all pilots in the bays, inlets, rivers, and harbors of the United States shall continue to be regulated in conformity with the existing laws of the states where such pilots may be, manifests an intention, with the single exception of boundary waters, not to regulate this subject, but to leave its regulation to the states. *Cooley v. Board of Wardens of Port of Philadelphia use of Society for Relief of D. P. (Cooley v. Port Wardens)* 12 How. 299, 13: 996

13. A steamship engaged in trade between the ports of Porto Rico and the port of New York is a coastwise, seagoing vessel within the meaning of U. S. Rev. Stat. § 4401, U. S. Comp. Stat. 1901, p. 3016, and, when under the control and direction of a pilot licensed under the Federal statute, is exempted by § 4444, U. S. Comp. Stat. 1901, p. 3037, from the provisions of state pilotage laws. *Huus v. New York & P. R. S. S. Co.* 182 U. S. 392, 21 Sup. Ct. Rep. 827, 45: 1146

Cited in Gonzales v. Williams, 192 U. S. 14, 48 L. ed. 322, 24 Sup. Ct. Rep. 177—*Percy Summer Club v. Astle*, 110 Fed. 490—*The Robert Dollar*, 115 Fed. 224.

14. Only the discriminatory features of state pilotage laws are abrogated by the provision of U. S. Rev. Stat. § 4237, U. S. Comp. Stat. 1901, p. 2903, forbidding such discrimination, and annulling and abrogating "all existing regulations or provisions

making any such discrimination." *Olsen v. Smith*, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49: 271

Cited in National Cotton Oil Co. v. Texas, 197 U. S. 131, 49 L. ed. 695, 25 Sup. Ct. Rep. 379—*Thompson v. Darden*, 198 U. S. 313, 49 L. ed. 1065, 25 Sup. Ct. Rep. 660.

15. The provisions of the act of Congress of August 30, 1852, to provide greater security for the lives of passengers on vessels propelled wholly or in part by steam, do not supersede any state legislation concerning port pilotage which was recognized by the act of Congress of 1789, adopting existing pilotage regulations and such as might be provided by subsequent state legislation. *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17: 806

Distinguished in The George S. Wright, Deady, 594, Fed. Cas. No. 5,340.

Cited in Covington & C. Bridge Co. v. Kentucky, 154 U. S. 211, 38 L. ed. 966, 4 Inters. Com. Rep. 653, 14 Sup. Ct. Rep. 1087—*Joslyn v. Nickerson*, 1 Fed. 134—*American U. Teleg. Co. v. Western U. Teleg. Co.* 67 Ala. 32, 42 Am. Rep. 90—*State v. Prouty*, 115 Iowa, 662, 84 N. W. 670—*State ex rel. Williams v. Livaudais*, 36 La. Ann. 128—*People v. Sperry*, 50 Barb. 185—*Cisco v. Roberts*, 36 N. Y. 295—*Sturgis v. Spofford*, 45 N. Y. 451—*Craig v. Kline*, 65 Pa. 409, 3 Am. Rep. 636.

16. The act of Congress of August 7, 1789 chap. 9, § 4 (Rev. Stat. § 4235), providing that all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing law of the states, respectively wherein such pilots may be; or with such laws as such state may afterwards enact, until further provision by Congress,—gives to the system prevailing in each state the same validity as if its provisions had been specially made by Congress. *Gibbons v. Ogden*, 9 Wheat. 1, 6: 23

Cited in Cooley v. Port Wardens, 12 How. 321, 13 L. ed. 1006—*Wilson v. McNamee*, 102 U. S. 574, 26 L. ed. 235—*The Wave v. Hyer*, 2 Paine, 144, Fed. Cas. No. 17,300—*Williams v. The Lizzie Henderson*, Fed. Cas. No. 17,726a—*The Clymene*, 9 Fed. 167—*The Chase*, 14 Fed. 855—*Mobile Bay Pilotage Comrs. v. The Cuba*, 28 Ala. 198—*Thompson v. Sprague*, 69 Ga. 421, 47 Am. Rep. 760—*Chambers v. The Clymene*, 14 Phila. 605—*Baker v. Wise*, 16 Gratt. 196.

17. The exemption of coastwise steam vessels of the United States from the operation of state pilotage laws, created by U. S. Rev. Stat. § 4444, U. S. Comp. Stat. 1901, p. 3037, interferes with such laws only so far as they relate to these vessels, as the section expressly declares that "nothing in this title shall be considered to annul or affect any regulation established by the laws of any state, requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state." *Olsen v. Smith*, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49: 224

18. Ga. Code, § 1512, requiring vessels bearing toward a port of that state, except:

coasters of such state, and between ports of that state and Florida or South Carolina, to accept the first pilot offering his services, is abrogated by U. S. Rev. Stat. § 4237, U. S. Comp. Stat. 1901, p. 2903. *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. Rep. 988. 30: 115

III. Compulsory Pilotage.

Right to Compensation under Compulsory Pilotage Law, see *infra*, IV.

Liability for Collision Due to Negligence of Pilot on Board under Compulsory Pilot Law, see *Collision*, 321, 322.

See also *supra*, 8.

19. Uniformity of duties, imposts, and excises throughout the United States, prescribed by U. S. Const. art. 1, § 8, cl. 1, is not violated by a state compulsory pilotage law, as pilotage is neither a duty, an impost, nor an excise. *Cooley v. Board of Wardens of Port of Philadelphia use of Society for Relief of D. P.* (*Cooley v. Port Wardens*) 12 How. 299, 13: 996

20. A state compulsory pilotage law does not violate U. S. Const. art. 1, § 9, cl. 8, providing that no preference shall be given by any regulation of commerce or revenue, to the ports of one state over those of another, and that vessels shall not be obliged to enter, clear, or pay duties to another; as pilotage fees are not duties, and the requirement of their payment does not constitute a preference. *Cooley v. Board of Wardens of the Port of Philadelphia use of Society for Relief of D. P.* (*Cooley v. Port Wardens*) 12 How. 299, 13: 996
Cited in *Williams v. The Lizzie Henderson*, Fed. Cas. No. 17,726a—*St. Louis v. Schulenburg & B. Lumber Co.* 13 Mo. App. 60.

21. A state compulsory pilotage law does not conflict with U. S. Const. art. 1, § 10, cls. 1, 3, prohibiting the state, without the consent of Congress, from levying any imposts or duties on exports or imports or tonnage. *Cooley v. Board of Wardens of Port of Philadelphia use of Society for Relief of D. P.* (*Cooley v. Port Wardens*) 12 How. 299, 13: 996
Cited in *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 88, 24 L. ed. 381—*The Ann Ryan*, 7 Ben. 22, Fed. Cas. No. 428—*Thompson v. Sprague*, 69 Ga. 421, 47 Am. Rep. 760—*State v. Penny*, 19 S. C. 222—*Crockett v. Thomas*, 20 Gratt. 424.

22. The adoption of compulsory pilotage regulations by a state, under the authority of U. S. Rev. Stat. § 4235, U. S. Comp. Stat. 1901, p. 2903, does not violate U. S. Const. art. 1, § 9, cl. 6, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another. *Thompson v. Darden*, 198 U. S. 310, 25 Sup. Ct. Rep. 660, 49: 1064

23-4. No discrimination in state pilotage laws forbidden by U. S. Rev. Stat. § 4237, U.

S. Comp. Stat. 1901, p. 2903, is made by the Virginia compulsory pilotage charge on all vessels (except coasting vessels having a pilot's license), either inward bound from the sea through the Virginia capes to Smith's Point, Yorktown, Newport News, or Norfolk and intermediate points, or outward bound to the sea from those points through the capes, although compulsory pilotage does not prevail in all the inland waters of the state. *Thompson v. Darden*, 198 U. S. 310, 25 Sup. Ct. Rep. 660, 49: 1064

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[Liability for compulsory pilotage. 39 L. R.A. 177.]

IV. Compensation.

Admiralty Jurisdiction of Claim for Pilotage, see *Admiralty*, I. f, 6.

Maritime Lien for Pilotage, see *Maritime Liens*, 8.

Remedy for Correcting Error as to, in Judgment, see *Prohibition*, 20, 23.

Right to Salvage, see *Salvage*, 25.

See also *supra*, 8, 18; *Shipping*, 421.

25. A New York pilot may recover pilotage for refusal of his services, although the tender of them was made outside of the jurisdiction of the state of New York. *Wilson v. McNamee*, 102 U. S. 572, 26: 234
Cited in *The Glaramara*, 8 Sawy. 24, 10 Fed. 679—*The Chase*, 14 Fed. 858—*Pullman Palace Car Co. v. Wagner Palace Car Co.* 44 Fed. 770—*The Carrie L. Tyler*, 54 L.R.A. 238, 45 C. C. A. 376, 106 Fed. 424—*Thompson v. Sprague*, 69 Ga. 419, 47 Am. Rep. 760.

26. A coastwise sea-going steam vessel, not sailing under register, having a pilot licensed by the United States inspector of steamboats in her employ, under pay from the commencement of the voyage, to be taken on board when necessary, is under the control and direction of such pilot as required by U. S. Rev. Stat. § 4401, U. S. Comp. Stat. 1901, p. 3016, and is exempt by § 4444, U. S. Comp. Stat. 1901, p. 3037, from any pilot charges levied by any state or municipal government, and may lawfully refuse the services of any other pilot. *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. Rep. 988, 30: 115
Cited in *Huvs v. New York & P. R. S. S. Co.* 182 U. S. 393, 45 L. ed. 1149, 21 Sup. Ct. Rep. 827—*The Alameda*, 31 Fed. 367—*The Alameda*, 32 Fed. 334—*Freeman v. The Undaunted*, 37 Fed. 663.

Half pilotage.

See also *supra*, 2.

27. In order to create and maintain an efficient class of pilots, most of the commercial states, from an early period, have enacted pilot laws which provide that the pilot who shall first tender his services may demand from the master of the vessel, who refuses such tender, half pilotage. *Re McNiell*, 13 Wall. 236, 20: 624
Cited in *Flanders v. Tripp*, 2 Low. Dec. 16,

Fed. Cas. No. 4,854—The William Law, 14 Fed. 705—The Edith Godden, 25 Fed. 511—The Alameda, 31 Fed. 368—Bigley v. New York & P. R. S. Co. 105 Fed. 76—Thompson v. Sprague, 69 Ga. 419, 47 Am. Rep. 780—Neil v. Wilson, 14 Or. 413, 12 Pac. 810—Patterson v. Pilot Comrs. 24 Tex. Civ. App. 41, 57 S. W. 1002.

28. The exemption of vessels engaged in the Pennsylvania coal trade for the necessity of paying the half pilotage imposed by Pa. acts March 2, 1803, for refusal to accept the proffered services of a pilot, is a fair exercise of legislative discretion on the subject of the regulation of the pilotage of the port of Philadelphia. *Cooley v. Board of Wardens of Port of Philadelphia use of Society for Relief of D. P. (Cooley v. Port Wardens)* 12 How. 299, 13: 996

29. A claim for half pilotage fees given by a state statute to a pilot whose proffered services were declined is not affected by a subsequent repeal of the statute. *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17: 805

30. A state statute which declares that when a vessel is spoken by a pilot, and his services are declined, he shall be entitled to half pilotage fees, creates a legal liability against the vessel, her master, and owners, for such fees. *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17: 805

Cited in Southern S. S. Co. v. New Orleans Port Wardens, 6 Wall. 34, 18 L. ed. 750—*Ex parte McNeil*, 13 Wall. 242, 20 L. ed. 626—*Banta v. McNeil*, 5 Ben. 76, Fed. Cas. No. 966—*The Bright Star*, Woolw. 273, Fed. Cas. No. 1,880—*The California*, 1 Sawy. 468, Fed. Cas. No. 2,312—*The George S. Wright*, Deady, 597, Fed. Cas. No. 5,340—*The Kalmarr*, 10 Ben. 242, Fed. Cas. No. 7,601—*Holmes v. Oregon & C. R. Co.* 6 Sawy. 272, 5 Fed. 84—*The Glenarne*, 7 Sawy. 202, 7 Fed. 606—*The Glamara*, 8 Sawy. 24, 10 Fed. 679—*The Francisco Gargullo*, 14 Fed. 496—*The William Law*, 14 Fed. 704—*The Edith Godden*, 25 Fed. 511—*The Alameda*, 31 Fed. 368—*The Alameda*, 32 Fed. 333—*McDonald v. Prioleau*, 44 Fed. 770—*Re Humboldt Lumber Mfrs. Asso.* 60 Fed. 443—*Newton v. The Carrie L. Tyler*, 54 L.R.A. 238, 45 C. C. A. 376, 106 Fed. 424—*Reliance Lumber Co. v. Rothschild*, 127 Fed. 747—*Thompson v. Sprague*, 69 Ga. 417, 47 Am. Rep. 760—*Augner v. New York*, 14 App. Div. 468, 43 N. Y. Supp. 803—*Ford v. New York*, C. & H. R. B. Co. 33 App. Div. 477, 53 N. Y. Supp. 764—*Pache v. Oppenheim*, 93 App. Div. 225, 87 N. Y. Supp. 704—*Neil v. Wilson*, 14 Or. 413, 12 Pac. 810—*State v. Turner*, 34 Or. 181, 55 Pac. 92.

V. Duties and Liabilities.

Negligence of Pilot in Running upon Obstruction in River, see Negligence, 22, 23.

31. A pilot who ran his vessel against a pier which he should have known was there but did not, was in fault for want of that knowledge, and also in fault for hugging the shore near where he knew a mill and boom were, when the current of the river would

have carried him into safe and deep water further out. *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 22: 619

32. A pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, is the temporary master, charged with the safety of his vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. *Cooley v. Board of Wardens of Port of Philadelphia use of Society for Relief of D. P. (Cooley v. Port Wardens)* 12 How. 299, 13: 996
Cited in Ralli v. Troop, 157 U. S. 402, 39 L. ed. 749, 15 Sup. Ct. Rep. 657.

33. Members of a voluntary, unincorporated pilot association, which, under the state laws, could neither select nor discharge its members, nor control or direct them in the performance of their duties as licensed pilots, whether technically partners or not, are not liable to the owners of piloted vessels for the negligence of each other because, instead of taking their fees as they earn them, such fees go into a common fund, and, after deducting expenses, are distributed to the several members according to the number of days they respectively were on the active list. *Guy v. Donald*, 203 U. S. 399, 27 Sup. Ct. Rep. 63, 51: 245

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Authority, duties, and responsibility of pilot. 23: 55

VI. Liability of Vessel for Pilot's Negligence.

Liability for Collision Due to Unskillfulness of Pilot, see Collision, II. 1.

34. Parties who suffer through error of one in command are entitled to have their remedy against the vessel that occasioned the damage, and not against the pilot. *The China v. Walsh (The China)* 7 Wall. 53, 19: 67

Cited in Tucker v. Alexandroff, 183 U. S. 433, 46 L. ed. 270, 22 Sup. Ct. Rep. 195—*The Kate Tremaine*, 5 Ben. 66, Fed. Cas. No. 7,622—*The F. C. Latrobe*, 28 Fed. 379—*The William H. Bailey*, 103 Fed. 800—*The Surprise*, 64 C. C. A. 317, 129 Fed. 881—*The Robert Rickmers*, 131 Fed. 642—*Cook v. Curtis*, 58 N. H. 509—*Saulter v. New York & W. S. S. Co.* 88 N. C. 125, 43 Am. Rep. 736.

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Responsibility of owner for acts of pilot. 23: 55

PIONEER INVENTION.

Infringement of, see Patents, 1025, 1062.

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PIRACY.

- I. Nature and Elements, 1-16.*
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 Merger of Civil Remedy in Criminal Offense, see Admiralty, 434.
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 Duty as to Waiting Approach of Vessel Suspected of, see Prize and Capture, 17.
 Restoration of Africans Recaptured from Pirates, see Prize and Capture, 264.
 Repeal of Statute as to, see Statutes, 617, 619.

I. Nature and Elements.

1. The jurisdictional limits of a foreign state, though neutral to war, are not neutral to crime, such as piracy. *United States v. Furlong*, 5 Wheat. 184, 5: 64

2. The words "out of the jurisdiction of any particular state," in the act of April 30, 1790, relating to crimes, mean out of the jurisdiction of any particular state of the Union. *United States v. Furlong*, 5 Wheat. 184, 5: 64
Cited in Smith v. United States, 1 Wash. Terr. 269.

What constitutes generally.

3. Piracy, by the law of nations and under the acts of Congress on the subject, is robbery upon the sea. *United States v. Smith*, 5 Wheat. 153, 5: 57
Cited in United States v. Smith, Fed. Cas. No. 16,318—*Re Charge*, 3 Sprague, 283, Fed. Cas. No. 18,256—*The Ambrose Light*, 25 Fed. 416.

4. Robbery on the sea is considered as an offense within the criminal jurisdiction of all nations. *United States v. Furlong*, 5 Wheat. 184, 5: 64
Cited in United States v. New Bedford Bridge, 1 Woodb. & M. 484, Fed. Cas. No. 15,867—*United States v. Wilson*, 3 Blatchf. 439 Fed. Cas. No. 16,731—*Smith v. United States*, 1 Wash. Terr. 274.

5. Robbery on the high seas is piracy under the act of April 30, 1790, providing for the punishment of certain crimes against the United States. *United States v. Palmer*, 3 Wheat. 610, 4: 471
Cited in Sparr v. United States, 156 U. S. 167, U. S. Dig.—282

39 L. ed. 384, 15 Sup. Ct. Rep. 273—*Dole v. New England Mut. M. Ins. Co.* 2 Cliff. 418, Fed. Cas. No. 3,966—*Dole v. Merchants' Mut. M. Ins. Co.* 51 Me. 468.

6-7. The meaning of the word "robbery," as used in the act of April 30, 1790, concerning crimes on the high seas must be understood in the sense in which it is recognized and defined at common law. It cannot be restricted to offenses which would be punishable with death if committed on land. *United States v. Palmer*, 3 Wheat. 610, 4: 471

Cited in Reagan v. United States, 157 U. S. 303, 39 L. ed. 710, 15 Sup. Ct. Rep. 610—*Anonymous*, Hempst. 418, Fed. Cas. No. 447—*United States v. Durkee*, McAll. 201, Fed. Cas. No. 15,009—*United States v. New Bedford Bridge*, 1 Woodb. & M. 448, Fed. Cas. No. 15,867—*United States v. Wilson*, Baldw. 93, Fed. Cas. No. 16,730—*United States v. Coppersmith*, 4 Fed. 200—*United States v. Stone*, 8 Fed. 251—*State ex rel. Butler v. Foster*, 187 Mo. 605, 86 S. W. 245.

8. The definition of piracy in the act of March 3, 1819, § 5, by referring to the law of nations, is a constitutional exercise of the authority delegated to Congress to define and punish felonies and piracies committed on the high seas, and offenses against the law of nations, since piracy by the law of nations is defined with reasonable certainty to be robbery on the high seas. *United States v. Smith*, 5 Wheat. 153, 5: 57
Cited in Dole v. New England Mut. M. Ins. Co. 2 Cliff. 420, Fed. Cas. No. 3,966—*United States v. New Bedford Bridge*, 1 Woodb. & M. 446, Fed. Cas. No. 15,867—*United States v. White*, 27 Fed. 201.

9. The word "piratical," in the act of 1819, means that class of offenses which pirates are in the habit of perpetrating, whether they do it for the purpose of plunder, hatred, revenge, or wanton abuse of power. *Harmony v. United States*, 2 How. 210, 11: 239
Cited in The Chapman, 4 Sawy. 510, Fed. Cas. No. 2,602—*Dole v. New England Mut. M. Ins. Co.* 2 Cliff. 420, Fed. Cas. No. 3,966—*Re Charge*, 2 Sprague, 283 Appx. Fed. Cas. No. 18,256—*The Ambrose Light*, 25 Fed. 416—*Dole v. Merchants' Mut. M. Ins. Co.* 51 Me. 468.

10. An attack made upon a vessel of the United States, by an armed vessel, upon a mistaken supposition that she was a piratical cruiser, and without piratical or felonious intent, is not a piratical aggression under the act of March 3, 1819. *The Marianna Flora*, 11 Wheat. 1, 6: 405

11. Under the act of 1819, to protect the commerce of the United States and punish piracy, etc., a vessel is considered armed which has a cannon, ammunition, daggers, and pistols on board, and whether armed for offense or defense is immaterial, if it commit unlawful acts, under that act of Congress. *Harmony v. United States*, 2 How. 210, 11: 239

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Robbery by foreigners at sea.

12. Robbery committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, is not piracy, under the act of April 30, 1790, and not punishable in the courts of the United States. *United States v. Palmer*, 3 Wheat. 610, 4: 471
United States v. Furlong, 5 Wheat. 184, 5: 64

13. Murder committed by a foreigner upon a foreigner in a foreign ship is not punishable under the act of April 30, 1790, § 8, providing for the punishment of certain crimes against the United States. *United States v. Furlong*, 5 Wheat. 184, 5: 64
Cited in Re Charge, 2 Sprague, 283, Fed. Cas. No. 18,256—*Com. v. Macloon*, 101 Mass. 22, 100 Am. Dec. 89.

Privateers.

14. Whatever the irregularities in granting a privateer's commission, if it was received and acted under in good faith, it ought, in the court of a neutral nation, to be held a competent protection against the imputations of general piracy. *The Palmyra*, 12 Wheat. 1, 6: 531

15. Whether a person acting with good faith under a commission from an unacknowledged government may or may not be guilty of piracy, it can be no justification of a capture *animo furandi*, and not *jure belli*. Such a transaction is not a belligerent capture, but robbery on the high seas. *United States v. Klintock*, 5 Wheat. 144, 5: 55

Cited in United States v. Holmes, 5 Wheat. 416, 5 L. ed. 123—*Dole v. New England Mut. M. Ins. Co.* 2 Clif. 419, Fed. Cas. No. 3,966—*United States v. Davis*, 2 Sumn. 485, Fed. Cas. No. 14,932—*United States v. Demarchi*, 5 Blatchf. 87, Fed. Cas. No. 14,944—*United States v. New Bedford Bridge*, 1 Woodb. & M. 485, Fed. Cas. No. 15,867—*Re Charge*, 2 Sprague, 283, Fed. Cas. No. 18,256—*The Ambrose Light*, 25 Fed. 415.

Slave trade.

16. The slave trade is not piracy unless made so by the treaties or statutes of the nation to which the trader belongs. *The Antelope*, 10 Wheat. 66, 6: 268
Cited in Osborn v. Nicholson, 18 Wall. 657, 20 L. ed. 694—*Anderson v. Poindexter*, 6 Ohio St. 705.

II. Who are Pirates.

17. [Pirates have no rights of war. Those who commit hostilities without authority from their sovereign are pirates. *Miller v. The Resolution* (Fed. Ct. Rep.) 2 Dall. 1, 1: 263]

18. Kidnapped Africans, illegally carried to Cuba and detained on board a vessel, of which they take possession by force after killing the captain, and which they navigate to an American port, are not punish-

able as pirates or robbers. *United States v. The Amistad*, 15 Pet. 518, 10: 826

19. When civil war exists in a foreign nation, the revolting subjects are no more liable to be punished as pirates than the subjects who adhere to their allegiance. *United States v. Palmer*, 3 Wheat. 610, 4: 471

Cited in Miller v. United States (Page v. United States) 11 Wall. 307, 20 L. ed. 145—*The Amy Warwick*, 2 Sprague, 133, Fed. Cas. No. 341—*Palmer v. Denn*, 2 La. Ann. 537.

III. Capture; Forfeiture; Punishment For.

See also Prize and Capture, 158.

20. Pirates may be lawfully captured by the public or private ships of any nation, in peace or in war. *The Marianna Flora*, 11 Wheat. 1, 6: 405

21. All piracies and trespasses against the law of nations may be proceeded against in any nation, unless special exemption exists. *Talbot v. Janson*, 3 Dall. 133, 1: 540

22. Upon a piratical capture, the property of the original owners cannot be forfeited for the misconduct of the captors in violating the municipal laws of the country to which the vessel seized by them is carried. *The Josefa Segunda*, 5 Wheat. 338, 5: 104

23. Although a defective commission acted upon in good faith may protect the crew of a vessel from the consequences attaching to the offense of piracy, by the general law of nations, yet if the defects in the commission be such as, connected with the insubordination and predatory spirit of the crew, to excite a justly founded suspicion, it is sufficient, under the Act of Congress of March 3, 1819, to justify the captors for bringing in the vessel for adjudication. *The Palmyra*, 12 Wheat. 1, 6: 531
Cited in Jecker v. Montgomery, 18 How. 116, 15 L. ed. 314—*The Ambrose Light*, 25 Fed. 415.

24. The condemnation of the cargo of a vessel employed in piratical depredations is not authorized by the act of 1819 for the protection of commerce. *Harmony v. United States*, 2 How. 210, 11: 239

25. The act of 1819 for the protection of commerce punishes any piratical aggression, search, restraint, or seizure, as well as a piratical depredation. *Harmony v. United States*, 2 How. 210, 11: 239
Cited in Ralli v. Troop, 157 U. S. 403, 39 L. ed. 750, 15 Sup. Ct. Rep. 657—*The Three Friends* (*United States v. The Three Friends*) 166 U. S. 51, 41 L. ed. 914, 17 Sup. Ct. Rep. 495—*Workman v. New York*, 179 U. S. 556, 45 L. ed. 330, 21 Sup. Ct. Rep. 212—*The Barnstable*, 181 U. S. 467, 45 L. ed. 957, 21 Sup. Ct. Rep. 684—*The Blackheath* (*United States v. Evans*) 195 U. S. 367, 49 L. ed. 237, 25 Sup. Ct. Rep. 46—*Hay v. Alexandria & W. R. Co.* 4 Hughes, 354—*The Jeanne*

Cushman, 8 Ware, 311, Fed. Cas. No. 7,250—*The Meteor*, 1 Am. L. Rev. 401, Fed. Cas. No. 9,498—*United States v. 58,850 Cigars*, 21 Month. Law Rep. 272, Fed. Cas. No. 15,002—*United States v. Hall*, 9 Am. L. Reg. 240, Fed. Cas. No. 15,281—*United States v. Hutchinson*, 1 Haskell, 154, Fed. Cas. No. 15,431—*The Director*, 28 Fed. 709—*The Anaces*, 34 C. C. A. 561, 93 Fed. 242—*Com. v. Certain Intoxicating Liquors*, 107 Mass. 400—*Colon v. Lisk*, 13 App. Div. 199, 43 N. Y. Supp. 364—*Boggs v. Com.* 76 Va. 993.

26. Condemnation of a vessel's cargo for petty offenses is not sanctioned by the law of nations, except in the enforcement of belligerent rights, unless the owner co-operates and authorizes the unlawful acts. *Harmony v. United States*, 2 How. 210, 11: 239

27. The ship is held responsible for the torts and misconduct of its master and crew; and innocence or ignorance on the part of the owner will not exempt it from condemnation. *Harmony v. United States*, 2 How. 210, 11: 239
Cited in *Jecker v. Montgomery*, 18 How. 116, 15 L. ed. 314—*Dobbin's Distillery Co. v. United States*, 96 U. S. 400, 24 L. ed. 638—*The Great Western*, 118 U. S. 534, 30 L. ed. 151, 6 Sup. Ct. Rep. 1172—*The John G. Stevens*, 170 U. S. 118, 42 L. ed. 973, 18 Sup. Ct. Rep. 544—*The Phoenix*, 34 Fed. 761.

28. Acts of a master to whom a vessel is intrusted bind the owner under the act of Congress of 1819 concerning piracy, and may cause a forfeiture of the vessel for a piratical aggression made without the consent or co-operation of the owner. *Harmony v. United States*, 2 How. 210, 11: 239
Cited in *Smith v. Maryland*, 18 How. 76, 15 L. ed. 271—*The Siren* (The *Siren v. United States*) 7 Wall. 156, 19 L. ed. 131—*The John Perkins*, 21 Month. Law Rep. 96, Fed. Cas. No. 7,360—*The Porpoise*, 2 Curt. C. C. 310, Fed. Cas. No. 11,284—*The Elexena*, 58 Fed. 366—*Hey Sing Leck v. Anderson*, 57 Cal. 253, 40 Am. Rep. 115.

29. When embarked on a piratical cruise, every individual becomes equally punishable, under the law of April 30, 1790, whatever may be his national character, or that of the vessel in which he sailed, or the vessel attacked. *United States v. Furlong*, 5 Wheat. 184, 5: 64

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On Dissolving Attachment, see Attachment, 65.

In Process of Outlawry, see Attainder and Outlawry, 23.

1. No formal complaint or pleadings are required in the proceedings under the act of May 5, 1892 (27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319), as amended by the act of November 3, 1893 (28 Stat. at L. 7, chap. 14, U. S. Comp. Stat. 1901, p. 1322), for the determination of the right of Chinese laborers to remain in the United States. *Ah How v. United States*, 193 U. S. 65, 24 Sup. Ct. Rep. 357, 48: 619 Cited in *United States v. Fah Chung*, 132 Fed. 110.

2. In equity a party cannot succeed upon a case proved but not alleged, any more than upon a case alleged but not proved. *Foster v. Goddard*, 1 Black, 506, 17: 228 *Groscholz v. Newman*, 21 Wall. 481, 22: 471 Cited in *Agawam Woolen Co. v. Jordan*, 7 Wall. 607, 19 L. ed. 183—*Providence Rubber Co. v. Goodyear*, 9 Wall. 793, 19 L. ed. 568—*Blandy v. Griffith*, 3 Fisher, Pat. Cas. 614, Fed. Cas. No. 1,529—*Bradley v. Converse*, 4 Chff. 367, Fed. Cas. No. 1,775—*Bunnel v. Stoddard*, Fed. Cas. No. 2,135—*Goodyear v. Providence Rubber Co.* 2 Chff. 370, 2 Fisher, Pat. Cas. 509, Fed. Cas. No. 5,583—

Lawrence v. Dana, 4 Cliff. 63, Fed. Cas. No. 8,136—Phelps v. Elliott, 35 Fed. 461—Edison Electric Light Co. v. Peninsular Light, Power & Heat Co. 95 Fed. 676—Baldwin v. Liverpool & L. & G. Ins. Co. 59 C. C. A. 662, 124 Fed. 208—Merrill v. Washburn, 83 Me. 191, 22 Atl. 118—Thompson v. Thompson, 126 Pa. 371, 17 Atl. 643.

Form.

Pleading in Positive Language, see *infra*, 597.

Waiver of Defects in, see Pleading, 30.
Special Demurrer for Defect in Form, see *infra*, 841, 858, 859.

See also *infra*, 732.

3. In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice. *Minor v. Mechanics Bank*, 1 Pet. 46, 7: 47

Otted in Morris v. Wheat, 11 App. D. C. 214—*Chadbourne v. Rackliff*, 80 Me. 358.

4. The court will not ordinarily sustain an objection directed more to the form than the merits of the action. *Marsteller v. M'Clean*, 7 Cranch, 156, 3: 300

5. An equitable discretion in relation to its rules of pleading is always exercised by a court of chancery, whenever it is found necessary to do so for the purpose of justice. *Rhode Island v. Massachusetts*, 14 Pet. 210, 10: 423

Cited in Florida v. Georgia, 17 How. 493, 15 L. ed. 189—*United States v. Dallas Military Road Co.* 140 U. S. 816, 35 L. ed. 565, 11 Sup. Ct. Rep. 989—*Matthews v. Lalance & G. Mfg. Co.* 18 Blatchf. 37, 5 Bann. & Ard. 322, 2 Fed. 234—*Sharp v. Reissner*, 20 Blatchf. 12, 9 Fed. 447—*Chisholm v. Johnson*, 84 Fed. 386—*Benson v. San Diego*, 100 Fed. 161—*Reavis v. Reavis*, 101 Fed. 23.

Counts.

Waiver by Leaving One Count without Answer, see *infra*, 39.

Curing Defects in Special Counts, see *infra*, 44.

6. A plaintiff may, before verdict, discontinue a count in his declaration, and waive the issues joined thereon, without affecting the other counts. *Hughes v. Moore*, 7 Cranch, 176, 3: 307
Cited in Leavitt v. Cowles, 2 McLean, 493, Fed. Cas. No. 8,171—*Crandall v. Lynch*, 20 App. D. C. 78.

b. Verification.

Lack of Verification of Reply, see *infra*, 131.
Admission by Failure to Interpose Verified Pleas, see *infra*, 155.

Lack of, as Ground for Demurrer, see *infra*, 844.

Verification by Deputy Clerk as Ground of Demurrer, see *infra*, 854.

In Admiralty, see Admiralty, 489-491.

Duty of Corporation to Answer under Oath, see Corporations, 281.

Answer in equity.

Probative Effect of Answer not under Oath, see Evidence, 2483.

See also *infra*, 26.

7. Unless a plaintiff in equity waives the answer under oath, the answer must be sworn to, and is evidence. *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. Rep. 1001, 30: 112

Otted in Dravo v. Fabel, 132 U. S. 489, 33 L. ed. 422, 10 Sup. Ct. Rep. 170—*McCalla v. Bane*, 45 Fed. 835—*Childs v. N. B. Carlstein Co.* 76 Fed. 91—*Penn Mut. L. Ins. Co. v. Union Trust Co.* 83 Fed. 894—*Callvada Colonization Co. v. Hays*, 119 Fed. 206—*Dewey Hotel Co. v. United States Electric Lighting Co.* 17 App. D. C. 365—*Kahn v. Weinlander*, 39 Fla. 217, 22 So. 653—*Throckmorton v. Throckmorton*, 86 Va. 770, 11 S. E. 289.

8. An answer verified by an affidavit cannot be deprived of its effect by the fact that complainants waived an answer under oath. *Clements v. Moore (Clements v. Nicholson)* 6 Wall. 299, 18: 786

Denial of execution of instrument.

Pleading in Action in Assumpsit, see *infra*, 477, 478.

Effect on Admissibility in Evidence, see Evidence, 992.

See also *infra*, 875.

9. An affidavit of verification in an action on county warrants, that the facts stated in the answer as defenses to the various causes of action declared on are true, and that the warrants sued on are not genuine, is a sufficient compliance with the statute requiring the verification of any answer containing a denial of the execution of an instrument on which suit is brought. *Apache County v. Barth*, 177 U. S. 538, 20 Sup. Ct. Rep. 718, 44: 878

10. The Illinois statute declaring that no person shall deny an instrument upon which action may have been brought, unless he shall verify his plea by affidavit, has no application to a defense that the contract in bills of lading sued upon has been fully performed. *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 7 Sup. Ct. Rep. 1132, 30: 1077

c. Definiteness; Particularity.

Waiver of Objections for Indefiniteness, see *infra*, 57.

In Bill of Particulars, see *infra*, 77, 78.

Definiteness of Declaration in Ejectment, see *infra*, 570-578.

General Demurrer for Indefiniteness, see *infra*, 856.

See also *infra*, 286, 447, 644, 760.

11-12. The law requires that every issue be founded on some certain points, that parties may not be taken by surprise, and that the jury be not misled by the introduction of various matters. *Minor v. Mechanics Bank*, 1 Pet. 46, 7: 47
Cited in Philip Schneider Brewing Co. v. American Ice Mach. Co. 23 C. C. A. 95, 40

U. S. App. 382, 77 Fed. 144—*Geat v. Shaw*, 1 Pinney (Wis.) 614.

13. Where an answer alleged that a statement furnished was false, and that, instead of a balance of \$3,400, there was less than \$1,550 due, and the court ordered the answer to be made more definite and precise by setting forth the statement referred to, and the particulars and items of alleged fraud and error, a second answer alleging that the original statement had been lost or destroyed, but presenting a copy of it, and definitely specifying four items which aggregated more than the difference between the sums first mentioned, must be held a sufficient compliance with the order. *Fuller v. Claffin*, 93 U. S. 14, 23: 785

In bill in equity.

In Action to Quiet Title, see *infra*, 452.
Sufficiency of Allegations of Fraud, see *infra*, 536–552a.

Necessity of Proof on Decree *Pro Confesso* if Allegations are Indefinite, see Judgment, 55.

See also *infra*, 286.

14–17. A bill in equity must contain a sufficiently certain, though general, statement of the essential ultimate facts upon which the complainant rests his claim for relief. General certainty is sufficient in pleadings in equity. *St. Louis v. Knapp*, S. & Co. 104 U. S. 658, 26: 883

d. Inconsistency.

Admission of Inconsistent Matter by Demurrer, see *infra*, 902.

In Admiralty, see Admiralty, 467.

Inconsistency in Indictment, see Indictment, etc., 146.

18–19. Allegations, if inconsistent with facts, of which the court is bound to take judicial notice, cannot be treated as conclusively supporting the verdict and judgment. *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. Rep. 80, 34: 691
Chief in Racer v. State, 131 Ind. 402, 31 N. E. 81.

Inconsistent defenses.

Including More Than one Defense in Plea Generally, see *infra*, 592–595.

Mandamus to Control, see Mandamus, 52.

20. In a suit against a carrier to recover for damages sustained by loss of goods by fire, defenses which contest all liability whatever are not repugnant to those seeking to establish a limited liability. *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 3 Sup. Ct. Rep. 379, 617, 27: 1038

21. In a redhibitory action in Louisiana, "for the avoidance of a sale on account of some vice or defect in the thing sold which renders it either absolutely useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice," an amended answer, in addition to a general

denial, insisting that the loss, if any, has occurred to plaintiff through his own negligence and disregard of the terms of sale, which was at auction and required examination before the property was accepted, is not contradictory, and a waiver of a general denial. *Andrews v. Hensler*, 6 Wall. 254, 18: 737

— Editorial note.

[Right to plead. 48 L.R.A. 177.]

e. Implication.

See also *infra*, 322, 333.

22. Under the Colorado Code of Civil Procedure, as at common law, facts may be pleaded according to their legal effect, without setting out the particulars that lead to it; and necessary circumstances implied by law need not be expressed in the plea. *Sullivan v. Iron Silver Min. Co.* 109 U. S. 550, 3 Sup. Ct. Rep. 339, 27: 1028

f. Conclusions.

Admission of, by Demurrer, see *infra*, 908–924.

See also *infra*, 538.

Ultimate facts.

23. For the purposes of pleading, the ultimate fact to be proved need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence. *McAllister v. Kuhn*, 96 U. S. 87, 24: 615
Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23: 898
Cited in Lavis v. Wisconsin C. R. Co. 54 Ill. App. 643—*Wilson v. Commercial Union Assur. Co.* 51 S. C. 543, 64 Am. St. Rep. 700, 29 S. E. 245—*Nebeker v. Harvey*, 21 Utah, 373, 60 Pac. 1029.

Legal effect.

See also *supra*, 22; *infra*, 537.

24. It is a rule in pleadings that facts may be stated according to their legal effect. *Bank of the Metropolis v. Guttachlick*, 14 Pet. 19, 10: 335
Cited in Nines v. Georgetown Gas Co. 3 App. D. C. 376—*Washington & G. R. Co. v. Hickey*, 5 App. D. C. 487—*St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 198, 54 Am. Dec. 840—*Hare v. Winterer*, 1 Herdman (Neb.) 855, 96 N. W. 179—*Swift & Co. v. Blease*, 68 Neb. 741, 57 L.R.A. 148, 89 N. W. 310.

Conclusions of law.

Admission of, by Demurrer, see *infra*, 916–922.

Mode of Pleading Illegality of Detention in Petition for Habeas Corpus, see Habeas Corpus, 203–205.

25. Pleadings must state facts, not conclusions of law. *Alabama v. Burr*, 115 U. S. 413, 6 Sup. Ct. Rep. 81, 29: 435
Cited in Fideler v. Norton, 4 Dak. 282, 32 N. W. 57—*Stutsman Co. v. Mansfield*, 5 Dak. 86, 37 N. W. 304.

26. A plea in equity may be disregarded,

if it alleges mere conclusions of law, or lacks the affidavit and certificate required by the 31st equity rule. *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26: 693

Cited in Farley v. Kittson, 120 U. S. 316, 30 L. ed. 689, 7 Sup. Ct. Rep. 534—Schuler v. Laclede Bank, 27 Fed. 426—Preston v. Finley, 72 Fed. 853—Brazoria County v. Youngstown Bridge Co. 25 C. C. A. 309, 52 U. S. App. 6, 80 Fed. 13—American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 183, 90 Fed. 599—Mutual L. Ins. Co. v. Blair, 130 Fed. 973—Straughan v. Hallwood, 30 W. Va. 295, 8 Am. St. Rep. 29, 4 S. E. 394.

27. The jurisdictional allegation that the plaintiffs are without adequate remedy at law is a mere inference or conclusion, which must be made out by facts averred or proved. *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. Rep. 646, 35: 273

28. General averments that a judgment was "an irregular and void judgment," or was "irregular" and "without any jurisdiction or authority," are averments of legal conclusions merely. *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. Rep. 171, 40: 133

29. An allegation that investments were "taxable capital," without describing their character, is an averment in the nature of a legal conclusion. *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 17 Sup. Ct. Rep. 629, 41: 1069
National Bank of Commerce v. Seattle, 166 U. S. 463, 17 Sup. Ct. Rep. 996, 41: 1079

g. Defects Waived or Cured; Time for Objections.

Raising Objection by Plea in Abatement or other Mode, see *infra*, III. d.

Consent to Filing of Amended Petition as Waiver of Defense, see *infra*, 217.

Curing Defect by Reply, see *infra*, 805-808.
First Raising Objection on Appeal, see Appeal and Error, VIII. j, 4.

Curing Defects Otherwise than by Pleadings, see Appeal and Error, VIII. k, 2.

Time for Objecting to Sufficiency of Indictment, see Indictment, etc., V.

See also *infra*, 248, 249.

29a. Omission or refusal by a defendant to join in demurrer to a plea is a waiver of the plea. *Morsell v. Hall*, 13 How. 212, 14: 117

Waiver by pleading or going to trial.

By Plea of *Puis Darrein Continuance*, see *infra*, 630, 631.

Waiver by Pleading over after Demurrer, see *infra*, VII. g.

In Criminal Case, see Criminal Law, 136-138.

Of False Return of Service, see Writ and Process, 121.

See also *infra*, 51, 52, 248, 602.

29b. Where the plaintiff has replied without taking an exception to the plea, he cannot,

on demurrer to the replication, avail himself of any defect that would not have been fatal on general demurrer. *United States v. Morris*, 10 Wheat. 246, 6: 314
Cited in Childress v. Foster, 3 Ark. 258—*Lake Shore & M. S. R. Co. v. Hessians*, 150 Ill. 558, 37 N. E. 905—*Frazer v. Roberts*, 32 Mo. 461.

30. Defects of form in the pleadings are waived by pleading to the merits or replying to an antecedent pleading. *Ferguson v. Meredith* (*Clearwater v. Meredith*) 1 Wall. 25, 17: 604

Cited in Delaware & H. Canal Co. v. Pennsylvania Coal Co. 8 Wall. 287, 19 L. ed. 353—*Baltimore & O. E. Co. v. Harris*, 12 Wall. 84, 20 L. ed. 359.

30a. By a plea to the merits, where the parties went to trial, all antecedent irregularities were waived. *Bell v. Mobile & O. R. Co.* 4 Wall. 598, 18: 338

Cited in Stanton v. Embrey, 93 U. S. 553, 23 L. ed. 984—*Cuthbert v. Galloway*, 35 Fed. 468—*Robinson v. Hartridge*, 13 Fla. 507—*Fisher v. Scholte*, 30 Iowa, 222—*Pottinger v. Garrison*, 3 Neb. 223—*Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 301, 23 Am. Rep. 214—*State v. Chadwick*, 10 Or. 427—*Young v. Martin*, 3 Utah, 486, 24 Pac. 909.

31. Defendant, by pleading to the merits, without insisting upon the illegality of the service of the process, waives objection to the jurisdiction of the court. *Irvine use of Lumberman's Bank v. Lowry*, 14 Pet. 293, 10: 462

Cited in Knott v. Southern L. Ins. Co. 2 Woods, 481, Fed. Cas. No. 7,894—*Lee v. Aetna Ins. Co.* Fed. Cas. No. 8,181—*Winans v. McKean R. & Nav. Co.* 6 Blatchf. 219, Fed. Cas. No. 17,862—*Robinson v. National Stockyard Co.* 20 Blatchf. 514, 12 Fed. 362—*Barnes v. Western U. Teleg. Co.* 120 Fed. 555—*Wheeler v. Cobb*, 75 N. C. 25.

31a. By pleading over in bar, a party waives all pleas in abatement. *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20: 354
Cited in Cuthbert v. Galloway, 35 Fed. 468—*Provisional Municipality v. Lehman*, 6 C. C. A. 355, 13 U. S. App. 411, 57 Fed. 330—*Cruzen v. McKaig*, 57 Md. 459—*Tice v. Shaw*, 68 Md. 9, 11 Atl. 582.

32. Plea of *non assumpsit* is a waiver of pleas to the jurisdiction for lack of proper parties. *Bailey v. Dozier*, 6 How. 23, 12: 328

Evans v. Gee, 11 Pet. 80, 9: 639

Simms v. Hundley, 6 How. 1, 12: 319

Cited in Smith v. Kernochen, 7 How. 218, 12 L. ed. 674—*Sheppard v. Graves*, 14 How. 511, 14 L. ed. 520—*Scott v. Sandford*, 19 How. 519, 15 L. ed. 748—*De Sobry v. Nicholson*, 3 Wall. 423, 18 L. ed. 264—*Farmington v. Pillsbury*, 114 U. S. 143, 29 L. ed. 116, 5 Sup. Ct. Rep. 807—*Davies v. Lathrop*, 21 Blatchf. 165, 13 Fed. 566—*Tyler v. Murray*, 57 Md. 438.

32a. If a plea in abatement be filed with the general issue, the latter waives the former. *De Sobry v. Nicholson*, 3 Wall. 420, 18: 263

Cited in Farmington v. Pillsbury, 114 U. S. 143, 29 L. ed. 116, 5 Sup. Ct. Rep. 807—*Davies v. Lathrop*, 21 Blatchf. 165, 13 Fed. 566—*Rae v. Grand Trunk R. Co.* 14 Fed.

402—*Missouri P. R. Co. v. Meeh*, 30 L.R.A. 250, 16 C. C. A. 512, 32 U. S. App. 691, 69 Fed. 755.

33. Objections to the jurisdiction of the court or the competency of the parties are matters pleadable in abatement only; and if, after such matters are relied upon, a defense in bar be interposed, the grounds alleged in abatement are waived. *Sheppard v. Graves*, 14 How. 512, 14: 521

Cited in *Scott v. Sandford*, 19 How. 519, 15 L. ed. 748—*Spencer v. Lapsley*, 20 How. 267, 15 L. ed. 904—*De Sobry v. Nicholson*, 3 Wall. 423, 18 L. ed. 264—*Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 373, 34 L. ed. 367, 10 Sup. Ct. Rep. 1004—*Roberts v. Lewis*, 144 U. S. 656, 36 L. ed. 582, 12 Sup. Ct. Rep. 781—*Adams v. White*, 2 Pittsb. 28, Fed. Cas. No. 68, 7 Pittsb. L. J. 41—*Lanning v. Lockett*, 4 Woods, 459, 11 Fed. 817—*Davies v. Lathrop*, 13 Fed. 566—*Rae v. Grand Trunk R. Co.* 14 Fed. 402—*Draper v. Springfield*, 21 Blatchf. 243, 15 Fed. 331—*Oregonian R. Co. v. Oregon R. & Nav. Co.* 27 Fed. 279—*Wittmore v. Malcomson*, 28 Fed. 606—*Imperial Ref. Co. v. Wyman*, 3 L.R.A. 505, 38 Fed. 576—*Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co.* 14 C. C. A. 296, 31 U. S. App. 252, 67 Fed. 40—*Missouri P. R. Co. v. Meeh*, 30 L.R.A. 252, 16 C. C. A. 512, 32 U. S. App. 691, 69 Fed. 755—*Jones v. Rowley*, 78 Fed. 288—*Newport News & M. Valley R. Co. v. Thomas*, 96 Ky. 615, 29 S. W. 437—*Tyler v. Murray*, 57 Md. 438—*Cruzen v. McKaig*, 57 Md. 459—*Reilly v. Dougherty*, 60 Md. 278—*Tise v. Shaw*, 68 Md. 9, 11 Atl. 582—*Dutcher v. Dutcher*, 39 Wis. 662.

34. The objection that tenants holding severally are counted against jointly in a writ of right must be pleaded in abatement or it will be deemed waived. *Liter v. Green*, 2 Wheat. 306, 4: 246
Cited in *Bolling v. Petersburg*, 3 Rand. (Va.) 583.

35. The error of not suing one or all of the obligors of a joint and several bond, but an intermediate number, if not taken advantage of by plea in abatement, is waived by pleading to the merits. *Minor v. Mechanics Bank*, 1 Pet. 46, 7: 47
Cited in *Bargh v. Page*, 4 McLean, 11, Fed. Cas. No. 980—*Chandler v. Byrd*, Hempst. 223, Fed. Cas. No. 2,591b—*Rowe v. Chandler*, 1 Cal. 171.

36-7. Allegations and pleadings to the merits are a waiver of the preliminary inquiry as to proprietary interest, and an admission that the party is rightly in court and capable of contesting the merits. *United States v. Hazard* (*United States v. 422 Casks of Wine*) 1 Pet. 547, 7: 257
Cited in *The Prindiville*, Brown, 487, Fed. Cas. No. 11,435.

38. The illegality of a contract cannot be waived by pleading. The defense is allowed, not for the sake of the defendant, but of the law itself. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. *Hall v. Coppell* (*Coppell v. Hall*) 7 Wall. 542, 19: 244
Cited in *Burbank v. Conrad*, 96 U. S. 302,

24 L. ed. 727—*Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 268, 26 L. ed. 543—*Embrey v. Jemison*, 131 U. S. 349, 33 L. ed. 177, 9 Sup. Ct. Rep. 776—*McMullen v. Hoffman*, 174 U. S. 658, 43 L. ed. 1124, 19 Sup. Ct. Rep. 839—*Oscanyan v. Winchester Repeating Arms Co.* 15 Blatchf. 88, Fed. Cas. No. 10,600—*Stewart v. National Union Bank*, 2 Abb. (U. S.) 432, Fed. Cas. No. 13,435—*Blackwell v. Webster*, 23 Blatchf. 539, 29 Fed. 615—*Carter-Crume Co. v. Peurung*, 30 C. C. A. 176, 58 U. S. App. 388, 86 Fed. 440—*Cumberland Teleph. & Teleg. Co. v. Evansville*, 127 Fed. 198—*Harcrow v. Gardiner*, 69 Ark. 20, 64 S. W. 881—*Shenk v. Phelps*, 6 Ill. App. 619—*Dow v. Higgins*, 72 Ill. App. 305—*Brieske v. North Chicago Street R. Co.* 82 Ill. App. 260—*Shortall v. Fitzsimons & C. Co.* 93 Ill. App. 234—*Zumpfe v. Gentry*, 153 Ind. 227, 54 N. E. 805—*Canaler v. Penland*, 125 N. C. 580, 48 L.R.A. 442, 34 S. E. 683—*Baltimore & O. R. Co. v. Diamond Coal Co.* 61 Ohio St. 252, 55 N. E. 616—*Delaware River Quarry & Constr. Co. v. Bethlehem & N. Street R. Co.* 7 Northampton Co. Rep. 347—*East Stroudsburg Nat. Bank v. Selpie*, 29 Pa. Co. Ct. 247—*Fowler v. Scully*, 72 Pa. 466, 13 Am. Rep. 699—*Brown v. Newell*, 64 S. C. 72, 41 S. E. 835—*Minnesota Sandstone Co. v. Clark*, 35 Wash. 472, 77 Pac. 803.

39. Where a plea is withdrawn, and one count in the declaration left without answer, and both parties proceed thereafter throughout the trial as if but one count was contained in the declaration, it must be understood that the second count was waived, where there is nothing to show that judgment was rendered upon it. *Aurora v. West*, 7 Wall. 82, 19: 42

40. Error in sustaining in part and overruling in part a bill in equity is waived by plaintiff, by an amendment of the bill. *Marshall v. Vicksburg*, 15 Wall. 146, 21: 121
Cited in *Darracott v. Chesapeake & O. R. Co.* 83 Va. 290, 5 Am. St. Rep. 266, 2 S. E. 511—*Harris v. Norfolk & W. R. Co.* 88 Va. 562, 14 S. E. 535.

41-2. An answer which states material facts omitted from the bill waives any objection to such omission. *Cavender v. Cavender*, 114 U. S. 464, 5 Sup. Ct. Rep. 955, 29: 212
Cited in *Provisional Municipality v. Lehman*, 6 C. C. A. 355, 13 U. S. App. 411, 57 Fed. 330—*Richardson v. Green*, 9 C. C. A. 574, 15 U. S. App. 488, 61 Fed. 431.

43. In Louisiana, if the defendant goes to trial on a petition defective in not setting forth the deed under which plaintiff claims, he waives the objection. *Waples v. Hays*, 108 U. S. 6, 1 Sup. Ct. Rep. 80, 27: 632

— Editorial note.

Pleading to the merits waives plea in abatement. 14: 518

Curing defective pleading.

44. If special counts have no formal conclusion, § 32 of the judiciary act would cure the defect. *Bank of the Metropolis v. Gutschlick*, 14 Pet. 19, 10: 335
Cited in *Chandler & T. Co. v. Norwood*, 14 App. D. C. 364.

45. When the complaint or bill is defec-

tive in some material allegation, which is supplied by the answer, the defect is cured. *Hagan v. Walker*, 14 How. 29, 14: 312. *Cited in Richardson v. Green*, 9 C. C. A. 574, 15 U. S. App. 488, 61 Fed. 431.

46. If a declaration against a corporation is insufficient in alleging its corporate character and existence within the jurisdiction of the court, additional averments in the replication, admitted by demurrer to be true, may cure the defect. *Lafayette Ins. Co. v. French*, 18 How. 404, 15: 451. *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20: 354.

Cited in Covington Drawbridge Co. v. Shepherd, 20 How. 233, 15 L. ed. 899—*Baltimore & O. R. Co. v. Harris*, 12 Wall. 86, 20 L. ed. 359—*McNitt v. Turner*, 16 Wall. 363, 21 L. ed. 347—*Muller v. Dows*, 94 U. S. 446, 24 L. ed. 208—*Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 454, 44 L. ed. 844, 20 Sup. Ct. Rep. 890—*American Sugar Ref. Co. v. Johnson*, 9 C. C. A. 116, 13 U. S. App. 681, 60 Fed. 509—*Iroquois Furnace Co. v. Wilkin Mfg. Co.* 77 Ill. App. 63.

47. In an action of debt, an omission in the declaration to state any damages, if in any respect material, is cured by an averment of an *ad damnum* in the writ. *Childress v. Emory*, 8 Wheat. 642, 5: 705.

— Editorial note.

What defects are cured by verdict. 23: 490

Parties.

Curing Defect by Amendment, see *infra*, 196.

Mistake in Name of Defendant, see Judgment, 85, 86.

See also *supra*, 32, 35; *infra*, 61.

48. The misdescription of the plaintiff in a bond is cured by an averment of identity in the declaration. *United States v. Bradley*, 10 Pet. 343, 9: 448.

49. That omitting the names of a part of the joint obligees, in an action of debt on a bond, was to give jurisdiction to the circuit court, does not cure the omission. *Farni v. Tesson*, 1 Black, 309, 17: 67. *Cited in Abrahams v. Jones*, 20 Ill. App. 87.

Variance.

Curing Variance by Amendment, see *infra*, 216.

Mode of Raising Objection to Variance between Writ and Declaration, see *infra*, 661-664.

As Ground for Demurrer, see *infra*, 880.

Variance Between Allegations and Proof Generally, see Evidence, XIII. b.

See also *infra*, 52, 110.

50. Where a defendant in attachment appeared and gave bail, whereupon a declaration was filed, to which the defendant pleaded, a variance between the manner in which defendant is charged in an account filed in the attachment proceedings, and in the declaration on which the cause was tried, is deemed waived, the cause standing as if the suit had been brought in the usual manner. *Barry v. Foyles*, 1 Pet. 311, 7: 157. *Cited in Toland v. Sprague*, 12 Pet. 381, 9 L. ed. 1106—*St. Louis & S. F. R. Co. v. Mc-*

Bride, 141 U. S. 132, 35 L. ed. 661, 11 Sup. Ct. Rep. 982—*Smith v. Miln*, Abb. Adm. 381. Fed. Cas. No. 13,081—*Kansas City & T. R. Co. v. Interstate Lumber Co.* 37 Fed. 5—*Southern Exp. Co. v. Todd*, 5 C. C. A. 435, 12 U. S. App. 351, 56 Fed. 107—*The Willamette*, 31 L.R.A. 719, 18 C. C. A. 370, 44 U. S. App. 26, 70 Fed. 878—*Creagh v. Equitable Life Assur. Soc.* 83 Fed. 850—*Fox v. Mackenzie*, 1 N. D. 303, 47 N. W. 388—*Murphy v. Montandon*, 3 Idaho, 330, 35 Am. St. Rep. 279, 29 Pac. 851—*Journey v. Dickerson*, 21 Iowa, 315—*Bates v. Killian*, 17 S. C. 556—*McNulty v. Batly*, 2 Pinney (Wis.) 56.

Time for objections.

See also *infra*, 599, 633.

51. A plea in abatement, after the defendants had pleaded to the merits, is too late. *Cook v. Burnley*, 11 Wall. 659, 20: 29. *Cited in Converse v. Michigan Dairy Co.* 45 Fed. 20—*State use of Bashe v. Boyce*, 73 Md. 142, 7 L.R.A. 272, 20 Am. St. Rep. 458, 19 Atl. 366.

52. After pleading the general issue, it is too late to take advantage of a defect in the writ, or a variance between the writ and the declaration. *McKenna v. Fisk*, 1 How. 241, 11: 117. *Cited in Waldo v. Beckwith*, 1 N. M. 111.

53. The objection that a bill is multifarious must be taken before answer, and must be determined by the structure of the bill alone. *Nelson v. Hill*, 5 How. 127, 12: 81.

Cited in Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 751, 31 L. ed. 311, 8 Sup. Ct. Rep. 337—*Bunuel v. Stoddard*, Fed. Cas. No. 2,135—*Converse v. Michigan Dairy Co.* 45 Fed. 20—*Barber v. National Carbon Co.* 64 C. C. A. 47, 129 Fed. 377—*Thornton v. Houtse*, 91 Ill. 220—*Chicago Teleph. Co. v. Illinois Mfrs. Assn.* 106 Ill. App. 59—*Woodworth v. Gibbs*, 61 Iowa, 401, 16 N. W. 287—*Ronayne v. Loranger*, 66 Mich. 383, 33 N. W. 840—*Abbot v. Johnson*, 32 N. H. 23—*St. Lawrence Boom & Mfg. Co. v. Holt*, 51 W. Va. 379, 41 S. E. 351.

54. The objection that the plea of the statute of limitations is not good in equity without an answer on the merits must be taken at the time of offering the plea, and before issue is joined. *Wilson v. Koontz*, 7 Cranch, 202, 3: 315.

55. Where the loss of a deed is made the ground for coming into a court of equity for discovery and relief, an affidavit of its loss must be made and annexed to the bill; and its absence must be objected to at the earliest practicable stage of the cause; and, if not then made, is considered waived. *Findlay v. Hinde*, 1 Pet. 241, 7: 128. *Cited in Frazier v. Miller*, 16 Ill. 491—*Staford v. Bartholomew*, 2 Ind. 154—*Temple v. Gove*, 8 Iowa, 513, 74 Am. Dec. 320—*Nesbitt v. Dallam*, 7 Gill & J. 510, 28 Am. Dec. 238—*Hopkins v. Adams*, 20 Vt. 414.

56. [A declaration must be filed before trial, but after accepting a plea, and submitting to a rule of trial or *non pros*, plaintiff can take no advantage of failure to file it. *Wenn v. Adams* (Pa. Sup. Ct.) 3 Dall. 156, 1: 329]

57. An objection that a denial is indefinite or uncertain must be taken by a motion made, before trial, to make the answer definite and certain by amendment, and cannot be availed of by excluding evidence at the trial. *Burley v. German-American Bank*, 111 U. S. 216, 4 Sup. Ct. Rep. 341, 28: 406 *Cited in* *Peterson v. Ruhnke*, 46 Minn. 116, 48 N. W. 768.

58. On trial upon the merits it is too late to take exception to the capacity of the plaintiff to sue; this should have been done by a plea in abatement before the trial. *Conard v. Atlantic Ins. Co.* 1 Pet. 386,

7: 189

Obtained in *Sheppard v. Graves*, 14 How. 511, 14 L. ed. 520—*Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 214, 16 L. ed. 77—*Brown v. Noyes*, 2 Woodb. & M. 81, Fed. Cas. No. 2,023—*Missouri P. R. Co. v. Meeh*, 30 L.R.A. 252, 16 C. C. A. 512, 32 U. S. App. 691, 69 Fed. 755—*Gubbins v. Laughtenschlager*, 75 Fed. 621—*Strickland v. Burns*, 14 Ala. 513—*Washington v. Finley*, 10 Ark. 425, 52 Am. Dec. 244—*Dutcher v. Dutcher*, 39 Wis. 662.

59. A plea in abatement, filed in connection with other matters in bar, and pleaded without an affidavit five years after pleas in bar had been filed which remain undisposed of,—is properly disallowed. *Spencer v. Lapsley*, 20 How. 264, 15: 902 *Cited in* *Wythe v. Myers*, 3 Sawy. 600, Fed. Cas. No. 18,119—*Wittmore v. Malcomson*, 28 Fed. 606—*Cuthbert v. Galloway*, 35 Fed. 468—*Imperial Ref. Co. v. Wyman*, 3 L.R.A. 505, 38 Fed. 576.

60. The objection of misjoinder of complainants should be taken either by demurrer or on the answer; it is too late to urge an objection of this kind for the first time at the hearing. *Story v. Livingston*, 13 Pet. 359, 10: 200 *Cited in* *Carey v. Brown*, 92 U. S. 172, 23 L. ed. 470—*Florence Sewing Mach. Co. v. Singer Mfg. Co.* 8 Blatchf. 127, 4 Fisher, Pat. Cas. 344, Fed. Cas. No. 4,884—*Potter v. Wilson*, 2 Fisher, Pat. Cas. 110, Fed. Cas. No. 11,342—*Buckingham v. Estes*, 68 C. C. A. 22, 128 Fed. 586—*Robertshaw v. Hanway*, 52 Miss. 717—*Clayton v. Henley*, 32 Gratt. 75—*Iowa County v. Mineral Point R. Co.* 24 Wis. 134.

61. It is within the discretion of the trial court to allow or reject a plea that certain necessary plaintiffs were not joined, when offered after issue was joined on a plea in bar and the argument of the case had commenced. *Breedlove v. Nicolet*, 7 Pet. 413,

8: 731

Burbank v. Bigelow, 154 U. S. 558 Appx. and 14 Sup. Ct. Rep. 1163, 19: 51 *Cited in* *Akerly v. Villas*, 3 Biss. 341, Fed. Cas. No. 120—*Sprague v. Litherberry*, 4 McLean, 446, Fed. Cas. No. 13,251—*Welch v. County Court*, 29 W. Va. 68, 1 S. E. 337.

62. It is too late to raise a technical question of pleading after a full hearing and finding by the court of all the facts pertinent to the case, under a submission of the case to the court by the parties. *Adam v. Norris*, 103 U. S. 591, 26: 583 *Cited in* *United States v. Conway*, 175 U. S. 70, 44 L. ed. 76, 20 Sup. Ct. Rep. 13—*Less*

v. English, 29 C. C. A. 280, 56 U. S. App. 16, 85 Fed. 475—*Patillo v. Allen-West Commission Co.* 47 C. C. A. 645, 108 Fed. 731.

63. Objections to the name of plaintiff cannot be taken advantage of after judgment. *Breedlove v. Nicolet*, 7 Pet. 413, 8: 731

64. The objection that the bill was filed without leave of the court is of no force when the defendants appeared, answered, and cross-examined witnesses, without making the objection until about a year and a half afterwards. *Jerome v. McCarter*, 94 U. S. 734, 24: 136

Jurisdiction.

Raising Objection to Jurisdiction by Plea in Abatement, see *infra*, 634-644.

See also *infra*, 839.

65. The rule that an objection to want of jurisdiction of the person is not waived by pleading to the merits and going to trial after the objection has been overruled,—applied. *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. Rep. 401, 38: 248 *Cited in* *Chicago Bldg. & Mfg. Co. v. Pewthers*, 10 Okla. 729, 63 Pac. 964.

65a. Objection to jurisdiction on the ground of citizenship must be raised by plea in abatement; it cannot be raised in the trial on the merits. *Smith v. Kernochen*, 7 How. 198, 12: 666 *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. Rep. 807, 29: 114 *Cited in* *Sheppard v. Graves*, 14 How. 511, 14 L. ed. 520—*De Sobry v. Nicholson*, 3 Wall. 423, 18 L. ed. 264—*Williams v. Nottawa*, 104 U. S. 211, 26 L. ed. 720—*Farmington v. Pillsbury*, 114 U. S. 143, 29 L. ed. 116, 5 Sup. Ct. Rep. 807—*Little v. Giles*, 118 U. S. 601, 30 L. ed. 271, 7 Sup. Ct. Rep. 32—*Graves v. Corbin*, 132 U. S. 590, 33 L. ed. 469, 10 Sup. Ct. Rep. 196—*Wetmore v. Bymer*, 169 U. S. 119, 42 L. ed. 683, 18 Sup. Ct. Rep. 293—*Adams v. White*, 2 Pittsb. 23, Fed. Cas. No. 68—*Goodyear v. Blake*, Fed. Cas. No. 5,560—*Richardson v. Mattison*, 5 Biss. 31, Fed. Cas. No. 11,790—*Van Antwerp v. Hulburt*, 7 Blatchf. 442, Fed. Cas. No. 16,826—*Re Groome*, 1 Fed. 467—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 392, 9 Fed. 238—*Rae v. Grand Trunk R. Co.* 14 Fed. 402—*Hartog v. Memory*, 23 Fed. 837—*Sharon v. Hill*, 10 Sawy. 668, 26 Fed. 723—*Wittmore v. Malcomson*, 28 Fed. 606—*Bland v. Fleeman*, 29 Fed. 672—*Cuthbert v. Galloway*, 35 Fed. 468—*Imperial Ref. Co. v. Wyman*, 3 L.R.A. 505, 38 Fed. 576—*Keeney v. Roberts*, 39 Fed. 629—*Simon v. House*, 46 Fed. 319—*Southern Exp. Co. v. Todd*, 5 C. C. A. 434, 12 U. S. App. 351, 56 Fed. 105—*Missouri P. R. Co. v. Meeh*, 30 L.R.A. 252, 16 C. C. A. 512, 32 U. S. App. 691, 69 Fed. 755—*Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 215, 52 U. S. App. 442, 84 Fed. 780—*Indiana ex rel. Muncie v. Lake Erie & W. R. Co.* 85 Fed. 2—*Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 479, 101 Fed. 515—*Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 490, 101 Fed. 542—*Desert King Min. Co. v. Wedekind*, 110 Fed. 877—*Adams v. Skirk*, 55 C. C. A. 27, 117 Fed. 803.

66. Neither a special appearance for the purpose of objecting to the jurisdiction, nor

an answer to the merits after that objection has been overruled, is a waiver of the objection. *Southern P. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. Rep. 44, 36: 942

Cited in *Empire Coal & Transp. Co. v. Empire Coal & Min. Co.* 150 U. S. 184, 37 L. ed. 1039, 14 Sup. Ct. Rep. 86—*Central Trust Co. v. McGeorge*, 151 U. S. 134, 38 L. ed. 100, 14 Sup. Ct. Rep. 286—*Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 497, 38 L. ed. 249, 14 Sup. Ct. Rep. 401—*Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 220, 40 L. ed. 402, 16 Sup. Ct. Rep. 272—*Re Atlantic City R. Co.* 164 U. S. 685, 41 L. ed. 580, 17 Sup. Ct. Rep. 208—*Shepard v. Adams*, 168 U. S. 626, 42 L. ed. 604, 18 Sup. Ct. Rep. 814—*Southern Exp. Co. v. Todd*, 5 C. C. A. 434, 12 U. S. App. 351, 56 Fed. 106—*Standley v. Roberts*, 8 C. C. A. 818, 19 U. S. App. 407, 59 Fed. 844—*Klinne v. Lant*, 68 Fed. 489—*Rust v. United Waterworks Co.* 17 C. C. A. 24, 36 U. S. App. 167, 70 Fed. 137—*Creagh v. Equitable Life Assur. Soc.* 83 Fed. 850—*Donahue v. Calumet Fire-Clay Co.* 94 Fed. 27—*Lowry v. Tile, Mantel & Grate Asso.* 98 Fed. 822—*Scott v. Hoover*, 99 Fed. 250—*Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 490, 101 Fed. 542—*Fosha v. Western U. Tele. Co.* 114 Fed. 702—*Derk P. Yonkerman Co. v. Charles H. Fuller's Advertising Agency*, 135 Fed. 615—*State use of Gemundt v. Shipley*, 98 Md. 663, 57 Atl. 12—*Buel v. Baltimore & O. S. W. R. Co.* 24 Misc. 662, 53 N. Y. Supp. 749—*Debnam v. Southern Bell Teleph. & Tele. Co.* 126 N. C. 841, 65 L.R.A. 920, 36 S. E. 269—*Chicago Bldg. & Mfg. Co. v. Pewthers*, 10 Okla. 729, 63 Pac. 964.

66a. An objection that the suit was brought in the wrong district, made after the defendant has pleaded in bar, is too late. *Texas & P. R. Co. v. Saunders*, 151 U. S. 105, 14 Sup. Ct. Rep. 257, 38: 90
Cited in *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 220, 40 L. ed. 402, 16 Sup. Ct. Rep. 272—*Creagh v. Equitable Life Assur. Soc.* 83 Fed. 850—*Leas v. English*, 29 C. C. A. 281, 56 U. S. App. 16, 85 Fed. 477—*Platt v. Massachusetts Real-Estate Co.* 103 Fed. 706.

67. The exemption from being sued in a Federal court out of the district of defendant's domicile is a personal privilege, which may be waived, and which is waived by pleading to the merits. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. Rep. 286. 38: 98

Cited in *Martin v. Baltimore & O. R. Co.* (Gering v. Baltimore & O. R. Co.) 151 U. S. 688, 38 L. ed. 317, 14 Sup. Ct. Rep. 533—*Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 220, 40 L. ed. 402, 16 Sup. Ct. Rep. 272—*Newman v. Schwerin*, 10 C. C. A. 135, 22 U. S. App. 393, 61 Fed. 871—*The Willamette*, 31 L.R.A. 719, 18 C. C. A. 370, 44 U. S. App. 26, 70 Fed. 878—*Marks v. Marks*, 75 Fed. 332—*Collins v. Stott*, 76 Fed. 614—*Duncan v. Associated Press*, 81 Fed. 418—*Creagh v. Equitable Life Assur. Soc.* 83 Fed. 850—*Carter-Crume Co. v. Peurrung*, 30 C. C. A. 178, 58 U. S. App. 388, 86 Fed. 442—*Callahan v. Hicks*, 90 Fed. 542—*Rodgers v. Platt*, 96 Fed. 677—*Cowell v. City Water Supply Co.* 96 Fed. 769—*Scott v. Hoover*, 99 Fed. 250—*Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 490, 101 Fed. 541—*Platt v. Massachusetts Real-Estate Co.* 103 Fed. 706—*Citizen's Bank & T. Co. v. Union Min. & Gold Co.* 106 Fed. 98—*Whitworth v. Illinois C. R. Co.* 107 Fed. 559—*Virginia-*

Carolina Chemical Co. v. Sundry Ins. Co. 108 Fed. 453—*Empire Min. Co. v. Propeller Tow-Boat Co.* 108 Fed. 902—*Memphis Sav. Bank v. Houchens*, 52 C. C. A. 182, 115 Fed. 102—*Lewis v. American Naval Stores Co.* 119 Fed. 396—*Occidental Consol. Min. Co. v. Comstock Tunnel Co.* 120 Fed. 519—*Dickinson v. Saunders*, 63 C. C. A. 670, 129 Fed. 20—*Barbour v. Paige Hotel Co.* 2 App. D. C. 186—*Guarantee Sav. Loan & Invest. Co. v. Pendleton*, 14 App. D. C. 388—*White v. Rio Grande Western R. Co.* 25 Utah, 358, 71 Pac. 593.

67a. Where facts stated in the petition show a want of jurisdiction, because the defendant was the receiver appointed by a state court, to which alone he was responsible, the defendant may avail himself of the objection at any stage of the proceedings. *Peale v. Phipps*, 14 How. 363, 14: 459

68. An objection that an action should have been brought at law instead of in equity, or that the form of the remedy is objectionable, may be waived by failure to take advantage of it at the proper time. *Inaley v. United States*, 150 U. S. 512, 14 Sup. Ct. Rep. 158, 37: 1163
Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 14 Sup. Ct. Rep. 127, 37: 1113
Cited in *Folts v. St. Louis & S. F. R. Co.* 8 C. C. A. 641, 19 U. S. App. 576, 60 Fed. 322—*Union P. R. Co. v. Harris*, 12 C. C. A. 601, 27 U. S. App. 450, 63 Fed. 803.

69. After a defendant has put in an answer to a bill in chancery, submitting himself to the jurisdiction of the court, it is too late to insist that the complainant has a perfect remedy at law, unless the court is wholly incompetent to grant the relief sought by the bill. *Magwire v. Tyler* (Tyler v. Magwire) 17 Wall. 253, 21: 576
Cited in *Tubb v. Fort*, 58 Ala. 284—*Kaufman v. Wiener*, 169 Ill. 602, 48 N. E. 479.

70. Where a court of equity may grant the relief sought and has jurisdiction of the subject-matter, the objection that there is a plain remedy at law should be taken at the earliest opportunity and before the defendants enter upon a full defense. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. Rep. 594, 32: 1005

Cited in *Brown, B. & Co. v. Lake Superior Iron Co.* 134 U. S. 536, 33 L. ed. 1025, 10 Sup. Ct. Rep. 604—*Allen v. Pullman's Palace Car Co.* 139 U. S. 662, 35 L. ed. 305, 11 Sup. Ct. Rep. 682—*Tyler v. Savage*, 143 U. S. 97, 36 L. ed. 89, 12 Sup. Ct. Rep. 340—*Hollins v. Brierfield Coal & I. Co.* 150 U. S. 381, 37 L. ed. 1115, 14 Sup. Ct. Rep. 127—*Perego v. Dodge*, 163 U. S. 164, 41 L. ed. 116, 16 Sup. Ct. Rep. 971—*Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 381, 46 L. ed. 605, 22 Sup. Ct. Rep. 410—*Mills v. Knapp*, 39 Fed. 595—*Washburn & M. Mfg. Co. v. Cincinnati Barbed Wire Fence Co.* 42 Fed. 673—*Preteca v. Maxwell Land Grant Co.* 1 C. C. A. 610, 4 U. S. App. 326, 50 Fed. 677—*Reynolds v. Watkins*, 9 C. C. A. 274, 22 U. S. App. 83, 60 Fed. 825—*Ross v. Ft. Wayne*, 11 C. C. A. 291, 24 U. S. App. 113, 63 Fed. 469—*Western Electric Co. v. Reedy*, 66 Fed. 164—*McConnell v. Provident Sav. Life Assur. Soc.* 16 C. C. A. 175, 37 U. S. App. 213, 69 Fed. 115—*Elder v. McClaskey*, 17 C. C. A. 277, 37 U. S. App. 1, 70 Fed. 555—*Waite v. O'Neill*, 72 Fed. 352—*Temple v. Glasgow*, 25

C. C. A. 543, 42 U. S. App. 417, 80 Fed. 445—Guarantee Co. v. Mechanics Sav. Bank & T. Co. 26 C. C. A. 151, 47 U. S. App. 91, 80 Fed. 772—Waterloo Min. Co. v. Doe, 27 C. C. A. 54, 48 U. S. App. 411, 82 Fed. 49—Lone Jack Min. Co. v. Megginson, 27 C. C. A. 65, 48 U. S. App. 452, 82 Fed. 91—Ryder v. Bateman, 93 Fed. 22—Green v. Turner, 98 Fed. 760—New York & T. Land Co. v. Gulf, W. T. & P. R. Co. 41 C. C. A. 88, 100 Fed. 830—Williamson v. Monroe, 101 Fed. 329—Bliss v. Reed, 113 Fed. 947—United States v. Southern P. R. Co. 117 Fed. 553—Pryor v. McIntire, 7 App. D. C. 433—Tyler v. Moses, 13 App. D. C. 443—Waddingham v. Robledo, 6 N. M. 375, 28 Pac. 663.

71. The rule that an objection to the jurisdiction by a denial of the complainant's averment of citizenship could only be raised by a plea in abatement, or by demurrer, and not by answer, is modified by the act of March 3, 1875, under which the objection may be taken at any time, in the cases mentioned. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 10 Sup. Ct. Rep. 1004, 34: 363
Cited in Anderson v. Watt, 138 U. S. 701, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449—*Curnow v. Phoenix Ins. Co.* 44 Fed. 305—*Hewitt v. Story*, 30 L.R.A. 273, 12 C. C. A. 262, 29 U. S. App. 155, 64 Fed. 522—*Missouri P. R. Co. v. Meeh*, 30 L.R.A. 252, 16 C. C. A. 512, 32 U. S. App. 691, 69 Fed. 755—*Mason v. Dullaghan*, 27 C. C. A. 297, 53 U. S. App. 539, 82 Fed. 689—*Reavis v. Reavis*, 101 Fed. 22.

— Editorial note.

General answer by corporation as waiver of lack of diversity of citizenship. 3: 36

h. Exhibits.

Waiver of Objection for Lack of, see *supra*, 55.

Making Bond Part of Declaration by Oyer, see *infra*, 307.

72. Copies of bonds and coupons declared upon, filed with the declaration, in pursuance of the Illinois statute of February 22, 1872, become a part of the pleadings in the case. *Nauvoo v. Ritter*, 97 U. S. 389, 24: 1050

Cited in Coler v. Santa Fe County, 6 N. M. 114, 27 Pac. 619.

i. Bill of Particulars.

Review of Discretion as to, see *Appeal and Error*, 4435.

In Criminal Case, see *Criminal Law*, 131.

Editorial note.

Effect of bill of particulars. 9: 222

When granted.

In Criminal Case, see *Criminal Law*, 130a, 131.

73-4. Courts usually require a bill of particulars where the declaration is general, in order that the defendant may know what the cause of action is to which he is required to respond. Where all the items of the demand are distinctly and specifically

stated in the bill, it is sufficient. *Garfield v. Paris*, 96 U. S. 557, 24: 821
Cited in Carver v. O'Neal, 11 App. D. C. 357—*Richmond & D. R. Co. v. Payne*, 86 Va. 483, 6 L.R.A. 852, 10 S. E. 749.

Matters of evidence.

75. Matters of evidence are never required to be stated in a bill of particulars. *Garfield v. Paris*, 96 U. S. 557, 24: 821
Cited in George Campbell Co. v. Angus, 91 Va. 441, 22 S. E. 187—*Clarke v. Ohio River R. Co.* 39 W. Va. 742, 20 S. E. 696.

Conclusiveness.

76. While a party is bound by his bill of particulars as to the items claimed, he is not bound by a mistake in carrying out the rate or price, but may show the true sum due. *Ames v. Quimby*, 106 U. S. 342, 1 Sup. Ct. Rep. 116, 27: 100

Particularity.

77. A bill of particulars should be so specific as to inform the defendant substantially on what the plaintiff's action is founded. *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. 541, 9: 222
Cited in Laffin v. Shackelford, 39 C. C. A. 103, 98 Fed. 378.

78. The item of a bill of particulars upon which the jury gave a verdict for the plaintiff, which states the plaintiff's claim for damage to be, "the detention and damage sustained for want of cement on locks numbers 5 & 6," sufficiently expresses that the claim arises for a want of cement, although the bill does not specify fully the ground on which the plaintiff claims damages. *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. 541, 9: 222

Amendment.

79. If the defendant objects to the want of precision in a bill of particulars, the court will require it to be amended before trial. *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. 541, 9: 222

j. Pleading Laws.

Pleading Statute of Limitations, see *infra*, II. e; III. g. 2; III. h. 3.

Denial of Validity of Statute, see *infra*, 625.

Judicial Notice of Laws, see *Evidence*, I. b.

80. The general rule is that while the pleader is not bound to negative a proviso, he is bound to aver that the defendant is not within any of the exceptions contained in the enacting clause of the statute. *Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. Rep. 774, 42: 1162
Cited in Re Bellan, 116 Fed. 78—*Re Brett*, 130 Fed. 984—*Re Callison*, 130 Fed. 988—*Re Hafl*, 68 C. C. A. 649, 136 Fed. 81.

k. Judgment on Pleadings.

Nature of Judgment on Demurrer, see *infra*, 949-955.

Conformity of Judgment to Pleading, see *Judgment*, II. f.

See also *Trial*, 12.

81. Facts alleged to be established by the

testimony cannot be considered in passing upon a motion for judgment based on confession of the allegations of a counterclaim. *Daggs v. Phenix Nat. Bank*, 177 U. S. 549, 20 Sup. Ct. Rep. 732, 44: 882

82. Where a demurrer to a plea was overruled, and the plaintiff did not reply, but judgment was entered upon the plea, another plea of *nil debet* became immaterial, and the judgment was properly entered for the defendant. *United States v. Ballard*, 14 Wall. 457, 20: 845
Cited in *Wade v. Doyle*, 17 Fla. 530—*Kern v. Saul*, 14 Ind. App. 74, 42 N. E. 496.

83. Defendant is not entitled to judgment on the case made by a declaration in *indebitatus assumpsit* to recover money alleged to have been illegally exacted under color of state laws concerning passengers coming into the state of New York and an answer setting up as a defense an act of Congress to legalize the collection of head moneys already paid, since it does not appear from these allegations that the moneys paid and sued for were head moneys, or that they may not have been exacted and paid in violation of the state laws under color of which they were demanded. *Liverpool, N. Y. & P. S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 5 Sup. Ct. Rep. 352, 28: 899

84. An action against principal and surety on a bond to insure the faithful performance of a contract is one "arising *ex contractu*," within the meaning of rule 73 of the supreme court of the District of Columbia, authorizing judgment for plaintiff in such actions for want of a sufficient affidavit of defense. *Fidelity & D. Co. v. United States use of Smoot*, 187 U. S. 315, 23 Sup. Ct. Rep. 120, 47: 194

85. Copies of the bonds in suit, and of the contracts the faithful performance of which they were executed to secure, need not be filed in order to comply with the provisions of rule 73 of the supreme court of the District of Columbia, that in actions *ex contractu* a plaintiff who has filed an affidavit setting out distinctly his cause of action shall be entitled to judgment unless a sufficient affidavit of defense is filed. *Fidelity & D. Co. v. United States use of Smoot*, 187 U. S. 315, 23 Sup. Ct. Rep. 120, 47: 194

1. Relief under Pleadings.

Nature of Judgment on Demurrer, see *infra*, 949-955.

In Admiralty, see Admiralty, 455.

Right to Recover on Common or General Counts, see Assumpsit, 16-22.

Evidence Admissible Under Pleadings; Variance, see Evidence, XIII.

Conformity of Judgment to Pleadings, see Judgment. II. f.

Invalidity of Sale of Property not Included in Prayer, see Judicial Sale, 66.

Raising Question of Nonjoinder by Plea in Abatement, see Pleading, 645-647.

Raising Question of Misjoinder by Plea in Abatement, see Pleading, 648.
See also *infra*, 225.

86-7. If a case proper for specific relief was laid before a civil-law court, and the direct contrary to the proper relief was prayed for, yet the court would be justified in granting the relief that might be properly afforded, if the party who had committed the mistake consented to it. Without that, indeed, it might be improper; for no court ought to force a benefit on a party unwilling to receive it. *Penhallow v. Doane*, 3 Dall. 54, 1: 507

88. In a suit to quiet title to real property, where the petition asked that defendant might be required to produce his title if he set up color of title, and the defendant in his answer set up title, and asked that it be acknowledged and plaintiff compelled to surrender possession, judgment may be rendered in favor of defendant for the property in controversy. *Flournoy v. Lastrapes*, 131 U. S. cxi. Appx. and 25: 406

89. A prayer in a bill for a forfeiture of an entire land grant does not preclude a forfeiture of a part of it. *United States v. Tennessee & C. R. Co.* 176 U. S. 242, 20 Sup. Ct. Rep. 370, 44: 462

90. Relief will not be granted in equity where the allegations of the complainant show that he has no title or interest, legal or equitable, in the subject-matter of the controversy. *Selz v. Unna*, 6 Wall. 327, 18: 799

91. In a bill in the nature of a bill of interpleader, the relief sought must be equitable relief. *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. Rep. 232, 28: 246

92. In equity practice, the rule is that the complainant, if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative, so that, if one kind of relief is denied, another may be granted; the relief of each kind being consistent with the case made by the bill. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. Rep. 771, 28: 1141

Cited in *Hubbard v. Urton*, 67 Fed. 425—*McGraw v. Woods*, 96 Fed. 58—*Lyons v. McCurdy*, 90 Ala. 501, 8 So. 52—*Tennant v. Dunlop*, 97 Va. 239. 33 S. E. 620.

Prayer for general relief.

In Action for Specific Performance, see *infra*, 105-107.

In Foreclosure Suit, see *infra*, 117.

Recovery of Damages under, see *infra*, 118, 119.

Sufficiency of, in Admiralty, see Admiralty, 482.

Nature of Decree on Foreclosure under, see Mortgage, 355, 380.

See also *infra*, 112; Appeal and Error, 4565.

93. Only relief consistent with the case made in the bill can be granted under a

general prayer. *Patterson v. Jenks*, 2 Pet. 216, 7: 402
Cited in Pensacola & G. R. Co. v. Spratt, 12 Fla. 101, 91 Am. Dec. 747.

94. Relief consonant with the facts set out in, and agreeable to the case made by, a bill in equity, may be properly granted under the prayer of the bill for general relief. *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. Rep. 340, 36: 82

95. Although there is a prayer for general relief, the relief awarded must be conformable with the case made by the bill. *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24: 855

Cited in Lockhart v. Leeds, 195 U. S. 437, 49 L. ed. 269, 25 Sup. Ct. Rep. 76—*London & S. F. Bank v. Dexter Horton & Co.* 61 C. C. A. 531, 126 Fed. 609—*Sigourney v. Zellerbach*, 55 Cal. 440—*Livingston v. Hayes*, 43 Mich. 184, 5 N. W. 78—*Lockhart v. Leeds*, 10 N. M. 599, 63 Pac. 48.

96. Relief not conformable to the case made by the bill cannot be granted under the prayer for general relief. *Kent v. Lake Superior Ship Canal, R. & Iron Co.* 144 U. S. 75, 12 Sup. Ct. Rep. 650, 36: 352

97. Where a bill prays for such other and further relief as to the court shall seem just and proper, any relief that is agreeable to the case made by the bill can be granted under such general prayer. *Texas v. Hardenberg* (*Texas v. White*) 10 Wall. 68, 19: 839

Hobson v. McArthur, 16 Pet. 182, 10: 930
Cited in Jones v. Van Doren, 130 U. S. 692, 32 L. ed. 1080, 9 Sup. Ct. Rep. 685—*Crawford v. Moore*, 28 Fed. 827—*Savings & Loan Soc. v. Davidson*, 38 C. C. A. 372, 97 Fed. 703—*London & S. F. Bank v. Dexter Horton & Co.* 61 C. C. A. 531, 126 Fed. 609—*Hasen v. Lyndonville Nat. Bank*, 40 Vt. 556, 67 Am. St. Rep. 680, 41 Atl. 1046.

98. A court of equity cannot act on a case which is not fairly made out on the bill and answer. But it is not necessary that these should point out in detail the means which the court shall adopt in giving relief. Under the general prayer for relief, the court will often extend relief beyond the specific prayer and not exactly in accordance with it. Where a case for relief is made out in the bill, it may be given by imposing conditions on the complainant, consistent with the rules of equity, in the discretion of the court. *Walden v. Bodley*, 14 Pet. 156, 10: 398
Cited in Stevens v. Gladding, 17 How. 455, 15 L. ed. 158.

99. A prayer for general relief entitles the plaintiff to any relief which may be granted under his bill, and which is not inconsistent with the specific relief for which he asks. *Boon v. Chiles*, 8 Pet. 532, 8: 1034
Cited in Boone v. Chiles, 10 Pet. 228, 9 L. ed. 406—*Rhode Island v. Massachusetts*, 12 Pet. 732, 9 L. ed. 1263—*Decatur v. Paulding*, 14 Pet. 600 Appx. 10 L. ed. 609 Appx.

100. Under a prayer for such other and further relief as the case required, such relief may be granted as is not inconsistent

with the bill or the specific prayers. *Boone v. Chiles*, 10 Pet. 177, 9: 388
Cited in Sanford v. Cloud, 17 Fla. 575.

101. Relief under a general prayer in a bill which states all the facts should not be denied because it is asked upon a different theory of the law than that upon which a special prayer for relief is based, where both prayers are based upon the same facts, clearly set forth in the bill. *Lockhart v. Leeds*, 195 U. S. 427, 25 Sup. Ct. Rep. 76, 49: 263

102. On a bill in equity to compel a trustee to account for property received by him, and for other relief, if the appointment of a new trustee and the payment of the trust funds to him are necessary, such relief may be granted without any specific prayer therefor in the bill. *Mitchell v. Moore*, 95 U. S. 587, 24: 492

103. The court, under a prayer for general relief in a bill for the specific execution of a contract, will grant such relief only as the case stated in the bill and sustained by the proofs will justify. *Hobson v. McArthur*, 16 Pet. 182, 10: 930

Cited in Stevens v. Gladding, 17 How. 455, 15 L. ed. 158—*Durant v. Essex County*, 7 Wall. 110, 19 L. ed. 156—*Hayward v. Elliot Nat. Bank*, 96 U. S. 615, 24 L. ed. 857—*Lockhart v. Leeds*, 195 U. S. 437, 49 L. ed. 269, 25 Sup. Ct. Rep. 76—*Hobson v. McArthur*, Fed. Cas. No. 6,554—*Rainey v. Herbert*, 5 C. C. A. 189, 3 U. S. App. 592, 55 Fed. 444—*London & S. F. Bank v. Dexter Horton & Co.* 61 C. C. A. 531, 126 Fed. 609—*Wiley v. Knight*, 27 Ala. 350—*Pensacola & G. R. Co. v. Spratt*, 12 Fla. 101, 91 Am. Dec. 747—*Scudder v. Young*, 25 Me. 155—*Lockhart v. Leeds*, 10 N. M. 598, 63 Pac. 48—*Ollum v. Stockbridge*, 8 Baxt. 359—*Dodd v. Benthall*, 4 Helsk. 609.

104. Under the general prayer, other relief may be granted than that particularly prayed for, but only such as is consistent with the bill. *English v. Foxall*, 2 Pet. 595, 7: 531

Cited in Boone v. Chiles, 10 Pet. 209, 9 L. ed. 399—*Stevens v. Gladding*, 17 How. 455, 15 L. ed. 158—*Texas v. Hardenberg* (*Texas v. White*) 10 Wall. 86, 19 L. ed. 842—*Hayward v. Elliot Nat. Bank*, 96 U. S. 615, 24 L. ed. 857—*Jones v. Van Doren*, 130 U. S. 692, 32 L. ed. 1080, 9 Sup. Ct. Rep. 685—*Lockhart v. Leeds*, 195 U. S. 437, 49 L. ed. 269, 25 Sup. Ct. Rep. 76—*Hunter v. Marlboro*, 2 Woodb. & M. 198, Fed. Cas. No. 6,908—*Rainey v. Herbert*, 5 C. C. A. 189, 3 U. S. App. 592, 55 Fed. 444—*London & S. F. Bank v. Dexter Horton & Co.* 61 C. C. A. 531, 126 Fed. 609—*Skinner v. Bailey*, 7 Conn. 500—*Sanford v. Cloud*, 17 Fla. 575—*Casady v. Woodbury County*, 13 Iowa, 120—*Thayer v. Lane*, Walk. Ch. (Mich.) 205—*Pennock v. Ela*, 41 N. H. 192—*Lockhart v. Leeds*, 10 N. M. 598, 63 Pac. 48—*Re Patterson*, 79 Hun, 377, 29 N. Y. Supp. 451—*Dodd v. Benthall*, 4 Helsk. 609—*Laird v. Boyle*, 2 Wis. 435.

Specific performance.

105. A decree for return of money paid on a contract is not proper under a mere prayer for general relief, in a bill for specific

ic relief, where performance is denied. *Holt v. Rogers*, 8 Pet. 420, 8: 995
Cited in London & S. F. Bank v. Dexter Horton & Co. 61 C. C. A. 530, 126 Fed. 608—*Stearns v. Beckham*, 31 Gratt. 421.

106. Specific performance, so far as practicable, may be decreed under a general prayer for relief, where the specific relief prayed for, which was for the rescission of a contract, cannot be granted. *Hepburn v. Dunlop*, 1 Wheat. 179, 4: 65
Cited in Morgan v. Morgan, 2 Wheat. 299, 4 L. ed. 244—*Galloway v. Finley*, 12 Pet. 297, 9 L. ed. 1092—*Kimball v. West*, 15 Wall. 379, 21 L. ed. 96—*Morrow v. Shepherd*, 9 Mo. 214.

107. A prayer for general relief includes a prayer for specific performance. *Taylor v. Merchants' F. Ins. Co.* 9 How. 390, 13: 187
Cited in Stevens v. Gladding, 17 How. 455, 15 L. ed. 158—*Jones v. Van Doren*, 130 U. S. 692, 32 L. ed. 1080, 9 Sup. Ct. Rep. 685—*Tyler v. Savage*, 143 U. S. 98, 36 L. ed. 90, 12 Sup. Ct. Rep. 340—*Kansas v. Colorado*, 185 U. S. 145, 46 L. ed. 846, 22 Sup. Ct. Rep. 552—*Patrick v. Ienhardt*, 20 Fed. 340—*Seattle, L. S. & E. R. Co. v. Union Trust Co.* 24 C. C. A. 521, 48 U. S. App. 255, 79 Fed. 188—*Colvin v. United States Mut. Accl. Asso.* 66 Hun, 546, 21 N. Y. Supp. 734.

108. Prayer for an injunction against refusing the use of a right of way of a railroad company is a prayer for all that is necessary to secure practically the specific performance of the agreement by which such right of way is given. *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243, 34: 843

109. Where the frame and structure of a bill is for the specific execution of a contract which provides only for the valuation of the land and makes no provision for the sale of the land or the payment of any moneys, if the facts would justify a prayer for the transfer and assignment of defendant's title and interest, the bill should have been framed with a double aspect, so that, if the court should decide against the complainant in one view of the case, it might afford him relief in another. *Hobson v. M'Arthur*, 16 Pet. 182, 10: 930

110. Upon a bill for specific performance, where the contract, as set up in the answer and as established by the proofs, differs from that set up in the bill, the court will, in a proper case, and to prevent litigation, give a decree for the performance of the contract as proved, without compelling the defendant to resort to a cross bill. *Bradford v. Union Bank*, 13 How. 57, 14: 49
Cited in Lockwood v. Cleveland, 6 Fed. 724—*Book v. Justice Min. Co.* 58 Fed. 831—*Moran v. Hagerman*, 12 C. C. A. 244, 29 U. S. App. 71, 64 Fed. 504—*Nelson v. Lowndes County*, 35 C. C. A. 422, 93 Fed. 541—*Billingsley v. Billingsley*, 37 Ala. 429—*Lamon v. McKee*, 7 Mackey, 473—*St. Andrews Bay Land Co. v. Campbell*, 5 Fla. 566—*Brown v. Chesapeake & O. Canal Co.* 73 Md. 606—*Coogan v. McCarren*, 50 N. J. Eq. 614, 25 Atl. 330—*Thompson v. Hawley*, 14 Or. 206, 12 Pac. 276—*Baldenberg v. Warden*, 14 W. Va. 405.

111. Where the prayer of the bill was for a specific execution of a contract of compromise under which notes were given, which were in fact an execution of the contract in that particular, a decree cannot be rendered condemning certain of the defendants to pay the notes given on the contract of compromise. *Shields v. Barrow*, 17 How. 130, 15: 158

Fraud.

Sufficiency of Allegations of Fraud, see *infra*, 536-552a.

See also Judgment, 1035a.

112-15. Where the prayer of a bill is chiefly directed toward securing a right to redeem the whole property by paying off the whole mortgage, but the general object of the bill is to secure to the plaintiff the dower interest of which she has been defrauded, and the bill contains a prayer for general relief, this is sufficient to enable a court of equity to decree such relief as the facts stated in the bill justify. *Jones v. Van Doren*, 130 U. S. 684, 9 Sup. Ct. Rep. 685, 32: 1077
Cited in Hopkins v. Grimshaw, 165 U. S. 358, 41 L. ed. 744, 17 Sup. Ct. Rep. 401—*Seattle, L. S. & E. R. Co. v. Union Trust Co.* 24 C. C. A. 529, 48 U. S. App. 255, 79 Fed. 188.

Foreclosure.

116. Where a bill seeks a foreclosure on the sole ground that a legal mortgage was given, if a legal mortgage is not shown the bill should be dismissed. If the complainants have any rights under the instrument as an equitable mortgage, a proper bill should be filed in another suit. *Koehler v. Black River Falls Iron Co.* 2 Black, 715, 17: 339
Cited in Allis v. Jones, 45 Fed. 150.

117. A decree for a deficiency is a necessary incident of a foreclosure suit in equity, and may be granted under a prayer for general relief. *Shepherd v. Pepper*, 133 U. S. 626, 10 Sup. Ct. Rep. 438, 33: 706

Damages.

118. Damages are recoverable under a prayer for general relief. *Penhallow v. Doane*, 3 Dall. 54, 1: 507
Distinguished in Cotton v. Wallace, 3 Dall. 304, 1 L. ed. 618.

119. Interest may be given as damages, although not specially demanded, if the *ad damnum* is large enough to cover the judgment with interest included. *Mills v. Bank of United States*, 11 Wheat. 431, 6: 512
Cited in Rhemke v. Clinton, 2 Utah, 238.

120. [Damages for a partial loss may be given upon a claim for total loss, although no abandonment, or offer to abandon, is proved. *Watson v. Insurance Co. of N. A.* (Pa. Sup. Ct.) 4 Dall. 283, 1: 835]

121. Damages to any part of the land may be recovered under a declaration claiming for injuries to an entire original lot which was in fact divided into sublots, all owned by the plaintiff. *Hetzel v. Baltimore & O. R. Co.* 169 U. S. 26, 18 Sup. Ct. Rep. 255.

122. An unnecessary recital that plaintiff had been prevented from selling land, made in a declaration for injuries thereto, does not restrict the recovery to damages for the prevention of any particular sale. *Hetzel v. Baltimore & O. R. Co.* 169 U. S. 26, 18 Sup. Ct. Rep. 255, 42: 648

123. Under a complaint in trespass for taking property, money paid to obtain its return is damages, and cannot be recovered back as money had and received, where the plaintiff fails to maintain his action for the trespass. *Wilson v. Haley Live Stock Co.* 153 U. S. 39, 14 Sup. Ct. Rep. 768, 38: 627

124. Where plaintiff owns two patents, he cannot in a suit on the later one recover damages for the infringement of the earlier one, which is not made the basis of the action, although the combination of the earlier patent is substantially contained in the later. *McCreery v. Pennsylvania Canal Co.* 141 U. S. 459, 12 Sup. Ct. Rep. 40, 35: 817

m. Admissions.

1. In General.

Motion for Judgment Based on, see *supra*, 81.
That Admitted by Demurrer, see *infra*, VII. e.

Appealability of Decree Providing for, see Appeal and Error, 113.

Allegations Taken as True in Determining Federal Jurisdiction, see Courts, 478.

Effect of Admission on Necessity of Proof, see Evidence, 149, 167, 168.

Regarding Finding Which Contradicts Fact Admitted, see Trial, 843.

See also *infra*, 716, 718.

124a. Where, in the pleadings of one party, there is a material averment which is traversable, but which is not traversed by the other party, it is admitted. The rule does not apply to immaterial averments. *Toland v. Sprague*, 12 Pet. 300, 9: 1093
Cited in United States v. Maloney, 4 App. D. C. 511—*Dupuy v. Bemiss*, 2 La. Ann. 515.

125. An averment that the charter of a corporation was duly surrendered to and accepted by another corporation, and that thereby said charter became vacated and annulled, is an allegation of fact, which stands admitted by being incorporated in an agreed statement of the case. *Mumma v. Potomac Co.* 8 Pet. 281, 8: 945
Cited in Moore v. Whitcomb, 48 Mo. 547.

Editorial notes.

Conclusiveness of admissions in pleadings. 2: 436

[Admissions and waivers by fiduciaries in actions. 32 L.R.A. 671.]

2. By Plea or Answer.

See also *infra*, 668.

126. No admissions in an answer to a bill in chancery can, under any circumstances, lay the foundation for relief under any specific U. S. Dig.—283

fic head of equity, unless it be substantially set forth in the bill. *Jackson v. Ashton*, 11 Pet. 229, 9: 698

Cited in McKinley v. Irvine, 13 Ala. 694—*Land v. Cowan*, 19 Ala. 300—*Equitable Mortg. Co. v. Finley*, 133 Ala. 578, 31 So. 985—*Trapnall v. Byrd*, 22 Ark. 18—*McKee v. Cochrane*, 7 Mackey, 459—*St. Andrews Bay Land Co. v. Campbell*, 5 Fla. 565—*Hyer v. Caro*, 17 Fla. 354—*Robson v. Harwell*, 6 Ga. 590—*Heim v. Cantrell*, 59 Ill. 530—*Small v. Owings*, 1 Md. Ch. 367—*Jerome v. Hopkins*, 2 Mich. 100—*Miller v. Finn*, 1 Neb. 296—*Johnson v. Johnson*, 4 Wis. 140.

127. Where the answer admits the execution of the mortgage in a foreclosure action, defendant cannot take the ground of defense that the directors of the corporation who executed the mortgage did so without authority. *Pugh v. Fairmount Gold & S. Min. Co.* 112 U. S. 238, 5 Sup. Ct. Rep. 131, 28: 684

128. Where a bill is filed by a creditor against an executor, for the discovery of assets and the application thereof to his debt, and the executor answers, admitting sufficient assets, and alleging that he is ready and willing to pay such debt, but that he disputes the justice thereof, and, upon the trial, the proof showed that the executor had not sufficient assets to pay such debt, which was proved to be valid, a decree against the executor personally for the amount of the debt was proper. *Kennedy v. Creswell*, 101 U. S. 641, 25: 1075

Cited in Lillenthal v. Washburn, 4 Woods, 68, 8 Fed. 709—*Earl v. Metropolitan Street R. Co.* 87 Fed. 629—*Westervelt v. Library Bureau*, 55 C. C. A. 438, 118 Fed. 826—*Adriaans v. Lyon*, 8 App. D. C. 536.

129. Where the law authorizes a defendant to plead several pleas, he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another. *Glenn v. Sumner*, 132 U. S. 152, 10 Sup. Ct. Rep. 41, 33: 301
Cited in McLaughlin v. Alexander, 2 S. D. 236, 49 N. W. 99—*Hickson v. Early*, 62 S. C. 51, 39 S. E. 782.

130. An express admission in an answer in an action on a judgment, that attorneys appeared for the defendant and that an answer was made, is sufficient to show submission to the jurisdiction, in the absence of any express denial of the authority of the attorneys to appear, or of any allegation of compulsion to appear or answer, although it is alleged that no hearing was had and that judgment was entered in defendant's absence without his knowledge. *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. Rep. 171, 40: 133

131. Kan. Code, § 108, requiring allegations in a pleading duly verified to be taken as true, unless the denial of the same be verified, does not require the allegations of a verified answer to be taken as true where the reply is not verified, if no reply be necessary. *Harper County v. Rose*, 140 U. S. 71, 11 Sup. Ct. Rep. 710, 35: 344

Facts not responsive or well pleaded.

132. Facts in an answer not responsive to

the bill may be relied on as admissions by the defendant. *Jackson v. Ashton*, 11 Pet. 229, 9: 638

133. Although matter is not well pleaded, and is no answer to the breach assigned in the declaration, it cannot be considered an admission of the cause of action stated in the declaration. *Simonton v. Winter*, 5 Pet. 141, 8: 75
Cited in Gear v. Shaw, 1 Pinney (Wis.) 614.

Capacity or competency to sue.

See also *infra*, 668.

134. Pleading to the merits is an admission of the capacity of the plaintiffs to sue. *Society for Propagation of Gospel v. Pawlet*, 4 Pet. 480, 7: 927

Livingston v. Story, 11 Pet. 351, 9: 746
Yeaton v. Lynn use of Lyles, 5 Pet. 224, 8: 105

Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16: 73

Cited in Southern Exp. Co. v. Western North Carolina R. Co. 90 U. S. 190, 25 L. ed. 320—*Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 572, 34 L. ed. 787, 11 Sup. Ct. Rep. 185—*Michigan Ins. Bank v. Eldred*, 143 U. S. 300, 36 L. ed. 164, 12 Sup. Ct. Rep. 450—*Blackburn v. Selma, M. & M. R. Co.* 2 Flipp. 533, Fed. Cas. No. 1,467—*Collinson v. Jackson*, 8 Sawy. 382, 14 Fed. 305—*Imperial Ref. Co. v. Wyman*, 3 L.R.A. 505, 38 Fed. 576—*Gubbins v. Laughtenschlager*, 75 Fed. 621—*Emerson Co. v. Nimocks*, 88 Fed. 281—*Hodges v. Kimball*, 34 C. C. A. 106, 63 U. S. App. 688, 91 Fed. 848—*Sadler v. Fisher*, 3 Ala. 202—*Jenks v. Edwards*, 6 Ala. 145—*Strickland v. Burns*, 14 Ala. 513—*Washington v. Finley*, 10 Ark. 425, 52 Am. Dec. 244—*Phenix Bank v. Curtis*, 14 Conn. 440, 36 Am. Dec. 492—*Tyler v. Mutual District Messenger Co.* 17 App. D. C. 95—*Meyerson v. First Nat. Bank*, 36 Fla. 410, 18 So. 786—*McIntire v. Preston*, 10 Ill. 59, 48 Am. Dec. 321—*Spangler v. Indiana & I. C. R. Co.* 21 Ill. 277—*Guaga Iron Co. v. Dawson*, 4 Blackf. 205—*Jones v. Cincinnati Type Foundry Co.* 14 Ind. 92—*Savage Mfg. Co. v. Armstrong*, 17 Me. 37, 35 Am. Dec. 227—*Garton v. Union City Nat. Bank*, 34 Mich. 280—*Girls' Industrial Home v. Fritchey*, 10 Mo. App. 349—*Polhemus v. Holland Trust Co.* 61 N. J. Eq. 657, 47 Atl. 417—*Butterfield's Overland Despatch Co. v. Wedeles*, 1 N. M. 532—*Leader Printing Co. v. Lowry*, 9 Okla. 106, 59 Pac. 242—*Rheem v. Naugatuck Wheel Co.* 33 Pa. 364—*Northumberland County Bank v. Eyer*, 60 Pa. 440—*Freeland v. Pennsylvania Cent. Ins. Co.* 94 Pa. 514—*Anderson v. Kanawha Coal Co.* 12 W. Va. 537—*Hall v. Bank of Virginia*, 14 W. Va. 621.

135. The general issue admits not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring. *Society for Propagation of Gospel v. Pawlet*, 4 Pet. 480, 7: 927
Cited in Pillsbury-Washburn Flour Mills Co. v. Eagle, 41 L.R.A. 173, 30 C. C. A. 406, 58 U. S. App. 490, 86 Fed. 628—*Washington v. Finley*, 10 Ark. 426, 52 Am. Dec. 244—*Phenix Bank v. Curtis*, 14 Conn. 442, 36 Am. Dec. 492.

What facts admitted.

Execution of Note, see Evidence, 631, 632.

By Failure to Deny Execution, see Evidence, 989, 990.

Plea to Merits as Admission of Citizenship, see Evidence, 2666.

See also *infra*, 628, 635.

136. In a suit by an assignee in bankruptcy of a corporation, the existence of the corporation is admitted by the defendant's plea of *non assumpsit*. *Pullman v. Upton*, 96 U. S. 328, 24: 818
Cited in Imperial Ref. Co. v. Wyman, 3 L.R.A. 505, 38 Fed. 576—*Emerson Co. v. Nimocks*, 88 Fed. 281—*Hodges v. Kimball*, 34 C. C. A. 106, 63 U. S. App. 688, 91 Fed. 848—*Arnau v. First Nat. Bank*, 36 Fla. 410, 18 So. 786—*McDonald v. Cole*, 46 W. Va. 187, 32 S. E. 1033.

137. An admission in an answer of a defendant who was sued jointly with others for the price of a sawmill sold to the partnership, that he and the other defendants were interested together in the business of sawing and manufacturing lumber, and intended to procure, by lease or purchase, or to erect, a sawmill, is an admission of the partnership. *Porter v. Graves*, 104 U. S. 171, 26: 691

138. A plea of no rent in arrear admits the demise as laid in the avowry. *Alexander v. Harris*, 4 Cranch, 299, 2: 627
Cited in Middleton v. Quigley, 12 N. J. L. 356—*Bandel v. Erickson*, 3 Pa. Super. Ct. 397—*Hill v. Miller*, 5 Serg. & R. 357—*Williams v. Smith*, 10 Serg. & R. 205—*Carter v. Grant*, 32 Gratt. 772.

139. If tenants claiming different parcels of land by distinct titles omit to plead that matter in abatement, and join the mise in a writ of right, it is an admission that they are joint tenants of the whole. *Green v. Liter*, 8 Cranch, 229, 3: 545
Cited in Sanders v. Buskirk, 1 Dana. 411.

140. Tenants holding severally admit a joint tenancy for the purposes of the suit by pleading in bar instead of abatement to a writ of right in which they are counted against jointly. *Liter v. Green*, 2 Wheat. 306, 4: 246

141. Where a patent has not in fact, upon a proper construction of its valid claims, been used by defendants, but they have admitted, in their answer, that they have used it in the manufacture of locks, the fact must be accepted as established by the pleadings. *Jones v. Morehead*, 1 Wall. 155, 17: 662

142. The language of the admission that they made locks as described in a patent is satisfied by assuming that the smallest number of locks were made consistent with the use of that word in the plural, and with the use by defendants of any part of the patent which is valid. *Jones v. Morehead*, 1 Wall. 155, 17: 662

143. A statement by defendant in his answer, that he has no knowledge that the fact is as stated in the complaint, without any answer, as to his belief concerning it, is not an admission of the fact. *Pierce v. Brown* (*Brown v. Pierce*) 7 Wall. 205, 19: 134
Cited in Ivory v. Candee, 17 Blatchf. 205, 4

Bann. & Ard, 550, Fed. Cas. No. 4,583—
Rogers v. Marshall, 3 McCrary, 93, 13 Fed.
64—Jones v. Lamar, 34 Fed. 470—Common-
wealth Title Ins. & T. Co. v. Cummings, 83
Fed. 768—Hanchett v. Blair, 41 C. C. A. 80,
100 Fed. 820—Samuel Bros. v. Hostetter Co.
55 C. C. A. 114, 118 Fed. 260—Peters v.
Tonopah Min. Co. 120 Fed. 588—Roller v.
Caruthers, 5 App. D. C. 374—Whitaker v.
Middle States Loan, Bldg. & Constr. Co. 7
App. D. C. 208—Tarbox v. Tonder, 1 Tenn.
Ch. 167—Smith v. St. Louis Mut. L. Ins.
Co. 2 Tenn. Ch. 603.

Necessity of proof.

See also *infra*, 159–162; Evidence, 167,
168.

144. In an action of covenant sounding in damages, the damages depend on matter outside the record, and cannot be determined from the instrument itself. In such case an admission of the cause of action does not dispense with proof of the damages. *Simonton v. Winter*, 5 Pet. 141, 8: 75
Cited in Clark v. Harmer, 5 App. D. C. 119.

145. In an action by an indorsee of promissory notes to recover thereon, the plaintiff need not prove the indorsement, where the defendant has admitted the plaintiff's right to the money due on the notes. *M'Niel v. Holbrook*, 12 Pet. 84, 9: 1009

146. In an action on a policy of life insurance, where the pleadings admit the death of the insured, and place the defense on the ground that, under the facts of the case, his death was not covered by the policy, it is not necessary for the plaintiff, in order to recover, to show that he had notified the company of such death, and made the necessary preliminary proofs required by the policy. *Knickerbocker L. Ins. Co. v. Schneider*, 131 U. S. clxxii Appx. and 25: 694

147. In an action to recover back revenue taxes on distilled spirits unlawfully collected, if plaintiff's allegation that the taxes were paid under protest is admitted by the plea, it is unnecessary to show nature of the protest made. *Stewart v. Barnes*, 153 U. S. 456, 14 Sup. Ct. Rep. 849, 38: 781

148. In chancery, if the answer of the defendant admits a fact, but insists on matter by way of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance. *Clements v. Nicholson* (*Clements v. Moore*) 6 Wall. 299, 18: 786

3. By Failure to Deny.

See also *supra*, 130, 139; *infra*, 689–691.

149. Upon argument of a plea, every fact stated in the bill, and not denied by answer in support of the plea, must be taken for true. *United States v. California & O. Land Co.* 148 U. S. 31, 13 Sup. Ct. Rep. 458, 37: 354

Cited in Southern P. R. Co. v. Groeck, 74 Fed. 585—*United States v. Peralta*, 90 Fed. 624—*Miller v. Rickey*, 123 Fed. 607—*Eveleth v. Southern California R. Co.* 123 Fed. 838.

150. In an action in a circuit court of the

United States which was held in the state of New York, allegations of the complaint not denied by the answer are to be taken as true. *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. Rep. 279, 32: 686

151. Allegations of a complaint in an action to recover duties illegally exacted that the plaintiff duly made and filed a protest, and duly appealed to the Secretary of the Treasury, and that the suit was brought in time, not denied in the answer, are to be taken as true. The word "duly" means in a proper way, or regularly, or according to law. *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. Rep. 279, 32: 686
Cited in Dodge v. Knapp, 112 Mo. App. 523, 87 S. W. 47.

152. Where the averment of diverse citizenship was not controverted by the answer, the averment must be taken as true, under the practice in Nebraska. *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. Rep. 539, 33: 923

153. Where petitioners aver that they are aliens, and the averment is not contradicted, the fact is admitted. *Breedlove v. Nicolet*, 7 Pet. 413, 8: 731

154. Under an Illinois statute the joint liability of defendants in a joint action is admitted if not denied by plea in abatement or in bar. *Forsyth v. Doolittle*, 120 U. S. 73, 7 Sup. Ct. Rep. 408, 30: 586

155. Under the statute of Illinois, proof of the partnership or joint liability of either plaintiffs or defendants is unnecessary in the first instance, unless a plea in abatement is interposed, or verified pleas are filed denying the execution of a writing set up. *Cooper v. Coates*, 21 Wall. 105, 22: 481
Cited in Robinson v. Parker, 11 App. D. C. 142.

156. Allegation of title under the pre-emption laws of the United States, and allegation that such owner was compelled, through threats of personal violence and fear of his life, to convey the same, without any consideration, to the defendant, are admitted by an answer that does not deny these facts, but alleges simply that defendant was owner in fee of the premises, and, as defendant was informed and believed, the complainant had entered upon the land as tenant, without alleging the circumstances of entry. *Pierce v. Brown* (*Brown v. Pierce*) 7 Wall. 205, 19: 134

157. The probate and record of a foreign will are not admitted by a failure to deny these facts in an answer to a bill which, on its face, shows this defect in the title of complainants to the land devised. *Kerr v. Moon*, 9 Wheat. 565, 6: 161

158. Failure of a tenant to deny the allegation of the bill that notice or a demand for rent was sent in a registered letter mailed to him, and of a registry return receipt, does not authorize an inference of personal service of such demand or notice. *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 25, 11 Sup. Ct. Rep. 691, 35: 332

Necessity of proof.

159. Where the execution of bonds sued on is not put in issue, the objection that there was no evidence that the bonds were authorized to be issued by the defendants, or that the seal annexed is the seal of the defendants, is not valid. *Chambers County v. Clews*, 21 Wall. 317, 22: 517

160. In a suit to recover the amount due on county bonds and the coupons thereof it is not necessary to prove the order of the county court authorizing the president of the court to sign, and the agent to counter-sign, the bonds, if there was no plea nor answer sworn to denying the execution of the bonds or coupons sued upon. *Ralls County v. Douglass*, 105 U. S. 728, 26: 957

161. In a suit brought by an express company against the receiver of a railroad corporation to compel the specific performance of a contract, the complainant need not prove its existence unless the fact is directly put in issue by the defendant. *Southern Exp. Co. v. Western North Carolina R. Co.* 99 U. S. 191, 25: 319

162. Under the statute of Texas, notes and a deed of trust on which the action is brought, described in the complaint, are to be taken as genuine instruments, without proof, when their execution is not specifically denied by defendant under oath. *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. Rep. 100, 35: 879

4. By Reply.

163-4. The sufficiency in law of a plea is admitted by a reply denying the truth of facts stated therein; and if they are proved the bill must be dismissed without reference to the equity arising from any other fact stated in the bill. *Rhode Island v. Massachusetts*, 14 Pet. 210, 10: 423
Distinguished in *Matthews v. Lalance & G. Mfg. Co.* 18 Blatchf. 85, 5 Bann. & Ard. 321, 2 Fed. 233—*Soderberg v. Armstrong*, 116 Fed. 710.

Cited in *Farley v. Kittson*, 120 U. S. 316, 30 L. ed. 688, 7 Sup. Ct. Rep. 534—*United States v. California & O. Land Co.* 148 U. S. 40, 37 L. ed. 359, 13 Sup. Ct. Rep. 458—*Myers v. Dorr*, 13 Blatchf. 26, Fed. Cas. No. 9,988—*Bean v. Clark*, 30 Fed. 225—*Daniels v. Benedict*, 38 C. C. A. 502, 97 Fed. 374—*Barber v. National Carbon Co.* 64 C. C. A. 47, 129 Fed. 377—*Knowlton v. Hanbury*, 117 Ill. 475, 5 N. E. 581—*Seebold v. Lockner*, 30 Md. 137.

165. A replication to a plea is an admission of the sufficiency of the plea; and if the facts relied on by the plea are proved, a dismissal of the bill on the hearing is a matter of course. *Hughes v. Blake*, 6 Wheat. 453, 5: 303

Cited in *Boone v. Chiles*, 10 Pet. 209, 9 L. ed. 399—*Rhode Island v. Massachusetts*, 14 Pet. 257, 10 L. ed. 445—*Farley v. Kittson*, 120 U. S. 314, 30 L. ed. 688, 7 Sup. Ct. Rep. 534—*Pearce v. Rice*, 142 U. S. 41, 35 L. ed. 930, 12 Sup. Ct. Rep. 120—*Monroe Cattle Co. v. Becker*, 147 U. S. 54, 37 L. ed. 76, 13 Sup. Ct. Rep. 217—*United States v. California &*

O. Land Co. 148 U. S. 40, 37 L. ed. 359, 13 Sup. Ct. Rep. 458—*Horn v. Detroit Dry Dock Co.* 150 U. S. 625, 37 L. ed. 1203, 14 Sup. Ct. Rep. 214—*Green v. Bogue*, 158 U. S. 500, 39 L. ed. 1069, 15 Sup. Ct. Rep. 973—*Myers v. Dorr*, 13 Blatchf. 26, Fed. Cas. No. 9,988—*Reissner v. Anness*, 13 Off. Gas. 7, Fed. Cas. No. 11,687—*Tilghman v. Tilghman*, Baldw. 491, Fed. Cas. No. 14,045—*Matthews v. Lalance & G. Mfg. Co.* 18 Blatchf. 85, 5 Bann. & Ard. 321, 2 Fed. 233—*Cottle v. Krementsz*, 25 Fed. 495—*National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 29—*Daniels v. Benedict*, 38 C. C. A. 599, 97 Fed. 374—*Reavis v. Reavis*, 101 Fed. 23—*Soderberg v. Armstrong*, 116 Fed. 710—*Giberson v. Cook*, 124 Fed. 987—*Barber v. National Carbon Co.* 64 C. C. A. 47, 129 Fed. 377—*Mutual L. Ins. Co. v. Blair*, 130 Fed. 973—*Tyson v. Decatur Land Co.* 121 Ala. 417, 26 So. 507—*Denver v. Lobenstein*, 3 Colo. 219—*Seebold v. Lockner*, 30 Md. 137—*Rouskulp v. Kershner*, 49 Md. 522—*Smith v. Cozart*, 45 Miss. 701—*Bassett v. Salisbury Mfg. Co.* 43 N. H. 253—*Swayze v. Swayze*, 37 N. J. Eq. 106—*Mann v. Fairchild*, 5 Barb. 110—*Heatherly v. Hadley*, 4 Or. 19—*Moore v. Holt*, 3 Tenn. Ch. 143—*Hartman v. Evans*, 38 W. Va. 672, 18 S. E. 810—*Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436.

5. By Failure to Reply.

166-8. An answer responsive to the bill must be taken to be true, unless it is replied to. *Gettings v. Burch*, 9 Cranch, 373, 3: 763

Eyre v. Potter, 15 How. 42, 14: 592
Cited in *Parton v. Prang*, 3 Cliff. 542, Fed. Cas. No. 10,784—*Sarchet v. The General Isaac Davis*, Crabbe, 193, Fed. Cas. No. 12,357—*Loneragan v. Fenlon*, 2 Pittsb. 117, 7 Pittsb. L. J. 266.

169. An allegation in an answer, entirely impertinent to the bill, cannot be established as evidence for the defendant, even though the plaintiff neglected to file a replication. *Gunnell v. Bird*, 10 Wall. 304, 19: 913
Cited in *Fretz v. Stover*, 22 Wall. 204, 22 L. ed. 770—*Newcombe v. Murray*, 77 Fed. 493—*Dunham v. Carson*, 42 S. C. 389, 20 S. E. 197.

170. An answer, undenied by replication, has its fair scope as an admission, but nothing can be supplied that is not expressed or reasonably to be implied from the language employed. *Pierce v. Brown* (*Brown v. Pierce*) 7 Wall. 205, 19: 134

171. On a plea of the statute of limitations against a claim for money payable on demand, the plaintiff must allege, by way of replication, a demand within the statutory period, otherwise the uncontradicted plea may be taken as admittedly true. *United States v. Buford*, 3 Pet. 12, 7: 585
Cited in *Gross v. Disney*, 95 Tenn. 596, 32 S. W. 632.

172. Where the plaintiff, under rule 60 in equity, instead of filing a replication to an answer, sets the cause down for hearing upon bill and answer, the allegations of new matter in an answer are to be taken as true. *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. Rep. 36, 32: 425
Cited in *Re Sanford Fork & Tool Co.* 160 U. S.

257, 40 L. ed. 417, 16 Sup. Ct. Rep. 291—*Crouch v. Kerr*, 38 Fed. 550—*Lake Erie & W. R. Co. v. Indianapolis Nat. Bank*, 65 Fed. 690—*United States v. Flournoy Live-Stock & Real Estate Co.* 71 Fed. 577—*Grether v. Wright*, 23 C. C. A. 500, 43 U. S. App. 770, 75 Fed. 744—*Goldman v. Smith*, 93 Fed. 183—*Stokes v. Farnsworth*, 99 Fed. 837—*Barrett v. Twin City Power Co.* 111 Fed. 46—*Re Waugh*, 66 C. C. A. 663, 133 Fed. 285.

172a. Where a statute of a state expressly declares that new matter in an answer shall, on trial, be deemed controverted by the adverse party, the answer of the defendant cannot be taken as true. *Cheong-Ke v. United States*, 3 Wall. 320, 18: 72

6. By Failure to Traverse Reply.

172b. Where a negative averment in the replication, that no account had been stated between the parties, was not a necessary part of the plaintiff's replication to bring him within the exception of the statute in relation to merchants' accounts, it is not admitted by failure to traverse it. *Toland v. Sprague*, 12 Pet. 300, 9: 1093
Cited in Brinkerhoff v. Ransom, 57 N. J. Eq. 316, 41 Atl. 725.

n. Amendments.

Waiver by, see *supra*, 40.
Striking out, see *infra*, 263.
Multifariousness of, see *infra*, 280.
Service of Amended Pleading, see *infra*, 313, 314.
Traverse of Amended Declaration, see *infra*, 622.
Setting up Limitations by Reply or Amendment, see *infra*, 809, 810.
In Admiralty, see Admiralty, III. g, 1.
On Appeal, see Appeal and Error, VIII. c, 2.
Raising Federal Question by Application to Amend, see Appeal and Error, 1222.
Remanding Case to Lower Court to Permit, see Appeal and Error, IX. i, 1, c.
Determining Jurisdictional Amount on Appeal from Amended Pleading, see Appeal and Error, 449, 452, 463.
Presumption on Appeal as to, see Appeal and Error, 4119.
Prejudicial Error as to, see Appeal and Error, 5016.
After Remand to Trial Court, see Appeal and Error, 5551-5556.
Allowance of, by Consent of Counsel as Denial of Due Process, see Constitutional Law, 644.
Allowance According to Equitable Considerations, see Courts, 31.
Dismissal for Lack of, see Dismissal and Discontinuance, 25.
Of Indictment, see Indictment, etc., II. f.
Necessity of Notice of, see Judgment, 708.
As Affecting Limitation of Actions, see Limitation of Actions, 599-602.
Indexing of Amended Declaration, see *Lis Pendens*, 5.
Amended Creditor's Bill as Notice, see *Lis Pendens*, 8.
Effect of Failure to File Amended Bill, see Mortgage, 510.

Amendment of Petition for Removal of Cause, see Removal of Causes, 286, 296-298.

Effect of, to Extend Time for Removal of Cause, see Removal of Causes, 391-393.

Permitting Amendments in Federal Court after Removal from State Court, see Removal of Causes, 442.

Amendment of Petition for Removal of Cause, see Removal of Causes, 443.

Failure of Amended Pleading after Removal of Cause to State Jurisdictional Facts, see Removal of Causes, 492.

Effect of Failure to Join Issue on Amended Declaration, see Trial, 12.

Amendment of Process, see Writ and Process, 4, 5.

New Process on Amended Bill, see Writ and Process, 7, 8.

See also *supra*, 57; *infra*, 249, 443, 519, 801, 897, 938.

173. The allowance of amendments is incidental to the exercise of all judicial power, and indispensable to the ends of justice. *Tilton v. Cofield*, 93 U. S. 163, 23: 858

Cited in International Bank v. Sherman, 101 U. S. 406, 25 L. ed. 867—*Gallegos v. United States*, 39 Ct. Cl. 94—*Wolf v. Cook*, 40 Fed. 437—*Chamberlain v. Bittersohn*, 48 Fed. 43—*McDonald v. Nebraska*, 41 C. C. A. 284, 101 Fed. 177—*Hall v. Lackmond*, 50 Ark. 115, 7 Am. St. Rep. 84, 6 S. W. 510—*Kipp v. Burton*, 29 Mont. 102, 63 L.R.A. 328, 101 Am. St. Rep. 544, 74 Pac. 85.

174. Amendment of pleadings is authorized by the 32d section of the judiciary act of 1789. *Randolph v. Barrett*, 16 Pet. 138, 10: 914

Cited in Molina v. United States, 6 Ct. Cl. 276—*Thomas v. United States*, 15 Ct. Cl. 348—*Nelson v. Barker*, 3 McLean, 380, Fed. Cas. No. 10,101—*Tyson v. Belmont*, Fed. Cas. No. 14,315a—*Chamberlain v. Bittersohn*, 48 Fed. 43—*Fidelity & C. Co. v. Freeman*, 54 L.R.A. 685, 48 C. C. A. 697, 109 Fed. 852—*Willey v. Durgin*, 118 Mass. 69—*Dalton-Ingersoll Co. v. Fiske*, 175 Mass. 19, 55 N. E. 468.

175. Federal courts possess the power to permit imperfections in pleadings to be amended in their discretion and upon such terms and conditions as the rules of the courts prescribe. *Ewing v. Howard*, 7 Wall. 499, 19: 293

176. No rule can be made in reference to amendments of equity pleadings that will govern all cases. They must depend upon the special circumstances of each case; and, in passing upon application to amend, the ends of justice must not be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. No error is committed in allowing an amendment which does not make a new case, but only enables the court to adapt its relief to that made by the bill and sustained by the proof. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. Rep. 771, 28: 1141

Cited in Smith v. Woolfolk, 115 U. S. 148, 29 L. ed. 359, 5 Sup. Ct. Rep. 1177—*Graffam v.*

Burgess, 117 U. S. 195, 29 L. ed. 844, 6 Sup. Ct. Rep. 686—*Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 870, 7 Sup. Ct. Rep. 788—*Jones v. Van Doren*, 130 U. S. 691, 32 L. ed. 1079, 9 Sup. Ct. Rep. 685—*Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 414, 35 L. ed. 1082, 12 Sup. Ct. Rep. 188—*Re Sanford Fork & Tool Co.* 160 U. S. 259, 40 L. ed. 417, 16 Sup. Ct. Rep. 291—*Jones v. Meehan*, 175 U. S. 28, 44 L. ed. 60, 20 Sup. Ct. Rep. 1—*Maynard v. Tilden*, 28 Fed. 703—*Reay v. Berlin & J. Envelope Co.* 30 Fed. 449—*Maynard v. Green*, 30 Fed. 644—*Gest v. Packwood*, 39 Fed. 537—*United States v. American Bell Teleph. Co.* 39 Fed. 717—*De Forest v. Thompson*, 40 Fed. 381—*Allis v. Jones*, 45 Fed. 150—*Drake v. Foundry Treasurers Min. Co.* 53 Fed. 476—*Bowden v. Burnham*, 8 C. C. A. 251, 19 U. S. App. 448, 59 Fed. 755—*Insurance Co. of N. A. v. Svendsen*, 74 Fed. 347—*Gubbins v. Laughtenschlager*, 75 Fed. 619—*McDonald v. Nebraska*, 41 C. C. A. 284, 101 Fed. 177—*Savage v. Worsham*, 104 Fed. 19—*Virginia-Carolina Chemical Co. v. Home Ins. Co.* 51 C. C. A. 26, 113 Fed. 6—*Re Glass*, 119 Fed. 511—*Kirby v. Muench*, 12 S. D. 617, 82 N. W. 93—*German Evangelical Soc. v. Prospect Hill Cemetery*, 2 App. D. C. 315—*Trimble v. Woolman*, 71 Mo. App. 487—*Stewart v. Van Horne*, 91 Mo. App. 657—*Berry v. Hull*, 6 N. M. 654, 30 Pac. 936—*Plett v. Willson*, 50 Hun, 62, 4 N. Y. Supp. 507—*Norton v. Parsons*, 67 Vt. 531, 32 Atl. 481—*Glenn v. Brown*, 99 Va. 328, 38 S. E. 189—*Wakeman v. Thompson*, 32 W. Va. 9 Appx—*Rattliff v. Sommers*, 55 W. Va. 37, 46 S. E. 712.

177. The allowance of amendments in equity pleadings must, at every stage of the case, rest in the discretion of the court, governed largely by the special circumstances of the case. *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788, 30: 864
Cited in Insurance Co. of N. A. v. Svendsen, 74 Fed. 348—*Gubbins v. Laughtenschlager*, 75 Fed. 619—*Southern R. Co. v. North Carolina Corp. Commission*, 105 Fed. 271—*Re Glass*, 119 Fed. 511—*Wolverton v. George H. Taylor & Co.* 157 Ill. 495, 42 N. E. 49.

178. Amendments are within the discretion of the court; although a case may occur where it would be error in a court, after having allowed one party to amend, to refuse to suffer the other party to amend also before trial. *Mandeville v. Wilson*, 5 Cranch, 15, 3: 23

Cited in Moss v. Riddle, 5 Cranch, 358, 3 L. ed. 125—*Chapman v. Barney*, 129 U. S. 682, 32 L. ed. 801, 9 Sup. Ct. Rep. 426—*Gormley v. Bunyan*, 138 U. S. 630, 34 L. ed. 1089, 11 Sup. Ct. Rep. 453—*Heye v. Lieberman*, Fed. Cas. No. 8,445a—*Poole v. Nixon*, 9 Pet. 773 Appx. Fed. Cas. No. 11,270—*Van Bokkelen v. Cook*, 5 Sawy. 593, Fed. Cas. No. 16,831—*Watkins v. Gayle*, 4 Ala. 155—*Merrillam v. Langdon*, 10 Conn. 473—*Boett v. Ming*, 1 Fla. 452—*Broussard v. Trahan*, 4 Mart. (La.) 504—*Henderson v. Hamer*, 5 How. (Miss.) 538—*Avery v. Bowman*, 39 N. H. 395—*State v. Ralford*, 13 N. C. (2 Dev. L.) 215—*Austin v. Jordan*, 5 Tex. 133—*Fowler v. Colton*, Burnett (Wis.) 182—*Fowler v. Colton*, 1 Pinney (Wis.) 337.

179. A question whether a plaintiff in ejectment shall be permitted to enlarge the term in the demise, in an action of ejectment, is in the discretion of the court. *Smith v. Vaughan*, 10 Pet. 366, 9: 457

180. In ejectment, the date of the demise in the declaration may be amended during the trial so as to conform to the title. *Blackwell v. Patton*, 7 Cranch, 471, 3: 408
[Coates v. Hamilton (Pa. Sup. Ct.) 2 Dall. 256, 1: 371]

Cited in Meeker v. Doe, 7 Blackf. 170—*Den ex dem. Vanarsdalen v. Hull*, 9 N. J. L. 282—*Den ex dem. Williamson v. Snowhill*, 13 N. J. L. 32, 22 Am. Dec. 496.

181. The court will allow the plaintiff, in an action upon a bill of exchange, to strike out a special, as well as a general, indorsement. *Morris v. Foreman*, 1 Dall. 193, 1: 96

182. An amended petition based upon a certain contract and its extensions may be filed, instead of attempting to file a substitute for the original petition, where the original, which with all the records in the case has been lost, was based on that contract and its extensions, with others in addition. *District of Columbia v. Talty*, 182 U. S. 510, 21 Sup. Ct. Rep. 896, 45: 1207

183. The amendment of a bill after a demurrer thereto has been allowed is not a matter of right; but courts of the United States may in their discretion allow amendments under such circumstances by virtue of the 35th rule of equity practice. *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25: 815

Cited in Boston & A. R. Co. v. Parr, 98 Fed. 484—*Edward P. Allis Co. v. Withlacooches Lumber Co.* 44 C. C. A. 675, 105 Fed. 682.

184-5. An order sustaining a defendant's demurrer, and giving the plaintiff leave to amend, does not preclude the plaintiff from renewing, or the court from entertaining, the same question of law at the subsequent trial, on the amended declaration. *Post v. Pearson*, 108 U. S. 418, 2 Sup. Ct. Rep. 799, 27: 774

Cited in Pepper v. Donnelly, 87 Ky. 263, 8 S. W. 441.

186. Under the practice in Louisiana, the court may consider an amendment as a mere addition to the original petition, and thus preclude the plaintiff from contesting a material fact within his own knowledge, which he had therein averred. *Henderson v. Louisville & N. R. Co.* 123 U. S. 61, 8 Sup. Ct. Rep. 60, 31: 92

187. An amended bill is esteemed a part of the original bill and a continuation of the suit. New process is not necessary upon an amended bill as to defendants who are already before the court. *French v. Stewart (French v. Hay)* 22 Wall. 238, 22: 854

188. A specific amendment to the declaration,—as, the extending of the term in a demise, which is entered on the records of the court, need not be interlined in the declaration. On the other hand, if leave to amend is given generally, the amendments must be so interlined. *Walden v. Craig*, 14 Pet. 147, 10: 393

Cited in Avery v. Bowman, 39 N. H. 397—*Cole v. Santa Fe County*, 6 N. M. 116, 37 Pac. 619.

189. [An amendment of the declaration in ejectment, enlarging the demise, may be allowed on payment of costs. *Cockshot v. Hopkins* (Pa. Sup. Ct.) 2 Dall. 96, 1: 305]

190. [Upon amendment of a declaration, defendants are entitled to imparlance and costs. *Jones v. Ross* (Pa. Sup. Ct.), 2 Dall. 143, 1: 324]

191. After an amended bill was filed, without leave of the court below, after the cause was at issue, it was irregular to hear the case without any order on the subject. *Washington, A. & G. R. Co. v. Bradley* (Washington, A. & G. R. Co. v. Washington) 10 Wall. 299, 19: 894

Editorial note.

[Right to set up judgment in other court by. 49 L.R.A. 285.]

Parties.

Remanding to Trial Court for Amendment as to, see Appeal and Error, 5443-5445.

Joinder of New Parties by Amendment, see Parties, 91.

192. Where an action is brought against a county, and the complaint names three persons, commissioners of the county, as defendants, instead of the county, the error is simply one of misnomer, amendable at the trial if objected to, and to be disregarded, both at the trial and on appeal, when such objection is not taken. *Anthony v. Bank of Commerce* (Pickens County v. Bank of Commerce) 97 U. S. 374, 24: 1060
Cited in *Union P. R. Co. v. Saline County*, 69 Kan. 284, 76 Pac. 885—*Sweetwater County v. Young*, 3 Wyo. 687, 29 Pac. 1002.

193. Where a defendant in a declaration is designated as an "administrator, etc.," and defendant files a plea in abatement that he is not "an administrator, etc., but an executor, etc.," the circuit court has a right to order the declaration amended by striking out the words "administrator, etc.," and inserting "executor, etc." *Randolph v. Barrett*, 16 Pet. 138, 10: 914

194. Under the Code of Civil Procedure of Dakota a codefendant may be added by amendment of the pleadings at the trial, and a judgment against him may be sustained if the allegations supporting it appear somewhere in the record. *Noonan v. Caledonia Gold Min. Co.* 121 U. S. 393, 7 Sup. Ct. Rep. 911, 30: 1061

195. Where an amended bill of complaint recites the substance of the original bill and makes the same a part thereof, and the original bill makes a corporation a party defendant, it is a party defendant to the amended bill. *Empire Coal & Transp. Co. v. Empire Coal & Min. Co.* 150 U. S. 159, 14 Sup. Ct. Rep. 66, 37: 1037

Citizenship.

Remanding Case for Amendment as to, see Appeal and Error, 5440-5442.

196. A defect in a bill in a Federal court which fails to aver the citizenship of a party

may be cured by amendment. *Howard v. DeCordova*, 177 U. S. 609, 20 Sup. Ct. Rep. 817, 44: 908

197. Where it does not affirmatively appear from the record that the citizenship of the parties was such as to give the circuit court jurisdiction, an amendment may be allowed in the circuit court in respect to the citizenship at the commencement of the action, if it was then such as to authorize the court to proceed with the trial. *Kennedy v. Bank of Georgia*, 8 How. 586, 12: 1209

198. Where judgment is reversed without considering the merits, on the ground that the record did not affirmatively show jurisdiction of the circuit court, as to citizenship of parties, the parties may be permitted to amend their pleadings as to citizenship of the parties, and the case may proceed to a final hearing on the merits. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. Rep. 690, 44: 842
Cited in *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 540, 48 L. ed. 784, 24 Sup. Ct. Rep. 576.

199. Leave to amend a petition for removal to a Federal court for diverse citizenship so as to show the citizenship of the plaintiffs may, in the exercise of the general power of Federal courts, under U. S. Rev. Stat. §§ 948, 954 (U. S. Comp. Stat. 1901, pp. 695, 696), to allow amendments of process, be granted after the filing of the removal papers, but before any action taken in the Federal court on the merits, where there was a general averment of diverse citizenship, and the citizenship of defendant had been clearly stated, and it appeared from the face of the trust deed, which was the subject-matter in controversy, that the plaintiffs were, at the time of its execution, residents of another state. *Kinney v. Columbia Sav. & L. Asso.* 191 U. S. 78, 24 Sup. Ct. Rep. 30, 48: 103
Cited in *Ex parte Wisner*, 203 U. S. 460, 51 L. ed. 268, 27 Sup. Ct. Rep. 150—*Gustafson v. Chicago, R. T. & P. R. Co.* 128 Fed. 87—*Dodd v. Louisville Bridge Co.* 130 Fed. 190—*Thompson v. Stalmann*, 131 Fed. 810—*Flynn v. Fidelity & C. Co.* 145 Fed. 265—*Mutual L. Ins. Co. v. Langley*, 145 Fed. 423.

200. An amendment of plaintiff's petition, after verdict and judgment thereon, with no further proceedings taken, by inserting the words, "and is a citizen of said state and of the United States of America," after the allegation therein that "plaintiff resides in El Paso, in El Paso county, state of Texas," may be allowed by a circuit court of the United States, under U. S. Rev. Stat. § 954 (U. S. Comp. Stat. 1901, p. 696), giving the trial court the right at any time to permit either of the parties to amend any defect in process or pleadings, upon such conditions as it shall prescribe. *Mexican C. R. Co. v. Duthie*, 189 U. S. 76, 23 Sup. Ct. Rep. 610, 47: 715
Cited in *West Virginia Northern R. Co. v. United States*, 67 C. C. A. 225, 134 Fed. 203.

201. If an alien should sue a citizen, and should omit to state the character of the

parties in the bill, though the court could not exercise jurisdiction while the defect in the bill remained, yet the defect may be corrected at any time before the hearing, and the court will not then hesitate to decree in the cause. *Conolly v. Taylor*, 2 Pet. 556, 7: 518

Cited in *Stuart v. Easton*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 268—*Fisher v. Rutherford*, *Baldw.* 193, Fed. Cas. No. 4,823—*Re McKibben*, 12 Nat. Bankr. Reg. 102, Fed. Cas. No. 8,859—*Woolridge v. McKenna*, 8 Fed. 679—*Glover v. Shepperd*, 11 Bliss. 579, 15 Fed. 838—*Betzoldt v. American Ins. Co.* 47 Fed. 707—*Laskey v. Newtown Min. Co.* 56 Fed. 629—*Brigel v. Tug River Coal & Salt Co.* 73 Fed. 15—*Excelsior Pebble Phosphate Co. v. Brown*, 20 C. C. A. 432, 42 U. S. App. 55, 74 Fed. 325—*Hall v. Mobley*, 13 Ga. 319.

Changing cause of action.

Alleging New Act of Bankruptcy and Effect thereof, see Bankruptcy, 145.

Within Rule as to Limitation of Actions, see Limitation of Actions, 600-602.

See also *infra*, 223.

202. An amendment to a complaint which presents a new cause of action, although it is permissible to amend, is a departure in pleading. *Union P. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. Rep. 977, 39: 983
Cited in *Seymore v. Franklin*, 92 Fed. 127—*Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L.R.A. 54, 41 C. C. A. 543, 101 Fed. 631—*Nelson v. First Nat. Bank*, 139 Ala. 590, 101 Am. St. Rep. 52, 36 So. 707—*Midland Steel Co. v. Citizens Nat. Bank*, 26 Ind. App. 81, 59 N. E. 211.

203. A departure exists when there is a change by amendment from the assertion of a cause of action under the general or common law to a reliance upon a statute giving a particular or exceptional right. *Union P. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. Rep. 977, 39: 983
Distinguished in *Anderson v. Union Terminal R. Co.* 161 Mo. 432, 61 S. W. 874.
Cited in *Southern R. Co. v. Simpson*, 65 C. C. A. 569, 131 Fed. 711.

204. Under the privilege of amending, complainant cannot make an entirely new bill. *Shields v. Barrow*, 17 How. 130, 15: 158
Distinguished in *Hardin v. Boyd*, 118 U. S. 764, 28 L. ed. 1143, 5 Sup. Ct. Rep. 771—*De Forest v. Thompson*, 40 Fed. 381.

Cited in *Smith v. Woolfolk*, 115 U. S. 148, 29 L. ed. 359, 5 Sup. Ct. Rep. 1177—*Clum v. Brewer*, 21 Month. L. Rep. 391, Fed. Cas. No. 2,910—*Goodyear v. Bourn*, 13 Blatchf. 268, Fed. Cas. No. 5,561—*Re Crowley*, 1 Nat. Bankr. Reg. 137, Fed. Cas. No. 11,644—*Judson v. Courier Co.* 25 Fed. 708—*Maynard v. Green*, 30 Fed. 644—*Gest v. Packwood*, 39 Fed. 536—*Henry v. Suttle*, 42 Fed. 94—*Gilmer v. Morris*, 46 Fed. 334—*Merriman v. Chicago & E. I. R. Co.* 12 C. C. A. 291, 24 U. S. App. 428, 64 Fed. 551—*New York Secur. & T. Co. v. Lincoln Street R. Co.* 74 Fed. 68—*Insurance Co. of N. A. v. Svendsen*, 74 Fed. 348—*Savage v. Worsham*, 104 Fed. 19—*Re Glass*, 119 Fed. 511—*Patterson v. Fowler*, 23 Ark. 474—*Frost v. Witter*, 132 Cal.

424, 84 Am. St. Rep. 53, 64 Pac. 705—*Ex parte Mansfield*, 11 App. D. C. 560—*Walker v. Warner*, 179 Ill. 25, 70 Am. St. Rep. 85, 53 N. E. 594—*Shaw v. Monson* Maine Slate Co. 96 Me. 45, 51 Atl. 285—*Bannon v. Comegys*, 69 Md. 422, 16 Atl. 129—*Eberle v. Heaton*, 124 Mich. 209, 82 N. W. 820—*Chambers v. Waterman*, 1 Legal Gaz. Rep. 60—*National Bank of Commerce v. Smith*, 17 R. I. 263, 21 Atl. 959—*Bynum v. Ewart*, 90 Tenn. 658, 18 S. W. 394—*Belton v. Apperson*, 26 Gratt. 215—*Hanby v. Henritze*, 85 Va. 183, 7 S. E. 204—*Derbyshire v. Jones*, 94 Va. 142, 26 S. E. 416—*Keyser v. Renner*, 87 Va. 251, 12 S. E. 406—*Pettyjohn v. Burson*, 2 Va. Dec. 169, 22 S. E. 508—*Piercy v. Beckett*, 15 W. Va. 451.

205. After a cause has been heard and taken under advisement by a court of chancery, the plaintiff should not be permitted to so amend his bill that it will present an entirely new case. *Snead v. McCoull*, 12 How. 407, 13: 1043

Cited in *Re Crowley*, 1 Nat. Bankr. Reg. 518, Fed. Cas. No. 11,644—*Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 607—*Hazleton Tripod-Boller Co. v. Citizens' Street R. Co.* 72 Fed. 330—*Fields v. Maloney*, 78 Mo. 174—*National Bank of Commerce v. Smith*, 17 R. I. 263, 21 Atl. 959.

206. An amendment changing the description of the cause of action which, in the view of equity and in point of fact was the same as that originally described, may be properly allowed. *Tilton v. Coffield*, 93 U. S. 163, 23: 858
Distinguished in *Chamberlain v. Mensing*, 51 Fed. 511.

Cited in *Thomas v. United States*, 15 Ct. Cl. 345—*Bowen v. Needles Nat. Bank*, 79 Fed. 50—*Oliver v. Raymond*, 108 Fed. 928—*Dunn v. Mayo Mills*, 67 C. C. A. 452, 134 Fed. 806.

207. A bill to obtain judicial administration of the affairs of an insolvent national bank may be properly amended to claim relief against the stockholders individually. *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788, 30: 864
Cited in *Tennant v. Dunlop*, 97 Va. 239, 33 S. E. 620.

208. Where a debtor of the United States makes a general assignment for the benefit of all his creditors and then makes an assignment to the United States, which files a bill for the payment of a debt due on the ground of the second assignment, the United States may afterwards file an amended bill in which the claim is placed upon the priority of the United States, for, although the original bill remains on the record, it is competent for the complainant to present a new state of facts by amendment. *Hunter v. United States*, 5 Pet. 173, 8: 86
Cited in *Re Glass*, 119 Fed. 511.

209. In a suit where the bill sets out a case either for annulling a sheriff's sale and decreeing an unconditional delivery of the property, or for a redemption on payment of the amount due, but the prayer of the bill is for the former, the court may properly allow an amendment praying permission

to redeem. *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. Rep. 686, 29: 839
Cited in Mackintosh v. Flint & P. M. R. Co.
 34 Fed. 614—*Re Glass*, 119 Fed. 511.

210. After a cause has been heard and a case for relief made out, but not the case disclosed by the bill, a court of equity may permit amendments upon terms that the party not in fault will have no reasonable ground to object to. *Neale v. Neale*, 9 Wall. 1, 19: 590

211. After hearing on a bill for the enforcement of a judgment lien upon specific property, with recourse against certain specified persons, the plaintiff should not be allowed to amend by way of supplement, praying for discovery and relief against all grantees of the judgment debtor, and for satisfaction out of any property purchased by him, or to which he had title at the date of the original judgment. *Snead v. M'Coull*, 12 How. 407, 13: 1043

212. The amendment of a bill to set up a judgment rendered pending the suit in another case between the same parties and involving the same issue, although for a different cause of action, is not necessary, as the judgment cannot be pleaded as an absolute bar arising upon the face of the record, but can be used as evidence. *Southern P. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. Rep. 18, 42: 355

213. An amendment to a bill in equity does not set forth a new and different cause of action, so as to forbid its allowance in the court's discretion, although the reasons for relief are stated more fully and in some respects differently from those in the original bill, where the purpose of both bills is the same,—to establish a resulting trust arising from the same transactions and based on the same general rule of law applicable to resulting trusts. *Brainard v. Buck*, 184 U. S. 99, 22 Sup. Ct. Rep. 458, 46: 449

214. Parties who, with knowledge of all the facts, sue to set aside a conveyance for actual fraud, cannot be permitted by the mandate of an appellate court, after a determination by it against them of every issue actually litigated, to amend their bill by asserting constructive fraud as a new and distinct ground for relief, with a prayer for a reconveyance upon payment to defendants of such sums as have been expended by them for and on account of the property,—especially where such complainants have persistently declined to accept from the defendants an offer to reconvey upon these very terms. *Warner v. Godfrey*, 186 U. S. 365, 22 Sup. Ct. Rep. 852, 46: 1203
Cited in Grand Central Min. Co. v. Mammoth Min. Co. 29 Utah, 596, 83 Pac. 648.

215. Amendment to a cross bill may be allowed at the hearing simply to enable the cross complainant to avail itself of what has been alleged and proved by the original complainants, although thereby is presented a new and independent basis of relief. *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 276, 10 Sup. Ct. Rep. 550, 33: 900

216. The trial court may allow a technical variance between the pleadings and proofs to be cured by an amendment not introducing any other cause of action or affecting the merits of the case between the parties. *Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. Rep. 453, 34: 1086
Cited in Sawyer v. Piper, 189 U. S. 157, 47 L. ed. 759, 23 Sup. Ct. Rep. 638.

217. Consent to the filing of an amended petition does not waive the defense that it states a new cause of action which is barred by the statute of limitations. *Union P. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. Rep. 877, 39: 983

Right to answer amended pleading.

218. The general rule is that an amendment of a bill gives a defendant the right to answer as if he had not answered before. *French v. Stewart (French v. Hay)* 22 Wall. 238, 22: 854
Cited in Blythe v. Hinckley, 84 Fed. 244—*Rodgers v. Pitt*, 96 Fed. 670.

219. [Permitting a declaration to be amended by the writ after the jury is sworn, then swearing the jury anew and receiving their verdict without the defendant's consent, without allowing him to plead anew or giving him an imparlance or awarding costs, is error. *Thompson v. Musser (Pa. Sup. Ct.)* 1 Dall. 458, 1: 222]

220. Where the plea upon argument is sustained, the court of chancery should allow an amendment, and permit complainant to put in issue, by a proper replication, the truth of the facts stated in the plea. *Rhode Island v. Massachusetts*, 14 Pet. 210, 10: 423

221. Although a bill was wrongly conceived, and the decree in favor of complainant is reversed, where the whole question has been fully litigated, the complainants will be allowed to amend their bill, and the defendants to answer any new matter therein; the proofs to stand as proofs upon any future hearing, with liberty to either party to take additional proofs. *Thompson v. Maxwell Land-Grant & R. Co.* 95 U. S. 391, 24: 481

Time of amendment.

Of Response to Order to Show Cause, see *Bankruptcy*, 230.

See also *supra*, 61, 199-201; *infra*, 245.

222. The trial court may at any time permit amendment of any defect in the process or pleadings, upon such conditions as it shall prescribe. When such amendment is permitted, the court must determine whether any submission which has been made ought to be vacated. *Bamberger v. Terry*, 103 U. S. 40, 26: 317
Cited in Shumacher v. St. Louis, & S. F. R. Co. 39 Fed. 181—*Bowden v. Burnham*, 8 C. A. 251, 19 U. S. App. 448, 59 Fed. 755—*Baker v. Barber Asphalt-Paving Co.* 92 Fed. 122—*McDonald v. Nebraska*, 41 C. C. A. 284, 101 Fed. 177—*Dunn v. Mayo Mills*, 67 C. C. A. 451, 184 Fed. 805.

223. There are cases in chancery where

amendments are permitted at any stage or progress of the cause;—as, where an essential party has been omitted; but amendments which change the character of the bill or answer, so as to make substantially a new case, should rarely, if ever, be admitted after the cause has been set for hearing, much less after it has been heard. *Walden v. Bodley*, 14 Pet. 156, 10: 398
Cited in *Snead v. McCoull*, 12 How. 422, 13 L. ed. 1049—*Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 414, 35 L. ed. 1062, 12 Sup. Ct. Rep. 188—*India Rubber Comb Co. v. Phelps*, 8 Blatchf. 87, 4 Fisher, Pat. Cas. 317, Fed. Cas. No. 7,025—*Page v. Holmes Burglar Alarm Teleg. Co.* 18 Blatchf. 121, 5 Bann. & Ard. 443, 2 Fed. 333—*Hicks v. Otto*, 22 Blatchf. 123, 20 Fed. 111—*Lockwood v. Cleveland*, 20 Fed. 165—*Spill v. Celluloid Mfg. Co.* 22 Blatchf. 459, 22 Fed. 96—*Newburyport Water Co. v. Newburyport*, 85 Fed. 728—*Southern R. Co. v. North Carolina Corp. Commission*, 105 Fed. 271—*Fields v. Maloney*, 78 Mo. 174—*Clark v. First Cong. Soc.* 46 N. H. 273—*National Bank v. Smith*, 17 R. I. 263, 21 Atl. 950—*Ratliff v. Sommers*, 55 W. Va. 37, 46 S. E. 712.

224. In granting amendments to equity pleadings great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite party. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. Rep. 771, 28: 1141
Cited in *Wolverton v. George H. Taylor & Co.* 157 Ill. 495, 42 N. E. 49—*Gunderson v. Illinois Trust & Sav. Bank*, 100 Ill. App. 474.

225. No amendment to a bill filed by one state against another state, whose averments are sufficient to present the question whether the latter state has the power wholly to deprive the former of the benefits of water from a river which rises in the former and by nature flows into and through the latter state, will be compelled on demurrer, whatever imperfections a close analysis of the bill may disclose; but any decision as to the sufficiency of the bill to warrant the relief prayed for will be postponed until the facts are before the court on the evidence. *Kansas v. Colorado*, 185 U. S. 125, 22 Sup. Ct. Rep. 552, 46: 838
Cited in *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 251, 46 L. ed. 1149, 22 Sup. Ct. Rep. 881—*Raymond Syndicate v. Brown*, 124 Fed. 83.

226. It is within the discretion of the court to permit an amendment of the complaint before trial, by which the sum claimed is reduced below the amount which will give a right to a writ of error after judgment. *Opelika v. Daniel*, 109 U. S. 108, 3 Sup. Ct. Rep. 70, 27: 873
Cited in *Nussbaum v. Northern Ins. Co.* 40 Fed. 337—*Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 489, 101 Fed. 541.

227. An amendment at the hearing may be made where a matter has not been put in issue with sufficient precision by the bill, or the prayer is not consistent with the

case made. *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. Rep. 686, 29: 839
Cited in *Bass v. Christian Feigenspan*, 82 Fed. 261.

228. All the proceedings in the case are supposed to be within the control of the court while they are in paper, and before a jury is sworn or judgment given, and an order theretofore made permitting a plea to the jurisdiction to be filed may, in the discretion of the court, be annulled. *Breedlove v. Nicolet*, 7 Pet. 413, 8: 731

229. Upon the trial, the circuit court has power to permit an amendment of the declaration by alleging the particular district of a state in which a judgment was recovered. *Dow v. Humbert*, 91 U. S. 294, 23: 368
Cited in *Bowden v. Burnham*, 8 C. C. A. 251, 19 U. S. App. 448, 59 Fed. 755—*McDonald v. Nebraska*, 41 C. C. A. 284, 101 Fed. 177.

230-1. In ejectment the date of the demise in the declaration may be amended during the trial, so as to conform to the title. *Blackwell v. Patton*, 7 Cranch. 471, 3: 408

232. A court of equity has power to amend the pleadings, after cause has been heard and before decree passed. *Neale v. Neale*, 9 Wall. 1, 19: 590
Cited in *Hardin v. Boyd*, 113 U. S. 764, 28 L. ed. 1144, 5 Sup. Ct. Rep. 771—*Graffam v. Burgess*, 117 U. S. 193, 29 L. ed. 844, 6 Sup. Ct. Rep. 686—*Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 870, 7 Sup. Ct. Rep. 788—*Re Sanford Fork & Tool Co.* 160 U. S. 239, 40 L. ed. 417, 16 Sup. Ct. Rep. 291—*Battle v. Mutual L. Ins. Co.* 10 Blatchf. 424, Fed. Cas. No. 1,109—*Collinson v. Jackson*, 8 Sawy. 358, 14 Fed. 306—*Lakin v. Sierra Buttes Gold Min. Co.* 25 Fed. 349—*Maynard v. Tilden*, 28 Fed. 703—*Hamilton v. Southern Nevada Gold & S. Min. Co.* 13 Sawy. 121, 33 Fed. 568—*Mackintosh v. Flint & P. M. R. Co.* 34 Fed. 614—*Nellis v. Pennock Mfg. Co.* 38 Fed. 380—*Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L.R.A. 421, 6 C. C. A. 515, 18 U. S. App. 256, 57 Fed. 692—*Gubbins v. Laughtenschlager*, 75 Fed. 619—*Bass v. Christian Feigenspan*, 82 Fed. 261—*Union Cent. L. Ins. Co. v. Phillips*, 41 C. C. A. 272, 102 Fed. 27—*Re Elmira Steel Co.* 109 Fed. 462—*Ferguson Contracting Co. v. Manhattan Trust Co.* 55 C. C. A. 532, 118 Fed. 794—*Belton v. Apperson*, 26 Gratt 217—*Ratliff v. Sommers*, 55 W. Va. 37, 46 S. E. 712.

233. In an action of ejectment a motion to extend the demise may be made after judgment, the parties being presumed to be still in court for all purposes for giving effect to the judgment. *Walden v. Craig*, 14 Pet. 147, 10: 393
Cited in *Bank of United States v. Moss*, 6 How. 39, 12 L. ed. 335—*Alabama & C. R. Co. v. Jones*, 7 Nat. Bankr. Reg. 170, Fed. Cas. No. 127—*Sprague v. Litherberry*, 4 McLean. 446, Fed. Cas. No. 13,251—*Union Trust Co. v. Rockford, R. I. & St. L. R. Co.* 6 Bias. 199, Fed. Cas. No. 14,401.

234. Under the 32d section of the judiciary act, empowering any court of the United States to permit either of the parties to amend and defect in the process of pleadings at any time, if the issue presented

by the pleadings is not only an improper one for the case, but, being imperfect in substance, does not determine the rights between the parties, and thus is not cured by the verdict or the statute of jeofails, the court may award an amendment or repleader after judgment has been rendered upon the verdict, a writ of error sued out, and the cause reversed and remanded by the higher court. *Garland v. Davis*, 4 How. 131, 11: 907

Cited in Phillips & C. Constr. Co. v. Seymour, 91 U. S. 658, 23 L. ed. 345—*Bentley v. Phelps*, 3 Woodb. & M. 408, Fed. Cas. No. 1,332—*Clark v. Sohler*, 1 Woodb. & M. 375, Fed. Cas. No. 2,835—*Heckscher v. Binney*, 3 Woodb. & M. 339, Fed. Cas. No. 6,316—*Warren v. Moody*, 9 Fed. 673—*McDonald v. Nebraska*, 41 C. C. A. 284, 101 Fed. 177—*Moss v. United States*, 23 App. D. C. 484—*Gross v. Sloan*, 54 Ill. App. 204.

235. An amendment to a bill in equity may be made after a final decree, where the cause was tried as if the bill contained the averment inserted by the amendment. *Tremaine v. Hitchcock* (The Tremolo Patent) 23 Wall. 518. 23: 97

Cited in Hardin v. Boyd, 113 U. S. 764, 28 L. ed. 1144, 5 Sup. Ct. Rep. 771—*Graftam v. Burgess*, 117 U. S. 195, 29 L. ed. 844, 6 Sup. Ct. Rep. 686—*Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 870, 7 Sup. Ct. Rep. 788—*Freese v. Bachof*, Fed. Cas. No. 5,110—*New York Grape Sugar Co. v. Buffalo Grape S. Co.* 22 Blatchf. 183, 20 Fed. 505—*Nellis v. Pennock Mfg. Co.* 38 Fed. 380—*Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L.R.A. 421, 6 C. C. A. 515, 18 U. S. App. 256, 57 Fed. 692—*Gubbins v. Laughtenschlager*, 75 Fed. 620—*Bass v. Christian Feigenspan*, 82 Fed. 261—*Dunn v. Mayo Mills*, 67 C. C. A. 451, 134 Fed. 805—*Burt v. Florida Southern R. Co.* 43 Fla. 348, 31 So. 265—*Livingston v. Hayes*, 43 Mich. 136, 5 N. W. 78—*Church v. Holcomb*, 45 Mich. 40, 7 N. W. 167.

236. [Amendment may be allowed to plaintiff after the statute of limitations is pleaded. *Wharton v. Lowrey* (C. Ct.) 2 Dall. 364, 1: 417]

237. A petition in an action under the Indian depredation act of March 3, 1891 (26 Stat. at L. 851, chap. 538, U. S. Comp. Stat. 1901, p. 758), in which the wrong was alleged to have been committed by a particular Indian tribe, cannot be amended after the three years' limitation prescribed by that act has expired, by stating another and different tribe as the wrongdoer, since it is manifestly intended by the statute, taken as a whole, that the tribe by whom the depredation was committed shall be joined in the petition where it can be identified, though it does not in terms provide for service of process upon such tribe. *United States v. Martinez*, 195 U. S. 469, 25 Sup. Ct. Rep. 80, 49: 282

238. An amended bill filed, without leave of the court, eight years after the original bill was filed, must be disregarded. *Terry v. McLure*, 103 U. S. 442, 26: 403

239. Longer time in which to amend is given to a state than to other classes of

parties. *Rhode Island v. Massachusetts*, 13 Pet. 23, 10: 41

o. Supplemental Pleading; New Pleading.

Editorial note.

[Right to set up judgment in other court by. 49 L.R.A. 285.]

Supplemental pleading.

Service of, see *infra*, 314.

Revival of Suit against New Trustee by, see Abatement and Revival, 66.

Remanding Case to Lower Court to Permit, see Appeal and Error, IX. i, 1, c.

Frivolousness of Federal Question as to, see Appeal and Error, 1121.

Necessity that Supplemental Bill in Federal Court be Supported by Record Showing Diverse Citizenship, see Courts, 1147.

Necessity of Notice of, see Judgment, 708.

Conclusiveness of Judgment on, see Judgment, 789a.

To Enforce Decree in Equity, see Judgment, 1130.

Applicability of Statute of Limitations to, see Limitation of Actions, 267.

Effect of, on Running of Limitations, see Limitation of Actions, 602a.

Necessity of, to Prevent Perversion of Foreclosure Decree, see Mortgage, 487.

See also Review, 2.

240. A supplemental bill is filed on leave and for matter happening after the filing of the bill, and is designed to supply some defect in the structure of the original bill. *Kennedy v. Bank of Georgia*, 8 How. 586, 12: 1209

Cited in Chester v. Life Asso. of America, 4 Fed. 489—*Nevada Nickel Syndicate v. National Nickel Co.* 86 Fed. 489—*Hill v. Phelps*, 41 C. C. A. 571, 101 Fed. 652—*Dillard v. Central Virginia Iron Co.* 125 Fed. 158—*Kelly v. Galbraith*, 186 Ill. 611, 58 N. E. 431.

241. A supplemental bill which has no possible connection with the original bill should be dismissed. *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* 6 Wall. 742, 18: 856

Cited in Schwab v. Schwab, 93 Md. 385, 52 L. R.A. 415, 49 Atl. 331—*Smith v. Pyrites Mtn. & Chemical Co.* 101 Va. 303, 43 S. E. 564.

242. Strictly new matter arising after the filing of a bill, properly set up by supplemental bill in support of the relief originally prayed for, is not a new cause of action. *Jenkins v. International Bank of Chicago*, 127 U. S. 484, 8 Sup. Ct. Rep. 1196, 32: 189

Distinguished in McKenna v. Simpson, 129 U. S. 512, 32 L. ed. 774, 9 Sup. Ct. Rep. 365.

Cited in Mellor v. Smither, 52 C. C. A. 68, 114 Fed. 120—*Swedish American Nat. Bank v. Dickinson Co.* 6 N. D. 229, 49 L.R.A. 289, 69 N. W. 455.

243. Where the practice of a state requires the real facts to be stated, any title acquired by defendant subsequent to the issue joined, by denial of plaintiff's title, must be set up by a supplemental answer in the nature of a plea *puis darrein continuance*. *Hardy v. Johnson*, 1 Wall. 371, 17: 502

Cited in Northern P. R. Co. v. Smith, 16 C. C. A. 338, 32 U. S. App. 573, 69 Fed. 581—*Rush v. French*, 1 Ariz. 149, 25 Pac. 816—*Moss v. Shear*, 80 Cal. 472—*Marshall v. Shafter*, 82 Cal. 194—*Spratt v. Price*, 18 Fla. 810.

244. One who has, under the act for the adjustment of land claims in Louisiana, filed a bill for certain lands, and afterwards discovered that the true right to the lands claimed existed, not in himself, but in another, cannot, by a supplemental petition, allege such other title in support of his bill, especially where such other title was barred by the statute of limitations. *United States v. Innerarity*, 19 Wall. 595, 22: 202

245. Where a final decree covering the entire original case existed, over which the court had no power, further relief can be reached, if at all, only by a supplemental bill. It is a gross error to allow an amended bill to be filed. *French v. Stewart* (*French v. Hay*) 22 Wall. 238, 22: 854

Cited in Excelsior Pebble Phosphate Co. v. Brown, 20 C. C. A. 431, 42 U. S. App. 55, 74 Fed. 324—*Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 442, 113 Fed. 752—*Smith v. St. Louis Mut. L. Ins. Co.* 3 Tenn. Ch. 153.

246. A bill in the nature of a bill of review which seeks to state a new fact, viz., the death of a party to the original suit before sale under an execution, as well as to review the original decree and to introduce the heirs of the decedent as new parties, bears as to the first the character of a supplementary bill. *Whiting v. Bank of United States*, 13 Pet. 6, 10: 33
Cited in Sanderson v. Jones, 6 Fla. 474, 63 Am. Dec. 217.

New pleading.

Abandonment of Former Pleading by Filing, see *infra*, 789.

Review of Discretion as to, see *Appeal and Error*, 4432-4434.

Necessity of New Process on, see *Writ and Process*, 8.

See also *infra*, 254.

247. The court may allow plaintiff to file a new petition in place of the original, when it is lost without the fault of plaintiff, and does not differ from the original in any substantial particular. *Phillips v. Moore*, 100 U. S. 208, 25: 603
Cited in Hardesty v. Hosmer, 4 App. D. C. 282.

248. The defendant, by failure to plead anew after a new count in the declaration in ejectment, and by going to trial without objection, waives his right of pleading *de novo*, and, if the plea cover the whole declaration, the plaintiff is put to proof on

the new as well as the old counts. *Wright v. Hollingsworth*, 1 Pet. 165, 7: 96
Cited in Townsend v. Jemison, 7 How. 718, 12 L. ed. 885.

249. A plea appearing in the original plea of the defendant, but omitted when he pleaded anew to the amended declaration, is waived where the amended declaration was filed as a substitute for the original, and no issue was taken on such plea. *Alexandria Canal Co. v. Swann*, 5 How. 83, 12: 60

p. Filing after Default.

250. Under the Virginia practice, it was customary to admit any plea, at the next term following a default judgment, which was necessary to bring forward the substantial merits of the case, whether it was strictly an issuable plea or not. *Resler v. Shehee*, 1 Cranch, 110, 2: 51

251. The refusal to permit a plea to be filed at the third term following a default judgment is a sound exercise of the court's discretion, under the Virginia practice, where the facts stated in the plea offered might have been given in evidence on the general issue. *Resler v. Shehee*, 1 Cranch, 110, 2: 51

Cited in Martin v. Baltimore & O. R. Co. (Gering v. Baltimore & O. R. Co.) 151 U. S. 686, 38 L. ed. 316, 14 Sup. Ct. Rep. 533.

q. Surplusage.

See also *infra*, 466.

252. Where plaintiff is not bound to sue in his representative capacity, his naming himself in such capacity may be rejected as surplusage. *Biddle v. Wilkins*, 1 Pet. 686, 7: 315

Cited in Newberry v. Robinson, 36 Fed. 842—*Innerarity v. Kennedy*, 2 Stew. (Ala.) 159—*Gibson v. Land*, 27 Ala. 125—*Anderson v. Wilson*, 13 Ark. 413—*Wiggins v. Halligan*, 46 Ill. 176—*Barnes v. Modisett*, 3 Blackf. 254—*Merritt v. Seaman*, 6 N. Y. 173.

253. Where the averment in a declaration sets forth that the plaintiff has been turned out of possession of a lot of ground purchased of the defendant, but does not state that the eviction was by due course of law, and the breach alleged in the count is that the defendant had refused, on demand, to convey the lot, the averment of eviction is mere surplusage. *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19, 10: 335

r. Withdrawal.

Review of Discretion as to, see *Appeal and Error*, 4420.

Revocation of Election by, see *Election of Remedies*, 27.

As Withdrawal of Appearance, see *Judgment*, 206.

Conclusiveness of Judgment by Default after Withdrawal, see *Judgment*, 270.

See also *supra*, 39; *infra*, 901.

254. After the filing of a new count to a

declaration, the defendant, who has pleaded to the former counts, may withdraw and plead anew or abide by his plea already pleaded. *Wright v. Hollingsworth*, 1 Pet. 165, 7: 96

Cited in Ridgely Nat. Bank v. Fairbank, 54 Ill. App. 297—*Pease v. Bartlett*, 97 Ill. App. 498.

255. Asking leave to plead to the jurisdiction is, in effect, a withdrawal of a plea to the merits; for after a plea in bar the defendant cannot plead to the jurisdiction of the court. *Kern v. Huidekoper*, 103 U. S. 485, 26: 354

256. [The jury being at the bar, defendant cannot retract his plea and enter judgment by *non sum informatus*, because of the inconvenience from delay so caused where there is no dispute. *Vasse v. Spicer* (Pa. Sup. Ct.) 2 Dall. 111, 1: 310]

257. Delay for six years will be ground for denying leave to withdraw an answer, in the absence of fraud or collusion. *White v. Miller* (*White v. Joyce*) 158 U. S. 128, 15 Sup. Ct. Rep. 788, 39: 921

258. Where a defendant appeared and pleaded to an action, and, at the trial, withdrew his plea, this court can take no notice of any matter of abatement in the writ or declaration. *Smith v. Clapp*, 15 Pet. 125, 10: 684

Cited in Dorman v. Bigelow, 1 Fla. 296.

Of replication.

By Filing New Replication, see *infra*, 789.

259. A replication inadvertently filed may be withdrawn by permission of the court. *Hughes v. Blake*, 6 Wheat. 453, 5: 303

Cited in Green v. Harris, 9 R. I. 409.

260. In overruling a motion for leave to withdraw a replication and file a new one, the court exercises its discretion, which cannot be affected by the reason assigned. *United States v. Buford*, 3 Pet. 12, 7: 585

s. Striking Out.

Of Cross Bill, see *infra*, 817, 833.

Striking out Surplus Words from Indictment, see *Indictment*, etc., 162.

Judgment by Default after Striking Out One Count of Declaration, see *Judgment*, 47.

Striking Out Evidence, see *Trial*, IV. c.

261. Facts stated in the declaration, pursuant to a law of the territory of Minnesota, which were material to the understanding of the rights of the parties to the controversy, cannot be suppressed by the court on motion to strike out. *Rey v. Simpson*, 22 How. 341, 16: 260

262. A notice of special matter may be struck out when all evidence admissible under it is admissible under the plea. *United States v. Stone*, 106 U. S. 525, 1 Sup. Ct. Rep. 287, 27: 163

263. If an amendment to the pleadings is one which the court, in the exercise of its discretion might properly allow, a motion to

strike the amended pleading from the files should be denied. *Jones v. Van Doren*, 130 U. S. 684, 9 Sup. Ct. Rep. 685, 32: 1077

Cited in Brainard v. Buck, 184 U. S. 104, 48 L. ed. 453, 22 Sup. Ct. Rep. 458—*Brainard v. Buck*, 16 App. D. C. 598.

Editorial note.

[Power to punish disobedience to orders in case by striking pleadings. 4 L.R.A. (N.S.) 1185.]

Answer or plea.

Appealability of Order, see *Appeal and Error*, 112.

Presumption as to, on Appeal, see *Appeal and Error*, 4120.

Review of Discretion as to, see *Appeal and Error*, 4417.

Prejudicial Error as to, see *Appeal and Error*, 5012-5015.

As Punishment for Contempt, see *Constitutional Law*, 690.

To Obtain Right to Close Argument, see *Trial*, 78a.

See also *infra*, 649; *Sheriff*, 16.

264. It is error to strike out an answer which constitutes a good defense and upon which defendant relies. *Hozey v. Buchanan*, 16 Pet. 215, 10: 941

Mandelbaum v. Nevada, 8 Wall. 310, 19: 479

Cited in Mandelbaum v. Nevada, 8 Wall. 314, 19 L. ed. 480—*Garnhart v. United States*, 18 Wall. 165, 21 L. ed. 276—*Edwards v. Elliott*, 21 Wall. 552, 22 L. ed. 490—*Fuller v. Claflin*, 93 U. S. 16, 23 L. ed. 786—*Felbelman v. Packard*, 109 U. S. 426, 27 L. ed. 986, 3 Sup. Ct. Rep. 289—*Pastene v. Pardini*, 135 Cal. 433, 67 Pac. 681—*Hobbs v. The Interchange*, 1 W. Va. 67.

265. In an action commenced against a sheriff for the value of property sold under execution, an allegation in his answer that the sale whereby the plaintiff claimed the property was fraudulent and void, and made with intent to defraud creditors, constitutes a good defense, and should not be stricken from the answer before the jury is sworn or the evidence heard. *Hozey v. Buchanan*, 16 Pet. 215, 10: 941

266. Where the defense set up is double taxation, and would be perfect if true, it is error for the court, on motion of the plaintiff, to strike out this defense as to all property standing in the same category in the answer except as to one item of value. *Mandelbaum v. Nevada*, 8 Wall. 310, 19: 479

Cited in Garnhart v. United States, 18 Wall. 165, 21 L. ed. 276—*Fuller v. Claflin*, 93 U. S. 16, 23 L. ed. 786.

267. [Where, upon pleas of *non assumpsit* and payment, plaintiff has sent a commission to another state for evidence as to the first plea, the defendant cannot strike out that plea, and thus obtain the right of closing the argument to the jury. (But see note.) *Jackson v. Winchester* (Pa. Sup. Ct.) 4 Dall. 205, 1: 802]

268. There is no error in striking out that portion of a defense which is not responsive

to any allegation in the petition. *Hart v. United States*, 95 U. S. 316, 24: 479

269. A plea in a suit for specific performance of a contract to convey land, that the plaintiffs had not used their influence to bring immigrants and make improvements on the property, and thus add value to the land which the defendant had refused to convey to them, is irrelevant if not impertinent, and subject to a motion to strike. *Fackler v. Ford*, 24 How. 322, 16: 690

270. In a suit for the specific performance of a contract to convey land, allegations in the answer that the Indian proprietors of the lands had been defrauded by the government, and the lands appraised and sold below their true value, and that the plaintiffs were cognizant of such fraud, and that the defendant had not put his town plat on record before he got a title from the United States, and that, therefore, the description of the land is so vague and uncertain that a court cannot decree a specific performance, is properly expunged from the answer as impertinent. *Fackler v. Ford*, 24 How. 322, 16: 690

t. Multifariousness; Misjoinder.

Time to Object because of, see *supra*, 53, 60. Raising Question of, by Plea in Abatement, see *infra*, 648.

Demurrer for, see *infra*, 848.

Prejudicial Error as to, see Appeal and Error, 5017.

Duplicity in Indictment, see Indictment, etc., II. d.

Joinder of Counts in Indictment, etc., see Indictment, etc., III.

Multifariousness of Indictment, see Indictment, etc., 191.

Collateral Attack on Decree for Multifariousness, see Judgment, 393.

Joinder of Parties Plaintiff, see Parties, I. b.

Joinder of Parties Defendant, see Parties, II. b.

Availability of, to Prevent Removal to Federal Court, see Removal of Causes, 256.

Validity of Statute Authorizing Joinder of Causes of Action, see Writ and Process, 30.

See also *infra*, 573; Parties, 278.

Editorial note.

Multifariousness in bill. 11: 402

What constitutes.

271. It is impracticable to lay down any rule as to what constitutes multifariousness as an abstract proposition, and each case must depend upon its own circumstances, and be left to the sound discretion of the court. *Barney v. Latham*, 103 U. S. 205, 26: 514

Cited in Hosmer v. Wyoming R. & Iron Co. 65 C. C. A. 36, 129 Fed. 888—*United Cigarette Mach. Co. v. Wright*, 132 Fed. 197—*Emmons v. National Mut. Bldg. & L. Assn.* 68 C. C. A. 830, 135 Fed. 692.

272. There is no fixed rule in equity as to what constitutes multifariousness which is

fatal to a suit on demurrer. *Harrison v. Perea*, 168 U. S. 311, 18 Sup. Ct. Rep. 129

42: 471

Cited in Dennison Mfg. Co. v. Thomas Mfg. Co. 94 Fed. 652—*Commercial Bank v. Sandford*, 99 Fed. 157—*United States Mineral Wool Co. v. Manville Covering Co.* 101 Fed. 146.

273. Every case in which multifariousness is charged must be governed by its own circumstances. No universal rule as to what constitutes multifariousness can be laid down as an abstract proposition. The exercise of a sound discretion by the court in each case is necessary. *Gains v. Chew*, 2 How. 619, 11: 402

Cited in Oliver v. Platt, 3 How. 411, 11 L. ed. 658—*Roberts v. Northern P. R. Co.* 158, U. S. 29, 39 L. ed. 883, 15 Sup. Ct. Rep. 756—*Mills v. Hurd*, 32 Fed. 129—*United States v. Guglard*, 79 Fed. 24—*Williams v. Crabb*, 59 L.R.A. 432, 54 C. C. A. 223, 117 Fed. 203—*United Cigarette Mach. Co. v. Wright*, 132 Fed. 197—*State v. Churchill*, 48 Ark. 436, 3 S. W. 352—*De Wolf v. Sprague Mfg. Co.* 49 Conn. 298—*Macon City Bank v. Bartlett*, 71 Ga. 806—*Thornton v. Hontze*, 91 Ill. 220—*Sturgeon v. Burrall*, 1 Ill. App. 549—*Carter v. Kerr*, 8 Blackf. 375—*Chew v. Glenn*, 82 Md. 375, 33 Atl. 722—*Whitfield v. Evans*, 56 Miss. 492—*Hardie v. Bulger*, 66 Miss. 583, 6 So. 186—*State use of Mitchell v. Kirby*, 9 Mo. 296—*Stalcup v. Garner*, 26 Mo. 73—*Kellogg v. Siple*, 11 App. Div. 466, 42 N. Y. Supp. 379—*Benson v. Keller*, 37 Or. 127, 60 Pac. 918—*Bartu v. Tompkins*, 4 Sneed, 636—*Woodward v. Hall*, 2 Tenn. Ch. 169—*Love v. Keowne*, 58 Tex. 198—*Com. v. Drake*, 81 Va. 316—*Jordan v. Liggan*, 95 Va. 618, 29 S. E. 330—*Crumlish v. Shenandoah Valley R. Co.* 28 W. Va. 631.

274. Multifariousness depends on the features of each case. *Shields v. Thomas*, 18 How. 253, 15: 368

Cited in Barney v. Latham, 103 U. S. 215, 26 L. ed. 518—*Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 410, 32 L. ed. 470, 9 Sup. Ct. Rep. 127—*Harrison v. Perea*, 168 U. S. 319, 42 L. ed. 481, 18 Sup. Ct. Rep. 129—*Fitchett v. Blows*, 20 C. C. A. 289, 36 U. S. App. 597, 74 Fed. 50—*Cutter v. Iowa Water Co.* 96 Fed. 780—*Commercial Bank v. Sandford*, 99 Fed. 157—*The Chicago*, 101 Fed. 145—*Williams v. Crabb*, 59 L.R.A. 432, 54 C. C. A. 223, 117 Fed. 203—*Inman v. New York Interurban Water Co.* 131 Fed. 999—*Bliss v. Parks*, 175 Mass. 543, 56 N. E. 566—*Crumlish v. Shenandoah Valley R. Co.* 28 W. Va. 631.

275-6. What constitutes a multifariousness is much in the discretion of the court, and that objection cannot be taken except by demurrer, or plea, or answer, and, if not so taken, is deemed waived; and an appellate court would scarcely entertain the objection unless it were a moral necessity. *Oliver v. Platt*, 3 How. 333, 11: 622

Cited in Barney v. Latham, 103 U. S. 215, 26 L. ed. 518—*Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 751, 31 L. ed. 311, 8 Sup. Ct. Rep. 337—*United States v. American Bell Teleph. Co.* 128 U. S. 352, 32 L. ed. 456, 9 Sup. Ct. Rep. 90—*Sheldon v. Keokuk Northern Line Packet Co.* 10 Blas. 473, 8 Fed. 770—*Mining Debris Case*, 8 Sawy. 636, 16 Fed. 32—*Singer Mfg. Co. v. Springfield Foundry Co.* 34 Fed. 396—*Converse v. Michigan Dairy Co.* 45 Fed. 20—*Ranger v. Champion Cotton-Press Co.* 52 Fed. 613—*Baltimore*

& O. Teleg. Co. v. Interstate Teleg. Co. 4 C. C. A. 187, 8 U. S. App. 340, 54 Fed. 53—Fitchett v. Blows, 20 C. C. A. 280, 36 U. S. App. 597, 74 Fed. 50—Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 993—Dennison Mfg. Co. v. Thomas Mfg. Co. 94 Fed. 652—Chisholm v. Johnson, 106 Fed. 210—Barber v. National Carbon Co. 64 C. C. A. 46, 129 Fed. 376—United Cigarette Mach. Co. v. Wright, 132 Fed. 197—Bean v. Bean, 37 Ala. 20—City Bank v. Bartlett, 71 Ga. 806—Thornton v. Houtze, 91 Ill. 220—Woodworth v. Gibbs, 61 Iowa, 401, 16 N. W. 287—Ash-ton v. Ashton, 35 Md. 504—Dunn v. Cooper, 3 Md. Ch. 49—Crocker v. Dillon, 133 Mass. 102—Shaw v. Chase, 77 Mich. 447, 43 N. W. 883—Cleland v. Casgrain, 92 Mich. 149, 52 N. W. 460—Torrent v. Hamilton, 95 Mich. 161, 54 N. W. 634—Stalcup v. Garner, 26 Mo. 73—Buchanan v. Wise, 28 Neb. 328, 44 N. W. 458—Abbot v. Johnson, 32 N. H. 23—Veghte v. Raritan Water Power Co. 19 N. J. Eq. 146—Conro v. Port Henry Iron Co. 112 Barb. 58—Heggle v. Hill, 95 N. C. 306—Benson v. Keller, 37 Or. 127, 60 Pac. 918—Persch v. Quiggle, 57 Pa. 258—Citizens Natural Gas Co. v. Shenango Natural Gas Co. 7 Pa. Co. Ct. 280—Clegg v. Varnell, 18 Tex. 303—Wade v. Pulsifer, 54 Vt. 71—Holt v. Daniels, 61 Vt. 93, 17 Atl. 786—Washington City Sav. Bank v. Thornton, 83 Va. 166, 2 S. E. 193—St. Lawrence Boom & Mfg. Co. v. Holt, 51 W. Va. 379, 41 S. E. 351.

Parties.

Dismissal for Misjoinder, see Dismissal and Discontinuance, 51.

277. It is not indispensable that all the parties to a suit in equity should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others. *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403, 9 Sup. Ct. Rep. 127, 32: 468
Cited in Allen v. Fairbanks, 45 Fed. 446—*Eastern Bldg. & L. Asso. v. Denton*, 13 C. C. A. 46, 31 U. S. App. 187, 65 Fed. 570—*Security Sav. & L. Asso. v. Buchanan*, 14 C. C. A. 100, 31 U. S. App. 244, 66 Fed. 802—*Hayden v. Thompson*, 17 C. C. A. 599, 36 U. S. App. 361, 71 Fed. 68—*Golden v. Bruning*, 72 Fed. 4—*First Nat. Bank v. Peavey*, 75 Fed. 155—*Kelley v. Boettcher*, 29 C. C. A. 23, 56 U. S. App. 363, 85 Fed. 64—*Curran v. Camplon*, 29 C. C. A. 29, 56 U. S. App. 383, 85 Fed. 70—*Ryan v. Seaboard & R. R. Co.* 89 Fed. 407—*Metropolitan Trust Co. v. Columbus, S. & H. R. Co.* 93 Fed. 691—*Cutter v. Iowa Water Co.* 96 Fed. 780—*Commercial Bank v. Sandford*, 99 Fed. 157—*United States Mineral Wool Co. v. Manville Covering Co.* 101 Fed. 145—*Williams v. Crabb*, 59 L.R.A. 432, 54 C. C. A. 223, 117 Fed. 203—*Ashley v. Little Rock*, 56 Ark. 402, 19 S. W. 1058—*Flelds v. Gwynn*, 19 App. D. C. 115—*Demarest v. Holdeman*, 157 Ind. 474, 62 N. E. 17.

278. A creditors' bill against the personal representatives of two deceased partners, as common members of two mercantile firms, and the surviving partners of one of the firms, is not multifarious. *Nelson v. Hill*, 5 How. 127, 12: 81

279. In an equity suit where the case against one of the defendants is so entire as to be incapable of being prosecuted in several suits, and another defendant is a neces-

sary party to some portion of the case stated, the objection of multifariousness cannot prevail. *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403, 9 Sup. Ct. Rep. 127, 32: 468

In bill.

Joinder of Causes of Action, see Action or Suit, II.

Union of Legal and Equitable Causes not Permissible in Federal Courts, see Courts, 1251-1260.

As to Parties, see supra, 277-281.

280. An amendment to a bill by the United States against a surety on an official bond, setting up an additional claim against him on another bond, does not make the bill multifarious. *United States v. Beebe*, 180 U. S. 343, 21 Sup. Ct. Rep. 371, 45: 563

281. Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other, cannot be joined in one bill in equity. *Stebbins v. St. Anne*, 116 U. S. 386, 6 Sup. Ct. Rep. 418, 29: 667

Cited in Day v. National Mut. Bldg. & L. Asso. 53 W. Va. 553, 44 S. E. 779.

281a. In general terms a bill is said to be multifarious which seeks to enforce, against different individuals, demands which are wholly disconnected. *Gaines v. Chew*, 2 How. 619, 11: 402

282. To support the objection of multifariousness because a bill contains different causes of suit against the same person, two things must concur: (1) The grounds of suit must be different; (2) each ground must be sufficient as stated to sustain a bill. *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403, 9 Sup. Ct. Rep. 127, 32: 468

Cited in Washington County v. Williams, 49 C. C. A. 635, 111 Fed. 815—*Watson v. Bonilla*, 53 C. C. A. 537, 116 Fed. 159—*United States v. Southern P. R. Co.* 117 Fed. 554—*Hosmer v. Wyoming R. & Iron Co.* 65 C. C. A. 86, 129 Fed. 888—*United Cigarette Mach. Co. v. Wright*, 132 Fed. 197—*Emmons v. National Mut. Bldg. & L. Asso.* 68 C. C. A. 330, 135 Fed. 692—*German Sav. & L. Soc. v. Tull*, 69 C. C. A. 12, 136 Fed. 12—*McMullen Lumber Co. v. Strother*, 69 C. C. A. 444, 136 Fed. 306—*Bradley v. Bradley*, 165 N. Y. 187, 58 N. E. 887—*Zell Guano Co. v. Heatherly*, 38 W. Va. 418, 18 S. E. 611.

283. A bill is multifarious where there is a misjoinder of parties complainant, and where the causes of action and the relief sought in regard to the property are distinct, in some respects antagonistic, and cannot properly be joined. *Walker v. Powers*, 104 U. S. 245, 26: 729

Cited in Williams v. Jackson, 107 U. S. 484, 27 L. ed. 531, 2 Sup. Ct. Rep. 814—*United States v. American Bell Teleph. Co.* 128 U. S. 352, 32 L. ed. 456, 9 Sup. Ct. Rep. 90—*Merriman v. Chicago & E. I. R. Co.* 12 C. C. A. 292, 24 U. S. App. 428, 64 Fed. 552—*United States v. Flournoy Live-Stock & Real Estate Co.* 69 Fed. 890—*Cutler v. Iowa Water Co.* 96 Fed. 770—*Animarium Co. v. Nelman*, 98 Fed. 15—*Bidwell v. Huff*, 103 Fed. 376—*Home Ins. Co. v. Virginia-Carolina-Chemical Co.* 109 Fed. 692—*Coffey v.*

Norwood, 81 Ala. 516, 8 So. 199—Dunn v. Wolf, 81 Iowa, 690, 47 N. W. 887—Laughead v. Beale, 24 Pa. Co. Ct. 468—Snyder v. Cabell, 29 W. Va. 54, 1 S. E. 241—Day v. National Mut. Bldg. & L. Asso, 53 W. Va. 553, 44 S. E. 779.

284. A bill may be filed with a double aspect, if the alternative case stated is the foundation for the same relief. *Shields v. Barrow*, 17 How. 130, 15: 158
Cited in St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 33 Fed. 448—*Fisher v. Moog*, 39 Fed. 668—*Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 607—*Merriman v. Chicago & E. I. R. Co.* 12 C. C. A. 292, 24 U. S. App. 428, 64 Fed. 552—*Halsey v. Goddard*, 86 Fed. 28—*McGraw v. Woods*, 96 Fed. 58—*Cutter v. Iowa Water Co.* 96 Fed. 782—*Rives v. Walthall*, 38 Ala. 332—*Gordan v. Ross*, 63 Ala. 365—*Lehman v. Meyer*, 67 Ala. 403—*Caldwell v. King*, 76 Ala. 154—*Bradley v. Bradley*, 185 N. Y. 187, 58 N. E. 887—*Brown v. Bedford City Land & Improv. Co.* 91 Va. 38, 20 S. E. 968.

285. A bill cannot be said to be multifarious that is authorized by Congress, since that doctrine may be modified, limited, and controlled by the legislative power which creates the court and confers jurisdiction. *United States v. Union P. R. Co.* 98 U. S. 569, 25: 143
Cited in Brown v. Tilley, 25 R. I. 584, 57 Atl. 380.

286. A bill charges a violation of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies, as against the objections of want of equity, multifariousness, and failure to set forth sufficient definite or specific facts, where it avers the existence of a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different states, to bid up prices for a few days in order to induce shipments to the stock yards, to fix selling prices, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and to secure less than lawful freight rates, to the exclusion of competitors. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. Rep. 276, 49: 518
Cited in New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 404, 50 L. ed. 528, 26 Sup. Ct. Rep. 272—*Reece Folding Mach. Co. v. Fenwick*, 2 L.R.A. (N.S.) 1098, 72 C. C. A. 42, 140 Fed. 290—*United States v. Atchison, T. & S. F. R. Co.* 142 Fed. 191.

287. A person claiming the same property by different titles may assert them all in one bill. *Stephens v. M'Cargo*, 9 Wheat. 502, 6: 145
Cited in Halsey v. Goddard, 86 Fed. 28.

288. A bill to recover a subject under a common title, although complainants claim aliquot parts against persons jointly liable,

is not multifarious. *Shields v. Thomas*, 18 How. 253, 15: 368
Cited in Bunnel v. Stoddard, Fed. Cas. No. 2-135—*Catlin v. Wheeler*, 49 Wis. 519, 5 N. W. 935.

289. A bill to foreclose the equity of redemption of personal property covered by twenty-six trust deeds executed to five different sets of trustees, plaintiff being the *cestui que trust* in all of them, either originally or by purchase of one of the deeds covering the entire property, and some of the defendants having liens upon various portions of the property, is not multifarious. It is necessary to adjudicate all claims in one suit. *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 105, 7 Sup. Ct. Rep. 841, 30: 905
Cited in First Nat. Bank v. Moore, 48 Fed. 802.

290. A bill is not multifarious in uniting trust property of two distinct companies where their interests are so mixed in all the transactions that a union of the two is necessary to enable the court to make a final decree touching all the interests. *Oliver v. Piatt*, 3 How. 333, 11: 622
Cited in Foote v. Linck, 5 McLean, 620, Fed. Cas. No. 4,913—*Woolsey v. Dodge*, 6 McLean, 144, Fed. Cas. No. 18,032—*Bound v. South Carolina R. Co.* 50 Fed. 854—*Barcus v. Gates*, 32 C. C. A. 347, 61 U. S. App. 596, 89 Fed. 793—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 990—*Animarium Co. v. Neiman*, 98 Fed. 15—*Williams v. Crabb*, 59 L.R.A. 433, 54 C. C. A. 223, 117 Fed. 203—*Adam v. Folger*, 56 C. C. A. 544, 120 Fed. 264—*Hosmer v. Wyoming R. & Iron Co.* 65 C. C. A. 86, 129 Fed. 888—*McCormick v. District of Columbia*, 7 Mackey, 540—*Warren v. Warren*, 56 Me. 368—*Klein v. Commercial Nat. Bank*, 44 Phila. Leg. Int. 144—*Barkley v. Barkley*, 14 Rich. Eq. 26—*Edwards v. Sartor*, 1 S. C. N. S. 270.

291. A bill to collect assessments on several lots is not multifarious where the assessments were assessed on the lots by the foot front, and all against the same defendant. *Fitch v. Creighton*, 24 How. 159, 16: 596
Cited in Barney v. Latham, 103 U. S. 215, 26 L. ed. 518—*Bunnel v. Stoddard*, Fed. Cas. No. 2,135—*Fitchett v. Blows*, 20 C. C. A. 289, 86 U. S. App. 597, 74 Fed. 49—*Edwards v. Sartor*, 1 S. C. N. S. 270.

292. A bill is not multifarious, although one paragraph sets out a verbal agreement to convey an interest in land, and the prayer is for the payment of money, where, in view of a trust deed, a decree for the interest in land will not satisfy plaintiff's claim, and his lien is claimed to extend to the whole property to satisfy a promise to convey half of its unencumbered value. *Townsend v. Vandewerker*, 160 U. S. 171, 16 Sup. Ct. Rep. 258, 40: 383

293. A bill filed by the holder of a non-negotiable note given by a national bank which afterwards went into voluntary liquidation is not multifarious because the complainant seeks by such bill, on behalf of himself and all other creditors, the winding up of its affairs, the determination of the

amount due on his note, the ascertainment of all the creditors and the amount of their claims, the subjection of the remaining assets to the payment of those claims, and the enforcement of the statutory liability of the stockholders. *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. Rep. 495, 50: 738
Frenzer v. Wallace, 201 U. S. 244, 26 Sup. Ct. Rep. 498, 50: 742

294. A bill to recover a share of an estate is not multifarious, although it seeks to open the settlement with the probate court as fraudulent, and to cancel the receipt from the complainant to the administrator. *Payne v. Hook*, 7 Wall. 425, 19: 260

295. A bill filed by one claiming as heir and devisee against the executors of the purchasers and occupants of an estate, calling for an account of the rents and profits from them, and charging the suppression of the last will under which she claimed, is not multifarious. *Gaines v. Chew*, 2 How. 619, 11: 402

Cited in *Oliver v. Platt*, 3 How. 411, 11 L. ed. 658—*Barney v. Latham*, 103 U. S. 215, 26 L. ed. 518—*Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 410, 32 L. ed. 470, 9 Sup. Ct. Rep. 127—*Bunuel v. Stoddard*, Fed. Cas. No. 2,135—*Central P. R. Co. v. Dyer*, 1 Sawy. 650, Fed. Cas. No. 2,552—*Gaines v. Mausseaux*, 1 Woods, 120, Fed. Cas. No. 5,176—*Pierpont v. Fowle*, 2 Woodb. & M. 34, Fed. Cas. No. 11,152—*Stafford Nat. Bank v. Sprague*, 19 Blatchf. 532, 8 Fed. 379—*Sheldon v. Keokuk Northern Line Packet Co.* 10 Bliss. 473, 8 Fed. 770—*Mining Debris Case*, 8 Sawy. 636, 16 Fed. 32—*Norris v. Hassler*, 22 Fed. 408—*Eastern Bldg. & L. Asso. v. Denton*, 18 C. C. A. 45, 31 U. S. App. 187, 65 Fed. 570—*Halsey v. Goddard*, 36 Fed. 28—*Central Nat. Bank v. Fitzgerald*, 94 Fed. 20—*Hosmer v. Wyoming R. & Iron Co.* 65 C. C. A. 86, 129 Fed. 888—*Horton v. Sledge*, 29 Ala. 496—*Boyd v. Hunter*, 44 Ala. 719—*Roberts v. Abbott*, 127 Ind. 87, 26 N. E. 565—*Demarest v. Holdeman*, 157 Ind. 474, 62 N. E. 17—*Warren v. Warren*, 56 Me. 368—*Lockwood Co. v. Lawrence*, 77 Me. 310, 52 Am. Rep. 763—*Torrent v. Hamilton*, 95 Mich. 161, 54 N. W. 634—*Roberts v. Starke*, 47 Miss. 261—*McGowan v. McGowan*, 48 Miss. 563—*Jones v. Foster*, 50 Miss. 53—*Waller v. Shannon*, 53 Miss. 502—*Columbus Ins. & Bkg. Co. v. Humphries*, 64 Miss. 276, 1 So. 232—*Montserrat Coal Co. v. Johnson County Coal Min. Co.* 141 Mo. 157, 42 S. W. 822—*Gage v. Dow*, 58 N. H. 421—*Rau v. Small*, 144 Pa. 309, 22 Atl. 740—*Clegg v. Varnell*, 18 Tex. 302—*Lewis v. St. Albans Iron & Steel Works*, 50 Vt. 482—*Yates v. Law*, 86 Va. 123, 9 S. E. 508—*Washington City Sav. Bank v. Thornton*, 83 Va. 166, 2 S. E. 193—*Bassett v. Warner*, 23 Wis. 688.

296. A declaration is bad which unites a count in tort with one in contract. *Garland v. Davis*, 4 How. 131, 11: 907

297. A bill for the rescission of a contract cannot be joined with one for specific performance of the same contract. *Shields v. Barrow*, 17 How. 130, 15: 158
Cited in *Williams v. Jackson*, 107 U. S. 484, 27 L. ed. 531, 2 Sup. Ct. Rep. 814—*Micou v. Ashurst*, 55 Ala. 613—*Fields v. Helms*, 70 Ala. 462—*Trust Co. v. Scottish Union & Nat. Ins. Co.* 119 Ga. 674, 46 S. E. 855—*Anderson v. Masson*, 3 Baxt. 302—*Day v. U. S. Dig.*—284

National Mut. Bldg. & L. Asso. 53 W. Va. 553, 44 S. E. 779.

298. A bill is not multifarious which assails two patents issued to the same party, and which relate to the same subject, and both of which are held by the same defendant, the latter patent being for an improvement upon the invention of the earlier one. *United States v. American Bell Teleph. Co.* 128 U. S. 315, 9 Sup. Ct. Rep. 90, 32: 450
Cited in *United States v. American Bell Teleph. Co.* 39 Fed. 717—*Harper v. Holman*, 84 Fed. 223—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 990—*Dennison Mfg. Co. v. Thomas Mfg. Co.* 94 Fed. 652—*Cutter v. Iowa Water Co.* 96 Fed. 779—*United States Mineral Wool Co. v. Manville Covering Co.* 101 Fed. 146—*Burlington Sav. Bank v. Clinton*, 106 Fed. 276—*Adam v. Folger*, 56 C. C. A. 544, 120 Fed. 264—*Hosmer v. Wyoming R. & Iron Co.* 65 C. C. A. 86, 129 Fed. 888—*Westinghouse Air Brake Co. v. Kansas City Southern R. Co.* 71 C. C. A. 7, 137 Fed. 32.

299. Consideration of the objections of multifariousness, misjoinder of parties and of causes of action, may properly be postponed until the final hearing on a bill filed by the commonwealth of Virginia against the state of West Virginia, which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state. *Virginia v. West Virginia*, 206 U. S. 290, 27 Sup. Ct. Rep. 732, 51: 1068

In answer.

300. A plea which sets up an accord and compromise of a disputed right, and prescription, is multifarious. *Rhode Island v. Massachusetts*, 14 Pet. 210, 10: 423
Cited in *Briggs v. Stroud*, 58 Fed. 718—*Hosletter Co. v. E. G. Lyons Co.* 99 Fed. 736—*Thann Societe v. Lueders*, 105 Fed. 633—*Miller v. Rickney*, 123 Fed. 607—*Didier v. Davison*, 3 Sent. Ch. 94.

u. Profert and Oyer.

See also *infra*, 880.

When demandable.

301. Oyer is not demandable of a record. *Sneed v. Wister*, 8 Wheat. 690, 5: 717
Cited in *Mealey v. Metropolitan L. Ins. Co.* 23 Fed. 25—*Renner v. Reed*, 3 Ark. 343.

302. In an action upon a bond for performance of covenants in a deed, oyer of such deed cannot be craved; for the defendant, and not the plaintiff, must show it, with a profert of it, or an excuse for the omission. *Sneed v. Wister*, 8 Wheat. 690, 5: 717
Cited in *Jackson v. Rundlet*, 1 Woodb. & M. 384, Fed. Cas. No. 7,145.

Necessity of.

Lack of, Cured by Verdict, see Appeal and Error, 4710.

See also *infra*, 310, 670.

303. The necessity of a profert of letters of administration depends on the local laws of a state. *Murphy v. Stewart*, 2 How. 263, 11: 261
Cited in *Ellis v. Appleby*, 4 R. I. 460.

304. A general profert of letters testamentary is sufficient; and if the defendant would object to them as insufficient, he must crave oyer. *Childress v. Emory*, 8 Wheat. 642, 5: 705

Cited in Kane v. Paul, 14 Pet. 42, 10 L. ed. 346—*The Boston, Blatchf. & H.* 314, Fed. Cas. No. 1,669.

305. In an action upon a judgment recovered in favor of an administrator, the plaintiff is not bound to make a profert of the letter of administration, or name himself as administrator. *Biddle v. Wilkins*, 1 Pet. 686, 7: 315

Cited in Green v. Foley, 2 Stew. & P. (Ala.) 449—*Riddle v. Hill*, 51 Ala. 228—*Lewis v. Adams*, 70 Cal. 409, 59 Am. Rep. 423, 11 Pac. 833—*Newhall v. Turney*, 14 Ill. 339—*Nelson v. Butterfield*, 21 Mo. 230—*Merritt v. Seaman*, 6 Barb. 333—*Bingham v. Marine Nat. Bank*, 41 Hun, 379—*Gross v. Gross*, 26 Misc. 386, 56 N. Y. Supp. 219.

306. If a plaintiff, in an action for breach of covenant of title, is not a party nor privy to an assignment which he alleges to have been made, by virtue of which his title is defective, he is not bound to make a profert of it. *Duval v. Craig*, 2 Wheat. 45, 4: 180

Effect of oyer or want of it.

307. By oyer, a bond declared upon is made part of the declaration. *Cooke v. Graham*, 3 Cranch, 229, 2: 420
Cited in Hilliard v. Noyes, 58 N. H. 313—*Giles v. Halsted*, 24 N. J. L. 367, 61 Am. Dec. 668.

308. The want of oyer of the condition of a bond, in plea of performance, is fatal. *United States v. Arthur*, 5 Cranch, 257, 3: 94

Cited in Polk v. Mitchell, 1 Harr. (Del.) 437—*Anderson v. Barry*, 2 J. J. Marsh. 278.

309. Oyer of a deed set forth in the first count does not make that deed part of the record so as to apply it to other counts in the declaration. *Hughes v. Moore*, 7 Cranch, 176, 3: 307

Cited in Larry v. Herrick, 58 N. H. 41—*Messer v. Smythe*, 58 N. H. 313—*Mansley v. Smith*, 6 Phila. 223.

Demurrer.

310. The omission to make profert of his letters testamentary, in the declaration in an action by an executor, is aided, and cannot be taken advantage of, where the defendant fails to demur specially for the defect. *Kane v. Paul*, 14 Pet. 33, 10: 341
Cited in Terbell v. Lee, 40 Fed. 44—*Ellis v. Ellis*, 4 R. I. 466.

311. If oyer be improperly demanded, the defect is aided on a general demurrer; but it is fatal to the plea where it is set down as a cause of demurrer. *Sneed v. Wister*, 8 Wheat. 690, 5: 717

v. Service of Pleading; Filing.

Filing after Default, see *supra*, I. p.
Waiver of Failure to File, see *supra*, 56.
Leave of Court to Filing of Cross-Bill, see *infra*, 830-833.

Waiver of Objections to Filing without Leave of Court, see *supra*, 64.

Prejudicial Error as to, see *Appeal and Error*, 4999.

As Commencement of Action, see *Limitation of Actions*, 595.

Filing as Notice of Pendency of Suit, see *Lis Pendens*, 3-5.

Motion for Leave to File, see *Motions and Orders*, 3.

Time to File Petition for Removal of Cause, see *Removal of Causes*, VII.

Estoppel to Object to Failure to File Complaint after Removal of Cause, see *Removal of Causes*, 444.

Time for Answer in Suit between States, see *Supreme Court of the United States*, 158, 159.

312. Where a statute required service of a declaration by leaving a copy thereof at the dwelling house of the defendant, if he be absent, leaving it at a distance of 125 feet from the house, in a corner of the yard, is not due service. *Kibbe v. Benson*, 17 Wall. 624, 21: 741

Distinguished in Harris v. State, 72 Miss. 963, 33 L.R.A. 90, 18 So. 387.

Cited in Amy v. Watertown, 130 U. S. 317, 32 L. ed. 951, 9 Sup. Ct. Rep. 530—*Phoenix Mut. L. Ins. Co. v. Wulf*, 9 Bias. 287, 1 Fed. 777—*Graham v. Loh*, 32 Ind. App. 187, 69 N. E. 474—*State v. Old Town Bridge Corp.* 85 Me. 28, 26 Atl. 947—*Lonkey v. Keyes Silver Min. Co.* 21 Nev. 317, 17 L.R.A. 353, 31 Pac. 57.

313. Where leave is given to file an amended declaration, and the court ordered defendant to plead thereto within ten days after a service of a copy thereof, the plaintiff is not entitled to judgment without conforming to the condition, imposed by serving a copy on defendant and giving the time stated in the order to plead thereto. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. Rep. 426, 32: 800

314. A complainant can have a decree against another complainant upon a supplemental or amended bill, only upon notice to the latter. No decree can be had by one complainant against another without notice, if at all. *Smith v. Woolfolk*, 115 U. S. 143, 5 Sup. Ct. Rep. 1177, 29: 357

315. Every court of equity possesses the power to modify its rules in relation to the time and manner of appearing and answering so as to prevent injustice, and should enlarge the time whenever the purposes of justice require. *Poultney v. La Fayette*, 12 Pet. 472, 9: 1161

Cited in Story v. Livingston, 13 Pet. 369, 10 L. ed. 205—*Gaines v. Relf*, 15 Pet. 16, 10 L. ed. 644—*Lawrence v. Bowman*, McAll. 421, Fed. Cas. No. 8,134—*Dally v. Doe*, 3 Fed. 919—*United States v. American Bell Teleph. Co.* 30 Fed. 523—*United States v. American Lumber Co.* 80 Fed. 316—*Ryan v. Seaboard & R. R. Co.* 89 Fed. 403—*Cummings v. Bradley*, 57 Ala. 237—*Meyers v. United States*, 5 Okla. 185, 48 Pac. 186.

316. The rules prescribed by the Supreme Court of the United States under the act of March 8, 1792, for the government of courts

of equity, were not intended to deprive those courts of their power to enlarge the time to appear and answer whenever the purposes of justice require it. *Poultney v. La Fayette*, 12 Pet. 472, 9: 1161
Cited in Hudson v. Parker, 156 U. S. 284, 39 L. ed. 426, 15 Sup. Ct. Rep. 450—*Yturblide v. United States*, Hoffm. Land Cas. 278, Fed. Cas. No. 18,191.

317. The refusal by the circuit court of the United States, of an application for leave to file a plea in an ancillary action, alleging that plaintiff was a citizen of the same state with defendant at the time the original action was brought, and had so continued down to the filing of the bill, but had fraudulently otherwise represented, and that defendant had no knowledge of these facts until after exceptions to the master's report were filed, is not an abuse of discretion, where nothing was said in the proposed plea as to the citizenship of a coplaintiff who was a necessary or proper party, and who, the record showed, was an alien. *New Orleans v. Fisher*, 180 U. S. 185, 21 Sup. Ct. Rep. 347, 45: 485

318. [A declaration must be filed before trial, but after accepting a plea, and submitting to a rule of trial or *non pros.*, plaintiff can take no advantage of failure to file it. *Wenn v. Adams* (Pa. Sup. Ct.) 2 Dall. 156, 1: 329]

319. In Virginia the plaintiff is not bound to declare until all the defendants have appeared, or the suit be abated as to such as have not appeared. *Barton v. Petit*, 7 Cranch, 194, 3: 313

320. [After plea filed, it is too late to require plaintiff to file his warrant of attorney. *Mercier v. Mercier* (Pa. Sup. Ct.) 2 Dall. 142, 1: 324]

II. Declaration or Complaint.

Prayer for Relief, see *supra*, I. 1.
 Multifariousness in Bill, see *supra*, 277-299.

Mode of Raising Objection to Variance between Writ and Declaration, see *infra*, 661-664.

In Admiralty, see Admiralty, III. g. 2.
 First Raising Objections to, on Appeal, see Appeal and Error, 4590-4594.

Curing Defects in, by Verdict, see Appeal and Error, 4685, 4695.

a. Jurisdictional Averments Generally.

Allegation that Remedy at Law is Lacking, see *supra*, 27.

Allegations as to Citizenship, see *infra*, II. c. 2.

Mode of Raising Objection to Lack of Jurisdiction, see *infra*, 679, 680.

Raising Objection to Jurisdiction by Plea in Abatement, see *infra*, 634-644.

Sufficiency of Plea to Jurisdiction, see *infra*, 716.

Reaching Defect in Jurisdiction by Demurrer, see *infra*, 860-863.

Waiver of Objection to Jurisdiction, see *infra*, 937.

Necessity of Appearance on Record of Federal Court, see Courts, V. c. 11.

Taking Allegations as True, see Courts, 478.

Necessity of Averring Alienage as Jurisdictional Fact, see Courts, 831.

Distinction between Original and Auxiliary Bills as Affecting Federal Jurisdiction, see Courts, 1043-1047.

Necessity of Showing Jurisdiction in Record by Means of Pleading, see Courts, 1150-1153.

General Allegations of Existence of Equities in Injunction Bills, see Injunction, 210-217.

Invalidity of Judgment where Jurisdiction is not Shown, see Judgment, 139.

Erroneous Allegations that Title was Perfect where Jurisdiction is Limited to Imperfect Titles, see Private Land Claims, 112.

See also Evidence, 583.

321. Every suitor bringing an action in a court of the United States must aver facts giving to the court jurisdiction. *Bushnell v. Kennedy*, 9 Wall. 387, 19: 736
Cited in Continental L. Ins. Co. v. Rhodes, 119 U. S. 239, 30 L. ed. 380, 7 Sup. Ct. Rep. 193.

322. Jurisdiction of the United States circuit court must appear positively from the averments of the pleadings, and cannot be argumentatively inferred. *Hanford v. Davies*, 163 U. S. 273, 16 Sup. Ct. Rep. 1051, 44: 157

Cited in Press Pub. Co. v. Monroe, 164 U. S. 110, 41 L. ed. 368, 17 Sup. Ct. Rep. 40—*St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 682, 42 L. ed. 316, 17 Sup. Ct. Rep. 925—*Muse v. Arlington Hotel Co.* 168 U. S. 435, 42 L. ed. 532, 18 Sup. Ct. Rep. 109—*Florida C. & P. R. Co. v. Bell*, 176 U. S. 328, 44 L. ed. 490, 20 Sup. Ct. Rep. 399—*Argonaut Min. Co. v. Kennedy Min. & Mill. Co.* 84 Fed. 2—*Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 29 C. C. A. 464, 57 U. S. App. 13, 85 Fed. 869—*San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 90 Fed. 520.

323. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. Rep. 449, 34: 1078

324. In courts of a special limited jurisdiction, the pleading must contain averments which bring the cause within the jurisdiction of the court, or the whole proceeding will be erroneous. *United States v. Clarke*, 8 Pet. 436, 8: 1001
Cited in United States v. Santa Fe, 165 U. S. 714, 41 L. ed. 888, 17 Sup. Ct. Rep. 472—*United States v. Sandoval*, 167 U. S. 294, 42 L. ed. 173, 17 Sup. Ct. Rep. 868.

325. Judicial notice of facts which the plaintiff has not chosen to rely upon in his pleading cannot make those facts a part of the complaint for the purpose of giving jurisdiction to a Federal court, as the averments, if not sufficient in themselves to give

jurisdiction, present no controversy in respect of which resort may be had to judicial knowledge. *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 533, 21 Sup. Ct. Rep. 488, 45: 656

Cited in Arkansas v. Kansas & T. Coal Co. 183 U. S. 190, 46 L. ed. 147, 22 Sup. Ct. Rep. 47—*Indiana Power Co. v. St. Joseph & E. Power Co.* 187 U. S. 636, 47 L. ed. 343, 23 Sup. Ct. Rep. 842—*Mutual L. Ins. Co. v. McGrew*, 188 U. S. 309, 47 L. ed. 485, 63 L.R.A. 45, 23 Sup. Ct. Rep. 375—*Bankers Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 192 U. S. 383, 48 L. ed. 489, 24 Sup. Ct. Rep. 325—*South Carolina v. Virginia-Carolina Chemical Co.* 117 Fed. 729—*Washington v. Island Lime Co.* 117 Fed. 777.

326. Where jurisdiction of a court of the United States is claimed, not on account of the citizenship of the parties, but because of the subject-matter of the action, it must be shown on the record, by the pleadings or otherwise, that the facts are such as are necessary to the jurisdiction. *Re Smith*, 94 U. S. 455, 24: 165

327. The declaration in a suit on an attachment bond given in a Federal district court need not show that the court had jurisdiction in the attachment suit, since that court has general jurisdiction of such cases. *Huff v. Hutchinson* use of *Hurlbut*, 14 How. 586, 14: 553

328. In an action in a Federal district court against two of three persons liable jointly and severally on a contract, it is not necessary to aver or prove that the third obligor was subject to the jurisdiction of the courts of the United States. *Breedlove v. Nicolet*, 7 Pet. 413, 8: 731
Cited in Liverpool Nav. Co. v. Agar, 4 Woods, 202, 14 Fed. 616—*Martin v. Meyer*, 45 Fed. 436.

Suit by assignee.

See also *infra*, 351.

329. In an action brought by an assignee to enforce a contract in a circuit court, the pleadings should contain an averment showing that the suit could have been maintained by the assignor of the contract, if no assignment had been made. *Corbin v. Black Hawk County*, 105 U. S. 659, 26: 1136

Cited in Adams v. Republic County, 23 Fed. 212—*Hudson v. Bishop*, 38 Fed. 681.

330. In order to sue in a Federal court an indorsee or assignee of a note must show diverse citizenship between the maker and original payee. This rule does not apply where the declaration contains the common money counts showing diverse citizenship between maker and indorsee. *Bank of United States v. Moss*, 6 How. 31, 12: 331

Jurisdictional amount.

Conclusiveness of Allegations, see Courts, 894.

Amendment to Show Ground on Record, see Courts, 1149.

See also *infra*, 449.

331. [In an action for tort, the amount of damages laid in the declaration fixes the ju-

risdiction. *Hulsecamp v. Teel* (C. Ct.) 2 Dall. 358, 1: 414]

332. An allegation that the "amount in dispute" is more than \$2,000, exclusive of interest and costs, is not insufficient to show that the case is within the jurisdiction of a Federal court merely because it says the "amount," instead of the "matter," in dispute. *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 20 Sup. Ct. Rep. 222, 44: 276

Cited in State ex rel Atty. Gen. & Frost, 113 Wis. 658, 89 N. W. 915.

333. An allegation of damage in the sum of \$10,000 is not sufficient to give jurisdiction to a Federal court in an action for claim and delivery of property alleged to be of the value of \$1,000, when the damages recoverable are only for the actual damage caused by the detention, which is confined to interest on the value of the property. *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 18 Sup. Ct. Rep. 645, 42: 1111

Cited in Wiley v. Slinker, 179 U. S. 65, 45 L. ed. 88, 21 Sup. Ct. Rep. 17—*Robinson v. West Virginia Loan Co.* 90 Fed. 771—*Levin-ski v. Middlesex Bkg. Co.* 34 C. C. A. 466, 92 Fed. 463—*Kunkel v. Brown*, 39 C. C. A. 667, 99 Fed. 594—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* 48 C. C. A. 453, 109 Fed. 410—*McCormick v. McDonald*, 110 Fed. 58—*Battle v. Atkinson*, 115 Fed. 385.

334. A mere *ad damnum* clause will not confer jurisdiction on a circuit court of the United States, where the plaintiff asserts as his cause of action a claim which he cannot be legally permitted to sustain by evidence to the extent of the jurisdictional amount. *North American Transp. & Trading Co. v. Morrison*, 178 U. S. 262, 20 Sup. Ct. Rep. 869, 44: 1061

Cited in Globe Ref. Co. v. Landa Cotton Oil Co. 190 U. S. 541, 47 L. ed. 1172, 23 Sup. Ct. Rep. 754—*C. H. Nichols Lumber Co. v. Franson*, 208 U. S. 282, 51 L. ed. 183, 27 Sup. Ct. Rep. 102—*Smithers v. Smith*, 204 U. S. 642, 51 L. ed. 660, 27 Sup. Ct. Rep. 297—*York County Sav. Bank v. Abbot*, 131 Fed. 982.

335. An averment that the value of the exemption of a bank's property during the continuance of its charter exceeds \$2,000 is not sufficient to give jurisdiction to a circuit court of the United States in a suit for an injunction against taxes for specific years the amount of which is not shown. *Citizens' Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. Rep. 89, 41: 451

336. A bill for injunction against taxes brought by a railroad company against a revenue agent who represents all the parties interested, sufficiently states the jurisdictional amount when it alleges that the taxes assessed amount to a specified sum, much larger than the jurisdictional limit; and a question not arising on the face of the bill, as to how the taxes, when collected, would be disposed of, and in what proportions and amounts they would be parceled out to interested municipalities,—is immaterial. II-

Illinois C. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. Rep. 251, 45: 410
Cited in People ex rel. Alexander v. District Court, 29 Colo. 233, 68 Pac. 242.

Federal question.

Raising Question by Anticipating Defense, see *Courts*, 506-508.

Averment of Legislative Intent in Pleading Unconstitutionality of Act, see *Courts*, 541.

See also *Courts*, 597.

337. The Federal question relied upon as conferring original jurisdiction on a circuit court of the United States must appear necessarily by plaintiff's statement of his own claim, and cannot arise from mere allegations in the bill of the defense which the defendants intend to set up, or which they rely upon. *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 23 Sup. Ct. Rep. 434, 47: 626
Cited in Boston & M. Consol. Copper & S. Min. Co. v. Chile Gold Min. Co. 188 U. S. 646, 47 L. ed. 635, 23 Sup. Ct. Rep. 440—*Joy v. St. Louis*, 201 U. S. 341, 50 L. ed. 781, 26 Sup. Ct. Rep. 478.

338. A cause of action arising under the laws of the United States, cognizable by the circuit court, is stated by a complaint alleging plaintiff's possession as a pre-emptor, and that he had done all acts necessary to entitle him to a patent for land, and that the defendant, a territorial corporation, entered upon and seized the land under territorial laws authorizing its appropriation for railroad purposes. *Spokane Falls & N. R. Co. v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. Rep. 728, 42: 79

Cited in Gableman v. Peoria, D. & E. R. Co. 82 Fed. 792—*Florida C. & P. R. Co. v. Bell*, 31 C. C. A. 14, 59 U. S. App. 189, 87 Fed. 374—*California Oil & Gas Co. v. Miller*, 96 Fed. 23—*Nevada Sierra Oil Co. v. Miller*, 97 Fed. 690—*Washington v. Island Lime Co.* 117 Fed. 778—*Mitchell Engineering & Machinery Co. v. Worthington*, 140 Fed. 950—*Helena Power Transmission Co. v. Spratt*, 146 Fed. 313.

335. The petition in an action of ejectment does not present a case arising under the laws of the United States of which a Federal circuit court has jurisdiction without diversity of citizenship because it states that there is a dispute between the parties over the construction of the patent from the United States and several acts of Congress set out as the source of plaintiff's title, where its averments show that the real controversy is over the claim of plaintiff that he is entitled to the land formed by accretion since the patent was issued, and after the statutes were passed. *Joy v. St. Louis*, 201 U. S. 332, 26 Sup. Ct. Rep. 478, 50: 776

Cited in Moore v. McGuire, 205 U. S. 219, 51 L. ed. 777, 27 Sup. Ct. Rep. 483.

340. Averments in a complaint in ejectment that defendant's possession rests upon an infraction by the United States of its treaty obligations, and upon a taking of private property for public use without just compensation, do not bring the case within

the jurisdiction of a Federal circuit court, where the averments respecting plaintiff's title disclose no case within the jurisdiction of that court. *Filhiol v. Torney*, 194 U. S. 356, 24 Sup. Ct. Rep. 698, 48: 1014
Cited in Moore v. McGuire, 205 U. S. 220, 51 L. ed. 777, 27 Sup. Ct. Rep. 483—*St. Louis, I. M. & S. R. Co. v. Davis*, 132 Fed. 632—*Arkansas v. Choctaw & M. R. Co.* 134 Fed. 107.

341. A complaint in ejectment against private individuals, which alleges that plaintiff was ousted in violation of U. S. Const. 5th Amend., and of the provision of the treaty with France of October 21, 1803, for the protection of the inhabitants of the territory ceded in the enjoyment of their property, does not show a cause arising under the Constitution or a treaty of the United States, of which the circuit court of the United States has jurisdiction, where no right, title, privilege, or immunity is asserted as derived from the Constitution or treaty, as against the defendants, and it is not charged that they took possession by direction of the United States government. *Filhiol v. Maurice*, 185 U. S. 108, 22 Sup. Ct. Rep. 560, 46: 827

Cited in Rosales y Cuell v. Moya y Rodriguez, 198 U. S. 582, 49 L. ed. 1172, 25 Sup. Ct. Rep. 804—*Joy v. St. Louis*, 201 U. S. 341, 50 L. ed. 781, 26 Sup. Ct. Rep. 478—*Filhiol v. Torney*, 119 Fed. 974—*Joy v. St. Louis*, 122 Fed. 528—*Love v. Busch*, 78 C. C. A. 548, 142 Fed. 432—*Harris v. Rosenberger*, 76 C. C. A. 227, 145 Fed. 451.

342. Allegations in a bill to quiet title, framed under Cal. Code Civ. Proc. § 738, that defendant's adverse claims are based upon an erroneous construction of the treaty of Guadalupe Hidalgo and the act of March 3, 1851 (9 Stat. at L. 631, chap. 41), and upon certain enumerated acts of the California legislature, and ordinances and charters of the city of Los Angeles, adopted and approved in pursuance of such construction, do not present a case arising under the Federal Constitution, laws, or treaties, of which a Federal circuit court has jurisdiction without diversity of citizenship. *Devine v. Los Angeles*, 202 U. S. 313, 26 Sup. Ct. Rep. 652, 50: 1046

343. Averments that patentees from the United States, whose titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners, acting under the act of March 3, 1851 (9 Stat. at L. 631, chap. 41), were deprived of their property without due process of law, and allegations that their contract obligations were impaired, by certain enumerated California statutes and charters of the city of Los Angeles, which conferred upon the city only such rights in respect to the waters of a river as may have been vested in the state, afford no proper basis for the jurisdiction of the Federal circuit court, as of a case arising under the Federal Constitution. *Devine v. Los Angeles*, 202 U. S. 313, 26 Sup. Ct. Rep. 652, 50: 1046

344. Want of due process of law in proceedings of a probate court is not sufficiently alleged to show a Federal question by the allegation that the court acted entirely without jurisdiction. *Hanford v. Davies*, 163 U. S. 273, 16 Sup. Ct. Rep. 1051,

41: 157

345. A bill invoking the jurisdiction of the circuit court of the United States on the ground that the case arises under the Constitution of the United States by reason of the violation and impairment of a contract will be dismissed when it does not aver facts to show such violation. *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 20 Sup. Ct. Rep. 40,

44: 92

346. If averments making a case arising under the Constitution, laws, or treaties of the United States appear to be immaterial, especially if they were evidently made for the purpose of creating a case cognizable by the circuit court, they are not sufficient to give that court jurisdiction. *Robinson v. Anderson*, 121 U. S. 522, 7 Sup. Ct. Rep. 1011,

30: 1021

Cited in *Torrence v. Shedd*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 726—*Florida, C. & P. R. Co. v. Bell*, 176 U. S. 330, 44 L. ed. 491, 20 Sup. Ct. Rep. 399—*Chrystal Springs Land & Water Co. v. Los Angeles*, 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573—*Excelstor Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 287, 46 L. ed. 914, 22 Sup. Ct. Rep. 681—*Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 643, 47 L. ed. 633, 23 Sup. Ct. Rep. 434—*Industrial & Min. Guaranty Co. v. Electrical Supply Co.* 7 C. C. A. 482, 16 U. S. App. 196, 58 Fed. 743—*Bane v. Keefer*, 66 Fed. 612—*Crystal Springs Land & Water Co. v. Los Angeles*, 82 Fed. 122—*Blythe v. Hincley*, 84 Fed. 247—*Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 6, 93 Fed. 279.

347. An allegation that the annexation of territory to a city in violation of the state Constitution, but which is upheld by the state courts after long acquiescence, on the principle of estoppel, where the only question is as to the validity of the city organization, constitutes a deprivation of the property of inhabitants of the territory without due process of law, and therefore in violation of the Federal Constitution,—is so palpably unfounded that it constitutes not even a color for the jurisdiction of a Federal court. *McCain v. Des Moines*, 174 U. S. 168, 19 Sup. Ct. Rep. 644, 43: 936
Cited in *Swatford v. Templeton*, 185 U. S. 493, 46 L. ed. 1008, 22 Sup. Ct. Rep. 783—*Newburyport Water Co. v. Newburyport*, 193 U. S. 576, 48 L. ed. 799, 24 Sup. Ct. Rep. 553—*Farmers' Loan & T. Co. v. Sioux Falls*, 199 U. S. 801, 50 L. ed. 328, 26 Sup. Ct. Rep. 748—*Montana Catholic Missions v. Missoula County*, 200 U. S. 130, 50 L. ed. 403, 26 Sup. Ct. Rep. 197—*Underground R. Co. v. New York*, 116 Fed. 956—*Savannah v. Holst*, 65 C. C. A. 451, 132 Fed. 903—*United States use of Kinney v. Bell*, 68 C. C. A. 147, 135 Fed. 339.

348. A bill does not show that a suit arises under the Constitution and laws of

the United States, by an averment in a suit by a telegraph company for specific performance of a contract for the use of a railroad right of way and for an injunction against interference with its rights, to the effect that it has a right to maintain its telegraph line on the railroad "under the provisions of the statute of the United States," as it has long been settled that the statute does not confer on telegraph companies the right to enter on private property without the consent of the owner. *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 20 Sup. Ct. Rep. 867,

44: 1052

Cited in *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 339, 45 L. ed. 223, 21 Sup. Ct. Rep. 171—*Lampasas v. Bell*, 180 U. S. 282, 45 L. ed. 530, 21 Sup. Ct. Rep. 368—*American Sugar Ref. Co. v. New Orleans*, 181 U. S. 281, 45 L. ed. 862, 21 Sup. Ct. Rep. 646—*Defiance Water Co. v. Defiance*, 191 U. S. 191, 48 L. ed. 143, 24 Sup. Ct. Rep. 63—*Spencer v. Duplan Silk Co.* 191 U. S. 530, 48 L. ed. 290, 24 Sup. Ct. Rep. 174—*Bankers Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 192 U. S. 384, 48 L. ed. 490, 24 Sup. Ct. Rep. 325—*Sloan v. United States*, 193 U. S. 620, 48 L. ed. 817, 24 Sup. Ct. Rep. 570—*Minnesota v. Northern Securities Co.* 194 U. S. 64, 48 L. ed. 878, 24 Sup. Ct. Rep. 598—*Empire State-Idaho Min. & Developing Co. v. Hanley*, 198 U. S. 293, 49 L. ed. 1059, 25 Sup. Ct. Rep. 691—*Ah Sou v. United States*, 200 U. S. 612, 50 L. ed. 619, 26 Sup. Ct. Rep. 752—*Jones v. Vane*, 200 U. S. 614, 50 L. ed. 621, 26 Sup. Ct. Rep. 755—*Owensboro v. Owensboro Waterworks Co.* 53 C. C. A. 149, 115 Fed. 321—*South Carolina v. Virginia-Carolina Chemical Co.* 117 Fed. 728—*Western U. Teleg. Co. v. Pennsylvania R. Co.* 120 Fed. 374—*Joy v. St. Louis*, 122 Fed. 528—*Terry v. Bird*, 64 C. C. A. 162, 129 Fed. 594—*Savannah v. Holst*, 65 C. C. A. 450, 132 Fed. 902—*Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 196—*Western U. Teleg. Co. v. Pennsylvania R. Co.* 33 Pittsb. L. J. N. S. 243.

349. An allegation in a complaint that full faith and credit will not be given to the public acts of Minnesota if a New Jersey corporation organized for the purpose of acquiring the control of two competing interstate railway companies engaged in business in Minnesota is allowed to carry out the object of its incorporation does not present a cause arising under the Federal Constitution, of which a circuit court of the United States can take jurisdiction. *Minnesota v. Northern Securities Co.* 194 U. S. 48, 24 Sup. Ct. Rep. 598,

48: 870

Diverse citizenship.

Allegations as to Citizenship, Generally, see *infra*, II. c, 2.

Resorting to Entire Record to Cure Defective Averment, see *Appeal and Error*, 3124a.

Presumption that Members have the Same Domicil as Corporation, see *Courts*, 640-644.

Sufficiency of Amendment to Produce Diversity, see *Courts*, 677.

Necessity for Total Diversity of Plaintiffs and Defendants, see *Courts*, 678-687.

As to Supplemental Bill, see Courts, 1147.

Defect Cured of Record by Summons, see Courts, 1151.

Sufficiency of Description in Record, see Courts, 1154, 1155.

Evidence as to Citizenship Immaterial under Plea to Merits, see Evidence, 2666.

See also *supra*, 330.

350. Where a contract under which a party would be prevented, from want of proper citizenship, from suing in the Federal courts, is set out as inducement to a subsequent one under which he would not be so prevented, the jurisdiction of such courts will not be taken away from the fact of the old contract being so set forth. *De Sobry v. Nicholson*, 3 Wall. 420, 18: 263 *Distinguished in* *Bradley v. Rhine* (*Bradley v. Hunt*) 8 Wall. 396, 19 L. ed. 469. *Cited in* *Superior City v. Ripley*, 138 U. S. 97, 34 L. ed. 916, 11 Sup. Ct. Rep. 288.

351. The jurisdiction of a circuit court of the United States, on the ground of diverse citizenship, of a suit by a foreign corporation against residents of the state, is not defeated on the theory that plaintiff is suing as the assignee of a domestic corporation, where the bill, although emphasizing the existence of certain contracts between defendants and its assignor, and alleging that it became substituted for such assignor as a party thereto, contains allegations which show that the parties, having the old contracts before them, entered into new agreements determined by reference to the terms of the old contracts, but none the less personal and immediate. *American Colortype Co. v. Continental Colortype Co.* 188 U. S. 104, 23 Sup. Ct. Rep. 265, 47: 404

352. An averment that a board of trustees of a state institution was created by and exists under the laws of a state other than that of complainant, and is a citizen of that state, without alleging that it is a corporation of the state, or that each individual member of the board is a citizen of that state, and where the highest court of the state has decided that the board, although possessing some of the attributes of a corporation, is not a corporation of such state,—is insufficient to sustain the jurisdiction of the circuit court on the ground of diverse citizenship. *Thomas v. Ohio State University*, 195 U. S. 207, 25 Sup. Ct. Rep. 24, 49: 160 *Cited in* *Fred Macey Co. v. Macey*, 68 C. C. A. 365, 135 Fed. 727—*Knight v. Litcher & M. Lumber Co.* 69 C. C. A. 249, 136 Fed. 405—*Saunders v. Adams Exp. Co.* 136 Fed. 495—*Anderson v. Bassman*, 140 Fed. 11.

Suit against United States.

353. As the United States is not suable of common right, the party who institutes a suit against it must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction. *United States v. Clarke*, 8 Pet. 436, 8: 1001 *Carr v. United States*, 98 U. S. 433, 25: 209 *Cited in* *United States v. Eckford* (*United*

States v. Tillou) 6 Wall. 488, 18 L. ed. 921—*The Siren* (*The Siren v. United States*) 7 Wall. 154, 19 L. ed. 131—*United States v. Thompson*, 98 U. S. 489, 25 L. ed. 195—*United States v. Lee*, 106 U. S. 207, 27 L. ed. 177, 1 Sup. Ct. Rep. 240—*Stanley v. Schwalby*, 147 U. S. 512, 37 L. ed. 261, 13 Sup. Ct. Rep. 418—*Belknap v. Schild*, 161 U. S. 16, 40 L. ed. 601, 16 Sup. Ct. Rep. 443—*United States v. Tillou*, 3 Ct. Cl. 456—*Briggs v. The Upper Cedar Point*, 11 Allen, 176—*Leonard v. Nye*, 125 Mass. 464—*Goldsmith v. The Revenue Cutter*, 6 Or. 253—*Jones v. United States*, 48 Wis. 410, 4 N. W. 519.

b. Right or Capacity to Sue.

Admission of Capacity by Defendant's Pleading, see *supra*, 134, 135.

Surplusage, see *supra*, 252.

Raising Issue on Averments of, by General Denial, see *infra*, 615.

Admission of Right to Sue, see *infra*, 635.

Raising Question of Right to Sue by Plea in Abatement, see *infra*, 649–652, 654–658.

Admission of, by Plea, see *infra*, 668.

Necessity of Alleging Lack of Capacity, see *infra*, 681–684.

Showing Capacity of Plaintiff's Assignor or Indorser to Sue, see Courts, 821.

Authority to Bring Suit on Behalf of United States, see United States, 148.

354. A decision of the Comptroller to enforce the liability of stockholders in a national bank, under the act of June 3, 1864, must be distinctly averred in a suit by the receiver to recover against the stockholders. *Kennedy v. Gibson*, 8 Wall. 498, 19: 476

355. Where the bill states that the complainant purchased a large number of shares and paid therefor, this is an allegation of an interest sufficient to sustain a bill by him on behalf of himself and other stockholders. *Jones v. Bolles*, 9 Wall. 364, 19: 734

Cited in *Wilson v. Seymour*, 22 C. C. A. 481, 40 U. S. App. 567, 76 Fed. 682.

356–7. An allegation that defendants "were a common carrier of passengers," in a complaint which in its caption designates them as distinct corporations and several defendants, and in separate paragraphs alleges each to be a corporation, cannot be construed as an averment that they constituted a single company or that neither had capacity to be sued alone. *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. Rep. 120, 41: 485

c. Description of Parties.

1. In General.

Waiver of Objections, see *supra*, 63
Amendment as to, see *supra*, 193.

358. The description of defendants in the declaration only as "trustees" is not a variance from the writ, in an action on their

personal covenant against encumbrances. *Duvall v. Craig*, 2 Wheat. 45, 4: 180
Cited in Cole v. Penwell, 5 Blackf. 178—
Underhill v. Gibson, 2 N. H. 354, 9 Am. Dec. 82.

359. The plaintiffs in actions seeking to recover damages for being unlawfully deprived of their right to be registered as voters must allege in their declarations, as matter of fact, that they were legally-qualified voters, or—that allegation being omitted—must allege all the facts necessary to show, as matter of law, that they were qualified voters; and to this end it is necessary that they should negative all the disqualifications pronounced by the law. *Murphy v. Ramsey*, 114 U. S. 15, 5 Sup. Ct. Rep. 747, 29: 47
Cited in Wiley v. Sinkler, 179 U. S. 66, 45 L. ed. 89, 21 Sup. Ct. Rep. 17—*Innis v. Bolton*, 2 Idaho, 450, 17 Pac. 264—*Shepherd v. Grimmett*, 2 Idaho, 1129, 31 Pac. 793—*Morris v. Powell*, 125 Ind. 299, 9 L.R.A. 334, 25 N. E. 221—*United States v. Musser*, 4 Utah, 175, 7 Pac. 389.

Editorial note.

[Necessity of alleging jurisdictional residence in divorce proceeding. 12 L.R.A. (N. S.) 1197.]

2. As to Citizenship.

a. Generally.

Admissions as to, by Failure to Deny, see *supra*, 152, 153.

Amendment as to, see *supra*, 196-201.

Putting Averments in Issue by General Denial, see *infra*, 614.

Taking Objection to Jurisdiction Because of Citizenship by Demurrer, see *infra*, 862.

Judgment on Demurrer for Lack of Averment as to, see *infra*, 955.

In Proceedings for Removal of Cause, see Removal of Causes, 305-316.

360. Where a plaintiff is an alien, the proper place for the averment that the defendant is a citizen of a state in the United States is in the declaration. *Bradstreet v. Thomas*, 12 Pet. 59, 9: 999
Cited in Lyell v. Goodwin, 4 McLean, 48, Fed. Cas. 8,616.

Necessity of alleging citizenship.

See also *supra*, 330.

361. Where citizenship of parties is the foundation of jurisdiction in the Federal courts, it must be distinctly alleged. *Abercrombie v. Dupuis*, 1 Cranch, 343, 2: 129
Wood v. Wagnon, 2 Cranch, 9, 2: 191
Sullivan v. Fulton S. B. Co. 6 Wheat. 450, 5: 302

Morgan v. Callender, 4 Cranch, 370, 2: 650

Brown v. Keene, 8 Pet. 112, 8: 885

Jackson v. Ashton, 8 Pet. 148, 8: 898

Hornthall v. Keary (*Hornthall v. The Collector*) 9 Wall. 560, 19: 560

Gates v. Osborne (*Assessor v. Osborne*) 9 Wall. 567, 19: 748

Germania F. Ins. Co. v. Francis, 11 Wall. 210, 20: 77

Emory v. Greenough, 3 Dall. 369, 1: 640

Bingham v. Cabot, 3 Dall. 382, 1: 646

Turner v. Enrille, 4 Dall. 7, 1: 717

Williamson v. Kincaid, 4 Dall. 20, 1: 723

Capron v. Van Noorden, 2 Cranch, 126, 2: 229

Cited in Turner v. Enrille, 4 Dall. 8, 1 L. ed. 718—*Course v. Stead*, 4 Dall. 27, 1 L. ed. 727—*Abercrombie v. Dupuis*, 1 Cranch, 343, 2 L. ed. 130—*Wood v. Wagnon*, 2 Cranch, 9, 2 L. ed. 191—*Brown v. Keene*, 8 Pet. 115, 8 L. ed. 886—*Jackson v. Ashton*, 10 Pet. 480, 9 L. ed. 502—*McNutt v. Bland*, 2 How. 20, 11 L. ed. 163—*Bank of United States v. Moss*, 6 How. 87, 12 L. ed. 334—*Marshall v. Baltimore & O. R. Co.* 16 How. 340, 14 L. ed. 964—*Scott v. Sandford*, 19 How. 402, 15 L. ed. 699—*Scott v. Sandford*, 19 How. 473, 15 L. ed. 729—*Scott v. Sandford*, 19 How. 518, 15 L. ed. 748—*Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 216, 16 L. ed. 78—*Hornthall v. The Collector* (*Hornthall v. Keary*) 9 Wall. 565, 19 L. ed. 562—*New Orleans Mail Co. v. Flanders* (*New Orleans & B. S. Mail Co. v. Fernandes*) 12 Wall. 135, 20 L. ed. 251—*Morgan v. Gay*, 19 Wall. 83, 22 L. ed. 100—*Grace v. American Cent. Ins. Co.* 109 U. S. 284, 27 L. ed. 935, 3 Sup. Ct. Rep. 207—*Bors v. Preston*, 111 U. S. 263, 28 L. ed. 422, 4 Sup. Ct. Rep. 407—*Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 382, 28 L. ed. 464, 4 Sup. Ct. Rep. 510—*Continental L. Ins. Co. v. Rhodes*, 119 U. S. 239, 30 L. ed. 380, 7 Sup. Ct. Rep. 193—*Cameron v. Hodges*, 127 U. S. 324, 32 L. ed. 133, 8 Sup. Ct. Rep. 1154—*Chapman v. Barney*, 129 U. S. 679, 32 L. ed. 801, 9 Sup. Ct. Rep. 426—*Timmons v. Elyton Land Co.* 139 U. S. 379, 35 L. ed. 196, 11 Sup. Ct. Rep. 585—*Roberts v. Lewis*, 144 U. S. 656, 36 L. ed. 582, 12 Sup. Ct. Rep. 781—*Shaw v. Quincy Min. Co.* (*Ex parte Shaw*) 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935—*Stuart v. Easton*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 268—*Mexican Nat. R. Co. v. Davidson*, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563—*Allen v. Blunt*, 1 Blatchf. 485, Fed. Cas. No. 215—*Bank of Cumberland v. Willis*, 3 Summ. 473, Fed. Cas. No. 885—*Berlin v. Jones*, 1 Woods, 639, Fed. Cas. No. 1,343—*Bobyshall v. Oppenheimer*, 4 Wash. C. C. 483, Fed. Cas. No. 1,592—*Brown v. Noyes*, 2 Woodb. & M. 79, Fed. Cas. No. 2,023—*Donaldson v. Hazaen*, Hempst. 424, Fed. Cas. No. 3,984—*The Fidelity*, 1 Abb. (U. S.) 579, Fed. Cas. No. 4,755—*Herlot v. Davis*, 2 Woodb. & M. 230, Fed. Cas. No. 6,404—*Morrison v. Bennet*, 1 McLean, 830, Fed. Cas. No. 9,843—*Parkhurst v. Kinsman*, 3 Woodb. & M. 174, Fed. Cas. No. 10,761—*Prentiss v. Barton*, 1 Brock 392, Fed. Cas. No. 11,384—*Prentiss v. Brennan*, 2 Blatchf. 164, Fed. Cas. No. 11,385—*Spelgle v. Meredith*, 4 Biss. 126, Fed. Cas. No. 13,227—*United States v. New Bedford Bridge*, 1 Woodb. & M. 406, Fed. Cas. No. 15,867—*United States v. Woolsey*, Fed. Cas. No. 16,762—*Van Antwerp v. Hulburd*, 7 Blatchf. 441, Fed. Cas. No. 16,826—*Stanley v. Albany County*, 5 Fed. 235—*Sherman v. Windsor Mfg. Co.* 19 Blatchf. 315, 11 Fed. 852—*Merchants' Nat. Bank v. Brown*, 4 Woods, 264, 17 Fed. 161—*Hampton v. Truette Canal Co.* 9 Sawy. 383, 19 Fed. 3—*Stephenson v. The Francis*, 21 Fed. 718—*Hershaberger v. Blewett*, 55 Fed. 174—*Lomergan v. Illinois C. R. Co.* 55 Fed. 531—*St. Louis I. M. & S. R. Co. v. Newcom*, 6 C. C. A. 178, 12 U. S. App. 503, 56 Fed. 953—

Wabash R. Co. v. Barbour, 19 C. C. A. 548, 43 U. S. App. 102, 73 Fed. 516—Duncan v. Associated Press, 81 Fed. 421—Block v. Standard Distilling & Distributing Co. 95 Fed. 979—Wahl v. Franz, 49 L.R.A. 64, 40 C. C. A. 640, 100 Fed. 682—Whitworth v. Illinois C. R. Co. 107 Fed. 560—Kansas City Southern R. Co. v. Prunty, 66 C. C. A. 166, 133 Fed. 16—Utah-Nevada Co. v. De Lamar, 66 C. C. A. 187, 133 Fed. 121—Childress v. McGehee, Minor (Ala.) 133—Commissioners Court v. Thompson, 18 Ala. 697—State ex rel. Savannah v. Dewa, R. M. Charl. (Ga.) 429—Western R. Co. v. Thornton, 60 Ga. 308—Ex parte Holman, 28 Iowa, 156, 4 Am. Rep. 159—Ducat v. Chicago, 48 Ill. 176, 95 Am. Dec. 529—Cleveland, C. C. & St. L. R. Co. v. Monaghan, 140 Ill. 485, 30 N. E. 869—Ingraham v. Arnold, 1 J. J. Marsh. 40—Beebe v. Armstrong, 11 Mart. (La.) 441—Oakley v. Commercial & R. Bank, 14 La. 517—Adams Exp. Co. v. Trego, 35 Md. 62—People v. Dawell, 25 Mich. 271, 12 Am. Rep. 260—Gould v. Jacobson, 58 Mich. 291, 25 N. W. 194—Florence Sewing Mach. Co. v. Grover & B. Sewing Mach. Co. 110 Mass. 81, 14 Am. Rep. 579—Jim v. State, 3 Mo. 168—Heyer v. Burger, Hoffm. Ch. 17—North River S. B. Co. v. Hoffman, 5 Johns. Ch. 303—Blair v. West Point Mfg. Co. 7 Neb. 154—Bierbower v. Miller, 30 Neb. 181, 47 N. W. 1—Robinson v. Peru Plow & Wheel Co. 1 Okla. 149, 31 Pac. 988—Wheeldon v. Camden & A. R. Co. 1 Grant, Cas. 425—Camp v. Wood, 10 Watts, 122—Gibbs v. Gibbs, 26 Utah, 428, 73 Pac. 641.

362. Where jurisdiction of the circuit court of the United States depends upon the citizenship of the parties, such citizenship, or the facts which constitute it, should be distinctly averred in the pleading or appear affirmatively in some other part of the record. *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. Rep. 518, 32: 914
Cameron v. Hodges, 127 U. S. 322, 8 Sup. Ct. Rep. 1154, 32: 132
Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. Rep. 449, 34: 1078
Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. Rep. 426, 32: 800
Scott v. Sandford, 19 How. 393, 15: 691
Cited in *Crehore v. Ohio & M. R. Co.* 131 U. S. 243, 33 L. ed. 145, 9 Sup. Ct. Rep. 692—*Jackson v. Allen*, 182 U. S. 34, 33 L. ed. 249, 10 Sup. Ct. Rep. 9—*Young v. Parker* (*Young v. Ewart*) 132 U. S. 271, 33 L. ed. 353, 10 Sup. Ct. Rep. 75—*Graves v. Corbin*, 132 U. S. 590, 33 L. ed. 469, 10 Sup. Ct. Rep. 196—*Parker v. Ormsby*, 141 U. S. 85, 35 L. ed. 656, 11 Sup. Ct. Rep. 812—*Kellam v. Keith*, 144 U. S. 570, 36 L. ed. 545, 12 Sup. Ct. Rep. 922—*Dowell v. Applegate*, 152 U. S. 336, 38 L. ed. 463, 14 Sup. Ct. Rep. 611—*Mattingly v. Northwestern Virginia R. Co.* 158 U. S. 56, 39 L. ed. 895, 15 Sup. Ct. Rep. 725—*Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 454, 44 L. ed. 844, 20 Sup. Ct. Rep. 690—*Giles v. Harris*, 189 U. S. 501, 47 L. ed. 917, 23 Sup. Ct. Rep. 639—*Freeman v. Butler*, 39 Fed. 2—*La Montagne v. T. W. Harvey Lumber Co.* 44 Fed. 647—*Fitzgerald v. Missouri P. R. Co.* 45 Fed. 814—*Burnham v. First Nat. Bank*, 3 C. C. A. 489, 10 U. S. App. 485, 53 Fed. 165—*Southern Exp. Co. v. Todd*, 5 C. C. A. 434, 12 U. S. App. 351, 56 Fed. 106—*Craswell v. Belanger*, 6 C. C. A. 3, 15 U. S. App. 104, 56 Fed. 530—*Laskey v. Newton Min. Co.* 56 Fed. 630—*Tod v. Cleveland & M. Valley R. Co.* 12 C. C. A. 524, 22 U. S. App.

707, 65 Fed. 148—*Caples v. Texas & P. R. Co.* 67 Fed. 12—*Mulcahey v. Lake Erie & W. R. Co.* 69 Fed. 175—*Baltimore & O. R. Co. v. McLaughlin*, 19 C. C. A. 555, 43 U. S. App. 181, 73 Fed. 522—*Johnson v. F. C. Austin Mfg. Co.* 76 Fed. 616—*Dexter, H. & Co. v. Sayward*, 84 Fed. 299—*Johnson v. Wells, F. & Co.* 91 Fed. 8—*Ralya Market Co. v. Armour & Co.* 102 Fed. 533—*Knott v. McGilvray*, 124 Cal. 131, 56 Pac. 789—*Jones v. Adams Exp. Co.* 129 Fed. 619—*Green v. Heaton*, 154 Ind. 130, 56 N. E. 87—*Carew v. Matthews*, 41 Mich. 581, 2 N. W. 829—*Herndon v. Lancashire Ins. Co.* (*Herndon v. Aetna F. Ins. Co.*) 107 N. C. 193, 10 L. R.A. 54, 12 S. E. 240—*Blackwell v. Lynchburg & D. R. Co.* 107 N. C. 219, 12 S. E. 133—*Lawson v. Richmond & D. R. Co.* 112 N. C. 397, 17 S. E. 169—*Baird v. Richmond & D. R. Co.* 113 N. C. 608, 18 S. E. 698—*Bradley v. Ohio River & C. R. Co.* 119 N. C. 745, 26 S. E. 169.

363. In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal indentment constitute it, must be distinctively and positively averred in the pleadings, or affirmatively, with equal distinctness, in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. Rep. 449, 34: 1078

Cited in *Horne v. George H. Hammond Co.* 155 U. S. 394, 39 L. ed. 197, 15 Sup. Ct. Rep. 187—*Danahy v. National Bank*, 12 C. C. A. 76, 24 U. S. App. 351, 64 Fed. 149—*Marks v. Marks*, 75 Fed. 324—*Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 215, 52 U. S. App. 442, 84 Fed. 780—*Blair v. Silver Peak Mines*, 93 Fed. 335.

364. The jurisdiction of the circuit court in a cause removed fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. Rep. 510, 28: 462
Thayer v. Life Assn. of America, 112 U. S. 717, 5 Sup. Ct. Rep. 355, 28: 864
Cited in *Continental L. Ins. Co. v. Rhoads*, 119 U. S. 239, 30 L. ed. 380, 7 Sup. Ct. Rep. 193—*King Iron & Mfg. Bridge Co. v. Otose County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552—*Metcalfe v. Watertown*, 128 U. S. 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173—*Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 454, 44 L. ed. 844, 20 Sup. Ct. Rep. 690—*Simon v. House*, 46 Fed. 318—*Craswell v. Belanger*, 6 C. C. A. 2, 16 U. S. App. 104, 56 Fed. 530—*Kingman v. Holt-haus*, 59 Fed. 315—*McDonald v. Seligman*, 81 Fed. 755—*Green v. Heaton*, 154 Ind. 129, 56 N. E. 87—*Townsend v. Sykes*, 38 La. Ann. 411.

365. Where a bill in the circuit court does not allege the citizenship of the parties, that court has no jurisdiction. *Godfrey v. Terry*, 97 U. S. 171, 24: 944
Cited in *Cameron v. Hodges*, 127 U. S. 325, 32 L. ed. 134, 8 Sup. Ct. Rep. 1154—*Adams v. Republic County*, 23 Fed. 212—*Baltimore Bldg. & L. Asso. v. Alderson*, 32 C. C. A. 544, 61 U. S. App. 636, 90 Fed. 144—*Peacock, H. & W. Co. v. Williams*, 110 Fed. 916.

366. To confer or oust jurisdiction, when that depends on citizenship, the necessary

facts must be distinctly alleged and admitted or proved. *Marine & River Phosphate Min. & Mfg. Co. v. Bradley*, 105 U. S. 175, 26: 1034

Cited in Superior v. Ripley, 138 U. S. 97, 34 L. ed. 916, 11 Sup. Ct. Rep. 288—*Crawford v. Neal*, 144 U. S. 593, 36 L. ed. 556, 12 Sup. Ct. Rep. 759—*Gubbins v. Laughtenschlager*, 75 Fed. 621.

367. Although the plaintiff be described in the proceedings as an alien, yet the defendant must be expressly stated to be a citizen of some one of the United States. Otherwise the courts of the United States have not jurisdiction in the case. *Hodgson v. Bowerbank*, 5 Cranch, 303, 3: 108
Distinguished in Commercial Bank v. Green, 2 Filipp. 182, Fed. Cas. No. 3,059.

Cited in McNutt v. Bland, 2 How. 22, 11 L. ed. 104—*Marshall v. Baltimore & O. R. Co.* 16 How. 340, 14 L. ed. 964—*Shaw v. Quincy Min. Co.* (Ex parte Shaw) 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935—*Donaldson v. Hazen*, Hempst. 424, Fed. Cas. No. 3,984—*The Fideliter*, 1 Sawy. 156, 1 Abb. (U. S.) 579, Fed. Cas. No. 4,755—*Clarey v. Marshall*, 4 Dana, 97—*Blair v. West Point Mfg. Co.* 7 Neb. 154—*Herndon v. Aetna F. Ins. Co.* 107 N. C. 195, 12 S. E. 241.

368. A bill not averring that any of the defendants are citizens of any state other than that of plaintiff's residence is insufficient to confer jurisdiction on the circuit court. *Mason v. Rollins*, 13 Wall. 602, 20: 527

369. A bill describing plaintiff as a citizen of Illinois, all but one of the defendants as citizens of the same state, and the remaining defendant as Commissioner of Internal Revenue, without stating him to be a citizen of any state, is not sufficient to give the circuit court jurisdiction, when the bill was filed after the act of 1833, conferring jurisdiction of suits under the internal revenue act, against collectors and others, without regard to citizenship, had been repealed. *Mason v. Rollins*, 13 Wall. 602, 20: 527

370. The pleadings must show that the citizenship of the payee and the indorser of an inland bill of exchange was such as to enable an indorsee, under the judiciary act of 1789, § 11, to maintain suit thereon in the Federal courts. *Morgan v. Gay*, 19 Wall. 81, 22: 100
Held obiter in Portage City Water Co. v. Portage, 102 Fed. 772.

Cited in Continental L. Ins. Co. v. Rhoads, 119 U. S. 240, 30 L. ed. 381, 7 Sup. Ct. Rep. 193—*Johnson v. Christian*, 125 U. S. 644, 31 L. ed. 820, 8 Sup. Ct. Rep. 989—*Cameron v. Hodges*, 127 U. S. 325, 32 L. ed. 184, 8 Sup. Ct. Rep. 1154—*Parker v. Ormsby*, 141 U. S. 85, 35 L. ed. 656, 11 Sup. Ct. Rep. 912—*Holmes v. Goldsmith*, 147 U. S. 157, 37 L. ed. 121, 13 Sup. Ct. Rep. 288—*Hampton v. Truckee Canal Co.* 9 Sawy. 383, 19 Fed. 3—*Goldsmith v. Holmes*, 1 L.R.A. 818, 13 Sawy. 527, 36 Fed. 486—*United States Nat. Bank v. McNair*, 56 Fed. 327—*Jones v. Shapera*, 6 C. C. A. 427, 13 U. S. App. 481, 57 Fed. 462—*Eau Claire v. Payson*, 48 C. C. A. 609, 109 Fed. 678—*Utah-Nevada Co. v. De Lamar*, 66 C. C. A. 188, 133 Fed. 122.

371. The citizenship of the individual members of a limited-partnership association created by the laws of Pennsylvania must be alleged in a suit by that association in a Federal court, where jurisdiction depends upon diverse citizenship of the parties. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. Rep. 690, 44: 842

Cited in Thomas v. Ohio State University, 195 U. S. 212, 49 L. ed. 164, 25 Sup. Ct. Rep. 24—*Ralya Market Co. v. Armour & Co.* 102 Fed. 533—*Houston v. Filer & S. Co.* 43 C. C. A. 458, 104 Fed. 164—*Boatner v. American Exp. Co.* 122 Fed. 718—*Derk P. Yonkerman Co. v. Charles H. Fuller's Advertising Agency*, 135 Fed. 614.

372. Jurisdiction of a suit against a national bank, brought since the act of August 13, 1888, was passed, must be deemed to depend upon citizenship alone, under averments that the bank is a citizen of Massachusetts and the complainant is a citizen of Pennsylvania. *Re Jones*, 164 U. S. 691, 17 Sup. Ct. Rep. 222, 41: 601
Cited in Philippine Sugar Estates Development Co. v. United States, 39 Ct. Cl. 241.

Sufficiency of averment of citizenship.

Sufficiency of Allegations of Alienage, see *infra*, 394-398.

By Averment as to Place of Business, see *infra*, 399-402.

Of Corporation, see *infra*, II. c, 2, b, (2).

Prejudicial Error as to, see Appeal and Error, 5001.

See also *supra*, 317.

373. Although an allegation of citizenship is not made in precise and technical form, it is sufficient if it fairly appear therefrom of what states the respective parties are citizens, unless the citizenship thus disclosed is otherwise negated. *Jones v. Andrews*, 10 Wall. 327, 19: 935
Cited in Kerp v. Michigan Lake Shore R. Co. Fed. Cas. No. 7727—*Sharon v. Hill*, 10 Sawy. 637, 23 Fed. 855.

374. Describing the parties to a suit, in the commencement of a declaration, as citizens of the same state, is not fatal to jurisdiction, where a subsequent part of the declaration avers that one of them is a citizen of another state. *Bailey v. Dozier*, 6 How. 23, 12: 328
Cited in Spencer v. Lapsley, 20 How. 267, 15 L. ed. 904—*People, ex rel. Citizens' Gas-light Co. of Brooklyn v. Brooklyn*, 39 N. Y. 88.

375. An allegation that the plaintiff is a citizen of a certain state is sufficient without declaring that the state named is one of the United States. *Wright v. Hollingsworth*, 1 Pet. 165, 7: 96

376. Diverse citizenship is not sufficiently shown for the purpose of conferring jurisdiction on a Federal circuit court, by the statement that plaintiff was a citizen of one state and defendant was "of" another. *Wood v. Wagon*, 2 Cranch, 9, 2: 191
Cited in Brown v. Keene, 8 Pet. 116, 8 L. ed. 887—*McNutt v. Bland*, 2 How. 21, 11 L. ed. 165—*Grace v. American Cent. Ins. Co.* 100

- U. S. 285, 27 L. ed. 935, 3 Sup. Ct. Rep. 207—Berlin v. Jones, 1 Woods, 639, Fed. Cas. No. 1,343—Donaldson v. Hazen, Hempst. 424, Fed. Cas. No. 3,984—Parkhurst v. Kinsman, 3 Woodb. & M. 174, Fed. Cas. No. 10,761—Prentiss v. Barton, 1 Brock. 392, Fed. Cas. No. 11,384—Spelgle v. Meredith, 4 Bias. 126, Fed. Cas. No. 13,227—United States v. Woolsey, Fed. Cas. No. 16,762—Sherman v. Windsor Mfg. Co. 19 Blatchf. 315, 11 Fed. 852—Merchants' Nat. Bank v. Brown, 4 Woods, 264, 17 Fed. 161—Stephenson v. The Francis, 21 Fed. 718.
377. An allegation that plaintiff is a citizen of the state of Maryland and that defendant is a citizen or resident of the state of Louisiana, holding his fixed and permanent domicile in the parish of St. Charles, is not sufficient to show jurisdiction in a Federal circuit court for diversity of citizenship and is not aided by an averment in the answer that both plaintiff and defendant are citizens of Louisiana. *Brown v. Keene*, 8 Pet. 112, 8: 895
Cited in *Livingston v. Story*, 11 Pet. 413, 9 L. ed. 771—*Scott v. Sandford*, 19 How. 473, 15 L. ed. 729—*Robertson v. Cease*, 97 U. S. 649, 24 L. ed. 1059—*Grace v. American Cent. Ins. Co.* 109 U. S. 284, 27 L. ed. 935, 3 Sup. Ct. Rep. 207—*Börs v. Preston*, 111 U. S. 263, 28 L. ed. 422, 4 Sup. Ct. Rep. 407—*Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 382, 28 L. ed. 464, 4 Sup. Ct. Rep. 510—*Continental L. Ins. Co. v. Rhoads*, 119 U. S. 240, 30 L. ed. 381, 7 Sup. Ct. Rep. 193—*Runkle v. United States*, 122 U. S. 556, 30 L. ed. 1170, 7 Sup. Ct. Rep. 1141—*Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449—*Wolfe v. Hartford Life & Annuity Ins. Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602—*Stuart v. Easton*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 268—*Hanford v. Davies*, 163 U. S. 279, 41 L. ed. 159, 16 Sup. Ct. Rep. 1051—*F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 655, 41 L. ed. 1152, 17 Sup. Ct. Rep. 709—*Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 111, 42 L. ed. 680, 18 Sup. Ct. Rep. 260—*Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 454, 44 L. ed. 844, 20 Sup. Ct. Rep. 690—*McClaghry v. Deming*, 186 U. S. 63, 46 L. ed. 1055, 22 Sup. Ct. Rep. 786—*Giles v. Harris*, 189 U. S. 501, 47 L. ed. 918, 23 Sup. Ct. Rep. 639—*Thomas v. Ohio State University*, 195 U. S. 210, 49 L. ed. 164, 25 Sup. Ct. Rep. 24—*Tryon v. United States*, 32 Ct. Cl. 429—*Smith v. United States*, 36 Ct. Cl. 319—*Smith v. United States*, 38 Ct. Cl. 274—*Berlin v. Jones*, 1 Woods, 639, Fed. Cas. No. 1,343—*The Fidelity v. United States*, 1 Sawy. 156, 1 Abb. (U.S.) 579, Fed. Cas. No. 4,755—*Third Nat. Bank v. Teal*, 4 Hughes, 575, 5 Fed. 506—*Glover v. Shepperd*, 11 Bias. 574, 15 Fed. 835—*Hampton v. Truckee Canal Co.* 9 Sawy. 383, 19 Fed. 3—*Stephenson v. The Francis*, 21 Fed. 718—*Wabash R. Co. v. Barbour*, 19 C. C. A. 548, 43 U. S. App. 102, 73 Fed. 516—*Hunt v. Howes*, 21 C. C. A. 358, 41 U. S. App. 152, 74 Fed. 658—*Marks v. Marks*, 75 Fed. 324—*Probst v. Cowen*, 91 Fed. 932—*Dalton v. Milwaukee Mechanics' Ins. Co.* 118 Fed. 878—*Dalton v. Germania Ins. Co.* 118 Fed. 938—*Irving v. Smith*, 132 Fed. 207—*Brock v. Doyle*, 18 Fla. 173—*Carswell v. Schley*, 59 Ga. 21—*Spragins v. Houghton*, 3 Ill. 416—*Cleveland, C. C. & St. L. R. Co. v. Monaghan*, 140 Ill. 485, 30 N. E. 869—*Heyer v. Burger*, Hoffm. Ch. 17—*Myers v. Berry*, 3 Okla. 618, 41 Pac. 580—
- Robertson v. Cease*, 35 Phila. Leg. Int. 476—*Mayfield v. Wheeler*, 37 Tex. 259—*Mears v. Sinclair*, 1 W. Va. 191—*Mayer v. Adams*, 27 W. Va. 257.
378. An averment in a bill that defendant is "of the city of Philadelphia" is insufficient to show that he is a citizen of Pennsylvania for the purpose of sustaining Federal jurisdiction. *Jackson v. Ashton*, 8 Pet. 148, 8: 898
379. The description of a party as "of Chelsea" in a certain county and state is not a sufficient allegation of citizenship for the purpose of jurisdiction in a Federal court. *Horne v. George H. Hammond Co.* 155 U. S. 393, 15 Sup. Ct. Rep. 167, 39: 197
Cooper v. Newell, 155 U. S. 532, 15 Sup. Ct. Rep. 355, 39: 249
Cited in *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 580, 31 U. S. App. 665, 67 Fed. 627—*Marks v. Marks*, 75 Fed. 325—*Bishop v. Averill*, 76 Fed. 388—*Littell v. Erie R. Co.* 105 Fed. 539—*Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 166, 133 Fed. 16.
380. Jurisdiction is not shown by the averments that plaintiff is an alien and that defendants were "late of the district of Maryland," since the citizenship of the defendants is not stated. *Hodgson v. Bowerbank*, 5 Cranch, 303, 3: 108
Cited in *Pooley v. Luco*, 72 Fed. 561—*Orosco v. Gagliardo*, 22 Cal. 85.
381. An averment that describes the plaintiff as a citizen of Illinois, one defendant as of the District of Columbia and a citizen of the state of —, and other defendants as citizens of Illinois, is not sufficient to give the circuit court jurisdiction under the judiciary act of 1789. *Mason v. Rollins*, 13 Wall. 602, 20: 527
382. A statement that defendant is a citizen of the state, and that complainants are not citizens thereof, will not give the United States circuit court jurisdiction. The adverse party must be a citizen of some other named state, or an alien. *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. Rep. 1154, 32: 132
383. The title or caption of a bill is no part of it and does not remove the objection to the failure of the pleading to show the diverse citizenship relied upon to sustain the Federal jurisdiction. *Jackson v. Ashton*, 8 Pet. 148, 8: 898
Cited in *Livingston v. Story*, 11 Pet. 414, 9 L. ed. 771—*Marshall v. Baltimore & O. R. Co.* 16 How. 342, 14 L. ed. 965—*Sharon v. Hill*, 10 Sawy. 635, 23 Fed. 353.
- Averment of residence.**
384. An averment of residence is not equivalent to an averment of citizenship, for the purposes of jurisdiction in the courts of the United States. *Timmons v. Elyton Land Co.* 139 U. S. 378, 11 Sup. Ct. Rep. 585, 35: 195
Denny v. Pironi, 141 U. S. 121, 11 Sup. Ct. Rep. 966, 35: 657
Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. Rep. 873, 30: 914

Southern P. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. Rep. 44, 36: 942
 Everhart v. Huntsville Female College, 120 U. S. 223, 7 Sup. Ct. Rep. 555, 30: 623
 Wolfe v. Hartford Life & Annuity Ins. Co. 148 U. S. 389, 13 Sup. Ct. Rep. 602, 37: 493

Cited in Menard v. Goggan, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873—Metcalf v. Watertown, 128 U. S. 588, 32 L. ed. 543, 9 Sup. Ct. Rep. 173—Chapman v. Barney, 129 U. S. 679, 32 L. ed. 801, 9 Sup. Ct. Rep. 426—Anderson v. Watt, 158 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449—Denny v. Pironi, 141 U. S. 124, 35 L. ed. 658, 11 Sup. Ct. Rep. 966—Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935—Wolfe v. Hartford Life & Annuity Ins. Co. 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602—Empire Coal & Transp. Co. v. Empire Coal & Min. Co. 150 U. S. 164, 37 L. ed. 1030, 14 Sup. Ct. Rep. 66—Simon v. House, 46 Fed. 318—Southwestern Teleg. & Teleph. Co. v. Robinson, 1 C. C. A. 92, 2 U. S. App. 148, 48 Fed. 769—Laskey v. Newtown Min. Co. 50 Fed. 636—New York & N. E. R. Co. v. Hyde, 5 C. C. A. 465, 5 U. S. App. 443, 56 Fed. 192—Craswell v. Belanger, 6 C. C. A. 2, 15 U. S. App. 104, 56 Fed. 530—St. Louis, I. M. & S. R. Co. v. Newcom, 6 C. C. A. 174, 12 U. S. App. 503, 56 Fed. 953—Grand Trunk R. Co. v. Twitchell, 8 C. C. A. 230, 21 U. S. App. 45, 59 Fed. 729—American Sugar Ref. Co. v. Johnson, 9 C. C. A. 115, 13 U. S. App. 681, 60 Fed. 508—Danahy v. National Bank, 12 C. C. A. 76, 24 U. S. App. 351, 64 Fed. 149—Tug River Coal & Salt Co. v. Brigel, 14 C. C. A. 580, 31 U. S. App. 665, 67 Fed. 627—Society of Shakers v. Watson, 15 C. C. A. 637, 37 U. S. App. 141, 68 Fed. 735—Brigel v. Tug River Coal & Salt Co. 73 Fed. 16—Marks v. Marks, 75 Fed. 325—Blair v. Silver Peak Mines, 93 Fed. 335—Re Plotke, 44 C. C. A. 286, 3 N. B. N. Rep. 125, 104 Fed. 967—Littell v. Erie R. Co. 105 Fed. 539—Thomas v. National Bank of D. O. Mills, 45 C. C. A. 407, 106 Fed. 438—Yocum v. Parker, 66 C. C. A. 82, 130 Fed. 772—Rothermel v. Meyerle, 7 Pa. Co. Ct. 017.

385. "Residence" and "citizenship" are not synonymous terms. An allegation of the former in a pleading is not a proper averment of the latter. *Parker v. Overman*, 18 How. 137, 15: 318

386. Citizenship and residence are not synonymous terms; the bare averment of the residence of the parties is not sufficient, *prima facie*, to show jurisdiction. *Robertson v. Cease*, 97 U. S. 646, 24: 1057
Distinguished in Littell v. Erie R. Co. 105 Fed. 539.

Cited in Cameron v. Hodges, 127 U. S. 325, 32 L. ed. 134, 8 Sup. Ct. Rep. 1154—Anderson v. Watt, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449—Denny v. Pironi, 141 U. S. 124, 35 L. ed. 658, 11 Sup. Ct. Rep. 966—F. G. Oxley Stave Co. v. Butler County, 166 U. S. 655, 41 L. ed. 1152, 17 Sup. Ct. Rep. 709—Union Mut. L. Ins. Co. v. Kirchoff, 169 U. S. 111, 42 L. ed. 680, 18 Sup. Ct. Rep. 260—Stephenson v. The Francis, 21 Fed. 718—Zambrino v. Galveston, H. & S. A. R. Co. 38 Fed. 453—Hewitt v. Story, 30 L.R.A. 274, 12 C. C. A. 263, 29 U. S. App. 155, 64 Fed. 523—Bishop v. Averill, 76 Fed. 387—Egerton v. Starin, 91 Fed. 932—Blair v. Silver Peak Mines, 93 Fed. 335—Thomas v. National Bank of D. O. Mills, 45 C. C. A. 407,

106 Fed. 438—Illinois L. Ins. Co. v. Shenelon, 109 Fed. 675—Yocum v. Parker, 66 C. C. A. 81, 130 Fed. 771—Kansas City Southern R. Co. v. Prunty, 66 C. C. A. 166, 133 Fed. 16—Utah-Nevada Co. v. De Lamar, 66 C. C. A. 183, 133 Fed. 117—Hamill v. Talbott, 81 Mo. App. 216—Herndon v. Lancashire Ins. Co. (Herndon v. Aetna F. Ins. Co.) 107 N. C. 194, 10 L.R.A. 55, 12 S. E. 240—Rothermel v. Meyerle, 136 Pa. 253, 20 Atl. 583—Brown v. Thomson, 31 S. C. 436, 17 Am. St. Rep. 40, 10 S. E. 95—Chafee v. Postal Teleg. Co. 35 S. C. 381, 14 S. E. 764.

387. It is not necessary to aver on the record that the defendant in the circuit court was an inhabitant of the district, or was found therein at the time of serving the writ. *Gracie v. Palmer*, 8 Wheat. 699, 5: 719

Cited in Teese v. Phelps, McAll. 17, Fed. Cas. No. 13,818—Cooley v. McArthur, 35 Fed. 373—Laskey v. Newtown Min. Co. 50 Fed. 635—Winter v. Ludlow, 3 Phila. 471, 16 Phila. Leg. Int. 332.

388. The jurisdiction of the circuit court must appear affirmatively, and an averment that a party resides in a particular state does not import citizenship there. *Union Mut. Ins. Co. v. Kirchoff*, 169 U. S. 103, 18 Sup. Ct. Rep. 260, 42: 677
Cited in Egerton v. Starin, 91 Fed. 932.

389. It is not a sufficient averment of the jurisdictional facts of citizenship, to state that the plaintiffs are residents of one state, and to describe the defendant as being "of" another state. *Abercrombie v. Dupuis*, 1 Cranch, 343, 2: 129

390. An averment in a complaint that the plaintiff "resides in El Paso, in El Paso county, state of Texas, in the western district of said state," and that defendant is a citizen of the state of Massachusetts, is not a sufficient allegation of citizenship in the state of Texas, to confer jurisdiction on the Federal court in that state, where diversity of citizenship is essential to confer jurisdiction. *Mexican C. R. Co. v. Duthie*, 189 U. S. 76, 23 Sup. Ct. Rep. 610, 47: 715
Cited in Sun Printing & Pub. Asso. v. Edwards, 194 U. S. 382, 48 L. ed. 1030, 24 Sup. Ct. Rep. 696—Kansas City Southern R. Co. v. Prunty, 66 C. C. A. 166, 133 Fed. 16.

391. The jurisdiction of the circuit court cannot be supported by averments that the parties reside in different states, without averring also that they are "citizens" of such states, although coupled with a subsequent allegation that the controversy is "between citizens of different states," the latter being merely an unauthorized conclusion of law. *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 3 Sup. Ct. Rep. 207, 27: 932

392. An averment that plaintiff is a resident of the state of Delaware will be regarded by an appellate court as a sufficient averment of citizenship in that state, for the purpose of giving jurisdiction to a Federal circuit court, where the uncontradicted testimony shows a legal domicile therein, and that any absence from the state was without intention to abandon such domicile.

Sun Printing & Pub. Asso. v. Edwards, 194 U. S. 377, 24 Sup. Ct. Rep. 696, 48: 1027
Cited in Every Evening Printing Co. v. Butler, 75 C. C. A. 660, 144 Fed. 919.

393. An averment in a petition filed in the district court of the United States for Louisiana, that defendant was, at the time of filing of the petition, residing in the parish of West Baton Rouge, where he had caused himself to be naturalized as an American citizen, was equivalent to an averment that the defendant was a citizen of the state of Louisiana, for the purpose of invoking jurisdiction for diverse citizenship. *Gassies v. Ballon*, 6 Pet. 761, 8: 573
Cited in *Hornthall v. The Collector (Hornthall v. Keary)* 9 Wall. 565, 19 L. ed. 562—*Marshall v. Baltimore & O. R. Co.* 16 How. 329, 14 L. ed. 960—*Scott v. Sandford*, 19 How. 571, 15 L. ed. 769—*Bayerque v. Haley*, Mcall. 98, Fed. Cas. No. 1,135—*Burnham v. Rangeley*, 1 Woodb. & M. 12, Fed. Cas. No. 2,176—*Parkhurst v. Kinsman*, 3 Woodb. & M. 174, Fed. Cas. No. 10,761—*Spelgle v. Meredith*, 4 Biss. 126, Fed. Cas. No. 13,227—*United States v. Myers*, 2 Brock. 529, Fed. Cas. No. 15,844—*Glover v. Shepperd*, 11 Biss. 576, 15 Fed. 836.

Averment of allegiance.

See also *supra*, 367, 380.

394. The alienage of the plaintiff is sufficiently alleged to sustain the jurisdiction of a Federal circuit court by an averment in the complaint that "the plaintiff now is, and for more than one year last past has been, a resident of Washington and a citizen of Sweden," although, at the time the action was brought, Sweden was under a monarchical form of government, since the designation "citizen of Sweden" could only have been intended as a statement of the nationality of the plaintiff,—*viz.*, the country to which he bore allegiance. *C. H. Nichols Lumber Co. v. Franson*, 203 U. S. 278, 27 Sup. Ct. Rep. 102, 51: 181

395. Complainants' description of themselves, in a bill in a suit against a citizen of Nebraska, as "all of Cognac in France, and citizens of the Republic of France," is sufficient, without any averment of alienage, to bring the suit within the provisions of 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508, conferring original jurisdiction upon circuit courts of the United States of all suits in which there is "a controversy between citizens of a state and foreign states, citizens, or subjects." *Hennessy v. Richardson Drug Co.* 189 U. S. 25, 23 Sup. Ct. Rep. 532, 47: 697

396. Where the declaration plainly sets out that the plaintiffs are aliens, and that defendant is a citizen of Maryland, there is no foundation for the objection to jurisdiction for defect of averment as to alienage of plaintiffs and citizenship of the defendant. *Waters v. Barril*, 131 U. S. lxxxiv Appx. and 18: 878

397. An allegation that defendant is the consul, in this country, of a foreign government, is not sufficient to show that he is an

alien. *Börs v. Preston*, 111 U. S. 252, 4 Sup. Ct. Rep. 407, 28: 419

398. Description of a party as "a citizen of London, England," does not sufficiently show that he is an alien for the purpose of giving jurisdiction to a Federal court. *Stuart v. Easton*, 156 U. S. 46, 15 Sup. Ct. Rep. 268, 39: 341
Cited in *Lumley v. Wabash R. Co.* 22 C. C. A. 63, 43 U. S. App. 476, 76 Fed. 69—*Bishop v. Averill*, 76 Fed. 387—*Rondot v. Rogers Twp.* 25 C. C. A. 146, 47 U. S. App. 290, 79 Fed. 677—*Ryder v. Bateman*, 93 Fed. 21—*Betancourt v. Mutual Reserve Fund Life Asso.* 101 Fed. 306—*Stuart v. Easton*, 6 Northampton Co. Rep. 257.

Place of business.

399. An averment that a person is engaged in business at a certain place is not an averment of citizenship. *Turner v. Bank of North America*, 4 Dall. 8, 1: 718
Cited in *Emsheimer v. New Orleans*, 186 U. S. 47, 46 L. ed. 1048, 22 Sup. Ct. Rep. 770—*Marks v. Marks*, 75 Fed. 325—*Clark v. Harkness*, 2 Ill. 58.

400. An averment that the plaintiffs are a mercantile firm engaged in business in the county of Los Angeles, California, where they reside, is not a sufficient averment of citizenship to give the circuit court jurisdiction. *Denny v. Pironi*, 141 U. S. 121, 11 Sup. Ct. Rep. 966, 35: 657
Cited in *Shaw v. Quincy Min. Co. (Ex parte Shaw)* 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935—*Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 581, 31 U. S. App. 665, 67 Fed. 628—*Bishop v. Averill*, 76 Fed. 387—*Thomas v. National Bank*, 45 C. C. A. 407, 106 Fed. 438—*Zeibert v. Hunt*, 108 Fed. 450—*Gale v. Southern Bldg. & L. Asso.* 117 Fed. 733.

401. A declaration in the circuit court of the United States in Virginia, stating the plaintiffs to be partners trading under a specified firm name and style, at a certain place in another states, does not establish that the plaintiffs were beyond the commonwealth of Virginia. It is insufficient to give the court jurisdiction of the action if the exception is taken by plea or by writ of error, within the limitation of such writ. *Rosa v. Duval*, 13 Pet. 45, 10: 51

402. An averment that the plaintiffs were a firm carrying on business in Omaha is equivalent to saying they had their domicile there, and must be considered sufficient, at least on writ of error, where the question of jurisdiction was not raised in the circuit court. *United States Exp. Co. v. Kountze Bros.* 8 Wall. 342, 19: 457

b. Of Corporations.

Curing Defect by Additional Averments in Reply, see *supra*, 46.

Raising Question of Corporate Existence or Capacity to Sue by Plea in Abatement, see *infra*, 654-658.

In Proceeding to Remove Cause to Federal Court, see Removal of Causes, 307, 314, 315.

(1) Necessity of Averment.

403. In an action in the circuit court against the "Pennsylvania Railroad Company," where the declaration described the plaintiff as a citizen of France, but contained no allegation as to the citizenship of the defendant, nor stated whether or not it was a corporation, the circuit court had no jurisdiction. *Piquignot v. Pennsylvania R. Co.* 16 How. 104, 14: 863

Cited in Scott v. Sandford, 19 How. 567, 15 L. ed. 768—New Orleans Mall Co. v. Flanders (New Orleans & B. S. Mail Co. v. Fernandes) 12 Wall. 135, 20 L. ed. 251—Mansfield C. & L. M. R. Co. v. Swan, 111 U. S. 834, 28 L. ed. 464, 4 Sup. Ct. Rep. 510—Hinckey v. Byrne, Deady, 227, Fed. Cas. No. 6,510—Van Antwerp v. Hulburd, 7 Blatchf. 443, Fed. Cas. No. 16,826—Grand Trunk R. Co. v. Tennant, 14 C. C. A. 191, 21 U. S. App. 682, 66 Fed. 923.

404. Citizenship of individual members of a corporate defendant must appear on the record to support the jurisdiction of a Federal circuit court invoked on the ground of diverse citizenship. *Sullivan v. Fulton S. B. Co.* 6 Wheat. 450, 5: 302

Cited in Marshall v. Baltimore & O. R. Co. 16 How. 348, 14 L. ed. 968—Dodge v. Woolsey, 18 How. 364, 15 L. ed. 415—Grace v. American Cent. Ins. Co. 109 U. S. 283, 27 L. ed. 934, 3 Sup. Ct. Rep. 207—Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 451, 36 L. ed. 772, 12 Sup. Ct. Rep. 935—Wheeldon v. Camden & A. R. Co. 1 Grant, Cas. 425.

405. A Federal circuit court has no jurisdiction on the ground of diverse citizenship of a suit against a corporation, where the bill does not state the citizenship of the individual corporators. *Breithaupt v. Bank of Georgia*, 1 Pet. 238, 7: 127
Distinguished in Wood v. Mann, 1 Sumn. 584, Fed. Cas. No. 17,952.

Cited in Marshall v. Baltimore & O. R. Co. 16 How. 348, 14 L. ed. 968—Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 451, 36 L. ed. 772, 12 Sup. Ct. Rep. 935—Bank of Cumberland v. Willis, 3 Sumn. 473, Fed. Cas. No. 885—Donaldson v. Hazen, Hempst. 424, Fed. Cas. No. 3,984—Speigle v. Meredith, 4 Biss. 126, Fed. Cas. No. 13,227—United States v. Woolsey, Fed. Cas. No. 16,762—Oakley v. Commercial & R. Bank, 14 La. 517.

406. In a suit by or against a corporation it is necessary that it be made to appear that the corporation was brought into existence by the law of some state other than that of which the adverse party is a citizen. Such an averment may be made anywhere in the pleadings. *Muller v. Dows*, 94 U. S. 444, 24: 207
Cited in Kansas City Southern R. Co. v. Prunty, 66 C. C. A. 165, 138 Fed. 15.

(2) Sufficiency of Averment.

See *supra*, 356.

407. A suit by a nonresident stockholder against his corporation and a municipal corporation in the same state, where jurisdiction depends upon citizenship, and it is not expressly alleged, as required by equity

rule 94, that "the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance," but merely that the suit is brought in good faith and for the collection of a meritorious claim; and in which it is not set forth with particularity what efforts he has made to secure action by the managing directors or trustees of the corporation, except a simple demand in writing for the institution of a suit sixteen days before beginning this suit,—must be dismissed as collusive. *Quincy v. Steel*, 120 U. S. 241, 7 Sup. Ct. Rep. 520, 30: 624

Cited in De Neufville v. New York & N. R. Co. 28 C. C. A. 308, 51 U. S. App. 374, 81 Fed. 13—Elkins v. Chicago, 119 Fed. 959—New Albany Waterworks v. Louisville Bkg. Co. 58 C. C. A. 578, 122 Fed. 778—Groel v. United Electric Co. 132 Fed. 259—Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 439, 59 N. W. 838.

Creation or citizenship in particular state.

408. An averment in a suit brought by a citizen of one state, that the defendants are a body corporate created by the legislature of another state, is sufficient to give the court jurisdiction. *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14: 953

Cited in Lafayette Ins. Co. v. French, 18 How. 405, 15 L. ed. 452—Covington Drawbridge Co. v. Shepherd, 21 How. 126, 16 L. ed. 41—Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 214, 16 L. ed. 77—Paul v. Virginia, 8 Wall. 178, 19 L. ed. 359—Pennsylvania v. Quicksilver Min. Co. 10 Wall. 556, 19 L. ed. 998—Baltimore & O. R. Co. v. Harris, 12 Wall. 82, 20 L. ed. 358—National S. R. Co. v. Tugman, 106 U. S. 121, 27 L. ed. 89, 1 Sup. Ct. Rep. 58—St. Louis & S. F. R. Co. v. James, 161 U. S. 556, 40 L. ed. 806, 16 Sup. Ct. Rep. 621—Thomas v. Ohio State University, 195 U. S. 210, 49 L. ed. 164, 25 Sup. Ct. Rep. 24—Dinsmore v. Philadelphia & R. R. Co. 11 Phila. 483, Fed. Cas. No. 2,921—Kerp v. Michigan, L. S. R. Co. Fed. Cas. No. 7,727—Malta v. American Exp. Co. 1 Filipp. 612, Fed. Cas. 9,002—Thornburgh v. Savage Min. Co. Fed. Cas. No. 13,966—Wheeling v. Baltimore, 1 Hughes, 96 W. Va. Cas. No. 17,502—Wilmer v. Atlanta, & E. Air Line R. Co. 2 Woods, 455, Fed. Cas. No. 17,776—Adams Exp. Co. v. Trego, 35 Md. 62—Gorton Steamer Co. v. Spofford, 5 N. Y. Civ. Proc. Rep. 118—Kranshaar v. New Haven S. B. Co. 7 Robt. 372—Stevens v. Phoenix Ins. Co. 41 N. Y. 153—Wheeldon v. Camden & A. R. Co. 1 Grant, Cas. 426—Wheeldon v. Camden & A. R. & Transp. Co. 2 Phila. 29, 1 Grant, Cas. 426—Densmore v. Philadelphia & R. R. Co. 11 Phila. 483—Hall v. Bank of Virginia, 14 W. Va. 621—Rece v. Newport News & M. Valley Co. 32 W. Va. 171, 3 L.R.A. 575, 9 S. E. 212—State ex rel. Atty. Gen. v. Milwaukee, L. S. & W. R. Co. 45 Wis. 594.

409. An allegation that a corporation was duly organized under the laws of a state sufficiently shows its citizenship. *Dodge v. Tulleys*, 144 U. S. 451, 12 Sup. Ct. Rep. 724, 36: 501

Cited in Roberts v. Pacific & A. R. & Nav. Co. 104 Fed. 579.

410. An averment in a declaration that

defendant is a foreign corporation, formed under and created by the laws of the state of New York, is equivalent to an allegation that defendant is a citizen of that state, for the purpose of invoking the jurisdiction of the Federal courts. *United States Exp. Co. v. Kountze Bros.* 8 Wall. 342, 19: 457
Cited in Jones v. Andrews, 10 Wall. 331, 19 L. ed. 936—*Home Ins. Co. v. Morse*, 20 Wall. 454, 22 L. ed. 369—*Southern Exp. Co. v. Western North Carolina R. Co.* 99 U. S. 198, 25 L. ed. 320—*Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 455, 44 L. ed. 844, 20 Sup. Ct. Rep. 690—*Sun Printing & Pub. Asso. v. Edwards*, 194 U. S. 383, 48 L. ed. 1030, 24 Sup. Ct. Rep. 696—*Ames v. Colorado C. R. Co.* 4 Dill. 257, Fed. Cas. No. 324—*Kerp v. Michigan L. S. R. Co.* Fed. Cas. No. 7,727—*Sharon v. Hill*, 10 Sawy. 638, 23 Fed. 353—*Dunton v. Muth*, 45 Fed. 393—*Ward v. Blake Mfg. Co.* 5 C. C. A. 540, 12 U. S. App. 295, 56 Fed. 440—*Shattuck v. North British & M. Ins. Co.* 7 C. C. A. 388, 19 U. S. App. 215, 58 Fed. 611—*Dorne v. Richmond Silver Min. Co.* 1 S. D. 23, 44 N. W. 1021.

411. An allegation of a complaint admitted by answer, that "defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the northern district of New York," sufficiently avers that the corporation is a citizen of New York, for the purpose of giving jurisdiction to a Federal circuit court. *Sun Printing & Pub. Asso. v. Edwards*, 194 U. S. 377, 24 Sup. Ct. Rep. 696, 48: 1027

412. An averment that plaintiff is a corporation created and subsisting under and by virtue of the laws of Kansas and Nebraska, and that defendant is a citizen of Kansas, does not show that the parties are citizens of different states. *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 17 Sup. Ct. Rep. 925, 42: 315

413. An allegation that the defendant, the Board of Trustees of the Ohio State University, is a citizen of and domiciled in that state, and was created by and exists under certain designated laws of that state, with power to sue and be sued, will be held not sufficiently to aver that such body is an Ohio corporation, within the jurisdictional rule of the Federal courts imputing to the members of a corporation citizenship in the state creating it, where the statute creating the board has been upheld by the highest court of the state as not conferring and not intended to confer corporate powers in violation of a prohibition in the state Constitution against conferring corporate powers by special act. *Thomas v. Ohio State University*, 195 U. S. 207, 25 Sup. Ct. Rep. 24, 49: 160

414. An allegation that defendant is a corporation and a citizen of a particular state is a sufficient averment of citizenship

for jurisdictional purposes. *Covington Drawbridge Co. v. Shepherd*, 21 How. 112, 16: 38
Covington Drawbridge Co. v. Shepherd, 20 How. 227, 15: 396

Cited in Ohio & M. R. Co. v. Wheeler, 1 Black, 226, 17 L. ed. 133—*St. Louis & S. F. R. Co. v. James*, 161 U. S. 557, 40 L. ed. 806, 16 Sup. Ct. Rep. 621—*Blake v. McClung*, 172 U. S. 259, 43 L. ed. 430, 19 Sup. Ct. Rep. 165—*Thomas v. Ohio State University*, 195 U. S. 210, 49 L. ed. 164, 23 Sup. Ct. Rep. 24—*Maltz v. American Exp. Co.* 1 Flipp. 612, Fed. Cas. No. 9,002—*Uphoff v. Chicago, St. L. & N. O. R. Co.* 5 Fed. 546—*Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.* 4 Woods, 365, 10 Fed. 500—*McCabe v. Illinois C. R. Co.* 4 McCrary, 497, 13 Fed. 331—*Pacific R. Co. v. Missouri P. R. Co.* 5 McCrary, 376, 23 Fed. 566—*United States v. Southern P. R. Co.* 49 Fed. 302—*Carnegie v. Hulbert*, 3 C. C. A. 392, 10 U. S. App. 454, 53 Fed. 11—*Loneragan v. Illinois C. R. Co.* 55 Fed. 551—*Dalton v. Milwaukee Mechanics' Ins. Co.* 118 Fed. 879—*Western R. Co. v. Thornton*, 60 Ga. 308—*Ducat v. Chicago*, 48 Ill. 175, 95 Am. Dec. 529—*Treadway v. Chicago & N. W. R. Co.* 21 Iowa, 358—*Western U. Teleg. Co. v. Dickinson*, 40 Ind. 445, 13 Am. Rep. 295—*Elston v. Piggott*, 94 Ind. 23—*Phoenix Ins. Co. v. Com.* 5 Bush, 73, 96 Am. Dec. 331—*Adams Exp. Co. v. Trego*, 35 Md. 62—*Morton v. Mutual L. Ins. Co.* 105 Mass. 147, 7 Am. Rep. 505—*Cooke v. State Nat. Bank*, 52 N. Y. 111, 11 Am. Rep. 667—*Fargo v. McVicker*, 55 Barb. 440—*Horne v. Boston & M. R. Co.* 62 N. H. 455—*Springs v. Southern R. Co.* 130 N. C. 194, 41 S. E. 100.

415-6. The averment in a declaration that a company, defendant, is a citizen of the state, is not sufficient to give jurisdiction. *Lafayette Ins. Co. v. French*, 18 How. 404, 15: 451

Cited in Covington Drawbridge Co. v. Shepherd, 20 How. 233, 15 L. ed. 899—*Muller v. Dows*, 94 U. S. 445, 24 L. ed. 207—*Fire Asso. of Philadelphia v. New York*, 119 U. S. 118, 30 L. ed. 346, 7 Sup. Ct. Rep. 108—*Thomas v. Ohio State University*, 195 U. S. 214, 49 L. ed. 165, 25 Sup. Ct. Rep. 24—*Uphoff v. Chicago, St. L. & N. O. R. Co.* 5 Fed. 546—*Frisbie v. Chesapeake & O. R. Co.* 57 Fed. 3—*Platt v. Massachusetts Real Estate Co.* 103 Fed. 707—*Winkler v. Chicago & E. I. R. Co.* 108 Fed. 308—*Dalton v. Milwaukee Mechanics' Ins. Co.* 118 Fed. 878—*Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 165, 133 Fed. 15—*Fred Macey Co. v. Macey*, 68 C. C. A. 365, 135 Fed. 727—*Manufacturers' Nat. Bank v. Baack*, 8 Blatchf. 139, 2 Abb. (U. S.) 234, Fed. Cas. No. 9,052—*Ducat v. Chicago*, 48 Ill. 175, 95 Am. Dec. 529—*Manufacturers' Nat. Bank v. Baack*, 40 How. Pr. 411—*Springs v. Southern R. Co.* 130 N. C. 192, 41 S. E. 100—*Rece v. Newport News & M. Valley Co.* 32 W. Va. 171, 3 L.R.A. 575, 9 S. E. 212.

Citizenship of individual members.

See also *supra*, 352, 404, 405.

417. Where the act of incorporation is a public law which the court is bound to notice, the averment of the citizenship of the members of the corporation is all that is required. *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15: 396
Cited in Covington Drawbridge Co. v. Shepherd, 21 How. 123, 16 L. ed. 40—*Paul v.*

Virginia, 8 Wall. 178, 19 L. ed. 359—Sewing Mach. Co's Case (Grover & B. Sewing-Mach. Co. v. Florence Sewing-Mach. Co.)—18 Wall. 575, 21 L. ed. 919—National S. S. Co. v. Tugman, 106 U. S. 121, 27 L. ed. 89, 1 Sup. Ct. Rep. 38—Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 451, 36 L. ed. 772, 12 Sup. Ct. Rep. 935—Dinsmore v. Philadelphia & R. R. Co. Fed. Cas. No. 3,921—Hatch v. Chicago, R. I. & P. R. Co. 6 Blatchf. 112, Fed. Cas. No. 6,204—Manufacturers' Nat. Bank v. Baack, 8 Blatchf. 139, 2 Abb. (U. S.) 234, Fed. Cas. No. 9,052—Terry v. Imperial F. Ins. Co. 3 Dill. 409, Fed. Cas. No. 13,838—St. Louis Nat. Bank v. Allen, 2 McCrary, 94, 5 Fed. 552—McCabe v. Illinois C. R. Co. 4 McCrary, 497, 13 Fed. 831—Stevens v. Phoenix Ins. Co. 41 N. Y. 153—Union Paper Collar Co. v. White, 11 Phila. 483—Dinsmore v. Philadelphia & R. R. Co. 2 W. N. C. 276—Rathbone Oil Tract Co. v. Rauch, 5 W. Va. 82—Hall v. Bank of Virginia, 14 W. Va. 621.

418. The jurisdiction of a Federal circuit court on the ground of diverse citizenship over a suit between a citizen of Michigan and the Board of Trustees of the Ohio State University will sufficiently appear, so far as the pleadings are concerned, without bringing the several persons constituting the board before the court as defendants, where it is averred that the board was created by and exists as an organized body under the laws of Ohio, with power to sue and be sued by its collective name, if it is also alleged that each individual trustee is a citizen of that state. *Thomas v. Ohio State University*, 195 U. S. 207, 25 Sup. Ct. Rep. 24, 49: 160

Cited in C. H. Nichols Lumber Co. v. Franson, 203 U. S. 282, 51 L. ed. 183, 27 Sup. Ct. Rep. 102.

419. The citizenship of the individual members of the Board of Trustees of the Ohio State University does not sufficiently appear for the purpose of conferring jurisdiction on a Federal circuit court of a suit against such board from averments that show that the board, while not an Ohio corporation, was created by and exists as an organized body under the laws of that state, although, under the Ohio Constitution, no person can be elected or appointed to any office in the state unless he possesses the qualifications of an elector, and an elector must be a citizen of the state. *Thomas v. Ohio State University*, 195 U. S. 207, 25 Sup. Ct. Rep. 24, 49: 160

Place of transacting business.

420. Averment of the facts of creation and the place of transacting business is sufficient to show the residence and citizenship of a corporation for the purpose of determining the jurisdiction of the Federal courts upon the ground of diverse citizenship. *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497, 11: 353

Cited in Marshall v. Baltimore & O. R. Co. 16 How. 325, 14 L. ed. 958—Covington Drawbridge Co. v. Shepherd, 20 How. 232, 15 L. ed. 898—*Germania F. Ins. Co. v. Francis*, 11 Wall. 216, 20 L. ed. 79—*Blackburn v. Selma, M. & M. R. Co.* 2 Filipp. 531, Fed. Cas. No. 1,467—*Dinsmore v. Philadelphia & R. R. Co.* 11 Phila. 483, Fed. Cas. No. 3,921—*Ketchum*

v. Farmers' Loan & T. Co. 4 McLean, 2 Fed. Cas. No. 7,736—*Calvert v. Southern R. Co.* 64 S. C. 158, 41 S. E. 963—*Dinsmore v. Philadelphia & R. R. Co.* 2 W. N. C. 276.

421. An averment that the defendants are a corporation created under the laws of a specified state, having its principal place of business in that state, is sufficient. *Lafayette Ins. Co. v. French*, 18 How. 404, 15: 451

Cited in Grand Trunk R. Co. v. Tennant, 14 C. C. A. 191, 21 U. S. App. 682, 66 Fed. 923—*Lewis v. Clyde S. S. Co.* 131 N. C. 653, 42 S. E. 969.

422. Citizenship of a corporation is not shown by merely alleging that it is doing business in a state. *Brock v. Northwestern Fuel Co.* 130 U. S. 341, 9 Sup. Ct. Rep. 552, 32: 905

423. An averment that a corporation is a "body politic in the law of, and doing business in, the state of California," is insufficient to establish as a jurisdictional fact that it is a California corporation. *Pennsylvania v. Quicksilver Min. Co.* 10 Wall. 553, 19: 998

Cited in Dinsmore v. Philadelphia & R. R. Co. 11 Phila. 484, Fed. Cas. No. 3,921—*New York & N. E. R. Co. v. Hyde*, 5 C. C. A. 463, 5 U. S. App. 443, 56 Fed. 192—*Springs v. Southern R. Co.* 130 N. C. 194, 41 S. E. 100—*Lewis v. Clyde S. S. Co.* 131 N. C. 653, 42 S. E. 969—*Dinsmore v. Philadelphia & R. R. Co.* 11 Phila. 484.

424. Where the declaration avers that the defendant is a corporation created by an act of the legislature of the state of New York, located and doing business in Mississippi, this is an averment that the defendant was a citizen of New York. *Germania F. Ins. Co. v. Francis*, 11 Wall. 210, 20: 77

Cited in Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 451, 36 L. ed. 772, 12 Sup. Ct. Rep. 935—*Berry v. Mobile L. Ins. Co.* Fed. Cas. No. 1,858—*Zambrino v. Galveston, H. & S. A. R. Co.* 38 Fed. 455—*Booth v. St. Louis Fire Engine Mfg. Co.* 40 Fed. 2—*Myers v. Murray, N. & Co.* 11 L.R.A. 217, 43 Fed. 696—*National Typographic Co. v. New York Typographic Co.* 44 Fed. 711—*Baughman v. National Waterworks Co.* 46 Fed. 5—*Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 578—*United States v. Southern P. R. Co.* 49 Fed. 302—*St. Louis R. Co. v. Pacific R. Co.* 52 Fed. 772—*Freeman v. American Surety Co.* 116 Fed. 551—*Holbrook v. Ford*, 153 Ill. 645, 27 L.R.A. 328, 46 Am. St. Rep. 917, 39 N. E. 1091—*Farmers & M. Ins. Co. v. Harrah*, 47 Ind. 241—*Elston v. Piggott*, 94 Ind. 23—*Tunstall v. Madison*, 30 La. Ann. 475—*Massachusetts Real Estate Co. v. Boston*, 158 Mass. 463, 33 N. E. 580—*Baltimore & O. R. Co. v. Cary*, 28 Ohio St. 221.

d. Statement of Cause Generally.

Necessity of Allegations to Admit Evidence, see Evidence, 2632-2637.

Petition for Habeas Corpus, see Habeas Corpus, 202-205.

Bills for Injunction, see Injunction, 209-217.

425-6. Any established form of words used

for the expression of a particular fact is a sufficient averment of it in law. *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14: 953

427. In a legal or equitable action, a party must allege all the grounds upon which he expects a judgment. *Stark v. Starr*, 94 U. S. 477, 24: 276
Cited in *Haley v. Breeze*, 144 U. S. 131, 36 L. ed. 374, 12 Sup. Ct. Rep. 836—*Columb v. Webster Mfg. Co.* 43 L.R.A. 197, 28 C. C. A. 227, 50 U. S. App. 264, 84 Fed. 594—*Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 980—*Bresnahan v. Tripp* *Grant Leveller Co.* 39 C. C. A. 511, 99 Fed. 283—*Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co.* 130 Fed. 560—*Breeze v. Haley*, 11 Colo. 355, 18 Pac. 551—*Conwell v. Neal*, 118 Ga. 626, 45 S. E. 910—*Richardson v. Opelt*, 60 Neb. 189, 82 N. W. 377—*Stover v. Stark*, 61 Neb. 375, 87 Am. St. Rep. 460, 85 N. W. 286—*Cincinnati v. Emerson*, 57 Ohio St. 142, 48 N. E. 667.

428. A bill is good when its object is clearly stated, such averments are set forth as on its face show some equity which requires an answer, and, although informal, would stand the test of a demurrer. *Bank of United States v. Beverly*, 1 How. 134, 11: 75
Cited in *Dodd v. Benthall*, 4 Helsk. 609—*Pritchitt v. Kirkman*, 2 Tenn. Ch. 391—*Blair v. Wilson*, 28 Gratt. 174.

429. Every bill must contain in itself sufficient matters of fact *per se* to maintain the case of the plaintiff, so that the same may be put in issue by the answer, and be established by the proofs. *Harrison v. Nixon*, 9 Pet. 483, 9: 201
Cited in *Phelps v. Elliott*, 35 Fed. 461—*Boston & A. R. Co. v. Parr*, 44 C. C. A. 141, 104 Fed. 698—*German v. Browne*, 137 Ala. 436, 34 So. 985—*Campbell v. Powers*, 139 Ill. 132, 28 N. E. 1062—*Hall v. Jackson*, 3 Tex. 309—*Gale v. Cutler*, *Burnett (Wis.)* 98—*Bracken v. Preston*, 1 Pinney (Wis.) 595, 44 Am. Dec. 412.

430. An allegation in a suit to charge the indorsers of a note as original promisors that the defendants, whose firm name is on the back of the note, placed it there for the purpose of becoming sureties and security to the plaintiff as payee for the amount therein specified, satisfies the requirement of the law of the territory of Minnesota that the statement of the facts constituting the cause of action be expressed in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. *Rey v. Simpson*, 22 How. 341, 16: 260

e. Negation of Defense.

In Admiralty, see Admiralty, 465, 466.
See also *supra*, 80; *infra*, 473.

431. It is not necessary, in an action to recover the price of an article warranted to give satisfaction, to allege in the complaint that it worked to defendant's satisfaction, but this matter is of defense. *Buckstaff v. U. S. Dig.*—285

Russell & Co. 151 U. S. 626, 14 Sup. Ct. Rep. 448, 38: 292

432. If the maker or acceptor of a negotiable instrument was at the place at the time designated, and was ready and offered to pay the money due, it is a matter of defense to be pleaded and proved by the defendant and it is not necessary to aver in the declaration a presentation and demand at the place of payment. *Wallace v. M'Connell*, 13 Pet. 136, 10: 95

Cited in *Connerly v. Planters' & M. Ins. Co.* 66 Ala. 441—*Butterfield v. Kinsie*, 2 Ill. 446, 30 Am. Dec. 657—*Dillingham v. Parks*, 30 Ind. App. 71, 65 N. E. 300—*Wright v. Sewall*, 9 Rob. (La.) 129—*Allain v. Lazarus*, 14 La. 331, 83 Am. Dec. 583—*Bradford v. Cooper*, 1 La. Ann. 327—*Bank of Commerce v. Rutland & W. R. Co.* 10 How. Pr. 9—*Nichols v. Pool*, 47 N. C. (2 Jones, L.) 28—*Rogers v. Capitol L. Ins. Co.* 1 W. N. C. 590—*Blair v. Bank of Tennessee*, 11 Humph. 88.

433. Where a mortgage contains a condition that, upon the failure for ninety days to pay the interest, the principal shall become due, provided such failure is not caused by the fault of a third party, it is sufficient to allege the default in payment of the interest. If there was any such fault in the third party, it is matter of defense. *Little Rock Waterworks Co. v. Barrett*, 103 U. S. 516, 26: 523

434. Where there is an exception in the general granting clause of a deed, the party relying upon such general clause must in pleading state the general clause, together with the exception, and must also show by the testimony that he is not within the exception. *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 14 Sup. Ct. Rep. 458, 38: 279

Cited in *Ledbetter v. United States*, 170 U. S. 611, 42 L. ed. 1163, 18 Sup. Ct. Rep. 774—*Re Taylor*, 42 C. C. A. 4, 2 N. B. N. Rep. 932, 102 Fed. 730—*Reusens v. Lawson*, 91 Va. 253, 21 S. E. 347.

Municipal bonds, orders, or contracts.

435. In an action on municipal bonds, plaintiff need only declare on them; if there is any defense to them by reason of want of performance of any of the requisites necessary to give them validity, or for any other cause, it is for the defendant to show it. *Lincoln Twp. v. Cambria Iron Co.* 103 U. S. 412, 26: 518

Cited in *Clay County v. Society for Savings*, 104 U. S. 586, 26 L. ed. 859—*Breckinridge County v. McCracken*, 9 C. C. A. 448, 22 U. S. App. 115, 61 Fed. 198—*Paxson v. Brown*, 10 C. C. A. 142, 27 U. S. App. 49, 61 Fed. 880—*Barber Asphalt Paving Co. v. Denver*, 19 C. C. A. 145, 36 U. S. App. 499, 72 Fed. 341—*Butler v. Cockrill*, 20 C. C. A. 127, 36 U. S. App. 702, 73 Fed. 950—*Shepard v. Tulare Irrig. District*, 94 Fed. 6—*Grattan Twp. v. Chilton*, 38 C. C. A. 88, 97 Fed. 149—*Mine & S. Supply Co. v. Parke & L. Co.* 47 C. C. A. 35, 107 Fed. 883—*Jefferson County v. Lewis*, 20 Fla. 997.

436. In a suit upon an order drawn upon the mayor and council of a city, for the payment of a certain sum in dollars, which

was accepted by the city, the acceptance stating that it was to be payable in city warrants, it is not necessary to allege that payment was demanded and refused, as payment is a matter of defense. *Superior v. Ripley*, 138 U. S. 93, 11 Sup. Ct. Rep. 288, 34: 914

437. In a suit against a municipal corporation, on a contract which required the sanction of two thirds of the electors of the city, such sanction need not be alleged in the declaration. The sanction will be presumed until the contrary is shown. The nonexistence of the fact is a matter of defense. *Gelpcke v. Dubuque*, 1 Wall. 221, 17: 519

Statute of Limitations.

Necessity of Pleading Statute, see *infra*, III. g, 2.

Sufficiency of Plea of Statute, see *infra*, III. h, 3.

Setting up Statute by Reply, see *infra*, 809-811.

Admissibility of Evidence of Acknowledgment Under Joinder in Issue on Plea of Statute, see *Evidence*, 2705.

Necessity of Allegation to Admit Evidence of New Promise, see *Pleading*, 2636.

438. A declaration need not set forth the circumstances which take the case out of the statute of limitations. *Mandeville v. Wilson*, 5 Cranch. 15, 3: 23
Cited in Van Bokkelen v. Cook, 5 Sawy. 593, Fed. Cas. No. 16,832.

439. Where the plaintiffs seek to avoid the limitation by the concealment and fraud of the defendants and those under whom they claim, the particular acts of fraud or concealment should be set forth, as well as the time when discovered. *Beaubien v. Beaubien*, 23 How. 190, 16: 484
Moore v. Greene, 19 How. 69, 15: 533
Wood v. Carpenter, 101 U. S. 135, 25: 807
Distinguished in Forbes v. Overby, 4 Hughes. 444, Fed. Cas. No. 4,928a—*Richardson v. Green*, 9 C. C. A. 574, 15 U. S. App. 488, 61 Fed. 482.

Cited in Beaubien v. Beaubien, 23 How. 208, 16 L. ed. 488—*Voorhees v. Bonesteel*, 16 Wall. 29, 21 L. ed. 271—*Wood v. Carpenter*, 101 U. S. 140, 25 L. ed. 808—*Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25 L. ed. 815—*Rosenthal v. Walker*, 111 U. S. 190, 28 L. ed. 397, 4 Sup. Ct. Rep. 382—*Wollensak v. Relher*, 115 U. S. 102, 29 L. ed. 352, 5 Sup. Ct. Rep. 1137—*Traer v. Clews*, 115 U. S. 538, 29 L. ed. 470, 6 Sup. Ct. Rep. 155—*Boone County v. Burlington & M. River R. Co.* 139 U. S. 693, 35 L. ed. 323, 11 Sup. Ct. Rep. 687—*Felix v. Patrick*, 145 U. S. 331, 36 L. ed. 728, 12 Sup. Ct. Rep. 862—*Ware v. Galveston City Co.* 146 U. S. 115, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Pearsall v. Smith*, 149 U. S. 233, 37 L. ed. 716, 13 Sup. Ct. Rep. 833—*Hardt v. Heldweyer*, 152 U. S. 559, 38 L. ed. 552, 14 Sup. Ct. Rep. 871—*Badger v. Badger*, 2 Cliff. 154, Fed. Cas. No. 718—*Martin v. Smith*, 1 Dill. 97, 4 Nat. Bankr. Reg. 285, Fed. Cas. No. 9,164—*Taylor v. South & North Ala. R. Co.* 4 Woods, 584, 13 Fed. 159—*Northern P. E. Co. v. Kin-*

dred, 3 McCrary, 630, 14 Fed. 79—*Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 637—*Rhino v. Emery*, 65 Fed. 835—*Lant v. Manley*, 71 Fed. 15—*Jones v. Perkins*, 76 Fed. 84—*Thompson v. German Ins. Co.* 77 Fed. 262—*Kelley v. Boettcher*, 29 C. C. A. 22, 56 U. S. App. 363, 85 Fed. 62—*McMonagle v. McGlinn*, 85 Fed. 92—*Hubbard v. Manhattan Trust Co.* 30 C. C. A. 529, 57 U. S. App. 730, 87 Fed. 60—*Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 67, 92 Fed. 872—*School District v. Deweese*, 93 Fed. 602—*Thayer v. Kansas Loan & T. Co.* 41 C. C. A. 108, 100 Fed. 903—*Williamson v. Monroe*, 101 Fed. 329—*Nash v. Ingalls*, 41 C. C. A. 549, 101 Fed. 649—*Re Oleson*, 110 Fed. 797—*Kimbell v. Chicago Hydraulic Press Brick Co.* 55 C. C. A. 166, 119 Fed. 106—*Boynton v. Haggart*, 57 C. C. A. 312, 120 Fed. 830—*Kessler v. Ensley Land Co.* 123 Fed. 566—*Edwards v. Mercantile Trust Co.* 124 Fed. 392—*Cutter v. Iowa Water Co.* 128 Fed. 509—*Lataillade v. Orena*, 91 Cal. 578, 25 Am. St. Rep. 219, 27 Pac. 924—*Robertson v. Burrell*, 110 Cal. 578, 42 Pac. 1086—*Lady Washington Consol. Co. v. Wood*, 113 Cal. 487, 45 Pac. 809—*Arnett v. Coffey*, 1 Colo. App. 39, 27 Pac. 614—*Lewis v. Denison*, 2 App. D. C. 393—*Bartalott v. International Bank*, 14 Ill. App. 163—*Stone v. Brown*, 116 Ind. 81, 18 N. E. 392—*Jackson v. Jackson*, 149 Ind. 243, 47 N. E. 963—*Leavenworth, L. & G. R. Co. v. Douglas County*, 18 Kan. 178—*Dauphin's Succession*, 112 La. 139, 36 So. 287—*Westervelt v. Filter*, 2 Neb. (Unof.) 735, 89 N. W. 994—*Erickson v. Quinn*, 3 Lans. 306—*Douglas v. Corry*, 46 Ohio St. 354, 15 Am. St. Rep. 604, 21 N. E. 440—*Hubble v. Morristown Land & Improv. Co.* 95 Tenn. 592, 32 S. W. 965—*Ogden Paint Oil & Glass Co. v. Child*, 10 Utah, 485, 37 Pac. 734.

440. In order to avoid the statute of limitations in a suit to set aside a deed for fraud, by want of knowledge of the fraud, the bill must set forth the impediments to an earlier prosecution of the claim, how the plaintiff came to be so long ignorant of his rights, the means, if any, used by the defendants fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matters alleged in the bill. *Pearsall v. Smith*, 149 U. S. 231, 13 Sup. Ct. Rep. 833, 37: 713
Cited in Elfert v. Craps, 7 C. C. A. 322, 8 U. S. App. 436, 58 Fed. 473—*Kemp v. Nickerson*, 66 Fed. 683—*Lant v. Manley*, 71 Fed. 19—*Lehman v. Crosby*, 2 N. B. N. Rep. 432, 99 Fed. 544—*Darnold v. Simpson*, 114 Fed. 370—*Bland v. Fleeman*, 58 Ark. 92, 23 S. W. 4.

441. In a possessory action an averment of fraud, to avoid the defense of a statute of limitations, is too indefinite which alleges merely the discovery of an intention to defraud some fifty years after the exclusive possession of the defendants had begun, the complainants having lived almost in sight of the premises, upon which a city had grown. *Beaubien v. Beaubien*, 23 How. 190, 16: 484

442. In a possessory action an averment of concealment and fraud is too indefinite and general to avoid the defense of a statute of limitations, which alleges, in effect, merely a supposition that the persons complained of had been acting in good faith,

and a discovery by the pleaders that they intended to cheat and defraud them of their just rights in the premises. *Beaubien v. Beaubien*, 23 How. 190, 16: 484

443. A plaintiff who would avoid the bar of the statute of limitations by any exception in the statute must explicitly allege such exception in his bill, or specially reply to it, or, according to the modern practice, amend the bill, if it contains no suitable allegations to meet the bar. *Piatt v. Vattier*, 9 Pet. 405, 9: 173

Cited in Long v. O'Fallon, 19 How. 125, 15 L. ed. 553—*Scott v. Evans*, 1 McLean, 489, Fed. Cas. No. 12,529—*United States v. White*, 5 Cranch, C. C. 87, Fed. Cas. No. 16,676—*Pulliam v. Pulliam*, 10 Fed. 56—*Maulding v. Scott*, 13 Ark. 95, 56 Am. Dec. 298—*Willson v. Anthony*, 19 Ark. 21—*Hackney v. Butts*, 41 Ark. 400—*Heath v. Hall*, 60 Ill. 350—*Abbott v. Godfrey*, 1 Mich. 182—*Keeton v. Keeton*, 20 Mo. 542—*Ruckman v. Decker*, 28 N. J. Eq. 289—*Thompson's Appeal*, 126 Pa. 371, 17 Atl. 643—*Gross v. Disney*, 95 Tenn. 595, 32 S. W. 632—*Sully v. Childress*, 106 Tenn. 117, 82 Am. St. Rep. 875, 60 S. W. 499—*Dorr v. Rohr*, 82 Va. 366, 3 Am. St. Rep. 106.

Laches.

Raising Bar of, by Demurrer, see *infra*, 865, 866.

See also *infra*, 543, 549; Limitation of Actions, 136.

444. Facts acquitting plaintiff on charge of laches must be distinctly alleged. *Foster v. Mansfield, C. & L. M. R. Co.* 146 U. S. 88, 13 Sup. Ct. Rep. 28, 36: 899
Cited in Hardt v. Heidweyer, 152 U. S. 560, 38 L. ed. 552, 14 Sup. Ct. Rep. 671—*Tyler v. Aspinwall*, 73 Conn. 498, 54 L.R.A. 767, 47 Atl. 755.

445. In order to excuse acquiescence or laches on the ground of fraud or concealment, the facts must be particularly set out in the bill. *Badger v. Badger*, 2 Wall. 87, 17: 836

Cited in Marsh v. Whitmore, 21 Wall. 185, 22 L. ed. 485—*Hayward v. Elliot Nat. Bank*, 96 U. S. 618, 24 L. ed. 858—*Godden v. Kimmell*, 99 U. S. 212, 25 L. ed. 435—*Wood v. Carpenter*, 101 U. S. 140, 25 L. ed. 808—*Lansdale v. Smith*, 106 U. S. 392, 27 L. ed. 219—*Wollensak v. Reiher*, 115 U. S. 102, 29 L. ed. 352, 5 Sup. Ct. Rep. 1137—*Speldel v. Henrich*, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—*Richards v. Mackall*, 124 U. S. 187, 31 L. ed. 399, 8 Sup. Ct. Rep. 437—*Hammond v. Hopkins*, 143 U. S. 252, 36 L. ed. 145, 12 Sup. Ct. Rep. 418—*Felix v. Patrick*, 145 U. S. 331, 36 L. ed. 726, 12 Sup. Ct. Rep. 862—*Ware v. Galveston City Co.* 146 U. S. 115, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Hardt v. Heidweyer*, 152 U. S. 559, 38 L. ed. 552, 14 Sup. Ct. Rep. 671—*Forbes v. Overby*, 4 Hughes, 444, Fed. Cas. No. 4,928a—*Livingston v. Ore Bed*, 16 Blatchf. 560, Fed. Cas. No. 8,418—*Taylor v. Holmes*, 14 Fed. 513—*Credit Co. v. Arkansas C. R. Co.* 5 McCrary, 31, 15 Fed. 53—*United States v. Beebe*, 4 McCrary, 17, 17 Fed. 40—*Pratt v. California Min. Co.* 9 Sawy. 365, 24 Fed. 876—*Lakin v. Sierra Buttes Gold Min. Co.* 25 Fed. 344—*Kittle v. Hall*, 20 Fed. 511—*Horsford v. Guder* 35 Fed. 388—*Fraker v. Houck*, 36 Fed. 407—*Teall v. Slaven*, 40 Fed. 781—*United States v. Dalles Military Road Co.* 41 Fed.

500—*Gilmer v. Morris*, 43 Fed. 460—*Kenney v. Contner*, 43 Fed. 711—*Van Vleet v. Sledge*, 45 Fed. 748—*Naddo v. Bardon*, 47 Fed. 790—*Naddo v. Bardon*, 2 C. C. A. 341, 4 U. S. App. 642, 51 Fed. 499—*Hinchman v. Kelley*, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—*Edison Electric Light Co. v. Equitable Life Assur. Soc.* 55 Fed. 481—*Reed v. Dingess*, 56 Fed. 176—*Elffert v. Craps*, 7 C. C. A. 322, 8 U. S. App. 436, 58 Fed. 473—*Fosdick v. Lowell Mach. Shop*, 58 Fed. 818—*Schlawig v. Purslow*, 8 C. C. A. 319, 19 U. S. App. 501, 59 Fed. 853—*Jones v. Perkins*, 76 Fed. 84—*McMonagle v. McGlinn*, 85 Fed. 92—*New York Security & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 234—*Potts v. Alexander*, 118 Fed. 887—*Gordon v. Ross*, 63 Ala. 367—*Gibson v. Herliott*, 55 Ark. 94, 29 Am. St. Rep. 17, 17 S. W. 589—*Murphy v. Kirby*, 3 App. D. C. 216—*Quirk v. Liebert*, 12 App. D. C. 400—*Peck v. Haley*, 21 App. D. C. 237—*Dauphin's Succession*, 112 La. 140, 36 So. 287—*Marcotte v. Hartman*, 46 Minn. 203, 48 N. W. 767—*Brooks v. Spann*, 63 Miss. 203—*Burgess v. St. Louis C. R. Co.* 99 Mo. 508, 12 S. W. 1050—*Parker v. Kuhn*, 21 Neb. 427, 59 Am. Rep. 838, 32 N. W. 74—*Horbach v. Marsh*, 37 Neb. 38, 55 N. W. 286—*Barton v. Long*, 45 N. J. Eq. 845, 19 Atl. 623—*Loomis v. Rosenthal*, 34 Or. 601, 57 Pac. 55—*French v. Dickey*, 3 Tenn. Ch. 304—*King v. White*, 63 Vt. 165, 25 Am. St. Rep. 752, 21 Atl. 535—*Eubank v. Barnes*, 93 Va. 156, 24 S. E. 908—*Swann v. Thayer*, 36 W. Va. 54, 14 S. E. 423—*Rogers v. Van Nortwick*, 87 Wis. 429, 58 N. W. 757.

446. A party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained. *Hardt v. Heidweyer*, 152 U. S. 547, 14 Sup. Ct. Rep. 671, 38: 548

Cited in Thompson v. German Ins. Co. 77 Fed. 262—*Richardson v. D. M. Osborne & Co.* 82 Fed. 97—*Hubbard v. Manhattan Trust Co.* 30 C. C. A. 529, 57 U. S. App. 730, 87 Fed. 60—*Thayer v. Kansas Loan & T. Co.* 41 C. C. A. 108, 100 Fed. 903—*Hale v. Coffin*, 114 Fed. 577—*Hendry v. Perkins*, 52 C. C. A. 445, 114 Fed. 811—*Robertson v. Burrell*, 110 Cal. 579, 42 Pac. 1086—*Loomis v. Rosenthal*, 34 Or. 602, 57 Pac. 55—*Ogden Paint. Oil & Glass Co. v. Child*, 10 Utah, 485, 37 Pac. 734—*Gay v. Havermaile*, 27 Wash. 396, 67 Pac. 804—*Rogers v. Van Nortwick*, 87 Wis. 429, 58 N. W. 757.

f. Allegations as to Damages.

In Bill of Particulars, see *supra*, 78.

Showing Jurisdictional Amount by, see *supra*, 331-336.

Admissibility of Evidence under, see Evidence, 2658-2661.

447-8. An averment that the establishment by a city of competing waterworks would inure the value of the property of a water company, and deprive it of rentals which the city had agreed to pay, need not specifically state how such damage would be done. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 19 Sup. Ct. Rep. 77, 43: 341

449. The amount of the damages involved

in an action for the breach of a written contract to deliver oil at a specified price f. o. b. buyer's tanks at seller's mill is not increased, for jurisdictional purposes, over and above the difference between the contract and market value by allegations in the petition that the seller had notice that the buyer would be compelled to send its tanks from distant points to the seller's mill; that in so doing transportation charges were incurred and the use of the tanks lost for thirty days; that seller was well aware that buyer had contracts over, and "had contracted to that end" with buyer; and that seller, contemplating the breach of its contract, maliciously caused the buyer to send the tanks a specified distance at a specified cost. *Globe Ref. Co. v. Landa Cotton Oil Co.* 190 U. S. 540, 23 Sup. Ct. Rep. 754, 47: 1171
Cited in *Smithers v. Smith*, 204 U. S. 643, 51 L. ed. 680, 27 Sup. Ct. Rep. 297—*Crocker-Wheeler Co. v. Bullock*, 134 Fed. 257—*Toledo Traction Co. v. Cameron*, 69 C. C. A. 35, 137 Fed. 55.

Special damage.

Relevancy of Evidence Without Allegation of, see Evidence, 2660, 2661.

450. An allegation that the plaintiff has been damaged and injured in her name and fame is not sufficient as an allegation of special damage, where the words charged to have been spoken are not actionable *per se*. *Pollard v. Lyon*, 91 U. S. 225, 23: 308
Cited in *Watters v. Retail Clerks Union No 470*, 120 Ga. 426, 47 S. E. 911—*Ledlie v. Wallen*, 17 Mont. 153, 42 Pac. 289—*Kansas City, M. & B. R. Co. v. Delaney*, 102 Tenn. 295, 45 L.R.A. 602, 52 S. W. 151.

451. The court refused to express an opinion, and expressly reserved the question, as to whether, in a suit by a state to prevent a nuisance in a navigable river of the United States, it must aver and prove special and pecuniary injury therefrom, such as would enable a private person to maintain a similar action in another court. *South Carolina v. Georgia*, 93 U. S. 4, 23: 782
Cited in *Wisconsin v. Pelican Ins. Co.* 127 U. S. 289, 32 L. ed. 243, 8 Sup. Ct. Rep. 1370—*Louisiana v. Texas*, 176 U. S. 18, 44 L. ed. 354, 20 Sup. Ct. Rep. 251.

g. Averments as to Ownership, Title, or Possession.

Ownership.

452. An allegation in a complaint to quiet title, in ordinary and concise terms, of the ultimate fact that the plaintiff is the owner in fee, is sufficient without setting out matters of evidence; and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to authorize the court to grant equitable relief. *Ely v. New Mexico & A. R. Co.* 129 U. S. 291, 9 Sup. Ct. Rep. 293, 32: 688

Cited in *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 260, 32 L. ed. 907, 9 Sup. Ct. Rep. 511—*Fulkerson v. Chisna Min. & Improv. Co.* 58 C. C. A. 585, 122 Fed. 785

—*Tonopah Fraction Min. Co. v. Douglass*, 123 Fed. 941—*Amter v. Conlon*, 3 Colo. App. 187, 32 Pac. 721—*Wall v. Magnes*, 17 Colo. 478, 30 Pac. 56—*Amter v. Conlon*, 22 Colo. 152, 43 Pac. 1002—*Schlageter v. Gude*, 30 Colo. 313, 70 Pac. 428—*Clark v. Darlington*, 7 S. D. 151, 58 Am. St. Rep. 835, 63 N. W. 771—*Lucas v. Whitacre*, 121 Iowa, 254, 96 N. W. 776—*Zumwalt v. Madden*, 23 Or. 186, 31 Pac. 400—*Watson v. Glover*, 21 Wash. 681, 59 Pac. 516.

453. The nature of plaintiff's estate in land is sufficiently pleaded under Hill's (Or.) Code, § 318, which is made applicable to Alaska under the act of Congress of May 17, 1884, requiring him to set forth the nature of his estate, whether "in fee, for life, or for a term of years," when he alleges that his ownership is by right of prior occupancy and actual possession, and that is in fact the only kind of estate that it is possible to have in the land claimed. *Malony v. Adsit*, 175 U. S. 281, 20 Sup. Ct. Rep. 115, 44: 163

Cited in *Price v. Brockway*, 1 Alaska, 235—*Tyree Consol. Min. Co. v. Langstedt*, 1 Alaska, 456—*Behrends v. Goldstein*, 1 Alaska, 526.

454. In an action to enforce an assessment against a married woman as a shareholder in an insolvent national bank, an allegation that she was the owner is an allegation that she was the lawful owner and had the capacity to own such shares. *Bundy v. Cocke*, 128 U. S. 185, 9 Sup. Ct. Rep. 42, 32: 396

Title.

Admission of Allegations as to, see *supra*, 156.

Setting up New Title by Supplemental Pleading, see *supra*, 243, 244.

Asserting Different Titles in Same Bill, see *supra*, 287.

Denial of Averment of, see *infra*, 626.

Manner of Pleading Title of Executor as Dependent on Time when Right Accrued, see *Executors and Administrators*, 162, 163.

455. A bill to quiet title against a single adverse claimant must aver that complainant's title has been successfully tried at law at least once. *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 23 Sup. Ct. Rep. 434, 47: 626

456. A complaint for the possession of a mine, alleging a valid and legal location by plaintiff for more than five consecutive years prior to the ouster by defendants, and payment of taxes by him during that time, sets up a claim to a title against all save the United States. *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 8 Sup. Ct. Rep. 1214, 32: 172

Cited in *Haws v. Victoria Copper Min. Co.* 160 U. S. 317, 40 L. ed. 441, 16 Sup. Ct. Rep. 282—*Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 538, 91 Am. St. Rep. 87, 69 S. W. 572—*Ellet v. Campbell*, 18 Colo. 522, 33 Pac. 521—*McCowan v. Maclay*, 16 Mont. 233, 40 Pac. 602.

457. Though the demise is a fiction, the plaintiff in ejectment must count on one which, if real, would support the action. *Binney v. Chesapeake & O. Canal Co.* 8 Pet. 214, 8: 921
Cited in Johnston v. Jones, 1 Black, 224, 17 L. ed. 121—*Galloway v. Doe*, 136 Ala. 327, 34 So. 957.

458. Where the complaint in proceedings by a landlord to recover possession does not allege that the complainant is entitled to the premises, but only that he is entitled to possession of the premises, the difference is immaterial. *Harris v. Barber*, 129 U. S. 366, 9 Sup. Ct. Rep. 314, 32: 697

459. It is, in general, not necessary, in deriving title to a bill or note through the indorsement of a partnership firm, or from the surviving partner, through the act of the law, to state particularly the names of the persons composing the firm. An indorsement in the firm name, duly authorized, is sufficient. *Childress v. Emory*, 8 Wheat. 642, 6: 705
Cited in Budd v. Wilkinson, 5 Blackf. 265—*Cochran v. Scott*, 3 Wend. 230—*Haviland v. Simons*, 4 Rich. L. 342.

460. A declaration setting out an agreement for the provisional distribution of a fund in suit, and a dismissal of the bill in said suit, by virtue of which decree the respondent, now plaintiff, became entitled to a certain sum, etc., states no cause of action, and is insufficient to support a verdict. *McDonald v. Hobson*, 7 How. 745, 12: 897

461. In a bill of interpleader, it is necessary to aver that the complainant has no interest in the subject-matter of the suit; he must admit title in the claimants, and aver that he is indifferent between them; and he cannot seek relief in the premises against either of them. *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. Rep. 232, 28: 246
Cited in Groves v. Sentell, 153 U. S. 485, 38 L. ed. 792, 14 Sup. Ct. Rep. 898—*Lockett v. Rumbaugh*, 45 Fed. 32—*Jackson & S. Co. v. Pearson*, 60 Fed. 123.

Possession generally.

Surplusage in Alleging Eviction, see *supra*, 253.

Allegations of Answer Showing Want of Right to, see *infra*, 726.

Disregarding Allegation as to, on Demurrer, see *infra*, 947, 948.

Presumption on Demurrer from Averment of Possession, see *infra*, 948.
 See also *supra*, 458; *infra*, 513, 558.

462. An averment of possession in the complainant is essential to the maintenance of a bill to quiet title in a Federal court, although under the state practice a person not in possession may maintain an action to quiet title. *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 23 Sup. Ct. Rep. 434, 47: 626
Distinguished in United States Min. Co. v. Lawson, 87 C. C. A. 590, 134 Fed. 772.
Cited in Big Six Development Co. v. Mitchell,

1 L.R.A. (N.S.) 840, 70 C. C. A. 576, 138 Fed. 236—*Maloney v. King*, 30 Mont. 161, 76 Pac. 4.

463. Under the practice act of Utah territory, a complaint which states that the plaintiff is in possession of real property, and that the defendant claims an adverse interest or an estate therein, is sufficient, in that respect, in an action brought to determine such adverse claim. *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 9 Sup. Ct. Rep. 511, 32: 906
Cited in Hammer v. Garfield Min. & Mill. Co. 130 U. S. 298, 32 L. ed. 966, 9 Sup. Ct. Rep. 548—*Union Mill & Min. Co. v. Warren*, 82 Fed. 522—*Wall v. Magnes*, 17 Colo. 480, 30 Pac. 56—*Glassman v. O'Donnell*, 6 Utah, 451, 24 Pac. 537.

464. It is no objection to counts in an action to recover in detinue that one of them states a right to recovery founded in a possession merely, without the direct allegation of property, since a tortious detention may well be of that which another has no interest in but to the temporary use or custody. *Shelby v. Guy*, 11 Wheat. 361, 6: 495

465. [An allegation in an inquest in forcible entry, that the defendant was possessed simply, is not sufficient. *Respublica v. Campbell* (Pa. Sup. Ct.) 1 Dall. 354, 1: 173]

Seisin.

Sufficiency of Plea Denying, see *infra*, 781, 783.

466. [An allegation in forcible entry that prosecutor was seised, etc., is good, although not stating when he was seised; an additional allegation of peaceable possession is merely surplusage. *Respublica v. Shryber* (Pa. Sup. Ct.) 1 Dall. 68, 1: 40]

466a. [An inquisition in a case of forcible entry and detainer, stating that A "was possessed on his demesne as of fee, etc., and continued so seised and possessed until the defendant, etc., him thereof disseised," states seisin sufficiently. *Commonwealth v. Fitch* (Pa. Sup. Ct.) 4 Dall. 212, 1: 805]

467. The allegation, in a bill of equity, that plaintiff is seised in fee, is a sufficient allegation of a possession of land as well as title. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239, 35: 1063

Gage v. Kaufman, 133 U. S. 471, 10 Sup. Ct. Rep. 406, 33: 725
Cited in Simmons Creek Coal Co. v. Doran, 142 U. S. 449, 35 L. ed. 1076, 12 Sup. Ct. Rep. 239—*Northern P. R. Co. v. Cannon*, 46 Fed. 232—*Davidson v. Calkins*, 92 Fed. 237—*United States Min. Co. v. Lawson*, 115 Fed. 1006—*Grace v. Ballou*, 4 S. D. 336, 56 N. W. 1075—*District of Columbia v. Hufty*, 13 App. D. C. 177—*Blew v. Ritz*, 82 Minn. 533, 85 N. W. 548—*Andrus v. Wheeler*, 18 Misc. 648, 42 N. Y. Supp. 523.

h. On Contract Liability.

Relief under Pleadings in Bill for Specific Performance of Contract, see *supra*, 105-111.

Relief under Pleadings in Foreclosure Suit, see *supra*, 116, 117.

Amendment of, see *supra*, 182.

Joinder of Bills for Rescission and for Specific Performance, see *supra*, 297.

Negation of Defenses, see *supra*, 431, 435-437.

Necessity of Alleging Illegality as Defense, see *infra*, 692, 693.

In Action of Debt Against Surety, see Debt, 20.

Sanction of Electors to Municipal Contract, see Evidence, 482.

Complaint against Special Partner, see Partnership, 216.

See also *supra*, 447; *infra*, 870.

468. In setting forth in a declaration the material parts of a written contract, it is sufficient to state the substance and legal effect. *Ferguson v. Harwood*, 7 Cranch, 408, 3: 386

469. Where the declaration is according to the true intent of the parties as apparent on the contract, it is sufficient. *Ferguson v. Harwood*, 7 Cranch, 408, 3: 386

470. The words of a contract stated in a declaration must have the same legal construction as they should have in the contract itself. *Ferguson v. Harwood*, 7 Cranch, 408, 3: 386

471. It is not sufficient to aver plaintiff's readiness to perform merely according to the letter of the contract. The performance must always be averred according to the intent of the parties. *Turner v. Ogden* (*Washington v. Ogden*) 1 Black, 450, 17: 203

472. A party is not obliged to aver readiness to perform a contract, where he alleges circumstances to show that the other party excused his nonperformance. *Phillips & C. Constr. Co. v. Seymour*, 91 U. S. 646, 23: 341
Cited in *Hazleton v. Le Duc*, 10 App. D. C. 396.

473. In an action by a contractor against the state to recover damages for the breach of a contract respecting paving, where the city had compelled the contractor to abandon the work without any fault of his own, it is not necessary to aver that the contractor has procured the assent of abutting property owners to the laying of a specified kind of pavement as provided for by the ordinance authorizing the improvement. *Hitchcock v. Galveston*, 96 U. S. 341, 24: 659

474. Where in a declaration it is averred that a bank by its officers agreed to a certain contract, this averment imports everything to make the contract binding.

Bank of the Metropolis v. Guttischlick, 14 Pet. 19, 10: 335

475. In a suit on an agreement between a company making sewing machines and a consignee, that the latter should sell them on commission, and that attachments should be sold him at wholesale rates,—to recover such proceeds and the sale price of attachments, a complaint which sets forth the retail price of each machine sold, and the excess of money, beyond commission, retained by the consignee, and the price of each attachment sold to the consignee, is sufficient. *Streeper v. Victor Sewing Mach. Co.* 112 U. S. 676, 5 Sup. Ct. Rep. 327. 28: 852

476. An allegation that defendant at all times refused to manufacture and furnish certain articles as agreed sufficiently alleges a demand. *Hammond v. Mason & H. Organ Co.* 92 U. S. 724, 23: 767
Cited in *Fuller & J. Mfg. Co. v. Bartlett*, 68 Wis. 80, 60 Am. Rep. 838, 31 N. W. 747—
Divan v. Loomis, 68 Wis. 152, 31 N. W. 760.

Assumpsit.

Defect Cured by Verdict, see Appeal and Error, 4689.

Recovery on Common Counts, see Assumpsit, 16-22.

Evidence of Joint Assumpsit Under Declaration in Action Against One Partner, see Evidence, 2643.

Admissibility of Evidence under General Counts, see Evidence, 2648-2653.

See also Assumpsit, 6.

477. In assumpsit a promise must be charged in the declaration, in order to maintain the action. *Cary v. Curtis*, 3 How. 236, 11: 576

478. In an action for money had and received, being founded upon what the law terms an implied promise to pay what in good conscience the defendant is bound to pay to the plaintiff, it being the duty of the defendant to pay, the law imputes to him a promise to pay; which promise must be charged in the declaration in order to maintain the action. *Cary v. Curtis*, 3 How. 236, 11: 576

479. In indebitatus assumpsit a promise is always charged in the declaration, and must be so charged in order to maintain the action. *Fiedler v. Curtis* (*Curtis v. Fiedler*) 2 Black, 461, 17: 273

480. Where the contract has been executed, it is not necessary to declare on the special agreement, but recovery may be had on the general counts. *Bank of Columbia v. Patterson*, 7 Cranch, 299, 3: 351

481. In an action of indebitatus assumpsit to recover money alleged to have been illegally exacted, a declaration which avers the fact of indebtedness, and a promise in consideration thereof, is sufficient on general demurrer, unless it appears that the alleged indebtedness was impossible in law. *Liverpool, N. Y. & P. S. S. Co. v. Commis-*

sioners of Emigration, 113 U. S. 33, 5 Sup. Ct. Rep. 352, 28: 899

482. [As between partners, it is sufficient to charge the defendant generally with the receipt of money to their joint benefit. *James v. Browne* (Pa. Sup. Ct.) 1 Dall. 339, 1: 165]

483. Where a declaration in assumpsit, upon an agreement to give certain promissory notes as soon as a patent for certain improvements was obtained (the property in which had been assigned to the promisors), alleged that the patent for such improvements was obtained on a certain date, it was sufficient, although the proof showed that several reissues were had at later dates before all of the improvements intended were entirely covered by the claims. *Bowman v. Read* (*Read v. Bowman*) 2 Wall. 591, 17: 812

Debt.

See also *infra*, 499.

484. An action of debt will not lie against a surety, without alleging that he promised to pay if the principal did not. *Thompson v. Jameson*, 1 Cranch, 282, 2: 109

485. Declaration in the *debit*, instead of the *detinet*, for foreign money, is good after verdict, or where the value is well known. *Brown v. Barry*, 3 Dall. 365, 1: 638

Bills and notes.

Amendment of Pleading, see *supra*, 181.

Negation of Defenses, see *supra*, 432.

Allegations of Title, see *supra*, 459.

First Raising Objection on Appeal, see Appeal and Error, 4591-4593.

See also *supra*, 430, 459, 483.

486. An averment in the declaration that the defendants made their promissory notes would imply that the instruments were at the time in the form and condition required by law. *Campbell v. Wilcox*, 10 Wall. 421, 19: 973

487. A declaration that "J. C., by his agent, A. C., made" the note, is good, and it is not necessary to state that he signed it. *Childress v. Emory*, 8 Wheat. 642, 5: 705

Cited in *Sherman v. Comstock*, 2 McLean, 20, Fed. Cas. No. 12,764.

488. In an action in Virginia upon a promissory note, which was set forth in the counts sufficiently to found a right of action, the further averment that the contract was made in Kentucky, in which state a note has the effect and force of a sealed instrument, does not vitiate the counts. *Bank of United States v. Donnally*, 8 Pet. 361, 8: 974

489. Recovery may be had upon a promissory note, by an assignee, without averment that it was for value received. *Wilson v. Codman*, 3 Cranch, 193, 2: 408
Cited in *Marr v. Plummer*, 3 Me. 76—*DeFrance v. Davis*, Walk. (Miss.) 71—*Olive v. Napier*, Cooke (Tenn.) 14—*Averett v. Booker*, 15 Gratt. 164, 76 Am. Dec. 203.

490. A count in a declaration on the payee's indorsement of a promissory note is defective where it does not state that the indorsement was made on a valuable consideration, and that the payee had actually received the money. *Welch v. Lindo*, 7 Cranch, 159, 3: 301

491. In an action against the drawer of a promissory note or bill of exchange payable at a particular place, the place of payment is a material part in the description of the note, and must be set out in the declaration. *Covington v. Comstock*, 14 Pet. 43, 10: 346

Sebree v. Dorr, 9 Wheat. 558, 6: 160
Distinguished in *Wilkins v. McGuire*, 2 App. D. C. 452.

Cited in *Mygatt v. Green Bay*, 1 Biss. 208, Fed. Cas. No. 9,998—*Roberts v. Mason*, 1 Ala. 375—*Lincoln & K. Bank v. Page*, 9 Mass. 158—*Apperson v. Bynum*, 5 Coldw. 348.

492. In actions on promissory notes against the maker, or on a bill of exchange against the acceptor, if the bill is made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made, in order to maintain an action. *Wallace v. McConnell*, 13 Pet. 136, 10: 95

Brabston v. Gibson, 9 How. 263, 13: 131
Cited in *Brabston v. Gibson*, 9 How. 279, 13 L. ed. 138—*Cox v. National Bank*, 100 U. S. 714, 25 L. ed. 742—*Walnut v. Wade*, 103 U. S. 695, 26 L. ed. 530—*Superior v. Ripley*, 138 U. S. 96, 34 L. ed. 916, 11 Sup. Ct. Rep. 288—*Brown v. Noyes*, 2 Woodb. & M. 84, Fed. Cas. No. 2,023—*Kendall v. Badger*, McAll. 523, Fed. Cas. No. 7,691—*Lee v. Chillicothe Branch*, 1 Biss. 331, Fed. Cas. No. 8,187—*Smith v. Tallapoosa County*, 2 Woods, 576, Fed. Cas. No. 13,113—*Thompson v. Cook*, 2 McLean, 126, Fed. Cas. No. 13,952—*Warner v. Rising Fawn Iron Co.* 3 Woods, 524, Fed. Cas. No. 17,188—*Wood v. Consolidated Electric Light Co.* 36 Fed. 541—*Hughes County v. Livingston*, 43 C. C. A. 557, 104 Fed. 321—*Sumner v. Ford*, 3 Ark. 403—*Rust v. Reeves*, 24 Ark. 362—*Jackson v. Packer*, 13 Conn. 358—*Wilkins v. McGuire*, 2 App. D. C. 451—*Greeley v. Whitehead*, 35 Fla. 529, 28 L.R.A. 287, 48 Am. St. Rep. 258, 17 So. 643—*Dougherty v. Western Bank*, 13 Ga. 293—*Dillingham v. Parks*, 30 Ind. App. 71, 65 N. E. 300—*Moorman v. Wood*, 117 Ind. 149, 19 N. E. 739—*Glatt v. Fortman*, 120 Ind. 386, 22 N. E. 300—*Scott v. Gilkey*, 49 Ill. App. 122—*Smith v. Landeckl*, 101 Ill. App. 252—*Gormley v. Hartray*, 105 Ill. App. 629—*Hunt v. Divine*, 37 Ill. 144—*Maloney v. Dewey*, 127 Ill. 406, 11 Am. St. Rep. 131, 19 N. E. 848—*Schoharle County Nat. Bank v. Bevard*, 51 Iowa, 258, 1 N. W. 524—*Lazier v. Horan*, 55 Iowa, 77, 39 Am. Rep. 167, 7 N. W. 457—*Ripka v. Pope*, 5 La. Ann. 62, 52 Am. Dec. 579—*Hamer v. Johnson*, 15 La. 244—*Reeve v. Pack*, 6 Mich. 241—*Carter v. Smith*, 9 Cush. 322—*Lyon v. Williamson*, 27 Me. 152—*Lehigh Zinc & Iron Co. v. Trotter*, 42 N. J. Eq. 581, 9 Atl. 601—*Adams v. Hackensack Improv. Commission*, 44 N. J. L. 642, 43 Am. Rep. 406—*Bank of the State v. Bank of Cape Fear*, 35 N. C. (13 Ired. L.) 77—*Mt. Vernon Bridge Co. v. Knox County Sav. Bank*, 46 Ohio St. 232, 20 N. E. 339—*Fitter*

v. Beckley, 2 Watts & S. 462—Middleton v. Boston Locomotive Works, 26 Pa. 258—Collins v. Naylor, 10 Phila. 437, 32 Phila. Leg. Int. 248—North Pennsylvania R. Co. v. Adams, 54 Pa. 96, 93 Am. Dec. 677—Bank of Charleston Nat. Bkg. Asso. v. Zorn, 14 S. C. 453, 37 Am. Rep. 733—Edwards v. Hasbrook, 2 Tex. 580—McCauley v. Leavitt, 10 Utah, 95, 37 Pac. 164—Fletcher v. Blodgett, 16 Vt. 29, 42 Am. Dec. 487—Armistead v. Armistead, 10 Leigh, 547—Truman v. McCollum, 20 Wis. 373—Commercial Nat. Bank v. Chicago, M. & St. P. R. Co. 45 Wis. 176.

493. In an action against the drawer of a note or bill payable at a particular place, it is not necessary to aver in the declaration that the note, when due, was presented at the place for payment, and was not paid. Covington v. Comstock, 14 Pet. 43, 10: 346

Cited in Silver v. Henderson, 3 McLean, 166, Fed. Cas. No. 12,854—Adams v. Rutherford, 13 Or. 96, 8 Pac. 896.

494. It seems that a demand on the maker of a note or the acceptor of a bill payable at a specified place need not be averred in the declaration or proven on the trial. Bank of United States v. Smith, 11 Wheat. 171, 6: 443

Cited in Wallace v. McConnell, 13 Pet. 145, 10 L. ed. 99—Cox v. National Bank, 100 U. S. 715, 25 L. ed. 742—Brown v. Noyes, 2 Woodb. & M. 84, Fed. Cas. No. 2,023—Mt. Adams & E. P. Inclined R. Co. v. Lowery, 20 C. C. A. 602, 43 U. S. App. 408, 74 Fed. 469—Roberts v. Mason, 1 Ala. 375—Irvine v. Withers, 1 Stew. (Ala.) 242—Woodcock v. Campbell, 2 Port. (Ala.) 460—Dearing v. Smith, 4 Ala. 437—State Bank v. Dent, 12 Ala. 190—Sumner v. Ford, 3 Ark. 403—Allen v. Miles, 4 Harr. (Del.) 237—Butterfield v. Kinzie, 2 Ill. 446, 30 Am. Dec. 657—Springfield v. Hickox, 7 Ill. 250—Wood v. Merchants' Sav. Loan & T. Co. 41 Ill. 270—Wright v. Sewall, 9 Rob. (La.) 129—Bacon v. Dyer, 12 Me. 22—Clark v. Henry, 9 Mo. 339—Clough v. Holden, 115 Mo. 344, 37 Am. St. Rep. 393, 21 S. W. 1071—Gay v. Paine, 5 How. Pr. 108—Green v. Goings, 7 Barb. 655—Harker v. Anderson, 21 Wend. 386—Weed v. Van Houten, 9 N. J. L. 191, 17 Am. Dec. 468—Middleton v. Boston Locomotive Works, 26 Pa. 258—Hallowell v. Curry, 41 Pa. 325—Davis v. Glasser, 1 W. N. C. 590—Mullen v. Maguire, 10 Phila. 437—Collins v. Naylor, 32 Phila. Leg. Int. 248—Smith v. Wood, 4 Vt. 404—Barrett v. Wills, 4 Leigh, 116, 26 Am. Dec. 315—Watkins v. Crouch, 5 Leigh, 545—Commercial Nat. Bank v. Chicago, M. & St. P. R. Co. 45 Wis. 177.

495. In an action against indorsers of a note, averment and proof of demand at the place of payment are necessary. Wallace v. McConnell, 13 Pet. 136, 10: 95
Cited in Zeigler v. McFarland, 2 Pearson (Pa.) 236.

496. In an action against an indorser, where the bill or note is made payable at a particular bank, and the bank itself is the holder, an averment and proof of demand at the place designated may be dispensed with. Bank of United States v. Smith, 11 Wheat. 171, 6: 443
Cited in Low v. Underhill, Fed. Cas. No. 8,561—Bond v. Storrs, 13 Conn. 416—Bowie v. Duvall, 1 Gill & J. 182—People's Bank v.

Sealso, 127 Mo. 187, 29 S. W. 1032—Spellman v. Welder, 5 How. Pr. 7—Apperson v. Bynum, 5 Coldw. 348—Grissom v. Commercial Nat. Bank, 87 Tenn. 358, 3 L.R.A. 276—Broun v. Hull, 33 Gratt. 28.

497. Where the custom is to demand payment on the fourth day, the declaration against the indorser must lay the demand on the fourth day. Renner v. Bank of Columbia, 9 Wheat. 581, 6: 166
Held obiter in Jackson v. Henderson, 3 Leigh, 210.

Cited in Bank of Columbia v. Magruder, 6 Harr. & J. 180—Catila v. Jones, 1 Pinney (Wis.) 132—Corwith v. Morrison, 1 Pinney (Wis.) 490.

498. In an action against an indorser, an omission to aver, in the declaration, notice of protest for a nonpayment, is fatal. Slacum v. Pomery, 6 Cranch, 221, 3: 205
Cited in Tappan v. Beardsley, 10 Wall. 436, 19 L. ed. 976—Knott v. Hicks, 2 Humph. 163.

499. A declaration in debt, under the law of Virginia, for the principal, interest, damages, and costs of protest of a protested bill of exchange, must aver the amount of those costs as well as the amount of the bill. Wilson v. Lenox, 1 Cranch, 194, 2: 79

Cited in Johnson v. Bank of Kentucky, 5 T. B. Mon. 120.

500. Where, in an action against the trustee of an insolvent, on a bill of exchange, the averments nowhere show that the trustee has sufficient funds in his hands to pay the bill, the pleadings are defective. McCarty v. Roots, 21 How. 432, 16: 162

501. Notice of the cause of action upon a note need only be given, under Ohio act of Feb. 18, 1820, by indorsing it on the writ and filing it with the declaration, after which the defendant can manage the defense as if the note had been declared upon in the usual manner. Fullerton v. Bank of United States, 1 Pet. 604, 7: 280

Order.

Negation of Defense, see *supra*, 436.

502. In a suit by the payee against the acceptor of an order, an allegation in the petition that defendant, though often requested, has not paid to plaintiff the amount of said order and acceptance, or any part thereof, and that there is due and unpaid upon the same the entire amount thereof, is a sufficient allegation of nonpayment and refusal to pay. Superior v. Ripley, 138 U. S. 93, 11 Sup. Ct. Rep. 288, 34: 914

Bonds.

Admissions as to, by Failing to Plead, see *supra*, 159, 160.

Multifariousness in Bill, see *supra*, 230.
Jurisdictional Averments, see *supra*, 327.

Negation of Defenses, see *supra*, 435.
Sufficiency of Pleas, see *infra*, 765-776.
Defects Cured by Verdict, see Appeal and Error, 4690.
See also *infra*, 539.

503. If the date of a surety bond is sub-

sequent to the appointment of the defaulting principal to office, the declaration should allege that the money collected by him was in his hands at the date of the bond. *United States v. Linn*, 1 How. 104, 11: 64
Cited in Bartlett v. Wheeler, 195 Ill. 451, 63 N. E. 169—*Allen v. State*, 61 Ind. 275, 28 Am. Rep. 673—*Ohning v. Evansville*, 66 Ind. 63—*Independent School District v. McDonald*, 39 Iowa, 567—*Thomas v. Blake*, 126 Mass. 323—*Van Sickle v. Buffalo County*, 13 Neb. 119, 42 Am. Rep. 753, 13 N. W. 19—*Frost v. Mixsell*, 38 N. J. Eq. 588—*Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 134, 21 N. E. 168—*Williamsburgh Sav. Bank v. Solon*, 136 N. Y. 478, 32 N. E. 1058—*Vivian v. Otis*, 24 Wis. 521, 1 Am. Rep. 199—*Clark v. Wilkinson*, 59 Wis. 550, 18 N. W. 481.

504. If the duties of purser in the Navy are regulated by usage and custom, or by the official orders of the Navy Department, they should be spread on the pleadings in an action against the sureties of the purser. *United States v. Tingey*, 5 Pet. 115, 8: 66

505. In an action on a collector's bond, where there is no averment in the declaration that the defendant was, or ever had been, appointed collector of any particular district, the declaration is bad on demurrer. *United States v. Jackson*, 104 U. S. 41, 26: 651

506. In an action upon an arbitration bond accompanying a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference, an allegation that the partner who agreed to the reference had not paid the money awarded by the arbitrators, sufficiently assigns a breach. *Karthaus v. Ferrer*, 1 Pet. 222, 7: 121

507. In a suit by the President of the United States, on bonds made to him and to his successors for the use of certain orphans, the declaration need not allege any title or interest in him, nor need it name the individuals for whose use they were taken. *Tyler v. Hand*, 7 How. 573, 12: 824
Cited in United States v. Pumphrey, 11 App. D. C. 56.

508. It is not necessary to aver, in the declaration upon bonds given to the President of the United States and his successors, that they were taken with authority of law. *Tyler v. Hand*, 7 How. 573, 12: 824
Cited in Stevens v. Hay, 6 Cush. 233.

509. Where a declaration is on a bond given to prosecute with effect a writ of replevin, and the breach assigned is that the suit was not prosecuted with effect, it is sufficient. *Gorman v. Lenox*, 15 Pet. 115, 10: 680

510. A town having but a limited authority to issue bonds for certain purposes, it is not enough for the plaintiff in an action upon a negotiable bond to aver in general terms that the town was authorized to issue the bonds in suit; but he must state the facts which bring the case within the special authority. *Hopper v. Covington*, 118

U. S. 148, 6 Sup. Ct. Rep. 1025, 30: 190
Cited in White v. Pecos Land & Water Co. 18 Tex. Civ. App. 637, 45 S. W. 207.

Coupons.

511. In an action on coupons, the complaint need not aver that the coupons were presented to the court of county commissioners for allowance before the suit was brought. *Greene County v. Daniel*, 102 U. S. 187, 26: 99

Covenants.

See also *infra*, 520.

512. It is not necessary that a breach of covenant be assigned in the very words of the covenant. It is sufficient if it show a substantial breach. *Fletcher v. Peck*, 6 Cranch 87, 3: 162
Cited in Tucker v. Lee, 3 Cranch, C. C. 686, Fed. Cas. No. 14,221—*Murphy v. Lawrence*, 2 Ga. 262—*Pumeroy v. Bruce*, 13 Serg. & R. 189—*Smith v. Lloyd*, 16 Gratt. 312.

513. An averment that an assignment and patent was a prior conveyance, which was still in full force and virtue, "by reason of which said assignment, patent, and encumbrance the said (plaintiff) hath been prevented from having and enjoying all or any part of the premises," is sufficient, upon general demurrer, as an averment that possession was legally withheld under such prior title, from the plaintiff, by the parties in possession. *Duvall v. Craig*, 2 Wheat. 45, 4: 180

514. Where a submission, after referring the claim mentioned to the decision of arbitrators and an umpire if necessary, adds the words "as provided in articles of submission this day executed," and the articles named had no existence, it was not necessary, in an action for breach of the covenant to perform the award, to make any reference in the declaration to these articles of submission. *Smith v. Morse*, 9 Wall. 76, 19: 597
Cited in Clark v. Chapman, 98 Cal. 114, 32 Pac. 812.

515. In an action for damages for covenant broken, a declaration is sufficient which substantially alleges that defendants, in consideration that the plaintiff grant to them the exclusive right to supply a certain district with his prepared flour, and the patented ingredients accompanying it, promised to account with and pay over to the plaintiff a certain tariff for every barrel of flour supplied, and for the patented ingredients, when manufactured and sold separately. *Hecker v. Fowler*, 2 Wall. 123, 17: 759

516. In a declaration upon a covenant of warranty, it is necessary to allege substantially an eviction by title paramount. *Day v. Chism*, 10 Wheat. 449, 6: 363
Cited in Garland v. Davis, 4 How. 154, 11 L. ed. 918—*Wilder v. McCormick*, 2 Blatchf. 34, Fed. Cas. No. 17,650—*Bailey v. White*, 3 Ala. 333—*Salle v. Light*, 4 Ala. 705, 39 Am. Dec. 317—*Montgomery Mfg. Co. v. Thomas*, 20 Ala. 476—*Daniel v. Inferior Ct. Justices*, 1 Dudley (Ga.) 4—*Davis v. Smith*,

5 Ga. 297, 48 Am. Dec. 279—*Scott v. Kirkendall*, 88 Ill. 467, 30 Am. Rep. 562—*Reese v. McQuilkin*, 7 Ind. 451—*Mills v. Rice*, 3 Neb. 85—*Cheney v. Straube*, 35 Neb. 524, 53 N. W. 479—*Jennings v. Klerman*, 35 Or. 352, 55 Pac. 443—*Patton v. McFarlane*, 3 Penn. & W. 424.

517. An allegation in a declaration on a covenant of warranty that defendant had not "a good and sufficient title to said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law," is sufficient as a substantial averment of an eviction by title paramount. *Day v. Chism*, 10 Wheat. 449, 6: 363
Cited in Van Hook v. Wood, Fed. Cas. No. 16,854—*Watts v. Sheppard*, 2 Ala. 432—*Rex v. Creel*, 22 W. Va. 375.

518. Where it was averred in a declaration that the defendant "had not a good and sufficient title to the said tract of land, and, by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises by due course of law," it was held sufficient as a substantial averment of an eviction by title paramount. *Day v. Chism*, 10 Wheat. 449, 6: 363

519. Where the plaintiffs declared in covenant, both as heirs and devisees, without showing in particular how they were heirs, and without setting out the will, it was held not to be fatal on general demurrer. Such a defect may be amended under the judiciary act of 1789, chap. 20, § 32. *Day v. Chism*, 10 Wheat. 449, 6: 363

Insurance.

Relief Granted under Pleadings, see *supra*, 120.

See also Insurance, 184.

520. It is not necessary, in an action of covenant on a policy, that the declaration should aver that the plaintiff had abandoned to the underwriters. *Hodgson v. Marine Ins. Co.* 5 Cranch, 100, 3: 48

521. A declaration in an action on a policy of marine insurance need not aver abandonment or notice to the underwriters, where the fact of a total loss is expressly alleged. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6: 664

522. An express averment in a declaration in an action on a policy of marine insurance, after the allegation of the loss, that the insurers had notice thereof, and by reason thereof became liable, and in consideration thereof promised that they would pay the sum due according to the tenor and effect of the insurance, is a sufficient averment of a promise to pay according to the stipulations of the policy. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6: 664

Landlord and tenant.

523. A declaration on an agreement to lease premises to the plaintiff from a certain day, which alleges that on that day plaintiff was ready and offered to take possession, etc., but that defendant refused and neglected to turn out the tenant then in

possession, and to deliver the possession to plaintiff, is a sufficient averment of the breach of the agreement. *Carroll v. Peake*, 1 Pet. 18, 7: 34

Cited in Wilder v. McCormick, 2 Blatchf. 34, Fed. Cas. No. 17,650.

524. The landlord and tenant act of the District of Columbia, providing that tenancies at sufferance may be determined by thirty days' written notice to quit, does not require the facts constituting the relation of landlord and tenant to be set forth in the complaint; but an allegation that a defendant is a tenant at sufferance, and that his tenancy has been determined by such notice, is sufficiently specific. *Harris v. Barber*, 129 U. S. 366, 9 Sup. Ct. Rep. 314, 32: 697
Cited in Loring v. Bartlett, 4 App. D. C. 11.

Vendor and purchaser.

525. At law, to entitle the vendor to recover, the purchase money, he must aver in his declaration performance of the contract on his part, or an offer to perform, at the day specified for the performance. *Bank of Columbia v. Hagner*, 1 Pet. 455, 7: 219
Cited in Pollak v. Brush Electric Asso. 128 U. S. 455, 32 L. ed. 477, 9 Sup. Ct. Rep. 119
 —*Dudley v. Hayward*, 11 Fed. 545—*Gray v. Smith*, 28 C. C. A. 173, 48 U. S. App. 581, 83 Fed. 829—*Kaufman v. Raeder*, 54 L.R.A. 253, 47 C. C. A. 287, 108 Fed. 180
 —*Kentucky Distilleries & Warehouse Co. v. Warwick Co.* 48 C. C. A. 367, 109 Fed. 284
 —*McGehee v. Hill*, 4 Port. (Ala.) 177, 29 Am. Dec. 277—*Smith v. Henry*, 7 Ark. 212, 44 Am. Dec. 540—*Newsome v. Williams*, 27 Ark. 635—*Newman v. Baker*, 10 App. D. C. 202—*First Nat. Bank v. Spear*, 12 S. D. 114, 80 N. W. 166—*Sanford v. Cloud*, 17 Fla. 550—*Henderson v. Wheaton*, 139 Ill. 586, 28 N. E. 1100—*Henderson v. Wheaton*, 40 Ill. App. 539—*Bowles v. Newby*, 2 Blackf. 365—*Cunningham v. Gwinn*, 4 Blackf. 344—*Owen v. Norris*, 5 Blackf. 481
 —*McCulloch v. Dawson*, 1 Ind. 418—*Summers v. Sleeth*, 45 Ind. 600—*School Dist. No. Two v. Rogers*, 8 Iowa, 318—*Harris v. Bolton*, 7 How. (Miss.) 171—*Stockton v. George*, 7 How. (Miss.) 175—*Wadlington v. Hill*, 10 Smedes & M. 563—*Oakey v. Cook*, 41 N. J. Eq. 363, 7 Atl. 495—*Bigler v. Morgan*, 77 N. Y. 319—*Hall v. Rupley*, 10 Pa. 232—*Breithaupt v. Tharmond*, 3 Rich. L. 221.

526. Where the declaration avers that the plaintiff has been ever ready to deliver defendants a deed, but there is no averment that the plaintiff had a good and sufficient title, free from incumbrance, it is not sufficient. *Turner v. Ogden* (*Washington v. Ogden*) 1 Black, 450, 17: 203
Cited in Cole v. Hynes, 46 Md. 185—*Davis v. Watson*, 89 Mo. App. 25.

527. If the acts covenanted to be performed by the vendor and the vendee respectively, in a contract for the sale of land, and dependent and concurrent, neither party is entitled to an action against the other without the averment of performance, or the tender of performance on his part. *Loud v. Pomona Land & Water Co.* 153 U. S. 564, 14 Sup. Ct. Rep. 928, 38: 822

Rescission of sale.

528. A purchaser seeking rescission of a sale need not aver ability to restore the property,—as his ability thereto is presumed as a usual, if not a necessary, consequence by reason of the object of his suit. (Per Woodbury, J.) *Veazie v. Williams*, 8 How. 134, 12: 1018

i. For Libel.

Allegation of Special Damages, see *supra*, 450.

529. In an action for a libel the word "maliciously" is not indispensable in the declaration, if words of equivalent import are used. *White v. Nicholls*, 3 How. 266, 11: 591
Cited in *Webster v. Holmes*, 62 N. J. L. 58, 40 Atl. 778—*Stewart v. Major*, 17 Wash. 242, 49 Pac. 503.

j. For Torts; Fraud; Harboring Slaves.

Libel in Collision Cases, see *Admiralty*, 484-487.

Editorial notes.

[Pleading as to master's knowledge as element of liability. 41 L.R.A. 145.]

Sufficiency of general allegations of negligence. 59 L.R.A. 209.

Recovery for ordinary negligence under allegations of gross negligence or vice versa. 69 L.R.A. 601.]

Torts generally.

Averment of Jurisdictional Amount, see *supra*, 331.

Allegation of Special Damages by, see *supra*, 450.

Sufficiency of Reply, see *infra*, 752, 754.

Sufficiency of Allegations in Injunction Bill Against Nuisance by Obstruction of River, see *Injunction*, 217.

Evidence of Individual Liability Under Declaration Charging Joint Liability, see *Evidence*, 2644, 2645.

Admissibility of Evidence Under Pleading, see *Evidence*, 2655, 2656.

530. A complaint averring that plaintiff was the holder of and traveling upon a certain ticket on a train which was derailed and thrown from the track causing an injury, without alleging any undertaking or promise or any breach of such, does not state an action *ex quasi contractu*, but is in tort. *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. Rep. 120, 41: 485
Cited in *The John G. Stevens*, 170 U. S. 125, 42 L. ed. 974, 18 Sup. Ct. Rep. 544—*The Anacres*, 34 C. C. A. 561, 93 Fed. 242—*Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* 36 C. C. A. 148, 94 Fed. 194—*American Exp. Co. v. Lankford*, 1 Ind. Terr. 238, 30 S. W. 817.

531. In an action of tort for breach of warranty a *scienter* need not be alleged or proved. *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. Rep. 1283, 30: 1172
Cited in *Watson v. Jones*, 41 Fla. 251, 25 So. 678—*Treschard v. Kell*, 127 Fed. 601—

Wood v. E. & H. T. Anthony & Co. 79 App. Div. 115, 79 N. Y. Supp. 829—*Tyler v. Moody*, 111 Ky. 196, 54 L.R.A. 419, 98 Am. St. Rep. 406, 63 S. W. 433—*Tracy v. McKlinney*, 82 Mo. App. 512—*Johnson v. Gulick*, 46 Neb. 821, 50 Am. St. Rep. 629, 65 N. W. 883.

532. In a suit for a false warranty, whether the declaration be in *assumpsit* or *tort*, it need not aver a *scienter*; and if the averment be made it need not be proved. *Schuchardt v. Allen*, 1 Wall. 359, 17: 642
Cited in *Dushane v. Benedict*, 120 U. S. 636, 30 L. ed. 811, 7 Sup. Ct. Rep. 696—*Shippen v. Bowen*, 122 U. S. 580, 30 L. ed. 1174, 7 Sup. Ct. Rep. 1283—*Wilfred v. Myers*, 40 Fed. 174—*Shippen v. Bowen*, 4 McCrary, 60, 48 Fed. 660—*Re Ryan*, 105 Fed. 761—*Nash v. Minnesota Title Ins. & T. Co.* 163 Mass. 587, 28 L.R.A. 759, 47 Am. St. Rep. 489, 40 N. E. 1039—*Caffman v. Baird*, 3 Legal Chronicle, 8—*Place v. Merrill*, 14 E. I. 579.

533. An averment that the defendant came to the possession of a chattel by finding does not constitute a count in *trover*; an alleged conversion characterizes that form of action. *Shelby v. Guy*, 11 Wheat. 361, 6: 495

534. A declaration charging a sheriff with refusal to preserve the public peace but alleging no special right, privilege, or franchise in the plaintiff, from the enjoyment of which he has been hindered by the malicious act of the sheriff; and which charges him with no misfeasance or nonfeasance in the execution of any process in which the plaintiff was concerned, sets forth no cause of action. *South v. Maryland*, 18 How. 396, 15: 433

535. An allegation that the plaintiff was a duly qualified collector, but without any allegation that he was ever registered as such, is insufficient to state a cause of action for unlawfully rejecting his vote, under S. C. Const. art. 8, § 3, and Rev. Stat. 1893, § 132, U. S. Comp. Stat. 1901, p. 67, making it necessary to be registered in order to be entitled to vote. *Wiley v. Sinkler*, 179 U. S. 58, 21 Sup. Ct. Rep. 17, 45: 84

Fraud.

Relief Granted Under Prayer for General Relief, see *supra*, 112.

By Asserting Constructive Fraud as New Ground for Relief, see *supra*, 214.

In Bill to Annul Patent to Land, see *infra*, 584.

Special Demurrer to Plea for Failure to Set Out Fraud, see *infra*, 859.

Necessity of Allegation to Admit Proof of, see *Evidence*, 2635.

See also *infra*, 890; *Limitation of Actions*, 136.

536. Affirmative relief will not be granted in equity upon the ground of fraud, unless it is alleged in the bill. *Voorhees v. Bonesteel*, 16 Wall. 16, 21: 268
Cited in *Bradley v. Converse*, 4 Cliff. 375, Fed. Cas. No. 1,775—*Bartol v. Walton & W. Co.* 92 Fed. 14—*Southall v. Farish*, 85 Va. 410, 1 L.R.A. 644, 7 S. E. 534.

536a. Relief will not be afforded upon the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings. Noonan v. Braley (Noonan v. Lee) 2 Black, 499, 17: 278

Cited in Voorhees v. Bonesteel, 16 Wall. 29, 21 L. ed. 271—Bartol v. Walton & W. Co. 92 Fed. 14.

536b. If fraud is relied on, it is not sufficient to make the charge in general terms. St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. Rep. 390, 33: 683
Cited in Field v. Hastings & B. Co. 65 Fed. 280—Brainard v. Van Dyke, 71 Vt. 362, 45 Atl. 758.

537. One who impugns the good faith of a transaction must state the essential, ultimate facts upon which his cause of action rests, and not content himself with general charges that what was done was "colorable," a "fraud," a "breach of trust," and a "scheme" by which the contractors were to get the stock without paying for it. These are allegations of legal conclusions merely, which a demurrer does not admit. Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. Rep. 476, 35: 104

Cited in Kent v. Lake Superior Ship Canal R. & Iron Co. 144 U. S. 91, 36 L. ed. 358, 12 Sup. Ct. Rep. 650—Kittel v. Augusta, T. & G. R. Co. 65 Fed. 860—Lumley v. Wabash R. Co. 71 Fed. 28—Patent Title Co. v. Stratton, 95 Fed. 746—New Bank v. Kleiner, 112 Wis. 292, 87 N. W. 1090.

538. A declaration alleging loss to the plaintiff by reason of the wrongful and fraudulent acts of the defendant is bad where the facts from which the conclusion is drawn are not sufficient to show that, in law, the loss was attributable to the fraud. Alabama v. Burr, 115 U. S. 413, 6 Sup. Ct. Rep. 81, 29: 435

539. In an original suit at law in the Supreme Court, by the state of Alabama, against the controlling officers and stockholders of the Alabama & Chattanooga Railroad Company, certain bonds of which had been indorsed by the state under the acts of the legislature of Alabama of 1867 and 1870, to recover losses alleged to have resulted from fraud of the defendants, the liability of the defendants is statutory only, and there can be no recovery unless the facts stated in the declaration bring them within the operation of the liability clause of one or the other of the statutes; nor are they liable in the action for an alleged fraud in obtaining the indorsement of the state, as it was not brought to enforce the payment of the bonds thus indorsed. Alabama v. Burr, 115 U. S. 413, 6 Sup. Ct. Rep. 81, 29: 435

540. A court of equity cannot regard a mere charge that acts are fraudulent, unless the transactions to which the acts relate, in their essential nature, constitute a fraud. Van Weel v. Winston, 115 U. S. 228, 6 Sup. Ct. Rep. 22, 29: 384
Cited in Warren v. Para Rubber Shoe Co. 106 Mass. 103, 44 N. E. 112—Tetrault v. Fournier, 187 Mass. 62, 72 N. E. 351—Lockhart

v. Leeds, 10 N. M. 598, 63 Pac. 48—MacGinniss v. Amalgamated Copper Co. 45 Misc. 110, 91 N. Y. Supp. 591—Knowles v. New York, 176 N. Y. 437, 68 N. E. 860.

541. Loose and general allegations of fraud and conspiracy do not make a case for relief in equity unless connected with charges of some specific acts for which one person is in law responsible to another. Ambler v. Choteau, 107 U. S. 586, 1 Sup. Ct. Rep. 556, 27: 322

Cited in St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 577, 33 L. ed. 687, 10 Sup. Ct. Rep. 390—Ritchie v. McMullen, 159 U. S. 242, 40 L. ed. 135, 16 Sup. Ct. Rep. 171—Everson v. Equitable Life Assur. Co. 68 Fed. 263—Lumley v. Wabash R. Co. 71 Fed. 28—Atlantic Trust Co. v. Dana, 62 C. C. A. 670, 128 Fed. 222—Winchester v. Howard, 136 Cal. 452, 89 Am. St. Rep. 153, 64 Pac. 692—Everson v. Equitable Life Assur. Co. 25 Pittsb. L. J. N. S. 372—Sackman v. Campbell, 15 Wash. 65, 45 Pac. 895—Zell Guano Co. v. Heatherly, 38 W. Va. 420, 18 S. E. 611.

542. It is not necessary, in stating the facts which constitute a fraud, where relief is sought in a bill in equity, that all the evidence which may be adduced to prove that fraud should be recited in the bill. It is sufficient if, in such bill, the main facts or incidents which constitute the fraud be fairly stated, so as to put the defendant upon his guard and apprise him of what answer may be required of him. United States v. American Bell Teleph. Co. 128 U. S. 315, 9 Sup. Ct. Rep. 90, 32: 450
Distinguished in American Bell Teleph. Co. v. United States, 15 C. C. A. 570, 33 U. S. App. 236, 68 Fed. 544.

Cited in Field v. Hastings & B. Co. 65 Fed. 280—Dennison Mfg. Co. v. Thomas Mfg. Co. 94 Fed. 664.

543. A complaint seeking the aid of a court of equity to open a settlement after a great length of time must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment, must specify how, when, and in what manner it was perpetrated. The charges must be definite and reasonably certain, capable of proof and clearly proved. Especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered. Stearns v. Page, 7 How. 819, 12: 926

Cited in Beaubien v. Beaubien, 23 How. 206, 16 L. ed. 488—Bailey v. Glover, 21 Wall. 348, 22 L. ed. 638, 12 Nat. Bankr. Reg. 28—Wood v. Carpenter, 101 U. S. 140, 25 L. ed. 808—Wollensak v. Reiher, 115 U. S. 102, 29 L. ed. 352, 5 Sup. Ct. Rep. 1137—Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 138, 30 L. ed. 573, 7 Sup. Ct. Rep. 430—Boone County v. Burlington & M. River R. Co. 139 U. S. 693, 35 L. ed. 823, 11 Sup. Ct. Rep. 687—Hammond v. Hopkins, 143 U. S. 251, 36 L. ed. 145, 12 Sup. Ct. Rep. 418—Feix v. Patrick, 145 U. S. 332, 36 L. ed. 726, 12 Sup. Ct. Rep. 862—Ware v. Galveston City Co. 146 U. S. 115, 36 L. ed. 909, 13 Sup. Ct. Rep. 33—Hardt v. Heldweyer, 152 U. S. 558, 38 L. ed. 552, 14 Sup. Ct. Rep. 671—United States v. La Abra Silver Mtn. Co. 32 Ct. Cl. 485—Badger v. Badger, 2 Chff.

154. Fed. Cas. No. 718—Carr v. Hilton, 1 Curt. C. C. 391, Fed. Cas. No. 2,437—Fisher v. Boody, 1 Curt. C. C. 220, Fed. Cas. No. 4,814—Greene v. Bishop, 1 Cliff. 202, Fed. Cas. No. 5,763—Martin v. Smith, 1 Dill. 96, 4 Nat. Bankr. Reg. 284, Fed. Cas. No. 9,164—Moore v. Greene, 2 Curt. C. C. 205, Fed. Cas. No. 9,763—Tyler v. Angevine, 15 Blatchf. 541, Fed. Cas. No. 14,306—Pulliam v. Pulliam, 10 Fed. 56—Elffert v. Craps, 7 C. C. A. 322, 8 U. S. App. 436, 58 Fed. 473—Halsey v. Cheney, 15 C. C. A. 660, 34 U. S. App. 50, 68 Fed. 767—Lant v. Manley, 71 Fed. 15—McDonagle v. McGlinn, 85 Fed. 92—Hubbard v. Manhattan Trust Co. 30 C. C. A. 528, 57 U. S. App. 730, 87 Fed. 60—Re Oleson, 110 Fed. 798—Martin v. Branch Bank, 31 Ala. 122—James v. James, 55 Ala. 534—Gordon v. Rose, 63 Ala. 367—Dorsey Mach. Co. v. McCaffrey, 189 Ind. 554, 47 Am. St. Rep. 290, 38 N. E. 208—Hiatt v. Auld, 11 Kan. 185—Dauphin's Succession, 112 La. 140, 36 So. 287—Humphrey v. Carpenter, 39 Minn. 117, 39 N. W. 67—Quimby v. Blackey, 63 N. H. 78—Erickson v. Quinn, 3 Lans. 306—Combs v. Watson, 32 Ohio St. 235—Rogers v. Van Nortwick, 87 Wis. 429, 58 N. W. 757—Melms v. Pabst Brewing Co. 93 Wis. 174, 57 Am. St. Rep. 899, 66 N. W. 518.

544. A bill which charges that a patentee knew he was not the first inventor, and that his efforts to procure the patent were fraudulent because he was aware that he was obtaining a patent to which he was not in law or equity entitled, sufficiently alleges the fraud in procuring the patent. *United States v. American Bell Teleph. Co.* 128 U. S. 315, 9 Sup. Ct. Rep. 90, 32: 450

545. A bill alleging the insolvency of a bank to the knowledge of its officers, and a wrongful neglect to disclose its insolvency to complainant; that by continuing in business it represented itself to be solvent; that complainant, on the faith of such representation and believing the bank solvent, deposited with it a draft; and that the next morning the bank closed its doors,—sufficiently alleges the insolvency and fraud of the bank. *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. Rep. 390, 33: 683

546. A bill in chancery, to set aside a judgment on the ground of fraud, must set out the particulars of the fraud, the names of the parties to it, and the manner in which the court or the party injured was misled or imposed upon. *United States v. Ather-ton*, 102 U. S. 372, 26: 213
Cited in *Knox County v. Harshman*, 133 U. S. 155, 33 L. ed. 588, 10 Sup. Ct. Rep. 257—*Zell Guano Co. v. Heatherly*, 38 W. Va. 420, 18 S. E. 611.

547. The allegation in a bill, that the record of a judgment as it stands is a gross fraud upon the judgment debtor, is limited to the particulars specified in the bill. *Knox County v. Harshman*, 133 U. S. 152, 10 Sup. Ct. Rep. 257, 33: 586

548. Fraud must be distinctly alleged and charged, to warrant the impeaching of a foreign judgment because procured by fraud.

Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. Rep. 171, 40: 133

549. In a suit to avoid a fraudulent transaction, the means of knowledge are in effect the same thing as knowledge, and the bill must show when the discovery of the fraud was made, and that the delay which has occurred is consistent with requisite diligence. *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25: 815
Distinguished in Lewis v. Denison, 2 App. D. C. 393.

Cited in *Rosenthal v. Walker*, 111 U. S. 190, 28 L. ed. 397, 4 Sup. Ct. Rep. 382—*Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 637—*Hinchman v. Kelley*, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—*Lant v. Manley*, 71 Fed. 15—*Jones v. Perkins*, 76 Fed. 84—*Moore v. Boyd*, 74 Cal. 171, 15 Pac. 670—*Thompson v. Whitaker Iron Co.* 41 W. Va. 584, 23 S. E. 795.

550. A deed will not, in the absence of allegations in regard thereto, be set aside for fraud in inducing the vendor to take confederate notes in payment for the land by fraudulent misrepresentations of the purchaser. *Dean v. Harvey (Dean v. Younell)* 8 Wall. 14, note, 19: 355

551. The allegation of fraudulent proceedings respecting the acquisition of the title to land does not convert an action at law into a suit in equity. *Smyth v. New Orleans Canal & Bkg. Co.* 141 U. S. 656, 12 Sup. Ct. Rep. 113, 35: 891

552. Equity will not review and reverse decisions of the officers of the Land Department on loose, untraversable allegations of fraud in general. *Marquez v. Frisbie*, 101 U. S. 473, 25: 800

552a-3. A vendee will not be relieved from payment of the purchase price for defect in title, on the ground of fraud, unless it is distinctly alleged in the bill, so that it may be put in issue by the pleadings. *Pat-ton v. Taylor*, 7 How. 132, 12: 637
Cited in *Baker v. Nachtrieb*, 19 How. 130, 15 L. ed. 531—*Bartol v. Walton & W. Co.* 92 Fed. 14—*Hoppes v. Cheek*, 21 Ark. 589—*Strong v. Downing*, 34 Ind. 303—*Fehrlie v. Turner*, 77 Ind. 535—*Hart v. Hannibal & St. J. R. Co.* 65 Mo. 510.

Harboring slaves.

554. The declaration in an action to recover a penalty under the act of February 12, 1793, for concealing or harboring a fugitive from labor, must bring the case clearly within the statute, whether looking to its language or spirit. *Jones v. Van Zandt*, 5 How. 215, 12: 122
Cited in *Greenberg v. Union Nat. Bank*, 5 N. D. 486, 67 N. W. 597.

555. Allegations in a count for harboring and concealing a fugitive from labor in violation of the act of February 12, 1793, which contain sufficient matter to show an escape, need not be in the very words of the statute. *Jones v. Van Zandt*, 5 How. 215, 12: 122

556. An averment of harboring a fugi-

tive from labor, in violation of the act of February 12, 1793, is sufficient which states in so many words that the defendant did "knowingly and wilfully harbor, detain, conceal, and keep said slave." *Jones v. Van Zandt*, 5 How. 215, 12: 122

557. The declaration in an action for harboring or concealing a fugitive from labor in violation of the act of February 12, 1793, contains the necessary averment of notice that the person harbored or concealed was such a fugitive when it alleges that such person was a fugitive from labor, and that the defendant well knew that he was a slave and was a fugitive from labor, and did harbor and conceal him. *Jones v. Van Zandt*, 5 How. 215, 12: 122

558. It is a fatal objection against the relief prayed in a bill for the restitution of slaves, that the bill nowhere avers that the defendants have any interest in them, or that the slaves are in their possession or control. *McClanahan v. Davis*, 8 How. 170, 12: 1033

k. As to Wills; Trusts.

Amendment to Bill to Establish Resulting Trust, see *supra*, 213.
See also *supra*, 507, 508.

559. An averment of the actual domicile of a testator is necessary to be made in a bill filed for the adjudication of a will of personal property. *Harrison v. Nixon*, 9 Pet. 483, 9: 201

560. Where a will by construction shows an intention to charge the real estate with the payment of a legacy, it is not necessary to aver, in a bill filed by the legatee, a deficiency of personal assets. *Lewis v. Darling*, 16 How. 1, 14: 819

561. A demurrer to a bill setting up a trust will not be sustained on the ground that the nature of the trust is not sufficiently set forth, when the facts stated show the creation of a trust estate, the appointment of a trustee, the designation of a *cestui que trust*, and specific directions to the trustee in respect to his duties, and are sufficiently true to enable the court to act intelligently. *Cavender v. Cavender*, 114 U. S. 464, 5 Sup. Ct. Rep. 955, 29: 212

562. A bill for settlement of a trust and partnership, which contains no averment that anything is due the complainant, is insufficient. *Philippi v. Philippe*, 115 U. S. 151, 5 Sup. Ct. Rep. 1181, 29: 336

563. A bill makes a sufficient showing to entitle complainant to treat the legal holders of a mine as trustees *ex maleficio*, and to recover from them, as such trustees, the materials taken from the mine, where it avers that their title was acquired under a relocation made in pursuance of a fraudulent conspiracy with complainant's partner, whereby that partner was to fail in his duty to perfect the original location. *Lock-*

hart v. Leeds, 195 U. S. 427, 25 Sup. Ct. Rep. 76, 49: 283

564. The rule that proceeds of property obtained by theft or fraud may be reclaimed in a suit in equity against the voluntary assignee or one holding in bad faith cannot successfully be invoked to sustain a bill filed on behalf of the United States, charging the cutting, carrying away, and conversion of timber from the public domain, where the allegations wholly fail to identify any specific, definite property as the proceeds of the timber wrongfully or fraudulently taken. *United States v. Bitter Root Development Co.* 200 U. S. 451, 26 Sup. Ct. Rep. 318, 50: 550
Cited in Southern P. R. Co. v. United States, 200 U. S. 351, 50 L. ed. 511, 26 Sup. Ct. Rep. 296—*Re Plant*, 148 Fed. 38.

l. As to Creditors' Bills; Judgments.

Creditors' bill.

To Create *Lis Pendens*, see *Lis Pendens*, 9.

565. A creditor's bill, the object of which is to obtain satisfaction of the judgment by a sale of property held in trust for the judgment debtor, must allege that execution has been issued. *Freedman's Sav. & T. Co. v. Earle*, 110 U. S. 710, 4 Sup. Ct. Rep. 226, 28: 301
Cited in Kittel v. Augusta, T. & G. R. Co. 65 Fed. 861—*Jenks v. Horton*, 114 Mich. 51, 72 N. W. 20—*Rytenberg v. Keels*, 39 S. C. 213, 17 S. E. 441—*Hutchinson v. Maxwell*, 100 Va. 182, 57 L.R.A. 389, 93 Am. St. Rep. 944, 40 S. E. 655—*Pierstoff v. Jorgea*, 86 Wis. 138, 39 Am. St. Rep. 881, 56 N. W. 735.

566. A bill in equity to reach equitable interests, choses in action, or the avails of property fraudulently conveyed, should state that judgment has been obtained, and that execution has been issued and returned unsatisfied. *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. Rep. 397, 28: 368
Cited in Bacon v. Harris, 62 Fed. 101—*Kittel v. Augusta, T. & G. R. Co.* 65 Fed. 863—*Childs v. N. B. Carlslein Co.* 76 Fed. 92—*Bickford v. McComb*, 88 Fed. 431—*Medberry v. Troutman*, 94 Fed. 954—*Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 480, 101 Fed. 510—*Paulson v. Ward*, 4 N. D. 104, 58 N. W. 792—*Minkler v. United States Sheep Co.* 4 N. D. 509, 33 L.R.A. 549, 62 N. W. 594—*Christensen v. Quintard*, 36 Hun. 336—*Moyer v. Riggs*, 8 Kan. App. 237, 55 Pac. 494—*Albright v. Texas, S. F. & N. R. Co.* 8 N. M. 425, 46 Pac. 448.

567. Where it is sought by equitable process to reach equitable interests of a debtor, the bill unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any court within such jurisdiction. *National Tube Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. Rep. 165, 36: 1070
Cited in Hollins v. Brierfield Coal & I. Co.

150 U. S. 379, 87 L. ed. 1115, 14 Sup. Ct. Rep. 127—*Streight v. Junk*, 8 C. C. A. 139, 16 U. S. App. 608, 59 Fed. 322—*Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L.R.A. 426, 8 C. C. A. 654, 18 U. S. App. 616, 60 Fed. 342—*Bacon v. Harris*, 62 Fed. 101—*Kittel v. Augusta, T. & G. R. Co.* 65 Fed. 863—*Alderson v. Dole*, 20 C. C. A. 282, 33 U. S. App. 460, 74 Fed. 31—*Childs v. N. B. Carlslein Co.* 76 Fed. 93—*Coit v. Sullivan-Kelly Co.* 84 Fed. 725—*Medberry v. Troutman*, 94 Fed. 954—*Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 480, 101 Fed. 516—*Hilliker v. Hale*, 54 C. C. A. 257, 117 Fed. 225—*Re Remington Automobile & Motor Co.* 119 Fed. 445—*Barber v. International Co.* 73 Conn. 593, 48 Atl. 758—*Hess v. Horton*, 2 App. D. C. 87—*Clark v. Walter T. Bradley Coal, Lime & Cement Co.* 6 App. D. C. 446—*Droop v. Ridenour*, 9 App. D. C. 105—*Tuttle v. National Bank*, 161 Ill. 506, 34 L.R.A. 755, 44 N. E. 984—*Grenell v. Ferry*, 110 Mich. 263, 68 N. W. 144—*Rule v. Omega Stove & Grate Co.* 64 Minn. 330, 67 N. W. 60—*Flournoy v. Champion (N. M.)* 55 L.R.A. 750, 66 Pac. 547—*Albright v. Texas, S. F. & N. R. Co.* 8 N. M. 422, 46 Pac. 448—*Marshall v. Sherman*, 148 N. Y. 27, 34 L.R.A. 766, 51 Am. St. Rep. 654, 42 N. E. 419—*Baird v. Richmond & D. R. Co.* 113 N. C. 608, 18 S. E. 698—*Miller v. Melone*, 11 Okla. 250, 56 L.R.A. 624, 67 Pac. 479—*Zell Guano Co. v. Heatherly*, 38 W. Va. 416, 18 S. E. 611.

Judgments.

Allegations of Fraud in Bill to Set Aside Judgment, see *supra*, 546-548.

Necessity of Pleading Res Judicata, see *infra*, 694, 695.

Amendment of Bill for Enforcement of, see *supra*, 211.

Amending Bill so as to Set up, see *supra*, 212.

Requisite of Bill to Show Equity Jurisdiction to Relieve against Judgment, see *Equity*, 234.

Sufficiency of Bill for Injunction against Judgment, see *Injunction*, 99.

568. An offer to repay the money received in payment of a compromise judgment in favor of the United States is not necessary in a bill by the United States to set aside the judgment on the ground that a larger sum was due, since, if that is found to be the case, a credit of the payment can be made, and, if nothing is found due, judgment can be entered against the United States for the amount of such payment. *United States v. Beebe*, 180 U. S. 343, 21 Sup. Ct. Rep. 371, 45: 563

569. A mere averment that there has been no adjudication on the merits is not enough to overcome the presumption that a case dismissed because a plea presenting a good defense was filed and not denied, was dismissed on the merits. *Leary v. Long*, 131 U. S. cxxviii. Appx. and 26: 301

m. As to Ejectment; Partition.

Ejectment.

Amendment of Pleading, see *supra*, 179, 180, 189, 230, 233.

Waiver by Failure to Plead to New Count in, see *supra*, 248.

Jurisdictional Averments, see *supra*, 339-341.

Sufficiency of Plea in Ejectment, see *infra*, III. h, 7.

See also *supra*, 457.

570. In a declaration in ejectment, a description of property by its abutments is sufficient. *Remington v. Linthicum*, 14 Pet. 84, 10: 364

571. In ejectment a general description of the premises in the declaration is good. *Barclay v. Howell*, 6 Pet. 498, 8: 477
Cited in Postlewaite v. Wise, 17 W. Va. 10.

572. A complaint in ejectment need not describe the land by its metes and bounds; and a description by name of property well known is often sufficient. *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 8 Sup. Ct. Rep. 1214, 32: 172

573. Under the California statutes a complaint in an action of ejectment may include different parcels, where they are covered by the same title and the action equally affects all parties. *Beard v. Federy*, 3 Wall. 478, 18: 88

574. The provision of those statutes as to the description of the premises by metes and bounds is only directory; a description by name, where the property is well known, will often answer equally well. *Beard v. Federy*, 3 Wall. 478, 18: 88

575. In an action of ejectment, the day of the ouster need not be alleged; and it is sufficient if laid after the demise. *Woodward v. Brown*, 13 Pet. 1, 10: 31

576. The specific date under a *videlicet* is not necessary in a declaration in ejectment, if it sufficiently appears on the face of the declaration that the ouster was after the entry on the several demises. *Woodward v. Brown*, 13 Pet. 1, 10: 31

577. A complaint for the possession of a mine, averring, after the description of the tunnel claim, that all the lodes therein have been worked and mined by plaintiff and its grantors, is sufficient; each lode need not be separately described. *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 8 Sup. Ct. Rep. 1214, 32: 172
Cited in Walsh v. Irwin, 115 Fed. 536.

578. In an action of ejectment, if the plaintiff counts upon a lease to himself from a person whom the evidence shows to have been dead at the time the lease is said to have been made, the count is bad, and no recovery can be had thereunder. *Connor v. Bradley*, 1 How. 211, 11: 105

Partition.

579. A bill which sets forth the title of the parties, and alleges that the plaintiff desires partition, or, if this cannot be done without injury of the parties, a sale of the land and the division of the proceeds, and prays for partition, is in proper and sufficient form

without alleging special reasons for partition. *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. Rep. 818, 36: 644

n. Commerce; Restraint of Trade.

Commerce.

580. An averment that the fixing or naming of Turner and Rochelle as the pretended termini of shipments under joint tariffs when destined to New York, Boston, Philadelphia, or Baltimore, was a device to evade the law, and that the property was in fact transported to Chicago and there sold on the market or delivered to connecting roads for eastern points, without stating what evasion was intended or how the device operated to make an evasion of the law, and without denying that there was a joint tariff established, or without alleging that the tariff itself was a pretense, is not sufficient to show a violation of the act to regulate commerce. *Parsons v. Chicago & N. W. R. Co.* 167 U. S. 447, 17 Sup. Ct. Rep. 887, 42: 231

Cited in Blair v. Sioux City & P. R. Co. 109 Iowa, 380, 80 N. W. 673—*Com. v. Chesapeake & O. R. Co.* 115 Ky. 61, 72 S. W. 361.

Restraint of trade.

Multifariousness in, *see supra*, 286.

581. A general allegation of intent may color and apply to all the specific charges of a bill which seeks relief against alleged violations of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. Rep. 276, 49: 518
Cited in Camora-McConnell Co. v. McConnell, 140 Fed. 416.

582. Vagueness cannot be asserted of a charge in a bill seeking relief against an attempt to monopolize commerce in fresh meat among the states, in violation of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), that a combination exists among independent meat dealers to restrain their respective agents from bidding against each other when purchasing live stock for them in the stock yards. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. Rep. 276, 49: 518

583. Trade in fresh meat is sufficiently shown to be commerce among the states, protected from restraint by the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by allegations in a bill charging meat dealers with violations of that act, which, even if they import a technical passing of title at the slaughtering places in cases of sales, also import that the sales are to persons in other states, and that the shipments to other states are pursuant to such sales, and by allegations charging sales of such meat by their agents in other states, which indicate that some, at least, of the sales were in the original pack-

ages. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. Rep. 276, 49: 518

o. Public Lands; Mines; Taxes; Duties.

Public lands; mines.

Jurisdictional Averments, *see supra*, 338, 339, 342, 343.

Conversion of Timber Cut on, *see supra*, 564.

Necessity of Attaching Map to Petition to Confirm Private Land Claim, *see Private Land Claim*, 459.

Bill Rather than Information, as Proper Mode of Canceling Patent, *see Public Lands*, 1159.

See also infra, 869.

584. A bill to set aside or annul a patent of the United States for public lands, or to correct it on account of fraud or mistake, must show the particulars of the fraud, and the character of the mistake, and how it occurred. *United States v. Atherton*, 102 U. S. 372, 26: 213

Cited in Quinby v. Conlan, 104 U. S. 426, 26 L. ed. 802—*Maxwell Land-Grant Case* (United States v. Maxwell Land-Grant Co.) 121 U. S. 380, 30 L. ed. 959, 7 Sup. Ct. Rep. 1015—*United States v. American Bell Teleph. Co.* 167 U. S. 240, 42 L. ed. 154, 17 Sup. Ct. Rep. 809—*Los Angeles Farming & Mill. Co. v. Hoff*, 48 Fed. 344—*United States v. Northern P. R. Co.* 37 C. C. A. 308, 95 Fed. 882—*Lyman v. Kansas City & A. R. Co.* 101 Fed. 639—*Deweese v. Smith*, 66 L. R.A. 979, 45 C. C. A. 415, 106 Fed. 446—*James v. Germania Iron Co.* 46 C. C. A. 489, 107 Fed. 601—*King v. McAndrews*, 50 C. C. A. 33, 111 Fed. 865—*Le Marchel v. Teegarden*, 133 Fed. 827—*McLaughlin v. Heid*, 63 Cal. 216—*Green v. Hayes*, 70 Cal. 281, 11 Pac. 716—*Plummer v. Brown*, 70 Cal. 548, 12 Pac. 464—*Merrill v. Washburn*, 83 Me. 192, 22 Atl. 118—*Tetrault v. Fournier*, 187 Mass. 62, 72 N. E. 351—*Cunningham v. Snow*, 82 Mo. 591—*King v. Thompson*, 3 Okla. 648, 39 Pac. 466—*Cummings v. McDermid*, 4 Okla. 279, 44 Pac. 276—*Paine v. Foster*, 9 Okla. 254, 53 Pac. 109—*Wiseman v. Eastman*, 21 Wash. 172, 57 Pac. 398.

585. The mere recital in a complaint, that an adverse decision of the Land Department was taken upon the opinion of the Attorney General, does not present any question for review, where no copy of the opinion of the Attorney General or of the Secretary of the Interior is given, nor any other statement made as to the principle of law decided by them. *Marquez v. Frisbie*, 101 U. S. 473, 25: 800

Cited in United States v. Atherton, 102 U. S. 375, 26 L. ed. 214—*Deweese v. Smith*, 66 L.R.A. 979, 45 C. C. A. 415, 106 Fed. 446—*Le Marchel v. Teegarden*, 133 Fed. 827—*Plummer v. Brown*, 70 Cal. 548, 12 Pac. 464.

586. The failure to file notice of a mining location within ninety days after discovery is stated with sufficient certainty to have been due to the failure to discover, until after that time, a conspiracy to defeat complainant's rights, whereby his partner was to fail in his duty to file such notice, by averments in the bill that the location was

made July 16, that the conspiracy was secret, and was entered into about October 1, and that the complainant would have complied with the mining laws had it not been for such conspiracy. *Lockhart v. Leeds*, 195 U. S. 427, 25 Sup. Ct. Rep. 76, 49: 263

Taxes.

Sufficiency of Defendant's Answer, see *infra*, 725.

Admissions as to, by Pleading, see *supra*, 147.

587. A party from whom some taxes are due must aver their payment or tender, in a bill for injunction against illegal taxes. *Northern P. R. Co. v. Clark*, 153 U. S. 252, 14 Sup. Ct. Rep. 809, 38: 706

588. A bill to set aside a tax sale, which does not charge that the statutory procedure was not strictly pursued, but relies on the failure of the sheriff's return of sale to set forth a compliance with such procedure, cannot be maintained on the theory that, as the statute validated tax deeds notwithstanding any irregularities in the sale not appearing on the record, plaintiff was deprived of his property without due process of law, as this is an attempt to test the constitutionality of the law without showing that plaintiff was injured by its application. *Turpin v. Lemon*, 187 U. S. 51, 23 Sup. Ct. Rep. 20, 47: 70

Duties.

Admissions as to, by Failing to Plead, see *supra*, 151.

See also Duties, 523, 524.

589. A declaration to recover an excess of duties paid under protest need not state that suit was brought within the time limited by U. S. Rev. Stat. § 2931. *Beard v. Porter*, 124 U. S. 437, 8 Sup. Ct. Rep. 556, 31: 492

III. Pleas and Answers.

a. Generally.

Necessity of Verification, see *supra*, I. b.

Admission by, see *supra*, I. m, 2.

Admission by Failure to Reply, see *supra*, I. m, 5.

Withdrawal of, see *supra*, I. r.

Inconsistent Defenses, see *supra*, 20, 21.

Setting out Circumstances Implied by Law in, see *supra*, 22.

Waiver of Omission in Bill by Including in Answer, see *supra*, 41, 45, 47.

Admission of Sufficiency by Replication, see *supra*, 163, 165.

Right to Answer Amended Pleading, see *supra*, 218-221.

Striking out, see *supra*, 264-270.

Multifariousness of Plea, see *supra*, 300.

Plea of Set-off, Recoupment or Reconvention, see *infra*, VI.

Right to both Demur and Plead, see *infra*, 846.

Taking Objection by Demurrer instead of Plea, see *infra*, 850.

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Consideration of Objections to Regularity of, on Demurrer, see *infra*, 894.

Waiver of Errors in, see Appeal and Error, 4698-4700.

Taking Advantage of Defense of Limited Responsibility by Answer or Plea, see Admiralty, 492.

In Criminal Case, see Criminal Law, III. d. Rule in Federal Courts as to Necessity of Plea or Demurrer, see Courts, 1286, 1289.

Admissibility of Evidence under Pleas and Answers Generally, see Evidence, XIII. a.

Plene Administravit, see Executors and Administrators, 179a, 180.

Answer as Prerequisite to Injunctive Order, see Injunction, 220.

Pleading Responsive to Adverse Suit on Mining Claims, see Mines, 160.

Answer or Disclaimer in Adverse Suits to Contest Mining Claims, see Mines, 166a.

Defendant in Bill of Review Bound by Answer Filed by his Solicitors, see Review, 57.

Necessity of Filing Petition for Removal before Pleading or Answering, see Removal of Causes, 370-374.

See also Parties, 10.

590. The proper office of a plea is not, like an answer, to meet all the obligations of the bill, or like a demurrer, admitting those obligations, to deny the equity of the bill; but it is to present some distinct fact which of itself creates a bar to the suit or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for and the expense of going into the evidence at large. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. Rep. 534, 30: 684

Cited in *Beals v. Illinois, M. & T. R. Co.* 133 U. S. 295, 33 L. ed. 611, 10 Sup. Ct. Rep. 314—*Pearce v. Rice*, 142 U. S. 41, 35 L. ed. 931, 12 Sup. Ct. Rep. 130—*United States v. California & O. Land Co.* 148 U. S. 39, 37 L. ed. 359, 13 Sup. Ct. Rep. 458—*Dalsell v. Dueber Watch Case Mfg. Co.* 149 U. S. 326, 37 L. ed. 755, 13 Sup. Ct. Rep. 886—*Farley v. Hill*, 150 U. S. 574, 37 L. ed. 1187, 14 Sup. Ct. Rep. 186—*Horn v. Detroit Dry Dock Co.* 150 U. S. 625, 37 L. ed. 1203, 14 Sup. Ct. Rep. 214—*Green v. Bogue*, 158 U. S. 500, 39 L. ed. 1069, 15 Sup. Ct. Rep. 975—*McCloskey v. Barr*, 38 Fed. 171—*Farley v. Hill*, 39 Fed. 513—*Kellner v. Mutual L. Ins. Co.* 43 Fed. 626—*Simon v. House*, 46 Fed. 322—*Briggs v. Stroud*, 58 Fed. 718—*Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 61 Fed. 544—*Elgin Wind Power & Pump Co. v. Nichols*, 12 C. C. A. 580, 24 U. S. App. 542, 65 Fed. 218—*Southern P. R. Co. v. Groeck*, 74 Fed. 585—*Earl v. Metropolitan Street R. Co.* 87 Fed. 529—*Hartz v. Cleveland Block Co.* 37 C. C. A. 228, 95 Fed. 682—*Daniels v. Benedict*, 38 C. C. A. 599, 97 Fed. 374—*United States v. Peralta*, 99 Fed. 624—*Hostetter Co. v. E. G. Lyons Co.* 99 Fed. 736—*Jones v. Hillis*, 100 Fed. 356—*Soderberg v. Armstrong*, 116 Fed. 710—*Westervelt v. Library Bureau*, 55 C. C. A. 438, 118 Fed. 826—*Standard Fireproofing Co. v. Toole*, 122 Fed. 651—*Miller v. Rickey*, 123 Fed. 607—*Giberson v. Cook*, 124 Fed. 987—*Miller v. Rickey*, 127 Fed. 581—*Gen-*

eral Electric Co. v. New England Electric Mfg. Co. 63 C. C. A. 449, 128 Fed. 739—Barber v. National Carbon Co. 64 C. C. A. 47, 129 Fed. 377—Mutual L. Ins. Co. v. Blair, 130 Fed. 973—Adriaans v. Lyon, 8 App. D. C. 540—Mains v. Homer Steel-Fence Co. 116 Mich. 538, 74 N. W. 735—Elsenbach v. Hatfield, 2 Wash. 265, 12 L.R.A. 645, 26 Pac. 539.

591. A plea or notice should apprise the opposite party of what he may expect to meet under it. Wise use of Darst v. Allis, 9 Wall. 737, 19: 784

592. A plea ought not to contain more defenses than one; various facts can never be pleaded in one plea, unless they are all conducive to a single point on which the defendant means to rest his defense. Rhode Island v. Massachusetts, 14 Pet. 210, 10: 423

Cited in Korn v. Wiebusch, 33 Fed. 51—Edison Electric Light Co. v. Equitable Life Assur. Soc. 55 Fed. 479—National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. 83 Fed. 29—Mutual L. Ins. Co. v. Blair, 130 Fed. 973—Swayze v. Swayze, 37 N. J. Eq. 180.

593. By the laws of Virginia, the defendant has a right to plead as many several matters, whether of law or fact, as he shall deem necessary for his defense. Bank of United States v. Donnelly, 8 Pet. 361, 8: 974

594. The allowance of double pleas and defenses is not a matter of absolute right, but of discretion in the court. Grand Chute v. Winegar, 15 Wall. 355, 21: 170

595. The rule in Louisiana on the subject of general and special pleas is that they may be presented together if consistent with each other. Andrews v. Hensler, 6 Wall. 254, 18: 737

596. A defendant in an equity suit may let the facts averred in the bill go unchallenged, and by plea set up some special matter, which, if established and sufficient, will defeat a recovery. United States v. California & O. Land Co. 148 U. S. 31, 13 Sup. Ct. Rep. 458, 37: 354
Cited in Elgin Wind Power & Pump Co. v. Nichols, 12 C. C. A. 580, 24 U. S. App. 542, 65 Fed. 218—Daniels v. Benedict, 38 C. C. A. 599, 97 Fed. 374—Soderberg v. Armstrong, 116 Fed. 710—Giberson v. Cook, 124 Fed. 987.

597. An answer of a defendant as to matters alleged in a bill, which are within his own knowledge, and which he could not readily have forgotten, should be in positive language, and not merely upon remembrance or belief. Slater v. Maxwell, 6 Wall. 268, 18: 796

598. At a hearing upon a plea and proofs no fact is in issue but the truth of the matter pleaded. Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. Rep. 534, 30: 684
Cited in Appleton v. Marx, 10 C. C. A. 561, 23 U. S. App. 420, 62 Fed. 644—Superior v. Norton, 12 C. C. A. 471, 24 U. S. App. 59, 63 Fed. 358—Evelevh v. Southern California

R. Co. 123 Fed. 838—General Electric Co. v. Bullock Electric Mfg. Co. 138 Fed. 414.

599. New defenses cannot be first set up in an answer to a bill of revivor, but such bill puts in issue nothing but the representative character of the new party brought in. Fretz v. Stover, 22 Wall. 198, 22: 769
Cited in Mason v. Hartford, P. & F. R. Co. 19 Fed. 56—Newcombe v. Murray, 77 Fed. 493—Mackaye v. Mallory, 24 C. C. A. 421, 45 U. S. App. 741, 79 Fed. 2—Dunham v. Carson, 42 S. C. 389, 20 S. E. 197.

600. A plea with two intendments must be construed most strongly against the party who pleads it. United States v. Linn, 1 How. 104, 11: 64
Cited in Sidway v. Missouri Land & Live Stock Co. 116 Fed. 387—Langsdale v. Woolen, 120 Ind. 80, 21 N. E. 541.

601. When a complainant omits to bring before the court persons who are necessary parties, but the objection does not appear on the face of the bill, the proper mode to take advantage of it is by plea and answer. Story v. Livingston, 13 Pet. 359, 10: 200

602. In Texas, in the statutory action of trespass to try title to land, if defendant pleads his title specially, he waives the general issue, and is confined to the defense thus specially pleaded. Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. Rep. 340, 37: 209

603. Pleading a former judgment against defendant does not estop him from claiming before a master to whom the amount due was referred, that the plaintiff had been partly paid the amount of the former judgment. New Orleans v. Whitney (New Orleans v. Gaines) 138 U. S. 595, 11 Sup. Ct. Rep. 428, 34: 1102
Cited in Pullman's Palace-Car Co. v. Washburn, 66 Fed. 797—Elliott v. Bastian, 11 Utah, 462, 40 Pac. 713.

604. Under the Code defendant may set up a condition precedent relied upon as a defense, and specifically allege its breach. Hamilton v. Liverpool & L. & G. Ins. Co. 136 U. S. 242, 10 Sup. Ct. Rep. 945, 34: 419
Cited in Kahnweiler v. Phenix Ins. Co. 14 C. C. A. 487, 32 U. S. App. 230, 67 Fed. 486—Phillip Schneider Brewing Co. v. American Ice-Mach. Co. 23 C. C. A. 96, 40 U. S. App. 382, 77 Fed. 145.

b. Denials.

Admissions by Failure to Deny Generally, see *supra*, I. m, 3.

Admission by Failure to Deny Belief, see *supra*, 143.

Verification of Denial, see *supra*, 9, 10.

Waiver of Objection to Sufficiency, see *supra*, 57.

605. A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. Milligan v. Milledge, 3 Cranch, 220, 2: 417
Cited in Rhode Island v. Massachusetts, 14 Pet. 262, 10 L. ed. 448—Platt v. Oliver, 1 McLean, 303, Fed. Cas. No. 11,114—Sharp

v. Relssner, 20 Blatchf. 13, 9 Fed. 447—
Salmon v. Claggett, 3 Bland, Ch. 135.

606. To support defendants' claim to protection as bona fide purchasers, the denial of notice of plaintiff's claim of title, alleged in the answer, must relate both to the time when the deed was delivered and to that when the consideration was paid. McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. Rep. 892, 36: 788

607. Where the purchase for a certain price and the delivery of a deed were at the same time and parts of one transaction, and are so alleged in the answer, the denial of notice until defendants had made the purchase is equivalent to a denial of notice at the delivery of the deed. McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. Rep. 892, 36: 788

608. Denials directly responsive to the charges in the bill are to be taken as true unless overcome by the proofs. Collins v. Thompson, 22 How. 246, 15: 280
Cited in Hill v. Ryan Grocery Co. 23 C. C. A. 628, 41 U. S. App. 714, 78 Fed. 25.

What traversable.

Traverse of Venue, see Venue, 12.

609. A traverse can only be taken on matter of fact, and it is always inadmissible to tender an issue on mere matter of law. Ferguson v. Meredith (Clearwater v. Meredith) 1 Wall. 25, 17: 604
Chapman use of Leavitt v. Smith, 16 How. 114, 14: 868
Cited in Le More & Co. v. United States, 35 Ct. Cl. 13—Walker v. Fuller, 29 Ark. 465—Rosema v. Porter, 112 Mich. 15, 70 N. W. 316—Irion v. Bexar County, 26 Tex. Civ. App. 529, 63 S. W. 550—Peay v. Salt Lake City, 11 Utah, 341, 40 Pac. 206.

610. The allegation that a bond "is void" is not traversable, since it is an allegation of law. Moss v. Riddle, 5 Cranch, 351, 3: 123
Cited in Finley v. Quirk, 9 Minn. 201, 86 Am. Dec. 93, Gil. 179.

611. The taking of the esplees of the land in controversy on a writ of right is not a traversable averment. Green v. Liler, 8 Cranch, 229, 3: 545
Cited in Bradstreet v. Clarke, 12 Wend. 678—Ward v. Fuller, 15 Pick. 192.

General issue.

Admissibility of Evidence under, see Evidence, 2688-2712.
Waiver of, see supra, 32a, 52, 602.
Inconsistency between Answer and General Denial, see supra, 21.
Admission by, of Plaintiff's Capacity to Sue, see supra, 135.
In Reply, see infra, 793.
See also infra, 639, 641, 670, 703, 847, 881.

612. The general issue raises an issue upon the merits, and leaves the jurisdictional allegations without a traverse. Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16: 73
Cited in Deputron v. Young, 134 U. S. 251, 33

L. ed. 923, 10 Sup. Ct. Rep. 539—Re Grooma, 1 Fed. 467—Holmes v. Oregon & C. R. Co. 7 Sawy. 392, 9 Fed. 238—Imperial Ref. Co. v. Wyman, 3 L.R.A. 505, 38 Fed. 576.

613. A general denial is not sufficient for the purpose of raising an issue as to the existence of a corporation. United States v. Home Ins. Co. 22 Wall. 99, 22: 816
Cited in Imperial Ref. Co. v. Wyman, 3 L. R.A. 505, 38 Fed. 576—Emerson Co. v. Nimocks, 88 Fed. 281.

614. In a suit in the United States circuit court for the district of Nebraska, a general denial in the answer puts in issue the allegation, in the petition, of the citizenship of the parties. Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. Rep. 781, 36: 579
Cited in Whelan v. Rio Grande Western R. Co. 111 Fed. 328.

615. No question involving the capacity of the parties to litigate in the circuit court can be raised under the general issue. Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16: 73

616. Infringers may plead the general issue, and, having given the required notice, may prove that the patentee is not the original and first inventor, or that the patented article had been in public use for more than two years before the patentee applied for his patent. Parks v. Booth, 102 U. S. 96, 26: 54
Cited in Uri v. Hirsch, 123 Fed. 571.

617. An unverified denial of each and every allegation in a counterclaim which sets up assignment of a promissory note for a valuable consideration, the fact of the maker's insolvency, of which the assignor had knowledge, and the nonpayment of the note, puts the allegations of insolvency and nonpayment in issue. Daggs v. Phoenix Nat. Bank, 177 U. S. 549, 20 Sup. Ct. Rep. 732, 44: 882

618. In New York, under the Code of Civil Procedure, an answer which makes certain statements and then denies every allegation of the complaint, "except as hereinbefore stated or admitted," amounts to a sufficient general denial of all allegations of the complaint not admitted. Burley v. German-American Bank, 111 U. S. 216, 4 Sup. Ct. Rep. 341, 28: 406
Cited in Alaska Commercial Co. v. Williams, 63 C. C. A. 95, 128 Fed. 365—Berry v. Barton, 12 Okla. 238, 66 L.R.A. 534, 71 Pac. 1074—Tullis v. Shannon, 3 Wash. 720, 29 Pac. 449.

619. If the defendant pleads nothing but the general issue and is found in possession of any part of the land demanded, he is considered as taking defense for the whole. Greer v. Mezes, 24 How. 268, 16: 661
Cited in Bell v. Foxen, 42 Fed. 756—Crandall v. Lynch, 20 App. D. C. 82—Hays v. Texas & P. R. Co. 62 Tex. 399.

620. A general denial, by a defendant, of each and every allegation of a petition which alleges generally the performance of a condition precedent in a contract, does not controvert the performance of the condition,

under Iowa Code §§ 2715, 2717, providing respectively that performance of conditions precedent may be alleged generally, and that to controvert such allegation the facts relied upon must be specifically stated. *Halferty v. Wilmering*, 112 U. S. 713, 5 Sup. Ct. Rep. 364, 28: 858

621. In an action in Alabama against a county, upon bond coupons, a plea of the general issue does not involve the making of the bonds, since, by the local practice, the execution of a written instrument cannot be questioned unless the defendant, by a sworn plea, denies its execution. *Chambers County v. Clews*, 21 Wall. 317, 22: 517

622. The plea of the general issue, filed to a declaration before the allowance of an amendment joining as party plaintiff in a suit for insurance the person to whom a transfer of the policy is alleged, will not be regarded as traversing the amended declaration, where the record shows that the case was tried on the theory that the transfer was not disputed, but was an established fact. *Royal Ins. Co. v. Miller*, 199 U. S. 353, 26 Sup. Ct. Rep. 46, 50: 226

Sufficiency to raise issue.

Sufficiency of General Denial to Raise, see *supra*, 612-622.

623. Under the civil practice act of Montana, a denial based on information and belief is sufficient to present an issue and prevent judgment by default. *Maclay v. Sands*, 94 U. S. 586, 24: 211
Cited in *Solomon v. Brodie*, 10 Colo. App. 358, 50 Pac. 1045—*Lewis v. Weyerhorst*, 16 Mont. 269, 40 Pac. 589—*State ex rel. Milsted v. Butte City Water Co.* 18 Mont. 204, 32 L. R.A. 699, 56 Am. St. Rep. 574, 44 Pac. 966—*Wood v. Raydure*, 39 Hun. 145—*Bennett v. Leeds Mfg. Co.* 110 N. Y. 153, 17 N. E. 689.

624. In a suit on bonds, where a statute requires no proof of execution unless the plea is verified, an affidavit denying that they were issued within a certain specified time raises the question of their validity if not issued within that time. *Chickaming v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. Rep. 620, 27: 307

625. An answer denying the validity of a statute reducing tolls, which discloses the average annual receipts of the company for several years immediately preceding, and the average annual expenses, and alleges that the receipts for that time have not admitted of more than 4 per cent dividend upon the par value of the stock, and that the statute in question has reduced the tolls 50 per cent, and that this will make the income insufficient to maintain the road and meet ordinary expenses and earn any dividend whatever,—is sufficiently full to raise the question of the validity of the statute. *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. Rep. 198, 41: 560

626. A denial of the allegation of title in complainant puts in issue the title of the

plaintiff at the commencement of the action. *Hardy v. Johnson*, 1 Wall. 371, 17: 502

627. The validity of a location of a pre-emption or settlement right is not put in issue by an allegation in an answer that defendant does not admit that the survey has been made agreeable to location or to law. *Crocket v. Lee*, 7 Wheat. 522, 5: 513

Negative pregnant.

628. Upon a charge of engaging "in and with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, . . . thereby showing an utter disregard and contempt for the law," a denial that defendant engaged in "counseling, advising, encouraging, or assisting an unlawful, tumultuous, and riotous gathering . . . in contempt and defiance of the law," amounts only to a negative pregnant, denying merely the attending circumstances and legal consequences attributed to the act, and in effect admitting the substantial matter of the charge. *Re Wall*, 107 U. S. 265, 2 Sup. Ct. Rep. 569, 27: 552
Cited in *Fields v. State*, 134 Ind. 53, 32 N. E. 780.

c. Puts Darrein Continuance.

Peremptory Judgment against Defendant on, see Judgment, 63.

In Mandamus Proceeding, see Mandamus, 242.

629. Where matter of defense has arisen after the commencement of a suit, it cannot be pleaded in bar of the action generally, but must, when it has arisen before plea or continuance, be pleaded as to the further maintenance of the suit, and when it has arisen after issue joined, *puis darrien continuance*. *Yeaton v. Lynn* use of Lyles, 5 Pet. 224, 8: 105

630. A plea *puis darrien continuance* is considered as a waiver of all previous pleas, and the cause of action is admitted to the same extent as if no other defense had been urged than that contained in the plea. *Wallace v. McConnell*, 13 Pet. 136, 10: 95
Yeaton v. Lynn use of Lyles, 5 Pet. 224, 8: 105

Cited in *Rio Grande R. Co. v. Gomila* (Rio Grande R. Co. v. Vinet) 132 U. S. 485, 33 L. ed. 403, 10 Sup. Ct. Rep. 155—*Wisdom v. Williams*, Hempst. 460, Fed. Cas. No. 17,904—*Brown v. Brown*, 13 Ala. 212, 48 Am. Dec. 52—*McDougald v. Rutherford*, 30 Ala. 257—*Harding v. Minear*, 54 Cal. 505—*Campbell v. District of Columbia*, 2 MacArth. 534—*Ryan v. Baltimore & O. R. Co.* 60 Ill. App. 615—*Scott v. Brokaw*, 6 Blackf. 243—*Rowell v. Hayden*, 40 Me. 585—*Waterbury v. McMillan*, 46 Miss. 643—*Den ex dem. Price v. Sanderson*, 18 N. J. L. 429—*Tru v. Huntton*, 54 N. H. 122—*Davis v. Burgess*, 18 R. I. 87, 25 Atl. 848—*Rider v. Duval*, 28 Tex. 624.

631. An executor instituted an action of assumpsit, and before trial his letters testamentary were revoked; but as this revocation was not brought before the court by a plea since the last continuance, the defend-

ant was held to waive such defense, and rest his cause on the general issue. *Yeaton v. Lynn* use of Lyles, 5 Pet. 224, 8: 105
Cited in Swatzel v. Arnold, Woolw. 389, Fed. Cas. No. 13,682—*Ex parte Jones*, 54 Ala. 109—*Ex parte Howell*, 118 Ala. 181, 24 So. 500—*Hall v. Pearman*, 20 Tex. 171.

632. If matter in abatement is pleaded *puis darrein continuance*, the judgment, if against the defendant, is peremptory as well on demurrer as on trial. *Renner v. Marshall*, 1 Wheat. 215, 4: 74
Cited in Nicholl v. Mason, 21 Wend. 339.

d. Abatement.

Waiver of Pleas in, see *supra*, 31a, 32a, 33.
 Time to Plead in Abatement, see *supra*, 51, 58, 59.

Necessity of Raising Objection by, see *supra*, 65a, 71.

Waiver by Not Pleading in Abatement, see *supra*, 33-35.

Admission by Failure to Plead in Abatement, see *supra*, 139, 155.

Effect of Withdrawing Plea, see *supra*, 258.
 By *Puis Darrien Continuance*, see *supra*, 632.

Right to Plead in Bar after Pleading in Abatement, see *infra*, 666.

Taking Advantage of Death of Defendant by Plea in Abatement, see *infra*, 835.

Abatement of Action Generally, see Abatement and Revival.

Setting up Former Action Pending by Plea in Abatement, see Abatement and Revival, II. e.

Necessity of Supporting by Affidavit, see Abatement and Revival, 3.

Review of Discretion as to, see Appeal and Error, 4353-4365.

Prejudicial Error in Ruling on, see Appeal and Error, 4998.

Burden of Proof, see Evidence, 169, 170.

Admissibility in Evidence on Plea in Bar of Fact to Which it Has No Relation, see Evidence, 2713.

Judgment by Default against Defendant Appearing to Plead in Abatement, see Judgment, 46.

See also *infra*, 678.

633. An objection to the validity of a seizure under the duty of collection act of 1832, on the ground that it was made by the collector of one port when it should have been made by the collector of another port, is not available before the jury upon pleadings addressed to the merits of the case, and involving the direct question of forfeiture or not; but should be propounded as preliminary matter in the nature of a plea in abatement. *Taylor v. United States*, 3 How. 197, 11: 559

Editorial note.

Plea in abatement of another suit pending; when good. 20: 29

Jurisdiction; citizenship.

Necessity of Considering Answer in Determining Questions of Jurisdictional Facts, see Courts, 481.

Sufficiency of Plea to the Jurisdiction, see *infra*, 716.

Taking Objection by Demurrer, see *infra*, 860-863.

Waiver of Objection to Jurisdiction, see *infra*, 937.

Judgment on Demurrer for Lack of Averment of Citizenship, see *infra*, 955.

Delay in Objection as Waiver of Defect in Jurisdiction of Person, see Courts, 16.

Burden of Proof, see Evidence, 170.

See also *supra*, 228; *infra*, 667; Evidence, 583.

634. The allowance of a plea to the jurisdiction does not preclude the court from subsequently setting aside the order of allowance before the jury is sworn or judgment rendered. *Breedlove v. Nicolet*, 7 Pet. 413, 8: 731

635. Matters in abatement and to the jurisdiction must be taken advantage of under a plea, and cannot be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue. *Livingston v. Story*, 11 Pet. 351, 9: 746

Cited in Scott v. Sandford, 19 How. 589, 15 L. ed. 777—*De Sobry v. Nicholson*, 3 Wall. 423, 18 L. ed. 264—*Harrison v. Urann*, 1 Story, 66, Fed. Cas. No. 6,146—*Pierpont v. Fowle*, 2 Woodb. & M. 26, Fed. Cas. No. 11,152—*Draper v. Springport*, 15 Fed. 331—*Sharon v. Hill*, 10 Sawy. 668, 26 Fed. 723—*Edison Electric Light Co. v. United States Electric Lighting Co.* 35 Fed. 136—*Simon v. House*, 46 Fed. 319—*Marshall v. Otto*, 59 Fed. 252.

636. An objection to the jurisdiction of the Federal court based on the citizenship of the parties must be taken by plea in abatement, where the requisite diversity of citizenship is averred on the record. *Evans v. Gee*, 11 Pet. 80, 9: 639
Cited in Imperial Ref. Co. v. Wyman, 3 L.R.A. 505, 38 Fed. 576—*Gubbins v. Laughtenschlager*, 75 Fed. 621.

637. Where jurisdiction is averred in the declaration, in conformity to law, an objection thereto, based on the citizenship or capacity of parties, must be taken by plea in abatement. *Sheppard v. Graves*, 14 How. 505, 14: 518

Cited in Adams v. White, 2 Pittsb. 23, 7 Pittsb. L. J. 41, Fed. Cas. No. 68—*Blackburn v. Selma, M. & M. R. Co.* 2 Flipp. 533, Fed. Cas. No. 1,487—*Sharon v. Hill*, 10 Sawy. 668, 26 Fed. 723—*Simon v. House*, 46 Fed. 319—*Roberts v. Langenbach*, 56 C. C. A. 254, 119 Fed. 350—*Yocum v. Parker*, 66 C. C. A. 81, 130 Fed. 771—*Rheem v. Naugatuck Wheel Co.* 33 Pa. 364.

638. A plea in abatement on the ground of citizenship is required only where the citizenship averred is such as to support the jurisdiction of the court, and the defendant desires to controvert the averment. *Susquehanna & W. V. R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20: 179

Cited in Southern P. Co. v. Denton, 146 U. S. 206, 36 L. ed. 944, 13 Sup. Ct. Rep. 44

—Gager v. Harrison, Fed. Cas. No. 5,171—Pond v. Vermont Valley R. Co. 12 Blatchf. 297, Fed. Cas. No. 11,265—Sharon v. Hill, 10 Sawy. 668, 26 Fed. 723—Flisk v. Henarie, 32 Fed. 421—Meyer v. Herrera, 41 Fed. 65—Curnow v. Phoenix Ins. Co. 44 Fed. 305—Laskey v. Newtown Min. Co. 50 Fed. 636—Bangs v. Loveridge, 60 Fed. 965.

639. In order to dispute the allegation of citizenship which is made in the declaration, the defendant must so plead in abatement; it cannot be disputed under the general issue. Jones v. League, 18 How. 76, 15: 263
Cited in Cragin v. Lovell, 109 U. S. 198, 27 L. ed. 905, 3 Sup. Ct. Rep. 132—Farmington v. Pillsbury, 114 U. S. 143, 29 L. ed. 116, 5 Sup. Ct. Rep. 807—Wetmore v. Rymer, 169 U. S. 121, 42 L. ed. 684, 18 Sup. Ct. Rep. 293—Blackburn v. Selma, M. & M. R. Co. 2 Philpp. 533, Fed. Cas. No. 1,467—Pond v. Vermont Valley R. Co. 12 Blatchf. 297, Fed. Cas. No. 11,265—Wythe v. Myers, 3 Sawy. 600, Fed. Cas. No. 18,119—Holmes v. Oregon & C. R. Co. 7 Sawy. 392, 9 Fed. 238—Draper v. Springport, 21 Blatchf. 243, 15 Fed. 331—Sharon v. Hill, 10 Sawy. 668, 26 Fed. 723—Imperial Ref. Co. v. Wyman, 3 L.R.A. 505, 38 Fed. 576—Simon v. House, 46 Fed. 319—Desert King Min. Co. v. Wedekind, 110 Fed. 877—Vimont v. Chicago & N. W. R. Co. 64 Iowa, 524, 21 N. W. 9.

640. Objection to jurisdiction on the ground of citizenship must be raised by plea in abatement; it cannot be raised in the trial on the merits. Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. Rep. 521, 29: 725
Cited in Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 353, 40 L. ed. 454, 16 Sup. Ct. Rep. 307—Wetmore v. Rymer, 169 U. S. 118, 42 L. ed. 683, 18 Sup. Ct. Rep. 293—Huntington v. Laidley, 176 U. S. 678, 44 L. ed. 635, 20 Sup. Ct. Rep. 526—Imperial Ref. Co. v. Wyman, 3 L.R.A. 505, 38 Fed. 576—Lehigh Min. & Mfg. Co. v. Kelly, 64 Fed. 403—Gubbins v. Laughtenschlager, 75 Fed. 620—Mason v. Dullaghan, 27 C. C. A. 297, 53 U. S. App. 539, 82 Fed. 689—National Masonic Accl. Asso. v. Sparks, 28 C. C. A. 401, 49 U. S. App. 681, 83 Fed. 227—Less v. English, 29 C. C. A. 279, 56 U. S. App. 16, 85 Fed. 474—Levinski v. Middlesex Bkg. Co. 34 C. C. A. 462, 92 Fed. 459—Reavis v. Reavis, 101 Fed. 21—Terry v. Davy, 48 C. C. A. 143, 107 Fed. 52—Desert King Min. Co. v. Wedekind, 110 Fed. 877—Adams v. Shirk, 55 C. C. A. 27, 117 Fed. 803—Wonderly v. Lafayette County, 150 Mo. 648, 45 L.R.A. 390, 73 Am. St. Rep. 474, 51 S. W. 745.

641. Objections to the jurisdiction of the court on the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue, it is too late; it cannot be raised at the trial upon the merits. De Sobry v. Nicholson, 3 Wall. 420, 18: 263
Cited in Germania F. Ins. Co. v. Francis, 11 Wall. 216, 20 L. ed. 70—Farmington v. Pillsbury, 114 U. S. 143, 29 L. ed. 116, 5 Sup. Ct. Rep. 807—Holmes v. Oregon & C. R. Co. 7 Sawy. 392, 9 Fed. 238—Draper v. Springport, 21 Blatchf. 243, 15 Fed. 331—Imperial Ref. Co. v. Wyman, 3 L.R.A. 505, 38 Fed. 576.

642. The question of the citizenship of the parties must be brought forward by plea

in abatement, before a trial on the merits. D'Wolf v. Rabaud, 1 Pet. 476, 7: 227
Cited in Smith v. Kernochen, 7 How. 216, 13 L. ed. 674—Sheppard v. Graves, 14 How. 511, 14 L. ed. 520—Scott v. Sandford, 19 How. 590, 15 L. ed. 777—NeSmith v. Calvert, 1 Woodb. & M. 38, Fed. Cas. No. 10,123—United States v. Woolsey, Fed. Cas. No. 16,762—Gause v. Clarksville, 1 McCrary, 86, 1 Fed. 360—Davies v. Lathrop, 13 Fed. 566—Draper v. Springport, 21 Blatchf. 243, 15 Fed. 331—Sharon v. Hill, 10 Sawy. 668, 26 Fed. 723—Bland v. Fleeman, 29 Fed. 672—Cuthbert v. Galloway, 35 Fed. 468—Imperial Ref. Co. v. Wyman, 38 Fed. 576—Missouri P. R. Co. v. Meeh, 30 L.R.A. 252, 16 C. C. A. 512, 32 U. S. App. 691, 69 Fed. 755—Prince v. Commercial Bank, 1 Ala. 245, 34 Am. Dec. 773—Educational Soc. v. Varney, 54 N. H. 379—Davis v. Packard, 6 Wend. 332—Dutcher v. Dutcher, 39 Wis. 662.

643. A plea to the jurisdiction of the circuit court must show that the parties were citizens of the same state at the time the action was brought, and not merely at the time of the plea. Mollan v. Torrance, 9 Wheat. 537, 6: 154
Cited in Scott v. Sandford, 19 How. 571, 15 L. ed. 769—Barnard v. Hartford, P. & F. R. Co. Fed. Cas. No. 1,003—Brown v. Noyes, 2 Woodb. & M. 79, Fed. Cas. No. 2,023—Mutual L. Ins. Co. v. Blair, 130 Fed. 975—Koppel v. Heinrichs, 1 Barb. 451—Spinning v. Ohio L. Ins. & T. Co. 2 Disney (Ohio) 380.

644. A plea in abatement is not a nullity, if, although not precise or formal, it denies the averment of citizenship of plaintiffs as they affirmed it to be. Eberly v. Moore, 24 How. 147, 16: 612

Nonjoinder or misjoinder of parties.

Raising Objection by Demurrer, see infra, 847, 848.

See also Parties, 275.

645. Nonjoinder of a defendant in an action *ex contractu* can be taken advantage of only by plea in abatement. Metcalf v. Williams, 104 U. S. 93, 26: 665
Barry v. Foyles, 1 Pet. 311, 7: 157
Cited in Virtue v. Ioka Tribe, 5 Pa. Dist. R. 635—Wilson v. McCormick, 86 Va. 997, 11 S. E. 976.

646. Nonjoinder of parties jointly liable upon an obligation must be pleaded in abatement. It cannot be taken advantage of on the general issue. Moore v. Bank of Metropolis, 13 Pet. 302, 10: 172

647. Generally speaking, all joint obligors and other persons bound by covenant, contracts, or quasi contracts, ought to be made parties to the suit; and the plaintiff may be made to join them all; but this objection can only be taken advantage of by plea in abatement. Gilman v. Rives, 10 Pet. 298, 9: 432

Denied in Bargh v. Page, 4 McLean, 11, Fed. Cas. No. 980.

Cited in Gilmer v. Morris, 30 Fed. 481—Walker v. Windsor Nat. Bank, 5 C. C. A. 431, 5 U. S. App. 423, 56 Fed. 81—Taylor v. The Auditor, 2 Ark. 190—Hamilton v. Buxton, 6 Ark. 26—Nichols v. Guy, 2 Ind. 84—Eldsoe

v. Irvin, 35 Ind. 294—Merrick v. Bank of Metropolis, 8 Ill. 74—Crusen v. McKaig, 57 Md. 464—People ex rel. Scott v. Orange County, 20 Hun, 200.

648. Misjoinder of parties must be pleaded in abatement. Green v. Liter, 8 Cranch, 229, 3: 545
Cited in South Park v. Gavin, 139 Ill. 286, 28 N. E. 826.

Capacity or right to sue.

Capacity of Corporation to Sue, see infra, 654-658.

Necessity of Alleging Lack of, see infra, 681-684.

Setting up Marriage Pending Suit by Plea in Abatement, see Abatement and Revival, 7.

See also supra, 58.

649. [A plea in abatement that the plaintiff is a *feme covert* must be supported by affidavit, and this cannot be supplied after motion to strike out the plea. Rapp v. Elliot (Pa. Sup. Ct.) 2 Dall. 184, 1: 341]

650. A plea that persons suing together as husband and wife are not so must be in abatement, and not in bar. Northwestern Union Packet Co. v. Clough, 20 Wall. 528, 22: 406

651. If it be alleged that the plaintiffs are not executors, the objection must be taken by plea in abatement. Kane v. Paul, 14 Pet. 33, 10: 341
Cited in Noonan v. Bradley, 9 Wall. 401, 19 L. ed. 760—Dental Vulcanite Co. v. Wetherbee, 2 Cliff. 562, 3 Fisher, Pat. Cas. 92, Fed. Cas. No. 3,810—Hodges v. Kimball, 34 C. C. A. 106, 63 U. S. App. 688, 91 Fed. 848—Tucker v. Nebeker, 2 App. D. C. 339.

652. An objection that plaintiffs suing as executors were not such must be taken by plea in abatement, and does not arise on a demurrer in bar. Childress v. Emory, 8 Wheat. 642, 5: 705
Explained in Noonan v. Bradley, 9 Wall. 401, 19 L. ed. 760.

Cited in Dental Vulcanite Co. v. Wetherbee, 2 Cliff. 562, 3 Fish. Pat. Cas. 92, Fed. Cas. No. 3,810—Black v. Henry G. Allen Co. 9 L.R.A. 437, 42 Fed. 624—Hodges v. Kimball, 34 C. C. A. 106, 63 U. S. App. 688, 91 Fed. 848—Cotton v. Ward, 45 Ala. 361—Pollard v. Buttery, 3 Blackf. 240—Thomas v. Cameron, 16 Wend. 582.

Objections to jurors.

653. All ordinary objections based upon the disqualification of particular jurors, or upon informalities in summoning or impaneling the jury, where no statute makes the proceedings utterly void, should be taken *in limine*, either by challenge, by motion to quash, or by plea in abatement. United States v. Gale, 109 U. S. 65, 3 Sup. Ct. Rep. 1, 27: 857
Cited in Re Wilson, 140 U. S. 584, 35 L. ed. 517, 11 Sup. Ct. Rep. 870—Kohl v. Lehlback, 160 U. S. 302, 40 L. ed. 435, 16 Sup. Ct. Rep. 304—Gibson v. Mississippi, 162 U. S. 584, 40 L. ed. 1079, 16 Sup. Ct. Rep. 904—Agnew v. United States, 165 U. S. 44, 41 L. ed. 627, 17 Sup. Ct. Rep. 235—Carter v. Texas, 177 U. S. 447, 44 L. ed. 841, 20 Sup. Ct. Rep. 687—United States v. Richardson,

28 Fed. 66—United States v. Clune, 62 Fed. 799—United States v. Jones, 69 Fed. 975—Territory v. O'Hare, 1 N. D. 40, 44 N. W. 1003—State v. Brown, 2 Marv. (Del.) 410, 36 Atl. 458—United States v. Angney, 6 Mackey, 89—Cooper v. State, 120 Ind. 380, 22 N. E. 320—Cooper v. State, 64 Md. 44, 20 Atl. 986—State v. Witt, 33 Or. 596, 55 Pac. 1053—Rainey v. State, 19 Tex. App. 485—Carter v. State, 39 Tex. Crim. Rep. 357, 48 S. W. 508—Smith v. State, 42 Tex. Crim. Rep. 221, 58 S. W. 97—Curtis v. Com. 87 Va. 592, 13 S. E. 73.

Corporate existence or capacity.

654. An objection as to the corporate existence of a plaintiff corporation must be taken by plea in abatement; any objection thereto is waived by a plea to the merits. Conard v. Atlantic Ins. Co. 1 Pet. 386, 7: 189

Cited in Society for Propagation of the Gospel v. Pawlett, 4 Pet. 501, 7 L. ed. 534—United States v. Home Ins. Co. 22 Wall. 101, 22 L. ed. 817—Blackburn v. Selma, M. & M. R. Co. 2 Filipp. 533, Fed. Cas. No. 1,467—Carr v. Gale, 3 Woodb. & M. 69, Fed. Cas. No. 2,435—Dental Vulcanite Co. v. Wetherbee, 2 Cliff. 562, Fed. Cas. No. 3,810—Goodyear v. Blake, Fed. Cas. No. 5,560—Union Cement Co. v. Noble, 15 Fed. 503—Oregonian R. Co. v. Oregon R. & Nav. Co. 10 Sawy. 476, 23 Fed. 235—Phenix Bank v. Curtis, 14 Conn. 440, 36 Am. Dec. 492—Tyler v. Mutual District Messenger Co. 17 App. D. C. 95—Savage Mfg. Co. v. Armstrong, 17 Me. 37, 35 Am. Dec. 227—Bennington Iron Co. v. Rutherford, 18 N. J. L. 160—Butterfield's Overland Despatch Co. v. Wedeles, 1 N. M. 532—Oregon C. R. Co. v. Wait, 3 Or. 96—Rheem v. Naugatuck Wheel Co. 33 Pa. 364—Northumberland County Bank v. Eyer, 60 Pa. 440—Freeland & Pennsylvania Cent. Ins. Co. 94 Pa. 514—Boston Type & Stereotype Foundry v. Spooner, 5 Vt. 96—Anderson v. Kanawha Coal Co. 12 W. Va. 537.

655. In an action by the receiver of an insolvent national bank to enforce the personal liability of a stockholder, pleas denying the existence or the legal validity of the acts of the corporation are properly framed in abatement, and not in bar. Casey v. Galli, 94 U. S. 673, 24: 168

656. The plea of *nul tiel corporation* regarded as a plea in abatement. Conard v. Atlantic Ins. Co. 1 Pet. 386, 7: 189
Cited in Brown v. Delafield & B. Cement Co. 1 App. D. C. 235.

657. A want of corporate capacity to sue must be insisted upon by a special plea in abatement or bar. Society for Propagation of Gospel v. Pawlett, 4 Pet. 480, 7: 927
Cited in United States v. Home Ins. Co. 22 Wall. 101, 22 L. ed. 817—Pullman v. Upton, 96 U. S. 329, 24 L. ed. 818—Morse Arms Mfg. Co. v. United States, 16 Ct. Cl. 299—New York Dry Dock v. Hicks, 5 McLean, 115, Fed. Cas. No. 10,204—Union Cement Co. v. Noble, 15 Fed. 503—Oregonian R. Co. v. Oregon R. & Nav. Co. 10 Sawy. 476, 23 Fed. 235—Eysler v. Western U. Tele. Co. 2 Colo. 156—Brown v. Delafield & B. Cement Co. 1 App. D. C. 235.

658. A misnomer, or mere mistake, in the name of a corporation plaintiff, which does not affect its capacity to sue in the right

name, is pleadable in abatement only, and is waived by pleading to the merits. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. Rep. 185, 34: 784 *Cited in Brown v. Delafeld & B. Cement Co.* 1 App. D. C. 235.

Nontenure.

659. Nontenure is pleadable only in abatement to a writ of right at common law. *Green v. Liter*, 8 Cranch, 229, 3: 545 *Cited in Fales v. Gibbs*, 5 Mason, 464, Fed. Cas. No. 4,621—*Fiedler v. Carpenter*, 2 Woodb. & M. 214, Fed. Cas. No. 4,750—*Smith v. Wigglin*, 48 N. H. 110.

660. If the demandant demands against the tenant more land than he holds, he may plead nontenure as to the parcel not holden; but the writ shall abate only as to the parcel whereof nontenure is pleaded and admitted or proved. *Green v. Liter*, 8 Cranch, 229, 3: 545

Cited in Inglis v. Sallor's Snug Harbor, 3 Pet. 188, 7 L. ed. 648—*Shaefer v. Gates*, 2 B. Mon. 454, 38 Am. Dec. 164.

Variance.

Variance as Ground for Abatement, see Abatement and Revival, 62.

Variance Between Allegations and Proof Generally, see Evidence, XIII. b.

661. Variances between the writ and declaration can be pleaded only in abatement. *Duvall v. Craig*, 2 Wheat. 45, 4: 180

Cited in McKenna v. Fisk, 1 How. 247, 11 L. ed. 119—*Buford v. Hickman*, Hempst. 234, Fed. Cas. No. 2,114a—*How v. McKinney*, 1 McLean, 320, Fed. Cas. No. 6,749—*Wilder v. McCormick*, 2 Blatchf. 33, Fed. Cas. No. 17,650—*Wilkinson v. Pomeroy*, 10 Blatchf. 529, Fed. Cas. No. 17,675—*Phelps v. Spruance*, 1 Colo. 414—*Prince v. Lamb*, Breese (Ill.) 298—*Cruikshank v. Brown*, 10 Ill. 77—*Weld v. Hubbard*, 11 Ill. 574—*Carpenter v. Hoyt*, 17 Ill. 530—*Giles v. Perryman*, 1 Harr. & G. 171—*Hite v. Hunton*, 20 Mo. 289—*Waldo v. Beckwith*, 1 N. W. 111—*White v. Miller*, 7 Hun, 432.

662. An objection of a variance between the writ and declaration, resulting from an amendment made under an order of court, is not available at the trial when no objection was taken to the amendment upon the record. *Chirac v. Reinicker*, 11 Wheat. 280, 6: 474

663. Where a party is charged separately for a joint debt he should plead in abatement; he cannot avail himself of the variance at the trial. *Barry v. Foyles*, 1 Pet. 311, 7: 157

Cited in Moore v. Bank of Metropolis, 13 Pet. 311, 10 L. ed. 177—*Waterbury v. Mather*, 16 Wend. 615—*Wilson v. McCormick*, 86 Va. 997, 11 S. E. 976.

664. In an action of trespass *quare clausum fregit*, there is not such a variance between the writ and the counts of the declaration as will abate the writ, which mentions the trespass with force and arms upon the storehouse of the plaintiff and the seizure and destruction of goods, where, in separate counts of the declaration, the entry of

separate storehouses is alleged. *McKenna v. Fisk*, 1 How. 241, 11: 117

e. Pleas to Merit Generally.

Waiver by, see supra, 51, 52, 65, 66a, 67, 69, 71.

Admission by, of Plaintiff's Capacity to Sue, see supra, 135.

Withdrawal of, see supra, 255.

Plea in Replevin, see infra, 733.

Necessity of Raising Objection by Plea in Abatement, see supra, III. d.

Waiver by, see supra, 30-35; Appeal and Error, 4670-4671a.

Necessity of Filing Petition for Removal before Filing Plea or Answer, see Removal of Causes, 370-374.

See also supra, 605, 633; infra, 757.

665. Pleas in bar are not so strictly construed as those of a dilatory nature. *Withers v. Greene*, 9 How. 213, 13: 109 *Cited in Lowmes v. Brown*, 22 Ark. 360.

666-7. A party having his plea in abatement passed upon by a jury, and found against him, is not permitted to set up the same matter in bar, and again to go to the jury upon it. *Grand Chute v. Winegar*, 15 Wall. 355, 21: 170 *Cited in Sharon v. Hill*, 10 Sawy. 670, 26 Fed. 387.

Suit by representative.

668. The rule that a plea to the merits admits the representative character of the plaintiff and his right to sue is only applicable where no other plea than one of that kind is interposed. It does not apply where that character is traversed by a special plea. *Noonan v. Bradley*, 9 Wall. 394, 19: 757

669. A plea which puts in issue the representative character of the plaintiff is a good plea in bar to the action. *Noonan v. Bradley*, 9 Wall. 394, 19: 757

670. Where a plea is the general issue, and raises the question of right or title in the executor, the certificate of probate and qualification as executor meets the requisition; a judicial examination can only be gone into upon a plea in abatement after oyer has been craved and granted; then, upon issue joined, the plaintiff's title, as executor or administrator, may be disputed. *Kane v. Paul*, 14 Pet. 33, 10: 341 *Explained in Lombard v. McMillan*, 95 Wis. 635, 70 N. W. 673.

Cited in Hodges v. Kimball, 34 C. C. A. 106, 63 U. S. App. 688, 91 Fed. 848—*Hatchett v. Berney*, 65 Ala. 48—*Anderson v. First Nat. Bank*, 4 N. D. 196, 59 N. W. 1029—*Henke v. Gunzenhauser*, 195 Ill. 135, 62 N. E. 896—*Louisville & N. R. Co. v. Brantley*, 96 Ky. 304, 49 Am. St. Rep. 291, 28 S. W. 477—*Smith v. Peckham*, 39 Wis. 418.

671. Special plea in bar on the ground of lack of authority sustained in an action by a foreign administrator. *Fenwick v. Sears*, 1 Cranch, 259, 2: 101

Cited in Louisville & N. R. Co. v. Brantley, 96 Ky. 304, 49 Am. St. Rep. 291, 28 S. W. 477.

672. Objection to an action by a foreign executor sustained upon a plea in bar. *Dixon v. Ramsay*, 3 Cranch, 319, 2: 453
Cited in Noonan v. Bradley, 9 Wall. 400, 19 L. ed. 759—*Louisville & N. R. Co. v. Brantley*, 96 Ky. 304, 49 Am. St. Rep. 291, 28 S. W. 477.

f. What may be Plead.

Inadmissibility of Equitable Defenses in Federal Law Courts, see Courts, 1261-1264.

Corporation Cannot Plead Usury to Bond, see Usury, 141.

673. There can be no averment in pleading against the validity of a record, though there may be against its operation. *Biddle v. Wilkins*, 1 Pet. 686, 7: 315
Cited in Hay v. Alexandria & W. R. Co. 1 Hughes, 170, Fed. Cas. No. 6,254—*Whitaker v. Bramson*, 2 Paine, 223, Fed. Cas. No. 17,526—*Hazard v. Griswold*, 21 Fed. 182—*Hunt v. Mayfield*, 2 Stew. (Ala.) 129—*Lucas v. Copeland*, 2 Stew. (Ala.) 153—*Lucas v. Bank of Darien*, 2 Stew. (Ala.) 310.

674. In Virginia, if the defendant dies after the entry of an office judgment by default and a writ of inquiry awarded, his administrator, upon scire facias, can plead only what his intestate would have pleaded. *M'Knight v. Craig*, 6 Cranch, 183, 3: 193
Cited in Janney v. Mandeville, 2 Cranch, C. C. 31, Fed. Cas. No. 7,213—*Borden v. Thorpe*, 35 N. C. (13 Ired. L.) 302.

675. The defendant to an attachment in chancery in Virginia may plead the statute of limitations without answer. *Wilson v. Koontz*, 7 Cranch, 202, 3: 315

676. The tenant may, at his election, under Va. act 1786, chap. 27, plead any special matter in bar of a writ of right, or give it in evidence on the mise joined. *Green v. Liter*, 8 Cranch, 229, 3: 545

g. What must be Plead.

1. In General.

Mode of Objecting to Multifariousness, see *supra*, 275.

In Admiralty, see Admiralty, 471.

Necessity of Objecting to Process by Regular Plea, see Appeal and Error, 3721.

677. Mistake in an accord and satisfaction must be set up by proper pleading, or it is not available. *Horn v. Detroit Dry Dock Co.* 150 U. S. 610, 14 Sup. Ct. Rep. 214, 37: 1199

678. Matter in abatement of a writ of right must be specially pleaded. *Green v. Liter*, 8 Cranch, 229, 3: 545
Cited in Bolling v. Petersburg, 3 Rand. (Va.) 582

Jurisdiction.

679. Jurisdiction of a Federal circuit court appearing by proper averments on the record of the trial can be impugned by de-

fendant only in a special plea. *Wickliffe v. Owings*, 17 How. 47, 15: 44

Cited in Scott v. Sandford, 19 How. 588, 15 L. ed. 768—*Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 214, 16 L. ed. 77—*Nashua & L. R. Corp. v. Boston & L. R. Corp.* 138 U. S. 373, 34 L. ed. 387, 10 Sup. Ct. Rep. 1004—*Blackburn v. Selma, M. & M. R. Co.* 2 Flipp. 533, Fed. Cas. No. 1,487—*Pond v. Vermont Valley R. Co.* 12 Blatchf. 297, Fed. Cas. No. 11,265—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 392, 9 Fed. 238—*Sharon v. Hill*, 10 Sawy. 668, 26 Fed. 723—*Bland v. Fleeman*, 29 Fed. 672—*Edison Electric Light Co. v. United States Electric Lighting Co.* 35 Fed. 136—*Simon v. House*, 46 Fed. 319—*Ralston v. Sharon*, 51 Fed. 713—*Book v. Justice Min. Co.* 58 Fed. 830—*Marshall v. Otto*, 59 Fed. 252—*Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co.* 14 C. C. A. 296, 31 U. S. App. 252, 67 Fed. 40—*Missouri P. R. Co. v. Meeh*, 30 L.R.A. 252, 16 C. C. A. 512, 32 U. S. App. 691, 69 Fed. 755—*Gubbins v. Laughtenschlager*, 75 Fed. 621—*Desert King Min. Co. v. Wedekind*, 110 Fed. 877—*Roberts v. Langenbach*, 56 C. C. A. 256, 119 Fed. 352—*People v. Dawell*, 25 Mich. 271, 12 Am. Rep. 260.

680. In equity, the defense of want of jurisdiction must be presented by a plea or demurrer, and not by answer. *De Sobry v. Nicholson*, 3 Wall. 420, 18: 263

Cited in Nashua & L. R. Corp. v. Boston & L. R. Corp. 138 U. S. 373, 34 L. ed. 387, 10 Sup. Ct. Rep. 1004—*Blackburn v. Selma, M. & M. R. Co.* 2 Flipp. 533, Fed. Cas. No. 1,487—*Sharon v. Hill*, 10 Sawy. 668, 26 Fed. 723—*Simon v. House*, 46 Fed. 319—*Butchers & D. Stock-Yards Co. v. Louisville & N. R. Co.* 14 C. C. A. 296, 31 U. S. App. 252, 67 Fed. 40—*Pine v. New York*, 103 Fed. 338.

Capacity or authority to sue.

681. Where an action is brought by a person capable of suing at the time, but who becomes incapable while the matter is depending, the disability must be pleaded. *Yeaton v. Lynn use of Lyles*, 5 Pet. 224, 8: 105

682. An executor's authority to sue in his representative character must be questioned by plea or answer. *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 19: 566

683. [In suit by an executor, he is not bound, under pleas of *non assumpsit* and payment, to produce his letters testamentary; since, if the defendant wished to have them produced, he should have pleaded and put the matter in issue. *M'Kimm v. Riddle* (Pa. N. P.) 2 Dall. 100, 1: 306]

Defenses.

Defense of Limitations, see *infra*, III, g, 2.

684. In an action by husband and wife for personal injury to the wife, evidence that the husband and wife were not living together at the time of the injury, and had not been for some time, is inadmissible on the defense. If available at all it must be pleaded in abatement, and not in bar, and unless so pleaded is not in issue upon the trial. *Northwestern Union Packet Co. v. Clough*, 20 Wall. 528, 22: 406

685. A matter of defense is not available

unless made affirmatively to appear. *Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25: 541

686-7. In an action of covenant on a policy under seal, all special matter of defense must be pleaded. *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206, 3: 200
Cited in Cooper v. Watson, 10 Wend. 205.

Bonds or written instrument.

Want of Execution of Note, see Evidence, 886.

Denial of Execution, see Evidence, 989, 990.

Evidence Inadmissible in Support of Defense not Pleased, see Evidence, 2662, 2663.

Special Plea of Matter to be Offered in Evidence under General Issue, see Evidence, 2672.

688. In an action upon bonds, where the only question put in issue by the pleadings was whether they were solvable in lawful money or Confederate notes, usury, as a defense, was not entitled to consideration. *Atlantic, T. & O. R. Co. v. Carolina Nat. Bank (Confederate Note Case)* 19 Wall. 548, 22: 196

689. By a statute of Florida (Duval's Comp. p. 96, §§ 33, 34), where suit is brought upon a bond, the plaintiff need not prove its execution, unless the defendant denies it under oath. *Bradford v. Williams*, 4 How. 576, 11: 1109

690. In an action on bonds it was not necessary to prove the order of the county court authorizing the president of the court to sign and the agent to countersign the bonds, if there was no plea or answer sworn to denying the execution of the bonds or coupons sued upon. *Ralls County v. Douglass*, 105 U. S. 728, 26: 957

691. In an action upon a written instrument, a statute prohibiting defendants from denying their signatures, except under plea verified by affidavit, does not apply to a case in which they demur because the instrument declared on appears upon its face to be the contract of their principal, and not of themselves. *Hitchcock v. Buchanan*, 105 U. S. 416, 26: 1078

Contracts.

See also Evidence, 2627.

692. The illegality of a contract in suit can be considered, although not affirmatively pleaded. *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26: 539
Distinguished in Cleveland, C. C. & I. R. Co. v. Closser, 126 Ind. 366, 9 L.R.A. 763, 3 Inters. Com. Rep. 396, 22 Am. St. Rep. 593, 26 N. E. 159—*Clark v. American Coal Co.* 86 Iowa, 444, 17 L.R.A. 562, 53 N. W. 291.

Cited in Lee v. Johnson, 116 U. S. 52, 29 L. ed. 571, 6 Sup. Ct. Rep. 249—*Higgins v. McCrea*, 116 U. S. 685, 29 L. ed. 769, 6 Sup. Ct. Rep. 557—*McCrea v. Parsons*, 50 C. C. A. 614, 112 Fed. 919—*Rucker v. Bolles*, 67 C. C. A. 34, 133 Fed. 862—*Alabama Gold*

L. Ins. Co. v. Mobile Mut. Ins. Co. 81 Ala. 334, 1 So. 561—*Crawford v. Burke*, 201 Ill. 593, 66 N. E. 833—*Dow v. Higgins*, 72 Ill. App. 305—*Ranney v. Donovan*, 78 Mich. 326, 44 N. W. 276—*Hefron v. Daly*, 133 Mich. 615, 95 N. W. 714—*MacFee v. Horan*, 40 Minn. 31, 41 N. W. 239—*Drake v. Lauer*, 93 App. Div. 88, 86 N. Y. Supp. 986—*Cary v. Western U. Teleg. Co.* 47 Hun. 612—*Milbank v. Jones*, 127 N. Y. 375, 24 Am. St. Rep. 454, 28 N. E. 81—*Buchtel v. Evans*, 21 Or. 314, 28 Pac. 67—*Brown v. Newell*, 64 S. C. 71, 41 S. E. 835—*Reed v. Johnson*, 27 Wash. 55, 57 L.R.A. 409, 67 Pac. 381.

Judgments.

See also Judgment, 176.

693. An answer which denies that any such agreement was made as alleged in the complaint is as effective for letting in the defense that the agreement is void by the statute of frauds as if the statute had been pleaded. *May v. Rice (May v. Sloan)* 101 U. S. 231, 25: 797

Cited in Dunphy v. Ryan, 116 U. S. 496, 29 L. ed. 704, 6 Sup. Ct. Rep. 486—*McDonald v. Yungbluth*, 46 Fed. 837—*Press Pub. Co. v. Falk*, 59 Fed. 327—*Buhl v. Stephens*, 84 Fed. 926—*Levis v. Kengla*, 8 App. D. C. 238—*Feeney v. Howard*, 79 Cal. 534, 4 L.R.A. 829, 12 Am. St. Rep. 162, 21 Pac. 984—*Von Trotha v. Bamberger*, 15 Colo. 14, 24 Pac. 883—*Third Nat. Bank v. Steel*, 129 Mich. 438, 64 L.R.A. 125, 88 N. W. 1050—*Ryan v. Dunphy*, 4 Mont. 356, 1 Pac. 710—*Graham v. Heinrich*, 13 Okla. 120, 74 Pac. 323—*Eaves v. Vial*, 98 Va. 140, 34 S. E. 978—*Williams-Hayward Shoe Co. v. Brooks*, 9 Wyo. 430, 64 Pac. 342.

694. A party cannot avail of a former adjudication which has not been pleaded for any purpose. *Morgan County v. Allen*, 103 U. S. 498, 26: 499

695. Extrinsic evidence to contradict the record of a judgment, by showing that appearance by the attorney was unauthorized, is not admissible under a plea of *mul tiel record*. A defense requiring evidence to contradict the record must be formally pleaded. *Hill v. Mendenhall*, 21 Wall. 453, 22: 616
Cited in Gage v. Bell, 124 Fed. 380—*Harper v. Cunningham*, 5 App. D. C. 205—*Eaton v. Hasty*, 6 Neb. 427, 29 Am. Rep. 365—*Hoffheimer v. Stiefel*, 17 Misc. 239, 39 N. Y. Supp. 714—*Tuggle v. Leath*, 14 *Louzerne Legal Reg.* 42—*Ritchie v. Carpenter*, 2 Wash. 522, 26 Am. St. Rep. 577, 28 Pac. 380.

Patents.

Deciding Invalidity of Patent on Demurrer, see *infra*, 850.

Admissibility of Patents not Set Up in the Answer, see Evidence, 2664.

Notice of Special Matter in Patent Cases, see Evidence, 2667-2687.

Pleading as Equivalent of Notice of Special Matter to be Offered in Evidence, see Evidence, 2672, 2680, 2682, 2685.

Admissibility of Letters Patent to a Third Person not Set Up By Way of Defense, see Evidence, 2678.

Admissibility of Evidence Under General Denial, see Evidence, 2710-2712.

696. The defense of lack of patentability

can be availed of without setting it up in the answer. *Hendy v. Golden State & Miners' Iron Works*, 127 U. S. 370, 8 Sup. Ct. Rep. 1275, 32: 207

Cited in May v. Juneau County, 137 U. S. 411, 34 L. ed. 730, 11 Sup. Ct. Rep. 102—*Hunt Bros. Fruit Packing Co. v. Cassidy*, 3 C. C. A. 528, 7 U. S. App. 424, 53 Fed. 280—*Brickill v. Hartford*, 57 Fed. 217.

697. In an action for damages for infringement of letters patent, want of patentability is a defense, though not set up in an answer or plea. *May v. Juneau County*, 137 U. S. 408, 11 Sup. Ct. Rep. 102, 34: 729

698. If a patent be void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the cause on that ground, whether the defense be set up in the answer or not. *Slawson v. Grand Street P. P. & F. R. Co.* 107 U. S. 649, 2 Sup. Ct. Rep. 663, 27: 576
Cited in Mahn v. Harwood, 112 U. S. 359, 28 L. ed. 667, 5 Sup. Ct. Rep. 174—*Hendy v. Golden State & Miner's Iron Works*, 127 U. S. 373, 32 L. ed. 209, 8 Sup. Ct. Rep. 1275—*May v. Juneau County*, 137 U. S. 411, 34 L. ed. 730, 11 Sup. Ct. Rep. 102—*Richards v. Chase Elevator Co.* 158 U. S. 301, 39 L. ed. 992, 15 Sup. Ct. Rep. 931—*Nicodemus v. Frazier*, 19 Fed. 262—*Brickill v. Hartford*, 57 Fed. 217—*Jones v. Cyphers*, 62 C. C. A. 23, 126 Fed. 735.

699. A defense that the patentee was not the first and original inventor cannot be made where it is not set up in the answer. *Rates v. Coe*, 98 U. S. 31, 25: 68
Cited in Imhaeuser v. Buerk, 101 U. S. 660, 25 L. ed. 947—*Parks v. Booth*, 102 U. S. 104, 26 L. ed. 57—*Andrews v. Hovey*, 124 U. S. 713, 31 L. ed. 502, 8 Sup. Ct. Rep. 676—*Strobridge v. Lindsay*, 5 Bann. & Ard. 414, 2 Fed. 695—*Goodvear Tire & Rubber Co. v. Rubber Tire Wheel Co.* 53 C. C. A. 598, 116 Fed. 376—*Diamond Drill & Mach. Co. v. Kelly Bros.* 120 Fed. 287—*Anderson v. Collins*, 58 C. C. A. 676, 122 Fed. 458.

700. A defendant in a suit for the infringement of a patent, who relies upon a want of knowledge on his part of the actual existence of the patent, should allege that defense in his answer. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. Rep. 799, 36: 609

Cited in Coupe v. Royer, 155 U. S. 584, 39 L. ed. 270, 15 Sup. Ct. Rep. 1199—*Winchester Repeating Arms Co. v. American Buckle & Cartridge Co.* 54 Fed. 711—*New Departure Bell Co. v. Bevin Bros. Mfg. Co.* 64 Fed. 866—*Lowell Mfg. Co. v. Hogg*, 70 Fed. 787—*Tuttle v. Clafin*, 22 C. C. A. 148, 45 U. S. App. 105, 76 Fed. 237—*Hart & H. Mfg. Co. v. Anchor Electric Co.* 34 C. C. A. 609, 92 Fed. 660.

2. Statute of Limitations.

right to Plead Statute, see *supra*, 675.

Sufficiency of Answer Setting up Statute, see *infra*, III. h. 3.

Setting up Statute by Reply, see *infra*, 809-811.

Necessity of Plaintiff Alleging Facts Avoiding Bar, see *supra*, 438-443.

Opening Judgment to Let in Plea of Statute, see Judgment, 1225.
See also Limitation of Actions, 16, 67.

701. Statutes of limitation, to be available as a defense, must be specially pleaded. *Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. Rep. 453, 34: 1086

702. The defense of a statute of limitations must be pleaded, and will not be considered for the first time on review. *Bufington v. Harvey*, 95 U. S. 99, 24: 381

703. A defense arising under the statute of limitations is not within a plea of the general issue. *Retzer v. Wood*, 109 U. S. 185, 3 Sup. Ct. Rep. 164, 27: 900

704-5. Prescription is lost to a mortgagor by his failure to plead it in foreclosure. *Shields v. Schiff*, 124 U. S. 351, 8 Sup. Ct. Rep. 510, 31: 445
Cited in Cartwright v. Cartwright, 68 Ill. App. 76—*Southern R. Co. v. Ferguson*, 105 Tenn. 561, 80 Am. St. Rep. 908, 59 S. W. 343.

Executor or administrator.

706. Under the laws of Virginia an executor is not obliged to plead the statute of limitations when sued. *West v. Smith*, 8 How. 402, 12: 1130

Cited in Sanderson v. Sanderson, 17 Fla. 853—*Pursel v. Pursel*, 14 N. J. Eq. 526.

707. A defense of the statute of limitations, interposed by an administrator, cannot avail those who represent the real estate, and who are the only parties in interest, in an action to subject the real estate to the payment of a debt. *Ingle v. Jones*, 9 Wall. 486, 19: 621

Minors.

708. It is the duty of the court to give minor defendants the benefit of the statute of limitations under an answer for them by a guardian *ad litem* submitting their rights to the protection of the court. *White v. Miller (White v. Joyce)* 158 U. S. 128, 15 Sup. Ct. Rep. 788, 39: 921
Cited in Walker v. Redding, 40 Fla. 128, 23 So. 565.

Duties.

709. The conditions imposed by the statute allowing to importers a right of action for duties illegally exacted after due protest, appeal to the Secretary of the Treasury, and his decision thereon, cannot be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitations. *Arnson v. Murphy*, 115 U. S. 579, 6 Sup. Ct. Rep. 185, 29: 491

How defense may be interposed.

Rule in Federal Courts, see Courts, 1287.

710. In cases between individuals, when the facts appear on the face of the bills, and no circumstances are stated which take the case out of the operation of the statute of limitations, the defendant may undoubtedly take advantage of it by demurrer, and is not

bound to plead or answer. *Rhode Island v. Massachusetts*, 15 Pet. 233, 10: 721
Cited in Mercantile Nat. Bank v. Carpenter,
 101 U. S. 568, 25 L. ed. 816.

711. A defense to a suit for the confirmation of a French or Spanish land grant, that the petition was not filed within the time limited therefor by an act of Congress, may be taken by way of answer, as well as by plea. *United States v. Porche*, 12 How. 426, 13: 1051

Laches.

Taking Bar of Laches by Demurrer, see *infra*, 865, 866.

712. A party seeking to enforce a stale claim should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his alleged rights, the means used to keep him in ignorance, and how he first came to the knowledge of his rights. *Godden v. Kimmell*, 99 U. S. 201, 25: 431

Cited in Wollensak v. Reither, 115 U. S. 102, 29 L. ed. 352, 5 Sup. Ct. Rep. 1137—*Felix v. Patrick*, 145 U. S. 332, 36 L. ed. 726, 12 Sup. Ct. Rep. 862—*Hardt v. Heldweyer*, 152 U. S. 559, 38 L. ed. 552, 14 Sup. Ct. Rep. 671—*Taylor v. Holmes*, 14 Fed. 509—*Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 639—*Teall v. Slaven*, 40 Fed. 781—*Van Vleet v. Sledge*, 45 Fed. 748—*Wetzel v. Minnesota R. Transfer Co.* 12 C. C. A. 494, 27 U. S. App. 594, 65 Fed. 26—*Rhino v. Emery*, 65 Fed. 835—*Dugan v. O'Donnell*, 68 Fed. 992—*Lant v. Manley*, 71 Fed. 15—*Jones v. Perkins*, 76 Fed. 84—*Curtis v. Lakin*, 36 C. C. A. 226, 94 Fed. 255—*New York Secur. & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 233—*Potts v. Alexander*, 118 Fed. 887—*Boynnton v. Haggart*, 57 C. C. A. 312, 120 Fed. 830—*Parker v. Kuhn*, 21 Neb. 427, 59 Am. Rep. 838, 32 N. W. 74—*Gay v. Havermale*, 27 Wash. 396, 67 Pac. 804.

713. A bill in equity should show affirmatively the reasons for delay in seeking relief, since a bill may be dismissed by the chancellor of his own motion for laches, without regard to defendant's pleading. *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. Rep. 437, 31: 396

Cited in Abraham v. Ordway, 158 U. S. 421, 39 L. ed. 1039, 15 Sup. Ct. Rep. 894—*Mackall v. Willoughby*, 167 U. S. 687, 42 L. ed. 325, 17 Sup. Ct. Rep. 951—*Teall v. Slaven*, 40 Fed. 781—*Van Vleet v. Sledge*, 45 Fed. 748—*Caulk v. Pace*, 3 C. C. A. 639, 2 U. S. App. 531, 53 Fed. 714—*Rhino v. Emery*, 65 Fed. 836—*Halsey v. Cheney*, 15 C. C. A. 662, 34 U. S. App. 50, 68 Fed. 768—*Nash v. Ingalls*, 41 C. C. A. 549, 101 Fed. 649—*Westinghouse Air Brake Co. v. New York Air Brake Co.* 111 Fed. 742—*Gibson v. Herriott*, 55 Ark. 95, 29 Am. St. Rep. 17, 17 S. W. 589—*Mayse v. Gaddis*, 2 App. D. C. 28—*Levis v. Kengla*, 8 App. D. C. 240—*Mackall v. Mitchell*, 18 App. D. C. 64.

714. Lapse of time was considered by the court, although not specially pleaded in defense of a bill charging a constructive trust. *Prevost v. Gratz*, 6 Wheat. 481, 5: 311

Cited in Salmon v. Clagett, 3 Bland, Ch. 142.

715. To let in the defense that the claim is stale, it is not necessary that a foundation shall be laid by any averment of the statute of limitations in the answer of the defendants. *Sullivan v. Portland, & K. R. Co.* 94 U. S. 806, 24: 324

Cited in Brown v. Buena Vista County, 95 U. S. 160, 24 L. ed. 423—*McLean v. Fleming*, 96 U. S. 257, 24 L. ed. 833—*Speidel v. Herich*, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—*Richards v. Mackall*, 124 U. S. 188, 31 L. ed. 399, 8 Sup. Ct. Rep. 437—*Ware v. Galveston City Co.* 146 U. S. 115, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Abraham v. Ordway*, 158 U. S. 420, 39 L. ed. 1039, 15 Sup. Ct. Rep. 894—*Willard v. Wood*, 164 U. S. 524, 41 L. ed. 540, 17 Sup. Ct. Rep. 176—*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 697, 42 L. ed. 631, 18 Sup. Ct. Rep. 223—*Maine v. United States*, 36 Ct. Cl. 556—*Livingston v. Ore B-d*, 16 Blatchf, 561, Fed. Cas. No. 8,418—*Credit Co. v. Arkansas C. R. Co.* 5 McCrary, 34, 15 Fed. 55—*United States v. Beebe*, 4 McCrary, 17, 17 Fed. 40—*Bartles v. Gibson*, 17 Fed. 298—*Leavenworth County v. Chicago, R. I. & P. R. Co.* 5 McCrary, 509, 18 Fed. 210—*Pratt v. California Min. Co.* 9 Sawy. 366, 24 Fed. 877—*Lakin v. Sierra Buttes Gold Min. Co.* 25 Fed. 344—*Barden v. Duluth*, 28 Fed. 15—*Norris v. Haggla*, 12 Sawy. 50, 28 Fed. 278—*Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 639—*Mathews v. Burdick*, 38 Fed. 896—*Teall v. Slaven*, 40 Fed. 781—*Pickering v. Leberman*, 41 Fed. 378—*United States v. Dalles Military Road Co.* 41 Fed. 500—*Naddo v. Bardon*, 47 Fed. 790—*St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 269, 4 U. S. App. 160, 49 Fed. 324—*Kinne v. Webb*, 49 Fed. 515—*DeMartin v. Phelan*, 2 C. C. A. 525, 7 U. S. App. 233, 51 Fed. 867—*Caulk v. Pace*, 3 C. C. A. 639, 2 U. S. App. 531, 53 Fed. 714—*Hinchman v. Kelley*, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—*Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 652, 17 U. S. App. 145, 57 Fed. 944—*Halsey v. Cheney*, 15 C. C. A. 662, 34 U. S. App. 50, 68 Fed. 768—*Dugan v. O'Donnell*, 68 Fed. 992—*Lant v. Manley*, 71 Fed. 16—*Swift v. Smith*, 25 C. C. A. 158, 49 U. S. App. 181, 79 Fed. 712—*New York Security & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 233—*Union P. R. Co. v. Cook*, 39 C. C. A. 91, 98 Fed. 286—*Williamson v. Monroe*, 101 Fed. 330—*Guarantee Trust & S. D. Co. v. Delta & Pine-Land Co.* 43 C. C. A. 406, 104 Fed. 15—*Westinghouse Air Brake Co. v. New York Air Brake Co.* 111 Fed. 742—*Callvada Colonization Co. v. Hays*, 119 Fed. 208—*Shea v. Nilma*, 133 Fed. 214—*Moore v. Nicker*, 68 C. C. A. 671, 133 Fed. 293—*Gibson v. Herriott*, 55 Ark. 93, 29 Am. St. Rep. 17, 17 S. W. 589—*Harris v. Hillegass*, 66 Cal. 80, 4 Pac. 987—*Bell v. Hudson*, 73 Cal. 287, 2 Am. St. Rep. 791, 14 Pac. 791—*Great West Min. Co. v. Woodmas of Alston Min. Co.* 14 Colo. 95, 23 Pac. 908—*Snider v. Rinehart*, 20 Colo. 460, 39 Pac. 408—*Hagerman v. Bates*, 24 Colo. 80, 49 Pac. 139—*Morgan v. King*, 27 Colo. 549, 63 Pac. 416—*Hagerman v. Bates*, 5 Colo. App. 404, 38 Pac. 1100—*Stansbury v. Inglehart*, 9 Mackey, 161—*Levis v. Kengla*, 8 App. D. C. 240—*Mathews v. Culbertson*, 83 Iowa, 441, 50 N. W. 201—*Old Times Distillery Co. v. Casey*, 104 Ky. 620, 42 L.R.A. 468, 84 Am. St. Rep. 480, 47 S. W. 610—*Spaulding v. Farwell*, 70 Me. 22—*Atty. Gen. v. Algonquin Club*, 153 Mass. 453, 11 L.R.A. 502, 27 N. E. 2—*Snow v. Boston Blank Book Mfg. Co.* 153 Mass. 457,

26 N. E. 1116—Harlow v. Lake Superior Iron Co. 41 Mich. 590, 2 N. W. 913—Kelly v. Hurt, 74 Mo. 566—Kline v. Vogel, 90 Mo. 248, 1 S. W. 733—Burgess v. St. Louis C. R. Co. 99 Mo. 508, 12 S. W. 1050—Murphy v. DeFrance, 105 Mo. 69, 15 S. W. 949—Wendover v. Baker, 121 Mo. 291, 25 S. W. 918—Wiggin v. Swamscot Mach. Co. 68 N. H. 16, 38 Atl. 727—DeGrauw v. Mechan, 48 N. J. Eq. 225, 21 Atl. 103—Coles v. Vanneman, 51 N. J. Eq. 329, 18 Atl. 468—Patterson v. Hewitt, 11 N. M. 21, 55 L.R.A. 663, 66 Pac. 552—Sedlak v. Sedlak, 14 Or. 541, 13 Pac. 452—Battin v. Martin, 10 Lanc. L. Rev. 211—Hensel v. Kegans, 8 Tex. Civ. App. 586, 28 S. W. 705—Tufts v. Tufts, 8 Utah, 148, 16 L.R.A. 485, 30 Pac. 309—Scott v. Crouch, 24 Utah, 389, 67 Pac. 1068—King v. White, 63 Vt. 166, 25 Am. St. Rep. 752, 21 Atl. 535—Morgan v. Fisher, 82 Va. 423—Graveley v. Graveley, 84 Va. 150, 4 S. E. 218—Troll v. Carter, 15 W. Va. 583—Cranmer v. McSworads, 24 W. Va. 602—Sommers v. Ward, 41 W. Va. 80, 23 S. E. 520—Coon v. Seymour, 71 Wis. 346, 37 N. W. 243—Kropp v. Kropp, 97 Wis. 145, 72 N. W. 381—McCann v. Welch, 106 Wis. 149, 81 N. W. 996.

h. Sufficiency.

1. In General.

State Decision as Rule in Federal Courts as to Deficiency in State Pleadings, see Courts, 2122.

In Divorce Suit, see Divorce and Separation, 14.

Pleading Prior Use of Patent, see Evidence, 2680.

715a. A plea on which issue has been taken, although defective in form, is sufficient if it contains matter sufficient in substance, which, if true, would bar the action. Stead v. Course, 4 Cranch, 403.

2: 660

Cited in Farley v. Kittson, 120 U. S. 315, 30 L. ed. 688, 7 Sup. Ct. Rep. 534—United States v. California & O. Land Co. 148 U. S. 40, 37 L. ed. 359, 13 Sup. Ct. Rep. 458—Dzelil v. Dueber Watch Case Mfg. Co. 149 U. S. 326, 37 L. ed. 755, 13 Sup. Ct. Rep. 886—Matthews v. Lalance & G. Mfg. Co. 18 Blatchf. 87, 5 Bann. & Ard. 322, 2 Fed. 235—Jones v. Hillis, 100 Fed. 356—Barber v. National Carbon Co. 129 Fed. 377.

716. A plea to the jurisdiction cannot be sustained when its correctness depends upon the existence of facts which are not admitted. Wright v. United States, 158 U. S. 232, 15 Sup. Ct. Rep. 819, 39: 963

717. A plea cannot be sustained which rests for its validity upon a supposed state of facts which may not exist. The plea must be an answer to the declaration. Lyon v. Bertram, 20 How. 149, 15: 847

718. An answer, to be good, must overcome the case made by the complainant. If the facts in the complaint are admitted, it must state other facts sufficient, if true, to defeat the action. Gillette v. Bullard, 20 Wall. 571, 22: 387

719. A plea not supported by the testimony should be overruled, and the defend-

ant ordered to answer the bill. Dalzell v. Dueber Watch Case Mfg. Co. 149 U. S. 315, 13 Sup. Ct. Rep. 886, 37: 749
Cited in Harts v. Cleveland Block Co. 37 C. C. A. 228, 95 Fed. 682—Westervelt v. Library Bureau, 55 C. C. A. 438, 118 Fed. 828—Eveleth v. Southern California R. Co. 123 Fed. 838.

720. An answer is not responsive to the bill, where it sets up distinct affirmative matter of defense and bar, which the defendants must prove, or it can have no effect for either purpose. Bank of United States v. Beverly, 1 How. 134, 11: 75
Cited in Wagenhurst v. Wineland, 22 App. D. C. 386—Eberly v. Groff, 21 Pa. 256.

721. Although no plea is to be held bad merely because the answer may extend to some part of the same matter covered by the plea, a plea may be overruled where the answer extends to the whole of the matter covered by it. Grant v. Phoenix Mut. L. Ins. Co. 121 U. S. 105, 7 Sup. Ct. Rep. 841, 30: 905

Cited in Mercantile Trust Co. v. Missouri, K. & T. R. Co. 84 Fed. 383.

722. Dismissal of a former bill filed by the same complainants, set up by an answer as a defense, is insufficient, unless the record is exhibited. Bank of United States v. Beverly, 1 How. 134, 11: 75
Cited in McCartney v. Fletcher, 10 App. D. C. 599.

723. Fraud consists in intention; and that intention is a fact which must be averred in a plea of fraud. Moss v. Riddle, 5 Cranch, 351, 3: 123

Cited in Brooks v. O'Hara Bros, 2 McCrary, 649, 8 Fed. 532—Blewett v. Front-Street Cable R. Co. 49 Fed. 127—Bartol v. Walton & W. Co. 92 Fed. 14—Feeney v. Howard, 79 Cal. 528, 4 L.R.A. 828, 12 Am. St. Rep. 162, 21 Pac. 984—Woodroof v. Howes, 88 Cal. 190, 26 Pac. 111—Ross v. Webster, 63 Conn. 68, 27 Atl. 476—Robson v. Harwell, 4 Ga. 614—Gray v. Earl, 13 Iowa, 190—Savage v. Davis, 7 Wend. 225.

724. If a bona fide purchase, without notice, be set up by plea or answer, the contents of the deed of purchase and the consideration must be stated, and it must be averred that it was bona fide and truly paid, independently of the recital in the deed, and notice must be denied previous to the delivery of the deed. Boone v. Chiles, 10 Pet. 177, 9: 388

Cited in Stanley v. Schwalby, 162 U. S. 277, 40 L. ed. 967, 16 Sup. Ct. Rep. 754—Re Long, 7 Phila. 590, Fed. Cas. No. 8,477—German Sav. & L. Soc. v. De Lashmuth, 67 Fed. 401—United States v. Sierra Nevada Wood & Lumber Co. 79 Fed. 604—Balfour v. Parkinson, 84 Fed. 860—Balfour v. Hopkins, 35 C. C. A. 450, 93 Fed. 570—Newman v. Schwerin, 48 C. C. A. 747, 109 Fed. 948—Ledbetter v. Walker, 31 Ala. 177—Smith v. Perry, 56 Ala. 269—Wynn v. Rosette, 66 Ala. 521—Wood v. Holly Mfg. Co. 100 Ala. 350, 46 Am. St. Rep. 56, 13 So. 948—Troy v. May, 101 Ala. 405, 13 So. 263—Buck v. Martin, 27 Ark. 7—Pearce v. Foreman, 29 Ark. 568—Davis v. Ward, 109 Cal. 187, 50 Am. St. Rep. 29, 41 Pac. 1010—Wagenhurst v. Wineland, 20 App. D. C. 97

—Brown v. Welch, 18 Ill. 346, 68 Am. Dec. 549—Watson v. Phelps, 40 Iowa, 483—Nolan v. Grant, 53 Iowa, 393, 5 N. W. 513—Bayard v. Norris, 5 Gill, 482, 46 Am. Dec. 647—Du Val v. Wilmer, 88 Md. 77, 41 Atl. 122—Pingree v. Coffin, 12 Gray, 307—Bank of Farmington v. Ellis, 30 Minn. 272, 15 N. W. 243—Lewis v. Lindley, 19 Mont. 443, 48 Pac. 765—Cox v. Wall, 132 N. C. 739, 44 S. E. 635—Woods v. Dille, 11 Ohio, 458—Lynch v. United States, 13 Okla. 145, 73 Pac. 1095—Hyland v. Hyland, 19 Or. 55, 23 Pac. 811—Raymond v. Flavel, 27 Or. 248, 40 Pac. 158—York v. McNutt, 16 Tex. 16, 67 Am. Dec. 607—Watkins v. Edwards, 23 Tex. 447—Briscoe v. Ashby, 24 Gratt. 477—National Valley Bank v. Harman, 75 Va. 609—Smith v. Ford, 48 Wis. 149, 2 N. W. 134.

725. In a suit to set aside a tax sale, where the facts relied upon to give equitable relief are within the defendant's own knowledge, he, the defendant, must answer positively, and not merely to his remembrance or belief. *Slater v. Maxwell*, 6 Wall. 268, 18: 796

726. In an action by the patentee of a placer claim, to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included in his application, well pleads the fact which, under Rev. Stat. § 2333, precludes him from having any right of possession of the vein or lode. *Sullivan v. Iron Silver Min. Co.* 109 U. S. 550, 3 Sup. Ct. Rep. 339, 27: 1028

Cited in Noyes v. Mantle, 127 U. S. 353, 32 L. ed. 170, 8 Sup. Ct. Rep. 1132—*Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co.* 143 U. S. 421, 36 L. ed. 210, 12 Sup. Ct. Rep. 543—*Sullivan v. Iron Silver Min. Co.* 143 U. S. 434, 36 L. ed. 215, 12 Sup. Ct. Rep. 555—*Worthen v. Sidway*, 72 Ark. 225, 79 S. W. 777—*Mantle v. Noyes*, 5 Mont. 293, 5 Pac. 856—*Horasky v. Moran*, 21 Mont. 849, 53 Pac. 1064.

727. An answer in a suit to foreclose a trust deed, setting up the homestead exemption, which does not show a compliance with the statute as to recording a homestead, is fatally defective. *Goodwin v. Colorado Mortg. & Invest. Co.* 110 U. S. 1, 3 Sup. Ct. Rep. 473, 28: 47

728. A plea that defendants had built their dam to its present height by right of certain statutes, which had not authorized it to be built to that height, nor provided for compensation for lands overflowed by it, is not good as showing color of right or lawful maintenance. *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20: 557

729. Where a plea relies on a statute authority as a defense, it must allege the facts which it asserts to be so authorized, and cannot allege generally that it complied with the statute. *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20: 557
Cited in Hopper v. Covington, 118 U. S. 151, 30 L. ed. 193, 6 Sup. Ct. Rep. 1025—*Eisenbach v. Hatfield*, 2 Wash. 265, 12 L.R.A. 645, 26 Pac. 539.

729a. If a bond be not usurious by the

law of the place where payable, a plea of usury cannot be sustained in an action thereon, unless it alleged that the place of payment was inserted as a shift or device to evade the law of the place where the bond was made. *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20: 385
Cited in Atkinson v. Allen, 17 C. C. A. 572, 36 U. S. App. 255, 71 Fed. 59—*Shannon v. Georgia State Bldg. & L. Asso.* 78 Miss. 975, 57 L.R.A. 805, 84 Am. St. Rep. 657, 30 So. 51.

730. Plea of the amnesty proclaimed by the President is insufficient, where it contains no averment that claimant was not within any of the exceptions made by the proclamation. *St. Louis Street Foundry v. United States (St. Louis Street Foundry)* 6 Wall. 770, 18: 894

731. The question of the forfeiture of a railroad grant for noncompletion within the time limited by the grant is not put in issue in a suit to annul a patent on the sole ground that it was issued under a mistaken belief as to the location of a terminus, by an allegation in the answer that it was "duly" and "in all respects" constructed in accordance with the law. *United States v. Northern P. R. Co.* 177 U. S. 435, 20 Sup. Ct. Rep. 706, 44: 836
Cited in King v. McAndrews, 50 C. C. A. 31, 111 Fed. 863.

Editorial notes.

Sufficiency of plea of usury. 2: 404

[Sufficiency of answers denying ownership of plaintiff in actions on negotiable instruments. 66 L.R.A. 513.]

Replevin.

732. The *similiter* to the plea of property, in replevin, is a matter of form, and its omission does not affect the validity of the plea. *Ingle v. Wallach (Dermott v. Wallach)* 1 Black, 96, 17: 50
Cited in Charles County v. Mandanyohl, 93 Md. 155, 48 Atl. 1058.

733. A plea in replevin that the goods and chattles mentioned in the declaration were not the property of the plaintiff is a good plea in substance in bar of the action. *Ingle v. Wallach (Dermott v. Wallach)* 1 Black, 96, 17: 50

733a. An avowry in replevin against a marshal, justifying the taking to satisfy a fine and forfeiture imposed by a court-martial for failure to perform militia service when required by the President, under the act of February 28, 1795, need not aver the existence of the exigency upon which the President acted, nor need it set out the orders of the President at large if it states that the call was in obedience to them. *Martin v. Mott*, 12 Wheat. 19, 6: 537
Cited in Wilder v. McCormick, 2 Blatchf. 34, Fed. Cas. 17,650—*Bruen v. Ogden*, 11 N. J. L. 375, 20 Am. Dec. 593.

— Editorial note.

Pleas in replevin, of property in defendant or a stranger, and of *non cepit*. 17: 50

Seizure.

734. A plea justifying a seizure and detention under the instructions of the President, for a supposed violation of the neutrality act of 1794, must aver that the naval or military force of the United States was employed for that purpose, and that the captor belonged to the force so employed. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381

735. A plea setting up a forfeiture under the neutrality act of 1794, in fitting out a ship to cruise against a new state, must aver that such state has been acknowledged by the United States or by the government to which it belonged. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381
Cited in *The Three Friends*, 78 Fed. 176.

736. A plea justifying a seizure for breach of the neutrality act of 1794 by fitting out a ship to cruise against a new state need not state by name the particular prince or state in whose service or against whom the ship was intended to cruise. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381
Cited in *United States v. O'Sullivan*, 9 N. Y. Legal Obs. 287, Fed. Cas. No. 15,974.

2. Payment; Tender.**Payment.**

Admissibility of Evidence Under, see Evidence, 2715-2718.

Sufficiency of Allegations to Enjoin Enforcement of Judgment, see Injunction, 216.

737. Upon a contract for the payment of a certain sum of money on a certain date, a plea of payment of that sum on a subsequent date is not good. *United States v. Gurney*, 4 Cranch, 333, 2: 638
Cited in *Redman v. State*, 1 Blackf. 474.

738. In an action of covenant on a charter party to recover sums stipulated therein, a plea of payment of the sums demanded in the declaration would confess and avoid the count and the affirmative would rest on the defendant to prove payment. *Simonton v. Winter*, 5 Pet. 141, 8: 75
Cited in *Shropshire v. Amite County Probate Judge*, 4 How. (Miss.) 133.

739. Where a breach assigned in the declaration was special,—the non-payment of a certain sum of money for specific services alleged to have been rendered,—a plea which alleges generally that the defendant had paid all such sums of money as were to become due and payable from the defendant, according to the intent of the agreement, is bad, to be considered as a nullity, and the plaintiff must prove the averments in the declaration. *Simonton v. Winter*, 5 Pet. 141, 8: 75
Cited in *Garland v. Davis*, 4 How. 150, 11 L. ed. 916—*Hazard v. Purdom*, 3 Port. (Ala.) 48—*Pool v. Hill*, 44 Miss. 310.

740. There can be no ground for presuming payment to the government where the pleas on which the presumption is supposed to arise not only did not allege payment,

but presupposes that payment has not been made, which failure to pay is ascribed to the laches of the officers of the government. *Dox v. Postmaster General*, 1 Pet. 318, 7: 160

Tender.

741. A plea which states that the sum due on a promissory note was a certain amount on a certain day, and avers tender on that day of the sum due in legal tender notes, is a good plea of tender. *Dooley v. Smith*, 13 Wall. 604, 20: 547

742. A demurrer to a plea which admits that a coupon tendered in payment of a license tax in Virginia was genuine, and bore on its face the contract of the state that it should be received in payment of all taxes, etc., shows a good tender. *Royall v. Virginia*, 121 U. S. 102, 7 Sup. Ct. Rep. 826, 30: 883

Cited in *McGahey v. Virginia*, 135 U. S. 679, 34 L. ed. 310, 10 Sup. Ct. Rep. 972—*McCullough v. Virginia*, 172 U. S. 106, 43 L. ed. 883, 19 Sup. Ct. Rep. 134.

3. Statute of Limitations.

Necessity of Pleading Statute, see supra, III. g, 2.

Waiver of Objection, see supra, 54.

Necessity of Plaintiff Alleging Facts Avoiding Bar, see supra, 438-443.

Setting up Statute by Reply, see infra, 809-811.

See also supra, 217.

743. In pleading the statute of limitations, it is unnecessary to rely, in terms, on the statute, as the court is judicially bound to take notice of the statute when the facts are stated and relied on as a bar to further proceedings, if they are found sufficient. *Harpending v. Reformed Protestant Dutch Church*, 16 Pet. 455, 10: 1029

744. A party claiming a disability under the statute of limitations must show, by a proper averment, a continuance of it to a time within which it would have been a perfect evidence of the bar. *Marsteller v. M'Clean*, 7 Cranch, 156, 3: 300
Distinguished in *Lewis v. Barksdale*, 2 Brock. 445, Fed. Cas. No. 8,317.

Cited in *Taylor v. Benham*, 5 How. 263, 12 L. ed. 145—*Buel v. St. Louis Transfer Co.* 45 Mo. 564—*Gross v. Disney*, 95 Tenn. 596, 32 S. W. 632.

745. The defendant to an attachment in chancery in Virginia may plead the statute of limitations, without denying the debt or averring it to be paid. *Wilson v. Koontz*, 7 Cranch, 202, 3: 315

746. A plea of the statute of limitations to an action to recover rents claimed to have been confiscated by military order is not bad because it does not set out a copy of the military order on which the defense is founded, where it does not appear that the order was in writing, and the substance of it is given. *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. Rep. 170, 312, 28: 279

747. A plea under the statute of limitations, where the defendant claimed certain lands by metes and bounds, and disclaimed all not included within them, was bad, there being nothing to show that the land included was part of the land claimed by the plaintiff. *Christy v. Scott*, 14 How. 282, 14: 422

748. A plea that the cause of action did not accrue within two years will not be sufficient, where the declaration will allow proof either of a cause that would be barred in two years or of another that would be barred in three years, and the plea does not contain averments to show that the cause is not of the latter class. *Lyon v. Bertram*, 20 How. 149, 15: 847
Cited in *Coler v. Sante Fe County*, 6 N. M. 113, 27 Pac. 619.

749. A plea of the statute of limitations, which is good as to one plaintiff, bars them both in a joint action. *Marsteller v. M^cClean*, 7 Cranch, 156, 3: 300
Distinguished in United States use of *McCarthy v. O'Leary*, 8 Mackey, 132—*Shute v. Wade*, 5 Yerg. 10.

Cited in *Shipp v. Miller*, 2 Wheat. 324, 4 L. ed. 251—*Davis v. Coblens* 174 U. S. 725, 43 L. ed. 1150, 19 Sup. Ct. Rep. 832—*Hardeman v. Sims*, 3 Ala. 751—*Lytle v. State*, 17 Ark. 652—State use of *Hazzard v. Layton*, 3 Harr. (Del.) 356—*Layton v. State*, 4 Harr. (Del.) 20—*Davis v. Coblens*, 12 App. D. C. 60—*Conyers v. Kennon*, 1 Ga. 380—*Shannon v. Dunn*, 8 Blackf. 183—*Burge*, 32 N. C. (10 Ired. L.) 171—*Sturges v. Longworth*, 1 Ohio St. 562—*Schnader v. Bender*, 8 Northampton Co. Rep. 263—*Henry v. Stewart*, 2 Hill, L. 333—*Hill v. Sanders*, 4 Rich. L. 528, 55 Am. Dec. 696—*Barrow v. Nave*, 2 Yerg. 227—*Allen v. Farrington*, 2 Sneed, 534—*University of Vermont v. Reynolds*, 3 Vt. 557, 23 Am. Dec. 234.

4. Justification.

Reply to Plea of, see *infra*, 795.

750. Whenever one justifies an act which in itself constitutes at common law a wrong, upon the process, order, or authority of another, he must set forth substantially and in a traversable form the process, order, or authority relied upon, and no mere averment of its legal effect, without other statement, will answer. *Bean v. Beckwith*, 18 Wall. 510, 21: 849
Distinguished in *Mitchell v. Clark*, 110 U. S. 646, 28 L. ed. 283, 4 Sup. Ct. Rep. 170.
Cited in *Beckwith v. Bean*, 98 U. S. 292, 25 L. ed. 134—*Edger v. Burke*, 96 Md. 723, 54 Atl. 986—*Clark v. Mitchell*, 64 Mo. 567.

751. In a plea of justification by a marshal, for not levying an execution, setting forth a remission, by the Secretary of the Treasury, of the forfeiture on which the judgment was obtained, it is not necessary to set forth the statement of facts upon

which the remission was founded. *United States v. Morris*, 10 Wheat. 246, 6: 314

752. To trespass for taking and detaining and converting property it is sufficient to plead a justification of the taking and detention; and if the plaintiff relies on the conversion, he should reply to it by way of new assignment. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381

753. A plea alleging a seizure for forfeiture as a justification should not only state the facts relied on to establish the forfeiture, but aver that thereby the property became and was actually forfeited, and was seized as forfeited. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381
Cited in *Day v. Compton*, 37 N. J. L. 517—*Bishop v. Baisley*, 28 Or. 128, 41 Pac. 936.

754. In an action of trespass in a state court, if the seizing officer plead the fact of forfeiture in his defense, without averring a *lis pendens*, or a condemnation, or an acquittal with a certificate of reasonable cause of seizure, the plea is bad. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381

5. In Action on Judgment.

Estoppel by Pleading Former Judgment, see *supra*, 603.

Defenses Generally in Action on Foreign Judgment, see Judgment, VI. b, 4.

Special Demurrer for Failure to Set out Fraud in Obtaining, see *infra*, 859.

See also *supra*, 28, 603, 617; Judgment. 1011a, 1035a.

755-6. In an action upon a judgment, it is sufficient to allege, generally, that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein, the original cause of action having passed in *rem judicatam*. *Biddle v. Wilkins*, 1 Pet. 686, 7: 315
Cited in *Tenney v. Townsend*, 9 Blatchf. 277. Fed. Cas. No. 13,832—*Davis v. Davis*, 65 Fed. 383—*Thompson v. Owen*, 8 Kulp, 41.

757. *Nil debet* is not a good plea to an action founded on a judgment of another state, as the judgment is necessarily conclusive when given full faith and credit, as prescribed by Const. art. 4, § 1, and the act of 1790. *Mills v. Durjee*, 7 Cranch, 481, 3: 411

[*Armstrong v. Carson* (C. Ct.) 2 Dall. 302, 1: 391]

Maxwell v. Stewart, 21 Wall. 71, 22 Wall. 77, 22: 564

Cited in *D'Arcy v. Ketchum*, 11 How. 173, 13 L. ed. 653—*Maxwell v. Stewart*, 22 Wall. 81, 22 L. ed. 566—*Jacquette v. Huguenot*, 2 McLean, 129, Fed. Cas. No. 7,169—*Duff v. Hopkins*, 33 Fed. 608—*Buller v. Sidell*, 43 Fed. 117—*Knapp v. Knapp*, 59 Fed. 643—*Lucas v. Bank of Darien*, 2 Stew. (Ala.) 309—*Morehead v. Grisham*, 13 Ark. 435—*Marr v. Wetzel*, 3 Colo. 5—*Stell v. Glass*, 1 Ga. 486—*McDade v. Burch*, 7 Ga. 564, 50 Am. Dec. 407—*Risley v. Indianapolis*, B. & W. R. Co. Willson Super. Ct. (Ind.) 575—*Davis v. Lane*, 2 Ind. 549, 54 Am. Dec. 458—*Buchanan v. Port*, 5 Ind. 265—*Indianapolis*

B. & W. R. Co. v. Risley, 50 Ind. 62—Bimeler v. Dawson, 5 Ill. 540, 39 Am. Dec. 430—Zepp v. Hager, 70 Ill. 225—Wright v. White, 14 La. Ann. 502—Citizens' Bank v. Hancock, 35 La. Ann. 44—Williams v. Guignard, 2 How. (Miss.) 723—Brengele v. McClellan, 7 Gill & J. 440—Eaton v. Hasty, 6 Neb. 426, 29 Am. Rep. 365—Jenkins v. Union Mut. F. Ins. Co. 37 N. H. 475—Pennypit v. Foote, 27 Ohio St. 616, 22 Am. Rep. 340—Jones v. Quaker City Mut. F. Ins. Co. 9 Pa. Dist. R. 214—Thompson v. Whitman, 31 Phila. Leg. Int. 157—Evans v. Tatem, 9 Serg. & R. 260, 11 Am. Dec. 717—Napier v. Gidlere, Speers, Eq. 220, 40 Am. Dec. 613—Ridley v. Buchanan, 2 Swan, 560—Bowler v. Huston, 30 Gratt. 274, 32 Am. Rep. 673.

758. To an action on a judgment, *nil debet* pleaded. *Mayhew v. Thatcher*, 6 Wheat. 129, 5: 223
Cited in *Jenkins v. Union Mut. F. Ins. Co.* 37 N. H. 477.

759. In an action on a foreign judgment, the record cannot be denied but by the plea of *nul tiel record*. *Mills v. Duryee*, 7 Cranch, 481, 3: 411
Explained in *M'Elmoyle v. Cohen*, 13 Pet. 326, 10 L. ed. 184.

Cited in *Hilton v. Guyot*, 159 U. S. 183, 40 L. ed. 115, 16 Sup. Ct. Rep. 139—*Amory v. Amory*, 3 Biss. 271, Fed. Cas. No. 334—*Allison v. Chapman*, 19 Fed. 488—*Hunt v. Mayfield*, 2 Stew. (Ala.) 128—*Crawford v. Simonton*, 7 Port. (Ala.) 127—*Foster v. Glazener*, 27 Ala. 308—*Shumway v. Stillman*, 4 Cow. 204, 15 Am. Dec. 374—*Carpentier v. Oakland*, 30 Cal. 446—*Davis v. Smith*, 5 Ga. 207, 48 Am. Dec. 270—*Baltzell v. Nosler*, 1 Iowa, 589, 63 Am. Dec. 466—*Walker v. Sleight*, 30 Iowa, 326—*Miller v. Ewing*, 8 Smedes & M. 431—*Carleton v. Blackford*, 13 Gray, 504, 74 Am. Dec. 652—*Jenkins v. Union Mut. F. Ins. Co.* 37 N. H. 479—*Rice v. Contant*, 38 App. Div. 547, 56 N. Y. Supp. 351—*Sheriff v. Smith*, 47 How. Pr. 471—*Borden v. Fitch*, 15 Johns. 143, 8 Am. Dec. 225—*Anderson v. Anderson*, 8 Ohio, 109—*Bennett v. Morley*, 10 Ohio, 102—*Miller v. Miller*, 1 Ball. L. 243—*Cameron v. Wurtz*, 4 M'Cord, L. 280—*Estes v. Kyle*, Meigs, 42—*Kopf v. Huckins*, 11 Tex. Civ. App. 88, 32 S. W. 41—*Fullerton v. Horton*, 11 Vt. 426—*Boston India Rubber Factory v. Holt*, 14 Vt. 97—*Lapham v. Briggs*, 27 Vt. 32—*Aultman v. Mills*, 9 Wash. 69, 36 Pac. 1046.

760-2. In an action based upon a decree, an allegation by defendant that he "does not admit the validity or regularity of said decree," or that "it is operative to affect his rights," but, on the contrary, "reserves to himself the right to impeach it if occasion should offer and require him to do so," is too vague and indefinite to have any effect, and does not allow him to assail the decree. *Cheever v. Wilson*, 9 Wall. 108, 19: 604

763. A plea of *plene administravit* in an action of debt against administrators, based on a judgment, need not state with precision the assets remaining unadministered, and, if they fail to sustain their plea, they are not thereby rendered liable to a judgment beyond the amount of assets unad-

ministered. *Sigler v. Haywood*, 8 Wheat. 675, 5: 713
Cited in *Burgess v. Young*, 97 Me. 397, 54 Atl. 910.

764. Upon the issue of a sci. fa. against bail, a plea setting up that the note upon which the judgment had been obtained had been paid before the judgment was rendered is bad. The plaintiff cannot be required to prove his demand twice. *Morsell v. Hall*, 13 How. 212, 14: 117

Editorial notes.

When *nil debet* not good plea to judgments. 3: 411

Fraud as plea to judgment of another state. 18: 475

6. In Action on Bond or Specialty.

Bonds.

Plea of General Issue, see supra, 621.

Admissibility of Evidence Under Plea of Payment, see Evidence, 2715-2718.

See also infra, 858.

765. Every plea in discharge or avoidance of a bond should state in plain terms the matter in discharge or avoidance. *United States v. Bradley*, 10 Pet. 343, 9: 448
Cited in *Greathouse v. Dunlap*, 3 McLean, 314, Fed. Cas. No. 5,742.

766-7. To an action of debt for the penalty of an embargo bond, it is a good plea, under the act of 1808, that the party was prevented from relanding by unavoidable accident. *Drouseau v. United States*, 6 Cranch, 307, 31: 232

768. Where a complaint on a penal bond avers that a certain sum was due at a certain date, an answer setting up a judgment against the plaintiff on the same bond, in an action brought subsequent to such date, may be construed as a sufficient averment that the amount claimed was a part of that sought to be recovered in the prior action, where the Code under which the pleadings are made requires them to be liberally construed "with the view to substantial justice." *United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. Rep. 454, 30: 601

769. In an action upon the bond of a clerk of a court, the breach alleged being that he had surrendered certain goods taken in attachment proceedings, without taking a proper bond, a plea alleging that a bond had been taken and assigned to the plaintiffs at their request, and that they had recovered a large amount under it, held good. *Bevins use of Earle v. Ramsey*, 15 How. 179, 14: 652

770. In an action upon an official bond, a plea relying upon the fraud of the principal is equally bad when set up by the sureties as by the principal. *United States v. Girault*, 11 How. 22, 13: 587

771. In Alabama the plea of *nil debet* in an action of debt on a bond with condition, where breaches are assigned, is bad on de-

murrer. *Alexander v. Bryan*, 110 U. S. 414, 4 Sup. Ct. Rep. 107, 28: 195

772. In an action upon a bond, a plea addressed, not to the declaration, or to the breach alleged, but to the evidence which it is supposed the plaintiff will adduce, is bad. *United States v. Girault*, 11 How. 22, 13: 587
Cited in Christy v. Scott, 14 How. 293, 14 L. ed. 426.

773. A plea alleging that seals were affixed to a bond without the consent of the defendant is insufficient without alleging that it was done with the knowledge and direction of the plaintiff. *United States v. Linn*, 1 How. 104, 11: 64
Cited in Moses v. United States, 166 U. S. 583, 41 L. ed. 1124, 17 Sup. Ct. Rep. 682—*Cotten v. Williams*, 1 Fla. 49.

774. Where several defendants in an action on a bond unite in a joint plea of *non est factum*, if the plea is false as to one, it is false as to all. *United States v. Linn*, 1 How. 104, 11: 64

775. Pleas in an action on a bond given to secure sales of merchandise on credit, which set up a breach by the obligees of a parol agreement respecting prices, are insufficient where there is nothing in the declaration or bond which shows the existence of any such separate agreement, or that an alteration in the prices could or would have any effect upon the liability of the sureties. *McGuire v. Gerstley*, 204 U. S. 489, 27 Sup. Ct. Rep. 332, 51: 581
Clark v. Gerstley, 204 U. S. 504, 27 Sup. Ct. Rep. 337, 51: 589

776. Where the answer to an action on an appeal bond alleged the taking of a further appeal, but nowhere averred that it had been perfected, nor that, at the time of the commencement of the action, it was still pending, the answer contains no defense, it being averred in the complaint, and not denied in the answer, that the judgment was affirmed on the appeal, in which the appeal bond was given. *Gillette v. Bullard*, 20 Wall. 571, 22: 387
Cited in Babbitt v. Finn (Babbitt v. Shields) 101 U. S. 15, 25 L. ed. 822.

Specialties.

See also *Sale*, 171.

777. *Nil debet* is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action. *Sneed v. Wister*, 8 Wheat. 690, 5: 717
Cited in Anderson v. Sloan, 1 Colo. 487.

778. If the breach of covenant assigned be that the legislature had no authority to sell and dispose of land, it is not a good plea in bar to say that the governor was legally empowered to sell and convey the premises, although the facts stated in the plea as an inducement are sufficient to justify the defendant in denying the breach alleged. *Fletcher v. Peck*, 6 Cranch, 87, 3: 162

7. In Ejectment or Writ of Right.

Ejectment.

Sufficiency of Plaintiff's Allegations, see *supra*, II. m.

Setting up New Title by Supplemental Answer, see *supra*, 243.

Plea of Nontenure, see *supra*, 659, 660.

Sufficiency of Plea of Limitations, see *supra*, 747.

See also *supra*, 602, 619.

779. To an action of ejectment in Texas, in which plaintiff alleges that he was seised in fee, a plea that the plaintiff was not a citizen of Texas at the time of the grant to him under which the plea alleges he has title, if he has any title, is bad on demurrer. *Christy v. Scott*, 14 How. 282, 14: 422

780. Although the technical forms of common-law pleading are dispensed with in Texas, yet the principles which regulate the merits of a trial by ejectment and the substance of a plea of title to such actions are preserved. *Christy v. Scott*, 14 How. 282, 14: 422
Cited in Teese v. Phelps, 1 McAll. 19, Fed. Cas. No. 13,818.

781. In ejectment, where the plaintiff says he was seised in fee and the defendant ejected him, it is no defense for the defendant, without denying this, to allege that if the plaintiff had any paper title it was under a grant which was not valid. *Christy v. Scott*, 14 How. 282, 14: 422
Cited in Sabariego v. Maverick, 124 U. S. 296, 31 L. ed. 444, 8 Sup. Ct. Rep. 461—*Rush v. French*, 1 Ariz. 153, 25 Pac. 833—*White v. Keller*, 114 Mo. 483, 21 S. W. 861—*New Mexico, R. G. & P. R. Co. v. Crouch*, 4 N. M. 299, 13 Pac. 203—*House v. Reavis*, 89 Tex. 631, 35 S. W. 1064.

782. In ejectment, where the plaintiff says he was seised in fee and the defendant ejected him, a plea in substance that the plaintiff had no good title against the state is bad. *Christy v. Scott*, 14 How. 282, 14: 422
Cited in Christy v. Young, 14 How. 296, 14 L. ed. 428—*Hamilton v. Brown*, 161 U. S. 274, 40 L. ed. 699, 16 Sup. Ct. Rep. 585—*Davis v. Thompson*, 56 Mo. 41.

Writ of right.

What may be Pleaded in Bar of, see *supra*, 676.

Necessity of Specially Pleading Matter in Abatement, see *supra*, 678.

See also *supra*, 611.

783. In a writ of right, to plead, in addition to the mise or general issue, that neither the plaintiff nor his ancestor, nor any other under whom he derived title to the demanded premises, was ever actually seised or possessed thereof, or of any part thereof, was bad because amounting to the general issue. *Liter v. Green*, 2 Wheat. 306, 4: 246

4. Necessity of Answer.

In Case Submitted on Agreed Statement of Facts, see Agreed Case, 4.

784. An assignee of a recorded judgment, defending his title thereto in chancery against one claiming under a sale on execution against his assignor, is not bound to answer an allegation that a release of the judgment had been fraudulently recorded. *Stockton v. Ford*, 11 How. 232, 13: 676. Cited in *Brown v. Pierce*, 7 Wall. 212, 19 L. ed. 136.

785. If a bill charges the defendant with notice of a particular fact, an answer must be given to the matter without a special interrogatory. *Mechanics Bank v. Lynn*, 1 Pet. 376, 7: 185

786. A defendant is not bound to answer an interrogatory not warranted by some matter contained in a former part of the bill. *Mechanics' Bank v. Lynn*, 1 Pet. 376, 7: 185

787. The validity of a location or entry set out in a bill as a part of a title cannot be attacked by any extrinsic proof, unless its validity is denied in the answer. *Crocket v. Lee*, 7 Wheat. 522, 5: 513

788. It is not a sufficient foundation for an exception to an answer, that a fact charged in a bill is not answered, unless the fact is material, and might contribute to support the equity of the case of the complainant, and induce the court to grant the relief sought by the bill. *Hardeman v. Harris*, 7 How. 726, 12: 889. Cited in *Brown v. Pierce*, 7 Wall. 212, 19 L. ed. 136—*Peters v. Tonopah Min. Co.* 120 Fed. 589.

IV. Replication and Subsequent Pleadings.

Admission by Reply, see *supra*, 163.

Admission by Failure to Traverse Reply, see *supra*, I. m, 6.

Reply to Amended Plea, see *supra*, 220.

Withdrawal of Replication, see *supra*, 259, 260.

What Admitted by Demurrer to, see *infra*, 906.

Waiver by Filing Rejoinder, see *infra*, 935.

When Repleader Allowed, see Appeal and Error, 4322.

First Raising Objection as to, on Appeal, see Appeal and Error, 4597-4602.

Curing Error by Repleader, see Appeal and Error, 5000.

Disuse of Repleader, see Appeal and Error, 5432.

Permitting Rejoinder after Remand to Trial Court, see Appeal and Error, 5555.

Sufficiency of Rejoinder Attacking Jurisdiction Previously Attached in Another Court, see Courts, 1559.

Removal of Cause where Federal Question is First Set up in Reply, see Removal of Causes, 329.

Reply to Bill of Review, see Review, 20.

See also Dismissal and Discontinuance, 21a.

789. A party who files a new replication by leave of the court abandons his former one. *Ferguson v. Meredith* (Clearwater v. Meredith) 1 Wall. 25, 17: 604

790. A new case cannot be made in equity by a replication. *Vattier v. Hinde*, 7 Pet. 252, 8: 675

Distinguished in Lebanon Min. Co. v. Consolidated Republican Min. Co. 6 Colo. 877.

Cited in *Mason v. Hartford, P. & F. R. Co.* 10 Fed. 335—*Farmers & T. Bank v. Kimball Mill. Co.* 1 S. D. 400, 36 Am. St. Rep. 739, 47 N. W. 402.

791. A replication should, of itself, contain a full and complete answer to the plea in bar. *Marsteller v. Mc'Clean*, 7 Cranch, 156, 3: 300

792. It is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea. *United States v. Buford*, 3 Pet. 12, 7: 585

793. A general replication denies every allegation in the answer not responsive to the bill. *Humes v. Scruggs*, 94 U. S. 22, 24: 51. Cited in *Robinson v. American Car & Foundry Co.* 132 Fed. 166—*Dexter v. Gordon*, 11 App. D. C. 62.

794. A replication in an action by the indorsee of a promissory note is not demurrable for failure to traverse the plea of the indorser's bankruptcy at the time of the transfer, where it avers that the indorser took the note in trust for the plaintiff. *Wilson v. Codman*, 3 Cranch, 193, 2: 408

795. The replication of *de injuria* interposed to a plea which sets up matter of justification resting upon authority of law other than a judgment of a court puts in issue the material averments of the plea. *Erskine v. Hohnbach*, 14 Wall. 613, 20: 745

796. In an action of trespass against a collector for a seizure of property by him, a replication to a special plea, which, if true, would only have shown that the assessor had erred in his judgment in making the assessment, which could not have justified the collector in suspending the enforcement of the tax, tenders an immaterial issue. *Erskine v. Hohnbach*, 14 Wall. 613, 20: 745

797. Where a verdict is rendered upon a replication *de injuria*, which put in issue the material averments of the plea, and an immaterial issue was formed upon a replication to another plea setting up the same defense, to award a repleader would be, in effect, to allow the same matter to be twice tried; and the granting or refusing the motion therefor is in the discretion of the court. *Erskine v. Hohnbach*, 14 Wall. 613, 20: 745

798. If a plea, upon argument, is ruled to be sufficient in law to bar the recovery of the plaintiff, the court will allow him to take issue upon it by replication and to disprove the facts upon which it is endeavored to support it. *United States v. Dalles Military Road Co.* 140 U. S. 599, 11 Sup. Ct. Rep. 988, 35: 560
Cited in Pearce v. Rice, 142 U. S. 42, 35 L. ed. 931, 12 Sup. Ct. Rep. 130—*MacVeagh v. Denver City Waterworks Co.* 29 C. C. A. 84, 55 U. S. App. 267, 85 Fed. 75.

Necessity of reply.

Admission by Failure to Reply, see supra, I. m, 5.

Judgment by Default for Want of Reply, see Judgment, 48.

See also supra, 443, 752.

799. According to the rules of pleading in the chancery courts, if the plea is unexceptionable in its form and character, the complainant must either set it down for argument, or he must reply to it, and put in issue the facts relied on in the plea. *Rhode Island v. Massachusetts*, 14 Pet. 210, 10: 423

Cited in Smith v. Cozart, 45 Miss. 701.

800. In pleading it is necessary that the facts of the plea should be traversed by replication, unless matter in avoidance be set up. *United States v. Buford*, 3 Pet. 12, 7: 585

801. An amended bill or special replication is not necessary in order to avoid the effect of an amended answer which is, at most, only a more extended statement of the grounds of defense previously set forth. *Southern P. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. Rep. 18, 42: 355

Failure to reply.

Admission by, see supra, I. m, 5.

First Raising Objection on Appeal, see Appeal and Error, 4599-4602.

Waiver of, see Appeal and Error, 4702.

Right to Dismissal Because of, see Dismissal and Discontinuance, 8, 22-24.

802. The omission to file a replication to an answer is an irregularity. *Washington, A. & G. R. Co. v. Bradley* (Washington, A. & G. R. Co. v. Washington) 10 Wall. 299, 19: 894

Joint replication.

803. A joint replication which is bad affects with its consequences all the parties joining in it. *Marsteller v. McClean*, 7 Cranch, 156, 3: 300

Cited in Kerr v. Force, 8 Cranch, C. C. 33, Fed. Cas. No. 7,730—*Morris v. Wheat*, 8 App. D. C. 385—*Ferrall v. Bradford*, 2 Fla. 519, 50 Am. Dec. 293—*Jordan v. Thornton*, 7 Ga. 524—*Poult v. Slocum*, 3 Blackf. 429—*Keeton v. Keeton*, 20 Mo. 544.

Departure.

First Raising Objection as to, on Appeal, see Appeal and Error, 4598.

By Amendment, see supra, 202, 203.

804. If a defendant plead the indorser's bankruptcy, a replication that the indorser

took the note in trust for the plaintiff is not a departure from the declaration that it was given for value received, and assigned to the plaintiff. *Wilson v. Codman*, 3 Cranch, 193, 2: 408

Alder; curing defects.

Waiver of Defect in Pleading by Reply, see supra, 29b, 30.

Curing Defects in Bill by Averments in Reply, see supra, 46.

See also supra, 30.

805. A defective plea may be aided in some cases by a replication. *United States v. Morris*, 1 Wheat. 246, 6: 314
Cited in McMahon v. Polk, 10 S. D. 300, 47 L.R.A. 836, 73 N. W. 77.

806. An evasive and insufficient answer is not helped by the omission of the complainant to file the general replication. *Pierce v. Brown* (*Brown v. Pierce*) 7 Wall. 205, 19: 134

807-8. A replication filed after a part of the testimony had been taken is within the statute of jeofails, and sufficient. *Clements v. Moore* (*Clements v. Nicholson*) 6 Wall. 299, 18: 786

Statute of limitations.

See also infra, 889.

809. A replication to the statute of limitations should set forth the facts specially, or they may be introduced by an amendment of the bill. *Taylor v. Benham*, 5 How. 233, 12: 130
Cited in Webb v. Powers, 2 Woodb. & M. 523, Fed. Cas. No. 17,323.

810. Where the statute of limitations is pleaded at law or in equity, and the plaintiff desires to bring himself within its savings, it would be proper for him, in his replication, or by an amendment of his bill, to set forth the facts specially. *Miller v. M'Intyre*, 6 Pet. 61, 8: 320

Cited in Platt v. Vattler, 9 Pet. 416, 9 L. ed. 177—*Taylor v. Benham*, 5 How. 263, 12 L. ed. 145—*Maury v. Mason*, 8 Port. (Ala.) 227—*Perkins v. Rogers*, 35 Ind. 141, 9 Am. Rep. 639—*McCrea v. Purmort*, 16 Wend. 477, 30 Am. Dec. 103—*Gross v. Disney*, 95 Tenn. 596, 32 S. W. 965—*Dorr v. Rohr*, 82 Va. 366, 3 Am. St. Rep. 106—*Switzer v. Noffsinger*, 82 Va. 522—*Elliot v. Trahern*, 35 W. Va. 642, 14 S. E. 223.

811-12. A reply relying on the exception in the statute of limitations in favor of merchants' accounts need not contain a negative averment that no account had been stated between the parties. *Toland v. Sprague*, 12 Pet. 300, 9: 1093
Cited in Bispham v. Price, 15 How. 178, 14 L. ed. 651.

V. Cross Bill.

Amendment of, see supra, 215.

Cross Libels in Admiralty, see Admiralty. III. g. 4.

Appealability of Decree on, see Appeal and Error, 73.

Right of Person Filing to be Heard on Appeal from Decree Rendered after Striking out of Cross Bill, see Appeal and Error, 4030.

First Objecting to, on Appeal, see Appeal and Error, 4603, 4604, 4652.

Retaining Jurisdiction after Dismissal of Bill to Reduce Jurisdictional Amount, see Courts, 915.

Jurisdiction of, as Ancillary to Jurisdiction of Bill, see Courts, 1064.

Dismissal of, on Dismissal of Original Bill, see Dismissal and Discontinuance, 3, 19.

Conclusiveness of Dismissal, see Judgment, 544.

Retention of Jurisdiction after Dismissal of Bill, see Equity, 30.

Necessity of Process Against Infant, see Infants, 39.

Disposal of, on Final Decree, see Judgment, 65.

Necessity of Parties Defendant to, see Parties, 135.

Introducing New Parties by, see Parties, 308.

Substituted Service, see Writ and Process, 85.

813. New parties cannot be brought into a cause by a cross bill. Fourth Nat. Bank v. New Orleans & C. R. Co. 11 Wall. 624, 20: 82
Cited in Simmons v. Taylor, 38 Fed. 699.

814. Where the complainants were not defendants in the original suit brought, they cannot file a cross bill. Bank of Washington v. Arkansas, 20 How. 530, 15: 993

815. When the subject-matter of an original bill filed by an infant was the title and ownership of property conveyed by a deed under which the plaintiff claimed title, and the allegations of a cross bill related to that property, and demanded that the trust created by the deed be declared and ownership established under the trust, although the cross bill alleged additional facts, the subject-matter of the cross bill was germane to that of the original bill. Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. Rep. 638, 33: 1047

816. A cross bill, although sustainable if it were an original bill, must be dismissed if the original bill is dismissed. Dows v. Chicago, 11 Wall. 108, 20: 65
Cross v. Del Valle (Cross v. Del Valle) 1 Wall. 1, 17: 515
Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. 6 Wall. 742, 18: 856
Distinguished in Blythe v. Hinckley, 84 Fed. 235—Carroll v. Taylor, 102 Tenn. 453, 52 S. W. 139.

Cited in Providence Rubber Co. v. Goodyear, 9 Wall. 809, 19 L. ed. 589—Ex parte South & North Ala. R. Co. 95 U. S. 225, 24 L. ed. 356—Nashville & C. R. Co. v. United States, 101 U. S. 641, 25 L. ed. 1075—United States v. California & O. Land Co. 192 U. S. 360, 48 L. ed. 479, 24 Sup. Ct. Rep. 266—Barnard v. Hartford, P. & F. R. Co. Fed. Cas. No. 1,003—Donohoe v. Mariposa Land & Min. Co. 5 Sawy. 172, Fed. Cas. No. 3,980—Ran-

dolph v. Robinson, Fed. Cas. No. 11,561—Schenck v. Peay, Woolw. 184, Fed. Cas. No. 12,450—Seckel v. Backhaus, 7 Bles. 356, Fed. Cas. No. 12,599—Weaver v. Alter, 3 Woods, 154, Fed. Cas. No. 17,308—Vannerson v. Leverett, 31 Fed. 377—First Nat. Bank v. Salem Capital Flour Mills Co. 31 Fed. 583—Neal v. Foster, 34 Fed. 498—Southwestern Transp. Co. v. Pittsburg Coal Co. 42 Fed. 921—Stonemetz Printers' Machinery Co. v. Brown Folding-Mach. Co. 46 Fed. 852—Bound v. South Carolina R. Co. 47 Fed. 33—Mexican Ore Co. v. Mexican Guadalupe Min. Co. 47 Fed. 856—Fidelity Trust & Safety Vault Co. v. Mobile Street R. Co. 53 Fed. 852—Industrial & Min. Guaranty Co. v. Electrical Supply Co. 7 C. C. A. 480, 16 U. S. App. 196, 58 Fed. 742—Stuart v. Hayden, 18 C. C. A. 625, 36 U. S. App. 462, 72 Fed. 410—Goff v. Kelly, 74 Fed. 330—Dickerman v. Northern Trust Co. 25 C. C. A. 558, 53 U. S. App. 270, 80 Fed. 458—Springfield Mill Co. v. Barnard & L. Mfg. Co. 26 C. C. A. 392, 49 U. S. App. 438, 81 Fed. 263—Blythe v. Hinckley, 84 Fed. 235—Brooks v. Laurent, 39 C. C. A. 206, 98 Fed. 652—Gillmore v. Bort, 134 Fed. 682—Freedman's Sav. & T. Co. v. Dodge, 3 MacArth. 534—Ledwith v. Jacksonville, 32 Fla. 14, 13 So. 454—Ray v. Home & Foreign Invest. & Agency Co. 106 Ga. 496, 32 S. E. 603—Loomis v. Freer, 4 Ill. App. 552—Follansbee v. Scottish American Mortg. Co. 7 Ill. App. 496—French v. Bellows Falls Sav. Inst. 67 Ill. App. 182—Kemp v. Mitchell, 36 Ind. 256—Hunter v. McLaughlin, 43 Ind. 50—Summers v. Hutson, 48 Ind. 233—Tippecanoe County v. Lafayette, M. & B. R. Co. 50 Ind. 102—Standley v. Northwestern Mut. L. Ins. Co. 95 Ind. 261—Chappell v. Chappell, 86 Md. 545, 39 Atl. 984—McGuire v. Circuit Judge, 69 Mich. 595, 37 N. W. 568—Gilmer v. Felhour, 45 Miss. 631—Joyce v. Growney, 154 Mo. 266, 55 S. W. 466—Mathiason v. St. Louis, 156 Mo. 200, 56 S. W. 890—Kirkpatrick v. Corning, 39 N. J. Eq. 141—Krueger v. Ferry, 41 N. J. Eq. 436, 5 Atl. 452—Allen v. Fury, 53 N. J. Eq. 36, 30 Atl. 551—Mexican Ore Co. v. Clayton, 48 Phila. Leg. Int. 383—Comfort v. McTeer, 7 Lea, 662—Hergel v. Laitenberger, 2 Tenn. Ch. 254—McMullen v. Eagan, 21 W. Va. 247.

817. A cross bill which is a nullity should be stricken from the files. Texas v. Chiles (Texas v. White) 10 Wall. 127, 19: 971

Nature of.

Retention of Cross Bill, on Dismissal of Bill, see Equity, 30.

818. Cross bill is for a discovery to aid a defense to the original suit, or for complete relief to all the parties as to matters charged in the original bill. It is auxiliary to the original suit, and a graft and dependency upon it. If its purpose be different from this, it is not a cross bill, though it may have a connection with the same general subject. Providence Rubber Co. v. Goodyear, 9 Wall. 807, 19: 587
Cited in Barnard v. Hartford, P. & F. R. Co. Fed. Cas. No. 1,003—Donohoe v. Mariposa Land & Min. Co. 5 Sawy. 172, Fed. Cas. No. 3,980—Weaver v. Alter, 3 Woods, 154, Fed. Cas. No. 17,308—Southwestern Transp. Co. v. Pittsburg Coal Co. 42 Fed. 921—Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co. 46 Fed. 852—Industrial & Min. Guaranty Co. v. Electrical Supply Co. 7 C. C. A. 481, 16 U. S. App. 196, 58 Fed. 742—Stuart v. Hayden, 18 C. C. A. 625, 36 U. S. App.

462, 72 Fed. 410—*Goff v. Kelly*, 20 C. C. A. 432, 42 U. S. App. 105, 74 Fed. 330—*Blythe v. Hinckley*, 84 Fed. 235—*Gilmore v. Bort*, 134 Fed. 661—*Ledwith v. Jacksonville*, 32 Fla. 14, 13 So. 454—*Douthitt v. Smith*, 69 Ind. 465—*Krueger v. Ferry*, 41 N. J. Eq. 436, 5 Atl. 452.

819. A cross bill is auxiliary to the proceeding in the original suit, and a dependency upon it. *Ayres v. Carver*, 17 How. 591,

15: 179

Cited in Providence Rubber Co. v. Goodyear, 9 Wall. 809, 19 L. ed. 589—*Donohoe v. Mariposa Land & Min. Co.* 5 Sawy. 171, Fed. Cas. No. 3,989—*Weaver v. Alter*, 3 Woods, 154, Fed. Cas. No. 17,308—*North British & M. Ins. Co. v. Lathrop*, 17 C. C. A. 180, 25 U. S. App. 443, 70 Fed. 434—*Stuart v. Hayden*, 18 C. C. A. 625, 36 U. S. App. 462, 72 Fed. 410—*Blythe v. Hinckley*, 84 Fed. 235—*American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union Nos. 1 & 3*, 90 Fed. 606—*Turner v. Southern Home Bldg. & L. Asso.* 41 C. C. A. 387, 101 Fed. 316—*Hogg v. Hoag*, 107 Fed. 814—*Mathieson v. St. Louis*, 156 Mo. 200, 56 S. W. 890—*Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 641, 41 Am. St. Rep. 741, 57 N. W. 664.

820. A cross bill must grow out of the original suit, and cannot bring in new and distinct matters. It is a proceeding to procure a complete determination of a matter already in controversy. *Ayers v. Chicago*, 101 U. S. 184,

25: 838

Cited in Nashville & C. R. Co. v. United States, 101 U. S. 641, 25 L. ed. 1075—*Chase v. Curtis*, 113 U. S. 458, 28 L. ed. 1040, 5 Sup. Ct. Rep. 554—*Winters v. Ethell*, 132 U. S. 210, 33 L. ed. 340, 10 Sup. Ct. Rep. 56—*Graves v. Corbin*, 132 U. S. 587, 33 L. ed. 468, 10 Sup. Ct. Rep. 196—*Malish v. Bird*, 4 McCrary, 131, 48 Fed. 608—*Hogg v. Hoag*, 107 Fed. 814.

When proper or necessary; relief.

First Raising Objection as to Necessity on Appeal, see Appeal and Error, 4603, 4604.

To Establish State Boundary, see Boundaries, 72.

Propriety of Cross Bill to Adjudicate Legal Rights in Subject-Matter of Jurisdiction, see Equity, 78.

See also *supra*, 110.

821. A cross bill is proper whenever the defendants, or any or either of them, have equities arising out of the subject-matter of the original suit which entitle them to affirmative relief which they cannot obtain in that suit. *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. Rep. 638, 33: 1047 *Distinguished in Detroit v. Detroit City R. Co.* 55 Fed. 575.

Cited in Jesup v. Illinois C. R. Co. 43 Fed. 495—*Whittemore v. Patten*, 84 Fed. 56.

822. A court of equity which denies legal remedies may enforce equitable remedies for the same debt; and an application for the latter is not foreign to a bill for the former. *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 276, 10 Sup. Ct. Rep. 550,

33: 900

823. A defendant who fails to file a cross

bill can have no decree for affirmative relief. *McPherson v. Cox*, 96 U. S. 404, 24: 746 *Cited in Savings & T. Co. v. Bear Valley Irrig. Co.* 112 Fed. 704.

824. The court, upon a cross bill which is a nullity cannot decree against the complainants the opposite of the relief which they sought by their bills. *Texas v. Chiles* (Texas v. White) 10 Wall. 127, 19: 971

825. A cross bill may assert rights to the property different from those allowed in the original bill, and claim an affirmative decree in favor of the complainant filing it. *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 171, 11 Sup. Ct. Rep. 61,

34: 625

Cited in Rouse v. Letcher, 156 U. S. 49, 39 L. ed. 342, 15 Sup. Ct. Rep. 286—*Gregory v. Pike*, 15 C. C. A. 40, 21 U. S. App. 658, 67 Fed. 845—*Southern Development Co. v. Farmers' Loan & T. Co.* 24 C. C. A. 500, 52 U. S. App. 111, 79 Fed. 215—*Morgan Envelope Co. v. Walton*, 82 Fed. 470—*Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 163, 95 Fed. 504—*Re Whitener*, 44 C. C. A. 440, 105 Fed. 186.

826. Where a bill is filed to set aside a conveyance, the conveyance cannot be established without a cross bill filed by the defendant. *Carnochan v. Christie*, 11 Wheat. 446,

6: 516

Cited in Washington, A. & G. R. Co. v. Bradley (Washington, A. & G. R. Co. v. Washington) 10 Wall. 303, 19 L. ed. 895—*Lockwood v. Cleveland*, 6 Fed. 724—*Melssner v. Buck*, 28 Fed. 163—*Springfield Mill. Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 392, 49 U. S. App. 438, 81 Fed. 263—*Carlton v. Southern Mut. Ins. Co.* 72 Ga. 393—*Follansbee v. Scottish-American Mortg. Co.* 7 Ill. App. 496—*Haire v. Baker*, 5 N. Y. 362.

827. In an answer in an action for the possession of lands, an equitable defense may be set up in a special count by way of cross complaint. The cross complaint is in the nature of a bill in equity, and must contain its material allegations disclosing a case which, if established, would entitle the defendant to a decree enjoining the further prosecution of the action or directing that the title be conveyed to him. *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782,

29: 61

Cited in South End Min. Co. v. Tinney, 22 Nev. 27, 35 Pac. 89.

828. If a purchaser at a judicial sale obtains an injunction against a subsequent levy upon the property by a judgment creditor, the judgment creditor cannot assail the title of such purchaser by his answer, but only by a cross bill. *Ford v. Douglas*, 5 How. 143,

12: 89

Cited in White v. Bower, 48 Fed. 187—*Wood v. Collins*, 8 C. C. A. 525, 23 U. S. App. 224, 60 Fed. 142—*Owens v. Heldreder*, 24 C. C. A. 363, 41 U. S. App. 736, 78 Fed. 838.

829. A cross bill is properly allowed to be filed for the return of property delivered under an illegal lease, where the complainant has alleged an election to terminate the lease, and also alleged its invalidity and offered to do what the court should decree to

be just. *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 13 Sup. Ct. Rep. 808, 43: 108

Leave of court.

830. Leave to file a cross bill is a matter in the discretion of the court. *Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co.* 109 U. S. 168, 3 Sup. Ct. Rep. 108, 27: 895
Otted in Bound v. South Carolina R. Co. 47 Fed. 33.

831. The permission of the court to file cross bills must be presumed where they were entertained by the court. *Muller v. Dows*, 94 U. S. 444, 24: 207

832. A delay in filing a cross bill is within the discretion of the court, which can direct it to be filed even at the hearing. *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 171, 11 Sup. Ct. Rep. 61, 34: 625

833. The filing of a cross bill without leave of the court is an irregularity for which it may be set aside. *Bronson v. La Crosse & M. R. Co.* 2 Wall. 283, 17: 725
Otted in Neal v. Foster, 34 Fed. 498.

VI. Set-Off; Recoupment; Reconvention.

Sufficiency of Denial of, see *supra*, 617.
 Acquiring Jurisdiction of Defendant by Pleading in Recoupment, see *Appearance*, 21a.

Facts Considered in Motion for Judgment Based on Confessions of Counterclaim, see *supra*, 81.

Admissibility of Evidence Under Plea of Set Off, see *Evidence*, 2723-2725.

Necessity of Finding of Facts When Question is Sufficiency of Averments and Counterclaim, see *Trial*, 922.

834. A rule of court, that where a defendant insists on a claim by way of set-off, founded on a written instrument, he cannot "be put to the proof of the execution of the instrument, or the handwriting" of the opposite party, unless an affidavit is filed "denying the same," refers only to proof of the genuineness of a seal or of handwriting, and not to any matter which goes to show the invalidity otherwise of an instrument; i. e., that it is illegal because made on Sunday. *Ames v. Quimby*, 106 U. S. 342, 1 Sup. Ct. Rep. 116, 27: 100
Otted in Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 457, 30 L. ed. 985, 7 Sup. Ct. Rep. 958—*Curtis v. Harrison*, 36 Ill. App. 292.

835. The want of the affidavit denying execution, required by a court rule in order to put a defendant who insists on a claim by way of set-off, founded upon a written instrument, to the proof of execution, does not prevent the plaintiff from showing that he had a duplicate copy differing slightly from the one in evidence, that it had been

lost, and then stating what the differences were. *Ames v. Quimby*, 106 U. S. 342, 1 Sup. Ct. Rep. 116, 27: 100

836. The particulars of the alleged resulting damages from the breach by the obligees in a bond given to secure sales on credit, of an alleged special agreement respecting prices, pleaded as an offset to the claim on such bond, should be so far set forth that the court may be able to see therefrom that such alleged damages are neither obscure, vague, or shadowy, but might, and probably would, naturally result from the act complained of. *McGuire v. Gerstley*, 204 U. S. 489, 27 Sup. Ct. Rep. 332, 51: 581
Clark v. Gerstley, 204 U. S. 504, 27 Sup. Ct. Rep. 337, 51: 589

837. Facts sufficient to constitute a valid set-off, recoupment, or independent cause of action are not set up by a plea in an action on a bond given to secure sales of merchandise on credit, which avers that the obligees induced one of the principals to dissolve the partnership existing between them, and to enter the employment of the obligees for the purpose of ruining the partnership business, but contains no allegation as to how long the partnership was to continue. *McGuire v. Gerstley*, 204 U. S. 489, 27 Sup. Ct. Rep. 332, 51: 581
Clark v. Gerstley, 204 U. S. 504, 27 Sup. Ct. Rep. 337, 51: 589

838. The plea of reconvention, claiming damages of a plaintiff for breaches of contract on his part as a set-off, is not authorized by the rules governing the practice in the district court of the United States for Louisiana, adopted in 1824. *Wilcox v. Hunt*, 13 Pet. 378, 10: 209

839. The claim in reconvention, under the Louisiana practice, is not a waiver of an exception to the jurisdiction where it is made conditional, and, in express terms, only in case the exception to the jurisdiction is overruled. *Peale v. Phipps*, 14 How. 368, 14: 459

VII. Demurrer.

a. In General.

Waiver by, not Raising Objection by, see *supra*, 71.

Compelling Amendment to Bill on Demurrer, see *supra*, 225.

Distinction Between Plea and Demurrer, see *supra*, 590.

Waiver of Objection as to, see *Appeal and Error*, 4709; *infra*, VII. g.

Appealability of Order upon, see *Appeal and Error*, 114-120.

Presumption as to Abandonment of, see *Appeal and Error*, 4118.

Prejudicial Error in Rulings on, see *Appeal and Error*, 5005-5011.

Proper Forms of Responsive Pleadings in Federal Courts, see *Courts*, 1286, 1287.

Filing Petition for Removal after Hearing on Demurrer, see Removal of Causes, 375-379.

Dismissal of Bill of Review on Demurrer, see Review, 55.

Demurrer in Criminal Case, see Criminal Law, III. d.

Demurrer to Evidence, see Appeal and Error, 4468, 5163, 5169, 5494; Trial, VI. c, 3, e.

840. Special demurrers are not favored, as they rarely have any real relation to the merits of the controversy. *Withers v. Greene*, 9 How. 213, 13: 109

841. A special demurrer is only for defects in form, and adds to the terms of a general demurrer as specification of the particular ground of exception. *Tyler v. Hand*, 7 How. 573, 12: 824

842. A demurrer is an answer in law to a bill, though not in a technical sense an answer, in the common language of practice. *New Jersey v. New York*, 6 Pet. 323, 8: 414

Cited in *Re Noesen*, 6 Biss. 447, 12 Nat. Bankr. Reg. 425, Fed. Cas. No. 10,288—*Baltimore v. Weatherby*, 52 Md. 448—*Thompson v. Michigan Mut. Ben. Asso.* 52 Mich. 524, 18 N. W. 247—*Pugsley v. Freedman's Sav. & T. Co.* 2 Tenn. Ch. 138—*Howell v. Howell*, 15 Wis. 60.

843. A demurrer is an objection made by one party to his opponent's pleading, alleging that he ought not to answer it for some defect in law in the pleading. *Tyler v. Hand*, 7 How. 573, 12: 824

b. When Lies.

For Multifariousness, see *supra*, 275.

Raising Objection of Lack of Jurisdiction by, see *supra*, 680.

844. In Alabama, a plea which denies the execution, by the defendant, of an instrument in writing, which is the foundation of the suit, must be verified by affidavit; and the want of such affidavit may be reached by a demurrer. *Alexander v. Bryan*, 110 U. S. 414, 4 Sup. Ct. Rep. 107, 28: 195

845. Under the Code of Iowa, a demurrer is allowed only when the petition, "by a fair and natural construction, does not show a substantial cause of action." *McFaul v. Ramsey*, 20 How. 523, 15: 1010

846. Under the Va. statute of 1792, a party may both demur and plead to the whole declaration. *Fowle v. Alexandria*, 3 Pet. 398, 7: 719
Cited in *Dormady v. State Bank*, 3 Ill. 242.

847. Defendant can object to a nonjoinder of plaintiffs by demurrer, and in arrest of judgment under the plea of the general issue. *Farni v. Tesson*, 1 Black, 309, 17: 67

848. A demurrer is proper for misjoinder and multifariousness, and, if the complain-

ant fails to amend, should be sustained and the bill dismissed. *Dial v. Reynolds*, 96 U. S. 340, 24: 644
Cited in *Fields v. Gwynn*, 19 App. D. C. 115.

849. Where an agreement set up by a bill in equity is shown on the face of the bill to be in parol, when it is void by the statute of frauds, it may be taken advantage of on demurrer. *Randall v. Howard*, 2 Black, 585, 17: 269

850. The invalidity of a patent, which is manifest upon its face, may be decided on a demurrer. *Richards v. Chase Elevator Co.* 158 U. S. 299, 15 Sup. Ct. Rep. 931, 39: 991

Cited in *American Fibre-Chamols Co. v. Buckskin-Fibre Co.* 18 C. C. A. 665, 37 U. S. App. 742, 72 Fed. 511—*Baldwin v. Kreal*, 22 C. C. A. 595, 46 U. S. App. 511, 76 Fed. 825—*Strom Mfg. Co. v. Weir Frog Co.* 27 C. C. A. 505, 54 U. S. App. 330, 83 Fed. 172—*Conley v. Marum*, 83 Fed. 310—*Patent Button Co. v. Consolidated Fastener Co.* 84 Fed. 191—*Fabric Coloring Co. v. Alexander Smith & Sons Carpet Co.* 109 Fed. 329—*A. R. Millner Seating Co. v. Yesbera*, 49 C. C. A. 399, 111 Fed. 388.

851. When a case stated by a bill appears to be one in which a court of equity will refuse its aid, the defendant may demur. *Maxwell v. Kennedy*, 8 How. 210, 12: 1051

Cited in *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 568, 25 L. ed. 816—*Spedel v. Henrich*, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—*Badger v. Badger*, 2 Cliff. 156, Fed. Cas. No. 718—*Markey v. Mutual Ben. L. Ins. Co.* 6 Ins. L. J. 542, Fed. Cas. No. 9,091—*Credit Co. v. Arkansas C. R. Co.* 5 McCrary, 34, 15 Fed. 55—*McLaughlin v. People's R. Co.* 21 Fed. 575—*Ætna L. Ins. Co. v. Middleport*, 31 Fed. 876—*Rich v. Bray*, 2 L.R.A. 228, 37 Fed. 277—*Naddo v. Bardon*, 47 Fed. 786—*Hinchman v. Kelley*, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—*Woodmanse & H. Mfg. Co. v. Williams*, 15 C. C. A. 525, 37 U. S. App. 109, 68 Fed. 494—*Hayden v. Thompson*, 17 C. C. A. 600, 36 U. S. App. 361, 71 Fed. 69—*Copeland v. Bruning*, 104 Fed. 170—*McGehee v. Blackwell*, 23 Ark. 30—*Cammack v. Carpenter*, 3 App. D. C. 229—*Anderson v. Northrop*, 30 Fla. 647, 12 So. 318—*Kerfoot v. Billings*, 160 Ill. 569, 43 N. E. 804—*Belt v. Bowles*, 65 Md. 355, 4 Atl. 295—*Sanborn v. Eads*, 38 Minn. 211, 36 N. W. 338—*Olden v. Hubbard*, 34 N. J. Eq. 86—*Perkins v. Lane*, 82 Va. 64—*Swann v. Thayer*, 36 W. Va. 54, 14 S. E. 423—*Beecher v. Foster*, 51 W. Va. 617, 42 S. E. 647.

852. An objection to the equity of plaintiff's claim as stated in the bill must be taken by demurrer, not by plea. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. Rep. 534, 30: 684

853. A fraudulent omission to stamp a promissory note, if available at all to the maker of the note, cannot be taken advantage of on demurrer. *Campbell v. Wilcox*, 10 Wall. 421, 19: 973
Cited in *Dowell v. Applegate*, 7 Sawy. 236, 7 Fed. 885—*United States v. Griswold*, 7 Sawy. 331, 8 Fed. 571—*Moses v. Taylor*, 6 Mackey, 280—*Plunkett v. Hanschka*, 14 S. D. 457, 85 N. W. 1004—*Crandall v. Lynch*, 20 App. D. C. 79—*Ricord v. Jones*, 33 Iowa, 27—

Ogden v. Forney, 33 Iowa, 206—Works v. Hershey, 35 Iowa, 344—State v. Shields, 112 Iowa, 29, 83 N. W. 807—Western U. Teleg. Co. v. Henley, 157 Ind. 93, 60 N. E. 682—Black v. Woodrow, 39 Md. 219—Carson v. Phelps, 40 Md. 96—Laird v. State, 61 Md. 312—Ebert v. Gitt, 95 Md. 193, 52 Atl. 900—More v. Quirk, 105 Mass. 51, 7 Am. Rep. 499—Rowe v. Bowman, 183 Mass. 490, 67 N. E. 636—Cabbott v. Radford, 17 Minn. 322, Gil. 296—Stewart v. Hopkins, 30 Ohio St. 522—Aufderhaus's Estate, 27 Pa. Co. Ct. 459—Timp v. Dockham, 29 Wis. 448.

854. Where the affidavit of the plea was sworn to before the deputy clerk, and the plea was not entitled of any term of court, if these were irregularities, they could only be urged as objections to receiving the plea, and not as ground of demurrer. Commercial & R. Bank v. Slocomb, 14 Pet. 60,

10: 354

855. The marshal, on his return to a scire facias to review a judgment in ejectment, stated that two of the defendants were dead; this does not become a matter of record and cannot be taken advantage of by demurrer; a plea in abatement was the proper method of taking advantage of the decease of these defendants. Walden v. Craig, 14 Pet. 147,

10: 393

General demurrer.

See also *infra*, 880

856. A general demurrer lies only for defects in substance, and excepts to the sufficiency of the pleading in general terms, without showing specially the nature of the objection. Tyler v. Hand, 7 How. 573,

12: 824

Cited in Emmons v. National Mut. Bldg. & L. Assn. 68 C. C. A. 330, 135 Fed. 692.

857. If it appears by the pleadings that there is another joint debtor who is not sued, and no reason is assigned for his not being made a party to the suit, the objection can be taken advantage of upon general demurrer. Gilman v. Rives, 10 Pet. 298,

9: 432

Cited in Davidson v. Smith, 1 Biss. 351, Fed. Cas. No. 3,608—United States v. Cushman, 2 Sumn. 312, Fed. Cas. No. 14,907—Hamilton v. Buxton, 6 Ark. 26—Bledsoe v. Irvin, 35 Ind. 294—Burgess v. Abbott, 6 Hill. 137—Needham v. Heath, 17 Vt. 226.

Special demurrer.

See also *supra*, 840, 841.

858. A plea which took issue upon the breach of a bond should have concluded to the country, but such an omission can only be taken advantage of by special demurrer. United States v. Girault, 11 How. 22,

13: 587

859. In an action upon a judgment, a demurrer to a plea of fraud in obtaining the judgment, on the ground that the plea does not set forth the particular acts which constitute the fraud, must be a special demurrer, as it is one to the form of the plea. Christmas v. Russell, 5 Wall. 290, 18: 475
Cited in Aurora v. West, 7 Wall. 100, 19 L.

ed. 48—Thompson v. Whitman, 18 Wall. 467, 21 L. ed. 901—Michaels v. Post, 21 Wall. 426, 22 L. ed. 526—Maxwell v. Stewart, 22 Wall. 81, 22 L. ed. 566—Sullivan v. Iron Silver Min. Co. 109 U. S. 555, 27 L. ed. 1030, 3 Sup. Ct. Rep. 339—Stimmons v. Saul, 138 U. S. 458, 34 L. ed. 1062, 11 Sup. Ct. Rep. 369—Barras v. Bidwell, 3 Woods, 7 Fed. Cas. No. 1,039—Phillips v. Hatch, 1 Dill. 576, Fed. Cas. No. 11,094—Allison v. Chapman, 19 Fed. 489—Kelly v. Millan, 21 Fed. 868—Union Trust Co. v. Rochester & P. R. Co. 29 Fed. 610—Peninsular Iron Co. v. Eells, 15 C. C. A. 201, 32 U. S. App. 348, 68 Fed. 35—Garrett v. Boeding, 15 C. C. A. 218, 37 U. S. App. 42, 68 Fed. 60—Lake County v. Platt, 25 C. C. A. 93, 49 U. S. App. 216, 79 Fed. 573—Alkire Grocery Co. v. Richesin, 91 Fed. 83—Streety v. McCurdy, 104 Ala. 503, 16 So. 686—Peet v. January, 35 Ark. 338, 37 Am. Rep. 27—Fisher v. Fielding, 67 Conn. 112, 32 L.R.A. 241, 52 Am. St. Rep. 270, 34 Atl. 714—Wells v. Edmison, 4 Dak. 51, 22 N. W. 497—Barbee v. Shannon, 1 Ind. Terr. 208, 40 S. W. 584—Tourigny v. Houle, 88 Me. 409, 84 Atl. 158—Hambleton v. Glenn, 72 Md. 348, 20 Atl. 115—Hendrick v. Whittemore, 105 Mass. 28—People v. Dawell, 25 Mich. 270, 12 Am. Rep. 260—Tittle v. Bonner, 53 Miss. 584—Ward v. Quinlvin, 57 Mo. 427—De Graw v. De Graw, 7 Mo. App. 130—Forest v. Bellows, 59 N. H. 231—Everett v. Everett, 75 App. Div. 374, 78 N. Y. Supp. 193—Plant v. Harrison, 36 Misc. 654, 74 N. Y. Supp. 411—Pennywit v. Foote, 27 Ohio St. 618, 22 Am. Rep. 340—Knapp v. Thomas, 39 Ohio St. 387, 48 Am. Rep. 462—Johnson v. Dobbins, 12 Phila. 520—Hyatt v. McBurney, 18 S. C. 210—Murchison v. White, 54 Tex. 85—Gentry v. Allen, 32 Gratt. 258—Peyton v. Peyton, 28 Wash. 299, 68 Pac. 757.

Jurisdiction.

860. Where the defect in the jurisdiction of the court is apparent in the complaint, it may be reached on demurrer or by motion. Susquehanna & W. Valley R. & Coal Co. v. Blatchford, 11 Wall. 172,

20: 179

861. Where the want of jurisdiction is apparent on the face of the petition, it may be taken advantage of by demurrer, and no plea in abatement is necessary. Southern P. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. Rep. 44,

36: 942

862. Objection to jurisdiction because of citizenship of parties may be taken by demurrer. Ober v. Gallagher, 93 U. S. 199,

23: 829

Cited in Romaine v. Union Ins. Co. 28 Fed. 627.

863. A demurrer upon which judgment was given was interposed to pleadings to raise the question of Federal jurisdiction. Dromgoole v. Farmers' & M. Bank, 2 How. 241,

11: 252

Cited in Bank of United States v. Moss, 6 How. 39, 12 L. ed. 335—Brow v. Noyes, 2 Woodb. & M. 80, Fed. Cas. No. 2,023.

Statute of limitations.

Rule in Federal Courts, see Courts, 1287.

See also *supra*, 710; *infra*, 887-893.

864. Where it appears on the face of plaintiff's pleading that the case which it

makes is barred by the statute of limitations, the defect can be taken advantage of by demurrer. *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25: 815
Rhode Island v. Massachusetts, 15 Pet. 233, 10: 721

Coddington v. Pensacola & G. R. Co. 103 U. S. 409, 26: 400

Kendall v. United States, 107 U. S. 123, 2 Sup. Ct. Rep. 277, 27: 437

Chemung Canal Bank v. Lowery, 93 U. S. 72, 23: 806

Distinguished in Theroux v. Northern P. R. Co. 12 C. C. A. 55, 27 U. S. App. 508, 64 Fed. 87.

Cited in Speidel v. Henrici, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—*Amy v. Watertown*, 22 Fed. 420—*Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 639—*Sinking Fund Commissioners v. Buckner*, 48 Fed. 535—*Bangs v. Loveridge*, 60 Fed. 966—*Merrill v. Monticello*, 66 Fed. 166—*Hayden v. Thompson*, 17 C. C. A. 600, 36 U. S. App. 361, 71 Fed. 69—*Copeland v. Bruening*, 104 Fed. 170—*Ratican v. Terminal R. Asso.* 114 Fed. 668—*Peters v. Hanger*, 62 C. C. A. 499, 127 Fed. 821—*Hartford & C. W. R. Co. v. Montague*, 72 Conn. 693, 45 Atl. 961—*Cammack v. Carpenter*, 3 App. D. C. 229—*Apalachicola v. Curtis*, 9 Fla. 357, 79 Am. Dec. 284—*Leavenworth v. Douglass*, 59 Kan. 422, 53 Pac. 123—*Bett v. Bowie*, 65 Md. 355, 4 Atl. 295—*Whittaker v. Southwest Virginia Improv. Co.* 34 W. Va. 229, 12 S. E. 507—*Bailey v. Calfee*, 49 W. Va. 646, 39 S. E. 642—*Beecher v. Foster*, 51 W. Va. 617, 42 S. E. 647—*Phillips v. Piney Coal Co.* 53 W. Va. 547, 97 Am. St. Rep. 1040, 44 S. E. 774—*Coon v. Seymour*, 71 Wis. 345, 37 N. W. 243.

Laches.

See also *infra*, 890-892.

865. When the bill shows upon its face that the plaintiff, by reason of lapse of time and of his own laches, is not entitled to relief, the objection may be taken by demurrer. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610, 30: 718

Cited in Bryan v. Kales, 134 U. S. 135, 33 L. ed. 833, 10 Sup. Ct. Rep. 435—*Ware v. Galveston City Co.* 146 U. S. 116, 36 L. ed. 910, 13 Sup. Ct. Rep. 33—*Horsford v. Guder*, 85 Fed. 388—*Teall v. Slaven*, 40 Fed. 781—*Cornell v. Green*, 43 Fed. 109—*Hinchman v. Kelley*, 4 C. C. A. 192, 7 U. S. App. 481, 54 Fed. 66—*Rhino v. Emery*, 65 Fed. 836—*McMonagle v. McGlinn*, 85 Fed. 92—*Cammack v. Carpenter*, 3 App. D. C. 229—*Kerfoot v. Billings*, 160 Ill. 569, 43 N. E. 804—*Leavenworth v. Douglass*, 59 Kan. 422, 53 Pac. 123—*Stillwater & St. P. R. Co. v. Stillwater*, 66 Minn. 178, 68 N. W. 836—*Zebble v. Farmers' Loan & T. Co.* 139 N. Y. 463, 34 N. E. 1067—*Beecher v. Foster*, 51 W. Va. 617, 42 S. E. 647—*Newberger v. Wells*, 51 W. Va. 633, 42 S. E. 625—*Kelly v. Green Bay, W. & St. P. R. Co.* 80 Wis. 335, 50 N. W. 187.

866. Where the bill shows such laches upon the part of the plaintiff that a court of equity ought not to give relief, the defendant need not interpose a plea or answer, but may demur upon the ground of want of equity apparent on the bill itself. *Bryan v. Kales*, 134 U. S. 126, 10 Sup. Ct. Rep. 435, 33: 829

c. What Demurrable.

See also *supra*, 310, 311, 771, 794; *Parties*, 278.

867. An error in a prayer for judgment in a plea in bar is not necessarily fatal on general demurrer. *Withers v. Greene*, 9 How. 213, 13: 109

868. Upon a bill filed by the purchaser at an execution sale, alleged to have been fair and regular, of certain promissory notes, for the purpose of establishing his right thereto and in property by which they were secured, the fact that he paid for the notes a sum vastly less than their face value is not sufficient ground for dismissing the bill on demurrer. *Erwin v. Parham*, 12 How. 197, 13: 952

869. A complaint for the possession of a mine, alleging a claim to a tunnel 5,000 feet in length, is not demurrable on the ground that the statute recognizes a right of only 3,000 feet from the mouth of the tunnel, since such allegation would be good as to the 3,000 feet. *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 8 Sup. Ct. Rep. 1214, 32: 172

870. An averment in a declaration that parties, one of which was a railroad company, had set their hands and seals to a contract the attesting clause of which alleged that the railroad company had signed, sealed, and delivered in the presence of two witnesses, who signed their names thereto, is on demurrer a sufficient allegation that the instrument was sealed with the common or corporate seal of the company. *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. Rep. 379, 40: 515

871. In an action upon coupons, pleas that the plaintiff is neither the owner, holder, nor bearer, and that the bonds belonged to a third person, and that the county did not make them, are good on general demurrer. *Pendleton County v. Amey*, 13 Wall. 297, 20: 579

Cited in McKee v. Vernon County, 3 Dill. 211, Fed. Cas. No. 8,851—*Lanning v. Lockett*, 4 Woods, 458, 11 Fed. 816—*Berry v. Barton*, 12 Okla. 236, 66 L.R.A. 532, 71 Pac. 1074.

872. Where a declaration sets out a copy of bonds, with all the recitals, and the recitals show that the bonds were irregularly issued and not binding upon the township, the declaration is demurrable. *McClure v. Oxford Twp.* 94 U. S. 429, 24: 129

873. Where city bonds recited on their face that the conditions had been complied with which authorized their issue, in an action on them by an innocent holder, pleas which simply tender an issue as to the authority of the city to issue the bonds are demurrable. *Nauvoo v. Ritter*, 97 U. S. 339, 24: 1050

874. When a plea in its commencement purports to respond to the entire declaration but it is in reality an answer to only a part

of such declaration, it is bad on demurrer. *Hogan v. Ross* use of *Patterson*, 13 How. 173, 14: 100

875. A plea of *non est factum*, filed without an affidavit of its truth, which is required by a statute of Mississippi, is demurrable under the practice of that state. *Bell v. Vicksburg*, 23 How. 443, 16: 579

876-9. A bill to charge a bankrupt's wife with money received from him, which fails to name any fund now existing, and does not seek a discovery, is bad on demurrer. *Huntington v. Saunders*, 120 U. S. 78, 7 Sup. Ct. Rep. 356, 30: 580

Cited in *Excelsior Wooden Pipe Co. v. Seattie*, 55 C. C. A. 160, 117 Fed. 144—*Hudson v. Wood*, 119 Fed. 776—*Manley v. Mickle*, 55 N. J. Eq. 567, 37 Atl. 738—*Ball v. Sawyer*, 62 Vt. 370, 19 Atl. 767.

880. Variance between the dates of the bond declared upon and of that produced on oyer is fatal on general demurrer. *Cooke v. Graham*, 3 Cranch, 229, 2: 420
Distinguishing in *Moses v. United States*, 166 U. S. 578, 41 L. ed. 1122, 17 Sup. Ct. Rep. 682.

Cited in *Chilton v. People*, 66 Ill. 503—*Deming v. Bullitt*, 1 Blackf. 241—*Smith v. Brown*, 3 Blackf. 25—*Compere v. State*, 7 Blackf. 553—*Church v. Feterow*, 2 Penr. & W. 304—*Bennett v. Giles*, 6 Leigh, 318.

881. If the declaration be upon a joint note, and the defendant plead that the note is the separate note of one of the defendants, and was given to and accepted by the plaintiff in full satisfaction of the debt, this plea is bad upon special demurrer as amounting to the general issue. *Van Ness v. Forrest*, 8 Cranch, 30, 3: 478
Cited in *Little v. Boldes*, 12 N. J. L. 174,

Demurrer to entire bill or answer.
See also *supra*, 874; *infra*, 952.

882. A demurrer taken to the entire bill fails if any part of the bill is good. *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 4 Sup. Ct. Rep. 583, 28: 498
Cited in *Savannah, F. & W. R. Co. v. Jacksonville, T. & K. W. R. Co.* 24 C. C. A. 440, 52 U. S. App. 51, 79 Fed. 38.

883. Where there is matter properly pleaded in the bill, which is proper ground for equitable relief and which requires an answer or a plea, a demurrer to the whole bill ought to be overruled. *Stewart v. Masterson*, 131 U. S. 151, 9 Sup. Ct. Rep. 682, 33: 114

884. In chancery a bill may be met by several modes of defense. The defendant may demur, answer, and plead to different parts of the bill; so that if a bill for discovery contains proper matter for the one and not for the other, the defendant should answer the proper and demur to the improper matter; but if he demur to the whole bill, it must be overruled. *Livingston v. Story*, 9 Pet. 632, 9: 255
Cited in *Phillips v. Preston*, 5 How. 289, 12 L. ed. 157—*Heath v. Erie R. Co.* 8 Blatchf. 407, Fed. Cas. No. 6,306—*Savannah, F. & W. R. Co. v. Jacksonville T. & K. W. R. Co.*

24 C. C. A. 440, 52 U. S. App. 51, 79 Fed. 38—*Edwards v. Bay State Gas Co.* 91 Fed. 947—*Maeder v. Buffalo Bills Wild West Co.* 132 Fed. 282—*Burke v. Morris*, 121 Ala. 130, 25 So. 759—*Fisher v. Scholte*, 30 Iowa, 222—*Boston Water Power Co. v. Boston & W. R. Corp.* 16 Pick. 521—*Brown v. Buck*, 75 Mich. 278, 5 L.R.A. 228, 13 Am. St. Rep. 438, 42 N. W. 827—*Winnipisslogee Lake Co. v. Worster*, 29 N. H. 445—*Currier v. Concord R. Corp.* 48 N. H. 831.

885. If an answer contains any good defense, a general demurrer to it must be overruled. *Dallas County v. MacKenzie*, 94 U. S. 660, 24: 182
Buffington v. Harvey, 95 U. S. 99, 24: 381

886. Where a demurrer is put in generally to several pleas, if any one of them constitutes a good bar to the action, the demurrer is bad. *United States v. Girault*, 11 How. 22, 13: 587
Cited in *Whitenack v. Philadelphia & R. R. Co.* 57 Fed. 902.

Statute of limitations; laches.

Necessity of Pleading Statute, see *supra*, II. g, 2.

Sufficiency of Plea of Statute, see *supra*, III. h, 3.

Taking by Demurrer Objection to Bar by Laches or Limitation, see *supra*, 864-866.

See also *infra*, 893.

887. A demurrer presenting the defense of the statute of limitations should be overruled unless the bar of the statute clearly and distinctly appears from the case made by the bill. *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. Rep. 3, 27: 69

888. Where a complaint in a suit against a surety does not state any facts to show the application of the statute of limitations in favor of the defendant, a plea which does not state such facts is bad on demurrer. *Alexander v. Bryan*, 110 U. S. 414, 4 Sup. Ct. Rep. 107, 28: 195

889. To a plea that the loan of a sum of money sued for was a private transaction barred by the statute of limitations, a replication not denying that the transaction was a private one, but alleging that the money belonged to the United States and was advanced by one officer to another, in his capacity as a Federal officer, is bad upon demurrer, for failure to take issue upon or avoid a material allegation. *United States v. Buford*, 3 Pet. 12, 7: 585

890. A demurrer on the ground of the statute of limitations and laches is properly sustained where there has been no obstruction to a suit, and the relief could better have been had immediately after the sale of a railroad and its franchises, which is complained of, than at the time of bringing the suit, and there is no allegation of fraud particularized, except that the railroad company had no authority under its charter to issue stock which plaintiff alleges he was fraudulently induced to accept in exchange for coupons, and that, if it

had, the certificates were invalid for want of the common seal of the company to them, and there is no allegation of the time of discovery of any fraud, and there has been delay in the bringing of the suit. *Coddington v. Pensacola & G. R. Co.* 103 U. S. 409, 26: 400

891-2. A bill which shows gross laches, without sufficient excuse on the part of the complainant, is bad on demurrer. *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350, 27: 219

Cited in Spedel v. Henrich, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610—*Bryan v. Kales*, 134 U. S. 135, 33 L. ed. 833, 10 Sup. Ct. Rep. 935—*Briggs v. United States*, 25 Ct. Cl. 135—*Credit Co. v. Arkansas C. R. Co.* 5 McCrary, 34, 15 Fed. 55—*Cornell v. Green*, 43 Fed. 109—*Caulk v. Pace*, 3 C. C. A. 639, 2 U. S. App. 531, 53 Fed. 715—*Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 652, 17 U. S. App. 145, 57 Fed. 944—*Dugan v. O'Donnell*, 68 Fed. 992—*Hubbard v. Manhattan Trust Co.* 30 C. C. A. 528, 57 U. S. App. 730, 87 Fed. 60—*Nash v. Ingalls*, 41 C. C. A. 549, 101 Fed. 649—*Potts v. Alexander*, 118 Fed. 886—*Kerfoot v. Billings*, 160 Ill. 569, 43 N. E. 804—*Belt v. Bowle*, 65 Md. 355, 4 Atl. 295—*Barton v. Long*, 45 N. J. Eq. 850, 19 Atl. 623—*Drake v. Wild*, 65 Vt. 617, 27 Atl. 427—*Marshall v. Hall*, 51 W. Va. 580, 42 S. E. 641—*Beecher v. Foster*, 51 W. Va. 617, 42 S. E. 647—*Phillips v. Piney Coal Co.* 53 W. Va. 548, 97 Am. St. Rep. 1040, 44 S. E. 774.

d. What Questions Raised By.

Propriety of Testing by Question Certified, see *Cases Certified*, 37, 38.
See also *supra*, 299.

893. The statute of limitations is available in chancery on demurrer. *Harpending v. Reformed Protestant Dutch Church*, 16 Pet. 455, 10: 1029
Cited in Williams v. First Presby. Soc. 1 Ohio St. 508.

894. Objections merely to the regularity of a plea cannot be heard upon demurrer, since only the legal effect of the plea is thereby put in issue. *Commercial & R. Bank v. Slocomb*, 14 Pet. 60, 10: 354
Cited in Bell v. Vicksburg, 23 How. 444, 16 L. ed. 580.

895. A demurrer led to counts on a guaranty does not bring up the validity of that instrument for decision. It must be specially pleaded, with suitable averments. *Clearwater v. Meredith*, 21 How. 489, 16: 201

896. A demurrer to a scire facias raises only questions of law on the facts stated in the writ of scire facias itself. *Walden v. Craig*, 14 Pet. 147, 10: 393

897. A demurrer to a complaint, because it does not state facts sufficient to constitute a cause of action, raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. Rep. 495, 28: 491

898. A defense that a reissue is not for the same invention as the original may be raised by demurrer. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 25: 77

Cited in Gay v. Skeen, 36 W. Va. 588, 15 S. E. 64.

899. Whether or not the design in a patent is new is a question of fact, not to be determined upon demurrer to the bill, but one which should be raised by answer and settled by proper proofs. *New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.* 137 U. S. 445, 11 Sup. Ct. Rep. 193, 34: 741

Cited in Covert v. Travers Bros. Co. 70 Fed. 789—*Caldwell v. Powell*, 19 C. C. A. 593, 39 U. S. App. 214, 73 Fed. 491—*Patent Button Co. v. Consolidated Fastener Co.* 84 Fed. 190—*Neldick v. Fosbenner*, 108 Fed. 267—*Union Welting Co. v. McCarter*, 47 C. C. A. 429, 108 Fed. 398—*Chinnock v. Paterson, P. & S. Tel. Co.* 50 C. C. A. 386, 112 Fed. 533.

900. The question whether the commonwealth of Virginia has been released from all liability on account of the public debt evidenced by bonds of the state outstanding on January 1, 1861, will not be passed upon on a demurrer to a bill filed by that state against the state of West Virginia, which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state, but the consideration of such question will be postponed until final hearing. *Virginia v. West Virginia*, 206 U. S. 290, 27 Sup. Ct. Rep. 732, 51: 1068

e. What Admitted By.

Admissions by Pleading or Failing to Plead
Generally, see *supra*, I. m.
On Bill of Review, see *Review*, 64.
See also *infra*, 925.

901. Where a demurrer to a bill in equity has been filed, by leave of the court, upon the withdrawal of an answer putting in issue facts set forth in the bill, after testimony thereon has been taken, the truth of the facts so set forth may be taken as admitted. *Reagan v. Farmers Loan & T. Co.* 154 U. S. 362, 420, 578, 14 Sup. Ct. Rep. 1047, 1062, 33: 1014
Cited in Missouri P. R. Co. v. Smith, 60 Ark. 241, 5 Inters. Com. Rep. 352, 29 S. W. 752.

902. An allegation in the declaration inconsistent with the terms of the writing sued on, and made part of the record, is not admitted by a demurrer. *Hitchcock v. Buchanan*, 105 U. S. 416, 26: 1078
Cited in Mosher v. St. Louis, I. M. & S. R. Co. 127 U. S. 395, 32 L. ed. 251, 8 Sup. Ct. Rep. 1324.

903. Where a bill alleges that the exemption from taxation of a railroad passed to and vested in the complainant below, the truth of the allegation is not admitted by a demurrer to the bill. A fact impossible in

law cannot be admitted by a demurrer. *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. Rep. 193, 27: 922
Cited in *Dennison Mfg. Co. v. Thomas Mfg. Co.* 94 Fed. 654—*People ex rel. Atty. Gen. v. Roach*, 76 Cal. 296, 18 Pac. 407—*Ex parte Thompson*, 20 Fla. 888—*Crockett v. McLanahan*, 109 Tenn. 525, 61 L.R.A. 916, 72 S. W. 950.

904. In an action upon a written instrument, a statute prohibiting defendants from denying their signatures, except under plea verified by affidavit, does not apply to a case in which they demur because the instrument declared on appears upon its face to be the contract of their principal, and not of themselves, since the fact of signature is admitted by the demurrer. *Hitchcock v. Buchanan*, 105 U. S. 416, 26: 1078

Averments of plea.

See also *supra*, 742.

905. The averments of a plea demurred to stand admitted. *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9: 709

906. Where a plea alleges that the plaintiff took certain bonds sued upon, with notice of irregularities, and the replication traversed the averment of notice, and tendered an issue to the country, a demurrer to the replication confessed that the allegations of the plea in that behalf were untrue, and that the plaintiff was a bona fide holder without notice. *Lexington v. Butler*, 14 Wall. 282, 20: 809
Cited in *Halsey v. New Providence*, 3 Fed. 366.

907. By setting down a plea for argument, a party admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent a recovery. *Rhode Island v. Massachusetts*, 14 Pet. 210, 10: 423
Distinguished in *Greene v. Harris*, 9 R. I. 409.
Cited in *Green v. Bogue*, 158 U. S. 500, 39 L. ed. 1069, 15 Sup. Ct. Rep. 975—*Burrell v. Hackley*, 35 Fed. 834—*Foster v. Bank of Abingdon*, 68 Fed. 725—*Southern P. R. Co. v. Groeck*, 74 Fed. 585—*Metcalf v. American School Furniture Co.* 122 Fed. 117—*Giberson v. Cook*, 124 Fed. 987.

Matters well pleaded; conclusions.

See also *supra*, 537.

908. A demurrer admits only what is well pleaded. *Commercial Bank v. Buckner*, 20 How. 108, 15: 862
Sullivan v. Iron Silver Min. Co. 109 U. S. 550, 3 Sup. Ct. Rep. 339, 27: 1028
Aurora v. West, 7 Wall. 82, 19: 42
Tyler v. Hand, 7 How. 573, 12: 824
United States v. Van Auken, 96 U. S. 366, 24: 852
Cited in *Aurora v. West*, 7 Wall. 99, 19 L. ed. 48—*Dillon v. Bannard*, Holmes, 389, Fed. Cas. No. 3,015—*Reid v. Field*, 83 Va. 29, 1 S. E. 895.

909. A general demurrer to a bill for an injunction is a denial in form and substance of the right of complainant, to have his case considered in a court of equity, but also an admission that all the allegations of it

which were properly pleaded are true. *Griffing v. Gibb*, 2 Black, 519, 17: 353
Cited in *Logan v. Clough*, 2 Colo. 328.

910. Where the fact that respondent's father became a naturalized citizen of the United States while respondent was a minor is well pleaded, a demurrer to the pleading admits that fact. *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 12 Sup. Ct. Rep. 375, 36: 103

911. On demurrer confessions made in the bill are to be regarded as facts admitted by complainant, and matters well pleaded in favor of complainant are to be regarded as facts admitted by the respondent. *Holden v. Joy*, 17 Wall. 211, 21: 523

912. In an action brought in a state court upon a judgment rendered in another state, an allegation as to the legal effect of the judgment in that state is admitted by demurrer. *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. Rep. 242, 29: 535
Cited in *Davidow v. Pennsylvania R. Co.* 85 Fed. 944—*St. Louis I. M. & S. E. Co. v. Halst*, 71 Ark. 265, 100 Am. St. Rep. 65, 72 S. W. 893.

913. A demurrer admits facts well pleaded, but does not admit that the construction of a written instrument set forth in the complaint is the true one. *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 11 Sup. Ct. Rep. 656, 35: 278
Cited in *Chicot County v. Sherwood*, 148 U. S. 536, 37 L. ed. 549, 13 Sup. Ct. Rep. 695—*Green v. Indian Gold Min. Co.* 120 Fed. 716—*Norman v. Kentucky Bd. of Managers*, 93 Ky. 547, 18 L.R.A. 558, 20 S. W. 991—*Newberry Land Co. v. Newberry*, 95 Va. 123, 27 S. E. 899—*Lockhead v. Berkeley Springs Waterworks & Improv. Co.* 40 W. Va. 559, 21 S. E. 1031.

914. A demurrer to a bill in equity does not admit the correctness of averments as to the meaning of an instrument set forth in or annexed to the bill. *Dillon v. Barnard*, 21 Wall. 430, 22: 673

Cited in *Gould v. Evansville & C. R. Co.* 91 U. S. 536, 23 L. ed. 420—*United States v. Ames*, 99 U. S. 45, 25 L. ed. 301—*Hitchcock v. Buchanan*, 105 U. S. 418, 26 L. ed. 1079—*Pennie v. Reis*, 132 U. S. 470, 33 L. ed. 429, 10 Sup. Ct. Rep. 149—*Fogg v. Blair*, 139 U. S. 127, 35 L. ed. 107, 11 Sup. Ct. Rep. 476—*Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 578, 35 L. ed. 282, 11 Sup. Ct. Rep. 656—*Taylor v. Holmes*, 14 Fed. 509—*Chicago & A. R. Co. v. New York, L. E. & W. R. Co.* 24 Fed. 519—*Dishong v. Finkblner*, 46 Fed. 17—*Gilchrist v. Helena, H. S. & S. R. Co.* 47 Fed. 596—*United States v. Trans-Missouri Freight Asso.* 24 L.R.A. 87, 4 Inters. Com. Rep. 457, 7 C. C. A. 82, 19 U. S. App. 36, 58 Fed. 78—*Fuller v. Montague*, 8 C. C. A. 104, 16 U. S. App. 391, 59 Fed. 215—*Lumley v. Wabash R. Co.* 71 Fed. 27—*United States v. Flournoy Live-Stock & Real-Estate Co.* 71 Fed. 578—*Salling v. Bolander*, 60 C. C. A. 472, 125 Fed. 704—*Woodruff v. New York & N. E. R. Co.* 59 Conn. 90, 20 Atl. 17—*Donaldson v. Wright*, 7 App. D. C. 54—*Clark v. Mutual Reserve Fund Life Asso.* 14 App. D. C. 172, 43 L.R.A. 395—*Lockhart v. Leeds*, 10 N. M. 594, 63 Pac. 48—*Rauh v. Public Parks*, 66

How. Pr. 370—Bonnell v. Griswold, 68 N. Y. 298—Jordan v. National Shoe & Leather Bank, 74 N. Y. 472, 30 Am. Rep. 319—Baltimore & O. R. Co. v. Wilson, 31 Ohio St. 558—O'Hara v. Parker, 27 Or. 166, 39 Pac. 1004—Alexander v. School Dist. No. 6, 62 Vt. 277, 19 Atl. 995—Newberry Land Co. v. Newberry, 95 Va. 123, 27 S. E. 899—State ex rel Boggs v. County Court, 33 W. Va. 593, 11 S. E. 72—Lockhead v. Berkeley Springs Waterworks & Improv. Co. 40 W. Va. 559, 21 S. E. 1031.

915. The general rule that the truth of material and relevant matters set forth with requisite precision is admitted by demurrer will not be applied in a controversy between states, which involves the question whether one state may wholly deprive the other state and its inhabitants of all the water of a river accustomed to flow through that state, whereby injury is inflicted on such state as an individual owner, and on all the inhabitants of that state, and especially on the inhabitants of that part of the state lying in the river valley. *Kansas v. Colorado*, 185 U. S. 125, 22 Sup. Ct. Rep. 552, 46: 838

916. Averments of legal conclusions are not admitted by a demurrer. *Kent v. Lake Superior Ship Canal R. & Iron Co.* 144 U. S. 75, 12 Sup. Ct. Rep. 650, 36: 352
Cited in *Crockett v. McLanahan*, 109 Tenn. 525, 61 L.R.A. 916, 72 S. W. 950.

917. A demurrer admits all facts well pleaded, but not necessarily all statements of conclusions of law. *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 6 Sup. Ct. Rep. 194, 29: 499
Cited in *Fogg v. Blair*, 139 U. S. 127, 35 L. ed. 107, 11 Sup. Ct. Rep. 476—*Lumley v. Wabash R. Co.* 71 Fed. 28.

918. A demurrer admits only the facts alleged, and not the conclusion of law inserted in the pleading demurred to. *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 8 Sup. Ct. Rep. 1324, 32: 249
Pennie v. Reis, 132 U. S. 464, 10 Sup. Ct. Rep. 149, 33: 426
Chicot County v. Sherwood, 148 U. S. 529, 13 Sup. Ct. Rep. 695, 37: 546
Cited in *Dennison Mfg. Co. v. Thomas Mfg. Co.* 94 Fed. 654—*Green v. Indian Gold Min. Co.* 120 Fed. 716.

919. Conclusions drawn from facts alleged in a pleading are not admitted by demurrer. *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 12 Sup. Ct. Rep. 308, 35: 1099
Cited in *Dennison Mfg. Co. v. Thomas Mfg. Co.* 94 Fed. 654—*Wiseman v. Eastman*, 21 Wash. 171, 57 Pac. 398.

920. Mere averments of a legal conclusion are not admitted by a demurrer, unless the facts set forth sustain the allegation. *Gould v. Evansville & C. R. Co.* 91 U. S. 526, 23: 416
Dillon v. Barnard, 21 Wall. 430, 22: 673
Cited in *Horsford v. Gudger*, 35 Fed. 388—*Cornell v. Green*, 43 Fed. 107—*Fuller v. Montague*, 8 C. C. A. 104, 16 U. S. App. 391, 59 Fed. 215—*Baltimore & O. R. Co. v. Wilson*, 31 Ohio St. 558.

921. An allegation that a partnership directed one of its members to give a bond in

the name of the partnership is not admitted by a demurrer. *United States v. Ames*, 99 U. S. 35, 25: 295

Cited in *Fogg v. Blair*, 139 U. S. 127, 35 L. ed. 107, 11 Sup. Ct. Rep. 476—*Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 578, 35 L. ed. 282, 11 Sup. Ct. Rep. 656—*Dishong v. Finkbinder*, 46 Fed. 17—*Haynes v. Brewster*, 46 Fed. 473—*Lumley v. Wabash R. Co.* 71 Fed. 28—*United States v. Flournoy Live-Stock & Real-Estate Co.* 71 Fed. 578—*Green v. Indian Gold Min. Co.* 120 Fed. 716—*Dauphin v. Key, McArthur & M.* 208—*Starbuck v. Farmers' Loan & T. Co.* 28 App. Div. 309, 51 N. Y. Supp. 8—*Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 256—*Newberry Land Co. v. Newberry*, 95 Va. 123, 27 S. E. 899—*State ex rel. Boggs v. County Court*, 33 W. Va. 593, 11 S. E. 72.

922. An averment that bonds issued by a town were executed pursuant to the laws of the state is a conclusion of law, not admitted by demurrer; and the declaration is fatally defective for not stating the facts necessary to determine whether that conclusion of law has any foundation in fact. *Hopper v. Covington*, 118 U. S. 148, 6 Sup. Ct. Rep. 1025, 30: 190
Cited in *Crockett v. McLanahan*, 109 Tenn. 525, 61 L.R.A. 916, 72 S. W. 950.

923. A demurrer does not admit that the construction of a statute set forth in the pleading demurred to is the correct one, or that the statute imposes the obligations or confers the rights which the pleading alleges. *Pennie v. Reis*, 132 U. S. 464, 10 Sup. Ct. Rep. 149, 33: 426
Cited in *Woodruff v. New York & N. E. R. Co.* 59 Conn. 90, 20 Atl. 17—*Donaldson v. Wright*, 7 App. D. C. 54—*Norman v. Kentucky Bd. of Managers*, 93 Ky. 547, 18 L.R.A. 558, 20 S. W. 901—*Alexander v. School Dist. No. 6*, 62 Vt. 277, 19 Atl. 995—*Woodstock v. Hancock*, 62 Vt. 351, 19 Atl. 991.

924. A state court is not concluded as to the proper construction of the statutes of another state and the decision of its courts construing them, on the theory that defendant, by demurring to the complaint, which contained an allegation in the form of an averment of fact as to the meaning of such laws and decisions set forth therein, admitted that such was the correct conclusion to be drawn from them. *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. Rep. 558, 47: 839
Cited in *Allen v. Alleghany Co.* 196 U. S. 465, 49 L. ed. 556, 25 Sup. Ct. Rep. 311—*Clark v. Knowles*, 187 Mass. 39, 105 Am. St. Rep. 376, 72 N. E. 352—*Kuickerbocker Trust Co. v. Iselin*, 185 N. Y. 58, 77 N. E. 877.

f. Effect.

Admission by Pleading, see *supra*, VII. e.
As Appearance, see *Appearance*, 6, 7.

925. An averment of possession of the subject of a legacy, in pursuance of the bequest in a will which is admitted by demurrer, raises the presumption that possession was with the assent of the executor. *McClanahan v. Davis*, 8 How. 170, 12: 1033

Searching record.

926. On demurrer the court will give

judgment against the party whose pleading was first defective in substance. *Spriggs v. Bank of Mt. Pleasant*, 10 Pet. 257, 9: 416
Gorman v. Lenox, 15 Pet. 115, 10: 680
Aurora v. West, 7 Wall. 82, 19: 42
Ferguson v. Meredith (Clearwater v. Meredith) 1 Wall. 25, 17: 604
Cooke v. Graham, 3 Cranch, 229, 2: 420
United States v. Arthur, 5 Cranch, 257, 3: 94

Cited in Aurora v. West, 7 Wall. 92, 19 L. ed. 46—*Gould v. Evansville & C. R. Co.* 91 U. S. 527, 23 L. ed. 416—*Jackson v. Rundlet*, 1 Woodb. & M. 383, Fed. Cas. No. 7,145—*Tingley v. Carroll*, 8 Cranch, C. C. 694, Fed. Cas. No. 14,056—*United States v. Central Nat. Bank*, 10 Fed. 615—*Park Bros. v. Kelly Axe Mfg. Co.* 1 C. C. A. 399, 6 U. S. App. 26, 49 Fed. 622—*Morton v. Kirk*, 79 Fed. 291—*United States v. Peralta*, 99 Fed. 624—*Fulton v. Fletcher*, 12 App. D. C. 14—*Wade v. Doyle*, 17 Fla. 530—*Conner v. Paxson*, 1 Blackf. 209—*McAlester v. Suchy*, 1 Ind. Terr. 669, 43 S. W. 952—*Wile v. Matherson*, 2 G. Greene, 186—*Peoria & O. R. Co. v. Nellis*, 16 Ill. 271—*Anderson v. Barry*, 2 J. J. Marsh. 269—*Potter v. Titcomb*, 7 Me. 323—*Hall v. Williams*, 8 Me. 436—*State use of Moore v. Mayugh*, 13 Md. 378—*Joy v. Simpson*, 2 N. H. 181—*Bigelow v. Drummond*, 42 Misc. 620, 87 N. Y. Supp. 581—*Ketchum v. State*, 2 Or. 105—*Wyoming County v. Bardwell*, 84 Pa. 106, 4 W. N. C. 355—*Stoney v. McNelle*, 1 M'Cord, L. 87—*State v. Williams*, 8 Tex. 285—*Damarin v. Young Bros.* 27 W. Va. 437.

927. A demurrer reaches back to the first error in the pleading. *Terry v. Tubman*, 92 U. S. 156, 23: 537

928. Judgment must be rendered against him who has committed the first fault, or, which will usually produce the same result, for him who upon the whole record appears entitled to judgment, notwithstanding defect in the pleading demurred to, since the demurrer brings all the pleadings before the court. *United States v. Gurney*, 4 Cranch, 333, 2: 638

Cited in United States v. Peralta, 99 Fed. 624—*Donnell v. Jones*, 13 Ala. 500, 48 Am. Dec. 59—*Bigelow v. Drummond*, 42 Misc. 620, 87 N. Y. Supp. 581—*Thompson v. People*, 23 Wend. 580—*State v. Crocker*, 5 Wyo. 398, 40 Pac. 681.

929. On demurrer the court will give judgment against the party whose pleading was first defective in substance. *Townsend v. Jemison*, 7 How. 706, 12: 880
Delaware & H. Canal Co. v. Pennsylvania Coal Co. 8 Wall. 276, 19: 349
United States v. Linn, 1 How. 104, 11: 64
Cited in Aurora v. West, 7 Wall. 94, 19 L. ed. 46—*Morton v. Kirk*, 79 Fed. 291—*Wade v. Doyle*, 17 Fla. 527.

930. Demurrer does not reach back to the first error in the pleadings, where the defect is one of form, and not of substance. *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20: 354
Aurora v. West, 7 Wall. 82, 19: 42
Cited in Baltimore & O. R. Co. v. Harris, 12 Wall. 84, 20 L. ed. 359—*Park Bros. v. Kelly Axe Mfg. Co.* 1 C. C. A. 399, 6 U. S. App. 26, 49 Fed. 622.

931. When the special demurrer is by the plaintiff, his own pleadings are to be scrutinized, and the court will notice what would have been bad upon general demurrer. *Cooke v. Graham*, 3 Cranch, 229, 2: 420

932. Although either party may take advantage of any defect or fault in pleading in the previous proceedings in the suit, the demurrer can reach no further back than the proceedings remain *in fieri*, or under the control of the court. *Dickson v. Wilkinsou*, 3 How. 57, 11: 491

g. Waiver by Pleading Over.

Amendment of Pleading after Sustaining Demurrer, see *supra*, 183, 184.

Prejudicial Error as to, see Appeal and Error, 5011.

See also *supra*, 897; Judgment, 293.

933. The filing of a plea to the merits, after a demurrer was overruled, operates as a waiver of the demurrer. *United States v. Boyd*, 5 How. 29, 12: 36
Campbell v. Wilcox, 10 Wall. 421, 19: 973
Bell v. Mobile & O. R. Co. 4 Wall. 598, 18: 338

Watkins v. United States, 9 Wall. 759, 19: 820

Aurora v. West, 7 Wall. 82, 19: 42

Young v. Martin, 8 Wall. 354, 19: 418

Stanton v. Embry, 93 U. S. 548, 23: 983

Cited in Smith v. Kernochen, 7 How. 216, 12 L. ed. 674—*Coffee v. Planters Bank*, 13 How. 187, 14 L. ed. 106—*Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 214, 16 L. ed. 77—*Aurora v. West*, 7 Wall. 92, 19 L. ed. 46—*Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 8 Wall. 287, 19 L. ed. 353—*Young v. Martin*, 8 Wall. 357, 19 L. ed. 419—*Watkins v. United States*, 9 Wall. 762, 19 L. ed. 821—*Campbell v. Wilcox*, 10 Wall. 423, 19 L. ed. 974—*Stanton v. Embrey*, 93 U. S. 553, 23 L. ed. 984—*Farmington v. Pillsbury*, 114 U. S. 143, 29 L. ed. 116, 5 Sup. Ct. Rep. 807—*Campbell v. Haverhill*, 155 U. S. 612, 39 L. ed. 281, 15 Sup. Ct. Rep. 217—*Brown v. Noyes*, 2 Woodb. & M. 82, Fed. Cas. No. 2,023—*Campbell v. Jordan*, Hempst. 535, Fed. Cas. No. 2,362—*Shuford v. Cain*, 1 Abb. (U. S.) 807, Fed. Cas. No. 12,823—*Holmes v. Oregon & C. R. Co.* 7 Sawy. 392, 9 Fed. 239—*Davies v. Lathrop*, 13 Fed. 566—*Weaver v. Field*, 4 Woods, 156, 16 Fed. 25—*Bland v. Freeman*, 29 Fed. 672—*Gulf, C. & S. F. R. Co. v. Washington*, 1 C. C. A. 288, 4 U. S. App. 121, 49 Fed. 349—*Imperial L. Ins. Co. v. Newcomb*, 10 C. C. A. 289, 19 U. S. App. 669, 62 Fed. 97—*Plankinton v. Gray*, 11 C. C. A. 269, 27 U. S. App. 321, 63 Fed. 416—*Connecticut Mut. L. Ins. Co. v. McWhirter*, 19 C. C. A. 525, 44 U. S. App. 492, 73 Fed. 449—*Frishmuth v. Farmers' Loan & T. Co.* 46 C. C. A. 226, 107 Fed. 173—*Anderson v. Sloan*, 1 Colo. 488—*Guenther v. People*, 22 Colo. 123, 43 Pac. 990—*Chester v. Leonard*, 68 Conn. 504, 37 Atl. 397—*Moses v. Taylor*, 6 Mackey, 280—*Harper v. Cunningham*, 8 App. D. C. 434—*Long v. Allen*, 2 Fla. 411, 50 Am. Dec. 281—*Ellison v. Allen*, 8 Fla. 209—*Robinson v. L'Engle*, 13 Fla. 497—*Dupols v. Thompson*, 16 Fla. 70—*Johnson v. Pensacola & P. R. Co.* 16 Fla. 658, 26 Am. Rep. 731—*Stewart v. Henry*, 5 Blackf. 446—*Rosa v. Missouri, K. & T. R. Co.* 18 Kan. 125—

Harlan v. People, 1 Dougl. (Mich.) 313—Pottinger v. Garrison, 3 Neb. 223—Delaware, L. & W. R. Co. v. Salmon, 39 N. J. L. 301, 23 Am. Rep. 214—Beall v. Territory, 1 N. M. 513—Butterfield's Overland Despatch Co. v. Wedeles, 1 N. M. 531—Kingman v. Pixley, 7 Okla. 352, 54 Pac. 494—Parker v. Lynch, 7 Okla. 632, 56 Pac. 1082—Berry v. Barton, 12 Okla. 224, 66 L.R.A. 518, 71 Pac. 1074—Wells v. Applegate, 12 Or. 209, 6 Pac. 770—First Nat. Bank v. Kinner, 1 Utah, 103—Young v. Martin, 3 Utah, 486, 24 Pac. 909—German v. Bennington & R. R. Co. 71 Vt. 71, 42 Atl. 972—McNulty v. Batty, 2 Pinney (Wis.) 58.

934. Error in sustaining a single demurrer to a bill in part and overruling it in part is waived by the defendant by answering. *Marshall v. Vicksburg*, 15 Wall. 146, 21: 121
Cited in *Campbell v. Haverhill*, 155 U. S. 613, 39 L. ed. 281, 15 Sup. Ct. Rep. 217.

935. Pleading over to a declaration adjudged good on demurrer is a waiver of the demurrer; and when a defendant files a rejoinder to a replication, previously adjudged good on demurrer, his pleading over must, for the same reason, be held to have the same effect. *Aurora v. West*, 7 Wall. 82, 19: 42

Cited in *Watkins v. United States*, 9 Wall. 762, 19 L. ed. 821—*Stanton v. Embrey*, 93 U. S. 553, 23 L. ed. 984—*Provisional Municipality v. Lehman*, 6 C. C. A. 355, 13 U. S. App. 411, 57 Fed. 330—*Harper v. Cunningham*, 8 App. D. C. 434—*Johnson v. Pensacola & P. R. Co.* 16 Fla. 659, 26 Am. Rep. 731—*Beall v. Territory*, 1 N. M. 513—*Butterfield's Overland Despatch Co. v. Wedeles*, 1 N. M. 531—*Klein v. East River Electric Light Co.* 32 Misc. 775, 66 N. Y. Supp. 472.

936. When a party pleads *de novo*, after a demurrer was sustained to his original pleading, he waives any right he might have had to question the correctness of the decision of the court on the demurrer. *Ferguson v. Meredith* (*Clearwater v. Meredith*) 1 Wall. 25, 17: 604

Cited in *Aurora v. West*, 7 Wall. 82, 19 L. ed. 46—*Young v. Martin*, 8 Wall. 357, 19 L. ed. 419—*Watkins v. United States*, 9 Wall. 762, 19 L. ed. 821—*Campbell v. Wilcox*, 10 Wall. 423, 19 L. ed. 974—*Stanton v. Embrey*, 93 U. S. 553, 23 L. ed. 984—*Campbell v. Haverhill*, 155 U. S. 613, 39 L. ed. 281, 15 Sup. Ct. Rep. 217—*Garlington v. Priest*, 13 Fla. 563—*Rosa v. Missouri, K. & T. R. Co.* 18 Kan. 125—*Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 301, 23 Am. Rep. 214—*Butterfield's Overland Despatch Co. v. Wedeles*, 1 N. M. 531—*Darracott v. Chesapeake & O. R. Co.* 83 Va. 290, 5 Am. St. Rep. 266, 2 S. E. 511—*Harris v. Norfolk & W. R. Co.* 88 Va. 562, 14 S. E. 535—*Prescott v. Puget Sound Bridge & Dredging Co.* 31 Wash. 178, 71 Pac. 772.

937. An objection to the jurisdiction presented by filing a demurrer for the special and single purpose of raising it is not waived by answering to the merits when the demurrer is overruled. *Re Atlantic City R. Co.* 164 U. S. 633, 17 Sup. Ct. Rep. 208, 41: 579

Cited in *Donahue v. Calumet Fire-Clay Co.* 94 Fed. 27.

938. The question of forfeiture is withdrawn from the case in an action for the forfeiture of property conveyed in an indenture, and for compensation for damages claimed to grow out of the agreement, where the court sustained a single demurrer in so far as it related to the forfeiture, overruling it as to the damages, and both parties waived the error, the one by amendment and the other by answering. *Marshall v. Vicksburg*, 15 Wall. 146, 21: 121

939. The question whether the election by a trustee in bankruptcy to avoid a preference should be exercised by a demand before suit, or can be exercised by the suit itself, is not open to the defendant, although it demurred to the complaint, and urged, as a ground of demurrer, the absence of an allegation of a demand, where it did not stand on the demurrer, but answered, and not only traversed the allegations of the complaint, but set up in independent defense, and showed that a demand would have been unavailing. *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 27 Sup. Ct. Rep. 391, 51: 596

939a. A defendant answering over by leave and order of the court may reserve his objection to the overruling of his demurrer. *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. Rep. 466, 37: 316

940. When the declaration fails to state a cause of action, and clearly shows, upon the case as stated, that the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment reviewed for the error in overruling the demurrer. *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. Rep. 420, 28: 415

Cited in *Bauserman v. Blunt*, 147 U. S. 652, 37 L. ed. 318, 13 Sup. Ct. Rep. 466—*Pontiac v. Talbot Paving Co.* 48 L.R.A. 328, 36 C. C. A. 90, 94 Fed. 67—*Hunter's Appeal*, 71 Conn. 198, 41 Atl. 557—*Fideler v. Norton*, 4 Dak. 281, 32 N. W. 57—*Harper v. Cunningham*, 8 App. D. C. 434—*Beadle County Nat. Bank v. Hyman*, 33 Ill. App. 621—*Louisville & N. R. Co. v. Schmidt*, 112 Ky. 723, 66 S. W. 629—*Schofield v. Territory*, 9 N. M. 533, 56 Pac. 306.

h. Practice Generally.

Considering Entire Record Connected with Demurrer on Appeal, see *Appeal and Error*, 4270.
See also *supra*, 29a, b.

941. On demurrer to a pleading its allegations will be liberally construed in favor of the pleader. *United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. Rep. 454, 30: 601
Cited in *Sommer v. Carbon Hill Coal Co.* 32 C. C. A. 162, 59 U. S. App. 519, 89 Fed. 60.

942. Under the practice of Louisiana, peremptory exceptions founded in law must be considered to be specially pleaded, when they are set forth in writing in a specific or

detailed form, and judgment prayed thereon: and a refusal to receive them when first offered will not be fatal if the party has the benefit of them on a motion in arrest of judgment, and in a bill of exceptions. *Phillips v. Preston*, 5 How. 278, 12: 152

What may be considered or regarded; presumptions.

See also *supra*, 184.

943. A demurrer cannot introduce, as its support, new facts which do not appear on the face of the bill and which must be set up by plea or answer. *Stewart v. Master-son*, 131 U. S. 151, 9 Sup. Ct. Rep. 682, 33: 114

Cited in Edwards v. Bay State Gas Co. 91 Fed. 947—*Richardson v. Loree*, 36 C. C. A. 305, 94 Fed. 379—*Beckner v. Beckner*, 104 Ga. 222, 30 S. E. 622.

944. On demurrer to the complaint the court may take judicial notice of the statutes of the state relied on by the pleader, but cannot consider facts except as they are offered in the complaint. *Memphis & St. L. R. Co. v. Loftin*, 105 U. S. 258, 26: 1042

945. On demurrer to a bill, the record in a former suit not made a part of the bill or of the record in the present suit cannot be referred to, although the bill prays liberty to refer to the files and record of the court in the former suit. *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 4 Sup. Ct. Rep. 583, 28: 498

946. That several breaches of the official bond of a government receiver have been averred will not be regarded by the court, where the defect is not alleged as a special cause of demurrer, as required by the procedure of the state where the action was tried. *United States v. Boyd*, 15 Pet. 187, 10: 706

947. An allegation that possession has never been obtained may be disregarded as immaterial on a general demurrer to a declaration upon a covenant of warranty. *Day v. Chism*, 10 Wheat. 449, 6: 363

948. An averment of possession of the subject of a legacy, in pursuance of the bequest of a will, raises the presumption, upon demurrer, that possession was with the assent of the executor. *McClanahan v. Davis*, 8 How. 170, 12: 1033

Decree or judgment.

Conclusiveness of, see *Judgment*, III. e.

949. A party seeking damages for a specified breach of duty is not entitled to judgment when he admits on demurrer that the damages resulted from other causes. *United States v. Chouteau*, 102 U. S. 603, 26: 246

950. On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue in fact, joined upon the same pleading, and found in favor of either party. *Ferguson v. Meredith* (Clearwater v. Meredith) 1 Wall. 25, 17: 604
Cited in Aurora v. West, 7 Wall. 100, 19 L. ed. U. S. Dig.—288

48—*Gould v. Evansville & C. R. Co.* 91 U. S. 534, 23 L. ed. 419—*Cromwell v. Sac County*, 94 U. S. 364, 24 L. ed. 202—*Spicer v. United States*, 5 Ct. Cl. 52—*North Muskegon v. Clark*, 10 C. C. A. 594, 22 U. S. App. 522, 62 Fed. 697—*Lindsley v. Union Silver Star Min. Co.* 52 C. C. A. 645, 115 Fed. 51—*Zirkle v. Jones*, 129 Ala. 450, 29 So. 681—*Tobias v. Morris*, 132 Ala. 268, 31 So. 498—*Andrews v. Hall*, 132 Ala. 322, 31 So. 356—*Kern v. Saul*, 14 Ind. App. 74, 42 N. E. 496—*Brown v. Kirkbridge*, 19 Kan. 502—*Dixon v. Zadek*, 59 Tex. 531—*Morris v. Lyon*, 84 Va. 335, 4 S. E. 734—*Henry v. Ohio River R. Co.* 40 W. Va. 237, 21 S. E. 863.

951. When the defendant's plea goes to bar the action, if the plaintiff demur to it, and the demurrer is determined in favor of the plea, judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact, because upon the whole it appears that the plaintiff had no cause of action. *Ferguson v. Meredith*, (Clearwater v. Meredith) 1 Wall. 25, 17: 604

Cited in Martin v. Bartow Iron Works, 35 Ga. 330—*Hibberd v. Trask*, 160 Ind. 505, 67 N. E. 179.

952. Where there is a demurrer to the whole bill and also to part, and the latter only is sustained, the regular decree is to dismiss so much of the bill as seeks relief as to the matters adjudged bad, and to overrule the demurrer to the residue, and direct the defendant to answer thereto. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 25: 77

Cited in Market Street Cable R. Co. v. Rowley, 153 U. S. 625, 39 L. ed. 287, 15 Sup. Ct. Rep. 224—*Gay v. Skeen*, 36 W. Va. 588, 15 S. E. 64.

953. A single demurrer cannot be sustained in part. It must be wholly sustained or overruled. *Marshall v. Vicksburg*, 15 Wall. 146, 21: 121

954. If the plea to any one of the counts in the declaration be bad, the plaintiff is entitled, on demurrer, to judgment on that count. *Fletcher v. Peck*, 6 Cranch, 87, 3: 162

955. On demurring in abatement,—as for lack of averment of citizenship,—if the demurrer be overruled, the judgment will be final for plaintiff. *Tyler v. Hand*, 7 How. 573, 12: 824

Dismissal.

See also *Bills and Notes*, 306.

956. Where a demurrer is sustained to a bill because the cause of action in behalf of one of the complainants is not within the jurisdiction of the circuit court, the remaining complainant may have the bill retained as to him by having the same dismissed as to his complaint. *Walker v. Powers*, 104 U. S. 245, 26: 729

Cited in Victor Talking Mach. Co. v. American Graphophone Co. 118 Fed. 52.

957. A complaint against persons jointly and severally liable should not be dismissed as to one of them who has not appeared, on

a demurrer by the other. *United States v. Piatt*, 157 U. S. 113, 15 Sup. Ct. Rep. 498, 39: 639
Cited in United States v. Salisbury, 157 U. S. 121, 39 L. ed. 642, 15 Sup. Ct. Rep. 50.

PLEDGE.

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Of Warehouse Receipts, see Warehouseman, 9, 10.

I. In General.

1. Where a debt has been pledged to another by the creditor, such creditor is liable for money received thereon by his collector. *United States v. Robertson*, 5 Pet. 641, 8: 257

2. A creditor may lawfully take and hold several securities for the same debt, and cannot be compelled to yield up either until the debt is paid. *Union Bank v. Laird*, 2 Wheat. 390, 4: 269
Cited in Trotter v. Crockett, 2 Port. (Ala.) 412—*Cocke v. Chaney*, 14 Ala. 66—*Goepper v. Phoenix Brewing Co.* 115 Ky. 716, 74 S. W. 726—*Watkins v. Worthington*, 2 Bland. Ch. 529—*Wiggin v. Suffolk Ins. Co.* 18 Pick. 157, 29 Am. Dec. 576.

3. When a debtor who has given personal guaranties for the performance of his obligation has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, the fund so appropriated shall be administered as a trust for the payment of the debt. *Hampton v. Phipps*, 108 U. S. 260, 2 Sup. Ct. Rep. 622, 27: 719

Cited in Tompkins v. Little Rock & Ft. S. R. Co. 21 Fed. 381—*Plaut v. Storey*, 131 Ind. 50, 30 N. E. 886.

4. A declaration in a statute, that all the stock held by the state in a railroad company shall be pledged for the redemption of state certificates, and any dividend declared thereon shall be applied to pay the interest on said bonds, is only a promise that the stock shall be held and set apart for the payment of the bonds, and that the dividends shall be applied to the interest. It is no actual pledge. *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 10 Sup. Ct. Rep. 260, 33: 589

5. Under the Civil Code of Louisiana, providing that "all clauses of agreements are interpreted the one by the other, giving to each the sense which results from the entire act," a contract may be shown not to be an absolute sale of land by an instrument executed at the same time and connected with the transaction. *Livingston v. Story*, 11 Pet. 351, 9: 746

5a. An antichresis in Louisiana was not converted into a sale by annulment of a counter letter, giving right of redemption, when the instrument then executed further extended the time of redemption upon valuable consideration. *Livingston v. Story*, 11 Pet. 351, 9: 746

5b. In Louisiana a contract is not a conditional sale of land with right of redemption (*vente à réméré*) if the purchaser, by another instrument, relinquishes his right of irrevocable possession upon failure to repurchase at time agreed. *Livingston v. Story*, 11 Pet. 351, 9: 746

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Assignment of debt or demand as transferring collateral. 21: 775

[How far may pledge be effectual of which the pledgeor's agent is made depository. 25 L.R.A. 577.]

II. Nature of; What Constitutes.

Parol Evidence to Vary, see Evidence, 1504.
Parol Evidence that Instrument was Intended as Collateral Security, see Evidence, 1554-1557.

6. The elements of a pledge determining the rights of the parties comprise (1) the property; (2) the debt; and (3) the delivery of the property into the creditor's possession, to be held as security for the debt. *Mechanics' & T. Ins. Co. v. Kiger*, 103 U. S. 352, 26: 433

7. It is required, in order to create a pledge, not only that delivery should accompany the private writing, but that the instrument itself should exhibit the nature and extent of the rights and obligations of the contracting parties reciprocally. *Freiburg v. Dreyfus*, 135 U. S. 478, 10 Sup. Ct. Rep. 716, 34: 206

8. Where bonds of a company are transferred to a director by unfair means and in a clandestine manner, he cannot be regarded as a legal and equitable pledgee thereof. *Washburn v. Green* (*Richardson v. Green*) 133 U. S. 30, 10 Sup. Ct. Rep. 280, 33: 516

9. Although a pledgeor derived his title from one who was insolvent, by a transfer which was subject to be set aside by his creditors but was good between the parties, yet until it was so set aside the pledgeor could create a valid pledge in favor of a bona fide party. *Freiburg v. Dreyfus*, 135 U. S. 478, 10 Sup. Ct. Rep. 716, 34: 206

10. Under a law of Louisiana, there are two kinds of pledges: the pawn, a thing movable given in security; and antichresis, where immovables are given in security. *Livingston v. Story*, 11 Pet. 351, 9: 746

11. In Louisiana an antichresis cannot be changed into an absolute sale, upon failure to pay at the stated time, by so providing in a subsequently executed instrument, since, by the Code, "any clause" in the original instrument "to the contrary" of the provision for a judicial sale upon such nonpayment, would be "null." *Livingston v. Story*, 11 Pet. 351, 9: 746
Cited in Moore v. Boagni, 111 La. 503, 35 So. 716.

12. In Louisiana a conveyance of real property and a delivery of possession, which is not intended to be an absolute sale, but a security for the payment of money, and as to which it is provided, either in the conveyance or in a separate instrument, that, upon failure to pay, the property shall be sold, and any surplus remaining after reimbursement of the debt and expenses returned to the debtor, is not a conditional sale, but a pledge denominated "antichresis," especially provided for by the laws of that state. *Livingston v. Story*, 11 Pet. 351, 9: 746

Delivery.

Of Chattels Covered by Pledged Warehouse Receipt, see Bankruptcy, 195.

13. A pledge, in the legal sense, requires to be delivered to the pledgee. He must have the possession of it. *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 10 Sup. Ct. Rep. 260, 33: 589
Cited in Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 178—*Hook v. Ayers*, 26 C. C. A. 291, 53 U. S. App. 195, 80 Fed. 981—*Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 81 Fed. 445—*Helbron v. Guarantee Loan & T. Co.* 13 Wash. 650, 43 Pac. 932.

14. A possession is of the essence of a pledge; and without it no privilege can exist as against third persons. *Casey v. Cavaroc*, 96 U. S. 467, 24: 779
Casey v. Schuchardt, 96 U. S. 494, 24: 790
Casey v. National Park Bank, 96 U. S. 492, 24: 789

Distinguished in Matthewson v. Caldwell, 59 Kan. 133, 52 Pac. 104.

Cited in Christian v. Atlantic & N. C. R. Co. 133 U. S. 242, 33 L. ed. 592, 10 Sup. Ct. Rep. 260—*Waterman v. Mackenzie*, 138 U. S. 258, 34 L. ed. 926, 11 Sup. Ct. Rep. 334—*Third Nat. Bank v. Buffalo German Ins. Co.* 103 U. S. 588, 48 L. ed. 803, 24 Sup. Ct. Rep. 524—*Nisbet v. Macon Bank & T. Co.* 4 Woods, 470, 12 Fed. 690—*Stout v. Yaeger Mill. Co.* 4 McCrary, 489, 13 Fed. 804—*Thurber v. Oliver*, 26 Fed. 227—*Bidstrup v. Thompson*, 45 Fed. 454—*Hook v. Ayers*, 26 C. C. A. 291, 53 U. S. App. 195, 80 Fed. 981—*Marden v. Phillips*, 3 N. B. N. Rep. 47, 103 Fed. 197—*Re Wittenberg Veneer & Panel Co.* 108 Fed. 597—*Dunn v. Train*, 60 C. C. A. 114, 125 Fed. 222—*Ryttenberg v. Schefer*, 131 Fed. 322—*Gilmer v. Morris*, 80 Ala. 85, 60 Am. Rep. 85—*American Pig Iron Storage Warrant Co.*

v. German, 126 Ala. 239, 85 Am. St. Rep. 21, 28 So. 603—Spangler v. Butterfield, 6 Colo. 360—National Exch. Bank v. Graniteville Mfg. Co. 79 Ga. 27, 3 S. E. 411—Seixas v. Brugler, 37 La. Ann. 515—Langaux's Succession, 46 La. Ann. 1068, 25 L.R.A. 584, 15 So. 708—Textor v. Orr, 86 Md. 397, 38 Atl. 939—Hallgarten v. Oldham, 135 Mass. 8, 46 Am. Rep. 433—Mahoney v. Hale, 66 Minn. 469, 69 N. W. 334—First Nat. Bank v. Caperton, 74 Miss. 869, 60 Am. St. Rep. 540, 22 So. 60—Storts v. Mills, 93 Mo. App. 208—Chitwood v. Lanyon Zinc Co. 93 Mo. App. 230—Buffalo German Ins. Co. v. Third Nat. Bank, 162 N. Y. 170, 48 L.R.A. 110, 56 N. E. 521—Jackson v. Kincaid, 4 Okla. 570, 46 Pac. 587—Sharp v. Philadelphia Warehouse Co. 14 Phila. 421, 37 Phila. Leg. Int. 85—Goodsell v. Benson, 13 R. I. 230—Samson v. Rouse, 72 Vt. 426, 48 Atl. 666—Hellbron v. Guarantee Loan & T. Co. 13 Wash. 650, 43 Pac. 932—Neill v. Rogers Bros. Produce Co. 41 W. Va. 55, 23 S. E. 702—Gelfuss v. Corrigan, 95 Wis. 671, 37 L.R.A. 175, 60 Am. St. Rep. 143, 70 N. W. 306.

15. The doctrine that without possession no privilege can exist as against third persons is in accordance with both the common and the civil law, the Code Napoleon, art. 2076, and the Civil Code of Louisiana, art. 3162. Casey v. Cavaroc, 96 U. S. 467,

24: 779

Casey v. Cavaroc, 96 U. S. 467, 24: 779
Casey v. National Park Bank, 96 U. S. 492,

24: 789

16. By the Civil Code of Louisiana, an actual delivery of securities is sufficient to constitute a pledge. Casey v. Schneider, 96 U. S. 496, 24: 790
Cited in Prentiss Tool & Supply Co. v. Godchaux, 13 C. C. A. 423, 30 U. S. App. 68, 66 Fed. 237.

17. The thing pledged may be in the temporary possession of the pledgeor as special bailee, without defeating the legal possession of the pledgee; but where it has never been out of the pledgeor's actual possession, and has always been subject to his disposal, no pledge exists as against third persons. Casey v. Cavaroc, 96 U. S. 467, 24: 779
Casey v. Schuchardt, 96 U. S. 494, 24: 790
Casey v. National Park Bank, 96 U. S. 492,

24: 789

Cited in Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 81 Fed. 445—Vaucluse v. Merchants Nat. Bank, 4 Dak. 497, 33 N. W. 897—Scherrer v. Caneza, 33 La. Ann. 319—Forstall v. Consolidated Asso. 34 La. Ann. 776—Citizens Bank v. Janin, 46 La. Ann. 1002, 15 So. 471—Britton v. Harvey, 47 La. Ann. 207, 16 So. 747—Moors v. Reading 167 Mass. 325, 57 Am. St. Rep. 460, 45 N. E. 760—Harding v. Eldridge, 186 Mass. 43, 71 N. E. 115—Cooley v. Minnesota Transfer R. Co. 53 Minn. 334, 30 Am. St. Rep. 609, 53 N. W. 141.

18. Where it was agreed a bank should deposit bills and notes with its president and his partner, by way of pledge to secure a loan made to it by a third party, and the president delivers them back to the bank officers for collection, with power to substitute other securities therefor, it is not such a deposit and collection as is necessary to

create a privilege by the law of Louisiana. Casey v. Cavaroc, 96 U. S. 467, 24: 779
Casey v. Schuchardt, 96 U. S. 494, 24: 790
Casey v. National Park Bank, 96 U. S. 492, 24: 789

19. Where notes given for money loaned contain the statements that they are each secured by a pledge of certain warehouse receipts for goods in store, and authorize a sale thereof to pay the notes, the delivery of the receipts is a delivery of the property, and the transaction constitutes a pledge, within the law of Louisiana. Freiburg v. Dreyfus, 135 U. S. 478, 10 Sup. Ct. Rep. 716, 34: 206

20. The indorsement to a third person, as security for loans, of a receipt issued by a warehouse company for goods kept under lock and key in a place leased by it from the owner of the goods, which receipt recites that it received the property on storage, "to be delivered only upon surrender of this receipt, properly indorsed, and payment of all charges thereon," is a sufficient delivery as against attaching creditors of the owner to validate the transaction as a pledge, whether the receipt is to be deemed a public warehouse receipt under Ill. Rev. Stat. chap. 114, § 2, or not. Union Trust Co. v. Wilson, 198 U. S. 530, 25 Sup. Ct. Rep. 766, 49: 1154

21. No such change of possession results from the issuance of so-called warehouse receipts acknowledging the receipt of goods on premises really occupied by the owner, though in form leased by the latter to the warehousing company, as renders valid a pledge of such receipts, where actual possession of the goods was exercised by and existed with the owner substantially the same after issuance of the receipts as before. Security Warehousing Co. v. Hand, 206 U. S. 415, 27 Sup. Ct. Rep. 720, 51: 1117

— Editorial note.

Delivery and possession of property pledged. 24: 589

III. Rights and Liabilities as to Third Persons.

Effective from Giving and not from Realization, see Bankruptcy, 221, 222.

Pledgee of Corporate Bonds, see Bonds, 149.

Liability of Pledgee as Stockholder, see Banks, 251-254; Corporations, 579-581.

Right of Pledgee of Stock to Vote, see Corporations, 673.

Memoranda as Evidence that Pledgee has Become Stockholder, see Evidence, 1356, 1357.

Validity as against Pledgeor's Creditors, see Fraudulent Conveyances, 51-60.

Estoppel of Pledgee to Deny Liability as Shareholder as Question for Jury, see Trial, 296.

Rights of Transferees of Note in Collateral, see Trusts, 32, 33.

Trust Property Taken as Security for Trustee's Debt, see Trusts, 208, 213, 235.

Rights of Pledgee of Warehouse Receipts as Against Creditors of Pledgeor, see Warehousemen, 10.

22. Though the pledgee may, under the law of Louisiana, recover possession of the thing, he cannot sustain a privilege thereon as against creditors, or against a receiver or an assignee in bankruptcy, who represents them. *Casey v. Cavaroc*, 96 U. S. 467, 24: 779

Casey v. Schuchardt, 96 U. S. 494, 24: 790

Casey v. National Park Bank, 96 U. S. 492, 24: 789

23. Where a complainant in equity alleged that certificates issued by the Treasury Department pursuant to the convention of April 11, 1839, between Mexico and the United States, had been purloined from him, and the defendant answered that he had received them in good faith from a third party as security for a loan, the complainant, having given no further proof of their having been purloined, was not entitled to an absolute return of the certificates, but was, however, entitled to the return of the certificates on repayment of the loan made by the defendant upon them as security. *Baldwin v. Ely*, 9 How. 580, 13: 266

24. Where promissory notes are pledged by a debtor to secure a debt, the pledgee acquires a special property in them, which is not lost by their being redelivered to the pledgeor for collection. Money which he may collect upon them is the specific property of the creditor. *Clark v. Iselin*, 21 Wall. 360, 22: 568

Cited in Casey v. Cavaroc, 96 U. S. 470, 24 L. ed. 784—*Fulton v. Hammond*, 11 Fed. 294—*Young v. Upson*, 115 Fed. 196—*Ryttenberg v. Schefer*, 131 Fed. 323—*Dodge v. Freedman's Sav. & T. Co.* 2 MacArth. 424—*Pierpont v. Johnson*, 104 Ill. App. 29—*Conger v. New Orleans*, 32 La. Ann. 1252—*Scherrer v. Canesa*, 33 La. Ann. 319—*Lanau's Succession*, 46 La. Ann. 1070, 25 L.R.A. 590, 15 So. 708—*Leahy v. Simpson*, 60 Mo. App. 85—*Butler v. Sprague*, 66 N. Y. 395—*National Bank v. Jennings*, 38 S. C. 378, 17 S. E. 16—*Wharton v. Lavender*, 14 Lea, 188—*Samson v. Rouse*, 72 Vt. 427, 48 Atl. 666.

25. The right of the pledgee to hold notes pledged by one adjudged bankrupt before their maturity is not impaired by his failure to appear in the bankruptcy court, or his refusal to prove his debt against the estate of the bankrupt. *Yeatman v. New Orleans Sav. Inst.* 95 U. S. 764, 24: 589

Cited in White v. Crawford, 3 McCrary, 413, 9 Fed. 372.

26. Where a person accepts, for the benefit of a corporation, drafts drawn on him by it, and receives from the corporation goods as security against his acceptances, a person to whom the acceptances are subsequently transferred by the corporation cannot take the goods from the former or his vendee, without discharging his obligations

on the acceptances. *Fourth Nat. Bank v. American Mills Co.* 137 U. S. 234, 11 Sup. Ct. Rep. 52, 34: 655

27. A secret equity in securities pledged by a person who had been empowered to do so by a corporation cannot be set up by it as against the pledgee. *Hubbard v. Tod*, 171 U. S. 474, 19 Sup. Ct. Rep. 14, 43: 246

28. A creditor of a bankrupt partnership may apply the proceeds of the sale of collateral in his hands, the property of one of the partners, to the extinction of the individual indebtedness of such partner. *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 27 Sup. Ct. Rep. 681, 51: 945

29. A sale of collateral security at public auction, without notice, and the purchase thereof by the pledgee, are not void as against the trustee in bankruptcy of the pledgeor, in the absence of fraud, where the contract of pledge permits such action, and is valid under the law of the state where such contract was made and executed and was to be performed. *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 27 Sup. Ct. Rep. 681, 51: 945

Editorial note.

[Extent of recovery by pledgee on negotiable note on which pledgeor could not recover, 44 L.R.A. 243.]

IV. Pledgee's Rights, Duties, and Liabilities as to Pledgeor and Vice Versa.

Of Partner Pledging Property for Firm Debt, see Bankruptcy, 277.

Right to Hold Collaterals until Payment of Debt, see Bankruptcy, 281.

Effect of Discharge in Bankruptcy on Pledgee's Liability for Conversion, see Bankruptcy, 441, 442.

Conversion by National Bank of Collateral Security Held, see Banks, 217.

Diligence in Enforcing Collateral Security, see Bills and Notes, 159.

Title of Pledgee of Bill of Lading, see Bills of Lading, 17.

Pledgee of Stock Certificate, see Corporations, 490, 491.

Election of Remedies by Pledgee, see Election of Remedies, 28.

Burden of Proving Unfairness in Sale by Pledgee, see Evidence, 285.

Extent of Pledgee's Interest in Judgment on Collateral, see Judgment, 1126.

Right of Pledgee of Credits to Apply Sum Realized upon other Debts not Secured, see Payment, 94.

Instruction as to Right to Pledge, see Trial, 682.

See also *supra*, 1, 2; Mortgage, 109.

30. A pledgee has a special property in the pledge, which may be sold or assigned; and the assignee in such case becomes invested with all the legal rights which be-

longed to the assignor. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19: 1008

Cited in Talty v. Freedman's Sav. & T. Co. 93 U. S. 325, 23 L. ed. 887.

31. The pledgee of personal property acquires the legal title and possession, and the pledgeor, retaining apparent possession, holds as his agent. *Easton v. German-American Bank*, 127 U. S. 532, 8 Sup. Ct. Rep. 1297, 32: 210

Cited in Pauly v. State Loan & T. Co. 165 U. S. 618, 41 L. ed. 849, 17 Sup. Ct. Rep. 465—*Pauly v. State Loan & T. Co.* 7 C. C. A. 424, 15 U. S. App. 259, 58 Fed. 668—*Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 81 Fed. 445—*Huntington v. Sherman*, 60 Conn. 467, 22 Atl. 769—*Pierpont v. Johnson*, 104 Ill. App. 29.

32. A pledgee may, upon default of the pledgeor, sell the pledged property, but he cannot become the purchaser at his own sale. *Easton v. German-American Bank*, 127 U. S. 532, 8 Sup. Ct. Rep. 1297, 32: 210
Cited in Rush v. First Nat. Bank, 17 C. C. A. 628, 36 U. S. App. 248, 71 Fed. 103.

33. A pledgee may sell his interest in the pledge, and the pledgeor cannot recover the pledge without tendering the amount for which it was held. *Talty v. Freedman's Sav. & T. Co.* 93 U. S. 321, 23: 886
Cited in Adams v. District of Columbia, 17 Ct. Cl. 362—*Hicks v. National L. Ins. Co.* 9 C. C. A. 219, 20 U. S. App. 410, 60 Fed. 694—*Philler v. Yardley*, 25 L.R.A. 831, 10 C. C. A. 567, 17 U. S. App. 647, 62 Fed. 649—*Rush v. First Nat. Bank*, 17 C. C. A. 629, 36 U. S. App. 248, 71 Fed. 104—*Re Swift*, 108 Fed. 213—*Williams v. Ashe*, 111 Cal. 187, 43 Pac. 595—*Brittan v. Oakland Bank of Savings*, 124 Cal. 289, 71 Am. St. Rep. 58, 57 Pac. 84—*Mankey v. Willoughby*, 21 App. D. C. 323—*Cumming v. McDade*, 118 Ga. 614, 45 S. E. 479—*First Nat. Bank v. Boyce*, 78 Ky. 50, 39 Am. Rep. 198—*Dungan v. Mutual Ben. L. Ins. Co.* 46 Md. 495—*German Sav. Bank v. Renshaw*, 78 Md. 490, 28 Atl. 281—*Cumcock v. Institution for Savings*, 142 Mass. 345, 56 Am. Rep. 679, 7 N. E. 869—*Goodwin v. Massachusetts Loan & T. Co.* 152 Mass. 194, 25 N. E. 100—*McClintock v. Central Bank*, 120 Mo. 133, 24 S. W. 1052—*Schaaf v. Fries*, 90 Mo. App. 118—*Hopper v. Smith*, 63 How. Pr. 37—*New York, L. E. & W. R. Co. v. Davies*, 38 Hun. 480—*Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 333, 21 N. E. 57—*Reynolds v. Witte*, 13 S. C. 8, 36 Am. Rep. 678—*Cherry v. Frost*, 7 Lea. 9.

34. The pledgee is only bound to take that care of the pledge which a careful man bestows on his own property. *McLemore v. Louisiana State Bank*, 91 U. S. 27, 23: 196

35. Superior force under military authority is a sufficient defense to a bank for failure to return paper pledged as collateral. *McLemore v. Louisiana State Bank*, 91 U. S. 27, 23: 196

36. A bank is not liable for depreciation and loss upon securities, pledged as collateral to notes, which become worthless be-

fore the maturity of the debt. *Bast v. First Nat. Bank*, 101 U. S. 93, 25: 794
Cited in Murphy v. Bartsch, 2 Idaho, 639, 23 Pac. 82.

37. One who holds a judgment as collateral security for the payment of a note, with authority to sell it and apply the proceeds in case of nonpayment of the note, need not collect it until the note matures, and has no right to do so where the only authority given by the assignment was to sell the same and apply the proceeds upon failure to pay the note at maturity. *Bast v. First Nat. Bank*, 101 U. S. 93, 25: 794

38. One who holds a judgment as collateral security for the payment of a note, with authority to sell it and apply the proceeds in case of nonpayment of the note, need not collect it until the note matures. *Bast v. First Nat. Bank of Ashland*, 101 U. S. 93, 25: 794

39. Where collateral security is given to a bank for notes, with no provision concerning future transactions, it cannot be applied to a subsequent debt accruing after the note is paid. *Biebinger v. Continental Bank*, 99 U. S. 143, 25: 271
Cited in Reynes v. Dumont, 130 U. S. 392, 32 L. ed. 945, 9 Sup. Ct. Rep. 486.

40. An agreement of a pledgee of securities, that the proceeds arising from their sale or recovered therefrom are to be applied to pay off the notes of the pledgeor, subject to the repayment of moneys expended by the pledgee in prosecuting claims or selling the securities, is not a contract on the part of the pledgee to prosecute or sell the securities mentioned in it, at his own risk and expense. *Culver v. Wilkinson*, 145 U. S. 205, 12 Sup. Ct. Rep. 832, 36: 676

41. A creditor is not bound to apply collaterals before enforcing his direct remedies. *Lewis v. United States*, 92 U. S. 618, 23: 513

Cited in Merrill v. National Bank, 173 U. S. 140, 43 L. ed. 644, 19 Sup. Ct. Rep. 360—*United States v. Dewey*, 39 Fed. 251—*Re Vetterlein*, 44 Fed. 61—*Chemical Nat. Bank v. Armstrong*, 50 Fed. 803—*Chemical Nat. Bank v. Armstrong*, 28 L.R.A. 234, 8 C. C. A. 159, 16 U. S. App. 465, 59 Fed. 375—*Wheeler v. Walton & W. Co.* 72 Fed. 967—*New York Security & T. Co. v. Lombard Invest Co.* 73 Fed. 554—*Childs v. N. B. Carlstein Co.* 76 Fed. 96—*Doe v. Northwestern Coal & Transp. Co.* 78 Fed. 72—*Sullivan v. Erie*, 8 Colo. App. 12, 44 Pac. 948—*Ambler v. Ames*, 1 App. D. C. 196—*Blount v. Munroe*, 60 Ga. 64—*Brunswick v. King*, 91 Ga. 524, 17 S. E. 940—*Levy v. Chicago Nat. Bank*, 158 Ill. 96, 30 L.R.A. 382, 42 N. E. 129—*Germania Sav. Bank v. Peuser*, 40 La. Ann. 799, 5 So. 75—*Morton v. Grafflin*, 68 Md. 561, 13 Atl. 341—*People v. E. Remington & Sons*, 121 N. Y. 334, 8 L.R.A. 460, 24 N. E. 793—*People v. E. Remington & Sons*, 54 Hun. 510, 8 N. Y. Supp. 34—*Re Hayes*, 37 Misc. 282, 75 N. Y. Supp. 312—*Sullivan v. Susong*, 30 S. C. 300, 9 S. E. 156—*Marberry v. Farmers & M. Nat. Bank*, 6 Tex. Civ. App. 609, 26 S. W. 215—*Benn v. Hatcher*, 81 Va. 33, 39

Am. Rep. 645—*Van Winkle v. Blackford*, 54 W. Va. 650, 46 S. E. 589—*Re Meyer*, 78 Wis. 622, 11 L.R.A. 843, 23 Am. St. Rep. 435, 48 N. W. 55—*Harrigan v. Gilchrist*, 121 Wis. 345, 99 N. W. 909.

42. Where a debt has been pledged to another by the creditor, the pledgee is not liable for money which comes into the sheriff's hands upon execution upon a judgment thereon, in the absence of negligence in withdrawing same from the sheriff's hands within a reasonable time. *United States v. Robertson*, 5 Pet. 641, 8: 257

43. A bank which has pledged its estate to the United States for the performance of a contract with the latter is entitled to credit for its necessary expenses incurred in suits prudently brought to collect its assets, and for reasonable commissions paid to a collector. *United States v. Robertson*, 5 Pet. 641, 8: 257
Cited in *Davis v. Tileston*, 6 How. 120, 12 L. ed. 369—*Planters' Bank v. Sharp*, 6 How. 323, 12 L. ed. 456.

44. The United States is entitled to recover from a bank, which has pledged to it its estate for the performance of a contract and which has found it necessary to purchase property pledged to it and subject to prior liens, the actual loss sustained by the United States in consequence of the bank having taken the property, by discharging the prior encumbrances instead of suing the debtor. *United States v. Robertson*, 5 Pet. 641, 8: 257

45. The pledgee of bonds, after waiting until the value of such bonds has risen, cannot in equity recover their value where he has never made a tender to redeem them or any effort to reclaim them. *Lacombe v. Edmund J. Forstall's Sons*, 123 U. S. 562, 3 Sup. Ct. Rep. 247, 31: 255
Cited in *Raymond v. Palmer*, 41 La. Ann. 433, 17 Am. St. Rep. 398, 6 So. 692.

Editorial notes.

Power of pledgee to sell. 10: 550
[Duty of pledgee as to care of thing pledged, 17 L.R.A. 193.]

Pledgee's conversion of pledged property by invalid sale, 43 L.R.A. 737.

Rights as to sale of bonds and commercial paper, when pledged, 53 L.R.A. 857.

Failure of holder to make demand or give notice of dishonor of paper held as collateral security, 68 L.R.A. 482.]

V. Redemption; Release.

See also *supra*, 5a, 5b, 45.

46. A debtor cannot maintain an action against a bank for the redemption of, and to compel it to retransfer to him, securities pledged to it by him with power of sale, and sold on notice to him after the debt became due. *Hayward v. Elliot Nat. Bank*, 96 U. S. 611, 24: 855
Distinguished in *Gilmer v. Morris*, 35 Fed. 686.

Cited in *Gilmer v. Billings*, 55 Fed. 780.

47. Where a bank held a pledge of stock, a so-called purchaser from the bank, who paid nothing therefor and to whom the stock was not delivered, took it still subject to the right of redemption. *Minneapolis Agri. & M. Asso. v. Canfield*, 121 U. S. 295, 7 Sup. Ct. Rep. 887, 30: 962

48. An agreement on the part of a bank which held stock as security, to release it for certain bonds, to take effect on mutual deliveries, does not relinquish the title. *Minneapolis Agri. & M. Asso. v. Canfield*, 121 U. S. 295, 7 Sup. Ct. Rep. 887, 30: 962

49. Where a bank, as collateral security for a debt, holds a note secured by mortgage, the payment of the amount of the debt to the bank releases the note and mortgage from the pledge. *Biebinger v. Continental Bank*, 99 U. S. 143, 25: 271
Cited in *Harding v. Giddings*, 19 C. C. A. 514, 34 U. S. App. 642, 73 Fed. 341.

VI. Extinguishment.

50. A pledge is discharged by the voluntary parting with possession of the property. *Hubbard v. Tod*, 171 U. S. 474, 19 Sup. Ct. Rep. 14, 43: 246

Editorial note.

[Waiver of lien of pledge by attachment or execution, 50 L.R.A. 719.]

PLENE ADMINISTRAVIT.

As Exempting Administrator from Personal Judgment, see *Executors and Administrators*, 179a, 180.

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Right of Citizens of Maryland in Virginian Waters, see *States*, 170.

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Right of City to Charge for Use of Streets, see *Municipal Corporations*, 44, 45.
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POLICE.

Vested Rights in Public Fund, see Constitutional Law, 928.

Repeal of Statute Prescribing Qualifications for Appointment on Police Force, see Statutes, 656.

1. The commissioners of the District of Columbia have power to remove a police officer without charges, notice, or hearing *Eckloff v. District of Columbia*, 135 U. S. 240, 10 Sup. Ct. Rep. 752, 34: 120 *Cited in Baltimore & O. R. Co. v. District of Columbia*, 10 App. D. C. 125—*Roth v. District of Columbia*, 16 App. D. C. 333.

2. Where a statute for the pay of police officers provided that \$2 a month be retained from the pay of each officer, for a fund, a certain sum of which should, on the death of each officer, be paid to his representatives, such fund, until such death, can be applied to a different purpose by the legislature. *Pennie v. Reis*, 132 U. S. 464, 10 Sup. Ct. Rep. 149, 33: 426 *Cited in Mahon v. Board of Education*, 171 N. Y. 263, 80 Am. St. Rep. 810, 63 N. E. 1107.

POLICE COURTS.

Jurisdiction in District of Columbia, see Courts, 430, 431.

POLICE JUDGE.

Exclusiveness of State Jurisdiction Respecting Right to Office, see Courts, 1374.

POLICE POWER.

Imposition of State Tax on Telegraph Poles and Wires under, see Appeal and Error, 5186.

Federal Question as to, see Appeal and Error, 1662.

Of State over Commerce, see Commerce, I. d.

Exercise of, as Effecting Protection of Contracts, see Constitutional Law, IV. g, 2, b.

Relative Function of Legislative and Judicial Departments, see Courts, I. e, 3, b.

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Regulating Warehouse Rates, see Warehouseman, 2.

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Keeping and Delivery of, see Elections, 50, 51.

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[What are; power to impose. 29 L.R.A. 404.

Legislative power to compel employer to pay employee's poll tax. 9 L.R.A.(N.S.) 306.]

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Appellate Jurisdiction over Conviction of, see Appeal and Error, 1015-1018.
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Routing Agreements, whether Unlawful Pools, see Carriers, 313, 314.
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See also Carriers, III. h.

POOR AND POOR-LAWS.

Exclusion of Japanese Paupers, see Aliens, 118.
Limitation of Action to Rescind Conveyance for Poorhouse, see Limitation of Actions, 339.

1. [A judgment of removal of a pauper, given by judges interested as inhabitants of the town removed from, will not be sustained. *Upper Dublin v. Germantown* (Pa. Sup. Ct.) 2 Dall. 213, 1: 353]

2. [The examination of a pauper, or of any other person, need not appear on the face of an order for removal. *Fallowfield Twp. v. Marlborough Twp.* (Pa. Sup. Ct.) 1 Dall. 28, 1: 23]

3. [Under the Pennsylvania act of 1782, the guardians of the poor in the city of Philadelphia were authorized to appoint six new managers of the almshouse half yearly. *Respublica v. Guardians of the Poor* (Pa. Sup. Ct.) 2 Dall. 224, 1: 358]

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[Settlement as affecting liability for support in time of epidemic. 26 L.R.A. 729.

Promise to pay for past support of pauper. 53 L.R.A. 358.

Liability of alleged pauper or estate to pay for support. 55 L.R.A. 570.]

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Jurisdiction of Supreme Court over Decisions of Courts of, see Appeal and Error, 1036-1043a.

Appeals Taken from Courts of, see Appeal and Error, 1041-1043.

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Jurisdiction of Suit to Recover Duties Paid under Protest, see Courts, 552.

Double Payment of Debts Due Intestate Under Laws of, see Descent and Distribution, 32.

Rights in Community Property of Divorced Wife in, see Divorce and Separation, 16, 17, 21-24.

Duties on Imports From or Into, see Duties, 3-6, 37.

Competency of Grand Jurors in, see Grand Jury, 10.

Necessity of Indictment in Criminal Prosecution in, see Indictment, etc., 26.

Infringement on Right to Jury Trial in, see Jury, 71, 72.

Limitation of Action on Insurance Policy, see Limitation of Actions, 308.

Lis Pendens in, see Lis Pendens, 12, 13.

Removal of Cause from Porto Rican to Federal Court, see Removal of Causes, 44.

Incorporation of Acquired Territory into United States, see United States, 14-16.

1. The intention of Congress that Porto Rico is not to be incorporated into the United States, for the present at least, is shown by the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), for temporarily providing revenue and a civil government for that island, and for other purposes. [Per Justices White, Shiras, and McKenna.] *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. Rep. 770, 45: 1088

2. Provisions of the Constitution of the United States, which are applicable, are in force in Porto Rico, whether the island be incorporated into the United States or not. [Per Justices White, Shiras, and McKenna.] *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. Rep. 770, 45: 1088

3. Porto Rico, though not a foreign country in an international sense, since it was subject to the sovereignty of and was owned by the United States after the treaty of cession, continued to be foreign to the United States in a domestic sense, because it had not been incorporated into the United States, but was merely appurtenant thereto as a possession. [Per Justices White, Shiras, McKenna, and Gray.] *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. Rep. 770, 45: 1088

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Federal Court Following State Laws Regulating Navigation in, see Admiralty, 315.

Preference of, see Commerce, VII. b.

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Adverse Possession, see Adverse Possession.
Reviewability of Order Putting Purchaser into Possession, see Appeal and Error, 194.

Of Vessel Assigned as Security, see Assignment, 12.

Writ of Assistance to Obtain, see Assistance.

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Effect of, on Right to Bring Suit to Quiet Title, see Cloud on Title, II. d.

As Essential to Bill to Remove Cloud on Title in Federal Courts, see Courts, 2067-2076.

Of Land, Taking Contract out of Statute of Frauds, see Contracts, 182, 190.

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Presumptions and Burden of Proof, see Evidence, II. k, 4.

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Sufficiency of Evidence of, Generally, see Evidence, XII. e.

Of Game Birds as an Offense, see Game Laws.

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Impropriety of Injunctive Process to Dispossess Party, see Injunction, 13.

Loss of, as a Total Loss, see Insurance, 559.

Recovery of, by Landlord, see Landlord and Tenant, III. e.

Effect of, on Defense of Laches, see Limitation of Actions, 206.

Necessity to Maintain Adverse Suits Respecting Mines, see Mines, 157.

Rights of Parties to Mortgage as to, see Mortgage, 120, 125.

Notice of Rights from, see Limitation of Actions, 114; Notice, III.

Averments as to, see Pleading, II. g.

Necessity of Delivering Possession of Pledge, see Pledge, 13, 21.

Former Delivery of Possession to Invest Mexican and Spanish Land Grantee, see Private Land Claims, 160-167.

Of Private Land Grants as Essential to Jurisdiction of Courts of Confirmation, see Private Land Claims, 398-406.

By Receiver, see Receivers, II. b.

Sale of Personal Property not in Rightful Owner's Possession, see Sale, 11, 12.

Purchaser's Right to Possession, see Sale, 34, 35.

Of Master of Vessel as Possession of United States, see Salvage, 74.

Necessity of, to Lien for Freight, see Shipping, 294-302.

Under Contract for Sale of Realty, see Vendor and Purchaser, 44-46i.

Of Warehouseman, see Warehouseman, 1.

Writ of, see Courts, 1090; *Lis Pendens*, 20.

1. A court of equity may enforce its own decree by writ of possession. *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. Rep. 136. 37: 1123

Cited in Motz v. Henry, 8 Kan. App. 421. 34 Pac. 796—State ex rel. Wyandotte Lodge I. O. O. F. v. Evans, 176 Mo. 327, 75 S. W. 914.

2. Change of possession of the east half of a lot cannot be effected by a writ of possession erroneously issued for the west half thereof. *Woodward v. Brown*, 13 Pet. 1, 10: 31

POSSESSORY RIGHTS.

Rights Acquired by Adverse Possession, see Adverse Possession.

In Mining Claims, see Mines, I. d, 1.

POSSESSORY TITLE.

Sufficiency of, to Maintain Ejectment, see Ejectment, II. b, 2.

POSTAGE.

Rates of, see Postoffice, V.

POSTAGE STAMPS.

Larceny of, see Larceny, 2.

Selling on Credit, see Postoffice, 101-103.

Purchase of Stamps to be Manufactured, see United States, 309, 310.

POSTAL CLERKS.

As Passengers, see Carriers, 14-16.

Indictment for Embezzlement by, see Indictment, etc., 28, 121, 122.

Validity of State Regulation as to Recovery for Injuries to, see Postoffice, 1.

POSTAL EMPLOYEE.

Indictment for Embezzlement by, see Indictment, etc., 28, 121, 122, 175.

POST BILL.

Entry on, as Evidence of Transmission of Letter, see Evidence, 2537.

POSTED RATES.

See Carriers, III. g.

POSTHUMOUS CHILDREN.

See After-Born Children; Unborn Children.

POSTING.

Of List of Stockholders of National Bank, see Banks, 231.

Posting Notice of Call on Stockholders, see Corporations, 651.

Posting Notices of Mining Location, see Mines, 37-39.

Posting Notices of Disposal of Public Lands in Sonora, see Private Land Claims, 89.

POSTMASTER.

See Postoffice, II.

POSTMASTER GENERAL.

See Executive Department, II. e.

POSTNUPTIAL AGREEMENTS.

See Husband and Wife, II. i.

POSTOFFICE.

I. In General, 1-6.

II. Postmaster, 7-23.

III. Letter Carriers, 24-7.

IV. Mail Transportation, 28-90.

a. In General, 28-47.

b. Regulation, 48-62.

c. Compensation for Carrying Mail Generally, 63-90.

V. Rates of Postage, 91-4.

VI. Offenses Against Postal Laws, 95-115.

Equal Protection of Laws in Restricting Carrier's Liability to Railway Mail Clerks, see Constitutional Law, 202.

Condemnation of Land for, see Eminent Domain, 21.

Contracts for Postal Supplies, see United States, 309, 310.

Postoffice Department and Postmaster General Generally, see Executive Departments, II. e.

I. In General.

1. The power of Congress to establish postoffices and post roads is not infringed by Pa. act of April 4, 1868, under which a railway postal clerk, injured in the course of his employment, can have no greater rights against the railway company than if he were an employee. *Martin v. Pittsburg & L. E. R. Co.* 203 U. S. 284, 27 Sup. Ct. Rep. 100, 51: 184

2. The Acts of April 29, 1864, and of March 3, 1865, for the relief of loyal postmasters, extend to losses by Confederate armed forces, either by robbery or burning. *United States v. Keebler*, 9 Wall. 83, 19: 574

Editorial note.

[Purchase of money order from agent of indorsee. 3 L.R.A.(N.S.) 136.]

Establishment and discontinuance of postoffices.

See also Executive Departments, 49, 50.

3. Power to establish postoffices and postroads is conferred upon Congress, but the power has been given to the Postmaster General to establish postoffices. *Ware v. United States*, 4 Wall. 617, 18: 389

4. The power to discontinue postoffices is incident to the power to establish them. *Ware v. United States*, 4 Wall. 617, 18: 389

5. A lease of a building for use as a postoffice cannot be made for a term of years, in the absence of any appropriation therefor, by virtue of the power of the postmaster general "to establish postoffices," and the provisions of U. S. Rev. Stat. § 3732, U. S. Comp. Stat. 1901, p. 2504, against any contract or purchase on behalf of the United States unless authorized by law or under an appropriation, with certain exceptions as to the War and Navy Departments. *Chase v. United States*, 155 U. S. 489, 15 Sup. Ct. Rep. 174, 39: 234
Cited in *Smoot v. United States*, 38 Ct. Cl. 423—*Abbott v. United States*, 66 Fed. 448.

6. When a postoffice has been discontinued, the postmaster is entitled to no damages by reason thereof. *Ware v. United States*, 4 Wall. 617, 18: 389

II. Postmaster.

Discretion as to Determining Rate of Postage, see *infra*, 92.
Bond of, see Bonds, 27, 46, 52, 109.

Effect of Settlement Made by Postmaster General, see United States, 47.
See also *supra*, 2, 6; *infra*, 24.

7. When the commission of a postmaster has been signed and sealed and placed in the hands of the Postmaster General, to be transmitted to the officer, it is a completed act; the officer has been commissioned by the President, and the latter's death subsequently can have no effect on it. To the benefit of that complete action the officer is entitled when he, on his part, fulfils the conditions imposed by law,—such as giving a bond and taking the oath. *United States v. Le Baron*. 19 How. 73, 15: 525
Cited in United States v. Eaton, 169 U. S. 347, 42 L. ed. 773, 18 Sup. Ct. Rep. 374—*Dalness v. United States*, 15 Ct. Cl. 79—*Howard Ins. Co. v. Silverberg*, 89 Fed. 172—*State v. Florida C. R. Co.* 15 Fla. 739—*State ex rel. Fleming v. Crawford*. 28 Fla. 494, 14 L.R.A. 260, 10 So. 118—*Bishop v. State*, 149 Ind. 228, 39 L.R.A. 279, 63 Am. St. Rep. 279, 48 N. E. 1038—*Speed v. Detroit*, 97 Mich. 209, 56 N. W. 570.

Compensation.

Compensation of Deputy Postmaster, see *infra*, 22, 23.

Compensation of Letter Carriers, see *infra*, 24-27.

Construction of Contract for Services in Readjusting Claims, see *Contracts*, 320.

Conclusiveness of Departmental Allowances upon Courts, see *Courts*, 241.

Liability for Interest on, see *Interest*, 51.

See also *supra*, 6.

8. After the salary of a postmaster has been fixed, a readjustment must be made before it can be increased, and the readjustment takes effect prospectively. *United States v. McLean*, 95 U. S. 750, 24: 579
Cited in United States v. Verdier, 164 U. S. 216, 41 L. ed. 408, 17 Sup. Ct. Rep. 42.

9. The government is not obliged to pay an increased salary to a postmaster, unless a readjustment has preceded it. *United States v. McLean*, 95 U. S. 750, 24: 579

10. The Postmaster General need not readjust the salaries of postmasters oftener than once in two years. *United States ex rel. McLean v. Vilas*, 124 U. S. 86, 8 Sup. Ct. Rep. 422, 31: 329
Cited in United States v. Verdier, 164 U. S. 220, 41 L. ed. 410, 17 Sup. Ct. Rep. 42—*United States v. Ewing*, 184 U. S. 148, 46 L. ed. 474, 22 Sup. Ct. Rep. 480—*Trask v. United States*, 27 Ct. Cl. 340.

11. The Postmaster General may, in his discretion, readjust the salaries of postmasters oftener than once in two years, in special cases. *United States ex rel. McLean v. Vilas*, 124 U. S. 86, 8 Sup. Ct. Rep. 422, 31: 329

12. A readjustment of the salaries of postmasters can only establish salaries for two years thereafter, and cannot be made unless there are quarterly returns for two years prior thereto upon which it can be

based. *United States ex rel. McLean v. Vilas*, 124 U. S. 86, 8 Sup. Ct. Rep. 422.

13. The act of March 3, 1883 (22 Stat. at L. 487), authorizing the Postmaster General to readjust salaries of a certain class of postmasters, imposes no obligation upon the government to pay an increased salary until the readjustment is made. *United States v. Verdier*, 164 U. S. 213, 17 Sup. Ct. Rep. 42, 41: 407
Cited in United States v. Ewing, 184 U. S. 149, 46 L. ed. 474, 22 Sup. Ct. Rep. 480.

14. The whole theory of the act of Congress of 1883 is that every postmaster shall receive a salary dependent upon and regulated by the amount of business done at his office. *United States v. Wilson*, 144 U. S. 24, 12 Sup. Ct. Rep. 539, 36: 332

15. Where a postoffice had been changed from one of the fourth class to one of the third class, and the salary of the postmaster had been correspondingly changed and increased, one who was then performing the duties of postmaster at that office became entitled to the salary thus increased, although the President did not commission him as a third-class postmaster until some months thereafter. Such salary could not be affected by an order of the sixth auditor. *United States v. Wilson*, 144 U. S. 24, 12 Sup. Ct. Rep. 539, 36: 332
Cited in United States v. Dumas, 149 U. S. 284, 37 L. ed. 736, 13 Sup. Ct. Rep. 872.

16. A readjustment of the salary of a postmaster under the acts of Congress of March 3, 1883, chap. 119 (22 Stat. at L. 487), and August 4, 1886 (24 Stat. at L. 256, 307, chap. 903, § 8), when the quarterly returns for a period of two years show that his salary is 10 per cent less than his commissions would have been for that period under the act of June 22, 1854 (10 Stat. at L. 298, chap. 61), must be made to begin with the next succeeding quarter, and cannot apply to the biennial period for which the returns have been made. *United States v. Ewing*, 184 U. S. 140, 22 Sup. Ct. Rep. 480, 46: 471

17. A postmaster suspended from office is not entitled to salary during such suspension, although subsequently restored. *Embry v. United States*, 100 U. S. 680, 25: 772

Cited in Howard v. United States, 22 Ct. Cl. 316—*Romero v. United States*, 5 L.R.A. 71, 24 Ct. Cl. 339—*Parsons v. United States*, 80 Ct. Cl. 243.

Liabilities and duties.

Liability for Selling Stamps on Credit, see *infra*, 101-103.

Bond of, see *Bonds*, 46, 52, 109.

Limitation of Actions on Bond, see *Limitation of Actions*, 276.

Treasury Transcript as Evidence in Action on Bond, see *Evidence*, 1117.

Copy of Postmaster's Bond in Action on, see *Evidence*, 1431.

Set-off in Action on Postmaster's Bond, see *Set-Off and Counterclaim*, 90.

Concurrent Jurisdiction of State and Federal Courts over Private Wrongs, see Courts, 1392.

Evidence of Neglect of Assistant not Admissible on Issue of Postmaster's Negligence, see Evidence, 2769.

Interest on Judgment Against Postmaster, see Interest, 121.

Liability for Balances Paid Over to Confederate States, see Payment, 7, 8.

Application of Payments in Settling Postmaster's Account, see Payment, 100.

18. Under the act of March 3, 1825, and the instructions of the Postmaster General in accordance therewith, it is as obligatory upon a postmaster who leaves office between the beginning and end of a quarter as upon one who leaves at the end, to make a report. *United States v. Roberts*, 9 How. 501, 13: 234

Cited in Sterling v. Warden, 51 N. H. 241, 12 Am. Rep. 80.

19. Where a postmaster refused to deliver a newspaper upon which there was an initial unless the person to whom it was addressed would pay better postage, he is liable in an action for trover. What was done by the postmaster was a mere act of his own, and ministerial, not judicial. *Teal v. Felton*, 12 How. 284, 13: 990

Cited in Claflin v. Houseman, 93 U. S. 142, 23 L. ed. 840—*New Orleans Nat. Bank v. Merchant*, 18 Fed. 850—*Stephenson v. Monmouth Min. & Mfg. Co.* 28 C. C. A. 293, 54 U. S. App. 499, 84 Fed. 116—*Raisler v. Oliver*, 97 Ala. 713, 38 Am. St. Rep. 213, 12 So. 238—*Raynsford v. Phelps*, 43 Mich. 344, 38 Am. Rep. 189, 5 N. W. 403—*Goetcheus v. Matthewson*, 61 N. Y. 432—*Smith v. Durham*, 127 N. C. 418, 37 S. E. 473.

20. To make a postmaster liable for negligence, it must appear that the loss or injury sustained was the consequence of such negligence. *Dunlop v. Munroe*, 7 Cranch, 242, 3: 329

Deputy postmasters.

Jurisdiction in Federal Courts of Suits on Bonds by Postmaster General, see Courts, 844.

Power of Postmaster General to take Bonds from Deputy, see Executive Departments, 51.

Discharge of Sureties on Bond of, see Principal and Surety, 37.

21. A postmaster of a local postoffice is a deputy within the meaning of a statute which authorizes the Postmaster General to appoint deputies, who shall render accounts and be responsible to him. *Postmaster General v. Early*, 12 Wheat. 136, 6: 577
Cited in Bishop v. State, 149 Ind. 228, 30 L.R.A. 279, 63 Am. St. Rep. 279, 48 N. E. 1038.

22. Where a deputy postmaster collects no postages, there can be no commission allowed him on postages; and the receipts from boxes having failed, the Department

can make no allowance. *Ware v. United States*, 4 Wall. 617, 18: 389

23. Where the claim of a deputy postmaster for credit was never presented to the auditor and disallowed, such credit cannot be allowed. *Ware v. United States*, 4 Wall. 617, 18: 389

III. Letter Carriers.

24. The postmaster is the agent of the United States to direct the employment of letter carriers, and they are entitled to pay for the time they are employed, during the intervals between their trips, in the post-office in such manner as the postmaster may direct, under the postal laws and regulations of 1887, § 647. *United States v. Post*, 148 U. S. 124, 13 Sup. Ct. Rep. 567, 37: 392

25. A letter carrier is entitled under the act of Congress of May 24, 1888, to extra pay for the time that he is so employed in excess of eight hours a day. *United States v. Post*, 148 U. S. 124, 13 Sup. Ct. Rep. 567, 37: 392

Cited in Gordon v. United States, 31 Ct. Cl. 260—*King v. United States*, 32 Ct. Cl. 237—*Laurey v. United States*, 32 Ct. Cl. 263—*Rush v. United States*, 33 Ct. Cl. 431—*Franklin v. United States*, 34 Ct. Cl. 528—*Rush v. United States*, 35 Ct. Cl. 239—*Coleman v. United States*, 81 Fed. 826—*Timmonds v. United States*, 28 C. C. A. 571, 56 U. S. App. 262, 84 Fed. 935—*United States v. Langston*, 29 C. C. A. 382, 52 U. S. App. 504, 85 Fed. 615.

26. A letter carrier who, by working more than eight hours in any one day, earns extra compensation under the act of Congress of May 24, 1888, is not to be deprived of the benefit of that act by the fact that on Sundays and legal holidays he may have worked less than eight hours. *United States v. Gates*, 148 U. S. 134, 13 Sup. Ct. Rep. 570, 37: 396

Cited in King v. United States, 32 Ct. Cl. 239—*Franklin v. United States*, 34 Ct. Cl. 528.

27. The letter carriers' eight-hour law requires no deduction to be made if the duties of the day do not extend through the prescribed time. The carrier is entitled to eight hours' work, and to his pay if work is not furnished to him. For any excess on any day he is entitled to extra pay. The only set-off that can be maintained is when he is absent from duty without leave. *United States v. Gates*, 148 U. S. 134, 13 Sup. Ct. Rep. 570, 37: 396

IV. Mail Transportation.

a. In General.

Finality of Decision of Circuit Court of Appeals in Action for Value of Registered Package, see Appeal and Error, 803.

Mailing Check before Sender's Bankruptcy, see Banks, 197.

Requiring Mail Trains to Stop at Certain Stations, see Carriers, 222, 223.

Power of Federal Government to Prevent Interference with, see Commerce 165.

Regulating Stops of Mail Train as Affecting Commerce, see Commerce, 323, 324.

Acceptance of Offer by Mail, see Insurance, 121.

Posting of Letter Accepting Offer, see Contracts, 87, 89.

Judicial Notice of Frequency of Mails, see Evidence, 141.

Presumption from Mailing Letter, see Evidence, 590-594.

Evidence of Custom and Course of Business, see Evidence, 2060-2062.

Entry on Post Bill as Evidence of Transmission of Letter, see Evidence, 2537.

Mailing Letter as Evidence of Receipt, see Evidence, 2538.

Injunction to Protect Railroads Carrying Mail, from Private Interference, see Injunction, 22.

Mailing of Check for Insurance Premium as Payment, see Insurance, 139.

Right to Send Notice by Mail to Insurance Company in Other State, see Constitutional Law, 602.

Federal Taxation of Receipts of Railroad Company for Carrying Mails, see Internal Revenue, 130.

Privilege from Search of Vessel with Government Mail on Board, see Prize and Capture, 18.

Exemption from Capture of Vessel Carrying Mail, see Prize and Capture, 140.

Exemption of Mail Coaches from Collection of Tolls on Toll Roads, see States, 204-210.

28. The United States has a property in the mails; it is not a mere common carrier. *Searight v. Stokes*, 3 How. 151, 11: 537
Offd in Re Debs, 158 U. S. 583, 39 L. ed. 1102, 15 Sup. Ct. Rep. 900.

29. It is discretionary with the Postmaster General at what time the mails shall leave and arrive at particular places, and how often. *Neil v. Ohio*, 3 How. 720, 11: 800

Editorial notes.

Postmaster General's and postmaster's liability for loss and detention of letters and papers. 3: 329

[Liability of railroad for loss of registered letter. 5 L.R.A.(N.S.) 459.]

Contracts generally.

Compensation under Contract, see infra, IV. c.

Estoppel as to, see Estoppel, 306.

Burden of Proving Assent to Manner of Performance, see Evidence, 223.

Presumption of Existence of Contract, see Evidence, 595.

Prima Facie Evidence of Abandonment, see Evidence, 2502.

Mortgage on, see Mortgage, 66.

Effect of Passage of Statute Annuling Contract, see Statutes, 697.

30. Where a notice called for proposals for carrying the mails on route No. 43.132 from Portland, Oregon, to Sitka, Alaska, stating the distance to be 1,400 miles, the duty to be performed each way once in each month, in safe and suitable steamboats, by the way of Port Townsend and San Juan, giving the time of departure and arrival at each terminus, and allowing ten days for the passage, and then added, "proposals invited to begin at Port Townsend (W. T.), 500 miles less,"—this was a sufficient notice that proposals were desired for carrying the mail from Port Townsend to Sitka. *Garfield v. United States*, 93 U. S. 242, 23: 779

31. The act of July 1, 1862, chap. 120 (12 Stat. at L. 489), as to transporting mails, etc., constitutes a contract between the United States and the Union Pacific Railroad Company, which has not been terminated by subsequent legislation. *Union P. R. Co. v. United States*, 104 U. S. 662, 26: 884
Offd in United States v. Central P. R. Co. 118 U. S. 238, 30 L. ed. 174, 6 Sup. Ct. Rep. 1038—*Re Pacific R. Commission*, 32 Fed. 280—*United States v. Stanford*, 69 Fed. 38.

32. The Revised Statutes did not alter the contract between the United States and the Union Pacific Railroad Company, and gave to the Postmaster General no authority to insist that it was not binding, or to change it; and, as the company, by its terms, was bound to render the service, if required, its compliance cannot be regarded as a waiver of any of its rights. *Union P. R. Co. v. United States*, 104 U. S. 662, 26: 884
Offd in Central P. R. Co. v. United States, 164 U. S. 98, 41 L. ed. 364, 17 Sup. Ct. Rep. 35.

33. A contract with the Pacific Mail Steamship Company for additional service in carrying mail between San Francisco, Japan, and China, made under the act of 1872, authorizing a contract for additional service, and requiring all steamships "hereafter" accepted for said service to be built of iron, and of American construction, and adapted for armed naval service, did not require that all the mail should be carried in such vessels, but only that such new vessels as should be required to be added should be of the kind specified. *Pacific Mail S. S. Co. v. United States*, 103 U. S. 721, 26: 419

34. The Postmaster General is authorized to terminate a contract with a railroad for carrying the mail upon allowing one month's pay, when such right is expressly reserved and indemnity provided for in the contract. *Chicago & N. W. R. Co. v. United States*, 104 U. S. 680, 26: 831
Offd in Slavens v. United States, 186 U. S. 236, 49 L. ed. 461, 25 Sup. Ct. Rep. 229.

35. The performance, by the Chicago & Northwestern Railroad Company, of the mail service required by its contract, notwithstanding the notice of the intended reduction, is not a waiver of its rights nor an acquiescence in new proposals, whether it protested against the erroneous construction

of the law or not. *Chicago & N. W. R. Co. v. United States*, 104 U. S. 680, 26: 891
Distinguished in Eastern R. Co. v. United States, 20 Ct. Cl. 40.

Cited in Illinois C. R. Co. v. United States, 18 Ct. Cl. 134—*Myerle v. United States*, 31 Ct. Cl. 137—*Wreford v. United States*, 32 Ct. Cl. 424—*Myerle v. United States*, 33 Ct. Cl. 25.

36. The fact that the road was within one of the four sections of the United States, in which section contracts were to be made for four years, raises no implication that a continuance of the service was under a new contract for four years. *Jacksonville, P. & M. R. Co. v. United States*, 118 U. S. 626, 7 Sup. Ct. Rep. 48, 30: 273

37. Where, in a contract for carrying the mails, places are designated as on the line of a mail route from one point to another and back, the contractor is required to return to the same places on his way back. He cannot return by a shorter route. *United States v. Carr*, 132 U. S. 644, 10 Sup. Ct. Rep. 182, 33: 483

38. Where an original mail contract was for a 62-hour schedule, the fact that the contractor performed the service on a schedule of 43 hours as a matter of private enterprise is not inconsistent with his sworn statement "that it will take 50 per cent more men and horses to perform the mail service on a reduced schedule from 62 hours to 43 hours in summer and 50 hours in winter." He could at any time abandon his 43-hour schedule and adopt the 62-hour schedule named in his contract. *United States v. Voorhees*, 135 U. S. 550, 10 Sup. Ct. Rep. 841, 34: 258

39. The Postmaster General may cancel a mail contract, the service under which has been materially decreased by using street cars to carry mail, in the exercise of his authority under the contract and U. S. Postal Laws and Regulations, § 817, to increase, decrease, or extend the service contracted for without change of pay, and to discontinue the entire service whenever the public interests, in his judgment, require it. *Slavens v. United States*, 196 U. S. 229, 25 Sup. Ct. Rep. 229, 49: 457
Cited in United States v. Utah, N. & C. Stage Co. 199 U. S. 422, 50 L. ed. 255, 26 Sup. Ct. Rep. 69.

40. A change of service under a mail contract by directing the carrying of the mails to and from street cars at certain street crossings is fairly within the power reserved by the contract in the Postmaster General to order, without additional compensation, any additional service caused by change of location of postoffice, stations, or landings, or by the establishment of others than those existing at the time of the contract, or rendered necessary, in his judgment, from any cause, and to change the schedule, vary the routes, increase, decrease, or extend the service without change of pay. *Slavens v. United States*, 196 U. S. 229, 25 Sup. Ct. Rep. 229, 49: 457

41. The carriage of the mails up and down the steps at elevated railroad stations is called for by a contract for performing the covered regulation wagon, mail messenger, transfer, and mail station service on a mail route, in which the contractor agreed to take the mails from and deliver them to the post-offices, mail stations, and cars. *United States v. Utah, N. & C. Stage Co.* 199 U. S. 414, 26 Sup. Ct. Rep. 69, 50: 251

42. Where a vessel has started on the round trip, carrying the mails in due performance of a contract with the Postmaster General, ten or twelve days before Congress passes a statute annulling the contract, and she carries the mails under the contract on the voyage out and return, the repeal of the statute and the annulment of the contract do not operate on that voyage. *Pacific Mail S. S. Co. v. United States*, 103 U. S. 721, 26: 419

43-4. Forfeitures imposed by the Postmaster General, for failure of the contractor to carry the mail within the prescribed time, are within the discretion of the Postmaster General, and are not subject to review by the Supreme Court of the United States. *Allman v. United States*, 131 U. S. 31, 9 Sup. Ct. Rep. 632, 33: 51
Cited in Parker v. United States, 26 Ct. Cl. 368.

Return to sender of prohibited matter.

45. The interference with purely private or domestic mail matter of individuals, which may be caused by the seizure and return of letters directed to persons engaged in certain prohibited enterprises, under a "fraud order" issued by the Postmaster General under the authority of U. S. Rev. Stat. § 3929 (U. S. Comp. Stat. 1901, p. 2686), as amended by the act of September 19, 1890 (26 Stat. at L. 465, chap. 908, U. S. Comp. Stat. 1901, p. 2686), and of the act of March 2, 1895 (28 Stat. at L. 964, chap. 191, U. S. Comp. Stat. 1901, p. 2688), § 4, does not render such legislation repugnant to the Federal Constitution. *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. Rep. 789, 48: 1092

46. A change of title of the property of the addressee of registered letters is not so effected by the seizure and return to the sender, under a "fraud order" issued by the Postmaster General under the authority of U. S. Rev. Stat. § 3929 (U. S. Comp. Stat. 1901, p. 2686), as amended by the act of September 19, 1890 (26 Stat. at L. 465, chap. 908, U. S. Comp. Stat. 1901, p. 2686), and of the act of March 2, 1895 (28 Stat. at L. 964, chap. 191, U. S. Comp. Stat. 1901, p. 2688), § 4, as to render such legislation repugnant to the Federal Constitution, as authorizing confiscation. *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. Rep. 789, 48: 1092

47. An objection to the constitutionality of the provisions of U. S. Rev. Stat. § 3929 (U. S. Comp. Stat. 1901, p. 2686), as amended by the act of September 19, 1890 (26

Stat. at L. 465, chap. 908, U. S. Comp. Stat. 1901, p. 2686), and of the act of March 2, 1895 (28 Stat. at L. 964, chap. 191, U. S. Comp. Stat. 1901, p. 2688), § 4, empowering the Postmaster General to direct the seizure and return to the sender of all mail matter addressed to persons conducting certain prohibited enterprises, on the ground that such legislation authorizes an interference with the purely domestic and private mail matter of individuals, cannot be successfully urged to invalidate a "fraud order" of the Postmaster General which only directs the return of all mail matter directed to the alleged fraudulent concerns or their officers or agents as such. *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. Rep. 789, 48: 1092

b. Regulation.

Offenses against Postal Laws, see *infra*, VI. See also *infra*, 91.

48. The power of Congress to establish "postoffices and postroads" embraces the regulation of the entire postal system. Congress may designate what shall be carried in the mail, and what excluded. *Re Jackson*, 96 U. S. 727, 24: 877
Cited in *Re Rapier*, 143 U. S. 133, 36 L. ed. 102, 12 Sup. Ct. Rep. 374—*Lottery Case (Champlon v. Ames)* 188 U. S. 365, 47 L. ed. 505, 23 Sup. Ct. Rep. 321—*Public Clearing House v. Coyne*, 194 U. S. 506, 48 L. ed. 1097, 24 Sup. Ct. Rep. 789—*United States v. Whittier*, 5 Dill. 39, Fed. Cas. No. 16,688—*Commerford v. Thompson*, 2 Fllpp. 613, 1 Fed. 419—*United States v. Durland*, 65 Fed. 415—*Enterprise Sav. Asso. v. Zumstein*, 15 C. C. A. 157, 37 U. S. App. 71, 87 Fed. 1005—*United States v. Burnell*, 75 Fed. 831—*Hoover v. McChesney*, 81 Fed. 478—*United States v. Loring*, 91 Fed. 882—*American School of Magnetic Healing v. McAnnulty*, 102 Fed. 566—*Dauphin v. Key*, *MacArthur. & M.* 210—*State v. Van Wye*, 136 Mo. 236, 58 Am. St. Rep. 627, 37 S. W. 938.

Exclusion generally.

Return to Sender of Prohibited Matters, see *supra*, 45-47.

Denial of Use of Mails to Prohibited Enterprises, see *Constitutional Law*, 771.

Power of Courts to Review, see *Courts*, 246.

Dutiable Articles, see *Duties*, 560.

Injunction against Obstructions or Interferences with Railroads, see *Injunction*, 22.

49. In excluding various articles from the mail, the object of Congress has been not to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals. *Re Jackson*, 96 U. S. 727, 24: 877
Cited in *United States v. Chase*, 135 U. S. 261, 34 L. ed. 120, 10 Sup. Ct. Rep. 756—*United States v. Williams*, 3 Fed. 490—*United States v. Moore*, 19 Fed. 40—*Ex parte Doran*, 32 Fed. 78—*United States v. Huggett*, 40 Fed. 638—*United States v. Males*, 51 Fed. 42.

50. Regulations against transporting printed mail matter which is open to examination cannot be enforced so as to interfere in any manner with the freedom of the press. Liberty of circulating is essential to that freedom. When, therefore, printed matter is excluded from the mail, its transportation as merchandise cannot be forbidden by Congress. *Re Jackson*, 96 U. S. 727, 24: 877

51. Regulations excluding matter from the mail may be enforced through the courts, upon competent evidence attained in other ways than by the unlawful inspection of letters and sealed packages. Objectional printed matter, open to examination, may be excluded by direct action of the postal officers, upon their own inspection. *Re Jackson*, 96 U. S. 727, 24: 877

Matter relating to lotteries.

Abridging Freedom of the Press by Excluding, see *Constitutional Law*, 907.

See also *infra*, 60, 61.

52. Congress may exclude from the mail matter relating to lotteries. *Horner v. United States*, 143 U. S. 570, 12 Sup. Ct. Rep. 522, 36: 266
Cited in *Hoover v. McChesney*, 81 Fed. 478.

53. The right of Congress to exclude lottery circulars, etc., from the mails is incident to the power to establish postoffices and postroads. *Re Rapier*, 143 U. S. 110, 12 Sup. Ct. Rep. 374, 36: 93
Cited in *Fong Yue Ting v. United States*, 149 U. S. 713, 37 L. ed. 913, 13 Sup. Ct. Rep. 1016.

54. The right to operate a lottery is not a fundamental right infringed by the legislation excluding lottery circulars, etc., from the mails; nor can Congress be held in its enactment to have abridged the freedom of the press. *Re Rapier*, 143 U. S. 110, 12 Sup. Ct. Rep. 374, 36: 93
Horner v. United States, 143 U. S. 207, 12 Sup. Ct. Rep. 407, 36: 126
Limited and Distinguished in United States v. Conrad, 59 Fed. 462.

Cited in *United States v. Conrad*, 59 Fed. 466—*MacDaniel v. United States*, 30 C. C. A. 672, 58 U. S. App. 729, 87 Fed. 326.

55. U. S. Rev. Stat. § 3894, U. S. Comp. Stat. 1901, p. 2659, as amended by the act of Congress of September 19, 1890, excluding from the mails circulars, advertisements, etc., concerning lotteries, is constitutional and does not abridge the freedom of the press. *Re Rapier*, 143 U. S. 110, 12 Sup. Ct. Rep. 374, 36: 93
Horner v. United States, 143 U. S. 207, 12 Sup. Ct. Rep. 407, 36: 126
Cited in *Enterprise Sav. Asso. v. Zumstein*, 15 C. C. A. 157, 37 U. S. App. 71, 87 Fed. 1005—*Hoover v. McChesney*, 81 Fed. 478—*American School of Magnetic Healing v. McAnnulty*, 102 Fed. 566.

56. Under the power vested in Congress to establish postoffices and postroads, Congress may designate what may be carried in the mail and what excluded, and may refuse the facilities of the mail for the distribution of

matter deemed injurious by Congress to the public morals. *Re Rapiet*, 143 U. S. 110, 12 Sup. Ct. Rep. 374, 36: 93

Cited in Lottery Case (Champion v. Ames) 188 U. S. 365, 47 L. ed. 505, 23 Sup. Ct. Rep. 321—*Public Clearing House v. Coyne*, 194 U. S. 508, 48 L. ed. 1098, 24 Sup. Ct. Rep. 789—*United States v. Martin*, 50 Fed. 920—*MacDaniel v. United States*, 30 C. C. A. 672, 58 U. S. App. 729, 87 Fed. 326.

57. A circular giving the amount to be paid for the redemption of certain Austrian bonds, which includes the sum or prize to be paid on them as a result of a drawing by chance, is a circular concerning a lottery or similar enterprise offering prizes dependent upon lot or chance, within the meaning of U. S. Rev. Stat. § 3894, U. S. Comp. Stat. 1901, p. 2659; and the sending of such a circular by mail is an offense under that statute. *Horner v. United States*, 147 U. S. 449, 13 Sup. Ct. Rep. 409, 37: 237

58. A paper that contains nothing but figures which in fact relate to a drawing that has already been completed is not a paper, certificate, or instrument purporting to be or representing a ticket, chance, share, or interest in any lottery, which the act of Congress of 1895, chap. 191, makes it unlawful to bring into the United States or deposit in the mails or carry from one state to another, as the statute describes papers which contemplate a future drawing of the lottery. *France v. United States*, 164 U. S. 676, 17 Sup. Ct. Rep. 219, 41: 595

Matter injurious to public morals.

See also *supra*, 56.

59. Acts of Congress prohibiting the use of the mails for the distribution of matter deemed injurious to the public morals are constitutional. *Re Jackson*, 96 U. S. 727, 24: 877

Cited in United States v. Bennett, 16 Blatchf. 843, Fed. Cas. No. 14,571—*United States v. Harmon*, 45 Fed. 415—*Harman v. United States*, 50 Fed. 922.

Matter relating to fraudulent schemes.

Return to Sender of Matter Prohibited by "Fraud Order," see *supra*, 45-47.

Fraud by Use of Mails as an Offense, see *infra*, 113-115.

Due Process in Seizure and Return Laws, see *Constitutional Law*, 771.

60. A financial co-operative scheme which contemplates the creation of a fund out of enrolment fees and monthly dues, to be returned to the members at the end of a fixed period of membership in the shape of "realizations," the amount of which will depend upon the growth in membership, the plan being certain to involve a loss to everyone interested as soon as the number of members ceases to increase, because of the absence of any provision for a reserve fund, is a lottery, or scheme for the distribution of money by lot or chance, within the meaning of the provisions of U. S. Rev. Stat. § 3929 (U. S. Comp. Stat. 1901, p. 2686), as amended by the act of September 19, 1890 (26 Stat. at L. 465, chap. 908, U. S. Comp. U. S. Dig.—289

Stat. 1901, p. 2686), and of § 4041 (U. S. Comp. Stat. 1901, p. 2749), and of the act of March 2, 1895 (28 Stat. at L. 964, chap. 191, U. S. Comp. Stat. 1901, p. 2688), § 4, empowering the Postmaster General to deny the privileges of the mails and the money order and registered-letter service to persons engaged in certain prohibited enterprises. *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. Rep. 789, 48: 1092 *Cited in Rosenberger v. Harris*, 136 Fed. 1004 —*Preferred Mercantile Co. v. Hibbard*, 142 Fed. 878—*Atty. Gen. v. Preferred Mercantile Co.* 187 Mass. 519, 73 N. E. 689—*State ex rel. Hathorn v. United States Exp. Co.* 95 Minn. 448, 104 N. W. 556—*People ex rel. Ellison v. Lavin*, 179 N. Y. 172, 68 L.R.A. 605, 71 N. E. 753.

61. The Postmaster General is not justified in prohibiting the delivery of letters addressed to a corporation which assumes to heal disease through the influence of the mind, by the provisions of U. S. Rev. Stat. §§ 3929, 4041 (U. S. Comp. Stat. 1901, pp. 2686, 2749), and the act of Congress of March 2, 1895, § 4 (28 Stat. at L. 963, 964, chap. 191, U. S. Comp. Stat. 1901, p. 2688), which authorize the retention of letters directed to any person obtaining money through the mails by false pretenses or promises, as the effectiveness of such treatment is a mere matter of opinion, and the statutes are only intended to cover cases of actual fraud in fact. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. Rep. 33, 47: 90 *Cited in Burton v. United States*, 202 U. S. 371, 50 L. ed. 1067, 26 Sup. Ct. Rep. 688—*Missouri Drug Co. v. Wyman*, 129 Fed. 626 —*Post v. United States*, 70 L.R.A. 994, 87 C. C. A. 574, 135 Fed. 6—*Rosenberger v. Harris*, 136 Fed. 1003—*Moxie Nerve Food Co. v. Holland*, 141 Fed. 203—*Czarra v. Medical Supervisors*, 25 App. D. C. 452.

Examination of mail matter.

62. Letters, and sealed packages subject to letter postage, in the mail, can be opened and examined only under like warrant as is required when papers are subjected to search in one's own household. The constitutional right to be secure against unreasonable searches and seizures extends to papers thus closed against inspection, wherever they may be. *Re Jackson*, 96 U. S. 727, 24: 877 *Cited in Commerford v. Thompson*, 2 Filipp. 616, 1 Fed. 421—*United States v. Loftis*, 8 Sawy. 197, 12 Fed. 674—*United States v. Gaylord*, 17 Fed. 442—*United States v. Andrews*, 58 Fed. 863—*Fairfield Floral Co. v. Bradbury*, 87 Fed. 416.

c. Compensation for Carrying Mail Generally.

Conclusiveness of Finding as to, see *Appeal and Error*, 4899.

Conditional Acceptance of Bill drawn by Mail Carrier on Postmaster General, see *Bills and Notes*, 51, 54.

Waiver of Claim, see *Claims*, 19.

Impairment of Contract Obligations as to, see *Constitutional Law*, 1239.

Estoppel to Claim, see *Estoppel*, 173.

Mandamus to Compel Postmaster General to Give Credit, see Mandamus, 25.

Mandamus to Compel Allowance of Credits, see Mandamus, 128, 129.

Necessary Parties in Action for Fraudulently Obtaining Excessive Compensation, see Parties, 202.

Transportation by Railroad Company over Toll Bridge Free of Charge, see Railroads, 85.

See also *supra*, 40.

63. Although Congress has power to direct the price at which the mail service shall be performed by railroads which have received land grants, where it is expressly reserved as a condition of the land grants, it cannot impose new contracts upon them. The government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals. It cannot retain the obligation of the contract as against a company, and at the same time vary its own, unless it has reserved the right to do so in the contract itself. *Chicago & N. W. R. Co. v. United States*, 104 U. S. 680, 26: 891

64. By the act of Congress of March 3, 1877, making appropriations for mail service performed in Confederate States, Congress intended to provide for the payment of only such claims as appeared not to have been paid by the Confederate government. *Selma, R. & D. R. Co. v. United States*, 139 U. S. 560, 11 Sup. Ct. Rep. 638, 35: 266

65. In a controversy between the Union Pacific Railway Company and the United States, arising under the act of July 1, 1862, it is immaterial whether the amount actually found to be due for transportation of the mails, "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service," as required by said section, is ascertained upon evidence comparing them with the rates previously determined and fixed by the company, or with those allowed by the accounting officers of the government. The only material thing is to adjudge what is due according to the rule prescribed by the statute. *Union P. R. Co. v. United States*, 117 U. S. 355, 6 Sup. Ct. Rep. 772, 29: 920

66. A railroad built partly by a land grant made by Congress is entitled, under the act of July 12, 1876, § 13, for transportation of the mail to full rates for such portion of the road as was not aided by such land grant. *United States v. Alabama G. S. R. Co.* 142 U. S. 615, 12 Sup. Ct. Rep. 306, 35: 1134

Cited in Boston Ins. Co. v. Chicago, R. I. & P. R. Co. 118 Iowa, 430, 59 L.R.A. 800, 92 N. W. 88—*State v. Comptoir National D'Escompte de Paris*, 51 La. Ann. 1279, 26 So. 91.

67. The provision for transportation of mails at such price as Congress or the Postmaster General shall fix, made by § 5 of the

land grant act of Congress of June 3, 1856, the substance of which is not re-enacted by the act of May 5, 1864, is among those intended by § 3 of the latter act, declaring that the grant is made "upon the same terms and conditions as are contained" in the act of 1856. *Wisconsin C. R. Co. v. United States*, 164 U. S. 190, 17 Sup. Ct. Rep. 45, 41: 393

Increase of compensation.

Estoppel by Obtaining, see Estoppel, 141.

See also *infra*, 82, 83.

68. Under the proviso in the act of April 7, 1880, limiting the discretion of the Postmaster General to expedite the service of carrying the mail to 50 per cent of the rate fixed in the original contract, the rate of pay established in the contract as originally let—not the amount of the pay expressed therein—is the basis or unit of compensation for such increased service. *Allman v. United States*, 131 U. S. 31, 9 Sup. Ct. Rep. 632, 33: 51

69. The Postmaster General may order an increase of service in carrying the mail, by enlarging the distance, by new route, or by requiring a greater number of trips between the terminal points, and by allowing therefor a pro rata increase on the contract pay. *United States v. Barlow*, 132 U. S. 271, 10 Sup. Ct. Rep. 77, 33: 346

70. A carrier of the United States mails, who is required by the order of the Postmaster General to render additional services beyond the terms of his contract, is entitled to compensation therefor. *Alvord v. United States*, 95 U. S. 456, 24: 414
Cited in Re Huttman, 70 Fed. 702.

71. The adjustment of compensation to a railway company for carrying the mails, made by the Postmaster General in the exercise of his authority under U. S. Rev. Stat. § 4002, U. S. Comp. Stat. 1901, p. 2719, to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation, may be confined, where an extension is made beyond the terminal of an established rail route, to the extension alone, without readjusting the compensation for the whole route as extended. *Chicago, M. & St. P. R. Co. v. United States*, 198 U. S. 385, 25 Sup. Ct. Rep. 665, 49: 1034

72. An increase in the service required on a mail route, as the result of the establishment of a new distributing station in the city of New York, amounting to more than 300,000 miles of additional transfer service, and involving an additional expenditure of nearly \$10,000 for ferry tolls, cannot be required by the Postmaster General without extra compensation, under the authority reserved to him in the contract to call for new, additional, mail messenger, or transfer service without additional compensation. *United States v. Utah, N. & C. Stage Co.* 199 U. S. 414, 26 Sup. Ct. Rep. 69, 50: 251
Cited in Serralles v. Esbri, 200 U. S. 113, 50 L. ed. 395, 26 Sup. Ct. Rep. 176.

73. The positive statement in the government's advertisement for proposals for services on a mail route that the number of elevated stations to be served was two, whereas in fact there were four to be served, entitles the contractor to additional compensation for the extra service thereby necessitated, although the advertisement required bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes. *United States v. Utah, N. & C. Stage Co.* 199 U. S. 414, 26 Sup. Ct. Rep. 69, 50: 251

Reduction of compensation.

See also *supra*, 35.

74. The reduction of price for mail service, under the act of 1876, cannot be made against a company whose road had been the subject of land grant, when the service had been rendered during the term of a written contract for four years, and which had not terminated when the act took effect. *Chicago, M. & St. P. R. Co. v. United States*, 104 U. S. 687, 25: 893

75. The reduction of the price for mail service, under the act of 1876, was not intended to apply to cases where the service had been rendered under a written contract for a term of years which had not expired when the act took effect. *Chicago, M. & St. P. R. Co. v. United States*, 104 U. S. 687, 26: 893

Chicago & N. W. R. Co. v. United States, 104 U. S. 680, 26: 891
Distinguished in Eastern R. Co. v. United States, 129 U. S. 396, 32 L. ed. 732, 9 Sup. Ct. Rep. 320.

Cited in Chicago, M. & St. P. R. Co. v. United States, 104 U. S. 688, 26 L. ed. 894—*St. Paul & D. R. Co. v. United States*, 112 U. S. 735, 28 L. ed. 861, 5 Sup. Ct. Rep. 366—*St. Paul & D. R. Co. v. United States*, 18 Ct. Cl. 416—*Eastern R. Co. v. United States*, 20 Ct. Cl. 40—*Jacksonville, P. & M. R. Co. v. United States*, 21 Ct. Cl. 108—*New York C. & H. R. R. Co. v. United States*, 21 Ct. Cl. 473.

76. U. S. Rev. Stat. § 3962, U. S. Comp. Stat. 1901, p. 2704, authorizing deductions from the pay of contractors for transportation of mail, for failure to perform services according to contract, is not repealed by the act of 1879, § 5, relating to railroad companies. *Chicago, M. & St. P. R. Co. v. United States*, 127 U. S. 406, 8 Sup. Ct. Rep. 1194, 32: 180

77. Where a contract for carrying the mails was subject to the provisions of the act of Congress of March 3, 1873 (17 Stat. at L. 558, chap. 231, U. S. Rev. Stat. 4002, U. S. Comp. Stat. 1901, p. 2719), which authorized the Postmaster General to readjust the compensation to be paid therefor, graduated by the weight of the mail; and by subsequent acts such officer was directed to and did readjust such compensation, giving due notice of the readjustment to the contractor,—the latter, having received the reduced compensation for continued service, without protest or objection, must be held

to have accepted it in full, and cannot recover the difference between the amounts actually received by him and the amount he would have received under the contract before the readjustment. *Eastern R. Co. v. United States*, 129 U. S. 391, 9 Sup. Ct. Rep. 320, 32: 73C

Cited in Allman v. United States, 131 U. S. 35, 38 L. ed. 53, 9 Sup. Ct. Rep. 632—*Boston Ins. Co. v. Chicago, R. I. & P. R. Co.* 118 Iowa, 429, 59 L.R.A. 800, 92 N. W. 88—*Evansville & I. R. Co. v. United States*, 32 Ct. Cl. 564—*Whitsell v. United States*, 34 Ct. Cl. 11.

Compensation under miscellaneous contracts.

78. A contractor for carrying the mail in the southern states, held entitled to one month's pay in pursuance of his contract, on the Postmaster General ordering the service to be discontinued in consequence of the Civil War. *Reese v. United States*, 8 Wall. 38, 19: 318

Cited in Salomon v. United States, 7 Ct. Cl. 493—*Fulenwelder v. United States*, 9 Ct. Cl. 407—*Garfield v. United States*, 11 Ct. Cl. 607—*Chicago & N. W. R. Co. v. United States*, 15 Ct. Cl. 245—*Mordecai v. United States*, 19 Ct. Cl. 14—*Campbell v. United States*, 19 Ct. Cl. 322—*Day v. United States*, 21 Ct. Cl. 265.

79. The contract of the Pacific Mail Steamship Company to carry the Asiatic mails, in American vessels to be inspected and accepted by the Postmaster General, authorizes a recovery only for services rendered by vessels accepted by the Postmaster General. For mails carried in unaccepted vessels, the sea postage offered by the Postmaster General must be, as before the contract, the only compensation. *Pacific Mail S. S. Co. v. United States*, 103 U. S. 721, 26: 419

80. The Union Pacific Railroad Company is entitled, under the provisions of its contract with the United States for the services rendered in transportation of the mails, to fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for similar services. *Union P. R. Co. v. United States*, 104 U. S. 662, 26: 884
Cited in Union P. R. Co. v. United States, 116 U. S. 156, 29 L. ed. 585, 6 Sup. Ct. Rep. 325—*Union P. R. Co. v. United States*, 117 U. S. 356, 29 L. ed. 921, 6 Sup. Ct. Rep. 772—*Ex parte Koehler*, 1 Inters. Com. Rep. 320, 31 Fed. 319.

81. Where a railroad company which had been aided by a land grant from the United States continued to carry mails after the expiration of a contract, and notices of reductions in prices were given at various times by the Postmaster General, there is no implication that the contract price was to be continued. *Jacksonville, P. & M. R. Co. v. United States*, 118 U. S. 626, 7 Sup. Ct. Rep. 48, 30: 273
Cited in Minneapolis & St. L. R. Co. v. United States, 24 Ct. Cl. 361.

82. In a contract for carrying mail in the

city of New York, although it included a specific agreement to carry mails a certain number of times each week to Jersey City, a provision "to perform all other mail, messenger, and transfer service now being performed in the said city of New York, and any and all new or additional mail, messenger, or transfer service in the said city," without additional compensation, does not apply to extra service across the river to Jersey City. *United States v. Otis*, 120 U. S. 115, 7 Sup. Ct. Rep. 449, 30: 609
Cited in Woolverton v. United States, 27 Ct. Cl. 312—*Slavens v. United States*, 38 Ct. Cl. 589.

83. A contractor for carrying the mails is not entitled to extra compensation for services outside the terms of his contract which were performed in compliance with the unauthorized demand of the local postmaster, where, upon protest to the Postmaster General, the contractor was promptly relieved from such services, and another contract was made for their performance. *Slavens v. United States*, 196 U. S. 229, 25 Sup. Ct. Rep. 229, 49: 457

Recovery of compensation paid.

Joint Action against Contractor and Subcontractors for, see *Parties*, 273.

Directing Verdict in Action for Money Fraudulently Demanded and Received, see *Trial*, 529.

84. The United States cannot recover back money paid for carrying the mails, if it was not paid by mistake of fact or obtained by false statement or erroneous representation. *United States v. Voorhees*, 135 U. S. 550, 10 Sup. Ct. Rep. 841, 34: 258

85. Money paid to a mail contractor and his subcontractor on an increase of service obtained by false statements, whether by fraud or mistake, can be recovered by the United States under U. S. Rev. Stat. § 4057, U. S. Comp. Stat. 1901, p. 2756. *United States v. Piatt*, 157 U. S. 113, 15 Sup. Ct. Rep. 498, 39: 639

86. Where allowance was made to contractors for expedited mail service, upon a clear mistake of fact as to what additional men and animals were required for such service, and the money was paid in ignorance of the fact that no additional number had been employed in that service, the United States may recover the moneys paid on such allowance. *United States v. Barlow*, 132 U. S. 271, 10 Sup. Ct. Rep. 77, 33: 346
Cited in United States v. Hume, 132 U. S. 414, 33 L. ed. 397, 10 Sup. Ct. Rep. 134—*United States v. Carr*, 132 U. S. 651, 33 L. ed. 485, 10 Sup. Ct. Rep. 182—*United States v. Voorhees*, 135 U. S. 552, 34 L. ed. 259, 10 Sup. Ct. Rep. 841—*United States v. Chidester*, 140 U. S. 49, 35 L. ed. 339, 11 Sup. Ct. Rep. 650—*United States v. Dumas*, 149 U. S. 286, 37 L. ed. 737, 13 Sup. Ct. Rep. 872—*Parker v. United States*, 26 Ct. Cl. 368—*Houser v. United States*, 39 Ct. Cl. 522.

87. An erroneous conclusion in the con-

struction or application of a statute by the Postmaster General is a "mistake" within the meaning of U. S. Rev. Stat. § 4057, U. S. Comp. Stat. 1901, p. 2756, providing for suit to recover money paid by mistake. *Wisconsin C. R. Co. v. United States*, 164 U. S. 190, 17 Sup. Ct. Rep. 45, 41: 399

88. Overpayments by a Postmaster General for transportation of mails, which are made under misconstruction or misapprehension of the law, can be deducted by his successor from money subsequently coming due to the same person, as this power is included in the power to cause suit to be brought under U. S. Rev. Stat. § 457, U. S. Comp. Stat. 1901, p. 259, for money paid by mistake. *Wisconsin C. R. Co. v. United States*, 164 U. S. 190, 17 Sup. Ct. Rep. 45, 41: 399

89. Fraudulent representations on which an allowance for expedited mail service was obtained will be ground for action by the United States to recover back the money, although the officers of the government did not participate in or countenance the fraud. *United States v. Barlow*, 132 U. S. 271, 10 Sup. Ct. Rep. 77, 33: 345

90. Moneys paid for carrying the mails cannot be recovered back by the United States as illegally paid, where it is not alleged that the money was paid under a mistake of fact on the part of the postoffice authorities, or that any false statement or erroneous representations were made on the part of the contractor, or that any sum was paid to him for men and horses never required or employed. *United States v. Voorhees*, 135 U. S. 550, 10 Sup. Ct. Rep. 841, 34: 258

Cited in Peterson v. United States, 26 Ct. Cl. 338—*Parker v. United States*, 26 Ct. Cl. 368.

V. Rates of Postage.

91. A newspaper does not, under the laws of Congress on the subject, become liable to letter postage by reason of an initial having been written on the wrapper; and regulations of the Department to that effect are void. *Teal v. Felton*, 12 How. 284, 13: 990

92. In determining whether or not a certain article should be charged postage at letter or newspaper rates, a postmaster has no discretion. *Teal v. Felton*, 12 How. 284, 13: 990

93. Books complete in themselves are not, because published at stated intervals and in consecutive numbers, entitled to second-class postage rates under the act of March 3, 1879 (20 Stat. at L. 355, 358, chap. 180, U. S. Comp. Stat. 1901, p. 2646), § 10, as "periodical publications," although they conform in every respect to the conditions of § 14 of that act, upon which a publication shall be admitted to the second class.

Houghton v. Payne, 194 U. S. 83, 24 Sup. Ct. Rep. 590, 48: 888
Cited in Smith v. Payne, 194 U. S. 105, 48 L. ed. 893, 24 Sup. Ct. Rep. 595—Columbian Correspondence College v. Wynne, 25 App. D. C. 153—Allen v. United States, 26 App. D. C. 23.

94. The refusal by the Postmaster General to admit to the mails as a periodical publication, entitled to second-class rates, a monthly musical publication, each issue of which is complete in itself, treating of the works of a single master musician, with a greater portion of its pages devoted to specimens of his genius, is not so clearly an erroneous exercise of his discretion as to call for interference by the courts. *Bates & G. Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. Rep. 595, 48: 894
Cited in Smith v. Payne, 194 U. S. 105, 48 L. ed. 894, 24 Sup. Ct. Rep. 595—Public Clearing House v. Coyne, 194 U. S. 508, 48 L. ed. 1098, 24 Sup. Ct. Rep. 789—People's United States Bank v. Gilson, 140 Fed. 8—United States v. Hyams, 76 C. C. A. 527, 146 Fed. 19—Columbian Correspondence College v. Wynne, 25 App. D. C. 153.

VI. Offenses Against Postal Laws.

Place of Commission of Crime Accomplished by Means of Letters, see Courts, 987-989, 991.

Jurisdiction to Prosecute Act Constituting Postal Crime and also State Crime, see Courts, 1435.

Telegrams as Evidence on Prosecution for Conspiracy to Obstruct the Mails, see Evidence, 1387.

Indictment for, see Indictment, etc., II. e, 3, d.

Number of Peremptory Challenges on Trial for, see Jury, 131, 132.

Larceny of Postage Stamps, see Larceny, 2.

Limitation of Time to Prosecute for, see Limitation of Actions, 556, 557.

95. A written order for goods, folded and directed as a letter, though not sealed, is mailable matter; and a conveyance of it by a packet-boat on a canal, on which line mail is transported, is a violation of the act of March 3, 1825, which prohibits the transportation of letters or other mailable matter, except such as may have relation to some part of the cargo or article at the same time conveyed, by any stagecoach, railroad car, steamboat, packet-boat, or other vehicle or vessel, or by the owners, managers, servants, or crews of either, which regularly performs trips on a post route on which mail is carried. *United States v. Bromley*, 12 How. 88, 13: 905
Cited in United States v. Huggett, 40 Fed. 642.

Editorial note.

[When may one who does not personally mail nonmailable matter be regarded as causing it to be deposited in the mails. 6 L.R.A.(N.S.) 424.]

Mailing obscene matter.

Consenting in Response to Decoy Letter as Defense, see Criminal Law, 47, 48.

Bill of Particulars on Prosecution for, see Criminal Law, 131.

Letter as Evidence, see Evidence, 1390.
 Newspaper as Evidence of Proprietorship, see Evidence, 1446.

Evidence of Knowledge, see Evidence, 2368.

Indictment for, see Indictment, etc., 112-115.

Instruction as to Obscenity, see Trial, 737.

See also *supra*, 56, 57, 59.

96. The words "obscene," "lewd," and "lascivious," as used in U. S. Rev. Stat. § 3893, U. S. Comp. Stat. 1901, p. 2658, respecting the wrongful use of the mails, signify that form of immorality which has relation to sexual impurity, and have the same meaning given them at common law in prosecutions for obscene libel, and therefore do not extend to language, although it may be exceedingly coarse and vulgar and plainly libelous, if it has not a lewd, lascivious, and obscene tendency calculated to corrupt and debauch the mind and morals. *Swearingen v. United States*, 161 U. S. 446, 16 Sup. Ct. Rep. 562, 40: 765
Cited in German Ins. Co. v. Manning, 78 Fed. 907—United States v. Moore, 104 Fed. 78—United States v. Clifford, 104 Fed. 298—Middleby v. Effer, 55 C. C. A. 356, 118 Fed. 262—United States v. Wroblenski, 118 Fed. 495.

97. Knowingly depositing in the mails an obscene letter inclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written is not an offense within the act of Congress of July 12, 1876, chap. 186. *United States v. Chase*, 135 U. S. 255, 10 Sup. Ct. Rep. 756, 34: 117
Distinguished in United States v. Andrews, 58 Fed. 862.

Cited in Re Palliser (Palliser v. United States) 136 U. S. 267, 34 L. ed. 518, 10 Sup. Ct. Rep. 1034—United States v. Clark, 43 Fed. 575—United States v. Martin, 50 Fed. 919—United States v. Wilson, 58 Fed. 770—United States v. Warner, 59 Fed. 356—United States v. Nathan, 61 Fed. 938—United States v. Ling, 61 Fed. 1002—Middleby v. Effer, 55 C. C. A. 357, 118 Fed. 262—United States v. Wroblenski, 118 Fed. 496.

98. Placing a private letter in the post-office, which conveys information as to where obscene matter can be obtained, with a view of giving such information to the person addressed, is an offense under U. S. Rev. Stat. § 3893, U. S. Comp. Stat. 1901, p. 2658, as amended by the act of September 26, 1888. *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. Rep. 470, 39: 550
Cited in Andrews v. United States, 182 U. S. 424, 40 L. ed. 1025, 16 Sup. Ct. Rep. 708.

99. Mailing a private sealed letter in an envelope on which nothing appears but the name and address, if it contains obscene

matter, is an offense under U. S. Rev. Stat. § 3893, U. S. Comp. Stat. 1901, p. 2658, as amended by the act of September 26, 1888. *Andrews v. United States*, 162 U. S. 420, 16 Sup. Ct. Rep. 798, 40: 1023
Cited in Middleby v. Effner, 55 C. C. A. 357, 118 Fed. 263—*United States v. Wroblewski*, 118 Fed. 496.

100. Knowledge of the contents of a paper which is in fact obscene is sufficient to make one who deposits it in the mails guilty of an offense under U. S. Rev. Stat. § 3893, U. S. Comp. Stat. 1901, p. 2658, although he did not regard the paper as one that the statute forbade to be carried in the mails. *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. Rep. 434, 480, 40: 606

Selling postage stamps on credit.

101. Cash, within the meaning of the act of Congress of June 17, 1878, chap. 259, § 1, forbidding a postmaster to sell or dispose of postage stamps except for cash, means ready money or money in hand, either in current coin or other legal tender, or in bank bills or checks paid and received as money; and does not include promises to pay money in the future. *Palliser v. United States (Re Palliser)* 136 U. S. 257, 10 Sup. Ct. Rep. 1034, 34: 514
Cited in Chick v. Robinson, 52 L.R.A. 844, 37 C. C. A. 209, 95 Fed. 624—*Norton v. Nevada*, 174 Mass. 245, 54 N. E. 537.

102. An offer of a contract to pay money to a postmaster for an unlawful sale by him of postage stamps on credit is not the less within the statute because his commission on the sale would be no greater than upon a lawful sale for cash. *Palliser v. United States (Re Palliser)* 136 U. S. 257, 10 Sup. Ct. Rep. 1034, 34: 514

103. A letter written and sent from New York to a postmaster in Connecticut, asking him to put postage stamps on circulars and send them out, at the rate of fifty to one hundred daily; and promising him that, if he would do so, the writer of the letter would remit to him the price of the stamps, was a tender of a contract for the payment of money to induce him to sell postage stamps for credit, in violation of his lawful duty, contrary to U. S. Rev. Stat. § 5451, U. S. Comp. Stat. 1901, p. 3680. *Palliser v. United States (Re Palliser)* 136 U. S. 257, 10 Sup. Ct. Rep. 1034, 34: 514

Obstruction of the mail.

104. The arrest of a mail carrier by bench-warrants, upon an indictment for murder, is not an obstruction of the mail, under the act of March 3, 1825, § 9. The act applies only to persons who "knowingly and wilfully obstruct or retard the passage of the mail or of its carriers." It has no reference to acts lawful in themselves, from the execution of which a temporary obstruction unavoidably follows. *United States v. Kirby*, 7 Wall. 482, 19: 278
Cited in Hawaii v. Mankichi, 190 U. S. 213, 47 L. ed. 1021, 23 Sup. Ct. Rep. 787—*United States v. Bean*, Fed. Cas. No. 14,550—*United States v. Clark*, 13 Phila. 477, Fed.

Cas. No. 14,805—*United States v. Stevens*, 2 Haskell, 170, Fed. Cas. No. 16,392—*Chinese Merchant's Case*, 7 Sawy. 553, 13 Fed. 610—*United States v. Claypool*, 14 Fed. 128—*United States v. Kane*, 9 Sawy. 616, 19 Fed. 44—*United States v. Woodward*, 44 Fed. 593—*United States v. Sears*, 55 Fed. 270—*United States v. Cassidy*, 67 Fed. 704—*Blake v. United States*, 18 C. C. A. 120, 33 U. S. App. 376, 71 Fed. 290—*Harper v. Endert*, 103 Fed. 918—*United States v. Clark*, 13 Phila. 477.

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Obstructing the mails.

19: 278

Robbery of mail.

105. The offense charged in an indictment founded on the statute of March 3, 1825, for advising, procuring, and assisting a mail carrier to rob the mail, is a misdemeanor. *United States v. Mills*, 7 Pet. 138, 8: 636
Cited in Beery v. United States, 2 Colo. 210—*Brugler v. United States*, 1 Dak. 7, 46 N. W. 502.

Embezzlement.

Of Decoy Letter, see Criminal Law, 49, 50.

Lack of Postmaster's Consent as Necessary Element of Crime, see Criminal Law, 51.

Variance Between Allegations and Proof, see Evidence, 2782, 2783.

Indictment for, see Indictment, etc., 28, 121, 122.

Limitation of Time to Prosecute for, see Limitation of Actions, 556.

106. The embezzlement, by a person employed in a department of the postal service, of a letter intended to be conveyed by mail and containing an article of value, which came into the possession of such person, is made an offense against the United States by U. S. Rev. Stat. § 5467, U. S. Comp. Stat. 1901, p. 3691, distinct from the offense of stealing such article; and the penalty is prescribed for such embezzlement by said section. *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. Rep. 625, 33: 1080

107. U. S. Rev. Stat. §§ 3891, 5467, U. S. Comp. Stat. 1901, pp. 2651, 3691, are to be considered together; and the offenses of secreting, embezzling, or destroying mail matter not containing articles of value, are punishable under the one, and that containing such articles under the other. *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. Rep. 625, 33: 1080
Cited in United States v. Delany, 55 Fed. 476.

108. Two classes of offenses were intended to be created by U. S. Rev. Stat. § 5467, U. S. Comp. Stat. 1901, p. 3691,—one relating to the embezzlement of letters, etc., and the other to stealing the contents. *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. Rep. 625, 33: 1080

109. A postoffice *de facto* need not be shown to have been regularly established as a postoffice by law, in order to make the embezzlement by a letter carrier of a letter deposited therein an offense under U. S. Rev. Stat. §§ 5467, 5469, U. S. Comp. Stat. 1901.

pp. 3691, 3692. *Goode v. United States*, 159 U. S. 663, 16 Sup. Ct. Rep. 136, 40: 297

110. A letter placed in the box of a letter carrier in a postoffice need not have gone through the usual channel or reached that box in the ordinary way, in order to make it a crime for him to embezzle or steal it. *Goode v. United States*, 159 U. S. 663, 16 Sup. Ct. Rep. 136, 40: 297

111. A decoy letter, even if addressed to a fictitious person, is a letter within the meaning of the United States Revised Statutes as to embezzling or stealing letters. *Goode v. United States*, 159 U. S. 663, 16 Sup. Ct. Rep. 136, 40: 297
Cited in Rosen v. United States, 161 U. S. 42, 40 L. ed. 610, 16 Sup. Ct. Rep. 434—*Montgomery v. United States*, 162 U. S. 410, 40 L. ed. 1020, 16 Sup. Ct. Rep. 797—*Andrews v. United States*, 162 U. S. 424, 40 L. ed. 1025, 16 Sup. Ct. Rep. 798—*Hall v. United States*, 168 U. S. 637, 42 L. ed. 608, 18 Sup. Ct. Rep. 237—*Scott v. United States*, 172 U. S. 349, 43 L. ed. 473, 19 Sup. Ct. Rep. 209.

112. The stealing by a postal employee of a test or decoy letter in the lawful possession of the Postoffice Department is a violation of the latter part of U. S. Rev. Stat. § 5467, U. S. Comp. Stat. 1901, p. 3691, whether or not the letter was intended to be conveyed by mail or delivered by a letter carrier. *Hall v. United States*, 168 U. S. 632, 18 Sup. Ct. Rep. 237, 42: 607

Fraud by use of mails.

Exclusion of Fraudulent Matter, see supra, IV. b.

Punishment for, see Criminal Law, 206.

Envelopes with Return Indorsement as Evidence, see Evidence, 1386.

Order for Goods as Evidence, see Evidence, 1435.

Indictment for, see Indictment, etc., 107-111.

113. Each letter taken out of or put into a postoffice to carry out a fraudulent scheme, contrary to U. S. Rev. Stat. § 5480, U. S. Comp. Stat. 1901, p. 3696, is a distinct violation thereof. *Re Henry*, 123 U. S. 372, 8 Sup. Ct. Rep. 142, 31: 174
Cited in Durland v. United States, 161 U. S. 315, 40 L. ed. 712, 16 Sup. Ct. Rep. 508—*Packer v. United States*, 46 C. C. A. 37, 106 Fed. 908—*United States v. Clark*, 125 Fed. 93.

114. The use of the mails in a scheme to sell counterfeit obligations of the United States will sustain a conviction under U. S. Rev. Stat. § 5480, U. S. Comp. Stat. 1901, p. 3696, as amended by the act of Congress of March 2, 1880, chap. 393, without any proof of a scheme to defraud. *Streep v. United States*, 160 U. S. 128, 16 Sup. Ct. Rep. 244, 40: 365

115. Mere representations and promises as to the future may constitute a scheme or artifice to defraud within the meaning of U. S. Rev. Stat. § 5480, U. S. Comp. Stat. 1901, p. 3696, as amended by the act of March 2, 1889, respecting unlawful use of

mails, although no misrepresentation as to existing facts is made where there is an intent to entrap the unwary and secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact and known to the person offering it to be such. *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. Rep. 508, 40: 709

Cited in Culp v. United States, 27 C. C. A. 296, 55 U. S. App. 42, 82 Fed. 992—*Fairfield Floral Co. v. Bradbury*, 89 Fed. 395—*Milby v. United States*, 48 C. C. A. 578, 109 Fed. 642—*Horman v. United States*, 53 C. C. A. 573, 116 Fed. 353—*O'Hara v. United States*, 64 C. C. A. 85, 129 Fed. 555—*Miller v. United States*, 66 C. C. A. 403, 133 Fed. 342—*Post v. United States*, 70 L.R.A. 996, 67 C. C. A. 577, 135 Fed. 9—*Ewing v. United States*, 69 C. C. A. 64, 136 Fed. 56—*Rosenberger v. Harris*, 136 Fed. 1004

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POSTPONEMENT.

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POWER OF ALIENATION.

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Collateral Attack on Judgment as to Power of Appointment, see Judgment, 405.

Power Given to Life Tenant to Sell or Mortgage Property, see Life Tenants, 1.

Sale of Mortgaged Premises under, see Mortgage, VII. g, 2.

Power to Sell on Expiration of Estate Tail as Violation of Rule against Perpetuities, see Perpetuities, 7.

Of Attorney, see Principal and Agent, II.

I. Nature and Operation.**a. General Principles.**

Of Executor or Administrator to Sell Land, see Executors and Administrators, 99-103.

1. Every case of a power given in a will is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person. *Hunt v. Rousmanier*, 8 Wheat. 174, 5: 589
Cited in *Quin v. Skinner*, 49 Barb. 135.

Essentials.

2. An agreement authorizing a mortgagor to convey the mortgaged property, made by the mortgagee, is not invalid as an authority to convey, under the Georgia Code, because not executed before two witnesses. *Woodward v. Jewell*, 140 U. S. 247, 11 Sup. Ct. Rep. 784, 35: 478

Nature of power of appointment or revocation.

3. The power of revocation and appoint-

ment reserved to the husband in a deed to his wife is not an interest in the property which can be transferred to another, or sold on execution, or devised by will, or which passes to his assignee in bankruptcy. *Jones v. Clifton*, 101 U. S. 225, 25: 908
Cited in *Brandies v. Cochrane*, 112 U. S. 353, 28 L. ed. 704, 5 Sup. Ct. Rep. 194—*Von Heese v. MacKaye*, 62 Hun, 463, 17 N. Y. Supp. 55.

4. Where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed, in equity, part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. *Brandies v. Cochrane*, 112 U. S. 344, 5 Sup. Ct. Rep. 194, 28: 760
Cited in *Manson v. Duncanson*, 166 U. S. 546, 41 L. ed. 1110, 17 Sup. Ct. Rep. 647—*Humphrey v. Campbell*, 59 S. C. 46, 37 S. E. 26—*Freeman v. Butters*, 94 Va. 411, 28 S. E. 845.

b. Construction.

Imperative or Discretionary Nature of Executor's Power, see Executors and Administrators, 101.

Interest of donee.

Irrevocability of Power Coupled with Interest, see *infra*, 16-18.

Execution of Power, see *infra*, 22, 24.

Right of Assignee in Bankruptcy, see Bankruptcy, 122, 123.

5. It is the possession of the legal estate, or a right in the subject over which the power is exercised, that makes a power coupled with an interest. *Peter v. Beverly*, 10 Pet. 532, 9: 522

Cited in *Tarver v. Haines*, 55 Ala. 506—*Michenor v. Rehnach*, 49 La. Ann. 363, 21 So. 552—*Van Allen v. Humphrey*, 15 Barb. 357—*Niles v. Stevens*, 4 Denio, 403.

Power of disposal.

Power of Attorney to Sell or Pledge Property, see Principal and Agent, II. b.

6. A power to dispose of land in the seisin of a third person is in no just sense an estate in the land itself. *Carver v. Jackson ex dem. Astor*, 4 Pet. 1, 7: 761

7. When a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless other words clearly indicate that a larger power is intended. *Giles v. Little*, 104 U. S. 291, 26: 745

Cited in *Fatty v. Goolsby*, 51 Ark. 73, 9 S. W. 846—*Henderson v. Blackburn*, 104 Ill. 231, 44 Am. Rep. 750—*Dickey v. Barnstable*, 122 Iowa, 579, 98 N. W. 308.

8. The power of disposition conferred by a will bequeathing personal property to the testator's wife "to and for her own use and benefit and disposal absolutely; the remainder of the said estate, after her decease, to be for the use of J,"—is such as may be

made by a person having only a life estate. *Smith v. Bell*, 6 Pet. 68, 8: 322
Cited in Brant v. Virginia Coal & I. Co. 93 U. S. 333, 23 L. ed. 928—*Giles v. Little*, 104 U. S. 296, 26 L. ed. 747—*Roberts v. Lewis*, 153 U. S. 378, 38 L. ed. 750, 14 Sup. Ct. Rep. 945—*Brant v. Virginia Coal & I. Co.* 2 Hughes, 511, Fed. Cas. No. 1,814—*Partee v. Thomas*, 11 Fed. 776—*Schreiner v. Smith*, 38 Fed. 900—*Smith v. McIntyre*, 37 C. C. A. 181, 95 Fed. 588—*McDuffie v. Montgomery*, 128 Fed. 108—*Mason v. Pate*, 34 Ala. 390—*Banks v. Jones*, 50 Ala. 486—*Patty v. Goolsby*, 51 Ark. 72, 9 S. W. 846—*Lewis v. Palmer*, 46 Conn. 456—*Mansfield v. Shelton*, 67 Conn. 396, 52 Am. St. Rep. 285, 35 Atl. 271—*Howard v. Carusi, MacArthur, & M.* 274—*Horn v. Gartman*, 1 Fla. 87—*Lott v. Meacham*, 4 Fla. 149—*Dudley v. Mallery*, 4 Ga. 63—*Burnett v. Lester*, 53 Ill. 333—*Henderson v. Blackburn*, 104 Ill. 231, 44 Am. Rep. 780—*Healy v. Eastlake*, 152 Ill. 433, 39 N. E. 260—*Kratz v. Kratz*, 189 Ill. 281, 59 N. E. 519—*Truax v. Gregory*, 196 Ill. 87, 63 N. E. 674—*Gondle v. Johnston*, 109 Ind. 432, 10 N. E. 296—*Crew v. Dixon*, 129 Ind. 91, 27 N. E. 728—*Ragsdale v. Barnett*, 10 Ind. App. 496, 37 N. E. 1109—*Turner v. Turner*, 3 Ind. Terr. 588, 64 S. W. 543—*Case v. Dwire*, 60 Iowa, 445, 15 N. W. 265—*Re Foster*, 76 Iowa, 368, 41 N. W. 43—*Law v. Douglass*, 107 Iowa, 611, 78 N. W. 212—*Williams v. McKinney*, 34 Kan. 521, 9 Pac. 265—*McNutt v. McComb*, 61 Kan. 28, 58 Pac. 965—*Stuart v. Walker*, 72 Me. 153, 39 Am. Rep. 311—*Copeland v. Barron*, 72 Me. 210—*Foos v. Scarf*, 55 Md. 311—*Russell v. Wernitz*, 88 Md. 215—*Re Bauernschmidt*, 97 Md. 55, 54 Atl. 637—*Barton v. Bigelow*, 4 Gray, 367—*Barnes v. Marshall*, 102 Mich. 255, 60 N. W. 468—*Robinson v. Finch*, 116 Mich. 182, 74 N. W. 472—*Semper v. Coates*, 93 Minn. 79, 100 N. W. 662—*Footte v. Sanders*, 72 Mo. 619—*Russell v. Eubanks*, 84 Mo. 88—*Harbison v. James*, 90 Mo. 426, 2 S. W. 292—*Munro v. Collins*, 95 Mo. 41, 7 S. W. 461—*Lewis v. Pitman*, 101 Mo. 292, 14 S. W. 52—*Evans v. Folks*, 135 Mo. 403, 37 S. W. 126—*Walton v. Druotra*, 152 Mo. 507, 54 S. W. 233—*Wead v. Gray*, 8 Mo. App. 520—*Little v. Giles*, 25 Neb. 321, 41 N. W. 186—*Burleigh v. Clough*, 52 N. H. 278, 13 Am. Rep. 23—*Rose v. Hatch*, 55 Hun, 463, 8 N. Y. Supp. 720—*Colt v. Heard*, 10 Hun, 191—*Crozier v. Bray*, 39 Hun, 123—*Wells v. Seeley*, 47 Hun, 112—*Kurtz v. Wlechmann*, 75 App. Div. 30, 77 N. Y. Supp. 964—*Gross v. Mathewson*, 34 Misc. 372, 69 N. Y. Supp. 878—*Wright v. Miller*, 8 N. Y. 26—*Terry v. Wiggins*, 47 N. Y. 518—*Campbell v. Beaumont*, 91 N. Y. 468—*Coleman v. Beach*, 97 N. Y. 557—*James v. Pruden*, 14 Ohio St. 255—*Baxter v. Bowyer*, 19 Ohio St. 499—*Davis v. Boggs*, 20 Ohio St. 566—*Johnson v. Johnson*, 51 Ohio St. 460, 38 N. E. 61—*Widows' Home v. Lipardt*, 70 Ohio St. 281, 71 N. E. 770—*Winchester v. Hoover*, 42 Or. 314, 70 Pac. 1035—*Neabit v. Clarke*, 1 Pennyp. 486—*Rhode Island Hospital Trust Co. v. Commercial Nat. Bank*, 14 R. I. 628—*Bailey v. Brown*, 19 R. I. 686, 36 Atl. 581—*Canedy v. Riddle*, 19 S. C. 305—*McCloskey v. Gleason*, 56 Vt. 267, 48 Am. Rep. 770—*Stowell v. Hastings*, 59 Vt. 497, 59 Am. Rep. 748, 8 Atl. 738—*Judevine v. Judevine* (Powers v. Judevine) 61 Vt. 594, 7 L.R.A. 522, 18 Atl. 778—*Re Keniston*, 73 Vt. 78, 50 Atl. 558—*McCamant v. Nuckolls*, 85 Va. 337, 12 S. E. 160—*Miller v. Potterfield*, 86 Va. 881, 19 Am. St. Rep. 919, 11 S. E. 486—*Robinson v. Robinson*, 89 Va. 919, 14 S. E. 916—*John v. Barnes*, 21

W. Va. 502—*Cresap v. Cresap*, 34 W. Va. 318, 12 S. E. 527—*Englerth v. Kellar*, 50 W. Va. 266, 40 S. E. 465—*Jones v. Jones*, 66 Wis. 317, 57 Am. Rep. 266, 28 N. W. 177.

9. A marriage settlement settling upon a woman her estate to her sole and separate use, with power to dispose of it by appointment or devise, and directing that the trustee should permit her to have all the interest, rents, and profits to her own use, or to that of such persons as she might from time to time appoint, or to whom she might give them by will; and, in default of such appointment or devise, then the estate and premises to go to those who might be entitled thereto by legal distribution, gave her the power to convey the whole fee. *Ladd v. Ladd*, 8 How. 10, 12: 967

10. Where a power to lease, and a power to convey, assure, and dispose of, are given by the same instrument, the latter power includes a power to sell. The power to sell is the superior power, and will override the other power and supersede it, if previously exercised. *Bowen v. Chase*, 94 U. S. 812, 24: 184

Power to sell and exchange.

Execution of Power, see *infra*, 26.

Time of Executing Power, see *infra*, 27.

Under Power of Attorney, see *Principal and Agent*, II. b.

See also *infra*, 19.

11. Power to sell gives authority to sell for cash only, and does not uphold a mere exchange. *Woodward v. Jewell*, 140 U. S. 247, 11 Sup. Ct. Rep. 784, 35: 478
Cited in McGrath v. Vanaman, 53 N. J. Eq. 460, 32 Atl. 686—*Morton v. Morris*, 27 Tex. Civ. App. 267, 66 S. W. 94.

12. A power to sell and exchange includes the power to make partition of lands. Power to dispose of signifies more than "to sell," and includes power to make partition of lands. *Phelps v. Harris*, 101 U. S. 370, 25: 855

Distinguished in Carr's Petition, 16 R. I. 647, 27 Am. St. Rep. 773, 19 Atl. 145.

Cited in Hill v. Sumner, 132 U. S. 123, 33 L. ed. 286, 10 Sup. Ct. Rep. 42—*Heard v. Read*, 171 Mass. 377, 50 N. E. 638—*Trutch v. Bunnell*, 11 Or. 63, 50 Am. Rep. 458, 4 Pac. 588—*Carr's Petition*, 16 R. I. 648, 27 Am. St. Rep. 773, 19 Atl. 145—*Gray v. Edwards*, 3 Tex. Civ. App. 346, 22 S. W. 536.

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Power to sell lands must be strictly pursued. 4: 518; 5: 334

Power to mortgage.

See also *supra*, 2.

13. Under a power given by statute, to one who has a life interest in property, to sell or mortgage a part of it, with the assent of the chancellor, because of his inability to support himself and his children, who were entitled upon his death to the property in fee, he cannot mortgage or sell to pay his own debts, even with the assent

of the chancellor. *Williamson v. Ball*, 8 How. 566, 12: 1200
Cited in Haywood v. Collins, 60 Ill. 336—
Cooper v. Sunderland, 3 Iowa, 123, 66 Am. Dec. 52—*Cooper v. Sunderland*, 3 Iowa, 129, 66 Am. Dec. 52.

14. Where power is given to mortgage an estate, a mortgage does not so exhaust the power that, after its release, another mortgage may not be given. *Williamson v. Berry*, 8 How. 495, 12: 1170

15. The power to encumber an estate "by way of mortgage or trust deed, or otherwise, and renew the same," is broad enough to include the renewal and extension of an existing encumbrance, as well as the creation of a new one; although the power is accompanied with the declaration that it is to be "for the purpose of raising money to pay off any and all encumbrances now on said property." *Warner v. Connecticut Mut. L. Ins. Co.* 109 U. S. 357, 3 Sup. Ct. Rep. 221, 27: 962

c. Revocation and Survival.

Revocation of Power of Attorney, see Principal and Agent, II. c.
 Survival of Trust, see Trusts, 85-87.
 See also *supra*, 3; *infra*, 22.

16. A power coupled with an interest is irrevocable. *Per Story, J.*, in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4: 629
Cited in Hilliard v. Beattie, 67 N. H. 573, 39 Atl. 897.

17. The interest which can protect a power after the death of the person who creates it must be an interest in the thing itself. *Hunt v. Rousmanier*, 8 Wheat. 174, 5: 589

Cited in Taylor v. Benham, 5 How. 269, 12 L. ed. 147—*Missouri ex rel. Walker v. Walker*, 125 U. S. 342, 31 L. ed. 772, 8 Sup. Ct. Rep. 929—*Kendall v. United States*, 2 Ct. Cl. 594—*Day v. Candee*, 3 Fish. Pat. Cas. 23, Fed. Cns. No. 3,676—*Hammond v. Allen*, 2 Sumn. 393, Fed. Cas. No. 6,000—*Lockett v. Hill*, 1 Woods, 558, Fed. Cas. No. 8,443—*The Perseverance*, Blatchf. & H. 388, Fed. Cas. No. 11,017—*Heath v. Griswold*, 18 Blatchf. 560, 5 Fed. 577—*Oregon & W. Mortg. Sav. Bank v. American Mortg. Co.* 35 Fed. 25—*Stier v. Imperial L. Ins. Co.* 58 Fed. 845—*Johnson Railroad Signal Co. v. Union Switch & Signal Co.* 59 Fed. 22—*China Mut. Ins. Co. v. Ward*, 8 C. C. A. 230, 20 U. S. App. 292, 59 Fed. 714—*Hall v. Gambrill*, 88 Fed. 711—*Hall v. Gambrill*, 34 C. C. A. 195, 63 U. S. App. 740, 92 Fed. 37—*Daniel v. Felt*, 100 Fed. 729—*Pacific Coast Co. v. Anderson*, 47 C. C. A. 108, 107 Fed. 975—*Chambers v. Seay*, 73 Ala. 378—*Nicks v. Rector*, 4 Ark. 280—*Barr v. Schroeder*, 32 Cal. 617—*Janin v. Browne*, 59 Cal. 47—*Frink v. Roe*, 70 Cal. 309, 11 Pac. 820—*Parke v. Frank*, 75 Cal. 368, 17 Pac. 427—*Norton v. Whitehead*, 84 Cal. 268, 18 Am. St. Rep. 172, 24 Pac. 154—*Darrow v. St. George*, 8 Colo. 598, 9 Pac. 791—*Mansfield v. Mansfield*, 6 Conn. 562, 16 Am. Dec. 70—*Lathrop & Co. v. Brown*, 65 Ga. 315—*Wilkins v. McGehee*, 86 Ga. 767, 13 S. E. 84—*Willingham v. Rushing*, 105 Ga. 76, 31 S. E. 130—*Bonney v. Smith*, 17 Ill. 533—*Walker v. Denison*, 86 Ill. 146—*Rowe*

v. Beckett, 30 Ind. 158, 95 Am. Dec. 676—*Hawley v. Smith*, 45 Ind. 203—*Lewis v. Kerr*, 17 Iowa, 76—*Smith v. Cedar Falls & M. R. Co.* 30 Iowa, 249—*Black v. Haraha*, 7 Kan. App. 795, 54 Pac. 21—*Smith v. Dare*, 89 Md. 51, 42 Atl. 909—*Webb v. Walker*, 7 Cush. 50—*Kepton v. Bray*, 99 Mass. 354—*Rich v. Ryder*, 105 Mass. 309—*Powers v. Harlow*, 53 Mich. 514, 51 Am. Rep. 154, 19 N. W. 257—*Alworth v. Seymour*, 42 Minn. 528, 44 N. W. 1030—*State ex rel. Walker v. Walker*, 88 Mo. 284—*Brown v. Massey*, 135 Mo. 531, 38 S. W. 939—*Lockart v. Forsythe*, 49 Mo. App. 657—*Gardner v. First Nat. Bank*, 10 Mont. 153, 10 L.R.A. 46, 25 Pac. 29—*State ex rel. Davis v. Second Judicial Dist. Court*, 30 Mont. 12, 75 Pac. 516—*Campbell v. Roddy*, 44 N. J. Eq. 247, 6 Am. St. Rep. 889, 14 Atl. 279—*Houghtaling v. Marvin*, 7 Barb. 413—*Knapp v. Alvord*, 10 Paige, 209—*Schauber v. Jackson*, 2 Wend. 54—*Terwilliger v. Ontario, C. & S. R. Co.* 149 N. Y. 92, 43 N. E. 432—*North Carolina State L. Ins. Co. v. Williams*, 91 N. C. 72—*Ballard v. Travelers' Ins. Co.* 119 N. C. 191, 25 S. E. 956—*Carter v. Slocumb*, 122 N. C. 477, 65 Am. St. Rep. 714, 29 S. S. 720—*Abbott v. Hunt*, 129 N. C. 405, 40 S. E. 119—*Simpson v. Carson*, 11 Or. 363, 8 Pac. 325—*Moyer's Estate*, 1 Lehigh Valley Law Rep. 34—*Morrel v. Bank of Pennsylvania*, 2 Phila. 62, 13 Phila. Leg. Int. 45—*Johnson v. Ogilbee*, 2 Phila. 79, 13 Phila. Leg. Int. 92—*Whitaker's Estate*, 38 Phila. Leg. Int. 403—*White's Appeal*, 36 Pa. 139—*Frederick's Appeal*, 52 Pa. 342, 91 Am. Dec. 159—*Hartley's Appeal*, 53 Pa. 214, 91 Am. Dec. 207—*Blackstone v. Buttermore*, 53 Pa. 268—*Yerkes's Appeal*, 99 Pa. 408, 12 W. N. C. 400—*Smith Co. v. McGuinness*, 14 R. I. 61—*Brownlee v. Shingler*, 2 Speers L. 526—*Fraser v. Charleston*, 11 S. C. 520—*Fisher v. Fair*, 34 S. C. 210, 14 L.R.A. 336, 13 S. E. 470—*Reilly v. Phillips*, 4 S. D. 611, 57 N. W. 780—*Wells v. Littlefield*, 59 Tex. 562—*Tinsley v. Dowell*, 87 Tex. 29, 26 S. W. 946—*Flagstaff Silver Min. Co. v. Patrick*, 2 Utah, 313—*Clayton v. Fawcett*, 2 Leigh, 23—*McNeill v. McNeill*, 43 W. Va. 768, 28 S. E. 717.

18. The interest coupled with a power, to make it irrevocable, must be an interest in the thing itself, and not that which is to be produced by the exercise of the power. *Missouri ex rel. Walker v. Walker*, 125 U. S. 339, 8 Sup. Ct. Rep. 929, 31: 769
Cited in Johnson Railroad Signal Co. v. Union Switch & Signal Co. 59 Fed. 22—*Marbury v. Barnet*, 17 Misc. 388, 40 N. Y. Supp. 76.

19. When a mere power to convey, as distinguished from a power to sell, is once executed in favor of a voluntary beneficiary, the execution cannot be revoked unless a power of revocation is reserved; and it will not be superseded by a subsequent conveyance made under the same power. *Bowen v. Chase*, 94 U. S. 812, 24: 184

II. Execution.

Power to Revoke Execution, see *supra*, 19.
 Jurisdiction of Equity to Interfere, see Equity, 147.

Effect of Death of Coexecutor, see Executors and Administrators, 82-86.

Effect of, to Cut off Lien of Judgment, see Judgment, 898.

20. The grant of a general power carries with it the right to execute the same by appropriate means. *M'Culloch v. Maryland*, 4 Wheat. 316, 4: 579

Cited in *Hepburn v. Griswold*, 8 Wall. 614, 19 L. ed. 523—*People ex rel. McCullough v. Pacheco*, 27 Cal. 224—*Low v. California P. R. Co.* 52 Cal. 63, 28 Am. Rep. 629—*People v. Hoge*, 55 Cal. 624—*Wells, F. & Co. v. State Bd. of Equalization*, 56 Cal. 202—*Bailey v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 401, 44 Am. Dec. 593—*Wills v. Jones*, 13 App. D. C. 497—*Tuttle v. Moore*, 3 Ind. Terr. 727, 64 S. W. 585—*Overshiner v. State*, 156 Ind. 189, 51 L.R.A. 750, 83 Am. St. Rep. 187, 59 N. E. 468—*People ex rel. Moloney v. Pullman's Palace Car Co.* 175 Ill. 170, 64 L.R.A. 385, 51 N. E. 664—*State ex rel. St. Joseph & D. C. R. Co. v. Nemaha County*, 7 Kan. 560—*Northern P. R. Co. v. Carland*, 5 Mont. 175, 3 Pac. 134—*East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 281, 2 Am. Rep. 82—*Clarke v. Rochester*, 14 How. Pr. 210—*Luke v. Brooklyn*, 43 Barb. 57—*Lancaster County v. Green*, 54 Neb. 101, 74 N. W. 430—*State, New Jersey R. & Transp. Co., Prosecutors, v. Hancock*, 35 N. J. L. 546—*Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 242, 23 Atl. 287—*National Docks & N. J. Junction Connecting R. Co. v. Pennsylvania R. Co.* 54 N. J. Eq. 155, 33 Atl. 860—*Steele ex rel. Cake v. Steele*, 39 Or. 427, 65 Pac. 515—*Kelly v. Pittsburgh*, 85 Pa. 184, 27 Am. Rep. 633—*Union Bank v. Jacobs*, 6 Humph. 522—*Ex parte Coupland*, 26 Tex. 417—*Martin v. Snowden*, 18 Gratt. 146—*McClanahan v. Western Lunatic Asylum*, 88 Va. 469, 13 S. E. 977—*Arbenz v. Wheeling & H. R. Co.* 33 W. Va. 7, 5 L.R.A. 375, 10 S. E. 14—*State ex rel. Priest v. University of Wisconsin*, 54 Wis. 170, 11 N. W. 472.

Persons who may execute.

Succession of Administrator *de Bonis non* to Power Given to Executor, see *infra*, 90.

21. Where an interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. *Hunt v. Rousmanier*, 8 Wheat. 174, 5: 589
Cited in *Rufe v. Commercial Bank*, 40 C. C. A. 30, 99 Fed. 653.

22. When the power given to several persons is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. Where the power is coupled with an interest, it may be executed by the survivor. *Peter v. Beverly*, 10 Pet. 532, 9: 522

Cited in *Freeman v. Prendergast*, 94 Ga. 391, 21 S. E. 837—*Richeson v. Ryan*, 15 Ill. 14—*Cinefelter v. Ayres*, 16 Ill. 333—*Pennsylvania Co. v. Bauerle*, 143 Ill. 474, 33 N. E. 166—*Gray v. Lynch*, 8 Gill, 423—*Shelton v. Homer*, 5 Met. 467—*Bartlett v. Sutherland*, 24 Miss. 401—*Clark v. Hornthal*, 47 Miss. 527—*Steele v. Farber*, 37 Mo. 78—*McKnight v. Wimer*, 38 Mo. 136—*Cawfield v. Owens*, 129 N. C. 287, 40 S. E. 62—*Bailey's Petition*, 15 B. I. 68, 1 Atl. 131—*Smith v. Winn*, 27 S. C. 598, 4 S. E. 240—*Fitzgerald v. Standish*, 102 Tenn. 388, 52 S. W. 204.

— Editorial note.

Powers conferred on several, when majority may act. 4: 518

Mode of execution.

Execution of Power of Attorney, see Principal and Agent, 16, 17.

23. It is not necessary, in order to a due execution of a power, that it should be recited or referred to in the instrument of conveyance which executes it. *Crane v. Morris*, 6 Pet. 598, 8: 514

Cited in *Gindrat v. Montgomery Gaslight Co.* 82 Ala. 602, 60 Am. Rep. 769, 2 So. 327—*Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 132, 90 Am. St. Rep. 22, 30 So. 466—*Morfev v. San Francisco & S. R. Co.* 107 Cal. 600, 40 Pac. 810—*Coombs v. O'Neal*, 1 MacArth. 407—*Terry v. Rodahan*, 79 Ga. 286, 11 Am. St. Rep. 420, 5 S. E. 38—*South v. South*, 91 Ind. 224, 46 Am. Rep. 591—*Smith v. Clark County*, 54 Mo. 71.

24. A conveyance or devise of property by one whose interest therein is only that of the donee of a power will generally operate as an execution of the power, although no reference to the owner is made in the deed or will. *Carver v. Jackson ex dem. Astor*, 4 Pet. 1, 7: 761

Cited in *Terry v. Rodahan*, 79 Ga. 286, 11 Am. St. Rep. 420, 5 S. E. 38.

25. Where a marriage settlement gave power of appointment by writing under hand and seal attested by three creditable witnesses, a deed which the witnesses attested as having been sealed and delivered was a sufficient execution of the power, although they did not attest the fact of signing. *Ladd v. Ladd*, 8 How. 10, 12: 967
Cited in *Yeaton v. Yeaton*, 4 Ill. App. 591—*Breit v. Yeaton*, 101 Ill. 262.

26. Where a power is given to sell at auction it cannot be executed in any other manner. But the objection may be removed by an agreement of the parties beneficially interested in the property under the deed of trust which created the power. *Greenleaf v. Queen*, 1 Pet. 138, 7: 85
Cited in *Chambers v. Mauldin*, 4 Ala. 483—*Everett v. Buchanan*, 2 Dak. 267, 8 N. W. 31.

Time of execution.

27. Where a sale, by the express terms of a will, was limited to the period of two years after the death of a certain person, a sale made eighteen years after his death was absolutely void at law. *Daly v. James*, 8 Wheat. 495, 5: 670

Cited in *Waldron v. Chasteney*, 2 Blatchf. 67, Fed. Cas. No. 17,058—*Kidwell v. Brummagin*, 32 Cal. 444—*De Vaughn v. McLeroy*, 82 Ga. 697, 10 S. E. 211—*Morrow v. Brenizer*, 2 Rawle, 193—*Wells v. Sloyer*, 1 Clark (Pa.) 526, 3 Pa. L. J. 212—*Gast v. Porter*, 13 Pa. 537.

Intention to execute.

28. If the donee of a power intends to execute it, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. *Lee v.*

Simpson, 134 U. S. 572, 10 Sup. Ct. Rep. 631, 33: 1038

Cited in Morfey v. San Francisco & S. R. R. Co. 107 Cal. 600, 40 Pac. 810—Buller v. Wright, 148 Ind. 484, 47 N. E. 931—Stewart v. Keating, 15 Misc. 49, 36 N. Y. Supp. 913—Burkett v. Whittemore, 36 S. C. 438, 15 S. E. 616.

29. Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) where there has been some reference in the will or other instrument to the power; (2) or a reference to the property which is the subject on which it is to be executed; (3) or where the provision in the will or other instrument executed by the donee of the power would have no operation except as an execution of the power. *Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. Rep. 631, 33: 1038

Cited in Smith v. McIntire, 83 Fed. 462—Daniel v. Felt, 100 Fed. 729—Arlington State Bank v. Paulsen, 57 Neb. 744, 78 N. W. 303—Mason v. Wheeler, 19 R. I. 23, 61 Am. St. Rep. 734, 31 Atl. 426—Young v. Mutual Ins. Co. 101 Tenn. 315, 47 S. W. 428—Law Guarantee & T. Co. v. Jones, 103 Tenn. 255, 58 S. W. 219—Machir v. Funk, 90 Va. 287, 18 S. E. 197.

30. If a will contains no expressed intent to execute a power, yet, if it may be gathered from all the gifts and directions made that their object was to execute it, the will must be regarded as an execution. *Blake v. Hawkins*, 98 U. S. 315, 25: 139

Cited in Hawkins v. Blake, 108 U. S. 423, 27 L. ed. 776, 2 Sup. Ct. Rep. 804—Warner v. Connecticut Mut. L. Ins. Co. 109 U. S. 367, 27 L. ed. 965, 3 Sup. Ct. Rep. 221—*Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. Rep. 631—*Lee v. Simpson*, 39 Fed. 241—Brooks v. Reynolds, 8 C. C. A. 378, 16 U. S. App. 679, 59 Fed. 931—Stewart v. Keating, 15 Misc. 51, 36 N. Y. Supp. 913—Bell's Estate, 15 Phila. 590, 30 Phila. Leg. Int. 430—Machir v. Funk, 90 Va. 287, 18 S. E. 197.

31. The donee of a power under a will, by doing a thing which, independently of the power, would be nugatory, conclusively evinces an intention to execute the power; and the act, if within the scope of the power, must be regarded as a valid execution of it. *Warner v. Connecticut Mut. L. Ins. Co.* 109 U. S. 357, 3 Sup. Ct. Rep. 221, 27: 962

Cited in Batchelor v. Brereton, 112 U. S. 404, 28 L. ed. 751, 5 Sup. Ct. Rep. 150—*Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. Rep. 631—*Lee v. Simpson*, 39 Fed. 241—Smith v. McIntire, 83 Fed. 462—Smith v. McIntire, 38 C. C. A. 177, 95 Fed. 592—Daniel v. Felt, 100 Fed. 729—Lanigan v. Sweeney, 53 Ark. 190, 13 S. W. 740—O'Brien v. Flint, 74 Conn. 506, 51 Atl. 547—Middleton v. Parke, 3 App. D. C. 163—Ladd v. Chase, 155 Mass. 422, 20 N. E. 637—Orr v. Rode, 101 Mo. 396, 13 S. W. 1066—Lindley v. O'Reilly, 50 N. J. L. 650, 1 L.R.A. 85, 7 Am. St. Rep. 802, 15 Atl. 379—Hogle v. Hogle, 49 Hun, 316, 2 N. Y. Supp. 172—Walke v. Moore, 95 Va. 737, 30 S. E. 374—Auer v. Brown, 121 Wis. 119, 98 N. W. 966.

32. Where an instrument in all its parts, and looking at its entire scope and purpose,

notwithstanding its omission of any direct and express stipulation of that character, was undoubtedly intended by the parties to be an execution of a power, and cannot operate to carry out the intention of the parties except by virtue of the power, it must be referred to the power which alone can make it effectual in all its provisions. *Warner v. Connecticut Mut. L. Ins. Co.* 109 U. S. 357, 3 Sup. Ct. Rep. 221, 27: 962

33. The power given by a will to dispose of, by will, a bequest of three fourths of a bond and mortgage, the enjoyment of which for life is bequeathed to the donee of the power, is properly executed by the will of the donee, which, after referring to the bequest, devises and bequeaths the entire property and estate to which she is "in anywise entitled," to her husband. *Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. Rep. 631, 33: 1038

34. The words "in anywise entitled" in a will executing a power are sufficient to cover not only property which a testatrix who was a donee of a power held in her own full right, but also property which she held in a limited right under her mother's will. *Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. Rep. 631, 33: 1038

Naked powers.

Power of Attorney, see Principal and Agent, 42.

See also *supra*, 22.

35. Every prerequisite to the exercise of a naked power, not coupled with an interest, must precede its exercise if the latter is to be sustained. *Williams v. Peyton*, 4 Wheat. 77, 4: 518

Cited in Taylor v. Benham, 5 How. 272, 12 L. ed. 149—Deputron v. Young, 134 U. S. 257, 33 L. ed. 930, 10 Sup. Ct. Rep. 539—Speigle v. Meredith, 4 Biss. 122, Fed. Cas. No. 13,227—Garth v. Arnold, 53 C. C. A. 204, 115 Fed. 472—Darrington v. Borland, 3 Port. (Ala.) 25—Turner v. Thrower, 5 Port. (Ala.) 53—Dickerson v. Acosta, 15 Fla. 620—Patterson v. Lemon, 50 Ga. 235—Metropolitan Bank v. Godfrey, 23 Ill. 611—Dement v. Rokker, 128 Ill. 194, 19 N. E. 33—Williamson v. Doe, 7 Blackf. 14—Mathews v. Gilliss, 1 Iowa, 251—Alexander v. Walter, 8 Ill. 260, 50 Am. Dec. 688—Rogers v. Barnes, 169 Mass. 184, 38 L.R.A. 148, 47 N. E. 602—Hutchins v. Lee, Walk. (Miss.) 294—Phillips v. Doe, 18 Smedes & M. 38—Rollins v. McIntire, 87 Mo. 509—Jackson ex dem. Webb v. Roberts, 11 Wend. 434—Van Slyke v. Shelden, 9 Barb. 285—Curtis v. Leavitt, 15 N. Y. 189—Fox v. Stafford, 90 N. C. 301—South Carolina R. Co. v. Toomer, 9 Rich. Eq. 274—State ex rel. Wildman v. Kidd, 63 Wis. 344, 23 N. W. 703.

36. In the case of a naked power to convey, not coupled with an interest, the law requires that every prerequisite to the exercise of the power should precede it. *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. Rep. 539, 33: 923

Cited in Arnold v. Garth, 106 Fed. 21—Campbell v. Foster Home Assn. 163 Pa. 633, 26 L.R.A. 122, 35 W. N. C. 296, 43 Am. St. Rep. 818, 30 Atl. 222—Hunter v. Eastham, 95 Tex. 653, 69 S. W. 66.

Sufficiency of execution.

See also *supra*, 23.

37. Although a will be expressed to be made in pursuance of a power, yet if the testator appears to dispose of his own property only, the power will not be executed by the will. *Blake v. Hawkins*, 98 U. S. 315, 25: 139

38. Where one who owns a moiety of certain land has a power from the other owner to convey his interest, a mortgage by him which does not affect to convey any part of it under the power will bind only his own interest. *Shirras v. Caig*, 7 Cranch, 34, 3: 260

Cited in Leach v. Beattie, 33 Vt. 197.

— Editorial note.

[What is sufficient execution by will of a power of appointment. 64 L.R.A. 849.]

Validity.

Burden of Proof, see Evidence, 676.

Power of Appointment in Marriage Settlement, see Husband and Wife, 121, 122.

39. If an unreasonable use be made of a power given in a will,—one not foreseen, and which could not have been intended by the testator,—it has been considered as a case for courts to decide on the rights of parties, *Pray v. Belt*, 1 Pet. 670, 7: 309
Cited in Bound v. South Carolina R. Co. 50 Fed. 854—*Greene v. Huntington*, 73 Conn. 111, 46 Atl. 883—*Boger's Appeal*, 10 Pa. 441.

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To Institute Blockade, see Blockade, 4.

To Withhold Payment of Claims Pending Re-examination, see Claims, 247-248.

To Accord Belligerent Rights Binding on Courts, see Courts, 95.

To Determine as between Contending State Governments, see Courts, 90.

As to Creation of Court-Martial, see Courts-Martial, 4-6.

To Return Proceedings to Court-Martial a Second Time, see Courts-Martial, 65.

To Commute Death Sentence, see Criminal Law, 183.

To Appoint Vice Consul, see Diplomatic and Consular Officers, 42.

To Remove District Attorney, see District Attorney, 2.

To Permit Commercial Intercourse During War, see Embargo and Nonintercourse, 1, 97.

To Suspend Federal Judge, see Judges, 3, 4.

To Control Ministerial Act of Solicitor of the Treasury, see Mandamus, 129.

To Call Forth Militia, see Militia, III.

As to Sale of Mines in Public Domain, see Mines, 167-170.

Pardoning Power, see Pardon and Amnesty.

To Regulate Captures at Sea, see Prize and Capture, 46-48.

To Make Reservations in Public Lands, see Public Lands, 22, 23.

To Employ Secret Agents, see Secret Service.

To Issue Orders for Government of Conquered Territory, see Territories, 12.

As to Removal of Federal Officers, see United States, 73-76.

To Establish Court in Conquered Territory, see War, 48, 72-74.

Delegation of Power by, see Constitutional Law, 167.

Interference with Functions of President, see Constitutional Law, 111.

Delegation of Power to, see Constitutional Law, 139, 140.

Relative Supremacy as Executive, see Courts, 220, 221.

Immunity from Injunction Respecting Executive Acts, see Courts, 221.

Effect of Regulations Described by President and Departments, see Executive Departments, 10.

Relative Power of Courts to Supervise, see Executive Departments, 18.

Time of Giving Permission to Indians to Alienate Lands, see Indians, 133.

1. The President has power to protect a judge of a court of the United States, who, while in the discharge of the duties of his office, is threatened with personal violence or death. *Cunningham v. Neagle* (Re Neagle) 135 U. S. 1, 10 Sup. Ct. Rep. 658.

34: 55

Cited in United States v. Mullin, 71 Fed. 686.

2. The President cannot authorize a Secretary of State to omit the performance of those duties which are enjoined by law. *Marbury v. Madison*, 1 Cranch. 137, 2: 60 *Cited in United States ex rel. White v. Bayard*, 5 Mackey, 429.

Action through subordinates.

As Commander-in-Chief, see Duties, 9-11, 13, 14.

Acts of Heads of Departments Regarded as Acts of President, see Executive Departments, 1-3.

Executive Order as Equivalent to Presidential Order, see Public Lands, 644, 646.

3. The President's duty, in general, requires his superintendence of the administration; yet he cannot be required to become the administrative officer of every department, bureau, etc., and to perform all the services in person. *Williams v. United States*, 1 How. 290, 11: 135
Distinguished in Peirce v. United States, 1 Ct. Cl. 286.

Cited in Truitt v. United States, 38 Ct. Cl. 403—*Bishop v. United States*, 38 Ct. Cl. 486—*United States v. Cutter*, 2 Curt. C. C. 622, Fed. Cas. No. 14,911—*Re Brodie*, 63 C. C. A. 422, 128 Fed. 668—*Re Spangler*, 11 Mich. 322—*Kulp v. Ricketts*, 3 Grant, Cas. 423.

4. An act of Congress prohibiting the advance of public money to disbursing officers, except under special directions of the President, does not require the ministerial performance of this duty to be exercised in every instance under his own hand. *Williams v. United States*, 1 How. 290, 11: 135

PRESIDENTIAL ELECTIONS.

Validity of Act for Election by Congressional Districts as Judicial Question, see Courts, 198.

PRESIDENTIAL ELECTORS.

Federal Question as to Validity of State Law for Election of, see Appeal and Error, 1667.

Fraudulent Voting for, see Elections, 46, 47.

Partial Invalidity of Statute as to, see Statutes, 87.

1. Presidential electors are state officers. *Fitzgerald v. Green (Re Green)* 134 U. S. 377, 10 Sup. Ct. Rep. 586, 33: 951
Cited in McPherson v. Blacker, 146 U. S. 35, 36 L. ed. 877, 13 Sup. Ct. Rep. 3—*Todd v. Johnson*, 99 Ky. 554, 33 L.R.A. 400, 36 S. W. 987—*McPherson v. Blacker*, 92 Mich. 390, 16 L.R.A. 480, 31 Am. St. Rep. 587, 52 N. W. 469.

2. The appointment and mode of appointment of electors belong exclusively to the states, under the Constitution of the United States. *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. Rep. 3, 36: 869
Cited in Todd v. Johnson, 99 Ky. 554, 33 L. R.A. 400, 36 S. W. 987—*State ex rel Morris v. Wrightson*, 56 N. J. L. 158, 22 L.R.A. 554, 28 Atl. 56.

3. The Federal Constitution does not provide that the appointment of electors shall be by popular vote, or that the electors shall be voted for upon a general ticket, or that the majority of those who exercise the elective franchise can alone choose the electors.

It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object. *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. Rep. 3, 36: 869

4. The right of a citizen to vote for all the presidential electors from his state, existing at the time when U. S. Const. 14th Amend. was adopted, is not protected by that amendment so as to prevent the legislature from providing for the choice of electors by districts. *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. Rep. 3, 36: 869

PRESS.

Freedom of, see Constitutional Law, IV. d.

PRESUMPTIONS.

On Appeal, see Appeal and Error, VII. d.

That Rules of Navigation will be Obeyed see Collision, 10-12.

As to Validity of Statutes, see Statutes, I d, 2.

In General, see Evidence, II.

PRICES.

Evidence of Generally, see Evidence, XI f.

PRICES CURRENT.

As Evidence, see Evidence, 1416, 1417.

PRIEST.

Imposition of Test Oath upon, see Attainder and Outlawry, 15.

Ex Post Facto Law Requiring Test Oath of, see Constitutional Law, 970.

Certificate of Marriage by, as Evidence, see Evidence, 1063.

Power to Grant Lands in Spanish Colonies, see Private Land Claims, 66.

PRIMARY EXAMINER.

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PRINCIPAL AND ACCESSORY.

See Criminal Law, I. f.

PRINCIPAL AND AGENT.

- I. Creation, Existence, and Termination of Relation, 1-15.**
 - a. *Who are Agents, 1-4.*
 - b. *Revocation of Agency, 5-15.*
- II. Powers of Attorney, 16-45.**
 - a. *In General, 16-26.*
 - b. *Power to Sell or Pledge, 27-37.*
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- III. Agents Authority; Rights and Liabilities of Principal as to Third Parties, 46-139.**
 - a. *In General, 46-57.*
 - b. *Authority of Agent as Affected by Scope of Agency, Whether General or Special, 58-70.*
 - c. *Effect of Special Limitations upon Powers of Agent, 71-2.*
 - d. *Authority to Sell or Pledge, 73-8.*
 - e. *Authority to Collect or Receive Payment, 79-84.*
 - f. *Authority to Execute Written Instruments, 85-6.*
 - g. *Mode of Performance, 87-90.*
 - h. *Delegation of Powers of Agent, 91-3.*
 - i. *Principal's Liability for Agent's Acts Generally, 94-105.*
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- V. Mutual Rights, Duties, and Liabilities, 151-71.**
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 - b. *Principal's Right to Benefit of Agent's Contract, 161-4.*
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 - d. *Remedies, 169-70.*
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Sufficiency of Acknowledgment by Attorney in Fact, see Acknowledgment, 11.
Admiralty Jurisdiction of Account between, see Admiralty, 225.
Agent's Oath to Claim in Admiralty, see Admiralty, 491.
Recovery under General Counts by Special Agent, see Assumpsit, 22.
Services of Agent as Subject of General Average, see Average, 29.
Bank Account in Name of Agent, see Banks, 192, 193.
Bank's Right to Apply Deposit by Agent to His Individual Debt, see Banks, 98.
Liability on Principal's Bond for Defalcation of Agent, see Bonds, 78, 79.
Sale by Agent as Commerce, see Commerce, IV. b, 4.
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Vindictive Damages Against Agent, see Damages, 25.
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License by Treasury Agent to Conduct Commercial Intercourse During War, see Embargo and Nonintercourse, 98, 102, 103.
Estoppel of Principal by Acts or Declarations of Agent, see Estoppel, III. d.
Estoppel to Deny Validity of Sale by Attorney, see Estoppel, 68.
Estoppel of One Paying Agent to Change Nature of Payment, see Estoppel, 261.
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Presumption that Agent Received Mail of Principal, see Evidence, 594.
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Right of Principal in Property Received from Factor, see Factor, 3, 4.
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Unauthorized Surrender of Insurance Policy by Agent of Assured, see Insurance, 388.
Suit on Insurance Policy by Agent, see Insurance, 697.
Power of Municipality to Act Through Agents, see Municipal Corporations, 33-35.
Imputing Agent's Knowledge to Principal, see Notice, II. b.
Constructive Notice to Principal of Agent's Acts, see Notice, 7.
Agent as Necessary Party, see Parties, 212.
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Validity of Acts Done by Agent Looking Toward Acquisition of Public Lands Generally, see Public Lands.
Necessity of Agent's Acts Appearing on Record, see Records, 10.
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Setting off, against Principal, Claims against Agent, see Set-Off and Counterclaim, 26, 27.
Necessity of Proving Agency Before Receiving Evidence of Transactions, see Trial, 54, 55.
Right of Resident of Confederacy to Appoint Agent to Care for Property in the North, see War, 34.
Competency of Agent as Witness against Principal, see Witnesses, 12.
As to Brokers, see Brokers.
Corporate Agents, see Corporations, V.
Agent of County, see Counties, III.
As to Factors, see Factors.
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Officers and Agents of United States Generally, see United States, III.
As to Warehouseman, see Warehouseman.

I. Creation, Existence, and Termination of Relation.

Authority of Corporation to Appoint Agent, see Corporations, 275.

a. Who are Agents.

Collecting Bank as Agent of Holder of Commercial Paper, see Banks, 146-150.
 Notary as Agent of Bank for Collection of Commercial Paper, see Banks, 157, 158.
 Consignee as Agent of Owner of Goods, see Bills of Lading, 16.
 Husband as Wife's Agent, see Husband and Wife, 72.

Insurer as Agent of Insured in Case of Abandonment, see Insurance, 581, 582.
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Owner as Agent of Underwriters in Case of Abandonment, see Insurance, 583.

Supercargo as Agent of Underwriter in Case of Abandonment, see Insurance, 584.

Captain as Insurer's Agent after Abandonment, see Insurance, 585.

Relation between United States Marshal and Parties in Suit, see Marshal, 3.

Pledgee Holding as Pledgee's Agent, see Pledge, 31.

Estoppel to Deny Agency, see Estoppel, 294, 295.

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Correspondence to Show Whether Persons Are Dealing With Another as Principal or Agent, see Evidence, 1368.

Sufficiency of Finding as Negating Existence of Relation, see Trial, 937.

See also Taxes, 716.

1. Where a sum has been left with a third person, by a debtor, for a creditor, notice to the creditor of that fact, given by the third person, converts the latter into an agent for and debtor to the creditor. *Hinkle v. Wanzer*, 17 How. 353, 15: 173

2. Where one party purchased land under a parol agreement for the conveyance of an interest therein to another person, the purchaser of the land is not the agent of the other party, and the law implies no promise by the latter to repay the price, as for money paid out at his request. *Dunphy v. Ryan*, 116 U. S. 491, 6 Sup. Ct. Rep. 486, 29: 703

3. Where plaintiff is by contract appointed exclusive vendor of defendant's machines, which he is to purchase from defendant at a large discount and cannot sell below the regular retail prices, he is the mere agent of defendant to sell the machines. *Willcox & G. Sewing Mach. Co. v. Ewing*, 141 U. S. 627, 12 Sup. Ct. Rep. 94, 35: 882

4. One who took an option to purchase a tract of land regarded as the owner's

agent in making a contract of sale. *Clark v. Reeder*, 158 U. S. 505, 15 Sup. Ct. Rep. 849, 39: 1070
Cited in Alger v. Keith, 44 C. C. A. 379, 105 Fed. 114.

b. Revocation of Agency.

Revocation of Power of Attorney, see *infra*, II. c.

Termination of Agency of Insurance Agent, see Insurance, II. f.

Revocation of Powers Generally, see Powers, I. c.

By act of principal.

5. The principal has a right to determine or revoke the authority given to his agent, at his own mere pleasure, where not otherwise agreed between them. *Willcox & G. Sewing Mach. Co. v. Ewing*, 141 U. S. 627, 12 Sup. Ct. Rep. 94, 35: 882
Cited in Stier v. Imperial L. Ins. Co. 58 Fed. 846—*Johnson Railroad Signal Co. v. Union Switch & Signal Co.* 59 Fed. 22—*Union Switch & Signal Co. v. Johnson Railroad Signal Co.* 10 C. C. A. 180, 17 U. S. App. 609, 61 Fed. 944—*Abbott v. Hunt*, 129 N. C. 405, 40 S. E. 119—*Fay Gas Fixture Co. v. Welsbach Light Co.* 189 Pa. 23, 41 Atl. 980.

6. A contract of service which states no time that the service is to continue, except that during the first year certain things are to be done, does not compel a continuance in the service after that year. *Willcox & G. Sewing Mach. Co. v. Ewing*, 141 U. S. 627, 12 Sup. Ct. Rep. 94, 35: 882
Cited in Kolb v. J. E. Bennett Land Co. 74 Miss. 572, 21 So. 233.

7-8. Where an agent employed by state fund commissioners to prosecute claims against the United States was to receive certain commissions on the amount collected for his services and expenses, the agency was revocable by the state at its will, by an act repealing the act under which he was employed. *Missouri ex rel. Walker v. Walker*, 125 U. S. 339, 8 Sup. Ct. Rep. 929, 31: 769

Cited in Ball v. Halsell, 161 U. S. 82, 40 L. ed. 625, 16 Sup. Ct. Rep. 554—*Kolb v. J. E. Bennett Land Co.* 74 Miss. 571, 21 So. 233.

By war.

Revocation of Power of Attorney by, see *infra*, 41.

See also *infra*, 82.

9. An agency will be presumed to continue, notwithstanding the breaking out of war, when it is for the manifest interest of the principal that it should continue. *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. Rep. 279, 42: 658

10. A state of war does not put an end to pre-existing obligations, nor transfer property from a principal to an agent, nor release the latter from safely keeping and restoring the property at the close of the

war. *New York L. Lns. Co. v. Davis*, 95 U. S. 425, 24: 453
Cited in Lamar v. Micou, 112 U. S. 464, 28 L. ed. 756, 5 Sup. Ct. Rep. 221—*Micou v. Lamar*, 17 Blatchf. 384, 1 Fed. 19.

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Effect of war on agency. 24: 453

By death.

Revocation of Power of Attorney by, see *infra*, 42-45.

11. The powers of an agent cease on the death of his principal. *Galt v. Galloway*, 4 Pet. 332, 7: 876
Cited in Long v. Thayer, 150 U. S. 522, 37 L. ed. 1169, 14 Sup. Ct. Rep. 189—*Clark v. Sigourney*, 17 Conn. 523—*Vance v. Anderson*, 39 Iowa, 430—*Clayton v. Merrett*, 52 Miss. 359—*Territory ex rel. Gildersleeve v. Perea*, 6 N. M. 546, 30 Pac. 928—*Michigan State Bank v. Leavenworth*, 28 Vt. 216—*Michigan Ins. Co. v. Leavenworth*, 30 Vt. 23.

12. The death of the principal revokes the agent's authority to act for him or his estate. *Long v. Thayer*, 150 U. S. 520, 14 Sup. Ct. Rep. 189, 37: 1167

13. Payments made to an agent after the death of the principal do not discharge the debtor's obligation, even if made in ignorance of the principal's death. *Long v. Thayer*, 150 U. S. 520, 14 Sup. Ct. Rep. 189, 37: 1167

— Editorial notes.

Revocation of relation by death, insanity or incapacity of principal or agent. 5: 589; 37: 1167

[Effect of death on contract of. 23 L.R. A. 707.]

Rights of third parties.

14. Where one is not notified of the revocation of the authority of an agent, he is justified in presuming its continuance. *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. Rep. 87, 32: 412
Cited in Gratz v. Land & River Improv. Co. 40 L.R.A. 399, 27 C. C. A. 310, 53 U. S. App. 499, 82 Fed. 385—*Alger v. Keith*, 44 C. C. A. 378, 105 Fed. 113—*Continental F. Ins. Co. v. Brooks*, 131 Ala. 620, 30 So. 876.

15. Persons who deal with an agent before notice of the recall of his powers are not affected by the recall. *Hatch v. Codrington*, 95 U. S. 48, 24: 339
Townsend v. Chappell (Bronson v. Chappell) 12 Wall. 681, 20: 436
Cited in Johnson v. Christian, 128 U. S. 381, 32 L. ed. 414, 9 Sup. Ct. Rep. 87—*Gratz v. Land & River Improv. Co.* 40 L.R.A. 399, 27 C. C. A. 310, 53 U. S. App. 499, 82 Fed. 385—*Alger v. Keith*, 44 C. C. A. 378, 105 Fed. 112—*Andrews v. Clark*, 72 Md. 434, 20 Atl. 429—*Snell v. Stone*, 28 Or. 331, 31 Pac. 688.

II. Powers of Attorney.

a. In General.

Necessity of Acknowledgment by Married Woman, see Acknowledgment, 29.

Lien on Fund under Power, see Attorneys, 89.

Construction of Deed Executed by Attorney in Fact, see Deeds, 6.

Construing Document as Power of Attorney Instead of Deed, see Deeds, 7.

Estoppel of Principal, see Estoppel, 40.

Burden of Proving Invalidity of Deed Executed under, see Evidence, 676.

Admissibility of, in Evidence, see Evidence, 1013.

Admissibility of, as Ancient Instrument, see Evidence, 1043.

Proof of, see Evidence, 2360.

Sufficiency of Agent's Letter to Establish Existence of, see Evidence, 2527.

By Married Woman, see Husband and Wife, 15, 17-20.

Validity of Power of Attorney by Lunatic, see Incompetent Persons, 4.

To Confess Judgment, see Judgment, 283.

As Acceptance of Partition, see Partition, 3.

Sufficiency of Evidence of Genuineness and Execution of, to Go to Jury, see Trial, 140.

Power of Trustee to Make Partition, see Trusts, 131, 132.

16. A power to transfer title to property must be executed in the name of the person who gives it. *Hunt v. Rousmanier*, 8 Wheat. 174, 5: 589

17. Where a deed was executed, by a party having a power of attorney, in his own name, and signed and sealed by him, it is not the act of the principal, but of the attorney. *Clarke v. Courtney*, 5 Pet. 319, 8: 140

Cited in Randall v. Jaques, Fed. Cas. No. 11-553—*Johnson Railroad Signal Co. v. Union Switch & Signal Co.* 59 Fed. 25—*Jones v. Morris*, 61 Ala. 524—*Hackney v. Butts*, 41 Ark. 399—*McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 404, 58 Pac. 358—*Donovan v. Welch*, 11 N. D. 116, 90 N. W. 262—*Stewart v. Katz*, 30 Md. 344—*Mussey v. Scott*, 7 Cush. 216, 54 Am. Dec. 719—*Wells v. Evans*, 20 Wend. 257—*Providence v. Miller*, 11 R. I. 277, 23 Am. Rep. 453—*Bradstreet v. Baker*, 14 R. I. 549—*Welsh v. Parish*, 1 Hill, L. 162—*Webster v. Brown*, 2 S. C. N. S. 431—*Martin v. Flowers*, 8 Leigh, 162.

Construction of powers in general.

Parol Evidence to Remove Ambiguity, see Evidence, 1634.

18. Every authority given to an agent or attorney to transact business for his principal, in the absence of counterproof, must be construed to be to transact it according to the laws of the place where it is to be done. A sale of property presumed to be authorized must be intended to be made in the manner required by the laws of that state to give it validity. *Owings v. Hull*, 9 Pet. 607, 9: 246
Cited in Condit v. Baldwin, 21 N. Y. 221, 78 Am. Dec. 137—*Bell v. Day*, 32 N. Y. 169.

19. If the construction of a power is in doubt, the agent can bind the principal by any construction of it which is reasonable,

in his dealings with a third person. *Le Roy v. Beard*, 8 How. 451, 12: 1151
Cited in *Very v. Levy*, 13 How. 359, 14 L. ed. 179—*Morris v. East Side R. Co.* 43 C. C. A. 612, 104 Fed. 417—*National Bank v. Old Town Bank*, 50 C. C. A. 445, 112 Fed. 727—*Lawrence v. Randall*, 47 Ala. 246—*Kelth v. Herschberg Optical Co.* 48 Ark. 147, 2 S. W. 777.

20. Where a power of attorney was given to two persons, constituting them "the lawful attorney or attorneys," the power vests a several as well as a joint authority in the attorneys. *Greenleaf v. Birth*, 5 Pet. 132, 8: 72

21. A power of attorney to recover a principal's interest in real estate will not warrant a conveyance of such interest. *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. Rep. 147, 30: 396
Cited in *McClaskey v. Barr*, 50 Fed. 718.

22. [A general power of attorney is sufficient authority to make a valid release of a debt. *Quesnel v. Mussey* (Pa. Sup. Ct.) 1 Dall. 449, 1: 218]

To collect or receive payment.

23. A power of attorney to collect moneys and give discharges therefor authorizes the attorney to give a receipt in full. *Chouteau v. United States*, 95 U. S. 61, 24: 371

24. Administrators being authorized by statute to prosecute and recover any claim in the District of Columbia, one holding a power of attorney to settle and release any claim against the decedent, and to receive all moneys that may be due the estate, have authority to receive and receipt for money in the District of Columbia. *United States use of Mackey v. Cox*, 18 How. 100, 15: 299

To settle liability.

25. A power of attorney to settle a liability and obtain the principal's release therefrom implies a power in the agent to settle a liability which it is necessary should be settled in order to obtain such release. *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. Rep. 837, 38: 694

Power of substitution.

Delegation of Powers of Agent Generally, see *infra*, III. h.

26. Attorneys, in substituting others in their place, cannot give any greater authority than that with which they themselves are clothed; and acquiescence by the principal in the substitution will not be held to enlarge the power. *Wright v. Ellison*, 1 Wall. 16, 17: 555

b. Power to Sell or Pledge.

Authority of Agent Generally to Sell or Pledge, see *infra*, III. d.

Revocation of Power, see *infra*, 40.

Burden of Proof to Impeach Deed, see Evidence, 237.

Requisites.

27. A power of attorney to convey lands

must possess the same requisites as are necessary in a deed directly conveying the lands. *Clark v. Graham*, 6 Wheat. 577, 5: 334

Cited in *Gage v. Gage*, 30 N. H. 424—*Shell v. Duncan*, 31 S. C. 573, 5 L.R.A. 831, 10 S. E. 330—*Gee v. Bolton*, 17 Wis. 612.

Construction.

28. A power of attorney giving authority to trade, sell, and dispose of notes, bills, bonds, or mortgages, authorized an agreement to receive pay for a note and mortgage having four years to run, in goods to be delivered within a year. *Very v. Levy*, 13 How. 345, 14: 173

Cited in *Very v. Watkins*, 23 How. 472, 16 L. ed. 523—*Clements v. Macheboeuf*, 92 U. S. 425, 23 L. ed. 506—*White v. Furgeson*, 29 Ind. App. 150, 64 N. E. 49—*Reed v. Welsh*, 11 Bush, 457—*Stringham v. St. Nicholas Ins. Co.* 3 Keyes, 290—*Stringham v. St. Nicholas Ins. Co.* 37 How. Pr. 375—*Massey v. Insurance Co.* 3 Phila. 202.

29. Where a person, on leaving a State, left his property in the care of an agent, with power to sell it, who transferred its care to a third person, and the owner wrote to the latter, "I wish you to manage my property as you would your own," "If a good opportunity offers, I would be glad to purchase;" this was sufficient authority to contract for the sale of it. *Lyon v. Pollock*, 99 U. S. 668, 25: 265
Distinguished in *Carstens v. McReavy*, 1 Wash. 364, 25 Pac. 471.

Cited in *Kleinhaus v. Jones*, 15 C. C. A. 647, 37 U. S. App. 185, 68 Fed. 746—*Farrell v. Edwards*, 8 S. D. 431, 60 N. W. 812—*Smith v. Allen*, 86 Mo. 190—*Glass v. Rowe*, 103 Mo. 536, 15 S. W. 334—*Donnan v. Adams*, 30 Tex. Civ. App. 620, 71 S. W. 580.

30. Where a power of attorney authorizes an agent to give deeds of land to any person claiming them that may apply to him within three months, the application only need be within the three months. The deed may be executed afterwards. *Clements v. Macheboeuf*, 92 U. S. 418, 23: 504

31. A power of attorney authorizing an agent "to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased," and "on such terms in all respects as he shall deem most advantageous," and to "execute deeds of conveyance necessary for the full and perfect transfer of all our respective right, title, etc., as sufficiently in all respects as we ourselves could do personally in the premises," is sufficient to authorize making a deed with covenants. *Le Roy v. Beard*, 8 How. 451, 12: 1151

Cited in *Reed v. Welsh*, 11 Bush, 457—*Backman v. Charlestown*, 42 N. H. 132—*Ramsey v. Wandell*, 32 Hun, 484—*Schultz v. Griffin*, 121 N. Y. 299, 18 Am. St. Rep. 825, 24 N. E. 480—*Wilson v. McEwan*, 7 Or. 105—*Hutchinson v. Lord*, 1 Wis. 313, 60 Am. Dec. 381—*Keep v. Sanderson*, 2 Wis. 60, 60 Am. Dec. 404—*Cribben v. Ellis*, 61 Wis. 347, 34 N. W. 154.

32. The power of attorney to sell and convey real property, given by a husband and

his wife in general terms, without any provision against a sale of the interest of either separately, or other circumstances restraining the authority of the attorney in that respect, authorizes the conveyance, by the attorney, of the interest of the husband by a deed executed in his name alone. *Holladay v. Daily*, 19 Wall. 606, 22: 187

Held Obiter in *Williams v. Paine*, 169 U. S. 68, 42 L. ed. 604, 18 Sup. Ct. Rep. 279.

Cited in *Henry v. Lane*, 62 C. C. A. 633, 128 Fed. 251—*Knight v. Lawrence*, 19 Colo. 434, 36 Pac. 242—*Owers v. Olathe Silver Min. Co.* 6 Colo. App. 11, 39 Pac. 980—*Gilbert v. How*, 45 Minn. 123, 22 Am. St. Rep. 724, 67 N. W. 643—*Security Sav. Bank v. Smith*, 38 Or. 74, 84 Am. St. Rep. 758, 62 Pac. 794—*Clark v. Mumford*, 62 Tex. 534.

33. Where power is given by a husband and wife to sell lands in a certain district, on showing that the husband owned lands there, but the husband and wife jointly owned none, power will be construed as giving authority to sell the husband's land. *Dolton v. Cain*, 14 Wall. 472, 20: 830

Cited in *McClaskey v. Barr*, 50 Fed. 715—*Clayton v. Spencer*, 2 Colo. 381.

34. A power of attorney "to sell, dispose, contract, and bargain for land, etc., to execute deeds, contracts, and bargains for the sale of the same," did not authorize the relinquishment of title to land in Kentucky subject to taxes. Such an abandonment of title for no compensation except the return of the taxes paid, if any, is not a sale such as the power contemplated. *Clarke v. Courtney*, 5 Pet. 319, 8: 140

Cited in *Le Roy v. Beard*, 8 How. 467, 12 L. ed. 1159—*Arnold v. Garth*, 106 Fed. 23—*Waldron v. McComb*, 1 Hill, 114.

35. Where a person occupying land, but not having the title, gives a power of attorney to sell his interests therein, and afterwards acquires the legal title, and receives the money on a sale made by his attorney, he cannot disavow such sale and recover the land, on the ground that he did not have the legal title at the time of the execution of the power of attorney, although the deed of the attorney was a quitclaim. *Bradford v. Union Bank of Tennessee*, 13 How. 57, 14: 491

36. Where the fee of lands is in a party who authorizes another to sell and convey them, a deed executed in conformity to the power, by the attorney in fact, is none the less valid because a decree has been rendered against the attorney in fact requiring him to convey it; and the decree is not necessary to its validity. *Hanrick v. Neely*, 10 Wall. 364, 19: 947

37. In Texas, under the Mexico-Spanish law, a power of attorney to sell and convey land was properly executed by the attorney in his own name, specifying that he executed the deed as attorney for his principal. *Hanrick v. Barton*, 16 Wall. 166, 21: 350

c. Revocation of Powers.

Revocation of Agency Generally, see *supra*, I. b.

Estoppel to Assert, see *Estoppel*, 203.

Tortious Retention by Maker's Agent of Notes Secured by Mortgage as Defense to Foreclosure Suit, see *Mortgage*, 346.

38. A power of attorney which the donor binds himself for a consideration, in terms, or by the nature of his contract, not to revoke, is irrevocable. *Hunt v. Rousmanier*, 8 Wheat. 174, 5: 589

Cited in *Wallace v. Collins*, 5 Ark. 48, 39 Am. Dec. 359—*Rider v. Rider*, 114 Ill. App. 215—*Chapman v. Bates*, 61 N. J. Eq. 685, 88 Am. St. Rep. 459, 47 Atl. 638—*Warren v. Pim*, 65 N. J. Eq. 53, 55 Atl. 66—*Farrell v. Amberg*, 8 Misc. 228, 28 N. Y. Supp. 564—*McGheehan v. Duffield*, 5 Pa. 499—*Montague v. McCarroll*, 15 Utah, 325, 49 Pac. 418.

39. An interest in the property upon which the power is to operate, and not merely an interest in the exercise of the power, is essential to make a power of attorney one coupled with an interest, so as not to be subject to revocation. *Taylor v. Burns*, 203 U. S. 120, 27 Sup. Ct. Rep. 40, 51: 116

40. A power of attorney to sell land is revoked by a conveyance of the land by the person giving the power, before such power is executed. *Love v. Simms*, 9 Wheat. 515, 6: 149

By war.

41. A power of attorney was not revoked by the breaking out of war and the fact that the makers went within the Confederate lines, where it authorized the sale of vacant, unimproved land in the city of Washington subject to burdensome taxes, and it appears to have been to the interest of all parties that it should be sold. *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. Rep. 279, 42: 658

By death.

42. A power of attorney given by a vessel owner to a creditor, authorizing him to make and execute a bill of sale of the vessel to himself, or to any other person, and, in event of its being lost, to collect the insurance, is a naked power, not coupled with an interest, which, though irrevocable by the owner in his lifetime, expired upon his death. *Hunt v. Rhodes*, 1 Pet. 1, 7: 27

Cited in *Key v. Bank of United States*, 1 Hayw. & H. 76, Fed. Cas. No. 7,746—*The Perseverance*, Blatchf. & H. 388, Fed. Cas. No. 11,017—*United States v. Cutts*, 1 Sumn. 140, Fed. Cas. No. 14,912—*National Bank of Deposit v. Rogers*, 166 N. Y. 391, 59 N. E. 922—*Michigan State Bank v. Leavenworth*, 28 Vt. 216—*Michigan Ins. Co. v. Leavenworth*, 30 Vt. 23.

43. A power of attorney, though irrevocable during the life of the party, becomes extinct by his death; but, if coupled with an interest, it survives, and may be executed

after his death. *Hunt v. Rousmanier*, 8 Wheat. 174, 5: 589
Ingle v. Jones, 9 Wall. 486, 19: 621
Bowen v. Chase, 94 U. S. 812, 24: 184
Loring v. Marsh, 6 Wall. 337, 18: 802
Cited in Taylor v. Benham, 5 How. 272, 12 L. ed. 149—*Young Reversible Lock-Nut Co. v. Young Lock-Nut Co.* 72 Fed. 64—*Bell v. Mills*, 59 C. C. A. 107, 123 Fed. 27—*Saltmarsh v. Smith*, 32 Ala. 408—*Yeates v. Pryor*, 11 Ark. 77—*Griffith v. Maxfield*, 66 Ark. 522, 51 S. W. 832—*Cully v. Bloomingdale*, 68 Ga. 759—*Jeffersonville Asso. v. Fisher*, 7 Ind. 702—*Jacquet v. His Creditors*, 38 La. Ann. 867—*Renshaw v. His Creditors*, 40 La. Ann. 40, 3 So. 403—*Muth v. Goddard*, 28 Mont. 253, 92 Am. St. Rep. 553, 72 Pac. 621—*Durbrow v. Eppens*, 65 N. J. L. 16, 46 Atl. 582—*Falconer v. Buffalo & I. R. Co.* 7 Hun, 513—*Stevens v. Sessa*, 50 App. Div. 549, 64 N. Y. Supp. 28—*White v. Wagner*, 31 Misc. 410, 65 N. Y. Supp. 541—*Putnam v. Lincoln Safe Deposit Co.* 34 Misc. 337, 69 N. Y. Supp. 808—*Hess v. Rau*, 95 N. Y. 363—*Farmers' Loan & T. Co. v. Wilson*, 139 N. Y. 287, 36 Am. St. Rep. 696, 34 N. E. 784—*Easton v. Ellis*, 1 Handy (Ohio) 76—*Lucas v. Railroad*, 3 Phila. 217—*Shisler's Estate*, 2 Pa. Dist. R. 590, 13 Pa. Co. Ct. 516—*Re Dahlem*, 26 Pittsb. L. J. N. S. 30—*Lightner's Appeal*, 82 Pa. 305—*Johnson v. Johnson*, 27 S. C. 316, 13 Am. St. Rep. 636, 3 S. E. 606—*Armstrong v. Moore*, 59 Tex. 648—*Michigan State Bank v. Leavenworth*, 28 Vt. 216—*Michigan Ins. Co. v. Leavenworth*, 30 Vt. 23—*Sulphur Mines Co. v. Thompson*, 93 Va. 312, 25 S. E. 232—*Rowan v. Hull*, 55 W. Va. 339, 104 Am. St. Rep. 998, 47 S. E. 92—*Metcalf v. Hart*, 3 Wyo. 532, 27 Pac. 900.

44. The general rule is that a letter of attorney may at any time be revoked by the party who makes it, and is revoked by his death. *Hunt v. Rousmanier*, 8 Wheat. 174,

5: 589

Cited in Hunt v. Rousmanier, 3 Mason, 301, Fed. Cas. No. 6,897—*Lockett v. Hill*, 1 Woods, 563, Fed. Cas. No. 8,443—*United States v. Cutts*, 1 Sumn. 140, Fed. Cas. No. 14,012—*Eagleton Mfg. Co. v. West, B. & C. Mfg. Co.* 18 Blatchf. 223, 5 Ban. & Ard. 480, 2 Fed. 779—*Treat v. Tolman*, 51 C. C. A. 524, 113 Fed. 894—*Wylly v. King*, Ga. Dec. pt. 2, p. 9—*Garber v. Myers*, 32 Ill. App. 177—*Mecartney v. Carbine*, 108 Ill. App. 286—*Spacy v. Evans*, 152 Ind. 432, 52 N. E. 605—*White v. Furgeson*, 29 Ind. App. 149, 64 N. E. 49—*Vance v. Anderson*, 39 Iowa, 430—*Patterson v. Attrill*, 58 Md. 250—*Clayton v. Merrett*, 52 Miss. 359—*White v. Stephens*, 77 Mo. 454—*Burke v. Priest*, 50 Mo. App. 313—*Gardner v. First Nat. Bank*, 10 Mont. 153, 10 L.R.A. 46, 25 Pac. 29—*Marbury v. Barnett*, 17 Misc. 388, 40 N. Y. Supp. 76—*Arming v. Steinway*, 35 Misc. 222, 71 N. Y. Supp. 810—*M'Intire v. Morris*, 14 Wend. 95—*Weber v. Bridgman*, 113 N. Y. 605, 21 N. E. 985—*Ish v. Crane*, 8 Ohio St. 534—*Divine v. Miller*, 70 S. C. 228, 49 S. E. 479—*Jackson v. Tilghman*, 1 Miles (Pa.) 36—*Morrel v. Bank of Pennsylvania*, 2 Phila. 62—*Lelar v. Gault*, 2 Phila. 79—*Vanderbilt v. Bennett*, 6 Pa. Co. Ct. 202—*Wilburn v. Spofford*, 4 Sneed, 704—*Cleveland v. Williams*, 29 Tex. 215, 94 Am. Dec. 274—*Battle v. Mack*, 33 Tex. 798—*Huston v. Cantrill*, 11 Leight. 170—*Herring v. Lee*, 22 W. Va. 667.

45. Upon the death of some of the donors of a power of attorney, it is revoked as to

them if not as to all. *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. Rep. 147, 30: 396
Cited in Pacific Bank v. Hannah, 32 C. C. A. 527, 59 U. S. App. 457, 90 Fed. 77.

— Editorial note.

[Effect of provision in power of attorney that it shall not be revoked by death. 6 L.R.A. (N.S.) 855.]

III. Agent's Authority; Rights and Liabilities of Principal as to Third Parties.

a. In General.

Authority of Attorney, see Attorneys, II. c.

Authority of Agent of Bank, see Banks, I. c, 2; IV. e, 2.

Authority of Collecting Bank as Agent of Holder, see Banks, 146-148.

Authority of Corporate Agent, see Corporations, V. b.

Authority of Insurance Agent, see Insurance, II.

Authority and Powers of Public Officers Generally, see Officers, 34-40.

Partner's Authority to Bind other Partners, see Partnership, II.

Authority of Railroad Receiver's Agent, see Receivers, 30.

Authority of Master of Vessel, see Shipping, VI. b.

Sufficiency of Test Affidavit by Agent in Prize Suit, see Admiralty, 353.

What Law Governs, see Conflict of Laws, 34.

Right of Agent to sue in His Own Name in Federal Courts, see Courts, 1280.

Presumptions and Burden of Proof, see Evidence, II. 4.

Acts and Declarations of Agent as Binding Principal, see Evidence, X. g.

Instruction From Owner to Master to Show Latter's Authority, see Evidence, 1370.

Admissions of Agent to Bind Principal, see Evidence, 1868-1874.

Evidence that Agents Fitted up Vessel for Slave Trade with Owner's Authority, see Evidence, 2226.

Effect of Agent's Unauthorized Issuance of Distress Warrant, see Landlord and Tenant, 74.

Imputing Agent's Notice to Principal, see Notice, II. b.

Suit by Agent in his own Name, see Parties, I. a, 5.

Possession of Land Warrant as Apparent Authority to Make Location, see Public Lands, 480.

Sale to Principal through Fraud of Seller and Principal's Agent, see Sale, 7.

Power of Agent to Bind Owner of Vessel, see Shipping, 44.

Question of Law or Fact as to, see Trial, 282-287.

Admissions or Declarations by Officers not Binding on United States, see United States, 123, 124.

Usury in Loan By Agent, see Usury, I. b.
Competency of Agent to Prove Authority,
see Witnesses, 110.

Service of Process on Agent of Foreign Corporation, see Writ and Process, 58-66.

Extent of agent's authority in general.

46. A principal is bound by the act of his agent no further than he authorizes that agent to bind him. *Parsons v. Armor*, 3 Pet. 413, 7: 724

Cited in The Joseph Grant, 1 Blas. 197, Fed. Cas. No. 7,538—*United States v. Halberstadt*, Gilpin, 270, Fed. Cas. No. 15,276—*United States v. 1,150½ Pounds of Celluloid*, 27 C. C. A. 235, 54 U. S. App. 273, 82 Fed. 631—*Peters v. Ballistier*, 3 Pick. 503—*Mussey v. Beecher*, 3 Cush. 518—*Valentine v. Packer*, 5 Pa. 335.

47. The liability of the principal depends upon whether or not the act was done in the exercise, and within the limits, of the power delegated. *Mechanics' Bank v. Bank of Columbia*, 6 Wheat. 326, 5: 100

Cited in Re Troy Woolen Co. 8 Nat. Bankr. Reg. 414, Fed. Cas. No. 14,203—*Walker v. Manhattan Bank*, 25 Fed. 254—*Poullin v. Canadian P. R. Co.* 47 Fed. 860—*Blum v. Robertson*, 24 Cal. 140—*Sagers v. Nuckolls*, 3 Colo. App. 101, 32 Pac. 187—*Cleveland v. Stewart*, 3 Ga. 297—*Belt R. Co. v. Banicki*, 102 Ill. App. 648—*Taylor v. Williams*, 17 B. Mon. 404—*Long v. Colburn*, 11 Mass. 98, 6 Am. Dec. 160—*Foster v. Essex Bank*, 17 Mass. 509, 9 Am. Dec. 168—*First Nat. Bank v. Gay*, 63 Mo. 42, 21 Am. Rep. 430—*Wilson v. Peverly*, 2 N. H. 549—*Norton v. Derry Nat. Bank*, 61 N. H. 593, 60 Am. Rep. 335—*Bruce v. Reed*, 104 Pa. 414, 49 Am. Rep. 586.

48. An authority to buy "on the best possible terms, not paying an average of more than 30 cents per pound," authorized an agent to pay, in some cases, above 30 cents. *Butler v. Maples*, 9 Wall. 766, 19: 822

49. An order of a county court, in Missouri, authorizing an agent to subscribe to the stock of a railroad company, did not authorize a subsequent subscription to the stock of another company. *Bates County v. Winters*, 97 U. S. 83, 24: 933

50. The acts of agents do not derive their validity from professing, on the face of them, to have been done in the exercise of their agency. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, 5: 100
Cited in Hobson v. Hassett, 78 Cal. 208, 9 Am. St. Rep. 193, 18 Pac. 320—*Stamford Bank v. Ferris*, 17 Conn. 270—*Emerson v. Providence Hat Mfg. Co.* 12 Mass. 240, 7 Am. Dec. 66—*First Nat. Bank v. Loyhed*, 28 Minn. 398, 10 N. W. 421.

— Editorial notes.

Agent's authority generally. 7: 724

[Agent's use of principal's property to pay his own debt. 14 L.R.A. 234.]

Extent of authority conferred upon traveling salesman. 18 L.R.A. 663.

Authority to employ medical services for employee or other third person. 20 L.R.A. 695.]

Implied authority.

Authority to Sell or Pledge, see *infra*, III. d.

As to Conditions of Railroad Tickets, see Carriers, 64-67.

Of Consignee to Receive Goods, see Carriers, 131.

51. Authority to superintend work includes the power to make necessary contracts. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 Sup. Ct. Rep. 730, 33: 934

Cited in Cooper v. Hawley, 60 N. J. L. 563, 38 Atl. 964.

52. Authority to lay out a town includes the power to determine the width of the streets, the size and form of the lots, to mark out the public grounds, and to determine, everything so far as relates to the town, which will add to its beauty, convenience, and value. *Barclay v. Howell*, 6 Pet. 498, 8: 477

Cited in Evans v. Blankenship, 4 Ariz. 315, 39 Pac. 812—*Franklin Bank v. Steward*, 37 Me. 526—*Matteson v. New York C. R. Co.* 62 Barb. 375.

53. According to the decisions of the supreme court of the state of Iowa, an authority to loan money at a legal rate of interest does not include, by implication, the authority to loan it at an illegal rate. An authority to violate the law will never be presumed. *Call v. Palmer*, 116 U. S. 98, 6 Sup. Ct. Rep. 301, 29: 559

Cited in McAleese v. Goodwin, 16 C. C. A. 389, 32 U. S. App. 650, 69 Fed. 761—*Barger v. Taylor*, 30 Or. 236, 47 Pac. 618.

Apparent authority of agents.

Issuing of Bill of Lading without Goods, see Carriers, 97, 98.

Evidence to Show Want of Authority see Evidence, 1874.

Evidence of Usage as to Authority, see Evidence, 2050-2052.

General Acts as Evidence of Authority, see Evidence, 2247.

Of Insurance Agent, see Insurance, II. b.

See also *infra*, 63.

54. The extent of the power given to an agent is determined as well from facts as from express delegation. *Parsons v. Armor*, 3 Pet. 413, 7: 724

55. When the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they will be protected. *Cowdrey v. Vandenberg*, 101 U. S. 572, 25: 923
Distinguished in Velsian v. Lewis, 15 Or. 549, 3 Am. St. Rep. 184, 16 Pac. 631.

Cited in Looney v. District of Columbia, 113 U. S. 261, 28 L. ed. 975, 5 Sup. Ct. Rep. 463—*Laughlin v. District of Columbia*, 116 U. S. 489, 29 L. ed. 702, 6 Sup. Ct. Rep. 472—*Neuchatel Co's Case*, 16 Ct. Cl. 600—*Adams v. District of Columbia*, 17 Ct. Cl. 381—*Strong v. District of Columbia*, 4 Mackey, 252—*National Safe Deposit Sav. & T. Co. v. Gray*, 12 App. D. C. 287—*Preston v. Witherspoon*,

109 Ind. 464, 58 Am. Rep. 417, 9 N. E. 585—Hirsch v. Norton, 115 Ind. 343, 17 N. E. 612—Babcock v. People's Sav. Bank, 118 Ind. 213, 20 N. E. 732—Dymock v. Missouri, K. & T. R. Co. 54 Mo. App. 410—Young v. Brewster, 62 Mo. App. 633.

56-7. If the principal has, by his declarations or conduct, authorized the opinion that he had given more extensive powers to such an agent than were in fact given, he would not be permitted to avail himself of the imposition; and in such a case he will not be allowed to protest bills, the drawing of which his conduct has sanctioned. Schimmelpennich v. Bayard, 1 Pet. 264, 7: 138
Cited in Golding v. Merchant, 43 Ala. 719—Lawrence v. Randall, 47 Ala. 246.

b. Authority of Agent as Affected by Scope of Agency, Whether General or Special.

Implied Authority of Agent, see *supra*, 51-53.

58. The distinction between general and special agencies is that the one is created by the power given to do acts of a class, and the other by power given to do individual acts only. Butler v. Maples, 9 Wall. 766, 19: 822

Cited in Kleinbans v. Jones, 15 C. C. A. 648, 37 U. S. App. 185, 68 Fed. 746—Keith v. Herschberg Optical Co. 48 Ark. 146, 2 S. W. 777—Littleton v. Loan, M. & Stock Assn. 97 Ga. 177, 25 S. E. 826—Jesse French Piano & Organ Co. v. Cardwell, 114 Ga. 842, 40 S. E. 292—Cross v. Atchison, T. & S. F. R. Co. 141 Mo. 147, 42 S. W. 675—Edwards v. Home Ins. Co. 100 Mo. App. 711, 78 S. W. 881.

59. Whether an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal, relative to the mode of its exercise. Butler v. Maples, 9 Wall. 766, 19: 822
General agents.

See also *supra*, 58, 59.

60. Authority to make purchases from any persons with whom the agent may choose deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. Butler v. Maples, 9 Wall. 766, 19: 822

61. Authority to buy cotton in a county and vicinity generally, although guarded by secret instructions, is a general agency. Butler v. Maples, 9 Wall. 766, 19: 822

62. An agent to buy cotton in a certain vicinity, who holds himself out as a general agent, and purchases under his power, may bind his principal in violation of special instructions not communicated to his vendors, and of which they had neither knowledge

nor reason to suspect the existence. Butler v. Maples, 9 Wall. 766, 19: 822
Cited in Foster v. Cleveland, C. C. & St. L. R. Co. 56 Fed. 436—Dysart v. Missouri, K. & T. R. Co. 58 C. C. A. 595, 122 Fed. 231—Oberne v. Burke, 30 Neb. 590, 46 N. W. 838—Beal v. Adams Exp. Co. 13 Pa. Super. Ct. 149—Vanderslice v. Royal Ins. Co. 13 Pa. Super. Ct. 460—Gooze v. Gaskill, 18 Pa. Super. Ct. 43.

63. Where an agent is clothed with all the indicia of property in a vessel, by authority of the principal, he has power to deal with it as owner, as to third persons who have bought in good faith and for a valuable consideration. Calais S. B. Co. v. Scudder, 2 Black, 372, 17: 282
Distinguished in Dize v. Beacham, 81 Md. 609, 32 Atl. 243.

Cited in Graham v. Cook, 48 Alt. 106—Gentry v. Singleton, 3 Ind. Terr. 522, 61 S. W. 990—England v. Neal, 28 La. Ann. 552—Shaw v. Spencer, 100 Mass. 391, 1 Am. Rep. 115, 97 Am. Dec. 107—Locke v. Lewis, 124 Mass. 7, 26 Am. Rep. 631—Crawford v. Dox, 5 Hun, 511—Charleston v. Ryan, 22 S. C. 348, 53 Am. Rep. 713—Adler v. Corning & Co. 26 Pittsb. L. J. N. S. 245.

64. A general authority to draw upon the principal for goods purchased is limited by a subsequent authorization "to draw on us when you send the bill of lading." Boyce v. Edwards, 4 Pet. 111, 7: 799

Special agents.

See also *supra*, 58, 59.

65. When the authority of an agent is special and limited, his acts under it are valid only as they come within its scope and operation. Morrill v. Cone, 22 How. 75, 16: 253

Cited in Woodward v. Jewell, 140 U. S. 253, 35 L. ed. 481, 11 Sup. Ct. Rep. 784—Kleinbans v. Jones, 15 C. C. A. 648, 37 U. S. App. 185, 68 Fed. 746—Garth v. Arnold, 53 C. C. A. 204, 115 Fed. 472—Edwards v. Bates County, 117 Fed. 533—Morton v. Morris, 27 Tex. Civ. App. 267, 66 S. W. 94.

66. An agent with limited powers cannot bind his principal when he transcends his power. Schimmelpennich v. Bayard, 1 Pet. 264, 7: 138

Cited in Chamberlain v. Darragh, Walk. Ch. (Mich.) 151—Thew v. Porcelain Mfg. Co. 5 S. C. N. S. 421—Komorowski v. Krumdick, 56 Wis. 28, 18 N. W. 881.

67. Authority to buy for a principal a single article of merchandise, by one contract, or to buy several articles from a person named, is a special agency. Butler v. Maples, 9 Wall. 766, 19: 822

68. A party is not bound by a contract made in her behalf by an agent on other terms than those contained in the specific authorization signed by her, and known to the other party to the agreement. Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. Rep. 109, 32: 500
Cited in Kleinbans v. Jones, 15 C. C. A. 648, 37 U. S. App. 185, 68 Fed. 746.

69. A person transacting business with a special agent, on the credit of his principal,

is bound to know the extent of his authority.
Owings v. Hull, 9 Pet. 607, 9: 246
Schimmelpennich v. Bayard, 1 Pet. 264, 7: 138

Cited in Le Roy v. Beard, 8 How. 468, 12 L. ed. 1160—Lyon v. Kent, 45 Ala. 664—Myers v. Walker, 104 Ga. 317, 30 S. E. 842—Reltz v. Martin, 12 Ind. 308, 74 Am. Dec. 215—Murdock v. Mills, 11 Met. 15—Hatch v. Taylor, 10 N. H. 547—Davis v. Bemis, 40 N. Y. 454 note—Towle v. Leavett, 23 N. H. 373, 55 Am. Dec. 195

70. When a purchaser from a special agent, who was directed to hold property until payment of certain drafts, received it and converted it to his use, he could acquire no title, or even lien, and its value can be recovered of him. Doves v. National Exch. Bank of Milwaukee, 91 U. S. 618, 23: 214
Cited in The John K. Shaw, 32 Fed. 494—New Dunderberg Min. Co. v. Old, 38 C. C. A. 93, 97 Fed. 154—H. A. Prentice Co. v. Page, 164 Mass. 281, 41 N. E. 279—Ratzer v. Burlington, C. R. & N. R. Co. 64 Minn. 248, 58 Am. St. Rep. 530, 66 N. W. 988—Marine Bank v. Fiske, 71 N. Y. 357—Farmers & M. Nat. Bank v. Logan, 74 N. Y. 584—Hieskell v. Farmers' & M. Nat. Bank, 89 Pa. 160, 33 Am. Rep. 745—Pennsylvania R. Co. v. Stern, 119 Pa. 29, 4 Am. St. Rep. 626, 12 Atl. 756—Mitchell v. Baker, 208 Pa. 379, 57 Atl. 760—National Bank v. Atlanta & C. Air Line R. Co. 25 S. C. 223—Walley v. Deseret Nat. Bank, 14 Utah, 314, 47 Pac. 147.

c. Effect of Secret Limitations upon Powers of Agent.

Limitations on Bailee's Authority, see Bailment, 9.
Special Instructions to Factor, see Factors, 18-20.

Limitations on Authority of Insurance Agent, see Insurance, II. c.

Limitations on Partner's Authority, see Partnership, 39, 44, 45, 66.
See also *supra*, 61, 62.

71. No secret arrangements between the principal and agent can affect third persons who purchase from the agent, where the agent was held out to the world as the legal owner. Calais S. B. Co. v. Scudder, 2 Black, 372, 17: 282

72. Special instructions limiting the authority of a general agent must be communicated to the party with whom he deals, or the principal will be bound as though such special instructions were not given. Southern L. Ins. Co. v. McCain, 96 U. S. 84, 24: 653

Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20: 617

Cited in Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boller Inspection & Ins. Co. 9 C. C. A. 8, 19 U. S. App. 510, 60 Fed. 359—Jacobson v. Poindexter, 42 Ark. 99—Commercial Union Assur. Co. v. State, 113 Ind. 338, 15 N. E. 518—McNeil v. Boston Chamber of Commerce, 154 Mass. 286, 13 L.B.A. 563, 28 N. E. 245.

d. Authority to Sell or Pledge.

Under Power of Attorney, see *supra*, II. b.

Power of Attorney to Transfer Title, see *supra*, 16.

Authority to Convey under Power of Attorney to Recover Principal's Interest, see *supra*, 21.

Burden of Proving Authority of Master of Vessel, see Evidence, 227, 228.

Authority of Factor, see Factors, 9.

Validity of Pledge by Factor, see Factors, 27.

Sale by Agent to Himself, see *infra*, 153-157.
See also *supra*, 70; Bailment, 8, 9.

73. An agency to transact all manner of business does not necessarily include a power to sell. Hodge v. Combs, 1 Black, 192, 17: 157

Cited in Claflin v. Continental Jersey Works, 85 Ga. 44, 11 S. E. 721—Craighead v. Peterson, 72 N. Y. 285, 28 Am. Rep. 150.

74. By common law a factor or agent for sale has no power to pledge, whether intrusted with possession of the goods themselves or with the symbol of them, as a bill of lading. Allen v. St. Louis Nat. Bank, 120 U. S. 20, 7 Sup. Ct. Rep. 460, 30: 573

Cited in Moore v. Hill, 38 Fed. 341—Halsey v. Bird, 39 C. C. A. 641, 99 Fed. 528—Commercial Bank v. Hurt, 99 Ala. 134, 19 L. R.A. 702, 42 Am. St. Rep. 38, 12 So. 568—Commercial Bank v. Lee, 99 Ala. 496, 19 L. R.A. 706, 12 So. 572—Lallande v. His Creditors, 42 La. Ann. 711, 7 So. 895—Holton v. Hubbard, 49 La. Ann. 737, 22 So. 338—Read v. Cumberland Teleg. & Teleph. Co. 93 Tenn. 489, 27 S. W. 660.

75. Authority, without restriction, to an agent to sell, carries with it authority to warrant. Schuchardt v. Allen, 1 Wall. 359, 17: 642

Cited in Keith v. Herschberg Optical Co. 48 Ark. 147, 2 S. W. 777—Talmage v. Bierhauser, 103 Ind. 275, 2 N. E. 716—H. B. Smith Co. v. Williams, 29 Ind. App. 343, 63 N. E. 818—Loomis Mill. Co. v. Vawter, 8 Kan. App. 439, 57 Pa. 43—McCormick v. Kelly, 28 Minn. 139, 9 N. W. 675—Cooley v. Perrine, 41 N. J. L. 325, 32 Am. Rep. 210—Dayton v. Hoogland, 39 Ohio St. 680.

76. A sale by an agent for the same price, but on different terms than those fixed by his principal, is not within the scope of the authority given. De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. Rep. 816, 39: 956

Cited in Norton v. Nevills, 174 Mass. 245, 54 N. E. 537—Halsey v. Monteiro, 92 Va. 585, 24 S. E. 258.

77. A general power to borrow money includes authority to give to the lender the ordinary securities for it. Among these are bonds, notes or acceptances, and collaterals. Hatch v. Coddington, 95 U. S. 48, 24: 339
Cited in Morse v. Richmond, 6 Ill. App. 170.

78. A check on a bank, payable at sight, and which an agent to raise money on negotiable paper took as money, and which was paid to a bona fide holder by the cashier, is money within the scope of authority given to borrow money on a note. The note or bill purchased by such check was sold for money; title passed to the purchaser; and the principal was bound by

the contract of the agent. Poorman v. Woodward, 21 How. 266, 16: 151

Editorial note.

Power of agent to warrant, on sale of chattels. 17: 642

e. Authority to Collect or Receive Payment.

Under Power of Attorney, see supra, 23, 24, 28.

Agent's Liability for Negligence in Collecting, see infra, 159.

Awards by Government Expressly Made Payable Directly and Not Through Agent, see Claims, 206, 207.

See also infra, 171; Bills and Notes, 100.

79. Authority in writing is not necessary to authorize an agent to demand and receive rent. Sheets v. Selden, 2 Wall. 177, 17: 822

80. A collecting agent can receive for the debt of his principal only legal tender or money which passes at par. Ward v. Smith, 7 Wall. 447, 19: 207

Cited in German American Bank v. Third Nat. Bank, 18 Alb. L. J. 253, Fed. Cas. No. 5,359—Levi v. National Bank, 5 Dill. 108, Fed. Cas. No. 8,289—Stoughton v. Hill, 3 Woods. 407, Fed. Cas. No. 13,501—Ople v. Castleman, 32 Fed. 513—Ferguson v. Morris, 67 Ala. 394—Bank of Antigo v. Union Trust Co. 149 Ill. 351, 23 L.R.A. 614, 36 N. E. 1029—Anderson v. Gill, 79 Md. 318, 25 L.R.A. 204, 47 Am. St. Rep. 402, 29 Atl. 527—State Bank v. Byrne, 97 Mich. 180, 21 L.R.A. 754, 37 Am. St. Rep. 332, 56 N. W. 355—Mangum v. Ball, 43 Miss. 298, 5 Am. Rep. 488—Gowling v. American Exp. Co. 102 Mo. App. 372, 76 S. W. 712—Guignon v. First Nat. Bank, 22 Mont. 145, 55 Pac. 1051—Hughes v. Kellogg, 3 Neb. 189—Moore v. Pollock, 50 Neb. 904, 70 N. W. 541—Sier v. Bache, 7 Misc. 166, 27 N. Y. Supp. 255—National Bank v. Grimm, 109 N. C. 96, 13 S. E. 867—Fifth Nat. Bank v. Ashworth, 123 Pa. 218, 2 L.R.A. 493, 16 Atl. 596—Bulow v. Witte, 3 S. C. N. S. 325—Ewart v. Saunders, 25 Gratt. 207.

81. An agent living in one of the revolted states had no right to take, during the late war, Confederate money, or bank-notes secured by Confederate bonds, in discharge of a debt due to his principal who lived in a loyal state. It could only be discharged by payment in legal currency of the United States. Fretz v. Stover, 22 Wall. 198, 22: 769

McBurney v. Carson, 99 U. S. 567, 25: 378
Ward v. Smith, 7 Wall. 447, 19: 207
Distinguished in Hyatt v. McBurney, 18 S. C. 221.

Cited in New York L. Ins. Co. v. Davis, 95 U. S. 430, 24 L. ed. 455—McBurney v. Carson, 99 U. S. 571, 25 L. ed. 382—Lamar v. Micou, 112 U. S. 476, 28 L. ed. 760, 5 Sup. Ct. Rep. 221—Baldy v. Hunter, 171 U. S. 402, 43 L. ed. 213, 18 Sup. Ct. Rep. 890—Dorr v. Gibboney, 3 Hughes, 390, Fed. Cas. No. 4-006—Ople v. Castleman, 32 Fed. 514—Hendry v. Benlisa, 37 Fla. 622, 34 L.R.A. 286, 20 So. 800—Rodgers v. Bass, 46 Tex. 518.

82. An agent, *ante bellum*, may continue

to collect rents and debts for his principal, an alien enemy, when the agent and debtor reside in the same state. New York L. Ins. Co. v. Davis, 95 U. S. 425, 24: 453
Cited in Elliott v. Higgins, 83 N. C. 461.

83. An order to hold "all the debts referred to in the inclosed letter" subject to the order of a person who had become personally responsible for a sum of money which these debts were in part intended to meet, was held only a power to such person to collect the debts; not an assignment thereof. Rogers v. Lindsey, 13 How. 441, 14: 215

84. The only condition imposed upon one who has appointed a collecting agent is that, if anything is received by the agent, other than what is by common consent considered as money, passing at par, he shall inform the debtor of his refusal to sanction the unauthorized transaction within a reasonable time after knowledge of it. Ward v. Smith, 7 Wall. 447, 19: 207
Cited in Stoughton v. Hill, 3 Woods, 407, Fed. Cas. No. 13,501—Dixon v. Guay, 70 N. H. 162, 46 Atl. 456.

f. Authority to Execute Written Instruments.

Authority under Power of Attorney, see supra, II. b.

Effect of Authority to Draw Bill of Exchange, see Bills and Notes, 16.

Who Liable on Instrument Executed by Corporate Officer, see Corporations, V. a.
Presumption of Authority, see Evidence, 233, 234.

Authority of Partner to Bind Firm, see Partnership, II. c.

Possession of Land Warrant as Apparent Authority to Make Location, see Public Lands, 480.

See also Evidence, 1209.

85. Where a party is authorized by parol to fill a blank in a deed by inserting the name of a grantee, the authority is subject to two conditions,—that it be done by the party authorized, and before or at the time of delivery to the grantee. Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. Rep. 517, 28: 90

Cited in McClung v. Steen, 32 Fed. 376—Henniges v. Paschke, 9 N. D. 495, 81 Am. St. Rep. 588, 84 N. W. 350—Feugh v. Mitchell, 3 App. D. C. 324—Cribben v. Deal, 21 Or. 215, 28 Am. St. Rep. 746, 27 Pac. 1046—Reeves v. Brayton, 36 S. C. 402, 15 S. E. 658—Lafferty v. Lafferty, 42 W. Va. 789, 26 S. E. 262.

86. Authority to draw bills on a principal for the purposes of an agency does not contemplate bills drawn by the agent on his own account as a merchant. Schimmelpennich v. Bayard, 1 Pet. 264, 7: 138

Editorial notes.

Deed of agent as binding on principal.

[Power of agents to indorse, 27 L.R.A. 404.] 5: 335

g. Mode of Performance.

By Attorney in Fact, see *supra*, II.
Mode of Executing Power of Attorney, see *supra*, 16, 17.

Acts Formally Insufficient, Regarded as Good in Equity, see Equity, 215.

87. A contract made by an agent, must, in order to bind the principal, be made in his behalf. *Bank of the Metropolis v. Guttshlick*, 14 Pet. 19, 10: 335
Cited in Evans v. Wells, 22 Wend. 335.

88. Whatever an agent does can be done only in the way usual in the line of business in which he is acting. *Hoffman v. John Hancock Mut. L. Ins. Co.* 92 U. S. 161, 23: 539

89. An agreement in writing, between "W. superintendent of the Keets Mining Company, parties of the first part, and P, party of the second part," by which "the said parties of the first part" agree to deliver to P's mill ore from the Keets mine (owned by the company), to be crushed and milled by P, and signed by "W, Supt. Keets Mining Co." and by P, is the contract of the company. *Post v. Pearson*, 108 U. S. 418, 2 Sup. Ct. Rep. 799, 27: 774
Cited in Calvary Cathedral v. United States, 29 Ct. Cl. 288—*Ames v. Holderbaum*, 44 Fed. 226—*Monticello Bank v. Bostwick*, 71 Fed. 645—*Second Nat. Bank v. Midland Steel Co.* 155 Ind. 587, 52 L.R.A. 311, 58 N. E. 833.

90. Where an instrument shows on its face the names of the contracting parties, the agent may sign his own name first, and add to it, as in the present case, "agent" for his principal; or he may sign the name of his principal first, and add by himself "as agent." Either form may be followed; all that is required in such case is that the contract shall purport on its face to be the contract of the principal. *Smith v. Morse*, 9 Wall. 76, 19: 597
Cited in The Serapis, 37 Fed. 440.

h. Delegation of Powers of Agent.

Under Power of Attorney, see *supra*, 26.

91. It is a general rule of law that a delegated authority cannot be delegated. *Shankland v. Washington*, 5 Pet. 390, 8: 166

92-3. Subagents of a collection agency, in collecting a note, are its agents, and not the subagents of the owner of the note. *Hoover v. Wise*, 91 U. S. 308, 23: 392
Cited in Essex County Nat. Bank v. Bank of Montreal, 7 Bliss. 200, Fed. Cas. No. 4,532—*Hyde v. First Nat. Bank*, 7 Bliss. 159, Fed. Cas. No. 6,970—*Milligan v. Alabama Fertilizer Co.* 89 Ala. 324, 7 So. 650—*Baillie v. Augusta Sav. Bank*, 95 Ga. 284, 51 Am. St. Rep. 74, 21 S. E. 717—*Irwin v. Reeves Pulley Co.* 20 Ind. App. 114, 48 N. E. 601—*Guelich v. National State Bank*, 56 Iowa, 438, 41 Am. Rep. 110, 9 N. W. 328—*Bank of Lindsborg v. Ober*, 31 Kan. 606, 3 Pac. 324—*Dentzel v. City & Suburban R. Co.* 90

Md. 443, 45 Atl. 201—*Mandel v. Mower*, 55 How. Pr. 243—*Dale v. Hepburn*, 11 Misc. 288, 32 N. Y. Supp. 269—*Morris v. First Nat. Bank*, 201 Pa. 164, 50 Atl. 1000.

i. Principal's Liability for Agent's Acts Generally.

Ratification of Agent's Acts, see *infra*, III. k.

Measure of Damages for Default of Agent, see Damages, VI. g.

Master's Liability for Acts of Servant, see Master and Servant, III.

Employer's Liability for Acts of Independent Contractor, see Master and Servant, III. b.

See also Bills and Notes, 50.

94. Where a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong, rather than by a stranger. *Macon County v. Shores*, 97 U. S. 272, 24: 889

95. The acts of an agent within the scope of his powers are binding upon the principal. *United States v. The Burdett*, 9 Pet. 682, 9: 273

96-7. A principal's liability depends upon whether or not the act of his agent was done in the exercise, and within the limits, of the powers delegated. *Merchants' Bank v. Bank of Columbia*, 5 Wheat. 326, 5: 100

98. A merchant who employs a broker to sell his goods is chargeable for loss resulting from a failure of a sample of the commodity sold fairly to represent the whole, where such commodity can most conveniently be offered by sample. *The Monte Allegre*, 9 Wheat. 616, 6: 174
Cited in Schuchardt v. Allen, 1 Wall. 369, 17 L. ed. 646—*Hoffeld v. United States*, 186 U. S. 276, 46 L. ed. 1162, 22 Sup. Ct. Rep. 927—*Middleton v. Findla*, 25 Cal. 81—*North River Bank v. Aymar*, 3 Hill, 268—*Andrews v. Kneeland*, 6 Cow. 358—*Le Roy v. Beard*, 8 How. 468, 12 L. ed. 1160—*Cooley v. Perrine*, 41 N. J. L. 325, 82 Am. Rep. 210.

99. An agent who purchases in excess of funds in hand contrary to directions from his principal, to the knowledge of the vendor, does not thereby render his principal liable to the latter upon the principal's refusal to accept bills of exchange drawn upon him to the amount of the purchase. *Parsons v. Armor*, 3 Pet. 413, 7: 724

100-101. A promise by a merchant's factor that he will write to his principal to get insurance done does not bind the principal to insure. *Randolph v. Ware*, 3 Cranch, 503, 2: 512

102. Where the government paid to an agent, on an order for the balance due to a contractor, a larger sum than was due, it must look to the agent, and not to the principal, for repayment of the excess. *United States v. Jones*, 8 Pet. 387, 8: 983
Cited in Eslin v. District of Columbia, 22 Ct. Cl. 402.

103. A borrowing by an insurance agent, to enable him to remit to his company the proceeds of his business, is prima facie the borrowing of the agent himself, rather than the company, and will be so treated unless the contrary is shown. *Central Nat. Bank v. Royal Ins. Co.* 103 U. S. 783, 26: 459
Cited in Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 66, 26 L. ed. 699—*Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 422, 34 L. ed. 728, 11 Sup. Ct. Rep. 118—*Hunter v. Robbins*, 117 Fed. 924—*United States L. Ins. Co. v. Guarantee, Trust & S. D. Co.* 2 Walk. (Pa.) 441.

104. Notes of an agent secured by mortgage do not bind the principal, though given for the purchase money of the mortgaged lands bought for the principal, and title taken in agent's own name; which lands the principal recovered in a suit in which he alleged his liability and readiness to pay for the same. *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. Rep. 132, 27: 903
Distinguished in Pope v. Porter, 38 Fed. 9.
Cited in Keller v. Ashford, 133 U. S. 621, 33 L. ed. 672, 10 Sup. Ct. Rep. 494—*Constable v. National S. S. Co.* 154 U. S. 73, 38 L. ed. 914, 14 Sup. Ct. Rep. 1062.

105. An imputation of collusion between principal and agent, for the purpose of saving to the former the amount of an excessive draft by the latter upon him, is rebutted by proof of instructions to the agent to purchase and draw upon the principal only to the extent of the funds in the hands of the agent. *Parsons v. Armor*, 3 Pet. 413, 7: 724

Editorial note.

[Criminal and penal liability for act of agent. 41 L.R.A. 650.]

j. Principal's Liability for Agent's Torts.

Principal's Duty as to Agent Examining Pass Book after Forgery of Check, see Banks, 138.

Liability for Collision Due to Deficiency or Unskillfulness of Officers or Crew of Vessel, see Collision, II. c.

Liability of Corporation, see Corporations, VII. b.

Exemplary Damages Against Principal, see Damages, 36-39.

Of Insurance Agents, see Insurance, II. d.
 Master's Liability for Torts of Employee, see Master and Servant, III.

Liability of Municipality for its Officers and Agents, see Municipal Corporations, 151.

Imputing to Principal, Agent's Knowledge of his Own Wrong, see Notice, 40-42.

Liability for Partner's Torts, see Partnership, III. b.

106. The tortious act of the agent is the act of his principals, if done in the course of his agency, although not directly authorized. *Stockwell v. United States*, 13 Wall. 531, 20: 491

Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14: 502
Cited in Bacon v. Robertson, 18 How. 486, 15

L. ed. 502—*Philadelphia. W. & B. R. Co. v. Quigley*, 21 How. 211, 16 L. ed. 76—*Fendleton v. Kinsley*, 3 Cliff. 416, Fed. Cas. No. 10,922—*The R. F. Cabill*, 9 Ben. 354, Fed. Cas. No. 11,735—*Nevada Bank v. Portland Nat. Bank*, 59 Fed. 341—*Texas & P. R. Co. v. Williams*, 10 C. C. A. 465, 23 U. S. App. 379, 62 Fed. 442—*Memphis & N. Packet Co. v. Hill*, 58 C. C. A. 612, 122 Fed. 248—*Bay Shore R. Co. v. Harris*, 87 Ala. 9—*Gilliam v. South & North Ala. R. Co.* 70 Ala. 270—*Pine Bluff Water & Light Co. v. Schneider* 62 Ark. 116, 33 L.R.A. 368, 34 S. W. 547—*Tucker v. Nebeker*, 2 App. D. C. 338—*Gasway v. Atlanta & W. P. R. Co.* 58 Ga. 219—*Arasmith v. Temple*, 11 Ill. App. 44—*Western U. Telegr. Co. v. Satterfield*, 34 Ill. App. 389—*Chicago Consol. Bottling Co. v. McGinnis*, 86 Ill. App. 41—*Wright v. Compton*, 53 Ind. 339—*Carter v. Louisville, N. A. & C. R. Co.* 98 Ind. 556, 49 Am. Rep. 780—*Flora v. Russell*, 138 Ind. 160, 37 N. E. 593—*Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 287, 87 Am. Dec. 391—*Kansas Lumber Co. v. Central Bank*, 34 Kan. 637, 9 Pac. 751—*Alken v. Southern P. Co.* 104 La. 160, 29 So. 1—*Julien v. The Wade Hampton*, 27 La. Ann. 378—*Rhoda v. Anna*, 75 Me. 25, 46 Am. Rep. 354—*Northern C. B. Co. v. State*, 29 Md. 442, 96 Am. Dec. 545—*Perry v. House of Refuge*, 63 Md. 25, 52 Am. Rep. 495—*Moore v. Fitchburg R. Corp.* 4 Gray, 468, 64 Am. Dec. 83—*Fogg v. Boston & L. R. Corp.* 148 Mass. 518, 12 Am. St. Rep. 583, 20 N. E. 109—*Perkins v. Missouri, K. & T. R. Co.* 55 Mo. 213—*Brokaw v. New Jersey R. & Transp. Co.* 32 N. J. L. 330, 90 Am. Dec. 659—*Salisbury v. Erie R. Co.* 66 N. J. L. 237, 55 L.R.A. 580, 88 Am. St. Rep. 480, 50 Atl. 117—*Haack v. Fearing*, 35 Illw. Pr. 463—*Weed v. Panama R. Co.* 17 N. Y. 367, 72 Am. Dec. 474—*Gillespie v. Brooklyn Heights R. Co.* 178 N. Y. 357, 66 L.R.A. 622, 102 Am. St. Rep. 503, 70 N. E. 857—*Pierce v. North Carolina R. Co.* 124 N. C. 95, 44 L. R.A. 318, 32 S. E. 399—*Lovick v. Atlantic Coast Line R. Co.* 129 N. C. 436, 40 S. E. 191—*Nelson Business College Co. v. Lloyd*, 60 Ohio St. 458, 46 L.R.A. 316, 71 Am. St. Rep. 729, 54 N. E. 471—*Echols v. Dodd*, 20 Tex. 195—*White v. Chesapeake & O. R. Co.* 26 W. Va. 805—*Lucas v. Milwaukee & St. P. R. Co.* 33 Wis. 54, 14 Am. Rep. 735—*Bass v. Chicago & N. W. R. Co.* 36 Wis. 462, 17 Am. Rep. 495—*Craker v. Chicago & N. W. R. Co.* 36 Wis. 675, 17 Am. Rep. 504.

107. A principal or master is liable for the acts and negligence of his agent or servant in the course of his employment, although he did not authorize or know of the acts complained of. *American Fur Co. v. United States*, 2 Pet. 358, 7: 450

108. One who acquires title through an agent is chargeable with the latter's fraud in the transaction. *McIntire v. Pryor*, 173 U. S. 38, 19 Sup. Ct. Rep. 352, 43: 606
Cited in Bangor & P. R. Co. v. American Bangor Slate Co. 203 Pa. 12, 52 Atl. 40.

109. Where the money or property of an innocent person has been received by fraud of an agent, the principal cannot retain the benefit. *United States v. State Nat. Bank of Boston*, 96 U. S. 30, 24: 647
Cited in McIntire v. Pryor, 173 U. S. 38, 19 Sup. Ct. Rep. 352—*Allen v. West Point Min. & Mfg. Co.* 132 Ala. 297, 31 So. 462—*Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 275, 9 Am. St. Rep. 698, 17 N. E. 496—*Boston v. Simmons*,

150 Mass. 465, 6 L.R.A. 632, 15 Am. St. Rep. 230, 23 N. E. 210—Norton v. Derry Nat. Bank, 61 N. H. 593, 60 Am. Rep. 335.

110. Trading with the enemy, by agents to whom a vessel is intrusted, subjects it to condemnation, although the owners did not anticipate any violation of the public law. Jecker v. Montgomery, 18 How. 110, 15:311

k. Ratification of Agent's Acts.

Of Purchase by Broker, see Accounts, 1.
Of Attorney's Act, see Attorneys, II. e.
Of By-Bidding at Auction, see Auction, 4.
Of Act of Vice President of Bank, see Banks, 44.
Of Illegal Contract, see Contracts, IV. b.
Of Acts of Corporate Agent, see Corporations, 229-233.
Of Corporate Contract, see Corporations, VI. g.
Of Insurance Agent's Acts, see Insurance, II. e.
See also *supra*, 84.

Editorial note.

Ratification of unauthorized act of agent. 9: 246

Necessity of election.

111. When an agent exceeds his authority, the principal is not bound unless he ratifies. Upon being informed he must exercise his election. Fry v. United States (The Sally Magee) 3 Wall. 451, 18: 197
Law v. Cross, 1 Black, 533, 17: 185

112. A principal cannot, by holding his peace, have the benefit of a contract if it should afterwards turn out to be profitable, and retain a right to repudiate it if otherwise. Law v. Cross, 1 Black, 533, 17: 185
Otted in Clews v. Jamieson, 182 U. S. 483, 44 L. ed. 1194, 21 Sup. Ct. Rep. 845—Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 259—Scott v. Methodist Church, 50 Mich. 532, 15 N. W. 891—State v. Luke, 104 Mo. 563, 16 S. W. 242—Higginbotham v. May, 90 Va. 239, 17 S. E. 941—Ladd v. Hilbrandt, 27 Wis. 142, 9 Am. Rep. 445.

113. Where the agent, acting, as he supposed, for the best interest of his distant principal, had gone beyond his instructions, if the principal did not choose to affirm the act, it was his duty, when informed of the agent's act, to give immediate information of his repudiation. Law v. Cross, 1 Black, 533, 17: 185
Otted in Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co. 120 U. S. 260, 30 L. ed. 641, 7 Sup. Ct. Rep. 542—Davies v. Atkinson, 25 Ill. App. 272—Hopkins v. Clark, 14 Misc. 600, 36 N. Y. Supp. 456—Johnson v. Gibbons, 27 Gratt. 636.

114. A principal having the right to dis-affirm acts of an agent must do it promptly, and if not done within a reasonable time ratification will be presumed. Indianapolis Rolling Mill Co. v. St. Louis, Ft. S. & W. R. Co. 120 U. S. 256, 7 Sup. Ct. Rep. 542, 30: 639

Otted in Robertson v. Salomon, 144 U. S. 608, 36 L. ed. 562, 12 Sup. Ct. Rep. 752.

Requisites of valid ratification.

115. A ratification can only be made when the party ratifying possesses power to perform the act ratified. It operates upon the act ratified in the same manner as though the authority had been given originally. Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30: 178

116. Ratification of an agent's acts is inoperative if the party attempted to be charged was not competent to contract at the time of the contract or the alleged ratification, or if the contract was illegal, immoral, or against public policy. Marshall County v. Schenck, 5 Wall. 772, 18: 556
Otted in Brown v. Bon Homme County, 1 S. D. 233, 46 N. W. 173.

117. A ratification, to be efficacious, must be made by a party who had power to do the act in the first place, and it must be made with knowledge of the material facts. Western Nat. Bank of New York v. Armstrong, 152 U. S. 346, 14 Sup. Ct. Rep. 572, 38: 470

118. The ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts; and if they be either suppressed or unknown, the ratification is treated as invalid. Owings v. Hull, 9 Pet. 607, 9: 246
Bennecke v. Connecticut Mut. L. Ins. Co. 105 U. S. 355, 26: 990
Otted in Bennecke v. Connecticut Mut. L. Ins. Co. 105 U. S. 360, 26 L. ed. 992—Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 135, 30 L. ed. 929, 7 Sup. Ct. Rep. 865—The Joseph Grant, 1 Biss. 197, Fed. Cas. No. 7,538—Perkins v. Currier, 3 Woodb. & M. 86, Fed. Cas. No. 10,985—Pacific Rolling Mill Co. v. Dayton, S. & G. E. R. Co. 7 Sawy. 67, 5 Fed. 858—McClelland v. Whiteley, 11 Blas. 450, 15 Fed. 327—Harmon v. Smith, 38 Fed. 486—Wheeler v. Northwestern Sleigh Co. 39 Fed. 350—Starr & Co. v. Galgate Ship Co. 15 C. C. A. 375, 29 U. S. App. 599, 68 Fed. 243—Westerly Waterworks Co. v. Westerly, 80 Fed. 621—Hartford & N. Y. Transp. Co. v. Plymmer, 57 C. C. A. 293, 120 Fed. 629—Henry v. Lane, 62 C. C. A. 637, 128 Fed. 255—Hitchcock v. M'Gehee, 7 Port. (Ala.) 562—McGlassen v. Tyrrell, 5 Ariz. 54, 44 Pac. 1088—McCracken v. San Francisco, 16 Cal. 626—Extension Gold Min. & Mill. Co. v. Skinner, 28 Colo. 240, 64 Pac. 198—Seeley v. North, 16 Conn. 97—Oxford Lake Line v. First Nat. Bank, 40 Fla. 359, 24 So. 480—Hardeman v. Ford, 12 Ga. 208—State v. Southwestern Co. 70 Ga. 24—Mason v. Walt, 5 Ill. 133—Metropolitan Bank v. Godfrey, 23 Ill. 611—Williams v. Merritt, 23 Ill. 627—Howard v. Carpenter, 11 Md. 280—Adams' Exp. Co. v. Trego, 35 Md. 69—Bannon v. Warfield, 42 Md. 42—Copeland v. Mercantile Ins. Co. 6 Pick. 203—Humphrey v. Havens, 12 Minn. 315, Gil. 196—Jackson v. Badger, 35 Minn. 54, 26 N. W. 908—First Nat. Bank v. Gay, 63 Mo. 41, 21 Am. Rep. 430—Re Millenovich, 5 Nev. 181—Edwards v. Carson Water Co. 21 Nev. 483, 34 Pac. 381—Annan v. Hill Union Brewing Co. 59 N. J. Eq. 420, 46 Atl. 563—Marshall v. Hann, 17 N. J. L. 431—Gulick v. Grover, 33 N. J. L. 471, 97 Am. Dec. 728—Robertson v. Ketchum, 11 Barb. 636—Haar v. Industrial Ben. Assn. 71 Hun, 558, 24 N. Y. Supp. 1035—

Nixon v. Palmer, 8 N. Y. 401—Seymour v. Wyckoff, 10 N. Y. 224—Smith v. Tracy, 36 N. Y. 86—Baldwin v. Burrows, 47 N. Y. 212—Smith v. Kidd, 68 N. Y. 142, 23 Am. Rep. 157—Johnson v. Royster, 88 N. C. 197—Crosby v. Hill, 39 Ohio St. 105—Wright v. Burbank, 64 Pa. 251—Tift v. Quaker City Nat. Bank, 8 Pa. Co. Ct. 607—Scott v. Johnson, 5 Helsk. 654—Commercial & Agrl. Bank v. Jones, 18 Tex. 827—Halsey v. Montelro, 92 Va. 587, 24 S. E. 258—Ladd v. Hildebrandt, 27 Wis. 144, 9 Am. Rep. 445—Fosha v. O'Donnell, 120 Wis. 344, 97 N. W. 924.

119. If merchandise is received by a principal from his agent, under a just confidence that his orders to the latter have been faithfully executed, his acceptance and sale of the merchandise do not constitute a ratification of the acts of the agent in disobedience of his orders. *Bell v. Cunningham*, 3 Pet. 69, 7: 606

Cited in *Wheeler v. Northwestern Sleigh Co.* 39 Fed. 351—*Starr & Co. v. Galgate Ship Co.* 15 C. C. A. 375, 29 U. S. App. 599, 68 Fed. 243—*Nichols v. Bruns*, 5 Dak. 34, 37 N. W. 752—*Orford Lake Line v. First Nat. Bank*, 40 Fla. 359, 24 So. 480—*Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge*, 8 Gill & J. 324, 29 Am. Dec. 543—*Adams' Exp. Co. v. Trego*, 35 Md. 69—*Bannon v. Wardfield*, 42 Md. 42—*Hyde v. Larkin*, 35 Mo. App. 373—*Smith v. Tracy*, 36 N. Y. 86.

Acts constituting ratification.

Ratification of Stockbroker's Unauthorized Sale of Stocks, see *Brokers*, 5, 5a.

Acts of Corporate Agent, see *Corporations*, 229-231.

Of Insurance Agent's Acts, see *Insurance*, 49.

Ratification by Church Trustees, see *Religious Societies*, 15.

Question of Law or Fact, see *Trial*, 289-291.

120. Ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name. *Marshall County v. Schenck*, 5 Wall. 772, 18: 556

Cited in *Hansen v. Boyd*, 161 U. S. 410, 40 L. ed. 751, 16 Sup. Ct. Rep. 571—*Eakin v. St. Louis, K. C. & N. R. Co.* 3 Cent. L. J. 657, Fed. Cas. No. 4,236—*Memphis v. Brown*, 1 Flipp. 196, Fed. Cas. No. 9,415—*Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co.* 67 Fed. 59—*Sullivan v. School Dist. No. 39*, 39 Kan. 349, 18 Pac. 287—*State ex rel. Robb v. Kiowa County*, 39 Kan. 659, 7 Am. St. Rep. 569, 19 Pac. 925—*Columbus Waterworks Co. v. Columbus*, 46 Kan. 677, 26 Pac. 1046—*Tift v. Quaker City Nat. Bank*, 8 Pa. Co. Ct. 607—*Louisville & N. R. Co. v. State*, 8 Helsk. 788—*Hatton v. Stewart*, 2 Lea, 236—*Noel Young Bond & Stock Co. v. Mitchell County*, 21 Tex. Civ. App. 646, 54 S. W. 284.

121. A subsequent assent by a principal is equivalent to an original authority. *Clark v. Van Riemsdyk*, 9 Cranch, 153, 3: 688

Cited in *Mason v. Crosby*, 1 Woodb. & M. 358, Fed. Cas. No. 9,234—*Wallace v. Agry*, 4 Mason, 341, Fed. Cas. No. 17,096—*Sadler v.*

Robinson, 2 Stew. (Ala.) 524—*Jones v. Atkinson*, 68 Ala. 170—*Haskell v. Cornish*, 13 Cal. 48—*Byrne v. Doughty*, 13 Ga. 53—*Mathews v. Gilliss*, 1 Iowa, 254—*Davidson v. Davidson Gaslight & Coke Co.* 24 Iowa, 424—*Citizens' Bank v. Millet*, 103 Ky. 24, 44 L.R.A. 671, 82 Am. St. Rep. 546, 44 S. W. 366—*Merrifield v. Parritt*, 11 Cush. 597—*Marshall v. Hann*, 17 N. J. L. 431—*Grant v. Beard*, 50 N. H. 133—*Pentz v. Stanton*, 10 Wend. 276, 25 Am. Dec. 558—*Delafield v. Illinois*, 26 Wend. 226—*Moss v. Averell*, 10 N. Y. 454—*Newton v. Bronson*, 13 N. Y. 594, 67 Am. Dec. 89—*Houston v. Shindler*, 11 Barb. 40—*McMahan v. McMahan*, 13 Pa. 381, 53 Am. Dec. 481—*Colwell v. Weybosset Nat. Bank*, 16 R. I. 290, 15 Atl. 80—*Devendorf v. West Virginia Oil & Oil Land Co.* 17 W. Va. 170—*Dodge v. Hopkins*, 14 Wis. 639.

122. Where an agent has exceeded his authority, an intention to ratify will be presumed from the silence of the principal, who has received a letter informing him what has been done. *Feild v. Farrington*, 10 Wall. 141, 19: 923

Southern L. Ins. Co. v. McCain, 96 U. S. 84, 24: 653

Cited in *Talcott v. Chew*, 27 Fed. 275—*McLendon v. Wilson*, 52 Ga. 48.

123-4. Acquiescence for a number of years in the action of an agent under a power of attorney, in entering into an agreement to receive lands in discharge of a debt due his principal, amounts to a ratification of such agreement. *Hepburn v. Dunlop*, 1 Wheat. 179, 4: 65

125. If a company is informed of the borrowing of money by its agent in its name, and, within a reasonable time, fails to disavow such acts of its agent, the jury are authorized to consider the company as assenting to it. *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24: 648

Cited in *Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.* 120 U. S. 259, 30 L. ed. 641, 7 Sup. Ct. Rep. 542—*Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 381, 33 L. ed. 160, 9 Sup. Ct. Rep. 770—*Oregon R. Co. v. Oregon R. & Nav. Co.* 28 Fed. 507—*Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 2 C. C. A. 241, 10 U. S. App. 98, 51 Fed. 327—*American Exch. Nat. Bank v. First Nat. Bank*, 27 C. C. A. 285, 48 U. S. App. 633, 82 Fed. 972—*First Nat. Bank v. G. V. B. Min. Co.* 89 Fed. 445—*The Sappho*, 36 C. C. A. 401, 94 Fed. 531—*G. V. B. Min. Co. v. First Nat. Bank*, 36 C. C. A. 640, 95 Fed. 30—*Alaska & C. Commercial Co. v. Solner*, 59 C. C. A. 667, 123 Fed. 860—*Illinois Trust & S. Bank v. Pacific R. Co.* 117 Cal. 346, 49 Pac. 107—*Connett v. Chicago*, 114 Ill. 239, 29 N. E. 250—*Denison & N. R. Co. v. Raney-Alton Mercantile Co.* 3 Ind. Terr. 153, 53 S. W. 496—*Scott v. Methodist Church*, 50 Mich. 532, 15 N. W. 891—*Heyn v. O'Hagen*, 60 Mich. 157, 26 N. W. 861—*Myers v. Mutual L. Ins. Co.* 32 Hun, 327—*Hopkins v. Clark*, 14 Misc. 600, 36 N. Y. Supp. 456—*Goshorn v. County Court*, 42 W. Va. 744, 26 S. E. 452.

126. Principals adopt and ratify an agent's acts by accepting a settlement by him, and bringing an action upon a cove-

nant in a submission to arbitration signed by him. *Smith v. Morse*, 9 Wall. 76,

be permitted to repudiate it. *Stark v. Starr*, 94 U. S. 477, 24: 276

19: 597
Cited in *Connett v. Chicago*, 114 Ill. 239, 29 N. E. 280.

127. If the principal, after a knowledge that his orders have been violated by his agent, receives merchandise purchased for him contrary to orders, and sells the same, without signifying any intention of disaffirming the acts of the agent, an inference in favor of the ratification of the acts of the agent may fairly be drawn by the jury. *Bell v. Cunningham*, 3 Pet. 69, 7: 608

Cited in *Perkins v. Currier*, 3 Woodb. & M. 86, Fed. Cas. No. 10,985—*Hitchcock v. M'Gehee*, 7 Port. (Ala.) 562—*Lee v. Fontaine*, 10 Ala. 771, 44 Am. Dec. 505—*Croom v. Swann*, 1 Fla. 216—*Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 73, 21 N. W. 184—*Taliaferro v. First Nat. Bank*, 71 Md. 214, 17 Atl. 1036—*Copeland v. Mercantile Ins. Co.* 6 Pick. 203—*Low v. Connecticut & P. Rivers R. Co.* 45 N. H. 379.

128. Where the usual course of the management of the principal's concerns in the employment of a subagent has been pursued for a length of time, and been recognized by the owners of property, they will be taken to have adopted the acts of the subagent as the acts of the agent himself. *Warner v. Martin*, 11 How. 209, 13: 667

129. Where one entitled to redeem from a sale on execution of real estate took an assignment of the sheriff's certificate, by giving his notes for the debt to the attorneys of the creditor, and there was no disaffirmance of the arrangement until the land had become a good object of speculation, and the time to redeem had passed, the principal, having had knowledge of all the facts, must be held to have affirmed the transaction. *Lafin v. Herrington*, 1 Black, 326, 17: 45

130. If a principal ratifies that part of a transaction which favors him, he ratifies the whole. *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. Rep. 426, 28: 466
Cited in *Merrill v. Rokes*, 4 C. C. A. 437, 12 U. S. App. 183, 54 Fed. 454—*White v. Insurance Co.* 93 Fed. 163.

131. A principal who intends to repudiate an act is bound to repudiate it *in toto*; he cannot accept that which is beneficial and avoid that which is burdensome. *Teague v. Maddox* (*Rader v. Maddox*) 150 U. S. 128, 14 Sup. Ct. Rep. 46, 67: 1025
Cited in *McDonald v. Metropolitan L. Ins. Co.* 68 N. H. 5, 73 Am. St. Rep. 548, 38 Atl. 500—*Medical College Laboratory v. New York University*, 76 App. Div. 59, 78 N. Y. Supp. 673—*New York L. Ins. Co. v. Taliaferro*, 95 Va. 528, 28 S. E. 879.

Effect.

Effect of, on Remedy Against Agent, see *infra*, 169.

Ratification of Retiring Partner's Contract, see *Partnership*, 176.

See also *Contracts*, 74.

132. Where the principal has adopted and approved an act of his attorney, he cannot

133. One who approves a contract made by another assuming to act for him, and takes the benefit of the contract, is bound by any conduct on the part of his assumed agent which might entitle the other party to a rescission. *Clark v. Reeder*, 158 U. S. 505, 15 Sup. Ct. Rep. 849, 39: 1070

134. If a principal, with knowledge of the facts, ratify a contract with reference to his property, made by another, he is bound by the contract, without the requirement of a new or additional consideration. *Drakeley v. Gregg*, 8 Wall. 242, 19: 409

Stark v. Starr, 94 U. S. 477, 24: 276
Cited in *La Compania Bilbaina de Navegacion de Bilbao v. Spanish American Light & Power Co.* 146 U. S. 498, 36 L. ed. 1059, 13 Sup. Ct. Rep. 142—*American Mortg. Co. v. Owens*, 64 Fed. 252—*Hatch v. Ferguson*, 14 C. C. A. 46, 20 U. S. App. 540, 66 Fed. 672—*American Mortg. Co. v. Owens*, 18 C. C. A. 518, 25 U. S. App. 659, 72 Fed. 224—*Lynch v. Smith*, 25 Colo. 110, 54 Pac. 634—*Smyth v. Lynch*, 7 Colo. App. 390, 43 Pac. 670—*Schneck v. Jeffersonville*, 152 Ind. 222, 52 N. E. 212.

135. Ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The intervening rights of third persons cannot be defeated by the ratification for the reason that the party ratifying should be able, not merely to do the act ratified at the time the act is done, but also at the time the ratification is made. *Cook v. Tullis*, 18 Wall. 332, 21: 933

Cited in *Clews v. Jamieson*, 182 U. S. 483, 45 L. ed. 1194, 21 Sup. Ct. Rep. 845—*Strain v. Gourdin*, 2 Woods, 385, 11 Nat. Bankr. Reg. 160, Fed. Cas. No. 13,521—*Consolidated Fruit Jar Co. v. Bellaire Stamping Co.* 27 Fed. 382—*Findlay v. Pertz*, 29 L.R.A. 195, 13 C. C. A. 571, 31 U. S. App. 340, 66 Fed. 439—*National Foundry & Pipe Works v. Oconto Water Co.* 68 Fed. 1010—*Union P. R. Co. v. Reed*, 25 C. C. A. 391, 40 U. S. App. 233, 80 Fed. 236—*Farmers' Loan & T. Co. v. Memphis & C. R. Co.* 83 Fed. 872—*Cunard S. S. Co. v. Kelley*, 53 C. C. A. 313, 115 Fed. 681—*Chesapeake & O. R. Co. v. Howard*, 14 App. D. C. 280—*Graham v. Williams*, 114 Ga. 719, 40 S. E. 790—*Spiegelberg v. Sternbach*, 156 Ill. 60, 41 N. E. 51—*Lomax v. Pickering*, 165 Ill. 435, 46 N. E. 238—*Merritt v. Kewanee*, 175 Ill. 549, 51 N. E. 867—*Spiegelberg v. Sternbach*, 50 Ill. App. 496—*Long v. Osborn*, 91 Iowa, 163, 59 N. W. 14—*Stickley v. Widle*, 122 Iowa, 402, 98 N. W. 135—*Sullivan v. School Dist. No. 39*, 39 Kan. 349, 18 Pac. 287—*Selzas v. Brugler*, 37 La. Ann. 514—*Nicholson v. Schmucker*, 81 Md. 465, 32 Atl. 182—*Mayer v. Bernstein*, 69 Miss. 22, 12 So. 257—*Johnston v. Milwaukee & W. Invest. Co.* 49 Neb. 76, 68 N. W. 383—*Edwards v. Carson Water Co.* 21 Nev. 493, 34 Pac. 381—*Wright v. Carson Water Co.* 23 Nev. 45, 42 Pac. 196—*Bennett v. Keen*, 59 N. J. Eq. 636, 43 Atl. 1070—*Pluckney v. Inglesby*, 28 S. C. 352, 5 S. E. 823—*Kempner v. Rosenthal*, 81 Tex. 16, 16 S. W. 639—*Williams v. Shoudy*, 12 Wash. 368, 41 Pac. 169—*West v. Chehalis*,

12 Wash. 372, 50 Am. St. Rep. 896, 41 Pac. 171—*Coleman v. Darling*, 66 Wis. 160, 57 Am. Rep. 253, 28 N. W. 367—*Galloway v. Hamilton*, 68 Wis. 656, 32 N. W. 636—*Franey v. Wauwatosa Park Co.* 99 Wis. 48, 74 N. W. 548—*Platt v. Schmitt*, 117 Wis. 497, 94 N. W. 345—*Rock Springs Nat. Bank v. Luman*, 6 Wyo. 159, 42 Pac. 874.

136. The ratification by the principal, soon after the insolvency of the agent, of the latter's unauthorized act in substituting a note and mortgage for bonds belonging to the principal, is valid as against trustees in bankruptcy appointed in proceedings commenced soon after the ratification was made. *Cook v. Tullis*, 18 Wall. 332, 21: 933

— Editorial notes.

Ratification proves agency. 6: 552

[Power of principal to ratify unauthorized contract of agent so as to raise cause of action in his own favor against the adverse party. 4 L.R.A.(N.S.) 431.]

1. Undisclosed Agency.

Liability of Agent, see *infra*, 146.

Responsibility of Carrier for Agents, see *Carriers*, 97, 98.

Parol Evidence to Establish, see *Evidence*, 1680-1686.

137. If a party prefers to deal with the agent personally, on his own credit, he will not be allowed afterwards to charge the principal; but, if the agency is not disclosed, he may elect to treat the after-discovered principal as the contracting party. *Ford v. Williams*, 21 How. 287, 16: 36
Cited in *Higgins v. McCrea*, 116 U. S. 680, 29 L. ed. 767, 6 Sup. Ct. Rep. 557—*Burrill v. Boston*, 2 Cliff. 592, Fed. Cas. No. 2,198—*New York & C. S. S. Co. v. Harrison*, 16 Fed. 692—*Boland v. Northwestern Fuel Co.* 34 Fed. 525—*Barrell v. Newby*, 62 C. C. A. 386, 127 Fed. 660—*Benjamin v. Birmingham*, 50 Ark. 440, 8 S. W. 183—*Curran v. Holland*, 141 Cal. 439, 75 Pac. 46—*Williams v. Uncompahgre Canal Co.* 13 Colo. 478, 22 Pac. 806—*Rice v. Bush*, 16 Colo. 492, 27 Pac. 720—*McIntosh-Huntington Co. v. Rice*, 18 Colo. App. 404, 58 Pac. 358—*Union Ins. Co. v. Grant*, 68 Me. 231, 28 Am. Rep. 42—*Scott v. First Free Methodist Church*, 50 Mich. 534, 15 N. W. 891—*Chandler v. Coe*, 54 N. H. 571—*Scheneck v. Spring Lake Beach Improv. Co.* 47 N. J. Eq. 46, 19 Atl. 881—*Rich v. Niagara County Sav. Bank*, 3 Hun. 486—*Masterson v. Boyce*, 29 Hun. 458—*Briggs v. Partridge*, 64 N. Y. 362, 21 Am. Rep. 617—*Fisher v. Knight*, 34 W. N. C. 312—*Rutherford v. Montgomery*, 14 Tex. Civ. App. 323, 37 S. W. 625.

138. Upon a negotiable promissory note made by an agent in his own name, and not disclosing on its face the name of the principal, no action lies against the principal. *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. Rep. 132, 27: 903
Cited in *Lovell v. Cragin*, 136 U. S. 151, 34 L. ed. 379, 10 Sup. Ct. Rep. 1024—*Johns v. Wilson*, 180 U. S. 447, 45 L. ed. 617, 21 Sup. Ct. Rep. 445—*Badger Silver Min. Co. v. Drake*, 31 C. C. A. 382, 58 U. S. App. 129, 88 Fed. 53—*Underwood v. Patrick*, 36

C. C. A. 332, 94 Fed. 470—*Union Nat. Bank v. Forstall*, 41 La. Ann. 116, 6 So. 32—*Shuey v. Adair*, 18 Wash. 202, 39 L. R.A. 478, 63 Am. St. Rep. 879, 51 Pac. 388—*Exchange Bank v. Lewis County*, 28 W. Va. 293.

139. A contract limiting a carrier's responsibility as to goods shipped by an agent is binding upon the principal, where the existence of the agency at the time the contract was made was unknown to the carrier. *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18: 170

Cited in *Western Translt Co. v. Hosking*, 19 Ill. App. 610—*Armstrong v. Chicago, M. & St. P. R. Co.* 53 Minn. 190, 54 N. W. 1059—*Rawson v. Holland*, 47 How. Pr. 304—*Jennings v. Grand Trunk R. Co.* 52 Hun. 242, 5 N. Y. Supp. 140—*Nelson v. Hudson River R. Co.* 48 N. Y. 507—*Vaughan v. Providence & W. R. Co.* 13 R. I. 580—*Levy v. Southern Exp. Co.* 4 S. C. N. S. 241—*Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 15, 57 Am. Rep. 589.

Editorial notes.

Undisclosed principal. 16: 36; 27: 903

IV. Agent's Liability to Third Persons.

a. In General.

Agent's Liability on Promise Made by Attorney Previously Appointed for Same Purpose, see *Compromise and Settlement*, 14.

Termination of Agency of Insurance Agent, see *Insurance*, II. f.

Liability of Independent Contractor for Negligent Acts, see *Master and Servant*, IV.

140. If a person merely adds to the signature of his name the word "agent," "trustee," "treasurer," etc., without disclosing his principal, he is personally bound. The appendix is regarded as a *descriptio personæ*. *Metcalf v. Williams*, 104 U. S. 93, 26: 665

141. If one is, in fact, a mere agent, trustee, or officer of some principal, and is in the habit of expressing, in that way, his representative character in his dealings with a particular party, who recognizes him in that character, the documents thus made and used will not be construed as his personal obligation. *Metcalf v. Williams*, 104 U. S. 93, 26: 665

Distinguished in *Cragin v. Lovell*, 109 U. S. 198, 27 L. ed. 905, 3 Sup. Ct. Rep. 132.

Cited in *Falk v. Moebis*, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1319—*De Witt v. Berry*, 134 U. S. 316, 33 L. ed. 900, 10 Sup. Ct. Rep. 536—*The Serapis*, 37 Fed. 440—*Society of Shakers v. Watson*, 15 C. C. A. 642, 37 U. S. App. 141, 68 Fed. 740—*Monticello Bank v. Bostwick*, 71 Fed. 645—*Reid v. Diamond Plate-Glass Co.* 29 C. C. A. 113, 54 U. S. App. 619, 85 Fed. 197—*Bean v. Pioneer Min. Co.* 66 Cal. 453, 56 Am. Rep. 106, 6 Pac. 86—*Anheier v. Signor*, 8 N. D. 503, 79 N. W. 983—*Small v. Elliott*, 12 S. D. 574, 76 Am. St. Rep. 630, 82 N. W. 92—*La Salle Nat. Bank v. Tola*

Rock & Rye Co. 14 Ill. App. 147—Miers v. Coates, 57 Ill. App. 221—Harris v. Coleman & A. White Lead Co. 98 Ill. App. 32—Swarts v. Cohen, 11 Ind. App. 23, 38 N. E. 536—Holt v. Sweetzer, 23 Ind. App. 242, 55 N. E. 254—Stevenson v. Polk, 71 Iowa, 286, 32 N. W. 340—Mathews v. Dubuque Mattress Co. 87 Iowa, 251, 19 L.R.A. 680, 54 N. W. 225—Capital Sav. Bank & T. Co. v. Swan, 100 Iowa, 723, 69 N. W. 1065—Kline v. Bank of Tescott, 50 Kan. 98, 18 L.R.A. 535, 34 Am. St. Rep. 107, 31 Pac. 688—State Bank v. McCabe, 135 Mich. 484, 98 N. W. 20—Newman v. Greeff, 101 N. Y. 663, 5 N. E. 335—James v. Citizens Bank, 9 Okla. 556, 60 Pac. 290—Guthrie v. Imbrile, 12 Or. 193, 53 Am. Rep. 331, 6 Pac. 664—Andrus v. Blazzard, 23 Utah, 264, 54 L.R.A. 364, 63 Pac. 888—Carr v. Branch, 85 Va. 605, 8 S. E. 476—Shuey v. Adair, 18 Wash. 197, 39 L.R.A. 476, 63 Am. St. Rep. 879, 51 Pac. 388.

142. One leasing property as agent for another is personally responsible for disturbing the peaceable possession of the tenant, although his principal is disclosed in the lease. Lutz v. Linthicum, 8 Pet. 165, 8: 904

Cited in Stott v. Rutherford, 1 MacArth. 13—Persons v. McDonald, 60 Neb. 453, 82 N. W. 672—Townsend v. Corning, 23 Wend. 441—Gear v. Shaw, 1 Pinney (Wis.) 615.

143. [An agent who advertised a ship for freight is not liable for damages caused to a shipper who had put goods on board, by the failure of the voyage on account of the vessel's being attached by a creditor of the owner. Joyce v. Sims (Pa. Sup. Ct.) 2 Dall. 223, 1: 358]

Editorial note.

[Liability of agent for conversion, trespass, or other positive act of wrongdoing against third person under employer's orders. 50 L.R.A. 644.]

b. On Contracts.

Who Liable on Instrument Executed by Corporate Officer, see Corporations, V. e.

Discharge from Liability, see Estoppel, 183.

Parol Evidence to Show that Contracting Party was Acting as Agent, see Evidence, 1680, 1681.

Personal Liability of Public Officer's Contracts Executed by them, see Generally, Officers, VI. b.

Contract in Officer's Name for Benefit of State, see States, 160.

See also *supra*, 140, 141.

144. Where a contract is made by an agent, and the principal is disclosed, the agent cannot be made personally liable unless he agreed to be so. Whitney v. Wyman, 101 U. S. 392, 25: 1050

Cited in Post v. Pearson, 108 U. S. 422, 27 L. ed. 775, 2 Sup. Ct. Rep. 799—Sun Printing & Pub. Assn. v. Moore, 183 U. S. 647, 46 L. ed. 371, 22 Sup. Ct. Rep. 240—Calvary Cathedral v. United States, 29 Ct. Cl. 288—Berwind v. Schultz, 25 Fed. 919—Monticello Bank v. Bostwick, 71 Fed. 644—General Electric Co. v. Gill, 127 Fed. 243—Anderson v. Timberlake, 114 Ala. 386, 62 Am. St. Rep. 105, 22 So. 431—Morrison v. Baech—U. S. Dig.—291

told, 93 Md. 329, 48 Atl. 926—Bleau v. Wright, 110 Mich. 185, 68 N. W. 115—Huston v. Tyler, 140 Mo. 265, 36 S. W. 654—Emery-Bird-Thayer Dry Goods Co. v. Coomer, 87 Mo. App. 407—Huffman v. Newman, 55 Neb. 716, 78 N. W. 409—Commercial Bank v. Waters, 45 App. Div. 444, 60 N. Y. Supp. 981—O'Rourke v. Geary, 207 Pa. 242, 56 Atl. 541—McKeen v. Providence County Sav. Bank, 24 R. I. 543, 54 Atl. 49—Shuey v. Adair, 18 Wash. 192, 39 L.R.A. 475, 63 Am. St. Rep. 879, 51 Pac. 388.

145. Where the name of the principal is disclosed in a contract as the person making the sale through his agent, this fixes the duty of the performance upon him, and exonerates the agent. The fact that the principal is a nonresident of the state makes no difference. Oelricks v. Ford, 23 How. 49, 16: 534

Cited in Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 453, 30 L. ed. 984, 7 Sup. Ct. Rep. 958—The Sullote, 23 Fed. 924—Berwind v. Schultz, 25 Fed. 919—Atlas S. S. Co. v. Colombian Land Co. 42 C. C. A. 400, 102 Fed. 360—Maury v. Ranger, 38 La. Ann. 480, 58 Am. Rep. 197—Curtis v. Gibney, 59 Md. 155—Kaulback v. Church—III, 59 N. H. 297.

146. Where one holds himself out as the agent of an unknown principal whom he had no authority to represent, his contract, though not binding upon anyone else, is binding upon the agent,—at least if the credit be given to such agent. Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. Rep. 811, 866, 37: 790

Editorial note.

Agent or officer, when personally liable to third persons on his contract made as agent. 1: 648

c. For Money or Property.

After Reversal of Judgment which Agent has Paid, see Appeal and Error, 5606.

Remedy of Debtor Against Supposed Agent of Creditor Paid by him, see Election of Remedies, 11.

Agent Paying over Money to Principal under Judgment Subsequently Reversed, see Execution, 86.

For Proceeds of Sale of Goods Illegally Captured, see Prize and Capture, 164.

147. An agent to whom money has been voluntarily paid cannot be held liable to pay it back, when he has paid it over to his principal before notice of objection or demand for repayment. Cary v. Curtis, 3 How. 236, 11: 576
Hooper v. Robinson, 98 U. S. 528, 25: 219
Cited in Brown v. Marden, 61 N. H. 20.

148. Where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal, when he has had notice not to pay it over. Elliott v. Swartwout, 10 Pet. 137, 9: 373

149. The case in which an agent may be liable to repay money received by him for his principal is that where he is not notor-

ously the mere carrier or instrument for transferring the fund, but has the power of retaining it, and, before he has paid it over, has received notice of the plaintiff's claim, and warning not to part with the fund. *Cary v. Curtis*, 3 How. 236, 11: 576

150. An agent lawfully placed by his principal in possession of a steam tug, and using her in towing for hire, is not liable either in contract or in tort to third persons for the use or earnings of the tug. *Baldwin v. Black*, 119 U. S. 643, 7 Sup. Ct. Rep. 326, 30: 530

Cited in Parker & W. Co. v. Yale Clock Co. 123 U. S. 104, 31 L. ed. 107, 8 Sup. Ct. Rep. 38—*Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 379, 34 L. ed. 183, 10 Sup. Ct. Rep. 884—*Electric Gas-Lighting Co. v. Boston Electric Co.* 139 U. S. 502, 35 L. ed. 260, 11 Sup. Ct. Rep. 586—*Freeman v. Asmus*, 145 U. S. 239, 36 L. ed. 690, 12 Sup. Ct. Rep. 989—*Wollensak v. Sargent*, 151 U. S. 228, 38 L. ed. 141, 14 Sup. Ct. Rep. 291—*Carpenter Straw-Sewing Mach. Co. v. Searle*, 52 Fed. 811.

Editorial note.

[Liability of agent toward his principal and a third person respectively for money or property received in course of agency. 2 L.R.A.(N.S.) 657.]

V. Mutual Rights, Duties, and Liabilities.

a. Agent's Duties and Liabilities in General.

Principal's Liability on Contract Signed by Agent as Such, see *supra*, 89, 90.

To Deliver Bill of Lading Attached to Accepted Draft, see *Bills of Lading*, 4.

Broker's Duty to Follow Principal's Directions, see *Brokers*, 1.

Illegality of Contract for Agent's Disregard of Obligations, see *Contracts*, 418-420.

Agent's Duty to Account for Proceeds of Unlawful Contract, see *Contracts*, 511-517.

Fiduciary Relation of Corporate Agent, see *Corporations*, V. d.

Agent's Lien on Stock Certificates Transferred to Himself, see *Corporations*, 478.

Rights of Heirs of Agent Purchasing at Tax Sale, see *Descent and Distribution*, 33.

Estoppel of Agent as Against Principal, see *Estoppel*, 336, 337.

Presumption of Accounting by Agent, see *Evidence*, 588.

Rights and Liabilities of Factor, see *Factors*, II.

Liability for Interest, see *Interest*, 136.

Agent's Right to Protection of Statute of Limitations, see *Limitation of Actions*, 232.

Limitation of Action on Claim against Agent, see *Limitation of Actions*, 367, 449, 450, 451.

Vested Right in Public Lands as between Principal and Agent, see *Public Lands*, 1329.

Right to Traffic on his own Account, see *Shipping*, 442.

Trover by Principal against Agent, see *Trover*, 2.

Conversion by Agent, see *Trover*, 5, 7.

Purchase by Agent of Property Which He Is Selling for Principal, see *Trusts*, 150.

Of Warehouseman, see *Warehousemen*, 8.

151. The law requires the strictest good faith upon the part of an agent towards his principal. *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. Rep. 303, 34: 984

152. The substitution by an agent of a note and mortgage for \$7,000, in place of United States bonds for \$6,000, belonging to the principal, is not invalid because the agent reserved to himself the surplus over the amount of the bonds. *Cook v. Tullis*, 18 Wall. 332, 21: 933

Gifts and purchases from principal.

Collecting Debt for Principal, see *Bills and Notes*, 159.

153. Gifts procured by agents and purchases made by them from their principals should be scrutinized with a close and vigilant suspicion. *Ralston v. Turpin*, 129 U. S. 663, 9 Sup. Ct. Rep. 420, 32: 747

154. The law prohibits one selling on another's account from buying on his own, at the sale. *Marsh v. Whitmore*, 21 Wall. 178, 22: 482

155. A purchase *per interpositum personam* by a trustee or agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it. *Michoud v. Girod*, 4 How. 503, 11: 1076

156. If an agent to sell effects a sale to himself under the cover of the name of another person, he becomes in respect to the property, a trustee for the principal, and at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account, not only for its real value, but for any profit realized by him on such resale. *Robertson v. Chapman*, 152 U. S. 673, 14 Sup. Ct. Rep. 741, 38: 592

157. Where an agent to sell, sells to a purchaser without any understanding or expectation of the agent that he is to become interested in the purchase with the purchaser, or is to take his place in the purchase, he is at liberty afterwards to buy the property of such purchaser. *Robertson v. Chapman*, 152 U. S. 673, 14 Sup. Ct. Rep. 741, 38: 592

Cited in Godfrey v. Dutton, 16 App. D. C. 131—*Oberlin College v. Blair*, 45 W. Va. 819, 32 S. E. 203.

— Editorial note.

Sales by agent to himself. 3: 181; 38: 592

Liability for neglect of duty.

See also Bailment, 14.

158. Strict compliance with the instructions of a principal by the agent is a condition of exemption of the agent from liability. Loss from disregard thereof must be borne by the agent unless he establishes that the disregard had no connection with the loss, and that it would certainly have followed whether the instructions were obeyed or disregarded. *Bank of British North America v. Cooper*, 137 U. S. 473, 11 Sup. Ct. Rep. 160, 34: 759

Cited in San Pedro Lumber Co. v. Reynolds, 121 Cal. 89, 53 Pac. 410—*American Exch. Nat. Bank v. Loretta Gold & S. Min. Co.* 165 Ill. 110, 56 Am. St. Rep. 236, 46 N. E. 202.

159. An agent charged with the duty of collecting a note and fixing the liability of the indorsers is bound to give notice of non-payment to his principal, in order that the latter may do what is necessary to protect himself. *Bird v. Louisiana State Bank*, 93 U. S. 96, 23: 818

160. Agents assuming the duty of recovering back an excess of duties paid on the importation of goods for the principal are liable to him therefor, by failure to bring an action until barred by statute. *Bowerman v. Rogers*, 125 U. S. 585, 8 Sup. Ct. Rep. 986, 31: 815

— Editorial note.

Agent's liability to principal for disregard of orders or for negligence. 7: 606

b. Principal's Right to Benefit of Agent's Contract.

Principal's Right to Sue on Contract of Agent, see Parties, 26, 27.

Agent as Trustee for Principal see Trusts, 53a, 54a, 54b, 54c, 63a, 64, 66, 69, 221a.

161. Where a principal directs his agent to purchase property for him, and instructs the agent that he is willing to give a certain price, and the agent purchased it for a less price, he cannot charge the principal with the larger price which the latter had instructed the agent he was willing to pay. But an agent is not obliged to account for commissions which he received from third persons on property the title of which he held as their trustees, and which was conveyed to his principal. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. Rep. 594, 32: 1005

162. Where there was no agreement that the principal should have the benefit of the agent's outstanding contracts, and the agent, before the agency commenced, had contracted to buy a piece of property, the principal cannot recover of the agent the difference between the price at which the agent had bargained for the property and the larger price at which it was subsequently sold to the principal, where the latter suffered no pecuniary loss for the want of knowledge of such previous bargain, but got

the property at his own offer although he might have rescinded the contract on learning that the agent was selling his own property. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. Rep. 594, 32: 1005

163-4. An agreement with a special agent of the Treasury Department to collect abandoned and captured cotton on behalf of the United States, does not give the United States a claim to any part of cotton purchased by the person so employed from private owners, on his own account, and which was not captured or surrendered to the army, or the property of, or destined for, the use of the Confederate States, where none of the cotton is of the kind specified in the agreement, and the person employed is not required to devote his whole time to the business of the agency, especially where such agency has been revoked. *Flanders v. Tweed (Tweed's Case)* 16 Wall. 504, 21: 389

c. Compensation of Agent.

Of Attorney, see Attorneys, III.

Of Corporate Officer or Agent, see Corporations, 204, 205.

Of Factor, see Factors, III.

Of Partners, see Partnership, V. b.

Lien as Unlawful Preference, see Bankruptcy, 191.

Remedy at Law as Adequate for Recovery of Commissions for Procuring Allowance of Claim, see Equity, 101.

Burden of Proof in Action to Recover Commissions, see Evidence, 312.

See also *supra*, 161.

165. When the whole compensation of an agent of a company engaged in loaning money is by special agreement to be paid from the fees paid him by the borrowers and mortgagors, he cannot recover from the company pay for his services. *Hughes v. Dundee Mortg. & T. Invest. Co.* 140 U. S. 98, 11 Sup. Ct. Rep. 727, 35: 354

166. Services of an agent outside of his original authority, which were beneficial to and approved by his principal, are a proper subject of compensation in an action at law. *Wright v. Ellison*, 1 Wall. 16, 17: 555

167. If the transactions in which the parties are engaged are illegal, the agent cannot recover either commissions for services rendered therein, or for advances and disbursements by him for his principal. *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. Rep. 950, 37: 819

168. The agent of a person engaged in perpetrating a fraud upon a railroad company by appropriating bonds issued by it to his own use can acquire no lien thereon on account of his services as agent, where his principal had no title against the company. *Trask v. Jacksonville, P. & M. R. Co.* 124 U. S. 515, 8 Sup. Ct. Rep. 574, 31: 574
Cited in Knevals v. Florida C. & P. R. Co. 13

C. C. A. 415, 23 U. S. App. 549, 66 Fed. 229.

Editorial note.

[Effect of agent's wilful failure to keep and render true accounts of his agency, upon his right to compensation. 5 L.R.A.(N. S.) 469.]

d. Remedies.

Right of Principal to Sue Agent's Administrator as such, or as Individual to Recover Property, see Executors and Administrators, 169.

169. Where an action is brought for the alleged wrongful acts of the defendant in selling certain bonds of plaintiff and using the proceeds to pay the notes of a third person, if the latter, by arrangement between him and the plaintiff, had authority to and did consent to such acts, and the plaintiff, having full knowledge of the transaction, ratified and confirmed what was done, he cannot maintain the action. *Hathaway v. First Nat. Bank of Cambridge*, 134 U. S. 494, 10 Sup. Ct. Rep. 608, 33: 1004

170. Where an agent, with authority to purchase goods for his principals and draw on them for the price, has made drafts therefor which are protested, and he thereupon sells the goods without orders, it does not prejudice his right of action for damages, although he has rendered no account of sales to the defendants. *Riggs v. Lindsay*, 7 Cranch, 500, 3: 419

e. Subagents.

Ratification of Subagent's Acts, see *supra*, 128.

Delegation of Authority by Factor, see Factors, 21, 22.

See also *supra*, 92.

171. If a party sends a bill of exchange to his agent for collection, who remits it to a subagent, living in the same place with the drawee, who receives the money, the holder of the bill may recover the money of the subagent. If the subagent has made no advances and given no new credit to the agent on account of the remittance of the bill, he cannot protect himself against such an action by passing the amount of the bill to the general credit of the agent, although the agent may be his debtor. *Wilson v. Smith*, 3 How. 763, 11: 820
Distinguished in Carroll v. Exchange Bank, 30 W. Va. 525, 8 Am. St. Rep. 101, 4 S. E. 440.

Cited in Hoover v. Wise, 91 U. S. 314, 23 L. ed. 395, 14 Nat. Bankr. Rg. 270—*United States v. State Nat. Bank*, 96 U. S. 34, 24 L. ed. 648—*Kelly v. Phelan*, 5 Dill. 233, Fed. Cas. No. 7,673—*Kent v. Dawson Bank*, 13 Blatchf. 240, Fed. Cas. No. 7,714—*First Nat. Bank v. Reno County Bank*, 1 McCrary, 495, 3 Fed. 260—*Holly v. Domestic & F. Missionary Soc.* 85 Fed. 240—*Morris v. Alabama Carbon Co.* 139 Ala. 623, 36 So. 764—*Whitehead v. Peck*, 1 Ga. 156—*Rathbone use of State Bank v. Sanders*, 9

Ind. 220—*Irwin v. Reeves Pulley Co.* 20 Ind. App. 115, 48 N. E. 601—*Cecil Bank v. Farmers Bank*, 22 Md. 156—*Miller v. Farmers & M. Bank*, 30 Md. 401—*Douglas v. First Nat. Bank*, 17 Minn. 40, Gil. 18—*Millikin v. Shapleigh*, 36 Mo. 600, 38 Am. Dec. 171—*Bury v. Woods*, 17 Mo. App. 252—*Power v. First Nat. Bank*, 6 Mont. 262, 12 Pac. 597—*Mayer v. McLure*, 36 Miss. 404, 72 Am. Dec. 190—*Finch v. Karate*, 97 Mich. 26, 56 N. W. 123—*Commercial Bank v. Varnum*, 3 Lans. 90—*Planter's & F. Nat. Bank v. First Nat. Bank*, 75 N. C. 536—*Reeves v. State Bank*, 8 Ohio St. 483—*Cornwell v. Kinney*, 1 *Handy* (Ohio) 506—*Winfield Nat. Bank v. McWilliams*, 9 Okla. 509, 60 Pac. 229—*City Bank v. Traders Nat. Bank*, 2 Lack. Legal News, 217—*Gocheaur v. Hostetter*, 18 Pa. 422—*Jones v. Milliken*, 41 Pa. 255—*Commercial & A. Bank v. Jones*, 18 Tex. 820—*Rock Springs Nat. Bank v. Luman*, 6 Wyo. 158, 42 Pac. 874.

PRINCIPAL AND SURETY.

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III. Release or Discharge, 17-69.

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Effect of Unauthorized Addition of Signature of Surety to Note, see Alteration of Instruments, 5.

Sureties on Appeal Bond, see Appeal and Error, IV. i, 7.

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Conclusiveness against Surety of Judgment against Principal, see Judgment, III. k, 4.

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 Sureties as Proper Parties to Action, see Parties, 213.
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 Judgment against, for Want of Affidavit of Defense, see Pleading, 85.
 Multifariousness in Bill against Surety, see Pleading, 280.
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 Competency of Principal as Witness for Sureties, see Witnesses, 122, 130.
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 As to Bonds Generally, see Bonds.
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I. Creation and Existence of Relation.

Married Woman as Surety, see Husband and Wife, I. b, 2, b.
 Between Grantor and Grantee of Mortgaged Premises, see Mortgage, 214, 226-229.

1. The obligation of suretyship arises only from positive contract. *United States v. Price*, 9 How. 83, 13: 56

2. Where a deed of trust on land is given to secure the payment of a promissory note and the maker of the note subsequently sells the land subject to the deed of trust, this conveyance does not create the relation of principal and surety between the grantee and grantor, in the absence of any agreement to that effect between the grantee, grantor, and the holder of the encumbrance; and the grantor is, therefore, not discharged from his liability on the note by an agreement for an extension of the time of payment between the grantee and the payee of the note. *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. Rep. 119, 29: 456

Editorial note.

[Law as to becoming surety for surety-maker. 21 L.R.A. 247.]

II. Nature and Extent of Liability Generally.

Prerequisites to Recovery Against Surety on Appeal Bond, see Appeal and Error, 5683-5689.

Liability on Appeal Bond, see Appeal and Error, XI.

Liability of Bail, see Bail and Recognizance, II. c.

Judgment Against Administrator as Evidence Against His Sureties, see Evidence, 2494.

3. The contract of a surety is to be strict-

ly construed, and his liability is not to be extended by implication beyond its terms. *Miller v. Stewart*, 9 Wheat. 680, 6: 189
United States v. Boyd, 15 Pet. 187, 10: 706
United States v. Boecker, 21 Wall. 652, 22: 472

United States v. Hough, 103 U. S. 71, 26: 305

Sprigg v. Bank of Mt. Pleasant, 14 Pet. 201, 10: 419

United States v. Ulrici, 111 U. S. 38, 4 Sup. Ct. Rep. 288, 28: 344

United States v. Price, 9 How. 83, 13: 56
Limited in Butte v. Cook, 29 Mont. 94, 74 Pac. 67—*Com. v. West*, 1 Rawle. 34.

Cited in United States v. Boyd, 15 Pet. 208, 10 L. ed. 714—*McMicken v. Webb*, 6 How. 299, 12 L. ed. 446—*Leggett v. Humphreys*, 21 How. 76, 16 L. ed. 54—*Martin v. Thomas*, 24 How. 317, 16 L. ed. 690—*Smith v. United States*, 2 Wall. 235, 17 L. ed. 792—*United States v. Boecker*, 21 Wall. 657, 22 L. ed. 475—*Magee v. Manhattan L. Ins. Co.* 92 U. S. 98, 23 L. ed. 700—*United States v. Ulrici*, 111 U. S. 42, 28 L. ed. 346, 4 Sup. Ct. Rep. 288—*Prairie State Nat. Bank v. United States*, 164 U. S. 237, 41 L. ed. 418, 17 Sup. Ct. Rep. 142—*Boody v. United States*, 1 Woodb. & M. 169, Fed. Cas. No. 1,636—*United States v. Cheeseman*, 3 Sawy. 429, Fed. Cas. No. 14,790—*United States v. Cushman*, 2 Sumn. 435, Fed. Cas. No. 14,908—*United States v. Linn*, 2 McLean, 505, Fed. Cas. No. 15,606—*United States v. Campbell*, 10 Fed. 818—*Pascault v. Cochran*, 34 Fed. 364—*Bollin v. Blythe*, 46 Fed. 182—*Scott v. Scruggs*, 9 C. C. A. 250, 23 U. S. App. 280, 60 Fed. 725—*United States v. American Bonding & T. Co.* 32 C. C. A. 423, 61 U. S. App. 584, 89 Fed. 929—*United States v. Freel*, 92 Fed. 301—*United States v. Boyd*, 118 Fed. 90—*Swift & Co. v. Jones*, 135 Fed. 439—*Gray v. Noonan*, 5 Ariz. 173, 50 Pac. 116—*Montgomery v. Hughes*, 65 Atl. 204—*People v. Breyfogle*, 17 Cal. 508—*Pierce v. Whiting*, 63 Cal. 543—*Elder v. Kutner*, 97 Cal. 493, 32 Pac. 563—*Neale v. Head*, 133 Cal. 46, 65 Pac. 131—*State Bank v. Brennan*, 7 Colo. App. 430, 43 Pac. 1050—*Rockford Ins. Co. v. Rogers*, 15 Colo. App. 26, 60 Pac. 956—*Davis v. Kingsley*, 13 Conn. 298—*Olmsted v. Olmsted*, 38 Conn. 337—*State v. Griswold*, 73 Conn. 98, 46 Atl. 829—*Prairie School Twp. v. Haselen*, 3 N. D. 342, 55 N. W. 938—*Raney v. Baron*, 1 Fla. 331—*State v. Montague*, 34 Fla. 36, 15 So. 589—*Reynolds v. Hall*, 2 Ill. 39—*McIntyre v. Trustees*, 3 Ill. App. 70—*Field v. Rawlings*, 6 Ill. 583—*Governor use of Thomas v. Lagow*, 43 Ill. 141—*Chicago & A. R. Co. v. Higgins*, 58 Ill. 133—*People v. Tompkins*, 74 Ill. 487—*Ovington v. Smith*, 78 Ill. 252—*Trustees v. Otis*, 85 Ill. 181—*Schnell v. North Side Planing Mill Co.* 89 Ill. 584—*Schreffler v. Madelhoff*, 133 Ill. 551, 23 Am. St. Rep. 626, 25 N. E. 630—*Abrahams v. Jones*, 20 Ill. App. 86—*Judah v. Zimmerman*, 22 Ind. 392—*Crews v. Ross*, 44 Ind. 489—*Scott v. State*, 46 Ind. 205—*State ex rel. Logansport Nat. Bank v. Kent*, 53 Ind. 118—*Burns v. Singer Mfg. Co.* 87 Ind. 548—*Markland Min. & Mfg. Co. v. Kimmel*, 87 Ind. 569—*Lafayette v. James*, 92 Ind. 244, 47 Am. Rep. 140—*Irwin v. Kilburn*, 104 Ind. 115, 3 N. E. 650—*Wapello County v. Bligham*, 10 Iowa, 43, 74 Am. Dec. 370—*Thompson v. Dickerson*, 22 Iowa, 363—*Spencer v. Sherwin*, 86 Iowa, 121, 53 N. W. 86—*Stillman v. Wickham*, 106 Iowa, 509, 76 N. W. 1003—*Novak v. Pitlick*, 120

Iowa, 289, 98 Am. St. Rep. 360, 94 N. W. 916—Hickman v. Fargo, 1 Kan. App. 705, 42 Pac. 381—Singer Mfg. Co. v. Armstrong, 7 Kan. App. 329, 54 Pac. 571—Green v. Locke, 31 La. Ann. 659—Fullerton v. Miller, 22 Md. 8—Wehr v. German Evangelical Lutheran St. M. Congregation, 47 Md. 190—Archer v. State, 74 Md. 451, 28 Am. St. Rep. 261, 22 Atl. 8—Detroit Sav. Bank v. Ziegler, 49 Mich. 160, 43 Am. Rep. 456, 13 N. W. 496—Overbeck v. Mayer, 59 Mo. App. 295—Springfield Lighting Co. v. Hobart, 98 Mo. App. 232, 68 S. W. 942—State ex rel. Hobart v. Smith, 173 Mo. 406, 73 S. W. 211—McCluskey v. Cromwell, 11 N. Y. 598—Bigelow v. Benton, 14 Barb. 128—Keene v. Newark Watch Case Material Co. 39 Misc. 8, 78 N. Y. Supp. 753—Stendal v. Ackerman, 43 Misc. 58, 86 N. Y. Supp. 468—Magee v. Manhattan L. Ins. Co. 51 How. Pr. 415—Van Sickle v. Buffalo County, 13 Neb. 119, 42 Am. Rep. 753, 13 N. W. 19—Gray v. School District, 35 Neb. 448, 53 N. W. 377—Crane Co. v. Specht, 39 Neb. 130, 42 Am. St. Rep. 562, 57 N. W. 1015—Paulson v. Halsey, 37 N. J. L. 210—Monroe v. DeForest, 53 N. J. Eq. 267, 31 Atl. 773—Carson Opera House Asso. v. Miller, 16 Nev. 338—State use of Magie v. Cutting, 2 Ohio St. 7—Lowe v. Guthrie, 4 Okla. 300, 44 Pac. 198—Hall v. Williamson, 9 Ohio St. 23—McGowney v. State, 20 Ohio, 97—Portland Trust Co. v. Havelly, 36 Or. 243, 61 Pac. 346—Crompton's Estate, 20 Phila. 65—Hutchinson v. Woodwell, 42 Phila. Leg. Int. 320—Cannell v. Crawford County, 59 Pa. 203—Griffith v. Newell, 69 S. C. 304, 48 S. E. 259—Borden v. Houston, 2 Tex. 607—Smith v. Montgomery, 3 Tex. 210—Smith v. Doak, 3 Tex. 222—Ayers v. Hite, 97 Va. 469, 34 S. E. 44—Stephens v. Elver, 101 Wis. 395, 77 N. W. 737—Blyth v. Pinkerton Nat. Detective Agency, 10 Wyo. 152, 57 L.R.A. 472, 67 Pac. 618.

4. The liability of a surety is limited by the penalty of his bond. Humphreys v. Leggett, 9 How. 297, 13: 145
Leggett v. Humphreys, 21 How. 66, 16: 50
Martin v. Thomas, 24 How. 315, 16: 689
M'Gill v. Bank of United States, 12 Wheat. 511, 6: 711

Distinguished in Ives v. Merchants Bank, 12 How. 164, 13 L. ed. 938.

Cited in Smith v. United States, 2 Wall. 235, 17 L. ed. 792—Leggett v. Humphreys, 21 How. 76, 16 L. ed. 54—United States v. Ulrich, 111 U. S. 42, 28 L. ed. 346, 4 Sup. Ct. Rep. 288—United States v. Freely, 186 U. S. 316, 46 L. ed. 1181, 22 Sup. Ct. Rep. 875—United States v. Cheeseman, 8 Sawy. 429, Fed. Cas. No. 14,790—United States v. Hills, 4 Cliff. 622, Fed. Cas. No. 15,369—United States v. American Bonding & T. Co. 32 C. C. A. 423, 61 U. S. App. 584, 89 Fed. 929—United States v. Freely, 92 Fed. 301—Swift v. Jones, 135 Fed. 439—Graeter v. DeWolf, 112 Ind. 3, 13 N. E. 111—Pennsylvania Co. v. Swain, 189 Pa. 628, 42 Atl. 297—Cross v. Scarboro, 6 Bart. 136.

5. The rule that a contract of suretyship is *strictissimi juris*, does not apply to matters collateral and incidental, or which arise in execution of it. Warner v. Connecticut Mut. L. Ins. Co. 109 U. S. 357, 3 Sup. Ct. Rep. 221, 27: 962

6. When a party is in reality only surety, but is willing to place himself in the situation of principal by expressly declaring up-

on his contract that he binds himself as such, he undertakes as a partner of the debtor. Sprigg v. Bank of Mt. Pleasant, 10 Pet. 257, 9: 416

Cited in Picott v. Signiogo, 22 Mo. 594—Heath v. Derry Bank, 44 N. H. 180.

7-8. The general rule is to attribute to the obligation of a surety the same extent as that of the principal. Benjamin v. Hilliard, 23 How. 149, 16: 518

Cited in Lamb v. Ewing, 4 C. C. A. 327, 12 U. S. App. 11, 54 Fed. 276—United States v. Freely, 92 Fed. 301—United States v. Maloney, 4 App. D. C. 511—Fulton v. Fletcher, 12 App. D. C. 17—Groendyke v. Musgrave, 123 Iowa, 539, 99 N. W. 144.

9. No distinction made between surety and principal debtor in regard to liability on a prison-bonds bond alleged to have been broken after discharge of the principal fraudulently obtained. Simms v. Slacum, 3 Cranch, 300, 2: 446

Cited in Farmers' Bank v. Boyer, 16 Serg. & R. 50.

10. Sureties are as much bound by the true intent and meaning of their contracts which they voluntarily subscribe, as principals. Bowman v. Read (Read v. Bowman) 2 Wall. 591, 17: 812

Cited in Lamb v. Ewing, 4 C. C. A. 328, 12 U. S. App. 11, 54 Fed. 276—Campbell & Z. Co. v. American Surety Co. 129 Fed. 493—United States v. Maloney, 4 App. D. C. 511—Fulton v. Fletcher, 12 App. D. C. 17.

11. The responsibility of a surety to a note cannot be made to apply by intendment to a note differing in its terms from that in fact executed. McMicken v. Webb, 6 How. 292, 12: 443

Distinguished in Brockway v. Petted, 79 Mich. 624, 7 L.R.A. 741, 45 N. W. 61.

Cited in Smith v. United States, 2 Wall. 235, 17 L. ed. 792—Ordan v. Davis, 116 Cal. 37, 47 Pac. 772—Manufacturers' Nat. Bank v. Dickerson, 41 N. J. L. 450, 32 Am. Rep. 237.

12-13. The engagement of a surety for the conduct or fidelity of his principal, or any other matter usually contemplated as arising in the future, is to be interpreted prospectively, and not retrospectively. Meyers v. Block, 120 U. S. 206, 7 Sup. Ct. Rep. 525, 30: 642

14. The insolvency of the principal debtor is no defense to the surety, either at law or in equity. Hardeman v. Harris, 7 How. 726, 12: 839

Editorial notes.

Liabilities of sureties for debts. 3: 708; 6: 577; 42: 967

Rights and liabilities of sureties. 12: 66

[Guaranty, by one signing obligation as surety, of genuineness of other signatures. 49 L.R.A. 315.]

Death of surety.

15. If the surety in a bond, joint but not several, who did not participate in the consideration, should die before his principal, his representatives cannot be sued at law,

nor will they or his estate be charged in equity. *Pickersgill v. Lahens*, 15 Wall. 140, 21: 119

Cited in Wood v. Fisk, 4 Hun, 526—Chard v. Hamilton, 56 Hun, 261, 9 N. Y. Supp. 575—Glasscock v. Hamilton, 62 Tex. 150.

16. Where the surety on a collector's bond died after the bond had been transmitted to the government, but before its approval by the comptroller, his estate was held liable. *Broome v. United States*, 15 How. 143, 14: 636

Cited in United States v. Le Baron, 19 How. 76, 15 L. ed. 526—McClaskey v. Barr, 79 Fed. 414—Vorls v. State, 47 Ind. 349.

III. Release or Discharge.

a. In General.

Effect of Surety's Death to Release Estates from Liability, see *supra*, 15, 16.

Of Attachment Bond Against Partnership, see Attachment, 39.

Discharge of Surety on Bail Bond, see Bail and Recognizance, I. b.; II. e.

Discharge of Indorser, see Bills and Notes, III. c.

Defenses to Action on Bond, see Bonds, 12-18.

Liability and Discharge of Bond of Executor or Administrator Generally, see Executors and Administrators, IV. h, 2.

Release of Married Woman, see Husband and Wife, 23.

17. A surety in a bond is bound only by its conditions. Where the condition is in the alternative, the bond is discharged as to him by the performance of one of the alternative conditions. *Dumont v. United States*, 98 U. S. 142, 25: 65

Cited in United States v. Georgi, 44 Fed. 257—Chattanooga, R. & C. R. Co. v. Evans, 14 C. C. A. 132, 31 U. S. App. 432, 66 Fed. 826—United States v. National Surety Co. 112 Fed. 342.

18. A notice to the government, by the surety on an official bond, that he is unwilling to continue his responsibility, would induce it, in most instances, to take the necessary steps for his release. *Smith v. United States*, 5 Pet. 292, 8: 130

19. The act of May, 1820, which requires new sureties to be given by certain public officers on or before September, 1820, does not, expressly or by implication, discharge the former sureties from their liability. *United States v. Nicholl*, 12 Wheat. 505, 6: 709

Cited in Postmaster General v. Munger, 2 Palne, 197, Fed. Cas. No. 11,309—Postmaster General v. Reeder, 4 Wash. C. C. 686, Fed. Cas. No. 11,311—Bank of Washington v. Barrington, 2 Penr. & W. 44—Tennessee Hospital v. Fuqua, 1 Lea, 609—Collins v. Knight, 3 Tenn. Ch. 185—Richmond & P. R. Co. v. Kasey, 30 Gratt. 229—State v. Hill, 17 W. Va. 463.

20. Mere laches, without fraud, does not

discharge a surety to a bond between private individuals. Per Story, *J. United States v. Kirkpatrick*, 9 Wheat. 720, 6: 199

Cited in Sprigg v. Bank of Mt. Pleasant, 14 Pet. 207, 10 L. ed. 422—American Bonding Co. v. Spokane Bldg. & Loan Soc. 65 C. C. A. 124, 130 Fed. 740—Sparks v. Farmers' Bank, 3 Del. Ch. 303—Moreland v. State Bank, Breeze, (Ill.) 205—Louisiana State Bank v. Ledoux, 3 La. Ann. 685—Read v. Cutts, 7 Me. 193, 22 Am. Dec. 184—Hunt v. Bridgman, 2 Pick. 585, 13 Am. Dec. 458—Amherst Bank v. Root, 2 Met. 541—Tapley v. Martin, 116 Mass. 278—Morris Canal & Bkg. Co. v. Van Vorst, 21 N. J. L. 117—Schroeppel v. Shaw, 5 Barb. 590—Looney v. Hughes, 26 N. Y. 522—State Bank v. Locke, 15 N. C. (4 Dev. L.) 548—Pittsburg, Ft. W. & C. R. Co. v. Shaeffer, 59 Pa. 356—Richmond & P. R. Co. v. Kasey, 30 Gratt. 229.

21-2. In the absence of fraud the surety on a sheriff's bond is discharged by the payment and satisfaction out of his property, to the full amount of the penalty of the bond, of a judgment entered against him as such surety, although at the time of the entry of the judgment an action was pending in an appellate court against the sheriff and the surety, and the sheriff, during the pendency of the appeal, transferred property to the surety to indemnify him against loss. *Leggett v. Humphreys*, 21 How. 66, 16: 50

23. Sureties on an official bond are not released by the facts that the government on discovering a defalcation brings an action against the officer alone and attaches his property, and that there is a delay of more than a year and a half in taking judgment against him, although he puts in no answer, when there is no evidence that they have suffered any damage by reason of any action or lack of action on the part of the government. *Moses v. United States*, 166 U. S. 591, 17 Sup. Ct. Rep. 682, 41: 1119

24. A surety on a note given by the purchaser at a receiver's sale is not released by the receiver's failure to reserve a lien on the property sold, as he is directed to do by the order of the court, when the surety signs an apparently unconditional obligation, and fails to notify either the receiver or his principal that he signs upon condition of the retention of such lien. *Joyce v. Auten*, 179 U. S. 591, 21 Sup. Ct. Rep. 227, 45: 332

25. The release from a mortgage given by a wife, as surety, to secure her husband's debt of certain portions of the mortgaged premises on the receipt and application, to the mortgage, of the proceeds of a sale thereof at a fair price, does not release the surety. *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. Rep. 67, 35: 843

Editorial notes.

Discharge of surety. 35: 486; 35: 679
[Breach of warranty in the principal contract as defense to a surety. 21 L.R.A. 406.]

b. Fraud and Concealment.

Fraud in Inducing Signing of Bond, see Bonds, 12.

As Ground to Enjoin Enforcement of Judgment Rendered against Surety on False Return of Service, see Injunction, 100.

Fraud of Principal in Transportation Bond, see Internal Revenue, 174.

Right of Surety to Set up Fraud of Principal, see Pleading, 770.

26. Taking a bond for discharge upon *exeat* which makes the surety liable for any amount adjudged to be due in the action, but which he executes in the belief that it is only to secure defendant's appearance, under an agreement with defendant that it is to secure the amount adjudged due, of which agreement the surety is ignorant, is a fraud upon the surety. *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. Rep. 972, 999, 35: 678

27. A surety is a favored debtor. The slightest fraud on the part of the creditor, touching a contract, annuls it. He must, however, be diligent in seeking information. *Magee v. Manhattan L. Ins. Co.* 92 U. S. 93, 23: 699
Distinguished in Engler v. People's F. Ins. Co. 46 Md. 333.

Cited in Denny v. Seeley, 34 Or. 367, 55 Pac. 976.

28. The mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases. The concealment, to release a surety, must have been at the execution of the instrument. *Magee v. Manhattan L. Ins. Co.* 92 U. S. 93, 23: 699
Cited in Frelinghuysen v. Baldwin, 16 Fed. 454—*Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 66, 19 C. C. A. 310, 37 U. S. App. 692, 72 Fed. 436—*Frink v. Southern Exp. Co.* 82 Ga. 42, 3 L.R.A. 482, 8 S. E. 862—*Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 543—*Smith v. First Nat. Bank*, 107 Ky. 261, 53 S. W. 648—*Orleans & J. R. Co. v. International Constr. Co.* 113 La. 413, 37 So. 10—*Lachman v. Block*, 28 L.R.A. 262, 17 So. 153—*Lake v. Thomas*, 84 Md. 624, 36 Atl. 437—*Wells, F. & Co's Express v. Walker*, 9 N. M. 199, 50 Pac. 353—*Hurd v. Green*, 17 Hun, 328—*Kingsland v. Pryor*, 33 Ohio St. 24—*Harrisburg v. Gilles*, 192 Pa. 200, 44 Atl. 48.

29. A creditor is not bound to inform an intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction. *Magee v. Manhattan L. Ins. Co.* 92 U. S. 93, 23: 699

Editorial note.

[Effect of fraud in obtaining. 21 L.R.A. 409.]

c. Discharge of Principal.

Effect of Discharge in Bankruptcy, see Bankruptcy, 399, 400, 405, 406.

Effect of Principal's Discharge in Insolvency, see Insolvency, 44.

As Defense to Action against Surety which He might have made but did not, see Injunction, 88.

30. The limit of the obligation of a surety is the obligation of the principal; and when that is extinguished the surety is liberated. *Cage v. Cassidy*, 23 How. 109, 16: 430

31. The discharge under the act of June 6, 1798, for the relief of persons imprisoned for debts due the United States, by the Secretary of the Treasury, of the principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against the sureties for the amount due upon the judgment. *United States v. Stansbury*, 1 Pet. 573, 7: 267
Cited in Hunter v. United States, 5 Pet. 186, 8 L. ed. 91—*Magniac v. Thompson*, 15 How. 301, 14 L. ed. 704—*United States v. Hunter*, 5 Mason, 65, Fed. Cas. No. 15,426—*Salmon v. Clagett*, 3 Bland. Ch. 178—*Clagett v. Salmon*, 5 Gill & J. 333—*State, David, Prosecutor, c. Blundell*, 40 N. J. L. 376.

32. Where a resigning administrator who was one of two originally appointed proceeded in conformity with the statute in such case made and provided, and, under the orders of the court of ordinary, ceased to be administrator, and was discharged from further liability as such, and a new bond was given by his successor,—the sureties who had signed the first bond of the two administrators were also discharged. *Veach v. Rice*, 131 U. S. 293, 9 Sup. Ct. Rep. 730, 33: 163
Distinguished in Sullivan v. Williams, 43 S. C. 525, 21 S. E. 642.

Cited in Smith v. Packard, 39 C. C. A. 301, 98 Fed. 799.

33. Sureties on a distiller's bond cannot be subjected to the penalty attached to the commission of an offense, when the principal has effected a full and complete compromise with the government, under the sanction of an act of Congress, of prosecutions based upon the same offense and designed to secure the same penalty. *United States v. Chouteau*, 102 U. S. 603, 26: 246

34. Where the clerk of a court was sued upon his official bond for surrendering goods without taking a bond with sufficient sureties, a plea that the bond which he took was assigned to the plaintiffs, who had brought suit and received large sums of money in discharge of the bond, was good. The clerk was the last and most favored surety, entitled, if he was forced to pay, to all the securities which the plaintiffs had. Consequently the discharge of the bond must discharge him, as he cannot be in a worse situation than if he had been a party to the bond in common with the other sureties. *Bevins use of Earle v. Ramsey*, 15 How. 179, 14: 652
Cited in Colwell v. Springfield Iron Co. 24 Fed. 632—*Lick v. Madden*, 36 Cal. 214, 95 Am.

Dec. 175—Hixon v. Cupp, 5 Okla. 554, 49 Pac. 927.

d. Failure to Proceed Against Principal.

Indulgence to Principal, see *infra*, III. e.
Discharge of Indorser by Failure to Proceed or to Exhaust Remedy, see Bills and Notes, 107-130.

As to whether Indorser is Surety, see Bills and Notes, 121, 125.

See also *supra*, 20.

35. Mere forbearance to sue a promissory note without an agreement therefor does not discharge a surety. Bank of Uniontown v. Mackey, 140 U. S. 220, 11 Sup. Ct. Rep. 844, 35: 485

36. Although the failure to sue upon a demand may have resulted injuriously to the surety, yet so long as there was no variation in the original contract of suretyship, the mere forbearance to sue the principal, without the request of the surety, will not discharge the latter. Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. Rep. 67, 35: 843

37. The act of Congress for regulating the Postoffice Department does not discharge the obligors in the official bond of a deputy postmaster from the direct claim of the United States upon them, on the failure of the Postmaster General to commence a suit against the defaulting postmaster within the time prescribed by law. Dox v. Postmaster-General, 1 Pet. 318, 7: 160
Cited in United States v. Wright, Fed. Cas. No. 16,776.

38. The provision of the law requiring a delinquent paymaster to be recalled, and a new appointment to be made in his place, is merely directory, and intended for the security of the government, but forms no part of the contract with the surety on his bond. United States v. Vanzandt, 11 Wheat. 184, 6: 448

Cited in Bank of United States v. Dandridge, 12 Wheat. 81, 6 L. ed. 558—United States v. Nicholl, 12 Wheat. 509, 6 L. ed. 710—United States v. Cutter, 2 Curt. C. C. 625, Fed. Cas. No. 14,911—Woolridge v. McKenna, 8 Fed. 662—United States v. De Visser, 10 Fed. 648—Pickering v. Day, 3 Houst. (Del.) 532, 95 Am. Dec. 291—State v. Smith, 16 Fla. 188—Bond v. Central Bank, 2 Ga. 108—Kindle v. State, 7 Blackf. 589—Moreland v. State Bank, Breese (Ill.) 205—Stern v. People, 102 Ill. 550—M'Haney v. Crabtree, 6 T. B. Mon. 107—State v. Hayes, 7 La. Ann. 121—Milburn v. State, 1 Md. 19—Young v. State, 7 Gill & J. 263—Green v. Brandon, Walk. (Miss.) 372—Morris Canal & Bkg. Co. v. Van Vorst, 21 N. J. L. 117—Newark v. Stout, 52 N. J. L. 49, 18 Atl. 943—Hayden v. Auburn Prison, 1 Sandf. Ch. 198—Albany Dutch Church v. Vedder, 14 Wend. 171—Village v. King, 116 N. Y. 362, 22 N. E. 559—Crawn v. Com. 84 Va. 287, 4 S. E. 721—Lake County v. Nellon, 44 Or. 20, 74 Pac. 212—Bank of Kentucky v. Schuykill Bank, 1 Pars. Sel. Eq. Cas. 231—Pittsburg, Ft. W. & C. R. Co. v. Shaeffer, 59 Pa. 357—Com. v. Holmes, 25 Gratt. 775.

39. The statute providing that a delinquent paymaster shall be recalled and another appointed in his place does not remove from office the delinquent paymaster *ipso facto*, but only makes it the duty of the proper officer to remove him, and therefore the circumstances of new funds being placed in his hands after his delinquency does not discharge the surety on his bond. United States v. Vanzandt, 11 Wheat. 184, 6: 448

40. Where the laws required periodical accounts and settlements, a mere omission to bring a suit, upon the neglect of the officer or agent to account, will not discharge his sureties. United States v. Vanzandt, 11 Wheat. 184, 6: 448
Smith v. United States, 5 Pet. 292, 8: 130
Dox v. Postmaster-General, 1 Pet. 318, 7: 160

Cited in Minturn v. United States, 106 U. S. 445, 27 L. ed. 211, 1 Sup. Ct. Rep. 402—Kimball v. United States, 5 Ct. Cl. 262—Silvey v. United States, 7 Ct. Cl. 342—United States v. Cutler, 2 Curt. C. C. 625, Fed. Cas. No. 14,911—United States v. Gausen, 2 Woods, 99, Fed. Cas. No. 15,192—United States v. De Visser, 10 Fed. 648—United States v. Adams, 54 Fed. 116—United States v. National Bank, 2 Mackey, 294—State v. Smith, 16 Fla. 189—Boone County v. Jones, 54 Iowa, 703, 37 Am. Rep. 229, 2 N. W. 987—Detroit v. Weber, 26 Mich. 290—Morris Canal & Bkg. Co. v. Van Vorst, 21 N. J. L. 117—Newark v. Stout, 52 N. J. L. 49, 18 Atl. 943—Albany Dutch Church v. Vedder, 14 Wend. 171—Re Mohawk & H. R. R. Co. 19 Wend. 143—Looney v. Hughes, 30 Barb. 613—Looney v. Hughes, 26 N. Y. 522—Monroe County v. Otis, 62 N. Y. 95—Converse v. Porter, 45 N. H. 399—Com. v. Porter, 21 Pa. 389—Com. v. Brice, 22 Pa. 214, 60 Am. Dec. 79—Richmond & P. R. Co. v. Kasey, 30 Gratt. 230—Crawn v. Com. 84 Va. 287, 10 Am. St. Rep. 839, 4 S. E. 721.

41. The provisions of the statute requiring the settlement of the accounts of treasury officers to be made at short intervals are for the protection of the government and form no part of the contract with the officer's sureties, and therefore a failure to enforce them will not discharge such sureties from liability. United States v. Nicholl, 12 Wheat. 505, 6: 709

Cited in United States v. Boyd, 15 Pet. 208, 10 L. ed. 713—United States v. De Visser, 10 Fed. 648—Detroit v. Weber, 26 Mich. 290—Albany Dutch Church v. Vedder, 14 Wend. 171—Boreland v. Washington County, 20 Pa. 151—Com. v. Holmes, 25 Gratt. 775—Crawn v. Com. 84 Va. 287, 10 Am. St. Rep. 839, 4 S. E. 721.

42. Sureties on the bond of a United States official are not released by failure to enforce the rules of the treasury department requiring officers to account and make quarterly payments, since these regulations are for the protection of the government merely and form no part of the contract of suretyship. United States v. Boyd, 15 Pet. 187, 10: 706

Cited in Kimball v. United States, 5 Ct. Cl. 262—Jones v. United States, 18 Wall. 663, 21 L. ed. 868—United States v. De Visser, 10 Fed. 648—Supreme Council C. K. of A. v. Fidelity & C. Co. 11 C. C. A. 101, 22 U.

S. App. 439, 63 Fed. 52—Newark v. Stout, 52 N. J. L. 49, 18 Atl. 943—Monroe County v. Otis, 62 N. Y. 95—Olean v. King, 116 N. Y. 362, 22 N. E. 559—Barry v. Screwmen's Benev. Asso. 67 Tex. 253, 3 S. W. 261—Com. v. Holmes, 25 Gratt. 775—Crawn v. Com. 84 Va. 287, 10 Am. St. Rep. 839, 4 S. E. 721.

43. The negligence of the officers of the government in failing to require an officer to submit his accounts and make settlements at stated intervals, as required by law, does not discharge the sureties on the officer's bond. *United States v. Kirkpatrick*, 9 Wheat. 720, 6: 199

Distinguished in New Orleans v. Blache, 6 La. 517—*Hayden v. State Prison*, 1 Sandf. Ch. 198—*M'Haney v. Crabtree*, 6 T. B. Mon. 107.

Cited in United States v. Vanzandt, 11 Wheat. 187, 6 L. ed. 450—*United States v. Nicholl*, 12 Wheat. 509, 6 L. ed. 710—*Dox v. Postmaster General*, 1 Pet. 325, 7 L. ed. 163—*United States v. Boyd*, 15 Pet. 208, 10 L. ed. 713—*Soule v. United States*, 100 U. S. 12, 25 L. ed. 538—*Minturn v. United States*, 106 U. S. 444, 27 L. ed. 210, 1 Sup. Ct. Rep. 402—*United States v. Dalles Military Road Co.* 140 U. S. 632, 35 L. ed. 571, 11 Sup. Ct. Rep. 988—*United States v. Verdier*, 164 U. S. 216, 41 L. ed. 408, 17 Sup. Ct. Rep. 42—*Jackson v. Simonton*, 4 Cranch, C. C. 261, Fed. Cas. No. 7,147—*Locke v. Postmaster General*, 3 Mason, 455, Fed. Cas. No. 8,441—*Postmaster General v. Munger*, 2 Paine, 197, Fed. Cas. No. 11,309—*Postmaster General v. Reeder*, 4 Wash. C. C. 680, Fed. Cas. No. 11,311—*Raymond v. United States*, 14 Blatchf. 52, Fed. Cas. No. 11,596—*United States v. Cutter*, 2 Curt. C. C. 625, Fed. Cas. No. 14,911—*United States v. Hosmer*, Fed. Cas. No. 15,394—*United States v. Minturn*, Fed. Cas. No. 15,783—*United States v. Wright*, Fed. Cas. No. 16,776—*United States v. Little Miami, C. & X. R. Co.* 1 Fed. 701—*United States v. Beebe*, 4 McCrary, 13, 17 Fed. 38—*United States v. Alexandria*, 4 Hughes, 548, 19 Fed. 611—*United States v. Saylor*, 31 Fed. 549—*United States v. Adams*, 54 Fed. 116—*Meads v. United States*, 26 C. C. A. 233, 54 U. S. App. 150, 81 Fed. 688—*Williams v. Lyman*, 31 C. C. A. 514, 60 U. S. App. 25, 88 Fed. 241—*Smith v. United States*, 5 Ariz. 64, 45 Pac. 341—*Pickering v. Day*, 3 Houst. (Del.) 538, 95 Am. Dec. 291—*State v. Smith*, 16 Fla. 188—*Stern v. People*, 102 Ill. 550—*Kindle v. State*, 7 Blackf. 589—*Boone County v. Jones*, 54 Iowa, 703, 37 Am. Rep. 229, 2 N. W. 987—*Independent School District v. Hubbard*, 110 Iowa, 63, 80 Am. St. Rep. 271, 81 N. W. 241—*Com. ex rel. Keel v. Preston*, 5 T. B. Mon. 588—*State v. Dunn*, 11 La. Ann. 551—*Farmington v. Stanley*, 60 Me. 476—*Young v. State*, 7 Gill & J. 263—*Milburn v. State*, 1 Md. 19—*McShane v. Howard Bank*, 73 Md. 156, 10 L.R.A. 537, 20 Atl. 776—*Detroit v. Weber*, 26 Mich. 290—*St. Louis County v. Security Bank*, 75 Minn. 181, 77 N. W. 815—*State use of Carroll County v. Roberts*, 68 Mo. 237, 30 Am. Rep. 788—*Schuster v. Weiss*, 114 Mo. 167, 19 L.R.A. 185, 21 S. W. 438—*Newark v. Stout*, 52 N. J. L. 49, 18 Atl. 943—*Looney v. Hughes*, 30 Barb. 613—*People v. Russell*, 4 Wend. 575—*Albany Dutch Church v. Vedder*, 14 Wend. 171—*Lake County v. Nelson*, 44 Or. 20, 74 Pac. 212—*McKee v. Com.* 2 Grant, Cas. 24—*Boreland v. Washington County*, 20 Pa. 151—*Com. v. Porter*, 21 Pa.

389—*Com. v. Brice*, 22 Pa. 214, 60 Am. Dec. 79—*Schuylkill County v. Com.* 36 Pa. 536—*Com. v. Philadelphia*, 157 Pa. 569, 27 Atl. 553—*Harrisburg v. Guiles*, 192 Pa. 200, 44 Atl. 48—*Com. use of Montgomery County v. Jimison*, 205 Pa. 370, 54 Atl. 1036—*McLean v. State*, 8 Helsk. 208—*Com. v. Holmes*, 25 Gratt. 775—*Loving v. Auditor*, 76 Va. 950—*Crawn v. Com.* 84 Va. 286, 10 Am. St. Rep. 839, 4 S. E. 721—*King County v. Ferry*, 5 Wash. 554, 19 L.R.A. 508, 34 Am. St. Rep. 880, 32 Pac. 538.

44. The law of Alabama passed in 1821, which authorizes securities to require of the creditor forthwith to put bond, etc., in suit, and absolves security unless the creditor commences suit, etc., does not include a case where principal and security unite in a joint and several sealed bill. (Affirmed upon equal division.) *Ellis v. Jones*, 1 How. 197, 11: 100

e. Indulgence to Principal.

Failure to Proceed against Principal Generally, see *supra*, III. d.

Discharge of Indorser by Indulgence, see *Bills and Notes*, 103-110.

Discharge of Guarantor by, see *Guaranty*, 57.

Discharge of Mortgagor by Extending Time to Grantee Assuming Mortgage, see *Mortgage*, 214, 230.

Question of Law or Fact as to, see *Trial*, 337.

See also *supra*, 2, 23; *infra*, 59.

45. Taking from the principal a mortgage which cannot be enforced for a certain time does not discharge a surety where it is taken merely as collateral security. *United States v. Hodge*, 6 How. 279, 12: 437
Cited in Tiernan v. Woodruff, 5 McLean. 352, Fed. Cas. No. 14,028—*United States v. Campbell*, 10 Fed. 820—*Harper v. National L. Ins. Co.* 5 C. C. A. 507, 17 U. S. App. 48, 56 Fed. 284—*Sweeney v. Bixler*, 69 Ala. 542—*Mobile L. Ins. Co. v. Randall*, 71 Ala. 223—*Mobile & M. R. Co. v. Brewer*, 76 Ala. 142—*Pendergrass v. Hellman*, 50 Ark. 263, 7 S. W. 132—*Fisher v. Denver Nat. Bank*, 22 Colo. 381, 45 Pac. 440—*Rosenbaum v. Hayes*, 10 N. D. 328, 86 N. W. 973—*Duer v. Morrill*, 20 Ill. App. 359—*Hall v. First Nat. Bank*, 5 Kan. App. 494, 47 Pac. 566—*Dunn v. Collins*, 70 Me. 231—*Brengle v. Bushey*, 40 Md. 149, 17 Am. Rep. 586—*Firemen's Ins. Co. v. Wilkinson*, 35 N. J. Eq. 179—*Elwood v. Delfendorf*, 5 Barb. 409—*Wagman v. Hoag*, 14 Barb. 239—*Fallhill Nat. Bank v. Sleight*, 1 App. Div. 191, 37 N. Y. Supp. 155—*Cary v. White*, 52 N. Y. 144—*Shaw v. First Associated Reformed Presby. Church*, 39 Pa. 236—*Gardner v. Gardner*, 23 S. C. 501—*Providence Mach. Co. v. Browning*, 70 S. C. 155, 49 S. E. 323—*Wood v. McFerrin*, 2 Baxt 495—*Paine v. Voorhees*, 26 Wis. 532.

46. When the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, mutually accommodate each other, there is no ground for the surety to

complain. *Benjamin v. Hillard*, 23 How. 149, 16: 518
Cited in *Fertig v. Bartles*, 78 Fed. 867—*Anderson v. May*, 10 Helsk. 88—*De Mattos v. Jordan*, 15 Wash. 389, 46 Pac. 402—*Grafton v. Hinkley*, 111 Wis. 57, 86 N. W. 859.

47. A mere delay in enforcing payment will not discharge a surety unless some agreement has been made injurious to his interest. *Sprigg v. Bank of Mt. Pleasant*, 14 Pet. 201, 10: 419

48. Mere voluntary indulgence to a debtor, without consideration, does not discharge sureties. *Creath v. Sims*, 5 How. 192, 12: 111

Cited in *Gordon v. Third Nat. Bank*, 144 U. S. 104, 36 L. ed. 363, 12 Sup. Ct. Rep. 657—*Re Goodwin*, 5 Dill. 142, Fed. Cas. No. 5,549—*Hazard v. White*, 26 Ark. 158—*Pfeiffer v. Knapp*, 17 Fla. 157—*Hart v. Stribling*, 25 Fla. 451, 6 So. 455—*Hale v. Forbis*, 3 Mont. 402—*Schroeppel v. Shaw*, 5 Barb. 590.

49. A mere agreement, by the holder of a bill with the drawer, for delay, without any consideration for it, and without any communication with or assent of the indorser, will not discharge the latter after he has been fixed in his responsibility by the refusal of the drawee and due notice to himself. *M'Leomore v. Powell*, 12 Wheat. 554, 6: 726

Distinguished in *Gardner v. Gardner*, 23 S. C. 591.

Cited in *Sprigg v. Bank of Mt. Pleasant*, 14 Pet. 207, 10 L. ed. 422—*Postmaster General v. Reeder*, 4 Wash. C. C. 687, Fed. Cas. No. 11,311—*Tiernan v. Woodruff*, 5 McLean, 352, Fed. Cas. No. 14,028—*Pyke v. Searcy*, 4 Port. (Ala.) 61—*Ellis v. Bibb*, 2 Stew. (Ala.) 84—*Pickering v. Day*, 3 Houst. (Del.) 536, 95 Am. Dec. 291—*Pfeiffer v. Knapp*, 17 Fla. 157—*Shaw v. Binkard*, 10 Md. 228—*Freeman's Bank v. Rollins*, 13 Me. 207—*Leavitt v. Savage*, 16 Me. 73—*Johnson v. Planters Bank*, 4 Smedes & M. 171, 43 Am. Dec. 480—*Pintard v. Davis*, 20 N. J. L. 207—*Morris Canal & Bkg. Co. v. Van Vorst*, 21 N. J. L. 121—*Sally v. Elmore*, 2 Paige, Ch. 500—*Bank of Steubenville v. Leavitt*, 5 Ohio, 214—*Washington v. Tait*, 3 Humph. 546—*Grimes v. Nolen*, 3 Humph. 413—*Wells v. Grant*, 4 Yerg. 495—*Peay v. Poston*, 10 Yerg. 114—*Benson v. Phipps*, 87 Tex. 581, 47 Am. St. Rep. 128, 29 S. W. 1061—*Brown v. Fountain*, 3 Tex. Civ. App. 231, 22 S. W. 129.

50. A mere proposition to give time, and suspend the right to sue, upon certain conditions and contingencies, which are not proved to have been complied with or to have happened, will not discharge the sureties. *United States v. Nicholl*, 12 Wheat. 505, 6: 709

51. An agreement between the creditor and principal debtor for delay, in order to discharge the surety, must be an agreement having a valid consideration and binding in law upon the parties. *Gordon v. Third Nat. Bank*, 144 U. S. 97, 12 Sup. Ct. Rep. 657, 36: 360

M'Leomore v. Powell, 12 Wheat. 554, 6: 726

Cited in *Bank of United States v. Hatch*, 6

Pet. 259, 8 L. ed. 391—*Creath v. Sims*, 5 How. 207, 12 L. ed. 119—*Specht v. Howard*, 16 Wall. 566, 21 L. ed. 349—*Gordon v. Third Nat. Bank*, 144 U. S. 104, 36 L. ed. 363, 12 Sup. Ct. Rep. 657—*Varnum v. Milford*, 2 McLean, 77, Fed. Cas. No. 16,800—*Hazard v. White*, 26 Ark. 158—*Hart v. Stribling*, 25 Fla. 451, 6 So. 455—*Hunter v. Van Bomhorst*, 1 Md. 517—*Bell v. Martin*, 18 N. J. L. 170—*Clark v. Niblo*, 6 Wend. 258—*Vilas v. Jones*, 10 Paige, Ch. 80—*Bank of State v. Myers*, 1 Ball. L. 418—*Claiborne v. Birge*, 42 Tex. 102.

52. The mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or guarantor. There must be another contract substituted for the original contract, or some alteration in the bond, so material as in effect to make a new contract without the surety's consent, to produce that result. *Benjamin v. Hillard*, 23 How. 149, 16: 518
Distinguished in *Grant v. Smith*, 46 N. Y. 99.

Cited in *Harper v. National L. Ins. Co.* 5 C. C. A. 507, 17 U. S. App. 48, 56 Fed. 284—*Marree v. Ingle*, 69 Ark. 128, 61 S. W. 369—*Hooper v. Hooper*, 81 Md. 174, 48 Am. St. Rep. 496, 31 Atl. 508—*Stephens v. Elver*, 101 Wis. 396, 77 N. W. 737.

53. A sixty-day extension of time for the payment of a bill for materials furnished to the principal obligor by a third party does not, at least in the absence of any evidence of loss thereby occasioned, discharge the surety on a bond conditioned not only for the faithful performance of the original contract with the United States for the construction of a public work, but for the prompt payment of all persons supplying labor and materials in the prosecution of such work. *United States Fidelity & G. Co. v. United States (United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co.)* 191 U. S. 416, 24 Sup. Ct. Rep. 142, 48: 242

Cited in *United States use of Hill v. American Surety Co.* 200 U. S. 202, 50 L. ed. 440, 20 Sup. Ct. Rep. 168—*Ziegler v. Hallahan*, 126 Fed. 791—*Shelton v. American Surety Co.* 127 Fed. 738—*Chaffee v. United States Fidelity & G. Co.* 63 C. C. A. 646, 128 Fed. 920—*Campbell & Z. Co. v. American Surety Co.* 129 Fed. 403—*Ziegler v. Hallahan*, 66 C. C. A. 5, 131 Fed. 209—*Shelton v. American Surety Co.* 66 C. C. A. 95, 131 Fed. 211—*City Trust, S. D. & Surety Co. v. United States*, 77 C. C. A. 402, 147 Fed. 160—*United States use of Standard Furniture Co. v. Aetna Indemnity Co.* 40 Wash. 94, 82 Pac. 171.

54. Extending to the principal further time of payment will discharge the surety. *Sprigg v. Bank of Mt. Pleasant*, 10 Pet. 257, 9: 416

Cited in *Spriggs v. Bank of Mt. Pleasant*, 1 McLean, 387, Fed. Cas. No. 13,257—*Varnum v. Milford*, 2 McLean, 76, Fed. Cas. No. 16,890—*Bowen v. Darby*, 14 Fla. 214—*Davis v. People*, 6 Ill. 410—*Leavitt v. Savage*, 16 Me. 76—*Solomon v. Gregory*, 19 N. J. L. 115—*Dunham v. Downer*, 31 Vt. 258.

55. If a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the con

tract, without the consent of the surety, the latter is discharged, although the change was for his advantage. *Green v. Biddle*, 8 Wheat. 1, 5: 547
Cited in Dey v. Martin, 78 Va. 4.

56. An agreement to extend the time of a promissory note will discharge the surety. *Bank of Uniontown v. Mackey*, 140 U. S. 220, 11 Sup. Ct. Rep. 844, 35: 485
Cited in Dillaway v. Peterson, 11 S. D. 218, 78 N. W. 925—*Reed v. Tierney*, 12 App. D. C. 171.

57. If a creditor, by positive contract with the principal debtor and without the consent of the surety, extends the time of payment by the principal debtor, he thereby discharges the surety, even if the relation of principal and surety has been created, to the creditor's knowledge, since the time of the original contract. *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. Rep. 437, 36: 118
Cited in Scott v. Scruggs, 9 C. C. A. 250, 23 U. S. App. 280, 60 Fed. 725—*Fertig v. Bartles*, 78 Fed. 867—*Johnston v. Paltzer*, 100 Ill. App. 174—*Nelson v. Brown*, 140 Mo. 591, 62 Am. St. Rep. 755, 41 S. W. 960—*Commercial Bank v. Wood*, 56 Mo. App. 218—*Parsons v. Harrold*, 40 W. Va. 124, 32 S. E. 1002.

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Discharge of surety by extension of time of payment. 35: 486; 35: 679

What forbearance or extension of time to principal debtor will discharge surety.

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[Usury in consideration for extension of time to principal. 53 L.R.A. 316.]

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f. Change in Contract.

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By Oral Agreement as to Place of Payment of Promissory Note, see Bills and Notes, 101.

Injunction against Suing Surety in Respect to Condition Fraudulently Inserted, see Injunction, 77.

See also *supra*, 52, 55.

58. Any agreement with the creditor which varies essentially the terms of the contract without the assent of the surety will discharge him from responsibility; but this principle does not apply where the surety has, by his own act, exchanged his character of surety for that of principal. *Sprigg v. Bank of Mt. Pleasant*, 14 Pet. 201, 10: 419

Cited in Shepherd v. May, 115 U. S. 511, 29 L. ed. 457, 6 Sup. Ct. Rep. 119—*Wagman v. Hoag*, 14 Barb. 239—*Stephens v. Elver*, 101 Wis. 396, 77 N. W. 737.

59. An agreement between the creditor and principal debtors, for delay or otherwise, changing the nature of the contract to the prejudice of the surety, to effect a discharge of the latter, must be on sufficient

consideration and be binding in law on the parties. *Specht v. Howard*, 16 Wall. 564, 21: 348

60. The surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock was released by a change made by the contracting parties, without his consent, in the location of the dry dock, which required the contractor to make additional excavations and connections with the water at an increased expense, and gave an increased time of performance, as such a change was not contemplated by the provisions of the contract for such changes in the plans and specifications as might be found advantageous or necessary. *United States v. Freely*, 186 U. S. 309, 22 Sup. Ct. Rep. 875, 46: 117
Cited in United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 424, 48 L. ed. 246, 24 Sup. Ct. Rep. 142—*United States v. Richardson*, 127 Fed. 894—*Fidelity & D. Co. v. United States*, 70 C. C. A. 207, 137 Fed. 869—*Com. v. Carl*, 29 Pa. Co. Ct. 51.

61. An agreement made by the principal does not work a discharge of his sureties, unless it places them in a different position from that which they occupied before it was made. *Roach v. Summers*, 20 Wall. 165, 22: 252
Cited in Zeigler v. Hallahan, 66 C. C. A. 4, 131 Fed. 209.

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When variation of contract, or agreement for delay, discharges surety. 6: 190

[Change of principals to obligation as discharge of surety (Case Note) 10: 1169]

Effect on liability of tenant's surety of surrender of lease containing an option to purchase. 9 L.R.A.(N.S.) 557.]

Alteration and erasure of instrument.

62. Any variation in an agreement signed by a surety, made without the surety's knowledge or consent, will discharge the surety. *Smith v. United States*, 2 Wall. 219, 17: 788

United States use of Rogers v. Conklin (Rogers v. The Marshal) 1 Wall. 644, 17: 714

Cited in United States v. Freely, 186 U. S. 316, 48 L. ed. 1181, 22 Sup. Ct. Rep. 875—*United States Fidelity & G. Co. v. United States* 191 U. S. 423, 48 L. ed. 245, 24 Sup. Ct. Rep. 142—*Crawford v. Dexter*, 5 Sawy. 204, Fed. Cas. No. 3,368—*United States v. Cheeseman*, 3 Sawy. 429, Fed. Cas. No. 14,790—*United States Glass Co. v. West Virginia Flint Bottle Co.* 81 Fed. 995—*First Nat. Bank v. Weidenbeck*, 87 Fed. 274—*United States Glass Co. v. Mathews*, 32 C. C. A. 367, 61 U. S. App. 542, 89 Fed. 831—*United States v. American Bonding & T. Co.* 32 C. C. A. 424, 61 U. S. App. 584, 89 Fed. 930—*United States v. Freely*, 92 Fed. 301—*Zeigler v. Hallahan*, 126 Fed. 791—*Zeigler v. Hallahan*, 66 C. C. A. 5, 131 Fed. 209—*Pierce v. Whiting*, 63 Cal. 543—*Scott v. State*, 46 Ind. 205—*McCramer v. Thompson*, 21 Iowa, 248—*McKim v. Demmon*, 139 Mass. 406—*Cambridge Sav. Bank v. Hyde*, 131 Mass. 79, 41 Am. Rep. 193—*Fred Helm Brewing Co. v. Hazen*, 55 Mo. App. 266—

Hale v. Forblis, 3 Mont. 408—Carson Opera House Asso. v. Miller, 16 Nev. 338—Manufacturers' Nat. Bank v. Dickerson, 41 N. J. L. 450, 32 Am. Rep. 237—New York L. Ins. Co. v. Casey, 178 N. Y. 891, 70 N. E. 916—Crompton's Estate, 20 Phila. 65—Bensinger v. Wren, 100 Pa. 505—Gardner v. Gardner, 23 S. C. 590—Victor Sewing Mach. Co. v. Crockwell, 2 Utah, 559—Christian v. Keen, 80 Va. 376—Blanton v. Com. 91 Va. 16, 20 S. E. 884—State Sav. Bank v. Baker, 93 Va. 515, 25 S. E. 550—Ayers v. Hite, 97 Va. 469, 34 S. E. 44—Kirschbaum v. Blair, 98 Va. 41, 34 S. E. 895.

62a. Where an erasure of one of the sureties' names in an official bond was made after another surety signed the instrument and before its approval, and without the knowledge and consent of the latter, he is discharged. *Smith v. United States*, 2 Wall. 219, 17: 788

Distinguished in State v. Churchill, 48 Ark. 437, 3 S. W. 352.

Cited in Mersman v. Verges, 112 U. S. 141, 28 L. ed. 642, 5 Sup. Ct. Rep. 65—*United States v. O'Neill*, 19 Fed. 571—*First Nat. Bank v. Weidenbeck*, 38 C. C. A. 133, 97 Fed. 898—*Cass County v. American Exch. State Bank*, 11 N. D. 248, 91 N. W. 59—*State ex rel. Griswold v. Blair*, 32 Ind. 317—*State v. Craig*, 58 Iowa, 241, 12 N. W. 301—*State v. Allen*, 69 Miss. 525, 30 Am. St. Rep. 563, 10 So. 473—*State v. McGonigle*, 101 Mo. 383, 8 L.R.A. 738, 20 Am. St. Rep. 609, 13 S. W. 758—*Hagler v. State*, 31 Neb. 149, 28 Am. St. Rep. 514, 47 N. W. 692—*Bingham v. Shadle*, 45 Neb. 85, 63 N. W. 143—*Schlageck v. Widhalm*, 59 Neb. 544, 81 N. W. 448—*Wilbarger County v. Bean*, 3 Tex. App. Civ. Cas. (Willson) § 16—*King County v. Ferry*, 5 Wash. 542, 19 L.R.A. 504, 34 Am. St. Rep. 880, 32 Pac. 538.

63. Where an erasure of one of the sureties' names in an official bond was made after another surety signed the instrument, and without knowledge or consent of the latter, he is discharged. *United States use of Rogers v. Conklin (Rogers v. The Marshal)*, 1 Wall. 644, 17: 714

64. Where the instrument of the appointment of a deputy collector, referred to in his bond, is afterwards altered so as to extend to another township, without the consent of the sureties, the surety is discharged from his responsibility for money subsequently collected by his principal. *Miller v. Stewart*, 9 Wheat. 680, 6: 189

Cited in United States v. De Visser, 10 Fed. 658—*United States v. O'Neill*, 19 Fed. 570—*Ziegler v. Hallahan*, 126 Fed. 791—*Anderson v. Bellenger*, 87 Ala. 336, 4 L.R.A. 680, 13 Am. St. Rep. 46, 6 So. 82—*McLennan v. Wellington*, 48 Kan. 760, 30 Pac. 183—*First Nat. Bank v. Gerke*, 68 Md. 456, 6 Am. St. Rep. 453, 13 Atl. 358—*Simonson v. Grant*, 36 Minn. 442, 31 N. W. 861—*Fred Helm Brewing Co. v. Hazen*, 55 Mo. App. 282—*Hale v. Forblis*, 3 Mont. 408—*Clark v. Niblo*, 6 Wend. 245—*Grant v. Smilh*, 46 N. Y. 97—*Benjamin v. Rogers*, 126 N. Y. 71, 26 N. E. 970—*Gardner v. Gardner*, 23 S. C. 590—*Christian v. Keen*, 80 Va. 376—*Walla Walla County v. Ping*, 1 Wash. Terr. 348—*Leonard v. County Court*, 25 W. Va. 52.

65. It is not sufficient that a surety may sustain no injury by a change in the contract, or that it may be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and an alteration of it is made, it is fatal. *Martin v. Thomas*, 24 How. 315, 16: 689

Reese v. United States, 9 Wall. 13, 19: 541
Cited in Jacksonville, M. & P. R. & Nav. Co. v. Hooper, 29 C. C. A. 386, 52 U. S. App. 579, 85 Fed. 624—*United States v. American Bonding & T. Co.* 32 C. C. A. 424, 61 U. S. App. 584, 89 Fed. 930—*United States v. Freel*, 92 Fed. 301—*Fred Helm Brewing Co. v. Hazen*, 55 Mo. App. 282—*Hagler v. State*, 31 Neb. 149, 28 Am. St. Rep. 514, 47 N. W. 692—*People v. Chalmers*, 1 Hun. 688—*Gardner v. Gardner*, 23 S. C. 590—*Victor Sewing Mach. Co. v. Crockwell*, 2 Utah, 559.

66. The maxim *Non haec in fœdera veni* is applicable to an obligation signed by one surety and then altered by the erasure of his signature after the signing by another surety, without the latter's knowledge or consent, and before approval of the obligation. *Smith v. United States*, 2 Wall. 219, 17: 788

67. A bond of sureties in replevin is void, where, after the same was executed by defendants as sureties, their principal, without their knowledge or consent, and with the consent of the marshal, erased his name from the bond. *Martin v. Thomas*, 24 How. 315, 16: 689

Cited in Smith v. United States, 2 Wall. 236, 17 L. ed. 792—*Mersman v. Verges*, 112 U. S. 141, 28 L. ed. 642, 5 Sup. Ct. Rep. 65—*First Nat. Bank v. Weidenbeck*, 38 C. C. A. 133, 97 Fed. 898—*State v. Churchill*, 48 Ark. 441, 3 S. W. 352—*State v. McGonigle*, 101 Mo. 383, 8 L.R.A. 738, 20 Am. St. Rep. 609, 13 S. W. 758—*Bingham v. Shadle*, 45 Neb. 85, 63 N. W. 143—*Davis v. State*, 5 Tex. App. 50.

g. Restoration of Liability.

68. A subsequent indemnity by his principal will not restore the liability of a surety when once discharged. *Leggett v. Humphreys*, 21 How. 66, 66: 50

69. A release of the sureties on a bond calling for a deed, by the vendee's failure to make a payment at the time agreed, which was a condition of the bond, cannot be avoided and the obligation renewed by the waiver of the default on the part of the vendors by accepting a subsequent payment. *Coughran v. Bigelow*, 164 U. S. 301, 17 Sup. Ct. Rep. 107, 41: 442
Cited in Fidelity & D. Co. v. United States, 70 C. C. A. 207, 137 Fed. 869.

IV. Rights and Remedies of Surety.

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Rights of Surety on Bail Bond, see Bail and Recognizance, II. d.

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Subrogation of Surety, see Subrogation, IV.

Right of Surety to Attack Constitutionality of Statute, see Statutes, 60.

Right to Apply Usurious Interest to Discharge of Principal, see Usury, 137.

See also Contracts, 308.

70. In a suit on a bond by a principal and a surety conditioned that the principal should pay to the obligee all indebtedness existing or to exist from the principal to such obligee and waiving notice of nonpayment, to recover the amount of notes executed by the principal, it is not necessary to allege or show any notice to the surety of a default in payments by the principal in paying. *Streper v. Victor Sewing Mach. Co.* 112 U. S. 676, 5 Sup. Ct. Rep. 327, 28: 852

Murphy v. Victor Sewing Mach. Co. 112 U. S. 688, 5 Sup. Ct. Rep. 324, 28: 856

71. In an action to make a surety liable for an alleged breach of his bond, he is entitled to have the benefit of any irregularity which his principal could have resisted. *Very v. Watkins*, 23 How. 469, 16: 522

72. The surety of a railroad company on an injunction bond given to protect its rolling-stock from execution sale is entitled to indemnity from the receiver of its property on mortgage foreclosure. *Union Trust Co. v. Morrison*, 125 U. S. 591, 8 Sup. Ct. Rep. 1004, 31: 825

73. The same right of priority which belongs to the government attaches to the claim of an individual who, as surety, has paid money to the government. *Hunter v. United States*, 5 Pet. 173, 8: 86

74. If there is no specific lien on the property of the principal in an official bond he may appropriate it in discharge of his surety. *Leggett v. Humphreys*, 21 How. 66, 16: 50

75. An open and honest effort of a principal to protect his surety against responsibility about to be assumed for him cannot be obnoxious to objection, and a deed of trust for that purpose is permissible. *Leggett v. Humphreys*, 21 How. 66, 16: 50

76. A surety who pays the debt of his principal succeeds to the rights of the creditor. *Lidderdale v. Robinson*, 12 Wheat. 594, 6: 740

Cited in M'Lean v. Lafayette Bank, 3 McLean, 605, Fed. Cas. No. 8,888—*Schindelholz v. Cullum*, 5 C. C. A. 303, 12 U. S. App. 242, 55 Fed. 891—*Newton v. Field*, 16 Ark. 232—*Jackson v. Davis*, 4 Mackey, 201—*Lumpkin v. Mills*, 4 Ga. 355—*Zook v. Clemmer*, 44 Ind. 26—*Murray v. Catlett*, 4 G. Greene, 110—*Brought v. Griffith*, 16 Iowa, 32—*Patterson v. Pope*, 5 Dana, 244—*Orem v. Wrightson*, 51 Md. 43, 84 Am. Rep. 286—*New Bedford Inst. for Sav. Bank v. Hathaway*, 134 Mass. 73, 45 Am. Rep. 289—*Taylor v. Wilcox*, 167 Mass. 576, 46 N. E. 115—*Smith v. Rumsey*, 83 Mich. 106—*Felton v. Bissel*, 25 Minn. 20—*Bowen v. Hoskins*, 45 Miss. 186, 7 Am. Rep. 728—*Merchants Nat. Bank v. Great Falls Opera House Co.* 23 Mont. 38, 45 L.R.A. 288, 75 Am. St. Rep. 409, 57 Pac. 445—*Furnold v. Bank of State*, 44 Mo. 339—*Nelson v. Webster (Neb.)* 68 L.R.A. 524, 100 N. W. 411—*Patterson v. Birdsall*, 6 Hun, 637—*Hess's Estate*, 69 Pa. 276—*Wright v. Grover & B. Sewing Mach. Co.* 82 Pa. 83—*Powell v. White*, 11 Leigh, 329—*German American Sav. Bank v. Fritz*, 68 Wis. 398, 32 N. W. 123.

77. Sureties in an attachment bond, given as a substitute for partnership property attached on a partnership debt, although judgment in the action was obtained against only one partner, were sureties for the partnership, and, if compelled to pay the amount, had a right of action against all who composed the firm at the time they assumed the liability. *Inbusch v. Farwell*, 1 Black, 566, 17: 188

Cited in Johnston v. Mathews, 32 Md. 368—*Rosenbaum v. Goodman*, 78 Va. 131—*Smith v. Ford*, 48 Wis. 145, 2 N. W. 134.

78. Sureties on a bond are not concluded by the account of their principal with his creditors; they may always inquire into the reality and truth of the matters existing between them. *United States v. Boyd*, 5 How. 29, 12: 36

Cited in Supreme Council C. K. of A. v. Fidelity & C. Co. 11 C. C. A. 101, 22 U. S. App. 439, 63 Fed. 52—*State v. Newton*, 33 Ark. 284—*Independent School District v. Hubbard*, 110 Iowa, 61, 80 Am. St. Rep. 271, 81 N. W. 241—*Salazar v. Territory*, 8 N. M. & 41 Pac. 581—*Hyde v. Miller*, 45 App. Div. 401, 60 N. Y. Supp. 974—*Bissell v. Scroton*, 66 N. Y. 61—*Tompkins County v. Bristol*, 99 N. Y. 322, 1 N. E. 878—*Robertson v. Trigg*, 32 Gratt. 81.

79. An agreement by one partner to pay firm debts and save another partner harmless therefrom is not an agreement merely

to indemnify the latter but is one to assume the indebtedness and discharge him from liability, and is broken by failure to pay such debts, it not being necessary to a breach that the partner who was to have been held harmless should first show that he had been compelled to pay the debts. *Johnson v. Risk*, 137 U. S. 300, 11 Sup. Ct. Rep. 11, 34: 683
Cited in White v. Lennig, 163 U. S. 711, 41 L. ed. 314, 16 Sup. Ct. Rep. 1208—*Brown & H. Co. v. Ligon*, 92 Fed. 856—*Central Trust Co. v. Louisville Trust Co.* 40 C. A. 531, 100 Fed. 547—*United States v. Smythe*, 120 Fed. 33.

80. Where the surety of a surety pays the debt of his principal, under a legal obligation, from which the principal was bound to relieve him, such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, although the payment was made without a request from the principal. *Hall v. Smith*, 5 How. 96, 12: 66

81. Where several units as privies in the same contract to secure a debt, payment by any of them except the debtor will support assumpsit against him. *Hall v. Smith*, 5 How. 96, 12: 66
Cited in Nichols v. Porter, 2 W. Va. 23, 94 Am. Dec. 500.

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[Control of collaterals by surety. 12 L.R. A. 131.

Rights of surety on payment of judgment. 16 L.R.A. 115.]

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82. Cosureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. *McDonald v. Magruder*, 3 Pet. 470, 7: 744
Cited in Springs v. Brown, 97 Fed. 407—*McNeilly v. Patchin*, 23 Mo. 43, 66 Am. Dec. 651.

83. A bond being joint and several, each surety is bound for the whole; and the contribution between the sureties is a matter with which the United States have no concern. *Cox v. United States*, 6 Pet. 172, 8: 359

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Between Maritime Liens, see Maritime Liens, III.

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I. *Inception and Validity under Former Sovereign.*a. *Authority to Make Grant.*1. *Generally.*

Incapacity of Indians, see Indians, VI.

Laws authorizing disposal of public proprietorship.

1. The only laws in force in the territory of Mexico for the disposition of the public lands, with the exception of those relating to missions and towns, are the Act of the Mexican Congress of 1824, and the Regulations of 1828. *United States v. Vigil*, 13 Wall. 449, 20: 602

Cited in Hayes v. United States, 170 U. S. 649, 42 L. ed. 1179, 18 Sup. Ct. Rep. 735 — *Whitney v. United States*, 181 U. S. 112, 45 L. ed. 774, 21 Sup. Ct. Rep. 565 — *Pueblo County v. Central Colorado Improv. Co.* 2 Colo. 634.

2. The Spanish royal order of January 4, 1814, relating to the distribution of vacant lands in the peninsular and adjacent islands, as well as the ultramarine provinces, seems to have been repealed on the 22d of August, 1814. *United States v. Clarke*, 8 Pet. 436, 8: 1001
Cited in United States v. Delespine, 15 Pet. 333, 10 L. ed. 758 — *Sheldon v. Milmo*, 90 Tex. 14, 36 S. W. 413.

3. In August, 1781, the Spanish laws had not been extended to the tract of land then known as West Florida. A grant of land in that territory, by the Spanish governor of Louisiana, was therefore void. *United States v. Power*, 11 How. 570, 13: 817

Power of Mexican states and territories.

Power of Officers of States and Territories, see *infra*, I. a, 3.

Mission Lands Resumed by Nation upon Abandonment, see *infra*, 15.
 Pueblo Lands, see Pueblo Lands, 33.

4. The several states in Mexico had in 1833 authority to make sales of vacant public lands within their limits which must be recognized by this government under the treaty of 1853. *Camou v. United States*, 171 U. S. 277, 18 Sup. Ct. Rep. 855, 43: 163
Perrin v. United States, 171 U. S. 292, 18 Sup. Ct. Rep. 861, 43: 169
Cited in Camou v. United States, 171 U. S. 279, 43 L. ed. 164, 18 Sup. Ct. Rep. 855—*United States v. Coe*, 174 U. S. 579, 43 L. ed. 1093, 19 Sup. Ct. Rep. 881—*Reloj Cattle Co. v. United States*, 184 U. S. 637, 46 L. ed. 726, 22 Sup. Ct. Rep. 499—*United States v. Green*, 185 U. S. 267, 46 L. ed. 904, 22 Sup. Ct. Rep. 640.

5. Vacant lands in California belonged to the supreme Mexican government, and the laws for the disposition of the same emanated from that source. *Castillero v. United States*, 2 Black, 1, 17: 360
Cited in Muse v. Arlington Hotel Co. 68 Fed. 642.

6. The imposing of a territorial status on New Mexico by the Constitution of Mexico operated to restrict that territory to such powers alone as a territory might lawfully exercise, and therefore deprive it of the power to alienate the national domain. *Hayes v. United States*, 170 U. S. 637, 18 Sup. Ct. Rep. 735, 42: 1174

7-8. The power of Sonora as a state to dispose of public lands was extinguished prior to 1838 by the Constitution and laws of Mexico. *United States v. Coe*, 170 U. S. 681, 18 Sup. Ct. Rep. 745, 42: 1195

De facto government.

9. Claims to land founded upon acts of a foreign government *de facto* must be sustained by the nature and character of such acts, as proceeding from the exercise of the inherent and rightful powers of an independent government. *United States v. Reynes*, 9 How. 127, 13: 74
Cited in Penn v. Tollison, 26 Ark. 574—*Hawver v. Seldenridge*, 2 W. Va. 283, 94 Am. Dec. 532.

10. An approval of a grant of lands by the government of Sonora during a time of rebellion in 1838 does not constitute an approval by the national government of Mexico. *United States v. Coe*, 170 U. S. 681, 18 Sup. Ct. Rep. 745, 42: 1195
Cited in Faxon v. United States, 171 U. S. 251, 43 L. ed. 154, 18 Sup. Ct. Rep. 849—*Camou v. United States*, 171 U. S. 279, 43 L. ed. 164, 18 Sup. Ct. Rep. 855—*United States v. Coe*, 174 U. S. 578, 43 L. ed. 1093, 19 Sup. Ct. Rep. 881—*Whitney v. United States*, 181 U. S. 112, 45 L. ed. 774, 21 Sup. Ct. Rep. 565.

11. A Mexican grant of lands made in 1838 by the state of Sonora, without approval by the general government, was void.

United States v. Coe, 174 U. S. 578, 19 Sup. Ct. Rep. 881, 43: 1092
 Denying rehearing in 170 U. S. 681, 18 Sup. Ct. Rep. 745, 42: 1195

Mission lands.

12. Mission lands were secularized by Mexican law in 1834, after which they were granted to individuals the same as other public lands. *United States v. Cervantes*, 18 How. 553, 15: 484
United States v. Ritchie, 17 How. 525, 15: 236

13. Regulations of 1828, § 17, had no application to lands not occupied by missions. *United States v. Cervantes*, 18 How. 553, 15: 484

14. Missionaries and Indians occupied lands appurtenant to missions at the will of the sovereign, but no legal title to such lands was ever vested in the Church, or any corporation or individual. *United States v. Cervantes*, 18 How. 553, 15: 484
Cited in Faxon v. United States, 171 U. S. 259, 43 L. ed. 157, 18 Sup. Ct. Rep. 849.

15. Pueblo and mission lands in Mexico seem, when abandoned, to have become, under the laws existing in 1844, a part of the public domain of the nation, which could not be granted by officers of a state. *Faxon v. United States*, 171 U. S. 244, 18 Sup. Ct. Rep. 849, 43: 151

Littorial and islands.

16. Islands situated on the coast were never granted by the governors of California, under the Colonization Law of 1824 or the Regulations of 1828. *United States v. Castillero*, 23 How. 464, 16: 498

17. The power to grant the lands of the islands on the coast of California was neither claimed nor exercised by the authorities of the department of the interior of the Mexican government prior to July 20, 1838. *United States v. Castillero*, 23 How. 464, 16: 498

18. Restraint, by the Mexican act of 1824, of grants of land within the littoral leagues, had no application, except to colonies of foreigners, not to Mexican citizens. *United States v. Cervantes*, 18 How. 553, 15: 484
De Arguello v. United States, 18 How. 539, 15: 478

Cited in Castillero v. United States, 2 Black. 344, 17 L. ed. 439—*United States v. Cervantes*, 18 How. 555, 15 L. ed. 485—*Soydam v. Williamson*, 24 How. 434, 16 L. ed. 745—*Mitchell v. Lippincott*, 2 Woods, 472 Fed. Cas. No. 9,665.

19. Under the former government of Louisiana, the regulations of O'Reilly, Gayoso, and Morales recognized the equitable claim of the owners of tracts of land fronting on rivers, etc., to a portion of the public lands which were back of them; and after the cession the United States did so also. *Jourdan v. Barrett*, 4 How. 169, 11: 824

Mineral rights.

Effect of Subsequent Discovery as Defeating Title, see *infra*, 273.

20. Mines, under Mexican laws, whether in public or private lands, belonged to the supreme government. *Castillero v. United States*, 2 Black, 1, 17: 360

Indian lands.

See also *supra*, 14.

21. Spanish grants extending partly over the Indian boundary are good so far as they interfere with no prior right of others as to whatever land is not within the Indian territory. *Mitchel v. United States*, 15 Pet. 52, 10: 658

22. A permit given by the lieutenant governor of Upper Louisiana, in 1799, to form an establishment on the Mississippi, followed by actual possession and improvement, constitutes a valid claim, although the Indian title was not then extinguished, under the Acts of Congress in favor of actual settlers. *Marsh v. Brooks*, 14 How. 513, 14: 522

Grants to Indians.

23. The grantee of a Mexican land claim, an Indian, was, under the Mexican laws, competent to take and convey real property. *United States v. Ritchie*, 17 How. 525, 15: 236

2. Transition of Power by Change of Sovereignty.

Federal Question as to Treaty Obligations, see *Appeal and Error*, 1741-1749.

Cession and retrocession of Louisiana.

Time when Spanish Laws were Extended to West Florida, see *supra*, 3.

Treaty Provisions Confirming Rights Attached before Change, see *infra*, 329-333.

Right to have Claims Confirmed when Founded on Settlements made after 1803, see *infra*, 424, 425.

See also *infra*, 332.

24. A Spanish grant of land lying east of the Mississippi and west of the Perdido, made subsequent to the treaty of St. Ildefonso, in 1800, was void, even if Spain possessed the power to make such grants prior to that time. By that treaty that territory was ceded to France, and France ceded it to the United States by the treaty of Paris of 1803. *Keene v. Whitaker*, 14 Pet. 170, 10: 404

Foster v. Neilson, 2 Pet. 253, 7: 415
Garcia v. Lee, 12 Pet. 511, 9: 1176
Cited in Keene v. Whitaker, 14 Pet. 171, 10 L. ed. 405—*Pollard v. Kibbe*, 14 Pet. 396, 10 L. ed. 511—*Mobile v. Esclava*, 18 Pet. 257, 10 L. ed. 956—*Mobile v. Emanuel*, 1 How. 103, 11 L. ed. 63—*Pollard v. Files*, 2 How. 602, 11 L. ed. 393—*Coffee v. Groover*, 123 U. S. 26, 31 L. ed. 61, 8 Sup. Ct. Rep. 1—*Taylor v. Morton*, 2 Curt. C. C. 463, Fed. Cas. No. 13,799—*Sullivan v. Richardson*, 33 Fla. 134, 14 So. 692—*Harvey v. Busch*, 67 Mo. 552.

25. A Spanish grant made after the date of the treaty of St. Ildefonso, October 1, 1800, of land within the limits of Louisiana, is void. The fact that Spain retained possession of portions of Louisiana until 1810 in no respect authorized such grants. *Foster v. Neilson*, 2 Pet. 253, 7: 415
United States v. Reynes, 9 How. 127, 13: 74

Garcia v. Lee, 12 Pet. 511, 9: 1176
Cited in United States v. Arredondo, 6 Pet. 742, 8 L. ed. 566—*Garcia v. Lee*, 12 Pet. 520, 9 L. ed. 1179—*Lattimer v. Poteet*, 14 Pet. 15, 10 L. ed. 333—*Keene v. Whitaker*, 14 Pet. 171, 10 L. ed. 405—*Pollard v. Kibbe*, 14 Pet. 390, 10 L. ed. 508—*Mobile v. Emanuel*, 1 How. 103, 11 L. ed. 63—*Pollard v. Files*, 2 How. 602, 11 L. ed. 393—*Davis v. Police Jury*, 9 How. 288, 13 L. ed. 142—*Goodtitle ex dem. Pollard v. Kibbe*, 9 How. 478, 13 L. ed. 233—*United States v. D'Auterive*, 10 How. 621, 13 L. ed. 565—*DeMontault v. United States*, 12 How. 51, 13 L. ed. 889—*United States v. Pillerin*, 18 How. 9, 14 L. ed. 28—*United States v. Lynde*, 11 Wall. 640, 20 L. ed. 232—*Bryan v. Kennett*, 113 U. S. 191, 28 L. ed. 912, 5 Sup. Ct. Rep. 407—*Coffee v. Groover*, 123 U. S. 25, 31 L. ed. 61, 8 Sup. Ct. Rep. 1—*Godfrey v. Beardsley*, 2 McLean, 419, Fed. Cas. No. 5,497—*Doe ex dem. Pollard v. Files*, 3 Ala. 50—*Abbot v. Doe*, 5 Ala. 396—*Innerarity v. Byrne*, 8 Port. (Ala.) 177—*Pollard v. Kibbe*, 9 Port. (Ala.) 717—*Doe ex dem. Kennedy v. Townsley*, 16 Ala. 248—*Esclava v. Bolling*, 22 Ala. 787—*Teschmacher v. Thompson*, 18 Cal. 28, 79 Am. Dec. 151—*Sullivan v. Richardson*, 33 Fla. 134, 14 So. 692—*Harvey v. Busch*, 67 Mo. 552.

26. A Spanish grant made in 1804, of land between the Iberville and Perdido, is void, since at that time the territory belonged to the United States. *Foster v. Neilson*, 2 Pet. 253, 7: 415

27. A Spanish grant of land, now situated in the town of Mobile, Alabama, was void, where made after the date of the treaty of St. Ildefonso, in 1800, by which Spain retroceded to France the province of Louisiana. *Goodtitle ex dem. Pollard v. Kibbe*, 9 How. 471, 13: 220

28. French grants of land in Louisiana made after the treaty of Fontainebleau, by which Louisiana was ceded to Spain, are void unless confirmed by the Spanish authorities before the cession to the United States. *United States v. Pillerin*, 13 How. 9, 14: 28

29. A grant of land in Louisiana, by the representative of the King of France, was void when made after the province had been ceded to Spain in 1762. *United States v. D'Auterive*, 10 How. 609, 13: 560
Cited in Montault v. United States, 12 How. 51, 13 L. ed. 889—*United States v. Pillerin*, 13 How. 9, 14 L. ed. 28—*United States v. Ducros*, 15 How. 41, 14 L. ed. 592—*United States v. Lynde*, 11 Wall. 643, 20 L. ed. 234—*Coffee v. Groover*, 123 U. S. 26, 31 L. ed. 61, 8 Sup. Ct. Rep. 1—*Esclava v. Bolling*, 22 Ala. 738.

30. A grant of land in Louisiana, by the representative of the King of France, is

void when made after the province had been ceded to Spain in 1762. *United States v. Ducros*, 15 How. 38, 14: 591

31-2. The treaty by which the territory between the Mississippi and Perdido rivers was ceded by France to Great Britain, having been signed on the 10th of February, 1763, a grant of land in the same tract of country, issued by the French governor of Louisiana on the 11th of March, 1763, was void. *Montault v. United States*, 12 How. 47, 13: 887
Cited in *Ealava v. Bolling*, 22 Ala. 738—*McElvain v. Mudd*, 44 Ala. 71, 4 Am. Rep. 106.

Treaty of 1782 with Great Britain.

33. Spanish grants made after the treaty of peace of 1782 between the United States and Great Britain, within the territory east of the Mississippi river and north of a line drawn from the river at the 31st degree of north latitude, east of the middle of the Apalachicola or Catahouchee river, are void. *Pollard v. Hagan*, 3 How. 212, 11: 565
Henderson v. Poindexter, 12 Wheat. 530, 6: 718
La Roche v. Jones, 9 How. 155, 13: 85
Cited in *Robinson v. Minor*, 10 How. 644, 13 L. ed. 575.

Cession of Florida.

Time within which Survey Might be made, see *infra*, 139, 140.

Treaty Provisions Saving Rights Already Attached, see *infra*, 334-345.

34. No claim for land in East Florida can be sustained, by virtue of the treaty of 1819, by which that territory was ceded by Spain to the United States, under a Spanish grant, or confirmation of a prior grant, made after January 24, 1818. *O'Hara v. United States*, 15 Pet. 275, 10: 737
United States v. Clarke, 9 Pet. 168, 9: 89

35. The treaty of 1819 with Spain ceded to the United States no territory west of the Perdido. It had already been acquired under the Louisiana treaty. *Pollard v. Files*, 2 How. 591, 11: 391

36. Under the act of Congress of 1860 the date of cession of Florida to the United States, or the time of transferring possession, is the point from which to test the validity of Spanish land grants. *United States v. De Morant* (*United States v. Morant*) 123 U. S. 335, 8 Sup. Ct. Rep. 189, 31: 171

Grants in present territory of Texas.

37. Spanish grants made in Texas of lands in the "Neutral Ground," east of Sabine, from 1790 to 1800, are valid. *United States v. Perot*, 98 U. S. 428, 25: 251

Conquest of Mexican territory.

Cession of Power to Forfeit Grant, see *infra*, 292, 293.

Treaty Provisions Saving Rights already Attached, see *infra*, 346-356.

Grants made in Contemplation of Military Disaster, see *infra*, 356.

38. The conquest of Upper California by the arms of the United States became com-

plete July 7, 1846. All grants made by the Mexican government after that time are void. *Stearns v. United States*, 6 Wall. 589, 18: 843

United States v. Yorba, 1 Wall. 412, 17: 635
United States v. Pico, 23 How. 321, 16: 464
Mumford v. Wardwell, 6 Wall. 423, 18: 756
Cited in *Castillero v. United States*, 2 Black. 370, 17 L. ed. 448—*United States v. Yorba*, 1 Wall. 423, 17 L. ed. 637—*Stearns v. United States*, 6 Wall. 590, 18 L. ed. 844—*Hornaby v. United States*, 10 Wall. 239, 19 L. ed. 904.

39. A prefect of a district of California had no power to grant a part of the common lands of the pueblo, after the conquest and acquisition of the country by the United States. *Alexander v. Roulet*, 13 Wall. 386, 20: 564
Cited in *Scott v. Dyer*, 54 Cal. 434.

39a. No alcalde appointed or elected after July 7, 1846, the time when the authority of Mexican officials in California terminated, could give judicial possession of land granted by the previous government. *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. Rep. 1067, 32: 51
Cited in *Russell v. Maxwell Land Grant Co.* 158 U. S. 255, 15 Sup. Ct. Rep. 827, 39 L. ed. 971.

40. An incomplete title under a Mexican grant could not be made perfect by any act of the Mexican authorities done after such authorities were displaced by American arms. *Fremont v. United States*, 17 How. 542, 15: 241
Cited in *More v. Steinbach*, 127 U. S. 80, 32 L. ed. 55, 8 Sup. Ct. Rep. 1067—*Pico v. United States*, Hoffm. Land Cas. 280, Fed. Cas. No. 11,130.

3. Authority of Officers.

Necessity of Approval by National Government of Mexico of Mining, Colonizing, or Littoral Grants, see *infra*, 117-129.
 Construction of Grant Reciting Two Grounds of Authority one of which does not Exist, see *infra*, 179.

Subsequent Declaration by Officer, see *infra*, 469.

Presumption of Authority, see *Evidence*, 517-528.

Recital in Papers as Proof of Authority, see *Evidence*, 2460.

41. A grant without authority is void under all governments. *United States v. De la Maza Arredondo*, 6 Pet. 691, 8: 547
Cited in *Doe ex dem. Barbarie v. Ealava*, 9 How. 444, 18 L. ed. 209—*Castillero v. United States*, 2 Black. 340, 17 L. ed. 438—*Best v. Polk* (*Best v. Doe*) 18 Wall. 117, 21 L. ed. 807—*Den v. Hill*, McAll. 487, Fed. Cas. No. 3,784—*Perry Mfg. Co. v. Brown*, 3 Woodb. & M. 459, Fed. Cas. No. 11,015—*United States v. Cambuston*, 7 Sawy. 587, Fed. Cas. No. 14,713—*Winter v. United States*, Hempst. 379, Fed. Cas. No. 17,893—*People v. Livingston*, 8 Barb. 278—*Webster v. Clear*, 49 Ohio St. 400, 31 N. E. 744.

42. An essential prerequisite to the allowance of a claim by the court of private land claims under an alleged complete grant is that this should have been made by a granting officer or body that had authority to convey the public domain. *Hayes v. United States*, 170 U. S. 637, 18 Sup. Ct. Rep. 735, 42: 1174

Cited in Ely v. United States, 171 U. S. 224, 43 L. ed. 146, 18 Sup. Ct. Rep. 840—*Faxon v. United States*, 171 U. S. 251, 43 L. ed. 154, 18 Sup. Ct. Rep. 849—*Chaves v. United States*, 175 U. S. 558, 44 L. ed. 272, 20 Sup. Ct. Rep. 201—*Mitchell v. Furman*, 180 U. S. 431, 45 L. ed. 610, 21 Sup. Ct. Rep. 430—*Whitney v. United States*, 181 U. S. 114, 45 L. ed. 775, 21 Sup. Ct. Rep. 565.

43. An alleged Spanish grant of lands in East Florida, which was not in itself a royal title, and was neither made nor confirmed by the lawful authorities of the King, was insufficient to constitute a perfect title, at the time of the cession of Florida to the United States, without further action of the Spanish government to perfect it. *Mitchell v. Furman*, 180 U. S. 402, 21 Sup. Ct. Rep. 430, 45: 596

43a. A recorder of land titles had no power fourteen years after the passage of the supplemental act of 1824 (4 Stat. at L. 65) in reference to the confirmation of town and village lots, to give the evidence of title, by issuing a certificate of confirmation, as provided by such act, and certifying the claim to the Surveyor General as one confirmed by the original act of 1812 (2 Stat. at L. 748). *Gamache v. Piquignot*, 16 How. 451, 14: 1012

Spanish governor.

Relative Power of Intendant, see *infra*, 60.

Restrictions on Amount Grantable, see *infra*, 77.

Presumption of Authority, see *Evidence*, 521.

44. The Spanish governor of Florida had authority to issue grants of land to reward the merits of his subjects. *United States v. Acosta*, 1 How. 24, 11: 33
United States v. Clarke, 8 Pet. 436, 8: 1001
Cited in United States v. Delespine, 15 Pet. 334, 10 L. ed. 758—*United States v. King*, 7 How. 883, 12 L. ed. 955—*Bissell v. Penrose*, 8 How. 331, 12 L. ed. 1101—*United States v. Davenport*, 15 How. 8, 14 L. ed. 578—*Serrano v. United States*, 5 Wall. 461, 18 L. ed. 497—*Mitchell v. Furman*, 180 U. S. 433, 45 L. ed. 610, 21 Sup. Ct. Rep. 430—*Williams v. Miller*, 2 Fla. 82—*Sullivan v. Richardson*, 33 Fla. 156, 14 So. 692—*Sheldon v. Milmo*, 90 Tex. 18, 36 S. W. 413.

45. A concession by the governor of East Florida, made before the Florida treaty, in consideration of services, is valid. *United States v. De la Maza Arredondo*, 13 Pet. 88, 10: 71
United States v. Levy, 13 Pet. 81, 10: 68
Cited in Sheldon v. Milmo, 90 Tex. 20, 36 S. W. 413.

45a. A grant of land by the governor of East Florida, in consideration of services to the Spanish government, made before the

cession of the territory of Florida to the United States, confirmed. *United States v. Chaires*, 10 Pet. 308, 9: 435

46. The governor of West Florida, during the period of Spanish sovereignty, had power to confirm a grant of Indian lands. *Mitchell v. United States*, 9 Pet. 711, 9: 283

47. The governor general of the province of Louisiana had authority to make conditional grants of land, either personally or through a deputy. *Glenn v. United States*, 13 How. 250, 14: 133

Mexican governor.

Power of Mexican States Relative to Nation, see *supra*, 4-8.

Relative Power of Departmental Assembly, see *infra*, 56, 57.

Restrictions on Power, see *infra*, 69-76, 78.

Necessity of Approval of Governor's Grant by Assembly, see *infra*, 95-100.

Presumption of Authority, see *Evidence*, 517.

48. A Mexican governor possessed no power to make grants of the public lands independently of that conferred by the act of 1824 and the Regulations of 1828. *United States v. Vallejo*, 1 Black, 541, 17: 232
Cited in Hayes v. United States, 170 U. S. 654, 42 L. ed. 1181, 18 Sup. Ct. Rep. 785—*Chaves v. United States*, 175 U. S. 556, 44 L. ed. 271, 20 Sup. Ct. Rep. 201—*Whitney v. United States*, 181 U. S. 112, 45 L. ed. 774, 21 Sup. Ct. Rep. 565—*Owen v. Presidio Min. Co.* 9 C. C. A. 344, 13 U. S. App. 248, 61 Fed. 13—*Hutton v. Frisbie*, 37 Cal. 484—*Pueblo County v. Central Colorado Improv. Co.* 2 Colo. 634—*Grant v. Jaramillo*, 6 N. M. 323, 28 Pac. 508.

48a. The authority of Micheltorena to distribute lands of the Department of California is found in the colonization laws of 1824 and 1828, the object of which was to secure for the Republic a population composed of industrious, obedient and loyal citizens, who might contribute to its strength and prosperity. *United States v. Rose*, 23 How. 262, 16: 448

49. The archives of the Mexican government show that the power to make grants had been exercised by the governors under Spain, and continued to be so exercised under Mexico. *United States v. Peralta*, 19 How. 343, 15: 678

50. It must be presumed that the Mexican governor was acting within his power when he dispensed with the plan of the boundaries which is required to be attached to the petition for a grant of land. *Fremont v. United States*, 17 How. 542, 15: 241
Cited in Whitney v. United States, 181 U. S. 113, 45 L. ed. 775, 21 Sup. Ct. Rep. 565.

51. It was the duty of the governor to obtain the necessary information both as regarded the applicant and the land before making any grant under the colonization laws of Mexico, and he had no power to

grant any other than vacant public lands.
Castillero v. United States, 2 Black, 1,
 17: 360

52. The power of the governor of Coahuila and Texas to sell lands to Mexicans, not exceeding eleven leagues in quantity, is unquestionable. *Spencer v. Lapsley*, 20 How. 264,
 15: 902

British governor.

53. A grant made by the British governor of Florida, after the Declaration of Independence, of land lying between the Mississippi and Chattahoochee rivers and north of the 31st parallel of north latitude, must be deemed invalid as the foundation of title in the courts of the United States in view of the fact that that parallel was claimed and asserted as the northern boundary of Florida by both Georgia and North Carolina in the Declaration of Independence, and was recognized as such by the treaty of peace. *Harcourt v. Gaillard*, 12 Wheat. 523, 6: 716
Cited in United States v. Arredondo, 6 Pet. 738, 8 L. ed. 563—*Strother v. Lucas*, 12 Pet. 448, 9 L. ed. 1152—*Rhode Island v. Massachusetts*, 12 Pet. 745, 9 L. ed. 1269—*Polard v. Kibbe*, 14 Pet. 399, 10 L. ed. 512—*Scott v. Sandford*, 19 How. 506, 15 L. ed. 742—*Castillero v. United States*, 2 Black, 354, 17 L. ed. 443—*Palmer v. United States*, *Huffm. Land Cas.* 250, *Fed. Cas. No.* 10,607—*Montgomery v. Doe*, 13 Smedes & M. 169—*Seneca Nation of Indians v. Christie*, 126 N. Y. 187, 27 N. E. 275.

Lieutenant governor or treasurer.

54. A grant of land in Missouri could be lawfully made by the lieutenant governor of Upper Louisiana before the treaty of 1803. *Mackey v. United States*, 10 Pet. 340,
 9: 447

55. An order of survey of a tract of land was made by the lieutenant governor of Louisiana after the power of granting land was transferred to the intendant-general; but the lieutenant governor was also sub-delegate, and in this character had the power to give the order of survey, which is the foundation of title, and capable of being perfected into a complete title. *Chouteau v. United States*, 9 Pet. 137, 9: 78
Cited in Mackey v. United States, 10 Pet. 341, 9 L. ed. 448—*Strother v. Lucas*, 12 Pet. 437, 9 L. ed. 1147—*United States v. Pendell*, 185 U. S. 199, 46 L. ed. 871, 22 Sup. Ct. Rep. 624—*Mulherin v. Simpson*, 124 Mo. 615, 28 S. W. 86—*McCann v. United States*, 2 Wyo. 297.

55a. The departmental treasurer of Sonora did not in 1844 have the power to determine by his sole authority that abandoned mission lands were of the temporalities, and that their value was not over \$500, entitling him to sell them. *Faxon v. United States*, 171 U. S. 244, 18 Sup. Ct. Rep. 849,
 43: 151

Departmental assembly or provincial council.

Power to Alter Authority of Governor, see *infra*, 70.

Necessity of Approval of Governor's Grant by Assembly, see *infra*, 95-100.

Authority to Suspend Governor's Grant by Disapproval, see *infra*, 253-255.
 Ratification by Governor, see *infra*, 303.

56. The regulations of the Mexican Congress of 1828 conferred on the governors of the territories the authority to grant vacant lands, and did not delegate it to the Departmental Assembly; and a grant which was the sole act of the Assembly, without even the governor's recommendation in its favor, was invalid. *United States v. Vigil*, 13 Wall. 449,
 20: 602
Distinguished in Hays v. United States, 175 U. S. 257, 44 L. ed. 154, 20 Sup. Ct. Rep. 80.

Cited in Chavez v. United States, 175 U. S. 556, 44 L. ed. 271, 20 Sup. Ct. Rep. 201—*Emeric v. Alvarado*, 64 Cal. 556, 2 Pac. 418.

57. The Departmental Assembly or territorial deputation of New Mexico in 1831 had no power or authority to make a grant of lands. *Chavez v. United States*, 175 U. S. 552, 20 Sup. Ct. Rep. 201,
 44: 269

58. A concession of lands by the council at St. Augustine was not authorized by the general laws of Spain. *United States v. Delespine*, 15 Pet. 319,
 10: 753

Intendant.

Conclusiveness of Decision of, see *Judgment*, 355.

59. An intendant directed by the King of Spain to facilitate the increase of the population of the province by all the means which his zeal and prudence could dictate, which object could only be effected by grants of land, was authorized to make them in his discretion. *United States v. De la Maza Arredondo*, 6 Pet. 691,
 8: 547

60. Up to the time of the royal order of October, 1798, the power of granting lands in Louisiana belonged to the governor, and not to the intendant. Consequently a receipt given by the intendant in September, 1797, for the purchase money of land, conveyed no title. *United States v. Moore*, 12 How. 209,
 13: 958

61. The power of an intendant to convey public lands was recognized by the government of Mexico as continuing after its separation from Spain. *Ely v. United States*, 171 U. S. 220, 18 Sup. Ct. Rep. 840,
 43: 142

62. A sale of land by the intendant of Sonora and Sinaloa in 1821, which was completed by title issued by the commissary general and by the payment of the purchase price into the public treasury, and which was never questioned by the Mexican government, should be recognized as valid by the court of private land claims. *Ely v. United States*, 171 U. S. 220, 18 Sup. Ct. Rep. 840,
 43: 142
Cited in Camou v. United States, 171 U. S. 237, 43 L. ed. 167, 18 Sup. Ct. Rep. 855.

63. A grant initiated by proceedings approved by the intendant *ad interim* of Sonora and Sinaloa, in which a sale was made in 1822, and the purchase price thereupon paid into the public treasury, and completed by

title issued by the commissary general of Sonora in 1825, should be recognized as valid by the court of private land claims. *United States v. Green*, 185 U. S. 256, 22 Sup. Ct. Rep. 640, 46: 898

Prefect, alcalde, commandant, or priest.

Date of Cessation of Power of Mexican Officers, see *supra*, 38-40.

Authority of Alcalde to Adjudicate Mining Title, see Evidence, 525.

64. A prefect had no power to make a grant of public lands under the laws of Mexico as they existed in 1840. *Crespin v. United States*, 168 U. S. 208, 18 Sup. Ct. Rep. 53, 42: 438

Cited in Hays v. United States, 175 U. S. 258, 44 L. ed. 154, 20 Sup. Ct. Rep. 80—*United States v. Pena*, 175 U. S. 508, 44 L. ed. 254, 20 Sup. Ct. Rep. 165—*United States v. Elder*, 177 U. S. 121, 44 L. ed. 697, 20 Sup. Ct. Rep. 537—*Mitchell v. Furman*, 180 U. S. 432, 45 L. ed. 610, 21 Sup. Ct. Rep. 430.

65. Neither a prefect nor an alcalde had power to make a grant of lands on behalf of the Mexican government. *United States v. Pena*, 175 U. S. 500, 20 Sup. Ct. Rep. 165, 44: 251

66. Under the government of Spain in California the commandant or priest had no authority to grant lands, or to make contracts that should bind the Spanish government to grant them; the governors of the country only had this power. *United States v. Montalva De Serrano (Serrano v. United States)* 5 Wall. 451, 18: 494

67. The commandants of posts in the Spanish colonies had power to make inchoate title to lands within their jurisdiction. *United States v. Davenport*, 15 How. 1, 14: 575

Commissioner.

68. An objection that grants in Texas were invalid, on the ground that a commissioner had no authority to act in that capacity in the colony of Nashville or Robertson, in 1833 and 1835, held cured by the act of the Republic of Texas in 1841. *Davila v. Mumford*, 24 How. 214, 16: 619

4. Qualifications and Restrictions.

69. The power of the governor of California to make grants of land was limited by the act of the Mexican Congress of 1824, and the regulations of 1828. *Fuentes v. United States*, 22 How. 443, 16: 376
United States v. Jones, 1 Wall. 766, 17: 712
United States v. Workman, 1 Wall. 745, 17: 705

Cited in Crespin v. United States, 168 U. S. 213, 42 L. ed. 440, 18 Sup. Ct. Rep. 53—*Mora v. Nunez*, 7 Sawy. 464, 10 Fed. 641—*Bouldin v. Phelps*, 30 Fed. 556—*Emeric v. Alvarado*, 64 Cal. 556, 2 Pac. 418.

70. The governor's authority was restricted to the granting of unoccupied public lands, and could not be enlarged or diminished by the Departmental Assembly. *United States v. Jones*, 1 Wall. 766, 17: 712

71. The power of Mexican governors to cede the public lands depended entirely on the uses to which they were to be put, either cultivation or settlement. The right to dispose of them for other objects belonged to the supreme government. *United States v. Vigil*, 13 Wall. 449, 20: 602

72. The governor of California had no authority, under the Mexican law, to make a grant of public establishments of the department, nor even of lands which were in the lawful possession and occupancy of persons claiming provisional title under the government; and this rule was true of mission lands. *United States v. Workman*, 1 Wall. 745, 17: 705

United States v. Jones, 1 Wall. 766, 17: 712
Beard v. Federy, 3 Wall. 478, 18: 88

Cited in Beard v. Federy, 3 Wall. 491, 18 L. ed. 92—*More v. Steinbach*, 127 U. S. 84, 32 L. ed. 56, 8 Sup. Ct. Rep. 1067—*Thompson v. Los Angeles Farming & Mill. Co.* 180 U. S. 78, 45 L. ed. 435, 21 Sup. Ct. Rep. 289—*Mora v. Foster*, 3 Sawy. 470, Fed. Cas. No. 9,784—*Mora v. Nunez*, 7 Sawy. 464, 10 Fed. 641.

73. No authority to make such a grant upon a sale of mission lands could be conferred by the Departmental Assembly. *Beard v. Federy*, 3 Wall. 478, 18: 88
Cited in Bouldin v. Phelps, 30 Fed. 558—*Emeric v. Alvarado*, 64 Cal. 556, 2 Pac. 418.

74. The act of 1824 and the regulations of 1828 are limitations upon the power of the governor to make grants of land. *United States v. Cambuston*, 20 How. 59, 15: 828
Cited in Owen v. Presidio Min. Co. 9 C. C. A. 344, 13 U. S. App. 248, 61 Fed. 13.

75. The regulations of 1828 are to be complied with, except as modified by the usages of the government under which the titles are derived, the principles of equity, and decisions of this court. *United States v. Cambuston*, 20 How. 59, 15: 828

76. In Mexican grants, in the absence of a limitation upon the quantity, the extent of the grant is only subject to the limitation upon the power of the governor imposed by the colonization law of 1824. *United States v. Pico*, 5 Wall. 536, 18: 695

77. The regulation made by a Spanish governor, that no grant of land shall exceed 1 league in front by 1 league in depth, does not declare that no individual shall receive grants for more land than 1 league square, or forbid different grants to the same person. *Chouteau v. United States*, 9 Pet. 147, 9: 82

78. The limitation of 11 leagues which § 12 of the Mexican laws of 1824 prescribes as the maximum which could be "united in one hand" prevented the governor of California from granting more than that quantity to the same person, although the land may be in different tracts. *United States v. Hartnell*, 22 How. 286, 16: 340
Cited in Whitney v. United States, 181 U. S. 109, 45 L. ed. 773, 21 Sup. Ct. Rep. 565—*Owen v. Presidio Min. Co.* 9 C. C. A. 344, 13 U. S. App. 248, 61 Fed. 13.

b. Mode and Requisites of Grant.

Duty of Mexican Governor to Ascertain Facts before Making Colonization Grant, see *supra*, 51.

Title Granted or Acquired, see *infra*, I. d, 4. Estoppel by Recital in Grant, see Estoppel, 8.

Estoppel by Refusal to Grant, see Estoppel, 101.

Presumption of Compliance with Preliminary Requirements, see Evidence, 530.

Presumption of Approval of Grant by Mexican Governor, see Evidence, 533.

Sufficiency of Evidence to Outweigh Recitals, see Evidence, 2381.

Sufficiency of Evidence to Prove Alienage of Grantee, see Evidence, 2382.

See also *infra*, 306.

Grant distinguished from license.

Right of Courts to Confirm Claim of Licensee, see *infra*, 428-430.

See also *infra*, 167, 333.

79. The license given by Mexican officials to occupy lands could not ripen into a grant in fee, or some lesser estate, in the absence in the papers giving it of words granting the tract absolutely, conditionally, provisional or otherwise, or by which any estate or interest could be implied. *De Haro v. United States*, 5 Wall. 599, 18: 681

80. A grant of the title to land by the governor of New Mexico was not made by an indorsement on a petition, directing the prefect of the district to ascertain whether the land applied for had an owner, and to cause delivery of the land referred to, as this is reasonably interpreted to be a mere license to occupy the land for cultivation or to give temporary possession pending further action in the matter. *United States v. Elder*, 177 U. S. 104, 20 Sup. Ct. Rep. 537, 44: 690

81. A Spanish grant made by the commandant of a post, for the purpose of grazing cattle, was not a mere license to use the land, but passed an inchoate title. *United States v. Davenport*, 15 How. 1, 14: 575
Cited in *Zia v. United States*, 168 U. S. 203, 42 L. ed. 436, 18 Sup. Ct. Rep. 42—*Muse v. Arlington Hotel Co.* 68 Fed. 645.

82. A grant to pueblos "for pasturing the stock and horses," providing that "they will hold the same with legitimate title under this royal grant so that they be not molested by any Spanish citizen or citizens taking their stock thereupon, deeming the pasturage to be common," but stipulating that in case of necessity the horses of the royal garrison of Santa Fé may be kept there "where they have been accustomed to graze," such grant being made on a petition stating that the pueblos have considered this "as their pasture ground," and that it has been used in urgent cases for horses of the royal garrison, and that they are aware that there are "applicants to acquire the same by grant, which will cause them very great injury," in consideration of which they ask that the place may be declared the legitimate

pasture grounds and pastures of the pueblos, constitutes a mere license for pasturage, which, if not revoked by subsequent grants, was revoked by the treaty of Guadalupe Hidalgo ceding the territory to the United States, and cannot, therefore, be confirmed by the court of private land claims. *Zia v. United States*, 168 U. S. 198, 18 Sup. Ct. Rep. 42, 42: 434

Petition and other papers.

Construction of Grant and Petition against, see *infra*, 177.

Map Attached to Papers as Sufficient Description, see *infra*, 199.

Petition as Defining Boundary by Reference in Grant, see *infra*, 207.

Plat or Map in Confirmation Proceeding, see *infra*, 554.

83. To vest an applicant under the colonization regulations of 1828 with title in fee, either absolute and perfect or conditional and imperfect, to public lands in New Mexico under a Mexican grant, substantial compliance with the preliminary requisites to a grant was essential; and it was necessary that the grant should be evidenced by an act of the governor clearly and unequivocally conveying the land intended to be granted, and that a public record in some form should be made of the grant. *United States v. Elder*, 177 U. S. 104, 20 Sup. Ct. Rep. 537, 44: 690
Cited in *Whitney v. United States*, 181 U. S. 110, 45 L. ed. 774, 21 Sup. Ct. Rep. 565.

84. A petition for a surplus, or *sobrante*, implies there was an existing and operative grant. *United States v. Sutter*, 21 How. 170, 16: 119

85. That no map accompanied the petition is not a controlling objection. *Hornsby v. United States*, 10 Wall. 224, 19: 900

86. Where no map is annexed to the petition, and there is neither an order of reference nor an informe, the inference follows that no order of reference or report was ever made. *United States v. Moorehead* (*United States v. Knight*) 1 Black, 227, 17: 76

87. Proceedings to obtain public land grants under the Mexican law were required to be in writing, the officers and tribunals before which it was to pass designated, and every step in the process, from the petition of the party to the final consummation of the title was not only required to be in writing, but also to be deposited and recorded in the proper public office among the public archives of the republic. *United States v. Castro*, 24 How. 346, 16: 659
Cited in *United States v. Vallejo*, 1 Black, 552, 17 L. ed. 234.

88. A concession having no defined boundaries, made by the lieutenant governor of Upper Louisiana in 1799, but not surveyed, gave no perfect title until it, with a copy of the survey,—which was attested by a *procès verbal* stating it to have been made in the presence of the commandant or of a syndic and two neighbors,—had been delivered to

the intendant-general at New Orleans. *Menard v. Massey*, 8 How. 293, 12: 1085
Cited in Sullivan v. Richardson, 33 Fla. 109.
 14 So. 692—*Smith v. Madison*, 67 Mo. 702

Publications and postings.

89. A disposal of public lands belonging to the state of Sonora, by the junta de almoneda in 1838, is invalid unless the regulations of July 20, 1831, respecting publication and posting notices, were complied with. *United States v. Coe*, 170 U. S. 681, 18 Sup. Ct. Rep. 745, 42: 1195

Grant or patent.

Necessity of Confirmation of Settler's Grant, see *infra*, 116.

Necessity that Survey Conform to Grant, see *infra*, 149-157.

Right of Petitioner for Surplus which was not Granted, see *infra*, 423.

Conformity of Confirmatory Survey to Grant, see *infra*, 544-548.

Presumption as to Validity, see Evidence, 517, 531, 532.

Certificate as Prima Facie Evidence of Existence of Grant, see Evidence, 537-539.

Pueblo Lands, see Pueblo Lands, 35.

90. No particular form of grant or patent of public lands is prescribed by the Mexican law. *United States v. Larkin*, 18 How. 557, 15: 485

Cited in Hornsby v. United States, 10 Wall. 238, 19 L. ed. 903—*United States v. Elder*, 177 U. S. 113, 44 L. ed. 693, 20 Sup. Ct. Rep. 537—*Smith v. Reynolds*, 9 App. D. C. 274.

91. Grants of the public domain of Mexico were of three kinds: (1) grants by specific boundaries; (2) grants by quantity; (3) grants of places by name. *Hornsby v. United States*, 10 Wall. 224, 19: 900
Higuera v. United States, 5 Wall. 827, 18: 469

Cited in Alviso v. United States, 8 Wall. 339, 19 L. ed. 305—*Hornsby v. United States*, 10 Wall. 232, 19 L. ed. 902—*Williams v. United States*, 92 U. S. 457, 23 L. ed. 497—*Trenler v. Stewart*, 101 U. S. 808, 25 L. ed. 1022—*Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.)* 121 U. S. 372, 30 L. ed. 955, 7 Sup. Ct. Rep. 1015—*United States v. McLaughlin*, 127 U. S. 448, 32 L. ed. 220, 8 Sup. Ct. Rep. 1177—*Ainsa v. United States*, 161 U. S. 221, 40 L. ed. 677, 16 Sup. Ct. Rep. 544—*United States v. Cameron*, 3 Ariz. 104, 21 Pac. 177.

92. The governor of New Mexico cannot be held to have made a grant of lands by reason of his being *ex officio* president of the territorial deputation at the time when that body attempted to make a grant of lands, although he was present and attested the action of the deputation. *Chavez v. United States*, 175 U. S. 552, 20 Sup. Ct. Rep. 201, 44: 269

93. Micheltorena, governor of California, while confined to his capital by insurgents, issued a decree by which he conferred upon citizens who had solicited lands, the lands designated in their applications, authorizing Sutter to give them hereafter a copy there-

of; such decree was sent to Sutter to enable him to raise a military force to assist the governor, and was known as Sutter's "general title." *Held*, that the decree had no signification except as an appeal to Sutter and such persons, and a promise to them that he would give them the land in case of their assistance so that he was successful. *United States v. Nye*, 21 How. 408, 16: 135

Cited in United States v. Bassett, 21 How. 413, 16 L. ed. 137—*United States v. Rose*, 23 How. 263, 16 L. ed. 449—*United States v. Bennitz*, 23 How. 262, 16 L. ed. 455—*United States v. Chana*, 24 How. 131, 16 L. ed. 612—*United States v. Hensley*, 1 Black, 37, 17 L. ed. 29.

94. Where a decree granted to a petitioner "license to construct a sawmill on a creek bounded by certain lands," and, "this tract not being sufficient, I grant him the equivalent quantity in another locality," this concession was construed to be a grant of land. *United States v. Richard*, 8 Pet. 470, 8: 1013

Approval of governor's grant by assembly.

Effect of Disapproval upon Title Granted, see *infra*, 253-255.

Presumption of Approval, see Evidence, 535.

See also *infra*, 301.

95. The public domain was the property of the Mexican nation. The governors of California did not represent the nation, so as to conclusively bind it. To have this effect the governor's grant must have the concurrence of the Departmental Deputation. *United States v. Hartwell*, 24 How. 236, 16: 340

96. Grants made by the governor of California, under the power conferred, without the concurrence of the Departmental Assembly of the Mexican government were void. *United States v. Castillero*, 23 How. 464, 16: 498

Cited in Castillero v. United States, 2 Black, 202, 17 L. ed. 391—*Whitney v. United States*, 181 U. S. 116, 45 L. ed. 776, 21 Sup. Ct. Rep. 565.

97. The approval of the Departmental Assembly is necessary to confirm title to public lands in Mexico granted by the governor. *De Arguello v. United States*, 18 How. 539, 15: 478

Cited in United States v. Peralta, 19 How. 348, 15 L. ed. 680—*Palmer v. United States*, 24 How. 127, 16 L. ed. 610—*Greer v. Mezes*, 24 How. 273, 16 L. ed. 663—*Noe v. United States*, Hoffm. Land Cas. 164, Fed. Cas. No. 10,285—*Tobin v. Walkinshaw*, McAll. 161, Fed. Cas. No. 14,069—*United States v. Enright*, Hoffm. Land Cas. 240, Fed. Cas. No. 15,053.

98. The approval of the Departmental Assembly of Mexico is necessary to the title to public lands granted by the governor. *United States v. Vaca*, 18 How. 556, 15: 485

Cited in Tobin v. Walkinshaw, McAll. 156, Fed. Cas. No. 14,069.

98a. A California colonization grant made by the Mexican governor without the concurrence of the Departmental Assembly is void, where the land claimed is an island near the entrance of the Bay of San Francisco and its occupancy is essential to the defense of the port. *United States v. Osio*, 23 How. 273, 16: 457

99. The Departmental Assembly was the controlling power which could reform or nullify a grant by the governor of California. *United States v. Hartnell*, 22 How. 286, 16: 340
Cited in *Semples v. Hagar*, 27 Cal. 169.

100. Of the documentary evidence of title, under the Mexican laws, the approval of the Departmental Assembly is next in importance to the grant itself. *United States v. Galbraith*, 2 Black, 394, 17: 449

100a. Mere want of approval of a California land grant by the Departmental Assembly of the Mexican government will not affect the validity of the grant. *United States v. Johnson*, 1 Wall. 326, 17: 597

Necessary words of grant.

Form of Grant or Patent, see *supra*, 90-94.

101. Under the laws of Spain, whenever there was an intention to grant private property, words were always used which severed the property from the public domain. *United States v. Turner*, 11 How. 663, 13: 857

102. A paper certified by the register of the land office at New Orleans, containing the usual preamble of Spanish grants, but instead of the granting clause simply "etc.," is no evidence of a grant. *United States v. Le Blanc*, 12 How. 435, 13: 1055

103. A grant of land cannot be construed from an instrument executed under special order from the King of Spain, which in every expression indicates its purpose to remove doubts under, and to give full effect to, a prior contract whereby one was to bring emigrants into the province as the agent of the government, and not as the proprietor of the land, the compensation for such service not being stated, but there being no words of grant. *United States v. King*, 7 How. 833, 12: 934

Necessary terms and conditions.

104. The absence, from a Mexican grant, of conditions requiring cultivation and inhabitancy, and the construction of a house, within a year, does not affect the validity of the grant, where such a cultivation and inhabitancy already existed. *United States v. Yorba*, 1 Wall. 412, 17: 635
United States v. Larkin, 18 How. 557, 15: 485

Cited in *Waterman v. Smith*, 13 Cal. 410.

Record or *espedientes*.

Necessity of Approval of Governor's Grant as Documentary Evidence of Title, see *supra*, 100.

In Mining Claim, see *infra*, 120, 123.

Map Attached to Papers as Sufficient Description, see *infra*, 199.

Title under Unrecorded Grants, see *infra*, 256.

Proof of Loss of Record, see also *infra*, 309.

Records Tinged with Suspicion, see *infra*, 312, 313.

Presumption of Record, see Evidence, 529, 536.

Evidence of Registry of Mining Claim, see Evidence, 2356.

Sufficiency of Evidence to Outweigh Presumption Arising from, see Evidence, 2382.

Sufficiency of Documentary Evidence Obtained from Private Source, see Evidence, 2458, 2459.

Weight of *Espediente*, see Evidence, 2462.

See also *supra*, 83, 87; *infra*, 264, 301, 304; Evidence, 2350.

105. A claim under an alleged Mexican grant, where it does not appear that a grant from a Mexican government had been deposited and recorded in the proper office among the public archives of the republic, as required by the Regulations of November, 1828, cannot be sustained. *Berreyesa v. United States*, 154 U. S. 623, 14 Sup. Ct. Rep. 1179, and 23: 913

United States v. Cambuston, 20 How. 59, 15: 828

United States v. Castro, 24 How. 346, 16: 659

United States v. Moorehead (United States v. Knight) 1 Black, 227, 17: 76

Peralta v. United States, 3 Wall. 434, 18: 221

Cited in *Romero v. United States*, 1 Wall. 745, 17 L. ed. 633—*Roland v. United States*, 7 Wall. 747, 19 L. ed. 185—*Ainsa v. United States*, 161 U. S. 224, 40 L. ed. 678, 16 Sup. Ct. Rep. 544—*United States v. Coe*, 170 U. S. 697, 42 L. ed. 1202, 18 Sup. Ct. Rep. 745—*Hays v. United States*, 175 U. S. 256, 44 L. ed. 153, 20 Sup. Ct. Rep. 80—*United States v. Ortiz*, 176 U. S. 426, 44 L. ed. 531, 20 Sup. Ct. Rep. 466—*Whitney v. United States*, 181 U. S. 110, 45 L. ed. 773, 21 Sup. Ct. Rep. 565—*Den v. Hill*, McAll. 482, Fed. Cas. No. 3,784—*Dias v. United States*, Fed. Cas. No. 3,878—*Morehead v. United States*, Fed. Cas. No. 9,792—*United States v. Bernal*, Fed. Cas. No. 14,579—*United States v. Cambuston*, 7 Sawy. 591, Fed. Cas. No. 14,713—*United States v. Flint*, 4 Sawy. 67, Fed. Cas. No. 15,121—*United States v. Peralta*, Fed. Cas. No. 16,029—*United States v. Pico*, Fed. Cas. No. 16,045—*United States v. Polack*, Hoffm. Land Cas. 297, Fed. Cas. No. 16,061—*Bouldin v. Phelps*, 30 Fed. 569—*Muse v. Arlington Hotel Co.* 68 Fed. 642—*Brown v. San Francisco*, 16 Cal. 459.

106. In a claim for a Mexican grant, where there is no record evidence and it rests entirely on parol evidence, the claim must be rejected. *Romero v. United States*, 1 Wall. 721, 17: 627

Cited in *Beley v. Naphtaly*, 169 U. S. 355, 42 L. ed. 776, 18 Sup. Ct. Rep. 354—*United States v. Ortiz*, 176 U. S. 427, 44 L. ed. 531, 20 Sup. Ct. Rep. 466—*Bouldin v. Phelps*, 30 Fed. 569—*Owen v. Presidio Min. Co.*

9 C. C. A. 350, 13 U. S. App. 248, 61 Fed. 18—Beley v. Naphhtaly, 19 C. C. A. 395, 44 U. S. App. 232, 73 Fed. 122.

107. Where the *espediente* is insufficient, nothing remains to support the claim except *parol proof*. *United States v. Moorehead* (*United States v. Knight*) 1 Black, 227, 17: 76

108. An *espediente* is a complete statement of every step taken in the proceedings for a Mexican grant. *Ainsa v. United States*, 161 U. S. 208, 16 Sup. Ct. Rep. 544, 40: 673
Cited in *United States v. Elder*, 177 U. S. 118, 44 L. ed. 696, 20 Sup. Ct. Rep. 537.

109. The petition, with the *diseño* annexed,—a decree approving the petition,—an order of reference to the proper officer for information, the *informe*, or report of that officer, the decree of concession, and the copy or duplicate of the grant, constitute a complete *espediente* within the meaning of the Mexican law. *United States v. Moorehead* (*United States v. Knight*) 1 Black, 227, 17: 76
United States v. Moreno, 1 Wall. 400, 17: 633
Cited in *United States v. Moreno*, 1 Wall. 404, 17 L. ed. 635—*Hornsby v. United States*, 10 Wall. 244, 19 L. ed. 905—*United States v. Elder*, 177 U. S. 112, 44 L. ed. 693, 20 Sup. Ct. Rep. 537.

110. The nature and effect of an *espediente*, when it is clearly ascertainable from contemporaneous and official construction, cannot be defeated by an entry in the *Toma de Razon*. *De Haro v. United States*, 5 Wall. 599, 18: 681
Cited in *United States v. Elder*, 177 U. S. 113, 44 L. ed. 694, 20 Sup. Ct. Rep. 537.

111. Where it is directed in the title paper that a "note be made of it in the respective book," and the secretary declares at the foot of the grant, "Note has been made of this title in the respective book," and no such record was made, the grant should not be confirmed. *United States v. Vallejo*, 1 Black, 541, 17: 232
Testimonio.

Probative Effect of, see Evidence, 2454.

112. A *testimonio* is the first copy of the *expediente* of a Mexican grant. *Ainsa v. United States*, 161 U. S. 208, 16 Sup. Ct. Rep. 544, 40: 673

113. The *testimonio* of a Mexican title is not void because not written upon properly stamped paper. This only made it necessary to prove its execution. *Moral y Gonzales v. Ross* (*Gonzales v. Ross*) 120 U. S. 605, 7 Sup. Ct. Rep. 705, 30: 801
Cited in *Williams v. Conger*, 125 U. S. 422, 31 L. ed. 789, 8 Sup. Ct. Rep. 933.

114. The fact that the *testimonio* of a Mexican title is dated two days after the time limited for taking possession, where it was executed ten or a dozen miles from the premises, will not make it invalid. *Moral y Gonzales v. Ross* (*Gonzales v. Ross*) 120 U. S. 605, 7 Sup. Ct. Rep. 705, 30: 801

Judicial confirmation.

As to Mining Grant, see *infra*, 119, 120.
As to Settlement of Contest, see *infra*, 268.

Conclusiveness of Decision of Spanish Tribunals Generally, see Judgment, 354-358.

115. Proceedings in the settlement of an estate cannot be considered to be a confirmation of a French grant by the Spanish authorities, merely because the description of the estate in the inventory includes the property covered by the grant. *United States v. Ducros*, 15 How. 38, 14: 591

Acquisition by occupation and settlement.

See also Evidence, 2338, 2339.

116. By the Spanish law in force in 1788 lands were distributed to those intending to settle, and after the settlers had lived and labored in those settlements for four years, they could sell or dispose of them as their own property. But confirmation by the *audiencia* or by the governor if recourse to the *audiencia* was impracticable was required in completion of the legal title. *Chaves v. United States*, 168 U. S. 177, 18 Sup. Ct. Rep. 72, 42: 426
Cited in *United States v. Elder*, 177 U. S. 118, 44 L. ed. 695, 20 Sup. Ct. Rep. 537.

Mining grants.

Power of Commissioners to Make Confirmation, see *infra*, 503.

Evidence of Registry, see Evidence, 2356.

117. Private persons could only acquire a title in mines not previously discovered and made individual property, by conforming to the conditions of the Mexican mining ordinance. *Castillero v. United States*, 2 Black, 1, 17: 360
Cited in *Lee Doon v. Tesh*, 68 Cal. 48, 8 Pac. 621.

118. The provisions of the Mexican mining ordinance as to the registry of the mine and the action of the tribunal thereon, and as to the juridical possession of the same, are conditions precedent to a title by discovery. *Castillero v. United States*, 2 Black, 1, 17: 360

119. The adjudication of the proper Mexican tribunal, and its registry, with the proceedings on which it was founded, are required to vest the title to a mine in the applicant, and not the mere fact of discovery. *Castillero v. United States*, 2 Black, 1, 17: 360

120. If an *alcalde* had jurisdiction to adjudicate a mining title under the Mexican law, such jurisdiction was special and limited and did not give title, where such adjudication was not registered and the boundaries of the mine were not fixed as required by the mining ordinance. *Castillero v. United States*, 2 Black, 1, 17: 360

121. A grant of land to the discoverer of a mine by the supreme Mexican government is not shown by a petition from him

to the Junta de Fomento requesting a loan for working the mine and a recommendation by the Junta to the supreme government of the necessity of approving possession of the mine given him by the local authorities, and a further representation of the advantages of granting him such land as a colonist; a recommendation of such petition from the Junta to the President through the minister of justice; a so-called decree entered by such minister on the margin of the communication that it was granted on the terms proposed; a dispatch by him to the minister of relations stating that the President had acceded to the petition; and an undelivered dispatch from the latter minister to the governor containing a copy of the dispatch from the minister of justice and stating that it is sent to the governor in conformity with the provisions of the laws relative to colonization, that he may give possession of such land to the petitioner. *Castillero v. United States*, 2 Black, 1,

17: 360

122. The adjudication by an alcalde of the title to a mining claim is not shown to have been ratified or confirmed by the supreme Mexican government by proving that the discoverer petitioned the Junta de Fomento for aid in working the mine, requesting the Junta to represent to the supreme government the necessity of approving the possession of the mine given him by the local authorities; the adoption by the Junta of such request; a recommendation to the President through the minister of justice that such possession be confirmed; and dispatches from the minister of justice and the minister of relations stating that the President had been pleased to approve the agreement made with the discoverer to commence the working or exploration of such mine. *Castillero v. United States*, 2 Black, 1,

17: 360

123. The failure of the discoverer of a mine in the department of California to register the same and fix its boundaries as required by the Mexican mining ordinance resulted in a failure on his part to acquire any title to the mine. *Castillero v. United States*, 2 Black, 1,

17: 360

124. No title to a mine, whether on public or private lands, was acquired under the Mexican mining ordinance, where no survey was made, no stakes set, and no boundaries marked in any manner. *Castillero v. United States*, 2 Black, 1,

17: 360

Colonizing grants.

Title Acquired Under Colonizing Grant, see *infra*, 241, 242, 245, 246.

125. The Mexican law of 1828 authorizes the political chief to grant lands to an empresario who may wish to colonize. But the grant shall not be definitely valid without the approbation of the supreme government. *United States v. Sutter*, 21 How. 170,

16: 119

Cited in United States v. Vallejo, 1 Black. 552, 17 L. ed. 234—*United States v. Yorba*, 1

Wall. 423, 17 L. ed. 637—*Hornsbey v. United States*, 10 Wall. 237, 19 L. ed. 903—*Morehead v. United States*, Fed. Cas. No. 9,197—*United States v. Larkin*, Fed. Cas. No. 15,562—*United States v. Sutter*, Fed. Cas. No. 16,424—*Owen v. Presidio Min. Co.* 9 C. C. A. 344, 13 U. S. App. 248, 61 Fed. 13—*Cornwall v. Culver*, 16 Cal. 427.

126. A grant of land by the ayuntamiento of El Paso under the national colonization law of Mexico of January 4, 1823, which was expressly "subject to the superior determination," and which was in fact expressly disapproved by the provincial deputation, is not a valid final grant. *Cessena v. United States*, 169 U. S. 165, 18 Sup. Ct. Rep. 304,

42: 702

Littoral and insular grants.

127. The consent of the Federal executive of Mexico was essential to the validity of a grant of lands within the border and coast leagues. A grant wanting such consent is void. *League v. Egery*, 24 How. 264,

16: 655

Foot v. Egery, 24 How. 267,

16: 656

Cited in Foot v. Egery, 24 How. 268, 16 L. ed. 657.

128. A dispatch from the supreme power of the Mexican nation operated of itself to adjudicate the title to the claimant of an island on the coast of California, leaving no discretion to be exercised by the authorities of the department of California. *United States v. Castillero*, 23 How. 464, 16: 498
Cited in United States v. Fossatt, Fed. Cas. No. 15,140.

129. The island of Santa Cruz off the coast of California was duly assigned to Andress Castillero by Governor Alvarado, pursuant to a special dispatch of the Minister of the Interior of Mexico on the order of the President directing the departmental authorities to so assign an island which he might select before distribution of the public lands. *United States v. Castillero*, 23 How. 464,

16: 498

Cited in Castillero v. United States, 2 Black.

164, 17 L. ed. 378—*Castillero v. United States*, 2 Black, 338, 17 U. ed. 437.

c. Location, Survey, and Possession.

Necessity of Map Accompanying Petition, see *supra*, 85, 86.

Confirmatory Location and Survey, see *infra*, III. c.

Map Attached to Papers as Sufficient Description, see *infra*, 199.

Right of Selection within Place Limits of Floating Grant, see *infra*, 257, 258.

Right to Make up Deficiency by Selection Outside of Place Limits, see *infra*, 259.

Delay in Location as Working Abandonment, see *infra*, 284-290.

Requisite Maturity and Certainty of Claim to Sustain Jurisdiction of Courts of Confirmation, see *infra*, 385-397.

Necessity of Attaching Copy of Survey to Petition, see *infra*, 459.

Conclusiveness of Finding as to Possession, see Appeal and Error, 4903, 4904.

Showing Proceedings on Examination of Survey, in Record, see Appeal and Error, 3189.

Conclusiveness of Finding as to Survey, see Appeal and Error, 4812.

Harmless Error as to Survey, see Appeal and Error, 4995a.

Presumption on Appeal as to Location of Lines, see Appeal and Error, 4105.

Evidence of Location, Possession or Cultivation, see Evidence, 2336-2340, 2346.

Necessity of location or survey.

Necessity of Returning Attested Copy to Lieutenant General of Louisiana, see *supra*, 88.

In Mining Grant, see *supra*, 120, 124.

Effect of Possession to Identify Grant, see *infra*, 160, 168-172.

Necessity of Certainty in Grant not Surveyed or Settled, see *infra*, 202.

Necessity of Location or Possession to Make Specific Title under Floating Grant, see *infra*, 247-251.

Necessity in Order to Make the Claim "Property" Within Treaty Protection, see *infra*, 331.

Severance or Segregation from Public Domain as Essential to Private Legal Title, see *infra*, 590, 591.

Extrinsic Evidence of Boundaries, see Evidence, 1750.

As to Pueblo Lands, see Pueblo Lands, 3, 4.

130. The land covered by a Spanish concession remained a part of the King's domain until severed from it by survey made and recorded. Until this was done the warrant was a floating warrant to survey, not recognized by the government of Spain before the cession, nor by the United States since, as conferring on the petitioner an individual title to any specific parcel of land. *United States v. Lawton*, 5 How. 10, 12: 27 *Cited in* *Winter v. United States*, Hempst. 384, Fed. Cas. No. 17,895—*Muse v. Arlington Hotel Co.* 68 Fed. 641—*Doe ex dem. Kennedy v. Townsley*, 16 Ala. 246—*Vanderslice v. Hanks*, 3 Cal. 42—*Doe ex dem. Commyns v. Latimer*, 2 Fla. 87.

131. Where claimant's grant contains no sufficient boundaries, it creates no right of private property in any particular land until a survey and location. *Maguire v. Tyler*, 8 Wall. 650, 19: 320 *Cited in* *United States v. Montana Lumber & Mfg. Co.* 196 U. S. 578, 49 L. ed. 605, 25 Sup. Ct. Rep. 367.

132. The want of a survey does not defeat a grant, if the description is definite enough to allow a survey to be made. *United States v. Arredondo*, 13 Pet. 133, 10: 93 *Cited in* *United States v. Forbes*, 15 Pet. 184, 10 L. ed. 705—*Villalobos v. United States*, 10 How. 556, 13 L. ed. 537—*Vanderslice v. Hanks*, 3 Cal. 42.

133. To constitute a valid grant of the public land, there must be an actual severance of the property claimed from the public domain. *Lecompte v. United States*, 11 How. 115, 13: 627 *Cited in* *Vanderslice v. Hanks*, 3 Cal. 42.

134. A grant of a water survey by the Spanish governor of Louisiana did not of itself confer title. It was necessary that the title should be made out under the existing regulations. In case of neglect for ten years or more to obtain a survey, to settle or improve the land or take possession of it, the Spanish government was under no obligation to grant the land, and therefore the claim is not good against the United States. *United States v. Simon*, 12 How. 433, 13: 1054

135. Title to a concession regularly made is not affected by lack of survey. *United States v. Arredondo*, 13 Pet. 133, 10: 93 *Cited in* *Villalobos v. United States*, 10 How. 556, 13 L. ed. 537—*Buyck v. United States*, 15 Pet. 215, 10 L. ed. 716—*Vanderslice v. Hanks*, 3 Cal. 42.

136. It is not necessary to the validity of the title to a Mexican grant in California that the land should have been surveyed and the quantity ascertained. *United States v. Moreno*, 1 Wall. 400, 17: 633 *Cited in* *Phelan v. Poyoreno*, 74 Cal. 455, 13 Pac. 681.

137. The want of a survey or a designation of boundaries is no objection where quantity and locality are defined, subject to measurements to be made of contiguous ranchos. *United States v. Vaca*, 18 How. 556, 15: 485 *Cited in* *United States v. Moreno*, 1 Wall. 404, 17 L. ed. 635.

138. A grantee of land in Florida, who had never caused the same to be severed from the public domain by survey, or identified, was without actual seisin or seisin in law, and was not within the protection of the treaty of 1819. *United States v. Miranda*, 16 Pet. 153, 10: 920 *Cited in* *Chaires v. United States*, 3 How. 619, 11 L. ed. 753—*United States v. King*, 3 How. 787, 11 L. ed. 830—*Villalobos v. United States*, 10 How. 557, 13 L. ed. 537—*Winter v. United States*, Hempst. 384, Fed. Cas. No. 17,895—*Muse v. Arlington Hotel Co.* 68 Fed. 643—*Doe ex dem. Commyns v. Latimer*, 2 Fla. 86—*Jopling v. Chachere*, 107 La. 528, 32 So. 248.

Time to make.

See also *supra*, 134.

139. The power to survey lands in conformity to concessions made by the Spanish governor of East Florida prior to January 24, 1818, existed up to the change of flags. *United States v. Huertas*, 9 Pet. 171, 9: 90 *Cited in* *Sheldon v. Milmo*, 90 Tex. 20, 36 S. W. 418.

140. The power to survey lands in conformity to concessions made prior to January 24, 1818, existed up to the change of flags. *United States v. Clarke*, 16 Pet. 228, 10: 946 *United States v. Acosta*, 1 How. 24, 11: 33

140a. An order for the survey of a Spanish land grant in Florida made subsequent to the 24th of January, 1818, could give no title to land not within the grant. *United States v. Huertas*, 8 Pet. 488, 8: 1019

141. That the officer authorized to survey and give judicial possession to land granted by the Mexican governor of California was absent and unable to perform his duties, are excuses for delay in obtaining such possession, in accordance with conditions prescribed. *United States v. Reading*, 18 How. 1, 15: 291
Cited in De Arguello v. Greer, 26 Cal. 628.

142. The impossibility of taking possession, surveying, and obtaining the consent of the Departmental Assembly prevents a forfeiture to the state because of the failure of the Mexican grantee to build on and inhabit the land within one year, according to the condition of the grant. *Fremont v. United States*, 17 How. 542, 15: 241
Cited in United States v. Reading, 18 How. 6, 15 L. ed. 293—*United States v. Noe*, 23 How. 317, 16 L. ed. 464—*United States v. Armijo*, 5 Wall. 449, 18 L. ed. 494—*Hornsbey v. United States*, 10 Wall. 241, 19 L. ed. 904—*Arguello v. United States*, 18 How. 550, 15 L. ed. 482—*United States v. Larkin*, 18 How. 563, 15 L. ed. 488—*Miller v. Dale*, 92 U. S. 476, 23 L. ed. 737—*McMicken v. United States*, 97 U. S. 215, 24 L. ed. 951—*Bissell v. Henshaw*, 1 Sawy. 565, Fed. Cas. No. 1,447—*Chabolla v. United States*, Hoffm. Land Cas. 131, Fed. Cas. No. 2,566—*Grimes v. United States*, Hoffm. Land Cas. 108, Fed. Cas. No. 5,828—*Noe v. United States*, Hoffm. Land Cas. 167, Fed. Cas. No. 10,285—*Pico v. United States*, Hoffm. Land Cas. 189, Fed. Cas. No. 11,129—*Semple v. United States*, Hoffm. Land Cas. 40, Fed. Cas. No. 12,662—*Tobin v. Walkinshaw*, McAll. 174, Fed. Cas. No. 14,068—*United States v. Juarez*, Fed. Cas. No. 15,500—*United States v. Weber*, Hoffm. Land Cas. 128, Fed. Cas. No. 16,657—*United States v. Maxwell Land Grant Co.* 26 Fed. 122.

Validity of survey.

143. A private survey is ineffectual to support a Spanish land claim. *Glenn v. United States*, 13 How. 250, 14: 133
Cited in United States v. Montana Lumber & Mfg. Co. 196 U. S. 578, 49 L. ed. 605, 25 Sup. Ct. Rep. 367—*Waterman v. Smith*, 13 Cal. 416—*Boggs v. Merced Min. Co.* 14 Cal. 359.

144. A private survey of a warrant or order of survey is of no validity. *Smith v. United States*, 10 Pet. 326, 9: 442
Cited in Strother v. Lucas, 12 Pet. 438, 9 L. ed. 1148—*Winter v. United States*, Hempst. 383, Fed. Cas. No. 17,895—*Waterman v. Smith*, 13 Cal. 416—*Boggs v. Merced Min. Co.* 14 Cal. 359—*Jenkins v. Chambers*, 9 Tex. 227.

145. A grant is not void because the surveyor returned an excess in his survey, without evidence that the grantee participated in the matter. *White v. Burnley*, 20 How. 235, 15: 886
Cited in Northern P. R. Co. v. Cannon, 46 Fed. 231—*White v. Blum*, 24 C. C. A. 575, 52 U. S. App. 59, 79 Fed. 273—*Lamprey v. Mead*, 54 Minn. 209, 40 Am. St. Rep. 328, 55 N. W. 1132—*American Dock & Improv. Co. v. Public Schools*, 39 N. J. Eq. 418—*Elliot v. Mitchell*, 28 Tex. 111.

146-7. Where a survey of land was made by a private surveyor, which did not follow the calls of the grant, and was not

made according to the established rules relative to surveys of such grants, nor was the plat laid as required by the regulations, a decree in conformity with such survey will be reversed, and a new survey ordered. *United States v. Hanson*, 16 Pet. 196, 10: 935

Cited in United States v. Boldsore, 11 How. 92, 13 L. ed. 618—*Yontz v. United States*, 23 How. 498, 16 L. ed. 473—*Winter v. United States*, Hempst. 382, Fed. Cas. No. 17,895—*Muse v. Arlington Hotel Co.* 68 Fed. 641—*Doe ex dem. Kennedy v. Townsley*, 16 Ala. 246—*Waterman v. Smith*, 13 Cal. 416—*Boggs v. Merced Min. Co.* 14 Cal. 359.

148. A fictitious plat and certificate of survey, not actually made upon the ground, but existing only upon paper, can have no influence in fixing the identity of land claimed under a Spanish land grant; nor can the grant be aided by a subsequent survey too imperfect to be effectual. *United States v. Lawton*, 5 How. 10, 12: 27
Cited in Ledoux v. Black, 5 La. Ann. 513—*Vasquez v. Ewing*, 42 Mo. 258.

Conformity to grant.

Right to Make up Deficiency by Selections Outside of Place Limits, see *infra*, 259.

Conformity of Decree of Confirmation to Grant, see *infra*, 477, 478.

Estoppel by Claiming Other Land than that Surveyed, see *Estoppel*, 268.

149. Land granted could only be surveyed at the place granted; if elsewhere, it would be a new appropriation, and therefore void. *United States v. Forbes*, 15 Pet. 173, 10: 701

Cited in United States v. Miranda, 16 Pet. 159, 10 L. ed. 922—*Chaires v. United States*, 3 How. 619, 11 L. ed. 753—*United States v. King*, 3 How. 787, 11 L. ed. 830—*United States v. King*, 7 How. 890, 12 L. ed. 959—*Villalobos v. United States*, 10 How. 556, 13 L. ed. 537—*Lecompte v. United States*, 11 How. 127, 13 L. ed. 632—*Maguire v. Tyler*, 8 Wall. 660, 19 L. ed. 323—*Tyler v. Magwire*, 17 Wall. 280, 21 L. ed. 582—*Winter v. United States*, Hempst. 384, Fed. Cas. No. 17,895—*Branch v. Mitchell*, 24 Ark. 445—*Doe ex dem. Commyns v. Latimer*, 3 Fla. 86.

150. A land grant could only be surveyed at the place granted; if elsewhere, it would be a new appropriation, and therefore void. *United States v. Breward*, 16 Pet. 143, 10: 916

151. Upon a grant of land by the Spanish governor of Florida, the survey by the surveyor general must be in reasonable conformity with the grant. *Villalobos v. United States*, 10 How. 541, 13: 531

152. Strict conformity to natural monuments was not required in the province of Florida under the government of Spain. Where a grant was of 10,000 acres on the northwest side of the head of the lagoon or Indian river, and the object of the grant was timbered land, if the nearest vacant timbered land to the head of the lagoon was surveyed, the intention of the govern-

ment and of the grantee was complied with. *United States v. Low*, 16 Pet. 162, 10: 923

153. A grant of 10,000 acres of land by the governor of Florida, and a survey of 7,000 acres at the place described in the grant, were confirmed; but a survey of 3,000 acres 4 or 5 miles away from the first survey was declared void, and a new survey ordered adjacent to the first survey, if so much vacant land could be found. *United States v. Breward*, 16 Pet. 143, 10: 916

153a. The Supreme Court refused to affirm a decree of the superior court of East Florida confirming a Spanish grant of land, where the grant required the land to lie on a certain stream and that the survey should commence four or five miles from a specified river, while the survey although locating the land on the stream does not disclose its distance from the river mentioned, and the cause was remanded to the superior court with directions to order a resurvey, if it shall appear that the tract was not surveyed in conformity with the grant. *United States v. Levi*, 8 Pet. 479, 8: 1016

154. Where a grant of 16,000 acres of land is made by the governor of Florida, and a survey of 520 acres is made at the place called for in the grant, and the residue is surveyed in another place, the survey of the residue is invalid, but the grantees has a right to have the residue surveyed adjoining the 520 acres. *United States v. Seton*, 10 Pet. 309, 9: 436
Cited in United States v. Kingsley, 12 Pet. 486, 9 L. ed. 1167—*United States v. Breward*, 16 Pet. 147, 10 L. ed. 918.

154a. The omission from the survey of a Spanish land grant of the boundaries described in the concession, except the boundaries upon two sides of the tract, is not material. *United States v. Huertas*, 8 Pet. 488, 8: 1019

155. Where, on a petition to the governor of East Florida, a grant of land was decreed to the petitioner, and the land was described in the petition particularly, its location designated, the order of survey obtained, and the land surveyed, the claim of the petitioner is valid, although the surveys do not appear to conform to the concession, under which alone the petitioner can claim; and a survey may be made of the land contained in the concession, according to the terms thereof, and the same decreed to the claimant so far as he has retained his title thereto. *United States v. Huertas*, 9 Pet. 171, 9: 90

Cited in United States v. Levy, 13 Pet. 83, 10 L. ed. 70—*United States v. Forbes*, 15 Pet. 182, 10 L. ed. 704—*Chaires v. United States*, 3 How. 619, 11 L. ed. 753—*Villalobos v. United States*, 10 How. 555, 13 L. ed. 587.

156. Where a survey is made of a half league from a larger quantity, as selected by the claimant, it will not be set aside upon the application of his grantee, because it did not conform to one of the calls of the grant, where the overplus has been surveyed,

settled, and improved. *United States v. De Haro*, 154 U. S. 544, Appx. and 14 Sup. Ct. Rep. 1161, 18: 61

157. Where a grant was for land mentioned in the petition, or for other lands that were vacant, three surveys made of lands, within the quantity granted, but not at the place specially mentioned in the grant, were held valid. *United States v. Clarke*, 16 Pet. 228, 10: 946

Effect and conclusiveness of survey.

Of Confirmatory Survey and Location, see *infra*, 632-643.

Conclusiveness on Courts, of Land Office Decisions and Acts, see *Courts*, 260a-267a.

Private Survey as Conclusive Evidence, see *Evidence*, 2445.

Probative Effect of Returns of Surveyor General, see *Evidence*, 2446.

158. The United States have a right to disprove a survey made by the surveyor general under the Spanish government in Florida, if the survey on the ground does not correspond to the land granted. *United States v. Breward*, 16 Pet. 143, 10: 916

158a. In a suit at law, United States courts will not go behind a survey and location made by the government that granted the title. If they are voidable for any cause, the question is one for a court of equity, and it will not be heard in an action at law. *Jones v. McMasters*, 20 How. 8, 15: 805
Cited in Burnes v. Scott, 117 U. S. 587, 29 L. ed. 992, 6 Sup. Ct. Rep. 865—*Smythe v. Henry*, 41 Fed. 716.

159. A custom to exclude from a grant such part as was covered by water or marsh, and to secure to the grantee the full quantity of land called for by his grant, clear of water, if established, could not be applied to a concession carried into an actual grant according to a survey, and returned by a duly appointed officer of the government. *United States v. Levy*, 13 Pet. 81, 10: 68

159a. In case of conflicting Spanish or Mexican land grants, without specific boundaries, each being floating grants for quantity, the one first located by an approved survey, appropriates the land embraced by the survey. *Miller v. Dale*, 92 U. S. 473, 23: 735

Formal possession as investiture.

As to Mining Grant, see *supra*, 118.

Conformity of Survey to Juridical Possession, see *infra*, 545.

See also *infra*, 300, 305.

160. Under the Mexican law, formal delivery of possession to the grantee of land granted by the government, by the magistrate of the vicinage, is essential to the complete investiture of title. This involves the establishment of boundaries of land granted. Unless the decree of the tribunals of the United States confirming such a grant limits the extent or the form of the

tract, such boundaries control. *Van Reynegan v. Bolton*, 95 U. S. 33, 24: 351
Cited in United States v. Ortiz, 176 U. S. 448, 44 L. ed. 539, 20 Sup. Ct. Rep. 466—*United States v. Elder*, 177 U. S. 117, 44 L. ed. 695, 20 Sup. Ct. Rep. 537—*Bouldin v. Phelps*, 30 Fed. 558.

160a. Title to public lands under a Mexican land grant does not pass until they are surveyed and possession delivered. *United States v. Fossat*, 20 How. 413, 15: 944
Cited in United States v. Armijo, Fed. Cas. No. 14,466—*Waterman v. Smith*, 13 Cal. 418—*Thornton v. Mahoney*, 24 Cal. 579—*Bernal v. Lynch*, 36 Cal. 145.

161. To vest a perfect title to land under a Mexican grant, a delivery of possession by its officers was necessary. *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. Rep. 1067, 32: 51
Cited in Ainsa v. United States, 161 U. S. 232, 40 L. ed. 681, 16 Sup. Ct. Rep. 544—*United States v. Elder*, 177 U. S. 117, 44 L. ed. 695, 20 Sup. Ct. Rep. 537.

162. That juridical possession had previously taken place cannot be inferred from a caution to the purchasers, in the final execution of a Mexican grant, "to restrict and limit themselves to the land, holdings, metes, and bounds particularly described in the hereinbefore inserted proceedings of survey." *Ainsa v. United States*, 161 U. S. 208, 16 Sup. Ct. Rep. 544, 40: 673

163. A Mexican grant is not void for want of the usual condition of possession within a year. *United States v. Larkin*, 18 How. 557, 15: 485

164. The delivery of possession under a Mexican grant, after eighteen months from the ratification, does not make it void under the act of 1832, but is only a ground of forfeiture of the grant, which might be waived by the government. *Moral y Gonzales v. Ross* (*Gonzales v. Ross*) 120 U. S. 605, 7 Sup. Ct. Rep. 705, 30: 801

165. Where there is any doubt of the intention of the Mexican governor to cede all the land contained within the boundaries, the juridical possession is conclusive as to the boundaries and extent of the land granted. *United States v. Pico*, 5 Wall. 536, 18: 695

Cited in Van Reynegan v. Bolton, 95 U. S. 35, 24 L. ed. 352—*Pinkerton v. Ledoux*, 129 U. S. 354, 32 L. ed. 709, 9 Sup. Ct. Rep. 339—*Ainsa v. United States*, 161 U. S. 230, 40 L. ed. 681, 16 Sup. Ct. Rep. 544—*United States v. Elder*, 177 U. S. 117, 44 L. ed. 695, 20 Sup. Ct. Rep. 537—*United States v. Castro*, 5 Sawy. 627, Fed. Cas. No. 14,754—*United States v. Southern P. R. Co.* 43 Fed. 611—*United States v. Cameron*, 3 Ariz. 104, 21 Pac. 177—*Foss v. Hinkell*, 91 Cal. 199, 27 Pac. 644—*Stoneroad v. Stoneroad*, 4 N. M. 192, 12 Pac. 736.

166. Where boundaries are described with great precision, and possession delivered to grantee, a certificate to that effect does not show that grantee has possession. The delivery of possession under the Spanish law is a formal and indispensable requi-

site. *United States v. Castant*, 12 How. 435, 13: 1056
Cited in Muse v. Arlington Hotel Co. 68 Fed. 645.

167. No title was granted by the Mexican government to claimants of land whose petition asked for the grant of possession of the land in order to plant grain thereon for harvesting, where the order based thereon directed them to be placed in possession "in order that they may not lose time in their labor until the necessary formalities can be had," while the act of possession made by the alcalde states that they were not "authorized to exchange, sell, or alienate the same until they shall have acquired title or have sufficient time to do so." *Peabody v. United States*, 175 U. S. 546, 20 Sup. Ct. Rep. 219, 44: 267

Settlement and possession to identify grant.

Necessity of Location or Possession to Make Specific Title under Floating Grant, see *infra*, 247-251.

Necessity of Occupancy and Cultivation or Possession to Give Jurisdiction to Courts, see *infra*, 398-406.

Question of Law or Fact, see *Trial*, 339.

168. Where the original grant does not locate the lands granted, the delivery of possession within the designated district renders the title complete, and defines the location of the grant. *Pinkerton v. Ledoux*, 129 U. S. 346, 9 Sup. Ct. Rep. 399, 32: 706
Cited in Foss v. Hinkell, 91 Cal. 199, 27 Pac. 644.

169. If a Mexican grant is also a grant of a certain place by name, and the boundaries are not given, its extent and limits must be shown by the settlement and possession of the grantee. *Alviso v. United States*, 8 Wall. 337, 19: 305

170. Where a Mexican grant is altered from one league to two leagues, and the proofs remove all suspicion from the alteration,—*Held*, that the juridical possession of two leagues, delivered to the grantee, and the subsequent occupation by him of the premises for nearly twenty years, establishes the validity of the grant. *Pacheco De Malarin v. United States* (*Malarin v. United States*) 1 Wall. 282, 17: 594
Cited in More v. Steinbach, 127 U. S. 80, 32 L. ed. 54, 8 Sup. Ct. Rep. 1067—*Ainsa v. United States*, 161 U. S. 231, 40 L. ed. 681, 16 Sup. Ct. Rep. 544—*United States v. Elder*, 177 U. S. 117, 44 L. ed. 695, 20 Sup. Ct. Rep. 537—*Bouldin v. Phelps*, 30 Fed. 537—*United States v. Castro*, 5 Sawy. 628, Fed. Cas. No. 14,754.

171. Land held under a Spanish concession and survey, but not occupied or cultivated, was not finally severed from the royal domain and converted into private property; nor did a claimant under such a concession possess a vested interest therein protected by the Louisiana treaty. *Les Bois v. Bramell*, 4 How. 449, 11: 1051

172. Where a tract contained over 200,000 acres of land, and the whole of the improvements consisted in the erection of three or four temporary huts for laborers, the clearing of a few acres of land around the fort, and planting the same with Indian corn, there had been no possession or occupancy. *United States v. Le Gardiur De Repentigny* (*United States v. De Repentigny*) 5 Wall. 211, 18: 627

Effect of actual possession.

Effect of Permissive Occupancy, see *infra*, 421.

Presumed Grant from Possession, see Evidence, 716-718, 722, 723.

See also *infra*, 307, 308; Evidence, 2338, 2339, 2340, 2346.

173. Bare possession did not bind the Mexican government, during its dominion in California from 1823 to 1846. *United States v. Montaha De Serrano* (*United States v. Serrano*) 5 Wall. 451, 18: 494

174. In a claim to lands under a Mexican grant, this court can give very little weight to a possession very limited as to duration and in extent. *United States v. Vallejo*, 1 Black, 541, 17: 232

175. A Mexican deed indefinite in its description of the land, attended by proof of the actual delivery of possession, which had been long continued, is sufficient to sustain a title. *Steinbach v. Stewart*, 11 Wall. 566, 20: 56

Cited in *Watriss v. Reed*, 99 Cal. 137, 33 Pac. 775.

Of dispossession or interruption.

See also *infra*, 287, 289.

176. Some interruption of possession under a Mexican grant during the war between the United States and Mexico is not fatal to the validity of the grant. *United States v. Pena*, 175 U. S. 500, 20 Sup. Ct. Rep. 165, 44: 251

d. Construction and Operation of Grant.

1. In General.

Recitals of Considerations for, and Purposes of Grant; Whether Conditional, see *infra*, 244.

Evidence of Attendant Circumstances, see Evidence, 1703.

Parol Evidence to Contradict or Limit, see Evidence, 1474.

Construction as Question, for Court, see Trial, 316, 317.

177. The petition of the claimant under a Spanish concession, and the grant of the governor, must be considered together, where the claimant proposes to do certain acts, and there is an acceptance of the proposition by the governor limited by several restrictions. What is stated in either paper as to facts or intent must be taken as true. *Glenn v. United States*, 13 How. 250, 14: 133

178. In determining the validity of Spanish land grants, the term "lawful authorities" refers to the local governors, intendants, or their deputies; the laws and ordinances of Spain, as composed of royal orders, of those of the local authorities, and the usage and custom of the provinces, respectively, under Spain. *Smith v. United States*, 10 Pet. 326, 9: 442

Cited in *Wherry v. United States*, 10 Pet. 339, 9 L. ed. 447—*Strother v. Lucas*, 12 Pet. 436, 9 L. ed. 1147—*Rhode Island v. Massachusetts*, 12 Pet. 749, 9 L. ed. 1270—*Pollard v. Kibbe*, 14 Pet. 390, 10 L. ed. 508—*Bissell v. Penrose*, 8 How. 331, 12 L. ed. 1101—*United States v. Boldsore*, 11 How. 88, 13 L. ed. 616—*Fremont v. United States*, 17 How. 573, 15 L. ed. 253—*Dauterive v. United States*, 101 U. S. 706, 25 L. ed. 871—*Hancock v. Walsh*, 3 Woods, 365, Fed. Cas. No. 6,012—*Winter v. United States*, Hempst. 384, Fed. Cas. No. 17,895—*Devall v. Choplin*, 15 La. 575.

Ambiguities and repugnancies.

179. A recital in a Spanish grant of land that it is made under a specified royal order, but with which it is not in conformity, is immaterial, and will not invalidate the grant, which also recites that it is made in recognition of the merits and services of the grantee. *United States v. Rodman*, 15 Pet. 130, 10: 685

180. A grant of land made by a royal governor will not be held to have been made in excess of his authority, or for a greater quantity of land than the regulation of the province allowed, when military service is the foundation of the grant, where the papers are translated from a foreign language, and deal with the transactions of foreign officers, with whose powers and authorities the court is not well acquainted, and contain uncertain and incomplete references to things understood by the parties, but not understood by the court. *United States v. Percheman*, 7 Pet. 51, 8: 604
Cited in *United States v. Delespine*, 15 Pet. 231, 10 L. ed. 721—*Re Metsger*, 1 Barb. 267—*Re Lobrasclano*, 38 Misc. 418, 77 N. Y. Supp. 1040.

181. The recital of a fact entirely immaterial, on which fact the grant does not profess to be founded, will not vitiate an instrument reciting other considerations on which it does profess to be founded, if the matter as recited is sufficient to authorize it. *United States v. Clarke*, 8 Pet. 436, 8: 1001

Cited in *United States v. Rodman*, 15 Pet. 137, 10 L. ed. 688.

182. That an Indian grant of lands, confirmed by the Spanish authorities, comprehended a fort then actually occupied by the troops of the King, cannot affect the validity of the deeds as to the residue of the lands. *Mitchel v. United States*, 9 Pet. 711, 9: 283

183. A Spanish grant on a petition by twenty persons "in unison," which is made on the express condition that it is to be settled by at least twenty citizens and the lands to be distributed in equal parts, un-

der which juridical possession is given by delivering to each one of the twenty settlers 300 varas of land, is not subject to an exception by a so-called certificate of the alcalde to the effect that after the allotments had been made eighteen of the twenty allottees assented to be deprived of any right or title to lands which had just been assigned to them because of a claim of the other two that they had been previously in possession under a former grant, as such an exception would be repugnant to the grant. *Chaves v. United States*, 168 U. S. 177, 18 Sup. Ct. Rep. 72, 42: 426

Joint or several grant.

See also *supra*, 183.

184. A grant in severalty was made by a Mexican grant to an applicant and his associates, when it directed the alcalde to place them in possession, "setting forth a general donation, in which shall necessarily be stated the boundaries of said possession," also requiring the alcalde to "take charge of the general document of distribution, which shall be for the archives," and to "give testimonios therefrom as may be requested,"—especially when it appears that the alcalde distributed the lands to them severally, giving judicial possession accordingly. *United States v. Pena*, 175 U. S. 500, 20 Sup. Ct. Rep. 165, 44: 251

Quantum of estate.

Title Granted or Acquired, see *infra*, I. d, 4.

Kind of Title Confirmable by Courts, see *infra*, 407-419.

Burden of Proof, see Evidence, 535.

Map as Evidence of, see Evidence, 2442.

185. Where the Spanish governor of Louisiana granted land to certain purchasers, directing them to apply to him for a "complete title," those words refer only to the instruments which constitute evidence of title, and not to the estate or interest thereby conveyed. *Slidell v. Grandjean*, 111 U. S. 412, 4 Sup. Ct. Rep. 475, 28: 321

186. A grant by which the alcalde gives, grants, and conveys unto one, his heirs and assigns forever, etc., is a grant in fee simple. *Palmer v. Low*, 98 U. S. 1, 25: 60

187. The word *titulo* is a *nomen generalissimum*, applicable alike to title papers, conveying title as generally understood, and to those which convey a mere right of occupancy; when used in the *Toma de Razon* its meaning would be determined by the particular right given by the papers creating it. *De Haro v. United States*, 5 Wall. 599, 18: 681

2. Description and Boundaries.

Fixing of Boundaries by Delivery of Official Possession, see *supra*, 160.

In Confirmatory Patent, see *infra*, 568, 570.

Map as Conclusive Evidence of Location, see Evidence, 2442.

Question of Law or Fact as to, see Trial, 336-339.

Certainty and definiteness of description.

In Mining Grant, see *supra*, 120.

Certainty in Description as Dispensing with Survey, see *supra*, 132.

Effect of Possession to Identify Grant, see *supra*, 160, 168-172.

Requisite Maturity and Certainty of Claim to Sustain Jurisdiction of Courts of Confirmation, see *infra*, 385-397.

Certainty and Definiteness in Decree of Confirmation, see *infra*, 476.

In Report of Land Commissioner, see *infra*, 516.

Parol Evidence in Aid of, see Evidence, 1586.

See also *infra*, 214-224.

188. The grantee of a specific tract of land takes nothing by his grant if there is no boundary and the grant is vague and cannot be identified. *Carondelet v. St. Louis*, 1 Black, 179, 17: 102
Ottid in Langford v. United States, 12 Ct. Cl. 351—*Muse v. Arlington Hotel Co.* 68 Fed. 646.

189. The rule of the Spanish government in the construction of grants is that the thing granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony. *Scull v. United States*, 98 U. S. 410, 25: 164
United States v. Clamorgan, 101 U. S. 822, 25: 836

Ottid in Pinkerton v. Ledoux, 129 U. S. 354, 32 L. ed. 709, 9 Sup. Ct. Rep. 399—*Muse v. Arlington Hotel Co.* 68 Fed. 641.

190. The validity of a grant depends upon the laws and ordinances of the government under which the claim originated, and is to be determined by the rule, which must be of uniform application in the construction of grants, and is essential to their validity, that the thing granted shall be so described as to be capable of being distinguished from other things of the same kind, or capable of being ascertained by extraneous testimony. *Buyck v. United States*, 15 Pet. 215, 10: 715
Ottid in Winter v. United States, Hempst. 384.
Fed. Cas. No. 17,895—*Muse v. Arlington Hotel Co.* 68 Fed. 644—*Mesick v. Sunderland*, 6 Cal. 312—*Doe ex dem. Commyns v. Latimer*, 2 Fla. 87.

191. A grant which contains no lines or boundaries whereby any definite and specific parcel of land was severed from the public domain creates no right of private property in a particular parcel of land, which can be maintained in a court of justice. *United States v. King*, 3 How. 773, 11: 824

Ottid in United States v. King, 7 How. 563, 12 L. ed. 945—*Doe ex dem. Barbie v. Mobile*, 9 How. 469, 13 L. ed. 220—*Lecompte v. United States*, 11 How. 127, 13 L. ed. 632—*United States v. Hughes*, 11 How. 563, 13 L. ed. 816—*United States v. Philadelphia*, 11 How. 653, 13 L. ed. 852—*United States v. Turner*, 11 How. 664, 13 L. ed. 857—

Fremont v. United States, 17 How. 575, 15 L. ed. 253—*Maguire v. Tyler*, 8 Wall. 660, 19 L. ed. 323—*Tyler v. Magwire*, 17 Wall. 280, 21 L. ed. 582—*Dauterive v. United States*, 101 U. S. 707, 25 L. ed. 871—*Sena v. United States*, 189 U. S. 238, 47 L. ed. 790, 23 Sup. Ct. Rep. 596—*Winter v. United States*, Hempst. 384, Fed. Cas. No. 17,895—*Branch v. Mitchell*, 24 Ark. 445—*Donahue v. Case*, 61 N. Y. 632—*George v. Bates*, 90 Va. 841, 20 S. E. 828.

192. When a grant of land is indefinite as to its location, or so uncertain as to the place where the lands granted are intended to be surveyed as to make it impossible to make a survey with certainty under the terms of the grant, the grant will not be confirmed. *United States v. Delespine*, 15 Pet. 319, 10: 753
Denise v. Ruggles, 16 How. 242, 14: 922
Cited in Winter v. United States, Hempst. 384, Fed. No. 17,895—*Doe ex dem. Commyns v. Latimer*, 2 Fla. 87.

193. A petition praying the confirmation of a Spanish land grant will be dismissed where the description of the grant is so indefinite that it is impossible to locate the proper boundary or to fix any one side line or any one place of beginning. *De Vilemont v. United States*, 13 How. 261, 14: 138

Cited in Muse v. Arlington Hotel Co. 68 Fed. 644.

194. It is no objection to a grant by the Spanish governor of Florida that the metes and bounds are not set forth. *United States v. Acosta*, 1 How. 24, 11: 33

195. It is not sufficient objection to a Mexican grant that the boundaries given of the tract in the grant were not specific enough to separate the land from the public domain, and therefore void for uncertainty, where the grant is founded upon a denunciation of a title to a tract already granted. *United States v. Olvera*, 154 U. S. 538, Appx. 14 Sup. Ct. Rep. 1158, and 17: 637

196. An indefinite description of a grant of land may be aided by the purpose for which it was made. *United States v. Lawton*, 5 How. 10, 12: 27

197. If an original grant is so uncertain that a survey cannot be made of it, the grantee cannot claim under an alternative grant for any deficiency. *O'Hara v. United States*, 15 Pet. 275, 10: 737

198. A Spanish grant of a square of 8 leagues on the waters of two bays is void for indefiniteness, where one of the bays is, in places, 40 miles broad, and neither the dimension nor form of the grant could be surveyed touching on both. *United States v. Miranda*, 16 Pet. 153, 10: 920
Cited in Sena v. United States, 189 U. S. 238, 47 L. ed. 790, 23 Sup. Ct. Rep. 596—*Vanderslice v. Hanks*, 3 Cal. 42.

199. The land being further described as "that which the *diseno* (map) attached to the expediente expresses," such description is sufficient in the absence of evidence that,

with the assistance of this map, a surveyor would have any difficulty in locating it. *United States v. Sutherland*, 19 How. 363, 15: 666

Cited in Ferris v. Chapman, 10 Cal. 629.

200. The act of Congress of March 3, 1811, providing for the sale of public lands, did not reserve from sale land covered by a Spanish concession which called for no boundaries and had never been surveyed. *Menard v. Massey*, 8 How. 293, 12: 1085
Cited in Ballance v. Tesson, 12 Ill. 330—*Canon v. White*, 16 La. Ann. 89.

201. Where a land grant is so vague and indefinite that it furnishes no given point from which to commence the survey or to establish the second corner, the court cannot order the mode in which the survey shall be made, since it would not be a judicial decree, but an exercise of political jurisdiction. *United States v. Boisdore*, 11 How. 63, 13: 605

Cited in Lecompte v. United States, 11 How. 128, 13 L. ed. 633—*Dauterive v. United States*, 101 U. S. 707, 25 L. ed. 871—*United States v. Fremont*, Hoffm. Land Cas. 22, Fed. Cas. No. 15,164—*Muse v. Arlington Hotel Co.* 68 Fed. 644—*Vanderslice v. Hanks*, 3 Cal. 42.

Sufficiency of particular descriptions.

See also *infra*, 214-224, 396, 397.

202. A grant made in the "district of Nassau" is too indefinite to convey any land, unless a survey had been made and recognized by the Spanish authorities, or unless the grantee had settled land under a decree; in which event a survey might be presumed. *O'Hara v. United States*, 15 Pet. 275, 10: 737

Cited in United States v. Miranda, 16 Pet. 160, 10 L. ed. 922—*United States v. King*, 3 How. 787, 11 L. ed. 830—*Lecompte v. United States*, 11 How. 127, 13 L. ed. 632—*United States v. Fremont*, Hoffm. Land Cas. 22, Fed. Cas. No. 15,164—*Winter v. United States*, Hempst. 384, Fed. Cas. No. 17,895—*Stewart v. Trenler*, 49 Ala. 503—*Vanderslice v. Hanks*, 3 Cal. 42—*Doe ex dem Commyns v. Latimer*, 2 Fla. 87.

203. A description in a Mexican patent, "A tract of land known by the name of 'El Cajin,' near the mission of San Diego," is not void for uncertainty. *United States v. Sutherland*, 19 How. 363, 15: 666

204. To show it void for uncertainty, it must be proved that there are two estates called "El Cajin," near the mission of San Diego, to which the description would equally apply; in which case it would be void for ambiguity; or it must be proved that there is no estate or property by that name about San Diego. *United States v. Sutherland*, 19 How. 363, 15: 666

Cited in Phelan v. Poyoreno, 74 Cal. 456, 13 Pac. 681.

205. The Spanish grant of "lands at Mosquito, 50,000 acres, south and north of said place," is too indefinite for a survey to be made, and the claimant can take nothing under the concession. The regulations for granting lands in Florida, by the Spanish

authorities, required that grants should be made in a certain place, and there were no floating rights of survey out of the place designated in the grant; unless where the land granted could not be got there in its exact quantity, and an equivalent was provided for. *Buyck v. United States*, 15 Pet. 215, 10: 715

Cited in United States v. Miranda, 16 Pet. 160, 10 L. ed. 922—*Chaires v. United States*, 3 How. 619, 11 L. ed. 753—*United States v. King*, 3 How. 787, 11 L. ed. 830—*United States v. Lawton*, 5 How. 28, 12 L. ed. 35—*Villalobos v. United States*, 10 How. 557, 13 L. ed. 537—*Lecompte v. United States*, 11 How. 127, 13 L. ed. 632—*Winter v. United States*, Hempst. 384, Fed. Cas. No. 17,895—*Vanderslice v. Hanks*, 3 Cal. 42—*Hancock v. McKinney*, 7 Tex. 453.

206. A grant declaring that a title should be issued "comprehending the place, and under the boundaries set forth in the petition," which was for a grant equivalent to 5 miles square on the western part of St. John's river, at a place known by the name of White Spring, is valid. *United States v. Clarke*, 8 Pet. 436, 8: 1001

Cited in United States v. Boisdore, 11 How. 102, 13 L. ed. 622—*United States v. Fremont*, Hoffm. Land Cas. 22, Fed. Cas. No. 15,164.

207. A grant of 6 miles square of land, the survey of which, under the description given, might be commenced with equal propriety at any point along a river for 30 miles, is void for uncertainty. *United States v. Lawton*, 5 How. 10, 12: 27

208. A Spanish grant giving the grantee permission to build a sawmill on a specified creek, and also to make use of the pine trees within a square of 5 miles, is too vague and indefinite to locate by survey, and is void. *Villalobos v. United States*, 10 How. 541, 13: 531

Grants by quantity; floating grants.

Necessity that Original Grant be Definite in Order to Support Claim for Alternative Grant for Deficiency, see *supra*, 197.

Survey of Floating Grant, see *supra*, 159a.

Amount of Land Confirmable, see *infra*, 479-485.

Confirmation by Decree for Floating Warrants, see *infra*, 490, 491.

209. The right of location possessed by Mexican grantees when a specific quantity is confirmed, lying within boundaries embracing a greater quantity, is, in many cases, controlled by their previous residence, or by sales, or other disposition made by them, of portions of the general tract. *United States v. Pacheco*, 2 Wall. 587, 17: 865

210. A tract equal to 2 leagues square situate within the given outboundaries was intended by a Mexican land grant of "2 square leagues" according to a map which shows a tract something more than 2

leagues long and about 2 leagues wide. *United States v. Pacheco*, 22 How. 225, 16: 336

Cited in United States v. Richardson, Fed. Cas. No. 16,156.

211. The eastern limit of the boundaries of the Mexican grant called the Moquelamos grant, which is bounded on the east by the adjacent Sierra, is at the point where the foothills of the Sierra begin to rise above the plain, near the line between ranges 7 and 8. *United States v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, 32: 213

212. Where, under a grant of a tract of land 5 miles square,—16,000 acres, or its equivalent, in the event that its situation will not permit the said form,—10,000 acres were surveyed, but no more could be surveyed at the place described without injury to third parties, the grantee is entitled to have the residue surveyed elsewhere. The equivalent for any deficiency refers to quantity rather than to the form of the survey. *United States v. Sibbald*, 10 Pet. 313, 9: 437

Littoral or riparian grants.

Riparian Rights Under, see *Waters*, 155.

213. When grants fronting on the river were made by the Spanish government, it was customary to reserve, to the depth of forty additional arpents, the lands immediately in the rear, to be used by the front proprietors for pasturage, or to obtain timber for fences or for fuel. *Slidell v. Grandjean*, 111 U. S. 412, 4 Sup. Ct. Rep. 475, 28: 321

Construction generally.

Sufficiency and Certainty of Description, see also *supra*, 188-208.

214. A Spanish land grant conveys only the land described in the instrument, and not land included within irregular surveys. *United States v. Clarke*, 8 Pet. 436, 8: 1001 *Cited in Smith v. United States*, 10 Pet. 331, 9 L. ed. 444—*United States v. Forbes*, 13 Pet. 182, 10 L. ed. 704—*Chaires v. United States*, 3 How. 619, 11 L. ed. 753—*Winter v. United States*, Hempst. 384, Fed. Cas. No. 17,895.

215. In construing an instrument alleged to constitute a Spanish grant, it cannot be presumed that a grant of thirty superficial leagues, an amount far in excess of the quantity usually conveyed to an individual, would have been carelessly drawn in new and unusual terms calculated to create doubts, and that established forms and usages would be disregarded and needlessly departed from. *United States v. King*, 7 How. 833, 12: 934

216. A Mexican grant of land whose measurement was made with great care and the quantity repeatedly recited in the proceedings to secure the grant is a grant by quantity, notwithstanding a general description by natural objects was given in the original petition; and when the quantity

covered by the grant has been laid off in Mexico by the Mexican authorities, on denouncement of the overplus within such grant, no legal or equitable title therefor exists against the United States. *Ainsa v. United States*, 184 U. S. 639, 22 Sup. Ct. Rep. 507, 46: 727

Cited in Ainsa v. United States, 184 U. S. 649, 46 L. ed. 731, 22 Sup. Ct. Rep. 507—*United States v. Green*, 185 U. S. 269, 46 L. ed. 905, 22 Sup. Ct. Rep. 640.

217. The construction of an instrument executed by provincial authorities by special order of the King of Spain, as to whether the title of certain lands is passed thereby, cannot be altered by any act of the alleged grantee. *United States v. King*, 7 How. 833, 12: 934

Words of place or location.

218. In a Mexican claim, where the concession describes the land as that "remaining in San Jacinto,"—Held, that the grant was for the entire surplus remaining, subject only to the limitation of eleven leagues square imposed by the colonization law of 1824. *United States v. De Aguirre*, 1 Wall. 311, 17: 595

Cited in United States v. San Jacinto Tin Co. 125 U. S. 276, 31 L. ed. 748, 8 Sup. Ct. Rep. 850—*United States v. Cameron*, 3 Ariz. 105, 21 Pac. 177.

219. In a petition to the Spanish governor of Louisiana for concession of lands, the words "came over to this side of the M. R. S. with the consent of your predecessors," refer to the Mississippi river, and were said to stand for *Majeste Rive Sud*. *Mills v. Stoddard*, 8 How. 345, 12: 1107

Words of measurement or area.

Title Acquired under Grant by Quantity, see *infra*, 247-251.

Right to have Confirmation on Payment for Surplus within Place Limits, see *infra*, 426, 427.

Amount Confirmed Restricted to Amount Paid for, see *infra*, 486, 487.

220. A *pertenencia*,—which term is used in describing the land acquired in mining claims—is a square of 200 varas, or 550 feet. *Castillero v. United States*, 2 Black, 1, 17: 360

221. The Mexican league applicable to grants of lands in Texas, being a square of 5,000 varas on each side, has always been estimated at 4,428.4 acres, the vara being considered $33\frac{1}{3}$ American inches. This varies slightly from the true Mexican vara, or that used in California. *United States v. Perot*, 98 U. S. 428, 25: 251

222. Where boundaries are distinctly marked out on a map, although there is no scale by which their extent can be ascertained, but there is a note upon it stating that they extend one league from north to south, and three quarters of a league from east to west, it is a grant by metes and bounds. *Gonzales v. United States*, 22 How. 161, 16: 332

223. The fact that a Mexican commissioner appointed to survey lands granted, with a specification of the quantity made an estimate of a portion of his measurements, is not equivalent to stamping "more or less" on the transaction, or rendering the specified quantity not of its essence. *Ainsa v. United States*, 161 U. S. 208, 16 Sup. Ct. Rep. 544, 40: 673

224. In confirming a Spanish grant from the governor of California, this court rejects the words, "a little more or less," as having no meaning in a system of location and survey like that of the United States, where a quantity is clearly expressed, and holds that the claim of the grantee is valid for the quantity expressed. *United States v. Fossat*, 20 How. 413, 15: 944
Distinguished in United States v. D'Aguiere, 1 Wall. 316, 17 L. ed. 597.

Cited in Fossat or Quicksilver Mine Case (Fossat v. United States) 2 Wall. 704, 17 L. ed. 747—*United States v. Peralta*, Fed. Cas. No. 16,032—*United States v. Folsom*, 7 Sawy. 604, Fed. Cas. No. 15,127—*United States v. Cameron*, 3 Ariz. 105, 21 Pac. 177.

3. Conditions.

Qualifications and Restrictions on Authority to make Grant, see *supra*, I. a, 4.

Necessity of Words in Grant Expressing Condition already Performed, see *supra*, 104.

Effect of Conditional Grants as Passing or Withholding Title, see *infra*, 241-246.

Forfeiture for Breach, see *infra*, 277-283.

Conditions upon Recognition or Confirmation of Title, see *infra*, 369, 370.

Time to Perform Conditions after Change of Sovereignty, see *infra*, 370.

Necessity of Inhabitaney, Cultivation or Possession to Make a Claim Cognizable by Courts of Confirmation, see *infra*, 398-406.

Right of Confirming Court to Impose Conditions, see *infra*, 492-494.

See also *supra*, 71.

225. The authenticity of the grant must first be established, before any question can arise upon the conditions annexed by law to such grants, or concerning the certainty or uncertainty of the boundaries specified in it. *United States v. Castro*, 24 How. 346, 16: 659

226. Where there was no express condition in a grant, none can be implied from the consideration being in part the erection of a sawmill. *United States v. Rodman*, 15 Pet. 130, 10: 685

227. Under the regulations of O'Reilly, persons receiving grants of land fronting upon the Mississippi were required to erect levees and clear and ditch the front within three years. Upon their failure to do so the land reverted to the Crown. *United States v. Moore*, 12 How. 209, 13: 958

228. A condition attached to a Mexican grant issued in 1844, prohibiting the sale or

mortgage of the property, was contrary to the express provisions of the Mexican law. *Fremont v. United States*, 17 How. 542, 15: 241

Sufficiency of compliance with conditions.

229. The building of a house on lands claimed under a Spanish grant, although evidence of an intention to make settlement thereon, is not a settlement under the terms of the grant, which required the removal of persons or workers to the land, and its cultivation. Nor does a loss of negroes attempted to be taken to the land fulfil the requirements of the grant. *O'Hara v. United States*, 15 Pet. 275, 10: 737

230. A grantee of a large tract of land given him for the purpose of removing his family thereto, and for the establishment of a cattle-raising farm, does not fulfil his duty of taking possession where he simply places a single slave upon the premises, who cultivated a few acres and kept cattle there. *United States v. Boisdore*, 11 How. 63, 13: 605
Cited in *New York Indians v. United States*, 170 U. S. 17, 42 L. ed. 983, 18 Sup. Ct. Rep. 531—*United States v. Cervantes*, Hoffm. Land Cas. 15, Fed. Cas. No. 14,768—*Gunn v. Bates*, 6 Cal. 270.

231. The provision of the treaty of cession by Spain to the United States as to the performance of the conditions in grants is not confined to owners of land by occupancy or residence, but extends to persons who have a legal seisin and possession of the land in virtue of a grant, and at the time of the cession it is enough that they show a performance of the condition *cy pres*. *United States v. Sibbald*, 10 Pet. 313, 9: 437
Cited in *Buyck v. United States*, 15 Pet. 223, 10 L. ed. 719—*United States v. Breward*, 16 Pet. 147, 10 L. ed. 918—*United States v. Hanson*, 16 Pet. 202, 10 L. ed. 937—*United States v. Acosta*, 1 How. 27, 11 L. ed. 34—*United States v. Lawton*, 5 How. 27, 12 L. ed. 35—*United States v. Fremont*, Hoffm. Land Cas. 26, Fed. Cas. No. 15,164—*United States v. Reading*, Hoffm. Land Cas. 19, Fed. Cas. No. 16,127—*Moore v. Hampton*, 3 La. Ann. 195—*Sibbald's Estate*, 18 Pa. 251.

232. The conditions in the royal deed of confirmation of a grant of land made in 1750, in what is now the state of Michigan, and containing over 200,000 acres, requiring the grantees to improve the concession and use and occupy the same, or it would be reunited to the royal domain is not fulfilled by four years occupancy evidenced only by a stockade fort, three or four temporary huts for laborers, and the clearing and planting of a few acres around the fort. *United States v. Le Gardiur De Repentigny* (United States v. De Repentigny) 5 Wall. 211, 18: 627

Cited in *New Orleans P. R. Co. v. United States*, 124 U. S. 130, 31 L. ed. 386, 8 Sup. Ct. Rep. 417—*Sioux City & St. P. R. Co. v. Countryman*, 83 Iowa, 181, 49 N. W. 72.

233. A condition in a grant of land requiring the grantee to build a house which shall be inhabited within one year, is suf-

ficiently complied with by appointing an agent who builds and inhabits the house. *United States v. Reading*, 18 How. 1, 15: 291
Cited in *Waterman v. Smith*, 13 Cal. 410.

Excuse for delay or noncompliance.

Effect of Interruption of Possession by War, see *supra*, 176.

See also *infra*, 283.

234. Nothing less than a law dispensing with the performance of conditions attached to a Spanish land grant, or a release of the performance of them by the governor, sanctioned by the general royal authority under which he acted, or a release by royal authority after the grant was made general in its application, or applicable to some particular case or class of cases, can be admitted, *proprio vigore*, as a release of the obligations upon the grantee to perform the conditions of his grant. *United States v. Kingsley*, 12 Pet. 476, 9: 1163

235. Where a Spanish grant was made on a condition subsequent that the grantee should settle 200 Spanish families on the land conveyed, which condition was reasonable at the time, but was subsequently rendered impossible of performance or unreasonably burdensome by the cession of the territory to another government, a court of equity will relieve from the condition. *United States v. De la Maza Arredondo*, 6 Pet. 691, 8: 547

Distinguished in Interstate Land Co. v. Maxwell Land Grant Co. 139 U. S. 589, 35 L. ed. 286, 11 Sup. Ct. Rep. 656.

Cited in *United States v. Kingsley*, 12 Pet. 484, 9 L. ed. 1166—*United States v. King*, 7 How. 858, 12 L. ed. 945—*Fremont v. United States*, 17 How. 563, 15 L. ed. 248—*McMicken v. United States*, 97 U. S. 216, 24 L. ed. 951—*Pindar v. Upton*, 44 N. H. 362.

236. Facts within the knowledge of the grantee at the time when he obtained a Spanish grant—such as the hostility of the Indians—cannot constitute an excuse for nonperformance of conditions,—that a road and clearing should be made upon the granted premises within one year, and an establishment made upon the land within three years. *De Vilemont v. United States*, 13 How. 261, 14: 138

Cited in *Fremont v. United States*, 17 How. 556, 15 L. ed. 245—*Ledoux v. Black*, 18 How. 475, 15 L. ed. 453—*United States v. Noe*, 23 How. 317, 16 L. ed. 464—*New York Indians v. United States*, 170 U. S. 17, 42 L. ed. 933, 18 Sup. Ct. Rep. 531—*United States v. Fremont*, Hoffm. Land Cas. 25, Fed. Cas. No. 15,164—*United States v. Reading*, Hoffm. Land Cas. 19, Fed. Cas. No. 16,127.

237. A grantee of land on condition that he erect a mill thereon cannot be excused from the performance of such condition by reason of the disturbed and dangerous condition of the country, where there was no more danger after his application for the grant than there was at the time of his application. *United States v. Kingsley*, 12 Pet. 476, 9: 1163

Cited in *United States v. Fremont*, Hoffm. Land Cas. 26, Fed. Cas. No. 15,164.

238. That the grantee in a land grant was compelled to be absent on military duty, that his house was burned and his agent in possession killed by Indians, are excuses for delay in building on or inhabiting the land, within a time prescribed. *United States v. Reading*, 18 How. 1, 15: 291
Cited in United States v. Bennitz, 23 How. 262, 16 L. ed. 455.

239. Hostility of the Mexican government to naturalized emigrants from the United States is good cause for joining the American forces and prevents forfeiture. *United States v. Reading*, 18 How. 1, 15: 291

240. Where claimant was hindered by the revolutionary state of the country from performing a condition subsequent in his Mexican grant, its nonfulfillment will not work a forfeiture of the title. *United States v. Vaca*, 18 How. 556, 15: 485
Cited in Hornsby v. United States, 10 Wall 238, 19 L. ed. 903.

4. Title Granted or Acquired.

Construction of Grant as to Quantum of Estate, see *supra*, 185-187.

Necessity of Confirmation or Recognition by United States to Complete Title, see *infra*, 317-323.

Nature of Claims Cognizable by Courts, see *infra*, 380-384.

Kind of Title Confirmable by Courts, see *infra*, 407-419.

Amount of Land Confirmable, see *infra*, 479-485.

Conformity of Confirmatory Survey to Grant, see *infra*, 544-548.

Title to Pueblo Lands, see *Pueblo Lands*, 8-12.

Grant of Land Under Water, see *Waters*, 79.

Conditional grants.

As to Conditions Generally, see *supra*, I. d, 3.

241. The *empresario*, or colonizing contractor, could not, under the Mexican colonization law, be put in possession of any specific portion of the land without first establishing a colony; where that was not done by him no rights of property were acquired. *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 11 Sup. Ct. Rep. 656, 35: 278

242. Where a Spanish grant was made upon condition that the grantee would introduce a colony and perform certain other conditions, until the conditions were performed the grantee did not possess a good title. The period within which the conditions could be performed expired March 3, 1804, the date fixed by Congress; and the grant must be judged as it stood that day. *Glenn v. United States*, 13 How. 250, 14: 133
Cited in De Villemont v. United States, 13 How. 267, 14 L. ed. 140—*Fremont v. United States*, 17 How. 556, 15 L. ed. 245—*Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 587, 35 L. ed. 285, 11 Sup. Ct.

Rep. 656—*New York Indians v. United States*, 170 U. S. 17, 42 L. ed. 933, 18 Sup. Ct. Rep. 531—*De Villemont v. United States*, Hempst. 393, Fed. Cas. No. 3,839—*Garcia v. United States*, Hoffm. Land Cas. 159, Fed. Cas. No. 5,215—*United States v. Cervantes*, Hoffm. Land Cas. 13, Fed. Cas. No. 14,768—*Branch v. Mitchell*, 24 Ark. 445.

242a. One granted by a decree of the Mexican governor a right or license to occupy an island, at the entrance of the Bay of San Francisco, to raise stock, subject to the right of the government to enter at any time and appropriate the premises as a site for a military fort, but who never availed himself of the license granted, or made any improvements on the island, acquired no interest in the land. *United States v. Osio*, 23 How. 273, 16: 457

243. A concession on condition becomes absolute where the condition is performed. *United States v. Clarke*, 9 Pet. 168, 9: 89

244. Where a grant was made "for the purpose of constructing a mill, and for services and other matters which are set forth," the grant is not founded on the consideration of building a mill, although intended for that purpose, but for meritorious services and losses. *United States v. Hanson*, 16 Pet. 196, 10: 935

245. The contract between Baron de Bastrop and the Spanish government, under which certain lands was "destined and appropriated" in order that the baron "might settle the land," it being expected that the baron would locate a large number of families upon the same to grow wheat, and certain portions of the same land being otherwise definitely granted to the baron, upon which to erect mills for the manufacture of flour, conveyed no title to the baron. *United States v. Philadelphia*, 11 How. 609, 13: 834

United States v. Livingston, 11 How. 662, 13: 856

United States v. Callender, 11 How. 662, 13: 856

246. Where a petition solicits a grant of 15,000 acres of land, and a decree is made granting the land solicited, "at the place indicated," "in conformity with the number of workers which he may have to cultivate it, the corresponding number of acres may be surveyed to him," and also "that he will take possession of the land in six months from date of the grant,"—Held, this is not an absolute grant for any quantity. *O'Hara v. United States*, 15 Pet. 275, 10: 737

Floating or unlocated grants.

Survey of Floating Grant, see *supra*, 159a.

Right of Selection, see *infra*, 257, 258.

Right to Make up Deficiency by Selections outside of Place Limits, see *infra*, 259.

Right to Have Confirmation on Payment for Surplus within Place Limits, see *infra*, 426, 427.

Effect of Satisfaction of Grant by other Grant in Lieu thereof, see *infra*, 440.

Confirmation by Decree for Floating Warrants, see *infra*, 490, 491.

Superiority as between Conflicting Patents for Specific and for Floating Grants, see *infra*, 571.

Effect of Confirmation and Survey as against Outstanding Floating Grant, see *infra*, 657a.

247. Under grants by quantity, the grantee had a vested interest in the quantity of land mentioned; and the general gift became a particular gift when the survey was made. *Hornsby v. United States*, 10 Wall. 224, 19: 900

Distinguished in *Fitzpatrick v. Dubols*, 2 Sawy. 440, Fed. Cas. No. 4,842.

Cited in *Page Co. v. Burlington & M. R. Co.* 40 Iowa, 521—*Fitzpatrick v. Dubols*, 2 Sawy. 440, Fed. Cas. No. 4,842.

248. Mexican grants of quantity within a larger tract described by outside boundaries, in which the donee is entitled only to the quantity specified, are properly floats, and do not attach to any specific land until located by authority of the government; the *Moquelamos* grant is of this kind. *United States v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, 32: 213
Distinguished in *Shanklin v. McNamara*, 87 Cal. 384, 26 Pac. 345.

Cited in *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 590, 35 L. ed. 286, 11 Sup. Ct. Rep. 656—*Cameron v. United States*, 148 U. S. 309, 37 L. ed. 462, 13 Sup. Ct. Rep. 595—*Carr v. Quigley*, 149 U. S. 658, 37 L. ed. 888, 13 Sup. Ct. Rep. 261—*United States v. Curtner*, 38 Fed. 8—*United States v. Southern P. R. Co.* 45 Fed. 608—*Pierce v. Molliken*, 78 Fed. 198—*Hays v. Stelger*, 76 Cal. 560, 18 Pac. 670—*Carr v. Quigley*, 79 Cal. 132, 21 Pac. 607—*United Land Asso. v. Knight*, 85 Cal. 485, 24 Pac. 818—*Grant v. Oliver*, 91 Cal. 161, 27 Pac. 596—*Foss v. Hinkell*, 91 Cal. 202, 27 Pac. 644—*Northern P. R. Co. v. Barnes*, 2 N. D. 362, 51 N. W. 386—*Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.* 45 Minn. 110, 47 N. W. 464.

249. A Mexican grant which purports to convey a present and immediate interest in consideration of the previous public and patriotic services of the grantee gives him, as between himself and the government, a vested interest in the quantity of land mentioned in the grant, although no survey has then been made. *Fremont v. United States*, 17 How. 542, 15: 241

Distinguished in *United States v. Castro*, 24 How. 351, 16 L. ed. 661.

Cited in *United States v. Vallejo*, 1 Black, 564, 17 L. ed. 240—*Castillero v. United States*, 2 Black, 347, 17 L. ed. 440—*United States v. Moreno*, 1 Wall. 404, 17 L. ed. 635—*Hornsby v. United States*, 10 Wall. 233, 19 L. ed. 902—*Hall v. Russell*, 101 U. S. 509, 25 L. ed. 832—*United States v. McLaughlin*, 127 U. S. 450, 32 L. ed. 221, 8 Sup. Ct. Rep. 1177—*Cameron v. United States*, 148 U. S. 309, 37 L. ed. 462, 13 Sup. Ct. Rep. 595—*New York Indians v. United States*, 170 U. S. 17, 42 L. ed. 933, 18 Sup. Ct. Rep. 531—*Armljo v. United*

States, Hoffm. Land Cas. 249, Fed. Cas. No. 536—*Cervantes v. United States*, 3 Am. L. Reg. 746, Fed. Cas. No. 2,560—*Fitzpatrick v. Dubols*, 2 Sawy. 440, Fed. Cas. No. 4,842—*Pico v. United States*, Hoffm. Land Cas. 117, Fed. Cas. No. 11,127—*Pico v. United States*, Hoffm. Land Cas. 142, Fed. Cas. No. 11,128—*Ryan v. Central P. R. Co.* 5 Sawy. 265, Fed. Cas. No. 12,185—*Sanger v. Sargent*, 8 Sawy. 98, Fed. Cas. No. 12,319—*Teschmacher v. United States*, Hoffm. Land Cas. 28, Fed. Cas. No. 13,843—*Tobin v. Walkinshaw*, McAll. 161, Fed. Cas. No. 14,069—*Yount v. United States*, Hoffm. Land Cas. 47, Fed. Cas. No. 18,188—*Illinois v. Illinois C. R. Co.* 33 Fed. 770—*Wineman v. Gastrell*, 3 C. C. A. 624, 2 U. S. App. 449, 53 Fed. 700—*Smyth v. New Orleans Canal & Bkg. Co.* 35 C. C. A. 669, 93 Fed. 921—*United States v. Cameron*, 3 Ariz. 104, 21 Pac. 177—*Gunn v. Bates*, 6 Cal. 269—*Palmer v. Bolling*, 8 Cal. 389—*Ferris v. Chapman*, 10 Cal. 616—*Waterman v. Smith*, 13 Cal. 410—*Doll v. Meador*, 16 Cal. 320—*Carpentier v. Webster*, 27 Cal. 564—*Wilson v. Castro*, 31 Cal. 437—*People v. Crockett*, 33 Cal. 154—*Morenhout v. Barron*, 42 Cal. 603—*Pueblo County v. Central Colorado Improv. Co.* 2 Colo. 635—*Chicago. R. I. & P. R. Co. v. Brown*, 40 Iowa, 335—*Fields v. Lamb*, 2 Or. 266.

250. A petition for a Spanish concession, not specifying definite boundaries, was referred to the solicitor general with instructions to put the petitioner in possession, if in so doing no prejudice would result to third persons. Such transaction did not constitute an absolute grant, without further action. Slight evidence of occupation, without establishing specific limits of the occupation, is insufficient. *Lecompte v. United States*, 11 How. 115, 13: 627

Cited in *Dauterive v. United States*, 101 U. S. 707, 25 L. ed. 871—*Castillero v. United States*, 2 Black, 333, 17 L. ed. 436—*Fremont v. United States*, 17 How. 575, 15 L. ed. 253—*Muse v. Arlington Hotel Co.* 68 Fed. 644.

251. The government holds the fee to unsurveyed public land unaffected by any vested equitable unlocated interest. *United States v. Delespine*, 15 Pet. 226, 10: 719

Cited in *United States v. Miranda*, 16 Pet. 160, 10 L. ed. 922—*Chalres v. United States*, 3 How. 619, 11 L. ed. 753—*United States v. King*, 3 How. 787, 11 L. ed. 830—*Villalones v. United States*, 10 How. 557, 13 L. ed. 537—*Lecompte v. United States*, 11 How. 127, 13 L. ed. 632—*Fremont v. United States*, 17 How. 568, 15 L. ed. 250—*Winter v. United States*, Hempst. 384, Fed. Cas. No. 17,893—*Vanderslice v. Hanks*, 3 Cal. 42.

Grants by governor not approved by assembly.

252. It was the governor's duty to forward grants to the assembly for approval, but his neglect to do so did not operate to divest the grantees of estates already vested in them. *Hornsby v. United States*, 10 Wall. 224, 19: 900

253. Under the regulations of 1823 the clause subjecting the grant of the governor to the approval of the Departmental Assembly did not prevent the title from passing to the grantees upon the execution of the instrument; until such approval the estate

granted was subject to be defeated. *Hornsby v. United States*, 10 Wall. 224. 19: 900
Cited in Crespin v. United States, 168 U. S. 213, 42 L. ed. 440, 18 Sup. Ct. Rep. 53—*Hays v. United States*, 175 U. S. 237, 44 L. ed. 154, 20 Sup. Ct. Rep. 80—*United States v. Elder*, 177 U. S. 112, 44 L. ed. 693, 20 Sup. Ct. Rep. 537—*Emeric v. Alvarado*, 64 Cal. 556, 2 Pac. 418.

254. If the approval of the Departmental Assembly was refused to a Mexican grant by the governor, it did not destroy the title, but only suspended it until it was rejected by the supreme government. *United States v. Reading*, 18 How. 1, 15: 291
United States v. Cervantes, 18 How. 553, 15: 484

Cited in Hornsby v. United States, 10 Wall. 238, 19 L. ed. 903—*Tobin v. Walkinshaw*, McAll. 160, Fed. Cas. No. 14,060.

255. A Mexican grant of land by the governor of a province, prior to its cession to the United States, was sufficient to pass title, although it did not become definitive until after it had been approved by the Departmental Assembly; and failure to obtain such approval, did not destroy the title, but suspended it merely, until rejected by the supreme government of Mexico. *United States v. Reading*, 18 How. 1, 15: 291
Cited in Arguello v. United States, 18 How. 550, 15 L. ed. 482—*United States v. Cervantes*, 18 How. 555, 15 L. ed. 485—*Hornsby v. United States*, 10 Wall. 238, 19 L. ed. 903—*Hays v. United States*, 175 U. S. 237, 44 L. ed. 154, 20 Sup. Ct. Rep. 80—*Tobin v. Walkinshaw*, McAll. 161, Fed. Cas. No. 14,069—*Ferris v. Chapman*, 10 Cal. 617.

Unrecorded grants.

256. There is nothing in the various acts of Congress upon the subject, by reason of which a perfected Spanish or French title to land in the Florida and Louisiana tracts is barred, as against the United States, by failure to record the same though barred as to private claims derived from the United States. *United States v. Power*, 11 How. 570, 13: 817

Right of selection within limits.

257. Where a grant was of a specific quantity within exterior limits embracing a much larger quantity, there is no obligation to allow the quantity to be selected in accordance with the wishes of the grantee; the right of selection is only a privilege given by the generosity of the government and is never permitted to defeat equitable prior rights. *United States v. Armijo*, 5 Wall. 444, 18: 492

258. The United States government succeeded to the right of the Mexican government of locating the quantity granted in a floating grant in such part of the larger tract as it saw fit. *United States v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, 32: 213

Right to transcend limits to make up deficiency.

Necessity of Certainty in Original Grant to Support Alternative Grant to Make up Deficiency, see *supra*, 197.

Amount Confirmed Restricted to Amount Paid for, see *infra*, 486, 487.

Restriction of Survey to Limits of Grant, see *infra*, 546.

259. In locating an unsurveyed concession, land outside of the limits of the description cannot be included for the purpose of furnishing an equivalent to such an amount as was necessarily deducted by reason of its previous grant to third persons. *United States v. Arredondo*, 13 Pet. 133, 10: 93

Conflicting grants and prior titles.

See also *supra*, 259.

260. It is a principle applicable to every grant, that it cannot affect pre-existing titles. *New Orleans v. De Armas*, 9 Pet. 224, 9: 109
Cited in Pollard v. Kibbe, 14 Pet. 391, 10 L. ed. 508—*Crystal Springs Land & Water Co. v. Los Angeles*, 76 Fed. 153—*Knabe v. Durden*, 88 Ala. 439, 7 So. 92—*Roberts v. Missouri*, K. & T. R. Co. 43 Kan. 108, 22 Pac. 1006.

261. In case of Mexican floating grants, the land, other than that actually reserved during the examination of the validity of the grant, was at the disposal of the government. *United States v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, 32: 213
Cited in Wisconsin C. R. Co. v. Forsythe, 159 U. S. 56, 40 L. ed. 74, 15 Sup. Ct. Rep. 1020—*United States v. Southern P. R. Co.* 39 Fed. 142—*Southern P. R. Co. v. Brown*, 68 Fed. 335—*Northern P. R. Co. v. Musser Sauntry Land, Logging & Mfg. Co.* 16 C. C. A. 102, 34 U. S. App. 66, 68 Fed. 908—*United States v. Oregon & C. R. Co.* 69 Fed. 902—*Apis v. United States*, 88 Fed. 935—*Lockhart v. Willis*, 9 N. M. 355, 54 Pac. 336.

262. Where a grant to one of land in California is in subordination to the previously existing rights of another, the rights of the latter are superior to those of the former, notwithstanding the formal title issued first to him. *United States v. Armijo*, 5 Wall. 444, 18: 492
Cited in Blissell v. Henshaw, 1 Sawy. 580, Fed. Cas. No. 1,447—*Bixby v. Bent*, 59 Cal. 529.

263. A subsequent grant of specific land by the government gives a title superior to a claim under a Mexican land grant, where that grant contains no definite boundaries, but only a certain quantity of land. *Fremont v. United States*, 17 How. 542, 15: 241

Cited in United States v. Frémont, 18 How. 38, 15 L. ed. 304—*Waterman v. Smith*, 13 Cal. 417—*Leese v. Clark*, 18 Cal. 575—*Thornton v. Mahoney*, 24 Cal. 579—*Yates v. Smith*, 38 Cal. 66—*Page County v. B. & M. R. Co.* 40 Iowa, 521—*Grosblouis v. Northcut*, 3 Or. 399.

264. In Texas, until a title is deposited in the land office, or duly recorded in the prop-

er county, bona fide purchasers not having notice thereof, although claiming under a junior Mexican grant, will be protected. *Airhart v. Massieu*, 98 U. S. 491, 25: 213

265. Where a defendant sets up title under a land warrant which he had located within the boundaries of the grant to plaintiff's grantor, and relies on adverse possession of three years under the junior title, such defense is insufficient. *Cook v. Burnley*, 11 Wall. 659, 20: 29

266. In locating an unsurveyed concession, it must be lessened so far as it interferes with previous grants to third persons. *United States v. Arredondo*, 13 Pet. 133, 10: 93

Cited in Doe ex dem. Commyns v. Latimer, 2 Fla. 89.

267. Where a grant was made by Spain, and afterwards confirmed by the United States, of a lot of land in the city of Mobile extending to the Mobile river, the grant included the land from high-water mark to the bed of the river, and this land was within the exceptions of the act of 1824 granting certain lots of ground to the city of Mobile and no claim to it was vested in the city. *Mobile v. Hallett*, 16 Pet. 261, 10: 958
Cited in Strout v. Foster, 1 How. 100, 11 L. ed. 62—*Pollard v. Hagan*, 3 How. 233, 11 L. ed. 575—*Shively v. Bowby*, 152 U. S. 27, 38 L. ed. 341, 14 Sup. Ct. Rep. 548—*Leverich v. Mobile*, 110 Fed. 174.

Decrees or orders to adjust conflicts.

Confirmations by Former Governments, see *supra*, 115.

268. An *ex parte* correspondence between the Mexican governor and an alcalde, in which the latter presents a claim by two of several allottees under a grant to twenty, to the effect that they had title under an earlier grant, when the other settlers had no knowledge of this correspondence and when the governor's reply expressly declined to adjudicate the matter for lack of jurisdiction in respect of documents "sanctioned by former governors," cannot affect the rights of such other allottees, although the governor gives his individual opinion that the land actually occupied by the claimants under a former grant could not be claimed by the other allottees. *Chaves v. United States*, 168 U. S. 177, 18 Sup. Ct. Rep. 72, 42: 426

Sale or mortgage of claim.

Right to Collaterally Attack Title under Judicial Sale against Grantee, see *Judicial Sale*, 136.

Assignment a Question for Jury, see *Trial*, 192.

269. Purchasers under Mexican Laws of 1825, art. 24, can alienate their grants as soon as the concession has been made to them; and the purchaser becomes the absolute owner when he is put into possession of the land and the evidence of title by the proper officer of the government. *Hunnicutt v. Peyton*, 102 U. S. 333, 26: 113
Cited in Muse v. Arlington Hotel Co. 68 Fed.

641—*Surghenor v. Ranger*, 66 C. C. A. 332, 133 Fed. 458.

270. Where the original grant did not locate the subject of the grant, when this was made, and the title was given, the title was complete. *Hunnicutt v. Peyton*, 102 U. S. 333, 26: 113

271. An imperfect Spanish title, claimed by virtue of a concession, was, by the laws of Missouri, subject to sale and assignment, and subject to be mortgaged for a debt. *Massey v. Papin*, 24 How. 362, 16: 734

272. An incomplete title acquired from the Spanish government, prior to the treaty of St. Ildefonso between Spain and France, to lands in the territory now embraced within the state of Missouri, was such a property interest as could be transferred by mortgage or reached by judicial process. *Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28: 908

Effect of discovery of minerals.

Invalidity of Conditions upon Confirmation that Land shall Revest on Discovery of Minerals, see *infra*, 635, 636.

273. The discovery of a mine on land held under a Mexican grant does not destroy the owner's title. *Fremont v. United States*, 17 How. 542, 15: 241
Cited in Castillero v. United States, 2 Black. 232, 17 L. ed. 402—*Boggs v. Merced Mts. Co.* 14 Cal. 358—*Fremont v. Flower*, 17 Cal. 211.

5. Effect of Fraud.

Effect of Fraudulent Papers as Showing Suspicion on Claim, see *infra*, 310-313.
Disability of Commissioners to Entertain Claim Previously Rejected on Account of Fraud or Fabrication, see *infra*, 505-507.

Jurisdiction of Law or Equity to Declare Forfeiture for Fraud, see *Courts*, 1263.
Burden of Proof, see *Evidence*, 524.

274. Where fraudulent attempts were made to enlarge the quantity granted in a Mexican grant, by erasures and interlineations, after California had been ceded to the United States, that cannot take away from the wife and children of the grantee their claim to the original grant. *United States v. West*, 22 How. 315, 16: 317
Cited in United States v. Galbraith, 2 Black. 406, 17 L. ed. 451—*United States v. Galbraith*, Fed. Cas. No. 15,182—*United States v. Juarez*, Fed. Cas. No. 15,500.

275. The authenticity of an attested copy of a certificate of survey from the Spanish authorities can be inquired into, and impeached, if antedated or fraudulent. *United States v. King*, 3 How. 773, 11: 824
Cited in Muse v. Arlington Hotel Co. 68 Fed. 643—*Ethridge v. Milling*, 15 La. Ann. 514.

276. Where the grant was originally made and dated by Governor Alvarado during his term of office, and the date which it now

bears an evident alteration against the interests of the claimants, it is not to be imputed to them. *United States v. De Haro*, 22 How. 293, 16: 343

e. Loss or Forfeiture of Claim.

Effect of Fraud, see *supra*, I. d. 5.
Disloyalty of Grantee as Ground for Forfeiture, see *supra*, 239.

Effect of Discovery of Minerals Subsequent to Grant, see *supra*, 273.

Power of Former Sovereign to Conclude Treaty Forfeiting Rights as Political Question, see Courts, 122.

Presumption against Forfeiture, see Evidence, 700.

Forfeiture for breach of condition.

Impossibility as Excuse Preventing Forfeiture, see *supra*, 142.

Sufficiency of Compliance with Conditions, see *supra*, 229-233.

Excuse for Delay in Performance of Conditions, see *supra*, 234-240.

277. A Spanish grant of land in Florida on condition that the grantee build a mill within the period fixed in the grant is void, where the grantee failed to perform the condition or show sufficient cause for its non-performance. *United States v. Drummond*, 13 Pet. 84, 10: 70

United States v. Burgevin, 13 Pet. 85, 10: 70

United States v. Mills, 12 Pet. 215, 9: 1061

United States v. Delespine, 15 Pet. 319, 10: 753

United States v. Kingsley, 12 Pet. 476, 9: 1163

Cited in United States v. Mills, 12 Pet. 216, 9 L. ed. 1062—*United States v. Drummond*, 13 Pet. 84, 10 L. ed. 70—*United States v. Burgevin*, 13 Pet. 86, 10 L. ed. 71—*United States v. Wiggins*, 14 Pet. 350, 10 L. ed. 489—*United States v. Miranda*, 16 Pet. 159, 10 L. ed. 922—*Fremont v. United States*, 17 How. 569, 15 L. ed. 251—*United States v. Noe*, 23 How. 317, 16 L. ed. 464—*Winter v. United States*, Hempst. 388, Fed. Cas. No. 17,895—*Muse v. Arlington Hotel Co.* 68 Fed. 642—*Vandersilce v. Hanks*, 3 Cal. 40—*Gunn v. Bates*, 6 Cal. 270—*Doe ex dem. Commyns v. Latimer*, 2 Fla. 80—*Holliman v. Peebles*, 1 Tex. 701—*Hancock v. McKinney*, 7 Tex. 446.

278. Where the inducement held out by the petitioner for a Spanish land grant was that the grant should be settled within an early period after the grant, and the land was granted on the conditions proposed, a forfeiture of the land resulted from the conditions not being complied with, and the United States was not bound to confirm the grant under the Florida treaty. *Buyck v. United States*, 15 Pet. 215, 10: 715
Cited in Fremont v. United States, 17 How. 568, 15 L. ed. 250.

279. An actual entry or office found is not necessary to enable the government to take advantage of a condition broken, and to resume the possession of lands which

have become forfeited. *McMicken v. United States*, 97 U. S. 204, 24: 947

Cited in St. Louis, I. M. & S. R. Co. v. McGee, 115 U. S. 474, 29 L. ed. 448, 6 Sup. Ct. Rep. 123—*New Orleans P. R. Co. v. United States*, 124 U. S. 130, 31 L. ed. 385, 8 Sup. Ct. Rep. 417—*Bybee v. Oregon & C. R. Co.* 139 U. S. 675, 35 L. ed. 307, 1 Sup. Ct. Rep. 641—*Atlantic & P. R. Co. v. Mingus*, 165 U. S. 434, 41 L. ed. 778, 17 Sup. Ct. Rep. 348—*Farmers' Loan & T. Co. v. Chicago, P. & S. R. Co.* 39 Fed. 149.

280. A condition against alienation contained in a Mexican land grant, even if valid, cannot be relied upon to work a forfeiture, when the land was conveyed to an American citizen while the territory was in the possession of the American forces, and held by the United States as a conquered territory, subject to the authority of the American government. *Fremont v. United States*, 17 How. 542, 15: 241

281. Failure of the grantee in a grant of land to comply with the conditions prescribed does not necessarily work a forfeiture, unless the delay has been so unreasonable as to show an intent to abandon the claim. *United States v. Reading*, 18 How. 1, 15: 291
Cited in United States v. Noe, 23 How. 317, 16 L. ed. 464.

282. The failure of a Mexican grantee to build on and inhabit the land within one year, according to the condition of the grant, will not necessarily destroy his title. The charge of negligence is to be determined by the proofs in each case. *United States v. Reading*, 18 How. 1, 15: 291

283. Nonperformance of the conditions or requirements of a Mexican grant within the time and in the manner stated in the grant will preclude the confirmation of the grant by the court of private land claims, unless the performance of the conditions was waived by the Mexican government; and the fact that it was prevented by the Mexican authorities will not give the court of private land claims any power to uphold the grant. *Cessna v. United States*, 169 U. S. 165, 18 Sup. Ct. Rep. 304, 42: 702

Forfeiture for nonlocation or abandonment.

Power of Departmental Treasurer to Declare Abandonment of Mission Lands, see *supra*, 55a.

Absence of Necessary Officer as Excuse, see *supra*, 141.

Effect of Delay in being Put into Possession, see *supra*, 163, 164.

Effect of Interruption of Possession During War, see *supra*, 176.

Delay in Performance of Condition as Betokening Abandonment, see *supra*, 281.

Presumption of Abandonment or Surrender, see Evidence, 747, 748.

Evidence of Abandonment Generally, see Evidence, 2353-2355.

Secondary Evidence of, see Evidence, 905.

See also *supra*, 282.

284. Mere neglect to comply with the condition to obtain juridical possession did not of itself work a forfeiture under the Mexican law. *Hornsby v. United States*, 10 Wall. 224, 19: 900

285. Specific performance of a grant made by the Mexican governor of California will not be decreed, where the one to whom it was made unreasonably delayed for eleven years in performing the conditions required of taking possession and filing an expediente in the archives to segregate the land from the public domain, other persons having settled and improved the land in the meantime. *United States v. Noe*, 23 Hok. 312, 16: 462
Cited in United States v. Vallejo, 1 Black, 552, 17 L. ed. 234—*United States v. White*, Fed. Cas. No. 16,873—*Vallejo v. United States*, Fed. Cas. No. 16,818, 18: 627

286. Where a Spanish title was nothing but a warrant or permit to survey, occupy, and improve the land, with a view to a grant, and with an express condition to be void if not done within three years, and no attempt to perform the condition has been made, or any excuse for its nonperformance, the title will not be sustained. *McMicken v. United States*, 97 U. S. 204, 24: 947

287. Where more than a century has elapsed since the original grant, during which time there has been but four years' actual possession by the grantee, and the first notice this government had of the title was forty-two years after the territory within which the lands are situate came into its possession, and in the mean time the lands have been surveyed, and put on sale, and are now, and have been for years, covered with inhabitants, such title is invalid. *United States v. Le Gardiur De Repentigny* (*United States v. De Repentigny*) 5 Wall. 211, 18: 627

Cited in Muse v. Arlington Hotel Co. 68 Fed. 649.

288. The petition of the claimant for a concession, and the grant of the governor, together constitute a contract. And where the petition states that the grant is to be for, and in consideration of, the establishment of a cattle farm: and the grant, after referring to such consideration gives a vague description of the land and specifies that it shall be surveyed,—a neglect to have the survey made while the title remained in Spain, and a failure to take anything but slight possession, is fatal to the claim. Long delay and apparent acquiescence in the occupation by others is a strong circumstance against the claimants. *United States v. Boisdore*, 11 How. 63, 13: 605
Cited in United States v. Moore, 12 How. 224, 13 L. ed. 964—*United States v. Simon*, 12 How. 434, 13 L. ed. 1055—*Glenn v. United States*, 13 How. 256, 14 L. ed. 135—*Fremont v. United States*, 17 How. 555, 15 L. ed. 245—*United States v. Reading*, 18 How. 13, 15 L. ed. 296—*Glenn v. United States*, *Hempst.*

400, Fed. Cas. No. 5,481—*Muse v. Arlington Hotel Co.* 68 Fed. 640.

289. Confirmation of a Spanish land grant cannot be had in the court of private land claims, where possession of the land had been abandoned by the descendants of the grantee for at least nine years before the treaty of 1848 with Mexico, under which the land passed into the possession of the United States, and there has been no possession by representatives of such grantee since the treaty, and no attempt to assert their title thereto for more than fifty years thereafter. *Sena v. United States*, 189 U. S. 233, 23 Sup. Ct. Rep. 596, 47: 787

290. A delay of forty years in bringing suit to enforce a Spanish claim must be considered as a constructive abandonment thereof. *United States v. Philadelphia*, 11 How. 609, 13: 834
Cited in Muse v. Arlington Hotel Co. 68 Fed. 649.

Forfeiture by official default or act.

Effect of Governor's Failure to Forward Grant for Approval, see *supra*, 252.

291. The omission or inability of the public authorities to do their duty cannot work a forfeiture to the state of land held under a Mexican grant. *Fremont v. United States*, 17 How. 542, 15: 241

292. The court cannot pronounce the lands forfeited for any acts or omissions by the Mexican authorities since July 7, 1846, when those authorities were displaced. *Hornsby v. United States*, 10 Wall. 224, 19: 900

293. No law of the United States authorizes this court to pronounce forfeiture of any claim under Mexican title to lands in California, for any act or omission since the date of the treaty of Guadalupe Hidalgo. *United States v. Sutter*, 21 How. 170, 16: 119

Cancellation or revocation.

294. The decree of Santa Anna on November 25, 1853, while he was temporary dictator and shortly before the Gadsden treaty was made with him by the United States, whereby he declares that alienations of public lands by the several states without approval of the general government are null, will not preclude the recognition of such a claim which had become a vested right at the time of his decree, when the grantee was never disturbed in his possession, nor any adjudication made of the nullity of his grant on account of such decree. *Camou v. United States*, 171 U. S. 277, 18 Sup. Ct. Rep. 855, 43: 163
Perrin v. United States, 171 U. S. 292, 18 Sup. Ct. Rep. 861, 43: 169
Cited in Perrin v. United States, 171 U. S. 292, 43 L. ed. 169, 18 Sup. Ct. Rep. 861—*United States v. Camou*, 184 U. S. 572, 40 L. ed. 694, 22 Sup. Ct. Rep. 515.

295. The disavowal and repudiation of a grant by the Mexican government, and the expulsion of the grantee from the country by

duly constituted authorities, preclude the grantee from claiming the validity of the grant as against the United States after the cession of the territory to this government. *Cessna v. United States*, 169 U. S. 165, 18 Sup. Ct. Rep. 304, 42: 702

296. The rights of mission Indians under a grant from the Mexican government was not recognized by that government at the time of the cession of California to the United States by the treaty of Gaudalupe Hidalgo, where, though one later grant was subject to the condition that the grantee should not molest the Indians thereon, a still later was made on a report of the justice of the peace to the effect that the land had been for two years vacant and abandoned and that there were some property rights vested in the mission, the officials of which had consented to the grant, which it could not longer cultivate and did not need, though it provides that the grantee shall be "allowed to fence it in without interference with the roads and other usages (servidumbres)." *Barker v. Harvey*, 181 U. S. 481, 21 Sup. Ct. Rep. 690, 45: 963

297. The grant of Florida land by the King of Spain to the Duke of Alagon being annulled by the treaty of 1819, a previous grant by the Duke to a citizen of the United States had no effect. *Doe ex dem. Clark v. Braden*, 16 How. 635, 14: 1090

f. Proof of Title.

Judicial Notice of Mexican Archives, see Evidence, 54.

Presumption and Burden of Proof, see Evidence, 497, 517-539.

Presumed Grant, see Evidence, 716-718, 722, 723.

Best Evidence of Grant, see Evidence, 892.

Secondary Evidence of, see Evidence, 902, 903, 927b, 938, 939, 968, 972, 973, 980.

Admissibility of Documentary Evidence Generally, see Evidence, 1012, 1014-1016, 1149, 1150, 1160-1166.

By Ancient Documents, see Evidence, 1046.

Judgment of Confirmation as Evidence, see Evidence, 1260.

Signatures of Mexican Officials as Standards of Comparison, see Evidence, 1426.

Parol Evidence to Contradict or Limit Grant, see Evidence, 1474, 1745, 1746.

Opinion as to Genuineness of Signatures, see Evidence, 1814a, 1815.

Sufficiency of Evidence, see Evidence, 2336-2341, 2346, 2349-2351.

Evidence of Abandonment, see Evidence, 2353-2355.

Weight of Documentary Evidence, see Evidence, 2442, 2443, 2445, 2446, 2449-2462.

298. The record title of a Mexican land grant should be produced or its absence accounted for to the satisfaction of the court.

United States v. Teschmaker, 22 How. 392, 16: 353

United States v. Pico, 22 How. 406, 16: 357

United States v. Vallejo, 22 How. 416, 16: 359

Cited in Bouldin v. Phelps, 30 Fed. 569—*Muse v. Arlington Hotel Co.* 68 Fed. 642.

299. A claim for lands under Mexican law requiring all proceedings to be recorded cannot be confirmed where there is neither a grant nor archive evidence. *Peralta v. United States*, 3 Wall. 434, 18: 221

300. Where the claimant did not produce either a concession or grant, or prove that he ever had possession of the land described in his petition, the decision of commissioners rejecting the claim was correct. *United States v. Gomez*, 3 Wall. 752, 18: 212

301. A title under a Mexican grant of land in New Mexico made in 1845 by the governor is incomplete and does not make a case for confirmation under the Mexican colonization law of August, 1824, and the regulations of 1828, where there is no evidence of the approval of the grant by the assembly or any record of further proceedings to obtain the approval of the supreme government, and there is no record of its existence in the archives of New Mexico. *Whitney v. United States*, 181 U. S. 104, 21 Sup. Ct. Rep. 565, 45: 771

302. The objection that a Mexican grant is not mentioned in "Jimeno's Index" is not entitled to much weight. *United States v. Auguisola*, 1 Wall. 352, 17: 613

303. Ratification by the governor of a grant of lands which the Departmental Assembly had attempted to make is not shown by a letter signed by him, in which he simply acknowledges the receipt of an official communication from an alcalde, reporting the execution of a decree of the deputation making the grant, and asking how much his fee should be, as to which the governor says he is ignorant, but advises him to ask the assessor, although the governor does not make any protest against the validity of the grant. *Chavez v. United States*, 175 U. S. 552, 20 Sup. Ct. Rep. 201, 44: 269

304. In a Mexican land case, where the only document found among public records shows that the petitioner asked for land, and that the governor did not accede to the request, the claim was rejected. *Palmer v. United States*, 24 How. 125, 16: 609
Cited in United States v. Castro, 24 How. 351, 16 L. ed. 661—*Castillero v. United States*, 2 Black, 353, 17 L. ed. 442—*Romero v. United States*, 1 Wall. 745, 17 L. ed. 633—*United States v. Ortiz*, 176 U. S. 427, 44 L. ed. 531, 20 Sup. Ct. Rep. 466—*Den v. Hill*, McAll. 484, Fed. Cas. No. 3,784—*Bouldin v. Phelps*, 30 Fed. 569.

305. A document purporting to be a grant of land in New Mexico by a justice of the peace, or alcalde, in 1842, making no reference to any grant or order of the governor, but certifying that the petitioner appeared before the magistrate, and that he

found the petition to be just, etc., and made the donation in the name of God and the Mexican Nation, but without making any mention of the delivery of juridical possession, or of any of the formalities which under the Spanish and Mexican custom were observed by the officer delivering possession, is insufficient, together with oral testimony of witnesses stating their recollection of what took place thirty years before, though they state that a grant was made by the governor, to show that any valid grant was made,—especially when there is no evidence that any such grant was ever recorded or that any testimonio was ever delivered to the grantee. *Hays v. United States*, 175 U. S. 243, 20 Sup. Ct. Rep. 80, 44: 150
Cited in United States v. Pena, 175 U. S. 508, 44 L. ed. 254, 20 Sup. Ct. Rep. 165—*Chavez v. United States*, 175 U. S. 563, 44 L. ed. 274, 20 Sup. Ct. Rep. 201—*United States v. Elder*, 177 U. S. 121, 44 L. ed. 696, 20 Sup. Ct. Rep. 537.

306. A paper wanting in all the written proceedings which the Mexican law required before a grant could be issued, which had never been seen by any one of the witnesses until produced two years after the cession of the territory, with no evidence of the time or place of its execution, with no trace of it in the Mexican archives, is not entitled to confirmation as a valid grant. *United States v. Castro*, 24 How. 346, 16: 659
Distinguished in Hornsby v. United States, 10 Wall. 241, 19 L. ed. 904.

Cited in Owen v. Presidio Min. Co. 9 C. C. A. 354, 18 U. S. App. 248, 61 Fed. 22.

307. Where, in a Mexican claim, no imputation is made against the integrity of claimant's documentary evidence, and no suspicion exists unfavorable to the bona fides of his petition, or the continuity of his possession, and he has been recognized as the proprietor of the land since 1840, the court will not disturb the decree in his favor. *United States v. Alviso*, 23 How. 318, 16: 456

Cited in United States v. Chaboya, Fed. Cas. No. 14,769—*United States v. De Haro*, Fed. Cas. No. 14,939—*United States v. Flint*, 4 Sawy. 78, Fed. Cas. No. 15,121—*United States v. Peralta*, Fed. Cas. No. 16,029—*United States v. Plco*, 1 Sawy. 349, Fed. Cas. No. 16,048—*United States v. White*, Fed. Cas. No. 16,673—*Beley v. Naphitaly*, 19 C. C. A. 398, 44 U. S. App. 247, 73 Fed. 126.

308. Where a Mexican claim alleged to have arisen in 1846 was first made known in 1850, and there is no proof that any of the conditions of the grant have been fulfilled, and there was no judicial possession, and no claim made to the possession by the grantee thereof, the validity of the grant was not sustained. *United States v. Bolton*, 23 How. 341, 16: 569

309. A Mexican title which is in conformity with the practice and usage of the Mexican government in setting apart small tracts connected with huts in which Indians lived about the missions, where there had been possession and cultivation for a consider-

able time, the claim, appearing to be an honest one, was properly confirmed upon the testimony of an alcalde that he set off the land to the claimant under order from the governor, and made a record of the same, which record and order were lost with all the archives of his office when the American troops passed through the mission. *United States v. Wilson*, 1 Black, 267, 17: 142

310. The use of fraudulent papers, by the claimant of a California land claim, in its support, can but excite apprehension and caution. *United States v. Galbraith*, 2 Black, 394, 17: 449

311. A claim to a Mexican grant was rejected because the archive papers failed to make out the title, and the papers produced by the claimant were not genuine. *Roland v. United States*, 7 Wall. 743, 19: 184

312. In a Mexican claim, where there is no archive evidence, and its absence is unaccounted for, and there has been no such possession as raises an equity in behalf of the party, and the expediente produced is tainted with suspicion of fraud, the claim must be rejected. *White v. United States*, 1 Wall. 660, 17: 698
Cited in Hornsby v. United States, 10 Wall. 245, 19 L. ed. 906—*United States v. Ortiz*, 176 U. S. 427, 44 L. ed. 531, 20 Sup. Ct. Rep. 466—*Muse v. Arlington Hotel Co.* 68 Fed. 640—*Davis v. California Powder-Works*, 84 Cal. 623, 24 Pac. 387.

313. A Mexican land grant signed by a governor and secretary and left by the governor among other archives in Los Angeles, on fleeing from the city after the authority of the governor to make any grant had expired, will be denied confirmation when a certificate of approval of such grant by the Departmental Assembly filed with it, signed by the same governor and secretary and proved to the same extent and in the same manner as the grant, is admittedly a fabrication, the date of the grant had been altered, there has been no occupation or possession in aid of the title, and the grantee was absent at the time of the alleged grant. *United States v. Galbraith*, 2 Black, 394, 17: 449

314. Where a claim is founded upon a grant, an error of date in the conveyance from the grantee cannot raise a suspicion against the regularity of the grant. *United States v. Vallejo*, 1 Black, 541, 17: 232

315. Where there has been no possession or occupation under a Mexican land grant, and the certificate of approval of the Departmental Assembly was fabricated, the Supreme Court can but distrust that all the papers relating to the title were fabricated in the same way and at the same time. *United States v. Galbraith*, 2 Black, 394, 17: 449

Of grantee's title.

316. A claimant of a share of the grants of land in neutral territory between the Sabine river and the Arroyo Hondo, having failed to produce evidence of the right of his

grantor to convey to him, cannot have a decree in his favor. *United States v. Patterson*, 15 How. 10, 14: 578

II. Recognition and Validation under United States.

Persons Entitled to Confirmation by Courts, see *infra*, III. a, 2.

Protection of, as Political Function, see Constitutional Law, 112.

Relative Function of Courts and Land Officers, see Courts, I. c, 6.

Concurrent Jurisdiction of State and Federal Courts over Complete Titles, see Courts, 1383.

Rights of Heirs of Claimant whose Title has been Confirmed, see Descent and Distribution, 34.

Sufficiency of Confirmed Concession to Support Ejectment, see Ejectment, 45.

Exclusion of Lands within Place Limits of Mexican Grant from Subsequent Grant to Railroads, see Public Lands, 195-201.

Withdrawal of Grant from Pre-emption of Settlement, see Public Lands, 670-673.

Inferring Legislative Intent to Confirm Land Title, see Statutes, 218.

As to Pueblo Lands, see Pueblo Lands, 13-26.

Necessity of recognition or confirmation.

Title at Judicial Sale under Former Government as Perfect Title not Confirmable by Courts, see *infra*, 417.

Confirmation as Conclusive that Original Grant was Valid, see *infra*, 647-649.

Power of Courts to Enforce Treaty Rights, see Courts, 124.

317. No title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose by the act of 1851, or, if rejected by that board, confirmed by the district or Supreme Court of the United States. *Botiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. Rep. 525, 32: 926

Cited in Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 82, 37 L. ed. 377, 13 Sup. Ct. Rep. 457—*Stoneroad v. Stoneroad*, 158 U. S. 248, 39 L. ed. 969, 15 Sup. Ct. Rep. 822—*Maish v. Arizona*, 184 U. S. 607, 41 L. ed. 570, 17 Sup. Ct. Rep. 193—*Rio Arriba Land & Cattle Co. v. United States*, 167 U. S. 309, 42 L. ed. 179, 17 Sup. Ct. Rep. 875—*Ainsa v. New Mexico & A. R. Co.* 175 U. S. 84, 44 L. ed. 82, 20 Sup. Ct. Rep. 28—*Barker v. Harvey*, 181 U. S. 487, 45 L. ed. 967, 21 Sup. Ct. Rep. 690—*Houston v. San Francisco*, 47 Fed. 339—*Anzar v. Miller*, 90 Cal. 343, 27 Pac. 299—*DeToro v. Robinson*, 91 Cal. 376, 27 Pac. 671—*Tuffree v. Polhemus*, 108 Cal. 675, 41 Pac. 806—*De La Guerra v. Santa Barbara*, 117 Cal. 533, 49 Pac. 733—*Harvey v. Barker*, 126 Cal. 272, 58 Pac. 692—*Grant v. Jaramillo*, 6 N. M.

322, 28 Pac. 508—*Chavez v. Chavez de Sanchez*, 7 N. M. 71, 32 Pac. 137—*Lockhart v. Wills*, 9 N. M. 348, 54 Pac. 336—Page v. Pierce County, 25 Wash. 10, 64 Pac. 801.

318. A Spanish grant made while the country was wrongfully occupied by Spain cannot be valid unless it was confirmed by the compact between the United States and the state of Georgia, or has been laid before the board of commissioners constituted by acts of Congress of March 3, 1803, and March 27, 1804. *Henderson v. Poindexter*, 12 Wheat. 530, 6: 718
Cited in United States v. Arredondo, 6 Pet. 716, 8 L. ed. 556—*Pollard v. Kibbe*, 14 Pet. 400, 10 L. ed. 513—*Pollard v. Hagan*, 3 How. 226, 11 L. ed. 572—*La Roche v. Jones*, 9 How. 167, 13 L. ed. 90—*Robinson v. Minor* 10 How. 643, 13 L. ed. 575—*Montgomery v. Doe*, 13 Smedes & M. 169.

319. An imperfect title derived from Spain before the cession would not be supported against a party claiming under a grant from the United States, unless it had been confirmed by an act of Congress. *United States v. King*, 3 How. 773, 11: 824

320. A concession of lands made by the Spanish authorities at Mobile, in the year 1806, cannot be given in evidence to support an ejectment in the courts of the United States, the same not having been recorded, or passed upon by the board of commissioners or register of the land office established by act of Congress. *De la Croix v. Chamberlain*, 12 Wheat. 599, 6: 741
Cited in Strother v. Lucas, 6 Pet. 769, 8 L. ed. 576—*Pollard v. Kibbe*, 14 Pet. 365, 10 L. ed. 496—*Muse v. Arlington Hotel Co.* 68 Fed. 642—*Bullock v. Wilson*, 2 Port. (Ala.) 442—*Hallett v. Eslava*, 2 Stew. (Ala.) 118—*Lewis v. Goulette*, 3 Stew. & P. (Ala.) 197—*Abbot v. Doe*, 5 Ala. 395.

321. Grants made by the Spanish government, even though complete at the time of the cession, might be required to have their genuineness and their extent established by proceedings in a particular manner, before they could be held valid. *Glenn v. United States*, 13 How. 250, 14: 133
Cited in Mitchell v. Furman, 180 U. S. 435, 45 L. ed. 611, 21 Sup. Ct. Rep. 430—*United States v. Parrott*, McAll. 821, Fed. Cas. No. 15,998—*Muse v. Arlington Hotel Co.* 68 Fed. 642.

322. Lands of which the grants were perfected before treaty of cession do not need confirmation. *Garcia v. Lee*, 12 Pet. 511, 9: 1176
Distinguished in Pollard v. Kibbe, 14 Pet. 365, 10 L. ed. 496.

Cited in Doe ex dem Barbarie v. Eslava, 9 How. 445, 13 L. ed. 210.

323. Spanish concessions of land in Florida, made by warrants of survey before the treaty of cession, were not, by the terms of that treaty, made a legal title before confirmation. *De la Croix v. Chamberlain*, 12 Wheat. 599, 6: 741

Power of Congress.

Disability of Courts to Entertain Suits Pending Confirmation by Congress, see *infra*, 378.

Recorder's Decision as Advisory and Not Conclusive, see *infra*, 525.

Relative Function of Courts and Land Officers, see Courts, I. e. 6.

As Exclusive of Judicial Power, see Courts, 162-167.

Power to Delegate Confirmation, see Courts, 163, 164.

Construction Generally of Particular Treaties, see Treaties, 48-67.

324. Congress has power by special act to confirm an incomplete title founded upon a Spanish land grant made during the period of Spanish occupancy but subsequent to the cession treaty of Louisiana. Pollard v. Kibbe, 14 Pet. 353, 10: 490
Cited in Mobile v. Eslava, 16 Pet. 257, 10 L. ed. 957—Mobile v. Emanuel, 1 How. 102, 11 L. ed. 63—Chouteau v. Eckhart, 2 How. 372, 11 L. ed. 304—Pollard v. Files, 2 How. 602, 11 L. ed. 395—Barry v. Gamble, 3 How. 54, 11 L. ed. 490—Pollard v. Hagan, 3 How. 230, 11 L. ed. 574—Doe ex dem. Barblie v. Mobile, 9 How. 469, 13 L. ed. 220—Gaines v. Hennen, 24 How. 579, 16 L. ed. 770—Shively v. Bowlby, 152 U. S. 27, 38 L. ed. 341, 14 Sup. Ct. Rep. 548—De Lima v. Bidwell, 182 U. S. 194, 45 L. ed. 1055, 21 Sup. Ct. Rep. 743—Downes v. Bidwell, 182 U. S. 320, 45 L. ed. 1119, 21 Sup. Ct. Rep. 770—Hancock v. Walsh, 3 Woods, 365, Fed. Cas. No. 6012—Doe ex dem. Pollard v. Files, 3 Ala. 50—Abbot v. Doe, 5 Ala. 397—Hallett v. Doe, 7 Ala. 899—Sullivan v. Richardson, 33 Fla. 138, 14 So. 692—State ex rel. Hart v. Burke, 33 La. Ann. 512—Lacroix v. Escobal, 37 La. Ann. 537—Strong v. Lehmer, 10 Ohio St. 98.

325. Congress, in confirming or rejecting a claim made to lands in Missouri under a Spanish concession, acted as the successor of the intendant general, and both exercised in this respect a portion of sovereign power, with full authority to award or refuse a perfect title. Chouteau v. Eckhart, 2 How. 344, 11: 293
Distinguished in Carondelet v. Dent, 18 Mo. 291.

Cited in Les Bois v. Bramell, 4 How. 464, 11 L. ed. 1058—Landes v. Brant, 10 How. 370, 13 L. ed. 459—Guitard v. Stoddard, 16 How. 508, 14 L. ed. 1036—Berthold v. McDonald, 22 How. 341, 16 L. ed. 321—Dent v. Emmeiger, 14 Wall. 313, 20 L. ed. 839—Pontalba v. Copland, 3 La. Ann. 88—Duplessis v. Miller, 6 La. Ann. 684—Bird v. Montgomery, 6 Mo. 526—Magwire v. Tyler, 40 Mo. 441—Warren v. Shuman, 5 Tex. 456.

326. The conditions of ascertaining Spanish land claims in Florida imposed by the act of Congress of March 23, 1823, confirming every claim that had been recommended for confirmation to the extent of the league square, and requiring a release of the residue to be filed within a certain period, were within the constitutional power of Congress. Mitchell v. Furman, 180 U. S. 402, 21 Sup. Ct. Rep. 430, 45: 596

327. By the treaty of Guadalupe Hidalgo and the Gadsden treaty, the property of

Mexicans within the territory ceded by Mexico to the United States was entitled to protection; and Congress might either itself discharge the duty of providing the mode of securing those rights, or delegate it to the judicial department. Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 80, 13 Sup. Ct. Rep. 457, 37: 376

Cited in United States v. Coe, 155 U. S. 84, 39 L. ed. 79, 15 Sup. Ct. Rep. 16—Stoneroad v. Stoneroad, 158 U. S. 248, 39 L. ed. 968, 15 Sup. Ct. Rep. 822—Ainsa v. United States, 161 U. S. 220, 40 L. ed. 677, 16 Sup. Ct. Rep. 544—Glidersleeve v. New Mexico Min. Co. 161 U. S. 579, 40 L. ed. 814, 16 Sup. Ct. Rep. 663—United States v. Sandoval, 167 U. S. 291, 42 L. ed. 172, 17 Sup. Ct. Rep. 868—Ainsa v. New Mexico & A. R. Co. 175 U. S. 79, 44 L. ed. 80, 20 Sup. Ct. Rep. 28—Barker v. Harvey, 181 U. S. 487, 45 L. ed. 967, 21 Sup. Ct. Rep. 690—Lockhart v. Johnson, 181 U. S. 524, 45 L. ed. 984, 21 Sup. Ct. Rep. 665—Potter v. Randolph, 126 Cal. 460, 58 Pac. 905—Lockhart v. Willis, 9 N. M. 349, 54 Pac. 336.

Treaty confirmation in general.

328. The utmost that our treaty stipulations ever required was that we should sustain titles which would have been sustained by the government from which our title to the territory was derived. McMicken v. United States, 97 U. S. 204, 24: 947

Under treaties relating to Louisiana.

329. The term "property," in the treaty by which the United States acquired Louisiana, comprehends every species of title, inchoate or complete, legal or equitable, and embraces rights which lie in contract, executory as well as executed. Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28: 908

Soulard v. United States, 4 Pet. 511, 7: 938
 Slidell v. Grandjean, 111 U. S. 412, 4 Sup. Ct. Rep. 475, 28: 321

Cited in Hornsby v. United States, 10 Wall. 242, 19 L. ed. 905—Morton v. Nebraska, 21 Wall. 672, 22 L. ed. 645—Slidell v. Grandjean, 111 U. S. 423, 28 L. ed. 325, 4 Sup. Ct. Rep. 475—Bryan v. Kennett, 113 U. S. 192, 28 L. ed. 912, 5 Sup. Ct. Rep. 407—Scranton v. Wheeler, 179 U. S. 170, 45 L. ed. 140, 21 Sup. Ct. Rep. 48—Denechaud v. Berrey, 48 Ala. 605—Sloan v. Frothingham, 72 Ala. 603—Teschemacher v. Thompson, 18 Cal. 24, 79 Am. Dec. 151—Fish v. Fowle, 58 Cal. 375—Kling v. Gotz, 70 Cal. 240, 11 Pac. 656—Estes Park Toll Road Co. v. Edwards, 3 Colo. App. 78, 32 Pac. 549—Flax v. Snook, 9 Ind. 204—Sherwood v. Lafayette, 109 Ind. 415, 58 Am. Rep. 414, 10 N. E. 89—Corkran Oil & Development Co. v. Arnaudet, 111 La. 577, 35 So. 747—Owen v. Smith, 31 Barb. 646—Watkins v. Wyatt, 9 Baxt. 255, 40 Am. Rep. 90—Aggs v. Shackelford County, 85 Tex. 149, 19 S. W. 1083—Puget Sound Agri. Co. v. Pierce County, 1 Wash. Terr. 170—Washington Iron Works Co. v. King County, 20 Wash. 153, 54 Pac. 1004.

330. Inchoate claims were not changed in their character by the treaty by which Louisiana was acquired. The treaty imposed on the government only a practical obligation to perfect them, and they cannot be

enforced by any action of the judicial tribunal. *Chouteau v. Eckhart*, 2 How. 344.

11: 293

Cited in United States v. King, 3 How. 787, 11 L. ed. 831—*Astiazaran v. Santa Rita Land & Min. Co.* 148 U. S. 82, 37 L. ed. 377, 13 Sup. Ct. Rep. 457—*Stoneroad v. Stoneroad*, 158 U. S. 248, 39 L. ed. 969, 15 Sup. Ct. Rep. 822—*Barker v. Harvey*, 181 U. S. 487, 45 L. ed. 967, 21 Sup. Ct. Rep. 690—*MaGee v. Doe*, 9 Fla. 397—*Lobdell v. Clark*, 4 La. Ann. 100—*Trimble v. Smithers*, 1 Tex. 807.

331. A concession having no defined boundaries, made by the lieutenant governor of Upper Louisiana in 1799, but not surveyed, cannot be considered as "property," and as such protected, under article 3 of the treaty of 1803 with France, by the courts, without sanction by the political power. *Menard v. Massey*, 8 How. 293.

12: 1085

Cited in Glenn v. United States, 13 How. 258, 14 L. ed. 136, *Hempst. 402*, Fed. Cas. No. 5,481—*Frémont v. United States*, 17 How. 573, 15 L. ed. 252—*Ledoux v. Black*, 18 How. 475, 15 L. ed. 458—*United States v. Hartnell*, 22 How. 289, 16 L. ed. 342—*Hall v. Papin*, 24 How. 144, 16 L. ed. 643—*Carondelet v. St. Louis*, 1 Black, 189, 17 L. ed. 105—*Dent v. Emmeger*, 14 Wall. 313, 20 L. ed. 839—*Glenn v. United States*, *Hempst. 402*, Fed. Cas. No. 5,481—*Tobin v. Walkinshaw*, McAll. 158, Fed. Cas. No. 14,060—*Muse v. Arlington Hotel Co.* 68 Fed. 644—*Doe ex dem. Chastang v. Dill*, 19 Ala. 430—*Doe ex dem. Mims v. Higgins*, 39 Ala. 17—*Vandersalce v. Hanks*, 3 Cal. 42—*Hood v. Martin*, 11 La. Ann. 554—*Burgess v. Gray*, 15 Mo. 223—*Hannibal & St. J. R. Co. v. Smith*, 41 Mo. 333—*Vasquez v. Ewing*, 42 Mo. 258—*Gibson v. Chouteau*, 7 Mo. App. 6—*Paschal v. Perez*, 7 Tex. 371—*Hancock v. McKinney*, 7 Tex. 449.

332. A Spanish grant made January 2, 1804, subsequent to the treaty of St. Ildefonso, is not protected by that article of the treaty of Paris which stipulated for the protection of the people of Louisiana in the free enjoyment of their liberty and property; the term "property" in any correct acceptation being applicable only to rights founded in justice and good faith, and based upon authority competent to their creation. *United States v. Reynes*, 9 How. 127, 13: 74 *Cited in Stewart v. Trenier*, 49 Ala. 503—*Teschemacher v. Thompson*, 18 Cal. 29, 79 Am. Dec. 151.

333. A claim to land in Iowa, under an alleged purchase from the Fox Indians by one Dubuque, and a subsequent grant from the Spanish authorities, which showed no intention to grant anything more than a mining privilege, did not constitute a complete title protected by the treaty of Paris of April 30, 1803. *Chouteau v. Molony*, 16 How. 203, 14: 905

Under Florida treaty.

Governmental and Official Authority to Make Grants, see *supra*, 34-36, 44-46.

334-35. Under the Florida treaty, grants of land made before January 24, 1818, by His Catholic Majesty, stand ratified and confirmed to the same extent that the same U. S. Dig.—294

grants would be valid if Florida had remained under the dominion of Spain. *United States v. Kingsley*, 12 Pet. 476, 9: 1163 *United States v. Clarke*, 16 Pet. 228,

10: 946

Cited in United States v. Acosta, 1 How. 27, 11 L. ed. 34—*Winter v. United States*, *Hempst. 384*, Fed. Cas. No. 17,895—*Jenkins v. Chambers*, 9 Tex. 231—*Sheldon v. Milmo*, 90 Tex. 20, 38 S. W. 413.

336. By the law of nations, the rights to property are secured when territories are ceded; and perfect titles stood confirmed by the Florida treaty, and must be so recognized by the United States and her courts. *United States v. Wiggins*, 14 Pet. 334,

10: 481

Cited in Hallett v. Doe, 7 Ala. 903—*Minturn v. Brower*, 24 Cal. 662—*Teddle v. McNeely*, 104 La. 606, 29 So. 247.

337. A grant of land in Florida within the Indian boundary, by the Spanish governor, before the cession of Florida to the United States, severed the lands from the royal domain, and passed the right of the Crown thereto, subject to the Indian right of occupancy, so that the lands became property which was not ceded to the United States. *United States v. Fernandez*, 10 Pet. 303, 9: 434

Cited in Strother v. Lucas, 12 Pet. 436, 9 L. ed. 1147—*Labadie v. United States*, 6 Okla. 416, 51 Pac. 666.

338. The validity of concessions by the authorities of Spain in East Florida is expressly recognized in the Florida treaty and in the several acts of Congress. The titles of persons claiming land under any patent, grant, concession, or order of survey dated prior to January 24, 1818, who filed their claims before the commissioners appointed under the act of Congress of May 8, 1822, have been uniformly confirmed, where the tract did not exceed a league square. *United States v. Clarke*, 9 Pet. 168, 9: 89 *Cited in Doe ex dem. Lafontaine v. Avaline*, 8 Ind. 14—*Sheldon v. Milmo*, 90 Tex. 20, 36 S. W. 413—*Veeder v. Guppy*, 3 Wis. 526.

339. The treaty of 1819 confirmed grants of land made in the Floridas east of the Perdido; but not those made to the west of that river, unless made to actual settlers, or made before the treaty of St. Ildefonso went into effect. *United States v. Lynde*, 11 Wall. 632, 20: 230

Cited in Coffee v. Groover, 123 U. S. 26, 31 L. ed. 61, 8 Sup. Ct. Rep. 1—*United States v. Morant*, 123 U. S. 342, 31 L. ed. 173, 8 Sup. Ct. Rep. 189.

340. By the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained a right by a perfect or an inchoate title. *Mitchel v. United States*, 9 Pet. 711, 9: 283

341. The 8th article of the Florida treaty, stipulating that grants of land made by Spain in Florida after the 24th of January, 1818, shall be ratified and confirmed to the persons in possession of the land to the same extent that the same grants would have been valid if the government of the territory

had remained under the dominion of Spain, was intended to apply to the claims to land whose validity depended upon the performance of conditions in consideration of which the concessions had been made, and which must have been performed before Spain was bound to perfect the titles. The United States was bound, after the cession of the country, to the same extent that Spain had been bound before the ratification of the treaty, to perfect them by legislation and adjudication; but it may take advantage of the nonperformance of the conditions prescribed, if the treaty does not provide for the omission. *United States v. Wiggins*, 14 Pet. 334, 10: 487

Cited in United States v. Delepine, 15 Pet. 333, 10 L. ed. 758—*United States v. Hanson*, 16 Pet. 199, 10 L. ed. 936—*Chouteau v. Eckhart*, 2 How. 375, 11 L. ed. 305—*United States v. Lawton*, 5 How. 29, 12 L. ed. 35—*Doe ex dem. Barbie v. Eslava*, 9 How. 445, 13 L. ed. 210—*Fremont v. United States*, 17 How. 568, 15 L. ed. 250—*Maguire v. Tyler*, 8 Wall. 652, 10 L. ed. 320—*Tyler v. Magwire*, 17 Wall. 274, 21 L. ed. 580—*Snyder v. Sickles*, 98 U. S. 204, 25 L. ed. 98—*Dauterive v. United States*, 101 U. S. 706, 25 L. ed. 871—*Ainsa v. New Mexico & A. R. Co.* 175 U. S. 83, 44 L. ed. 81, 20 Sup. Ct. Rep. 28—*Glenn v. United States*, 13 How. 258, 14 L. ed. 136, Hempst. 403, Fed. Cas. No. 5,481—*Muse v. Arlington Hotel Co.* 68 Fed. 642—*Smyth v. New Orleans Canal & Bkg. Co.* 35 C. C. A. 669, 93 Fed. 921—*Vanderslice v. Hanks*, 3 Cal. 40—*Gunn v. Bates*, 6 Cal. 270—*Doe ex dem. Commyns v. Latimer*, 2 Fla. 82—*Loddell v. Clark*, 4 La. Ann. 100—*Lacroix v. Escobal*, 37 La. Ann. 537—*United States v. Lucero*, 1 N. M. 447—*Hancock v. McKinney*, 7 Tex. 447.

342. Where the Creeks and Seminole Indians had granted tracts of land in East Florida to parties, which grants were confirmed by the authorities of Spain before the cession of Florida to the United States, the grants were confirmed under the treaty of Spain. *Mitchell v. United States*, 9 Pet. 711, 9: 283
Cited in Sanborn v. Vance, 69 Mich. 226, 37 N. W. 273—*United States v. Santistevan*, 1 N. M. 590.

343. Although the words "shall be ratified and confirmed," in the Spanish treaty of 1819, are properly words of contract, stipulating for some future legislation, they are not necessarily so. They may import that "they shall be ratified and confirmed" by force of the instrument itself. *United States v. Percheman*, 7 Pet. 51, 8: 604
Cited in Garcia v. Lee, 12 Pet. 519, 9 L. ed. 1179—*United States v. Miranda*, 16 Pet. 159, 10 L. ed. 922—*United States v. Clarke*, 16 Pet. 232, 10 L. ed. 947—*Rhode Island v. Massachusetts*, 12 Pet. 747, 9 L. ed. 1269—*United States v. Wiggins*, 14 Pet. 349, 10 L. ed. 489—*United States v. Lynde*, 11 Wall. 640, 20 L. ed. 233—*United States v. Huckabee*, 16 Wall. 434, 21 L. ed. 404—*Vlterbo v. Friedlander*, 120 U. S. 727, 30 L. ed. 783, 7 Sup. Ct. Rep. 962—*Ainsa v. New Mexico & A. R. Co.* 175 U. S. 79, 44 L. ed. 80, 20 Sup. Ct. Rep. 28—*Mitchell v. Furman*, 180 U. S. 436, 45 L. ed. 612, 21 Sup. Ct. Rep. 430—*Godfrey v. Beardsley*, 2 McLean, 418, Fed. Cas. No. 5,497—*Minturn v. Brower*,

24 Cal. 662—*MaGee v. Doe*, 9 Fla. 392—*Doe ex dem. Magruder v. Roe*, 13 Fla. 616—*Courtright v. Cedar Rapids & M. River R. Co.* 35 Iowa, 400—*Little v. Watson*, 32 Me. 224—*United States Trust Co. v. Territory*, 10 N. M. 419, 62 Pac. 987—*Re Metzger*, 1 Barb. 260—*Gaston v. Stott*, 5 Or. 60.

344. By grants of land in Florida which are declared to be confirmed by the treaty of 1819 is not meant the mere grant itself, but the right, title, legal possession, and estate, property, and ownership, legally resulting upon a grant to the owner. *United States v. Miranda*, 16 Pet. 153, 10: 920

345. Grants of land do not mean the mere grant itself, but the right, title, legal possession, and estate, property, and ownership legally resulting upon a grant of land to the owner. *United States v. De la Maza Arredondo*, 6 Pet. 691, 8: 547
Cited in Pollard v. Kibbe, 14 Pet. 369, 10 L. ed. 498—*United States v. Miranda*, 16 Pet. 159, 10 L. ed. 922—*United States v. Clarke*, 16 Pet. 232, 10 L. ed. 947.

Under Mexican treaties.

Governmental and Official Authority to Make Grants, see *supra*, 38-40, 48-52, 56-67.

346. The United States is bound to protect all rights of property in California emanating from the Mexican government previous to the treaty of Guadalupe Hidalgo. *Knight v. United Land Asso.* 142 U. S. 161, 12 Sup. Ct. Rep. 258, 35: 97
Cited in Maese v. Hermann, 17 App. D. C. 71—*Catron v. Laughlin*, 11 N. M. 632, 72 Pac. 26.

347. Grants not recognized by the Mexican government at the time of the cession made by the treaty of Guadalupe Hidalgo, or those the conditions of which had not been fully performed, were not adopted or the obligations thereof recognized by the United States. *Cessna v. United States*, 169 U. S. 165, 18 Sup. Ct. Rep. 304, 42: 702

348. Where Spain and Mexico never granted the land, or were under obligations to grant it, the claim to it has no validity against the United States. *United States v. Montalva De Serrano (Serrano v. United States)* 5 Wall. 451, 18: 494

349. The rights of the prior owners of property in the territory ceded by Mexico to the United States are protected by the treaties of 1848 and 1853, as well as by the law of nations. *United States v. Chavez*, 159 U. S. 452, 16 Sup. Ct. Rep. 57, 40: 215

350. Under the treaty of cession of California which provides for the protection of the rights of property of the inhabitants of the ceded territory, a grant should be confirmed, which has not been forfeited, and the conditions annexed to the grant have not been disregarded so as to have justified a forfeiture. *Hornsby v. United States*, 10 Wall. 224, 19: 970
Cited in Henshaw v. Bissell, 18 Wall. 263, 21 L. ed. 838—*McMicken v. United States*, 97 U. S. 216, 24 L. ed. 951—*Slidell v. Grand*

jean, 111 U. S. 423, 28 L. ed. 325, 4 Sup. Ct. Rep. 475.

351. All titles, legal or equitable, perfect or imperfect, are embraced by the term "property" as used in the provision of the treaty of peace with Mexico for the protection of the rights of property of the inhabitants of the ceded territory. *Hornsby v. United States*, 10 Wall. 224, 19: 900. Cited in *Bryan v. Kennett*, 113 U. S. 192, 28 L. ed. 912, 5 Sup. Ct. Rep. 407.

351a. Every species of title that originated in the rightful exercise of legitimate authority, and existed under the safeguard of Mexican laws at the date of the acquisition of California by the United States is protected by the treaty of cession; but it is the duty of the court to distinguish between rights acquired under the laws and usages of Mexico, and claims depending upon the mere pleasure of those who were in power. *United States v. Rose*, 23 How. 262, 16: 448.

352. The treaty of Guadalupe Hidalgo had no relation to property included in the state of Texas. *McKinney v. Saviego*, 18 How. 235, 15: 365. *Basse v. Brownsville*, 154 U. S. 610, 14 Sup. Ct. Rep. 1195, and 22: 420.

353. The treaty of Guadalupe Hidalgo provides for the protection of the rights of the inhabitants of the ceded country to their property; and there is no distinction to be made with reference to the property claimed by towns under Mexican government. *Townsend v. Greeley*, 5 Wall. 326, 18: 547.

Cited in *Widdicombe v. Childers*, 124 U. S. 405, 31 L. ed. 430, 8 Sup. Ct. Rep. 517—*San Francisco v. Le Roy*, 138 U. S. 664, 34 L. ed. 1099, 11 Sup. Ct. Rep. 364—*Knight v. United Land Asso.* 142 U. S. 186, 35 L. ed. 983, 12 Sup. Ct. Rep. 258—*People ex rel. Bryant v. Holladay*, 68 Cal. 443, 9 Pac. 655—*Bæter v. Brickell*, 87 Cal. 334, 25 Pac. 489.

354. The 8th section of the treaty of Guadalupe Hidalgo, of 1848, is inapplicable to those who, before the revolution in Texas, had been citizens of Mexico, and who, by that revolution, had been separated from it. *McKinney v. Saviego*, 18 How. 235, 15: 365. Cited in *Jones v. McMasters*, 20 How. 21, 15 L. ed. 810—*Bowmer v. Hicks*, 22 Tex. 157.

355. The property to which this article of the treaty approved a guaranty was that which, at its date, belonged to Mexican citizens not established within the territories then ceded to the United States. *McKinney v. Saviego*, 18 How. 235, 15: 365.

356. A grant purporting to be issued by Micheltorena, at a time when he was prosecuting an intestine war, and only a few days before his defeat, which was concealed by the claimant until the entire change in the political constitution of the country took place, is not a valid claim, under the treaty of Guadalupe Hidalgo. *United States v. Sutter*, 21 How. 170, 16: 119. Cited in *United States v. Nye*, 21 How. 411, 16 L. ed. 136—*Castro v. Hendricks*, 23 How. 442, 16 L. ed. 577.

356a. California land claims under "the general title of Sutter" exhibit a wide divergence from the essential rules prescribed in the colonization laws and are not valid claims under the treaty of Guadalupe Hidalgo. *United States v. Rose*, 23 How. 262, 16: 448.

Particular confirmatory acts.

Confirmation in Part by Congress as Excluding Jurisdiction of Courts over Claim to Remainder, see *infra*, 382.

Effect of Legislative Confirmation, see *infra*, 622-627.

Effect of Statutes Confirming Report of Commissioners, see *infra*, 678-680.

357. Although, in the interval between the Louisiana treaty and the time when the United States took possession of the country west of the Perdido, Spain had no power to grant the soil during the time she thus wrongfully held possession, permits were granted to settle on the public domain, and these incipient concessions of the land are recognized by the acts of Congress. *Pollard v. Files*, 2 How. 591, 11: 391.

358. The act of Congress of 1824 gave a title to the owners of old water lots in Mobile, only where an improvement was made on the east side of Water street, and made by the proprietor of the lot on the west side of that street. Such person could not claim as a riparian proprietor, or where his lot had a definite limit on the east. *Pollard v. Files*, 2 How. 591, 11: 391. *Mobile v. Eslava*, 16 Pet. 234, 10: 948. Cited in *Pollard v. Files*, 2 How. 606, 11 L. ed. 396—*Guitard v. Stoddard*, 16 How. 512, 14 L. ed. 1038—*Leverich v. Mobile*, 110 Fed. 174.

359. The act of June 22, 1860, entitled an act for the final adjustment of private land claims in the states of Florida, Louisiana, and Missouri and for other purposes, validates grants to bona fide grantees of land in the disputed territory between the Mississippi and Perdido rivers, which were made by the Spanish government while it remained in possession of the territory and claimed sovereignty over it. *United States v. Lynde*, 11 Wall. 632, 20: 230. Cited in *United States v. Watkins*, 97 U. S. 220, 24 L. ed. 952—*Scull v. United States*, 98 U. S. 416, 25 L. ed. 164—*Harvey v. Rusch*, 67 Mo. 562.

359a. The act of Congress of June 13, 1812, entitled "An Act Making Further Provision for Settling the Claim to Land in the Territory of Missouri," passes a present title, *proprio vigore*, of the property described, to the persons designated. *Glasgow v. Hortiz*, 1 Black, 595, 17: 110. Cited in *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 592, 42 L. ed. 592, 18 Sup. Ct. Rep. 208—*Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 239, 50 C. C. A. 88, 112 Fed. 12—*Glasgow v. Lindell*, 50 Mo. 82—*Easton & A. R. Co. v. Central R. Co.* 52 N. J. L. 274, 19 Atl. 722.

360. In consenting to be made defendant in equity at the suit of claimants for land

in Missouri, the United States waived all rights which the treaty of 1803 could give it as purchaser for a valuable consideration without notice. *Smith v. United States*, 10 Pet. 326, 9: 442

Cited in Woodworth v. Fulton, 1 Cal. 314—*Teschemacher v. Thompson*, 18 Cal. 23, 79 Am. Dec. 151—*Groover v. Coffee*, 19 Fla. 80—*Roussin v. Parks*, 8 Mo. 539.

361. Congress intended, by the act of February 14, 1874 (18 Stat. at L. 16), entitled "An Act to Confirm Certain Titles in the State of Missouri," to recognize the claim of Austin arising from the Spanish concession, survey, and grant recited in its preamble, and to assure the assignees of Austin, who were in possession, that they would not be disturbed by any assertion of claim upon the part of the United States. *Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28: 908

362. The act of April 12, 1814, confirmed only those claims which appeared to have been rejected by the recorder, upon the specific ground that the land was not inhabited by the claimant December 20, 1803. *Burgess v. Gray*, 16 How. 48, 14: 839
Cited in Bryan v. Kennett, 113 U. S. 191, 28 L. ed. 912, 5 Sup. Ct. Rep. 407.

363. The limitations of the act of Congress of May 23, 1828, confirming Spanish land claims recommended for confirmation to the extent of a league square on condition that a full and final release of all claims to the residue be filed, were applicable to all claims, whether perfect or imperfect; and a failure to comply with the conditions of the statute barred the claim. *Mitchell v. Furman*, 180 U. S. 402, 21 Sup. Ct. Rep. 430, 45: 596
Cited in Barker v. Harvey, 181 U. S. 489, 45 L. ed. 987, 21 Sup. Ct. Rep. 690—*Florida Town Improv. Co. v. Bigalsky*, 44 Fla. 781, 33 So. 450—*Ashley Co. v. Bradford*, 109 La. 653, 33 So. 634.

364. The joint resolution of Congress approved March 30, 1867, directing the suspension of the execution of the law for the relief of the heirs of John Bouligny, suspended the execution of such act until the further act of the Congress of the United States. *United States ex rel. Levey v. Stockslager*, 129 U. S. 470, 9 Sup. Ct. Rep. 382, 32: 785

365. The act of Congress of April 29, 1816, confirming a grant to the extent of a league square, restricted it to that quantity, and cannot be construed as confirming the residue. *United States v. King*, 3 How. 773, 11: 824

366. When a doubtful land claim has been confirmed by Congress, without any allowance for the sales of lands included within it, the confirmation must be considered as a compromise accepted by the other party, and he will be considered to have thereby relinquished his claim to floats. *United States v. Roselius*, 15 How. 31, 14: 587
Cited in Arguello v. United States, 18 How. 546, 15 L. ed. 481—*Dent v. Emmeger*, 14 Wall. 312, 20 L. ed. 839.

367. The act of July 23, 1866, 14 Stat. at L. 218, ch. 219, to quiet land titles in California, is limited in its effect to the confirmation of the title of the state and no attempt is made in it to provide for the settlement of the rights of conflicting claimants under the state. *California ex rel. Hastings v. Jackson*, 112 U. S. 233, 5 Sup. Ct. Rep. 113, 28: 712

Donations in lieu of grant.

Right of Confirmation as Affected by Prior Grant or Patent, see also *infra*, 438, 439.

Effect of Satisfaction of Grant by other Grant in Lieu thereof, see *infra*, 440.

Power of Court to Grant Lieu Lands, see also *infra*, 440.

Inurement of Lieu Grant to Original Claimant's Grantee, see *infra*, 572.

Right of Claimant under Void Grant to Pre-empt Public Lands Claimed, see *Public Lands*, 748-753.

See also *infra*, 621.

368. Where the lands in question were donated by the United States to settlers thereon, the case comes within the words of the act of 1860, and, if they have been disposed of, the successful claimant should have other lands in lieu thereof. *United States v. Watkins*, 97 U. S. 219, 24: 952
Distinguished in Five Per Cent Cases, 110 U. S. 484, 28 L. ed. 202, 4 Sup. Ct. Rep. 210.

Conditions.

369. The confirming act of 1836 declared that it should convey no title to any part of the land which had previously been surveyed and sold by the United States. This the United States had a right to do, because having a plenary power of confirmation they could annex such conditions to it as they chose. *Menard v. Massey*, 8 How. 293, 12: 1085

Cited in Dufresne v. Haydel, 7 La. Ann. 663—*St. Louis Public Schools v. Walker*, 40 Mo. 402.

370. By the treaty of cession by Spain to the United States the same time is allowed to the owners of land, granted under the authority of Spain, to fulfil the conditions of their grants, after the date of the treaty, as was limited in the grant. *United States v. Sibbald*, 10 Pet. 313, 9: 437
Cited in McMicken v. United States, 97 U. S. 216, 24 L. ed. 951—*Pico v. United States*, Hoffm. Land Cas. 118, Fed. Cas. No. 11,127—*Sharon v. Sharon*, 79 Cal. 688, 22 Pac. 26—*Sibbald's Estate*, 18 Pa. 251.

Exceptions in favor of conflicting claims.

Right of Confirmation as Affected by Prior Grant or Patent, see also *infra*, 438, 439.

371. Water lots in the city of Mobile, granted by the Spanish government subsequent to the Louisiana treaty of 1803, but before the territory west of the Perdido passed from the possession of Spain, are within the exception contained in the private act of Congress

of May 26, 1824, granting water lots to the city and to certain individuals who had improved them, but excepting lots of which the Spanish government had improved "new grants" during the time it had "power" to do so. *Pollard v. Kibbe*, 14 Pet. 353,

10: 490

Compact between United States and Georgia.

Georgia Grants Generally, see Public Lands, II. b.

Rights of French and Canadian Inhabitants Protected by Cession of Northwest Territory, see States, 203.

See also *supra*, 318; States, 199.

372. The compact of 1802 between the United States and Georgia, in confirming Spanish grants to settlers, provided only for persons who actually inhabited and cultivated the land claimed, October 27, 1795. *La Roche v. Jones*, 9 How. 155, 13: 85
Hickie v. Starke, 1 Pet. 94, 7: 67
Cited in Guitard v. Stoddard, 16 How. 512, 14 L. ed. 1038.

373. One in possession of land in Georgia on October 27, 1795, under a legal and fully executed Spanish grant, is protected in his title by the express terms of the deed of cession from Georgia to the United States in 1802. *Robinson v. Minor*, 10 How. 627, 13: 568

III. Confirmation by Courts, Commissions, or Officers.

Recognition of Rights Having Inception under Former Government Generally, see *supra*, II.

Legislative or Treaty. Confirmation, see *supra*, II.

Confirmation of Settler's Grant as Essential under Spanish Law, see *supra*, 116.

Confirmation of Imperfect Grants to Public Lands by United States, see Public Lands, I. g.

a. By Courts.

1. Jurisdiction; Claims Cognizable.

Jurisdiction of Suits to Contest or Adjudicate Equities in Land Confirmed, see *infra*, III. e.

Relative Function of Courts and Land Officers, see Courts, I. e. 6.

Power of Courts to Enforce Treaty Rights, see Courts, 124.

Conclusiveness of Prior Judgment in Suit to Confirm Title, see Judgment, 603.

Jurisdiction of state or territorial courts.

Concurrent Jurisdiction over Complete Titles, see Courts, 1383.

374. The state courts have no jurisdiction over any equitable and inchoate title to land

claimed under the treaty with France. *Burgess v. Gray*, 16 How. 48, 14: 839
Cited in Tobin v. Walkinshaw, McAll. 164, Fed. Cas. No. 14,069—*Stewart v. Trenier*, 49 Ala. 504—*Grant v. Jaramillo*, 6 N. M. 318, 28 Pac. 508.

375. A party holding a Spanish grant, and not a resident of the Mississippi territory on October 27, 1795, and who did not have his grant confirmed according to the act of 1803, has no title to the land, although the court of chancery in Mississippi took cognizance of the grant afterwards, and established its validity by its own judgment and decree, which whole proceeding of the court of chancery was void, as it has no jurisdiction. *Hickey v. Stewart*, 3 How. 750, 11: 814

376. A judge of the superior court of West Florida, acting under the act of May 23, 1828 (4 Stat. at L. 284, 285, chap. 70), § 6, had jurisdiction to reject a Florida land claim because of an unwarranted alteration in the date of the registro which would save the grant from invalidity under the treaty of February 22, 1819 (8 Stat. at L. 258), with Spain, although a proviso to that section excluded him from taking cognizance of any claims annulled by the treaty. *United States v. Dalcour*, 203 U. S. 408, 27 Sup. Ct. Rep. 58, 51: 248

Other proceeding pending.

377. The circuit court has no jurisdiction to interfere with or to relieve against a survey, which is pending before the district court, of confirmed Mexican grants in California. *United States v. Throckmorton*, 98 U. S. 61, 25: 93

378. Where Congress has constituted itself the tribunal to finally determine the validity of a grant from the Mexican government, under which the plaintiffs claim title, while the matter is pending before Congress the question of the title of the plaintiffs cannot be contested in the ordinary courts of justice. *Astiazaran v. Santa Rita Land & Min. Co.* 148 U. S. 80, 13 Sup. Ct. Rep. 457, 37: 376

Cited in Malsh v. Arizona, 164 U. S. 807, 41 L. ed. 570, 17 Sup. Ct. Rep. 193—*Page v. Pierce County*, 25 Wash. 10, 64 Pac. 801.

379. An adjudication by the local courts of a territory cannot affect the title claimed under a Spanish grant, when the title to the property under the treaty of Guadalupe Hidalgo and the act of Congress of July 22, 1854, was *sub judice*, as the claimants were then proceeding before the surveyor general and Congress under that act. *Rio Arriba Land & Cattle Co. v. United States*, 167 U. S. 298, 17 Sup. Ct. Rep. 875, 42: 175
Cited in Alms v. New Mexico & A. R. Co. 175 U. S. 79, 44 L. ed. 80, 20 Sup. Ct. Rep. 28
—*United States v. Pena*, 175 U. S. 506, 44 L. ed. 253, 20 Sup. Ct. Rep. 165.

Claims cognizable in general.

Sufficiency of Authority to Sustain Claim as One within Jurisdiction, see *supra*, I. a, 3.

Persons Entitled to Confirmation, see infra, III. a, 2.

Complete or Possessory Titles, see infra, 407.

Claims Cognizable by Commissioners, see infra, 503-507.

Claim to Tide Lands, see Waters, 31, 32.

See also supra, 376.

380. A case presented for adjudication to the court of private land claims must be clearly within the act of Congress creating a tribunal, or relief cannot be given. *United States v. Sandoval*, 167 U. S. 278, 17 Sup. Ct. Rep. 868, 42: 168

381. The fact that Congress may have confirmed similar grants cannot justify the court of private land claims in making an adjudication in a case which does not come within the terms of the law of its creation. *Rio Arriba Land & Cattle Co. v. United States*, 167 U. S. 298, 17 Sup. Ct. Rep. 875, 42: 175

Cited in Crespín v. United States, 188 U. S. 217, 42 L. ed. 441, 18 Sup. Ct. Rep. 53.

382. A claim for the remainder of the land included in an alleged Mexican land grant, and which has been allowed in part only by act of Congress, is not within the jurisdiction of the court of private land claims, under the act of March 31, 1891 (26 Stat. at L. 854, chap. 539), § 13, subd. 4, U. S. Comp. Stat. 1901, p. 773, excluding claims for lands the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority. *Las Animas Land Grant Co. v. United States*, 179 U. S. 201, 21 Sup. Ct. Rep. 92, 45: 153

Cited in United States v. Baca, 184 U. S. 659, 46 L. ed. 735, 22 Sup. Ct. Rep. 541.

383. The act of 1805 required three things in order to entitle the claimant to a confirmation: (1) That the parties should be residents; (2) that the Indian title should have been extinguished; (3) that the land should have been actually inhabited and cultivated. *United States v. D'Auterive*, 10 How. 609, 13: 560
Cited in United States v. Castant, 12 How. 440, 13 L. ed. 1057.

384. The acts of Congress of May 26, 1824, and June 17, 1844, created no new rights, but only provided and regulated remedies. *United States v. D'Auterive*, 10 How. 609, 13: 560

Cited in United States v. Castant, 12 How. 441, 13 L. ed. 1058.

Maturity and certainty of claim.

Necessity of Definite Boundary or Description to Constitute Valid Claim, see supra, 188-208.

385. Incipient land titles under the act of May 26, 1824, can be confirmed by the court only when the "locality, extent, and boundaries" are found. *United States v. Lawton*, 5 How. 10, 12: 27
Cited in United States v. De Rodriguez, 7

Sawyer, 636, Fed. Cas. No. 14,950—*Trimble v. Smithers*, 1 Tex. 808.

386. The act of 1836 makes no provision for the confirmation of an unlocated concession or order of survey. *Bissell v. Penrose*, 8 How. 317, 12: 1095
Cited in Magwire v. Tyler, 40 Mo. 441.

387. Claims to land lying within the states of Florida, Louisiana, or Missouri, by virtue of any grant or other evidence of title bearing date prior to the cession of the territory out of which those states were formed, which contain no boundaries, or any means to determine either the location or the extent of the supposed grant, and which were not legally surveyed before such cession, cannot be sustained. *D'Auterive v. United States*, 101 U. S. 700, 25: 869
Snyder v. Sickles, 98 U. S. 203, 25: 97

388. Where a claim to land has no limits, and the judgment of confirmation carries with it the condition that the land shall be surveyed, and severed from the public land and the land of others, the title does not attach to any land; and a court of justice has no authority to ascertain and establish its boundaries, such authority being reserved to the Executive Department. *Stanford v. Taylor*, 18 How. 409, 15: 463

389. No claims to land in Missouri can be confirmed under the acts of 1824 or 1828, unless by a grant, warrant, or order of survey for some tract of land described therein, making it capable of some definite location, made before 1804, or unless it has been located by a survey made by the proper officer before that time. *Smith v. United States*, 10 Pet. 326, 9: 442
Wherry v. United States, 10 Pet. 338, 9: 446

Cited in Winter v. United States, Hempst. 384, Fed. Cas. No. 17,895—*Emblen v. Lincoln Land Co.* 42 C. C. A. 503, 102 Fed. 563—*Vanderslice v. Hanks*, 3 Cal. 42—*Stockton v. Williams*, 1 Dougl. (Mich.) 564—*Bird v. Montgomery*, 6 Mo. 511—*Jones v. Menard*, 1 Tex. 783—*Trimble v. Smithers*, 1 Tex. 807.

390. The Spanish or French title on which a suit can be sustained must be one which had been perfected under the Spanish or the French government before the cession to the United States, and the lands separated from the public domain by actual survey; or, where the lands are susceptible of such separation, by a description which will enable a surveyor to ascertain and identify them by the boundaries found in the grant, or in an order of survey, or investiture by possession. *Scull v. United States*, 98 U. S. 410, 25: 164

391. A claim under an alleged grant, by the Western Company, of land near the Mississippi, was rejected, there being no record of the grant, and no evidence of its extent. *United States v. D'Auterive*, 15 How. 14, 14: 580

392. When it appears that none of the preliminary steps for granting land in Cali-

fornia have been taken, this court will not confirm such a claim. *Fuentes v. United States*, 22 How. 443, 16: 376
Cited in United States v. Bolton, 23 How. 351, 16 L. ed. 573—*United States v. Castro*, 24 How. 351, 16 L. ed. 661—*United States v. Knight*, 1 Black, 252, 17 L. ed. 80—*Hornby v. United States*, 10 Wall. 245, 19 L. ed. 606—*Muse v. Arlington Hotel Co.* 68 Fed. 645.

393. The mere fact that a Mexican land grant is narrower than the limits of the outboundaries does not prevent the court of private land claims, through the aid of a commissioner, surveyor, or master, from determining exactly what did equitably pass under the grant. *Ely v. United States*, 171 U. S. 220, 18 Sup. Ct. Rep. 840, 43: 142
Cited in United States v. Camou, 184 U. S. 574, 46 L. ed. 695, 22 Sup. Ct. Rep. 515—*Arivaca Land & Cattle Co. v. United States*, 184 U. S. 653, 46 L. ed. 733, 22 Sup. Ct. Rep. 525.

394. An inchoate claim which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is not within the purview of the act of March 3, 1891, creating the court of private land claims (26 Stat. at L. 854, chap. 539) and therefore is beyond the reach of judicial cognizance. *United States v. Santa Fé*, 165 U. S. 675, 17 Sup. Ct. Rep. 472, 41: 874
Cited in United States v. Sandoval, 167 U. S. 298, 42 L. ed. 173, 17 Sup. Ct. Rep. 868—*Bergere v. United States*, 168 U. S. 85, 42 L. ed. 389, 18 Sup. Ct. Rep. 4—*United States v. Albuquerque*, 171 U. S. 685, 43 L. ed. 1178, 19 Sup. Ct. Rep. 881—*United States v. Pena*, 175 U. S. 506, 44 L. ed. 253, 20 Sup. Ct. Rep. 165.

395. A Mexican grant of a specific quantity of land within exterior boundaries containing a larger quantity, which was not located prior to the Gadsden treaty of December 30, 1853, cannot be established under that treaty and the act of Congress of March 3, 1891, creating the court of private land claims, which does not provide for incomplete or imperfect claims unless the claimant had a right to make them perfect and they were such as the United States is bound to respect and permit to become complete and perfect upon the principles of public law or by the provisions of the treaty of cession. *Ainsa v. United States*, 161 U. S. 208, 16 Sup. Ct. Rep. 544, 40: 673
Distinguished in United States v. Camou, 184 U. S. 577, 46 L. ed. 696, 22 Sup. Ct. Rep. 505.

Cited in Bergere v. United States, 168 U. S. 85, 42 L. ed. 389, 18 Sup. Ct. Rep. 4—*Ainsa v. New Mexico & A. R. Co.* 175 U. S. 85, 44 L. ed. 82, 20 Sup. Ct. Rep. 28.

396. Unallotted lands within the exterior boundaries of a grant made on condition that a settlement should be formed and that the tract should be in common to all settlers who joined in the formation of a town thereon were by the laws of Spain and Mexico subject to the disposition of the government, and neither the settlers nor the

town have any right to such lands in New Mexico which the court of private land claims, under the act of Congress of March 3, 1891, can confirm as a claim which the United States are bound to recognize and confirm by virtue of the treaties of cession of said county by Mexico to the United States. *United States v. Sandoval*, 167 U. S. 278, 17 Sup. Ct. Rep. 868, 42: 168
Rio Arriba Land & Cattle Co. v. United States, 167 U. S. 298, 17 Sup. Ct. Rep. 875, 42: 175
Cited in Rio Arriba Land & Cattle Co. v. United States, 167 U. S. 308, 42 L. ed. 178, 17 Sup. Ct. Rep. 875—*Bergere v. United States*, 168 U. S. 85, 42 L. ed. 389, 18 Sup. Ct. Rep. 4—*Hayes v. United States*, 170 U. S. 654, 42 L. ed. 1181, 18 Sup. Ct. Rep. 735—*United States v. Pena*, 175 U. S. 506, 44 L. ed. 253, 20 Sup. Ct. Rep. 165—*Holladay v. San Francisco*, 124 Cal. 356, 57 Pac. 146.

397. A Mexican grant of "2 sitios of land for raising cattle and horses, which comprise the place called Aribac," made in proceedings to perfect a title acquired under a prior sale, the record of which had been lost, is not so located as to admit of confirmation under the provision of the Gadsden treaty that grants are not to "be respected or to be considered as obligatory which have not been located and duly recorded in the archives of Mexico," where the landmarks described in the depositions taken in the proceedings to secure the grant cannot be identified with adequate certainty, and the location of the 2 sitios within the larger area claimed cannot be satisfactorily determined because the record contains no original survey or field notes, and there is no certainty as to an initial point or center. *Arivaca Land & Cattle Co. v. United States*, 184 U. S. 649, 22 Sup. Ct. Rep. 525, 46: 731
Cited in Sana v. United States, 189 U. S. 238, 47 L. ed. 790, 23 Sup. Ct. Rep. 596.

Claims occupied and settled.

398. Inhabitation and cultivation annexed to imperfect titles derived from the Spanish government in the Louisiana territory are material and essential. *McMicken v. United States*, 97 U. S. 204, 24: 947

399. Actual settlement and housekeeping on the land at the time of the passing of the act of 1832, by which a board of commissioners was appointed to examine all unconfirmed claims to land in the state of Missouri were not essential prerequisites of the validity of the claims before the board as Spanish claims. They depended upon the settlement right under the act of 1807, and subsequent acts relating thereto. *O'Brien v. Perry*, 1 Black, 132, 17: 114

400. One who claims to have purchased the title arising from occupation, cultivation, or possession of lands confirmed to inhabitants of towns and villages in Missouri by the act of Congress of June 13, 1812, is not required to prove with certainty and precision the time when and the person who cultivated or occupied that precise property eighty or ninety years ago. Neither the

statute nor justice can require anything more than satisfactory proof that such lots had been inhabited, cultivated, or possessed prior to the year 1803. *Glasgow v. Baker*, 128 U. S. 560, 9 Sup. Ct. Rep. 154,

32: 513

401. A California private land claim must be rejected where no grant was obtained and the only evidence of title is to the effect that the claimant obtained an order of the governor to search after and to take possession of land and selected a tract and occupied and improved it and afterwards solicited a grant and that the then governor referred the petition to the alcalde for the usual informe, and the latter reported that the land did not belong to any private individual. *United States v. Garcia*, 22 How. 274, 16: 338
Cited in United States v. De Haro, Fed. Cas. No. 14,989.

402. Sixteen years undisturbed possession under claim of a grant from the governor of California furnishes ground for confirmation as against the objection of an alteration in the date of the grant to the manifest injury of the claimants. *United States v. De Haro*, 22 How. 293, 16: 343
Cited in United States v. Wilson, 1 Black, 270, 17 L. ed. 143—*Hays v. United States*, 175 U. S. 280, 44 L. ed. 155, 20 Sup. Ct. Rep. 80—*United States v. De Haro*, Fed. Cas. No. 14,937—*United States v. De Haro*, Fed. Cas. No. 14,938.

403. An actual "settler" on a Spanish grant in Georgia is one who is a resident of the territory at the time of its acquisition. *Henderson v. Poindexter*, 12 Wheat. 530, 6: 718
Cited in Hickie v. Starke, 1 Pet. 98, 7 L. ed. 69.

404. Possession for six or seven years before the treaty of Guadalupe Hidalgo, in 1848, of land by an alleged grantee, is not sufficient to constitute a title which can be confirmed under the court of private land claims act, where a valid grant is not proved to have been made. *Hays v. United States*, 175 U. S. 248, 20 Sup. Ct. Rep. 80, 44: 150

405. Possession of land since the date of the treaty of Guadalupe Hidalgo, in 1848, cannot be considered as dispensing with the requirement that a title to lands, if not perfect at that time, must be one that the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States. *Hays v. United States*, 175 U. S. 248, 20 Sup. Ct. Rep. 80, 44: 150
Cited in Sena v. United States, 189 U. S. 240, 47 L. ed. 791, 23 Sup. Ct. Rep. 596.

406. Adverse possession since the acquisition of the territory by the United States from Mexico cannot be regarded as an element of a perfect title which can be confirmed by the court of private land claims, even if there could be in any case a right, as against the Mexican or Spanish government, to a grant by prescription or adverse

possession. *Crespin v. United States*, 168 U. S. 208, 18 Sup. Ct. Rep. 53, 42: 438
Cited in Chavez v. United States, 175 U. S. 563, 44 L. ed. 273, 20 Sup. Ct. Rep. 201.

Kind or degree of title confirmable.

Sufficiency of Claimant's Equity to Complete Title, see *infra*. 420-425.
 Power of Commissioners to Confirm Perfect Titles, see *infra*. 504, 512.
 Power of Register and Receiver as Restricted to Imperfect Grants, see *infra*, 520.

407. Under the act of 1844, reviving that of 1824, the district court has no jurisdiction over complete titles. This is true of titles derived from British as well as French or Spanish grants. *United States v. D'Auterieve*, 15 How. 14, 14: 580
United States v. Castant, 12 How. 437, 13: 1056

United States v. Philadelphia, 11 How. 609, 13: 834

United States v. Pillerin, 13 How. 9, 14: 28

United States v. McCullagh, 13 How. 216, 14: 118

United States v. Ducros, 15 How. 38, 14: 591

Cited in United States v. Rosellus, 15 How. 37, 14 L. ed. 590—*United States v. Lynde*, 11 Wall. 643, 20 L. ed. 234—*Coffee v. Groover*, 123 U. S. 26, 31 L. ed. 61, 8 Sup. Ct. Rep. 1—*Ainsa v. New Mexico & A. R. Co.* 175 U. S. 81, 44 L. ed. 81, 20 Sup. Ct. Rep. 28—*United States v. Martinez*, 184 U. S. 445, 46 L. ed. 634, 22 Sup. Ct. Rep. 422—*Smyth v. New Orleans Canal & Bkg. Co.* 35 C. C. A. 663, 93 Fed. 915.

408. Under the acts of 1824 and 1844 the district court has no jurisdiction of a claim supported only by evidence of possession. *United States v. Gusman*, 14 How. 193, 14: 383

United States v. Power, 11 How. 570, 13: 817

United States v. Rillieux, 14 How. 189, 14: 381

Cited in United States v. Rillieux, 14 How. 190, 14 L. ed. 382—*United States v. Fendell*, 185 U. S. 201, 46 L. ed. 872, 22 Sup. Ct. Rep. 624.

409. The act of Congress of May 26, 1824 (4 Stat. at L. 52, chap. 173), for enabling claimants to lands to institute proceedings to try the validity of their titles, which was revived by the act of June 17, 1844 (5 Stat. at L. 676, chap. 95), did not embrace within its operations complete or perfect titles to land. It applied to incomplete titles only, derived from Spanish, French, or British grants, and of these provided for such only as had been legally issued by a competent authority, and were protected by treaty. It was not designed to invest the holders of imperfect titles with new or additional rights, but merely to provide a remedy by which legal, just, and bona fide claims might be established. *United States v. Reynes*, 9 How. 127, 13: 74
Cited in United States v. Philadelphia, 11 How. 647, 13 L. ed. 850—*United States v. Castant*, 12 How. 440, 13 L. ed. 1067—*United*

States v. Rosellius, 15 How. 34, 14 L. ed. 589.

410. The act of May 24, 1824, gave the district court authority to hear and determine all questions arising in any cause brought before it by the petition of any person claiming lands in Missouri by virtue of any French or Spanish grant legally made before March 10, 1804, and within the protection of the treaty between the United States and France of April 30, 1803, and which might have been perfected into a complete title under the laws of the government under which it originated. *Delassus v. United States*, 9 Pet. 117, 9: 71

411. Under the laws of 1824 and 1844, the district court did not possess jurisdiction to act upon a perfect title, but where a mutilated title paper is set up, unaccompanied by a plan of survey and *proces verbal*, which the grant refers to as a part thereof, and an equity standing in advance of the grant is also relied on, the court may act on the mutilated title and on the assumed equity, and ascertain whether the claim can be sustained. *United States v. Power*, 11 How. 570, 13: 817

412. Of a title not perfect the district court has jurisdiction, although the petition alleged it to have been perfect. *United States v. Davenport*, 15 How. 1, 14: 575

413. If questions of a judicial nature arise in the settlement of the locations and boundary of grants confirmed to individuals, the district court is empowered to settle those questions upon a proper case being submitted to it, and the judgment, in such a case, may properly extend to the confirmation of the survey and an order for a patent to issue. *Castro v. Hendricks*, 23 How. 438, 16: 576

Cited in United States v. De Rodriguez, 7 Sawy. 634, Fed. Cas. No. 14,950—*United States v. Rico*, Fed. Cas. No. 16,160—*United States v. Vaca*, Fed. Cas. No. 16,604.

414. A grant by a Spanish governor of Florida means an incipient right which, when surveyed, required confirmation by the government; and the duty of confirmation is deputed by the acts of Congress to the courts of justice of the United States. *United States v. Hanson*, 16 Pet. 196, 10: 935

Cited in United States v. Lawton, 5 How. 27, 12 L. ed. 35—*Muse v. Arlington Hotel Co.* 68 Fed. 642—*Gibbons v. Mobile & G. N. R. Co.* 36 Ala. 449.

415. An imperfect grant which can be confirmed by the court of private land claims must be one which the complainant could by right, and not by grace, have demanded should be made perfect by the former government had the territory not been acquired by the United States. *Bergere v. United States*, 168 U. S. 66, 18 Sup. Ct. Rep. 4, 42: 383

Cited in Hays v. United States, 175 U. S. 259, 44 L. ed. 155, 20 Sup. Ct. Rep. 80—*United States v. Fendell*, 185 U. S. 197, 46 L. ed. 870, 22 Sup. Ct. Rep. 624.

416. Grants of land in the "neutral territory" between the Sabine and the Arroyo Hondo, by the Spanish commander of Nacogdoches, being defined by metes and bounds, and the grantee having been put into possession by an officer, although they lacked the required ratification by the civil and military authorities, created an inchoate title, calling for confirmation under the act of 1824. *United States v. Davenport*, 15 How. 1, 14: 575

Cited in United States v. Patterson, 15 How. 13, 14 L. ed. 580—*United States v. D'Auterlieve*, 15 How. 30, 14 L. ed. 587—*United States v. Sutter*, 21 How. 175, 16 L. ed. 120—*United States v. Vallejo*, 1 Black, 555, 17 L. ed. 235—*United States v. Perot*, 98 U. S. 429, 25 L. ed. 252—*Muse v. Arlington Hotel Co.* 68 Fed. 645.

417. A title to land under a judicial sale by order of the highest court in Louisiana, in 1760, followed by peaceable possession, constitutes a perfect title over which the district court has no jurisdiction under the acts of 1824 and 1844. *United States v. Rosellius*, 15 How. 36, 14: 590
Cited in Almsa v. New Mexico & A. R. Co. 175 U. S. 81, 44 L. ed. 81, 20 Sup. Ct. Rep. 28—*United States v. Baca*, 184 U. S. 660, 46 L. ed. 736, 22 Sup. Ct. Rep. 541—*Chaves v. Chaves de Sanchez*, 7 N. M. 70, 32 Pac. 137.

418. It was obviously the intention of Congress, in passing the act of May 26, 1830, for the final settlement of land claims in Florida, to extend the jurisdiction of the court to all existing claims, and to have them finally settled. *United States v. Clarke*, 8 Pet. 436, 8: 1001

419. The act of Congress of February 6, 1835, for the final adjustment of claims to lands in the state of Louisiana, removes the bar imposed by the act of 1805, as to claims not presented as required thereunder; but it imparts no merit or strength to any claim, which it did not previously possess. *United States v. D'Auterlieve*, 10 How. 609, 13: 560

Equitable interest entitled to confirmation.

420. In passing upon an imperfect Spanish title, under the act of May 26, 1824 (revised by that of June 17, 1844), the test to be applied by this court is: Can a court of equity, according to its rules and the laws of Spain, consider the conscience of the king so affected by the acts of his lawful authorities that he became a trustee for the claimant, and held the land claimed by an equity upon it amounting to a severance of so much from the public domain, before and at the time the country was ceded to the United States? *United States v. Boisdore*, 11 How. 63, 13: 605

421. Where there was no adverse holding, but the possession was a permissive one, and consistent with the proprietary interest of Spain and Mexico, the fact that those governments did not terminate the possession—which was a mere tenancy at

will—cannot create an equity entitled to confirmation. *United States v. Montalva De Serrano* (*Serrano v. United States*) 5 Wall. 451, 18: 494
Cited in Miller v. Dale, 92 U. S. 475, 23 L. ed. 737—*Peabody v. United States*, 175 U. S. 551, 44 L. ed. 269, 20 Sup. Ct. Rep. 219
 —*United States v. Berreyesa*, Fed. Cas. No. 14,585.

422. Bare possession is too limited^a to raise any equity, where the claimant only occupied the place about a year before the conquest of the country. *Peralta v. United States*, 3 Wall. 434, 18: 221
Cited in United States v. Elder, 177 U. S. 123, 44 L. ed. 697, 20 Sup. Ct. Rep. 537.

423. A petition to the governor of Mexico for a surplus not granted by the Mexican government is no foundation for an equitable claim against the United States. *Miramontes v. United States*, 131 U. S. Appx. lxxiii. and 17: 603

424. While Spanish permits to settle on public domain granted after the treaty of 1803 passed no title thereto, the Federal government observed the equities of settlers by confirming title where it appeared advisable under the reports of investigating commissions appointed for that purpose by Congress. *Pollard v. Files*, 2 How. 591, 11: 391
Cited in Teschemacher v. Thompson, 13 Cal. 29, 79 Am. Dec. 151.

425. A Spanish grant, although made after the title of Spain had ceased to exist, yet while that government had actual possession of the country and claimed the sovereignty thereof, is within the purview of the act of 1860, and may be confirmed. *United States v. Watkins*, 97 U. S. 219, 24: 952

Pre-emptive rights within limit of grant.

Time to File Claim Based on Right to Purchase Surplus, see *infra*, 448.
 See also *supra*, 423.

426. Title to overplus within a Mexican land grant, for which the government has a right to compel payment from the owner of the lawful area, or to resell such surplus to a third party, could not be confirmed by the court of private land claims on payment of such amount as might be found due, in view of the provision of the act creating that court, that no authority to acquire land on condition should be admitted or confirmed unless such condition has been performed,—especially where such claim was not filed within the time given by that act for filing imperfect claims. *Ainsa v. United States*, 184 U. S. 639, 22 Sup. Ct. Rep. 507, 46: 727

427. No confirmation of title to overplus within a Mexican land grant, for which the Mexican government had a right to compel payment or to resell such surplus to a third party, can be had in the court of private land claims upon payment of the asserted

value of such excess. *United States v. Green*, 185 U. S. 256, 22 Sup. Ct. Rep. 640, 46: 838

Mere licenses or occupancies.

See also *supra*, 421, 422, 424, 425.

428. A mere permit for possession and settlement of lands in the former Spanish province of West Florida, given by the commandant, upon which no title, grant, cession, survey, or order of survey was ever issued, is not a title on which a claimant, under the act of June 22, 1860, § 11, is entitled to recover. *United States v. McDonough* (*United States v. Baltimore*) 98 U. S. 424, 25: 167

429. Where the only thing conferred, or intended to be conferred, by the Mexican officials, was a provisional or temporary license of occupation, if the license in question has been terminated, there is an end to the case. *De Haro v. United States*, 5 Wall. 599, 18: 681

430. A license is a personal privilege, revocable at pleasure, and not transferable. Such a claim, if presented to the Mexican government, would have been rejected, and is therefore not entitled to confirmation. *De Haro v. United States*, 5 Wall. 599, 18: 681
Cited in Peabody v. United States, 175 U. S. 550, 44 L. ed. 268, 20 Sup. Ct. Rep. 219—*Jackson v. Emmons*, 19 App. D. C. 256—*Nunnally v. Southern Iron Co.* 94 Tenn. 410, 28 L.R.A. 428, 29 S. W. 361.

2. Persons Entitled and Parties to Proceeding.

Right of Claimant under Void Grant to Pre-empt Public Lands Claimed, see *Public Lands*, 748-753.

Persons entitled in general.

To Whom Confirmation should be Made, see *infra*, 495.

Persons Entitled to Contest Location or Patent as Confirmed, see *infra*, 573, 574.

431. In a land case brought to procure the confirmation of a Spanish grant, no recovery can be had, in the absence of proof that the persons purporting to convey the property, as heirs of the original grantee, to the petitioner, were actually the heirs of the party whom they professed to represent. *United States v. Hughes*, 13 How. 1, 14: 25
United States v. Hughes, 13 How. 4, 14: 26
United States v. Hughes, 13 How. 7, 14: 27

432. A part owner of lands claimed, or his heirs or representative, may have the benefit of proceedings authorized by the act of 1860. *United States v. De Morant* (*United States v. Morant*) 123 U. S. 335, 8 Sup. Ct. Rep. 189, 31: 171

433. Claimants, asserting a right to land under a French or Spanish grant as the heirs of the original grantees, are not entitled to a decree in their favor, in the absence of proof of heirship. *United States v. Gusman*, 14 How. 193, 14: 383

434. A Spanish land grant cannot be confirmed in the absence of evidence that the claimants are the heirs of the grantee, or that anyone claiming under him ever took possession, or exercised any act of ownership from the date of the alleged grant down to the filing of the claimants' petition,—a period of sixty-nine years. *United States v. Le Blanc*, 12 How. 435, 13: 1055
Cited in United States v. Billieux, 14 How. 192, 14 L. ed. 383.

435. That the sheriff's deed of property sold to satisfy a judgment against the original claimant of the land was not recorded is of no consequence as between a party claiming under that deed and the devisees of the original claimant; nor is it of any consequence as between the party claiming under that deed and an assignee of those devisees, provided such assignee had notice of the existence of the deed from the sheriff. *Landes v. Brant*, 10 How. 348, 13: 449

Residence to entitle claimant.

436. Under the act of 1824 a claimant of land in Louisiana must aver and prove residence in that province at the date of the grant, or on or before March 10, 1804. *United States v. Castant*, 12 How. 437, 13: 1056

Claimants who broke allegiance to grantor nation.

Disloyalty of Grantee, as Ground for Forfeiture, see *supra*, 239.

As to Treaty Provisions, see *supra*, 354, 355.

437. One who abandons his allegiance to his government in time of war, and joins the forces of the enemy, is entitled to protection from the latter, in both person and property; therefore, where a native American and naturalized citizen of Mexico abandoned his allegiance to the latter, joining the American Army, during the war between the two countries, it was held that the United States could not urge this as ground for forfeiting his title to land acquired under Mexican laws, even though he had abandoned his Mexican allegiance voluntarily and without excuse. *United States v. Reading*, 18 How. 1, 15: 291

Loss of right by prior grant or confirmation.

Restriction of Decree of Confirmation to Lands Remaining Open for Settlement, see *infra*, 488, 489.

Lands Previously Granted as Exception to Rule of Title of Relation Back, see *infra*, 615, 616, 620, 621.

Prior Grant to School, see *Public Lands*, 367, 368.

Exceptions as to Mexican Grants to Acts Confirming School Selections, see *Public Lands*, 398.

Effect of Patent Making Exception of Existing Spanish Claims, see *Public Lands*, 883.

438. A claim for lands within the limits of a grant which has been confirmed by Congress, and for which a patent has been issued to another party, is properly rejected

by the court of private land claims. *Real de Dolores del Oro v. United States*, 175 U. S. 71, 20 Sup. Ct. Rep. 17, 44: 76

439. An Indian claim or title that has been confirmed by Congress is a "just and unextinguished" one, within the meaning of the private land claim act, § 13, subd. 2, providing that no claim shall be allowed that shall interfere with or overthrow any such title. *United States v. Conway*, 175 U. S. 60, 20 Sup. Ct. Rep. 13, 44: 72

Claims satisfied by grant in lieu.

440. A claimant under a Mexican land grant, for whose predecessor in interest the Mexican authorities, on formal denouncement of the excess therein over the area which the grantee could take under the Mexican law, have laid off in Mexico this lawful area, cannot have such lawful area confirmed by the court of private land claims out of territory ceded by Mexico to the United States, which was included within the original survey of the grant. *Reloj Cattle Co. v. United States*, 184 U. S. 624, 22 Sup. Ct. Rep. 499, 46: 721
Cited in Ainsa v. United States, 184 U. S. 646, 46 L. ed. 730, 22 Sup. Ct. Rep. 507—
Arivaca Land & Cattle Co. v. United States, 184 U. S. 653, 46 L. ed. 733, 22 Sup. Ct. Rep. 525.

Parties plaintiff.

See also *Parties*, 11.

441. Under the act of 1836, an assignee of a claim could obtain confirmation of title in his own name. *Bissell v. Penrose*, 8 How. 317, 12: 1095

442. The assignee of a Mexican title may present his case before the commissioners, where he is an assignee of the whole claim. But if the land claimed has been divided out among a large number of vendees, the proper party to the proceeding is the original grantee in behalf of himself and his assignees. *United States v. Grimes*, 2 Black, 610, 17: 352

443. It is competent to persons interested to employ the name of the original claimant, in proceedings to establish the grant. *United States v. Sutter*, 21 How. 170, 16: 119
Cited in United States v. Covilland, 1 Black, 341, 17 L. ed. 40—*United States v. Grimes*, 2 Black, 612, 17 L. ed. 352.

Defendants.

Adjustment of Diverse Interests in Claims upon Confirmation thereof, see *infra*, 496.

Effect of Lack of, on Validity of Confirmation, see *Judgment*, 140.

444. The act of 1844 revived and extended that of 1824, but not that of 1828, which repealed so much of the act of 1824 as required petitioners to make adverse claimants parties. *United States v. Moore*, 12 How. 209, 13: 958
United States v. Porche, 12 How. 426, 13: 1051

Cited in United States v. Davenport, 15 How. 9, 14 L. ed. 578—*United States v. Rosellius*, 15 How. 36, 14 L. ed. 590—*United States*

v. Rosellus, 15 How. 37, 14 L. ed. 590—United States v. De Rodriguez, 7 Sawy. 637, Fed. Cas. No. 14,950.

3. Time for Proceedings.

Time to Present Claim before Commissioners, see *infra*, 511, 514.

Mode of Raising Defense that Petition was not Filed in Time, see Pleading, 711.

445. Congress has power to pass acts limiting the time within which to file claims to lands acquired by cession from a foreign government. *Strother v. Lucas*, 12 Pet. 410, 9: 1137

Cited in Barry v. Gamble, 3 How. 55, 14 L. ed. 490—*Guyot v. Chouteau*, 19 Mo. 548.

446. A petition to have confirmed a Spanish grant under the act of 1860, filed March 1, 1870, was in time under the act of March 2, 1867, which extended such a time for three years from the passage of the act. *United States v. Innerarity*, 19 Wall. 595, 22: 202

447. Under the acts of Congress of 1805, 1806, and 1807, it was necessary to file the evidences of an incomplete claim under French and Spanish authority, which bore date anterior to the 1st of October, 1806, as well as those of subsequent date; and, in case of neglect, the bar provided in the acts applied to both classes. A title resting on a permit to settle and warrant of survey dated before the 1st of October, 1800, without any settlement or survey having been made, was an incomplete title, and within these acts. *Barry v. Gamble*, 3 How. 32, 11: 479
Cited in Minturn v. Brower, 24 Cal. 667—*Steinbach v. Moore*, 30 Cal. 508.

448. A preferential right of purchase of overplus land within a Mexican land grant, to which the owner of the lawful area was entitled under the Mexican law at the date of the treaty with Mexico, is an imperfect claim, and is therefore barred by the act of March 3, 1891, § 12, unless filed within two years from that date. *Reloj Cattle Co. v. United States*, 184 U. S. 624, 22 Sup. Ct. Rep. 499, 46: 721

449. Under the act of 1844, claimants were obliged to present their claims on or before June 17, 1846. *United States v. Porche*, 12 How. 426, 13: 1051

450. The courts of Florida had no right to receive a petition for the confirmation of an incomplete concession, after May 26, 1831, because the act of 1830 must be construed as limiting the time to one year within which to present the petition to the court, the same as the act of 1828. *United States v. Marvin*, 3 How. 620, 11: 753
Cited in Yturbe v. United States, Hoffm. Land Cas. 275, Fed. Cas. No. 18,191.

Bar and its effect.

451. Express waiver of a defense to a suit for the confirmation of a French or Spanish land grant, that the petition was not filed within the time limited therefor

by act of Congress, will not confer jurisdiction upon the district court to hear the case, where the act of Congress has not conferred it. *United States v. Porche*, 12 How. 426, 13: 1051

452. One who has not filed his claim within the time limited by law cannot set up any claim or any act of Congress, or be permitted to give evidence thereof in any court, against a person having a grant from the United States under the confirmation of the board of commissioners for adjusting land titles in Missouri, and the act of 1812, confirming the title of the inhabitants according to their private right or rights in common. *Strother v. Lucas*, 12 Pet. 410, 9: 1137
Cited in Hall v. Doe, 19 Ala. 392—*Estrada v. Murphy*, 19 Cal. 270.

453. Notwithstanding the act of 1824 makes it the duty of claimants to proceed within eighteen months to designate their lots, yet this act imposes no forfeiture for noncompliance. *Glasgow v. Hortiz*, 1 Black, 595, 17: 110

Acts removing bar.

Priority of New Madrid Location made after Bar Complete and before Removal Thereof, see Public Lands, 534.

454. A permit to settle, and warrant of survey of 1800, were valid against the United States after the act of 1824, removing the bar created against claims by failure to present them according to the acts of 1805, 1806, and 1807, but in nowise affected titles of adverse claimants. *Barry v. Gamble*, 3 How. 32, 11: 479
Cited in Les Bois v. Bramell, 4 How. 459, 11 L. ed. 1055—*Mills v. Stoddard*, 8 How. 362, 12 L. ed. 1114—*Gibson v. Chouteau*, 13 Wall. 102, 20 L. ed. 537—*State v. Ham*, 19 Mo. 606—*Warren v. Shuman*, 5 Tex. 456.

455. No person can bring suit for lands under the act of Congress of June 22, 1860, which removed the bar of lapse of time in respect to private land claims, who, by himself or by those under whom he claims, has not been out of possession over twenty years. *Scull v. United States*, 98 U. S. 410, 25: 164

Cited in United States v. Baltimore (United States v. McDonough), 98 U. S. 424, 25 L. ed. 167—*Dauterive v. United States*, 101 U. S. 706, 25 L. ed. 871—*United States v. Clamorgan*, 101 U. S. 825, 25 L. ed. 836.

456. The right to prosecute claims to lots in St. Louis saved from the grant of 1812 for schools, which was restricted to two years by the act of 1824, was renewed by the act of 1832. It was competent for the sovereign, after forfeiture had occurred by laches, to release it, to consent to hear the claimant, and give him another chance to prove his claim. *St. Louis Public Schools v. Walker*, 9 Wall. 282, 19: 576

Amendment or defense made after period.

457. Where a petition for the confirmation of a claim to lands in Florida was pre-

sented, and was defective. and the court allowed an amended petition to be filed, it would be too strict to say that the original petition was not the commencement of the proceeding, but that the time that the amendment was allowed by the superior court should be taken as the date when the claim was first preferred, thereby bringing it outside of the period prescribed for the presentation of claims by act of Congress. *United States v. Delepine*, 15 Pet. 319. 10: 753

458. Claims asserted by defendants during the pendency of a proceeding instituted in due time in the court of private land claims to confirm an imperfect title are not barred because such defendants were made parties or filed their claims for affirmative relief after the expiration of the period prescribed by the act establishing that court, within which petitions in respect to imperfect claims must be filed in order to preserve such claims. *United States v. Green*, 185 U. S. 256, 22 Sup. Ct. Rep. 640. 46: 898

4. *Petition and Plats.*

Conformity of Decree to Petition, see *infra*, 478.

Necessary Allegations as to Previous Grants Within Place Limit, see *infra*, 490.

Mode of Presenting and Stating Claim to Commissioners, see *infra*, 508-514.

Mode of Presentment before Register or Recorder, see *infra*, 522.

Conformity of Survey made in Confirmation of Grant, see *infra*, 549.

459. The failure to annex a sworn copy of government surveys to the petition addressed to the court is matter relating merely to form of procedure, and not to jurisdiction. *United States v. De Morant* (*United States v. Morant*) 123 U. S. 335, 8 Sup. Ct. Rep. 189. 31: 171

5. *Rules of Decision.*

460. The validity of titles to lands lying within territory acquired from a former government by the United States must be determined by the laws of the government from which the title emanated. *Slidell v. Grandjean*, 111 U. S. 412, 4 Sup. Ct. Rep. 475. 28: 321

McMicken v. United States, 97 U. S. 204, 24: 947

United States v. De la Maza Arredondo, 6 Pet. 691, 8: 547

Steinbach v. Stewart, 11 Wall. 566. 20: 56

Cited in Pollard v. Kibbe, 14 Pet. 397, 10 L. ed. 511—*United States v. Lucero*, 1 N. M. 429—*People ex rel. Cutler v. Dibble*, 16 N. Y. 224.

461. Cases of Mexican grants are to be governed by the laws and usages of the Mexican government before the conquest of California, and according to the principles of equity. *Roland v. United States*, 7 Wall. 743. 19: 184

462. The effect of a grant of land made in California before it was ceded to the United States must be determined by Mexican law. *Steinbach v. Stewart*, 11 Wall. 566. 20: 56

463. The decision as to the validity of a land claim under titles from the Mexican government must, under the act of Congress of March 3, 1851, § 11, be governed by the treaty, the law of nations, the laws, usages and customs of the government ceding the lands, the principles of equity, and the decisions of this court so far as they are applicable. *Castillero v. United States*, 2 Black, 1, 17: 360

464. The laws, usages, and customs of Spain are legitimate sources of title to lands in Missouri, under the treaty with Spain. *Strother v. Lucas*, 12 Pet. 410. 9: 1137

465. The acts of Congress confer on the Supreme Court the same jurisdiction over inchoate and imperfect titles as over legal and perfect ones, and require the court to decide by the same rules on all claims submitted to it, whether legal or equitable. *Mitchel v. United States*, 9 Pet. 711. 9: 283

466. The United States must maintain the rights of property under the Florida treaty by applying the laws and customs by which those rights were secured before Florida was ceded. *United States v. Kingsley*, 12 Pet. 476. 9: 1163

467. In the construction of the Florida treaty, the United States succeeds to all those equitable obligations which we are to suppose would have influenced His Catholic Majesty to secure to his subjects their property. *United States v. Kingsley*, 12 Pet. 476. 9: 1163

Cited in Pollard v. Kibbe, 14 Pet. 398, 10 L. ed. 512—*United States v. Cervantes*, Hoffm. Land Cas. 13, Fed. Cas. No. 14,768.

468. The fact that similar grants have been confirmed by Congress or have received the approval of the Mexican authorities is not decisive in favor of the recognition of the validity of a Mexican land grant by the court of private land claims. *Crespin v. United States*, 168 U. S. 208, 18 Sup. Ct. Rep. 53. 42: 438

Cited in Hayes v. United States, 170 U. S. 654, 42 L. ed. 1181, 18 Sup. Ct. Rep. 735.

469. The rights of the inhabitants of the ceded territory to their lands depend upon the concessions made by the officers of the former government, and not upon any subsequent declaration of the Mexican commissioners on the subject. *United States v. Yorba*, 1 Wall. 412. 17: 635

Cited in More v. Steinbach, 127 U. S. 80, 32 L. ed. 55, 8 Sup. Ct. Rep. 1067—*Jones v. United States*, 137 U. S. 212, 34 L. ed. 696, 11 Sup. Ct. Rep. 80—*The James G. Swan*, 50 Fed. 111—*Re Gunn*, 50 Kan. 231, 19 L.R. A. 542, 32 Pac. 948.

According to rules of equity.

See also *supra*, 461, 463, 467.

470. The provision in the act of 1824, for

enabling claimants to lands to institute proceedings to try the validity of their titles, that the petitions presented under the act shall "be conducted according to the rules of a court of equity," should be understood rather as excluding the technicalities of proceedings in courts, than as varying the rights of the parties litigant. *United States v. Reynes*, 9 How. 127, 13: 74

471. Where Congress directs that proceedings for the settlement of land claims be conducted according to the rules of equity, it means those well-settled laws, usages, and customs of the court of chancery as adopted and recognized in their decisions, which have been acted upon in the Supreme Court, under the provisions of the Constitution and the acts of Congress. *United States v. De la Maza Arredondo*, 6 Pet. 691, 8: 547

472. In an investigation of a Mexican land title, the court of private land claims is not limited to the dry, technical rules of a court of law, but may inquire and establish that which equitably was the land granted by the government of Mexico. *Ely v. United States*, 171 U. S. 220, 18 Sup. Ct. Rep. 840, 43: 142

Questions excluded from inquiry.

Proceedings before Register and Receiver, see *infra*, 517, 518, 520.

Scope of Inquiry in Case Removed from California Land Commissioners, see *infra*, 586-589.

Conclusiveness on Courts, of Land Office Decisions and Acts, see *Courts*, 260a-267a.

See also *infra*, 489; *Evidence*, 758.

473. Spain had the power to grant her public domain in Florida in accordance with her own ideas of the merits and considerations presented by the grantee; and the powers of the Supreme Court of the United States extend only to the inquiry whether, in fact, the grant has been made, and its legal effect when made, in cases where the law, by implication, introduces a condition, or it is peculiar in its provisions. *United States v. Hanson*, 16 Pet. 196, 10: 935

474. Spain had the power to make grants founded on any consideration and subject to any restrictions, within her dominions; and if it was binding on that government, it was so on the United States as successor of Spain. *United States v. Clarke*, 16 Pet. 228, 10: 946

475. Any decision upon the merits of a claim under a Spanish grant of land which has been included in grants confirmed by Congress and duly patented by the proper authorities is expressly forbidden the court of private land claims by the act of March 3, 1891, § 13, declaring that all proceedings and rights shall be conducted and decided subject to the provision that "no claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority,"

since, where the court has no jurisdiction to confirm or reject, it has no authority to inquire into or pass upon the case beyond the decision of the question of jurisdiction. *United States v. Baca*, 184 U. S. 653, 22 Sup. Ct. Rep. 541, 46: 733

6. Decree or Order of Confirmation.

Effect of, Including Claimed Lands in Estate as Working Judicial Confirmation of Grant, see *supra*, 115.

Matters Excluded from Inquiry, see *supra*, 473-475.

Conformity of Survey to Decree, see *infra*, 550-553.

To What Court Appeal Lies, see *Appeal and Error*, 877, 878.

Federal Question as to, see *Appeal and Error*, 1744-1746.

Extension of Time for Taking Appeal, see *Appeal and Error*, 2604.

Right to take Second Appeal, see *Appeal and Error*, 5622.

As Evidence to Sustain Title to Excepted Lands, see *Evidence*, 1260.

Powerlessness of Equity to Grant Equivalent Lands, see *Public Lands*, 1064.

Description and boundaries.

476. A confirmation of claims for land, of which no quantity is given and no boundary stated, and for whose ascertainment no rule is furnished, is void for uncertainty. *Slidell v. Grandjean*, 111 U. S. 412, 4 Sup. Ct. Rep. 475, 28: 321
Cited in Farmers' Loan & T. Co. v. Chicago, P. & S. R. Co. 39 Fed. 151.

477. Federal courts have no power to designate a new location varying from an original concession, since such an alteration would be equivalent to a new grant, power to make which was not contemplated by the statutes conferring upon them jurisdiction over Spanish land grants in Florida. *United States v. Levy*, 13 Pet. 81, 10: 68
Cited in Villalobos v. United States, 10 How. 556, 13 L. ed. 537.

478. In cases coming up by appeal from the district courts of Missouri and Florida, which adjudicated Spanish claims under the act of 1824, the petition to the governor for land, and his concession, must be taken as one act; the decree usually proceeded on the petition, which described the land as respected locality and quantity. *Yontz v. United States*, 23 How. 495, 16: 472

Amount of land.

479. Every confirmation of a Mexican land claim is limited by the extent of the claim made; a confirmation of a claim to part of a grant does not involve a recognition of the validity of the whole grant. *Brown v. Brackett*, 21 Wall. 387, 22: 622
Cited in McMicken v. United States, 97 U. S. 208, 24 L. ed. 948—*Bouldin v. Phelps*, 30 Fed. 562.

480. A Mexican land claim will be confirmed to the extent of only 500 acres where it clearly appears that the claimant never had any legal title nor exclusive possession

beyond such 500 acres which had been allotted to him by the authorities of the pueblo of San Jose, and that a claim by him in excess of such amount had been denied by the other villagers and that he renounced such claim and consented to occupy the premises under the authorities of the pueblo, until the allotment of the 500 acres to him. *Chaboya v. United States* (United States v. Chaboya) 2 Black, 593, 17: 357

481. An appraisement, advertisement, and sale of a specified quantity of land at the minimum price cannot be enlarged by the words "comprising the vacant public lands" in a certain locality, as used in a Mexican grant, while in other parts of the proceedings it is described as "contained in" or "comprised in" the vacant public lands. *Ainsa v. United States*, 161 U. S. 203, 16 Sup. Ct. Rep. 544, 40: 673
Cited in *Reloj Cattle Co. v. United States*, 184 U. S. 638, 46 L. ed. 726, 22 Sup. Ct. Rep. 499.

482. A Mexican grant should not be sustained by the court of private land claims for more than the amount purchased, petitioned, and paid for, when all the proceedings contemplate a sale of that quantity only. *United States v. Maish*, 171 U. S. 242, 18 Sup. Ct. Rep. 948, 43: 150
Cited in *United States v. Coe*, 174 U. S. 579, 43 L. ed. 1093, 19 Sup. Ct. Rep. 881.

483. A Mexican grant can be confirmed only to the extent of the 4 sitios which, under the laws in force at the time of the sale in the proceedings to obtain the grant, it could not exceed, and which was the quantity denounced, appraised, paid for, and purported to have been granted. *United States v. Green*, 185 U. S. 256, 22 Sup. Ct. Rep. 640, 46: 898

484. Under the colonization laws of Mexico, by which no more than eleven leagues could be granted to a single individual, a claim to eleven leagues by one who has had confirmed a claim to four leagues and is making claim to nine more, cannot be confirmed. *Roland v. United States*, 7 Wall. 743, 19: 184

485. Where a Spanish land grant refers to the previous steps (including the petition, asking for only two leagues), and carries them along with the grant, the decree of the district court restricting the quantity to two square leagues must be affirmed. *Yontz v. United States*, 23 How. 495, 16: 472

Distinguished in United States v. D'Aguirre, 1 Wall. 316, 17 L. ed. 597.

Cited in *United States v. Cameron*, 3 Ariz. 104, 21 Pac. 177.

Restricting confirmation to amount paid for.

486. If the Mexican government had a right to compel payment for overplus in land grant then the United States government may treat the grant as limited to the

area purchased and paid for. *Ely v. United States*, 171 U. S. 220, 18 Sup. Ct. Rep. 840, 43: 142
Cited in *Ainsa v. United States*, 184 U. S. 648, 46 L. ed. 731, 22 Sup. Ct. Rep. 507.

487. Sustaining the validity of a Mexican grant to the extent of the land paid for is but carrying out the spirit of the treaty, the obligations of international justice, and the duties imposed by the act creating the court of private land claims, where the grant was of a specified quantity of land, in a certain place, at a certain price per sitio. *Ely v. United States*, 171 U. S. 220, 18 Sup. Ct. Rep. 840, 43: 142
Cited in *United States v. Maish*, 171 U. S. 242, 43 L. ed. 151, 18 Sup. Ct. Rep. 948—*United States v. Green*, 185 U. S. 267, 46 L. ed. 904, 22 Sup. Ct. Rep. 640.

Restriction to lands not previously settled or confirmed.

Loss of Right to Confirmation by Reason of Prior Grant, see supra, 438, 439.

See also *infra*, 615, 618, 620, 621.

488. Where a Mexican grant is a grant by quantity, the claimant is entitled to the amount specified, if that amount can be obtained without encroachment upon the prior rights of adjoining proprietors. *Alviso v. United States*, 8 Wall. 337, 19: 305
Cited in *Hornsby v. United States*, 10 Wall. 232, 19 L. ed. 902—*Snyder v. Sickles*, 98 U. S. 214, 25 L. ed. 102—*Trenier v. Stewart*, 101 U. S. 807, 25 L. ed. 1023—*Maxwell Land-Grant Case* (United States v. Maxwell Land Grant Co.) 121 U. S. 372, 30 L. ed. 955, 7 Sup. Ct. Rep. 1015—*Cameron v. United States*, 148 U. S. 309, 37 L. ed. 462, 13 Sup. Ct. Rep. 595—*United States v. Cameron*, 3 Ariz. 104, 21 Pac. 177.

489. Lands previously confirmed by act of Congress to Indian pueblos should be excepted from a decree of confirmation of a Spanish grant, even if the previous grant by Congress to the pueblos may be void, as the effect of the confirmation is only to release all claim of title by the United States, and it is not incumbent upon the court of private land claims to determine the priority of right as between the claimant and another grantee. *United States v. Valdez de Conway*, 175 U. S. 60, 20 Sup. Ct. Rep. 13, 44: 72

Cited in *Real de Dolones v. United States*, 175 U. S. 75, 44 L. ed. 78, 20 Sup. Ct. Rep. 17—*United States v. Chavez*, 175 U. S. 525, 44 L. ed. 261, 20 Sup. Ct. Rep. 159—*United States v. Baca*, 184 U. S. 659, 46 L. ed. 736, 22 Sup. Ct. Rep. 541—*Pueblo v. Romero*, 10 N. M. 60, 61 Pac. 122—*Territory v. Delinquent Taxpayers*, 12 N. M. 66, 73 Pac. 621.

Allowance of floating rights.

490. A claimant who fails to state in his petition what lands have been granted by the United States, or to whom, or who fails to make the grantees parties, is not entitled to have floating warrants awarded him. *United States v. Rosellus*, 15 How. 31, 14: 587

491. In a suit to establish a claim to land

under a Spanish grant, the district court should not, after determining the claim to be valid, decree that floats should issue, where the United States had sold portions of the land, when the vendees of the United States were not made parties to the proceedings. *United States v. Davenport*, 15 How. 1, 14: 575

Conditions on decree.

492. Where a grant of absolute property is given, with a promise of a title in form, by the Spanish governor, the court cannot attach any condition; he was to be the exclusive judge of the conditions and their performance. *United States v. Segui*, 10 Pet. 306, 9: 435
Cited in United States v. Kingsley, 12 Pet. 485, 9 L. ed. 1166—*United States v. Rodman*, 15 Pet. 139, 10 L. ed. 689.

493. Where an entry is required by statute to be on a condition expressed, the court is bound by the statute. *De Yturbide v. United States (Yturbide v. United States)* 22 How. 290, 16: 342

494. The conditions in a grant, of public lands in California, for cultivation and occupancy being conditions subsequent, which by the treaty with Mexico ceased to have any binding effect, may be stricken from the grant. *United States v. Fremont*, 18 How. 30, 15: 302
Cited in Nunez v. United States, Hoffm. Land Cas. 193, Fed. Cas. No. 10,379—*United States v. Larkin*, Hoffm. Land Cas. 43, Fed. Cas. No. 15,563—*United States v. Polack*, Hoffm. Land Cas. 298, Fed. Cas. No. 16,061.

To whom confirmed.

Who Entitled to Patent, see *infra*, 568.
 See also Evidence, 702.

495. Confirmation of a grant to persons claiming to derive title by conveyances and legal succession from the grantee may be made under the act of Congress of 1891, § 8, to the claimants alone, without making it more generally to the "assigns and legal representatives of the original grantee," since the confirmation excepts lands disposed of by the United States, and is made subject to any conflicting private interests, rights, or claims. *United States v. Chavez*, 175 U. S. 509, 20 Sup. Ct. Rep. 159, 44: 255

Cited in United States v. Pendell, 185 U. S. 197, 46 L. ed. 870, 22 Sup. Ct. Rep. 624.

Adjustment of diverse interests in claim.

Necessity of Impleading Adverse Claimants, see *supra*, 444.

Contests and Suits to Recover Equities in Lands Confirmed, see *infra*, III. e.

Power of Commissioners, see *infra*, 499.

Effect of Order of Confirmation on Outstanding Rights of Third Persons, see *infra*, 650-657a.

496. Where two persons who were tenants in common of undivided moieties of land filed a claim for it under a Spanish grant, and one of them subsequently parted with all title to the land, no decree can be

made for the latter, but a decree may be made in favor of the other for one half of the amount of the land. *United States v. Watkins*, 97 U. S. 219, 24: 952

b. Proceedings Before Land Commissioners or Officers.

Power of Secretary of Interior, see Executive Departments, 45.

1. Commissioners.

Conclusiveness of Effect of Confirmation by Commissioners, see *infra*, III. f, 3.

Proceedings to Remove Case from Commissioners' Courts and Review, see *infra*, 582-589.

Relative Function of Courts and Land Officers, see Courts, I. e, 6.

Competency of Grantor as Witness for Grantee, see Witnesses, 124.

Eligibility and disqualification of commission.

497. A confirmation by the board of commissioners of the United States for adjusting land titles in Missouri is not invalid because at the time it was made the grantee of the person to whom the title was confirmed was a member of the board and a judge of the superior court of the territory, —especially where he was not present when the confirmation was made. *Strother v. Lucas*, 12 Pet. 410, 9: 1137
Cited in Farmers' Loan & T. Co. v. Chicago, P. & S. R. Co. 39 Fed. 151.

Authority, powers, and duties.

As to Land Officers other than Commissioners, see *infra*, 517-521.

Review of Question of Lack of Authority, see Appeal and Error, 4238.

498. The refusal of the commissioners of the land office to issue a patent upon a survey of a claim confirmed under the act of 1851 was an appropriate exercise of the quasi judicial functions of his office. *Castro v. Hendricks*, 23 How. 438, 16: 576
Cited in St. Louis v. United States, 9 Ct. Cl. 463—*Bissell v. Henshaw*, 1 Sawy. 561, Fed. Cas. No. 1,447—*Wythe v. Haskell*, 3 Sawy. 579, Fed. Cas. No. 18,118—*Johnson v. Vandyke*, 20 Cal. 229—*Mahoney v. Van Winkle*, 33 Cal. 457—*Sabichl v. Aguilar*, 43 Cal. 291.

499. It is the duty of the commissioners to establish the boundary, as well as validity of a Mexican grant, as between the grantee and the government, but not to arbitrate the disputes of the several assignees of such grant. *United States v. Grimes*, 2 Black, 610, 17: 352

500. Power to decide upon the validity of any Spanish or Mexican claim to land in California is conferred by the act of Congress of March 3, 1851, upon the commissioners appointed under its provisions. *Castillero v. United States*, 2 Black, 1, 17: 360

Cited in Chavez v. Chavez de Sanchez, 7 N. M. 71, 32 Pac. 137.

501. The extraordinary tribunals, under the act of 1851, cannot order a second patent to issue for a portion of Sutter's grant. *United States v. Covilland*, 1 Black, 339, 17: 40

502. Such judgment could have no effect against the government, and, as between Sutter and the petitioners, would be a nullity, being prohibited by the act of 1851, § 15. *United States v. Covilland*, 1 Black, 339, 17: 40

Kind of claims cognizable.

Restriction of Power of Officer to Confirm Titles not Previously Passed upon by Commissioners, see *infra*, 519.

503. Commissioners appointed under the act of March 3, 1851, had jurisdiction over the claim to a mine under § 8 of such act providing that every person claiming "land" in California by virtue of any right or title derived from the Mexican government should present the same for adjudication to such commissioners. *Castillero v. United States*, 2 Black, 1, 17: 360
Cited in *Harvey v. Barker*, 126 Cal. 275, 58 Pac. 692.

504. There is no distinction as to the jurisdiction of the board to settle private land claims in California created by the act of March 3, 1851, between claims derived from the Spanish or Mexican government, which were perfect under the laws of those governments, and those which were incipient, imperfect, or inchoate. *Botiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. Rep. 525, 32: 926

505. Judges of the superior court of West Florida were "public officers acting under authority of Congress" within the meaning of the proviso in the act of June 22, 1860 (12 Stat. at L. 85, 87, chap. 188), § 3, prohibiting commissioners from embracing among the Florida land claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means." *United States v. Dalcour*, 203 U. S. 408, 27 Sup. Ct. Rep. 58, 51: 248

506. Florida land claims which previously had been rejected as fraudulent or maintained by improper means, when the fraud addressed itself to avoiding the treaty of February 22, 1819 (8 Stat. at L. 258), with Spain, as well as when the fraud related to some other fact material to the validity of the claims at the time when they were created, were covered by the proviso in the act of June 22, 1860 (12 Stat. at L. 85, 87, chap. 188), § 3, prohibiting commissioners from embracing among the claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of U. S. Dig.—295

Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means." *United States v. Dalcour*, 203 U. S. 408, 27 Sup. Ct. Rep. 58, 51: 248

507. The rejection of a Florida land claim by a judge of the superior court of West Florida, acting under the act of May 23, 1828 (4 Stat. at L. 284, 285, chap. 70), § 6, because of an unwarranted alteration of the date in the registro which would save the grant from invalidity under the treaty of February 22, 1819 (8 Stat. at L. 258), with Spain, brings the case within the proviso of the act of June 22, 1860 (12 Stat. at L. 85, 87, chap. 188), § 3, prohibiting commissioners from embracing among the claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means." *United States v. Dalcour*, 203 U. S. 408, 27 Sup. Ct. Rep. 58, 51: 248

Presentment of claims and statement thereof.

508. Any defect in the title of a petition presented before the board of commissioners for the adjustment of land claims in Florida will be considered in deciding on the petitioner's right, but does not constitute an objection to the jurisdiction. *United States v. Clarke*, 3 Pet. 436, 8: 1001

509. The primary object of the act of March 3, 1851, "to ascertain and settle the private land claims in the state of California," was to distinguish the vacant and public lands from those that were private property. *Castro v. Hendricks*, 23 How. 438, 16: 576

510. For this purpose an inquiry into pre-existing titles became necessary. To accomplish this, every person claiming lands in California from the Spanish or Mexican government was required to present the same to a board of commissioners. *Castro v. Hendricks*, 23 How. 438, 16: 576
Cited in *Estrada v. Murphy*, 19 Cal. 274.

511. Under the act of Congress of March 3, 1851, for the settlement of private land claims in California, persons claiming land by title derived from the Spanish or Mexican government were required to present their claims to the board of commissioners created by the act within two years from its date, and were bound by a judgment of the board, if confirmed by the courts on appeal, and by the survey and location of the claim by the land officers, following the final decree of confirmation. *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. Rep. 1067, 32: 51

Distinguished in *Ely v. New Mexico & A. R. Co.* 129 U. S. 292, 32 L. ed. 689, 9 Sup. Ct. Rep. 293.

Cited in *Botiller v. Dominguez*, 130 U. S. 253, 32 L. ed. 931, 9 Sup. Ct. Rep. 525—*Thompson v. Los Angeles Farming & Mill. Co.* 180

U. S. 78, 45 L. ed. 435, 21 Sup. Ct. Rep. 289—Huston v. San Francisco, 47 Fed. 339—De La Guerra v. Santa Barbara, 117 Cal. 533, 49 Pac. 733.

512. The act of March 3, 1851, relating to the presentation of Spanish or Mexican land titles to the board of land commissioners, required such presentation, not only of inchoate or equitable titles, but of legal titles also. *Frémont v. United States*, 17 How. 542, 15: 241

Cited in *Bottiller v. Domínguez*, 130 U. S. 252, 32 L. ed. 930, 9 Sup. Ct. Rep. 525—*Stoneroad v. Stoneroad*, 158 U. S. 252, 39 L. ed. 970, 15 Sup. Ct. Rep. 822—*Ainsa v. United States*, 161 U. S. 223, 40 L. ed. 678, 16 Sup. Ct. Rep. 544—*United States v. Sandoval*, 167 U. S. 291, 42 L. ed. 172, 17 Sup. Ct. Rep. 868—*Ainsa v. New Mexico & A. R. Co.* 175 U. S. 84, 44 L. ed. 82, 20 Sup. Ct. Rep. 28—*Estrada v. Murphy*, 19 Cal. 269—*Minturn v. Brower*, 24 Cal. 670—*Bernal v. Lynch*, 36 Cal. 145—*Chavez v. Chavez de Sanchez*, 7 N. M. 69, 32 Pac. 137.

513. Petitioners for the confirmation of Mexican land grants were required by the act of Congress of March 3, 1851, to present not only their claims to the commissioners, but also the documentary evidence of title on which they relied to support the same. *Castillero v. United States*, 2 Black, 1, 17: 360

514. Mission Indians claiming a right of permanent occupancy to land in California under a Mexican grant are within the provisions of the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41), § 8, requiring every person claiming lands in California by virtue of any right or title derived from a Spanish or Mexican government to present the same to commissioners, and their failure to do so within the two years limited for that purpose by § 13, constitutes an abandonment of their rights. *Barker v. Harvey*, 181 U. S. 481, 21 Sup. Ct. Rep. 690, 45: 963
Cited in *Minnesota v. Hitchcock*, 185 U. S. 392, 46 L. ed. 964, 22 Sup. Ct. Rep. 650—*United States v. Blendaur*, 63 C. C. A. 639, 128 Fed. 913—*Northern Lumber Co. v. O'Brien*, 71 C. C. A. 601, 139 Fed. 617.

Hearings.

515. Where there are divers vendees under one original title, and the Mexican grantee has filed his petition before the commissioners for a confirmation of his title, and there are others—his assignees—who have petitioned also, the commissioners should consolidate all the cases. *United States v. Grimes*, 2 Black, 610, 17: 352

Report and requisites thereof.

Certificate as Essential to Right to Patent, see *infra*, 567.

Correction of Action of Board, see *infra*, 579.

Effect of Statutory Confirmation or Adoption of Report, see *infra*, 678-680.

516. A report of the Commissioner of Public Lands in favor of a claim under an alleged Spanish land grant is insufficient to

render applicable the provisions of the treaty with Spain of February 22, 1819 (8 Stat. at L. 252), for the confirmation of such grants, where it contains no other description of the land granted than its area in arpents and the statement that it is situated on the Mobile river, but that no survey of the land existed. *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 23 Sup. Ct. Rep. 170, 47: 266

2. Land Officers.

Disability of Courts to Entertain Suit Pending Proceedings before Land Officers. see *supra*, 379.

Relative Function of Courts and Land Officers, see *Courts*, I. e, 6.

Authority and duty.

Interest as Disqualifying Commissioner. see *supra*, 497.

517. The register and receiver are empowered to decide on the true location of grants or confirmations, but not on the legal questions of title. *Tate v. Carney*, 24 How. 357, 15: 633
Cousin v. Labatut, 19 How. 202, 15: 601
Doe ex dem. Barbarie v. Eslava, 9 How. 421, 13: 200

Cited in *Doe ex dem. Barbarie v. Mobile*, 9 How. 469, 13 L. ed. 219—*Tate v. Carney*, 24 How. 361, 16 L. ed. 694—*Smiley v. Sampson*, 1 Neb. 76.

518. The act of May 8, 1822, did not confer the adjudication of titles of land, but the adjudication of locations, on registers and receivers, in the part of Alabama to which it referred. *Doe ex dem. Barbarie v. Eslava*, 9 How. 421, 13: 200
Doe ex dem. Barbarie v. Mobile, 9 How. 451, 13: 212

519. The authority of the recorder of land titles of St. Louis county to confirm land titles in Missouri was, by the express terms of the Acts of 1812 and 1813, confined to those claims on which the board of commissioners of the United States for adjusting land titles in Missouri had not previously acted. *Strother v. Lucas*, 12 Pet. 410, 9: 1137

520. The power of the registers and receivers embraced only imperfect grants made before the cession of the country. *Doe ex dem. Barbarie v. Mobile*, 9 How. 451, 13: 212

521. A military governor of the United States in California had no power to grant lands and confirm titles. *Mumford v. Wardwell*, 6 Wall. 423, 18: 756
Cited in *Alexander v. Roulet*, 13 Wall. 286, 20 L. ed. 564.

Presentment of claims.

522. The act of March, 1805, for ascertaining and adjusting titles to lands within the territory of Orleans, required every claimant to deliver to the register of the land office, or the recorder of land titles, within the district where the land lay, a notice in writing stating the extent of his

claim, and also, except where the lands were claimed under a complete French or Spanish grant, to deliver for recording every grant, order of survey, deed, conveyance, or other written evidence of his claim. In the case of the complete grants, recording the grant or patent, with the warrant or order of survey and the plat, was sufficient. *Strother v. Lucas*, 6 Pet. 763, 8: 573
Cited in Strother v. Lucas, 12 Pet. 437, 9 L. ed. 1147—*Bissell v. Penrose*, 8 How. 338, 12 L. ed. 1104—*Fenn v. Holme*, 21 How. 486, 16 L. ed. 200—*Connoyer v. Schaeffer*, 22 Wall. 262, 22 L. ed. 838—*Newman v. Lawless*, 6 Mo. 290—*Hogan v. Page*, 32 Mo. 75—*Carpenter v. Rannells*, 45 Mo. 590—*Challefoux v. Ducharme*, 4 Wis. 562.

Decision and its effect.

Necessity of Approval of Survey of Surveyor General, see *infra*, 555, 556.

Conclusiveness and Effect of Surveys by Surveyor General, see *infra*, 632, 635-639, 641.

Conclusiveness on Courts, of Land Office Decisions and Acts, see *Courts*, 260a-267a.

523. The surveyor general's report under the act of July 22, 1854, on a claim to a Spanish or Mexican grant, does not of itself establish a title favorably reported on. *Pinkerton v. Ledoux*, 129 U. S. 346, 9 Sup. Ct. Rep. 399, 32: 706
Distinguished in Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 83, 37 L. ed. 377, 13 Sup. Ct. Rep. 457.

Cited in Potter v. Randolph, 126 Cal. 461, 58 Pac. 905—*Chavez v. Chavez de Sanchez*, 7 N. M. 78, 32 Pac. 137.

524. The function of the surveyor general under the act of Congress of 1854 (10 Stat. at L. 308, chap. 103), was merely advisory, and until action by Congress had supervened on a recommendation for the confirmation of a private land claim made by his predecessor in office, it was not only the right, but the duty, of that official, on proper suggestion being made to him, to hear additional evidence and transmit it for the consideration of Congress. *United States v. Ortiz*, 176 U. S. 422, 20 Sup. Ct. Rep. 466, 44: 529

525. The decisions of the recorder of land titles were subject to the revision of Congress. *Strother v. Lucas*, 12 Pet. 410, 9: 1137

Cited in Doe ex dem. Barbarie v. Eslava, 9 How. 450, 13 L. ed. 212—*Hart v. Burnette*, 15 Cal. 553.

526. The power of the register and receiver, under the act of Congress of May 8, 1822, to decide on the validity of land claims in Florida, is restricted to cases where the claims do not exceed 1,000 acres, unless the claimant is an actual settler, and their decision is not conclusive unless made in conformity with their statutory power. *United States v. Percheman*, 7 Pet. 51, 8: 604

Cited in Smiley v. Sampson, 1 Neb. 77—*Challefoux v. Ducharme*, 4 Wis. 562.

c. Confirmatory Location, Survey, and Approval.

Locative Surveys, see *supra*, I. c.

Necessity of Attaching Copy of Survey to Petition, see *supra*, 459.

Description in Patent as Construed with Reference to Survey, see *infra*, 569, 570.

Conclusiveness and Effect of Survey, see *infra*, 632-643.

Parol Evidence to Show Official Survey of Wrong Tract, see *Evidence*, 1747.

Order of Survey as Property, see *Property*, 4.

Necessity of survey.

Severance or Segregation from Public Domain as Essential to Private Legal Title, see *infra*, 590, 591.

See also *infra*, 617.

527. A survey is by necessary implication contemplated by an act of Congress confirming a grant which had never been surveyed, in the absence of any express statement in the act indicating a contrary intention. *Stoneroad v. Stoneroad*, 158 U. S. 240, 15 Sup. Ct. Rep. 822, 39: 966
Cited in Ainsa v. United States, 161 U. S. 222, 40 L. ed. 678, 16 Sup. Ct. Rep. 544—*Gildersleeve v. New Mexico Min. Co.* 161 U. S. 579, 40 L. ed. 814, 16 Sup. Ct. Rep. 663.

528. Congress, by the act of March 3, 1807, did not intend to give a final legal title to lands held under Spanish and French grants vaguely described, until the bounds were ascertained and defined by survey. *West v. Cochran*, 17 How. 403, 15: 110

Cited in Kissell v. St. Louis Public Schools, 18 How. 25, 15 L. ed. 327—*Lafayette v. Kenton*, 18 How. 199, 15 L. ed. 347—*Stanford v. Taylor*, 18 How. 412, 15 L. ed. 454—*Bryan v. Forsyth*, 19 How. 336, 15 L. ed. 675—*Willot v. Sandford*, 19 How. 82, 15 L. ed. 550—*Carondelet v. St. Louis*, 1 Black, 189, 17 L. ed. 105—*Maguire v. Tyler*, 8 Wall. 661, 19 L. ed. 323—*Tyler v. Magwire*, 17 Wall. 280, 21 L. ed. 582—*Snyder v. Sickles*, 98 U. S. 212, 25 L. ed. 101—*Cragin v. Powell*, 128 U. S. 699, 32 L. ed. 568, 9 Sup. Ct. Rep. 203—*Mezes v. Greer*, McAll. 406, Fed. Cas. No. 9,520—*United States v. Parrott*, McAll. 463, Fed. Cas. No. 15,999—*Muse v. Arlington Hotel Co.* 68 Fed. 645—*Wilson v. Wall*, 34 Ala. 305—*Doe ex dem. Mims v. Higgins*, 39 Ala. 22—*Waterman v. Smith*, 13 Cal. 412—*Magwire v. Tyler*, 25 Mo. 501—*Gray v. Givens*, 26 Mo. 301—*Dent v. Sigerson*, 29 Mo. 515—*LeBeau v. Gaven*, 37 Mo. 558—*Magwire v. Tyler*, 40 Mo. 438—*Hannibal & St. J. R. Co. v. Smith*, 41 Mo. 333—*Le Beau v. Armitage*, 56 Mo. 193—*Tyler v. Wells*, 57 Mo. 475—*Smith v. Madison*, 67 Mo. 705—*Tyler v. Wells*, 2 Mo. App. 532—*Coleman v. Allen*, 5 Mo. App. 132—*McBride v. Whitaker*, 65 Neb. 146, 90 N. W. 966—*Clark v. Hills*, 67 Tex. 146, 2 S. W. 356.

529. A public survey was essential to give the inhabitants of Carondelet title to the tract claimed under the act of June 13, 1812, as community property. *Carondelet v. St. Louis*, 1 Black, 179, 17: 102

530. A Spanish grant of land which has been confirmed by the commissioners, and which is indefinite, uncertain, and vague as to its boundaries, attaches to no particular tract, and must be surveyed and the survey approved before the party can be entitled to a patent, and before a recovery in ejectment for it can be sustained. *West v. Cochran*, 17 How. 403, 15: 110
Snyder v. Sickles, 98 U. S. 203, 25: 97
Ledoux v. Black, 18 How. 473, 15: 457
Cited in *Muse v. Arlington Hotel Co.* 68 Fed. 644—*Doe ex dem. Mims v. Higgins*, 39 Ala. 19.

531. In a Mexican title, where one of the boundaries of the tract is wanting, the title is imperfect, and requires a survey to distinguish the land intended to be granted, before the title is perfect. *Carpentier v. Montgomery*, 13 Wall. 480, 20: 698
Cited in *Pinkerton v. Ledoux*, 129 U. S. 354, 32 L. ed. 709, 9 Sup. Ct. Rep. 399.

532. Spanish or Mexican grants or concessions made upon certain conditions passed no interest, legal or equitable, in particular land, until a survey was made and returned. *Frémont v. United States*, 17 How. 542, 15: 241
Cited in *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 590, 35 L. ed. 286, 11 Sup. Ct. Rep. 656—*Muse v. Arlington Hotel Co.* 68 Fed. 642—*Puget Sound Agri. Co. v. Pierce County*, 1 Wash. Terr. 166.

533. Until confirmation of a Spanish claim, no valid title to any specific land is vested; and confirmation does not locate the claim and sever the land from the public domain without a survey. *Ledoux v. Black*, 18 How. 473, 15: 457
Cited in *Henshaw v. Bissell*, 18 Wall. 267, 21 L. ed. 839—*Bissell v. Henshaw*, 1 Sawy. 573, Fed. Cas. No. 1,447—*Tobin v. Walkinshaw*, McAll. 173, Fed. Cas. No. 14,069—*Waterman v. Smith*, 13 Cal. 413.

534. Neglect to procure survey and location of an out-lot in St. Louis, under the act of 1824, did not impair or forfeit title acquired under the act of 1812, which confirmed "the rights, titles, and claims to town or village lots, out-lots, common-field lots and commons," in several towns, including St. Louis, "which lots have been cultivated or possessed prior to the 20th of December, 1803, according to their several right or rights in common." *Guitard v. Stoddard*, 16 How. 494, 14: 1030
Savignac v. Garrison, 18 How. 136, 15: 290

Cited in *Bunell v. Stoddard*, Fed. Cas. No. 2,135—*Tyler v. Wells*, 2 Mo. App. 538.

Requisites of survey generally.

Necessity of Sufficient Description in Land Commissioner's Report on Claimants Heard, see *supra*, 515.

Necessity of Approval of Survey, see *infra*, 555, 556.

535. The survey of a Mexican grant of a specific quantity of land without definite boundaries is now required to be made in the form and divisions prescribed for surveys in California, embracing the entire

grant in one tract. *Frémont v. United States*, 17 How. 542, 15: 241
Cited in *United States v. Sutter*, Fed. Cas. No. 10,424.

535a. It is no objection to a survey of a grant of land of a specific quantity within the boundary of a larger tract that it does not locate the land in a compact form, but it should be made so as to avoid collision with any elder patents, and in reasonable conformity with the decree of confirmation. *United States v. Armijo*, 5 Wall. 444, 18: 492

Cited in *United States v. McLaughlin*, 127 U. S. 450, 32 L. ed. 221, 8 Sup. Ct. Rep. 1177—*Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 590, 35 L. ed. 286, 11 Sup. Ct. Rep. 656—*Cameron v. United States*, 148 U. S. 309, 37 L. ed. 462, 13 Sup. Ct. Rep. 595.

536. According to the strict idea of confirming a survey of a location in the United States, the survey would be located adjoining the natural object called for, there being no other to aid and control the general call. *United States v. Low*, 16 Pet. 162, 10: 923

537. Where a survey of land had been located as the claimant desired, was compact, and embraced two houses inhabited by the owners of the claim, the survey was sustained, although the surplus left the United States was in two disconnected parcels. *United States v. De Jesus Vallejo (United States v. Vallejo)* 1 Wall. 658, 17: 677
Cited in *United States v. Maxwell Land Grant Co.* 21 Fed. 22.

538. In Mexican land grant cases, a large discretion must necessarily be left to the surveyor, and the court will not inquire whether it has been accompanied with the nicest discrimination or the highest wisdom. *United States v. De Jesus Vallejo (United States v. Vallejo)* 1 Wall. 658, 17: 674

539. Objection that the survey was void because not made by the surveyor-general in person, but by a deputy, is frivolous. *United States v. Billings*, 2 Wall. 444, 17: 848

539a. A survey and location of a Mexican grant of land in California was held to have been made in conformity with the decree and mandate of the Supreme Court. *United States v. Sutter (The Sutter Case)* 2 Wall. 562, 17: 881

Notice.

540. Lack of notice to holders of a grant, and the fact that some of them were minors and some were under coverture, do not invalidate a survey of the grant to separate it from the public domain. *Stoneroad v. Stoneroad*, 158 U. S. 240, 15 Sup. Ct. Rep. 822, 39: 966

541. A board of commissioners appointed to adjust land titles in Missouri, had the power to adopt a private survey if placed on record by the recorder, which was a reasonable notice within the acts of Congress. *Mills v. Stoddard*, 8 How. 345, 12: 1107

Unofficial surveys.

Private Locative Surveys under Former Government, see *supra*, 143, 144, 146.

Conclusiveness and Effect of Adopted Private Survey, see *infra*, 633, 634.

Extrinsic Evidence as to Correctness or Incorrectness, see Evidence, 1748.

See also *supra*, 541.

542. A survey made at the instance of the inhabitants of St. Louis, for the purpose of presenting their claim to commons in due form to the board of commissioners, was not binding on the United States, and had no binding influence on the title of subsequent litigants. *Mackay v. Dillon*, 4 How. 421, 11: 1038

Cited in *Les Bois v. Bramell*, 4 How. 457, 11 L. ed. 1054—*Guitard v. Stoddard*, 16 How. 508, 14 L. ed. 1036—*Ledoux v. Black*, 5 La. Ann. 513—*Carondelet v. McPherson*, 20 Mo. 199—*Carondelet v. St. Louis*, 25 Mo. 404.

543. The act of 1804, forbidding private surveys upon the public lands, was impliedly repealed by the act of 1805, which required claimants to file a plat. The act of 1806 authorized the commissioners to direct such survey as they might deem necessary, giving them power to adopt private surveys. *Bissell v. Penrose*, 8 How. 317, 12: 1095

Conformity to original survey, place, or possession.

Instruction as to Allowance for Differences, see Trial, 667.

544. Land granted could only be surveyed at the place granted; if elsewhere, it would be a new appropriation, and therefore void. *United States v. D'Auterieve*, 15 How. 14, 14: 580

United States v. Low, 16 Pet. 162, 10: 923

545. Where juridical possession of land under a confirmed Mexican grant had been delivered to the grantee, it is the duty of the court to locate the lands according to the measurements made by the alcalde, upon the delivery of possession. *Graham v. United States*, 4 Dall. 259, 18: 334

Cited in *United States v. Pico*, 5 Wall. 539, 18 L. ed. 690—*Van Reynegan v. Bolton*, 95 U. S. 35, 24 L. ed. 352—*United States v. Elder*, 177 U. S. 117, 44 L. ed. 695, 20 Sup. Ct. Rep. 537—*Bouldin v. Phelps*, 30 Fed. 558—*United States v. Southern P. R. Co.* 45 Fed. 611—*Foss v. Hinkell*, 91 Cal. 199, 27 Pac. 644—*Stoneroad v. Stoneroad*, 4 N. M. 193, 12 Pac. 736.

546. The acts of Congress for ascertaining claims and titles to lands in Florida, while they recognize patents, grants, concessions, or orders of survey, as evidence of title when lawfully made, do not permit, in case of a deficiency in the quantity, from any cause whatever, the survey to be extended on other land. *United States v. Arredondo*, 13 Pet. 133, 10: 93

Cited in *Doe ex dem. Commyns v. Latimer*, 2 Fla. 89.

547. Under a Spanish grant of 5 miles square of land to one contemplating the erection of a sawmill on a specified creek,

the surveyor general is without authority to change the location and split up the surveys into three separate parcels, the nearest of which is 30 miles from the creek named. Such surveys cannot be upheld. *Villalobos v. United States*, 10 How. 541, 13: 531

548. Where a grant was of 10,000 acres on the northwest side of the head of the lagoon or Indian river, and the object of the grant was timbered land, if the nearest vacant timbered land to the head of the lagoon was surveyed, the intention of the government and of the grantee was complied with. *United States v. Low*, 16 Pet. 162, 10: 923

Conformity to petition or claim.

549. The want of survey does not defeat a grant, but the land may be taken as near as may be as it is described in the petition, where it was asked for and cannot be taken elsewhere. *Buyck v. United States*, 15 Pet. 215, 10: 715

Cited in *Villalobos v. United States*, 10 How. 556, 13 L. ed. 537.

Conformity to decree of confirmation.

550. There must exist a reasonable conformity between the survey and the decree of confirmation, or the survey cannot be sustained. *United States v. Halleck*, 1 Wall. 439, 17: 664

Cited in *Henshaw v. Bissell*, 18 Wall. 260, 21 L. ed. 840—*Bissell v. Henshaw*, 1 Sawy. 563, Fed. Cas. No. 1,447—*Muse v. Arlington Hotel Co.* 68 Fed. 645—*United States v. Peralta*, 99 Fed. 629.

551. The act of 1860, chap. 128, did not enlarge, or in any way affect the duty or power of the surveyor-general to survey and locate the confirmed tract in conformity with the decree of the district court made in pursuance of a mandate of the Supreme Court of the United States. *Fossat v. United States* (Fossat or Quicksilver Mine Case) 2 Wall. 649, 17: 739

Cited in *Bissell v. Henshaw*, 1 Sawy. 589, Fed. Cas. No. 1,447—*United States v. Carpenter*, Fed. Cas. No. 14,728—*United States v. De Rodriguez*, Fed. Cas. No. 14,950—*United States v. Southern P. R. Co.* 45 Fed. 610—*United States v. Peralta*, 99 Fed. 629—*Hale v. Akers*, 69 Cal. 167, 10 Pac. 385—*United Land Asso v. Knight*, 85 Cal. 479, 24 Pac. 818—*Foss v. Hinkell*, 91 Cal. 203, 27 Pac. 644—*De Guyer v. Banning*, 91 Cal. 402, 27 Pac. 761.

552. The survey made by the surveyor general of a Mexican grant corresponds with the decree of confirmation if the lines are run according to the natural monuments mentioned therein, although not following the course thereof, which are plainly erroneous. *Higuera v. United States*, 5 Wall. 827, 18: 469

553. Where the decree of confirmation of a private land claim under a Spanish or Mexican grant is by metes and bounds the survey required thereon must conform to the decree. *Higuera v. United States*, 5 Wall. 827, 18: 469

Plat or map.

Necessity to Give Right to Patent, see *infra*, 567.

554. A plat of a survey on file, clearly identified by the claimant's name written upon it, is not made invalid by the fact that another plat appears upon the same piece of paper. *Bissell v. Penrose*, 8 How. 317, 12: 1095

Necessity or approval.

Necessity to Give Right to Patent, see *infra*, 567.

Effect of Attempted Void Limitation upon Approval, see *infra*, 635, 636.

Effect of Survey not yet Approved, to Open Excluded Land to Public Settlement, see *infra*, 658, 658a.

Approval Relating Back to Date of Survey, see *infra*, 665.

555. A survey, by the surveyor-general of the United States, of a claim confirmed, is inoperative until finally approved by the Land Department at Washington. *Van Reynegan v. Bolton*, 95 U. S. 33, 24: 351
Cited in Frasher v. O'Connor, 115 U. S. 107, 29 L. ed. 313, 5 Sup. Ct. Rep. 1141—*United States v. McLaughlin*, 127 U. S. 450, 32 L. ed. 221, 8 Sup. Ct. Rep. 1177—*United Land Asso. v. Knight*, 85 Cal. 479, 24 Pac. 818—*Shanklin v. McNamara*, 87 Cal. 381, 26 Pac. 345.

556. The survey of a claim under a former Mexican grant by the United States surveyor general for California, under § 8 of the act of July 23, 1866, "to quiet land titles in California," is operative without the approval of the commissioner of the General Land Office to fix the limits of such claim and set free lands outside of it for other disposal. *McCreery v. Haskell*, 119 U. S. 327, 7 Sup. Ct. Rep. 176, 30: 408

Concelation, amendment, or resurvey.

Jurisdiction to Grant Relief against Survey Pending before Another Court, see *supra*, 377.

557. The circuit court of the United States has now no original jurisdiction to reform surveys, made by the Land Department, of confirmed Mexican grants in California. *United States v. Throckmorton*, 98 U. S. 61, 25: 93

558. The district court has no jurisdiction to revise the action of the surveyor general, and correct his survey of a California land claim confirmed by it under the act of March 3, 1851. *United States v. Sepulveda*, 1 Wall. 104, 17: 569
Distinguished in Valentine v. Sloss, 103 Cal. 221, 37 Pac. 326.

Cited in United States v. Maxwell Land Grant Co. 21 Fed. 22—*United States v. Hancock*, 30 Fed. 852.

559. Under the act of 1860 the district court was authorized to order into court, for examination and adjudication, only the surveys of claims confirmed by the board of commissioners. *Higuera v. United States*, 5 Wall. 827, 18: 469

560. A suit in equity for the cancelation

of an approved plat, delivered by the United States to an alleged actual settler, for part of the Las Animas grant, on the ground that it was illegal, is not maintainable by one claiming an undivided interest in the residuum of the grant remaining after the satisfaction of claims of actual settlers, or on the ground that the patent issued on such plat has cut off complainant's right of appeal from the register and receiver. *Downs v. Hubbard (Craig v. Leitensdorfer)* 123 U. S. 189, 8 Sup. Ct. Rep. 85, 31: 114

561. The act of 1860 authorizes the return of surveys for examination and adjudication only upon the application of parties who have such interest as to make it proper for them to intervene. *United States v. Estudillo*, 1 Wall. 710, 17: 702

562. By the act of March 3, 1849, the Secretary of the Interior had authority to set aside a survey, order another to be made, and to issue a patent to one, throwing out the claim of another. *Maguire v. Tyler*, 8 Wall. 650, 19: 320
Magwire v. Tyler, 1 Black, 195, 17: 137
Cited in Snyder v. Sickles, 98 U. S. 211, 25 L. ed. 101—*Butterworth v. United States*, 112 U. S. 56, 28 L. ed. 658, 5 Sup. Ct. Rep. 25—*Knight v. United Land Asso.* 142 U. S. 179, 35 L. ed. 980, 12 Sup. Ct. Rep. 258—*Le Roy v. Clayton*, 2 Sawy. 498, Fed. Cas. No. 8,268—*Stimson Land Co. v. Rawson*, 62 Fed. 430—*Michigan Land & Lumber Co. v. Rust*, 15 C. C. A. 346, 31 U. S. App. 731, 68 Fed. 166—*Smyth v. New Orleans Canal & Bkg. Co.* 35 C. C. A. 671, 93 Fed. 923—*Wood v. Pittman*, 113 Ala. 215, 20 So. 972—*Gaines v. Hale*, 26 Ark. 194—*Vantongeren v. Heffernan*, 5 Dak. 200, 38 N. W. 52—*Mitchell v. Handfield*, 33 Mo. 439—*Magwire v. Tyler*, 40 Mo. 438—*Hannibal & St. J. R. Co. v. Smith*, 41 Mo. 333—*Maguire v. Tyler*, 47 Mo. 125—*Tyler v. Wells*, 57 Mo. 475—*Smith v. Madison*, 67 Mo. 704—*Tyler v. Wells*, 2 Mo. App. 531.

563. Where a survey was made in good faith and has been unchallenged for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented. *United States v. Hancock*, 133 U. S. 193, 10 Sup. Ct. Rep. 264, 33: 601

564. If the survey of a confirmed Mexican grant does not conform to the decree of the board, the remedy must be sought from the commissioner of the General Land Office before the patent issues, and not in the district court. *United States v. Sepulveda*, 1 Wall. 104, 17: 569
Cited in Bissell v. Henshaw, 1 Sawy. 561, Fed. Cas. No. 1,447—*Sabichi v. Aguilar*, 43 Cal. 292

565. The decree of the district court of California, in pursuance of mandate of the United States Supreme Court, having fixed three boundaries of a Mexican land grant as directed thereby, and ordered a survey to fix the fourth so as to include just the amount of land therein directed, cannot be subsequently changed by the said district court to alter the lines so fixed and surveyed to include more land, in the exercise

of power conferred by act of Congress, June 14, 1860, ch. 128. *Fossat v. United States* (Fossat or Quicksilver Mine Case) 2 Wall. 649, 17: 739

Conflicting surveys.

566. Rights under a patent and survey based upon a superior Mexican grant are not concluded by a prior survey under the act of June 14, 1860, chap. 128, § 5 of which act gives a survey thereunder, as finally determined, the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States,—such prior patent being conclusive evidence only as between the United States and the grantee that the latter had established the validity of the grant. *Adam v. Norris*, 103 U. S. 591, 26: 583

d. Confirmatory Patent.

Power of Commissioners to Issue or Refuse Patent, see *supra*, 490, 501.

Right to patent.

Prerequisite Location and Survey, see *supra*, III. c.

567. A right to the patent of a Mexican land grant was complete only when the claimant presented to the General Land Office an authentic certificate of the confirmation by the land commissioners together with a plat or survey of the land, only certified and approved by the surveyor-general. *Higuera v. United States*, 5 Wall. 827, 18: 469

Cited in *Cameron v. United States*, 148 U. S. 309, 37 L. ed. 462, 13 Sup. Ct. Rep. 595.

To whom patented.

568. The government cannot be required to give two patents for the same lands, one to the vendor and another to the vendee. *United States v. Grimes*, 2 Black, 610, 17: 352

Description and boundaries; land included.

569. An island within the exterior limits of a bay and almost covered at high tide is not included in a patent for a private land claim, although the exterior lines of the survey made under the decree of confirmation, as shown by a map which is made a part of the patent, included the whole of the bay, where the map also contained words stating that the bay was excluded from the survey, and the survey itself said that it was exclusive of the land covered "by the navigable waters" of the bay, and further described the land as certain numbered lots of the public survey, none of which include the island. *De Guyer v. Banning*, 167 U. S. 723, 17 Sup. Ct. Rep. 937, 42: 340

570. Claimants of land under a patent issued under the act of Congress of March 3, 1851, for a private land claim in California, cannot recover lands expressly excluded from the survey to which no objection was urged, as well as from the patent issued and accepted under a decree confirming the

claim, so long as the patent remains uncancelled. *De Guyer v. Banning*, 167 U. S. 723, 17 Sup. Ct. Rep. 937, 42: 340
Cited in *United States v. Peralta*, 99 Fed. 680—*Harvey v. Barker*, 126 Cal. 276, 58 Pac. 692—*Brown v. Parker*, 127 Mich. 393, 86 N. W. 989.

Conflicting patents.

Conflicting Surveys, see *supra*, 566.

Priority Generally, see *infra*, 608–621.

571. In case of conflicting claims under patents of the United States issued upon confirmation of grants of land in California made by the former Mexican government, a grant identified by specific boundaries, or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises than a subsequent floating grant, although such floating grant be first surveyed and patented. *Henshaw v. Bissell*, 18 Wall. 255, 21: 835

Cited in *Miller v. Dale*, 92 U. S. 477, 23 L. ed. 737—*Mora v. Nunez*, 7 Sawy. 463, 10 Fed. 641—*Hayner v. Stanly*, 8 Sawy. 226, 13 Fed. 226—*United States v. Central P. R. Co.* 26 Fed. 484—*Harrison v. Ulrichs*, 39 Fed. 630—*Hale v. Akers*, 69 Cal. 166, 10 Pac. 385.

572. The assignee of the original claimant to a Spanish title to land in Missouri, with a conditional transfer applied for confirmation of the grant, and the land was granted to the original claimant "or his legal representatives." Such assignee was held entitled in ejectment against another, claiming under the original claimant, to land which had been patented to the original claimant "or his representatives" in lieu of the original grant. *Carpenter v. Rannels*, 19 Wall. 138, 22: 77

e. Contests, Correction, and Review of Confirmation.

Jurisdiction of Land Cases Generally, see Courts, V. c, 2, e.

Contest of location or patent.

Right of Party to Set Aside Confirmation, see also *infra*, 577.

573. When the United States and the claimant to whom a Mexican grant has been confirmed are both satisfied with its location, any other person, in order to contest such location, must show some title, legal or equitable, to some part of the land. *Dehon v. De Bernal*, 3 Wall. 774, 18: 146

574. The act of Congress of March 3, 1851, § 13, points out the mode in which contesting claimants may litigate their respective rights to a patent from the government, by a claimant presenting a petition to the district judge for the district in which the lands are, setting forth the title under which he claims, and praying the judge to hear and determine the same. *United States v. White*, 23 How. 249, 16: 560

Cited in *White v. United States* (Re Valentine) 1 Black, 502, 17 L. ed. 227.

Right of grantees to intervene.

575. Where the decree made by this court in favor of Sutter remanded the proceeding to the surveyor-general's office in California, to have a survey made of the land,—in executing the survey, Sutter's assignees may intervene and protect their rights. *United States v. Covilland*, 1 Black, 339, 17: 40

Cited in United States v. Sutter, Fed. Cas. No. 16,424.

576. When the survey is finally completed, and the patent issued to Sutter, his assignees may intervene and protect their rights, against him, in the courts of the county. *United States v. Covilland*, 1 Black, 339, 17: 40

Setting aside final confirmation or patent.

577. One must establish the validity of his own grant in order to defeat a subsequent grant which has been adjudged valid in proper legal proceedings. *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 11 Sup. Ct. Rep. 656, 35: 278

578. It is essential to a bill in chancery on behalf of the United States to set aside a patent for lands or the final confirmation of a Mexican grant, that the attorney-general brings it himself, or gives his authority for bringing it. *United States v. Throckmorton*, 98 U. S. 61, 25: 93
Cited in Western P. R. Co. v. United States, 108 U. S. 512, 27 L. ed. 806, 2 Sup. Ct. Rep. 802—*United States v. Mullan*, 7 Sawy. 476, 10 Fed. 793—*United States v. San Jacinto Tin Co.* 10 Sawy. 655, 23 Fed. 290—*Lynch v. United States* 13 Okla. 145, 73 Pac. 1095—*State ex rel. Taylor v. Lord*, 28 Or. 530, 31 L.R.A. 482, 43 Pac. 471—*State ex rel. Atty. Gen. v. Seattle Gas & Electric Co.* 28 Wash. 507, 70 Pac. 114.

Amendment or vacation of commissioners' confirmation.

579. It is too late to correct a petition to a board of land commissioners, and to enlarge the boundaries of the land confirmed by its decree, fifteen years after such board has ceased to exist, where no appeal had been taken, and all parties had acquiesced in its decision. *Williams v. United States*, 92 U. S. 457, 23: 497

Remedy by appeal generally.

580. If a decree of the board of commissioners to settle private land claims in California, settling boundaries and title, was erroneous in either particular, the remedy was by appeal. *United States v. Billings*, 2 Wall. 444, 17: 848

Appeals from land officers.

581. Where the ascertainment of actual settlers upon the Las Animas grant was entrusted to the register and receiver of the proper land district, a right of appeal from their decision is not hindered by its fraudulent character. *Downs v. Hubbard (Craig v. Leitensdorfer)* 123 U. S. 189, 8 Sup. Ct. Rep. 85, 31: 114

Cited in Sioux City & St. P. R. Co. v. United States, 34 Fed. 837—*Sioux City & St. P. R. Co. v. United States*, 36 Fed. 612—*Howell*

v. Killie, 17 Colo. 91, 28 Pac. 464—*Lee v. Justice Min. Co.* 2 Colo. App. 125, 29 Pac. 1020.

Removal to courts from California commissioners.

582. Appellate jurisdiction over the decisions of the board of commissioners to settle private land claims in California, under title conferred by the Mexican government is, by the act of Congress of March 3, 1851, conferred upon the district courts of the United States, and finally upon this court. *Castillero v. United States*, 2 Black, 1, 17: 360

583. The act of August 31, 1852, as to removal, to the district court, of a case decided by the board of commissioners to settle private land claims in California, is constitutional. *United States v. Ritchie*, 17 How. 525, 15: 236

584. The act of August 31, 1852, as to appeal to the district court from the board of commissioners of California land claims, is mandatory on the court, and authorizes the exercise of no discretion. *De Yturbe v. United States (Yturbe v. United States)* 22 How. 290, 16: 342
Cited in Meyers v. United States, 5 Okla. 185, 48 Pac. 186—*Cogswell v. Hogan*, 1 Wash. 5, 28 Pac. 835.

585. Proceedings before the board of commissioners to settle land claims in California may be removed to the district court, in conformity with the act of 1852. The filing of the transcript by the board is notice of the removal to the prevailing party. *United States v. Ritchie*, 17 How. 525, 15: 236

Cited in Guthrie Nat. Bank v. Guthrie, 173 U. S. 539, 43 L. ed. 800, 19 Sup. Ct. Rep. 513—*Smiley v. Sampson*, 1 Neb. 70.

Nature and scope of review.

586. The district court has jurisdiction on appeal from the decision of the board of commissioners, to settle land claims in California. The hearing in the district court is essentially an original suit. *Beard v. Federy*, 3 Wall. 478, 18: 88
Frémont v. United States, 17 How. 542, 15: 241

United States v. Ritchie, 17 How. 525, 15: 236

Grisar v. McDowell, 6 Wall. 363, 18: 863
Castillero v. United States, 2 Black. 1, 17: 360

Distinguished in United States v. Lles, 20 C. C. A. 652, 38 U. S. App. 655, 74 Fed. 547.

Cited in Frémont v. United States, 17 How. 552, 15 L. ed. 244—*Arguello v. United States*, 18 How. 550, 15 L. ed. 482—*United States v. Cervantes*, 18 How. 555, 15 L. ed. 485—*United States v. Armijo*, 5 Wall. 446, 15 L. ed. 493—*Grisar v. McDowell*, 6 Wall. 375, 18 L. ed. 866—*Reese v. United States*, 9 Wall. 19, 19 L. ed. 543—*Trenouth v. San Francisco*, 100 U. S. 255, 25 L. ed. 627—*Boyd v. Nebraska*, 143 U. S. 163, 36 L. ed. 110, 12 Sup. Ct. Rep. 375—*Thompson v. Los Angeles Farming & Mill. Co.* 180 U. S. 78, 45 L. ed. 435, 21 Sup. Ct. Rep. 280—*Cervantes v. United States*, 3 Am. L. Rep. 746, Fed. Cas. No. 2560—*Grisar v. McDowell*, 4 Sawy. 602, Fed. Cas. No. 5,532

—*Le Roy v. Wright*, 4 Sawy. 533, Fed. Cas. No. 8,273—*San Francisco v. United States*, 4 Sawy. 531, Fed. Cas. No. 12,316—*United States v. Flint*, 4 Sawy. 67, Fed. Cas. No. 15,121—*Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L.R.A. 317, 37 Fed. 615—*Apis v. United States*, 88 Fed. 936—*Emeric v. Alvarado*, 64 Cal. 555, 2 Pac. 418—*Norwalk Street R. Co's Appeal*, 69 Conn. 609, 39 L.R.A. 805, 37 Atl. 1080—*Taylor v. Place*, 4 R. I. 335.

587. An appeal from the commissioners to the district court is essentially an original suit, in which new evidence is given and the entire case is open. *Grisar v. McDowell*, 6 Wall. 363, 18: 863
United States v. Ritchie, 17 How. 525, 15: 236

588. In a case on appeal from a decision of the land commissioners involving the rival claims of two claimants under a land patent, neither can carry on the litigation by assuming to act for the government, nor are the United States officers bound to settle the dispute. *United States v. White*, 23 How. 249, 16: 560
Cited in United States v. White, Fed. Cas. No. 16,680.

589. The district court may open a California land case to hear newly-discovered evidence. *United States v. Rocha*, 9 Wall. 639, 19: 612

f. Title Acquired and Effect of Confirmation and Patent.

1. In General.

Title Granted or Acquired by Original Grant, see *supra*, I. d, 4.

Necessity of Certain and Definite Description in Boundaries to Give Grant Valid Inception, see *supra*, 188–208.

Vested Rights of Widow and Children in Certificates of New Location, see Constitutional Law, 922.

Jurisdiction to Adjust Boundaries of Confirmed Grant, see Courts, 603.

Grant Giving Mere Easement or License, see Ejectment, 21.

Exclusion of Lands within Place Limits of Mexican Grant from Subsequent Grant to Railroads, see Public Lands, 195–201. See also Public Lands, 889–892a.

General requisites to pass legal title.

Confirmatory Location, Survey and Approval as Requisite to Title, see *supra*, III. c.

Survey Sufficient to Pass Title, see *infra*, 632.

590. No legal title to land included in a Mexican grant can exist until there is a survey followed by a severance of the land from the public domain and the transfer of a public title by a final grant from the United States into private ownership. *United States v. Pacheco*, 22 How. 225, 16: 336

591. Where a Spanish grant of land has been confirmed by this government, and the boundaries are well defined and settled, the

grant will be sustained. *United States v. McMasters*, 4 Wall. 680, 18: 311

Passing of title.

592. The act of Congress of June 13, 1812, by which certain town or village lots in or adjoining the then village of St. Louis and other villages or towns which had been inhabited, cultivated, or possessed prior to December 20, 1803, were confirmed to the inhabitants of the respective towns or villages according to their several right or rights in common thereto,—was a present grant, at the moment of its passage, of all the title of the United States to such land as had been so inhabited, cultivated, or possessed prior to 1803, and operated to convey or confirm such titles and claims as came within its description. *Glasgow v. Baker*, 128 U. S. 560, 9 Sup. Ct. Rep. 154, 32: 513

Cited in Cummings v. Powell, 97 Mo. 531, 10 S. W. 519.

593. Under the act of Congress of 1812, confirming rights, titles, and claims to town or village lots, out lots, common field lots, and commons in, adjoining, and belonging to the several towns and villages, which had been inhabited, cultivated, or possessed prior to December 20, 1803, the confirmation was absolute, depending only on the facts of inhabitation, cultivation, or possession prior to the day named. It was not necessary for the confirmer to have received a grant or survey or permission to cultivate the land. The act of 1824, making it the duty of claimants to prove the fact of inhabitation, the boundaries, etc., and obtain certificates, imposed no forfeiture for noncompliance. Claimants may still establish the necessary facts by parol evidence. *Guitard v. Stoddard*, 16 How. 494, 14: 1030
Cited in Glasgow v. Hortis, 1 Black. 601, 17 L. ed. 113—*Glasgow v. Baker*, 128 U. S. 575, 32 L. ed. 518, 9 Sup. Ct. Rep. 154—*Bunell v. Stoddard*, Fed. Cas. No. 2,135—*Griffing v. Gibb*, McAll. 217, Fed. Cas. No. 5,819—*St. Louis v. Toney*, 21 Mo. 251—*Carondelet v. St. Louis*, 25 Mo. 460—*Funkhouser v. Langkopf*, 26 Mo. 459—*Carondelet v. St. Louis*, 29 Mo. 534—*Fine v. St. Louis Public Schools*, 30 Mo. 176—*Fine v. St. Louis Public Schools*, 39 Mo. 66—*Glasgow v. Lindell*, 50 Mo. 82—*Peting v. De Lore*, 71 Mo. 16—*Glasgow v. Baker*, 85 Mo. 569—*Baird v. St. Louis Hospital Asso.* 116 Mo. 428, 22 S. W. 726—*Tyler v. Wells*, 2 Mo. App. 538—*Gibson v. Chouteau*, 7 Mo. App. 6.

594. The act of March 3, 1807, regarding French and Spanish land claims, did not, *proprio vigore*, vest title in the claimants; the favorable decision of the commissioners, followed by the issue of a patent, was necessary to complete the title. *Burgess v. Gray*, 16 How. 48, 14: 839
Cited in Le Beau v. Gaven, 37 Mo. 558—*Le Beau v. Armitage*, 47 Mo. 139—*Smith v. Madison*, 67 Mo. 704—*Tyler v. Wells*, 2 Mo. App. 537.

595. No act of the surveyor-general was necessary to give validity to the titles confirmed by the act of Congress of June 13,

1812, for settling land claims in the territory of Missouri, and could not operate to defeat them. The act passed title to the lands *proprio vigore*. *Glasgow v. Hortiz*, 1 Black, 595, 17: 110
Cited in Glasgow v. Baker, 128 U. S. 575, 32 L. ed. 518, 9 Sup. Ct. Rep. 154—*Robbins v. Eckler*, 36 Mo. 506—*Gibson v. Chouteau*, 39 Mo. 570—*Peting v. De Lore*, 71 Mo. 16—*Glasgow v. Baker*, 85 Mo. 569—*Cummings v. Powell*, 97 Mo. 532, 10 S. W. 819.

Inurement to grantees or legal successors.

See also *infra*, 608.

596. A Spanish claim to land, if confirmed by the commissioners, has the effect of a confirmation to the legal representatives of the person to whom the original concession was made, where the commissioners passed upon nothing but the merits of the original concession. *Connoyer v. Schaeffer*, 22 Wall. 254, 22: 837
Cited in Bradley v. Dells Lumber Co. 105 Wis. 252, 81 N. W. 394.

597. But where the claimant presented before the board, besides the original title, evidences of derivative title, and the commissioners decided upon both, the confirmation operates as a grant to the claimant, although his name was omitted in the form of confirmation. *Connoyer v. Schaeffer*, 22 Wall. 254, 22: 837

598. The formula, "or his legal representatives," embraces representatives of the original grantee in the land,—such as assignees or grantees,—and leaves the question open to inquiry in a court as to the party to whom the patent should enure. *Hogan v. Page*, 2 Wall. 605, 17: 854
Carpenter v. Rannels, 19 Wall. 138, 22: 77
Cited in Connoyer v. Schaeffer, 22 Wall. 261, 22 L. ed. 837—*Bryan v. Kennett*, 113 U. S. 192, 28 L. ed. 912, 5 Sup. Ct. Rep. 407—*De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 225, 37 L. ed. 144, 13 Sup. Ct. Rep. 283—*Dunlap v. Green*, 8 C. C. A. 604, 23 U. S. App. 154, 60 Fed. 247—*McDonald v. McCoy*, 121 Cal. 70, 53 Pac. 421—*Bowman v. Long*, 89 Ill. 22—*Lyles v. Lescher*, 108 Ind. 384, 9 N. E. 365—*Ready v. Kearsley*, 14 Mich. 225—*Morgan v. Hazlehurst Lodge*, 53 Miss. 676—*McInnis v. Pickett*, 65 Miss. 357, 3 So. 600—*Connoyer v. Washington University*, 36 Mo. 484—*Carpenter v. Rannels*, 45 Mo. 591—*Hammond v. Coleman*, 4 Mo. App. 321—*Neal v. Nelson*, 117 N. C. 406, 53 Am. St. Rep. 590, 23 S. E. 428—*Simmons v. Allison*, 118 N. C. 776, 24 S. E. 716—*Weeks v. Milwaukee*, L. S. & W. R. Co. 78 Wis. 519, 47 N. W. 737—*Walker v. Daly*, 80 Wis. 226, 49 N. W. 812—*Bradley v. Dells Lumber Co.* 105 Wis. 253, 81 N. W. 394.

599. Confirmation inures to the benefit of the confirmee only so far as the legal title is concerned, and those equitably entitled to rights in the land under the title confirmed must go into equity, where their rights can be settled and decreed. *Carpenter v. Montgomery*, 13 Wall. 480, 20: 698

599a. The confirmation by act of Congress of a Spanish claim vests in the confirmee the right of the United States; and such

title inures, by way of estoppel, to his grantee and those who claim under him. On a title by estoppel an action of ejectment may be maintained. *Stoddard v. Chambers*, 2 How. 284, 11: 269
Cited in Dickerson v. Colgrove, 100 U. S. 583, 25 L. ed. 620—*Bryan v. Forsyth*, 19 How. 337, 15 L. ed. 675.

599b. The confirmation of a Spanish claim, upon the report of commissioners under the act of 1836, to the claimant and his legal representatives, vested the legal title in him, and inured, by way of estoppel, to his grantee and those who claimed by deed under him. *Stoddard v. Chambers*, 2 How. 284, 11: 269
Distinguished in Phelps v. Kellogg, 15 Ill. 137.

Cited in Landes v. Brant, 10 How. 374, 13 L. ed. 460—*Easton v. Salisbury*, 21 How. 431, 18 L. ed. 183—*Kingman v. Holthaus*, 59 Fed. 312—*Cleveland v. Cleveland*, C. C. & St. L. R. Co. 93 Fed. 123—*Cavender v. Smith*, 3 G. Greene, 356, 56 Am. Dec. 541—*St. Louis Public Schools v. Walker*, 40 Mo. 402—*Quinney v. Denney*, 18 Wis. 488.

599c. Between the filing and the confirmation of a Spanish land claim, the claimant had an interest which was subject to seizure and sale under execution, according to the laws of Missouri in 1808; and a patent subsequently issued in the name of the original claimant inured, by the doctrine of relation, to the grantee in the sheriff's deed. *Landes v. Brant*, 10 How. 348, 13: 449

599d. Where a conveyance was made by one not having the legal title, but who afterwards obtained it by confirmation of a Spanish claim, the legal title vested in him, and inured, by way of estoppel, to his grantee and those claiming under him. *Easton v. Salisbury*, 21 How. 426, 16: 181

600. The confirmation of a Mexican title enures to the benefit of the grantee. *Steinbach v. Stewart*, 11 Wall. 566, 20: 56
Distinguished in Bouldin v. Phelps, 30 Fed. 562.

Cited in Caperton v. Bowyer, 14 Wall. 236, 20 L. ed. 884—*Schmitt v. Giovanari*, 43 Cal. 624—*McDonald v. McCoy*, 121 Cal. 70, 53 Pac. 421—*Donnelly v. Parker*, 5 W. Va. 324.

601. The decision of the commissioners confirming a Spanish claim founded on a settlement for ten years prior to December 20, 1803, was final against the United States, and entitled the claimant to a patent, which gave a perfect legal title, and went back by relation to the original presentation of the petition. It consequently inured to the benefit of an alienee. *Landes v. Brant*, 10 How. 348, 13: 449

Cited in Beard v. Federy, 3 Wall. 491, 18 L. ed. 92—*Grisar v. McDowell*, 6 Wall. 380, 18 L. ed. 868—*Henderson v. Tennessee*, 10 How. 328, 13 L. ed. 441—*Lessieur v. Price*, 12 How. 77, 13 L. ed. 900—*French v. Spencer*, 21 How. 239, 16 L. ed. 100—*Berthold v. McDonald*, 22 How. 341, 16 L. ed. 321—*Prentice v. Stearns*, 113 U. S. 446, 28 L. ed. 1063, 5 Sup. Ct. Rep. 547—*De Guyer v. Banning*, 167 U. S. 740, 42 L. ed. 345, 17 Sup. Ct. Rep. 937—*United States v.*

Loughrey, 172 U. S. 229, 43 L. ed. 428, 19 Sup. Ct. Rep. 153—United States v. Anderson, 194 U. S. 401, 48 L. ed. 1039, 24 Sup. Ct. Rep. 716—Aurora Hill Consol. Min. Co. v. 85 Min. Co. 12 Sawy. 360, 34 Fed. 518—Evans v. Durango Land & Coal Co. 25 C. C. A. 537, 49 U. S. App. 320, 80 Fed. 438—Peyton v. Desmond, 63 C. C. A. 681, 129 Fed. 11—Waterman v. Smith, 13 Cal. 419—Hilberd v. Smith, 67 Cal. 566, 56 Am. Rep. 726, 4 Pac. 473—Grigsby v. Shwarz, 82 Cal. 282, 22 Pac. 1041—McDonald v. McCoy, 121 Cal. 67, 53 Pac. 421—McMurttrie v. Riddell, 9 Colo. 505, 13 Pac. 181—Welch v. Dutton, 79 Ill. 468—Doe ex dem. Dunn v. Hearick, 14 Ind. 247—Sumner v. Coleman, 23 Ind. 94—Wood v. Sandford, 23 Ind. 99—Emmons v. Harding, 162 Ind. 160, 70 N. E. 142—Cavender v. Smith, 3 G. Greene, 356, 56 Am. Dec. 541—Clark v. West, 23 Mich. 249—Johnson v. Ballou, 28 Mich. 397—Musser v. McRae, 44 Minn. 347, 46 N. W. 673—Donohoe v. Veal, 19 Mo. 334—Gibson v. Chouteau, 39 Mo. 569—Magwire v. Tyler, 40 Mo. 439—Callahan v. Davis, 90 Mo. 83, 2 S. W. 216—Jacobus v. Mutual Ben. L. Ins. Co. 27 N. J. Eq. 608—Magruder v. Esmay, 35 Ohio St. 232.

602. The confirmation by the board of commissioners of the United States for adjusting land titles in Missouri, when made expressly to those who claim by a derivative title, operates to their use, and not to the use of the original owner. *Strother v. Lucas*, 12 Pet. 410, 9: 1137

Cited in Bissell v. Penrose, 8 How. 338, 12 L. ed. 1104—*Connoyer v. Schaeffer*, 22 Wall. 262, 22 L. ed. 838—*Hall v. Doe*, 19 Ala. 397—*Delaunay v. Burnett*, 9 Ill. 495—*Purvis v. Harmanson*, 4 La. Ann. 423—*Newman v. Lawless*, 6 Mo. 290—*Hogan v. Page*, 32 Mo. 76—*Carpenter v. Rannels*, 45 Mo. 590—*Warren v. Shuman*, 5 Tex. 456—*Quinney v. Denney*, 18 Wis. 488.

603. Where the original claimant is dead, and a patent has been issued to his representatives, the title under the act of Congress of May 20, 1836, inures to the benefit of his assignees, so that the sheriff's deed executed on a sale of the premises to satisfy a judgment recovered against the original claimant of the property conveys a valid title to the purchaser in preference to an heir or devisee. The patent, when issued, conveys, by virtue of this act, the legal title to the person holding the equitable title. *Landes v. Brant*, 10 How. 348, 13: 449

Cited in Massey v. Papin, 24 How. 364, 16 L. ed. 735—*Bryan v. Kennett*, 113 U. S. 193, 28 L. ed. 913, 5 Sup. Ct. Rep. 407—*Montgomery v. Bevans*, 1 Sawy. 671, Fed. Cas. No. 9,735—*Gray v. Jones*, 4 McCrary. 520, 14 Fed. 86—*Klingman v. Holthaus*, 59 Fed. 310—*Sumner v. Coleman*, 23 Ind. 94—*Wood v. Sandford*, 23 Ind. 69—*Simpson v. Greeley*, 8 Kan. 598—*Oliver v. Forbes*, 17 Kan. 120—*Beauvais v. Wall*, 14 La. Ann. 196—*Frost v. Missionary Soc.* 56 Mich. 80, 22 N. W. 189—*Gibson v. Chouteau*, 39 Mo. 589—*Johnson v. Parcels*, 48 Mo. 555—*Harvey v. Rusch*, 67 Mo. 567—*Hayward v. Ormsbee*, 11 Wis. 7—*Quinney v. Denney*, 18 Wis. 488—*Spless v. Neuberg*, 71 Wis. 286, 5 Am. St. Rep. 211, 37 N. W. 417.

604. The subsequent grant of lands in a Spanish claim to the heirs of the claimant, who had executed a mortgage thereon, by

act of Congress of 1836, carried the equities of the mortgagee with the legal title, of which he took the benefit. *Carpentier v. Montgomery*, 13 Wall. 480, 20: 698
Massey v. Papin, 24 How. 362, 16: 734
Cited in Toledo, D. & B. R. Co. v. Hamilton, 184 U. S. 305, 33 L. ed. 909, 10 Sup. Ct. Rep. 546—*Gray v. Jones*, 4 McCrary, 520, 14 Fed. 86—*Haney v. Roy*, 54 Mich. 640, 20 N. W. 621—*Papin v. Blumenthal*, 41 Mo. 439—*Block v. Morrison*, 112 Mo. 354, 20 S. W. 340.

605. Where Congress, by special act, directed a patent to issue on a Spanish claim to an original claimant and his representatives, such patent enured to the benefit of claimant's grantee. *Morrison v. Jackson*, 92 U. S. 654, 23: 517

606. An affirmation, by this court, of a decree which confirmed an original grant, left the proviso in the decree that the confirmation should enure to the benefit of subsequent grantees, in full force. *Steinbach v. Stewart*, 11 Wall. 566, 20: 56
Cited in Dunton v. McCook, 120 Iowa, 447, 94 N. W. 942.

Possessory rights pending location and patent.

Right to Make Mineral Locations within Claimed Limits, of Mexican Grant, see *Mines*, 16.

607. Where a quantity of land in California was granted by the Mexican government, within a tract embracing a larger amount, in the possession of which tract the grantee was placed, he is entitled to retain such possession until that quantity is set apart to him; and he may maintain ejectment against parties in possession claiming under the pre-emption laws. *Van Reynegan v. Bolton*, 95 U. S. 33, 24: 351

Priorities; relation back.

Right to Confirmation as Affected by Prior Grant or Disposal of Lands in Question, see *supra*, 438, 439.

Conflicts in Surveys, see *supra*, 566.

Effect of Confirmation on Outstanding Rights of Third Persons, see *infra*, 650-657a.

Withdrawal of Grant from Pre-emption Laws, see *Public Lands*, 670-673.

See also *infra*, 645, 669.

608. Confirmation of claimant's title by patent relates back to date of location and inures to grantee's benefit. *Bissell v. Penrose*, 8 How. 317, 12: 1095

Cited in Landes v. Brant, 10 How. 370, 13 L. ed. 459—*Morehouse v. Phelps*, 21 How. 305, 16 L. ed. 143—*Massey v. Papin*, 24 How. 364, 16 L. ed. 735—*Tyler v. Magwire*, 17 Wall. 280, 21 L. ed. 582—*Carpenter v. Rannels*, 19 Wall. 146, 22 L. ed. 80—*Connoyer v. Schaeffer*, 22 Wall. 261, 22 L. ed. 838—*Cavender v. Smith*, 3 G. Greene, 356, 56 Am. Dec. 541—*Sanborn v. Vance*, 69 Mich. 226, 37 N. W. 273—*Connoyer v. Washington University*, 36 Mo. 483—*Connoyer v. LaBeaume*, 45 Mo. 140.

609. Where two titles to the same land depend exclusively for their validity upon the action of Congress, he who first obtains

the title, and not he who first applied for it, has the better right. *Trenier v. Stewart*, 101 U. S. 797, 25: 1021
McCabe v. Worthington, 16 How. 86, 14: 856

Cited in Trenier v. Stewart, 101 U. S. 808, 25 L. ed. 1024—*Stewart v. Trenier*, 49 Ala. 504—*Steinbach v. Moore*, 30 Cal. 508—*Rogers v. Odell*, 39 N. H. 461.

610. Where there are two confirmations for the same land, the older must hold it. *Willot v. Sandford*, 19 How. 79, 15: 549
Cited in Mezes v. Greer, McAll. 402, Fed. Cas. No. 9,520—*Doe ex dem. Mims v. Higgins*, 39 Ala. 17—*Waterman v. Smith*, 13 Cal. 413—*Cannon v. White*, 16 La. Ann. 89.

611. Inchoate rights in real property confirmed by Congress are valid only from their confirmation, and the elder confirmee has a better right than the junior, without reference to the date of the origin of their respective claims. *Dent v. Emmeger*, 14 Wall. 308, 20: 838
Cited in Muse v. Arlington Hotel Co. 68 Fed. 644—*St. Louis v. Missouri P. R. Co.* 114 Mo. 21, 21 S. W. 202—*Chavez v. Chavez de Sanchez*, 7 N. M. 66, 32 Pac. 137.

612. Where each party has a good title, as against the United States, by virtue of a confirmation of the board of commissioners, proof could be heard in a court of law to determine the better rights between the contending parties. *Berthold v. McDonald*, 22 How. 334, 16: 318

613. On confirmation of imperfect Spanish titles, the legal title took date from that time, and did not relate back to antedate any intermediate grant to other persons, at least one made before the confirming act of 1836. *Menard v. Massey*, 8 How. 293, 12: 1085
Cited in Dent v. Sigerson, 29 Mo. 513.

614. Where rival claimants to a tract of land each obtained from the United States a confirmation of a previous grant deemed incomplete, each title, so far as the United States is concerned, stands on the same footing; and the state court, in an action of ejectment, having so instructed the jury, and that they must look to other evidence on which to base their verdict, this court will not disturb the judgment. *Doe ex dem. Barbarie v. Eslava*, 9 How. 421, 13: 200
Cited in Berthold v. McDonald, 22 How. 340, 16 L. ed. 321—*Lanfeur v. Hunley*, 4 Wall. 210, 18 L. ed. 326—*Lanfeur v. Harper*, 13 La. Ann. 548.

615. Where plaintiff claimed title to a tract of land under a Spanish concession and the confirmatory act of 1836, and defendant claimed title under acts of Congress of 1812 and 1831, granting a right of common to St. Louis, it was held that the title to land held under a concession and survey was not perfected until ratified and a final grant issued. This had not been done, and the confirmatory act of 1836 does not reach back to the original concession, and exclude grants of land made in the intermediate

time under the authority of Congress. *Les Bois v. Bramell*, 4 How. 449, 11: 1051
Cited in Mackay v. Dillon, 4 How. 448, 11 L. ed. 1051—*Kennedy v. Hunt*, 7 How. 592, 12 L. ed. 832—*Bissell v. Penrose*, 8 How. 339, 12 L. ed. 1104—*Doe ex dem. Barbarie v. Eslava*, 9 How. 447, 13 L. ed. 210—*Landes v. Brant*, 10 How. 370, 13 L. ed. 459—*Guitard v. Stoddard*, 16 How. 509, 14 L. ed. 1036—*Willot v. Sandford*, 19 How. 82, 15 L. ed. 549—*Bryan v. Forsyth*, 19 How. 337, 15 L. ed. 675—*Berthold v. McDonald*, 22 How. 341, 16 L. ed. 321—*Dent v. Emmeger*, 14 Wall. 313, 20 L. ed. 839—*United States v. Santa Fé*, 165 U. S. 714, 41 L. ed. 888—17 Sup. Ct. Rep. 472—*United States v. Sandoval*, 167 U. S. 293, 42 L. ed. 173, 17 Sup. Ct. Rep. 868—*United States v. Montana Lumber & Mfg. Co.* 196 U. S. 578, 49 L. ed. 605, 25 Sup. Ct. Rep. 367—*Doe ex dem. Mims v. Higgins*, 39 Ala. 17—*Vanderslice v. Hanks*, 3 Cal. 42—*Waterman v. Smith*, 13 Cal. 416—*Boggs v. Merced Min. Co.* 14 Cal. 359—*Purvis v. Harmanson*, 4 La. Ann. 423—*Thomas v. Phillips*, 7 La. Ann. 547—*Burris v. Tucker*, 13 La. Ann. 615—*Burgess v. Gray*, 15 Mo. 223—*St. Louis v. Toney*, 21 Mo. 252—*Maguire v. Page*, 23 Mo. 197—*Vasquez v. Ewing*, 24 Mo. 36, 66 Am. Dec. 694—*Carondelet v. St. Louis*, 25 Mo. 461—*Dent v. Sigerson*, 29 Mo. 513—*Robbins v. Eckler*, 36 Mo. 503—*Jones v. Menard*, 1 Tex. 784—*Trimble v. Smithers*, 1 Tex. 807—*Jones v. Borden*, 5 Tex. 413—*Howard v. Perry*, 7 Tex. 264—*Paschal v. Perez*, 7 Tex. 371—*Lewis v. Mixon*, 11 Tex. 571—*Quinney v. Denney*, 18 Wis. 488.

616. The act of Congress passed on the 13th of June, 1812, confirming the titles and claims of certain towns and villages to village lots and commons gave a title which is paramount to a title held under an old Spanish concession confirmed by Congress in 1836. *Chouteau v. Eckhart*, 2 How. 344, 11: 233

617. The right of the grantee, under the act of Congress of June 13, 1812, was not dependent on the *factum* of a survey under the Spanish government. A patent to another after the passage of said act, for any of these lands, would be void, because the government had already released all title and claim thereto. *Glasgow v. Baker*, 128 U. S. 560, 9 Sup. Ct. Rep. 154, 32: 513
Cited in Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 44 Fed. 830.

618. A claim under title from Missouri, under the acts of Congress of March 6, 1820, and March 3, 1831, giving lands to Missouri, to land sold between May 29, 1829, and July 9, 1832, between which dates there was an intermission of the legislation reserving lands claimed under Spanish concessions, leaving them on the same footing as other public lands, must be sustained against a Spanish claim which had been confirmed by Congress in 1836. During the period of such intermission there was no protection to the inchoate right of the original claimants. *Delauriere v. Emison*, 15 How. 525, 14: 800

619. A certificate issued by the commissioners, under the act of March 3, 1807, for adjudicating titles in Missouri, is conclu-

sive that the party to whom it issued was the proper successor of the original claimant under whom he claimed, and that his was an older and better title than that of any other claimant under the Spanish government. *Landes v. Brant*, 10 How. 348, 13: 449

Cited in Berthold v. McDonald, 24 Mo. 131—*Smith v. Madison*, 67 Mo. 704.

620. A claim not filed with the recorder of land titles, under the act of 1807, prior to July 1, 1808, was barred; and if the bar was removed by the act of 1824, enabling the claimants to institute proceedings to try the validity of their claims, the lands claimed were not reserved from sale. And as a decree rendered in favor of the claimants under the act of 1828 could operate only prospectively, a sale by the United States pending the proceedings for confirmation is good. *McCabe v. Worthington*, 16 How. 86, 14: 856

621. A concession and survey of land in Missouri, which was granted by the lieutenant governor of Louisiana, before the treaty of Louisiana, is valid, and will be confirmed except so far as the land embraced in the same has been sold by the United States. For the quantity of land so sold, the owners of the concession may enter a like quantity in any land office in Missouri after the same has been offered for sale. *Soulard v. United States*, 10 Pet. 100, 9: 361

Cited in Strother v. Lucas, 12 Pet. 436, 9 L. ed. 1147—*Sibbald v. United States*, 12 Pet. 495, 9 L. ed. 1170—*Pollard v. Kibbe*, 14 Pet. 390, 10 L. ed. 508—*Glenn v. United States*, 13 How. 257, 14 L. ed. 136, *Hempst.* 401, *Fed. Cas.* No. 5,481—*McCabe v. Worthington*, 16 How. 96, 14 L. ed. 860—*Knight v. United Land Assn.* 142 U. S. 184, 35 L. ed. 982, 12 Sup. Ct. Rep. 258—*Cleveland v. La Crosse & M. R. Co.* 7 Am. L. Reg. 549, *Fed. Cas.* No. 2,887—*Dubois v. McLean*, 4 McLean, 488, *Fed. Cas.* No. 4,107—*Glenn v. United States*, *Hempst.* 401, *Fed. Cas.* No. 5,481.

Effect of legislative confirmation.

When Title Passes under Particular Acts, see *supra*, 592-595.

Effect in Courts of Other Countries, see *Conflict of Laws*, 163.

Conclusiveness on Courts, of Land Office Decisions and Acts, see *Courts*, 260a-267a.

Invalidity of Subsequent Conflicting Patent, see *Public Lands*, 1103.

See also *Courts*, 167; *Public Lands*, 889-892a.

622. A private act of Congress granting designated lots of ground to a city and certain individuals, will be presumed to have been passed with reference to the particular claims of such individuals, and the situation of the land embraced within the law at the time it was passed. *Pollard v. Kibbe*, 14 Pet. 353, 10: 490

623. An act of Congress confirming a Spanish land grant neither enlarges nor diminishes what the grant conveys. It ex-

tinguishes all claims of the United States to the land surveyed; but, as regards all adverse claimants, it determines nothing, and concludes no one. *Lanfeur v. Hunley*, 4 Wall. 204, 18: 325

Cited in Lavedan v. Trinchard, 35 La Ann. 541.

624. Under the act of 1805, providing for the appointment of commissioners to examine and decide on certain claims to lands, and the act of 1812, confirming those claims, Congress did not intend to adopt the boundary lines of the claims according to the surveys which had been laid before the commissioners. *Mackay v. Dillon*, 4 How. 421, 11: 1038

625. A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quitclaim from the government; and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated. *Langdeau v. Hanes*, 21 Wall. 521, 22: 606

Distinguished in Sildell v. Granjean, 111 U. S. 439, 28 L. ed. 330 4 Sup. Ct. Rep. 475—*Marsh v. Nichols*, S. & Co. 128 U. S. 611, 32 L. ed. 541, 9 Sup. Ct. Rep. 168—*Michigan Land & Lumber Co. v. Rust*, 168 U. S. 592, 42 L. ed. 592, 18 Sup. Ct. Rep. 208—*Smith v. Madison*, 67 Mo. 704.

Cited in Morrow v. Whitney, 95 U. S. 555, 24 L. ed. 457—*Whitney v. Morrow*, 112 U. S. 695, 28 L. ed. 872, 5 Sup. Ct. Rep. 333—*Wright v. Roseberry*, 121 U. S. 499, 30 L. ed. 1041, 7 Sup. Ct. Rep. 985—*Wisconsin C. R. Co. v. Price County*, 133 U. S. 510, 33 L. ed. 694, 10 Sup. Ct. Rep. 341—*St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 6, 35 L. ed. 80, 11 Sup. Ct. Rep. 389—*Deseret Salt Co. v. Tarpey*, 142 U. S. 251, 35 L. ed. 1003, 12 Sup. Ct. Rep. 158—*McNee v. Donahue*, 142 U. S. 598, 35 L. ed. 1127, 12 Sup. Ct. Rep. 211—*Barden v. Northern P. R. Co.* 154 U. S. 337, 38 L. ed. 1005, 14 Sup. Ct. Rep. 1030—*Stoneroad v. Stoneroad*, 158 U. S. 253, 39 L. ed. 970, 15 Sup. Ct. Rep. 822—*Russell v. Maxwell Land Grant Co.* 158 U. S. 255, 39 L. ed. 971, 15 Sup. Ct. Rep. 827—*Shaw v. Kellogg*, 170 U. S. 341, 42 L. ed. 1060, 18 Sup. Ct. Rep. 632—*Joplin v. Chachere*, 192 U. S. 100, 48 L. ed. 361, 24 Sup. Ct. Rep. 214—*Adams v. Burke*, 3 Sawy. 419, *Fed. Cas.* No. 49—*Tripp v. Spring*, 5 Sawy. 216, *Fed. Cas.* No. 14,180—*Wythe v. Haskell*, 3 Sawy. 578, *Fed. Cas.* No. 18,118—*Cahn v. Barnes*, 7 Sawy. 55, 5 *Fed.* 333—*Pengra v. Munz*, 29 *Fed.* 835—*Denny v. Dodson*, 32 *Fed.* 904—*Briggs v. Wash-puqua*, 37 *Fed.* 137—*Farmers' Loan & T. Co. v. Chicago*, P. & S. R. Co. 39 *Fed.* 151—*Francoeur v. Newhouse*, 40 *Fed.* 620—*Northern P. R. Co. v. Wright*, 51 *Fed.* 71—*Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 239, 50 C. C. A. 88, 112 *Fed.* 12—*McNee v. Donahue*, 76 Cal. 502, 18 Pac. 438—*Jatunn v. Smith*, 95 Cal. 159, 30 Pac. 200—*De Mares v. Gilpin*, 15 Colo. 81, 24 Pac. 568—*Liddon v. Hodnett*, 22 Fla. 448—*Kaskaskia v. McClure*, 167 Ill. 37, 47 N. E. 72—*Briggs v. McClain*, 43 Kan. 655, 23 Pac. 1045—*Teddle v. McNeely*, 104 La. 612, 29 So. 247—*Jopling v. Chachere*, 107 La. 529,

32 So. 243—Busch v. Donohue, 31 Mich. 484—Sage v. Rudnick, 91 Minn. 329, 98 N. W. 89—Talbot v. King, 6 Mont. 108, 9 Pac. 434—Gilderleeve v. New Mexico Min. Co. 6 N. M. 89, 27 Pac. 318—United States Trust Co. v. Territory, 10 N. M. 419, 62 Pac. 987—Miller v. Tobin, 16 Or. 545, 16 Pac. 161—Clark v. Hills, 67 Tex. 145, 2 S. W. 356.

626. Under the confirming act declaring that it is not to prejudice any title theretofore derived from the United States, the school lands theretofore granted to Missouri are excepted from the confirmation and the title of the state thereto is superior to that under a Spanish claim. *Ham v. Missouri*, 18 How. 126, 15: 334

627. The proviso of the act of June 13, 1812 (2 Stat. at L. 748), excepting from its provisions claims to land in the territory of Missouri theretofore perfected and confirmed operates in favor but not to the prejudice of claims confirmed by the board of commissioners. *Ryan v. Carter*, 93 U. S. 78, 23: 807

Cited in Baird v. St. Louis Hospital Asso. 116 Mo. 427, 22 S. W. 726—*Tyler v. Wells*, 2 Mo. App. 539.

2. Conclusiveness and Effect of Judicial Confirmation, and of Survey and Patent.

Of decree.

Of Proceedings on Removal of California Commissioners, see supra, 588.

Of Decree of Commissioners, see infra, 663-672.

Who Concluded by, see Judgment, 757.

628. Where a decree gives with precision the boundaries of the tract to which a claim is confirmed, and has become final by stipulation of the United States and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies. *United States v. Hancock*, 133 U. S. 193, 10 Sup. Ct. Rep. 264, 33: 601
Cited in Sioux City & St. P. R. Co. v. United States, 159 U. S. 370, 40 L. ed. 184, 16 Sup. Ct. Rep. 17—*United Land Asso. v. Knight*, 85 Cal. 469, 24 Pac. 818.

629. A confirmation of a Mexican grant of a tract with specified boundaries covered all the land within these boundaries, irrespective of quantity; and this, notwithstanding there appeared in the prior proceedings statements that the tract contained a certain amount, "a little more or less," which amount was very much less than that included within the boundaries. *United States v. Hancock*, 133 U. S. 193, 10 Sup. Ct. Rep. 264, 33: 601

630. Where a grant of a Mexican government was for a certain specified quantity of land lying within exterior boundaries embracing a much larger tract, a confirmation of the claim is only a judicial determination of the right of the claimant to have a specific quantity set apart to him out of a

general tract. *United States v. Sepulveda*, 1 Wall. 104, 17: 569
Cited in Foss v. Hinkell, 91 Cal. 200, 27 Pac. 644.

631. The *empresario* grant to Royuela and Beales in 1832, by the states of Coahuila and Texas, passed no title to the *empresarios*, or colonizing contractors, until the colony was established; it was simply a designation of a tract within which they might establish a colony. *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 11 Sup. Ct. Rep. 666, 35: 278
Cited in Russell v. Maxwell Land Grant Co. 158 U. S. 255, 39 L. ed. 971, 15 Sup. Ct. Rep. 827—*United States v. Trans-Missouri Freight Asso.* 24 L.R.A. 87, 4 Inters. Com. Rep. 457, 7 C. C. A. 82, 19 U. S. App. 36, 58 Fed. 78.

Of survey and location.

Conclusiveness of Locative Survey by Officials of Former Government, see supra, 158.

Disputes as to Boundaries as Presenting Federal Question, see Courts, 603.

Who Concluded by Survey, see Judgment, 757.

632. A full transfer of title without any patent is made by an approved survey and location of the private land claim, made in accordance with the act of Congress of June 21, 1860, § 6, authorizing the selection of a certain quantity of vacant land, not mineral, in the territory of New Mexico, to be surveyed and located by the surveyor general. *Shaw v. Kellogg*, 170 U. S. 312, 18 Sup. Ct. Rep. 632, 42: 1050
Cited in Maese v. Herman, 183 U. S. 580, 46 L. ed. 338, 22 Sup. Ct. Rep. 91—*Olive Land & Development Co. v. Olmstead*, 103 Fed. 576—*Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 241, 50 C. C. A. 91, 112 Fed. 16—*Shaw v. Lockett*, 14 Colo. App. 415, 60 Pac. 363.

633-4. The effect of a private survey adopted under the act of 1805, requiring claimants to accompany the claim filed with a plat of the tract, is not to sever the tract from the public domain, but merely to define the tract claimed in order that the claim might be presented for confirmation fully located. *Bissell v. Penrose*, 8 How. 317, 12: 1035

Cited in Frémont v. United States, 17 How. 576, 15 L. ed. 253—*Carondelet v. St. Louis*, 1 Black, 189, 17 L. ed. 105—*Tyler v. Maguire*, 8 Wall. 661, 19 L. ed. 323—*Snyder v. Sickles*, 98 U. S. 212, 25 L. ed. 101—*Doe ex dem. Mims v. Higgins*, 39 Ala. 20—*Teddle v. McNeely*, 104 La. 611, 29 So. 247.

635-6. A limitation of an approval of a survey by the surveyor-general of lands selected under the act of Congress of June 21, 1860, § 6, and duly certified to be vacant and not mineral, by attempting to make the approval subject to the provisions of that section, is beyond the power of the executive officers to impose, and will not make the title of the grantee subject to the future discovery of minerals. *Shaw v. Kellogg*, 170 U. S. 312, 18 Sup. Ct. Rep. 632, 42: 1050

637. The surveyor-general's report on the validity of Spanish or Mexican land claims is conclusive only in the first instance. Final action on the subject is reserved to Congress. *Tameling v. United States Freehold & Emigration Co.* 93 U. S. 644,

23: 998

Cited in Astiazaran v. Santa Rita Land & Min. Co. 3 Ariz. 24, 20 Pac. 189—*Stoneroad v. Stoneroad*, 4 N. M. 194, 12 Pac. 736—*United States v. San Pedro & C. d'A. Co.* 4 N. M. 551, 17 Pac. 337—*Chaves v. Whitney*, 4 N. M. 626, 16 Pac. 608—*Waddingham v. Robledo*, 6 N. M. 373, 28 Pac. 663.

638. The official return of the surveyor-general has the force of a deposition. *United States v. Low*, 16 Pet. 162,

10: 923

Cited in United States v. Boldsore, 11 How. 91, 13 L. ed. 617—*Winter v. United States*, Hempst. 384, Fed. Cas. No. 17,896—*Kirby v. Lewis*, 39 Fed. 75.

639. Where the surveyor-general returned that a survey was made according to the grant, in the absence of contradictory proof, the claim was confirmed. *United States v. Low*, 16 Pet. 162,

10: 923

640. A mere loose prior order of survey was held not to have prima facie effect to prove title and the United States could sell the land. *Cousin v. Labatut*, 19 How. 202,

15: 601

Cited in Dent v. Sigerson, 29 Mo. 516.

641. An objection to the survey of the surveyor general extends to the competency of the evidence, and not to its effect when heard. *United States v. Low*, 16 Pet. 162,

10: 923

642. A survey made by proper officers of the United States, and confirmed by the Land Department, cannot be shown to be inaccurate by collateral attack in the courts, although the question whether any particular tract of land is within the survey or not is a question of fact always open to inquiry in the courts. *Russell v. Maxwell Land Grant Co.* 158 U. S. 253, 15 Sup. Ct. Rep. 827,

39: 971

Cited in Horne v. Smith, 159 U. S. 43, 40 L. ed. 69, 15 Sup. Ct. Rep. 988—*DeGuyer v. Banning*, 167 U. S. 742, 42 L. ed. 346, 17 Sup. Ct. Rep. 937—*Whitaker v. McBride*, 197 U. S. 512, 49 L. ed. 860, 25 Sup. Ct. Rep. 530—*Colorado Fuel Co. v. Maxwell Land Grant Co.* 22 Colo. 74, 43 Pac. 556—*Brown v. Milliman*, 119 Mich. 612, 78 N. W. 785—*Brown v. Parker*, 127 Mich. 393, 86 N. W. 989.

643. A survey of the Carondelet common duly made and afterwards returned and approved by the Land Department is conclusive upon the corporation of Carondelet, especially since that corporation recognized, accepted, and held under such survey. *Carondelet v. St. Louis*, 1 Black, 179, 17: 102
Cited in Dent v. Emmeger, 14 Wall. 314, 20 L. ed. 840—*Lake Superior Ship Canal, R. & Iron Co. v. Cunningham*, 44 Fed. 843—*Robbins v. Eckler*, 36 Mo. 505—*St. Louis v. Missouri P. R. Co.* 114 Mo. 21, 21 S. W. 202—*Coleman v. Allen*, 5 Mo. App. 182.

643a. The object of the proceeding before the tribunals of the United States, for the approval of a survey of a confirmed claim

to land in California, under a Mexican or Spanish grant, pursuant to the act of Congress of June 14th, 1860, was to insure conformity of the survey with the decree of confirmation, and not to settle any question of title against other claimants. The approval of the court established the fact that the survey was in conformity with the decree of confirmation; or, if the decree was for quantity only, that the survey was authorized by it, and is conclusive as to the location of the land against all floating grants not previously located. *Miller v. Dall*, 92 U. S. 473,

23: 735

Of patent.

Of Patent Pursuant to Legislative Confirmation, see *supra*, 625.

Defects in Preliminary Proceedings Concluded by Confirmation of Grant, see *infra*, 648-649.

Patent Pursuant to Commissioner's Confirmation, see *infra*, 661.

Who Concluded by Patent, see Judgment, 757.

644. A patent is a conveyance by the government when the government has any interest to convey; but where it is issued upon confirmation of a claim or a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title or of such equities respecting the claim as justify its recognition and confirmation. *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, 30: 1039
Cited in St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 6, 35 L. ed. 80, 11 Sup. Ct. Rep. 389—*Barden v. Northern P. R. Co.* 154 U. S. 337, 38 L. ed. 1005, 14 Sup. Ct. Rep. 1030—*Catholic Bishop v. Gibbon*, 158 U. S. 166, 39 L. ed. 936, 15 Sup. Ct. Rep. 779—*Denny v. Dodson*, 32 Fed. 904—*Tolleston Club v. State*, 141 Ind. 209, 38 N. E. 214—*Horsky v. Moran*, 21 Mont. 359, 53 Pac. 1064—*Miller v. Tobin*, 16 Or. 553, 16 Pac. 161.

645. A land patent issued by the United States upon confirmation of a claim to land under the laws of Spain or Mexico is a deed. Its operation is that of a quit claim or conveyance of such interest as the United States possessed in the land, and it took effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners. *Beard v. Federy*, 3 Wall. 478,

18: 88

Distinguished in Henshaw v. Bissell, 18 Wall. 265, 21 L. ed. 839.

Cited in Meader v. Norton, 11 Wall. 457, 20 L. ed. 187—*Carpenter v. Montgomery*, 13 Wall. 496, 20 L. ed. 702—*Adam v. Norris*, 103 U. S. 593, 26 L. ed. 584—*St. Louis Smelting Co. v. Kemp*, 104 U. S. 641, 26 L. ed. 877—*Knight v. United Land Assn.* 142 U. S. 184, 35 L. ed. 982, 12 Sup. Ct. Rep. 258—*California Powder Works v. Davis*, 151 U. S. 394, 38 L. ed. 208, 14 Sup. Ct. Rep. 350—*Russell v. Maxwell Land Grant Co.* 158 U. S. 255, 39 L. ed. 971, 15 Sup. Ct. Rep. 827—*De Guyer v. Banning*, 167 U. S. 740, 42 L. ed. 345, 17 Sup. Ct. Rep. 937—*United States v. Loughrey*, 172 U. S. 229, 43 L. ed. 428, 19 Sup. Ct. Rep. 153—*United States v. Conway*, 175 U. S. 70, 44 L. ed. 76, 20

Sup. Ct. Rep. 13—Barker v. Harvey, 181 U. S. 491, 45 L. ed. 968, 21 Sup. Ct. Rep. 690—United States v. Anderson, 194 U. S. 399, 48 L. ed. 1039, 24 Sup. Ct. Rep. 716—Blissell v. Henshaw, 1 Sawy. 565, Fed. Cas. No. 1,447—Boyle v. Hinds, 2 Sawy. 530, Fed. Cas. No. 1,759—Montgomery v. Bevans, 1 Sawy. 681, Fed. Cas. No. 9,735—Mora v. Foster, 3 Sawy. 470, Fed. Cas. No. 9,784—Manning v. San Jacinto Tin Co. 7 Sawy. 422, 9 Fed. 729—Mora v. Nunez, 7 Sawy. 464, 10 Fed. 640—Hayner v. Stanly, 8 Sawy. 220, 13 Fed. 222—United States v. Minor, 29 Fed. 135—United States v. Dalles Military Road Co. 41 Fed. 498—Northern P. R. Co. v. Amacker, 46 Fed. 236—Germania Iron Co. v. United States, 7 C. C. A. 258, 19 U. S. App. 10, 58 Fed. 336—Deweese v. Reinhard, 10 C. C. A. 59, 19 U. S. App. 698, 61 Fed. 780—Coburn v. San Mateo County, 75 Fed. 528—Peyton v. Desmond, 129 Fed. 12—Yates v. Smith, 38 Cal. 71—Thompson v. Felton, 54 Cal. 554—Phelan v. Poyoreno, 74 Cal. 452, 13 Pac. 681—Byrne v. Alas, 74 Cal. 639, 16 Pac. 523—De Guyer v. Banning, 91 Cal. 402, 27 Pac. 761—McDonald v. McCoy, 121 Cal. 67, 53 Pac. 421—Harvey v. Barker, 126 Cal. 272, 58 Pac. 692—Colorado Fuel Co. v. Maxwell Land Grant Co. 22 Colo. 73, 43 Pac. 556—Winona & St. P. Land Co. v. Ebbliesor, 52 Minn. 322, 54 N. W. 91—Silver Bow Min. & Mill. Co. v. Clark, 5 Mont. 425, 5 Pac. 570—Talbot v. King, 6 Mont. 106, 9 Pac. 434—Weeks v. Milwaukee, L. S. & W. R. Co. 78 Wis. 519, 47 N. W. 737.

646. A patent from the United States, based upon the confirmation of a grant from the Mexican government by the board of land commissioners under the act of Congress of 1851 (9 Stat. at L. 631, chap. 41) giving the board jurisdiction over claims "by virtue of any right or title derived from the Spanish or Mexican government," cannot be attacked collaterally on the ground that the grant was invalid and that the board had no jurisdiction to confirm an invalid claim, since the board is given jurisdiction to consider whatever is necessary to the validity of the claim, including the question of the fact of a grant or the power to grant. *Thompson v. Los Angeles Farming & Mill. Co.* 180 U. S. 72, 21 Sup. Ct. Rep. 289, 45: 432
Cited in Barker v. Harvey, 181 U. S. 489, 45 L. ed. 968, 21 Sup. Ct. Rep. 690.

Confirmation of void or defective grant.

647. A confirmation, by the commissioners appointed under the act of March 3, 1803, and in pursuance of the cession by Georgia to the United States, to a claimant who was an actual settler October 27, 1795, under a grant made by the governor general of Louisiana, north of the 31st degree of latitude,—which grant was originally void,—rendered his title valid as against the United States. *Robinson v. Minor*, 10 How. 627, 13: 568
Cited in Coffee v. Groover, 123 U. S. 21, 31 L. ed. 60, 8 Sup. Ct. Rep. 1—*Woods v. Jackson Iron Mfg. Co.* Holmes, 384, Fed. Cas. No. 17,993.

648. Defects in preliminary steps to obtain a Mexican land grant cannot be taken

advantage of at law after the grant has issued. *Spencer v. Lapsley*, 20 How. 264.

15: 902
Cited in Interstate Land Co. v. Maxwell Land Grant Co. 139 U. S. 586, 35 L. ed. 285, 11 Sup. Ct. Rep. 656—*Interstate Land Co. v. Maxwell Land Grant Co.* 41 Fed. 282.

649. Defects in an entry and survey on a grant in Texas cannot be taken advantage of at law. *White v. Burnley*, 20 How. 235.

15: 886

Claims of third persons.

Conflicts in Surveys, see *supra*, 566.

Effect of Survey, see also *supra*, 635.

As to Confirmation, see also *infra*, 673, 674.

See also Constitutional Law, 922.

650. A patent based upon a Mexican grant is conclusive evidence only as between the United States and the grantee, that the latter has established the validity of the grant. *Adam v. Norris*, 103 U. S. 591, 26: 583

Distinguished in Hayner v. Stanly, 8 Sawy. 224, 13 Fed. 225.

Cited in De Guyer v. Banning, 167 U. S. 742, 42 L. ed. 346, 17 Sup. Ct. Rep. 937—*Byrne v. Alas*, 74 Cal. 639, 16 Pac. 523.

651. Under the act of 1851 for the settlement of private land claims in California adverse claimants are not entitled to intervene; and the patent when issued is only conclusive between the United States and the claimant, and does not affect third parties. *United States v. Fossat*, 20 How. 413,

15: 944

652. The survey of the surveyor general, and his certificate that a lot was reserved for public schools by the act of 1812, is not conclusive, at least as against private persons. *St. Louis Public Schools v. Walker*. 9 Wall. 282, 19: 576

653. Although the United States and their confirmee are concluded by a survey made after confirmation of an imperfect Spanish title, a previous grantee is not. *Menard v. Massey*, 8 How. 293, 12: 1085

Cited in Guitard v. Stoddard, 16 How. 512, 14 L. ed. 1038—*Willot v. Sandford*, 19 How. 82, 15 L. ed. 550—*Bryan v. Forsyth*, 19 How. 336, 15 L. ed. 675—*Dent v. Emmeger*, 14 Wall. 313, 20 L. ed. 839—*Carondelet v. McPherson*, 20 Mo. 200—*Smith v. St. Louis*, 21 Mo. 39—*Carondelet v. St. Louis*, 25 Mo. 463—*Carondelet v. St. Louis*, 29 Mo. 534.

654. The government has no interest in contests between persons claiming *ex post facto* the grant; nor is it charged to decide between such claimants. *Castro v. Hendricks*, 23 How. 438, 16: 576

Cited in McMicken v. United States, 97 U. S. 208, 24 L. ed. 948—*Hardy v. Harbin*, 1 Sawy. 208, Fed. Cas. No. 6,059—*Hardy v. Harbin*, 4 Sawy. 542, Fed. Cas. No. 6,060—*Norton v. Meader*, 4 Sawy. 616, Fed. Cas. No. 10,351—*United States v. Sanchez*, Fed. Cas. No. 16,217—*Salmon v. Symonds*, 30 Cal. 307—*Wilson v. Castro*, 31 Cal. 439.

655. A land patent, issued in pursuance of an act of Congress, is conclusive only between the United States and the claimants

under it, but does not affect the interest of third parties. *United States v. White*, 23 How. 249, 16: 560
Cited in Bissell v. Henshaw, 1 Sawy. 583, Fed. Cas. No. 1,447—*Byrne v. Alas*, 74 Cal. 639, 16 Pac. 523.

656. A patent issued after the survey and location of a California land claim, under the act of Congress of March 3, 1851, is conclusive as to the validity, extent, and boundaries of the claim, as against all parties not claiming by superior title. *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. Rep. 1067, 32: 51
Cited in De Guyer v. Banning, 167 U. S. 742, 42 L. ed. 346, 17 Sup. Ct. Rep. 937—*Los Angeles Farming & Mill. Co. v. Thompson*, 117 Cal. 600, 49 Pac. 714—*Colorado Fuel Co. v. Maxwell Land Grant Co.* 22 Colo. 74, 43 Pac. 536—*Brown v. Parker*, 127 Mich. 394, 86 N. W. 989.

657. A recital in a patent from the United States, confirming a Mexican land grant to the original grantees, "their heirs, successors in interest, and assigns," that two persons named therein had acquired an undivided interest in the land, which patent was based on a decree to that effect of the court of private land claims, established by the act of March 3, 1891 (26 Stat. at L. 854, chap. 539, U. S. Comp. Stat. 1901, p. 765), is sufficient to establish a record title in the persons so named as against others holding merely by adverse possession, although, under §§ 8, 13, of that act, the confirmation of the grant by that court only quitclaims the title of the United States, and saves the rights of third parties. *Herrick v. Boquillas Land & Cattle Co.* 200 U. S. 96, 26 Sup. Ct. Rep. 192, 50: 388

657a. An approval by the district court of a survey of a confirmed land claim, under the act of June 14, 1860, authorizing the intervention by any interested party for the protection of his interests, and providing for the approval of the survey if correct, and its correction, or the making of a new survey if erroneous,—is conclusive as against a claimant under a floating grant. *Henshaw v. Bissell*, 18 Wall. 255, 21: 835
Cited in Adam v. Norris, 103 U. S. 593, 26 L. ed. 584—*United States v. McLaughlin*, 127 U. S. 450, 32 L. ed. 221, 8 Sup. Ct. Rep. 1177—*Cragin v. Powell*, 128 U. S. 699, 32 L. ed. 568, 9 Sup. Ct. Rep. 203—*United States v. Conway*, 175 U. S. 70, 44 L. ed. 76, 20 Sup. Ct. Rep. 13—*Manning v. San Jacinto Tin Co.* 7 Sawy. 424, 9 Fed. 730—*Southern P. R. Co. v. Duill*, 10 Sawy. 516, 22 Fed. 496—*Last Chance Min. Co. v. Tyler Min. Co.* 9 C. C. A. 621, 15 U. S. App. 456, 61 Fed. 566.

Opening excluded lands to public disposal.

Title of Grantee of California School Selections as against Mexican Claimant, see Public Lands, 357.

658. Lands outside of such a survey of a claim under a former Mexican grant become subject to state selection in lieu of school sections covered by the grant, and are open to pre-emption without awaiting approval U. S. Dig.—296

of the survey. *McCreery v. Haskell*, 119 U. S. 327, 7 Sup. Ct. Rep. 176, 30: 408

658a. Surveys, under the act of July 23, 1866, "to quiet land titles in California," become operative by approval of the United States surveyor-general for the state, and his filing in the local land office of the township plats. Lands thereby excluded from a confirmed private land claim become subject to state selections and other modes of disposal of public lands. Previous approval of the survey by the commissioner of the general land office is not necessary. *Frasher v. O'Connor*, 115 U. S. 102, 5 Sup. Ct. Rep. 1141, 29: 311
Cited in Mower v. Fletcher, 116 U. S. 384, 29 L. ed. 594, 6 Sup. Ct. Rep. 409—*McCreery v. Haskell*, 119 U. S. 330, 30 L. ed. 409, 7 Sup. Ct. Rep. 176—*Durand v. Martin*, 120 U. S. 369, 30 L. ed. 677, 7 Sup. Ct. Rep. 587—*Cragin v. Powell*, 128 U. S. 699, 32 L. ed. 568, 9 Sup. Ct. Rep. 203—*Tubbs v. WHolt*, 138 U. S. 144, 34 L. ed. 890, 11 Sup. Ct. Rep. 279—*Noble v. Union River Logging R. Co.* 147 U. S. 172, 37 L. ed. 126, 13 Sup. Ct. Rep. 271—*Hough v. Buchanan*, 27 Fed. 329—*Wells County v. McHenry*, 7 N. D. 251, 74 N. W. 241.

3. Conclusiveness and Effect of Commissioners' Confirmation.

Decision of Register, Receiver or other Land Officer and Effect thereof, see *supra*, 523-526.

Remedy at Law or in Equity against Illegal Action of Land Officers, see *Equity*, 112a.

Parol Evidence to Determine Better Right as Between Conflicting Confirmations, see *Evidence*, 1753.

Probative Effect of Certificate of Confirmation, see *Evidence*, 2451.

See also *supra*, 511.

Effect of commissioners' confirmation.

Effect of Legislative Confirmation with Exception in Favor of Previous Official Confirmation, see *supra*, 627.

Of Commissioner's Confirmation of Void Grant, see *supra*, 647.

Decisions under Mississippi Donation Act, see *Public Lands*, 523.

659. The approval of a survey by the Commissioner of the General Land Office takes effect by relation as of the date when the survey and appropriation of land thereunder were made. They must be held valid from that time, so as to protect proceedings taken in accordance with them. *Quinby v. Conlan*, 104 U. S. 420, 26: 800

659a. It is only when the officers of the Land Department have clearly misconstrued the law and denied the parties their rights, or where misrepresentations and fraud have been practised necessarily affecting their judgment, that the courts can interfere and refuse to give effect to their action. *Quinby v. Conlan*, 104 U. S. 420, 26: 800
Cited in Rector v. Gibbon, 111 U. S. 291, 28 L. ed. 432, 4 Sup. Ct. Rep. 605—*Bohall v. Dilla*, 114 U. S. 50, 29 L. ed. 62, 5 Sup. Ct.

Rep. 782—*Craig v. Lelensdorfer* (Downs v. Hubbard) 123 U. S. 212, 31 L. ed. 123, 8 Sup. Ct. Rep. 85—*Cornellus v. Kessel*, 128 U. S. 460, 32 L. ed. 483, 9 Sup. Ct. Rep. 122—*Sanford v. Sanford*, 139 U. S. 647, 35 L. ed. 291, 11 Sup. Ct. Rep. 666—*Noble v. Union River Logging R. Co.* 147 U. S. 175, 37 L. ed. 127, 13 Sup. Ct. Rep. 271—*United States v. California & O. Land Co.* 148 U. S. 44, 37 L. ed. 380, 13 Sup. Ct. Rep. 458—*Wisconsin C. R. Co. v. Forsythe*, 159 U. S. 61, 40 L. ed. 76, 15 Sup. Ct. Rep. 1020—*Black v. Jackson*, 177 U. S. 357, 44 L. ed. 805, 20 Sup. Ct. Rep. 648—*Hartwell v. Havighorst*, 196 U. S. 635, 49 L. ed. 629, 25 Sup. Ct. Rep. 793—*Aurora Hill Consol. Min. Co. v. 85 Min. Co.* 12 Sawy. 363, 34 Fed. 520—*Northern P. R. Co. v. Cannon*, 4 C. C. A. 309, 7 U. S. App. 507, 54 Fed. 258—*American Mortg. Co. v. Hopper*, 56 Fed. 71—*Smith v. Northern P. R. Co.* 7 C. C. A. 410, 19 U. S. App. 131, 58 Fed. 518—*American Mortg. Co. v. Hopper*, 12 C. C. A. 296, 29 U. S. App. 12, 64 Fed. 556—*Diller v. Hawley*, 26 C. C. A. 516, 48 U. S. App. 462, 81 Fed. 653—*Moss v. Dowman*, 31 C. C. A. 452, 60 U. S. App. 69, 88 Fed. 186—*Sloan v. United States*, 95 Fed. 194—*Linkswiler v. Schneider*, 95 Fed. 205—*Boynton v. Haggart*, 57 C. C. A. 310, 120 Fed. 828—*Holmes v. State*, 100 Ala. 295, 14 So. 51—*Plummer v. Brown*, 70 Cal. 548, 12 Pac. 464—*Hays v. Steiger*, 76 Cal. 558, 18 Pac. 670—*Iron Silver Min. Co. v. Campbell*, 17 Colo. 272, 29 Pac. 513—*Hawke v. Deffebach*, 4 Dak. 25, 22 N. W. 480—*Forbes v. Driscoll*, 4 Dak. 356, 31 N. W. 633—*Vantongerren v. Heffernan*, 5 Dak. 211, 38 N. W. 521—*Porter v. Bishop*, 25 Fla. 759, 6 So. 863—*Fearns v. Atchison, T. & S. F. R. Co.* 33 Kan. 280, 6 Pac. 237—*Silver Bow Min. & Mill. Co. v. Clark*, 5 Mont. 424, 5 Pac. 570—*Talbot v. King*, 6 Mont. 106, 9 Pac. 434—*Colburn v. Northern P. R. Co.* 13 Mont. 485, 34 Pac. 1017—*Murphy v. Patterson*, 24 Mont. 582, 63 Pac. 375—*South End Min. Co. v. Tinney*, 22 Nev. 27, 35 Pac. 89—*Knapp v. Thomas*, 39 Ohio St. 387, 45 Am. Rep. 462—*Paine v. Foster*, 9 Okla. 228, 53 Pac. 109—*Keane v. Brygger*, 3 Wash. 350, 28 Pac. 653—*Gallher v. Cadwell*, 3 Wash. Terr. 514, 18 Pac. 68.

660. The confirmation of a land claim by the act of 1836 is equally effectual in favor of the claimant, whether the commissioners recommended that the claim should be confirmed generally or confirmed "according to survey." The only difference is that in the latter case the survey on file is probably conclusive upon the government and errors cannot be corrected, while in the former case they may be. *Bissell v. Penrose*, 8 How. 317, 12: 1095
Cited in *Eslava v. Bolling*, 22 Ala. 739.

661. A confirmation of a Spanish or Mexican grant in California segregates the land from the public domain and invests the confirmee with the legal title, whereby he is entitled to a patent when the survey is made. In ejectment no other title not clothed with equal solemnities can be set up against that of the confirmee or his assigns. *Carpentier v. Montgomery*, 13 Wall. 480, 20: 698

662. Confirmation of claims to land made by the recorder of land titles, under the act of June 13, 1812, in excess of his jurisdiction, were not obligatory upon Congress, but

Congress could adopt and ratify them. *Morrison v. Jackson*, 92 U. S. 654, 23: 517
Morrison v. Benton, 92 U. S. 664, note. 23: 520

Conclusiveness of decisions of commissioners.

Correction of Proceedings of Commissioner, see *supra*, 579.

See also *supra*, 619.

663. The decree of the board of commissioners established to settle private land claims in California is a finality, not only as to question of title, but as to the boundaries specified in it. *United States v. Billings*, 2 Wall. 444, 17: 848
Fossat v. United States (*Fossat v. Quick-silver Mine Case*) 2 Wall. 649, 17: 733
DeArguello v. United States, 18 How. 539, 15: 478
United States v. Halleck, 1 Wall. 439, 17: 664
Higuera v. United States, 5 Wall. 827, 18: 489

Distinguished in *Grisar v. McDowell*, 6 Wall. 376, 18 L. ed. 867.

Cited in *United States v. Billings*, 2 Wall. 448, 17 L. ed. 848—*United States v. Hancock*, 133 U. S. 196, 33 L. ed. 603, 10 Sup. Ct. Rep. 264—*De Guyer v. Banning*, 167 U. S. 738, 42 L. ed. 245, 17 Sup. Ct. Rep. 937—*United States v. Elder*, 177 U. S. 111, 44 L. ed. 892, 20 Sup. Ct. Rep. 537—*United States v. Hancock*, 30 Fed. 852—*United States v. Southern P. R. Co.* 45 Fed. 610—*McGarvey v. Little*, 15 Cal. 30—*De Arguello v. Greer*, 26 Cal. 623—*United Land Asso. v. Knight*, 85 Cal. 479, 24 Pac. 818—*Foss v. Hinkell*, 91 Cal. 200, 27 Pac. 644—*Valentine v. Sloss*, 103 Cal. 220, 37 Pac. 326—*Stoneroad v. Stoneroad*, 4 N. M. 192, 12 Pac. 756

664. The correctness of a decree of confirmation made by land commissioners, and not appealed from, giving the boundaries of a Mexican claim, cannot be questioned, nor can its terms be modified. *Higuera v. United States*, 5 Wall. 827, 18: 469
Cited in *Snyder v. Sickles*, 98 U. S. 214, 25 L. ed. 102—*United States v. Hancock*, 133 U. S. 196, 33 L. ed. 603, 10 Sup. Ct. Rep. 264—*United States v. Hancock*, 30 Fed. 952—*United States v. Southern P. R. Co.* 45 Fed. 610—*United Land Asso. v. Knight*, 85 Cal. 479, 24 Pac. 818—*Foss v. Hinkell*, 91 Cal. 200, 27 Pac. 644.

665. Reference to original title papers, where no doubt arises upon the terms of the decree, will not authorize an inquiry into a matter of boundary. *United States v. Halleck*, 1 Wall. 439, 17: 664

666. Courts have no power to revise what Congress, or commissioners acting under its authority, have done in confirming titles to public land; and, as against the United States and the patentee, such confirmations are conclusive as to such lands as were not legally claimed by others, where such claims were exempted in the act authorizing the grant. *Lafayette v. Kenton*, 18 How. 197, 15: 345

667. Congress did not design to submit the validity of titles in Florida which were "valid under the Spanish government, or by

the law of nations," to the determination of the commissioners acting under the act of May 8, 1822. Their decision was conclusive in no case until confirmed by an act of Congress. *United States v. Percheman*, 7 Pet. 51, 8: 604

Distinguished in *Muse v. Arlington Hotel Co.* 68 Fed. 648.

Cited in *Strother v. Lucas*, 12 Pet. 458, 9 L. ed. 1156—*United States v. Delespine*, 15 Pet. 329, 10 L. ed. 756—*Doe ex dem. Barbarie v. Eslava*, 9 How. 449, 13 L. ed. 211.

668. Where a party claimed a tract of land by virtue of a Spanish grant, and the claim was presented to the board of commissioners of East Florida, by whom it was rejected, and an entry made that, if a certain survey had been produced, it would have furnished some support for the certificate of the governor's secretary, but that, in its absence, the claim must be rejected,—it was not a final action on the claim within the act of May, 1813, nor did the rejection of the claim withdraw it from the jurisdiction of the court. *United States v. Percheman*, 7 Pet. 51, 8: 604

669. The decision of the board of commissioners in regard to warrants or orders of survey of the Spanish government was final and conclusive as between the parties and the title first confirmed was best. *Hickey v. Stewart*, 3 How. 750, 11: 814
Cited in *Bank of United States v. Moss*, 6 How. 38, 12 L. ed. 334—*La Roche v. Jones*, 9 How. 171, 13 L. ed. 92—*Robinson v. Minor*, 10 How. 644, 13 L. ed. 575—*Coffee v. Groover*, 123 U. S. 24, 31 L. ed. 60, 8 Sup. Ct. Rep. 1—*Montgomery v. Doe*, 13 Smedes & M. 177.

670. Commissioners were appointed pursuant to the provisions of the act of Congress of March, 1803, to determine the claims of those claiming benefits under the Spanish grants, and their decisions as to such claims were final. *Henderson v. Poin Dexter*, 12 Wheat. 530, 6: 718
Cited in *United States v. Arredondo*, 6 Pet. 733, 8 L. ed. 563—*Strother v. Lucas*, 12 Pet. 448, 9 L. ed. 1152—*Hickey v. Stewart*, 3 How. 761, 11 L. ed. 819—*Coffee v. Grover*, 123 U. S. 24, 31 L. ed. 60, 8 Sup. Ct. Rep. 1—*Hall v. Doe*, 19 Ala. 393—*Minturn v. Brower*, 24 Cal. 663—*Emeric v. Penniman*, 26 Cal. 123—*Challefoux v. Ducharme*, 4 Wis. 562.

671. A certificate of confirmation of a Spanish land grant by the board of commissioners of the United States acting under the act of Congress of March 3, 1805, when recorded, is conclusive on the question of title in ejectment. *LaRoche v. Jones*, 9 How. 155, 13: 85
Cited in *Chastang v. Armstrong*, 20 Ala. 626.

Persons bound.
672, 673. The confirmation by the board of land commissioners for California of a Mexican or Spanish claim established in the claimant only the legal title, without determining the equitable relations between the claimants and third persons, or affecting any trust imposed on them in the hands

of the claimant. *Townsend v. Greeley*, 5 Wall. 326, 18: 547

Cited in *Carpentier v. Montgomery*, 13 Wall. 496, 20 L. ed. 702—*Hedrick v. Atchison*, T. & S. F. R. Co. 167 U. S. 681, 42 L. ed. 323, 17 Sup. Ct. Rep. 922—*San Francisco v. United States*, 4 Sawy. 584, Fed. Cas. No. 12,316—*Bouldin v. Phelps*, 30 Fed. 561.

674. A confirmation in the name of the original grantee of Mexican land is binding on the government and on the assignees. *United States v. Covilland*, 1 Black, 339, 17: 40

Collateral attack.

675. The board of commissioners having acquired jurisdiction, its subsequent proceedings cannot be collaterally questioned for mere error or irregularity. *Beard v. Federy*, 3 Wall. 478, 18: 88

676. Where the board of land commissioners acquire jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision cannot be collaterally assailed on the ground that it was rendered on insufficient evidence. *Beard v. Federy*, 3 Wall. 478, 18: 88
Cited in *Hartman v. Warren*, 22 C. C. A. 38, 40 U. S. App. 245, 78 Fed. 164—*United States v. Peralta*, 99 Fed. 632—*Ward v. Mulford*, 32 Cal. 371—*Bernal v. Lynch*, 36 Cal. 143—*Miller v. Dale*, 44 Cal. 578—*De Guyer v. Banning*, 91 Cal. 402, 27 Pac. 761—*Los Angeles Farming & Mill. Co. v. Thompson*, 117 Cal. 599, 49 Pac. 714—*Brown v. Parker*, 127 Mich. 393, 86 N. W. 989—*Winona & St. P. Land Co. v. Eblicisor*, 52 Minn. 322, 54 N. W. 91—*Silver Bow Min. & Mill. Co. v. Clark*, 5 Mont. 424, 5 Pac. 570—*Talbott v. King*, 6 Mont. 106, 9 Pac. 434—*South End Min. Co. v. Tinney*, 22 Nev. 44, 35 Pac. 89—*Waddingham v. Robledo*, 6 N. M. 373, 28 Pac. 663—*Weeks v. Milwaukee L. S. & W. R. Co.* 78 Wis. 519, 47 N. W. 737—*Bradley v. Dells Lumber Co.* 105 Wis. 252, 81 N. W. 394.

677. The adjudication of the board of commissioners upon a Mexican claim for lands cannot be collaterally assailed on the ground of insufficient evidence. The provision of the act of March 3, 1851, § 15, that such final decrees shall be conclusive between the United States and claimants only, and shall not affect the interests of third persons, does not change the operation of the general rule. *Lynch v. DeBernal*, 9 Wall. 315, 19: 714

Cited in *Chaboya v. Umbarger*, 97 U. S. 283, 24 L. ed. 895—*Harris v. McGovern*, 99 U. S. 166, 25 L. ed. 818—*Umbarger v. Chaboya*, 49 Cal. 537—*Ohm v. San Francisco*, 92 Cal. 454, 28 Pac. 580—*Ruggles v. First Nat. Bank*, 43 Mich. 196, 5 N. W. 257.

Statutes confirming reports.

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See also *supra*, 662.

678. Where Congress has, by confirming the report of commissioners of other tribunals, sanctioned the rules and principles on which they were founded, it is a legislative affirmance of the construction put by

these tribunals on the laws conferring the authority and prescribing the rules by which it should be exercised; or what is, to all intents and purposes, of the same effect in law; it is a legislative ratification of an act done without previous authority; and this subsequent recognition and adoption is of the same force as if done by pre-existing power, and relates back to the act done. *United States v. Dela Maza Arredondo*, 6 Pet. 691, 8: 547
Cited in Ex parte Ortiz, 100 Fed. 963—*Tameling v. United States Freehold Land & Emigration Co.* 2 Colo. 420—*Litchfield v. Hamilton Co.* 40 Iowa, 68—*Farrel v. Pingree*, 5 Utah, 449, 16 Pac. 848.

679. Where Congress passed an act confirming the decisions of three commissioners, naming them, in favor of land claimants, the act indicates that Congress intended to refuse a confirmation of decisions by two of them, although a majority of the commissioners were authorized to decide claims. *Slidell v. Grandjean*, 111 U. S. 412, 4 Sup. Ct. Rep. 475, 28: 321
Cited in Chaves v. Whitney, 4 N. M. 630, 16 Pac. 608.

680. A confirmation to a town of a claim reported by the surveyor general as a claim by the town under a Mexican grant cannot be contested by a bill in equity against the Land Department on the ground that the grant, properly interpreted, was to private persons instead of to the town, even if the so-called town has no legal or corporate existence, since the capacity of the town to take the patent is settled by the confirmation to it by Congress. *Maese v. Herman*, 183 U. S. 572, 22 Sup. Ct. Rep. 91, 46: 335

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I. Right, Nature, and Effect of Capture or Condemnation.

a. General Rules.

1. [Prize is a technical term to express a legal capture. *Miller v. The Resolution* (Fed. Ct. Ap.) 2 Dall. 1, 1: 263]

2. The right of capture acts on the proprietary interest of the thing captured, at the time of capture, and is not affected by the secret liens or private engagements of the parties. *The Carlos F. Roses*, 177 U. S. 655, 20 Sup. Ct. Rep. 803, 44: 929

3. A civil war, such as that waged between the Northern and Southern States, is properly conducted according to the humane regulations of public law as regards capture on the ocean. *Prize Cases*, 2 Black, 635, 17: 459

4. A legal capture of an enemy's vessel as a prize is the act of the belligerent sovereign, and not of the captor as an individual. *The Adventure*, 8 Cranch, 221, 3: 542

Cited in The Siren (The Siren v. United States) 7 Wall. 163, 19 L. ed. 134.

5. Civil officers cannot be employed by the President to make seizures under the neutrality act of 1794, since the power intrusted to the President is of a character manifestly intended to be exercised only when by the ordinary process or the exercise of civil authority the purposes of the law cannot be effected. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381

6. Certificates "containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known whether any forbidden or contraband goods be on board the same," were required by the Spanish treaty of 1795. *The Amiable Isabella*, 6 Wheat. 1, 5: 191
Cited in The Peterhoff, Blatchf. Prize Cas. 539, Fed. Cas. No. 11,024.—*The Springbok, Blatchf. Prize Cas.* 457, Fed. Cas. No. 13,264.

7. When a ship is captured as prize of war, she and her owners are bound by the flag and pass under which she sailed. *The Wm. Bagaley v. United States (The William Bagaley)* 5 Wall. 377, 18: 583

What constitutes capture.

8. In order to constitute a capture, some act should be done indicative of an intention to seize and to retain as prize; and it is sufficient if such intention is fairly to be inferred from the conduct of the captor. *The Grotius*, 9 Cranch, 368, 3: 762
Cited in Mangrove Prize Cases (United States v. The Mangrove) 188 U. S. 721, 47 L. ed. 666, 23 Sup. Ct. Rep. 343.

Private capture.

9. The right of private capture is statutory, and subject to legislative modification or destruction at any time. *The Thomas Gibbons*, 8 Cranch, 421, 3: 610
Cited in Hooper v. United States, 22 Ct. Cl. 428.—*Stewart v. United States*, 1 Ct. Cl. 119.

Forfeitures; remitting.

10. A forfeiture under the neutrality act of 1794 must be deemed to attach at the moment of the commission of the offense, and from that moment the title of the owner is completely divested, so that he can maintain no action for a subsequent seizure. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381
Cited in Caldwell v. United States, 8 How. 382, 12 L. ed. 1122.—*Henderson's Distilled Spirits (United States v. 100 Barrels Distilled Spirits)* 14 Wall. 56, 20 L. ed. 817.—*Averill v. Smith*, 17 Wall. 93, 21 L. ed. 616.—*United States v. Stowell*, 133 U. S. 17, 33 L. ed. 559, 10 Sup. Ct. Rep. 244.—*Clark v. Protection Ins. Co.* 1 Story, 134, Fed. Cas. No. 2,832.—*The Cloth Cases, Crabbe*, 354, Fed. Cas. No. 2,902.—*The Maria, Dendy*, 100, Fed. Cas. No. 9,075.—*Re Rosey*, 6 Ben. 510, Fed. Cas. No. 12,066.—*United States v. 56 Barrels of Whiskey*, 1 Abb. (U. S.) 100, Fed. Cas. No. 15,095.—*United States v. Mackoy*, 2 Dill. 306, Fed. Cas. No. 15,696.—*United States v. The Beindeer*, 2 Cliff. 68, Fed. Cas. No. 16,144.—*United States v. 64 Barrels of Distilled Spirits*, 3 Cliff. 315, Fed. Cas. No. 16,308.—*Heldritter v. Ellzabern Oil-Cloth Co.* 6 Fed. 141.—*Kriess v. Faron*, 118 Cal. 146, 50 Pac. 388.—*Mariatigul v. Louisiana Ins. Co.* 8 La. 69, 28 Am. Dec. 129.—*Kneeland v. Willard*, 59 Me. 447.—*Tracey v. Corse*, 55 N. Y. 149.

11. Forfeiture of a vessel under U. S. Rev. Stat. § 5283, U. S. Comp. Stat. 1901, p. 3599, on the ground that it was fitted out to cruise or commit hostilities against a foreign prince or state, does not depend upon the conviction of a person or persons for doing the criminal acts. *United States v. The Three Friends (The Three Friends)* 166 U. S. 1, 17 Sup. Ct. Rep. 495, 41: 837

12. The order of the Secretary of the Treasury remitting a forfeiture so far as it was incurred under the act of July 13, 1861, does not reach the case of the goods and vessels going from a rebel to a foreign or neutral port. The secretary has no power to remit forfeitures in any case of property captured as maritime prize of war. *The Grey Jacket v. United States (The Gray Jacket)* 5 Wall. 342, 18: 646

b. Right to Approach and Search.

Right to Detain for Search, see *infra*, I. c.

13. The right of visitation and search does not exist in time of peace. *The Antelope*, 10 Wheat. 66, 6: 268
The Marianna Flora, 11 Wheat. 1, 6: 405
Cited in Crapo v. Kelly, 16 Wall. 633, 21 L. ed. 439.

14. The exercise of the right of search is essential to the exercise of the right to capture enemy's goods, and articles going to the enemy which are contraband of war. It is a right growing out of, and ancillary to, the greater right of capture. *The Nereide*, 9 Cranch, 388, 3: 769

15. The right of visitation and search is a belligerent right which cannot be drawn in question, but must be conducted with as much regard to the safety of the vessel de-

tained as is consistent with a thorough examination. Detention after search is unjustifiable. *The Anna Maria*, 2 Wheat. 327, 4: 252
Cited in The Springbok, Blatchf. Prize Cas. 352, Fed. Cas. No. 13,262.

16. Ships of war sailing under the authority of their government, in time of peace, have a right to approach other vessels at sea for the purpose of ascertaining their real character, so far as the same can be done without the exercise of the right of visitation and search. *The Marianna Flora*, 11 Wheat. 1, 6: 405

17. No vessel is bound to await the approach of armed ships suspected of being piratical cruisers, but such vessel cannot lawfully prevent their approach by the use of force, upon the mere suspicion of danger. *The Marianna Flora*, 11 Wheat. 1, 6: 405

18-19. The captain of a merchant steamer is not privileged from search by the fact that he has a government mail on board. *The Peterhoff v. United States (The Peterhoff)*, 5 Wall. 28, 18: 564
Cited in The Panama, 176 U. S. 543, 44 L. ed. 580, 20 Sup. Ct. Rep. 480.

c. Right of Detention

As Excuse for Spoliation or Damage to Property Seized, see *infra*, 159.
 Duty of Officer Detaining, see *infra*, 168.
 See also *infra*, 155.

20. Detention after ineffectual search is unjustifiable. *The Anna Maria*, 2 Wheat. 327, 4: 252

21. To detain for examination is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets on the ocean. *The Eleanor*, 2 Wheat. 345, 4: 257

22. Where a vessel was never actually taken out of possession of her own officers, but was merely detained for search, it is not necessary to man the vessel with a prize master and crew; the captain of the detaining vessel has a right to detain the other by orders from his own quarter deck, and the officers of the other are bound to obey. *The Eleanor*, 2 Wheat. 345, 4: 257

23. The modern usages of war authorize the bringing of one of the principal officers of the vessel detained on board the belligerent vessel, with the papers, for examination. *The Eleanor*, 2 Wheat. 345, 4: 257

24. The right to detain for examination necessarily carries with it all the means essential to its exercise, among which may be sometimes included the assumption of disguise of a friend or an enemy, which is a lawful stratagem of war. *The Eleanor*, 2 Wheat. 345, 4: 257

25. If a vessel is pursued for the purpose of detaining her for examination, and is

stranded or lost, the pursuing vessel will be acquitted. *The Eleanor*, 2 Wheat. 345, 4: 257

26. If a capture itself was justifiable, the subsequent detention for adjudication has never been punished by damages. *The Marianna Flora*, 11 Wheat. 1, 6: 405

27. For probable cause to believe a vessel liable to recapture, it is lawful to take her for examination and adjudication of the courts. *Talbot v. Seeman*, 1 Cranch, 1, 2: 15

28. Probable cause justifying the bringing of a vessel in for the examination and adjudication of the courts exists where, during a war with France, an armed vessel is found commanded and manned by Frenchmen, and bearing no evidence of her neutral character. *Talbot v. Seeman*, 1 Cranch, 1, 2: 15
Cited in Stacey v. Emery, 97 U. S. 646, 24 L. ed. 1036—*The Panama*, 176 U. S. 546, 44 L. ed. 581, 20 Sup. Ct. Rep. 480.

d. Who May Capture.

Rights in Prize taken by Co-operation of Army and Navy, see *infra*, 234, 235.
 Burden of Proving Bona Fides of Transfer of Capturing Vessel, see Evidence, 838.
 See also *infra*, 199, 280.

29. Capture by a neutral is illegal, though made with the co-operation of a lawful privateer. *Talbot v. Janson*, 3 Dall. 133, 1: 540
Cited in Novlon v. Hallett, 16 Johns. R. 346

30. Individuals cannot practise hostilities in war against individuals of a hostile nation, without public authority. *Talbot v. Janson*, 3 Dall. 133, 1: 540

31. The President's instructions prohibiting the interruption of vessels coming from Great Britain, in consequence of the supposed repeal of the British orders in council, must have been actually known to the commanders of vessels of war at or before the seizure, to invalidate capture. *The Mary and Susan*, 1 Wheat. 46, 4: 32
Cited in M'Donald v. Elfe, 1 Nott. & McC. 505.

32. The fact that the commander of a privateer, at the time of a capture made by him, was an alien enemy, does not invalidate the capture. *The Mary & Susan*, 1 Wheat. 46, 4: 32

33. Customs officers have the right to make a seizure for violation of the neutrality act of 1794 by virtue of the authority, under the act of February 18, 1793, to seize any ship or goods where any breach of the law of the United States has been committed. *Gelston v. Hoyt*, 3 Wheat. 246, 4: 381

34. Any citizen may seize any property forfeited to the use of the government, to enforce the forfeiture; and if the government adopts the acts of the party, and pro-

ceeds to enforce the forfeiture, it is a sufficient confirmation of the seizure. *The Caledonian*, 4 Wheat. 100, 4: 523

35. A noncommissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government. *Carrington v. Merchants' Ins. Co.* 8 Pet. 495, 8: 1021

36. The capture of a vessel while dismantled and lying by the bank of a river, when made by the naval forces of the United States, although under the general control of the War Department, is not deemed to have been made by the Army instead of the Navy. *Oakes v. United States*, 174 U. S. 778, 19 Sup. Ct. Rep. 864, 43: 1169

e. Commission, Privateers, and Letters of Marque.

Liability of Owners of Letters of Marque, see *infra*, 159a.

Sale of Privateer as Violation of Neutrality, see *Neutrality*, 12.

Piracy by Privateers, see *Piracy*, 14, 15. See also *supra*, 32, 35; *infra*, 88.

37. If captors are duly commissioned, the vessel, if good prize, may be condemned to the captors. *The Amiable Isabella*, 6 Wheat. 1, 5: 191

38. Whether a capture from an enemy is made by a duly-commissioned captor or not is a question between the government and the captors, with which the claimant has nothing to do. *The Mary & Susan*, 1 Wheat. 46, 4: 82
The Dos Hermanos, 2 Wheat. 76, 4: 189
The Amiable Isabella, 6 Wheat. 1, 5: 191
Cited in The Ouachita, Blatchf. Prize Cas. 309, Fed. Cas. No. 10,620—*The Tropic Wind*, Blatchf. Prize Cas. 65, Fed. Cas. No. 14,186—*United States v. The Wren*, Fed. Cas. No. 16,768.

39. Collusive captures and violations of the nonintercourse laws, committed by a private armed vessel, are a breach of the conditions of the bond given by the owners under the prize act of June 26, 1812, requiring the owners, officers, and crew to observe the treaties and laws of the United States. *Greeley v. United States*, 8 Wheat. 256, 5: 611

Commissions generally.

Crew's Right in Capture Founded on, see *infra*, 224.

Right of Noncommissioned Captors to Prize or Prize Money, see *infra*, 226-229.

Right to Examine Validity of Commission, see *infra*, 279.

Secondary Evidence of, see *Evidence*, 956, 964.

Commission as Conclusive Evidence of Nationality, see *Evidence*, 2465.

Collusive Capture as Evidence that Commission was Fraudulently Obtained, see *Evidence*, 2589.

Sufficiency of Evidence to Show Employment by New Government, see *Evidence*, 2590.

See also *supra*, 35; *infra*, 133.

40. If a commission is fairly obtained, without imposition or fraud upon the officers of government, it is not void merely because the parties privately intended to violate, under its protection, the laws of their country. *The Experiment*, 8 Wheat. 261, 5: 612

41. A brigadier of an unknown republic, or a generalissimo of a province, has no power to issue a commission to authorize private or public vessels to make captures at sea. *United States v. Klintock*, 5 Wheat. 144, 5: 55

Cited in Ford v. Surget, 97 U. S. 617, 24 L. ed. 1025—*The Ambrose Light*, 25 Fed. 420.

42. The commission of a public ship of a foreign state, signed by the proper authorities, is conclusive evidence of her national character. The title is not examinable. The property must be taken to be duly acquired, and that fact cannot be controverted. *The Santissima Trinidad*, 7 Wheat. 283, 5: 454

Cited in Luther v. Borden, 7 How. 57, 12 L. ed. 605—*The Pizarro v. Matthias*, 10 N. Y. Legal Obs. 100, Fed. Cas. No. 11,199—*United States v. Bartlett*, 2 Ware, 24, Fed. Cas. No. 14,532.

43. Where a capture is made by captors acting under the commission of a foreign country, no nation neutral to them has authority to impugn such capture, unless for the purpose of vindicating its own violated neutrality. In such a case, if condemnation by a court of another nation is set up, it is peculiarly proper to show the jurisdiction of that court by an exemplification of the proceedings anterior to the sentence of condemnation. *La Nereyda*, 8 Wheat. 108, 5: 574

— Editorial note.

Commission of captors, when inquirable into. 4: 32

Prohibitions against taking.

44. Under the act of June 14, 1797, citizens, subjects, or inhabitants of the United States are strictly prohibited from taking any commission or letters of marque for arming any ship or vessel against Spain, from her revolting colonies. *The Bello Corrunes*, 6 Wheat. 152, 5: 229

45. The 4th article of the Spanish treaty of 1795, which prohibits citizens and subjects of either from taking commissions, etc., to cruise against the other, is confined to private armed vessels. *The Santissima Trinidad*, 7 Wheat. 283, 5: 454

Powers of President.

46. The President's instructions to privateers not to interrupt American vessels sailing from British ports with British merchandise, in consequence of the alleged repeal of British orders in council, was authorized by the prize act of 1812, chap. 107.

empowering the President to establish and order suitable instructions for the better governing and directing the conduct of private armed vessels commissioned under that act. *The Thomas Gibbons*, 8 Cranch, 421, 3: 610

47. The President had the power, under the prize act of 1812, chap. 107, to grant, annul, and revoke, at his pleasure, the commissions of privateers. *The Thomas Gibbons*, 8 Cranch, 421, 3: 610

48. The power of the President to make regulations concerning privateers, without statutory authorization, doubted. *The Thomas Gibbons*, 8 Cranch, 421, 3: 610
Cited in *The Parkhill*, Fed. Cas. No. 10,755a.

f. Where Capture May Be Made.

Effect of Place of Capture on Right to Share in Prize Money, see *infra*, 234, 235.

See also *supra*, 36; *infra*, 54, 55, 261.

49. A capture as prize of war may lawfully be made within the territorial limits of the United States, at any place below low-water mark. *The Joseph*, 8 Cranch, 451, 3: 621

50. American ships offending against our own laws may be seized upon the ocean; and foreign ships thus offending within our territorial jurisdiction may be pursued and seized upon the ocean, and brought into our ports for adjudication. *The Marianna Flora*, 11 Wheat. 1, 6: 405

51. The term "inland," as used in the act of June 30, 1864, § 7, in relation to captures on "inland" waters of the United States, applies to all waters of the United States upon which a naval force can go, other than bays and harbors on the sea coast. Rivers across which one can see are inland waters, although the tide ebbs and flows for miles above their mouths. *United States v. Steam Vessels of War* (Porter v. *United States*) 106 U. S. 607, 1 Sup. Ct. Rep. 539, 27: 286
Cited in *Oakes v. United States*, 30 Ct. Cl. 403.

52. A capture made within neutral waters is, as between enemies, deemed to all intents and purposes rightful, and its validity can be questioned only by the neutral sovereign. *The Anne*, 3 Wheat. 435, 4: 428
Cited in *The Florida* (*Collins v. The Florida*) 101 U. S. 42, 25 L. ed. 899—*The Parkhill*, Fed. Cas. No. 10,755a—*United States v. 100 Barrels of Cement*, 3 Am. L. Reg. N. S. 738, Fed. Cas. No. 15,945—*United States v. The Wren*, Fed. Cas. No. 16,768—*Perkins v. Rogers*, 35 Ind. 145, 9 Am. Rep. 639.

Editorial note.

Seizures beyond territorial jurisdiction. 6: 111

g. What Property Subject to Capture.

1. Generally.

What Property may be Confiscated, see Confiscation and Sequestration, III. b.

Exclusion of Courts from Applying Principles of Retaliation or Reciprocity, see Courts, 93.

What Vessels and Voyages Prohibited by Embargo and Nonintercourse Acts, see Embargo and Nonintercourse, III.

What Property Subject to Forfeiture under Nonintercourse Act, see Embargo and Nonintercourse, 35.

Property Illegally Traded in Between Enemies, see Embargo and Nonintercourse, 116-120.

Presumption as to Ownership of Vessel or Cargo, see Evidence, 843-851.

Reference of Question as to, see Reference, 42.

See also Embargo and Nonintercourse, 57.

53. Property unclaimed will be decreed as good prize. *The Adeline*, 9 Cranch, 244, 3: 719

Cited in *The Carlos F. Roses*, 177 U. S. 663, 44 L. ed. 932, 20 Sup. Ct. Rep. 803.

54. A capture of a steamer and her cargo of cotton, within the state of North Carolina, on the Roanoke river and about one hundred and thirty miles above its mouth, made by a naval force detached from two steamers, is an inland capture, though made upon a river which empties into the sea. Property thus captured cannot be regarded as maritime prize and subject to condemnation as such. *The Cotton Plant v. United States* (*The Cotton Plant*) 10 Wall. 577, 19: 983

Cited in *Oakes v. United States*, 30 Ct. Cl. 403—*Porter v. United States* (*United States v. Steam Vessels of War*) 106 U. S. 612, 27 L. ed. 288, 1 Sup. Ct. Rep. 539.

55. Naval stores captured at a naval station by a naval force of the United States, as the result of a naval engagement, are no less subject to condemnation as prize of war because taken on land, since, if the rights of captors were confined to the proceeds of ship and cargoes by the act of July 17, 1862 (12 Stat. at L. 600, chap. 204), § 2, providing for distribution among the captors of the proceeds "of all ships and vessels, and the goods taken on board them, which shall be adjudged good prize," such restriction was so far removed by the act of June 30, 1864 (13 Stat. at L. 306, chap. 174, U. S. Comp. Stat. 1901, p. 3127), which, in addition to the repeal of such section, provided that captors should be entitled to "the net proceeds of all property condemned as prize," as to permit such statute to extend to other property fairly coming within the accepted rules of prize. *United States v. Dewey* (*Manila Prize Cases*) 188 U. S. 254, 23 Sup. Ct. Rep. 415, 47: 463

56. Barges propelled by sweeps and by polling, and nonseagoing floating derricks or wrecking boats without means of propulsion, the property of private citizens, are not the subject of capture as prize of war. *United States v. Dewey* (*Manila Prize Cases*) 188 U. S. 254, 23 Sup. Ct. Rep. 415, 47: 463

Editorial note.

Prize taken in violation of neutrality.
4: 338

2. Neutral Vessels.

Vessels Containing Contraband Property,
see *infra*, I. g. 6.

Capture of Enemy's Property Found in
Neutral Vessels, see *infra*, 91, 118.

Forfeiture of Right to Protection from Cap-
ture, see *infra*, 142-144.

Presumption of Neutral Ownership, see Evi-
dence, 843.

See also *infra*, 86; Embargo and Noninter-
course, 122.

57. Vessels of war authorized to make captures may, in time of war, seize neutral vessels on the high seas, and bring them into the port of such belligerent to answer for any breach of neutrality; and for such captures they are not amenable before the tribunals of the neutral power, but only to the sovereign in whose service they acted. *United States v. Peters*, 3 Dall. 121,

1: 535

58. A neutral vessel is liable to condemnation if her owner lends his name to cover a fraud with respect to the cargo. *The Fortuna*, 3 Wheat. 236,

4: 379

Cited in United States v. 129 Packages, 2 Am. L. Reg. N. S. 423, Fed. Cas. No. 15,941—*United States v. 100 Barrels of Cement*, 3 Am. L. Reg. N. S. 746, Fed. Cas. No. 15,945.

59. Neutrals who place their vessels under belligerent control, and engage them in belligerent trade, or permit them to be sent with contraband cargoes, under cover of false destination, to neutral ports, while the real destination is to belligerent ports, render them liable to be seized and condemned as enemy's property. *The Stephen Hart v. United States (The Hart)* 3 Wall. 559,

18: 220

Cited in The Pedro, 175 U. S. 375, 44 L. ed. 203, 20 Sup. Ct. Rep. 138.

60. To legitimate the capture of a neutral vessel or neutral property on the high seas, a war must exist *de facto*, and the neutral must have knowledge or notice of the intention of one of the parties belligerent to blockade a port, city, or territory of the other. *Prize Cases*, 2 Black, 635,

17: 459

61. Where goods destined ultimately for a belligerent port are being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, the ship, though liable to seizure in order to confiscation of the goods, is not liable to condemnation as prize. *The Springbok v. United States (The Springbok)* 5 Wall. 1, 18: 480

62. A vessel having on board one musket, a few ounces of powder, and a few balls, has not sufficient capacity for offense to

warrant her capture as an "armed" vessel. *Murray v. The Charming Betsy*, 3 Cranch, 64, 2: 208
Cited in The Panama, 176 U. S. 547, 44 L. ed. 582, 20 Sup. Ct. Rep. 480.

63. An armed vessel, captured while attempting to repel the approach of an armed schooner of the United States, upon a mistaken supposition that she was a piratical cruiser, is not liable to confiscation as for a hostile aggression under the general law of nations. *The Marianna Flora*, 11 Wheat. 1,

6: 405

Cited in United States v. The Malek Adhel, 2 How. 235, 11 L. ed. 250—*The Ambrose Light*, 25 Fed. 415.

64. A steamer built in New York for a Spanish corporation, which, under permission of the flag officer in command of the blockade of a rebel port, puts into such port to supply itself with coal while going from New York to Havana, is not lawful prize of war or subject of capture, and its owner is entitled to fair indemnity for losses sustained by its seizure and employment by the United States. *United States v. The Nuestra Señora De Regla (The Nuestra Señora de Regla)* 17 Wall. 29,

21: 596

65-7. The treaty of 1795 between the United States and Spain declared that free ships made free goods; and a Spanish vessel was protected from capture, regardless of the character of her cargo. *The Pizarro*, 2 Wheat. 227,

4: 226

Cited in Pollard v. Kibbe, 14 Pet. 413, 10 L. ed. 519.

3. Enemy's Vessels.

Capture of Neutral Cargo Shipped on, see *infra*, 83.

Right to Restoration of, see *infra*, 242.

For Illegal Trading, see Embargo and Non-intercourse, 117, 117a, 119a, 120.

Presumption as to, see Evidence, 843, 844.

Concealment and Spoliation of Ship's Papers as Sufficient Evidence of Hostile Character, see Evidence, 2583, 2585, 2587.

See also *infra*, 86; Embargo and Nonintercourse, 79.

68. Merchant vessels of the enemy, carrying on innocent commercial enterprises at the time, or just prior to the time, when hostilities break out, are entitled to a liberal interpretation of a proclamation which lays down rules for the treatment of merchant vessels of the enemy. *The Buena Ventura v. United States (The Buena Ventura)* 175 U. S. 384, 20 Sup. Ct. Rep. 148,

44: 206

69. Merchant vessels which had loaded in a port of the United States, and sailed therefrom before the commencement of the war with Spain, and were still on their original voyage, not having reached any foreign port, were within the exemption from capture given by the President's proclamation, allowing such vessels in ports

of the United States until May 21, 1898, for loading their cargoes and departing from ports or places within the United States. *The Buena Ventura v. United States* (The Buena Ventura) 175 U. S. 384, 20 Sup. Ct. Rep. 148, 44: 206
Cited in The Styria v. Morgan, 186 U. S. 3, 46 L. ed. 1028, 22 Sup. Ct. Rep. 731.

70. A vessel owned by a Spanish corporation, having a Spanish registry, sailing under the Spanish flag and a Spanish license, and officered and manned by Spaniards, must be deemed a Spanish vessel for the purpose of capture as a prize, although British subjects were the legal owners of some, and the equitable owners of the rest, of the stock in the corporation, and intended to restore the vessel to British registry if war rendered the change desirable. *The Pedro*, 175 U. S. 354, 20 Sup. Ct. Rep. 138, 44: 195

71. A Spanish vessel sailing from Havana for Santiago on April 22, 1898, with no cargo except what was destined for the enemy's ports, was subject to capture, although her voyage began at Antwerp, Belgium, and she was under charter to proceed from Cuba to a port of the United States to get a cargo for a return voyage to Europe. *The Pedro*, 175 U. S. 354, 20 Sup. Ct. Rep. 138, 44: 195

72. A vessel owned by a Spanish corporation, officered and manned by Spanish subjects, sailing under Spanish registry and the Spanish flag, having a royal patent from the Crown of Spain, and proceeding to a Cuban port, was subject to capture on April 27, 1898, notwithstanding her intention, according to custom, to proceed from Cuba to the United States for a cargo to be taken to Europe. *The Guido*, 175 U. S. 382, 20 Sup. Ct. Rep. 152, 44: 206

73. Coast fishing vessels, with their implements, supplies, cargoes, and crews, when unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, and not employed for a warlike purpose or in such a way as to give aid or information to the enemy, are exempt from capture as prize of war by the general consent of the civilized nations of the world, and independently of any express treaty or other public act. *The Habana*, 175 U. S. 677, 20 Sup. Ct. Rep. 290, 44: 320
Cited in United States v. Dewey, 188 U. S. 254, 47 L. ed. 463, 23 Sup. Ct. Rep. 423—*The Paquete Habana* (United States v. The Paquete Habana) 189 U. S. 464, 47 L. ed. 903, 23 Sup. Ct. Rep. 593.

74. A vessel of 35 tons burden, with a crew of six men, engaged in coast fishing, and on which the fish caught by the crew from the sea, amounting to about 10,000 pounds, are kept alive on board, two thirds of which belong to the crew and the other third go to the owner of the vessel as compensation for her use,—is to be regarded as engaged in coast fishery, and not in a commercial adventure, within the rule of international law exempting coast fishing ves-

sels from capture as prize. *The Habana*, 175 U. S. 677, 20 Sup. Ct. Rep. 290, 44: 320

75. The exemption from capture by the President's proclamation of April 26, 1898, of "Spanish merchant vessels," while completing their voyage then begun, if they do not have on board any prohibited article or contraband of war, does not extend to a Spanish vessel owned by a subject of the enemy, when it has an armament fit for hostile use, and is intended in the event of war to be used as a war vessel, and which is destined to a port of the enemy, although the armament is one that the vessel, as a mail steamship, is required by contract with the Spanish government to carry. *The Panama*, 176 U. S. 535, 20 Sup. Ct. Rep. 480, 44: 577

Cited in The Carlos F. Roses, 177 U. S. 675, 44 L. ed. 937, 20 Sup. Ct. Rep. 803—*The Mangrove Prize Cases* (United States v. The Mangrove) 188 U. S. 720, 47 L. ed. 665, 23 Sup. Ct. Rep. 343—*The Mangrove Prize Cases* (United States v. The Mangrove) 188 U. S. 725, 47 L. ed. 667, 23 Sup. Ct. Rep. 343.

76. An enemy's war vessels, run ashore in battle and sunk by their own commanders, though left in such condition as not to be floated by any of the means ordinarily possessed by a naval force, cannot be said to have been "sunk or otherwise destroyed," within the meaning of the bounty provisions of U. S. Rev. Stat. § 4635 (U. S. Comp. Stat. 1901, p. 3134), where they are afterwards raised, reconstructed, and commissioned in the United States Navy, but are vessels captured and appropriated to the use of the United States, within the meaning of §§ 4624, 4625 (U. S. Comp. Stat. 1901, p. 3130), and are therefore lawful prize of war for the benefit of the captors. *United States v. Dewey* ((Manila Prize Cases) 188 U. S. 254, 23 Sup. Ct. Rep. 415, 47: 463

77. Appliances and outfit taken from an enemy's vessels of war sunk or otherwise destroyed in battle by naval vessels of the United States are not the subject of prize, but are included within the words "ship or vessel of war," as used in U. S. Rev. Stat. § 4635 (U. S. Comp. Stat. 1901, p. 3134), awarding a bounty for the destruction of an enemy's vessels. *United States v. Dewey* (Manila Prize Cases) 188 U. S. 254, 23 Sup. Ct. Rep. 415, 47: 463
Cited in The Infanta Maria Teresa (United States v. Taylor) 188 U. S. 284, 47 L. ed. 477, 23 Sup. Ct. Rep. 412—*The Frolic*, 148 Fed. 921.

78. An enemy's war vessel, raised and floated after a naval engagement, in an attempt by the United States, with the advice and concurrence of the captors, to save her, but which by reason of the injuries received in action was lost in an endeavor to reach the nearest practicable point at which she could be reconstructed, was not appropriated to the use of the United States so as to be lawful prize of war for the benefit of the captors, under U. S. Rev. Stat. § 4625

(U. S. Comp. Stat. 1901, p. 3130), but such captors are entitled to bounty under § 4635 (U. S. Comp. Stat. 1901, p. 3134), for her destruction in the engagement. *United States v. Taylor* (The Infanta Maria Teresa) 188 U. S. 283, 23 Sup. Ct. Rep. 412, 47: 477

79. The entire equipment of a vessel of war, including everything necessary to be used for the purposes of the vessel, is included in the words, "ship or vessel of war belonging to an enemy," as used in the provisions for bounty made by U. S. Rev. Stat. § 4635 (U. S. Comp. Stat. 1901, p. 3134), and is, therefore, not the subject of condemnation as prize of war. *United States v. Taylor* (The Infanta Maria Teresa) 188 U. S. 283, 23 Sup. Ct. Rep. 412, 47: 477

4. Neutral Property Generally.

Contraband Property, see *infra*, I. g, 6.
Mode of Determining whether Property is Hostile or Neutral, see *infra*, 104-108.
Effect of Capture, see *infra*, I. n.
Forfeiture of Right to Protection from Capture, see *infra*, 143.
Restitution of, see *infra*, 240, 246-256, 262.
Admiralty Jurisdiction, see Admiralty, 209a-213, 287-289.
For Breach of Blockade, see Blockade, 48, 58, 59.
Necessity of Proving Neutrality Beyond Reasonable Doubt, see Evidence, 2597.
What Property is Neutral, see Neutrality, III.
See also *supra*, 60.

80. Where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel built, armed, equipped and owned in the United States, such capture is illegal, and the property, if brought within our territorial limits, will be restored to the original owners. *La Conception*, 6 Wheat. 235, 5: 249
Cited in *Stewart v. United States*, 1 Ct. Cl. 117.

81. A neutral cargo is not liable to condemnation as prize of war merely because found on board an enemy's armed vessel. *The Atlanta*, 3 Wheat. 409, 4: 422
Cited in *The Galen*, 37 Ct. Cl. 94—*The Sea Nymph*, 36 Ct. Cl. 375—*The Nancy*, 27 Ct. Cl. 102.

82. Where it is clearly shown that property is really neutral, its being covered with hostile habiliments for the purpose of evasion will not subject it to condemnation. *The Frances*, 9 Cranch, 183, 3: 698

83. A cargo shipped by neutral commission merchants on an enemy vessel, to an enemy port, though on a voyage commenced before war was declared, where the invoices state that the goods were shipped "to order, for account and risk, and by order of the parties noted below," who are, in addition to the consignor, the owners of the vessel and other subjects of the enemy, while

the bills of lading state that the goods are taken "for account of whom it may concern," and there is no charter party, will be deemed to be the property of the consignees during the voyage, so as to be subject to capture,—especially when no claim to any part of the cargo is made by the consignor. *The Carlos F. Roses*, 177 U. S. 655, 20 Sup. Ct. Rep. 803, 44: 929

84. Where enemy's property is fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former. *The St. Nicholas*, 1 Wheat. 417, 4: 125
Cited in *The Fortuna*, 3 Wheat. 238, 4 L. ed.

379—*The Venus*, 5 Wheat. 130, 5 L. ed. 51—*Carrington v. Merchants' Ins. Co.* 8 Pet. 522, 8 L. ed. 1031—*The Betsy*, 2 Gall. 385, Fed. Cas. No. 1,364—*The Lilla*, 2 Sprague, 182, Fed. Cas. No. 8,348—*United States v. The Lilla*, 2 Cliff. 183, Fed. Cas. No. 15,600—*United States v. 100 Barrels of Cement*, 3 Am. L. Reg. 746, Fed. Cas. No. 15,945—*Westcot v. Bradford*, 4 Wash. C. C. 497, Fed. Cas. No. 17,429.

85. The property which a neutral takes with him from a belligerent country, on the breaking out of war, is not liable to condemnation for breach of blockade by the vessel in which he sails, he being ignorant, when he sailed, of any intent on the part of the vessel to break the blockade. *United States v. Guillem*, 11 How. 47, 13: 599
Cited in *The Hiawatha*, Blatchf. Prize Cas. 20, Fed. Cas. No. 6,451—*United States v. 100 Barrels of Cement*, 3 Am. L. Reg. N. S. 789, Fed. Cas. No. 15,945.

86. After the capture and military occupation of New Orleans by the Federal forces, vessels and cargoes belonging to citizens of New Orleans, or to neutrals residing there, not affected by any attempts to run the blockade, or by any act of hostility against the United States, were protected, and were not liable to capture as prize of war. *United States v. Cooke* (The Venice) 2 Wall. 258, 17: 866

Cited in *Cutner v. United States*, 6 Ct. Cl. 419—*Cartwright v. United States*, 8 Ct. Cl. 468—*Goodman v. United States*, 14 Ct. Cl. 568—*The Balgorry* (The Balgorry v. United States) 2 Wall. 481, 17 L. ed. 881—*The Ouachita Cotton* (Withenbury v. United States) 6 Wall. 531, 18 L. ed. 939—*The Grapeshot* (The Grapeshot v. Wallerstein) 9 Wall. 131, 19 L. ed. 653—*United States v. Padelford*, 9 Wall. 541, 19 L. ed. 791—*New Orleans Mail Co. v. Flanders* (New Orleans & B. S. Mail Co. v. Fernandez) 12 Wall. 134, 20 L. ed. 250—*Planters' Bank v. Union Bank*, 16 Wall. 495, 21 L. ed. 478—*Hamilton v. Dillin*, 21 Wall. 94, 22 L. ed. 538—*Clark v. United States*, 99 U. S. 496, 25 L. ed. 482—*Dow v. Johnson*, 100 U. S. 181, 25 L. ed. 640—*Britton v. Butler*, 9 Blatchf. 465, Fed. Cas. No. 1,903—*The David E. Wolf*, Fed. Cas. No. 3,594—*Williams v. Mobile Sav. Bank*, 2 Woods, 503, Fed. Cas. No. 17,729—*Williams v. New England Mut. M. Ins. Co.* 8 Cliff. 250, Fed. Cas. No. 17,731—*Bets v. Illinois C. R. Co.* 52 La. Ann. 921, 26 So. 644—*Graham v. Merrill*, 5 Coldw. 627—*Taylor v. Nashville & C. R. Co.* 6 Coldw. 650, 98 Am. Dec. 474—*Anhert v. Zaun*, 40 Wis. 630.

5. Enemy's Property Generally.

Restitution of, see *infra*, 260-262.

Property Engaged in Unlawful Trading with Enemy, see *Embargo and Nonintercourse*, 116-120.

Presumption of Enemy's Ownership, see *Evidence*, 848-851.

Concealment or Spoliation of Ship's Papers as Sufficient Evidence of Hostile Character, see *Evidence*, 2582-2587.

Sufficiency of Evidence to Overcome Document Showing Enemy's Interest in Captured Cargo, see *Evidence*, 2588.

Sufficiency of Evidence of Hostile Ownership, see *Evidence*, 2599, 2600.

See also *supra*, 84, 86; *Aliens*, 3; *Sale*, 41.

87. All property engaged in the commerce of the hostile power is legitimate prize, without regard to the domicile of the owner. *Prize Cases*, 2 Black, 635, 17: 459 *Cited in Mitchell v. United States*, 21 Wall. 351, 22 L. ed. 587—*The Benito Estenger*, 176 U. S. 571, 44 L. ed. 593, 20 Sup. Ct. Rep. 489—*The Sally Magee*, *Blatchf. Prize Cas.* 384, *Fed. Cas. No. 12,260*—*United States v. Athens Armory*, 2 Abb. (U. S.) 141, *Fed. Cas. No. 14,473*—*Kershaw v. Kelsey*, 100 Mass. 566, 1 Am. Rep. 142, 97 Am. Dec. 124—*Hedges v. Price*, 2 W. Va. 281, 94 Am. Dec. 507.

88. British merchandise on board an American vessel was protected from capture without any exception on account of British proprietary interests by the President's instructions to privateers, issued under the authority of the prize act of 1812, chap. 107, not to interrupt American vessels sailing from British ports with British merchandise, in consequence of the alleged repeal of the British orders in council. *The Thomas Gibbons*, 8 Cranch, 421, 3: 610

89. Enemy property purchased by a British subject resident at New Orleans, during the late civil war, remained enemy property after such purchase. *United States v. Cooke (The Venice)* 2 Wall. 258, 17: 866

90. The only qualification of the rule that property from enemy territory is enemy property is that where, upon the breaking out of hostilities, or as soon after as possible, the owner escapes with his property, the property in such cases is exempt from the liability which would otherwise attend it. *The Gray Jacket v. United States (The Gray Jacket)* 5 Wall. 342, 18: 646

91. The goods of an enemy, found in the vessel of a friend, are prize of war; and the goods of a friend, found in the vessel of an enemy, are to be restored. *The Nereide*, 9 Cranch, 388, 3: 769 *Cited in The Atalanta*, 3 Wheat. 415, 4 L. ed. 423.

92. Goods shipped by an alien enemy on his own account and risk to an American citizen, and captured before delivery to the consignee, are good prize. *The Frances*, 8 Cranch, 358, 3: 589

Property on land generally.

Effect of Capture on Land, see *infra*, 202-204.

93. Private property on land, though the capture of it might be lawful, is not the subject of maritime prize. *United States v. Alexander (Mrs. Alexander's Cotton)* 2 Wall. 404, 17: 915 *Cited in Cook v. United States*, 9 Ct. Cl. 290 —*Winchester v. United States*, 14 Ct. Cl. 48—*Manilla Prize Cases (United States v. Dewey)* 188 U. S. 274, 47 L. ed. 473, 23 Sup. Ct. Rep. 415.

Property in enemy's territory.

94. For the purpose of capture, property found in enemy's territory is enemy's property, without regard to the status of the owner. *The Wm. Bagaley v. United States (The William Bagaley)* 5 Wall. 377, 18: 583

The Cheshire v. United States (The Cheshire) 3 Wall. 231, 18: 175 *Lamar v. Browne*, 92 U. S. 187, 23: 650 *Cited in Gooch v. United States*, 15 Ct. Cl. 287—*Webb v. United States*, 20 Ct. Cl. 490 —*Briggs v. United States*, 25 Ct. Cl. 137 —*Young v. United States*, 97 U. S. 58, 24 L. ed. 997—*The Paquete Habana (United States v. The Paquete Habana)* 189 U. S. 465, 47 L. ed. 903, 23 Sup. Ct. Rep. 593.

95. During the war of the rebellion, cotton found within the Confederate territory, though the private property of noncombatants, was subject to capture. *Young v. United States*, 97 U. S. 39, 24: 992 *United States v. Alexander (Mrs. Alexander's Cotton)* 2 Wall. 404, 17: 915 *Haycraft v. United States*, 22 Wall. 81, 22: 738 *Lamar v. Browne*, 92 U. S. 187, 23: 650 *United States v. Padelford*, 9 Wall. 531, 19: 788

Cited in Cote v. United States, 3 Ct. Cl. 68 —*Witkowski v. United States*, 7 Ct. Cl. 398 —*Moore v. United States*, 10 Ct. Cl. 380—*Erwin v. United States*, 13 Ct. Cl. 58—*Gilmer v. United States*, 14 Ct. Cl. 186—*Gooch v. United States*, 15 Ct. Cl. 288—*Briggs v. United States*, 25 Ct. Cl. 137—*Stovall v. United States*, 26 Ct. Cl. 240—*Vance v. United States*, 30 Ct. Cl. 268—*United States v. Padelford*, 9 Wall. 540, 19 L. ed. 791—*Haycraft v. United States*, 22 Wall. 93, 22 L. ed. 741—*Lamar v. Browne*, 92 U. S. 194, 23 L. ed. 653—*Young v. United States*, 97 U. S. 58, 24 L. ed. 997—*Ford v. Surget*, 97 U. S. 605, 24 L. ed. 1021—*Kirk v. Lynd*, 106 U. S. 318, 27 L. ed. 194, 1 Sup. Ct. Rep. 296—*Stafford v. Mercer*, 42 Ga. 561—*Ford v. Surget*, 46 Miss. 152—*Ford v. Surget*, 36 Phila. Leg. Int. 29—*Hamilton v. Kennedy*, 3 Baxt. 482.

96. Property of persons domiciled or residing within the enemy's lines is enemy's property and liable to capture as prize of war, without regard to their sentiments of loyalty or disloyalty to the United States government. *United States v. Farragut*, 22 Wall. 406, 22: 879

97. Personal property, if suffered to remain in the hostile country after war breaks out, becomes impressed with the national character of the belligerent where it

is situated. *The Wm. Bagaley v. United States (The William Bagaley)* 5 Wall. 377, 18: 583

97a. After a declaration of war a citizen of one belligerent cannot lawfully send a vessel to the enemy's country, to bring away his property. *The Rapid*, 8 Cranch, 155, 3: 520

Distinguished in Amory v. McGregor, 15 Johns. 85.

97b. The right of an American citizen, on the breaking out of hostilities, to withdraw his property, purchased before the war, from an enemy's country, not denied. *The St. Lawrence*, 8 Cranch, 434, 3: 615
Cited in Amory v. McGregor, 15 Johns. 36.

97c. Eleven months after the declaration of war is too late for citizens to withdraw their property from the enemy's country, when they have a right to do so. It must be done within a reasonable time. *The St. Lawrence*, 9 Cranch, 120, 3: 676
Distinguished in Amory v. McGregor, 15 Johns. 36.

98. The produce of an enemy's colony is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or whatever may be his place of residence. *Bentzon v. Boyle*, 9 Cranch, 191, 3: 701
Cited in New Orleans v. New York Mail S. S. Co. 20 Wall. 397, 22 L. ed. 359.

99. An island in the temporary occupation of the enemy is to be considered as an enemy's colony, and its produce enemy's property. *Bentzon v. Boyle*, 9 Cranch, 191, 3: 701

Distinguished in The Circassian (Hunter v. United States) 2 Wall. 158, 17 L. ed. 802.
Cited in United States v. Huckabee, 16 Wall. 434, 21 L. ed. 464—*Dooley v. United States*, 182 U. S. 231, 45 L. ed. 1081, 21 Sup. Ct. Rep. 762—*Downes v. Bidwell*, 182 U. S. 303, 45 L. ed. 1113, 21 Sup. Ct. Rep. 770—*The Sarah Starr, Blatchf. Prize Cas.* 75, Fed. Cas. No. 12,352—*Tait v. New York L. Ins. Co.* 1 Filipp. 330, Fed. Cas. No. 13,726—*United States v. One Hundred Barrels of Cement*, Fed. Cas. No. 15,945, 3 Am. L. Reg. N. S. 739—*United States v. Reiter*, 4 Am. L. Reg. N. S. 558, Fed. Cas. No. 16,146—*Jeffries v. State*, 39 Ala. 659—*Georgia R. & Bkg. Co. v. Eddleman*, 38 Ga. 477—*Kershaw v. Kelsey*, 100 Mass. 566, 1 Am. Rep. 142, 97 Am. Dec. 124—*Rutledge v. Fogg*, 3 Coldw. 560, 91 Am. Dec. 299.

100. If property come from enemy territory, it bears the impress of enemy property; and, although owned by a loyal citizen of the country of the captors, it is as liable to condemnation as if owned by a citizen or subject of the hostile country. The liability of the property is irrespective of the *status domicilii*, guilt or innocence, of the owner. *The Grey Jacket v. United States (The Gray Jacket)* 5 Wall. 342, 18: 646

101. Goods purchased by order in the enemy's country and partly paid for when consigned to the agent of the vendors, remain, during transit, the property of, and

at the risk of, the enemy shippers. *The St. Joze Indiana*, 1 Wheat. 208, 4: 73
Cited in The Amy Warwick, 2 Sprague, 153, Fed. Cas. No. 343—*The Francis*, 2 Gall. 392, Fed. Cas. No. 5,036.

102. Products of islands of Louisiana under the military control of our authorities are not to be treated as enemy property. *United States v. Weed*, 5 Wall. 62, 18: 531

Domicil of owner generally.

See also *supra*, 87, 98.

103. The property of a house of trade established in an enemy's country is condemnable as prize, whatever may be the domicil of the partners. *The Friendschaft*, 4 Wheat. 105, 4: 525
The Cheshire v. United States (The Cheshire) 3 Wall. 231, 18: 175
The Frances, 8 Cranch, 363, 3: 590
The Antonia Johanna, 1 Wheat. 159, 4: 60

Cited in The Cheshire (The Cheshire v. United States) 3 Wall. 233, 18 L. ed. 176—*The Pedro*, 175 U. S. 368, 44 L. ed. 200, 20 Sup. Ct. Rep. 138—*Brown v. Hiatt*, 1 Dill. 384, Fed. Cas. No. 2,011—*The Commercen*, Fed. Cas. No. 3,055—*United States v. 100 Barrels of Cement*, 3 Am. L. Reg. N. S. 749, Fed. Cas. No. 15,945—*Perkins v. Rogers*, 35 Ind. 160, 9 Am. Rep. 639.

104. The commercial domicil of a merchant at the time of the capture of his goods determines the character of those goods, as hostile or neutral. *The Frances*, 8 Cranch, 363, 3: 590
[*The Chester v. The Experiment (Fed. Ct. Ap.)* 2 Dall. 41, 1: 280]
The Venus, 8 Cranch, 253, 3: 553

104a. If a citizen of the United States establishes his domicil in a foreign country, between which and the United States hostilities afterwards break out, any property shipped by such citizen before knowledge of the war, and captured by an American cruiser after the declaration of war, must be condemned as lawful prize. *The Venus*, 8 Cranch, 253, 3: 553
Cited in The Parkhill, Fed. Cas. No. 10,733a—*Micou v. Benjamin*, 26 La. Ann. 723.

105. A firm doing business in the enemy's territory, where the active member of the firm resided, must be ruled by his status, in reference to the property of the firm under his control in the enemy's country. *Prize Cases*, 2 Black, 635, 17: 459

106. Where a commercial firm is domiciled in enemy country, its property so domiciled is lawful prize of war, although a member of the firm resides elsewhere. *The Wm. Bagaley v. United States (The William Bagaley)* 5 Wall. 377, 18: 583

107. Individual members of a commercial firm domiciled in the enemy's country cannot, where the property so domiciled is captured as prize of war, defeat the rights of the captors by proving that their own domicil was that of a friend or that they had no connection with the illegal

voyage. The Wm. Bagaley v. United States (The William Bagaley) 5 Wall. 377,

18: 583

108. The share of a partner in a neutral house, where his own domicile is in a hostile country, is subject to confiscation *jure belli*. The Antonia Johanna, 1 Wheat. 159, 4: 60

109. [A settled resident of a place has, as a trader, all the privileges, and is subject to all the inconveniences, of his residence, no matter to whom his natural allegiance is due. The Chester v. The Experiment (Fed. Ct. Ap.) 2 Dall. 41, 1: 280] Cited in The Hiawatha, Blatchf. Prize Cas. 14, Fed. Cas. No. 6,451—Rogers v. The Amado, Newberry, Adm. 408, Fed. Cas. No. 12,005.

— Editorial notes.

Domicil of owner determines character of goods. 3: 531; 4: 32

What constitutes domicil generally.

See also War, 17.

110. Mere declarations of intention to abandon a domicil are insufficient, when contradicted or rendered doubtful by a continuance of residence, to change a party's domicil acquired by residence, so as to exempt property shipped by him from capture. The Venus, 8 Cranch, 253, 3: 553 Cited in Plant v. Harrison, 36 Misc. 660, 74 N. Y. Supp. 411.

111. All the circumstances of the case must be consulted in the determination of the question whether the intention to alter domicil has been sufficiently expressed by the owner and shipper of property, so as to exempt it from capture. The Venus, 8 Cranch, 253, 3: 553 Cited in Charles Green's Son v. Salas, 31 Fed. 112—Re High, 2 Dougl. (Mich.) 524.

112. If it appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence of a few days. The Venus, 8 Cranch, 253, 3: 553

Cited in United States v. Chong Sam, 47 Fed. 885—Marks v. Marks, 75 Fed. 327—Gravillon v. Richard, 13 La. 298, 33 Am. Dec. 563—Ex parte Blumer, 27 Tex. 738.

What constitutes foreign domicil.

113. A naturalized citizen who, in time of peace, went to his native country with intention of returning to his adopted country, and in fact returned after closing up a complicated business, about a year after his first knowledge of the existence of a war between the two countries, without engaging in any new commercial enterprises gained a domicil in his native country, so that his goods, shipped during the war, were, if captured, liable to condemnation. The Frances, 8 Cranch, 335, 3: 581

114. Foreign domicil ceases the moment a party puts himself in motion *bona fide* to quit the country. *sine animo revertendi*. The Venus, 8 Cranch, 253, 3: 553 Cited in United States v. The F. W. Johnson,

Fed. Cas. No. 15,179—Re Walker, 1 Nat. Bankr. Reg. 388, Fed. Cas. No. 17,061.

115. Abandonment of foreign domicil does not take place until the intent to return is accompanied by some *bona fide* motion to quit the country, *sine animo revertendi*. The Frances, 8 Cranch, 363, 3: 590 Cited in Vischer v. Vischer, 12 Barb. 643.

116. A merchant having a fixed residence and carrying on business at the place of his birth does not acquire a foreign commercial character by occasional visits to a foreign country. The Nereide, 9 Cranch, 388, 3: 769 Cited in Cadwalader v. Howell, 18 N. J. L. 144.

Recapture.

Admiralty Jurisdiction, see Admiralty, 291.

117. The property of persons domiciled in France, whatever their citizenship, having been captured by the enemy, is good prize if recaptured after being twenty-four hours in possession of the enemy. That being the rule adopted in the French tribunals, and the rule of reciprocity having been established by our government, it will be applied to the claim of owners, domiciled in France, of an American vessel captured by the British, and recaptured by Americans and brought into our courts. The Adeline, 9 Cranch, 244, 3: 719

Neutral bottoms.

See also supra, 91; infra, 179.

118. A stipulation in the treaty of 1795 with Spain that neutral bottoms shall make neutral goods does not, by implication, require that enemy ships shall make enemy goods. The Nereide, 9 Cranch, 388, 3: 769 Cited in United States v. The El Telegrafo, Newberry, Adm. 386, Fed. Cas. No. 15,049.

6. Contraband Property.

Liability to Capture after Deposit, see infra, 149.

Duty of Captors where Existence of Contraband Suspected, see infra, 172.

See also supra, 59, 75; Neutrality, 32, 35.

119. Contraband merchandise is liable to capture when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The Peterhoff v. United States (The Peterhoff) 5 Wall. 28, 18: 564

120. Contraband articles contaminate the whole cargo belonging to the same owners; and such part of it as belongs to the same owner as the contraband portion must share the same fate. The Peterhoff v. United States (The Peterhoff) 5 Wall. 28, 18: 564

121. The portion of a cargo, not contraband, belonging to a Union citizen escaped from a rebel state and living in a neutral port, and destined to him at that port, is not liable to condemnation. The Peterhoff

v. United States (The Peterhoff) 5 Wall. 28, 18: 564

122. The carriage of contraband goods to the enemy subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty, except for some co-operation in a meditated fraud upon the belligerents, by covering up the voyage under false papers and with a false destination. Carrington v. Merchants' Ins. Co. 8 Pet. 495, 8: 1021
Cited in The Bermuda (Haigh v. United States) 3 Wall. 556, 18 L. ed. 206—The Springbok (The Springbok v. United States) 5 Wall. 26, 18 L. ed. 486—The Lucy, 37 Ct. Cl. 100—The Ralph, 39 Ct. Cl. 208—The Lucy, 39 Ct. Cl. 222—The Peterhoff, Blatchf. Prize Cas. 549, Fed. Cas. No. 11,024—The Springbok, Blatchf. Prize Cas. 460, Fed. Cas. No. 13,264—Szymanski v. Plassan, 20 La. Ann. 92, 96 Am. Dec. 382.

123. The cargo having all been consigned to enemies, and most of it contraband, must share the fate of the ship when that is condemned. Haigh v. United States (The Bermuda) 3 Wall. 514, 18: 200

124. The residue of a cargo, portions of which are contraband of war, and all belonging to the same owners, must share the fate of the contraband when seized on its destination to a neutral port to be transhipped to a blockaded port. The Springbok v. United States (The Springbok) 5 Wall. 1, 18: 480

125. Where the vessel and her outward cargo were neutral property destined to neutral consignees, and the cargo had been actually delivered as consigned, although the proof tended to show that a portion of this cargo consisted of Confederate uniform cloth, but there was none showing destination to enemy territory, or immediate enemy use, there was nothing in the character of the vessel or of the outward cargo which warrants condemnation. United States v. The Science (The Science) 5 Wall. 178, 18: 625

126. A vessel is liable to condemnation for the conveyance of contraband goods destined to a belligerent port, under circumstances of fraud and bad faith such as the fact that such contraband articles were fitted for immediate use of a rebel government; deceptive bills of lading requiring delivery at a neutral point with no intention to deliver there; the appointment of an enemy as master; and the complete surrender of such vessel to the use and control of such enemies without pretense of ignorance of her destined and actual employment, by the alleged owner. Haigh v. United States (The Bermuda) 3 Wall. 514, 18: 200

[Darby v. The Erstern (Fed. Ct. Ap.) 2 Dall. 34, 1: 277]

127. Formerly, conveyance of contraband subjected the ship to forfeiture; but in more modern times, that consequence, in ordinary cases, attaches only to the freight

of the contraband merchandise. The Peterhoff v. United States (The Peterhoff) 5 Wall. 28, 18: 564

Editorial note.

What articles are contraband of war. 18: 201

7. Property of Subject of Capturing Nation.

See also *supra*, 121.

128. An American vessel sailing homeward with a cargo, which, on hearing that war had broken out between Great Britain and the United States, alters her course for England, is captured by the British, carried into Ireland, libeled and acquitted, then sells her cargo, purchases a return cargo in Liverpool, and sails for the United States, is subject to capture by a United States privateer. The Alexander, 8 Cranch, 169, 3: 524

Cited in The Joseph, 8 Cranch, 454, 3 L. ed. 622—The Diana, 2 Gall. 98, Fed. Cas. No. 8,876.

129. Goods purchased by British merchants before the war between the United States and Great Britain, and shipped upon his order and at his risk to an American citizen, are vested in him, and are not liable to condemnation as British property, although the vessel sailed from England after the declaration of war was known there. The Merrimack, 8 Cranch, 317, 3: 575

130. A citizen who embarks his property in shares of a ship is bound by the character of the ship after due notice and reasonable opportunity to dispose of his shares. The Wm. Bagaley v. United States (The William Bagaley) 5 Wall. 377, 18: 583

h. Grounds for Capture or Condemnation.

Probable Cause for Capture, see *infra*, I. l. Breach of Blockade, see Blockade, IX. c. Under Nonintercourse Act, see Embargo and Nonintercourse, IV.

Illegal Trading with Enemy, see Embargo and Nonintercourse, 116-120.

Seizure or Condemnation for Violation of Slave Trade Act, see Slaves, VI. b.

See also *supra*, 58, 59, 61; International Law, 4.

131. The want of a sea-letter or passport or such certificates as are described in the 17th article of the Spanish treaty of 1795, by the express provisions of that treaty only authorizes capture and sending in for adjudication and condemnation, when the proprietary interest in the ship is not proved by other equivalent testimony. The Pizarro, 2 Wheat. 227, 4: 226
Cited in The Hazard, 39 Ct. Cl. 380.

132. Sailing with the intention to further the views of the enemy is sufficient to condemn the property, although that intention

be frustrated by capture. The Aurora, 8 Cranch, 203, 3: 536

133. The assertion of a false claim, in whole or in part, by an agent, or in connivance with the real owner, is a substantive cause of condemnation. The Amiable Isabella, 6 Wheat. 1, 5: 191
Cited in United States v. 129 Packages, 2 Am. L. Reg. N. S. 423, Fed. Cas. No. 15,941.

134. A colorable transfer of a ship from a belligerent to a neutral is in itself ground for condemnation as prize. The Benito Estenger, 176 U. S. 563, 20 Sup. Ct. Rep. 489, 44: 592

135. Forfeiture to the Federal government occurs under the act of Congress of December 31, 1792, where a vessel sails under a register obtained by false swearing as to the domicile of the owners. The Venus, 8 Cranch, 253, 3: 553
Cited in The Gefa, 1 Mason, 90, Fed. Cas. No. 5,290—The Rover, 2 Gall. 242, Fed. Cas. No. 12,091.

Using enemy's license.

When Liability to Capture Terminated, see *infra*, 150.

As Ground for Confiscation, see Confiscation and Sequestration, 2.

Presumption, see Evidence, 837.

Imputing Agent's Knowledge of Use to Principal, see Notice, 24.

136. The acceptance and use of an enemy's license, on a voyage prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation. The Aurora, 8 Cranch, 203, 3: 536

The Julia, 8 Cranch, 181, 3: 528

The Hiram, 8 Cranch, 444, 3: 619

Distinguished in The Adula, 176 U. S. 379, 44 L. ed. 513, 20 Sup. Ct. Rep. 432—Hayward v. Blake, 12 Mass. 179.

Cited in The Hiram, 8 Cranch, 449, 3 L. ed. 620—Coppell v. Hall, 7 Wall. 558, 19 L. ed. 248—The Alliance, Blatchf. Prize Cas. 264, Fed. Cas. No. 245—Craig v. United States Ins. Co. Pet. C. C. 416, Fed. Cas. No. 3,340—The Gondar, Blatchf. Prize Cas. 268, Fed. Cas. No. 5,526—The Liverpool Packet, 1 Gall. 522, Fed. Cas. No. 8,406—Maisonnable v. Keating, 2 Gall. 336, Fed. Cas. No. 8,978—Rogers v. The Amado, Newberry, Adm. 404, Fed. Cas. No. 12,005—The Sarah Starr, Blatchf. Prize Cas. 85, Fed. Cas. No. 12,352—Kershaw v. Kelsey, 100 Mass. 367, 1 Am. Rep. 142, 97 Am. Dec. 124—Colquhoun v. New York Firemen Ins. Co. 15 Johns. 353.

137. Sailing under the enemy's license with a cargo of provisions to the port of a neutral, who is the ally of the enemy in his war with another power, is such a furtherance of the interests of the enemy as subjects ship and cargo to confiscation as prize of war. The Hiram, 8 Cranch, 444, 3: 619

Cited in Payson v. Coolidge, 2 Gall. 235, Fed. Cas. No. 10,860—Hayward v. Blake, 12 Mass. 179.

138. The sailing under the enemy's license constitutes, of itself, an act of illegality. U. S. Dig.—297

which subjects the property to confiscation without regard to the object of the voyage or the port of destination. The Ariadne, 2 Wheat. 143, 4: 205

Cited in The Pedro, 175 U. S. 368, 44 L. ed. 200, 20 Sup. Ct. Rep. 138—The Adula, 176 U. S. 379, 44 L. ed. 513, 20 Sup. Ct. Rep. 432—The Alliance, Blatchf. Prize Cas. 364, Fed. Cas. No. 245—Craig v. United States Ins. Co. Pet. C. C. 417, Fed. Cas. No. 3,340—The Gondar, Blatchf. Prize Cas. 268, Fed. Cas. No. 5,526—Rogers v. The Amado, Newberry, Adm. 405, Fed. Cas. No. 12,005—The Sarah Starr, Blatchf. Prize Cas. 85, Fed. Cas. No. 12,352—Hayward v. Blake, 12 Mass. 179—Perkins v. New England M. Ins. Co. 12 Mass. 220—Colquhoun v. New York Firemen Ins. Co. 15 Johns. 353.

139. It is not necessary, in order to subject vessel and cargo to condemnation because of the acceptance and use of an enemy's license on a voyage prosecuted in furtherance of the enemy's avowed objects, that the person granting the license should be authorized to grant it, providing the person receiving it takes it with the expectation that it will protect his property from the enemy. The Aurora, 8 Cranch, 203, 3: 536

i. Exemption from Capture.

Privilege from Search by Reason of Having Mail on Board, see *supra*, 18.

Consul's Power to Exempt Vessel from Capture, see Diplomatic and Consular Officers, 11.

Exemption from Forfeiture under Nonintercourse Act, see Embargo and Nonintercourse, 50, 61.

Judicial Notice as to Coast Fishing Boats, see Evidence, 60.

140. A mail steamship carrying mail of the United States is not for that reason exempt from capture as an enemy vessel. The Panama, 176 U. S. 535, 20 Sup. Ct. Rep. 480, 44: 577

j. Forfeiture of Rights.

By Collusive Capture, see *infra*, 200.
See also *infra*, 181, 183, 274.

141. Irregularities on the part of captors, originating from mere mistake, will not forfeit their right. The Anne, 3 Wheat. 435, 4: 428

Cited in The Parkhill, Fed. Cas. No. 10,755a.

142. If the captured vessel commences the hostilities, she forfeits all right to neutral protection, and no redress can be sought from the neutral sovereign. The Anne, 3 Wheat. 435, 4: 428

143. [Although neutral property cannot be captured, infringement of neutrality destroys a neutral's protection. Darby v. The Erstern (Fed. Ct. App.) 2 Dall. 34, 1: 277]

144. A vessel is subject to condemnation as a prize if she acts in such a manner as to forfeit the protection to which she is

entitled by her neutral character. *Maley v. Shattuck*, 3 Cranch, 458, 2: 498
Cited in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 432, 12 L. ed. 503—
The Baigorry (The Baigorry v. United States) 2 Wall. 481, 17 L. ed. 881—*Pay v. Montgomery*, 1 Curt. C. C. 269, Fed. Cas. No. 4,709—*The George*, 1 Mason, 27, Fed. Cas. No. 5,328—*The La Manche*, 2 Sprague, 214, Fed. Cas. No. 8,004—*The Marianna Flora*, 3 Mason, 123, Fed. Cas. No. 9,080—*The Parkhill*, Fed. Cas. No. 10,755a—*Post v. Phoenix Ins. Co.* 10 Johns. 84.

k. Termination of Liability to Capture.

145. [A vessel captured after the preliminary articles of peace cannot be condemned. *Bain v. The Speedwell* (Fed. Ct. App.) 2 Dall. 40, 1: 280]

146. This court has never decided that the offense adheres to the vessel under whatever change of circumstances that may take place, nor that it cannot be deposited at the termination of the cruise in preparing for which it was committed. But a merely colorable termination will not avail to purge the vessel of the offense. *The Wren v. United States (The Wren)* 6 Wall. 582, 18: 876

147. If an American vessel be captured on a circuitous voyage to the United States, in a former part of which voyage she has been guilty of conduct subjecting her to confiscation, she must be condemned, although, at the time of seizure, she is committing no illegal act. *The Joseph*, 8 Cranch, 451, 3: 621

148. It is no objection that the vessel was on her way home and near an American port when she was captured. *The Joseph*, 8 Cranch, 451, 3: 621

149. When the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it is not usual to apply the penalty of confiscation to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband. And the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it has terminated. *Carrington v. Merchants' Ins. Co.* 8 Pet. 495, 8: 1021
Cited in The Ely, 110 Fed. 573.

150. A vessel and cargo liable to capture for sailing under a pass or license of the enemy, or for trading with the enemy, may be seized after her arrival in a port of the United States, and condemned as prize of war. The fault is not purged by the termination of the voyage. *The Caledonian*, 4 Wheat. 100, 4: 523

151. A vessel which clears from a port of the United States where it is owned and manned, to a port of a belligerent, for the purpose of cruising from that port as a privateer, cannot invoke the rule that a

violation of the neutrality laws may be purged by termination of the cruise in preparing for which it was committed. *The Gran Para*, 7 Wheat. 471, 5: 501
Cited in United States v. 100 Barrels of Cement, 3 Am. L. Reg. N. S. 746, Fed. Cas. No. 15,945.

l. Probable Cause for Capture or Seizure.

As Defense against Restitution, see *infra*. 268-271.

Commander's Liability for Seizure without, see *Army and Navy*, 160.

Conclusiveness of Judgment as to, see *Judgment*, 539, 540.

See also *supra*, 27, 28.

152. The term "probable cause," in matters of prize, means such circumstances as would warrant a reasonable ground of suspicion that the vessel was engaged in an illegal traffic. *The Isabella Thompson v. United States (The Thompson)* 3 Wall. 155, 18: 55

153. "Probable cause" means less than evidence which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion. *Locke v. United States*, 7 Cranch, 339, 3: 364
The Isabella Thompson v. United States (The Thompson) 3 Wall. 155, 18: 55
Cited in The Olinde Rodrigues, 174 U. S. 535, 43 L. ed. 1076, 19 Sup. Ct. Rep. 851.

154. Probable cause for the seizure of a vessel as prize exists when there are circumstances sufficient to warrant suspicion, though they may not prove sufficient to warrant condemnation. *The Olinde Rodrigues*, 174 U. S. 510, 19 Sup. Ct. Rep. 851, 43: 1065

155. False colors, false registration, etc., of a neutral vessel are sufficient probable cause for seizure by a privateer for examination. *Del Col v. Arnold*, 3 Dall. 333, 1: 624

156. Probable cause may exist by reason of the lateness of the period at which the vessel is found on the ocean after the withdrawal of embargo. *The Mary*, 9 Cranch. 126, 3: 678
Cited in The La Manche, 2 Sprague, 214, Fed. Cas. No. 8,004.

157. Probable cause will excuse, and sometimes justify, a capture *jure belli*. Captors with probable cause will be exempt from damages, and may even recover costs and expenses, in proceeding to adjudication, in a case of strong suspicion, or one requiring further proof to entitle claimant to restitution. *Per Story, J. The Apollon*, 9 Wheat. 362, 6: 111
Explained in The Palmyra, 12 Wheat. 17, 6 L. ed. 536.

Cited in Averill v. Smith, 17 Wall. 93, 21 L. ed. 617—*The Olinde Rodrigues*, 174 U. S. 536, 43 L. ed. 1076, 19 Sup. Ct. Rep. 851
—*Schmalz v. United States*, 4 Ct. Cl. 147
—*Schmalz v. United States*, 5 Ct. Cl. 301

—United States v. The Reindeer. 14 Month. Law Rep. 260, Fed. Cas. No. 16,145—Cucullu v. Louisiana Ins. Co. 5 Mart. N. S. 482.

158. The principle that probable cause of seizure is no defense against a claim of damages does not extend to captures *jure belli*, or to marine torts generally, or to acts of Congress authorizing the exercise of belligerent rights, such as the piracy acts of 1819 and 1830. The Palmyra, 12 Wheat. 1, 6: 531

m. Duties and Liabilities of Captors or Agents.

Circumstances Justifying Sale without Condemnation, see *infra*, 272, 273.

Commander's Liability for Capture, see Army and Navy, 158-162.

Measure of Liability for Unlawful Seizure, see Damages, VII. 3.

Measure of Liability of Agents, see Damages, 145.

Presumption in Favor of Innocence of Captor, see Evidence, 306.

See also *supra*, 141; *infra*, 220.

159. The right to seize and bring in a vessel for examination does not excuse any spoliation or damage to it; captors proceed at their own peril. Del Col v. Arnold, 3 Dall. 333, 1: 624

Cited in The Amiable Nancy, 1 Palne, 119, Fed. Cas. No. 331—Arnold v. Delcol, Bee, 5, Fed. Cas. No. 556—The Delta, Blatchf. Prize Cas. 135, Fed. Cas. No. 3,777—The Invincible, 2 Gall. 38, Fed. Cas. No. 7,054—Moodle v. The Harriet, Bee, 131, Fed. Cas. No. 9,744—Tunno v. Preary, Bee 7, Fed. Cas. No. 14,238.

159a. [The owners of letters of marque are responsible for injuries committed on the high seas by the commanders of vessels sent out by them—at least, to the value of the vessel. Talbot v. Three Brigs (H. Ct. Er. & Ap. Pa.) 1 Dall. 95, 1: 52]

160. A capture may be good, though only a prize master is put on board, where the circumstances are such as to do away with all apprehension of rescue, and inspire confidence that the crew will bring her into port. The Alexander, 8 Cranch, 169, 3: 524

161. A suit by the owners of captured property lost through the fault and negligence of the captors may be brought for compensation in damages. The Anna Maria, 2 Wheat. 327, 4: 252

162. If, during the assumption of the guise of an enemy, the crew of the detained vessel abandon it before being made prisoners of war, and the vessel is thereby lost, the captors are not responsible. The Eleanor, 2 Wheat. 345, 4: 257

163. One who seizes upon the high seas an American ship offending against our laws, or a foreign ship which is so offending within our jurisdiction, does so at his peril, and is liable for costs and damages

if he fails to establish the forfeiture. The Marianna Flora, 11 Wheat. 1, 6: 405
Cited in United States v. The Wren, Fed. Cas. No. 16,708.

164. Commercial agents not trespassers *ab initio*, having sold goods illegally captured, under instructions, and paid over the proceeds to the captor, with notice of the plaintiffs' claims, are answerable only for the sum which came into their hands. Hills v. Ross, 3 Dall. 331, 1: 623

165. Where an attack was made upon a vessel of the United States by a foreign armed ship, and a combat ensued upon mutual apprehension and mistake, the commander of the United States vessel was held exempt from costs and damages for seizing and bringing the offending vessel into port for adjudication. The Marianna Flora, 11 Wheat. 1, 6: 405

166. The government of the United States was absolved from all liability, under its prize statutes, to the captors of property of an enemy susceptible of condemnation as prize of war, by the restoration of such property to the enemy before condemnation. United States v. Dewey (Manila Prize Cases) 188 U. S. 254, 23 Sup. Ct. Rep. 415, 47: 463

167. A prize court may enter a decree against the United States for the damages sustained by the claimants of vessels captured by its Navy as prize of war, the proceeds of which have, in the prize proceedings, been ordered restored to such claimants, with damages and costs, where the libels were filed by the United States in its own behalf, praying a forfeiture to it, and alleging a capture pursuant to instructions from the President. United States v. The Habana (The Habana) 189 U. S. 453, 23 Sup. Ct. Rep. 593, 47: 900

Duty to institute judicial proceedings.

168. Whenever an officer seizes a vessel as prize, he is bound to commit her to the care of a competent prize master and crew; but this rule does not extend to the case of a mere detention for examination. The Eleanor, 2 Wheat. 345, 4: 257
Cited in Fay v. Montgomery, 1 Curt. C. C. 273, Fed. Cas. No. 4,709.

169. It is the duty of the captor to send his prize home, in order that a judicial inquiry may determine whether the capture was lawful, and, if so, to settle all intervening claims of property. Harlan v. United States (The Nassau) 4 Wall. 634, 18: 413

170. It is the duty of captors to bring the ship's papers into the registry of the district court, and to have the examinations of the principal officers and seamen of the captured ship taken on the standing interrogatories. The Dos Hermanos, 2 Wheat. 76, 4: 189

171. The commander of a capturing vessel can decide, in his discretion, whether to

send the prize home for condemnation or not. *Jecker v. Montgomery*, 18 How. 110, 15: 311

Cited in The Joseph H. Toone, Blatchf. Prize Cas. 231, Fed. Cas. No. 7,541—*The Prince Leopold*, Blatchf. Prize Cas. No. 11,428—*Perkins v. Rogers*, 35 Ind. 166, 9 Am. Rep. 639.

172. Where the search of a vessel led to the belief by the captors that there was contraband on board destined to the enemy, it was the duty of the captors to bring the vessel in for adjudication; and they are not liable for the costs and expenses of doing so. *The Peterhoff v. United States (The Peterhoff)* 5 Wall. 28, 18: 564
Cited in The Ollande Rodrigues, 174 U. S. 536, 43 L. ed. 1076, 19 Sup. Ct. Rep. 851.

173. It is the duty of a captor to institute judicial proceedings for the condemnation of his prize without unnecessary delay; and if he fails to do so, the court may, in case of restitution, decree demurrage against him as damages. *United States v. The Nuestra Señora de Regla (The Nuestra Señora de Regla)* 108 U. S. 92, 2 Sup. Ct. Rep. 287, 27: 662

174. Condemnation in a court constituted by order of the President is excuse for delay in instituting proceedings in a proper court, although such court has no legal existence. *Jecker v. Montgomery*, 18 How. 498, 14: 240

Liability of owner of privateer.

175. The owner of a privateer capturing neutral property is not liable for failure to restore the property under a decree of restitution not made against him specifically, unless the property or its proceeds come to his hands. *Jennings v. Carson*, 4 Cranch, 2, 2: 531

176. The owner of a privateer is liable in damages for a wrongful seizure by the master. *The Anna Maria*, 2 Wheat. 327, 4: 252

Cited in The Mulhouse, 22 Law Rep. 286, Fed. Cas. No. 9,910—*Taylor v. Brigham*, 3 Woods, 379, Fed. Cas. No. 13,781—*United States v. 100 barrels of Cement*, 3 Am. L. Reg. (N. S.) 746, Fed. Cas. No. 15,945.

177. Owners of a privateer are responsible for the conduct of their agents, the officers and crew, in the case of captured property, to the full value of all the property injured. *Del Col v. Arnold*, 3 Dall. 333, 1: 624
The Eleanor, 2 Wheat. 345, 4: 257

Liability of naval captors.

Claim against United States for Use of Merchant Ship Captured in War, see Claims, 107.

178. Naval captors of vessels as prize of war, the proceeds of which the prize courts have decreed should be restored to the claimants, with damages and costs, cannot be held liable therefor, where the libels were filed by the United States in its own behalf, praying a forfeiture to it, and alleging a capture pursuant to instructions from the President. *United States v. The*

Habana (The Habana) 189 U. S. 453, 23 Sup. Ct. Rep. 593, 47: 900

Liability for freight.

Measure of Liability, see Damages, 188.

179. The capture of a neutral ship having enemy's property on board is a justifiable exercise of the rights of war. By the capture the captors are substituted in lieu of the owners and take the property *cum onere*. But they are responsible for freight, where part of the cargo is condemned and part restored, only to the extent of the goods they have received. *The Antonia Johanna*, 1 Wheat. 159, 4: 60
Cited in The Commercen Fed. Cas. No. 3,053.

n. Effect of Capture.

180. A captor obtains an immediate right in property captured, such as a neutral nation cannot impugn. *M'Donough v. Danery*, 3 Dall. 188, 1: 563
The Josefa Segunda, 5 Wheat. 338, 5: 104
Cited in Bond v. The Cora, 2 Wash. C. C. 83, Fed. Cas. No. 1,621—*Booth v. L'Esperanza*, Bee, 93, Fed. Cas. No. 1,647—*Hopner v. Appleby*, 5 Mason, 75, Fed. Cas. No. 6,699—*Russell v. Forty Bales Cotton*, Fed. Cas. No. 12,154—*Dawson v. State*, Riley, L. 113.

181. A forfeiture of property to the Federal government under municipal statute is superseded by its capture as a prize under the general laws of war. *The Sally*, 8 Cranch, 382, 3: 597
Cited in The Hampton (The Hampton v. United States) 5 Wall. 376, 18 L. ed. 661—*The Sarah Starr*, Blatchf. Prize Cas. 84, Fed. Cas. No. 12,352—*Amory v. McGregor*, 15 Johns. 34.

182. Capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage; and anything done thereafter designed to incumber the property or change its ownership is a nullity. No change in the ownership can be made while the property is in transitu. *Fry v. United States (The Sally Magee)* 3 Wall. 451, 18: 197

183. Where a capture of a vessel of one foreign belligerent was made under a regular commission from the other, the captors acquired thereby a title to the vessel and cargo which could be divested only by recapture, or by the sentence of a prize court of the country under whose commission the capture was made; and the property is therefore subject to forfeiture for any infraction, by the captors, of the municipal regulations of the United States. *The Josefa Segunda*, 5 Wheat. 338, 5: 104

184. The capture of an enemy's vessel, after recapture by the enemy from another privateer, vests the prize in the last captor. *The Astrea*, 1 Wheat. 125, 4: 52

185. Where an enemy's vessel was captured by a private armed vessel of the United States, and the latter was subsequently dispossessed by the force or terror

of another, the prize was, under the circumstances of the case, adjudged to the first captor, with costs and damages. *The Mary*, 2 Wheat. 123, 4: 200

186. The bona fide purchaser of goods illegally captured is entitled to be reimbursed for freight paid by him on such goods. *The Fanny*, 9 Wheat. 658, 6: 184

Effect pending adjudication.

137. Until there is a sentence of condemnation or restitution a captured ship is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it. *Harlan v. United States (The Nassau)* 4 Wall. 634, 18: 413
Collins v. The Florida (The Florida) 101 U. S. 37, 25: 898

188. Where the capture has actually taken place with the assent of the commander of a squadron, expressed or implied, the prize master may be considered as bailee to the use of the whole squadron, who are to share in the prize money. *The Eleanor*, 2 Wheat. 345, 4: 257

189. When captured as prize of war, the property is in custody of the law, to await the decision of a prize court, and, if condemned, all claims to the property are by it adjusted. *Harlan v. United States (The Nassau)* 4 Wall. 634, 18: 413
Cited in Re People's Mail S. S. Co. 3 Ben. 227, 2 Nat. Bankr. Reg. 554, Fed. Cas. No. 10,970.

190. Property captured at sea can never be converted by the captor until it has been brought to legal adjudication. Capture of movable property on land changes the ownership, unless restrained by governmental regulations. *Lamar v. Browne*, 92 U. S. 187, 23: 650

191. When a vessel is captured at sea as a prize of war, the title is not transferred by the mere fact of capture. *Jecker v. Montgomery*, 13 How. 498, 14: 240
Harlan v. United States (The Nassau) 4 Wall. 634, 18: 413

192. Property of a neutral is not divested by capture, but by condemnation as prize, though the condemnation relates back to the capture. *Jecker v. Montgomery*, 13 How. 498, 14: 240
Cited in The William Bagaley (The Wm. Bagaley v. United States) 5 Wall. 405, 18 L. ed. 588—*The A. J. View*, Blatchf. Prize Cas. 143, Fed. Cas. No. 118.

Effect on liens and other claims.

193. Capture as prize of war *jure belli* overrides all previous liens. *The James Battle v. United States (The Battle)* 6 Wall. 498, 18: 933
Cited in The Siren (The Siren v. United States) 7 Wall. 162, 19 L. ed. 133—*The Carlos F. Roses*, 177 U. S. 669, 44 L. ed. 935, 20 Sup. Ct. Rep. 803.

194. Capture overrides all liens created by a mere private contract of individuals, depending upon the different laws of dif-

ferent countries. *The Frances*, 8 Cranch, 418, 3: 609

The James Battle v. United States (The Battle) 6 Wall. 498, 18: 933
Cited in The Battle (The James Battle v. United States) 6 Wall. 498, 18 L. ed. 933—*The Siren (The Siren v. United States)* 7 Wall. 162, 19 L. ed. 133—*The Carlos F. Roses*, 177 U. S. 666, 4 L. ed. 934, 20 Sup. Ct. Rep. 803—*The Amy Warwick*, 2 Sprague, 155, Fed. Cas. No. 343—*The Delta*, Blatchf. Prize Cas. 134, Fed. Cas. No. 3,777—*The Hannah M. Johnson*, Blatchf. Prize Cas. 35, Fed. Cas. No. 6,029a—*The Lynchburg*, Blatchf. Prize Cas. 52, Fed. Cas. No. 8,637a—*The Mary Anne*, 1 Ware, 106, Fed. Cas. No. 9,195—*United States v. The Arcola*, Fed. Cas. No. 14,464a.

195. Except in the case of liens imposed by the general mercantile law, the title of the owner of goods prevails in prize courts without regard to liens of factors or consignees, arising under contract with the owner. *The Frances*, 8 Cranch, 418, 3: 609
Cited in The Hannah M. Johnson, Blatchf. Prize Cas. 35, Fed. Cas. No. 6,029a.

196. A libel filed against a ship by private parties, to recover for repairs made and materials furnished, is properly dismissed where the prize commissioners certify to the court that the vessel is claimed as prize of war. *Harlan v. United States (The Nassau)* 4 Wall. 634, 18: 413

197. The district court sitting as a prize court may hear and determine all questions respecting claims arising after the capture of the vessel; but claims upon the vessel existing previous to the capture are superseded by the capture. *The James Battle v. United States (The Battle)* 6 Wall. 498, 18: 933

Capture disavowed by government.

198. When a capture is disavowed by the government it becomes as if it had not occurred; and a libel for the same as prize of war cannot be sustained. *Collins v. The Florida (The Florida)* 101 U. S. 37, 25: 898

Private captures.

199. Captures of enemy property made by private citizen are illegal unless ratified by the sovereign. *Story, J., in Brown v. United States*, 8 Cranch, 110, 3: 504
Cited in Prize Cases, 2 Black, 671, 17 L. ed. 477—*1,253 Bags of Rice*, Blatchf. Prize Cas. 212, Fed. Cas. No. 10,535—*Cummings v. Diggs*, 1 Helsk. 72.

Collusive capture.

200. A collusive capture vests no title in the captors; not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property. *The Experiment*, 8 Wheat. 261, 5: 612

201. Where a capture was collusive, and a mere device for the introduction of goods into the country, the property was properly condemned to the United States. *The George*, 2 Wheat. 273, 4: 239
Cited in The Experiment, 8 Wheat. 264, 5 L. ed. 613—*Robinson v. Hook*, 4 Mason, 156,

Fed. Cas. No. 11,956—*McCracken v. Todd*, 1 Kan. 161—*Dustin v. Dickinson*, 2 Mich. N P. 8.

Captures on land.

202. The rightful capture of movable property on land transfers the title to the government of the captors, and it is complete when reduced to a firm possession. There is no necessity for judicial condemnation. *Lamar v. Browne*, 92 U. S. 187,

23: 650

Titus v. United States, 20 Wall. 475,

22: 400

203. The rightful capture of movable property on land transfers the title to the government of the captors, and it is complete when reduced to a firm possession. There is no necessity for judicial condemnation. But this doctrine is substantially restricted to special cases dictated by the necessary operation of the war, and as excluding in general seizures of the private property of pacific persons for the sake of gain. *Young v. United States*, 97 U. S. 39,

24: 992

204. The well-settled principle in the law of war, that the public property of an enemy captured on land becomes, for the time being at least, the property of the conqueror, is applicable to the late civil war. At the close of that war the title to all captured property of the Confederate government came absolute in the United States. No judicial proceeding is necessary to pass the title. *Titus v. United States*, 20 Wall. 475,

22: 400

Cited in Whitfield v. United States, 92 U. S. 169, 23 L. ed. 707—*Blewett v. United States*, 10 Ct. Cl. 246—*Atkinson v. Central Georgia Agri. & Mfg. Co.* 58 Ga. 220—*Whitfield v. United States*, 51 How. Fr. 419.

o. Effect of Condemnation.

Illegality of Condemnation by Court Sitting in Foreign Country, see Courts, 2.

Effect of Forfeiture under Nonintercourse Act, see Embargo and Nonintercourse, 38.

Burden of Proving Jurisdiction, see Evidence, 580.

See also *supra*, 192.

205. By the general maritime law a sentence of condemnation extinguishes the title of the original owner; and if it is afterwards recaptured by vessels of his nation, he has no right to have it restored to him. *The Star*, 3 Wheat. 78,

4: 338

[*Miller v. The Resolution* (Fed. Ct. Ap.) 2 Dall. 1,

1: 263]

206. The sentence of condemnation by a foreign prize court of competent jurisdiction, which proves its own illegality because it purports to be made under a decree which the government of the United States has declared to be subversive of neutral rights and national law, is nevertheless conclusive, and operates as an absolute change

of the property. *Williams v. Armroyd*, 7 Cranch, 423.

3: 392

Cited in Ex parte Watkins, 3 Pet. 206, 7 L. ed. 654—*Wright v. Marsh*, 2 G. Greene, 114—*Melhop v. Doane*, 31 Iowa, 401, 7 Am. Rep. 147—*Arnold v. Shields*, 5 Dana, 25, 30 Am. Dec. 669.

207. A decree condemning as prize of war shipments evidenced by bills of lading with blank indorsements, or without indorsements, which contains a blank obviously intended for enumeration of the particular bills to which those terms should apply, will be considered as applying only to those bills which required indorsement or were in a condition to admit of it. *The Friendship*, 3 Wheat. 14,

4: 322

p. Title and Interests in Prize and Prize Money.

Right to Bounty, see *supra* 76-79.

Who may Assert Rights in Admiralty Court Generally, see Admiralty, III. b. 1.

Right of Alien Enemy to be Heard in Prize Court, see Admiralty, 342, 342a.

Extrinsic Evidence to Establish Rights, see Admiralty, 508.

Liability of Marshal Making Erroneous Distribution of Prize Money, see Marshal, 34.

Remedy against Marshal for Refusal to Pay Over Proceeds, see Marshal, 66.

Liability for Prize Money Lost by Failure of Depository Bank, see Payment, 13.

Conclusiveness of Referee's Findings as to Participants in Capture, see Reference, 76.

Right of Captors to Salvage, see Salvage, 31-40.

Loss of Right to One Half of Proceeds of Sale of Negroes, see Slaves, 80.

See also *supra*, 188.

208. [Admiralty courts will make distribution of prize money, in proportion to the number, interest, and merits of the captors, where no articles of agreement directing the distribution were executed. *Keane v. The Gloucester* (Fed. Ct. Ap.) 2 Dall. 36,

1: 278]

Cited in Robinson v. Hook, 4 Mason, 146, Fed. Cas. No. 11,956.

209. If a capture be with a commission as a national vessel, the condemnation must be to the United States; but the proceeds are to be distributed by the court among the captors, according to law. *The Dos Hermanos*, 2 Wheat. 76,

4: 189

Cited in 858 Bales of Cotton, Blatchf. Prize Cas. 326, Fed. Cas. No. 4,318.

210. The claim of an antecedent forfeiture to the United States for a violation of the nonintercourse act of March 1, 1809, will not prevail as against the right of the captors to property engaged in illicit intercourse with the enemy. *The Sally*, 8 Cranch, 382,

3: 597

211. The prize court has no authority to award payment, from the prize money, to the agent of the officers and crews of the

capturing vessels, of compensation agreed upon between the parties. He must apply, under his power of attorney, to the proper officers of the government charged with the distribution of the money. Officers, etc. *United States Ironclad Weehawken v. The Atlanta (The Ironclad Atlanta)* 3 Wall. 425, 18: 253
Cited in United States v. Steever, 113 U. S. 752, 28 L. ed. 1135, 5 Sup. Ct. Rep. 765—*Dewey v. United States*, 178 U. S. 514, 44 L. ed. 1172, 20 Sup. Ct. Rep. 981—*The Mangrove Prize Cases (United States v. The Mangrove)* 188 U. S. 724, 47 L. ed. 667, 23 Sup. Ct. Rep. 343.

212. The prize act of June 26, 1812, operates as a grant, from the United States to the captors, of all property rightfully captured by commissioned privateers as prize of war. *The Sally*, 8 Cranch. 382, 3: 597

213. Since the act of March 3, 1849, all prize money arising from captures by vessels of the navy of the United States, whether received by marshals for the sale of prizes or in the hands of prize agents, should be deposited in the treasury of the United States. *Jecker v. Montgomery*, 18 How. 110, 15: 311

214. Under the act of July 17, 1862, if the prize taken be of equal or superior force to the capturing vessel or vessels, the whole shall go to the captors; but if it be of an inferior force, only one half the prize money goes to the captors. Officers, etc. *United States Ironclad Weehawken v. The Atlanta (The Ironclad Atlanta)* 3 Wall. 425, 18: 253

215. Where a vessel, although liable to confiscation under the act of July 13, 1861, was actually condemned under international laws of war, and not under the statute, the act of March 3, 1863, which provides for saving bona fide claims of loyal citizens against the property condemned, has no application to the case. *The Hampton v. United States (The Hampton)* 5 Wall. 372, 18: 659

Cited in The Carlos F. Roses, 177 U. S. 668, 44 L. ed. 934, 20 Sup. Ct. Rep. 803—*Brown v. Hiatt*, 1 Dill. 381, Fed. Cas. No. 2,011—*Phillips v. Hatch*, 1 Dill. 576, Fed. Cas. No. 11,094—*Hill v. Baker*, 32 Iowa, 310, 7 Am. Rep. 193—*Billgerry v. Branch*, 19 Gratt. 429, 100 Am. Dec. 679.

216. Under the act of August 8, 1882, chap. 480, referring the claims of the captors of the ram *Albemarle* to the Court of Claims, each captor is entitled to recover such a sum as, together with the sum formerly paid him by the secretary of the navy, will equal his lawful share of the prize money in that case. The act does not impeach the validity of the distribution formerly made, but, treating them each as having received no more than a suitable reward for his gallantry, it allows to those who had received less than their shares, according to the rules of the prize act, enough to make up the deficiency. *United States v. Steever*, 113 U. S. 747, 5 Sup. Ct. Rep. 765, 28: 1133

United States.

Captures Made by Noncommissioned Captors, see *infra*, 226-229.

Suit in Proceedings in Admiralty in Name of, see Admiralty, 345-347.

Scope of Inquiry Authorized by Intervention of United States in Prize Case, see United States, 172.

See also *supra*, 201-204, 209.

217. Property engaged in an illicit intercourse with the enemy is to be condemned to the captors, not to the United States. *The Sally*, 8 Cranch, 382, 3: 597

218. No one can have any right or interest in any prize except by the grant or permission of the United States; and all captures made without its express authority enure to its benefit. Officers, etc. *United States Ships of War v. United States (The Siren)* 13 Wall. 389, 20: 505
Cited in United States v. Steever, 113 U. S. 754, 28 L. ed. 1136, 5 Sup. Ct. Rep. 765—*Manila Prize Cases (United States v. Dewey)* 188 U. S. 258, 47 L. ed. 467, 23 Sup. Ct. Rep. 415—*Winchester v. United States*, 14 Ct. Cl. 48.

219. Joint captures by the army and navy enure exclusively to the benefit of the United States. Officers, etc. *United States Ships of War v. United States (The Siren)* 13 Wall. 389, 20: 505
United States v. The Nuestra Señora de Regla (The Nuestra Señora de Regla) 108 U. S. 92, 2 Sup. Ct. Rep. 287, 27: 662
Cited in Porter v. United States (United States v. Steam Vessels of War) 106 U. S. 611, 27 L. ed. 287, 1 Sup. Ct. Rep. 539—*The Nuestra Señora De Regla (United States v. The Nuestra Señora De Regla)* 108 U. S. 101, 27 L. ed. 666, 2 Sup. Ct. Rep. 287—*Dewey v. United States*, 178 U. S. 515, 44 L. ed. 1172, 20 Sup. Ct. Rep. 981—*Oakes v. United States*, 30 Ct. Cl. 401.

220. Where the government is the actor in a suit for the condemnation of a vessel as prize, and asks for the sale thereof, the proceeds coming into the registry of the court come affected with all claims which existed upon the vessel, created subsequent to her capture, and may be charged with payment of damages for a maritime tort committed while in charge of a prizemaster. *The Siren v. United States (The Siren)* 7 Wall. 152, 19: 129

Distinguished in Workman v. New York, 179 U. S. 567, 45 L. ed. 322, 21 Sup. Ct. Rep. 212—*The Fidelity*, 16 Blatchf. 573, Fed. Cas. No. 4,758—*Moore v. Tate*, 87 Tenn. 740, 10 Am. St. Rep. 712, 11 S. W. 935.

Cited in Cushing v. Laird, 107 U. S. 82, 27 L. ed. 396, 2 Sup. Ct. Rep. 196—*The Avon*, Brown, Adm. 186, Fed. Cas. No. 680—*Lee v. Kaufman*, 3 Hughes, 61, Fed. Cas. No. 8,191—*United States v. Mackoy*, 2 Dill. 308, Fed. Cas. No. 15,696—*Carlisle v. Cooper*, 12 C. C. A. 238, 26 U. S. App. 240, 64 Fed. 475—*Bowker v. United States*, 105 Fed. 399—*United States v. American Surety Co.* 110 Fed. 914—*Judson v. United States*, 57 C. C. A. 105, 120 Fed. 643—*United States v. Warren*, 12 Okla. 365, 71 Pac. 685—*State v. Corbin*, 16 S. C. 542—*Lowry v. Thompson*, 25 S. C. 421, 1 S. E. 141—*Columbia Water Power Co. v. Columbia Electric Street R.*

Light & P. Co. 43 S. C. 169, 20 S. E. 1002
—Shelby County v. Bickford, 102 Tenn. 402,
52 S. W. 772—McCandlish v. Com. 76 Va.
1006—Cecil v. Clark, 44 W. Va. 675, 30 S.
E. 216—Unlon P. R. Co. v. United States,
2 Wyo. 189.

Officers.

Officer's Share of Penalties under Non-intercourse Act, see Embargo and Nonintercourse, 39.

Right to Share in Proceeds of Sale of Imported Negroes, see Slaves, 78.

See also supra, 211, 216.

221. The distribution of prize money among the subordinate officers and crew of a ship, "in proportion to their respective rates of pay in the service," under the prize act of June 30, 1864, chap. 174, § 10, rule 5, is to be made according to their pay at the time of the capture, and not according to the pay of grades to which they have since been promoted as of that time. *United States v. Steever*, 113 U. S. 747, 5 Sup. Ct. Rep. 765, 28: 1133

222. The share of the commander of a ship under the prize act of June 30, 1864, is the same whether he is leading in action or lying disabled in his berth, and the share of the admiral commanding the squadron is not increased if the capture is made by his flag ship, nor diminished if it is made without his participation or knowledge by another ship belonging to his command. The courts cannot depart from the express law because of the peculiar bravery or merit of the captors or any of them. *United States v. Steever*, 113 U. S. 747, 5 Sup. Ct. Rep. 765, 28: 1133

223. A torpedo steam launch attached to a division of a naval squadron, although not proved to have had any books, is a ship within the meaning of the prize act of June 30, 1864, and her commander is entitled to one tenth of prize money awarded to her, and it is error to award him instead a share proportioned to his rate of pay; but her other officers and men are entitled to share in proportion to their rates of pay. *United States v. Steever*, 113 U. S. 747, 5 Sup. Ct. Rep. 765, 28: 1133

Crew.

Admiralty Jurisdiction, see Admiralty, 286.

Right of Crew to Bring Libel, see Admiralty, 344.

See also supra, 211, 221, 223.

224. [The right of a crew to captures is not founded on the articles of agreement, but on the privateer's commission. *Keane v. The Gloucester* (Fed. Ct. Ap.) 2 Dall. 36, 1: 278]

225. Members of the crew of a privateer, who without any objection to their skill or ability were ordered by the captain to leave the ship, new articles of agreement being entered into by the remaining members, are entitled to share in prizes subsequently

taken. *Keane v. The Gloucester* (Fed. Ct. Ap.) 2 Dall. 36, 1: 278
Cited in The Brutus, 2 Gall. 529, Fed. Cas. No. 2,060.

225a. [After distribution of prize money has been decreed by a court of admiralty, an action at law may be sustained against the marshal, by the agent of mariners, for their share. *Henderson v. Clarkson* (Pa. Sup. Ct.) 2 Dall. 174, 1: 337]

Noncommissioned captors.

Right to Salvage, see Salvage, 31.

226. If the capture be made by a noncommissioned captor, the prize will be condemned to the United States. *The Dos Hermanos*, 2 Wheat. 76, 4: 189
Cited in The Rita, 89 Fed. 768.

227. All captures by a noncommissioned cruiser are made for the benefit of the government, and give the captor no right to the prize proceeds except for salvage. *The Dos Hermanos*, 10 Wheat. 306, 6: 328
Cited in The Siren (The Siren v. United States) 7 Wall. 163, 19 L. ed. 134—*Carrington v. Merchants' Ins. Co.* 8 Pet. 522, 8 L. ed. 1031—*The Siren* (United States Ships of War v. United States) 13 Wall. 393, 20 L. ed. 506—*Re 858 Bales of Cotton*, Blatchf. Prize Cas. 326, Fed. Cas. No. 4,318—*The Ella Warley*, Blatchf. Prize Cas. 207, Fed. Cas. No. 4,371—*The Siren*, 1 Low. Dec. 282, Fed. Cas. No. 12,911.

228. If capture be made without any legal commission, the vessel, if decreed good prize, must be condemned to the government. *The Amiable Isabella*, 6 Wheat. 1, 5: 191

229. If the capture be made by a noncommissioned captor, the government may contest the right of the captor after decree of condemnation and before distribution is decreed. *The Amiable Isabella*, 6 Wheat. 1, 5: 191

Vessels participating in capture.

230. Vessels used by the Navy of the United States as colliers, manned principally by unenlisted men, and armed only for purposes of defense, are not, though within signal distance of a capture, entitled to participate in the prize money awarded, under U. S. Rev. Stat. § 4632 (U. S. Comp. Stat. 1901, p. 3133), to "all vessels of the Navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required." *United States v. Dewey* (Manila Prize Cases) 188 U. S. 254, 23 Sup. Ct. Rep. 415, 47: 463

231. A vessel of the United States navy was not "within signal distance" of another vessel making the capture, so as to be entitled to share in the distribution of the prize money under U. S. Rev. Stat. § 4632 (U. S. Comp. Stat. 1901, p. 3133), where the two vessels were from 12 to 15 miles apart, and the vessel making the capture was equipped with boat flags 3 feet by 4 in size, instead of the usual signal flags 8 feet by 11. *United States v. The Mangrove*

(Mangrove Prize Money) 188 U. S. 720, 23 Sup. Ct. Rep. 343, 47: 664

232. Naval vessels not within signal distance of a capture are not vessels "making the capture," within the meaning of U. S. Rev. Stat. § 4630 (U. S. Comp. Stat. 1901, p. 3132), and therefore cannot be taken into account in estimating the relative force of captor and prize, for the purpose of determining the proportion of the prize money to which the captor is entitled under that section, although their proximity may have induced the surrender of the prize to an inferior force. *United States v. The Mangrove (Mangrove Prize Money)* 188 U. S. 720, 23 Sup. Ct. Rep. 343, 47: 664

233. The mere fact that the only shot fired and the only damage done was by one vessel is not decisive of the question whether another vessel co-operated in the capture. Where the other vessel diverted the fire of the enemy from the one which fired the shot, and both were present, ready for the conflict, under such circumstances that the enemy must have acted with reference to their combined action, the two vessels must be considered as both participating in the capture. *Officers, etc. United States Ironclad Weehawken v. The Atlanta (The Ironclad Atlanta)* 3 Wall. 425, 18: 253

— Editorial note.

Distribution of prize money in cases of joint capture. 22: 879

Co-operation of army with navy.

Conclusiveness of Award of Arbitrators, see Reference, 56.

See also *supra*, 219.

234. Prize money, or bounty in lieu of it, is not allowed by the laws of Congress, where vessels of the enemy are captured or destroyed by the navy with the co-operation of the army, nor for vessels captured on inland waters of the United States. *United States v. Steam Vessels of War (Porter v. United States)* 106 U. S. 607, 1 Sup. Ct. Rep. 539, 27: 286
Cited in *Dewey v. United States*, 35 Ct. Cl. 195—*Dewey v. United States*, 178 U. S. 517, 44 L. ed. 1173, 20 Sup. Ct. Rep. 981.

235. Where half the proceeds of cotton seized on land by the naval forces was distributed to the naval captors as prize money, the claimant is entitled to recover for such amount illegally distributed. *United States v. Winchester*, 99 U. S. 372, 25: 479

Mortgagees.

236-7. A mortgagee is not entitled to have the amount of his mortgage paid to him out of the proceeds of the sale of the vessel captured on the high seas and condemned as prize. *The Hampton v. United States (The Hampton)* 5 Wall. 372, 18: 659
Cited in *The Battle (The James Battle v. United States)* 6 Wall. 498, 18 L. ed. 933—*The Siren (The Siren v. United States)* 7 Wall. 162, 19 L. ed. 133.

q. Owner's Right to Recapture.

238. [A neutral may pursue and recover

his property illegally captured, anywhere and at any time, until it is condemned as prize by a court of competent jurisdiction. *Miller v. The Resolution (Fed. Ct. Ap.)* 2 Dall. 1, 1: 263]

II. Hearing and Determination.

Presumptions and Burden of Proof, see Evidence, II. m.

Depositions in One Prize Cause as Evidence in Another, see Evidence, 1296.

Ship's Papers as Evidence, see Evidence, 1407.

Scope of Inquiry Authorized by Intervention of United States in Prize Case, see United States, 172.

Parties or Interested Persons, see Witnesses, 56, 57.

a. Claim and Restitution.

Liability after Restitution, see *supra*, 166, 167.

Liability for Failure to Restore Property under Decree of Restitution, see *supra*, 175

What may be Considered on Libel for Restitution, see *infra*, 279.

Sufficiency of Test Affidavit for, see Admiralty, 488.

Right to Restoration without Prayer for Condemnation, see Admiralty, 547.

Sufficiency of Proof to Entitle to Restitution, see Admiralty, 525.

Appealability of Decree of Restitution, see Appeal and Error, 38.

Permitting New Claim in Appellate Court, see Appeal and Error, 5400.

Setting up New Claims after Decree of Restitution, see Appeal and Error, 5549.

Restitution where Intent to Violate Blockade not Shown, see Blockade, 30.

Restitution of Property Confiscated, see Confiscation and Sequestration, III. 1.

Allowance of Costs on Restitution, see Costs, 68-71.

Jurisdiction of Federal Courts to Decree Restitution of Capture in Violation of Neutrality, see Courts, 542.

Measure of Damages in Case of Restitution, see Damages, 192.

Power of Neutral Consul to Interpose Claim for Restitution, see Diplomatic and Consular Officers, 8.

Duties on Captured Goods after Restoration of Proceeds, see Duties, 111.

Burden of Proving Claimant's Title, see Evidence, 846, 847.

Sufficiency of Evidence of Neutrality, see Evidence, 2598.

Restitution of Insured Vessel, see Insurance, 554, 555.

Right to Interest when Restitution is Awarded, see Interest, 28.

Conclusiveness of Order for Restitution, see Judgment, 539.

Conclusiveness of Judgment as to Right to Damages on Restoration, see Judgment, 550.

Effect of Amnesty Proclamation on Right to Restitution, see Pardon and Amnesty, 41.

239. A definite condemnation of captured property, within the meaning of article 4 of the convention with France, signed September 30, 1800, such that restoration cannot be had, must be a final decree by the court of last resort. *United States v. The Peggy*, 1 Cranch, 108, 2: 49

240. Where the presumption arising upon the facts proved is that the cargo was neutral property, it must be restored, although the vessel was condemned. *United States v. The Science (The Science)* 5 Wall. 178, 18: 625

241. The former decree of this court ordering the delivery, out of the whole number of Africans on a captured ship, of a certain number to the claimant, must be executed by requiring him to designate them by satisfactory proof, and not to select them by lot. *The Antelope*, 11 Wheat. 413, 6: 508
Cited in *The Antelope*, 12 Wheat. 546, 6 L. ed. 724—*The Tilton*, 5 Mason, 465, Fed. Cas. No. 14,054.

242. The right of a belligerent to his vessel captured by his enemy and given to a neutral, with whom war subsequently breaks out, revives upon such donation, subject to salvage. *The Adventure*, 8 Cranch, 221, 3: 542

Distinguished in *Russel v. Forty Bales Cotton*, Fed. Cas. No. 12,154.

Cited in *Re 78 Bales of Cotton*, 1 Low. Dec. 17, Fed. Cas. No. 12,679.

243. The claimants or original owners cannot, on restitution, set up a claim for interest upon the stipulation taken in the usual form for the appraised value of the goods, interest not being mentioned in the stipulation itself. *The Santa Maria*, 10 Wheat. 431, 6: 359

244. Upon a mandate to the circuit court, to carry into effect a general decree of restitution by this court, where the property has been delivered upon a stipulation for the appraised value, and the duties paid upon it by the party to whom it is delivered, the amount of the duties is to be deducted from the appraised value. *The Santa Maria*, 10 Wheat. 431, 6: 359

245. Federal courts cannot restore to the original Spanish owner property of which he has been dispossessed by capture, under a commission derived from Spanish colonies in revolt, where the government of the United States has recognized the existence of the war and there has been no violation of its neutrality. *The Neustra Señora de la Caridad*, 4 Wheat. 497, 4: 624
Cited in *Dole v. New England Mut. M. Ins. Co* 2 Cliff. 427, Fed. Cas. No. 3,966—*The Tilton*, 5 Mason, 471, Fed. Cas. No. 14,054—*The Ambrose Light*, 25 Fed. 429.

Violation of neutrality.

Admiralty Jurisdiction, see Admiralty, 212, 213, 288, 289.

Burden of Proof, see Evidence, 839-842.

Necessity of Proving Beyond Reasonable Doubt, see Evidence, 2596.

246. The neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored. *Collins v. The Florida (The Florida)* 101 U. S. 37, 25: 898

247. As to the restitution of prizes made in violation of neutrality, there is no reason for a distinction between national and private armed vessels of a belligerent. *L'Invincible*, 1 Wheat. 238, 4: 80
The Santissima Trinidad, 7 Wheat. 283, 5: 454

248. If a capture be made within the territorial limits of a neutral country into which the prize is brought, or by a privateer which had been illegally equipped in that country, the prize courts possess the power to restore the property to the owner. *The Alerta v. Moran*, 9 Cranch, 359, 3: 758

249. Prizes made by armed vessels which have violated the statutes for preserving the neutrality of the United States will be restored to the original owners, if brought into our ports. *La Amistad de Rues*, 5 Wheat. 385, 5: 115
The Gram Para, 7 Wheat. 471, 5: 501
The Santa Maria, 7 Wheat. 490, 5: 505
The Arrogante Barcelones, 7 Wheat. 496, 5: 507

The Monte Allegre, 7 Wheat. 520, 5: 513
Cited in *The Monte Allegre*, 9 Wheat. 641, 6 L. ed. 180—*The Florida (Collins v. The Florida)* 101 U. S. 42, 25 L. ed. 899—*The Elmira*, 16 Fed. 137.

250. Where property has been captured by citizens of the United States, under the flag of a belligerent, in violation of the neutrality of the United States, the lawful owners cannot be deprived of their right to restitution by any breach of the revenue laws of the United States by the captors or persons who have rescued the property from their possession. *The Bello Corrunes*, 6 Wheat. 152, 5: 229

251. Prizes made by armed vessels which have violated the statutes for preserving the neutrality of the United States will be restored to the original owners if brought into our ports, even though the property may have come back to the possession of the original wrongdoer, who claims it, after a regular condemnation as prize. *The Arrogante Barcelones*, 7 Wheat. 496, 5: 507
Cited in *Stewart v. United States*, 1 Ct. Cl. 117.

252. Restitution of prize goods captured by armed vessel violating neutrality, decreed. *The Santa Maria*, 7 Wheat. 490, 5: 505
Cited in *Stewart v. United States*, 1 Ct. Cl. 117—*The Tilton*, 5 Mason, 471, Fed. Cas. No. 14,054.

253. A bona fide purchaser, without notice, of goods illegally captured in violation of neutrality, cannot obtain from the captors

any title which will avail against the original owners. *The Fanny*, 9 Wheat. 658, 6: 184

254. A neutral vessel bound from Liverpool to Matamoras, with a cargo of general merchandise and coin, no part of which was contraband, must be restored if captured. *United States v. The Dashing Wave* (The Dashing Wave) 5 Wall. 170, 18: 622

255. Where a capture is made by either of the belligerent parties without any violation of our neutrality, and the captured prize is brought innocently within our jurisdiction, the courts leave things in the same state in which they find them, or restore them to the state from which they have been forcibly removed by the act of our own citizens. *The Neustra Senora de la Caridad*, 4 Wheat. 497, 4: 624

256. Where no affidavits of title or neutral ownership of the cargo have been put in, this neglect is an admission that the claimants are not entitled to restitution. *United States v. The Pearl* (The Pearl) 5 Wall. 574, 18: 677

— Editorial note.

Prize taken in violation of neutrality.

4: 338

Treaties.

See also *supra*, 239.

257. The Spanish treaty as to restitution of captures does not apply to the case of a capture of a Spanish ship by a commissioned vessel of a revolted Spanish colony, where the capture was not made within our jurisdiction, as the captors cannot be considered as pirates. *The Neustra Senora de la Caridad*, 4 Wheat. 497, 4: 624

258. Citizens of the United States cannot demand restitution to them of a prize which they made in violation of a treaty and the provisions of law of this country, and of which they have been dispossessed by their partners in guilt; the property will be adjudged to the original owner. *The Bello Corrunes*, 6 Wheat. 152, 5: 229

259. The 6th article of the Spanish treaty of 1795 applies exclusively to Spanish ships, and only for their restitution when captured within our jurisdiction. *The Santissima Trinidad*, 7 Wheat. 283, 5: 454

Property of enemies.

Jurisdiction of Admiralty to Restore Property, see Admiralty, 39, 41.

260. If a ship and cargo be enemy's property, it cannot be restored to the claimants. *The Amiable Isabella*, 6 Wheat. 1, 5: 191

261. Neither an enemy, nor a neutral acting the part of an enemy, can demand restitution on the sole ground of capture in neutral waters. *The Adela v. United States* (The Adela) 6 Wall. 266, 18: 821
Collins v. The Florida (The Florida) 101 U. S. 37, 25: 898
United States v. The Sir William Peel (The Sir William Peel) 5 Wall. 517, 18: 696

Cited in The Adela (The Adela v. United

States) 6 Wall. 267, 18 L. ed. 821—*The Florida* (Collins v. The Florida) 101 U. S. 42, 25 L. ed. 899—*The Lilla*, 2 Sprague, 178, Fed. Cas. No. 8,348.

262. Whenever a prize is brought to adjudication in the admiralty, if upon the hearing of the cause upon the ship's papers, and the evidence taken in preparatory, the property appears to belong to enemies, it is immediately condemned. If its national character appears doubtful, or even neutral, and no claim is interposed, the court does not proceed to a final decree, but the case is postponed, with a view to enable any person having title to assert it within a reasonable time, before the court. This time has been, by the general usage of nations, fixed to a year and a day after the institution of the prize proceedings; and if no claim be interposed within that period, the property is deemed to be abandoned, and is condemned to the captors for contumacy and default of the supposed owner. *The Harrison*, 1 Wheat. 298, 4: 95

Cited in Saltonstall v. Birtwell, 150 U. S. 420, 37 L. ed. 1129, 14 Sup. Ct. Rep. 169—*The Carlos F. Roses*, 177 U. S. 663, 44 L. ed. 932, 20 Sup. Ct. Rep. 803—*The Avery*, 2 Gall. 390, Fed. Cas. No. 672—*The Falcon*, Blatchf. Prize Cas. 54, Fed. Cas. No. 4,816—*Read v. Owen*, 9 Port. (Ala.) 185.

Recapture.

Official Correspondence as Evidence, see Evidence, 1109.

263. An American vessel captured by the enemy and recaptured by an American privateer after condemnation and sale was not to be restored to the former American owner under the salvage act of March 3, 1800, or the prize act of June 26, 1812, but was subject to condemnation as good prize of war. *The Star*, 3 Wheat. 78, 4: 338

264. Africans recaptured from a belligerent privateer or from a pirate, and brought into ports of the United States, are not to be restored to the claimants without full proof of the proprietary interest. *The Antelope*, 10 Wheat. 66, 6: 268

265. A vessel purchased by the Confederate government from an agent of the owner although without the owner's authority, consent or knowledge, is not, when captured by the United States, within the provisions of the act of Congress of March 3, 1800, providing for the restoration to the owners of private vessels recaptured from the enemy as there can be no recapture where there has been no capture. *Oakes v. United States*, 174 U. S. 778, 19 Sup. Ct. Rep. 864, 43: 1169

Illegal augmentation.

Burden of Proof, see Evidence, 840-842.

266. An augmentation of force, or illegal outfit, does not affect any capture made after the original cruise for which such augmentation or outfit was made is terminated. But as to captures made during the same cruise, they are infected with the character of torts; and the original owner is entitled to restitution, when the property

is brought into our jurisdiction. The Santissima Trinidad, 7 Wheat. 283, 5: 454

267. Illegal augmentation in the United States of the force of a belligerent cruiser requires restoration to the original owner of the property captured by such vessel. The Santissima Trinidad, 7 Wheat. 283, 5: 454

Probable cause for capture.

Costs in Case of, see Costs, 68, 69, 77, 82.

268. Upon a libel for restitution of property seized as prize, or its proceeds, where the captor withheld the property, claiming it as prize, probable cause for capture is no defense. Jecker v. Montgomery, 13 How. 498, 14: 240
Cited in Hooper v. United States, 22 Ct. Cl. 439.

269. When the answer to a libel for restitution showed probable cause, the court should have ordered the captors to institute proceedings for its condemnation by a day named. Jecker v. Montgomery, 13 How. 498, 14: 240

270. Restitution of a vessel seized as a prize has been ordered although there was probable cause for sending her in. The Mary, 9 Cranch, 126, 3: 678
Cited in The La Manche, 2 Sprague, 216, Fed. Cas. No. 8,004.

271. Where a case of prize presents a prima facie case of violation of municipal law, which justifies further investigation, the judgment dismissing the libel was affirmed by the supreme court, but that part of the decree awarding restitution of the vessel and cargo was reversed, with directions to allow libellant a reasonable time to file a new libel. If this is not done within the time thus fixed by the court, the property was to be restored by a new decree. United States v. The Watchful (The Watchful) 6 Wall. 91, 18: 763
Cited in The City of Mexico, 28 Fed. 150.

b. Sale Without Condemnation.

272. Circumstances of public necessity will justify a captor in selling a prize, instead of sending it to the ports of the United States and libeling it for condemnation. Jecker v. Montgomery, 13 How. 498, 14: 240
Cited in Fay v. Montgomery, 1 Curt. C. C. 273, Fed. Cas. No. 4,709—The Gipse, Blatchf. Prize Cas. 127, Fed. Cas. No. 5,456—The Joseph H. Toone, Blatchf. Prize Cas. 231, Fed. Cas. No. 7,541.

273. When the sale of the prize was necessary, the captor should, within reasonable time, institute proceedings to condemn it. Jecker v. Montgomery, 13 How. 498, 14: 240
Cited in Jecker v. Montgomery, 18 How. 124,

15 L. ed. 317—Fay v. Montgomery, 1 Curt. C. C. 269, Fed. Cas. No. 4,709—The Thomas Watson, Blatchf. Prize Cas. 121, Fed. Cas. No. 13,933.

274. The decision of the commander of the captured vessel to sell the prize in a foreign port instead of sending it home for condemnation, will not forfeit the right of prize if made with discretion and honesty. Jecker v. Montgomery, 18 How. 110, 15: 311

275. A sale by the authority of the captors, before sentence of condemnation, is affirmed by such sentence, and is good *ab initio*. Williams v. Armroyd, 7 Cranch, 423, 3: 392
Cited in Jecker v. Montgomery, 13 How. 516, 14 L. ed. 248.

c. Proceedings for Condemnation.

Duty of Captors to Institute Proceeding, see supra, 168-174.

Record of Condemnation as Evidence, see Evidence, 1265-1268.

276. The court of another nation, whether an ally or cobelligerent, can acquire no general right to take cognizance of a prize cause, unless by the assent or upon the submission of the captors. La Nereyda, 8 Wheat. 108, 5: 574

277. A sentence of condemnation is essential to divestiture of property seized for breach of blockade. Rose v. Himely, 4 Cranch, 241, 2: 608
Cited in Jecker v. Montgomery, 13 How. 517, 14 L. ed. 248—Stoughton v. Taylor (Juando v. Taylor) 2 Paine, 679, Fed. Cas. No. 7,558—Cherlot v. Foussat, 3 Binn. 258.

278. All demands against captured property—even those claimed to be superior to the rights of the captors—must be adjusted in the prize court. The property arrested as prize is not attachable at the suit of private parties. Harlan v. United States (The Nassau) 4 Wall. 634, 18: 413

279. The validity of an alleged privateer's commission from a foreign belligerent is examinable, in a neutral court, on a libel against the captor for restitution. Talbot v. Janson, 3 Dall. 133, 1: 540

280. Unless the neutral rights of the United States are violated by the cruisers sailing under commissions from South American governments in revolt against Spain, captures by them are to be regarded by us as other captures *jure belli* are regarded, the legality of which cannot be determined in the courts of a neutral country. The Divina Pastora, 4 Wheat. 52, 4: 512
Cited in The Neustra Senora de la Caridad, 4 Wheat. 502, 4 L. ed. 625.

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